

# TENNESSEE DEPARTMENT OF HUMAN SERVICES



*Helping shape Tennessee lives.*

To improve the well-being of Tennesseans who are economically disadvantaged, vulnerable or living with disabilities through a network of financial, employment, protective and rehabilitative services.

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JUDICIAL ACADEMY

August 21, 2014

**CONFIDENTIALITY** (in reference to FTI or Federal Tax Information)

26 U.S.C. 6103 ---Confidentiality and Disclosure of Returns and Return Information

General rule

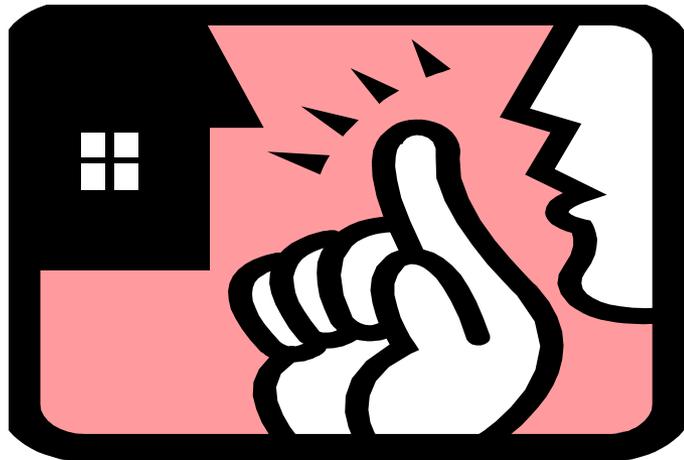
Returns and return information shall be confidential, and except as authorized by this title---

No officer or employee of the United States,

No officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section or section 6104(c), and

No other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6), (10), (12), (16), (19), (20), or (21) of subsection (1), paragraph (2) or (4)(B) of subsection (m) or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.



## TAX RETURNS OR OTHER FTI

What if the person is self-employed and income information you have is an income tax return? Can you present this information to the court? Under what circumstances can you present this information?



The IV-D attorney **cannot** disclose any FTI information to the Court, other attorneys, parties, etc. that is received. **However**, if a party **consents** or voluntarily presents his/her income tax returns to you, this information can be submitted. It has to be a **voluntary consent** on his/her part.



# INCOME TAX REFUND/INTERCEPT

Is a IV-D attorney allowed to mention that an income tax refund is pending on the State's records? Can the attorney tell the Court (or another attorney or party) that a payment is as the result of an income tax intercept?

A IV-D attorney can never give the source of a payment as being a product of an income tax intercept. Neither Child Support Division Staff (whether State employees or contractors) nor IV-D attorneys are permitted to disclose federal tax information received from the IRS to the Court. If the judge asks if a payment is an IRS tax offset intercept, the child support attorney cannot verbally disclose the source of the payment to the Court.



Tax offset payment information may not be disclosed by any federal, state or local child support enforcement agency employee, representative, agent or contractor into any court proceeding pursuant to 26 U.S.C. Section 6103 and in accordance with Publication 1075 section 5.6.

What the attorney or child support employee can and should say when asked the source of a payment is that it was an “involuntary payment.” This could mean tax intercept, FIDM (lien on bank account), etc.

# LEGISLATIVE UPDATE



## **PUBLIC CHAPTER NO. 798 (Substituted for Senate Bill No. 2418 by Gresham/House Bill No. 2314 by Ragan, Durham, Camper)**

This Act amends Tennessee Code Annotated, Title 36, *relative to the Uniform Deployed Parents Custody and Visitation Act*.

This amendment to Title 36 of Tennessee Code Annotated does not change or amend any previous chapters, but **adds** a new chapter to address the issues arising in custody and visitation as a result of a parent being deployed in the military. This chapter outlines the steps a deployed person must take upon receiving orders for deployment to address the custodial responsibilities of their child(ren) during the time of deployment. It specifically states a service member's past deployment or possible future deployment *in itself* is not considered in determining the best interest of the child(ren), but may consider any significant impact on the best interest of the child of the parent's past and possible future deployment. This chapter specifically provides that a temporary order for modification of a child custody decree shall terminate at the end of the deployment and shall revert back to the previous custody order. This chapter allows for a service member to concentrate on their military duties during deployment without the fear of repercussions of possibly losing custody of a child as a result.





TENNESSEE CHILD SUPPORT GUIDELINES  
INCOME SHARES

## WHY HAVE GUIDELINES?

Title IV-D of the Social Security Act (42 U.S.C. §§ 651-669) requires that states have a child support program in compliance with federal law to receive a grant for federal TANF program, which includes establishment of guidelines for setting and modifying child support award amounts.

T.C.A. §§ 36-5-101(e), 71-1-105(15), and 71-1-132 implement these requirements.

Tennessee's first set of Guidelines became effective February 1, 1988.



## WHO APPLIES THE GUIDELINES?

The guidelines are applied by all judicial, administrative, and state officials who have power to determine child support awards as a rebuttable presumption as to the amount of child support to be awarded and provide for the child's health care needs through health insurance coverage or other means.

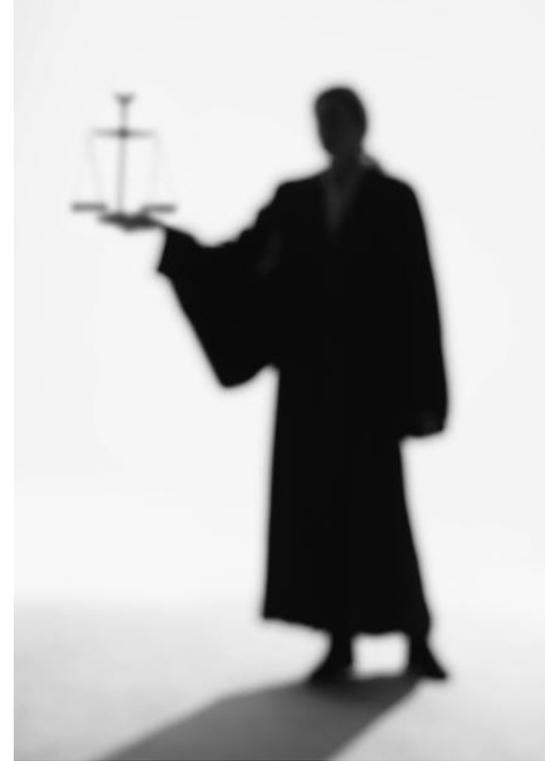
42 U.S.C. § 667

Tennessee's child support guidelines are located at TN Rules & Rags. 1240-02-04:

<http://www.tn.gov/sos/rules/1240/1240-02/1240-02.htm>

Child Support Rules, Worksheets, and tutorials are available at:

[http://www.tennessee.gov/humanserv/cs/cs\\_main.html](http://www.tennessee.gov/humanserv/cs/cs_main.html)



## WHICH GUIDELINES APPLY?

Apply the Child Support Guidelines in effect on the date a hearing is held which results in an order establishing, modifying, or enforcing support, regardless of when the action was filed.

RULE 1240-2-4-.01(2)(a)

***Boyd v Bates***, M2007-02345-COA-R3-CV, 2008 WL 3342998 (Tenn.Ct.App.2008)

***Pruett v. Pruett***, E2007-00349-COA-R3-CV, 2008 WL 182236, (Tenn.Ct.App.2008)



## Required Use and Forms

The Guidelines include a Child Support Worksheet, a Credit Worksheet, Instructions for both Worksheets, and the Child Support Schedule.

The completed Worksheets must be maintained as part of the official record either by filing them as exhibits in the tribunal's file or as attachments to the order.

***Smith v. Smith***, M2008-0158-9COA-R3CV, 2009 WL 2868745  
(Tenn.Ct.App. Sept. 2, 2009)

Any child support obligation determined by calculations made using the Department Worksheets shall be reflected in the tribunal's order, together with a description of any additional expenses the parent is to pay as part of the child's support as well as any deviations from the presumptive child support order.

RULE 1240-2-4-.04



## INCOME SHARES

The current Tennessee Child Support Guidelines are based on an Income Shares Model. This model presumes that both parents contribute to the financial support of the child in pro rata proportion to the actual income available to each parent.

The model is predicated on the concept that the child should receive support at the same level the child would receive if the parents were living together.

***Wiser v. Wiser***, 339 S.W.3d 1, 18 (Tenn. Ct. App. 2010), reh'g denied (Aug. 11, 2010), appeal denied (Feb. 16, 2011)



## Child Support Assumptions

The Guidelines assume that all families incur certain child-rearing expenses and includes an average amount of support to cover these expenses for various levels of the parents' combined income and number of children. The bulk of these child-rearing expenses is comprised of housing, food, and transportation. A smaller share of expenditures is included for clothing and entertainment.

Basic educational expenses associated with a public school education, such as fees, books, and local field trips, are also included in the Child Support Schedule which is used to determine the Basic Child Support Obligation (BCSO).

The BCSO does not include the child's health insurance premium, work-related childcare costs, the child's uninsured medical expenses, special expenses, or extraordinary educational expenses.



## Taxation Assumptions:

- 1) All income is earned income subject to federal withholding and the Federal Insurance Contributions Act (FICA/Social Security).
- 2) The alternate residential parent will file as a single wage earner claiming one withholding allowance.
- 3) The primary residential parent claims the tax exemptions for the child.

The Child Support Schedule's combined obligation includes the tax adjustments for federal withholding and the Federal Insurance Contributions Act (FICA/Social Security).



## Child Support Extras



Extraordinary Education Expenses: including, but not limited to, tuition, room and board, fees, books, and other reasonable and necessary expenses associated with special needs education or private elementary and secondary schooling are not included in the basic child support schedule and may be added as a deviation.

Special Expenses: activities intended to enhance the athletic, social or cultural development of a child that do not otherwise qualify as mandated expenses may be added to the PCSO as a deviation when this category of expenses exceeds 7% of the monthly Basic Child Support Obligation (BCSO).

***Farmer v. Stark***, M2007-01482-COA-R3-CV, 2008 WL 836092, (Tenn.Ct.App.2008)



## Adjustments to the BCSO

In addition to basic support, the child support award **shall** include adjustments that account for each parent's pro rata share of the child's health insurance premium costs, uninsured medical expenses, and work-related childcare costs, as provided in 1240-2-4-.04(8), and **may** include adjustments for the parenting time of the ARP.  
RULE 1240-2-4-.03





## **MINIMUM BASE – SPECIFIC PAYMENTS**

The Guidelines are a minimum base for determining child support obligations. The presumptive child support order may be increased according to the best interest of the child for whom support is being considered, the circumstances of the parties, and the rules of this chapter.

**RULE 1240-2-4-.01(4)**

The order must state a specific dollar amount of support that is to be paid by the responsible party on a weekly, bi-weekly, semi-monthly or monthly basis.

**RULE 1240-2-4-.01(2)(c)**

## DEFINITIONS – RULE 1240-2-4-.02



This Rule contains definitions for key terms used in the Guidelines:

*Primary Residential Parent (PRP)* is the parent or caretaker with whom the child resides more than 50% of the time.

*Alternate Residential Parent (ARP)* is the parent with whom the child resides less than 50% of the time.

*Equal Parenting:* the child resides with each parent exactly 50% of the time. In this instance, the court determining custody determines the PRP.

## DEFINITIONS – RULE 1240-2-4-.02

*“Standard Parenting”* - all of the children supported under the order spend more than 50% of the time with the same PRP. There is only 1 PRP and 1 ARP in a standard parenting case.

*“Split Parenting”* – there must be 2 or more children of the same parents, where 1 parent is PRP for at least 1 child of the parents, and the other parent is PRP for at least 1 other child of the parents.

*“50-50”* or *“equal”* parenting occurs when the parents each spend 50% of the parenting time with that child. On the Child Support Worksheet, each parent will be designated as having 182.5 days with the child. For purposes of calculating the support obligation, 50-50/equal parenting is a form of standard parenting.



## DEFINITIONS – RULE 1240-2-4-.02

*“Days”* — a “day” of parenting time occurs when the child spends more than twelve (12) consecutive hours in a twenty-four (24) hour period under the care, control or direct supervision of one parent or caretaker. The twenty-four (24) hour period need not be the same as a twenty-four (24) hour calendar day – it could be either an overnight period or a daytime period, or a combination of day and night.



*“Days” are important because the ARP can receive a “Parenting Time Adjustment” for 92 or more days or 68 or fewer days of parenting time annually.*

To calculate the “day” for a parenting time adjustment, begin when the ARP starts spending time with the child; end when that period is over.

***State ex rel. Flemming v. Elder***, E2008-02487-COA-R3-JV, 2009 WL 1676010 (Tenn. Ct. App. June 16, 2009)

## DEFINITIONS – RULE 1240-2-4-.02 - CONTINUED



*“Caretaker”* — The person or entity providing primary care and supervision of a child.

A non-parent caretaker that has **physical or legal custody** of the child is the child’s PRP for the purposes of the guidelines.

See: Tennessee Code Annotated §§ 36-5-101(b); 71-3-124(a)(6)

*“Low Income Provider”* - is a person who is not willfully and voluntarily unemployed or underemployed and whose Adjusted Gross Income is **at or below** the federal poverty level.



## Determining the Presumptive Amount of Child Support

First, determine the gross income of each parent. Gross income includes all income from any source (before deductions for taxes and other deductions such as credits for other qualified children), whether earned or unearned.

A non-parent caretaker (NPC) has no duty of support, therefore the income of a NPC is not needed.

***Massey v Casals***, 315 S.W.3d 788 (Tenn. App. 2009)

***Wiser v. Wiser***, 339 S.W.3d 1, 19 (Tenn. Ct. App. 2010), reh'g denied (Aug. 11, 2010), appeal denied (Feb. 16, 2011)

Variable income such as commissions, bonuses, overtime pay, dividends, etc. shall be averaged over a reasonable period of time consistent with the circumstances of the case and added to a parent's fixed salary or wages to determine gross income.

***Taylor v. Fezell***, 158 S.W.3d 352, 354 (Tenn. 2005) (earnings retained by S corporation)





## Imputing Income:

Additional gross income may be imputed to a parent in the following situations:

- 1) If a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed; or
- 2) When there is no reliable evidence of income; or
- 3) When the parent owns substantial non-income producing assets, the court may impute income based upon a reasonable rate of return upon the assets.

## IMPUTING INCOME: Willful and/or Voluntary Underemployment or Unemployment

There is no presumption that any parent is willfully/voluntarily under- or un-employed. The determination is to ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and whether such choices benefit the children.

The determination is not limited to choices motivated by an intent to avoid or reduce the payment of child support, but may be based on any intentional choice or act that adversely affects a parent's income.

Criminal activity and/or incarceration shall not provide grounds for reduction of any child support obligation. Therefore, criminal activity and/or incarceration shall result in a finding of voluntary underemployment or unemployment under this section, and child support shall be awarded based upon this finding of voluntary underemployment or unemployment.

**Langford v Langford**, M2007-01275-COA-R3-CV, 2008 WL 4367576 (Tenn.Ct.App.)

**Laxton v Biggerstaff**, E2009-01707-COA-R3-CV, 2010 WL 759842 (Tenn.Ct.App.)



## **Imputed Income:** Willful and/or Voluntary Underemployment or Unemployment, continued

When making a determination of willful and voluntary under- or un- employment the following may be considered:

The parent's past and present employment; education, training, and ability to work; role as a stay-at-home parent.

***Owensby v. Davis***, M2007-01262-COA-R3-JV, 2008 WL 3069777, (Tenn.Ct.App.2008)

When making a determination regarding a stay-at-home parent, the tribunal may consider:

- Whether the parent acted in the role of full-time caretaker while the parents were living in the same household;
- The length of time the parent staying at home has remained out of the workforce for this purpose; and
- The age of the minor children.

Rule 1240-2-4-.04 (3)2(iii)



## Willful and/or Voluntary Underemployment or Unemployment, continued

Other factors to consider:

- A parent's extravagant lifestyle that appears inappropriate or unreasonable for the income claimed by the parent;



***Miller v. Welch***, 340 S.W.3d 708, 713 (Tenn. Ct. App. 2010), appeal denied (Mar. 9, 2011)



- The parent's role as caretaker of a handicapped or seriously ill child or other relative for whom that parent has assumed the role of caretaker which eliminates or substantially reduces the parent's ability to work outside the home, and the need of that parent to continue in that role in the future;

## Other Factors:

- Whether un- or under-employment for the purpose of pursuing additional training or education is reasonable in light of the parent's obligation to support his/her child(ren) and whether the training or education will ultimately benefit the child(ren) in the case immediately under consideration by increasing the parent's level of support for that child in the future;
- Any additional factors deemed relevant to the particular circumstances of the case.

***Pearson v. Pearson***, E2007-02154-COA-R3-CV, 2008 WL 4735305,  
(Tenn.Ct.App.2008)

Rule 1240-2-4-.04(3)2(IV-VII)



## Willful and/or Voluntary Underemployment or Unemployment, continued

***Once a finding is made that a parent is willfully and/or voluntarily under- or un-employed, then additional income to the parent shall be allocated/imputed using the following criteria:***

The parent's past and present employment; and  
The parent's education and training.

***Von Tagen v. Von Tagen***, M2009-00850-COA-R3CV, 2010 WL 891893 (Tenn. Ct. App. Mar. 12, 2010), appeal denied (Aug. 25, 2010).



A determination of willful and voluntary unemployment or underemployment shall not be made when an individual enlists, is drafted, or is activated from a Reserve or National Guard unit, for full-time service in the Armed Forces of the United States.

RULE 1240-2-4-.04 (3) 2 (ii) (II)



## Imputing Income – No Reliable Evidence

When establishing an initial support order where there is no reliable evidence of employment or education, income or income potential, or income (such as tax returns for prior years, check stubs, or other credible information for determining current ability to support or ability to support in prior years for calculating retroactive support)

**then**

gross income shall be determined by **imputing annual gross** income of thirty-seven thousand five hundred eight-nine dollars (\$37,589) for male parents and twenty-nine thousand three hundred dollars (\$29,300) for female parents.

Rule 1240-2-4-.04 (3)2(iv)



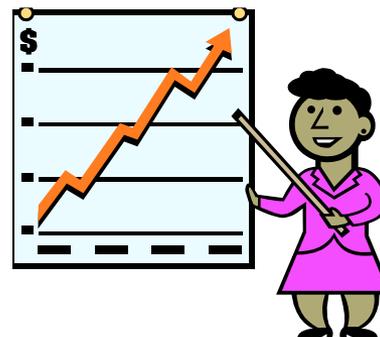
## Imputing Income - Modifying

When modifying a support order, if a parent fails to produce reliable evidence of income and the tribunal has no current reliable evidence of that parent's income or income potential;

After increasing the gross income of the parent failing or refusing to produce evidence of income by an increment not to exceed **10%** per year for each year since the support order was entered or last modified, the tribunal shall calculate the basic child support obligation using the increased income amount as that parent's gross income.

If the order to be modified is not an income shares order, and the parent who fails or refuses to provide reliable evidence of income was the obligee parent, then that parent's gross income shall be determined as though there is no prior order.

Rule 1240-2-4-.04 (3)2(II)



## Removing Imputed Income

If income was imputed due to lack of evidence, upon **motion** served upon all interested parties pursuant to the Tennessee Rules of Civil Procedure, a parent may provide the reliable evidence necessary to determine the appropriate amount of support based upon this reliable evidence.

Under this circumstance, the parent is not required to demonstrate the existence of a significant variance otherwise required for modification of an order under 1240-2-4-.05.

In ruling on a proper motion, the tribunal may modify the amount of current support prospectively.

RULE 1240-2-4-.05(3)2(III)



## Self Employment Income

Income from self-employment includes income from, but not limited to, business operations, work as an independent contractor or consultant, sales of goods or services, and rental properties, etc., less ordinary and reasonable expenses necessary to produce such income.

Excessive promotional, excessive travel, excessive car expenses or excessive personal expenses, or depreciation on equipment, the cost of operation of home offices, etc., and amounts allowed by the Internal Revenue Service for accelerated depreciation or investment tax credits shall not be considered reasonable expenses.

RULE 1240-2-4-.04 (3) 3 (i-ii) (I-II)

***Parris v. Parris***, M2006-02068-COA-R3-CV,  
2007 WL 2713723, (Tenn.Ct.App.2007)



## Self Employment Income - Taxes

Deductions from a parent's gross income for the employee's share of the contributions for the first 6.2% in Federal Insurance Contributions Act (FICA) and 1.45% in Medicare taxes are **included in the Child Support Schedule**. The full tax rate, 15.3%, is a total of 12.4% for social security (old-age, survivors, and disability insurance) and 2.9% for Medicare (hospital insurance). All net earnings of at least \$400 are subject to the Medicare tax. Employers pay one-half of an employee's FICA and Medicare taxes.

For a self-employed parent, an amount for FICA — 6.2% Social Security plus 1.45% Medicare as of 1991, or any amount subsequently set by federal law as FICA tax — shall be deducted from that parent's gross income earned from self-employment, **up to the amounts allowed under federal law, and actually paid by the parent.**

RULE 1240-25-4-.04 (4) (a-g)



## Other Income

Fringe benefits or “in-kind” remuneration received by a parent in the course of employment, or operation of a trade or business, shall be counted as income if they reduce personal living expenses, including but not limited to: company car, housing, or room and board.



Do not include employee benefits that are typically added to the compensation that a parent may receive as a standard benefit (e.g., employer-paid portions of health insurance premiums or employer contributions to a retirement or pension plan).

***Hommerding v. Hommerding***, M2008-00672-COA-R3-CV, 2009 WL 1684681, Tenn.Ct.App., June 15, 2009

***Pruett v. Pruett***, E2007-00349-COA-R3-CV, 2008 WL 182236, (Tenn.Ct.App.2008)

Basic Allowance for Housing (BAH), Basic Allowance for Subsistence (BAS), and Variable Housing Allowances (VHA) for service members are considered income for the purposes of determining child support.

RULE 1240-2-4-.04 (3) 4 (i-iv)

# Capital Gains

Gross income includes “net capital gains” – a parent with capital gains can deduct capital losses from capital gains which occur in the same year. The parent cannot deduct capital losses from any other income.

T.C.A. § 36-5-101(e)(1)(B): “In determining each party's income for the purpose of applying the child support guidelines, the court shall deduct each party's capital losses from that party's capital gains in each year.”

***Moore v Moore***, 254 SW3d 357 (Tenn.2007)

***State ex rel Vivien v. Campbell***, W2009-01602-COA-R3-JV, 2011 WL 1837777 (Tenn.Ct. App. 2011) (gambling losses)



## Excluded from gross income:

- Child support payments received for the benefit of children of another relationship;
- Benefits received from means-tested public assistance programs such as, but not limited to: TANF; Food Stamps; Supplemental Security Income (SSI) received under Title XVI of the Social Security Act; Benefits received under Section 402(d) of the Social Security Act for disabled adult children of deceased disabled workers; and Low Income Heating and Energy Assistance Program (LIHEAP) payments.
- The child's income from any source, including, but not limited to, trust income and Social Security benefits drawn on the child's disability.
- Adoption Assistance subsidy under Tennessee's Interstate Compact on Adoption Assistance, found at T.C.A. § 36-1-201 *et seq.* or another state's adoption assistance subsidy which is based on the Adoption Assistance and Child Welfare Act (42 USC 670 *et seq.*).

***Via v. Via***, M2006-02002-COA-R3-CV, 2007 WL 2198187, (Tenn.Ct.App.2007)

RULE 1240-2-4-.04 (3) 5 (c)

## Federal Benefits

A child's benefit, paid to the caretaker, is considered as income to the parent when it springs from the parent's federal benefits including veteran's benefits and Social Security Title II benefits. If the parent is the obligor parent, the parent receives credit against the support obligation for the federal benefit paid to the caretaker for the child.

If the child support obligation is greater than the benefit paid on behalf of the child on that parent's account, then that parent shall be required to pay the amount of the obligation exceeding the benefit.

If the child support obligation is less than or equal to the benefit paid to the caretaker on behalf of the child on that parent's account, the child support obligation of that parent is met and no additional child support amount must be paid by that parent.

***Young v Engel***, M2008-02402-COA-R3-CV, 2010 WL 744528, (Tenn.Ct.App.2008)

RULE 1240-2-4-.04 (3) 5 (i-iv)



## Federal Benefits, continued

Any benefit amounts sent to the caretaker which are greater than the support ordered shall be retained by the caretaker for the child's benefit and shall not be used as a reason for decreasing the child support order or reducing arrearages.

The tribunal shall make a written finding in the support order regarding the use of the federal benefit in the calculation of the child support obligation.

RULE 1240-2-4-.04 (3) 5 (i-iv)



## Adjustments for Qualified Other Children

A parent's gross income may be reduced by credit for a qualified, other child. A child is an **other child** when the child is one:

- For whom the parent is legally responsible and actually supporting; and
- Who is not before the tribunal to set, modify, or enforce support in the case immediately under consideration, but
- Documentary evidence must be present to show parent-child relationship by way of birth certificate and/or court order.



Credits against income are available for the parent's other children who meet the **qualifications** :

- a child being supported in the parent's home;
- a child being supported by the parent under a child support order in another case;
- and/or a child who does not live in the parent's home and is receiving support from the parent, but not pursuant to a court order.

RULE 1240-2-4-.04 (5)

## Adjustments for Qualified Other Children, continued

Step children and other minors in the home that the parent has no legal obligation to support shall not be considered in the calculation of this credit.

Credit amounts are not subtracted from the parent's gross income when calculating a theoretical child support.

The amount of a theoretical order allowed as a credit against gross income is subject to the limitation of 1240-2-4-.07(2)(g). ("cap")

RULE 1240-2-4-.04 (5)



## Credit for In-Home Children

An “in-home” child resides with the parent seeking credit but is not supported by the order under consideration. The parent must establish a legal duty of support and that the child resides with the parent 50% or more of the time.

The available credit against gross income for either parent’s qualified “in-home” children is 75% of a theoretical support order calculated according to these Guidelines for the total number of qualified other children living in the parent’s home.

RULE 1240-2-4-.04 (5) (e)



## Credit for Not-In-Home Children

A “not-in-home” child resides with the parent seeking credit less than 50% of the time but is not supported by the order under consideration. The parent must establish the legal duty of support and provide documented proof of support paid for the other child consistently over a reasonable and extended period of time prior to the initiation of the proceeding that is immediately under consideration by the tribunal, but in any event, such time period shall not be less than 12 months.

Credit = up to a maximum of 75% of a theoretical support order calculated according to the Guidelines for the total number of qualified other children not living in the parent’s home or the average monthly amount paid, whichever is less.

RULE 1240-2-4-.04 (5) 2



## Parenting Time Adjustment –

Parenting Time Adjustments are not mandatory, but presumptive.

Only 1 day of credit for parenting time can be taken in any 24 hour period.



If there are multiple children for whom support is being calculated, and the ARP is spending a different amount of time with each child, then calculate an annual average of parenting time with all of the children.

Partial days of parenting time are not considered a “day” under these Guidelines unless there are extraordinary circumstances. An example of extraordinary circumstances would include a parenting situation where the ARP is scheduled to pick up the child after school 3 or more days a week and keep the child until 8 o’clock p.m. This 3 day period of routinely incurred parenting time of shorter duration may be cumulated as a single day for parenting time purposes.

***State ex rel. Flemming v. Elder***, E2008-02487-COA-R3-JV, 2009 WL 1676010 (Tenn. Ct. App. June 16, 2009)

## Parenting Time Adjustment, continued

In cases of split parenting, both parents are eligible for a parenting time adjustment for the child(ren) for whom the parent is the ARP.

Due to the method of calculation, in a non-parent caretaker situation, neither parent is eligible for a parenting time adjustment.

It is anticipated in a case where the PRP has greater income and the ARP has a high level of parenting time support may be due from the PRP to the ARP to assist with the expenses of the children during the times spent with the ARP. In this circumstance, a support payment from the PRP to the ARP is allowed.

RULE 1240-2-4-.04 (7)



# Parenting Time Adjustment



## Combination Parenting Situations

In a 50/50 situation, there is no PRP and/or ARP designation based upon parenting time. Solely for the purpose of calculating the parenting time adjustment, the following is used:

Fifty-Fifty / Equal-Parenting - The Father is deemed the ARP

Fifty-Fifty / Equal-Parenting Combined with Split Parenting - The Father is deemed the ARP

Fifty-Fifty / Equal-Parenting Combined with Standard Parenting - The ARP in the standard parenting situation will also be the ARP in the equal parenting situation

The worksheet will calculate the adjustment.

RULE 1240-2-4-.04 (7)

## Reduction in Obligation for Increased Parenting Time

- If the ARP spends 92 or more days per calendar year with a child, or an average of 92 days with all applicable children, an assumption is made that the ARP is making greater expenditures on the child during parenting time for transferred costs such as food and/or is making greater expenditures for child-rearing expenses for items that are duplicated between the 2 households.
- The additional child-rearing expenses incurred by the ARP during parenting time are added to the obligation; the increased BCSO is divided pro rata between the parents.
- The presumption that more parenting time by the ARP results in greater expenditures may be rebutted by evidence.

RULE 1240-2-4-.04 (7) 4



# Increase in Obligation for Less Parenting Time

If the ARP spends 68 or fewer days per calendar year with the child/ren in the case, or an average of 68 days with all applicable children, the ARP's child support obligation may be increased for the lack of parenting time.

Determine the number of days fewer than 69 the ARP spends with the child and then divide this number of days by 365, then multiply the percentage of days by the ARP's share of the BCSO. The increased share of support is added to the ARP's share of the BCSO.

The presumption that less parenting time by the ARP should result in an increase to the ARP's support obligation may be rebutted by evidence.

In an action to modify an existing child support order to reflect a change in parenting time, the parent seeking the credit must prove a significant variance pursuant to 1240-2-4-.05 when comparing the current order to the proposed order with application of the parenting time adjustment.

RULE 1240-2-4-.04(7)(i)



## Additional Expenses

- The additional expenses for the child’s health/dental insurance premium, recurring uninsured medical expenses, and work-related childcare are required to be included in the calculations to determine child support, to be divided between the parents and included in the written order of the tribunal together with the amount of the BCSO.
- All amounts paid by a non-parent caretaker for either child care or health care expenses shall be included in the calculation for payment by the parents.
- Amounts paid by a step-parent shall not be considered in the calculation.



RULE 1240-2-4-.04(8)

## Health Insurance Premiums - RULE 1240-2-4-.04(8) (b)

Tennessee law requires a support order address the medical needs of the children. If health and/or dental insurance that provides for the health care needs of the child can be obtained by a parent at reasonable cost [TCA 36-5-501(a)], the premium should be included on the worksheet. “Reasonable cost” is defined by **45 C.F.R. § 303.31** as 5% of gross income.

Include only the amount of the insurance cost attributable to the child(ren) being supported in the case.

Eligibility for or enrollment of the child(ren) in TennCare or Medicaid shall not satisfy the requirement that the child support order provide for the child’s health care needs.

T.C.A. § 36-5-101(h)(1).



## Work-Related Childcare Expenses



- Childcare expenses necessary for either parent’s employment, education, or vocational training that are appropriate to the parents’ financial abilities and to the lifestyle of the child if the parents and child were living together, shall be averaged for a monthly amount and entered on the Worksheet in the column of the parent initially paying the expense.
- If a childcare subsidy is being provided pursuant to a means-tested public assistance program, only the amount of the childcare expense actually paid by either parent or the non-parent caretaker shall be included in the calculation.
- If either parent or the non-parent caretaker is the provider of childcare services to the child for whom support is being determined, the value of those services shall not be added to the basic child support obligation when calculating the support award.

## **Uninsured Medical Expenses – RULE 1240-2-4-.04 (8) (d)**



The child's uninsured medical expenses: deductibles, co-pays, dental, orthodontic, counseling, psychiatric, vision, hearing or other medical needs not covered by insurance are the financial responsibility of both parents.

If uninsured medical expenses are routinely incurred so that a specific monthly amount can be reasonably established, a specific dollar amount shall be added to the BCSO to cover those established expenses.

If uninsured medical expenses are not routinely incurred the court order shall specify that these expenses shall be paid by the parents as incurred according to each parent's percentage of income unless some other division is specifically ordered by the tribunal.

Every child support order shall specify how the parents are to pay both known and unknown medical expenses as they are incurred.

## **Presumptive Child Support Order - RULE 1240-2-4-.04 (11)**

The Presumptive Child Support Order (PCSO) is the result of the calculations under the Guidelines, rounded to the nearest whole dollar, and is the amount of support for which the obligor is responsible prior to consideration of any deviations.

Deviations must be supported by written findings in the support order, as required by 1240-2-4-.07(1).



## MODIFICATION OF SUPPORT ORDERS

All modifications shall be calculated under the Guidelines in effect when a hearing which results in an order modifying support is held.

Unless a significant variance exists, a child support obligation is not eligible for modification.

However, the necessity of providing for the child's health care needs is a basis for modification regardless of whether a modification in the amount of child support is warranted.



## Restrictions on Modifications

T.C.A. § 36-5-101(f) - RULE 1240-2-4-.05(8)

No ordered child support is subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties.

Any payment or installment of support under any child support order on or after the date it is due is a judgment by operation of law with the full force, effect, and attributes of a judgment, including the ability to be enforced, and is entitled as a judgment to full faith and credit. This provision applies to all child support orders issued in all Tennessee courts, including but not limited to circuit, chancery, and juvenile courts and all other tribunals with jurisdiction to modify child support, whether the order originated under an action taken by the authority of Tennessee Code Annotated Titles 36 or 37, or the equivalent law in any other state.



## Modifying Flat Percentage Orders:



For orders that were established or modified before January 18, 2005, and are being modified under income shares for the first time, a **significant variance is defined as:**

- At least a 15% change in the gross income of the ARP; *and/or*
  - A change in the number of children for whom the ARP is legally responsible and actually supporting; *and/or*
  - A child supported by this order becoming disabled; *and/or*
  - The parties voluntarily entering into an agreed order to modify support in compliance with these Rules, and submitting completed worksheets with the agreed order;
- AND**
- At least a 15% change between the amount of the current support order and the proposed amount of the obligor parent's pro rata share of the BCSO if the current support is \$100 or greater per month and at least \$15 if the current support is less than \$100 per month (7.5% if the parent seeking modification qualifies as a low-income provider).

## Significant Variance - RULE 1240-2-4-.05(3-7)

An order may be modified to reflect a change in the number of children for whom a parent is legally responsible, a parenting time adjustment, and work-related childcare only upon compliance with the significant variance requirement specified in 1240-2-4-.05.



The tribunal shall not refuse to consider modification of a current support order relating to the payment of prospective support on the basis that the party requesting modification has accumulated an arrears balance, unless the arrearage is the result of the intentional actions by the party.

## Special Cases

If an order was established or modified under the Income Shares guidelines between January 18, 2005 and April 1, 2005, in a case with split parenting or a case in which parenting time is divided on a 50/50 basis, the order may be modified without compliance with the significant variance requirement only for the purpose of correcting a calculation error in the old worksheet.

Any arrears which may have accumulated under any such order as originally established or modified under the Income Shares guidelines may be recalculated consistent with the amount of the child support obligation as modified pursuant to this part.



## MODIFICATION – HOW DO I DETERMINE ...

Calculate a child support order on the Worksheet using current evidence of the parties' circumstances. Do not include the amount of any previously ordered deviations or proposed deviations in the comparison.

Existing order Flat Percentage?

If the current order was calculated using the flat percentage guidelines, compare the existing ordered amount of current child support to the proposed amount of the ARP's pro-rata share of the BCSO. (Line 12 amount compared to Line 4(a) of the Worksheet) **REMEMBER: A Flat percentage order requires more than a difference in amounts.**

Existing order Income Shares?

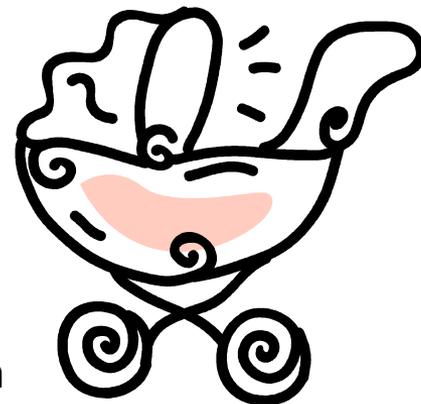
If the current child support order was calculated using the income shares guidelines, compare the presumptive child support order amounts in the current and proposed orders. (Line 12 of each worksheet)

If there is a 15% difference between the two amounts, such a variance may justify the modification of a child support order unless, in situations where a downward modification is sought, the obligor is willfully and voluntarily unemployed or underemployed, or except as otherwise restricted. (7.5% for low income)

***Von Tagen v Von Tagen***, M2009-00850-COA-R3-CV, 2010 WL 891893 (Tenn.Ct.App.2010)

RULE 1240-2-4-.05(3-7)

# Retroactive Support



Unless the rebuttal provisions of Tennessee Code Annotated §§ 36-2-311(a)(11) or 36-5-101(e) have been established by clear and convincing evidence, then, in cases in which initial support is being set, a judgment must be entered to include an amount of support due up to the date that an order for current support is entered:

- From the date of the child's birth:
  - In paternity cases; or,
  - Where the child has been voluntarily acknowledged by the child's putative father as provided in Tennessee Code Annotated § 24-7-113, or pursuant to the voluntary acknowledgement procedure of any other state or territory of the United States that comports with Title IV-D of the Social Security Act, or, as applicable;
- From the date:
  - Of separation of the parties in a divorce or in an annulment; or
  - Of abandonment of the child and the remaining spouse by the other parent in such cases; or
  - Of physical custody of the child by a parent or non-parent caretaker.

***Burnine v. Dauterive***, W2010-02611-COA-R3-JV, 2011 WL 3115967 (Tenn.Ct.App 2011)

# How Do I Calculate Retroactive Support? - - RULE 1240-2-4-.06 (3)

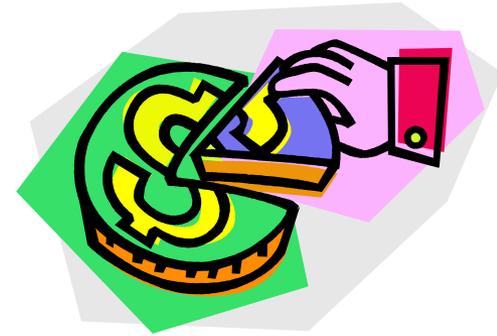
Using the Guidelines and Worksheet , calculate retroactive support:

- 1) Use the average monthly income of both parents over the past 2 years as the amount to be entered for “monthly gross income,” unless the tribunal finds that there is adequate evidence to support a different period of time for use in the calculation and makes such a finding in its order.
- 2) Do not include any additional expenses on the retroactive work expenses will be included later.
- 3) Complete the worksheet.
- 4) Determine the number of months for the retroactive period.
- 5) Multiply the amount shown on line 15 as the “Final Child Support Order” times the number of months in the retroactive period for the base retroactive support.



Example: Line 15 is \$200; the retroactive support period is 15 months, so  
 $\$200 \times 15 = \$3,000$  for the base retroactive support.

# How Do I Calculate Retroactive Support



- 6) Total the amounts actually paid (or still owed) by the PRP for childcare, the child's health insurance premium, and uninsured medical expenses during the retroactive period, plus any birth or other expenses allowed under Tennessee Code Annotated § 36-2-311.
- 7) Multiple the total actual expenses from step 6 by ARP's percentage of income (Line 3).
- 8) Add the amounts from steps 5 and 7 for the total retroactive support due. The amount as calculated is presumed to be correct unless rebutted by either party.
- 9) A periodic payment amount may be included in the support order, in addition to any amount of current support, to eliminate the retroactive judgment within a reasonable time.
- 10) Payment of the monthly amount as ordered shall be considered compliance with the retroactive order, for contempt purposes, however, the department may use additional means of collection to reduce this judgment without regard to the timeliness of the periodic payment.

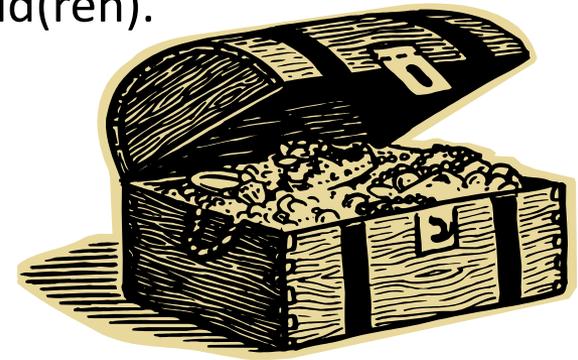
# Statutory Limitation on the Child Support Obligation –

Rebuttal and Deviation - RULE 1240-2-4-.07(2)(g)

When the presumptive child support order exceeds the amount found by multiplying a net income of ten thousand dollars (\$10,000) by the percentages set out pursuant to T.C.A. § 36-5-101(e)(1)(B), a PRP seeking support in excess of that amount must prove by a preponderance of the evidence that more is reasonably necessary to provide for the needs of the child(ren).

## The percentages are:

- One child = Twenty-one percent (21%), or \$2,100;
- Two children = Thirty-two percent (32%), or \$3,200;
- Three children = Forty-one percent (41%), or \$4,100;
- Four children = Forty-six percent (46%), or \$4,600; and
- Five or more children = Fifty percent (50%), or \$5,000.



**Wiser v. Wiser**, 339 S.W.3d 1, 18 (Tenn. Ct. App. 2010), reh'g denied (Aug. 11, 2010), appeal denied (Feb. 16, 2011)

## Application of Statutory Limitation On the Worksheet

If the PCSO calculated under these rules exceeds the amount specified above for the number of children for whom support is being calculated (Line 11 of the Worksheet), then, absent the rebuttal, the amount of the PCSO is limited to the amount specified above. The limited amount will appear on Line 12 of the Worksheet.

If the PRP proves the need for support in excess of the limited amount, the tribunal shall add an appropriate amount to the PCSO of the ARP as a deviation. The court may require that sums be placed in an educational or other trust fund for the benefit of the child.

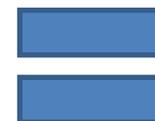
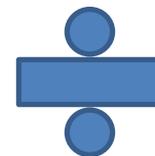


## Deviation - RULE 1240-2-4-.07(2)(a)

Deviation from the Guidelines may be appropriate when the tribunal finds it is in the best interest of the child, in accordance with the requirements and the following procedures:

Consideration of Needs of the Children and Income and Expenses of the Parents for Purposes of Deviation.

- In making its determination regarding a request for deviation pursuant to this chapter, the tribunal shall consider all available income of the parents.
- If the circumstances that supported the deviation cease to exist, the child support order may be modified to eliminate the deviation irrespective of compliance with the significant variance requirement of 1240-2-4-.05.



## Deviation - RULE 1240-2-4-.07(1)

The tribunal's order shall contain written findings of fact stating:

- 1) The reasons for the change or deviation from the presumptive amount of child support that would have been paid pursuant to the Guidelines; and
- 2) The amount of child support that would have been required under the Guidelines if the presumptive amount had not been rebutted; and
- 3) How, in its determination,
  - Application of the Guidelines would be unjust or inappropriate in the particular case before the tribunal; and
  - The best interests of the child for whom support is being determined will be served by deviation from the presumptive guideline amount.

***Kopp v. Kopp***, M2008-01146-COA-R3-CV, 2009 WL 2951172, (Tenn.Ct.App.2009)



No deviation shall be made which seriously impairs the ability of the PRP in the case under consideration to maintain minimally adequate housing, food, and clothing for the children being supported by the order and/or to provide other basic necessities, as determined by the court.

## Deviation - RULE 1240-2-4-.07(2)(b)

In cases where the child is in the legal custody of the **Department of Children's Services**, the child protection or foster care agency of another state or territory, or any other child-caring entity, public or private, the tribunal may consider a deviation from the presumptive child support order if the deviation will assist in accomplishing a permanency plan or foster care plan for the child that has a goal of returning the child to the parent(s), and the parent's need to establish an adequate household or to otherwise adequately prepare herself or himself for the return of the child clearly justifies a deviation for this purpose.



If parenting time-related **travel expenses** are substantial due to the distance between the parents, the tribunal may order the allocation of such costs by deviation from the PCSO, taking into consideration the circumstances of the respective parties as well as which parent moved and the reason that the move was made.



## Deviations - RULE 1240-2-4-.07(2)(c-d)

**Extraordinary Expenses** are in excess of the average amounts included in the Schedule and are highly variable among families. These are considered on a case-by-case basis in the calculation of support and added to the basic support award as a deviation so that the actual amount of the expense is considered in the calculation of the final child support order for only those families actually incurring the expense. These expenses may be, but are not required to be, divided between the parents according to each parent's PI.



## Deviations - RULE 1240-2-4-.07(2)(c-d)

**Extraordinary Educational Expenses** may be added to the presumptive child support as a deviation and may include, but are not limited to, tuition, room and board, lab fees, books, fees, and other reasonable and necessary expenses associated with special needs education or private elementary and/or secondary schooling that are appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together.

In determining the amount of deviation for extraordinary educational expenses, scholarships, grants, stipends, and other cost-reducing programs received by or on behalf of the child shall be considered.

If a deviation is allowed for extraordinary educational expenses, a monthly average of these expenses shall be based on evidence of prior or anticipated expenses and entered on the Worksheet in the deviation section.



## Deviations - RULE 1240-2-4-.07(2)(d)2

**Special expenses** incurred for child rearing which can be quantified may be added to the child support obligation as a deviation from the PCSO. Such expenses include, but are not limited to, summer camp, music or art lessons, travel, school-sponsored extra-curricular activities, such as band, clubs, and athletics, and other activities intended to enhance the athletic, social or cultural development of a child, but that are not otherwise required used in calculating the child support order.

When this category of expenses **exceeds 7%** of the monthly BCSO, then the tribunal shall consider additional amounts of support as a deviation to cover the full amount of these special expenses.



# Deviation for Low-Income Persons

## RULE 1240-2-4-.07(2)(e)(f)

- The tribunal may consider the low income of either parent as a basis for deviation from the guideline amounts.
- The tribunal shall consider all non-exempt sources of income available to each party and all expenses actually paid by each party.
- The party seeking a low-income deviation must present to the tribunal documentation of all his/her income and expenses or provide sworn statements of all his/her income and expenses in support of the requested deviation.
- The tribunal shall make a written finding in its order that the deviation from the Guidelines based upon the low income and reasonable expenses of a party is clearly justified and shall make the necessary written findings.
- A parent is considered to be a low-income person if his/her annual gross income is at or below the federal poverty level for a single person.
- Under no circumstance shall the tribunal fail to order a basic support obligation if the parent has non-exempt gross income. See Rule 1240-2-4-.03(6)(a)4.



## Extreme Economic Hardship –

In instances of **extreme economic hardship**, such as in cases involving extraordinary medical needs not covered by insurance or other extraordinary special needs for the child(ren) of a parent's current family [child living in the home with the parent for whom the parent is legally responsible], deviation from the Guidelines may be considered when the tribunal finds the deviation supported by the criteria of 1240-2-4-.07(1). In such cases, the tribunal must consider all resources available for meeting such needs, including those available from agencies and other adults.

***Hall v. Hall***, No. E2009-01889-COA-R3-CV, 2010 WL 3893763 (Tenn.Ct.App. 2010)



## **MORE Hardship Deviations - RULE 1240-2-4-.07(2)(h) 3**

It is not the intent or purpose of the guidelines to reduce the lifestyle the children enjoyed under the previous guidelines merely by the application of the income shares guidelines but to appropriately allocate the financial responsibilities of the parties with regard to the children while considering the status quo of the parties. The following factors shall be considered:

- Whether the significant variance is created solely by the application of the income shares guidelines or whether it also includes a significant change in the income of either or both of the parents
- Whether the parent has incurred fixed expenses based on the amount of support previously ordered, including but not limited to mortgage payments, automobile payments, and other long-term financial obligations;
- The standard of living the children enjoyed as a result of receiving the current level of support. In making this determination the tribunal shall consider the amount actually incurred by the PRP for basic expenses comparing the actual basic expenses incurred with the BCSO set forth by the guidelines. If the tribunal finds that the actual amount incurred for basic expenses exceeds the presumed BCSO and that the actual amount incurred is reasonable considering the relative incomes of the parents the tribunal may use the actual expenses as the BCSO.

- If the children incurred Extraordinary Educational Expenses or Special Expenses that were previously included in the support amount determined under the prior guidelines, the tribunal may consider those expenses if the application of the guidelines does not adequately take said expenses into account. The tribunal may also make an equitable division of these expenses so as to maintain the status quo with regard to the financial obligations of each party.
- If the current order for support includes provisions for allocating the cost of medical and / or dental insurance and uninsured medical expenses, the tribunal may compare the allocation of said expenses under the application of the guidelines with the allocation under the order.

*The hardship deviation cannot be utilized in a later action to create a significant variance.*

## Deviations - RULE 1240-2-4-.07(2)(h)

**FLAT PERCENTAGE HARDSHIP** - Any time following the effective date of these Rules when a tribunal is considering modification of an order initially established under **Tennessee's Flat Percentage Guidelines**, and the tribunal finds a significant variance between the amount of the existing child support order and the amount of the proposed child support order calculated under this chapter, **which change results from the application of the guidelines rather than from the change in the income and/or circumstances of the parties**, then the tribunal may modify the current child support order up to the full amount of the variance or may apply a hardship deviation.

Under this provision, the tribunal may deviate and limit the amount of the upward or downward modification if:

- A deviation is supported in writing in the order by the criteria in 1240-2-4-.07(1); **and**
- The tribunal finds that the change in the amount of child support caused by the transition to Income Shares will create a hardship either to:
  - The recipient of the support who will have a substantial decrease of previously ordered support; or
  - The payor who will have a substantial increase of previously ordered support.



The Guidelines include a **WORKSHEET** and **CREDIT WORKSHEET** that contains all of the information and calculations needed for determining the amount of support under the Guidelines.

The current Worksheet is shaded **LILAC**

where the previous Worksheets were shaded **BLUE** or **GREEN**.

Only enter information in the **SHADED** areas.

### Rule 1240-2-4-.08(4)



## USING THE WORKSHEET:

Only one worksheet is needed to calculate support, regardless of the parenting situation(s) represented.

Support for standard, split, and 50-50 situations can be calculated on the same worksheet . The same worksheet can be used to calculate support for both parents in non-parent caretaker situations.

The automated program will validate based on the fields entered, e.g., if no mother is entered in Part I, no data should be entered for mother on the rest of the worksheet . . . and vice versa.

The **“Clear Worksheet”** button clears only the CS Worksheet.

The **“Clear All Worksheets”** button will clear both the CS Worksheet and the Credit Worksheet.



Child Support Worksheet

<http://www.state.tn.us/humanserv/is/isdownloads.html>

Child Support Payment History

<https://apps.tn.gov/tcses/>

Pro Se Forms

[http://www.tn.gov/humanserv/cs/cs\\_forms.html](http://www.tn.gov/humanserv/cs/cs_forms.html)



## CASE CITATIONS

SLIDE 4:

**Boyd v Bates**, M2007-02345-COA-R3-CV, 2008 WL 3342998 (Tenn.Ct.App.2008)  
**Pruett v. Pruett**, E2007-00349-COA-R3-CV, 2008 WL 182236,  
(Tenn.Ct.App.2008)

SLIDE 5:

**Smith v. Smith**, M2008-0158-9COA-R3CV, 2009 WL 2868745 (Tenn.Ct.App. Sept. 2, 2009)

SLIDE 6:

**Wiser v. Wiser**, 339 S.W.3d 1, 18 (Tenn. Ct. App. 2010), reh'g denied (Aug. 11, 2010), appeal denied (Feb. 16, 2011)

SLIDE 9:

**Farmer v. Stark**, M2007-01482-COA-R3-CV, 2008 WL 836092,  
(Tenn.Ct.App.2008)

SLIDE 14:

**State ex rel. Flemming v. Elder**, E2008-02487-COA-R3-JV, 2009 WL 1676010  
(Tenn. Ct. App. June 16, 2009)

SLIDE 16:

**Massey v Casals**, 315 S.W.3d 788 (Tenn. App. 2009)

**Wiser v. Wiser**, 339 S.W.3d 1, 19 (Tenn. Ct. App. 2010), reh'g denied (Aug. 11, 2010), appeal denied (Feb. 16, 2011)

**Taylor v. Fezell**, 158 S.W.3d 352, 354 (Tenn. 2005) (earnings retained by S corporation)

SLIDE 18:

**Langford v Langford**, M2007-01275-COA-R3-CV, 2008 WL 4367576 (Tenn.Ct.App.)

**Laxton v Biggerstaff**, E2009-01707-COA-R3-CV, 2010 WL 759842 (Tenn.Ct.App.)

SLIDE 19:

**Owensby v. Davis**, M2007-01262-COA-R3-JV, 2008 WL 3069777, (Tenn.Ct.App.2008)

SLIDE 20:

**Miller v. Welch**, 340 S.W.3d 708, 713 (Tenn. Ct. App. 2010), appeal denied (Mar. 9, 2011)

SLIDE 21:

***Pearson v. Pearson***, E2007-02154-COA-R3-CV, 2008 WL 4735305,  
(Tenn.Ct.App.2008)

SLIDE 22:

***Von Tagen v. Von Tagen***, M2009-00850-COA-R3CV, 2010 WL 891893  
(Tenn. Ct. App. Mar. 12, 2010), appeal denied (Aug. 25, 2010).

SLIDE 26:

***Parris v. Parris***, M2006-02068-COA-R3-CV, 2007 WL 2713723,  
(Tenn.Ct.App.2007)

SLIDE 28:

***Hommerding v. Hommerding***, M2008-00672-COA-R3-CV, 2009 WL 1684681,  
Tenn.Ct.App., June 15, 2009  
***Pruett v. Pruett***, E2007-00349-COA-R3-CV, 2008 WL 182236,  
(Tenn.Ct.App.2008)

SLIDE 29:

**Moore v Moore**, 254 SW3d 357 (Tenn.2007)

**State ex rel Vivien v. Campbell**, W2009-01602-COA-R3-JV, 2011 WL 1837777  
(Tenn.Ct. App. 2011) (gambling losses)

SLIDE 30:

**Via v. Via**, M2006-02002-COA-R3-CV, 2007 WL 2198187, (Tenn.Ct.App.2007)

SLIDE 31:

**Young v Engel**, M2008-02402-COA-R3-CV, 2010 WL 744528,  
(Tenn.Ct.App.2008)

SLIDE 37:

**State ex rel. Flemming v. Elder**, E2008-02487-COA-R3-JV, 2009 WL 1676010  
(Tenn. Ct. App. June 16, 2009)

SLIDE 52:

**Von Tagen v Von Tagen**, M2009-00850-COA-R3-CV, 2010 WL 891893  
(Tenn.Ct.App.2010)

SLIDE 53:

***Burnine v. Dauterive***, W2010–02611–COA–R3–JV, 2011 WL 3115967  
(Tenn.Ct.App 2011)

SLIDE 56:

***Wiser v. Wiser***, 339 S.W.3d 1, 18 (Tenn. Ct. App. 2010), reh'g denied (Aug. 11, 2010), appeal denied (Feb. 16, 2011)

SLIDE 59:

***Kopp v. Kopp***, M2008-01146-COA-R3-CV, 2009 WL 2951172, (Tenn.Ct.App.2009)

SLIDE 65:

***Hall v. Hall***, No. E2009-01889-COA-R3-CV, 2010 WL 3893763 (Tenn.Ct.App. 2010)



THE END

**RECENT HOT TOPICS, QUESTIONS  
AND CASE LAW**

## **INTEREST ON PAST DUE CHILD SUPPORT**

Tennessee Code Annotated, Section 36-5-101(f) states as follows:

(f)(1) Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state, and shall be entitled to full faith and credit in this state and in any other state. Such judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties. If the full amount of child support is not paid by the date when the ordered support is due, the unpaid amount is in arrears, shall become a judgment for the unpaid amounts, and shall accrue interest from the date of the arrearage, at the rate of twelve percent (12%) per year. All interest that accumulates on arrearages shall be considered child support. Computation of interest shall not be the responsibility of the clerk.

The interest rate charged on child support changed to twelve percent (12%) per year effective July 1, 1995. Prior to this date, the interest rate charged was ten percent (10%) per year.

**NOTE: Always either grant a judgment for interest in each order (breaking down the principal and interest) OR at the very least, reserve the calculation of interest.**

If you do not do this, the custodial parent may be barred from collecting interest due to the doctrine of *res judicata*.

See case of **State of Tennessee ex rel. Sheron L. Jones vs. Martin Leon May**, 2008 WL 2557374.

The principles of this decision can be used to bar interest on any case with unpaid arrears which accrued prior to the entry of a judgment. Interest following the judgment would still be allowed if the judgment is unpaid.

**EMANCIPATION OF A CHILD---Does the legal obligation end as of the date of emancipation (i.e. 18<sup>th</sup> birthday and graduation from high school; whichever occurs last) even when there are other minor children in the case if the obligor does not timely file a petition for modification?**

As a rule, child support cannot be modified retroactively prior to the filing of a petition for modification. However, it is not considered to be a retro modification when the support is modified back to the date of emancipation of the child because that parent's legal duty (notwithstanding a contractual agreement to the contrary) ended at the time the child emancipated.

See the case of **Carie C. Brooks v. Douglas J. Brooks**, No. M2007-00351-COA-R3-CV- (Tenn.Ct.App. April 6, 2009).

## **VOLUNTARY UNDEREMPLOYMENT OR UNEMPLOYMENT (and a few other issues)**

**Carl Scott Blankenship v. Amy Lynn Cox**, No. M2013-00807-COA-R3-CV—(Tenn.Ct.App. April 17, 2014)

This case deals with issues such as voluntary unemployment and imputing income to a stay at home parent, retroactive modification, deviation for extraordinary educational expenses, overpayment of child support (and a judgment against the custodial parent), allocation of uninsured medical expenses, and an allocation of tax exemptions.

**Kimberly Meeks v. Bryant Leo Meeks**, No. M2013-01203-COA-R3-CV—(Tenn.Ct.App. March 6, 2014)

**Donald Lester Benedict v. Gretchen Michelle Benedict**, No. E2013-00978-COA-R3-CV--- (Tenn.Ct.App. May 27, 2014)

**DISESTABLISHMENT OF PATERNITY AND ITS EFFECT ON  
CHILD SUPPORT ARREARS**

***Ashley Purdy v. Matthew C. Smith*, No. M2012-02463-COA-R3-  
CV—(Tenn.Ct.App. May 23, 2014)**

# TENNESSEE DEPARTMENT OF HUMAN SERVICES



*Helping shape Tennessee lives.*

To improve the well-being of  
Tennesseans who are economically  
disadvantaged, vulnerable or living  
with disabilities through a network of  
financial, employment, protective and  
rehabilitative  
services.

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JUDICIAL ACADEMY

August 21, 2014

**CONFIDENTIALITY** (in reference to FTI or Federal Tax Information)

26 U.S.C. 6103 ---Confidentiality and Disclosure of Returns and Return Information

(a) General rule

Returns and return information shall be confidential, and except as authorized by this title---

- (1) No officer or employee of the United States,
- (2) No officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section or section 6104(c), and
- (3) No other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6), (10), (12), (16), (19), (20), or (21) of subsection (1), paragraph (2) or (4)(B) of subsection (m) or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term “officer or employee” includes a former officer or employee.

**TAX RETURNS OR OTHER FTI**

What if the person is self-employed and income information you have is an income tax return? Can you present this information to the court? Under what circumstances can you present this information?

The IV-D attorney **cannot** disclose any FTI information to the Court, other attorneys, parties, etc. that is received. **However**, if a party **consents** or voluntarily presents his/her income tax returns to you, this information can be submitted. It has to be a **voluntary consent** on his/her part.

## **INCOME TAX REFUND/INTERCEPT**

Is a IV-D attorney allowed to mention that an income tax refund is pending on the State's records? Can the attorney tell the Court (or another attorney or party) that a payment is as the result of an income tax intercept?

A IV-D attorney can never give the source of a payment as being a product of an income tax intercept. Neither Child Support Division Staff (whether State employees or contractors) nor IV-D attorneys are permitted to disclose federal tax information received from the IRS to the Court. If the judge asks if a payment is an IRS tax offset intercept, the child support attorney cannot verbally disclose the source of the payment to the Court.

Tax offset payment information may not be disclosed by any federal, state or local child support enforcement agency employee, representative, agent or contractor into any court proceeding pursuant to 26 U.S.C. Section 6103 and in accordance with Publication 1075 section 5.6.

What the attorney or child support employee can and should say when asked the source of a payment is that it was an "involuntary payment." This could mean tax intercept, FIDM (lien on bank account), etc.

## LEGISLATIVE UPDATE

### **PUBLIC CHAPTER NO. 798 (Substituted for Senate Bill No. 2418 by Gresham/House Bill No. 2314 by Ragan, Durham, Camper)**

This Act amends Tennessee Code Annotated, Title 36, *relative to the Uniform Deployed Parents Custody and Visitation Act*.

This amendment to Title 36 of Tennessee Code Annotated does not change or amend any previous chapters, but **adds** a new chapter to address the issues arising in custody and visitation as a result of a parent being deployed in the military. This chapter outlines the steps a deployed person must take upon receiving orders for deployment to address the custodial responsibilities of their child(ren) during the time of deployment. It specifically states a service member's past deployment or possible future deployment *in itself* is not considered in determining the best interest of the child(ren), but may consider any significant impact on the best interest of the child of the parent's past and possible future deployment. This chapter specifically provides that a temporary order for modification of a child custody decree shall terminate at the end of the deployment and shall revert back to the previous custody order. This chapter allows for a service member to concentrate on their military duties during deployment without the fear of repercussions of possibly losing custody of a child as a result.

**SECTION 1.** Tennessee Code Annotated, Title 36, is amended by adding the following as a new chapter 7:

**36-7-101.** This chapter shall be known and may be cited as the Uniform Deployed Parents Custody and Visitation Act.

**36-7-102.** In this chapter:

- (1) "Adult" means an individual who has attained eighteen (18) years of age or is an emancipated minor;
- (2) "Caretaking authority" means the right to live with and care for a child on a day-to-day basis. "Caretaking authority" includes physical custody, parenting time, right to access, and visitation;
- (3) "Child" means:
  - (A) An unemancipated individual who has not attained eighteen (18) years of age; or
  - (B) An adult son or daughter by birth or adoption, or under law of this state other than this chapter, who is the subject of a court order concerning custodial responsibility;
- (4) "Court" means a tribunal, including an administrative agency, authorized under law of this state other than this chapter to make, enforce, or modify a decision regarding custodial responsibility;
- (5) "Custodial responsibility" includes all powers and duties relating to caretaking authority and decision-making authority for a child. "Custodial responsibility" includes physical custody, legal custody, parenting time, right to access, visitation, and authority to grant limited contact with a child;

- (6) (A) "Decision-making authority" means the power to make important decisions regarding a child, including decisions regarding the child's education, religious training, health care, extracurricular activities, and travel.
- (B) "Decision-making authority" does not include the power to make decisions that necessarily accompany a grant of caretaking authority;
- (7) "Deploying parent" means a service member who is deployed or has been notified of impending deployment and is:
- (A) A parent of a child under law of this state other than this chapter; or
- (B) An individual who has custodial responsibility for a child under law of this state other than this chapter;
- (8) "Deployment" means the movement or mobilization of a service member for more than thirty (30) days pursuant to uniformed service orders that:
- (A) Are designated as unaccompanied;
- (B) Do not authorize dependent travel; or
- (C) Otherwise do not permit the movement of family members to the location to which the service member is deployed;
- (9) "Family member" means a sibling, aunt, uncle, cousin, stepparent, or grandparent of a child or an individual recognized to be in a familial relationship with a child under law of this state other than this chapter;
- (10) "Limited contact" means the authority of a non-parent to visit a child for a limited time. "Limited contact" includes authority to take the child to a place other than the residence of the child;
- (11) "Nonparent" means an individual other than a deploying parent or other parent;
- (12) "Other parent" means an individual who, in common with a deploying parent, is:
- (A) A parent of a child under law of this state other than this chapter; or
- (B) An individual who has custodial responsibility for a child under law of this state other than this chapter;
- (13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;
- (14) "Return from deployment" means the conclusion of a service member's deployment as specified in uniformed service orders;
- (15) "Service member" means a member of a uniformed service;
- (16) "Sign" means, with present intent to authenticate or adopt a record:
- (A) To execute or adopt a tangible symbol; or
- (B) To attach to or logically associate with the record an electronic symbol, sound, or process;
- (17) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States; and

(18) "Uniformed service" means:

(A) Active and reserve components of the army, navy, air force, marine corps, or coast guard of the United States;

(B) The United States merchant marine;

(C) The commissioned corps of the United States public health service;

(D) The commissioned corps of the national oceanic and atmospheric administration of the United States; or

(E) The national guard of a state.

**36-7-103.** In addition to other remedies under law of this state other than this chapter, if a court finds that a party to a proceeding under this chapter has acted in bad faith or intentionally failed to comply with this chapter or a court order issued under this chapter, the court may assess reasonable attorney's fees and costs against the party and order other appropriate relief.

**36-7-104.**

(a) A court may issue an order regarding custodial responsibility under this chapter only if the court has jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, compiled in chapter 6, part 2 of this title.

(b) If a court has issued a temporary order regarding custodial responsibility pursuant to part 3 of this chapter, the residence of the deploying parent is not changed by reason of the deployment for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act during the deployment.

(c) If a court has issued a permanent order regarding custodial responsibility before notice of deployment and the parents have requested to modify that order temporarily by agreement pursuant to part 2 of this chapter, the residence of the deploying parent is not changed by reason of the deployment for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act.

(d) If a court in another state has issued a temporary order regarding custodial responsibility as a result of impending or current deployment, the residence of the deploying parent is not changed by reason of the deployment for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act.

(e) This section does not prevent a court from exercising temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.

**36-7-105.**

(a) Except as otherwise provided in subsection (d) and subject to subsection (c), a deploying parent shall notify in a record the other parent of a pending deployment not later than seven (7) days after receiving notice of deployment unless reasonably prevented from doing so by the circumstances of service. If the circumstances of service prevent giving notification within the seven (7) days, the deploying parent shall give the notification as soon as reasonably possible.

(b) Except as otherwise provided in subsection (d) and subject to subsection (c), each parent shall provide in a record the other parent with a proposed plan for fulfilling that parent's share of custodial responsibility during deployment. Each parent shall provide the plan as soon as reasonably possible after notification of deployment is given under subsection (a).

(c) If a court order currently in effect prohibits disclosure of the address or contact information of the other parent, notification of deployment under subsection (a), or notification of a plan for custodial responsibility during deployment under subsection (b), may be made only to the issuing court. If the address of the other parent is available to the issuing court, the court shall forward the notification to the other parent. The court shall keep confidential the address or contact information of the other parent.

(d) Notification in a record under subsection (a) or (b) is not required if the parents are living in the same residence and both parents have actual notice of the deployment or plan.

(e) In a proceeding regarding custodial responsibility, a court may consider the reasonableness of a parent's efforts to comply with this section.

**36-7-106.**

(a) Except as otherwise provided in subsection (b), an individual to whom custodial responsibility has been granted during deployment pursuant to part 2 or 3 of this chapter shall notify the deploying parent and any other person with custodial responsibility of a child of any change of the individual's mailing address or residence until the grant is terminated. The individual shall provide the notice to any court that has issued a custody or child support order concerning the child which is in effect.

(b) If a court order currently in effect prohibits disclosure of the address or contact information of an individual to whom custodial responsibility has been granted, a notification under subsection (a) may be made only to the court that issued the order. The court shall keep confidential the mailing address or residence of the individual to whom custodial responsibility has been granted.

**36-7-107.** In a proceeding for custodial responsibility of a child of a service member, a court may not consider a parent's past deployment or possible future deployment in itself in determining the best interest of the child but may consider any significant impact on the best interest of the child of the parent's past or possible future deployment.

**36-7-201.**

(a) The parents of a child may enter into a temporary agreement under this part granting custodial responsibility during deployment.

(b) An agreement under subsection (a) must be:

(1) In writing; and

(2) Signed by both parents and any nonparent to whom custodial responsibility is granted.

(c) Subject to subsection (d), an agreement under subsection (a), if feasible, must:

(1) Identify the destination, duration, and conditions of the deployment that is the basis for the agreement;

(2) Specify the allocation of caretaking authority among the deploying parent, the other parent, and any nonparent;

(3) Specify any decision-making authority that accompanies a grant of caretaking authority;

(4) Specify any grant of limited contact to a nonparent;

(5) If under the agreement custodial responsibility is shared by the other parent and a nonparent, or by other nonparents, provide a process to resolve any dispute that may arise;

(6) Specify the frequency, duration, and means, including electronic means, by which the deploying parent will have contact with the child, any role to be played by the other parent in facilitating the contact, and the allocation of any costs of contact;

(7) Specify the contact between the deploying parent and child during the time the deploying parent is on leave or is otherwise available;

(8) Acknowledge that any party's child-support obligation cannot be modified by the agreement, and that changing the terms of the obligation during deployment requires modification in the appropriate court;

(9) Provide that the agreement will terminate according to the procedures under part 4 of this chapter after the deploying parent returns from deployment; and

(1 0) Specify which parent is required to file the agreement with a court of competent jurisdiction pursuant to § 36-7-205.

(d) The omission of any of the items specified in subsection (c) does not invalidate an agreement under this section.

**36-7-202.**

(a) An agreement under this part is temporary and terminates pursuant to part 4 of this chapter after the deploying parent returns from deployment, unless the agreement has been terminated before that time by court order or modification under § 36-7-203. The agreement does not create an independent, continuing right to caretaking authority, decision-making authority, or limited contact in an individual to whom custodial responsibility is given.

(b) A nonparent who has caretaking authority, decision-making authority, or limited contact by an agreement under this part has standing to enforce the agreement until it has been terminated by court order, by modification under § 36-7-203, or under part 4 of this chapter.

**36-7-203.**

(a) By mutual consent, the parents of a child may modify an agreement regarding custodial responsibility made pursuant to this part.

(b) If an agreement is modified under subsection (a) before deployment of a deploying parent, the modification must be in writing and signed by both parents and any non-parent who will exercise custodial responsibility under the modified agreement approved by the court.

(c) If an agreement is modified under subsection (a) during deployment of a deploying parent, the modification must be agreed to in a record by both parents and any non-parent who will exercise custodial responsibility under the modified agreement approved by the court.

**36-7-204.** A deploying parent, by power of attorney, may delegate all or part of custodial responsibility to an adult nonparent for the period of deployment if no other parent possesses custodial responsibility under law of this state other than this part, or if a court order currently in effect prohibits contact between the child and the other parent. The deploying parent may revoke the power of attorney by signing a revocation of the power.

**36-7-205.** An agreement or power of attorney under this part must be filed within a reasonable time with any court that has entered an order on custodial responsibility or child support that is in effect concerning the child who is the subject of the agreement or power of attorney and shall be binding upon the parties upon approval by the court. The case number and heading of the pending case concerning custodial responsibility or child support must be provided to the court with the agreement or power of attorney.

**36-7-301.** In this part, "close and substantial relationship" means a relationship in which a significant bond exists between a child and a nonparent.

**36-7-302.**

(a) After a deploying parent receives notice of deployment and until the deployment terminates, a court may issue a temporary order granting custodial responsibility unless prohibited by the Service Members Civil Relief Act, 50 U.S.C. Appendix Sections 521 and 522 and may not issue a permanent order granting custodial responsibility without the consent of the deploying parent.

(b) At any time after a deploying parent receives notice of deployment, either parent may file an action regarding custodial responsibility of a child during deployment. A motion must be filed in a pending proceeding for custodial responsibility in a court with jurisdiction under § 36-7-104 or, if there is no pending proceeding in a court with jurisdiction under § 36-7-104, in a new complaint for granting custodial responsibility during deployment.

**36-7-303.** If an action to grant custodial responsibility is filed under § 36-7-302(b) before a deploying parent deploys, the court shall conduct an expedited hearing.

**36-7-304.** In a proceeding under this part, a party or witness who is not reasonably available to appear personally may appear, provide testimony, and present evidence by electronic means unless the court finds good cause to require a personal appearance.

**36-7-305.** In a proceeding for a grant of custodial responsibility pursuant to this part, the following rules apply:

(1) A prior judicial order designating custodial responsibility in the event of deployment is binding on the court unless the circumstances meet the requirements of law of this state other than this chapter for modifying a judicial order regarding custodial responsibility; and

(2) The court shall enforce a prior written agreement between the parents for designating custodial responsibility in the event of deployment, including an agreement or modification executed under part 2 of this chapter, unless the court finds that the agreement is contrary to the best interest of the child.

**36-7-306.**

(a) On motion of a deploying parent and in accordance with law of this state other than this chapter, if it is in the best interest of the child, a court may grant caretaking authority to a nonparent who is an adult family member of the child.

(b) Unless a grant of caretaking authority to a nonparent under subsection (a) is agreed to by the other parent, the grant is limited to an amount of time not greater than:

(1) The amount of time granted to the deploying parent under a permanent custody order, but the court may add unusual travel time necessary to transport the child; or

(2) In the absence of a permanent custody order that is currently in effect, the amount of time that the deploying parent habitually cared for the child before being notified of deployment, but the court may add unusual travel time necessary to transport the child.

(c) A court may grant part of a deploying parent's decision-making authority, if the deploying parent and the other parent are both unable to exercise that authority, to a non-parent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship. If a court grants the authority to a nonparent, the court shall specify the decision-making powers granted, including decisions regarding the child's education, religious training, health care, extracurricular activities, and travel.

**36-7-307.**

(a) A grant of authority under this part is temporary and terminates under part 4 of this chapter after the return from deployment of the deploying parent, unless the grant has been terminated before that time by court order. The grant does not create an independent, continuing right to caretaking authority, decision-making authority, or limited contact in an individual to whom it is granted.

(b) A nonparent granted caretaking authority, decision-making authority, or limited contact under this part has standing to enforce the grant until it is terminated by court order or under part 4 of this chapter.

**36-7-308.**

(a) An order granting custodial responsibility under this part must

- (1) Designate the order as temporary; and
- (2) Identify to the extent feasible the destination, duration, and conditions of the deployment.

(b) If applicable, an order for custodial responsibility under this part must:

- (1) Specify the allocation of caretaking authority, decision-making authority, or limited contact among the deploying parent, the other parent, and any nonparent;
- (2) If the order divides caretaking or decision-making authority between individuals, or grants caretaking authority to one individual and limited contact to another, provide a process to resolve any dispute that may arise;
- (3) Provide for liberal communication between the deploying parent and the child during deployment, including through electronic means, unless contrary to the best interest of the child, and allocate any costs of communications;
- (4) Provide for liberal contact between the deploying parent and the child during the time the deploying parent is on leave or otherwise available, unless contrary to the best interest of the child; and
- (5) Provide that the order will terminate pursuant to part 4 of this chapter after the deploying parent returns from deployment.

**36-7-309.** If a court has issued an order granting caretaking authority under this part, or an agreement granting caretaking authority has been executed under part 2 of this chapter, the court may enter a temporary order for child support consistent with law of this state other than this chapter if the court has jurisdiction under the Uniform Interstate Family Support Act, compiled in chapter 5, parts 21-29 of this title.

**36-7-310.**

(a) Except for an order under § 36-7-305, except as otherwise provided in subsection (b), and consistent with the Service Members Civil Relief Act, 50 U.S. C. Appendix Sections 521 and 522, on motion of a deploying or other parent or any nonparent to whom caretaking authority, decision-making authority, or limited contact has been granted, the court may modify or terminate the grant if the modification or termination is consistent with this part and it is in the best interest of the child. A modification is temporary and terminates pursuant to part 4 of this chapter after the deploying parent returns from deployment, unless the grant has been terminated before that time by court order.

(b) On motion of a deploying parent, the court shall terminate a grant of limited contact.

**36-7-401.**

A temporary order entered under this chapter providing for a modification of a child custody decree shall terminate at the end of the deployment and shall revert back to the previous custody order.

**36-7-501.** In applying and construing this uniform law, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**36-7-502.** This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 (c) of that act, 15 U.S.C. Section 7001 (c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

**36-7-503.** This chapter does not affect the validity of a temporary court order concerning custodial responsibility during deployment which was entered before the effective date of this chapter.

**SECTION 2.** Tennessee Code Annotated, Sections 36-6-113 and 36-6-308, are amended by deleting the sections in their entirety.

**SECTION 3.** This act shall take effect July 1, 2014, the public welfare requiring it.

## INCOME SHARES/GUIDELINES

### WHO APPLIED THE GUIDELINES?

The guidelines are applied by all judicial, administrative, and state officials who have power to determine child support awards as a rebuttable presumption as to the amount of child support to be awarded and provide for the child's health care needs through health insurance coverage or other means.

42 U.S.C. § 667

Tennessee's child support guidelines are located at TN Rules & Regs. 1240-02-04:

<http://www.tn.gov/sos/rules/1240/1240-02/1240-02.htm>

Child Support Rules, Worksheets, and tutorials are available at:

[http://www.tennessee.gov/humanserv/cs/cs\\_main.html](http://www.tennessee.gov/humanserv/cs/cs_main.html)

### Child Support Assumptions

The Guidelines assume that all families incur certain child-rearing expenses and includes an average amount of support to cover these expenses for various levels of the parents' combined income and number of children. The bulk of these child-rearing expenses is comprised of housing, food, and transportation. A smaller share of expenditures is included for clothing and entertainment.

Basic educational expenses associated with a public school education, such as fees, books, and local field trips, are also included in the Child Support Schedule which is used to determine the Basic Child Support Obligation (BCSO).

The BCSO does not include the child's health insurance premium, work-related childcare costs, the child's uninsured medical expenses, special expenses, or extraordinary educational expenses.

### Adjustments to the BCSO

In addition to basic support, the child support award **shall** include adjustments that account for each parent's pro rata share of the child's health insurance premium costs, uninsured medical expenses, and work-related childcare costs, as

provided in 1240-2-4-.04(8), and **may** include adjustments for the parenting time of the ARP.

RULE 1240-2-4-.03

### **DEFINITIONS---RULE 1240-2-4-.02**

This Rule contains definitions for key terms used in the Guidelines: *Primary Residential Parent (PRP)* is the parent or caretaker with whom the child resides more than 50% of the time. *Alternate Residential Parent (ARP)* is the parent with whom the child resides less than 50% of the time. *Equal Parenting*: the child resides with each parent exactly 50% of the time. In this instance, the court determining custody determines the PRP.

“Days” — a “day” of parenting time occurs when the child spends more than twelve (12) consecutive hours in a twenty-four (24) hour period under the care, control or direct supervision of one parent or caretaker. The twenty-four (24) hour period need not be the same as a twenty-four (24) hour calendar day – it could be either an overnight period or a daytime period, or a combination of day and night.

### **Determining the Presumptive Amount of Child Support**

First, determine the gross income of each parent. Gross income includes all income from any source (before deductions for taxes and other deductions such as credits for other qualified children), whether earned or unearned.

A non-parent caretaker (NPC) has no duty of support, therefore the income of a NPC is not needed.

***Massey v Casals***, 315 S.W.3d 788 (Tenn. App. 2009)  
***Wiser v. Wiser***, 339 S.W.3d 1, 19 (Tenn. Ct. App. 2010), reh'g denied (Aug. 11, 2010), appeal denied (Feb. 16, 2011)

Variable income such as commissions, bonuses, overtime pay, dividends, etc. shall be averaged over a reasonable period of time consistent with the circumstances of the case and added to a parent’s fixed salary or wages to determine gross income.

**Taylor v. Fezell**, 158 S.W.3d 352, 354 (Tenn. 2005) (earnings retained by S corporation)

### **Imputing Income**

Additional gross income may be imputed to a parent in the following situations:

- 1) If a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed; or
- 2) When there is no reliable evidence of income; or
- 3) When the parent owns substantial non-income producing assets, the court may impute income based upon a reasonable rate of return upon the assets.

### **Imputing Income: Willful and/or voluntary Underemployment or Unemployment**

There is no presumption that any parent is willfully/voluntarily under- or unemployed. The determination is to ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and whether such choices benefit the children.

The determination is not limited to choices motivated by an intent to avoid or reduce the payment of child support, but may be based on any intentional choice or act that adversely affects a parent's income.

Criminal activity and/or incarceration shall not provide grounds for reduction of any child support obligation. Therefore, criminal activity and/or incarceration shall result in a finding of voluntary underemployment or unemployment under this section, and child support shall be awarded based upon this finding of voluntary underemployment or unemployment.

**Langford v Langford**, M2007-01275-COA-R3-CV, 2008 WL 4367576 (Tenn.Ct.App.)  
**Laxton v Biggerstaff**, E2009-01707-COA-R3-CV, 2010 WL 759842 (Tenn.Ct.App.)

When **establishing an initial support order** where there is no reliable evidence of employment or education, income or income potential, or income (such as tax returns for prior years, check stubs, or other credible information for determining current ability to support or ability to support in prior years for calculating retroactive support).

Imputed income for female: \$29,300 per year; for male: \$37,589 per year  
Current minimum wage is \$7.25 per hour

When ***modifying a support order***, if a parent fails to produce reliable evidence of income and the tribunal has no current reliable evidence of that parent's income or income potential;

After increasing the gross income of the parent failing or refusing to produce evidence of income by an increment not to exceed **10%** per year for each year since the support order was entered or last modified, the tribunal shall calculate the basic child support obligation using the increased income amount as that parent's gross income.

If the order to be modified is not an income shares order, and the parent who fails or refuses to provide reliable evidence of income was the obligee parent, then that parent's gross income shall be determined as though there is no prior order.

Rule 1240-2-4-.04 (3)2(II)

**Excluded from gross income:**

- Child support payments received for the benefit of children of another relationship;
  
- Benefits received from means-tested public assistance programs such as, but not limited to: TANF; Food Stamps; Supplemental Security Income (SSI) received under Title XVI of the Social Security Act; Benefits received under Section 402(d) of the Social Security Act for disabled adult children of deceased disabled workers; and Low Income Heating and Energy Assistance Program (LIHEAP) payments.
- The child's income from any source, including, but not limited to, trust income and Social Security benefits drawn on the child's disability.
  
- Adoption Assistance subsidy under Tennessee's Interstate Compact on Adoption Assistance, found at T.C.A. § 36-1-201 *et seq.* or another state's adoption assistance subsidy which is based on the Adoption Assistance and Child Welfare Act (42 USC 670 *et seq.*).

***Via v. Via***, M2006-02002-COA-R3-CV, 2007 WL 2198187, (Tenn.Ct.App.2007)  
RULE 1240-2-4-.04 (3) 5 (c)

## Federal Benefits

A child's benefit, paid to the caretaker, is considered as income to the parent when it springs from the parent's federal benefits including veteran's benefits and Social Security Title II benefits. If the parent is the obligor parent, the parent receives credit against the support obligation for the federal benefit paid to the caretaker for the child.

If the child support obligation is greater than the benefit paid on behalf of the child on that parent's account, then that parent shall be required to pay the amount of the obligation exceeding the benefit.

If the child support obligation is less than or equal to the benefit paid to the caretaker on behalf of the child on that parent's account, the child support obligation of that parent is met and no additional child support amount must be paid by that parent.

*Young v Engel*, M2008-02402-COA-R3-CV, 2010 WL 744528, (Tenn.Ct.App.2008)  
RULE 1240-2-4-.04 (3) 5 (i-iv)

Any benefit amounts sent to the caretaker which are greater than the support ordered shall be retained by the caretaker for the child's benefit and shall not be used as a reason for decreasing the child support order or reducing arrearages.

## Adjustments for Qualified Other Children

A parent's gross income may be reduced by credit for a qualified, other child. A child is an **other child** when the child is one:

- For whom the parent is legally responsible and actually supporting; and
- Who is not before the tribunal to set, modify, or enforce support in the case immediately under consideration, but
- Documentary evidence must be present to show parent-child relationship by way of birth certificate and/or court order.

Credits against income are available for the parent's other children who meet the **qualifications** :

- a child being supported in the parent’s home;
- a child being supported by the parent under a child support order in another case;
- and/or a child who does not live in the parent’s home and is receiving support from the parent, but not pursuant to a court order.

### **Credit for In-Home Children**

An “in-home” child resides with the parent seeking credit but is not supported by the order under consideration. The parent must establish a legal duty of support and that the child resides with the parent 50% or more of the time.

### **Additional Expenses**

– The additional expenses for the child’s health/dental insurance premium, recurring uninsured medical expenses, and work-related childcare are required to be included in the calculations to determine child support, to be divided between the parents and included in the written order of the tribunal together with the amount of the BCSO.

#### **Health Insurance Premiums - RULE 1240-2-4-.04(8) (b)**

Tennessee law requires a support order address the medical needs of the children. If health and/or dental insurance that provides for the health care needs of the child can be obtained by a parent at reasonable cost [TCA 36-5-501(a)], the premium should be included on the worksheet. “Reasonable cost” is defined by **45 C.F.R. § 303.31** as 5% of gross income.

Include only the amount of the insurance cost attributable to the child(ren)being supported in the case.

Eligibility for or enrollment of the child(ren) in TennCare or Medicaid shall not satisfy the requirement that the child support order provide for the child’s health care needs.

T.C.A. § 36-5-101(h)(1).

## **Work-Related Childcare Expenses**

–Childcare expenses necessary for either parent’s employment, education, or vocational training that are appropriate to the parents’ financial abilities and to the lifestyle of the child if the parents and child were living together, shall be averaged for a monthly amount and entered on the Worksheet in the column of the parent initially paying the expense.

RULE 1240-2-4-.04 (8) (c)

## **Uninsured Medical Expenses –**

The child’s uninsured medical expenses: deductibles, co-pays, dental, orthodontic, counseling, psychiatric, vision, hearing or other medical needs not covered by insurance are the financial responsibility of both parents.

If uninsured medical expenses are routinely incurred so that a specific monthly amount can be reasonably established, a specific dollar amount shall be added to the BCSO to cover those established expenses.

If uninsured medical expenses are not routinely incurred the court order shall specify that these expenses shall be paid by the parents as incurred according to each parent’s percentage of income unless some other division is specifically ordered by the tribunal.

Every child support order shall specify how the parents are to pay both known and unknown medical expenses as they are incurred.

RULE 1240-2-4-.04 (8) (d)

## **MODIFICATION OF SUPPORT ORDERS**

All modifications shall be calculated under the Guidelines in effect when a hearing which results in an order modifying support is held.

Unless a significant variance exists, a child support obligation is not eligible for modification.

However, the necessity of providing for the child's health care needs is a basis for modification regardless of whether a modification in the amount of child support is warranted.

### **Restrictions on Modifications**

No ordered child support is subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties.

T.C.A. § 36-5-101(f) - RULE 1240-2-4-.05(8)

### **Significant Variance** - RULE 1240-2-4-.05(3-7)

An order may be modified to reflect a change in the number of children for whom a parent is legally responsible, a parenting time adjustment, and work-related childcare only upon compliance with the significant variance requirement specified in 1240-2-4-.05.

### **Retroactive Support**

Unless the rebuttal provisions of Tennessee Code Annotated §§ 36-2-311(a)(11) or 36-5-101(e) have been established by clear and convincing evidence, then, in cases in which initial support is being set, a judgment must be entered to include an amount of support due up to the date that an order for current support is entered:

- From the date of the child's birth:

- In paternity cases; or,

- Where the child has been voluntarily acknowledged by the child's putative father as provided in Tennessee Code Annotated § 24-7-113, or pursuant to the voluntary acknowledgement procedure of any other state or territory of the United States that comports with Title IV-D of the Social Security Act, or, as applicable;

- From the date:

- Of separation of the parties in a divorce or in an annulment; or

- Of abandonment of the child and the remaining spouse by the other parent in such cases; or

- Of physical custody of the child by a parent or non-parent caretaker.

## How Do I Calculate Retroactive Support?

-- RULE 1240-2-4-.06 (3)

Using the Guidelines and Worksheet , calculate retroactive support:

1)Use the average monthly income of both parents over the past 2 years as the amount to be entered for “monthly gross income,” unless the tribunal finds that there is adequate evidence to support a different period of time for use in the calculation and makes such a finding in its order.

2)Do not include any additional expenses on the retroactive worksheet. The actual prior expenses will be included later.

3)Complete the worksheet.

4)Determine the number of months for the retroactive period.

5)Multiply the amount shown on line 15 as the “Final Child Support Order” times the number of months in the retroactive period for the base retroactive support.

Example: Line 15 is \$200; the retroactive support period is 15 months, so  $\$200 \times 15 = \$3,000$  for the base retroactive support.

6)Total the amounts actually paid (or still owed) by the PRP for childcare, the child’s health insurance premium, and uninsured medical expenses during the retroactive period, plus any birth or other expenses allowed under Tennessee Code Annotated § 36-2-311.

7)Multiple the total actual expenses from step 6 by ARP’s percentage of income (Line 3).

8)Add the amounts from steps 5 and 7 for the total retroactive support due. The amount as calculated is presumed to be correct unless rebutted by either party.

9)A periodic payment amount may be included in the support order, in addition to any amount of current support, to eliminate the retroactive judgment within a reasonable time.

10)Payment of the monthly amount as ordered shall be considered compliance with the retroactive order, for contempt purposes, however, the department may use additional means of collection to reduce this judgment without regard to the timeliness of the periodic payment.

**Deviation - RULE 1240-2-4-.07(1)**

The tribunal's order shall contain written findings of fact stating:

- 1) The reasons for the change or deviation from the presumptive amount of child support that would have been paid pursuant to the Guidelines; and
- 2) The amount of child support that would have been required under the Guidelines if the presumptive amount had not been rebutted; and
- 3) How, in its determination,
  - Application of the Guidelines would be unjust or inappropriate in the particular case before the tribunal; and
  - The best interests of the child for whom support is being determined will be served by deviation from the presumptive guideline amount.

## **RECENT HOT TOPICS, QUESTIONS AND CASE LAW**

### **INTEREST ON PAST DUE CHILD SUPPORT**

Tennessee Code Annotated, Section 36-5-101(f) states as follows:

(f)(1) Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state, and shall be entitled to full faith and credit in this state and in any other state. Such judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties. If the full amount of child support is not paid by the date when the ordered support is due, the unpaid amount is in arrears, shall become a judgment for the unpaid amounts, and shall accrue interest from the date of the arrearage, at the rate of twelve percent (12%) per year. All interest that accumulates on arrearages shall be considered child support. Computation of interest shall not be the responsibility of the clerk.

The interest rate charged on child support changed to twelve percent (12%) per year effective July 1, 1995. Prior to this date, the interest rate charged was ten percent (10%) per year.

**NOTE: Always either grant a judgment for interest in each order (breaking down the principal and interest) OR at the very least, reserve the calculation of interest.**

If you do not do this, the custodial parent may be barred from collecting interest due to the doctrine of *res judicata*.

See case of *State of Tennessee ex rel. Sheron L. Jones vs. Martin Leon May*, 2008 WL 2557374.

The principles of this decision can be used to bar interest on any case with unpaid arrears which accrued prior to the entry of a judgment. Interest following the judgment would still be allowed if the judgment is unpaid.

**EMANCIPATION OF A CHILD---Does the legal obligation end as of the date of emancipation (i.e. 18<sup>th</sup> birthday and graduation from high school; whichever occurs last) even when there are other minor children in the case if the obligor does not timely file a petition for modification?**

Is it considered to be a retroactive modification (which we all know is prohibited prior to the filing of a petition for modification) or not when support is modified back to the date of emancipation of a child even if the petition was not filed until months or even years later?

As a rule, child support cannot be modified retroactively prior to the filing of a petition for modification. However, it is not considered to be a retro modification when the support is modified back to the date of emancipation of the child because that parent's legal duty (not withstanding a contractual agreement to the contrary) ended at the time the child emancipated.

See the case of *Carie C. Brooks v. Douglas J. Brooks*, No. M2007-00351-COA-R3-CV- (Tenn.Ct.App. April 6, 2009). This case is dealing with several other issues such as the father being in contempt of court for his failure to pay child support as ordered, however, it did make the finding that the father's obligation was reduced because the older child had reached majority and the father was therefore, no longer responsible for his support.

This case changes the law that I had argued for years and quoted the case of *Parker v. Parker* which was a 2001 COA out of Davidson County. In this case, it was considered a retroactive modification to modify the support back to the date of emancipation of the older children prior to the filing of a petition.

The law as it stands now is making it difficult for accounting purposes in going back and recalculating for support should have been based upon the parties' income at that time. In some cases, it has ended up with the non-custodial parent having an overpayment and then getting a judgment against the custodial parent. In most cases that I have seen, there is an arrearage owed at the time of going into court and so the difference of the overpayment is then applied to the arrearage. It can still be an accounting nightmare which could be avoided if people would just take care of business (but that is thinking we live in a perfect world which we obviously do not).

**Another twist to this issue:** What if the obligor/non-custodial parent writes on the memo line of the check to the obligee/custodial parent the names of the children and specifies something like, “child support payment for Peter, Luke and Ellie” wherein Peter has emancipated?

This is exactly what the father did in the case of *Carl Scott Blankenship v. Amy Lynn Cox*, No. M2013-00807-COA-R3-CV---(Tenn.Ct.App April 17, 2014.) There were many other issues of importance discussed in this opinion, however, for a subject here, the Court ruled the father’s support obligation could not be modified back to Peter’s emancipation date as he requested in his petition because he voluntarily continued to pay support for Peter by noting on the check’s memo line that the support was for all three (3) children. The court only modified his support obligation back to the date he filed his petition.

### **VOLUNTARY UNDEREMPLOYMENT OR UNEMPLOYMENT (and a few other issues)**

*Carl Scott Blankenship v. Amy Lynn Cox*, No. M2013-00807-COA-R3-CV—  
(Tenn.Ct.App. April 17, 2014)

This is a post-divorce action for a modification of child support following the emancipation of the parties’ oldest of three children. This case deals with several issues including, a judgment against the Mother arising from Father’s overpayment of child support following the emancipation of their oldest child, the imputation of income to Mother for voluntary unemployment, an upward deviation for extraordinary education expenses, allocation of the uncovered medical expenses, and the allocation of the tax exemptions for the two minors.

Both Father and Mother are highly educated. Father is an anesthesiologist and Mother has a bachelor’s degree in secondary education as well as a master’s degree. During the marriage, Mother worked in the home and, by agreement of the parties, she home-schooled their children until they entered high school.

The parties divorced in **2000** and per the Final Decree, Father was to pay Mother the sum of \$3,551 per month as child support for four (4) children. In August **2002**, the support was modified to \$4,618 per month for the four (4) children.

In **2003**, Father petitioned the court for a modification of the parenting plan and while the petition was pending, he voluntarily terminated his parental rights

of one of the two oldest children (Mother's current husband adopted this child). The parties also agreed to lower Father's child support to \$4,230 per month for the three (3) remaining minor children (Peter, Luke, and Ellie) beginning February 1, **2004** and divided uninsured medical expenses equally. In **2005**, again the parties disagreed over Father's obligation for child support and with the help of a mediator, entered into an Agreed Order on May 16, **2006** which basically maintained the status quo as established in the prior order.

The parties rocked on along for about four (4) more years (surprisingly long time between litigation considering their history) when Peter graduated from high school in June **2010**. However, Father continued paying child support of \$4,230 per month pursuant to the prior order and specifically wrote on each check, a comment that the child support was for "Peter, Luke and Ellie" even though Peter graduated from high school.

Later in **2010**, Father lost his job and remained unemployed for six months. He then filed a Petition for Modification on February 28, **2011** which led to this appeal. He requested that child support be modified retroactive to the date of filing the petition.

Mother filed a counter-petition, of course contesting the reduction in child support, but requesting that if the court did grant the modification, she requested the court incorporate extraordinary educational expenses (private school tuition).

Father requested the court to impute income to Mother asserting she was voluntarily unemployed. He also asserted he was entitled to reimbursement for overpayments incurred in paying support for Peter after he graduated from high school in June 2010.

Acting unilaterally, Father reduced his child support to \$1910 effective September 1, **2012** believing this was the correct amount for two children. (I'm sure he wasn't listening to an attorney at this point---at least I hope not.)

Following an October 2, **2012** hearing, the court temporarily reduced Father's child support to \$3,200 per month. The trial was conducted over three days in October, November and December 2012 (wow!). Father offered testimony of Mother's education and asserted Mother was able-bodied and capable of employment. Mother asserted she was unable to work as she was continuing to home-school the youngest child who was not yet in high school and that she needed to be available full time for Luke, who was in high school, but had recent emotional issues (Father's visitation had earlier been terminated and he was restrained from seeing the children).

On the last day of trial, the parties stipulated to Father's gross income to be \$19,685.71 per month. While there wasn't a significant variance in Father's income, the court did find Father was entitled to modification due to Peter's emancipation. However, the court limited the modification to February 28, 2011, the filing date of Father's petition.

The trial court concluded that Mother was voluntarily unemployed and in calculating the basic child support order, the court imputed income to her of \$2,475 per month. The trial court found that Mother had proven extraordinary educational expenses due to the children attending private school, but did not make this upward deviation retroactive to the date of the filing of the petition even though Luke was in private school at that time. The court modified the support between February 28, 2011 through July 31, 2013 at \$2,149 per month which is based on the worksheet with no educational deviation. With the upward deviation for educational expenses for both Luke and Ellie, the support obligation was \$3,706.35 per month from August 1, 2013 to May 1, 2014 (when Luke would emancipate). The court went on to order a specific amount reflecting just Ellie as the remaining minor child beginning June 1, 2014.

Due to the fact that two (2) years passed from the date of filing the petition in 2011 until the entry of the final judgment, there was a substantial overpayment of support by Father for which he was entitled a judgment. The trial court granted Father a judgment against Mother in the sum of \$41,683 plus interest at the rate of 5.25% and ordered she pay this at \$913.66 per month.

Each party raised numerous issues on appeal. The first one we'll address is **imputed income** to Mother or **voluntary unemployment**.

The child support guidelines provide that gross income may be imputed to a parent in certain situations, including when the "parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed." Tenn. Comp. R & Regs. 1240-02-04-.04(3)(a)(2)(i)(I). While the guidelines stress the importance of the role of a stay-at-home parent such as Mother, they do not prohibit imputing income to that parent under appropriate circumstances. Tenn. Comp. R & Regs. 1240-02-04-.04(3)(a)(2)(iii). The guidelines also state that we should "not presume that any parent is willfully and/or voluntarily under or employed." Tenn. Comp. R & Regs. 1240-02-04-.04(3)(a)(2)(ii). The determination may be based on any intentional choice or act that adversely affects a parent's income. Tenn. Comp. R & Regs. 1240-02-04-.04(3)(a)(2)(ii)(I). The trial court is afforded considerable discretion in determining this issue.

In the case at bar, the record reveals that the parties agreed during their marriage that Mother would home-school the children until high school and this practice was followed before and after the divorce. At trial, both parties acknowledged the youngest child, Ellie, would complete her home-schooling in the summer of 2013 and enter private school that fall. Thus, as of September 2013, both Luke and Ellie would be in high school. Thus, considering the record as a whole, the Court of Appeals was unable to conclude that the trial court erred in finding that Mother will be voluntarily unemployed as of September 2013 when no children are being home-schooled.

Now on the issue of **retroactive modification**, Father contends the modification should be retroactive to the date of Peter's graduation and Mother contends it should be prospective only.

A parent is obligated to provide support for children only until they turn eighteen years old or graduate from high school, whichever is later. However, the record in this case reveals the express intent of Father to voluntarily support Peter after graduation in 2010 is proven by Father's notation on his checks that they represent child support for "Peter, Luke, and Ellie."

Therefore, the Court of Appeals found no error in the trial court's decision to limit the retroactive application of the modified support to the filing of Father's petition.

As for the **upward deviation for extraordinary educational expenses**, the guidelines specifically recognize, under the facts of a particular case, these expenses may prompt the court to deviate from the standard child support amounts. Tenn. Comp. R & Regs. 1240-02-04-.07(2)(d). "Extraordinary expenses are in excess of these average amounts and are highly variable among families. For these reasons, extraordinary expenses are considered on a case-by-case basis in the calculation of support and are added to the basic support award as a deviation so that the actual amount of the expense is considered in the calculation of the final child support order for only those families actually incurring the expense. These expenses may be, but are not required to be, divided between the parties according to each parent's percentage of income.

The trial court found it was the parties' intent prior to the divorce to home school the children until high school, at which time they enrolled in private school, and the parties had the financial means to pay for private school. Therefore, the court of appeals affirms this upward deviation, but only applied it prospectively to begin in the fall of 2013 as opposed to February 2011 when the

other modification went into effect. Mother contends that by not applying the upward deviation retroactive to February 2011, the overpayment of child support increased dramatically causing an unjust result. The Court of Appeals agreed with the Mother. While it is true that Ellie did not begin private school until the fall of 2013, Luke was in private school as of the filing of the petition or February 2011. Therefore, the Court of Appeals was unable to distinguish why the same reasoning should not also be retroactive to February 2011 to account for an upward deviation for Luke's private school tuition alone.

As for the issue of **overpayment of child support**, the Court of Appeals affirmed the decision to make the modification based on the guidelines retroactive to the filing of Father's petition in February 2011, and determined that the upward deviation for Luke's private school expenses should be made retroactive to this date as well. Accordingly, the amount of the judgment for overpayment would to be modified and a judgment entered for the amount of the overpayment consistent with the COA opinion.

A couple of other issues which were raised included that of the **allocation of uninsured medical expenses**. Basically, the court stated that if the expenses not covered by insurance were "routinely incurred so that a specific monthly amount can be reasonably established, a specific dollar amount shall be added to the basic child support obligation to cover those established expenses and these expenses are to be pro-rated between the parents according to each parent's percentage of income." Tenn. Comp. R. & Regs. 1240-02-04-.04(8)(d)(2). However, if they are not routinely incurred and included in the monthly child support obligation, the court shall specify that the expenses be paid by the parents as incurred according to each parent's percentage of income *unless some other division is specifically ordered by the tribunal*. Therefore, the percentage paid by each parent is discretionary by the tribunal.

As for the issue of the **allocation of tax exemptions**, the "Taxation Assumption" in the schedule assumptions in the guidelines state in pertinent part: "The alternate residential parent will file as a single wage earner claiming one withholding allowance, and the primary residential parent claims the tax exemptions for the child." Tenn. R. & Reg. 1240-02-04-.03(6)(b)(2)(ii). Mother in this case contends this this regulation operates as a legal standard and, thus, the trial court erred in failing to allocate both tax exemptions to her (the court divided them). The COA disagreed noting that our courts have held this "rule" is not obligatory on trial courts. "This regulation 'simply describes the methodology used to compute spouses' respective net income,' and is merely a mathematical

assumption with no bearing on the trial court's discretion to award the tax exemptions." Therefore, the COA did not find error with the trial court in not allocating both tax exemptions to Mother.

### **ISSUE: VOLUNTARY UNDEREMPLOYMENT**

**Kimberly Meeks v. Bryant Leo Meeks**, No. M2013-01203-COA-R3-CV— (Tenn.Ct.App. March 6, 2014)

In this case, the Father appeals the trial's court's determination that he was *voluntarily underemployed* for the purpose of calculating his child support obligation.

These parties were on their 2<sup>nd</sup> divorce from each other. Mother filed for divorce (2<sup>nd</sup> time) on 3/7/11. At a hearing on 5/31/11, Court named Mother PRP of the 2 children and ordered Father to pay temporary support in the amount of \$992.00 per month. Final hearing occurred on 2/28/12. At that time, Father was employed as a mortgage originator and Mother worked at a Shoney's Restaurant. The Court entered the opinion on 3/15/12, stating: "The father has made varying amounts at different financial institutions. At this point, it is unknown what he may be earning based on commissions. Based on past experience his yearly income should exceed \$80,000.00. For child support purposed, the father's monthly income shall be \$6,666.66."

On 3/6/12, Father was terminated from his employment and on 3/22/12, Father filed a motion requesting the court to "grant a moratorium" on child support because he had lost his job and had a decrease in income. In his motion, he stated that he was terminated "based on the bank's allegation that he had violated company policy in recording a conversation he had with a District Manager.

The Final Decree was entered on 7/10/12 incorporating the opinion and set Father's support at \$1002 per month. On 8/1/12, Father filed a motion to alter or amend the Final Decree. Father submitted a letter that a certain mortgage company would not hire him due to his criminal background check revealing a felony forgery charge. This charge was a result for Father signing Mother's name to an income tax refund check without her permission.

Upon a hearing on 3/3/13, an order was entered on 4/22/13 modifying Father's income beginning in March 2012 to \$6,000 and found him to be willfully underemployed based upon the Child Support Guidelines, Chapter 1240-2-4 (Rule 1240-2-4-.04), and the Court's finding that the father's criminal history will not allow the Court to find that Father makes less than \$6,000 per month commencing March 2012.

The Court did modify the child support obligation to \$850 per month commencing March 2013 due to Father's payment of monthly medical premiums for the children.

In this case, the trial court found Father to be willfully underemployed. In support of this conclusion, the court cited Tenn. Comp. R. & Regs. 1240-02-04-.04 and state that Father's "criminal history" required the court to find that Father could make at least \$6,000 per month.

Pursuant to Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii)(I):

*A determination of willful and/or voluntary underemployment or unemployment is not limited to choices motivated by an intent to avoid or reduce the payment of child support. The determination may be based on any intentional choice or act that adversely affects a parent's income. Criminal activity and/or incarceration shall not provide grounds for reduction of any child support obligation. Therefore, criminal activity and/or incarceration shall result in a finding of voluntary underemployment or unemployment under this section, and child support shall be awarded based upon this finding of voluntary underemployment or unemployment.*

Father also argued that the trial court erred when it "elected to go outside the Father's pleadings to find him to be willfully underemployed based on the trial judge's personal and independent knowledge as the criminal court judge in the case of State v. Bryant Leo Meeks. The trial judge did preside over Father's criminal proceedings. However, Father included references to his criminal problems in both his testimony and his pleadings for the child support modification case. Thus, there was sufficient, independent evidence from which the trial court could conclude that Father engaged in criminal activity.

## ISSUE: VOLUNTARY UNDEREMPLOYMENT

**Donald Lester Benedict v. Gretchen Michelle Benedict**, No. E2013-00978-COA-R3-CV---(Tenn.Ct.App. May 27, 2014)

This is a post-divorce action regarding the issue of child support and willful or voluntary underemployment. It does contain several other issues, but we're just going to discuss the voluntary underemployment issue.

At the time of the divorce in 2000, Father was ordered to pay child support for two children in the amount of \$3200 per month. His income was \$350,000 per year. In 2002, Father lost his job at Adams Lithography where he was earning the \$350,000 per year as a result of a major client leaving Adams (no fault of Father). The parties resumed living together in 2002, but later separated in 2006.

In January 2007, Father filed a petition to modify his child support obligation. Over the years since losing his job in 2002, he tried several enterprises, but they eventually floundered. The evidence in the record on appeal does not support a finding that Father intentionally torpedoed his career prospects. Rather, it appears Father tried and failed to reestablish some measure of his previous lifestyle.

By 2009, Father returned to work at Adams and earned \$75,000 per year. In March 2011, the Master entered his order and set Father's child support obligation at \$1,259 per month based on Father's salary of \$75,000 per year. The trial court held that the Master erred in calculating Father's income and stated Father was willfully and voluntarily underemployed. The trial court set his income at \$75,000 salary plus imputed an additional \$144,362 for a total of \$219,362 (this additional amount was taken from income earned and not earned as draws against the company for his enterprises he was trying to make work over the years).

The burden is on the support recipient, in this case the Mother, to prove underemployment. It is not sufficient to point out that Father once earned a great deal more money than he does currently. There must be some evidence in the record to show that Father is capable of earning more and is refraining from acquiring this better-paying work to reduce or terminate his income.

The Court of Appeals did not believe the record was sufficient to show willful underemployment by Father. The trial court added his salary of \$75,000 to an imputed income of \$144,362 to reach \$219,362 and the Court of Appeals disagreed with this method of calculating Father's income. The Father was earning a salary of \$75,000 or was an entrepreneur capable of earning \$144,362, but not both at the same time. The COA believes the preponderance of the evidence supports the Master's finding of Father's income being \$75,000 for purposes of calculating child support and that the trial court erred by setting aside the finding of the Master. Therefore, the COA believes the trial court erred in finding the Father was willfully or voluntarily underemployed.

### **DISESTABLISHMENT OF PATERNITY AND ITS EFFECT ON CHILD SUPPORT ARREARS**

**Ashley Purdy v. Matthew C. Smith**, No. M2012-02463-COA-R3-CV—(Tenn.Ct.App. May 23, 2014)

The issue in this case involves disestablishment of paternity and its effect on child support arrears. Over a year after the trial court entered an order granting a default judgment establishing paternity and setting current and retroactive support, Mr. Smith filed a Rule 60 motion for relief on the grounds that he was not the biological father of the child. Based upon the statutory prohibition against the retroactive modification of child support and the related case law, the COA affirms the trial court's decision denying Mr. Smith's Rule 60 relief for any time period prior to the filing of his petition.

In this case, the child was born on 7/25/09 and the State of Tennessee filed a Petition to Establish Paternity on 4/14/10. Service of process was accomplished via certified mail. The Summons ordered Mr. Smith to appear for a hearing on 6/9/10, but the return receipt was returned without a signature or other notation. Another Summons was sent to Father by certified mail and there was no return receipt. Mr. Smith failed to appear for the hearing scheduled for 8/11/10. Case was set out a couple more times and the Court proceeded with a default judgment and set current and retroactive support.

On 12/21/10, the State filed a Petition for Contempt. On 5/11/11, Mr. Smith appeared in court and requested DNA testing which was granted. Several more court dates were set and Mr. Smith failed to appear.

On 12/1/11, Mr. Smith filed a motion to set aside the 10/13/10 order setting support. He then failed to appear at his 12/14/11 hearing to present the DNA evidence. The case was reset several times.

On 7/14/12, Mr. Smith filed an amended motion to set aside the default judgment. On 8/15/12, the trial court heard the State's contempt petition and Mr. Smith's motion to set aside the default judgment. The Court made very detailed findings, including the following:

“Upon a review of the facts, the Court determined the original service of process issued by the Clerk of the Court was sufficient under the Tennessee Rules of Civil Procedure to constitute actual and/or constructive notice in light of the fact the Respondent's obvious attempts to avoid being served by intentionally refusing to accept service of process, via certified mail, and/or willfully evading personal service of process, but knowing to appear and appearing, for court on May 11, 2011....”

The trial court stated that absent an allegation of fraud and/or intentional misrepresentation, Mr. Smith's motion to set aside the October 2010 order should have been filed no later than 30 days after the May 11, 2011 hearing when he appeared in court and requested DNA testing.

While denying Mr. Smith's motion to set aside the default judgment, the court ordered that, in light of the DNA test results, the order amended to reflect that Mr. Smith “is not the biological father of the subject matter child and, therefore, Mr. Smith will not have any future child support obligations under said order.”

In light of TCA Section 36-5-101(f)(1), the court consistently upheld “the prohibition against retroactive modification of child support in the face of equitable defenses.” The Court compares this case to Hodge v. Craig, 382 S.W.3d 325 (Tenn. 2012) wherein the petition sought damages for an intentional tort--that the mother had intentionally misrepresented that Mr. Craig was the father of the child when she knew or should have known otherwise. The Court concluded

that the trial court's damage award (in the amount of child support, medical expenses, and insurance premiums paid by the petition) was not a retroactive modification of child support because it was a damage award to recover the pecuniary loss Mr. Craig suffered as a result of the mother's intentional misrepresentations.

In the case at bar, the amended petition did not expressly allege that Mother intentionally misrepresented to Mr. Smith that he was the father (as was the case in *Hodge*). Mr. Smith's petition asks the court to set aside the order establishing paternity and child support and does not include a prayer for damages.

Even though the result may be harsh, in light of the statutory law and case law, the COA affirms the trial court's decision in denying the Rule 60 relief. Although Mr. Smith cannot receive retroactive modification of child support, the trial court did grant Rule 60 relief as to any obligation to pay child support prospectively.