

# **Oregon Support Enforcement Division**

## **Guidelines Commentary**

### **Effective October 15, 1994**

This commentary was prepared by John Ellis, Assistant Administrator, Support Enforcement Division, Oregon Department of Justice and a principal drafter of these guidelines. It does not have official status as legislative history. It is intended as an aid to users insofar as it clarifies and explains these new and amended rules.

ORS 25.275 requires the Support Enforcement Division (SED) of the Department of Justice to adopt administrative rules which constitute the child support guidelines required by Public law 100-485, the Family Support Act of 1988.

The guidelines establish presumptively correct child support awards, which may be deviated from only after a finding that the presumptive amount is "unjust or inappropriate". The guidelines set forth criteria upon which a such a finding must be based.

In March and in July 1994, SED gave notice proposing that the guidelines be amended by adopting new rules, repealing one rule and amending several others. Not all of the changes proposed in April and July were adopted by SED. Those changes which were adopted are discussed below.

#### 1994 COMMENTARY TO OAR 137-50-320

The definition of "gross income" has been amended to include "temporary income," which is a new concept created by the adoption of new rule OAR 137-50-365. For a discussion of this concept please see 137-50-365, below.

#### 1994 COMMENTARY TO OAR 137-50-330

Section (1) of this rule sets forth the step -by - step procedure for a child support calculation under the guidelines. At (1)(g) of this rule a reference has been inserted to adjustments as provided by OARs 137-50-410, 137-50-420 and 137-50-430 in consideration of health insurance costs, medical expenses and child care costs. The additional language added here is for clarification only and could previously be inferred by a reading of the other rules referred to above. The additional language at 137-50-330(1)(g). Then, does not constitute a substantive change to the guidelines.

Section (2) of this rule sets forth the criteria for a rebuttal of the presumptively correct amount produced by a guidelines calculation. The drafters have rewritten (2)(a) of this rule for clarity and to contain reference to additional rebuttal criteria which have been added to this rule. The clarification is intended to underscore the point that in a deviation from the presumptively correct amount, the order must recite both the presumptively correct amount, the amount actually ordered, and the reasons for the deviation.

#### 1994 COMMENTARY ON OAR 137-50-330(2)(a)(F)

At (2)(a)(F) of this rule, the existing rebuttal criterion concerning "special hardships" of a parent has been broadened to include "extraordinary visitation transportation costs". The drafters have been persuaded that in certain cases, when a parent incurs extraordinary transportation costs in the exercise of visitation with a child or children, and when that

expense would impair the ability to pay the presumed correct child support amount, the trier may find that it is appropriate to reduce the amount of support to be paid by a parent. This criterion could also be used, however, to justify an increase in the amount of support paid by a parent when the other parent (i.e., the custodial parent) incurs extraordinary transportation costs to facilitate visitation between the child and the non - custodial parent.

#### 1994 COMMENTARY ON OAR 137-50-330(2)(a)(H)

At (2)(a)(H) of this rule language has been added to provide that “working less than full time to fulfill the role of parent and homemaker” may be considered as a reason to rebut the presumptively correct support amount. These guidelines have always included as a rebuttal criterion “the desirability of the custodial parent remaining in the home as a full - time parent”. The addition of the new language simply expands this concept to include a custodial parent who works less than full time. This criterion would most likely be used to justify a deviation from the guidelines which would provide for more than the presumed amount to support. To increase the support order based on this factor, it would presumably be demonstrated that both the custodial parent’s failure to work full time (or at all) was justified by the compelling desirability of remaining at home with the child or children and that the custodial parent’s failure to produce the expected income (part of which would be allocated to the needs of the child or children) should be compensated for by increased payments on the part of the non - custodial parent. In considering an argument that this criterion stand as the reason for a rebuttal, the trier will probably have to be persuaded both on the merits of the custodial parent remaining at home, the non-custodial parent’s ability to pay an increased amount and the equities of such an order.

The above discussion is not intended to suggest that application of this criterion is appropriate only to facts similar to those recited.

#### 1994 COMMENTARY OF OAR 137-50-330(2)(a)(J)

(2)(a)(J) of this rule previously provided as rebuttal to the presumptive amount, the financial advantage afforded a parent’s household by the income of a spouse or another person with whom the parent lives in a relationship similar to husband and wife. We have expanded this criterion to include situations wherein a parent may live with more than one other person, and not only in a relationship similar to husband and wife, but in other forms of domestic partnership.

In intent of the drafters is to allow for consideration of any financial advantage accruing to a parent because of a sharing of household expenses with another person or persons without regard to whether the other person or persons be a spouse, a person with whom the parent lives in a relationship similar to husband and wife, or simply housemate or housemates. This criterion may be applied to either increase or reduce the presumptively correct amount depending on whether it is the custodial or non - custodial parent who benefits from the income of a spouse or other person.

#### 1994 COMMENTARY OF OAR 137-50-330(2)(a)(K)

(2)(a)(K) is new to the list of rebuttal criteria. It provides for consideration of the financial advantage afforded a parent’s household by benefits of employment including, but not limited to those provided by a family owned corporation or self employment.

The “benefits of employment” could be any benefit not counted as “gross income” which provided a financial advantage. Those benefits may include, but are not limited to those which provide or subsidize housing, transportation, food, clothing, health benefits and the like. The trier, in allowing a rebuttal based on this criteria would have to assign a dollar value to the benefit and make a decision about how that amount affects the need for, or the ability to pay child support.

#### 1994 COMMENTARY OF OAR 137-50-330(2)(a)(L)

(2)(a)(L) is also new to the list of rebuttal criteria. It provides for consideration of “Evidence that a child who is subject to the support order is not living with either parent or is a “child attending school” as defined in ORS 107.108.” The guidelines assume that a child who is a beneficiary of the support award is in the physical custody of one, or in the case of split and shared custody situations, both parents. When that is not true, the guidelines do not provide for a formalistic solution to the problem of child support. That is, the guidelines do not provide for consideration of any specific factors which may apply in a situation wherein a child is not in the custody of one or another parent. It is left in those situations for the trier to determine whether the presumptive amount of support should be ordered, given the living arrangements for the child, or whether a departure from the guidelines is appropriate. As in all cases where a rebuttal is successful and a departure is authorized, it is for the trier to craft an equitable solution by whatever method is deemed appropriate.

It is also now clear that these guidelines often have not worked well in those situations where an 18-21 year old child is a “child attending school” as defined in ORS 107.108. An 18-21 year old is, of course, not in the custody of either parent. Furthermore, this person is a party to any action regarding support. Because these “children” often have income of their own, often live with roommates in cost sharing situations, and sometimes form domestic partnerships, it has always been true that support awards in such situations may call for a rebuttal of the presumptive amounts. Formerly, such a rebuttal was possible under other, more general provisions of OAR 137-50-330 (2) . The new language of this rule simply underscores the availability of this criterion as a rebuttal factor.

#### 1994 COMMENTARY OF OAR 137-50-330(2)(a)(M)

(2)(a)(M) of this rule is new. It allows, as rebuttal criteria, “prior findings in a Judgement, Order, Decree or Settlement Agreement that an existing support award was made in consideration of other property, debt or financial awards.” Clearly, if previous orders regarding child support varied from the presumptively correct amount because of other property, debt or financial awards, and those facts remain relevant to any subsequent proceeding (i.e., a modification proceeding), then those facts should be allowed to support rebuttal argument to any support award contemplated. Two examples:

1. In the agreement incorporated as part of the decree of dissolution, the parties agreed that the non - custodial parent would take the tax dependency exemptions. This increased his or her net disposable income. It also may have decreased the net income of the custodial parent (but perhaps not if he or she receives public assistance or has extremely low income). These facts led to an order for support higher than the presumptively correct amount. If this situation still exists at the time of some future

modification action, then it would be appropriate to again at least consider those factors in rebuttal of the presumption.

2. At the time of dissolution of marriage it is agreed that the custodial parent and children will remain in the marital home subject to future sale and sharing of those proceeds. The arrangements are such that the amount of child support which would normally be paid under the guidelines is reduced. At some later modification proceeding in which these facts still pertain, it would be appropriate to again at least consider those factors in rebuttal of the presumption.

#### 1994 COMMENTARY OF OAR 137-50-330(2)(a)(N)

(2)(a)(N) of this rule is new. It allows for consideration in rebuttal of the presumed amount “the net income of the parent remaining after payment of financial obligations mutually incurred”.

If the parties jointly purchased certain property but only one of them assumed the responsibility for making payments on the obligation after separation, and if such payments were substantial, and relieved the other parent of significant financial burden, then these facts may be advanced in rebuttal of the presumed support amount. One can imagine other fact situations where this criterion would apply to either reduce or increase the child support award.

#### 1994 COMMENTARY OF OAR 137-50-330(2)(a)(O)

(2)(a)(O) is of this rule is new. It provides for consideration as a rebuttal criterion, “The tax free or adverse tax effect of a party’s income or benefits”. The guidelines assume that income will be taxed as earnings and that there is a standard net income for each gross income level specified in these guidelines. That is, even though the guidelines provide for calculations using gross income amounts, the child support awards produced by the guidelines are, in fact, based upon the net income which resulting from that particular gross income amount, assuming a tax deduction claim for only one person, i.e., the person whose income is being determined.

Therefore child support for one child based on a gross income of \$2000.00, and filing as described above, is \$245.00. What is transparent to the user is that \$245.00 is really the child support for net disposable income of \$1477.00, which is \$2000.00 minus \$237.00 federal income taxes, \$133.00 state income tax and \$153.00 in Social Security deductions.

This is not to imply that a parent who claims more or less than one deduction, and whose net income is therefore more or less than would result from one deduction, should be treated differently by this process. The method of deriving net income from gross as explained here is simply a method of “leveling the playing field”, so that when we deal with people with similar gross earnings we will also be attributing to them similar net incomes regardless of the number of exemptions they may claim.

It is true, however, that if the nature of the income or benefit received by the parent is such that it is subject to either more or less taxes than earned income then consideration should be given to both the parent’s before tax and after tax income. If the trier finds that the

income or benefit (e.g. Workers' Compensation Benefits, Welfare benefits, Oregon Lottery winnings) are not taxable as assumed by the guidelines, then the presumptively correct support award is probably not correct and should be subject to rebuttal under this rule.

#### 1994 COMMENTARY OF OAR 137-50-330(2)(a)(P)

(2)(a)(P) is new. In our Notice of Rulemaking dated July 1, 1994, we proposed including "return of capital" in the definition of gross earnings. Comments received persuaded us not to do that, but rather to provide for a rebuttal of the presumptively correct support amount based on return of capital. Users of these guidelines should not confuse "return of capital" with "return on capital". "Return on capital" has always been considered gross income pursuant to OAR 137-50-340 and remains so. "Return on capital" can be, for instance, interest earnings on investments. "Return of Capital," on the other hand, could be that part of a payment received on a land sale contract in payment for real property which represents the principal and not the interest. In other words, in this example, "return of capital" is income derived from conversion of the real property (capital) into monthly income, but would not include the interest payment, which would be "return on capital".

The drafters were not persuaded that "return of capital" should always be counted as income for purposes of these guidelines. It is for the trier to determine based on the facts presented whether "return of capital" should be counted as gross income.

#### 1994 COMMENTARY TO OAR 137-50-335

This is a new rule which provides that the changes to these guidelines apply only with respect to cases initiated after the effective date of these changes (i.e., October 15, 1994).

#### 1994 COMMENTARY TO OAR 137-50-340

This rule was amended to include lottery winnings as income. Lottery winnings were not specifically mentioned in the prior definition of "gross income" but were presumably covered in the general statement that "gross income includes income from any source". The drafters do not consider this a substantive change to the guidelines.

Elimination from the definition of gross income is money from income tested public assistance programs. The drafters did provide, however, that the recipient of Aid to Dependent Children shall be imputed an amount of income equal to that earned for full-time work at the state minimum wage. We did this because even though welfare benefits cannot be assigned to pay child support, and welfare recipients are presumed unable to pay support (ORS 25.245) and therefore would usually not be ordered to pay support, we wish to impute some income to all parties (even custodial parents who receive public assistance) for purpose of the calculation only, and not for purposes of ordering such parties to pay support.

#### 1994 COMMENTARY TO OAR 137-50-365

This is a new rule, which provides that for purposes of this process parent's temporary income (i.e., workers' compensation, unemployment compensation, etc.) may be used to determine child support if the presumption of OAR 137-50-360 (i.e., that a person can be

gainfully employed on a full time basis) is rebutted. The rule is adopted to correct what the drafters believe has been a commonly made mistake under the ostensible authority of OAR 137-50-360 to attribute to a person receiving unemployment compensation an income equal to the income previously earned by the parent even though that parent's chances of ever again earning that income are unlikely. An example follows:

A parent formerly worked as a millwright in a lumber mill. The parent earned \$40,000 or more a year for several successive years. The mill closed, however, and the parent became unemployed. The parent now receives \$1200.00 per month in unemployment compensation. Job opportunities and wage levels in the community are such that this parent will probably not earn \$40,000 per year again in the foreseeable future, if ever. The parent is undergoing retraining to be a computer programmer, but placement in such a job is not assured and, in any case, will not be a possibility for another year.

It would not seem appropriate, given these facts, to impute \$40,000 per year earnings to this parent. It would seem more appropriate to attribute actual income (i.e., \$1200.00 per month unemployment compensation). In such a case, any order entered based upon this level of income could be modified as the parent's job situation improved.

#### 1994 COMMENTARY TO OAR 137-50-380

This rule is repealed. The rule provided for a formalistic reduction in the income of any parent subject to a determination under the guidelines, who was also required to pay support for non - joint children who were not the subject of the instant action. This was seen as a way recognizing the importance of other child support obligations a parent may have by reducing the amount of income ( and therefore the support order) attributed to the parent in any action to order support for joint children. This issue is now covered in OAR 137-50-400. See below for further discussion.

#### 1994 COMMENTARY TO OAR 137-50-400

This rule previously provided a formula for reducing the income to be used in a support order calculation of either parent who had a parental responsibility for nonjoint children in the parent's household. The effect was to slightly reduce the amount of the support order being established in consideration of the parent's other (nonjoint) children. We have rewritten the rule to give the same level of credit for nonjoint children regardless of whether those nonjoint children reside with the parent or are children for whom the parent owes child support. Previously, if the parent owed child support to a child outside the parent's household, credit was given under OAR 137-50-380. If nonjoint children were in the parent's household credit was given under 137-50-400. With the repeal of 137-50-380 and the amendment of 137-50-400, both types of credit are treated under the latter rule.

Finally, the new procedure for nonjoint child credit results in slightly higher credit being given, and therefore slightly lower support award for joint children.

#### 1994 COMMENTARY TO OAR 137-50-410

This rule was amended to provide that health insurance costs in split and shared custody cases are treated under the separate rules for split and shared custody cases. The

previous version of this rule did not work well in assigning responsibility and credit for costs incurred in split and shared custody cases.

The amended rule also specifies that when only one parent is subject to the determination and the child is not in the custody of either (e.g., child is in foster care, we do not know where father is, he is not subject to the action because he has not been served and the action is to set mother's support obligation) any and all health insurance costs incurring by the parent subject to the action will cause the support order to be reduced by an amount equal to those costs. In a more typical case, where both parents are parties, the costs of health insurance are shared. If the non custodial parent buys the insurance this sharing is reflected in a decrease in the amount of support paid by the parent. The decrease is equal to the custodial parent's pro rata share of the obligation based upon relative income levels of both parents. Where there was only one parent, however, and that one parent assumes full responsibility for health insurance costs, then the support order is reduced by the full amount of the insurance costs because there is no other parent with whom to share both responsibility and credits for these costs.

#### 1994 COMMENTARY TO OAR 137-50-420

These rules have always provided that the basic support obligation could be increased to subsidize child care costs. Like health insurance costs, however, child care costs were not easy to allocate between parents in split and shared custody situations using the previous version of this rule. The rule has been amended to require that allocation of child care costs between the parties in split and shared custody cases be subject to the process set forth in the separate split and shared custody rules.

#### 1994 COMMENTARY TO OAR 137-50-430

This rule has been amended to further define "recurring medical costs." The rule has always provided for an increase in the basic support amount to subsidize "recurring medical costs." Because of questions about the meaning of this term, we have defined it to mean "costs which are reasonably expected to occur regularly and periodically in the future based on documented past experience or on substantial evidence of future need." That is, a support order would not be increased to cover the unexpected minor medical event, which in any case could not be planned for because of its unexpected nature. The support order might, however, be increased to provide for those uninsured costs incurred by a child with a chronic illness or condition and for whom prospective costs can reasonably be anticipated. This provision should not be confused with the courts' authority to order parents to share future medical costs on some equitable basis (e.g., share any and all future costs 50/50) whether or not those costs are recurring costs as that term is defined here. That issue is not dealt with in these guidelines and nothing in the guidelines gives or precludes authority for such an order.

#### 1994 COMMENTARY TO OAR 137-50-450

This rule is amended. The previous version did not instruct the user specifically how to allocate costs for health insurance, child care costs and recurring medical costs in shared custody determinations. In the absence of such information users were left their own solutions to this problem. The amended rule provides a specific process for allocating

these costs based on the theory that all costs relating to the needs of the child in a shared custody situation should be borne by the parents based upon their relative incomes and the percentage of time the child resides in each parent's home.

#### 1994 COMMENTARY TO OAR 137-50-460

This rule is amended. The previous version did not instruct the user specifically how to allocate costs for health insurance, child care costs and recurring medical costs in split custody determinations. In the absence of such information users were left to find their own solutions to this problem. The amended rule provides a specific process for allocating these costs based on the theory that all costs relating to the needs of the child in a split custody situation be borne by the parents based upon a factor their relative incomes and the number of children in each parent's physical custody.

#### 1994 COMMENTARY TO OAR 137-50-490

This rule is amended as follows:

1. It provides for using the income of one parent only when a child is not in the custody of either parent and a support order is sought against that one parent only. Under the former rule it was not clear how to proceed in such a case. In cases where a child is in foster care, it is quite common to be able to locate and serve only one parent. In those situations there was a question as to whether support should have been calculated based upon the known income of the parent whose duty to pay support was being determined combined with the figure which represented the presume income (often minimum wage earnings) of the missing parent, or whether only one income should be used. The drafters have decided that it is more appropriate to use only the income of the parent whose duty is being decided.
2. It provides a method of determining the amount of support when support is sought for seven or more children. The previous guidelines did not provide a solution for situations in which support was sought for more than six children.
3. It reflects certain reductions in the contemplated support awards for two or more children at various income levels above \$3100.00. These amounts have been reduced based on economic data regarding the costs of raising children. The data suggests that the economy of scale (that is the relative lesser costs of supporting each successive child after the first child) was understated in the previous version. Specifically, for six children at income levels of \$3100.00, the basic support amount has been reduced from \$1124.00 to \$1113.00 per month. Reductions have been made for six children at all income levels above \$3100.00 and like changes have been introduced for five, four, three, and two children at various income levels between 3300.00 and \$4100.00. Above \$4100.00, for two or more children, all basic support amounts have been lowered. Furthermore Child support amounts were slightly lowered for income levels of \$800.00 and below based on studies which suggest the amount of money with which a parent who pays support should be left.

Finally the drafters did not, as was proposed in the Notice of Rulemaking, lower the child support amounts by ten percent across - the- board.