



DEPARTMENT OF JUSTICE

MEMORANDUM

DATE: May 3, 2010 (updated October 5, 2010)
FROM: Jean Fogarty, Child Support Program Director
SUBJECT: General Guidelines Q&A for the Oregon Bar

Colleagues:

A number of questions have come up from concerned members of the Bar about the interpretation and application of the 2010 Child Support Guidelines. The information provided below is the result of a discussion between Gil Feibleman and my staff and is intended to help answer some of his questions as well as those posed by other members of the Bar. We hope that this information may be of use to private practitioners and the bench.

DISCLAIMER: This publication is not "legal advice" and should not be taken as a binding statement of legal authority. While the responses reflect the view of DCS on these issues, DCS cannot predict how these same issues will be treated by OAH or the courts.

1) In what form will medical support be ordered?

The term "medical support" is defined by ORS 25.321(7) as both cash medical support and health care coverage (private or public). ORS 25.323(4) requires health care coverage to be provided if it is available. If health insurance is not available, then cash medical support must be ordered *unless findings are entered* indicating why cash medical support is not appropriate. It is not necessary to include cash medical support language if there is health insurance provided by that party.

2) How is the amount of medical support determined?

Under OAR 137-050-0750, the maximum amount of medical support that can be ordered is determined by calculating the "reasonable in cost cap" for each party. This is determined in most cases by calculating 4% of each party's "adjusted income" (there are some other criteria in the rule for low income parties). The resulting calculation results in the maximum amount that can be ordered for providing health insurance if it is available.

If health insurance is unavailable or exceeds the "reasonable in cost cap" then cash medical should be ordered *unless there is a finding that it is inappropriate*. An example would be a party with \$3000/ month of adjusted income. 4% of \$3000 is \$120. This means that health care coverage will be ordered if it is available and the cost for enrolling the children is \$120 a month or less. If health insurance is unavailable or costs more than \$120 per month, then cash medical support of \$120/month would be ordered instead.

3) Can more than 4% of adjusted income be ordered for medical support?

OAR 137-050-0750 permits ordering more than 4% if there are compelling factors to do so. In the example in #2, if the cost of health insurance was available to a party at \$135, a finding could be entered that there are compelling reasons to use 4.5% instead of 4%. This would be result in a reasonable in cost cap of \$135.

4) How is medical support determined for low wage parties?

Under ORS 25.323(7), parties earning minimum wage or less are exempt from cash medical support obligations and are not required to provide health care coverage. This determination is made by using the parties' unadjusted, gross income (first line of the calculator). Therefore a parent who has unadjusted gross income of Oregon minimum wage or less is not required to pay for medical support of any kind.

However, for parties that are above minimum wage, the amount of medical support (health care coverage and/or cash medical support) is calculated using adjusted income (line 1e of worksheet), which includes the addition of spousal support received or the subtraction of spousal support paid. See question # 6 and # 9.

OAR 137-050-0750 also provides that the amount of medical support may not exceed a party's income available for support. This is calculated and shown on line 6a of the worksheet.

5) Would being \$1 over minimum wage create a Cash Medical Support obligation?

Yes, INCOME of one dollar over minimum wage would qualify for medical support under ORS 25.323(7), but the amount of cash medical support would depend on the facts of a particular case (OAR 137-050-0750(2)).

6) Would \$1,000 in Spousal Support, in addition to a minimum wage presumption, create a medical support obligation?

The eligibility determination for medical support under ORS 25.323(7) is based on a whether a party's INCOME is above minimum wage. Spousal support is not considered income for purposes of the guidelines; it is an adjustment to income. Therefore, paying or receiving spousal support does not affect the medical support obligation threshold. However, in cases where there is substantial spousal support, the parties could consider applying a rebuttal to income to address this.

7) What is contingent medical support? Is it mandatory?

As noted in #3 above, ORS 25.323(3) allows (but does not require) orders to contain contingent medical provisions. This means an order may provide that when health insurance is available, it will be provided, but when it is unavailable, cash medical will be provided instead. The change in the type of medical support would occur without the need to modify the order. Once a party notifies DCS that there has been a change in the availability of health insurance, DCS would begin enforcing the type of medical support that applies.

Thus, if the order contains contingent medical support language and DCS learns that health insurance has become unavailable, the health insurance provisions would be turned off and the cash medical provisions would be turned on. Conversely, if we learn that health insurance has become available, the cash medical provisions would be turned off and the health insurance provisions would be turned on.

DCS intends to make these provisions a standard part of its orders, but it is not required and may not be appropriate in all orders depending on the facts of a particular case.

There is no presumption in favor of the use of contingent medical support. On the contrary, contingent medical is purely optional for the private bar and may be used or not at the election of the parties, counsel or the courts. Electing not to use it does not require any special findings or for the parties to rebut any presumptions. If you do not want it, do not use it.

It is also worth noting that even if an order contains contingent medical support language, a modification may nevertheless be appropriate at the time of a change in the availability of medical support. For example, if health insurance becomes unavailable because an obligor loses a job, the income on which the order was calculated may no longer be correct and the contingent cash medical amount that is built into the existing order may be too high.

8) Is it assumed that Cash Medical Support (CMS), if ordered, includes all uninsured expenses?

The first \$250 per child per year of uninsured medical expense is already factored into the basic child support guideline scale. It is assumed that all other uninsured medical expenses, in excess of \$250, are included in the cash medical support obligation. However, nothing in the amended statutes or new administrative rules prevents practitioners from allocating uninsured medical costs in lieu of cash medical or in addition to cash medical when uninsured expenses exceed the amount of cash medical support. All that is required is that the medical support clause include a finding that: "Cash medical support is not being ordered because the parties have agreed to provide medical support by sharing uninsured medical expenses in the following manner: _____.

9) Is the cost of Health insurance still factored into the calculation as it was before? If not, are the parties still sharing the cost of health insurance as part of the child support calculation?

The cost of Health insurance is no longer apportioned between the parties in the child support calculation. The guidelines use each party's adjusted income to calculate a separate reasonable in cost "cap" (or limit) for each party (see question #2 above).

Adjusted income is shown on line 1e of the worksheet. It is calculated by taking gross income and adjusting it for spousal support received or paid, union dues paid and a party's individual cost to obtain health insurance if the party must be covered in order to obtain insurance for the children.

10) If a party is required to provide health insurance, would the support judgment still provide for a division of the costs of uninsured expenses as was traditionally done in the past?

DCS takes no position on whether or not uninsured expenses should or should not be ordered in addition to health care coverage. The individual facts of the case should determine if it is appropriate. See question # 7.

However, private orders could choose to require the provision of health insurance and the payment of cash medical support to cover uninsured expenses. ORS 25.323(3) provides that: "*A medical support clause may require that medical support be provided in more than one form, and may make the requirement that medical support be provided in a particular form contingent on the availability of another form of medical support.*" There is a good faith argument that this language allows ordering two different types of medical support (i.e. health insurance and Cash medical) and that they may be ordered at the same time or as alternative obligations dependent upon the availability of insurance.

Also, whether or not there is actually an "out-of pocket" cost for health insurance may help influence whether private parties decide to have both health care coverage and cash medical support. For example, in the past, health insurance costs were factored into child support and courts regularly ordered a sharing of the uninsured expenses. Under the new guidelines, those costs are not factored and each party pays his or her entire cost of providing health insurance if it is available. If health insurance is a free employee benefit, a sharing of uninsured expenses may still be appropriate and parties may choose to also require the payment of cash medical support.

11) Does the receipt or payment of spousal support change the support calculation for medical support?

As explained above, spousal support does not affect income for purposes of determining if a party is eligible to provide medical support under ORS 25.323. It can, however, affect the amount of medical support for someone who is otherwise eligible to pay it.

The reasonable in cost "cap," which is used to determine the amount of cash medical support, is calculated on ADJUSTED income. This includes adjustments like spousal support, union dues and the cost to the parent of insuring themselves if coverage is necessary to provide insurance for the children. See questions # 2 and # 9.

12) If the custodial parent and kids are on the Oregon Health Plan does the money judgment need to reflect DHS as the obligee of cash medical support?

No and here's why:

In order to receive Medicaid-funded coverage from the Oregon Health Plan, (OHP) the applicant must assign any rights to medical support to the State. See OAR 461-120-0310 at <http://apps.state.or.us/caf/arm/A/461-120-0310.htm>. On opening the assistance case, DHS sends an electronic referral to the DOJ, which is then responsible for collecting and distributing support payments. We notify the parties that a case has been opened and that payments are to be made through the DOJ. DOJ accounts for the payments, forwards cash child support to the obligee, and pays cash medical, if any, to DHS. **Because of the statutory requirements and the applicant's assignment of rights, no changes are required to a support judgment that**

provides for direct payment to the obligee. Also noteworthy, if DHS receives cash medical in excess of actual medical expenditures, they forward the excess to the obligee annually. (New Q&A August 10, 2010)

13) With a child attending school, do the guidelines address how the obligee would pay that child or is rebuttal likely for a family with a child attending school?

The guidelines permit ordering both parents to pay the CAS (child attending school) but the child support program does not establish orders for children over the age of 18 (OAR 137-055-3485) or seek new orders against "obligees." That will be left to private practitioners.

The child support program will enforce orders against the obligee if such an order has been obtained by a private practitioner in a court order. Under the new guidelines, all children (both minor and CAS) are treated the same. This includes the application of parenting time credits.

In practice, if there is a parenting time credit, the obligee is likely to have, in most cases, a \$100 presumed minimum support amount to the adult child. This will depend on several factors including income disparity, the amount of parenting time and the number of minor children.

Rebuttal may be the most equitable way to address child support if there is a child attending school situation, particularly if support is being ordered against both parties. You might consider running the calculation under the old and new guidelines to put a dollar value on the rebuttal.

14) With a child attending school, do the guidelines address where the child is living?

For the sake of the computation only, the guideline calculator imputes parenting time for the adult child in the same percentages that parenting time is calculated for the minor children, regardless of where the adult child is living. Thus a custodial parent of a minor child may be getting credit for an adult child that does not live in that parent's home at all. In many cases this will be inaccurate and a rebuttal will be appropriate to have the calculation reflect the actual facts. See question # 13.

15) Are the child support figures on the Obligee's side of the calculator intended to create an obligation?

No, the support amounts listed on the obligee's side of the calculator are informational only and are intended to show the amount of support that would be ordered if PHYSICAL CUSTODY of all minor children changed from the obligee to the obligor with no other changes. ORS 416.416 was added during the 2009 legislature and allows orders to contain provisions reversing support obligations if custody changes. It is a permissive provision and can be used at the option of the parties, counsel or the courts. Whether it is used or not, findings or rebuttals are not necessary. It may not be appropriate in some cases where the facts make reversing the obligations unfair (i.e. parenting time credits, rebuttals to income or costs, split custody, etc.)

16) Under the new guidelines, can support be ordered from a custodial parent to a non-custodial parent?

Yes, a parent with primary or legal custody may be required to pay support to the non-custodial parent. This happens primarily when both parents qualify for parenting time credits and there are significant income disparities.

A rebuttal may be appropriate in this situation to prevent a custodial parent from having a support obligation.

17) Under the new guidelines, will rebuttal still be appropriate when the facts dictate a different result than the presumed support obligations?

The particular facts of an individual case will determine whether any of the above issues come up and whether rebuttals are available and appropriate to provide a just and proper support obligation (including child support, insurance, CMS or uninsured expenses.)

The 2010 child guidelines represent a completely new approach and make significant changes from past practices. As a result, the assumptions used by parties and courts in drafting pre-2010 judgments may no longer apply to 2010 judgment. This is particularly true in areas involving uninsured expenses and families with children attending school.

The grounds for rebuttal and the *Peterson* case exception are essentially the same as they were before the new guidelines. The ability of the court to rebut income, adjustments or the final amount of support remains intact.

18) Will there be more changes in 2011?

Everything is going to be reviewed in 2011 and changes are anticipated. The private Bar will be invited to participate in the Guidelines Workgroup that will make recommendations to me on changes to the administrative rules as well as the scale and formula.

19) Is there still a requirement that a rebutted support amount be calculated by assigning a dollar value to be attributed to each rebuttal criteria applied?

No. The new OAR 137-050-0760(2) has removed that obligation. There may be multiple reasons to rebut the presumed amount but there does not need to be more than one adjustment. However, OAR 137-050-0760(1) does require you to “state the reason the presumed amount is unjust or inappropriate” in a finding. (New Q&A October 5, 2010)

20) The Social Security and veteran’s benefits rule has changed. Previously, the obligor could only get partial credit and only if benefits were paid to the child on the obligor’s behalf. Now the obligor gets dollar for dollar credit for benefits paid to the child. Do the changes to the rule also allow the obligor to receive credit when it is the obligee whose benefits are paid to the child?

No, the obligor may only receive a credit when the child (or a representative payee) receives Social Security benefits as a result of the obligor’s disability. The calculator will accept benefit amounts for either parent because in some cases it’s difficult to tell before completing the calculation which parent will be the obligor and because both parents could be obligors if a child is in state custody or with a caretaker. If benefits are paid to the child on the obligee’s behalf, the

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obligor's final child support amount, as shown by the calculator, will not be reduced. The statute requires this result. ORS 25.275 provides that the child support obligation to be paid by the obligor may be reduced dollar for dollar in consideration of the benefits paid to child as a result of the obligor's disability or retirement. (New Q&A October 5, 2010)