

## A brief survey of the new amendments to the Indiana Child Support Rules & Guidelines

On Sept. 15 the Indiana Supreme Court issued its Order Amending Indiana Child Support Rules & Guidelines. These revisions to the Guidelines become effective Jan. 1. The Supreme Court's order is a redlined document that highlights the revisions and can be found, in its entirety, here: <http://www.in.gov/judiciary/orders/rule-amendments/2009/0909-childsupguidlns.pdf>

For ease of discussion, this article refers to the Guidelines prior to the recent amendment as "the old Guidelines" and the amended version as "the new Guidelines."

In 1989, the use of the Indiana Child Support Guidelines became mandatory for all cases involving the establishment or modification of child support. The public policy

behind the Guidelines had many facets, but one substantial objective was to provide more predictability and continuity in child support calculations, from court to court, and from case to case. Prior to the adoption of the Guidelines, the determination of child support was largely arbitrary, and a hypothetical family presenting with a given set of facts (e.g., income levels, number of children, etc.) might receive 10 significantly differing child support orders from 10 randomly selected trial courts across the state. An important goal of the Guidelines was to eliminate such vagaries.



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### *As they were adopted by the Indiana Supreme Court on Sept. 15*

The following summary is intended to be just that: a summary of the changes created by the amendment, as well as some practical examples of the changes at work. This is not an exhaustive description of every revision to the Guidelines, and any reader seeking that level of detail should consult the Court's order amending the Guidelines directly. The significant changes to the Guidelines are as follows:

#### **Changes to gross weekly income and added caution for imputing income**

The new Guidelines include revisions for addressing Social Security income as well as handling imputation of income. Guideline 3(A)(1) is revised to provide that Social Security disability benefits paid for the benefit of a child are included in the disabled parent's Weekly Gross Income; however, that parent is also entitled to a credit for the amount of that benefit.

Guideline 3(A)(3) is revised to provide that potential income should be imputed to a parent only when the unemployment or underemployment is "without just cause." The Commentary to this section is also revised to provide that where the underemployment or unemployment is the result of a disability, health issue, excessive child care costs or similar circumstances, it may be improper to impute any income to the parent. This revision seemingly modifies the widely used past of imputing an amount no less than minimum wage to an unemployed or underemployed parent. The Commentary also is revised to dovetail with recent case law discouraging

imputing potential income to incarcerated parents. *See, e.g., Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007); *see also Becker v. Becker*, 902 N.E.2d 818 (Ind. 2009).

The old Guidelines used a multiplier that reduced a parent's Weekly Gross Income depending upon the number of subsequent children. Though the net effect on the child support obligation remains the same, under the new Guidelines, the parent's Weekly Gross Income is not reduced; instead, a new line 1(A) is added to the Child Support Obligation Worksheet that produces a credit against Weekly Gross Income. Additionally, the new credit line allows for up to eight subsequent children, whereas the old Guidelines provided multipliers for only five or fewer subsequent children. The impact on the final support amount as a result of subsequent children remains unchanged.

#### **Elimination of child support plateau for high income earners**

One of the more significant changes to the Guidelines can be found in Guideline 3(D). The new Guidelines retain a substantially similar means of calculating the parties' Combined Weekly Adjusted Income. Likewise, the Combined Weekly Adjusted Income is still plugged into the Guidelines' "Schedules Table" to determine the parties' Basic Child Support Obligation, which is simply a function of: (1) the parents' Combined Weekly Adjusted Income; and (2) the number of children. However, under the old Guidelines, the Schedules maxed out at \$4,000 per week (or \$208,000 per year) of Combined Weekly

Father's Annual Income	Support Amount Under "Old Guidelines"	Support Amount Under "New Guidelines"
\$208,000/yr	\$330/week	\$330/week
\$260,000/yr	\$350/week	\$413/week
\$312,000/yr	\$367/week	\$457/week
\$364,000/yr	\$380/week	\$500/week
\$416,000/yr	\$392/week	\$584/week
\$468,000/yr	\$403/week	\$648/week
\$520,000/yr	\$412/week	\$712/week

Adjusted Income. For income levels in excess of \$4,000 per week, the Guidelines applied a complicated formula that had the effect of causing support amounts to plateau as income increased further.

Under the new Guidelines, the Schedules max out at \$10,000 per week (or \$520,000 per year) of Combined Weekly Adjusted Income. Further, for income levels in excess of \$10,000 per week, the plateau-causing formula has been jettisoned in favor of a simple linear calculation. For all income above \$10,000 per week, the Basic Child Support Obligation will increase at a fixed percentage of the income above \$10,000 per week, depending upon the number of children (e.g., 7.1 percent for one child, 10 percent for two children, 11.5 percent for three children, 12.9 percent for four children, etc.).

**Examples.** To give a sense of how the old Guidelines and new Guidelines create diverging results for high income earners, consider the following. For simplicity, suppose that Father is the sole income earner and that Father and Mother are calculating support for one child. Above, for each level of income, is what Father would pay to Mother in weekly child support

(again, for ease of calculation, we are not factoring in parenting time or other credits) under the old Guidelines and the new Guidelines.

The new Guidelines also provide that, beyond \$10,000 per week, the support obligation increases in a linear fashion at 7.1 percent of combined weekly income for one child. So, there never is any "plateau" in support obligation. Everything else held constant, child support for someone earning \$20,000 per week will be roughly twice what it would be earning \$10,000 per week. This is a substantial departure from the operation of the old Guidelines.

**New rebuttable presumption that 'negative' support orders require support payments from custodial parent to noncustodial parent**

The new Guidelines contain added language in Guideline 3(F) providing that, when a child support calculation produces a "negative" support amount for the noncustodial parent, there is now a rebuttable presumption under the new Guidelines that the custodial parent shall pay to the noncustodial parent an amount equal to the "negative" support figure. This

effectively overrules the interpretation of the old Guidelines set forth in *Grant v. Hager*, 868 N.E.2d 801 (Ind. 2007). Interestingly, Justices Sullivan and Rucker expressly dissented to this revision. They would have retained the *Grant* holding that, in the event of a negative support calculation, there is a rebuttable presumption that no support is due between parents.

**New guidance for Social Security benefits**

The new Guidelines include an extensive new discussion in Guideline 3(G) for handling Social Security benefits, much of which is a codification of prior case law. The new terms include:

1. Social Security disability benefits received for the benefit of the child as a result of the *custodial* parent's disability are not a credit toward the child support obligation of the noncustodial parent.

2. Social Security benefits received by a custodial parent, as a representative of the child, but arising from the earnings or disability of the *noncustodial* parent are credited to the noncustodial parent's child support obligation in the following manner:

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a. If the child is receiving Social Security retirement benefits as a result of the noncustodial parent's retirement, then the court has the discretion of awarding a credit to the noncustodial parent; it is not automatic.

b. If the child is receiving Social Security disability benefits as a result of the noncustodial parent's disability, then the court shall automatically include those payments in the noncustodial parent's Weekly Gross Income but also give the noncustodial parent an automatic credit against his child support obligation.

c. Frequently, Social Security disability payments are made in a retroactive lump sum after disability is determined. To the extent such a lump sum is paid to the custodial parent, it shall be applied to any child support arrearage of the disabled noncustodial parent; if the lump sum exceeds any arrearage (or if there is no arrearage) then the excess amount shall be considered gratuitous and neither refundable to the noncustodial parent, nor a credit to the noncus-

todial parent's future support obligations.

There is significant additional commentary for Social Security disability benefits in the new Guidelines. Judges and attorneys with applicable pending cases should read new Child Supp. G. 3(G) and its Commentary in its entirety.

**Two new exceptions to rule that child support modifications may relate back no earlier than date petition to modify is filed**

New language in the Commentary to Guideline 4 adopts the holding of *Whited v. Whited*, 859 N.E.2d 657 (Ind. 2007). Specifically, modification of support may relate back no earlier than the date a petition to modify child support is filed, with two exceptions: (1) the parties have agreed to and carried out an alternative method of payment that substantially complies with the spirit of the decree; or (2) the obligor parent takes the child into his home and assumes custody, provides necessities and exercises parental control

for a period of time that a permanent change of custody is exercised.

Also, under the old and new Guidelines, child support orders for cases involving multiple children are not issued on a "per child" basis. They are issued for the children *collectively*. Further, the math of the support calculation is such that the support amount for two children is not twice the amount of support for one child. (It's actually 1.5 times higher.) New language in the Commentary addresses how to handle a step-down in support when one child is emancipated, yet the support obligation for other children continues. It further provides that "[s]upport orders may ... be framed to allow for automatic abatement of support upon the emancipation of the first child if that emancipation is by reaching age twenty-one (21) or by virtue of some other significant event that will not be disputed between the parties." Therefore, predetermining automatic "step-downs" of child support is now expressly permitted, provided the parties agree and emancipation of a child prior to age 21 is not anticipated. The new Guidelines caution, however, that such practice should be the exception, not the rule, and judicially amending orders remains the preferred resolution.

**New details on allocating 'controlled expenses'**

The Parenting Time Credit now has its own new Guideline 6. (Previously, it was a component of Guideline 3(G), with additional commentary provided elsewhere.) However, its method of calculation remains unchanged.

New Commentary provides added explanation of the concept of "controlled expenses." These are expenses that are never either

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transferred to the other parent (so-called “transferred expenses,” such as food) or duplicated by the other parent (so-called “duplicated expenses,” such as housing, bedroom furniture, etc.) as a result of the exercise of parenting time. The new Commentary identifies “controlled expenses” as “clothing, education, school books and supplies, ordinary uninsured health care and personal care.”

The new Commentary adds that controlled expenses are normally a concern only in situations where physical custody is shared equally. In these situations, either Mother or Father should be designated as the parent to pay the child’s controlled expenses. Then, the other parent is given the parenting time credit. Under such a situation, “[t]he controlled expenses remain the sole obligation of the parent for whom the parenting time credit is not calculated.” The new Commentary also gives guidance in equal time cases as to which parent should be responsible for paying the controlled expenses. Factors include:

1. Which parent has traditionally paid those expenses;
2. Which parent is more likely to be able to readily pay the controlled expenses;
3. Which parent more frequently takes the child to the health care provider; and
4. Which parent has traditionally been more involved in the child’s school activities.

Based upon an analysis of these factors, one parent should be designated as the parent to pay the controlled expenses, while the other parent should be given the parenting time credit.

#### **New health care and medical support guideline and worksheet**

Under the new Guidelines, health care and medical support issues now have their own new Guideline 7 and a new worksheet for determining the feasibility of insurance coverage. Notably, the new Guidelines mandate coverage where feasible: “**The court shall order one or both parents to**

**provide private health care insurance when accessible to the child at a reasonable cost.**” The concept of being “accessible to the child” is defined as “covering the geographic area in which the child lives.”

The new Guidelines’ health insurance provision also focuses heavily on testing to determine if one or both parents can reasonably provide the private health insurance coverage. The “reasonable cost” inquiry articulated by the new Guidelines is whether the child’s insurance premium is less than 5 percent of that parent’s Weekly Gross Income *and* the premium, plus that parent’s share of the Basic Child Support Obligation, is equal to or less than 50 percent of the parent’s Weekly Gross Income.

This expanded attention to health insurance coverage includes a new worksheet for the Guidelines called the Health Insurance Premium Worksheet (“HIPW”). The new HIPW is available on the Supreme Court’s Web site, and within the amended order.

The HIPW is basically a flow chart that applies a four-part test to determine whether to include a private health insurance requirement in the court’s order:

1. Is private health insurance for the children available to the parent?
2. Would the premium to cover the children be less than 5 percent of that parent’s Weekly Gross Income?
3. Would the premium to cover the children *plus* that parent’s share of the Basic Child Support Obligation be equal to or less than 50 percent of that parent’s Weekly Gross Income?
4. Would the coverage for the insurance be accessible for the children to enjoy (*e.g.*, it would cover them geographically)?

Importantly, the HIPW need not be completed and filed when the parents agree that one or both of them will provide health insurance for the child.

The Commentary to new Guideline 6 provides some added guidance for requiring health insurance:

1. If both parents “pass” the HIPW test, the parent who can acquire more comprehensive coverage at a lower cost should be required to provide it.

2. Where neither parent passes the HIPW test, the trial court can order the parties to investigate coverage further, and to acquire it if and when doing so becomes reasonable and accessible.

3. Where the parents have a history of changing jobs or insurance providers, the trial court may

order both parents to carry coverage. In such cases, both parents should receive the premium credit on Line 7 of the Child Support Obligation Worksheet.

The new Guidelines preserve use of the “6% Rule” for uninsured medical expenses. (The “6% Rule” is a term of art referencing that 6 percent of the Basic Child Support Obligation is earmarked to cover the child’s uninsured and deductible medical expenses; because of this, the Guidelines automatically calculate an amount of uninsured and deductible medical expenses for the child that the custodial parent must pay before any further contribution is expected toward those expenses from the noncustodial parent.) The new Guidelines also include language permitting the court to require

fathers to pay a percentage of birthing expenses (e.g., prenatal care, delivery, hospitalization and postnatal care, etc.).

### **Extraordinary expenses moved from commentary to new guideline**

Under the new Guidelines, “extraordinary expenses” – such as private schooling, college and extracurricular activities – also receive their own new guideline. This new Guideline 8 adopts the language that was previously additional commentary to old Guideline 6.

**Elementary and secondary education.** The trial court has the discretion to order private elementary and secondary education, but is instructed to “consider whether

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the expense is the result of a personal preference of one parent or whether both parents concur, if the parties would have incurred the expense while the family was intact; and whether or not education of the same or higher quality is available at less cost.”

**College.** Under the Guidelines, an order for the payment of college expenses is strictly discretionary. *See* New Guideline 8(b). This guideline gives added encouragement to requiring the child to make a financial contribution: “the court should consider post-secondary education to be a group effort, and weigh the ability for each parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expenses” and that the court “should apportion the expenses

between the parents and the child.” However, any student loans, grants, scholarships, etc., “should be credited to the child’s share.”

The guideline also encourages trial courts to include in its college order a requirement that the child maintain some academic performance level. The order should also require the student (or the custodial parent) to provide copies of report cards to the parents. The court may limit its consideration to the cost of state-supported schools. New Guideline 8(c) gives detailed instruction for completing the Post-Secondary Education Worksheet; however, the worksheet has not been modified.

**Other extraordinary expenses.** The new Guidelines address the possibility of dealing with camps, sports leagues, and similar extraor-

dinary expenses for the child. The new Guidelines instruct that “[i]n the absence of an agreement relating to such expenses, assigning responsibility for the costs should take into account factors such as each parent’s ability to pay, which parent is encouraging the activity, whether the children have historically participated in the activity, and the reasons a parent encourages or opposes participation in the activity.”

### **Accountability and tax exemptions moved from commentary to new guideline**

The new Guidelines also move language dealing with support “accountings” and the allocation of tax exemptions into a new Guideline 9. Again, this language previously appeared in the old Guidelines as part of additional commentary to old Guideline 6. The only provision below that is new to the Guidelines is that concerning “rounding” values.

**Accountings.** New Guideline 9 authorizes the trial court to require a parent that is receiving child support payments to provide an accounting of how those funds are spent. However, the Guidelines provide that this should be required only upon a showing of reasonable cause that child support is not being used for the support of the child. Further, accountings may be ordered only on a prospective basis: “An accounting may not be ordered as to support payments previously paid.”

**Tax exemptions.** Of course, tax exemptions for children are vested, by default, with the custodial parent. The issue in some cases is if, or when, that exemption should be claimable by the noncustodial parent. The Guidelines’ language notes that a trial court cannot actually award the exemption, but can effectively do so by requiring a party to

execute IRS Form 8332 to transfer the exemption. Though the Guidelines have no rules for allocating the exemption, “[j]udges may wish to consider ordering the release to be executed on an annual basis, contingent upon support being current at the end of the calendar year ... .” Further, in determining whether to order the release, the court should consider the following factors:

1. The value of the exemption to each parent;
2. The income of each parent;
3. The age of the child(ren) and how long the exemption will be available;
4. The percentage of the cost of supporting the child(ren) borne by each parent;
5. The financial aid benefit for post-secondary education for the child(ren); and
6. The financial burden assumed by each parent under the property settlement in the case.

### New provision on rounding to nearest dollar

**Rounding.** This language is new to the Guidelines. Child support orders should be rounded to the nearest dollar when working from the Child Support Obligation Worksheet (e.g., an order for \$50.50 becomes \$51, and \$50.49 becomes \$50.) See new Guideline 9.

### What’s not in the new Guidelines?

As noted above, the adoption of these changes may cause significant increases in support amounts for high income earners. But the new Guidelines are notably silent as to whether the adoption of these new rules, without more, is grounds for a modification. However, since I.C. §31-16-8-1 permits modification of child support when at least 12 months have

passed since the last support order, and the old order “differs from the Guideline amount presently computed by more than 20 percent,” this language would seem to permit modifications in high income cases as a result of nothing more than the amendment to the Guidelines. (Emphasis supplied.)

In any event, it is likely that child support calculations will become more hotly contested in high income cases. Under the old Guidelines, the parties (and their counsel) did not have a strong incentive to spend resources, arguing whether a parent was earning, say, \$500,000 per year or \$600,000 per year because the difference in the amount of child support payable at the two income levels was not substantial. Under the new Guidelines that will change, and it can be expected that “income disputes” for high income earners will become more vigorously contested.

Finally, how should a practitioner handle cases for the remainder of 2009 that would be significantly affected by the new Guidelines? If the new Guidelines would work to the benefit of the client, then there are really only two options. The first option, obviously, is to try and stay out of court until after the new Guidelines become effective on Jan. 1. However, if that is not possible, then there would seem to be a reasonable argument that a trial court applying the old Guidelines could enter a deviation to the child support amount set forth under the new Guidelines, with appropriate written findings that reference the imminent changes. ☺

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