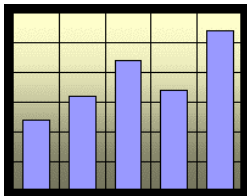

Georgia Income Shares Child Support Guidelines: Deviation Strategies[©]

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CHAPTER 14

Child Care on an Automatic Future Modification Basis or on a Reimbursement Basis as a Deviation Factor

Introduction to the Issue of Child Care on a Reimbursement Basis as a Deviation Factor

The new child support guidelines require the inclusion of day care expenses that are work-related as part of the presumptive award. This can create a number of inequitable situations for both custodial and noncustodial parents. First, if there are no day care expenses at the time of the child support determination, then the presumptive award would have no day care expenses. If either parent—more likely the custodial parent—were to later incur day care expenses, then that parent most likely would have to request a modification to include day care expenses in the child support award.

Alternatively, if an award includes day care expenses being incurred at the time of the child support determination and those day care expenses are no longer incurred at a later time, then the parent not incurring those day care expenses but paying a share through the child support award would have to seek a modification to adjust for day care expenses no longer being incurred.

In either of these two situations, the parent seeking a modification may not be able to get a timely modification and both parents are likely to have to incur attorney fees. Additionally, if there has been a modification of the child support award already, then the parent needing a new modification due to changes in child care expenses, that parent may be precluded from seeking a modification for two years if that parent is the one initiating the prior modification or agreed to the prior modification. See OCGA § 19-6-15(k)(2):

(2) No petition to modify child support may be filed by either Parent within a period of two years from the date of the final order on a previous petition to modify by the same Parent except where:

(A) A Noncustodial Parent has failed to exercise the court ordered visitation;

(B) A Noncustodial Parent has exercised a greater amount of visitation than was provided in the court order; or

(C) The motion to modify is based upon an involuntary loss of income as set forth in subsection (j) of this Code section.

As an aside, if there has been no modification request since the entry of the initial order, the two year rule does not apply (there is no required waiting period for a modification after the initial order).

The bottom line is that the current presumptive arrangement for taking into account day care expenses in its standard language is very inflexible, can lead to significant inequities, and can lead to inadequate support for a child or excessive burdens for an obligor.

Under the guidelines in effect prior to January 1, 2007, day care was a deviation factor and most courts treated day care as a reimbursable expense and court orders stated what each parent's obligation of the day care expenses would be. Under the new guidelines, a presumptive award inclusive of day care must be fully rebuttable. See Chapter 6, "Rebuttable and Irrebuttable Presumptions Plus the Issue of the Best Interests of the Child Standard." This means that child care's presumptive inclusion in the cash award cannot be irrebuttable. The Court can deviate from the presumptive award and treat day care expenses as a reimbursable item. However, proper deviation procedures must be followed in order to take this approach.

What Is Presumptively Required Regarding Child Care Expenses?

As background for deviating on a reimbursement basis, there are two key legal requirements. First, child care expenses are no longer a deviation to the presumptive award but are included and shared presumptively. Second, the presumptive award must always be calculated before deviating and this requirement might complicate having an automatic modification to a cash award when child care expenses change (such as when day care expenses cease). This issue is discussed below in this chapter.

The requirement to include child care expenses presumptively is found in OCGA § 19-6-15(b)(6) and in OCGA § 19-6-15(h).

OCGA § 19-6-15(b)(6):

(b) Process of calculating child support. Pursuant to this Code section, the determination of child support shall be calculated as follows:

. . .

(6) Find the Adjusted Child Support Obligation amount by adding the additional expenses of the costs of Health Insurance and Work Related Child Care Costs, prorating such expenses in accordance with each Parent's pro rata share of the obligation and adding such expenses to the pro rata share of the obligation. The monthly cost of health insurance premiums and Work Related Child Care Costs shall be entered on the Child Support Schedule D – Additional Expenses. The pro rata share of the Basic Child Support Obligation and the pro rata share of the combined additional expenses shall be added together to create the Adjusted Child Support Obligation;

OCGA § 19-6-15(h):

(h) *Adjusted support obligation.* The Child Support Obligation Table does not include the cost of the Parent's Work Related Child Care Costs, Health Insurance premiums, or Uninsured Health Care Expenses. The additional expenses for the Child's Health Insurance premium and Work Related Child Care Costs shall be included in the calculations to determine child support. A Nonparent Custodian's expenses for Work Related Child Care Costs and Health Insurance premiums shall be taken into account when establishing a Final Child Support Order.

(1) WORK RELATED CHILD CARE COSTS.

(A) Work Related Child Care Costs necessary for the Parent's employment, education, or vocational training that are determined by the Court to be appropriate, and that are appropriate to the Parents' financial abilities and to the lifestyle of the Child if the Parents and Child were living together, shall be averaged for a monthly amount and entered on the Child Support Worksheet in the column of the Parent initially paying the expense. Work Related Child Care Costs of a Nonparent Custodian shall be considered when determining the amount of this expense.

(B) If a child care subsidy is being provided pursuant to a means-tested public assistance program, only the amount of the child care expense actually paid by either Parent or a Nonparent Custodian shall be included in the calculation.

(C) If either Parent is the provider of child care services to the Child for whom support is being determined, the value of those services shall not be an adjustment to the Basic Child Support Obligation when calculating the support award.

(D) If child care is provided without charge to the Parent, the value of these services shall not be an adjustment to the Basic Child Support Obligation. If child care is or will be provided by a person who is paid for his or her services, proof of actual cost or payment shall be shown to the Court before the Court includes such payment in its consideration.

(E) The amount of Work Related Child Care Costs shall be determined and added as an adjustment to the Basic Child Support Obligation as 'additional expenses' whether paid directly by the Parent or through a payroll deduction.

(F) The total amount of Work Related Child Care Costs shall be divided between the Parents pro rata to determine the Presumptive Amount of Child Support and shall be included in the Worksheet and written order of the Court.

Applicable Code Sections for deviating

Making child care expenses on a reimbursement basis is not specifically listed in the initial list of deviation factors in OCGA § 19-6-15(b)(8) or in OCGA § 19-6-15(i). This would mean that this would have to be treated as authorized as a non-specific deviation factor under OCGA § 19-6-15(b)(8)(J) and OCGA § 19-6-15(i)(3).

OCGA § 19-6-15(b)(8)(J):

(8) In accordance with subsection (i) of this Code section, deviations subtracted from or increased to the Presumptive Amount of Child Support are applied, if applicable, and if supported by the required findings of fact and application of the best interest of the child standard. The proposed Deviations shall be entered on the Child Support Schedule E – Deviations. In the Court's or the jury's discretion, Deviations may include, but are not limited to, the following:

...

(J) Nonspecific deviations;

OCGA § 19-6-15(i)(3):

(3) NONSPECIFIC DEVIATIONS. Deviation from the Presumptive Amount of Child Support may be appropriate for reasons in addition to those established under this subsection when the Court or the jury finds it is in the best interest of the Child. If the circumstances which supported the Deviation cease to exist, the Final Child Support Order may be modified as set forth in subsection (k) of this Code section to eliminate the Deviation.

Incorporating an Automatic Change in the Child Care Expenses Portion of the Award

Before addressing the issue of child care on a reimbursement basis as a deviation factor, is it possible to enter a child support award in which there is an automatic future adjustment in a sum certain cash award for changes in child care expenses? Case law does address this issue to some degree. *Scherberger v. Scherberger*, 260 Ga. 635; 398 S.E.2d 363 (1990) states that automatic future adjustments can be made if triggered by financial reasons and not by non-financial reasons. From *Scherberger v. Scherberger*:

Modification of child support is controlled by the provisions of O.C.G.A. § 19-6-19 (a) and is available only upon a change in financial condition. Once the jury has set child support for the entire minority of a child, it cannot provide for a future modification of its award based on non-economic reasons.

A change in day care expenses should be considered a financial reason for future modification and would appear to qualify as an expense that could trigger an automatic future adjustment. However, there is an important consideration—the award must be a sum certain or a definite amount. This is noted in *Hayes v. Hayes*, 248 Ga. 526, 283 S.E.2d 875 (1981) but more importantly is a specific requirement in the new child support code. From OCGA §19-6-15(c)(2)(A):

(c) Applicability and required findings.

...

(2) The provisions of this Code section shall not apply with respect to any divorce case in which there are no minor children, except to the limited extent authorized by subsection (e) of this Code section. In the final judgment or decree in a divorce case in

which there are minor children, or in other cases which are governed by the provisions of this Code section, the Court shall:

(A) Specify in what sum certain amount and from which Parent the Child is entitled to permanent support as determined by use of the Worksheet;

Another key issue is that presumptively, the Court must allocate child care expenses between the parents on a pro-rata basis. This is seen in OCGA §19-6-15(b)(6):

(6) Find the Adjusted Child Support Obligation amount by adding the additional expenses of the costs of Health Insurance and Work Related Child Care Costs, prorating such expenses in accordance with each Parent's pro rata share of the obligation and adding such expenses to the pro rata share of the obligation. The monthly cost of health insurance premiums and Work Related Child Care Costs shall be entered on the Child Support Schedule D – Additional Expenses. The pro rata share of the Basic Child Support Obligation and the pro rata share of the combined additional expenses shall be added together to create the Adjusted Child Support Obligation;

➤ Essentially, one can include a future automatic modification of child support for a change in day care expenses only if:

- the future modification is a sum certain amount;
- the presumptive future modification is on a pro-rata basis unless there is a proper deviation; and
- a deviation future modification follows proper procedure for deviating, including showing the presumptive pro-rata based award.

Yes, one could deviate from the presumptive requirements for pro-rata allocation of day care expenses with a fixed amount, but one still would have to be able to enter the presumptive award on a pro-rata basis. The presumptive award must always be shown. If the dollar value of day care is not known for a future award, then a future cash award cannot be based on a deviation with a fixed dollar obligation for the obligor without knowing the presumptive obligation.

These requirements would seem to allow future modification mainly for when the initial award (or award being modified in a case before the Court) includes day care expenses and the future modification is for provision for when day care expenses cease. When day care expenses cease, the sum certain award is simply adjusted for removal of the day care expenses in the presumptive or deviation award.

- Hence, it appears to be possible to have an automatic future modification for when day care expenses exist at the time of the award but cease at a later date.

Additionally, if the current award does not have day care expenses included, a future automatic award for incurring day care expenses can be made only if the day care expenses are known at the time of establishing or modifying the child support order. This might be possible for a situation, for example, in which the mother is on maternity leave and knows what the day care expenses are going to be in one month when she returns to work. There would be no immediate day care expenses to go into the presumptive award but it is known what these expenses will be in the very near future and the presumptive, pro-rata award would be known.

- For day care expenses not yet incurred but known to be incurred shortly after the hearing, then an automatic future adjustment for day care might be possible if the expenses are known with a reasonable degree of certainty. The Court would have to make a sum certain adjustment to the award, however.

For other situations in which day care is not incurred at the time the award is made and it is uncertain how much day care expenses might be in the future, an automatic adjustment in the award does not conform to the requirements of a sum certain adjustment—assuming that the expenses should be made presumptively on a pro-rata basis and not just on a fixed dollar basis that does not reflect an obligor's pro-rata share. In any event, basing a future fixed amount adjustment for unknown day care costs is highly speculative and would not be basing an award on the actual needs of the child. Importantly, there were be no known future presumptive award. The guidelines require that day care expenses presumptively be shared on a pro-rata basis and if the future child care costs are not a known dollar amount, the day care expenses cannot be on a pro-rata basis and result in a sum certain award.

Other than for the above limited situations, a future automatic modification for a change in day care expenses being built into the award does not appear to be available. Even for these situations, child care expenses could change at an even later date and not be provided for. For example, there could be an automatic provision to adjust for when existing day care expenses cease. But what if day care expenses are incurred at an even later date? Then a modification likely would be needed.

Treating day care expenses as a reimbursable expense may be the most equitable approach to a fixed award inclusive of day care expenses or an award with limited provisions for automatic future adjustments for day care expenses.

Sum Certain a Problem or Not in Enforcement Issues

Georgia code on enforcing payment on uninsured health care expenses gives some guidance on whether there is a problem with an obligor's share of day care expenses not necessarily being a sum certain and how collection might be enforced. From OCGA §19-6-15(h)(3)(B):

(3) UNINSURED HEALTH CARE EXPENSES.

(A) The Child's Uninsured Health Care Expenses shall be the financial responsibility of both Parents. The Final Child Support Order shall include provisions for payment of the Uninsured Health Care Expenses; provided, however, that the Uninsured Health Care Expenses shall not be used for the purpose of calculating the amount of child support. The Parents shall divide the Uninsured Health Care Expenses pro rata, unless otherwise specifically ordered by the Court.

(B) If a Parent fails to pay his or her pro rata share of the Child's Uninsured Health Care Expenses, as specified in the Final Child Support Order, within a reasonable time after receipt of evidence documenting the uninsured portion of the expense:

(i) The other Parent or the Nonparent Custodian may enforce payment of the expense by any means permitted by law; or

(ii) The Child Support Enforcement Agency shall pursue enforcement of payment of such unpaid expenses only if the unpaid expenses have been reduced to a judgment in a sum certain amount.

The Georgia Office of Child Support Services (OCCS) has indicated that the Office can enforce a child support order that includes child care on a percentage reimbursement basis without having to reduce arrearages to a judgment in a sum certain amount. OCCS already enforces orders with such provisions and is able to do so since obtaining actual child care expenses from the provider is not a difficult fact finding process as is the case for uninsured health care expenses. For health care expenses, determining an obligor's arrearage would require obtaining very extensive and lengthy documentation on actual expenses, set aside percentages for certain medical plans (providers often waive collection of some percentage of certain listed expenses in some group plans), expenses actually paid by an insurer, and then the obligor's share of the remainder.

What Are Alternative Approaches to Treating Child Care Expenses on a Reimbursement Basis?

- On a fixed dollar basis, based on the obligor's share of adjusted income being applied to the known or expected child care expenses;
- On a fixed dollar basis, on some other basis than applying the obligor's share of adjusted income being applied to the known or expected child care expenses;
- Requiring the obligor to pay a percentage of an unknown future expense for child care with no ceiling on the obligation;
- Requiring the obligor to pay a percentage of an unknown future expense for child care with a ceiling on the obligation.

For the two fixed dollar obligation scenarios, the Court can choose to end the obligation based on the future economic event of the child care expenses no longer being incurred—with summer being an allowed suspension of child care expenses if not needed.

Worksheet Example of Deviating by Treating Child Care on a Reimbursement Basis

There are several key points to adjusting the child support worksheet for a deviation to put day care expenses on reimbursement basis.

- The presumptive award must always be shown.
- To have day care on a reimbursement basis, the deviation adjustment amount should exactly offset the other parent's (the parent not incurring the child care expenses—either or both parents could incur) share of the child care expenses.

The first point means that if there are child care expenses at the time child support is being determined, then those expenses must be shown in Schedule D and, in turn, on the main worksheet.

The second point means that the deviation adjustment amount is equal to the non-incurring parent's presumptive share of child care expenses.

An example best illustrates these points.