

# Administrative Office of the Courts

Supreme Court of New Mexico

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## REPORT TO COURTS, CORRECTIONS AND JUSTICE INTERIM COMMITTEE

TO: The Courts, Corrections and Justice Interim Committee  
FROM: Arthur W. Pepin, Director, Administrative Office of the Courts  
RE: Senate Joint Memorial 26  
DATE: October 10, 2014

Senate Joint Memorial 26 (“SJM26”), adopted during the 2014 regular session, requires the Administrative Office of the Courts (“AOC”) *“to study equity in awarding child support and how child support payments are calculated”* and to *“present its findings and recommendations to the appropriate interim legislative committee by November 1, 2014.”*

SJM26 begins with the statement that “providing adequate financial support is important when a couple with children divorce.” SJM26 then sets forth in nine “Whereas” statements the basis for the Legislature’s conclusion that AOC should study “equity” in child support cases:

1. Child support is calculated by utilizing guidelines that are established by the Legislature.
2. These guidelines rely upon a formula based upon the combined income of the parents and their respective percentages of that income.

3. An increase in a parent's income requires that child support be recalculated;
4. Child support is calculated using the parties' gross monthly incomes rather than their net incomes;
5. Following the entry of a child support award, the noncustodial parent may experience a change of circumstances that makes the payment of child support difficult;
6. Modifications of child support are not retroactive, even when the modification is necessary following the loss of employment;
7. Paying child support arrears that accrue during protracted unemployment is often difficult when an individual is also required to pay on-going child support;
8. The child support calculation does not give a noncustodial parent credit for a subsequent marriage or the birth of subsequent children; and
9. Courts have failed to distinguish between individuals who are unable to pay child support as opposed to individuals who refuse to pay child support.

Each of the above statements is examined in relation to the requirement in SJM 26 to consider the equity of child support payments in New Mexico.

### **1: Use of Guidelines to Determine Child Support Awards**

Pursuant to federal regulation, all states are required to have child support guidelines.<sup>1</sup>

The federal government has mandated that “[t]he guidelines established...must at a minimum:

- (1) *Take into consideration all earnings and income of the noncustodial parent* [emphasis added];
- (2) *Be based on specific descriptive and numeric criteria and result in a computation of the support obligation; and*

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<sup>1</sup> 45 CFR §302.56.

*(3) Address how the parents will provide for the child(ren)'s health care needs through health insurance coverage and/or through cash medical support... ”*

The New Mexico child support guidelines are codified in statute <sup>2</sup> and are set forth in NMSA 1978, §40-4-11.1. Subsection (B) of this statute sets forth the legislative intent underlying the adoption of the child support guidelines. The statutory sections states:

*The purpose of the child support guidelines are to:*

- (1) establish as state policy an adequate standard of support for children, subject to the ability of parents to pay;*
- (2) **make awards more equitable** [emphasis added] by ensuring more consistent treatment of persons in similar circumstances; and*
- (3) improve the efficiency of the court process by promoting settlements and giving courts and the parties guidance in establishing levels of awards.<sup>3</sup>*

The stated purpose of the guidelines is to facilitate the entry of child support awards that provide sufficient financial support to children, that are equitable to the parents, and that foster judicial efficiency. There is a presumption that the Legislature, in adopting the current child support guidelines, found them to be the most reasonable method of accomplishing these objectives. Therefore, by the very wording of Subsection (B)(2) itself, the child support guidelines are presumed by the Legislature to be equitable on their face.

## **2: Use of Parents' Combined Incomes in Calculating Child Support**

The child support guidelines utilize a formulation that factors in the actual or capable earnings of both parents. <sup>4</sup> This method, called the “Income Shares Model,” is the most

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<sup>2</sup> In eighteen (18) states, the child support guidelines are established by court rule rather than legislative action. (*Child support Guidelines and Guidelines Reviews: State Differences and Common Issues* Jane C. Venohr, *Family Law Quarterly*, Vol. 47, No. 3 (Fall 2013), p. 337.)

<sup>3</sup> 45 CFR §302.56(c).

commonly used method in the United States for determining child support guidelines.<sup>5</sup> This model is predicated on the theory that children should receive the same amount of support that would have enjoyed had their parents never separated. As such, the incomes of both parents are factored into the child support calculation in an effort to keep a child “whole”; that is, not reducing the child’s standard of living despite the separation of the child’s parents.

### **3: Increases in Income Require a Recalculation of Child Support**

The issue of modification of an existing child support obligation (Items #3, 5, and 6, above) has been addressed by the New Mexico Legislature through the enactment of NMSA 1978, §40-4-11.4 and §40-4-11.5.

The New Mexico Legislature specifically provided for the contingency that child support obligations would be subject to modification.<sup>6</sup> NMSA 1978, §40-4-11.4(A) grants trial courts discretion to “*modify a child support obligation upon a showing of material and substantial changes in circumstances.*” The statute continues:

*“There shall be a presumption of material and substantial changes in circumstances if application of the child support guidelines in Section 40-4-11.1 NMSA 1978 would result in a deviation **upward or downward** [emphasis added] of more than twenty percent of the existing child support obligation and the petition for modification is filed more than one year after the filing of the pre-existing order.”*

It is important to state that, contrary to the assertion of Item #3, above, an increase in the income of the child support obligor does not, in and of itself, necessarily result in the

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<sup>4</sup> Regarding equity, it should be noted that New Mexico’s child support guidelines exceed the requirements of the federal mandate set forth in 45 CFR §302.56(c)(1) because New Mexico’s guidelines consider the incomes of both parents, not simply the income of the payor.

<sup>5</sup> Thirty-nine (39) states use this method. (*Child support Guidelines and Guidelines Reviews: State Differences and Common Issues* Jane C. Venohr, *Family Law Quarterly*, Vol. 47, No. 3 (Fall 2013), at pp. 330-331.)

<sup>6</sup> Child support is owed until a child is emancipated (typically age 18, but up to 19 if the child is completing high school). Accordingly, an on-going support obligation for an individual child can, potentially, exist for 19 years. In addition, as older siblings emancipate, modifications are undertaken to adjust the child support award for fewer children.

modification of a child support award. Numerous factors other than the payor's income factor into the determination of a child support obligation. (See Footnote 8). Accordingly, child support is not modified simply because an obligor receives an increase in income. Rather, the trial court examines the totality of the circumstances of both parties and then determines if the party moving for a modification has demonstrated a material and substantial change in circumstance to warrant the granting of a modification.

#### **4: Use of Gross Monthly Incomes Instead of Net Incomes**

The New Mexico child support guidelines specifically require the use of the parents' gross monthly income in calculating child support.<sup>7</sup> (See NMSA 1978, §40-4-11.1(C)(1) and (C)(2)). These statutory provisions define in great detail what earnings are to be considered as gross income, and also what earnings are expressly excluded from gross income.<sup>8</sup>

By utilizing the gross monthly income of the parties, the guidelines eliminate the income fluctuations that can result from various voluntary reductions of take-home pay, such as: payment of insurance premiums; adjusted withholdings for taxes, as claimed on a parties' federal W-4; and investments in various retirement plans such as pension, 401(k), and SEP-IRAs, to name a few.

The use of the parents' gross monthly incomes in determining a support award is factored into the development of the guideline amounts, as well as the applicable federal and state tax rates at varying income levels. (See below for more detailed information.) In addition, the

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<sup>7</sup> Of the thirty-nine (39) states that use the Income Shares Model, twenty-eight (28) of them use the parents' gross monthly incomes in calculating child support. (*Id.*)

<sup>8</sup> Some items expressly excluded from gross income are: benefits from means tested public assistance (to include TANF benefits and a parent's SSI benefits), "ordinary and necessary expenses" of operating a business venture, alimony payments actually paid in accordance with a court order, child support actually paid in accordance with a court order, and "a reasonable amount...to support prior children who are in that parent's custody." (NMSA 1978, §40-4-11.1(C)(2)).

economic analysis considers the federal dependent tax exemption and head of household filing status for the custodial parent.

Accordingly, the child support guidelines recognize that individuals receive net income as opposed to gross income, and these adjustments have been made in the determination of the child support schedule and its recommended level of financial support for a child whose parents earn a combined gross monthly income.<sup>9</sup>

## **5: Changes in Circumstance**

It is true that a noncustodial parent may experience a change of circumstance that makes it difficult to pay child support. Likewise, however, a custodial parent may also experience a change of circumstance that makes the prior award of child support insufficient to care for the needs of that parent's household.<sup>10</sup> The remedy, in either event, is to request that the previous award of child support be reviewed to determine if modification is appropriate. To that end, the New Mexico Legislature has enacted two separate statutes pertaining to the modification of child support: NMSA 1978, §40-4-11.4 and §40-4-11.5.

The first provision, NMSA 1978, §40-4-11.4(B), states that, "*All child support orders shall contain a provision for the annual exchange of financial information by the obligor and the obligee upon a written request by either party.*" Further, NMSA 1978, §40-4-11.5 requires that each case being enforced by the New Mexico Human Services Department's Child Support Enforcement Division ("CSED") be reviewed every three years to determine if the child support

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<sup>9</sup> It must also be noted that other factors contributing to the determination of a child support award include: the cost of medical insurance coverage for the child(ren), work-related child care expenses, and "*additional expenses*" to include school tuition or the costs of activities for the child(ren), as well long-distance travel costs for one parent to exercise visitation with the child(ren), if applicable. In addition, the amount of time the child spends with each parent is analyzed to determine which of two different child support worksheets is to be used by the court.

<sup>10</sup> Given that child support obligations exist over a period of many years (See Footnote 9, *supra.*), it is almost certain that both parents will experience changes in their respective circumstances following the entry of the original child support order.

award is appropriate. These two statutory provisions demonstrate the recognition by the Legislature that circumstances are likely to change for custodial and noncustodial parents at some point after the entry of a child support award, and they provide a mechanism for having the cases reviewed, either by the individual parties or by CSED.

## **6: Prohibition on Retroactive Modification of Child Support**

It is true that modifications of child support are not retroactive. This principal was established in New Mexico by the New Mexico Supreme Court case Montoya vs. Montoya (1980 NMSC 122), which found, *“The vast majority of cases and texts support the rule that the applicable date for any modification is the date of filing of the petition or pleading rather than the date of hearing, absent an unreasonable delay in bringing the case to trial by a party, or unless there are unusual circumstances.”* (Id.).

Supporting the correctness of the New Mexico Supreme Court’s ruling in Montoya vs. Montoya, in April 1989 the federal Office of Child Support Enforcement promulgated a regulation prohibiting states from allowing child support to be retroactively modified. The federal regulation<sup>11</sup> reads, in part:

*“(a) The State shall have in effect, and use procedures which require that, any payment or installment of support under any child support order is, on and after the date it is due:...*

*(3)Not subject to retroactive modification by such State or by any other State, except as provided in paragraph (b) of this section*

*(b) The procedure referred to in paragraph (a)(3) of this section may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given [emphasis added]...*

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<sup>11</sup> 45 CFR §303.106.

Stated simply, no state has authority to amend its laws to allow for a modification of child support prior to the filing of a motion with a court. The principal underlying this concept is that the party seeking the modification of a child support award should be required to bring the matter to the attention of the Court as soon as circumstances warrant it. Delay in the filing of the modification request makes it more difficult for the parties to obtain necessary evidence and for the trier of fact to make a determination that a modification is in the best interests of the children.

Additionally, it should be noted that a recipient of child support builds his or her household budget around the expectation that the child support will be paid in the amount ordered. To allow a modification of child support retroactively to a time period prior to the filing of a request for modification<sup>12</sup> would have potentially disastrous consequences on the household in which the child(ren) primarily reside. In essence, a noncustodial parent, who presumably is in the best position to determine if his or her circumstances have changed to such an extent that a reduction of child support may be warranted, bears the burden of alerting the other parent to this contingency. To allow a modification of support prior to the filing date of the request could result in the custodial parent having to refund child support payments that have already been received and, in all likelihood, spent.<sup>13</sup>

## **7: Challenge of Paying Ongoing Child Support and Arrears Resulting from Parental Unemployment**

When a parent who owes a child support obligation and who has previously been paying becomes unemployed, the subsequent unemployment does have an adverse impact on both the

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<sup>12</sup> The filing and service of the modification motion alerts the non-moving parent that a request to reduce the child support award has been formally lodged with the court.

<sup>13</sup> It should also be noted, that modifications of support can be downward *or upward*, and changing the effective date of a modification to a date other than the filing of the modification request could have shocking results for the other side. Accordingly, having the modification become effective as of the date of the filing of the motion is the fairest outcome for both litigants.

payor's household, as well as on the household of the custodial parent who is reliant upon the monthly child support payment. However, relief is available in various forms for both the support obligor and for the obligee.

If an individual owing a child support obligation becomes unemployed and that individual is eligible for unemployment compensation, then the Department of Workforce Solutions ("DWS") will withhold from each weekly payment of unemployment benefits an amount sufficient to cover the obligor's child support award, provided that the child support case is being enforced by CSED. (NMSA 1978, §51-1-37.1).<sup>14</sup>

If an individual owing support becomes unemployed for a protracted period of time, or if the individual is not eligible for unemployment benefits, their best course of action is seek a modification of child support based upon a material and substantial change of circumstances. Modifications can be requested by filing a motion with the appropriate court, or by contacting CSED and requesting the case be administratively reviewed.<sup>15</sup>

If child support arrears are owed in a case, the court may order a payment toward those arrears in accordance with the Support Enforcement Act. The relevant provision of the Act is NMSA 1978, §40-4A-6(A)(2), which authorizes a court to order an obligor owing past due child support to pay their on-going obligation, plus *"the amount of twenty percent of the monthly support obligation set forth in the order for support, or such amount as the court may order after notice and hearing..."*<sup>16</sup>

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<sup>14</sup> The requirement that child support payments be withheld automatically from unemployment benefits in cases being enforced by state child support agencies is federally mandated and is tied to federal approval of and funding for these agencies. (45 CFR §302.65).

<sup>15</sup> See *RESPONSE TO STATEMENT 3, 5, AND 6*, above, for information on modifications of child support awards.

<sup>16</sup> For example, if an obligor owes on-going child support of \$300 per month and child support arrears are also owed, the trial court may order a payment on the unpaid child support of \$60 per month to be paid in addition to the on-going obligation.

In addition, there exists a statutory presumption that an award of child support is too burdensome when it reaches a statutorily pre-determined percentage of a payor's gross monthly income. NMSA 1978, §40-4-11.1(J) states that:

*“Whenever application of the child support guidelines...requires a person to pay to another person more than forty percent of the paying person's gross income for a single child support obligation for current support, there shall be a presumption of a substantial hardship, justifying a deviation from the guidelines.”*

There is also an additional statutory provision that protects the person paying child support from excessive withholdings: NMSA 1978, §40-4A-4.1(E) states that *“The maximum amount withheld pursuant to this section [meaning income withholding]...shall not exceed fifty percent of the obligor's income.”*

## **8: Subsequent Remarriage and Birth of Subsequent Children**

It is true that the child support calculation does not give a noncustodial parent “credit” for a subsequent marriage or the birth of subsequent children. However, the Legislature has addressed the effect of a party's remarriage and the birth of subsequent children on an existing child support award.

Remarriage: NMSA 1978, §40-4-11.1(C)(1), which defines the term “income” for purposes of calculating child support states, in part, *“The gross income of a parent means only the income and earnings of that parent and not the income of subsequent spouses, notwithstanding the community nature of both incomes after remarriage”*. In adopting this definition of “income,” the Legislature has clearly carved out an exception to the doctrine of community property and has found that, upon remarriage, the income of subsequent spouses shall not be considered by a trial court in calculating child support as between the parents of the

child(ren). This statutory provision is a benefit to both parties as it allows them to freely marry without regard to the potential consequences to a child support award.

Birth of Subsequent Children: The Legislature has also addressed the issue of the birth of subsequent children. NMSA 1978, §40-4-11.1(C)(2)(e) provides:

*“gross income” shall not include a reasonable amount for a parent’s obligation to support prior children who are in that parent’s custody. A duty to support subsequent children is not ordinarily a basis for reducing support owed to children of the parties but may be a defense to a child support increase for the children of the parties. In raising such a defense, a party may use Table A as set forth in Subsection K of this section to calculate the support for the subsequent children.”*

The clearly stated legislative intent, as set forth in the above statutory provision, is to provide child support for older children and to ensure that their financial support does not suffer due to the birth of their younger siblings. If one considers the “equity” of the issue, the child’s right to support should not be reduced by the unilateral decision of the child support obligor to have additional children with a new partner.<sup>17</sup>

In recognition of the fact that adults have a right to bear other children, however, the statute provides that, while not reducing the amount of support owed for an older child, the birth of a younger child may prevent an increase in a child support award for an older child. The ultimate determination as to whether or not the birth of the younger child constitutes “*a material and substantial change of circumstances*” to warrant a modification of the child support paid on behalf of the older sibling is left to the discretion of the trial court.

An issue that frequently arises in the context of an increase of income is the effect, if any, of a parent who pays child support obtaining a second job. In examining whether or not to increase a payor’s child support obligation due to the individual finding additional employment,

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<sup>17</sup> For a more comprehensive discussion of this concept, see *Thompson vs. Dehne* (2009-NMCA-120), which addresses the birth order of siblings and the step down in a payor’s gross monthly income for determination of child support for younger children.

the trial court will examine several factors: whether or not the individual's "first" job is full time or part-time; the amount of additional income the individual receives from the subsequent employment; the consistency of the work; whether or not the paying parent worked a second job prior to the establishment of the child support obligation; and the general equities of the case, including the amount of child support already being paid. The determination of whether or not to include earnings from a second job in the calculation of child support is left to the sound discretion of the trial court to weigh in light of the factors set forth above.

### **9: Failure of Courts to Distinguish Between Parents Who Can Afford to Pay Support but Refuse to Do So and Parents Who Lack the Ability to Pay Support**

Courts do distinguish between parents who are able to pay child support but refuse to do so and those who lack the ability to pay child support. One of the chief instruments of enforcing a child support order is to file a Motion for Order to Show Cause<sup>18</sup> against the non-paying parent. The major elements of a Show Cause hearing are: 1) Notice; 2) an opportunity to be heard; and 3) a determination as to whether or not an individual has an ability to comply with the terms of a court's order.

At the hearing, the payor is afforded the opportunity to explain to the court why child support payments have not been made pursuant to the court's order. If an individual states that child support cannot be paid due to unemployment, the court will explore the reason(s) for the unemployment and will determine if in fact the parent does or does not have the ability to pay child support. If it is determined by the court that the payor lacks the ability to pay, the court does not find the individual in contempt of court and may even modify the child support obligation.

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<sup>18</sup> In a hearing on a Motion for Order to Show Cause, the individual is required to demonstrate why he or she should not be found to be in contempt of court for non-compliance with an order of the court.

## CHILD SUPPORT GUIDELINE REVIEW

As indicated above, the federal government has mandated that all states have in place guidelines to be used in determining child support awards. In addition to mandating the development of these guidelines, the federal government requires that states undertake a quadrennial review of their guidelines.<sup>19</sup> New Mexico provides for this quadrennial review by statute.<sup>20</sup>

Every four years, CSED commissions an economic study of the costs of raising a child in this State. The economic study is presented to the commission and the commission deliberates to determine whether or not the child support schedule used to determine the guidelines is equitable. The economic study examines the estimated child-rearing expenditures from the Consumers Expenditure Survey prepared by the federal Bureau of Labor Statistics, and includes analysis of the expenditures of families with children and childless families.<sup>21</sup> An additional component of the economic analysis is federal and New Mexico income tax rates, and income levels in New Mexico.

In conjunction with this economic analysis, CSED convenes a committee (“Guideline Review Committee”) to determine if a recommendation should be made to the Governor and the Legislature that the child support guidelines be modified or adjusted.<sup>22</sup> The Guideline Review Committee that meets to review the economic analysis is composed of the senior management of CSED (typically the Director or Deputy Directors), attorneys, judges, family court hearing officers, and members of the public, to include at least one payor of child support and one

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<sup>19</sup> “The State must review, and revise, if appropriate, the guidelines...at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.” (45 CFR §302.56(e)).

<sup>20</sup> NMSA 1978, §40-4-11.3.

<sup>21</sup> Relevant expenditures include costs for: food, housing, clothing, transportation, healthcare, education, etc.

<sup>22</sup> New Mexico’s child support guidelines were first enacted in 1988, and they have been updated three times since their adoption: 1991, 1994, and 2008.

recipient of child support.<sup>23</sup> The commission's meetings are subject to the Open Meetings Act (NMSA 1978, §10-15-1, *et seq.*). As such, public service announcements are issued by the Human Services Department to advertise the meeting(s) and the public is invited to attend and offer comments to be considered by the commission.

The child support guidelines that result are therefore the product of detailed economic studies and have been vetted by the Guideline Review Committee to ensure that they satisfy the Legislature's mandate set forth in NMSA 1978, §40-4-11.1(B)(2) to "*make awards more equitable*".

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<sup>23</sup> The Child Support Guideline Review Committee most recently met in August 2014.