

137-050-0760 Rebuttals

(1) The presumption that the guideline support amount as provided in OAR 137-050-0700 through OAR 137-050-0755 is the correct support amount may be rebutted by a finding that sets out the presumed amount, concludes that it is unjust or inappropriate, and sets forth a different amount and a reason it should be ordered.¹ A supplemental calculation is not required but may be used in support of the rebuttal.² The criteria that may be the basis for rebuttal include but are not limited to:

- (a) Evidence of the other available resources of the parent;³
- (b) The reasonable necessities of the parent;
- (c) The net income of the parent remaining after withholding required by law or as a condition of employment;⁴
- (d) A parent's ability to borrow;
- (e) The number and needs of other dependents of a parent;⁵

¹ Commentary: The child support amount determined by the formula in OAR 137-050-0700 through OAR 137-050-0755 is presumed correct. If the result is unjust or inappropriate, the court, administrator, or administrative law judge may rebut that presumption and substitute a just and appropriate figure. This list of possible reasons for rebuttal, like the list in ORS 25.280, is not exclusive. The court, administrator, or administrative law judge may consider other appropriate economic factors that directly affect the needs and best interests of the child(ren). *Matter of Marriage of Petersen*, 132 Or App 190 198; 888 P2d 23 (1994).

The party seeking to rebut the presumption in ORS 25.280 has the burden of coming forward with probative evidence that would support a finding that it would be unjust or inappropriate to apply the formula in establishing a child support obligation. *Redler & Redler*, 330 Or 51, 60, 996 P2d 963, 968 (2000)

The court may not base a rebuttal on a factor, such as income disparity between the parties, that is a determinative factor in the guidelines' calculation of a parent's presumed child support obligation. *Matter of Marriage of Larkin*, 146 Or App 310, 313, 932 P2d 115, 116 (1997)

² Commentary: Such a calculation could be based on the guideline support formula but also include factors not considered under the support guidelines. The rebuttal factors may be applied by adjusting the income of a parent, or the costs for the child or the presumed support amount. The Oregon Child Support Program publishes a support rebuttal calculator which allows the user to include such factors.

³ Commentary: "Evidence of the other available resources of the parent" may include income earned as overtime that will increase the parent's ability to support the child, but is not already included in gross income because, e.g., it is not recurring or is not amenable to annualization.

⁴ Commentary: Employee contributions to a retirement plan required as a condition of employment may or may not make a significant impact on a parent's ability to pay the presumed amount of child support. In order to be considered as a rebuttal by the trier of fact, any adjustment must be mandatory and significantly reduce or enhance the income that is available to the parent.

⁵ Commentary: Stepchildren are excluded from the nonjoint child deduction in OAR 137-050-0720 unless there is an order for the stepparent to support the child, as it is presumed that the legal parents of the

(f) The special hardships of a parent affecting the parent's ability to pay support, including, but not limited to, any medical circumstances, extraordinary travel costs related to the exercise of parenting time, or requirements of a reunification plan if the child is in state-financed care;⁶

(g) The desirability of the custodial parent remaining in the home as a full-time parent or working less than full-time to fulfill the role of parent and homemaker;⁷

(h) The tax consequences, if any, to both parents resulting from spousal support awarded, the determination of which parent will name the child as a dependent, child tax credits, or the earned income tax credit received by either parent;⁸

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stepchild are responsible for his or her support. However, where the stepparent is providing substantial support for a stepchild, rebuttal may be appropriate.

⁶ Commentary: When a parent incurs extraordinary transportation costs in the exercise of parenting time with a child, and when that expense would impair the ability to pay the presumed correct child support amount, the trier may find it appropriate to reduce the amount of support to be paid by a parent. This criterion might also justify an increase in support when the nonpaying parent incurs extraordinary travel costs to facilitate parenting time between the child and the other parent.

Transportation costs should be extraordinary in order to render the guideline support amount unjust or inappropriate, such as travel that requires an overnight stay or transportation other than by auto. The parenting time credit considers basic travel costs, including exercising parenting time.

This criterion also includes the hardships of a parent trying to comply with the specific requirements of a reunification plan or other agreement to reunite with their child, who are in custody of Child Welfare or the Oregon Youth Authority. When a parent is required to pay for expenses (such as classes, counseling, medical costs, appropriate housing, transportation costs, visitation costs, etc.) as part of the reunification plan or other agreement, it may be appropriate to reduce the amount of support to be paid by the parent when such expenses would impair the ability to pay the presumed correct child support amount.

⁷ Commentary: To increase the support order based on this factor, it would presumably be demonstrated both that 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(ren) and that the custodial parent's failure to produce the expected income should be compensated for by increased payments on the part of the noncustodial parent. In considering an argument that this criterion stands 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 noncustodial parent's ability to pay an increased amount and the equities of such an order.

⁸ Commentary: The formula and scale presume that the parent with primary physical custody of the child will receive the dependency exemption. If this presumption is correct, no further consideration need be given to this issue. If in a particular case, however, this exemption goes to the parent who does not have primary physical custody, there may be a reason to adjust the calculation. Because the parenting time credit is based on the scale amount, it allocates the dependency exemption between the parents in proportion to their parenting time credits.

The scale is based on 2006 federal and state tax assumptions. It does not include any changes to the tax code since 2006. It also does not account for any Earned Income Tax Credit (EITC) to which a parent may be entitled. The fact finder may use actual evidence of the earned income or child tax credit in these scenarios. See

http://oregonchildsupport.gov/laws/guidelines_archive/docs/psi_guidelines_review_2006.pdf#page=21.

(i) The financial advantage afforded a parent's household by the income of a spouse or domestic partner;⁹

(j) 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, such as housing, food, clothing, health benefits and the like, but only if unable to include those benefits as income under OAR 137-050-0715;¹⁰

(k) Evidence that a child who is subject to the support order is not living with either parent;¹¹

(L) Findings in a judgment, order, decree or settlement agreement that the existing support award is or was made in consideration of other property, debt or financial awards, and those findings remain relevant;¹²

⁹ Commentary: This criterion is intended to apply in situations where an obligor or obligee is voluntarily unemployed or employed at less than his or her earning capacity because a spouse or domestic partner provides a financial advantage to the household which enables the obligor or obligee to be unemployed or work at less than a full-time job.

A spouse or domestic partner's income is not included in income for purposes of the guideline support calculation. *Matter of Marriage of Ainsworth*, 114 Or App 311, 314-315, 835 P2d 928, 929-30 (1992). The Court of Appeals found that it was error for the court to include the wages of each parent's new partner in calculating the presumptive child support obligation of each parent. *Matter of Marriage of Hardiman*, 133 Or App 112, 113, 889 P2d 1354, 1355 (1995).

Example: Obligee used to work full-time, but is no longer working because he or she is married to a spouse who earns a significant income. Because obligee has chosen not to work, his or her income would be calculated based on a determination of potential income. Under this situation, the fact finder may consider the financial advantage afforded to obligee's household resulting from the spouse's income to rebut the presumed child support amount.

Before employing this rebuttal criterion, ensure that the guideline support amount reflects any appropriate imputed income for the unemployed or underemployed parent. For a parent foregoing a professional career because of a spouse's income, using the parent's potential income may result in a just and appropriate support amount without need to rebut.

¹⁰ Commentary: The "benefits of employment" could be any benefit, not counted as income, that provides 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 criterion, must 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. This criterion should be considered only after determining the guideline support amount in light of any in-kind payments or reimbursements counted as income under OAR 137-050-715(4)(b).

¹¹ Commentary: Where the child does not live with either parent, it is for the trier to determine whether the presumptive amount of support should be ordered, or whether a departure from the guidelines is appropriate.

¹² 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.

(m) The net income of the parent remaining after payment of mutually incurred financial obligations;¹³

(n) The tax advantage or adverse tax effect of a parent's income or benefits;¹⁴

(o) The extraordinary or diminished needs of the child,¹⁵ except:

¹³ Commentary: One party may assume financial responsibility for significant obligations incurred jointly. If this obligation relieves one parent of a significant financial burden while reducing the available resources of the other, it may be appropriate to increase or reduce the income of the parent accordingly.

¹⁴ Commentary: 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 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, and filing as described above, is \$245. What the user cannot see is that \$245 is really the child support for net disposable income of \$1477, which is \$2000 minus \$237 federal income taxes, \$133 state income tax and \$153 in Social Security deductions. For details of the net to gross conversion method, please see http://oregonchildsupport.gov/laws/guidelines_archive/docs/psi_guidelines_review_2006.pdf#page=127.

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 similar net incomes to them regardless of the number of exemptions they may claim.

However, 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 is not taxable as assumed by the guidelines or taxed at a lower than normal rate, then the presumptively correct support award may not be correct and could be subject to rebuttal under this rule.

¹⁵ Commentary: The guideline support amount is intended to provide for the educational, physical and emotional needs of the child for whom support is sought. In some circumstances, these needs may be higher or lower than that of the average child.

Extraordinary medical expenses are not considered in the guideline support amount. If the child has extraordinary medical expenses, they can be addressed under this factor to the extent they are not addressed through cash medical support. The basic support amount derived from the scale and determined under OAR 137-050-0725 includes the children's ordinary medical expenses (i.e., out-of-pocket expenses not covered by insurance). This includes band-aids, co-pays for doctor's well visits, and over-the-counter medicines. Extraordinary are "likely to be expended on such items as orthodontia and uninsured expenses that may include asthma treatment, certain medical equipment, visits to the emergency room of a hospital outside of the healthcare provider's network and other expenses." Because extraordinary and ordinary medical expenses are different in character, and ordinary expenses typically consist of small over-the-counter purchases, it is not necessary to demonstrate \$250 in expenditures before considering extraordinary costs as a rebuttal factor.

A child's earnings may be considered as a possible basis for departing from the presumed support amount if there is evidence that those earnings diminish the child's need for parental support. Such earnings, therefore, should be extraordinary, e.g., a large personal injury settlement or a significant trust fund, etc. In the vast majority of cases, a child's earnings or property should not impact a parent's

(A) Expenses for extracurricular activities¹⁶ and

(B) Social Security benefits paid to a child because of a child's disability;¹⁷

(p) The return of capital.¹⁸

(q) The financial costs of supporting a Child Attending School at school, including room, board, tuition and fees, and discretionary expenses, the ability of the Child Attending School to meet those expenses with scholarships, grants and loans, and the ability of a parent to provide support for the Child Attending School, either in kind where a child continues to live in a parent's home or with cash if there are parental resources to provide financial support over and above the amount for a Child Attending School generated by the child support calculator.¹⁹

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responsibility to contribute to the support of his or her child. To conclude otherwise would negatively impact the parent-child relationship and provide a disincentive for children to obtain experience in the workforce. See *Redler & Redler*, 330 Or 51, 60-61, 996 P2d 963, 968 (2000) (Evidence that two minor daughters residing with mother earned combined income of approximately \$6,200 from newspaper routes in previous year and that their mother earned approximately \$3,900 in same year was insufficient to rebut presumption that statutory formula provided correct amount of child support owed by noncustodial father, where other evidence indicated mother and father had only part-time jobs that paid minimum wage or slightly above minimum wage and that financial situation in mother's household remained "tight" despite daughters' employment)

¹⁶ Commentary: The guidelines do not take into consideration extracurricular expenses. This is an issue that needs to be negotiated between the parents as these types of expenses are wants, not needs, and the guidelines and scale cover only the needs of children.

¹⁷ Commentary: Social Security benefits paid to a child because of the child's disability are based on the child's extraordinary needs the child and should not be included as income to either parent or be used to reduce the child support obligation. Because the benefits paid by the Social Security Administration are intended to defray the additional costs associated with a child's disability, an upward deviation from the guideline amount may not be necessary. On a related but distinct issue, please see OAR 137-050-0740 for the treatment of Social Security or Veterans benefits received on behalf of a child due to a parent's disability.

For case law on this topic see *Longcor v. Longcor*, 114 Or App 89, 834 P2d 479 (1992), and *Dawson v. Dawson*, 142 Or App 35, 919 P2d 517 (1996).

¹⁸ Commentary: Return *on* capital (for instance, interest earnings on investments), is income as provided in OAR 137-050-0715. Return *of* capital is income derived from the sale of property, but does not include interest payments. Return *of* capital could, for example, be the part of a payment received on a land sale contract in payment for real property which represents the principal rather than the interest.

Generally, it is not intended that an obligated parent should be required to spend down an asset in order to pay support. However, it may be appropriate to increase the parent's income in certain scenarios, such as where a parent has opted to live off of the sale of an asset rather than earning income.

¹⁹ Commentary: Application of these guidelines is often difficult in those situations where an 18-21 year old child is a "child attending school" as defined in ORS 107.108. The scale itself is based on the average expenses of children in the home from ages 0-17. (For further discussion, see commentary to OAR 137-050-0490). A child attending school may live with a parent, in a dormitory, with a roommate, with a domestic partner, or alone. These situations may call for a rebuttal of the presumptive amount of child support.

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