



The New Child Support Guidelines:

Guidelines:

What You Need to Know About Changes
to the Guidelines Statute



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I. Introduction

In 2007, Oklahoma Child Support Services' legislative committee drafted legislation to update the child support guidelines pursuant to the requirement in 43 OS § 119.1 that the guidelines be reviewed every four years.

After drafting its proposal, OCSS invited the private bar to review and offer feedback on the legislation. OCSS held two forums in Tulsa and Oklahoma City which were attended by attorneys and judges. The legislation was also reviewed at various local county bar organizations. After a presentation to the Oklahoma County Bar Association Family Law Section, OU Law Professor Robert Spector and Oklahoma City attorney Carolyn Thompson worked with CSE to revise the bill and make it more amenable to private practitioners.

The revised draft was presented to legislators and passed through a conference committee which included Representative Rex Duncan and Senator James Williamson (a family law attorney in Tulsa). The bill was signed by Governor Henry on June 3, 2008. The child support guidelines portion of the bill is effective July 1, 2009.

A note about the numbering: The sections are number 43 O.S. § 118, 118A, 118B, etc. The numbering scheme was determined by legislative staff. Citations will be a little unwieldy due to the use of this scheme. For example, a citation to the definition for "parent" will be 43 O.S. § 118A(10). However, having the material broken down into separate statutory sections should still make using the guidelines easier for practitioners.

II. 43 O.S. 118

One of the main goals of the legislation is to reorganize the monstrous amount of law stuffed into 43 O.S. § 118 and put it into some logical order. The new organization makes it much easier to navigate through the guidelines and pinpoint particular citations during an actual case.

This section, which previously¹ contained the entirety of the guidelines, now contains only two provisions. Subsection A contains the "rebuttable presumption" language from the previous statute, and states that a child support calculation based on the guidelines is rebuttably presumed to be the correct amount.

New language in subsection B lists the assumptions of what is covered by a basic child support obligation. The statute "assumes that all families incur certain child-rearing

¹ For the purposes of this paper, references to the "previous" statute will be to the version of 43 O.S. § 118 currently in effect through June 30, 2009. Reference to the "current" statute will reference the statutory changes in SB 2194, effective July 1, 2009.

expenses.” The base child support obligation includes housing, food, transportation, basic educational expenses, clothing, and entertainment.

Most of the other language from 43 O.S. § 118 has been moved into the sections below.

III. 43 O.S. § 118A – Definitions

This section gives definitions that control common terms throughout the guidelines statute. Many of the definitions are intuitive, while others were found in the previous statute.

1. “Adjusted gross income.” This term means the net income of a parent comprised of the gross income of the parent (discussed in 118B), plus any Social Security benefit paid on behalf of that parent (discussed further in 118B(G)), minus: support alimony actually paid in another case, deductions for other children (discussed in 118C), and deduction for debt service on the preexisting, jointly acquired debt of the parents.
2. “Base child support obligation.” The amount from the guidelines schedule found in 43 O.S. § 119 for the parents’ income and the number of children in the case. This amount is rebuttably presumed to be appropriate and does not include other expenses, such as medical and child care costs.
3. “Current monthly child support obligation.” This is the base child support obligation plus the proportional share of medical insurance and child care costs. Note that this includes “annualized” (or averaged) child care costs. Medical insurance and child care are covered in more detail in subsequent sections.
4. “Custodial person.” This is the parent or third party who has physical custody of the child for more than 182 days per year.²
5. “Noncustodial parent.” This is the parent who has physical custody of the child for 182 or fewer days per year.
6. “Obligor.” The person who is ordered to pay child support.
7. “Obligee.” The person to whom child support is owed. This may include DHS or another person designated by the court.

It should be noted that due to the shared parenting formula, it may be possible for a noncustodial parent to be an obligee, and for a custodial parent to be an obligor. These definitions do not address legal custody of a child, but attempt to ensure that

² The reference to “days” in this and in subsection (5) are a result of a scrivener’s error. The text should read “overnights.”

the child receives equivalent or proportional support regardless of with which parent he or she is residing.

8. "Other contributions." These are expenses not included in the current monthly child support obligation, such as recurring monthly medical and visitation transportation costs. These are not commonly included in a child support order, but the statutes make allowance for them.
9. "Overnight." This is the trigger for the shared parenting (now "parenting time adjustment") calculation. While shared parenting in Oklahoma has always been triggered by the number of overnights spent with a parent, the definition has been tightened up to require that the "overnight" be for a period of at least twelve hours and that the parent exercising the overnight must make a "reasonable expenditure of resources for the care of the child." Shared parenting is discussed further in 118E below.
10. "Parent." This definition, which cross-references the Uniform Parentage Act,³ may seem unnecessary and self-explanatory. In some cases, however, it might avoid litigation. For example, in cases where one parent is deceased and the child is in the custody of a third-party, the noncustodial parent may attempt to argue that the custodial person's income should be used in place of the deceased parent's income. Under this definition, however, it is clear that a "parent" for the purposes of the guidelines is a legal parent, not a third party custodial person. Only the gross income of parents is used in the guidelines. (43 O.S. § 118D(A)). Therefore, the income of a third party custodial person is not included for child support purposes unless that person has become a parent (presumably by adoption) under the UPA.
11. "Parenting time adjustment." This term replaces "shared parenting" and refers to the credit to the child support obligation based on an increase in parenting time with the noncustodial parent.
12. "Payor." This is a person or entity paying money to an obligor. If the obligor is self-employed, the obligor is also the payor.

The intent of the definitions is to ensure that terms are used consistently throughout the guidelines. Unfortunately, there is likely some room for clarification and perhaps further definitions. Suggestions are always welcome and suggested language is appreciated.

Further clarification or examination is especially appropriate with regard to the term "physical custody." The intent is to take the child support calculation out of the realm of legal custody. The term "custody" is loaded with meaning in Oklahoma law, meaning

³ "Parent" means an individual who has established a parent-child relationship under Section 5 of this act." 10 O.S. § 7700-102(13). "Parent-child relationship" means the legal relationship between a child and a parent of the child. The term includes the mother-child relationship and the father-child relationship." 10 O.S. § 7700-102(14).

both physical possession and control of the child and the bundle of legal rights associated with parenthood.

Unless Oklahoma is willing to take on the Texas model of “managing conservator,” etc., there must be some other distinction between legal custody and physical custody. Input from private practitioners indicated they were no longer comfortable discussing parents in terms of “custodial” and “non-custodial.” In the way of compromises, this portion of the final product was not entirely satisfactory to any of the participants and could likely be improved with some clarification. It may be time for a sea-change in nomenclature. Hopefully, there will be meaningful participation from all members of the family law community as we attempt to work this out and come up with terms that are acceptable to all.

IV. 43 O.S. § 118B - Defining “Income”

While the definition section above attempts to define terms that should be used consistently throughout the statutes, the definition of income is such a complex and integral part of calculating child support that it was given its own section.

Subsection A discusses income included for the purpose of child support. Gross income for purposes of child support is comprised of earned and passive income. “Earned income” is, intuitively, any income earned by a parent, unless specifically excluded. The statute gives an inclusive list of types of earned income, and includes salaries, wages, tips, commissions, bonuses, severance pay, and various types of military pay.

Passive income is any other type of income and includes dividends, pensions, rent, interest and trust income, support alimony from another case, annuities, social security and workers’ compensation benefits, unemployment and disability benefits, gifts, prizes, gambling and lottery winnings, and royalties. Again, this list is inclusive and there may be other types of passive income that can be included for the guidelines.

Subsection B discusses income excluded from the guidelines. Excluded income is an exclusive list, meaning that if a type of income is not included in the list, it is not excluded from use in the guidelines. Excluded income is money received for the benefit of a child (child support for children not before the court, adoption assistance subsidy, the child’s income, foster care payments), or is means-tested, or received due to some hardship on the part of the parent (TANF, SSI, food stamps, disability payments).

Subsection C discusses the computation of gross income. The court may use the most equitable of four options:

1. actual monthly income (plus overtime and supplemental income as deemed equitable);

2. average gross monthly income for time actually employed during the previous three years;
3. minimum wage for a forty-hour work week; or
4. imputed income as discussed in subsection (D).

As under the previous statute, if the parent is permanently disabled, the court must use actual monthly gross income.

Subsection D discusses imputing income. This section allows the court to use an amount other than the actual earned income of a parent when the actual amount does not reflect the parent's true earning ability or the funds available for the support of the child. The court may use the actual or average income, or may instead impute gross income. The court must choose one method.

While the court has always had the power to impute income, this section provides clarification by giving the court guidance as to factors that may make imputation appropriate in a particular case. In considering whether or not to impute income, the court may determine if a parent is willfully or voluntarily underemployed or unemployed. The court may consider such facts as:

- Whether a parent's un- or underemployment is willful or voluntary, including whether the parent is unemployed due to training or education that will ultimately benefit the child.
- Whether there is no reliable evidence of income.
- The earning ability of the parent (past employment, education, training, ability to work).
- The lifestyle of the parent, including assets and resources owned by the current spouse that appears unreasonable for the income claimed by the parent.
- Whether the parent is a caretaker of a handicapped or seriously ill child or relative, if the care required reduces the parent's ability to work outside the home.

The court may also consider other case-specific factors as appropriate. It should be noted that these factors can be used both ways, that is, the presence of a particular factor may make it appropriate for the court to impute higher than actual income (for example, if a parent is able, by training or education, to earn more), or to impute lower than actual income, or perhaps no income at all (for example, if a parent lacks training or the ability to work and earn money). The court has great discretion on the issue of income imputation and can tailor a gross monthly income that is most appropriate in the case before it.

Subsection E discusses self-employment income, mostly in the context of what should be excluded from the gross income of the self-employed parent. Self-employment income includes income from business operations, independent contracting or consulting, sales of goods or services, and rental property income. The self-employed parent is entitled to subtract the "ordinary and reasonable expenses necessary to

produce such income.” The statute retains the language that clarifies that a determination of income for tax purposes does not control for child support purposes. Accelerated depreciation, in particular, is not considered a reasonable expense and should not be deducted.⁴

Subsection F discusses the inclusion of fringe benefits as income. If a parent receives fringe benefits or in-kinds remuneration that significantly reduces personal living expenses, those benefits shall be counted as income. Fringe benefits may include company car, housing, or room and board. The statute specifically includes Basic Allowance for Housing, Basic Allowance for Subsistence, and Variable Housing Allowances for service members.⁵

Subsection G discusses the interaction of Social Security Disability Benefits and the child support guidelines. The new statute attempts to codify Oklahoma case law regarding the treatment of Social Security benefits when calculating the guidelines,⁶ and also to clarify the treatment of Social Security benefits paid directly to the obligee or minor child as a credit against child support arrears.⁷

SSA Benefits and Ongoing Support

First, the statute sets out the calculation method for setting child support when the child receives Social Security benefits based on the death or disability of a parent. The benefit amount is included as income “to the parent on whose account the benefit of the child is drawn.”

In other words, if the father is disabled and the child receives a disability benefit based on father’s disability, the child’s benefit is included in father’s income:

Father’s actual monthly income (from SSA benefit):	\$1,000.00
<u>Amount paid by SSA to mother on child’s behalf:</u>	<u>\$ 500.00</u>
Father’s total monthly gross income for child support:	\$1,500.00

The calculation continues as in any other case, through the calculation of medical insurance and child care costs. After the calculation is complete, the current monthly child support amount is compared to the amount of the benefit paid on the child’s behalf. If the guideline amount is less than the SSA benefit, no further amount is assessed to father and he owes no current monthly child support:

Child support guideline amount:	\$ 450.00
<u>SSA benefit:</u>	<u>\$ 500.00</u>
Net child support amount:	\$ 0.00

⁴ See e.g., *Fisher v. Fisher*, Court of Civil Appeals unpublished opinion #102,872 (Division 3, 2007).

⁵ See e.g., *Hees v. Hees*, 2003 OK CIV APP 103.

⁶ *Nazworth v. Nazworth*, 1996 OK CIV APP 134.

⁷ See e.g., *Merritt v. Merritt*, 2003 OK 68.

If the guideline amount is greater than the SSA benefit, father owes the difference between the amounts:

Child support guideline amount:	\$ 600.00
SSA benefit:	\$ 500.00
Net child support amount:	\$ 100.00

Any “excess” SSA benefits paid for the child over and above the guidelines amount are retained by the child’s caretaker and cannot be used to decrease the child support order or reduce arrearages. The child support form must include a notation about the use of SSA benefits.

SSA Benefits and Past Support

The formula above is to be applied to ongoing support only. It can only be applied to child support from the date a Motion to Modify was filed. However, the court may determine whether or not to give credit for SSA benefits paid to the child’s caretaker prior to a modification. Credit can be given for monthly payments or for lump sums. The payments must have been made to the caretaker rather than to the child, and credit can only be given for the time period of the noncustodial parent’s disability, as determined by the SSA.

V. 43 O.S. § 118C – Credit for Other Children

The previous guidelines statute allowed the court to consider the obligations of parents for children not before the court, and the court retains that power. Formerly, the statute required that the amount of a court order for child support, to the extent actually paid, be deducted from the parent’s gross monthly income. The previous statute allowed consideration of children in a parent’s home, but did not provide any guidance as to how that consideration would work in the guidelines.⁸

In order to qualify for the credit, the children must be:

1. The biological, legal, or adopted child of the parent;
2. born prior to the child in the case before the court;
3. actually supported by the parent; and
4. not a child of the parents before the court.

The child must satisfy all of these criteria, or no credit may be given. The statute continues to exclude from credit stepchildren and other children for whom the parent has no legal obligation.

⁸ See 43 O.S. § 118(C).

This section provides credit for two types of children who are not the children of the parents in the case before the court. Under this statute, the court will continue to credit the court ordered amount from the parent's income. Now, the court must also set an amount for in-home children according to the parent's income and the guidelines.

"Out of home children" refers to children not living in the parent's home, but who are the subject of a court order for support. Once the parent proves the existence of a support order and compliance with the order, the parent may deduct from his income the actual court-ordered amount, "averaged to the amount actually paid over the most recent twelve month period."

"In-home children" refers to children who live in the parent's home. In order to calculate the credit for these types of children, the court determines the number of children entitled to the credit, then uses the guideline amount for the parent's income for that number of children. That amount is used as a credit from the parent's gross income in the same way that a court-ordered amount is credited.

In the example below, father is requesting credit for one child living in his home. Assuming father's monthly gross income is \$1,000, the following calculation would apply:

	Father	Mother
Parent Income Information	\$1000	\$0.00
Number of Qualified children living in parent's home	1	
Hypothetical child support order. Apply Line 1 to Child Support Guideline Schedule for number of children in Line 2	\$206	
75% of Hypothetical child support order Line 3 x .75	\$154.50	

In this case, father is entitled to a credit of \$154.50 from his gross income, leaving him with an adjusted gross of \$845.50. The Department of Human Services is charged with preparing a deduction worksheet that will be part of the Child Support Guidelines computation form. This calculation can be done automatically as part of a guidelines calculator.

VI. 43 O.S. § 118D – The Computation

This section contains the formula and mechanism of the guidelines. It is the “meat and potatoes” of the child support guidelines and sets out how the actual computation is to be done. As under the previous statute, child support is computed by determining the gross income of both parents and then combining the income. The combined monthly income is used to determine each parent’s share of the cost of raising their child and to determine the appropriate amount of support for the child. Each parent pays his or her proportionate share of the guideline amount from the chart in 43 O.S. § 119.

This section also clarifies that child support is based on physical custody. In cases where the parents have split custody (that is, each parent has at least one child for whom the parents are responsible), the guidelines are calculated for each child, and then the amounts are offset. The parent owing the larger child support amount becomes the obligor and the difference between the two amounts is the child support obligation.

Much language from the previous statute has been carried over into this section.

1. The court may make provision for a prospective adjustment to address any foreseen changes, including changes in medical or child care costs.
2. The court can provide for the cost of transportation between the homes of the parents (with a new requirement that the allocation of these costs cannot significantly reduce the ability of the custodial parent to provide for the basic needs of the child).
3. The Summary of Support Order form (SOSO) must be prepared and presented to the judge in any case where DHS is not a necessary party. The SOSO must contain the Social Security number of the parents and the children.

It should be noted that due to privacy concerns, Social Security numbers are generally not included in the body of pleadings and orders. Instead, the SOSO allows the capturing of that data in cases where DHS is not providing services. This insures that payments through the Centralized Support Registry can be identified and distributed in a timely fashion. Like the district court cover sheet, the SOSO form is not filed with the court and the sensitive information contained on the form does not become part of the public court record.

VII. 43 O.S. § 118E – Parenting Time Adjustment

This section replaces the shared parenting section in the previous statute. Much of the actual calculation remains unchanged, with a few important exceptions. The trigger for the parenting time adjustment (PTA) is 121 overnights exercised by the noncustodial parent. Once that threshold is reached, the parenting time adjustment is presumed.

Changes to the PTA:

- The PTA is presumptive, not mandatory. The presumption may be rebutted if the adjustment is not in the best interest of the child or if the increased parenting time does not result in greater expenditures.
- The formula now uses a sliding scale to determine the adjusted combined child support obligation. The adjusted child support obligation is found by multiplying the guideline amount (based on the combined gross monthly income of the parents) by a varying factor. The statute sets the factors as follows:

“(a). one hundred twenty-one (121) overnights to one hundred thirty-one (131) overnights, the factor shall be two (2),

b. one hundred thirty-two (132) overnights to one hundred forty-three (143) overnights, the factor shall be one and three-quarters (1.75), or

c. one hundred forty-four (144) or more overnights, the factor shall be one and one-half (1.5).”

43 O.S. § 118E(D)(2).

Under this scheme, the credit off the base child support more closely corresponds to the amount of time spent with the child. For example, if the incomes of the parents are equal, the noncustodial parent who spends one-third of the time with the child will receive a 33% reduction in child support.

- The provision prohibiting a child support award against the custodial person has been removed. Instead, the statute forbids the payment of child support “by a parent having more than two hundred five overnights”, or roughly 60% of the time with the child. Under this section, if the split is 59/41 or above, the custodial person may be a child support obligor. Of course, this will only occur if the custodial person is a parent and has a larger gross monthly income than the noncustodial parent.

The statute also adds a built in protection in subsection E for the custodial person who is facing having the child support obligation lowered by the application of the PTA. First, failure to exercise the number of overnights upon which the PTA is based is a material change of circumstances that would justify a modification. Second, if the obligor fails to exercise the number of overnights, the court can establish the amount of the PTA as a judgment, which is then enforceable like any other child support judgment. Finally, an obligor who fails to exercise the overnights faces losing the PTA for a prospective twelve month period. If that occurs, the obligor may only petition the court for reapplication of the PTA after a twelve month period of exercising the overnights without receiving the adjustment.

For example, consider the case where a mother is given a \$100 reduction in child support based on her exercising 121 overnights per year. If she fails to keep the child for 121 overnights for a period of twelve months, the following can occur:

1. Father can file a Motion to Modify to calculate the child support without the PTA.
2. The court can grant a judgment against mother for \$1,200 (\$100 x 12 months). Father can then enforce that judgment.

The court can order that even if mother begins to exercise the 121 overnights, she will not get the credit back for 12 months. So, in the modification proceeding, the court will calculate the child support without the PTA.

The changes to shared parenting set out in this section should act as assurance to custodial parents first, that the child support will not be slashed, as the “cliff effect” has been ameliorated by the variable rate set out in (D)(2), and second, there will be meaningful recourse if the PTA is granted and the noncustodial parent fails to live up to his or her side of the bargain.

VIII. 43 O.S. § 118F – Medical Support

The new statute, based on changes to the federal regulations governing child support and Medicaid, requires courts to go further in establishing meaningful medical support orders for children. Under this statute, the court is required to enter an order for medical support “in any case in which an ongoing child support order is entered or modified.” Medical support is defined as health insurance, cash medical support, or a combination of the two. The court must make specific orders regarding how health insurance is to be provided and must require the parent ordered to provide coverage to provide proof that the health care coverage has been provided as ordered.

Medical Support Orders - Requirements

The statute sets out two requirements for medical support. The medical support order must be: 1. reasonable in cost, and 2. accessible. The statute defines “reasonable in cost” as an actual premium cost (for the child(ren) only) that does not exceed 5% of the gross income of the responsible parent. “Accessible” is defined as a plan with available providers that meet the child’s health care needs located no more than sixty miles one way from the primary residence of the child.

The statute also sets out a hierarchy for the court to use if multiple options are available. The court should look first for health insurance available through the parents’ employers. If both parents have this type of plan available, the court must give priority to the preference of the custodial person. If no employer-sponsored plan is available, the court next looks to other sources of private health insurance. This may include insurance available through a spouse’s employer, or a private insurance plan, such as those offered by Blue Cross/Blue Shield. If this option is not available, the court must

order the parents to apply immediately for government medical assistance. In Oklahoma, this would be the SoonerCare program.

Cash Medical Support

The statute enacts a new principal in Oklahoma child support, that of “cash medical support.” Cash medical support is defined as:

- a. an amount ordered to be paid toward the cost of health coverage provided by a public entity or by a person other than the parents through employment or otherwise, or
- b. fixed periodic payments for ongoing medical costs.

43 O.S. § 118F(A)(2). Cash medical support is calculated as the obligor’s pro rata share of the actual monthly medical expenses, or five percent of his/her monthly gross income, whichever is less.

The cash medical order can be calculated using a chart promulgated by OCSS with assistance from the Oklahoma Health Care Authority.

Eff. JULY 1, 2009								
OKLAHOMA CASH MEDICAL INCOME GUIDELINES TABLE								
The following table reflects 185% of the Federal Poverty Guidelines as of 04-01-2009. If the combined income of the parents as shown on line 1 of the Child Support Computation and the total number of children in the case being considered is at or below the amounts on the table, cash medical support will be established at \$0.00. If the combined income exceeds the amount listed on the table for the number of children, the cash medical support obligation will be \$115.00 per child for the children in line 22, pro rated by the income of the parents. The obligor's share of the cash medical order should not exceed 5% of the gross income of the obligor.								
Number of children	1	2	3	4	5	6	7	8 or more
Income of the parents	\$2,823	\$3,400	\$3,976	\$4,553	\$5,130	\$5,706	\$6,283	Add \$577 per month for each over 7

Under this chart, if the combined income of the parents is at or below 185% of the federal poverty guidelines for the number of children in the case, the cash medical order is zero. If the income exceeds that amount, the cash medical order is calculated by multiplying \$115 by the number of children in the case, then pro rating it between the parents according to their share of the combined income. The obligor’s portion is added to the monthly child support amount. The cash medical order may also be used by pro rating the actual monthly medical expenses for the child if the parents have information as to those costs.

The statute allows the discontinuation of cash medical support if health insurance becomes available for the child, provided that the obligor has enrolled the child and provided notice to the obligee and DHS (as appropriate) of the enrollment.

Medical Costs and the Guidelines

As under the previous statute, the health insurance cost for the child(ren) is allocated between the parents according to their respective percentages of the combined gross income. Either the obligor's portion of the insurance amount is added to the obligor's base child support – in cases where the obligee provides the insurance – or the obligee's portion is subtracted from the obligor's base child support – in cases where the obligor provides the insurance. In the case of a cash medical support order, the cash medical support is added to the obligor's base child support without further pro rating, as the amount already represents the obligor's portion of the "actual medical cost." The parent providing health coverage must furnish proof of the insurance and documentation of any change in the cost, carrier, or benefits within thirty days of the date of change.

If the medical cost changes, the court may adjust the past due or ongoing child support in accordance with the changes. This is shown in the examples below.

Example 1: Custodial person (CP) provides medical coverage at a cost of \$100 per month. The base child support is \$400 per month and the parents are each responsible for 50% of the child support.

- Obligor's child support order: \$200 base child support + \$50 medical insurance = \$250 total monthly amount.
- After ten months, the coverage lapses and no coverage is in force. The CP has no cost for insurance. Eight months after that, the obligor files a Motion to Modify.
- During the modification, the court can find that for eight of the 18 months the order was in effect, the CP had no insurance cost. The court can grant a credit of \$500 (\$50 x 10 months) off of obligor's past support, or give the obligor a reduction of \$500 off of the ongoing child support, at the rate of \$13.88 per month (36 month payout).

Example 2: NCP provides medical coverage at a cost of \$100 per month. The base child support is \$400 per month and the parents are each responsible for 50% of the child support.

- Obligor's child support order: \$200 base child support - \$50 obligee's portion of the medical insurance = \$150 total monthly amount.
- After ten months, the coverage lapses and no coverage is in force. The obligor has no cost for insurance. Eight months after that, the obligee files a Motion to Modify.

- The court can find that obligor owes \$500 (\$50 x 10 months) in additional child support, since he did not actually pay the insurance for those ten months. The \$500 can be set as a judgment and enforced like any other child support judgment.

Other expenses and exchanging information

The new statute builds in some protection for parents paying out of pocket medical expenses. As before, uncovered expenses are paid proportionately between the parents. However, proof of those expenses must be exchanged within forty five days of receiving the Explanation of Benefits or other proof of the expense. If the parent incurring the expense fails to exchange the information within this time frame, or a parent fails to notify the other parent of a change in coverage or cost, the court may deny credit or reimbursement for the expense or increased premium.

Changes in insurance costs should be addressed in a review of the order for modification as set out in 118I.

IX. 43 O.S. § 118G – Child Care

As before, the new guidelines statute allows the court to make provision for child care expenses. This section provides that child care expenses must be “reasonably necessary to enable either or both parents to: 1. Be employed; 2. Seek employment; or 3. Attend school or training to enhance employment income.” 43 O.S. § 118G(A). The child care costs should be annualized (or averaged), allocated between the parents according to their percentages, then added to the base child support, becoming part of the final child support order. While adding in the child care to the final amount is not always a popular policy, under Oklahoma case law, it is more appropriate.

Child Care When DHS is Not Providing a Subsidy

First and foremost of any discussion of child care expenses must be a consideration of *Barnes v. Barnes*, 2005 OK 1. In that case, the Oklahoma Supreme Court ruled it was error when a trial court did not include a determination as to the amount of child care expenses. *Id.* at ¶ 16. The court found that “[u]nder Oklahoma statute, child care expenses are to be considered a part of the total child support due to the mother, and it is also collectable in an income assignment. . . .” *Id.* at ¶ 18. Guided by this unambiguous statement by the Supreme Court, the statute includes child care amounts as part of the final monthly child support order.

Again, standard fluctuations in child care amounts are often a known quantity at the outset of a case. For example, it is common knowledge that child care costs are higher in the summer than during the school year. Child care is often abated during extended visitation periods with the non-custodial parent. These issues can be taken into account during the process of annualizing or averaging. During negotiation, discovery, and

sometimes trial, evidence is accrued with regard to the cost of child care, when it will be used, and when the costs will change. The order can reflect those changing circumstances without bringing the parties back to court with each fluctuation.

Changes occurring outside of the expected pattern, like any other change in the expenses or income of the parties, are best handled by a motion to modify. Participants in a DHS child support case can use the administrative process to file for modification free of charge. Standard forms (available at <http://www.okdhs.org/library/forms/default.htm>) enable most parents to file for modification pro se and avoid attorney's fees.

Problems arise in this area when parties do not communicate. (This is, unfortunately, not an exceptional circumstance in the family law arena.) However, as we constantly find throughout child support and family law litigation in general, courts have broad equity power. I have litigated many cases where the court credited the "overpayment" of the child care against the obligor's arrears, even when no motion to modify had been filed. This is true whether in the administrative court or the district courts. Again, courts are experienced and comfortable using their power of equity. Language parallel to the medical under- and overpayment section was not included in this section. Such language would be helpful here.

Child Care When DHS is Paying a Subsidy

This language has been in the statute since 2006. The intent of the section is to quantify the child care co-payment paid by an obligee who receives a child care subsidy from DHS. This gives the court a specific way of dealing with a foreseeable change of circumstances in the immediate future. See e.g., 43 O.S. § 118(E)(21) (as currently in effect) and 43 O.S. § 118D(F). In the situation where DHS is providing a child care subsidy, the co-payment amount fluctuates as the parent's income increases or decreases. Child support is considered income when determining qualification and amount of a child care subsidy. The calculation is as follows:

1. Take the base child support obligation of the parent who is not paying the child care expense and add it to the custodial parent's actual income.
2. Refer to the chart showing child care subsidy co-payment amounts. (The chart is available at <http://www.okdhs.org/NR/rdonlyres/7747070A-17C9-4024-AED5-E994CC30E8D4/0/C4.pdf>) Find the appropriate co-pay for the obligee's new income (i.e., income after child support is received).
3. That co-pay is used on the guidelines chart as the child care amount. The noncustodial parent is responsible for his or her pro rata share of the co-pay amount.

In a nutshell, the child care co-payment is a known quantity that will change shortly after child support is ordered. Therefore, it is appropriate for the court to make provision for it in the child support order, rather than forcing the obligee to move for modification.

As required by statute, DHS has promulgated administrative rules to provide clarification and fill in the gaps for real-world scenarios. As always, the policy for DHS in general and for Child Support in particular can be found at <http://www.okdhs.org/library/policy/> and at the Oklahoma Secretary of State's website. Specific Child Support policy is included in the "Oklahoma Laws and Administrative Code Relating to Child Support" booklet distributed by Child Support free of cost throughout the year.

Parents Providing Child Care

The statute continues to allow parents to provide child care while the other parent is at work or attending school or training "if it would lead to a significant reduction in the actual annualized child care cost."

X. 43 O.S. § 118H – Deviations

As under the previous statute, the court may find that the child support guidelines amount is inappropriate under the facts of a particular case and may deviate from that amount, either increasing the child support order or decreasing it. The new statute bases all deviations on the best interests of the child involved, and allows the court to deviate only after meeting the best interests test. Additionally, the court must find one of these factors is present:

- a. the amount of support so indicated is unjust or inappropriate under the circumstances,
- b. the parties are represented by counsel and have agreed to a different disposition, or
- c. one party is represented by counsel and the deviation benefits the unrepresented party.

43 O.S. § 118H(B)(2). No deviation may be made that "seriously impairs the ability of the obligee in the case under consideration to maintain minimally adequate housing, food, and clothing for the children being supported by the order or to provide other basic necessities, as determined by the court." 43 O.S. § 118H(A).

The court must support any deviation with specific findings of fact, which must include the reasons for the deviation, the guideline amount of child support, and a finding of how the deviation serves the best interest of the child and how the application of the guidelines would be unjust or inappropriate.

The statute allows for deviation:

- in cases of extreme economic hardship,
- if a child in a parent's home has extraordinary medical needs (the court must consider all other resources available for meeting those needs),
- in cases where the child is in foster care and the deviation will assist in returning the child to the parent.

The court may also add amounts to the child support obligation as a deviation where there are extraordinary education needs for a child with a disability, or for special expenses, such as music lessons, private school tuition, travel, or other special expenses that the income of the parents will support.

XI. 43 O.S. § 118I – Modification

This section combines all the modification language from the previous statute. Child support orders are modifiable upon material changes in circumstance, which include, but are not limited to:

- an increase/decrease in the needs of the child;
- increase/decrease in parental income
- changes in annualized child care costs
- changes in medical costs
- one of the children ages out.

Bases for modification throughout the guidelines statutes:⁹

1. The number of overnights is below or in excess of the designated nights used to determine the PTA (43 O.S. § 118E(E)).
2. Change in the health insurance premium (located both at 43 O.S. §§118F(K) and 118I(A)(1))
3. An increase or decrease in the child's needs (43 O.S. §118I(A)(1))
4. An increase or decrease in the parties' income (43 O.S. §118I(A)(1))
5. Changes in actualized annual child care expenses (43 O.S. §118I(A)(1))
6. When one of the children ages out or is no longer entitled to support (43 O.S. §§118I(A)(1) and (C)).

Modifications continue to be effective based on the filing date, absent an agreement of the parties or a court finding that the material change of circumstances actually occurred later than the filing date. The statute also still prohibits retroactive modifications. In other words, a court can order that a modification is effective *later* than the filing date, but not *prior to* the filing date. Child support orders are aggregates and are not "per child" orders. A child aging out is not an automatic modification, but rather, the parents must seek a modification from the court. The statute does clarify that child support automatically terminates once the youngest child ceases to be entitled to support.

With regard to the informal review and adjustment process and the exchange of income information, the court can make provision or the parties can agree to the periodic exchange of information. If the order does not contain such a provision, either party can

⁹ With thanks to Julie Rivers for her concise list in her paper "Child Support For The New Millenium: The Good, The Bad And The Ugly" presented on September 10, 2008, during an OBA Webcast.

request the information and it must be provided within forty five days. This information can include: “verification of income, proof and cost of medical insurance of the children, and current and projected child care costs” as well as information regarding overnights for the PTA. Modification agreements must be in writing using the standard modification forms (available on the OKDHS website) and the child support computation form.

XII. Conclusion

The changes to the guidelines statutes are not minor. Practitioners who do not use the guidelines on a daily basis may be especially impacted by the changes. However, due to the reorganization and clarification of different topics within the guidelines, the end result should be a product that is easier to access and use for practitioners and the public alike. Updates to the automatic child support calculator will also help to ease the transition period.