Chapter 9

CHILD SUPPORT

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§9.1 INTRODUCTION

This chapter provides an overview of statutes and case law relating to the establishment and payment of child support obligations. In addition, the chapter analyzes the administrative rules and requirements the lawyer will encounter when dealing with a child support matter. This chapter overlaps with the topics of other chapters, but the overlapping is unavoidable if child support matters are to be placed in the proper perspective.
§9.2 EXISTENCE OF DUTY TO SUPPORT

American common law recognized the parents’, specifically the father’s, duty to support children. *Haxton and Haxton*, 299 Or 616, 621–624, 705 P2d 721 (1985) (absent statutory authority, support duty may be enforced by a direct action by child against the parent under ORS 109.010). The statutes conferring authority on the court to enter child support judgments are numerous. See ORS 109.010, 107.095(1)(b), 107.105(1)(c). See discussion in §9.3.

The linchpin of that statutorily imposed duty, containing essentially the same wording since enacted in 1853, is ORS 109.010: “Parents are bound to maintain their children who are poor and unable to work to maintain themselves; and children are bound to maintain their parents in like circumstances.” The term”children” connotes relationships rather than age. Adult children who meet the prerequisites, such as a mentally handicapped adult child, may enforce duty to support. *Haxton*, supra. The statutory duty to support exists independent of any court order or judgment. *State ex rel Adult & Family Services v. McDonald*, 42 Or App 793, 795, 601 P2d 875 (1979). The lack of a specific statutory procedure to enforce the parents’ duty of support does not proscribe its enforcement. When there is no applicable legal procedure, the duty may be enforced by any appropriate method recognized by the general law of procedure. *Haxton, supra*, 299 Or at 628–630.

“Both parents have an obligation to support their minor children. . . [P]ublic policy generally requires that a noncustodial parent pay some child support, even though the custodial parent can adequately support the children without the help of the noncustodial parent.” *Rice and Rice*, 60 Or App 95, 100, 652 P2d 877 (1982). See also, ORS 109.030; *Kenyon*
Educational and family expenses of their children can be charged against the property of either or both parents. ORS 109.012(1). When a parent has legal but not physical custody of a child, the parent may nevertheless be required to pay child support. ORS 25.240. Moreover, notwithstanding the court’s inability to award custody of a “child attending school” who is between the ages of 18 and 21, the court may nevertheless require support from either of the parents. ORS 107.108.

Under ORS 108.045, the duty of parents to support their children is extended to their stepchildren. The duty ceases when a judgment of dissolution is entered.

§9.3 STATUTES AUTHORIZING SUPPORT PROCEEDINGS OR SUPPORT ORDERS

Although statutes authorizing a court or an administrative agency to issue an order of support are numerous, those statutes also limit the authority of the court or administrative agency, as suggested by the following frequently-cited holding:

A divorce court is a court of limited jurisdiction, and it enjoys no power whatever except that expressly conferred upon it by statute. We have held many times that proceedings in a suit for divorce are purely statutory, and the powers which the court exercises are the mere creation of statute.

The following list sets forth statutes that authorize interested parties, including state agencies, to seek child support orders, or authorize a court or an administrative body to enter such orders, or both.

<table>
<thead>
<tr>
<th>STATUTE</th>
<th>TYPE OF PROCEEDING/COMMENT</th>
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<tr>
<td>ORS 25.275 et seq.</td>
<td>Establishes procedure for determining amount of child support; authorizes Department of Justice (DOJ) to establish formula.</td>
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<tr>
<td>ORS 107.105(1)(c)</td>
<td>Dissolution, annulment, separation.</td>
</tr>
<tr>
<td>COMMENT: Authorizes entry of order for child support in judgment.</td>
<td></td>
</tr>
<tr>
<td>ORS 107.095(1)(b)</td>
<td>Dissolution, annulment, separation.</td>
</tr>
<tr>
<td>COMMENT: Authorizes temporary, nonappealable support order during pendency of appeal of proceeding.</td>
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**PRACTICE TIP:** If support is awarded by judgment and an appeal is taken, a temporary support order may be obtained from the trial court pursuant to ORS 107.105(4) to be effective pending the appeal. The temporary order is appealable. If, after the appeal, the judgment as modified or affirmed requires payment of a greater amount of support for the period of time covered by the temporary order, then the obligated parent can be required to pay the difference. *Ferran and Ferran, 64 Or App 663, 669 P2d 385 (1983).*
COMMENT: Authorizes support order for children between ages of 18 and 21 who are attending school (see §9.30).

ORS 107.135(1)(b) Dissolution, annulment, separation.

COMMENT: Authorizes entry of child support order for children residing in Oregon who were not Oregon residents at the time of the judgment, who were unknown to the court, or who were erroneously omitted from the judgment.

ORS 107.718(1)(h) FAPA Restraining Order

COMMENT: The Family Abuse Prevention Act (FAPA), ORS 107.700 et seq., now authorizes the court “to provide for the safety and welfare of the petitioner and the children in the custody of the petitioner including, but not limited to, emergency monetary assistance from the respondent” ORS 107.718(1)(h) (emphasis added).

ORS 108.040 Recovery of expenses.

COMMENT: Permits recovery for necessities furnished to the family, including costs of education of the children. If there is a support order, the parent’s liability is limited by that order. See Coastal Adjustment v. Wehner, 246 Or 115, 423 P2d 967 (1967). Statutes regulating support after divorce control; if support was inadequate, court is statutorily empowered to modify divorce judgment on proper application).

ORS 108.110–108.130 Support during marriage.

COMMENT: Authorizes married person or state agency providing assistance to spouse or on behalf of minor children to seek support order.
ORS 109.010  Child support.
COMMENT: Authorizes a child, regardless of age, to seek support from parents if the child is poor and unable to provide for his or her own maintenance. See Haxton and Haxton, 299 Or 616, 705 P2d 721 (1985) (discussed in §9.2).

ORS 109.100  Child support.
COMMENT: Authorizes minor child or an administrator to seek support order. Incorporates ORS 108.110(3), 108.120, and 108.130.

ORS 109.103  Child support.
COMMENT: Authorizes either parent of a child born out of wedlock to seek support when paternity has been established. Incorporates ORS 107.093–107.425.

COMMENT: Authorizes parents, child, or state agency to initiate paternity proceedings. Authors court to enter support order.

ORS chapter 110  Uniform Interstate Family Support Act (UIFSA).
COMMENT: Establishes procedures for interstate enforcement of support obligations, whether or not there is an existing support order. The court is also authorized to establish paternity through the use of this chapter. ORS 110.438.

ORS 125.025  Protective Proceedings
COMMENT: Authorizes court to order support for any minor who is a respondent or protected person in a protective proceeding.
ORS 125.025(3)(k).

COMMENT: Authorizes the Division of Child Support (DCS) of the DOJ to seek and enter administrative orders for reimbursement and for child support whenever the Department of Human Services (DHS) makes payments to or for the benefit of a dependent child. See §9.7-1.

ORS 419B.400–419B.408 Juvenile court.

COMMENT: Authorizes juvenile court to require parents to pay support for child within its jurisdiction.

COMMENT: A child support judgment is not a judgment for the recovery of money and, hence, is not subject to ORS 19.335(1), which provides for stays on appeal when supersedeas undertakings are given. McGinley and McGinley, 156 Or App 449, 452–453, 965 P2d 486 (1998). Child support obligations are ongoing, apply to future financial obligations, and are not fixed as to future payments, whereas a judgment for the recovery of money is due for past events or conduct. A supersedeas undertaking does not apply to a child support judgment, notwithstanding that the statutory provisions relating to stays on appeal “apply to a domestic relations judgment.” See ORS 19.355(1).

§9.3-1 Child Support in the Domestic Partnership Context

In 2007, the Oregon Legislature passed the Oregon Family Fairness Act (ORS 106.300 to 106.340), commonly referred to as the Domestic Partnership Act. ORS 106.340(3) provides:

Any . . . responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law to or on a spouse with
respect to a child of either of the spouses is granted or imposed on equivalent terms, substantive and procedural, to or on a partner with respect to a child of either of the partners.

This statute authorizes a court to award child support in accordance with the Child Support Guidelines if a dissolution of a domestic partnership is entered into in a manner consistent with the Act and involving children. When both partners comply with Oregon’s adoption law (ORS 109.304–109.410), or the artificial insemination statute (ORS 109.239–109.247), the criteria for determining an award of child support in the context of dissolution (ORS 107.105(1)(c)) should be the same.

COMMENT: Because of the strong public policy favoring child support enforcement, foreign jurisdictions will likely give full faith and credit to Oregon child support orders entered in accordance with the Act, especially if the partners obtain a judgment of adoption or a declaratory judgment of paternity when the child is conceived through assisted reproductive technology. The Act confers on the court additional authority to order child support, although the court’s authority to require a legal parent to pay child support is apparent even without the Act.

§9.4 CHILD SUPPORT JURISDICTION

§9.4-1 Jurisdiction in Rem

The distinction between in rem jurisdiction and in personam jurisdiction is not a particularly useful distinction in family law, especially when it involves the law of support. See Williams v. North Carolina, 317 US 287, 297–298, 63 S Ct 207, 87 L Ed 279 (1942). The theory most commonly asserted in dissolution proceedings is that dissolution is an in rem action, with the marital status as the res, and the
res located at the domicile of either of the parties at the time the proceeding is commenced. See ORS 107.075. Although this legal fiction is sufficient to describe the termination of the husband-wife relationship, it does not encompass the termination of “personal” rights to support or property. The courts have developed the concept of the “divisible” divorce, whereby one state, on an ex parte basis, can terminate the marriage relationship while another state can have jurisdiction to decide questions of support and property. *Estin v. Estin*, 334 US 541, 545, 68 S Ct 1213, 92 L Ed 1561 (1948); *Vanderbilt v. Vanderbilt*, 354 US 416, 77 S Ct 1360, 1 L Ed2d 1456 (1957). See *Leuty v. Leuty*, 207 Or 562, 298 P2d 207 (1956). Cf. *Rodda v. Rodda*, 185 Or 140, 200 P2d 616, 202 P2d 638 (1949). See also *Weller v. Weller*, 164 Or App 25, 988 P2d 921 (1999).

§9.4-2 Personal Jurisdiction and the UCCJEA

“dissolution” or other proceeding in which the rights and obligations of an obligor are to be determined. *Adams and Adams*, 173 Or App 242, 245, 21 P3d 171 (2001); *see Horn, supra*, 97 Or App at 180. If a court enters a judgment for support without personal jurisdiction, the judgment is void. *Horn, supra*; *Henry, supra*; *Boer v. Boer*, 28 Or App 347, 349, 559 P2d 529 (1977). The question of personal jurisdiction for support purposes arises, however, only when an obligor has been served outside the state of Oregon and disputes the extent of his or her contacts with the state. For further discussion, see §9.8, regarding long-arm jurisdiction.

The initial inquiry in determining whether an Oregon court has personal jurisdiction under the due process clause is whether an obligor has established minimum contacts in Oregon. *Sutherland v. Brennan*, 321 Or 520, 529, 901 P2d 240 (1995). Minimum contacts are established when a party has “created connections with Oregon sufficient to receive the benefits and protections of Oregon’s laws.” *Adams, supra*, 173 Or App at 246.

To determine whether federal constitutional due process requirements are met, it is necessary to determine whether the out-of-state respondent has certain “minimum contacts” within the state such that the maintenance of the action does not offend “traditional notions of fair play and substantial justice.” *Internat. Shoe Co. v. Washington*, 326 US 310, 316, 66 S Ct 154, 90 L Ed 95 (1945). There are two parts to this test. First, a court must determine whether reasonable notice has been given to the respondent that an action has been brought. *Kulko v. California Superior Court*, 436 US 84, 91, 98 S Ct 1690, 56 L Ed2d 132 (1978); *Mullane v. Central Hanover Tr. Co.*, 339 US 306, 314, 70 S Ct 652, 94 L Ed 865 (1950). Second, there must be a sufficient connection.
between the respondent and Oregon to make it fair to require defense of
the action in Oregon. See Kulko, supra; Milliken v. Meyer, 311 US 457,
463, 61 S Ct 339, 85 L Ed 278 (1940); Horn and Horn, 97 Or App 177,
180, 775 P2d 338 (1989). Under the second part of this test, the court
examines whether the quality and nature of the respondent’s activity are
such that it is reasonable and fair to require the respondent to defend the
action in Oregon. See Kulko, supra, 436 US at 92; Internat. Shoe Co.,
supra, 326 US at 319; Horn, supra. The court also considers the interests
of Oregon and the petitioner in proceeding with the action in Oregon. See
2 L Ed2d 223 (1957). Because the above standards require a
determination of “reasonableness,” the “minimum contacts” test of
Internat. Shoe cannot be applied mechanically. The facts of each case
must be weighed to determine whether the requisite “affiliating
circumstances” are present. Kulko, supra; Griggs, supra, 51 Or App at
279–280; Adams and Adams, 173 Or App 242, 246–247, 21 P3d 171

For example, the mere act of sending a child to California to live
with her mother connotes no intent to obtain nor expectancy of receiving
a corresponding benefit in that state, nor does it result in a financial
benefit such that it would be fair for California to assert personal
jurisdiction. Kulko, supra.

After determining whether “minimum contacts” exist, the court
then must determine whether it is reasonable for the State of Oregon to
exercise personal jurisdiction. In so determining, the court, as more fully
explained below, has used a balancing test. Adams, supra, 173 Or App at
249. “The final due process inquiry is whether the exercise of jurisdiction
by the trial court comports with traditional notions of fair play and substantial justice” to exercise jurisdiction over a nonresident. Adams, supra, 173 Or App at 250; Horn, supra, 97 Or App at 180–181. It does not comport with traditional notions of fair play “when the only contacts with the forum state are the payment of child support, communications by mail and telephone with and about the minor child, and occasional family visits.” Horn, supra.

In Adams, supra, the court of appeals upheld an ex parte default divorce notwithstanding obligor’s motion to set aside those portions of the judgment that determined his personal and monetary obligations. The court denied obligor’s motion because obligor purposefully established “minimum contacts” with Oregon by previously establishing residency in Oregon, continuing to own property here, continuing to hold an interest in joint bank accounts in Oregon, seeking employment here, frequently visiting Oregon during his absence, maintaining an Oregon driver’s license, and recently receiving a loan from an Oregon bank secured by Oregon property. In light of these facts, the trial court’s exercise of personal jurisdiction over obligor was reasonable and comported with recognized notions of fair play and substantial justice. In determining whether the exercise of personal jurisdiction was reasonable, the court balanced the burden imposed on obligor to litigate in Oregon against several factors: “[obligee’s] interest in obtaining convenient and effective relief; Oregon’s interest in adjudicating the dispute; the interstate judicial system’s interest in obtaining the most efficient resolution of this controversy; and the shared interest of the several states in furthering fundamental substantive social policies.” Adams, supra, 173 Or App at 249. Cf. Oberoi and Oberoi, 145 Or App 51, 928 P2d 1007 (1996) (lack
of minimum contacts with nonresident spouse, even though the spouse frequently visited Oregon to see his children and stored a car in Oregon to facilitate those visits).

**PRACTICE TIP:** ORCP 4 A(1) provides that in personam jurisdiction is obtained over any party served in an action pursuant to ORCP 7 if the respondent is present within Oregon when served. When children are present within the state of Oregon, lawyers are well advised to wait for a noncustodial, nonresident parent to visit his or her child to obtain personal service within the confines of the state. See *State ex rel Hydraulic Servocontrols v. Dale*, 294 Or 381, 384–385, 657 P2d 211 (1982).

Although the court must have personal jurisdiction before it can enter an order for child support, in entering such an order, the court need not have subject-matter jurisdiction over the question of custody, nor over the parties’ children. As set forth in the UCCJEA, “[c]hild custody determination’ does not include an order relating to child support or other monetary obligation of an individual.” ORS 109.704(3).

The necessity of obtaining personal jurisdiction over an obligor, notwithstanding which forum has the authority to award custody and parenting time, is a source of confusion to some lawyers. In *Creavin v. Moloney*, 773 SW2d 698, 703 (Tex App 1989) (citations omitted), the Texas Court of Appeals explained its rationale when uncoupling the UCCJEA from its authority to impose a child support order:

The rationale behind [the UCCJEA] is that due process requires that claims for child support be brought in a state where the [obligor] has at least some form of minimal contacts. This is because a support claim is analogous to a claim for debt and it is generally believed that the
courts of the State in which the [obligor] resides are in a better position to determine the [obligor’s] ability to pay. Child custody, on the other hand, focuses primarily on the “status” of the child, and it is generally believed that the state with the closest connection to the child has the greatest access to information concerning the child’s care, protection, training, and relationship. Moreover, the underlying principle behind jurisdiction in a child custody matter is the duty of the state to look after the welfare of individuals residing within its borders. However, the special jurisdictional principles used in custody determinations which are based on “status” or “subject matter” formulate a narrow exception to the “minimum contacts” standard, and do not include child support.

In determining whether it is reasonable for an Oregon court to exercise jurisdiction over an obligor, consider that the children remain residents of Oregon and—importantly—that “Oregon’s interest in providing a forum is substantial in another respect as well: if [obligor] does not provide for the children and [obligee] is unable to do so, the burden will fall upon the state of the residence to provide support for them. Adams, supra, 173 Or App at 249. “The shared interest of the several states in furthering substantive social policies favors resolving disputes concerning child support in the state of the children’s residence.” Id. The state of the children’s residence was nonetheless considered by the court only after it had first found that obligor had minimum contacts with the state. If competing states each have personal jurisdiction over an obligor, in establishing child support, Oregon courts will either defer to the state having jurisdiction over the question of custody and parenting time or retain jurisdiction over a case to establish child support if it has UCCJEA subject-matter jurisdiction.
Oregon has subject-matter jurisdiction over the issue of child support whether a judgment of child support from another state is properly registered in Oregon or not, as long as there is personal jurisdiction over the parties and the parties’ children reside in Oregon when the motion to modify is filed. See Klar and Klar, 118 Or App 538, 539, 848 P2d 144 (1993); Burbback and Burbback, 81 Or App 74, 724 P2d 853 (1986). In Burbback, Id. at 76–79, the court held that it had subject-matter jurisdiction when an obligee attached an authenticated copy of the parties’ California judgment to her motion to modify child support even though she had not registered the judgment in Oregon. Obligee and the children resided in Oregon and Oregon had personal jurisdiction over obligor, a Florida resident, at the time of the motion. See ORS 110.432, 110.436.

§9.4-3 Child Support and UIFSA

If one of the parties has moved from the state or, alternatively, a party to a proceeding that resulted in a child support order has moved to Oregon from another state, the provisions of the Uniform Interstate Family Support Act (UIFSA) apply to determine which state has the authority to modify support. See ORS 110.303 et seq. Under ORS 110.327(1)(a) the state of Oregon, if it is the state issuing the initial child support order, will have “continuing, exclusive jurisdiction over a child support order” as long as either obligor or the child remain residents of the state of Oregon.

There exists a federal statute, consistent with UIFSA, titled the Full Faith and Credit for Child Support Orders Act (FFCCSOA). 28 USC §1738B. The following provisions of the federal statutory scheme are
equally applicable and preempt the Oregon UIFSA statute to the extent they are inconsistent.

Under the FFCCSOA, 28 USC §1738B(d): “A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child’s State or the residence of any contestant. . . .” (emphasis added). See ORS 110.327(1).

And 28 USC §1738B(e) provides:

A court of a State may modify a child support order issued by a court of another State if —

(1) the court has jurisdiction to make such a child support order . . . ; and

(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child’s State or the residence of any individual contestant; or

(B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order. (Emphasis added.)

ORS 107.135(10)(b) mandates that the state of Oregon “shall recognize the provisions of the federal Full Faith and Credit for Child Support Orders Act (28 U.S.C. 1738B).”

Finally, ORS 110.411 provides that the law of the issuing state governs “the nature, extent, amount and duration” of current support obligations. Hence, the issuing state statutes governing duration of support, and the state’s guideline scale and formula governing the amount of support, trump those of Oregon.
Under the terms of UIFSA, “[i]f only one tribunal has continuing, exclusive jurisdiction, then the order of that tribunal is the controlling order. If more than one tribunal has continuing, exclusive jurisdiction, then the order issued by the tribunal in the current home state of the child controls, if such an order exists.” *Cohen v. Powers*, 180 Or App 409, 413, 43 P3d 1150 (2002). In *Cohen*, the Florida support order controlled in accordance with ORS 110.333(2) because the child’s home state was Florida. *Id.* at 416.

A motion for modification filed in accordance with ORS 107.135 does not confer authority to modify a foreign child support judgment to extend the judgment beyond the original expiration date of age 18. ORS 110.432(3) of UIFSA provides that an Oregon court may not modify any aspect of the child support order that may not be modified under the laws of the issuing state. *Cooney & Cooney*, 150 Or App 323, 327–328, 946 P2d 305 (1997).

If an Oregon court has jurisdiction to modify the child support component of an out-of-state “family support award,” it may modify the child support component of the judgment under the terms of UIFSA, ORS 110.426 to 110.436 and ORS 110.432(1)(b). The latter statute allows Oregon to acquire jurisdiction over child support awards from an issuing tribunal, provided those awards are expressly made subject to transfer by mutual consent of all the parties. *Daly and Daly*, 228 Or App 134, 141–142, 147, ___ P3d ___ (2009).

§9.4-4 Use of Long-Arm Jurisdiction

To obtain personal jurisdiction over a person who is not found within Oregon, both statutory and constitutional requirements must be

A court of this state having jurisdiction of the subject matter has jurisdiction over a party served in an action pursuant to Rule 7 under any of the following circumstances:

. . . .

K(1) In any action to determine a question of status instituted under ORS chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state.

K(2) In any action to enforce personal obligations arising under ORS chapter 106 or 107, if the parties to a marriage have concurrently maintained the same or separate residences or domiciles within this state for a period of six months, notwithstanding departure from this state and acquisition of a residence or domicile in another state or country before filing of such action; but if an action to enforce personal obligations arising under ORS chapter 106 or 107 is not commenced within one year following the date upon which the party who left the state acquired a residence or domicile in another state or country, no jurisdiction is conferred by this subsection in any such action.

K(3) In any proceeding to establish paternity under ORS chapter 109 or 110, or any action for declaration of paternity where the primary purpose of the action is to establish responsibility for child support, when the act of sexual intercourse which resulted in the birth of the child is alleged to have taken place in this state.
The exercise of long-arm jurisdiction is limited by the due process clause of the Fourteenth Amendment to the United States Constitution as set out in ORCP 4 L, which states: “Notwithstanding a failure to satisfy the requirement of sections B through K of this rule, in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States.” Under this provision, the questions regarding compliance with statutory and state and federal constitutional requirements merge. Some cases will fall outside the scope of ORCP 4 K but within the scope of ORCP 4 L.

In Griggs, supra, obligee, an Oklahoma resident, requested Oregon to enter a child support order and a judgment for past-due support against obligor under ORS chapter 110 (now the UIFSA statutes). The past-due support accrued under an Oklahoma divorce decree obtained after notice to obligor by publication. The trial court entered an order for current support, but not for past-due support. The court of appeals reversed as to past-due support. Under Oklahoma’s long-arm statute, the Oklahoma court had personal jurisdiction. Notice by publication was authorized. Obligor and Oklahoma had the following “affiliating circumstances” justifying the assertion of personal jurisdiction: (1) Oklahoma was obligor’s personal and marital domicile, (2) obligor availed himself of Oklahoma law by relying on obligee to obtain a divorce decree there, (3) obligor had intercourse there, and birth of a child whom he would have to support was a foreseeable consequence of that act, (4) Oklahoma had an interest in providing jurisdiction because it would have to support the child if obligor did not, (5) obligor did not show any other forum in which obligee could obtain relief and, by abandoning her there, made it
an economic necessity to live and bring her divorce action there, and (6) it is in keeping with Oregon’s social policy to grant full faith and credit, because Oregon has long-arm statutes (ORCP 4 K(2)–(3)) authorizing jurisdiction of Oregon courts over nonresidents.

§9.4-5 Venue Distinguished from Jurisdiction

Although jurisdiction deals with the court’s authority to hear a case, venue refers to the proper county where the support action should be brought. See Mutzig v. Hope, 176 Or 368, 385–388, 158 P2d 110 (1945). If the action is brought in the wrong county, the court may, on motion of either party, transfer the case to the county where venue lies as long as the motion is not made for the purpose of delay. ORS 14.110. The failure to move for a change of venue waives the objection because a defect in venue is not jurisdictional. Mack Trucks, Inc. v. Taylor, 227 Or 376, 381–382, 362 P2d 364 (1961); Hanzlik v. Hanzlik, 110 Or 95, 99–100, 222 P 1081 (1924). A motion for change of venue is the sole remedy to cure a defect in venue. Mack Trucks, supra, 227 Or at 382.

If a party seeking modification or enforcement of a child support order files a certificate stating that a party is currently in another county in Oregon, the court may, on motion of the party, order that certified copies of the files in the original proceeding be transmitted to the court of any Oregon county in which obligee or obligor resides, or in which property of obligor is located. ORS 25.100(1). According to the statute, that county is deemed “auxiliary” to the county in which venue was initially established. ORS 25.100(2). Although practices may vary from county to county, statutes addressing the question of venue do not
specifically address whether venue can be changed after entry of judgment.

The following statutes govern venue for various support proceedings:

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## §9.5 FACTORS AFFECTING AMOUNT OF CHILD SUPPORT

### §9.5-1 Child Support Guidelines

The Family Support Act of 1988, Pub L No 100-485, 102 Stat 2343, required that by October 13, 1989, all states have in effect child support guidelines establishing presumptively correct support awards and all support adjudications. 42 USC §667(a).

The Oregon Legislature complied with the federal mandate with what are now ORS 25.270–25.287. Pursuant to the statutory scheme, the Division of Child Support (DCS) of the DOJ has adopted administrative rules establishing the guidelines applicable in any judicial or administrative proceeding for the award of child support. ORS 25.275(1). OAR 137-050-0700 to 137-050-0765 and the Obligation Scale at the appendix.

Under ORS 25.270(3) the formula establishing the presumptive amount of child support must “be reviewed at least once every four years to insure that the application of the formula results in appropriate child support awards.” The guidelines apply to all judicial and administrative actions initiated or pending after the effective date of the rules. OAR 137-050-0700(2)(4). The adoption of new guidelines does not, in and of itself, “constitute a substantial change in circumstances for purposes of modifying a child support order.” OAR 137-050-0700(3).


The guidelines are based on what is called the “Income Shares Model.” Under that model, a “child is entitled to benefit from the income of both parents to the same extent that the child would have benefited had the family unit remained intact.” ORS 25.275(2)(a). Accordingly, the Income Shares model requires a calculation based on the “share in the costs of supporting the child in the same proportion as each parent’s income bears to the combined income of both parents.” ORS 25.275(2)(b). The guidelines were adopted to avoid a situation in which the child for whom support is sought attains fewer benefits from the income and resources of the absent parent than other children of that absent parent. ORS 25.275(3).
The Obligation Scale, based upon “a national average of incomes and costs of living,” is applicable even if a parent “resides or works in another state.” OAR 137-050-0725(1).

The current Parenting Time Credit rule eliminates the concept of Parent A and Parent B. The credit now equals the parents’ parenting time multiplied by the basic support obligation. The basic support is increased by 50% for shared custody to reflect fixed duplicated expenses. This method, although not perfect, reduces the large “bumps” at 25% and 50% parenting time, which formerly encouraged litigation, and creates a more comparable standard of living for the child between the parents’ households.

PRACTICE TIP: Practitioners should be aware that the new Parenting Time Credit Rule may still yield a “bump” at 25%, may over-credit obligors in standardized parenting time plans, or may not reflect significant differences between variable expenses and fixed, duplicated expenses.

The child support guidelines enacted in Oregon and other states have withstood a number of constitutional and administrative rule challenges. See Herd v. Support Enforcement Division, 137 Or App 633, 906 P2d 870 (1995); P.O.P.S. v. Gardner, 998 F2d 764 (9th Cir 1993) (upholding constitutionality of Washington guidelines). The court of appeals, in Guthrie v. Support Enforcement Division, 110 Or App 622, 823 P2d 1033, adhered to on reconsideration, 112 Or App 266 (1992), rejected a panoply of supposed defects similar to constitutional challenges that were rejected by the Ninth Circuit in P.O.P.S., supra.

The federal “best interests of the child” standard, as mandated by the federal regulations, 45 CFR §302.56(g) (requiring that state rebuttal
criteria “must take into consideration the best interests of the child”), ensures flexible consideration by the trier of fact of all the comprehensive factors that the federal authority has deemed necessary in formulating the child support obligation. Cf. Watters and Watters, 47 Or App 483, 486, 614 P2d 589 (1980) (reducing obligor’s monthly lien payments to wife to enable obligor to meet child support obligation); Hockema v. Hockema, 18 Or App 273, 276, 524 P2d 1238 (1974) (excessive child support order will discourage obligor from working, staying near his children, and paying his support). The trial court’s authority is circumscribed to the extent that the determination of such child support amounts be based on economic factors that bear on the needs and the best interests of the children. Petersen and Petersen, 132 Or App 190, 200, 888 P2d 23 (1994). Cf. State ex rel DHR v. Fairchild, 159 Or App 517, 522, 979 P2d 768 (1999) (children’s best interests required father to pay presumed amount of child support even though he had incurred debts in reliance on mother’s representation that children were to be adopted).

For example, if the trial court sets obligor spouse’s support based on significant overtime, support set at a level commensurate with significant overtime may not allow obligor parent to continue participating in desirable child-rearing activities or to continue a beneficial parenting relationship with the child. However, an analysis by the court of how the economic factor (the parent’s earnings from overtime) bears on the best interests of the children would result in an adjustment of support to serve both the needs and the best interests of the children. Petersen, supra, 132 Or App at 200–202.

Arguably, the federal “best interests” standard gives parents some flexibility when deciding to deviate from the presumed guidelines
amount. This flexibility is more important when, for example, the parents’ combined gross income is substantial enough to result in a guideline child support obligation that exceeds the cost of providing for the child’s basic financial “needs,” such as higher education. Such “best interest” flexibility has been incorporated into the new Agreed Support Amount rule, discussed at §9.5-12.

§9.5-2 Burden of Proof

Unaddressed by the guideline statutes and regulations (see §9.5-1) is the evidentiary burden necessary to rebut. Oregon has adopted the so-called Morgan theory of presumptions, giving presumptions a much greater force than they had under prior Oregon law. OEC Rule 308, Legislative Commentary. See LAIRD C. KIRKPATRICK, OREGON EVIDENCE §308 (4th ed 2002; supplemented periodically). A civil presumption is defined in ORS 40.120 as follows: “In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.” The Morgan approach to rebuttable presumption has been criticized in Oregon as leading to inconsistent and confusing results, see, e.g., Ronald B. Lansing, Enough is Enough: A Critique of the Morgan View of Rebuttable Presumptions in Civil Cases, 62 OR L REV 485 (1983). The Morgan approach, however, remains unchanged. See, Massee and Massee, 328 Or 195, 203–205, 970 P2d 1203 (1999).

The rebuttable presumption “is one that may be overcome if the party against whom the presumption is directed submits probative evidence that the nonexistence of the presumed fact is more probable than its existence.” Redler and Redler, 330 Or 51, 60, 996 P2d 963
(2000). The party seeking a departure from the presumed amount “has the burden of coming forward with probative evidence that would support a finding that it would be unjust or inappropriate to apply the formula in establishing a child support obligation.” Id. The presumption can be rebutted by submitting “such probative evidence that it would be an abuse of discretion not to find that it would be unjust or inappropriate to apply the formula.” Id. at 61 (emphasis added).

PRACTICE TIP: The Redler case highlights the broad discretion trial courts may exercise in refusing to consider rebuttal evidence when evaluating whether or not a departure from the presumed correct guidelines amount is appropriate in a given case. When the noncustodial parent seeks to introduce evidence of other available income of the child in seeking a departure from the guidelines, counsel should argue that such evidence is admissible not only as being relevant but also to demonstrate that the application of the formula would be unjust or inappropriate in the particular case. Such an offer of proof will avoid misinterpreting the trial court’s ruling and will preserve the record for appellate review. However, on appeal, counsel now faces the additional hurdle of convincing the appellate court to exercise its discretion to either review the matter de novo or make a factual finding anew on the record. ORS 19.415(3)(b), ORAP 5.40(8).

The rebuttal criteria are now found at OAR 137-050-0760. In Rossi and Rossi, 128 Or App 536, 548, 876 P2d 820 (1994), the Court of Appeals held that “the guidelines expressly preserve the trial courts’ authority to make adjustments to an award otherwise presumed correct, if they make a finding that the award is not ‘just.’” The court
supplied some detail in *Wesley and Wesley*, 125 Or App 128, 131, 865 P2d 432 (1993), holding that a finding must be made with sufficient specificity for meaningful review; the trial court must include the specific reasons for the variation. In *Wesley, supra*, the trial court failed to identify “the extent or nature of the ‘other resources’ of father, nor did it specify the ‘hardship’ of mother.” *See also Larkin and Larkin*, 146 Or App 310, 314–315, 932 P2d 115 (1997) (trial court’s reference to “the other equities and findings in the case” as a rebuttal factor was too vague a reference); *Van Etten and Van Etten*, 158 Or App 122, 972 P2d 1213, *rev. denied*, 328 Or 246 (1999) (court remanded case to trial court to recalculate the child support amount, noting that the trial court has a responsibility to make a record of “‘written findings or findings on the record,’” that does not exist in the ordinary case); *Allen and Allen*, 168 Or App 97, 100, 4 P3d 81 (2000) (trial court’s finding that “‘[t]he guideline amounts for shared custody are inadequate and inequitable’ . . . does not state a specific basis for departing from the presumptive support obligation’’); *Schmidt and Sweitz*, 172 Or App 182, 185–186, 18 P3d 431 (2001) (trial court’s variation of $2.40 from the presumptive child support amount, using mother’s estimate of child care costs, was a negligible difference in either the numbers or the calculation technique used by the trial court; since the trial court did not intend to make any departure from the presumptive child support amount, no written findings or a specific finding was required).

However, “[t]here is no support in ORS 25.280 or former OAR 137-050-0333(2) that a court can ‘impliedly’ deviate from the guidelines.” *Berry and Berry*, 196 Or App 296, 300, 101 P3d 817 (2004).
Where the record contains no findings or explanation of how or why the trial court deviated from the child support formula, the appellate court will remand for recalculation. Despite the court’s authority to review *de novo*, it is not appropriate to recalculate child support “in the first instance on appeal.” *South and South*, 222 Or App 403, 405, ___ P3d ___ (2008).

A trial court must now accept the parties’ child support settlement agreement to the effect that an obligor pay 10% more or 10% less than the presumed or rebutted amount of child support, as such an agreement is presumed to be just and appropriate. OAR 137-050-0765. Lawyers should not rely on the court to look behind stipulations that, with very limited exceptions, will bind a party both as to the amount of child support and as to the findings that underlay the determination. *See ORCP 67 F.* A specific stipulation in open court to an amount of child support that is accepted by the court “cannot be set aside at the behest of a party except on a showing of fraud, mutual mistake or the actual absence of consent.” *Lorenz and Lorenz*, 104 Or App 438, 439, 801 P2d 892 (1990). An erroneous child support computation worksheet offered and entered into evidence without objection, however, does not bind a party to the erroneous amount of child support when the lawyer indicates that the worksheet required adjustment. *See Hirscht and Hirscht*, 115 Or App 724, 726, 840 P2d 98 (1992).

**§9.5-3 Computing Individual Child Support Obligation**

The formula used to determine the amount of support owed by a parent is set forth in OAR 137-050-0710:
(1) Apply standard rules of rounding to perform a child support calculation under the guidelines. Round to the hundredth place (two decimal places). For example, if the number beyond the one to be used is less than five, round the number down (2.443 becomes 2.44). If the number beyond the one to be used is equal to or greater than five, round up (2.445 becomes 2.45).

(2) Although reliable and comprehensive data is not available for costs of children between the ages of 18 and 21, the guidelines are used to calculate appropriate support amounts for a child attending school as defined in ORS 107.108. The presumption that the amounts are appropriate may be rebutted under OAR 137-050-0760.

(3) Determine an appropriate amount of support by following the steps in sections (4) through (16).

(4) Determine each parent’s income as defined in OAR 137-050-0715.

(5) Determine each parent’s adjusted income, as provided in OAR 137-050-0720.

(6) Determine each parent’s income share by dividing the total combined income into each parent’s individual adjusted income.

(7) Determine the basic support obligation and the parents’ shares, as provided in OAR 137-055-0725.

(8) Determine parenting time credit, if any, as provided in OAR 137-050-0730.

(9) Determine each parent’s costs for child care, as provided in OAR 137-050-0735.
(10) Determine the credit to be applied to the support obligation as a result of any Social Security or veterans’ benefits as provided in OAR 137-050-0740.

(11) Determine each parent’s support obligation before medical support by adding the parent’s basic support obligation, subtracting the parenting time credit, adjusting for child care expenses, and subtracting the amount of credit given for Social Security or veterans’ benefits. If the total is less than zero, use zero.

(12) Determine each parent’s support obligation after application of the self-support reserve as provided in OAR 137-050-0745. Round the result to the nearest dollar.

(13) Determine each parent’s medical support obligation, as provided in OAR 137-050-0750. Round the result to the nearest dollar.

(14) Determine whether the provisions of OAR 137-050-0755 (minimum order) apply, and if appropriate, enter the amount of the minimum order.

(15) If the support amount is unjust or inappropriate, as authorized in ORS 25.280, apply any appropriate rebuttal as provided in OAR 137-050-0760. Round the result to the nearest dollar.

(16) Determine whether an agreed support amount is appropriate as provided in OAR 137-050-0765.

The amount of child support to be paid as determined in steps (1) through (14) above is presumed to be the correct amount. ORS 25.280. This presumption may be rebutted, OAR 137-050-0710(15), as discussed in §9.14.

Return on capital, such as interest, trust income, annuities and investment income is considered part of income. OAR 137-050-
0715(2)(b). Return of capital (such as repayment of principal on a contract) is a rebuttal factor. OAR 137-050-0760(1)(p).

The term *adjusted income* is separately defined at OAR 137-050-0720(1):

(1) “Adjusted income” means income, as determined in OAR 137-050-0715, after:
   (a) Deducting mandatory contributions to a union or other labor organization;
   (b) If health care coverage is ordered as provided in ORS 25.323, deducting any cost associated with enrolling or maintaining the providing party in the insurance, if enrollment of the providing party is necessary to insure the child;
   (c) Deducting the parent’s monetary spousal support obligation, whether ordered in the same or a different proceeding, to this or a different party and whether paid or not;
   (d) Adding the amount of court-ordered monetary spousal support owed to the parent, whether ordered in the same or a different proceeding, by this or a different party and whether paid or not; and
   (e) Applying the additional child deduction described in section (2) of this rule.

The term *non-joint child credit* is no longer used, being replaced by the *additional child deduction*, OAR 137-050-0720(2):

(2) A parent is entitled to an income deduction when the parent is legally responsible for the support of a child not included in the current calculation.
   (a) To qualify for the additional child deduction, the minor child must reside in the parent’s household or the parent must be ordered to pay ongoing support for that child.
   (b) A child attending school, as defined in ORS 107.108 and OAR 137-055-5110, qualifies the parent for the additional child
deduction only if the parent is ordered to pay ongoing support for the child attending school.

(c) A stepchild only qualifies a parent for an additional child deduction if the parent is ordered to pay ongoing support for the stepchild.

(d) To calculate the additional child deduction:
   (A) Subtract the union dues, health care coverage and spousal support deductions described in subsections 1(a), 1(b) and 1(c) of this rule from the parent’s income;
   (B) Add the amount of spousal support described in subsection (1)(d) of this rule to the parent’s income; and
   (C) Use the result to reference the obligation scale in the appendix using the income and number of children determined in this section to determine the total additional child deduction.

This additional child deduction includes the cost to the parent for the child health care coverage. OAR 137-050-0720(2)(d)(A).

The term *basic child support obligation* is defined in a stand-alone rule at OAR 137-050-0725. The child support scale includes ordinary unreimbursed medical costs of $250 per child per year. OAR 137-050-0750(1).

The most significant changes to the new guidelines are the Parenting Time Credit and methodology (discussed in §9.5-4), followed by the Parenting Time Credit for minor children as applied to children attending school, OAR 137-050-0730, as well as new rules for Child Care Costs, OAR 137-050-0735, Social Security and Veterans’ Benefits, OAR 137-050-0740, the Self-Support Reserve, OAR 137-050-0745, the Minimum Order, OAR 137-050-0755, the Agreed Support Amount, OAR 137-050-0765, and the elimination of single parent orders.
The scale has extrapolated support figures up to 10 children; for more than 10 children, the presumed support obligation will be the same as for parents with 10 children. OAR 137-050-0725(6). A deviation in the support obligation for more than 10 children may be demonstrated by resort to the rebuttal rule, OAR 137-050-0760. *Id.*

The Obligation Scale is now used to calculate appropriate support amounts for a child attending school as defined in ORS 107.108, notwithstanding that reliable data is unavailable for costs of children between the ages of 18 and 21. OAR 137-050-0710(2). Use of rebuttals at OAR 137-050-0760 is appropriate for this reason. *Id.*

**PRACTICE TIP:** Practitioners are encouraged to utilize Oregon’s Child Support Calculator, a step-by-step interview process to determine the correct support amount. Assistance is available at calculatorquestions@doj.state.or.us. To use this feature, the practitioner needs Adobe Acrobat Reader or, for more advanced users, the Child Support Guidelines Calculator—Microsoft Excel Workbook.

### §9.5-4 Parenting Time Credit

The Parenting Time Credit rule, OAR 137-050-0730, provides as follows:

1. For the purposes of this rule, “split custody” means that there are two or more children and each parent has at least one child more than 50 percent of the time.

2. If there is a current written parenting time agreement or court order providing for parenting time, the percentage of overall parenting time for each parent must be calculated as follows:

   a. Determine the average number of overnights using two consecutive years.
(b) Multiply the number of children by 365 to arrive at a total number of child overnights. Add together the total number of overnights the parent is allowed with each child and divide the parenting time overnights by the total number of child overnights.

(c) Notwithstanding the calculation provided in subsections (2)(b) and (2)(c), the percentage of parenting time may be determined using a method other than overnights if the parents have an alternative parenting time schedule in which a parent has significant time periods where the child is in the parent’s physical custody but does not stay overnight. For example, in lieu of overnights, 12 continuous hours may be counted as one day. Additionally, four-hour up to 12-hour blocks may be counted as half-days, but not in conjunction with overnights. Regardless of the method used, blocks of time may not be used to equal more than one full day per 24-hour period.

(3) If the parents have split custody but no written parenting time agreement, determine each parent’s percentage share of parenting time by dividing the number of children with the parent by the total number of children.

(4) If there is no written parenting time agreement or court order providing for parenting time, the parent or party having primary physical custody will be treated as having 100 percent of the parenting time, unless a court or administrative law judge determines actual parenting time.

(5) If the court or administrative law judge determines actual parenting time exercised by a parent is different than what is provided in a written parenting plan or court order, the percentage of parenting time may be calculated using the actual parenting time exercised by the parent.

(6) If each parent’s parenting time is at least 25 percent, or the child resides with a caretaker or is in the care of a state agency and
the obligated parent has at least 25 percent parenting time, a parenting
time credit will be calculated as follows:

(a) Multiply the combined basic child support obligation
by 1.5 (150 percent); and

(b) Except as provided in subsection (c), multiply each
parent’s percentage share of parenting time by the combined basic
child support obligation in subsection (a). The result is the amount of
credit to be subtracted from the obligation determined in subsection (a)
for each parent;

(c) If the child resides with a caretaker or is in the care of a
state agency, multiply the obligated parent’s percentage share of
parenting time by the combined basic child support obligation in
subsection (a). The result is the amount of credit to be subtracted from
the obligation determined in subsection (a).

(7) The parenting time credit is applied to the entire
support obligation, including any support obligation for a child
attending school.

See discussion of Parenting Time Credit in §9.5-4.

In place of overnights, 12 continuous hours may be counted as one
day. In addition, blocks of four hours, up to 12 hours, may be counted as
half-days, but not in conjunction with overnights. Regardless of the
method used, blocks of time may not be used to equal more than one full
day per 24-hour period. OAR 137-050-0730(2)(c).

The new parenting time credit is prorated between all children. In
addition, the court has discretion to allocate parenting time different from
a party’s written parenting-time agreement or court order if the court or
administrative law judge determines that actual parenting time exercised
by a parent is different. OAR 137-050-0730(5). Such discretion enables
the obligor to enjoy more parenting time.
Under the new Parenting Time Credit rule, then, the court may simply recalculate the percentage of parenting time based on what is actually occurring, without changing the parenting time to which the parties are entitled, in arriving at a presumptively correct amount under the parenting time rule. *Cf. Bleiler & Bleiler*, 207 Or App 372, 142 P3d 97 (2006) (prior written court order could not be overridden).

The parenting time credit is also subject to specific rebuttals where the child is attending school or is not living with either parent. OAR 137-050-0760(1)(k).

§9.5-5 **Rebuttal Factors**

The Rebuttal rule, OAR 137-050-0760, provides for three (3) types of rebuttal events: (1) amounts used to rebut *income* will be applied before determining income shares; (2) amounts used to rebut *costs* will be based on respective income shares of the parties; (3) amounts used to rebut the *presumed support amount* will be applied on a dollar-for-dollar basis. OAR 137-050-0760(2).

As discussed in §§9.5-3 and 9.5-4, the amount of child support determined by the formula is presumed to be the correct amount of the obligation. However, this presumption may be rebutted by “a written finding or a specific finding on the record that the application of the formula would be unjust or inappropriate in a particular case.” ORS 25.280. The following criteria must be considered in making that finding:

1. Evidence of the other available resources of a parent. ORS 25.280(1); OAR 137-050-0760(1)(a).

2. The reasonable necessities of a parent. ORS 25.280(2); OAR 137-050-0760(2)(b).
Pre-guidelines authority recognized that the burden of paying support should not be so heavy as to “preclude the ability to support oneself.” *Hockema v. Hockema*, 18 Or App 273, 276, 524 P2d 1238 (1974). ORS 25.245 provides that

a parent who is eligible for and receiving cash payments under ORS 412.001 to 412.069 and 418.047, Title IV-A of the Social Security Act, the general assistance program as provided in ORS chapter 411 or a general assistance program of another state or tribe, the Oregon Supplemental Income Program or the federal Supplemental Security Income Program shall be rebuttably presumed unable to pay child support and a child support obligation does not accrue unless the presumption is rebutted.

When an obligor is receiving public assistance, this statute overrides the section of the guidelines administrative rules entitled “Minimum Order,” OAR 137-050-0755(2)(c)(C). When public assistance is not involved, the court must presume the parent has the ability to pay at least $100 monthly in child support unless the parenting time is equal, the parent is incarcerated or receives disability benefits as sole source of income. OAR 137-050-0755(2).

An obligor’s substantial consumer debt, his retirement fund payment, and his inability to qualify for a loan are not “reasonable necessities” under the rebuttal criteria. Discretionary expenses generally do not qualify as reasonable necessities. The obligor may rebut the presumption by offering evidence that creditors have been contacted in an attempt to reduce debt payments, the obligor has attempted to refinance a car, or has considered reducing a voluntary retirement fund payment. *Pedroza and Pedroza*, 128 Or App 102, 108, 875 P2d 478 (1994)
A deviation upward from the presumed amount of child support will be made where obligor files bankruptcy, discharging an equalizing judgment, forcing obligee to pay a number of debts, including sizeable attorney fees arising from the dissolution, that the court had previously ordered obligor to pay.” Howell and Hooyman, 171 Or App 545, 547, 16 P3d 1173 (2000) rev. denied, 332 Or 239 (2001).

(3) The net income of a parent remaining after withholdings required by law or as a condition of employment. ORS 25.280(3); OAR 137-050-0760(1)(c).

Former OAR 137-050-0333(1)(c) (2001) specifically cited the example of withholdings to include “the parent’s mandatory contribution to a retirement plan as a condition of employment.” That language was removed from this rebuttal factor in the 2003 guidelines. The 2007 Commentary to the rule discussed the change and noted that “any adjustment must be mandatory and significantly reduce or enhance the income that is available to the parent” to be considered a basis for rebuttal. 2007 Commentary to former OAR 137-050-0333(1)(c).

(4) A parent’s ability to borrow. ORS 25.280(4); OAR 137-050-0760(1)(d).

COMMENT: Although difficult to foresee the circumstances when a parent’s ability to borrow would play a key rebuttal factor, this criteria may become relevant when considering the totality of circumstances in assessing the parents’ actual and potential financial resources. See Shlitter and Shlitter, 188 Or App 277, 286–287, 71 P3d 154 (2003).

(5) The number and needs of other dependents of a parent. ORS 25.280(5); OAR 137-050-0760(1)(e).
A downward deviation may be justified when the noncustodial parent faces special hardships supporting stepchildren, because stepparents are legally responsible for the expenses of their stepchildren. ORS 108.045. See §9.7-2. This consideration becomes important in calculating “adjusted income,” because the parent can now qualify for an additional child deduction if that parent is ordered to pay support for the stepchild. OAR 137-050-0720(2)(c). Judicial antipathy may be anticipated toward allowing a rebuttal deviation based on additional expense as a result of stepchildren. Accordingly, any such deviation will need to be based on somewhat extraordinary facts. The rule is not limited to stepchildren and clearly applies to other dependents as well.

(6) The special hardships of a parent including, but not limited to, any medical circumstances, extraordinary travel costs related to the exercise of parenting time, or requirements of a reunification plan if the child is in state financed care. ORS 25.280(6); OAR 137-050-0760(1)(f).

This rebuttal is broadened by administrative rule to include the needs of a parent who is attempting to “comply with the specific requirements of a reunification plan or other agreement to reunite with their child(ren) who are in custody of Child Welfare or the Oregon Youth Authority.” 2007 Commentary to former OAR 137-050-0333. The presumed guideline amount may be reduced by expenses for parenting classes and counseling, medical costs, appropriate housing, transportation and visitation costs and the like. 2007 Commentary, supra.

In attempting to define extraordinary transportation costs, the 2007 Commentary cited the example of traveling a distance “which requires an overnight stay or transportation other than by auto. The parenting time credit is intended to provide for the basic travel cost of the
parent in exercising parenting time.” In appropriate cases, trial courts can justify deviations for extraordinary parenting time travel expenses consistent with the statutory “best interest” directive of ORS 107.105(1)(b). See, Rossi and Rossi, 128 Or App 536, 547–548, 876 P2d 820 (1994). However, an obligor’s house and car payments “do not normally constitute a special hardship,” putting obligor at a financial disadvantage. State ex rel DHR v. Fairchild, 159 Or App 517, 522, 979 P2d 768 (1999).

(7) The needs of the child. ORS 25.280(7). This new Rebuttable rule, found at OAR 137-050-0760(1)(o), provides:

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

(A) Expenses for extracurricular activities and
(B) Social Security benefits paid to a child because of a child’s disability;

The phrase ‘extraordinary or diminished’ was inserted before ‘needs of the child’ to avoid confusion about whether the needs of the child can serve as a basis for an upward, as well as a downward, deviation from the presumed amount of support.

The new Rebuttal rule considers extracurricular expenses to be wants, not needs, and therefore an issue that must be negotiated between the parents, as the issue is not accounted for in the guidelines. 2007 Commentary to former OAR 137-050-0333.

A child’s earnings may be considered as a rebuttal from the presumed child support amount if the evidence shows those earnings diminish the child’s need for parental support. See Redler and Redler, 330 Or 51, 996 P2d 963 (2000). The earnings should be considered
extraordinary, such as a large personal injury settlement or a significant trust fund, rather than a child’s regular job earnings or property; “[t]o conclude otherwise would negatively impact the parent-child relationship and provide a disincentive for children to obtain experience in the work force.” 2007 Commentary, supra. Likewise, Social Security benefits paid for a child’s disability should not be used to reduce a child support obligation, as those benefits “are intended to defray the additional costs associated with [the] child’s disability.” 2007 Commentary, supra. “In the vast majority of cases, a child’s earnings or property should not impact a parent’s responsibility to contribute to the support of his or her child.” 2007 Commentary, supra.

COMMENT: The guidelines apparently do not change the limitation that no support be ordered for a wealthy or self-sustaining child. See ORS 109.010. Still, in setting the amount of support, it is not improper for a court to refuse to consider the income of the parties’ children when the children are full-time students and the income is derived from summer employment. Cunningham and Cunningham, 74 Or App 311, 315–316, 702 P2d 1157 (1985).

See Wuepper and Wuepper, 109 Or App 172, 175, 818 P2d 964 (1991) (holding that a child’s desire to be a member of the U.S. Ski Team was not equivalent to a need); Dept. of Human Resources v. Lucia 130 Or App 130, 133, 880 P2d 505 (1994) (“child’s age, standing alone, is not sufficient to qualify as ‘the needs of the child’ sufficient to constitute a rebutting factor”); Wesley and Wesley, 125 Or App 128, 865 P2d 432 (1993) (trial court’s finding of special needs of child was insufficient for upward deviation from presumed amount, when trial court failed to

Consideration of whether the child’s needs warrant a deviation is fact specific to the case. For example, where a children’s trust directs that the income therefrom will not reduce obligor’s child support obligation, and obligor has substantial asset income to pay support, a downward deviation has been deemed inappropriate, Short and Short, 155 Or App 5, 13, 964 P2d 1033 (1998), especially if the children are young. Butler and Butler, 160 Or App 314, 981 P2d 389 (1999). Obligor may seek modification of the child support or the trust instrument itself when the children begin receiving trust benefits. Butler, 160 Or App at 324 n 5; ORS 107.105(1)(g)(c).

COMMENT: In view of the court’s holding in Dawson and Dawson, 142 Or App 35, 39, 919 P2d 517 (1996), lawyers should be cautious of advising obligor parent to agree that private schooling should continue. Such an agreement, whether oral or written, could result in an upward deviation.

In determining whether continued private education constitutes a “need of the child” rather than attendance at public schools, the court has considered the emotional trauma to a child of transferring out of private school if it occurs in the middle of a current school year. Niman & Niman, 206 Or App 259, 274–275, 136 P3d 105 (2006). Niman compares and contrasts with Dawson, supra, in two respects: (1) In Niman, the court entered an explicit finding of necessity for the children; (2) In Niman, as in Dawson, “[c]lass size, safety, and religious training [were]
legitimate concerns . . .”’’ Niman, supra, 206 Or App at 274–275 (quoting Dawson, 143 Or App at 39).

In Longcor and Longcor, 114 Or App 89, 834 P2d 479 (1992), the trial court made a downward adjustment from the presumptive support amount because of father’s direct, voluntary payments for the children’s parochial school tuition and other activities and needs. Father argued that he should be allowed a credit for his voluntary payments to be applied against this child support obligation. The court of appeals held that father had not established that his voluntary payments had “significantly reduced” mother’s expenses to support the children: “That he may pay for parochial school, entertainment and vacations does not overcome the presumption that he should pay his full share of child support.” Longcor, 114 Or App at 93.

COMMENT: The current Uniform Support Declaration set forth in the UTCR Appendix of Forms, form 8.010.5., unlike its predecessor, does not include a section detailing the monthly expenses of the parties’ children. Where child and spousal support are at issue, practitioners should attach a budget for the child[ren]. The omission of a separate budget for the children from the Uniform Support Declaration is arguably reflective of skepticism regarding the representations and occasional puffery which appeared on the list of expenses and perhaps is also recognition that the presumed expenses set forth in the Obligation Scale for a child is an adequate substitute for the prior budgetary information.

(8) The desirability of the custodial parent remaining in the home as a full-time parent and homemaker. ORS 25.280(8); OAR 137-050-0760(1)(g).
COMMENT: Before the guidelines were enacted, the court of appeals considered the desirability of a parent remaining in the home as a homemaker. *Hopkins and Hopkins*, 95 Or App 200, 204, 768 P2d 436 (1989). The *Hopkins* court concluded that wife’s desire to remain at home as a parent was not inappropriate as long as she did not cut her work hours in bad faith.

The 1994 Guidelines Commentary stated that “[i]n considering an argument that this criterion stand as the reason for a rebuttal, the trier will probably have to be persuaded both on the merits of the custodial parent remaining at home, the non-custodial parents’ ability to pay an increased amount and the equities of such an order.” Presumably, an increase would be demonstrated by the compelling desirability of the custodial parent’s remaining at home with the child; the failure of the custodial parent to produce the expected income to meet the proportionate needs of the child should be compensated for by increasing the noncustodial parent’s payments.

In *St. Sauver & St. Sauver*, 196 Or App 175, 183–184, 100 P3d 1076 (2004), the court of appeals held that the trial court must calculate child support using actual potential income, then deviate upwards based on the children’s need to have mother stay at home. The trial court used minimum wage for mother rather than potential income when the trial court found it to be in the children’s best interest for mother to remain at home.

(9) The tax consequences, if any, to both parents resulting from spousal support awarded, the determination of which parent will name the child as a dependent, child tax credits, or the earned income tax credit received by either parent. ORS 25.280(9); OAR 137-050-0760(1)(h). The
child support guidelines assume that the parent with primary physical custody will retain the child dependency exemption. OAR 137-050-0725(9).

Federal law controls which parent can or cannot claim the dependent child exemption. 26 USC 152(e). Neither state law nor state court judgments can order or control the allocation of the dependent child exemption. The IRS regulation, 26 CFR §1.152-4 (2008), clarifies the issue. Commentary to the regulation states: “A state court may not allocate an exemption because sections 151 and 152, not state law, determine who may claim an exemption for a child for Federal income tax purposes.” 73 Fed Reg 37800 (Column 1).

COMMENT: If a noncustodial parent claims a child as an exemption, aside from what remedies may be available through the IRS, the Rebuttal rule, OAR 137-050-0760(2)(h), specifically authorizes the fact finder to adjust child support, presumably in an amount equivalent to the value of the exemption lost to the custodial parent. Although the state court can deviate from the child support guidelines by taking the tax exemption and tax consequences into effect, the state court does not have the authority under federal law to “award” a dependent child exemption. Gleason v. Michlitsch, 82 Or App 688, 728 P2d 965 (1986) (no federal statutory basis for state court to award dependency exemption). The reasoning appears to be that the state court has jurisdiction over the parties and, through the contempt powers, can order a parent to waive the right to claim the dependent child exemption. However, if the custodial parent takes the dependent child exemption under federal law, and the
noncustodial parent then brings a contempt action, presumably federal law would preempt state law, and the custodial parent could not be held in contempt.

Where the tax effects of allowing obligor to claim deductions for the children are inconsequential, no deviation will be allowed. Sigler and Sigler, 133 Or App 68, 74, 889 P2d 1323 (1995); Ranes and Ranes, 118 Or App 264, 268–269, 846 P2d 1195 (1993). If the noncustodial parent is awarded the dependency exemptions, the trial court must enter written findings justifying rebuttal of the presumption favoring the custodial parent. Willey and Willey, 155 Or App 352, 963 P2d 141 (1998).

The 2007 child support guidelines commentary to former OAR 137-050-0333(1)(i) stated:

“The consideration of child tax credits or the earned income tax credit received by either parent was added to the rule in 2003. . . . In some circumstances, the income of the party may increase substantially as a result of these credits. The fact finder may use actual evidence of the . . . tax credit(s) in these scenarios.”

(10) The financial advantage afforded a parent’s household by the income of a spouse or another person with whom the parent lives in a relationship similar to husband and wife. ORS 25.280(10); OAR 137-050-00760(1)(i).

COMMENT: According to the 1994 Guidelines Commentary, the intention of this rebuttal criterion was to increase or reduce the presumptive child support amount depending on whether or not the custodial or noncustodial parent would benefit from the income of “a sharing of household expenses with another person or persons without regard to whether the person or persons be a spouse, a
person with whom the parent lives in a relationship similar to husband and wife or simply house mate or house mates.” The Commentary noted that this criterion may result in either an increase or a reduction depending on whether the custodial or noncustodial parent benefits from the income of the spouse or other person.

Accordingly, the trial court must determine the extent to which additional income attributable to an obligor’s spouse rebuts the presumed child support obligation, Ainsworth and Ainsworth, 114 Or App 311, 835 P2d 928 (1992). Where the contributions are irregular and uncertain in the context of obligee’s overall situation, a deviation is inappropriate. Howell and Hooyman, supra, 171 Or App at 548.

The 2007 Commentary to former OAR 137-050-0333, gave as an example an obligee who used to work full time but is no longer working because he or she is married to a spouse who earns a significant income. In such a situation, “his or her presumed income would be calculated based on a determination of potential income. Under this situation the fact finder may consider the financial advantage afforded to obligee’s household resulting from the spouse’s income to rebut the presumed child support amount.”

However, the rule is that the income of a parent’s new spouse should not be included in the parent’s income for purposes of computing child support. Hardiman and Hardiman, 133 Or App 112, 889 P2d 1354 (1995).

Additional Rebuttal Factors Set Forth in Administrative Rules

ORS 25.280 includes only those rebuttal factors listed above as sections (1) through (10). ORS 25.275, however, specifically directs that
“[t]he Division of Child Support of the Department of Justice shall establish by rule a formula for determining child support awards in any judicial or administrative proceedings. The additional rebuttal factors set forth below are consistent with the authority granted. The additional administrative rebuttal factors are set forth at OAR 137-050-0760(2)(j)–(p).

(11) The financial advantage afforded a parent’s household by benefits of employment, including but not limited to those provided by a family-owned corporation or self-employment, such as housing, food, clothing, health benefits and the like, but only if unable to include those benefits as income under OAR 137-050-0760(1)(j).

COMMENT: According to the former Guidelines Commentary, the “benefits in employment” might be any benefit not counted as “gross income” that provided a financial advantage. These benefits may include, but are not limited to, benefits for subsidized housing, transportation, food, clothing, and health. In allowing a rebuttal based on this criterion, the court should assign a dollar value to the benefit and enter a finding regarding how that amount affects the need for, or the ability to pay, child support. See Perlenfein and Perlenfein, 316 Or 16, 848 P2d 604 (1993) (undistributed income dividends of closely held corporation that is attributed to minority shareholder for income tax purposes is also attributable to shareholder for purpose of determining child support obligation).

(12) Evidence that a child who is subject to the support order is not living with either parent or is a “child attending school” as defined in ORS 107.108. OAR 137-050-0760(1)(k).
When a child is in the custody of neither parent, the court calculates each parent’s support obligation by performing a single calculation for each parent using the caretaker’s child care costs and the procedure of OAR 137-050-0710. OAR 137-050-0700(5).

The methodology for computing support for a child attending school is discussed further in §§9.6-1 to 9.6-1(d).

COMMENT: In arguing for a rebuttal of the presumptive amount of child support, counsel should consider whether the adult child has income of his or her own, has scholarships or loans, lives on his or her own, or lives with roommates in a cost-sharing arrangement. See, ORS 107.108(14) (“support . . . is not intended to replace other resources or meet all of the financial needs of a child attending school.”) There are no appellate cases interpreting the rebuttal factor listed above. In light of the fact that the Obligation Scale now appears to apply to a child attending school, OAR 137-050-0725(2), 137-050-730(6), a trial court may be no more circumspect in presuming the needs of a child attending school than for a child less than 18. The rebuttal criteria, together with the statute regarding a child attending school, nonetheless give the court wide latitude in fashioning support for the adult child.

In Sandlin and Sandlin, 113 Or App 48, 50, 831 P2d 64 (1992), the court required obligor to continue paying child support to his 18-year-old daughter who was attending a community college notwithstanding the fact that the daughter was “totally emancipated” and “living openly . . . in a relationship which resemble[d] marriage.” However, the court closely analyzed the child’s needs and expenses and limited its award to an amount necessary to meet those needs.
Since a parent’s total child support obligation for all joint children is to be determined in one calculation, a decision to deviate from the guidelines in order to cover more of a CAS’s educational expenses will require findings to support the deviation from the guidelines. *McGinley and McGinley*, 172 Or App 717, 735, 19 P3d 954, *rev. denied*, 332 Or 305 (2001).

(13) Prior findings in a judgment, order, decree, or settlement agreement that the existing support award was made in consideration of other property, debt, or financial awards, and those findings remain relevant. OAR 137-050-0760(1)(l).

(14) The net income of the parent remaining after payment of mutually incurred financial obligations. OAR 137-050-0760(1)(m).

COMMENT: Former Guidelines Commentary noted that this criterion could involve a situation in which the parties jointly purchase property but, after separation, only one of the parties assumes responsibility for paying the obligation, relieving the other parent of significant financial burden. The party assuming the obligation would argue for rebuttal of the presumed support amount. *However, see Pedroza, supra.*

(15) The tax advantage or adverse tax affect of a party’s income or benefits. OAR 137-050-0760(1)(n).

COMMENT: According to the 1994 and 2007 Guidelines Commentary, the amount of child support resulting from application of the guidelines was based on the net income from a particular gross income amount, assuming a tax deduction claim for only one person (i.e., the person whose income is being determined). This so-called method of leveling the playing field
allowed similar net incomes to be attributed to people with similar gross earnings regardless of the number of exemptions they may claim. This rebuttal criterion is used, however, if the nature of the income or benefit received by the parent is subject to either more or less taxes than is customary in Oregon. If the income or benefit (e.g., workers’ compensation benefits, welfare benefits, Oregon lottery winnings, and disability benefits) is not taxable as assumed by the guidelines, then the presumed correct support amount may be incorrect and should be subject to rebuttal under this rule.

*Compare Hoag and Hoag*, 122 Or App 230, 235, 857 P2d 208 (1993) (court ruled no deviation upward was appropriate notwithstanding tax-free nature of disability income, when guidelines did not “explicitly require the court to consider the potential tax consequences of [disability] benefits”; case was decided, however, before adoption of this explicit rebuttal factor); *with Howell*, supra, 171 Or App at 548–549 (court held that the trial court correctly adjusted obligor’s income upward to reflect the fact that it was not subject to income tax, taking into account the parties’ overall financial situation).

In *South and South*, 222 Or App 403, ___ P3d ___ (2008), the court of appeals, following its holding in *Howell and Hooyman*, 171 Or App 545, 548–549, 16 P3d 1173 (2000), held that an upward adjustment of mother’s income, to reflect the fact that her income was not taxable, was appropriate.


**COMMENT:** The former Guidelines Commentary cautioned that the term *return of capital* should not be confused with the term
return on capital. Return of capital can constitute a portion of a payment received on a land sale contract in payment for real property which represents the principal and not the interest. On the other hand, return on capital is regarded as interest earnings on investments. It is still considered actual income pursuant to OAR 137-050-0715(2)(b). In this scenario, then, return of capital constitutes income derived from conversion of the real property (capital) into monthly income, with the interest payment constituting return on capital. The intention is to clearly delineate that return of capital is counted as a rebuttal criteria for purposes of the guidelines.

The 2007 Commentary to former OAR 137-050-0333(1)(p) stated that “it may be appropriate to increase the parent’s income in certain scenarios, such as where a parent has opted to live off of the sale of an asset rather than earning income.” It is not, however, “intended that an obligated parent should be required to spend down an asset in order to pay support.”

§9.5-6 Other Non-Enumerated Rebuttal Factors

The rebuttal factors are not limited to those enumerated in the “rebuttal” statute or regulations. ORS 25.280; OAR 137-050-0760(2).

For example, ORS 25.245(1) “establishes a rebuttable presumption that an obligor is unable to pay child support if the obligor is receiving cash payments from any of a variety of government assistance programs, including the federal Supplemental Security Income Program.” Gellatly v. Gellatly, 243 Or App 367, 368, ___ P3d ___ (2011).
In *Petersen and Petersen*, 132 Or App 190, 198, 888 P2d 23 (1994), the court of appeals authorized the trial court to consider “nonenumerated economic factors that are relevant to the needs of the dependent child.”

In *Larkin and Larkin*, 146 Or App 310, 313–314, 932 P2d 115 (1997), obligor argued that the parties’ income disparity and the fact that the parties had joint legal custody were other rebuttal factors not specifically enumerated. The court of appeals rejected these arguments, holding that the parties’ income disparity is a determinative factor in calculating the guidelines amount, not a rebuttal factor, because the relative incomes of the parties are a key component in computing the child support obligation. Joint legal custody is not a rebuttal factor, either, because rebuttal criteria are facts that have a significant enough economic effect on the parties that those facts render the presumptively correct basic child support obligation an “amount [that] is unjust or inappropriate.” OAR 137-50-330(2)(b).

Joint legal custody of a child has no such affect. Neither is it an “economic” factor that is “relevant to the needs of the dependent child.”

*Larkin, Id.* (quoting *Petersen and Petersen*, 132 Or App 190, 198, 888 P2d 23 (1994)). The label of joint legal custody, as defined in ORS 107.169, is not relevant to the actual number of overnights a noncustodial parent enjoys as contemplated under this section of the guidelines.

Other irrelevant non-enumerated rebuttal factors are (1) the fact that neither party paid child support to the other since the dissolution—this does not relate to the factor pertaining to the needs of the child; and (2) the contention that it is poor public policy to require a legal custodian

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who has the child the majority of overnights to pay child support. *Cain and Gilbert*, 196 Or App 28, 32–33, 100 P3d 735 (2004).

§9.5-7 Income

§9.5-7(a) Income Defined by Rule

The new Income rule, OAR 137-050-0715(1)(2) provides as follows:

1. “Income” means the actual or potential gross income of a parent, as determined in this rule.

2. “Actual income” means all earnings and income from any source, except as provided in section (4). Actual income includes but is not limited to:
   a. Employment-related income including salaries, wages, commissions, advances, bonuses, dividends, severance pay, pensions, and honoraria;
   b. Return on capital, such as interest, trust income and annuities;
   c. Income replacement benefit payments including Social Security benefits, workers’ compensation benefits, unemployment insurance benefits, disability insurance benefits;
   d. Gifts and prizes, including lottery winnings;
   e. Income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, minus costs of good sold, minus ordinary and necessary expenses required for self-employment or business operation. Specifically excluded from ordinary and necessary expenses are amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the fact finder to be inappropriate or excessive for determining gross income; and
(f) Expense reimbursements or in kind payments received by a parent in the course of employment, self employment, or operation of a business are income to the extent they reduce personal living expenses.

Specifically excluded from “income” is any child support payment, adoption or guardianship assistance and foster care subsidies. OAR 137-050-0715.

Under the child support guidelines, a determination of the “adjusted income” of a parent allows for the subtraction of mandatory contributions to a labor organization, necessary child health care coverage costs, court-ordered spousal support (whether paid or not) and any additional child deduction. OAR 137-050-0720(1).

The 2007 Commentary to former OAR 137-050-0340 discussed examples of “expense reimbursements” which are added to the income of a parent in determining child support:

The drafters recognize that some employers contribute to medical benefits beyond the cost of health care coverage. This employer contribution [i.e., payment of medical premium by the employer] should be included as gross income to the person. Any cash benefits a person may receive from not enrolling in, or “opting out” of, a health care coverage plan are considered income.

Employer contributions to profit sharing, such as unexercised stock options, should be treated as gross income only if such contributions are capable of ready conversion into cash (i.e., considered liquid assets).

Parents often question the fairness of including overtime in gross income. While overtime is clearly “income” to the parent, the drafters believe that flexibility should be exercised in determining whether the overtime will continue. If a parent is working overtime for a short period...
of time to “catch up” or an employer can verify that overtime will not continue in the future, it may not be appropriate to include overtime in gross income for purposes of the child support calculation or rebuttal.

The commentary’s discussion of the inclusion or exclusion of overtime within the income of a parent should be read in conjunction with §9.10 of the text, which discusses the federal “best interests of the child” standard and the flexibility that standard mandates. See 45 CFR §302.56(g); Petersen and Petersen, 132 Or App 190, 200, 888 P2d 23 (1994).

The method to determine average monthly income when wages are paid weekly is to multiply the weekly earnings by 52 and divide by 12. OAR 137-050-0715(3). If the parent is a recipient of Temporary Assistance for Needy Families, the parent’s income is presumed to be the amount which could be earned by full-time work (40 hours a week) at the state minimum wage. This presumption shall not be used to overcome the rebuttable presumption of inability to pay for parents receiving certain public assistance. ORS 25.245; OAR 137-050-0715(9).

An obligor’s receipt of public assistance requires termination of obligor’s child support obligation and not mere suspension. ORS 25.245; Hofstetter and Hofstetter, 129 Or App 365, 367–369, 879 P2d 220 (1994).

The “general assistance” referred to in ORS 25.245(1) refers to specific types of state assistance programs, not a generic category. If an obligor receives fixed income consisting of non-qualifying cash assistance and grants, the court may enter a finding that the presumed amount of child support is unjust or inappropriate in the circumstances. Amiotte v. Woods, 179 Or App 179, 181, 184, 39 P3d 268 (2002).
The New Income rule avoids the evidentiary proof problem encountered in *Timm & Timm*, 200 Or App 621, 633–634, 117 P3d 301 (2005). There, notwithstanding evidence that obligee had not applied adoption assistance payments exclusively towards the children’s special needs, the court held that because wife testified that she will do so in the future, and husband presented no evidence to the contrary, the rebuttable presumption of non-inclusion (*former* OAR 137-050-0340(5)) was not rebutted.

§9.5-7(b)  **Cases Defining Income**


In addition, “a trial court cannot use [obligor’s] income to determine the amount due under the guidelines and then use that same
figure to depart from those guidelines without reference to the child’s needs.” *Stringer v. Brandt*, 128 Or App 502, 508, 877 P2d 100 (1994).

NOTE: In *Stringer, supra*, the guidelines set a cap on the presumed basic child support obligation when the combined adjusted gross income of the parents exceeded $10,000 per month. That amount has been raised to $30,000 per month. See, OAR 137-050-0725(5) and Obligation Scale. Nonetheless, lawyers are safe in assuming that the doctrine set forth in *Stringer, supra*, will still apply to income above $30,000. The Obligation Scale requires that the presumed basic child support obligations for income exceeding $30,000 per month presume the same total child support obligation as for parents with combined gross monthly income of $30,000. However, an upward deviation may be demonstrated for a basic child support obligation in excess of the monthly $30,000 level, using the Rebuttal rule, OAR 137-050-0760.

An active duty obligor’s military allowances for housing and sustenance are includable within income as “expense reimbursements,” even though such items are not includable as income for federal tax purposes. OAR 137-050-0715(2)(f); *Stokes and Stokes*, 234 Or App 566, ___ P3d ___ (2010).

§9.5-7(c)  Additional Child Income Deduction for Parent

A deduction from income is now granted to a parent who is legally responsible for the support of “a child not included in the current calculation.” OAR 137-050-0720(2). The additional child deduction is allowed if the child lives in the parent’s household or is a child for whom that parent is paying support. OAR 137-050-0720(2)(a). A stepchild
qualifies for the deduction “if the parent is ordered to pay support for the stepchild.” OAR 137-050-0720(2)(c).

**COMMENT:** Be aware of ORS 108.045(1), which charges the stepparent with legal responsibility for the expenses and education of stepchildren. If the parent is not ordered to pay support for the stepchild, counsel may consider arguing a deviation from the guidelines amount using the rebuttal criteria found in OAR 137-050-0760(1)(e)(f) relating to the number and the needs of the other dependents of a parent or special hardships of a parent that may arise as a result of stepchildren living in the household.

The parent is entitled to the additional child deduction for a CAS “only if the parent is ordered to pay support for the CAS.” OAR 137-050-0720(2)(b).

The additional child deduction is calculated pursuant to OAR 137-050-0720(2)(d), set out in §9.12.

**§9.5-7(d) Self-Employment Income or Operation of a Business**

“Actual income” for purposes of calculating child support means— income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, minus costs of goods sold, minus ordinary and necessary expenses required for self-employment or business operation. Specifically excluded from ordinary and necessary expenses are amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the fact finder to be inappropriate or excessive for determining gross income.

OAR 137-050-0715(2)(e).
COMMENT: It is unknown why this definition of ordinary and necessary business expenses excludes the accelerated component of depreciation expenses and does not exclude straight-line depreciation. There seems to be no reason for the distinction. The 2007 Commentary noted that explaining the difference between accelerated depreciation and regular depreciation may eliminate confusion by providing easier-to-calculate information. The straight-line method (regular depreciation) involves the deduction of the same amount of depreciation each year. With accelerated depreciation, the depreciation is “front loaded,” showing less income realized in the beginning and then, if the property is sold and new property purchased, the accelerated depreciation schedule continues to show a lower amount of income due to the higher depreciation allowed with the accelerated depreciation method. See IRS Publication 534 (11/1995) (available at <www.irs.gov/pub/irs-pdf/p534.pdf>).

“Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business are income to the extent they reduce personal living expenses.” OAR 137-050-0715(2)(f). See, Stokes and Stokes, discussed in §9.17.

COMMENT: It is very common for a small business owner to pay a number of bills, including car payments, gas, costs of transportation associated with the car, certain meal expenses, insurance, etc., from the business account.

The 2007 Commentary to former OAR 137-050-0350 noted that although undistributed corporate income is included in determining the gross income, this calculation may be rebutted if evidence indicates that
such income is not actually available to the parent. See, Perlenfein and Perlenfein, 316 Or 16, 25, 848 P2d 604 (1993) (obligor rebutted presumptive amount of support because “gross income” as calculated did not properly factor parent’s proportionate share of corporate profits and accelerated depreciation credits).

Although self-employment taxes must be deducted as an ordinary and necessary business expense, Redler and Redler, 112 Or App 203, 206, 827 P2d 1363 (1992), courts may require more than a tax return in order to establish entitlement to other business expense offsets. State ex-rel Juttner v. Lofdahl, 152 Or App 26, 31, 952 P2d 84 (1998) (obligor not permitted to offset his self-employment trucking income with his ordinary and necessary farm expenses using only his federal tax return).

While an obligor is not required to carry the burden of explaining the origin of all deposits into a business account, ORS 25.290, the court may consider withdrawals from obligor’s business account during what the court finds to be the relevant time frame. MacArthur v. Paradis (In Re Christensen) 201 Or App 530, 541–542, 120 P3d 904 rev. denied, 339 Or 609 (2005). The obligor “has the burden of proof and must furnish documentation” to support claimed offsets from gross receipts, during the relevant time period. ORS 25.290. Failure to provide credible documentation may result in the court calculating potential rather than actual gross income. Mathews and Mathews, 242 Or App 225, 232–233, ___ P3d ___ (2011) (obligor’s income tax return from his tavern business lacked credibility; no documentation was provided to explain tax return figures showing that income from food and beverage was actually less than the cost of goods sold: court rejected obligor’s testimony that losses were due to promotional give-aways and equipment failures).
COMMENT: The *MacArthur* and *Mathews* cases illustrate the importance of (1) selecting the relevant time period for analysis of self-employment income and (2) careful consideration of both the deposit and withdrawal history during the relevant time period. The court in *MacArthur* concluded that obligor’s outgoing monthly expenses for his business were not much less than the average monthly deposit amount relied on by obligee during the shorter, relevant time period when obligor was self-employed as an auto rebuilder. The *Mathews* court concluded that since obligor’s tax return lacked credibility, potential income should be calculated utilizing, in part, obligee’s tax returns and testimony from the operation of obligee’s own similar tavern business. The court adopted obligee’s higher markup-over-cost for food and beverage sold.

§9.5-7(e) Potential Income

The administrative rule regarding potential income, OAR 137-050-0715(5), provides as follows:

(5) “Potential income” means the greater of:

(a) The parent’s probable full-time earnings level based on employment potential, relevant work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community; or

(b) The amount of income a parent could earn working full-time at the current state minimum wage.

(6) Income is presumed to be the amount determined as potential income in the following scenarios:

(a) An unemployed parent;

(b) A parent employed on less than a full-time basis;
(c) A parent with income less than Oregon minimum wage for full-time employment; or
(d) A parent with no direct evidence of any income.

(7) Income is presumed to be the parent’s actual income in the following scenarios.

(a) A parent working full-time at or above the state minimum wage:
(b) A parent unable to work full-time due to a verified disability;
(c) A parent receiving workers’ compensation benefits;
(d) An incarcerated obligor as defined in OAR 137-055-3300; or
(e) When performing a calculation for a temporary modification pursuant to ORS 416.425(13), except as provided in section (9) of this rule.

(8) The presumptions in sections (6) and (7) of this rule may be rebutted by a finding that the presumption is inappropriate in light of the parent’s probable full-time earnings level based on employment potential, relevant work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community.

(9) Notwithstanding any other provision of this rule, if the parent is a recipient of Temporary Assistance for Needy Families, the parent’s income is presumed to be the amount which could be earned by full-time work at the current state minimum wage. This income presumption is solely for the purposes of the support calculation and not to overcome the rebuttable presumption of inability to pay in ORS 25.245.

(10) As used in this rule, “full-time” means 40 hours of work in a week except in those industries, trades or professions in
which most employers, due to custom, practice or agreement, utilize a normal work week of more or less than 40 hours in a week.

Subsection (10) of the rule adopts the definition of *full-time work* used by the Employment Department. The term *underemployed* was not added to the rule, following the reasoning in *LaFavor and LaFavor*, 151 Or App 257, 264, 949 P2d 313 (1997). In *LaFavor*, the question of whether a person “is employing his or her abilities on a full-time basis [is to] be determined on a case-by-case basis.” The issue of intentional underemployment is addressed in ORS 107.135(4)(b)(c) and *Hogue and Hogue*, 115 Or App 697, 839 P2d 760 (1992), *modified on other grounds*, 118 Or App 89 (1993).

**PRACTICE TIP:** Where the parties can afford it, and where potential income is an issue, a vocational expert can be called instead of relying, exclusively, upon a parties’ own testimony as to his or her potential income.

Where a parent is employed half-time, the court may use parent’s half-time income in the calculation, if a finding is entered in the record that either the presumption of full-time employment capability is rebutted or that the presumed amount is unjust or inappropriate. OAR 137-050-0715(5)(6)(b); *Dotson and Dotson*, 177 Or App 450, 452, 33 P3d 1065 (2001); *Adams and Adams*, 177 Or App 459, 34 P3d 731 (2001). However, the fact finder may not segregate part-time employment from consideration under the Potential Income rule simply because it believes the part-time employment to be an unprofitable enterprise. *Dept. of Human Resources v. Offenbacher*, 146 Or App 648, 651–652, 934 P2d 582 (1997).
As stated by the court of appeals in *Uppendahl and Uppendahl*, 112 Or App 283, 286, 828 P2d 1048 (1992) (quoting former OAR 137-050-0360(2)(a)), “the rule requires that [a party’s] support obligation be based on [his or her] potential income. That may be determined from [the party’s] ‘recent work history, occupational qualifications, or prevailing job opportunities and earnings levels in the community.’” *See Wand and Wand*, 111 Or App 66, 824 P2d 1181 (1992); *Gudmundson and Gudmundson*, 145 Or App 135, 141, 929 P2d 319 (1996) (3-year historical average used because self-employed salesman presented contradicting evidence of more recent lower monthly earnings).

A court is not precluded from forecasting a party’s potential income in calculating an appropriate child support obligation even though the court finds the person is employed less than full time. *State v. Cunningham*, 225 Or App 168, 172–173, ___ P3d ___ (2009). Again, the presumption of higher employment potential may be aided by expert testimony—an accountant or vocational counselor—regarding the professional or semi-professional’s employment potential. *Harper and Harper*, 122 Or App 9, 856 P2d 334 (1993); *Talik and Talik*, 226 Or App 67, 77, ___ P3d ___ (2009). The presumption will also stand if the party fails to produce any evidence other than a doctor’s recommendation not to perform heavy lifting for a year, *Cutting and Cutting*, 147 Or App 30, 35, 934 P2d 622 (1997), or testimony that one’s affliction alone, such as alcoholism, will not prevent that person from working. *McCarthy and McCarthy*, 170 Or App 183, 189, 192, 12 P3d 519 (2000).

On the flip side, the rebuttable presumption of capability to work full time may be rebutted where the party demonstrates that he or she is not employed but is, in fact, a full-time student, *Rykert and Rykert*, 146
Or App 537, 546, 934 P2d 519 (1997). However, future plans to attend college (in two years) have been held to be too speculative, failing to rebut the presumption of minimum wage potential income. *Gibbons and Gibbons*, 194 Or App 257, 266, 94 P3d 879 (2004).

If a party is involuntarily terminated from employment and he or she finds work which is not as equally paying as the former employment, the party’s good faith or bad faith in producing the income reduction is irrelevant to the choice of methods for imputing potential income. *Dominguez and Dominguez*, 154 Or App 430, 436–437, 961 P2d 906 (1998). Being employed at “less than full earning capacity” does not mean being “employed on less than a full-time basis,” in reference to a party’s past employment. *Waterman and Waterman*, 158 Or App 267, 273, 974 P2d 256 (1999). The necessary predicate is that the parent must be unemployed or employed less than full time. *Id.* When the potential income provision is triggered, the Potential Income rule does not make the amount of replacement income the measure of full-time employment.

When potential income is used as a basis of calculating support, the costs of child care are not to be presumed. OAR 137-050-0735(2). Evidence of additional child care costs may be the basis for a future modification.

§9.5-7(f) **Temporary Income**

As part of the Recession Response project, the temporary income rule has now been reenacted as a temporary modification rule pursuant to ORS 416.425(13); OAR 137-055-3430. The rule allows for verbal requests for temporary modification where an employment-related change of income occurs.
§9.5-8 Social Security Benefits Received on Behalf of Child

Social Security and veterans’ benefits must be considered in establishing the formula for child support. ORS 25.275(4)(b).

Social Security and veterans’ benefits also must be added to the list of factors to be considered by the court in determining whether a change of circumstances has occurred to warrant modification of a child support obligation. ORS 107.135(4)(a)(D). The statute also provides for a credit against child support arrearage for Social Security or veterans’ benefits paid retroactively to a child. ORS 107.135(7)(b). Child support may be modified if the designated payee of the Social Security benefits should change. Pagano and Pagano, 147 OrApp 357, 365, 935 P2d 1246 (1997); OAR 137-050-0715(2)(c). DHS has rulemaking authority to determine how a credit against past support will be calculated.

The new Social Security and Veterans’ Benefits rule represents a break with the past. The rule now provides a dollar-for-dollar benefit reduction against the presumed support obligation in consideration of any Social Security Benefits or apportioned benefits, as well as any Survivors’ and Dependents’ Educational Assistance under 38 USC Ch. 35, paid to the child or the child’s representative payee. ORS 25.275(4)(b)(c); OAR 137-050-0740(2). “Apportioned veterans’ benefits” is defined as the amount that the Veterans’ Administration deducts from the veterans’ award and disburses to the child or his or her representative payee. OAR 137-050-0740(1)(a).

NOTE: The above rule considers only apportioned veterans’ benefits; such apportioned benefits are actually distinct from the award received by the veteran and disbursed directly to the child or
his or her representative payee. Veterans’ benefits that are not apportioned are considered as income to the veteran parent. This rule does not address Social Security death or survivor benefits because these benefits are not derived from either party to the support order. Death benefits should be treated as income to the child only and, when appropriate, considered as a rebuttal factor under OAR 137-050-0760(o)(B) as other resources of the child. 2007 Commentary to former OAR 137-050-0405.

§9.5-9 Child Care Costs

As part of the Recession Response project, an entirely new rule for Child Care Costs was enacted. The rule provides for child care costs caps by age, city and region, based upon DHS payment limits. OAR 137-050-0735 provides:

(1) Adjust the support obligation for child care costs if the child for whom support is being calculated is disabled or under the age of 13. The adjustment is equal to the average monthly child care expense less any state or federal child care tax credit.

(2) Child care costs can be incurred by either parent, but must be related to the parent’s employment, job search, or training or education necessary to obtain a job. Only child care costs that can be documented and determined can be considered.

(3) Child care costs are allowable only to the extent that they are reasonable and, except as provided in section (4), do not exceed the maximums set out in table 1. For the purposes of applying the maximums, the location of the provider determines which rates apply. [Table not included.]

(4) The maximum amounts allowed by the Department of Human Services in their Employment-Related Day Care allowance tables at OAR 461-155-0150
(http://dhsmanuals.hr.state.or.us/EligManual/07cc-f.htm#RateCharts) may be used as cost maximums in lieu of the abbreviated table in section (3).

(5) Child care costs incurred or to be incurred by a parent include any amounts paid by government subsidies for that parent.

(6) As used in this rule, “child with disabilities” means a child who has a physical or mental disability that substantially limits one or more major life activities (self-care, walking, seeing, speaking, hearing, breathing, learning, working, etc.).

The rule provides that the support obligation must be adjusted for child care costs for children who are under the age of thirteen or who are disabled. The adjustment is equivalent to the average monthly child care expense, including government child care subsidies, less any state or federal child care credit regarding the child for whom support is being calculated. OAR 137-050-0735(1)(5).

The drafters’ stated reason for including government subsidies in the cost of child care is that “[o]nce child support is received, obligee’s eligibility for day care assistance is reduced.” 2007 Commentary to former OAR 137-050-0420.

For example, if the custodial parent is receiving job skills training through the CAF jobs program, the program may be paying $100 per month in out-of-pocket child care costs and the state may be paying the day care provider the remaining $200 through the employment-related day care program. In this scenario, the figure that should be used in the guidelines calculation is the full $300, notwithstanding the fact that it represents a government subsidy.

**PRACTICE TIP:** Day care expenses and so-called preschool expenses are generally treated the same for purposes of applying
this rule. Although the costs for preschool and day care may be the same level of expense, an argument can be made that higher costs for preschool exceed the level required to provide quality care for the child from a child care provider. If necessary, obligee may rebut the cap to include the full cost of preschool. OAR 137-050-0760(o).

The 2007 Commentary to former OAR 137-050-0420 relevant to current OAR 137-050-0735(2) noted that “[f]uture child care costs that are determinable and certain to occur should be included in the guidelines calculation . . . when those future costs are known to the parties.” Alexander and Alexander, 87 Or App 259, 261, 742 P2d 63 (1987) (expert testimony provided a “reasonable and supportable” basis.)

The broad definition of child with disabilities in this rule is adopted from the ADA, 42 USC §12101. OAR 137-050-0735(6).

§9.5-10 Medical Support

In accordance with the Deficit Reduction Act of 2005 (DEFRA), Pub L No 109-171, 120 Stat 4, DEFRA requires that the child support guidelines now include findings of fact regarding health insurance coverage for children and contain an obligation of coverage under an “appropriate plan,” or provide for payment of cash medical support in each child support order for which appropriate coverage is not currently available. The rule mandates fact finders to order either parent to provide health care coverage, indicating whether the coverage is “accessible,” “appropriate,” and “reasonable in cost,” even if the amount of ordered health care is zero. See, 2007 Commentary to former OAR 137-050-0410.
ORS 25.323(1)(2)(4) provides that whenever a child support order is entered or modified, the court or the enforcing agency shall order “one or both parties to provide private health care coverage for a child that is appropriate and available at the time the order is entered.” ORS 25.323(5)(6) defines what constitutes “appropriate and available” coverage; the federal statute uses the term *satisfactory*. Under OAR 137-050-0750(2)(a)(5)(6)(7)(c), all child support orders or modifications must address how the parents will provide for the child’s health care needs through findings of fact.

To be “appropriate,” coverage must be:

1. *Accessible*, meaning
   - available for at least one year,
   - not having service area limitations, or
   - the child lives within 30 minutes or 30 miles of primary care provider who is eligible for payment under the coverage;

2. *Reasonable in cost*, meaning no unreasonable required deductibles or co-payments;


The requirements of “appropriate and accessible” do not apply to public medical assistance such as Medicaid or the Oregon Health Plan. ORS 25.321(11).

If the court finds that satisfactory health care coverage is unavailable at the time the support order is entered, the court *(must)* order one or both parties to provide coverage when it becomes available.
and (2) either order that, until it is available, one or both parties pay “medical support” or include findings why it is not required. ORS 25.323(4).

ORS 25.321(7) defines *medical support* as cash medical support and health care coverage.

*Medical support* is a more comprehensive term than *cash medical support*. ORS 25.321(1)(6)(7). The term encompasses both provisions of actual health care coverage (such as insurance) and possibly cash medical support, a pro rata contribution to the premiums, and possibly also to deductibles and out-of-pocket uncovered or unreimbursed expenses by the nonproviding party (or even the providing party in certain circumstances).

Ordinary unreimbursed medical costs of $250 per year per child are included in the Obligation Scale; these costs become prorated between the parents in the support calculation under OAR 137-050-0710. OAR 137-050-0750(1).

The 2007 Commentary to *former* OAR 137-050-0430 noted that:
Uninsured or out-of-pocket medical costs may include co-payments, payments toward premiums paid by the other parent (under certain circumstances decided by the fact finder), deductibles, over-the-counter medications and other medical costs not covered by the family health care coverage. . . . Medical expenses, as defined by this rule, which exceed $250 per child per year may be added to the basic support obligation.

Based on these changes, cash medical support now becomes a second component of the child support money award, enforceable by the same remedies as previous child support judgments. ORS 25.323(1)(2)(8). “[U]ninsured costs that exceed $250 per child per year
and that are reasonable are addressed in this rule.” The fact-finder has discretion to disallow such costs by entering a finding why the cash medical support is not ordered. OAR 137-050-0750(6). A deduction to a parent’s income may be made for the cash medical support or premium cost to the parent for the child’s health care insurance. OAR 137-050-0720(1)(b).

ORS 25.321(12) defines \textit{providing party} as either obligor or obligee, as both parties to the child support order may be ordered to provide medical support.

The rule governing Medical Support incorporates portions of former OAR 137-050-0410 and 137-050-0430 into current 137-050-0750 and provides as follows:

1. The scale (see OAR 137-050-0725 and its appendix) includes ordinary unreimbursed medical costs of $250 per child per year. These costs are included in the support obligation and prorated between the parents in the support calculation performed under OAR 137-050-0710.

2. In addition to the definitions in ORS 25.321 and 25.323, “reasonable in cost” means that:
   a. The cost to a parent of cash medical support or private health insurance is not more than four percent of the parent’s adjusted income as determined in OAR 137-050-0720. A greater amount may be ordered if compelling factors support a finding that a higher cost is reasonable;
   b. The cost to the obligated parent of cash medical support or private health insurance does not exceed the amount of the parent’s income determined in OAR 137-050-0745(2) to be available for medical support; and
(c) The parent’s income is greater than the Oregon minimum wage for full-time employment.

(3) In applying the reasonable in cost standard to private health care coverage, only the cost of covering the child for whom support is sought will be considered. If family coverage is provided for the joint child and other family members, prorate the out-of-pocket cost of any premium for the child for whom support is sought only.

(4) If only one parent has private health care coverage that is appropriate and available under ORS 25.323, that parent must be ordered to provide it.

(5) If both parents have access to appropriate, available private health care coverage, both parents may be ordered to provide coverage. If both parents provide coverage, neither parent will be ordered to reimburse the other for the cost of the premium, except as provided in section (10).

(6) If the obligee is ordered to provide private health care coverage and the obligor is not, the obligor must be ordered to pay cash medical support that is reasonable in cost to defray the cost of the premium and other medical expenses, or the order must include a finding explaining why cash medical support is not ordered.

(7) If neither parent has access to appropriate, available private health care coverage:

(a) One or both parents must be ordered to provide private health care coverage at any time whenever it becomes available;

(b) The party with custody of the child may be ordered to provide public health care coverage for the child; and

(c) Either or both parents must be ordered to pay cash medical support that is reasonable in cost, or the order must include a finding explaining why cash medical support is not ordered.
(8) For purposes of this rule, “to provide” health care coverage means to apply to enroll the child and pay any costs associated with the enrollment, even if the cost to the parent is zero.

(9) If the child is not in the custody of either parent and cash medical support is or will be ordered as provided in section (7) of this rule, the agency or person with legal or physical custody of the child is considered the parent for the purposes of receipt or assignment of cash medical support.

(10) A medical support clause may be contingent in that it may order a party to provide private health care coverage and may order an amount of cash medical to be paid any time private health care coverage is unavailable to that party. If cash medical support is ordered due to private health care coverage being unavailable to a party, the order may also provide that any time private health care coverage is available to that party it will be provided instead of cash medical support.

(11) For purposes of ORS 25.323, private health care coverage may be “available” to a parent from any source, including but not limited to an employer or a spouse or domestic partner.

This extensive Medical Support rule provides that all orders must contain a medical support clause. The term “reasonable in cost,” in addition to the criteria of ORS 25.323(5)(6), means that the cost to a parent of cash medical support or private health insurance is not more than 4% of the adjusted income of the providing parent. OAR 137-050-0750(2)(a).

The “contingent alternatives” of the cash medical obligation or health insurance are not mandatory. OAR 137-050-0750(10). A parent with income less than the Oregon minimum wage cannot be ordered to pay cash medical support. ORS 25.323(7). If no insurance is available,
the parent is required to pay cash medical support. The requirement can be rebutted by a finding explaining why the cash medical support is not ordered. OAR 137-050-0750(7)(c). The medical support order may provide that a parent provide private health care coverage or an amount of cash medical support to be paid any time the private health care coverage is unavailable. OAR 137-050-0750(10). Once the private health care coverage becomes available to that party, the order may dispense with a payment of cash medical support. *Id.* This method avoids modification to a support order in the event the obligated parent loses or changes employment.

For those parents able to pay cash medical support or who can provide private health insurance, the 4% figure can be exceeded if there are “compelling factors,” such as, if the obligor has insurance at a cost that exceeds 4%. If the 4% figure is exceeded due to a “compelling factor,” there must be a finding entered describing what the compelling factor is and that the higher cost is reasonable. However, the higher amount may not exceed the cash child support amount determined under the Self-Support Reserve rule, OAR 137-050-0745(2). OAR 137-050-0750(a)(b).

**QUERY:** Are both parents required to provide health care coverage?

**ANSWER:** No. The new rule provides that both parents “may” be ordered to provide coverage if both have access to coverage. However, premium reimbursement may be provided under the “contingency provision if health coverage becomes unavailable to a party. OAR 137-050-0750(5)(10). The advantage of dual health care coverage is the avoidance of uninsured costs
most often borne by the custodial parent and the elimination of a cash medical support order. If, however, the obligee is ordered to provide insurance, obligor will be ordered to pay cash medical to obligee in an amount not to exceed 4% of his or her adjusted income, unless a finding is entered explaining why cash medical support is not ordered. OAR 137-050-0750(6).

**Practice Tip:** A support order may now be increased to cover an unexpected minor medical event that could not be planned for because of its unexpected nature. OAR 137-050-0750(2)(a) contemplates the “compelling factor” of an increase to provide for uninsured costs incurred by a child with a chronic illness or condition whose medical management will necessitate prospective costs that can be reasonably anticipated. The Medical Support rule recognizes the court’s authority to order parents to share future medical costs on an equitable basis regardless of whether those costs are, indeed, recurring costs. See, *Horner and Horner*, 119 Or App 112, 849 P2d 560 (1993) (obligee sought modification of stipulated dissolution judgment providing each party pay equally to the support of the child; court determined mother’s motion as a request for specific enforcement of the property settlement agreement; the court acted within its authority in establishing the amount owing and reducing it to judgment under the agreement).

In any event, the new cash medical support provisions are not intended to supplant conventional stipulations providing for division of uninsured medical expenses. When it is “reasonable and appropriate” for parents to agree to split uninsured medical expenses above the $250
threshold, such agreements are not contrary to public policy and are enforceable. ORS 107.104(1)(b). Such agreements are also now contemplated within the purview of support orders by the new Guideline rules; see discussion of Agreed Support Amount rule at §9.28.

Practitioners should recognize that where the MSA, itself, provides that each party share the child’s unreimbursed medical expenses, with obligor only paying medical support, no statute of limitations exists to preclude enforcement of the contractual reimbursement provision against obligee in case of default. See, Brown v. Brown, 206 Or App 239, 253–254 n 7, ___ P3d ___ (2006) (recognizing that the provisions of ORS 107.104 “specifically authorize courts to enforce as contract terms the terms of judgment, including stipulated judgments signed by the parties and judgments incorporating Marital Settlement Agreements”). A court has authority, under its statutory and equitable powers and resort to contempt, to reduce obligee’s medical cost reimbursement obligation to judgment on motion of obligor and to enforce the reimbursement provision. See, ORS 25.323(2)(8); Fitzgerald and Fitzgerald, 70 Or App 625, 628, 690 P2d 1114 (1984); Drake and Drake, 36 Or App 53, 583 P2d 1165 (1978). The money award should be forwarded to DCS for enforcement and collection purposes.

§9.5-10(a) Enforcing Payment of Uninsured Health Care Expenses

The trial court may order obligor to pay a proportionate share of a child’s unreimbursed health care expenses that are not paid for by health insurance coverage. ORS 107.106(1)(A) requires that all judgments “providing for the custody, parenting time, visitation, or support. . .” of a
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child include a provision for the “[p]ayment of uninsured medical expenses of the child.”

Obligee may file an order to show cause to obtain a money award for unreimbursed health care expenses. In granting a money award, the court may rely on its equitable powers or, arguably, enforce the provision as a species of child support subject to contempt. See Fitzgerald and Fitzgerald, 70 Or App 625, 690 P2d 1114 (1984); Drake and Drake, 36 Or App 53, 58, 583 P2d 1165 (1978). There appear to be no practical time limitations for an obligee to seek a money award if the obligor fails to contribute an appropriate share to unreimbursed health care expenses. ORS 107.104(1)(b)(2); Brown v. Brown, 206 Or App 239, 253 n 7, ___ P3d ___ (2006).

Where the parties have executed a stipulated dissolution judgment, obligee’s motion is tantamount to a request for specific enforcement of the terms of the property settlement agreement which the court may calculate and reduce to a specific money award. In both scenarios, the money award should be forwarded to DCS for enforcement and collection purposes.

§9.5-11 Spousal Support

The amount of any preexisting or concurrently entered court-ordered spousal support, whether paid or not, is deducted from the income of the parent obligated to pay that spousal support and is included in determining the adjusted income of the parent entitled to receive that spousal support. OAR 137-050-0720(1)(c)(d).

COMMENT: The payment of child or spousal support may be used to meet some of the same expenses incurred by obligee. In
analyzing the expenses of a family, the proportionate share of a parent or a child is difficult to determine with specificity, given the fact that expenditures on behalf of the children often come from one or the other parent, at different intervals, come from common funds, and are intertwined with expenditures made on behalf of the entire family, such as for food, shelter, utilities, and transportation. Robert G. Williams, *Development of Oregon Child Support Guidelines*, OSB FAMILY & JUVENILE LAW NEWSLETTER, Vol 9, No 4 (Dec 1989), at 3. In *Goff and Goff*, 109 Or App 447, 820 P2d 33 (1991), the court of appeals approved a $500 monthly increase in spousal support after the youngest child had attained the age of 18 and did not attend school. Such an increase in spousal support on the attaining of adulthood by a child is tacit recognition of the difficulty in distinguishing expenses of the parent, the child, and the household. An argument can be made that the court should be mindful of the total support obligation of an obligor in establishing either spousal or child support because the money often meets some of the same expenses.

A post-dissolution step-down of spousal support will not automatically warrant modification or review of child support. Obligor must show a substantial change of circumstances, whereupon the court will determine what modification is appropriate. *Shlitter and Shlitter*, 188 Or App 277, 287–288, 71 Ped 154 (2003).

An obligor’s initial motion for child support modification is sufficient to trigger the requirement that the recalculation be made retroactive to the date that spousal support is terminated. ORS 107.135(6); *Rubey & Rubey*, 184 Or App 383, 387, 56 P3d 471 (2002);
Garza & Garza, 201 Or App 318, 330, 118 P3d 824 (2005) (because calculation of child support under the guidelines is dependent in part on the amount of spousal support, child support must be recalculated where a combined family support obligation is modified).

§9.5-11(a) Low-Income Obligors

The new Self-Support Reserve rule, OAR 137-050-0745, effective January 4, 2010, provides a credit of $1,059 from the parent’s adjusted income. This amount is compared to the amount of support calculated under OAR 137-050-0710, the lesser of the two amounts is presumed to be the correct support amount. Any available income remaining after application of the self-support reserve is income available for medical support. The Self-Support Reserve rule does not apply to an incarcerated obligor.

COMMENT: Although the factfinder retains the authority to deviate from the presumed child support obligation based on the reasonable necessities of a parent (ORS 25.280(2); OAR 137-050-0760(2)(b)), the self-support reserve provides more specific direction and brings consistency to the manner in which support orders are established for low-income obligors by keeping pace with inflation. The self-support reserve will be adjusted annually after 2009, indexed to the federal poverty guidelines. See Hockema v. Hockema, 18 Or App 273, 276, 524 P2d 1238 (1974) (preguidelines case in which court of appeals noted that burden of paying support should not be so heavy as to “preclude the ability to support oneself”).
In addition, the new Minimum Cap Order, OAR 137-050-0755, was enacted as part of the Recession Response Project. It provides a rebuttable presumption that a parent has the ability to pay at least $100 per month as child support. The presumption does not apply when, for example, parenting time is equal, the parent’s sole source of income is disability benefits or public assistance or the parent is incarcerated without ability to pay. ORS 25.245(1); OAR 137-050-0755(2).

§9.5-12 Agreed Support Amount

This rule permits parents to agree on a support amount either 10% above or 10% below the amount of the guideline formula after application of the appropriate rebuttals. OAR 137-050-0765. The agreed support amount entered with the written consent of the parties is presumed to be just and appropriate and no finding is required. The intent of the rule is to promote positive parental involvement to encourage settlement and increase compliance.

QUERY: Do the “Agreed Support” rule and the Rebuttal rule change the law established in Petersen and Petersen, 132 Or App 190, 888 P2d 23 (1994).

ANSWER: No. ORS 25.270(4) and Petersen, supra, 132 Or App at 198, instruct the court to determine a “just and appropriate” child support amount based upon economic factors that bear on the needs and best interests of the children. The Rebuttal rule contains a non-exclusive list of factors. The presumed amount can be rebutted by a court finding or by stipulation of the parties supported by one or more rebuttal factors. In addition, the parties may further stipulate, even after the application of rebuttal factors,
to an increase or decrease by 10% to avoid the uncertainty of 
hearings and possible appeals.

§9.6 THE ADULT CHILD

§9.6-1 Liability for and Definition of Child Attending School 
(CAS)

A CAS is defined as a child of the parties who is unmarried, is 18 
years of age or older and under 21 years of age and is making satisfactory 
academic progress as defined by the child’s school, such as a high school, 
community college, four-year college or university, or a course of 
professional or technical training designed to fit the child for gainful 
employment. ORS 107.108(1)(a)(c). The support obligation for a CAS is 
contingent: if a child of the parties is over the age of 18, but does not 
meet the statutory criteria defining a CAS, no support is due. Eusterman 

A judgment for dissolution, annulment, or separation should 
include a provision for support of a CAS. Eusterman and Eusterman, 41 
Or App 717, 722, 598 P2d 1274 (1979). The failure to include such a 
provision means, in the absence of modification, that child support will 
no longer accrue after the child reaches 18, even if the child is attending 

The court may require either or both parents to provide for the 
support of a CAS anytime after the commencement of a divorce, 
annulment, or separation proceeding, including throughout the course of 
an appeal and after entry of a final judgment. ORS 107.108(2).

ORS 107.108(2) provides that the court “may” enter an order of 
support for a CAS. Although the statutory language is discretionary, the
statute has been interpreted as a mandatory directive to order support if a child meets the criteria necessary to be a CAS. This is so even if a child is “totally emancipated” and is “living openly . . . in a relationship which resembles marriage,” and receives the benefit of a fiancé’s commingled income. *Sandlin and Sandlin*, 113 Or App 48, 50–52, 831 P2d 64 (1992); *Cf., DHS v. McGraw*, 68 Or App 834, 683 P2d 154 (1984) (court did not order custodial parent to reimburse state for public assistance provided to minor, where minor “abandoned” parent without permission and without good cause).

Support can be sought from either parent, notwithstanding the award of custody before the child’s 18th birthday. ORS 107.108(2). It is thus possible for a child living at college to seek support from the nominal custodial parent. However, the legally denominated, noncustodial parent can seek support for a child older than 18 and younger than 21 who is attending school and residing with him or her. ORS 25.240.

The statute distinguishes between distribution of child support payments and continuing liability for child support. Child support is distributed directly to the CAS as long as the child provides notice of the child’s intent to attend or continue to attend school, and gives written consent for the obligor parent to obtain necessary enrollment and academic information. ORS 107.108(5)(a), (6)(a)–(b).

The statute also clarifies that support will continue during regularly scheduled breaks as long as the child intends to continue attending school during the next scheduled term or semester. ORS 107.108(1)(b) (defining *regularly scheduled break*), 107.108(7).
The general rule is that a student who has registered to attend the next succeeding academic term is considered to be a student during the various “regularly scheduled breaks” between terms. ORS 107.108(1)(b)(7). Because the child’s need for support does not necessarily terminate when the school term ends, support is paid throughout the year, including periods during which school is not in session. *Eusterman, supra*, 41 Or App at 729–730. The rule equally applies to children who have reached 18 years of age, are still in high school or home schooling and have not yet started college. The support obligation for that child continues during the summer after high school, and resumes when the child actually begins attending school, ORS 107.108(1)(b)(B)(c)(A)(C), unless support is suspended because the child fails to give notice of intent to attend school before reaching age 18. ORS 107.108(6)(a)(B). See, *Riback and Riback*, 59 Or App 670, 673–674, 651 P2d 1089 (1982) (under *Eusterman, supra*, 41 Or App at 729–730, the contingent liability was held to be self executing, and automatically continued during regularly calendared school year recesses; however, where notice not given to obligor prior to child turning 18, after high school graduation, contingent liability ceased during child’s “sabbatical” from school, until notice was given of child’s post-high school entry into college).

Oregon is among the minority of states requiring postmajority support for children. See, *In re Marriage of Chester*, 44 Cal Rptr2d 717 (Cal App 4 Dist 1995) (requiring the State of California to give effect to an Oregon judgment directing a father to pay child support until age 21, in accordance with Oregon law, notwithstanding that in California the duty to pay child support usually ends at age 18); *Noble v. Fisher*, 894
P2d 118, 123 (Idaho 1995) (court held that since it had no power to order support after age 19, a CAS settlement provision was void, although the children might be able to pursue father as third-party beneficiaries of the settlement agreement).

Oregon appellate courts have rejected various challenges to the constitutionality of ORS 107.108, reasoning that the statute’s targeting of a CAS whose parents are divorced or separated is “rationally related to the state’s interest in having a well-educated populace.” Crocker and Crocker, 157 Or App 651, 654, 971 P2d 469 (1998), aff’d, 332 Or 42 (2001). The statute is subject to neither intermediate (heightened) scrutiny nor strict scrutiny because the statute does not substantially and directly infringe the fundamental right to marry; nor do divorced parents constitute a suspect class for purposes of equal protection. McGinley and McGinley, 172 Or App 717, 730–731, 19 P3d 954, rev. denied, 332 Or 305 (2001).

§9.6-1(a) Procedures Involving the CAS

When a custodial parent seeks support for a CAS, the child is a party to the proceedings for purposes of matters relating to the provision of child support. ORS 107.108(3). Because the CAS is a party, counsel need not file a motion to add the child as a party to the proceedings, but should list the child as a party in the case caption. Counsel may secure a waiver of appearance from the CAS who does not wish to participate in his or her parents’ dissolution proceedings.

The adult CAS has the right to do the following:

(1) Apply for services under ORS 25.080;
(2) Request a judicial or administrative modification of the support amount;

(3) Be a party to any legal proceeding as long as they qualify as a CAS; and

(4) Receive notice of certain legal proceedings that may affect the adult child’s rights, whether or not the adult child qualifies as a CAS. ORS 107.108(3)(a)–(b), (4)(a)–(b).

The statute addresses difficulties with technical grade average requirements and obligor’s difficulty obtaining information when the child ceases attending school or drops out soon after enrolling simply to qualify for support. The statute requires the adult child to maintain satisfactory academic progress as defined by the school the child attends in order to qualify as a CAS. The adult child must also provide written consent for obligor parent to obtain information directly from the school that relates to enrollment, standing, grades, and course load. ORS 107.108(1)(a)(C), (6)(a)–(b).

§9.6-1(b) Modification, Suspension and Reinstatement of Support For CAS

If a judgment does not contain a provision requiring the payment of support for a CAS, the judgment may be modified anytime before the child reaches the age of 21. Eusterman, supra, 41 Or App at 724–725; State ex rel Wick v. Wick, 37 Or App 125, 129, 586 P2d 400 (1978). The degree of proof necessary to permit the court to modify the judgment depends on the age of the child when the judgment is entered, and whether the issue regarding the support of an 18- to 21-year-old CAS was litigated when the judgment was entered. If the child was young when the judgment was entered, that is, if the child was not yet in or on the
threshold of entering college, the issue regarding support of an 18- to 21-year-old child normally could not have been litigated fully at that time. In that event, the burden of proving changed circumstances is generally inapplicable. *Eusterman, supra*, 41 Or App at 727. However, if the child was on the threshold of entering college when the original judgment was entered, the change-of-circumstances rule would apply to any motion to provide for that support. *Id.* at 726.

The support obligation is suspended if the CAS fails to meet the requirements of a CAS, ORS 107.108(1)(a), and if certain conditions are not met. ORS 107.108(6)(a)(8).

If the obligor is paying a prorated share and support is suspended, obligor must pay the support for the CAS directly to obligee until support is modified. ORS 107.108(10). Suspension of support constitutes a substantial change of circumstances for modification purposes. *Id.* An alternative support amount, to be paid if the support obligation is reinstated, may also be awarded. *Id.*

Child support may be reinstated without a court order if the adult child, after failing to meet the statutory criteria, qualifies anew as a CAS before the age of 21. ORS 107.108(9). Absent a stipulation, child support ordinarily may not be extended beyond the age of 21. Oregon appellate courts have not yet addressed the enforceability of a judgment which purports to continue payment of child support beyond 21. ORS 107.104; *Haxton and Haxton*, 299 Or 616, 621–624, 705 P2d 721 (1985) (child support obligation of parents may be enforced by direct action by a disabled child against a parent pursuant to ORS 109.010); *Porter and Griffin*, 245 OrApp 178, 183–184, ___ P3d ___ (2011) (non-biological father and husband obligated to pay child support where stipulated
general judgment treated non-joint child as a child of the marriage for purposes of support).

Finally, the court may authorize payment for a CAS from a “higher education savings plan” established by the parent. ORS 107.108(12)(a). Payment is made into the plan’s “tax advantaged account,” not through the department, for paying “qualified higher education expenses” of the CAS at “eligible educational institutions.” ORS 107.108(12)(b)(c).

§ 9.6-1(c) Amount of Support for the CAS

When there are multiple children for whom support is ordered, the amount paid to the CAS is that child’s prorated portion of the total support order, unless otherwise ordered. When support is ordered for a CAS, the support must be paid directly to the child unless good cause is shown for distribution in some other manner. ORS 107.108(5)(a). DHS must adopt rules to determine the circumstances under which fact finders may allocate support on other than a prorated basis. ORS 107.108(5)(b)(c). When support is not paid through DOJ, however, if the judgment does not already provide that support will be paid directly to the CAS, an obligor may need to bring a modification proceeding in order to ensure his or her direct payments to the CAS satisfy the child support obligation.

Where the amount paid to the adult child is “a prorated share based on the children for whom support is ordered,” ORS 107.108(5)(b), the parenting time credit for minor children is also applied to the CAS, even if the CAS is not named in the parenting agreement or order. OAR 137-050-0730(4)(6). Accordingly, in calculating child support, an adult child is presumed to exercise the same percentage of parenting time as his
minor siblings regardless of his current living circumstances. This calculation reduces complexity by including the costs and credits intended for the minor children to be included in the CAS’s support, and vice versa. The rule appears easily rebutted in the event the parenting time credit is afield from the facts.

If support is not paid to a parent having primary physical custody of the child before he or she turns 18 years of age, due to a parenting-time or split-custody arrangement, the support may not be paid directly to the CAS unless the support order is modified. ORS 107.108(5)(b). The statute authorizes the DOJ to enact administrative regulations to determine allocation of support by other than a prorated share in those circumstances. ORS 107.108(5)(c).

COMMENT: Since a child attains majority at the age of 18, ORS 109.510, the court has no jurisdictional authority to award custody or, for that matter, parenting time, when a child attains the age of 18. See Klock and Klock, 83 Or App 656, 659, 733 P2d 65 (1987). The refusal of a child between the ages of 18 and 21 to see the obligated parent does not permit the court to modify or terminate the support order for lack of parenting time. Because the court lacks authority to order parenting time past the majority of the child, it cannot attempt to require parenting time by the adult child as a requirement of receiving support payments. Smith and Smith, 44 Or App 635, 641, 606 P2d 694 (1980). In calculating the percentage of parenting time that a parent receives, OAR 137-050-0730(2) requires that the calculation of parenting time be in accord with a “parenting time agreement or court order . . . or the parents have split custody.” Indeed, if no written parenting time agreement
or court order exists for the CAS, “the parent having primary physical custody” gets 100 percent of the parenting time. OAR 137-050-0730(4). Because the circuit court has no authority to order parenting time for a child over the age of 18, and the agreement of the parties that applied during the child’s minority has no prospective effect after the child attains 18, application of the Parenting Time Credit rule to CAS may result in serious distortion. The parenting time credit for the minor children as also applied to the CAS, OAR 137-050-0730(6), artificially reduces the presumed support amount for the CAS.

Some courts have calculated child support by preparing a separate and singular computation for the CAS when the CAS “does not reside with either parent.” OAR 137-050-0700(5)

§9.6-1(d)  Rebuttal of Presumed Amount

If the result is unjust or inappropriate, the amount of support for the CAS can be rebutted. See, OAR 137-050-0760(2)(k)(3)(b). In addition, the court has discretion to allocate support for a CAS differently than a pro-rated share between the children, pursuant to ORS 107.108(5)(b)&(c). For example, an agreement to pay educational expenses may provide a basis to deviate upward from the presumed amount of support. See, Dawson and Dawson, 142 Or App 35, 919 P2d 517 (1996).

The guidelines concede that “reliable and comprehensive data is not available for cost of children between the ages of 18 and 21, . . . .” OAR 137-050-0705(5). Accordingly, practitioners are invited to utilize
the Rebuttal rule whenever the guideline amount for the CAS becomes problematic. *Id.*

**COMMENT:** The decision in *Berry and Berry*, 196 Or App 296, 101 P3d 817 (2004), discussed in §9.11, signaled the need for guideline regulations to assist the trial court with its discretionary function in assigning an “appropriate dollar value” adjustment to the guideline calculation for the CAS’s educational needs.

It has been argued that educational costs be determined first, then deduct educational loans and other financial assistance, grants, scholarships, educational trust funds, as well as other outside and substantial financial resources of the student. In applying rebuttal factors, the court should consider criteria, such as:

1. Financial resources of both parents;
2. Ability, willingness, and desire of the adult child to pursue and complete the course of study;
3. Ability of the adult child to contribute to his or her expenses through employment;
4. Child’s voluntary estrangement from a parent caused by the conduct of the child;
5. The living arrangements of the child.

This approach is supported by the language of ORS 107.108(14), which recites that this support “is not intended to replace other resources or meet all of the financial needs of a CAS.”

**§9.6-2 Emancipation, Death and Child Support**

A person is deemed to have arrived at majority on (1) reaching age 18 or (2) being married. ORS 109.510, 109.520. Also, a minor who is at
least 16 years of age may apply to the court for a judgment of emancipation. ORS 419B.552, 419B.558. The emancipation judgment recognizes the minor as an adult for specified purposes and terminates the parent-child relationship until the child reaches age 18. ORS 419B.552(1). Because the emancipation judgment terminates the parent-child relationship, it follows that it also terminates a noncustodial parent’s obligation to pay child support even if the parents of a child are divorced. *Ellis v. Ellis*, 292 Or 502, 507–508, 640 P2d 1024 (1982) (decree required father to pay support until child was 21, self-supporting, or otherwise emancipated from the home. When child became self-supporting, mother notified both father and the Department of Human Resources (now DHS). Supreme court held that under the original decree, father’s support obligation terminated on emancipation: no formal modification of the decree was needed). On the other hand, once a divorce or separation occurs the “concept of emancipation is irrelevant” to the question whether child support should be paid for an 18- to 21-year-old child who is attending school. *Sandlin and Sandlin*, 113 Or App 48, 51, 831 P2d 64 (1992); *Miller and Miller*, 62 Or App 371, 374–376, 660 P2d 205 (1983).

In addition, “equitable considerations” will not allow a court to satisfy child support arrearages that accrue between the time the child leaves obligee’s home and the time the child reaches majority, *Alspaugh and Alspaugh*, 44 Or App 505, 605 P2d 1386 (1980); nor can the court satisfy arrearages occurring after a child dies and before formal modification. *Hunt and Hunt*, 238 Or App 195, 198–199, ____ P3d ____ (2010) (despite oral agreement between parties to eliminate support for
deceased child, court without authority to satisfy accrued arrearages). The latter result has been criticized:

“[Current ORS 107.135(7)] can usually be applied with a decree, a calendar and a calculator, but its effect is not absolute. If, for example, the child dies and the non-custodial parent does not promptly request modification of the decree, it is inconceivable that judgment would be enforced to require payment of amounts accrued for support under the decree after the death of the child. The reason is that no payments would have accrued because the underlying obligation of the decree to pay for the support of the child ended when the child died.” (Emphasis and bracketed matter added).

Alspaugh, supra, 44 Or App at 510–511 (Tanzer, J., dissenting).

§9.7 CHILD SUPPORT FOR CHILDREN IN OTHER SETTINGS

§9.7-1 Children Within Jurisdiction of Juvenile Court

The juvenile court has exclusive original jurisdiction of children who are under 18 years of age and whose circumstances are such that they fall into one of the specifically enumerated categories set forth in ORS 419B.100.

If a child is under the jurisdiction of the juvenile court, the juvenile court may, after a hearing, require the parents or other person legally obligated to support the child “to pay toward the child or ward’s support such amounts at such intervals as the court may direct, even though the child or ward is over 18 years of age as long as the child or ward is a CAS, as defined in ORS 107.108.” ORS 419B.400(1). In determining the amount to be paid, the juvenile court must use the scale and formula provided in ORS 25.275 and 25.280. ORS 419B.400.
Although ORS 419B.400 specifically authorizes the juvenile court to compel the parents of children found to be within its jurisdiction to contribute toward their support, “a prerequisite to the exercise of that authority is the service of summons upon the parent to be so charged.” *State ex rel Juv. Dept. v. Scudder*, 30 Or App 131, 133, 566 P2d 551 (1977). If a parent has not been served, the parent’s physical presence before the court is not sufficient to give the court jurisdiction to order support without the parent’s consent. *Id.* See ORS 419B.117 (notice to parents).

Any order for support entered pursuant to ORS 419B.400 for a child in the care and custody of DHS may be made contingent on the child residing in a state-financed or -supported residence, shelter, or other facility or institution. ORS 419B.404.

When a child is in the legal custody of DHS and the child is the beneficiary of an existing order of support and DHS “is required to provide financial assistance for the care and support” of the child, DHS is the “assignee of and subrogated to” that child’s proportionate share of the support obligation, “including sums that have accrued whether or not the support order or judgment provides for separate monthly amounts for the support of each of two or more children or a single monthly gross payment for the benefit of two or more children,” up to the amount of assistance provided by DHS. ORS 419B.406. See ORS 418.042 regarding the assignment of support rights.

The new Single Parent methodology of child support calculation when the child is in the legal and physical custody of a third party or of DHS is found at OAR 137-050-0700(5):
“The calculation instructions in OAR 137-050-0710 apply when at least one minor child for whom support is being calculated lives with a parent. If none of the minor children for whom support is being calculated lives with a parent, calculate each parent’s obligation separately. For the ‘other parent’ in these single-parent calculations, use the same income, spousal support, union dues and additional children as for the parent whose obligation is being calculated. Include the caretaker’s child care costs, if any. Do not include any other information for the ‘other parent.’”

The rule eliminates “one-parent” calculations. When the children are in the physical custody of DHS, each parent will be assessed child support separately. Actual or potential income, at minimum wage when the parent can’t be located, is used. This method avoids excessively high orders.

§9.7-2 Stepchildren

A stepparent is responsible for the expenses of the family and the education of minor stepchildren as long as the stepparent is married to and not legally separated from the custodial parent. ORS 108.045(1)–(2). A stepchild also includes a CAS pursuant to ORS 107.108 and in the custody of the married biological parent. ORS 108.045(2). A person who is married to the noncustodial parent has no duty to support his or her spouse’s child by another marriage upon entry of a judgment of dissolution. See ORS 109.053(2).

QUERY: Does a stepparent have a duty to support his or her stepchild after legal separation but before a judgment of dissolution from the stepchild’s parent?

COMMENT: Notwithstanding the absence of a statutory enforcement procedure, some have argued that the statute requiring
a stepparent to support his or her children, as long as no divorce or separation has occurred, enables the court to order child support for a stepchild during the pendency of a case. In *Haxton and Haxton*, 299 Or 616, 627–630, 705 P2d 721 (1985), the Oregon Supreme Court ordered the parent of a mentally disabled adult child to pay support to that child, notwithstanding the absence of a statutory enforcement procedure, based on the parent’s statutory and common-law duty to support children who are poor and unable to work to maintain themselves. ORS 109.010. It is unclear whether a court would extend the reasoning in *Haxton* to a stepparent, even if only during the pendency of a case, in the absence of a statutory enforcement procedure. What is clear is that the stepparent’s support duty does not supplant the biological parent’s obligation. *Dooley and Dooley*, 30 Or App 989, 994, 569 P2d 627 (1977).

A stepchild may qualify a parent for an additional child deduction only if the parent is ordered to pay support for the stepchild. OAR 137-050-0720(2)(c).

§9.7-3 Children with Disabilities

Although a court normally has authority to order support for children, there are special limitations on the extent of that authority when the child is disabled.

Congress has attempted to assure that all children with disabilities have access to a free, appropriate, public education emphasizing special education and related services designed to meet their unique needs. 20 USC §1400(c). See 34 CFR §§104.33, 300.1. To this end, Congress
enacted a statutory scheme that ties the availability of federal funding for education of the handicapped to the establishment of state policies and programs to assure free, appropriate, public education. 20 USC §§1411–1413; see generally 20 USC §§1400–1482; 34 CFR §§104.31–104.39; 34 CFR pt 300; ORS 343.085.

To understand this concept, it is necessary to define several terms. In general, the term child with a disability means a child “with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . ., orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities” and “who, by reason thereof, needs special education and related services.” 20 USC §1401(3)(A).

The term special education means “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.” 20 USC §1401(29).

The term related services means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that
such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabiling conditions in children.

20 USC §1401(26).

Other paragraphs define the terms specific learning disability and free appropriate public education. 20 USC §1401(30), (9). See ORS 343.035.

A broad spectrum of children with disabilities may be eligible for a free education and related services. The school district must conduct a full evaluation of a handicapped child’s educational needs. 34 CFR §300.531. See ORS 343.164 (parental consent requirements for preplacement evaluation, placement, or evaluation; exceptions). If it is determined that a child is in need of special education and related services, an individual education plan (IEP) must be developed for the child. 34 CFR §300.535(b). If the district identifies a need for placing the child in a public or private residential program in order to provide special education and related services, the program must be at no cost to the parent or child. 20 USC §1412(a)(1)(A), (10)(B)(i); 34 CFR §300.302. An individualized education program for a child with disabilities, who is placed in public or private school, to provide special education and related services, must be at no cost to the child or parent. However, the parents of a minor child can be held responsible for the costs of education and all related expenses if they refuse an educational placement offered by a school district and unilaterally place their child in a private school. Burlington School Comm. v. Mass. Dept. of Ed., 471 US 359, 373–374, 105 S Ct 1996, 85 L Ed2d 385 (1985).
§9.7-4  Children Within Context of Protective or Psychological Parent Proceedings

Although Oregon’s psychological parent statute, ORS 109.119, is silent on a child’s statutory right to support, this statute does not prevent the imposition of support under other legal theories. When a third-party caretaker is awarded custody, courts in Oregon and elsewhere have imposed a duty of support on the birth parent. See Frederiksen v. Ostermeier, 162 Or App 430, 436, 986 P2d 1194 (1999) (guardianship and custody awarded to maternal grandmother after child’s mother had died; court of appeals remanded case to trial court to determine father’s child support obligation). Support is found in common-law theories that parents owe a duty to support their children. ORS 109.010; see Haxton and Haxton, 299 Or 616, 630, 705 P2d 721 (1985).

Child support can be ordered from a legal parent when a psychological parent, often a grandparent, has legal and physical custody of the child. ORS 109.100; see ORS 25.240.

The child support guidelines establish two mechanisms that allow a psychological parent (i.e., a caretaker relative such as a grandparent or third person) to receive child support from both legal parents, and sets forth how the child support calculation is to be made. In the first method, each legal parent’s child support obligation is calculated separately on his or her income alone. OAR 137-050-0700(5), discussed in §9.36. The financial result is that each parent will pay a lower amount of child support than would have been required under the former calculation utilizing only the single biological parent’s income.

The second method allows a parent who has established a child-parent relationship pursuant to ORS 109.119(3)(a)(10)(a), to obtain an
income deduction in computing adjusted income under the guidelines. The psychological parent may qualify for the additional child deduction if the child resides in the parent’s household. OAR 137-050-0720(2)(a).

No statutory provision requires a nonlegal parent to pay child support. See generally ORS 109.119. If the nonlegal parent is the legal guardian of the child, the guardian has no legal obligation to provide support to a minor beyond the support that the minor’s estate can provide. ORS 125.315(1)(e).

In Compton v. Compton, 187 Or App 142, 144, 66 P3d 572 (2003), the legal guardians of the minor children, the grandparents, on their divorce, voluntarily executed a contract establishing parenting time as between the two guardians and established child support from the grandfather to the grandmother. Grandfather then refused to pay child support, asserting that the contract was against public policy and was unenforceable. Id. at 145. The court held that child support could not have been ordered by the court under the dissolution statutes, the parent-child statutes, or the guardianship statutes. However, the court held that there was no violation of public policy to provide for the voluntary support of a minor child. Grandmother’s reliance on grandfather’s representation that he would pay support was cited as a reason to enforce the agreement and estopped grandfather from asserting that he had no legal support obligation. In Porter and Griffin, 245 Or App 178, 183–184, ___ P3d. ____ (2011), the parties submitted a stipulated general judgment in which each stipulated that a non-biological child was a “child of the marriage” for purposes of custody, support and parenting time. The court upheld and enforced the parties’ agreement and approved
the stipulated general judgment as it did not violate the law or public policy.

In the absence of a stipulation, an interesting issue still exists as to what support, if any, may be ordered from caretaker relatives who lose custody. Generally, the statutory requirements must be narrowly-tailored to serve a compelling state interest to pass constitutional muster. For example, caretaker relatives may be ordered to provide health and dental insurance or part of the parenting-time transportation costs for children under their physical custody. If custody is lost, some states have judicially ordered support for caretakers using in loco parentis or estoppel theories.


§9.8 TAX CONSIDERATIONS IN CHILD SUPPORT

§9.8-1 Income Tax Deductions, Exemptions, and Credits

The child support guidelines defer to IRC §152(e) by presuming that the custodial parent retains the child dependency exemption. OAR 137-050-0725(8); Emily Lynn Krupp, Exemptions for Children of Divorced Parents, OSB FAMILY & JUVENILE LAW NEWSLETTER, Vol 10, No 3 (June 1990), at 7.
The income tax deductions for dependents can affect the net income realized by either party. *See* IRC §151(c). A parent who provides over half the support for a child is entitled to the federal income tax deduction for that child. IRC §152(a). The rule changes if the parents are divorced, legally separated, live apart at all times during the last six months of the year, or have never been married. If a child (1) receives over half of his or her support during the calendar year from his or her parents (a) who are divorced or legally separated under a decree of divorce or separate maintenance, (b) who are separated under a written separation agreement, or (c) who live apart at all times during the last six months of the calendar year, and (2) the child is in the custody of one or both of his or her parents for more than half the calendar year, the parent who has custody the greater portion of the year may take the deduction. IRC §152(e)(1). An exception to this latter rule is found at IRC §152(e)(2). Under this exception, the court judgment or written agreement may allocate the deduction to the noncustodial parent if the custodial parent signs a written declaration or “waiver” that the child will not be claimed as a dependent by the custodial parent and attaches the declaration to the noncustodial parent’s tax return. There is an additional exception for pre-1985 divorce judgments or written agreements. *See* IRC §152(e)(4)(A).

The “waiver” of the dependency exemption is accomplished by the custodial parent signing an IRS form, 8332; the non-custodial parent must attach this form to the non-custodial parent’s return for each taxable year.

**CAVEAT:** If the custodial parent releases his or her dependency credit, that parent also releases the child tax credit but
not the child care credit, earned income credit or head of household status.

**COMMENT:** Section 152(e)(4)(A) defines custodial parent as the parent having custody for the greater portion of the calendar year. If the parents share equal parenting time, the custodial parent is the parent with the higher adjusted gross income. Section 152(c)(4). This rule becomes important if the custodial parent has not effectively released his or her right to the exemption.

State personal exemption credits may be claimed under the same tests. *See* ORS 316.007, 316.012. Disputes over who is entitled to the credit are to be resolved pursuant to ORS 305.215.

If the tax consequences result in a departure from the presumed child support, the trial court must enter written findings justifying the rebuttal. *Willey and Willey*, 155 Or App 352, 356, 963 P2d 141 (1998).

A child care credit is also available to the custodial parent. IRC §21. Generally, the credit is available to a custodial parent who maintains a household with one or more members under the age of 13 or one or more members otherwise physically or mentally incapable of caring for themselves for whom the custodial parent incurs dependent care expenses to enable him or her to be gainfully employed. IRC §21(a)(1), (b)(1)–(2)(A). The amount of expense that can be claimed is limited to $3,000 for one dependent and $6,000 for two. IRC §21(c). Depending on the person’s income, he or she can claim up to 30% of the allowable expenses. IRC §21(a)(2). The “applicable percentage” is reduced by “1 percentage point for each $2,000 (or fraction thereof) by which the taxpayer’s adjusted gross income for the taxable year exceeds $15,000.” IRC §21(a)(2).
The credit itself is not available to the noncustodial parent because he or she is not treated as a qualifying individual with regard to this section. IRC §21(e)(5). OAR 137-050-0760(2)(h).

The tax credit per year for each qualifying child is $600 for years 2001–2004. IRC §24(a). The amount increases for years 2005–2008, 2009, and 2010. A qualifying child of the taxpayer is a child under age 17 for the taxable year. IRS §24(a)(c)(1). This credit is generally nonrefundable, but with three or more children the credit may be refundable depending on the taxpayer’s circumstances. The credit is phased out as adjusted gross income exceeds $110,000 for joint filers, $75,000 for unmarried filers, and $55,000 for married filers who choose to file separately. IRS §24(b), (d). The credit may be claimed by the same parent who claims the dependency exemption.

**PRACTICE TIP:** As with the child care credit, the lawyer should make the amount of the tax exemption for the child known to the fact finder when attempting to rebut the presumed guideline amount. OAR 137-050-0760(2)(h). If it is advantageous for the noncustodial parent to claim the child as a tax exemption, such as when the custodial parent does not have sufficient taxable income to take advantage of the exemption, and the court orders the custodial parent to sign the waiver, the judgment should specifically state that the award of child support is based on the custodial parent signing the waiver, and if the custodial parent does not do so, the failure to sign the waiver will be considered a substantial change in economic circumstances to modify the child support amount to reflect the dependent child exemption.
§9.8-2 Unallocated Family Support

Although generally not favored by the courts, some support agreements may require obligor to pay support for the spouse and the child or children as “unallocated family support.” See §9.33, regarding the tax implications of unallocated support agreements. Amounts are treated as child support (and not spousal support) in three instances: (1) when a payment is clearly stated as child support, (2) when a reduction in an alimony payment is made on the happening of a contingency relating to a child, such as the child’s reaching a specified age, marrying, dying, or leaving school, and (3) when a reduction in an alimony payment is made “at a time which can clearly be associated with a contingency” relating to a child. IRC §71(c)(2). See, Gorin, Lawrence D., “When is it Alimony and When is it Not,” Family Law Newsletter, Vol. 29 No. 4 (OSB; August 2010).

A combined family support order is reviewable if accompanied by a child support guideline worksheet, contains findings as to the spousal support category and relative factors in accordance with ORS 107.105(1)(d)(A). Garza & Garza, 201 Or App 318, 118 P3d 824 (2005).

Under the Garza holding it has become easier to determine the portion of the family support that is treated as child support for income tax purposes because of the requirement for findings and documentation. IRC §71(C)(2). The Garza holding eliminates the tax traps incipient in unallocated family support orders. Compare Kean v. Comm’r, 407 F3d 186 (3rd Cir 2005), with Lovejoy v. Comm’r, 295 F3d 1208 (10th Cir 2002), discussed in §9.29.

Although Oregon statutes do not refer to or provide for “family support,” an out-of-state family support judgment that contains findings
necessary to determine the amount of family support attributable to child support is reviewable by an Oregon court exercising proper subject-matter jurisdiction. *Daly and Daly*, 228 Or App 134, 140–141, ___ P3d ___ (2009).

The *Daly* court, in holding that the court was not deprived of authority to modify a family support provision, relied on *Watson and Watson*, 149 Or App 598, 603–605, 945 P2d 522 (1997), which preceded the *Garza* case. In *Watson*, the court held that a dissolution judgment and the stipulated agreement it incorporated, obligating husband to pay “family support,” did not preclude modification of the child support. The *Watson* court found that the stipulation allocated a specific amount of “family support” to child support payments and provided a uniform child support guideline worksheet. *Id.* at 605. Even though there has never been statutory provision for combined awards (*see Vinson and Vinson*, 83 Or App 487, 491, 732 P2d 79 (1987)), domestic relations courts have authority to order combined support under their general equity powers as long as the order or the stipulation contains all appropriate findings and documentation required by the guidelines and spousal support statutes.

§9.8-3 **Collecting Support Arrears from Retirement Accounts and Tax Consequences**

In *Mark J. Vorwald*, 73 TCM (CCH) 1697 (1997), the United States Tax Court ruled that money garnished from an obligor’s individual retirement account (IRA) for child support arrearage was includable in obligor’s gross income, not obligee’s. In ruling against obligor parent, the Tax Court held that the transfer of funds from the parent’s IRA to the former spouse was an income distribution to obligor, notwithstanding that obligor never actually received the money or that the transfer of
funds was not “voluntary.” In addition to his income tax liability, the taxpayer was also found to be liable for a 10% penalty on the early distribution from obligor’s IRA.

PRACTICE Tip: Lawyers for obligors who are in arrears on child or spousal support should warn their clients of the additional tax burden they may incur if these obligations are not satisfied from after-tax income or assets. On the other hand, lawyers for obligees should consider the garnishment or threat of garnishment of an IRA as an effective collection method that may well prompt a recalcitrant obligor to comply with his or her obligation. The effective double-hit of loss of retirement benefits plus payment of interest and penalties, let alone the payment of the principal amount of the child support, should serve to deter future noncompliance by obligor. Appropriate planning by obligor will minimize the risk of negative income tax consequences that occurred to obligor in the Vorwald case. The Vorwald principles have special significance in Oregon because an obligor’s interest in a retirement plan is not entirely exempt from execution for a child support obligation. See ORS 18.358(3)(b) (“Unless otherwise ordered by a court under ORS 25.387, 75 percent of a beneficiary’s interest in a retirement plan shall be exempt from execution or other process arising out of a support obligation”).

Case holdings from other jurisdictions also clarify that ERISA restrictions for enforcement against pension plans do not apply to the issuance of a qualified domestic relations order directing payment of spousal support arrearage (or, arguably, child support) from an obligor’s pension plan. See, e.g., Stinner v. Stinner, 554 A2d 45 (Pa 1989)
(ERISA’s proscription on alienation and assignment is designed to protect employees from their own financial misdealings with third parties and is not intended to alter traditional support obligations); In re Marriage of LeBlanc, 944 P2d 686 (Colo App 1997); Baird v. Baird, 843 SW2d 388 (Mo App 1992). Accordingly, a garnishment issued pursuant to ORS 18.358(3)(b) to collect a child support obligation from an obligor’s retirement plan would not be precluded by federal ERISA restrictions.

§9.9 CHILD SUPPORT ORDERS DEFINED FURTHER

§9.9-1 Automatic Increases in Support Orders

Automatic increases in support orders or automatic cost-of-living adjustments in judgments are improper. Maurer and Maurer, 49 Or App 355, 361, 619 P2d 964 (1980); DeBonny and DeBonny, 36 Or App 783, 788, 585 P2d 742 (1978); Picker v. Vollenhover, 206 Or 45, 72–73, 290 P2d 789 (1955). Inflation and the costs of raising children as they get older are to some extent contemplated by the judgment, Garrison and Garrison, 28 Or App 297, 300, 559 P2d 513 (1977). Cf. Sterrett v. Hartzell, 640 NE2d 74 (Ind App 1994); Ware v. Ware, 9 Wash App 276, 512 P2d 742 (1993), not to mention the Guideline rules and Updated Obligation Scale. OAR 137-050-0725(1) and Appendix.

§9.9-2 Duration of Child Support Judgments

If a judgment was entered before January 1, 1994, “[t]he judgment lien of the child support award portion . . . , and any installment arrearage lien that arose under the judgment lien, expires 10 years after the entry of the judgment that established the support obligation.” ORS 18.192(1). In addition, if the child support award portion of the judgment or any lump-
sum money award for unpaid child support installments was entered after January 1, 1994, the judgment remedies “expire 35 years after the entry of the judgment that first establishes the support obligation.” ORS 18.180(5). However, a judgment resulting from an obligor’s failure to make a periodic child support installment payment stemming from a child support award portion of a judgment entered before January 1, 1994, may be renewed for a 10-year period, if the periodic judgment did not expire before January 1, 2004. ORS 18.192(1). The renewed pre–January 1, 1994, periodic judgment will have the same judgment remedies for the time period provided by ORS 18.192(1), (3).

PRACTICE TIP: See the practice tip in §9.38 regarding perfection of judgment liens on real property. The same rules apply to the attachment of child support judgment liens to all real property.

§9.9-3 Interest on Support Orders

Support obligations constitute judgments when due. ORS 107.135(7). Judgments accrue interest at the rate of 9% per annum unless the parties have otherwise agreed. ORS 82.010(2). Thus, as each support payment falls due, it begins to accrue interest at the 9% rate. See Meyer v. Meyer, 10 Or App 371, 499 P2d 823 (1972).

Where unpaid child support payments automatically become separate judgments under ORS 107.135(7) when the support is not paid, “the effect of entering a judgment consolidating the different amounts of interest due on each unpaid judgment is that obligor . . . pay[s] compound interest.” ORS 82.010(2)(c); Mannix and Mannix, 146 Or App 36, 44, 932 P2d 70 (1997).
Unless interest has been calculated from the time each support payment became due, it can be very time-consuming and confusing to calculate how much interest is owing on a support judgment. Each payment that falls due is a separate judgment. ORS 107.135(7). Contrary to the rules adopted by the DOJ regarding payment allocation, the common-law rule provides that every time money is received toward a support arrearage, the money is to be applied to the oldest judgment unless one of the parties makes a different election. See Fatland v. Wentworth & Irwin, 149 Or 277, 283, 40 P2d 68 (1935).

In response to the decision in Gayer and Gayer, 326 Or 436, 952 P2d 1030 (1998) (allowing obligors to direct application of monthly support payments), ORS 25.020 now requires that all payments made to the DOJ from both assigned and private cases be distributed according to rules promulgated by DHS which are consistent with federal regulations. The federal regulations provide that current distribution is applied first to current monthly support obligation and then to accrued arrearage, oldest first. 45 CFR §302.51.

On written request of a party, the Division of Child Support (DCS) or an enforcing district attorney must add interest calculations to support accounts when the order of support is an Oregon order and the requesting party provides “a month by month calculation showing support accrual, principal due and interest accrual for each month with total principal and interest due as separate totals at the end of the calculations.” OAR 137-055-5080(1)(a)–(b). In that event, interest is calculated at the statutory rate, currently 9% per annum simple interest. ORS 82.010(2). DCS or an enforcing district attorney’s office may limit adding interest to the
support order or support arrears to one time every 24 months. OAR 137-055-5080(2).

When UIFSA support enforcement proceedings are initiated in this state, Oregon courts must recognize and enforce the issuing state’s law regarding interest accrual on child support arrearage. In State v. Calvert (In re Calvert & Calvert), 191 Or App 361, 82 P3d 1056 (2004), the court held that even though a California support order and money judgment failed to state an applicable interest rate for arrearage when it was registered in this state, this omission did not preclude the Division of Child Support from subsequently seeking to enforce an interest obligation on the child support arrearage. Id. at 372–373.

§9.9-4 Limited Judgments

The court may award support for the benefit of a minor child during the pendency of a dissolution, separation, or annulment proceeding. ORS 107.095(1)(b). The court may also order support for a CAS after the commencement of the case. ORS 107.108(1)(a)(13). While it may remain questionable practice to forego a motion for temporary support, ORS 107.105(1)(c) now authorizes a court to award support retroactive to the date of service of the summons and petition. Counsel may now consider such factors as the expense of an additional hearing and the amount of support likely to be recovered in determining whether to seek temporary support. ORS 107.105(1)(c) provides that a trial court may enter support retroactively regardless of whether support was sought by an obligee during the pendency. The amendment to ORS 107.105(1)(c) effectively overrules Moore and Moore, 84 Or App 182, 184, 733 P2d 482 (1987) which held a trial court had no authority to
award support retroactive to a date prior to trial, equitable considerations notwithstanding.

In a filiation proceeding to obtain judgment for the support of a child (ORS 109.155(4)), the court may award retroactive child support notwithstanding language contained in ORS 109.103 to the effect that support provisions found in ORS 107.093–107.425 are applicable to a filiation proceeding. *State ex rel Olson v. Renda*, 171 Or App 713, 17 P3d 514 (2000).

**COMMENT:** There is no statutory authority on modifying an existing limited judgment during the pendency of a dissolution or separation proceeding. Some trial courts have nonetheless held that litigants are entitled to only one limited judgment proceeding, while others have placed the burden of proving an unanticipated substantial change of circumstances on a party who wishes to modify a limited judgment during the pendency of a case. However, ORS 107.135(3)(a), which provides that a “substantial change in economic circumstances” must be established to modify a judgment after entry, does not apply to limited judgments. On the other hand, a limited judgment may be modified by the court, ORS 18.082(1)(e), but is not appealable. ORS 107.095(2). Given that limited judgments by definition do not dispense with all of the claims set forth in a petition for dissolution or separation, ORS 18.005(13)(d), it appears that limited judgment orders may be revised at anytime during the pendency of the case, subject to the discretion of the court.

Any delinquent amounts in payment of support under a limited judgment must be entered and docketed as a judgment, so that execution
of garnishment may issue. ORS 107.095(2). A trial court may not forgive unpaid limited judgments for child and spousal support that accrue during the pendency of the case. “Under ORS 107.095(2), each payment under the temporary support order that was not paid by its due date became a judgment and could not be cancelled.” Alls and Alls, 137 Or App 32, 34, 902 P2d 1204 (1995).

A trial court may not forgive an arrearage resulting from a temporary support order. The total arrearage from temporary support order obligations for family support must be entered and docketed as a separate money judgment. Although the arrearage may not be included in a property settlement under ORS 107.095(2), the court may offset the judgment against any equalizing judgment in favor of obligor. Binnell and Binnell, 153 Or App 204, 207–208, 956 P2d 1003 (1998).

§9.9-5 Setoff of Support and Support Arrearages

It is error to offset one party’s spousal support obligation against the other party’s child support obligation. LaFrance and LaFrance, 134 OrApp 76, 79, 894 P2d 1210 (1995) (such an arrangement “creates a problematic situation in which any change in circumstances warranting a modification of child support will require the court to recalculate and modify wife’s spousal support amount, as well.”); Pagano and Pagano, 147 OrApp 357, 365, 935 P2d 1246 (1997) (“[I]nappropriate to offset a spousal support award with child support.”)

Equally, the trial court has no authority to cancel, forgive or set off an unpaid, accrued support arrearage by determining issues outside the scope of the arrearage. ORS 25.167; Stokes and Stokes, 324 Or App 566, 580, ___ P3d ___ (2010) (payment on marital credit card cannot satisfy

§9.10 PAYMENT OF SUPPORT

§9.10-1 Neither Payment nor Satisfaction in Kind; Equitable Estoppel

It is perhaps obvious that child support cannot be satisfied other than by payment to obligee or the DOJ. *See Eagen and Eagen*, 292 Or 492, 495, 640 P2d 1019 (1982). *See also* ORS 25.020(11), 25.030. Counsel should be under no illusion: “contributions of services or clothing to the children may not constitute a substitute form of child support.” *Grage and Grage*, 128 Or App 409, 413, 876 P2d 350, *modified*, 131 Or App 158 (1994). There is neither statutory nor administrative authority for the payment of support in kind, whether by services or by other forms of contribution. *Id*. See the discussion of *Longcor and Longcor*, 114 Or App 89, 834 P2d 479 (1992), in §8.11D (voluntary payments for parochial school tuition held not to offset child support obligation).

On the other hand, such contributions may provide a future basis for a downward deviation of the presumed amount of child support, OAR 137-050-0760(1)(a); or, if an obligor has parenting time of a child more than 25%, a credit shall be given against obligor’s future support. OAR 137-050-0730(6). This parenting time credit simplifies computing a
credit given against obligor’s future support when obligor’s direct
collection reduces obligee’s support expenses.

Finally, the court may allow a credit against support arrearage for
periods of time during which obligor, with the knowledge and consent of
obligee or pursuant to a court order, has physical custody of the child.
ORS 107.135(7)(a); Hunt and Hunt, 238 Or App 195, 200, ___ P3d ___
(2010). A judgment for child support, however, is final when due and
cannot be modified until either party makes a motion to set aside or
modify the judgment. ORS 107.135(7).

With the exception set forth in ORS 107.135(7)(a), the court does
not have the authority to satisfy an unpaid child support obligation
retroactively. And, in Oregon, equitable estoppel is no defense to the
enforcement of a child support judgment. Starzinger v. Starzinger, 82 Or
App 96, 98–100, 727 P2d 168 (1986). In Starzinger, obligee and obligor
entered into an express agreement to relieve obligor of the duty of
support. Obligee, however, subsequently changed her mind and
demanded payment of the support, together with interest. Although the
court found the result to be “somewhat unfair,” it nonetheless upheld the
judgment for support, together with interest that accrued during the term
of the parties’ agreement. Id. at 99.

Current law requires that any agreements relieving or modifying
support be reduced to judgment in order to be enforceable. ORS
107.104(2). Compare Forester and Forester, 147 Or App 319, 321, 936
P2d 388, modified on other grounds, 149 Or App 111 (1997) (obligor
made payments on a post-separation credit card debt incurred solely by
obligee, based on his understanding that the parties had agreed that in
exchange for father paying the credit card bill, mother would offset
father’s support obligation; court upheld the judgment for arrears), with Wyllie and Wyllie, 95 Or App 109, 111, 767 P2d 931 (1989) (obligor testified that he and obligee had reached agreement that he would relinquish his lien on marital residence in exchange for obligee’s surrender of all claims to further child support; court rejected obligor’s argument, holding that whether such an agreement existed was irrelevant because judgment for support had not been modified).

§9.10-2 Recovering Support Over-Payments

ORS 25.125 and OAR 137-055-6260 describe the circumstances under which a credit may be obtained for over-payment of child support where DCS receives support payments.

Since the above administrative rule is limited to DCS collection cases, obligor who overpays support outside the context of the agency must rely upon ORS 107.135(7)(a) to obtain a credit or utilize common law tort remedies.

ORS 107.135(7)(a) provides that obligor may obtain a credit against child support arrearages for periods of time, excluding reasonable parenting time, that obligor has physical custody of the child, unless otherwise provided by order or judgment.

PRACTICE TIP: Obligor’s counsel should draft the child support judgment to allow a credit against child support arrearages for over-payments made by obligor, with provision for notice to obligee or any collection agency.

The omission of careful drafting might leave obligor with the following alternative: pay reduced support to cancel out the over-payment, allow the monthly support arrearages to accumulate, and then
file an order to show cause requesting an order, pursuant to ORS 107.135(7)(a), to allow obligor a credit against child support arrearages. Prudence would also dictate that the order to show cause be accompanied by a pleading for money had and received or other equitable remedy accompanied with a prayer for appropriate equitable relief pursuant to the court’s general equity powers. ORS 107.405.

§9.10-3  Maximum Garnishment of Social Security Benefits for Child Support

Section 207 of the Social Security Act (42 USC §407), protects social security benefits from assignment, levy or garnishment with certain exceptions. Section 459 of the Act (42 USC §659), allows social security benefits to be garnished to enforce child support obligations. Maximum amounts are subject to the limitations of the Federal Consumer Protection Act. The maximum amount subject to garnishment varies from 50% to 65% for the noncustodial parent, depending upon if that parent has other dependents, owes no arrearage or is in arrears more or less than 12 weeks.

§9.11  MISCELLANEOUS CONSIDERATIONS

§9.11-1  Incarcerated Obligors

For purposes of establishing a support order involving an incarcerated obligor, the guidelines support calculation (OAR 137-050-0715(7)(d)) is used with one small change: all obligor’s income and assets are attributed to obligor unless specifically restricted or inaccessible and, if obligor’s gross income is less than $200 per month, the agency will presume that obligor has zero ability to pay support. OAR 137-055-3300(4)–(5). To be considered an “incarcerated obligor”
under this rule, a person must be, or expect to be, confined in a correctional institution for at least six consecutive months from the date of the initiation of the action. OAR 137-055-3300(1)(b). After obligor is released from incarceration, the order remains in effect until modified pursuant to a request from one of the parties.

COMMENT: In *In re Marriage of Willis and Willis*, 314 Or 566, 840 P2d 697 (1992), the Oregon Supreme Court rejected obligee’s assertion that an incarcerated obligor was estopped from modifying his child support obligation because of unclean hands. The court held that equitable considerations notwithstanding, obligor’s conviction would not bar modification as husband’s conviction was not taken “for the primary purpose of avoiding his support obligation.” *Id.* at 570. See ORS 107.135(4)(b). Although the court rejected obligee’s equitably based argument, it also suggested: “On the other hand, of course, incarceration alone does not demonstrate an inability to meet an existing child support obligation. For example, some incarcerated persons may have substantial assets; some may have a reasonable opportunity to acquire future income and assets, . . . ; or the period of incarceration may be extremely short. The court must consider each motion for modification on a case-by-case basis, to determine whether obligor had shown a ‘substantial change in economic circumstances. . . .’” *Id.* at 570–571 (internal citations omitted).

The supreme court’s discussion in *Willis, supra*, should be read in conjunction with the administrative rule regarding incarcerated obligors “without ability to pay.” OAR 137-055-3300(4); 137-050-0755(2)(C)(B).
§9.11-2  Effect of Bankruptcy

The Bankruptcy Code excepts from discharge child or spousal support obligations “in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement,” but not to the extent that:

(1) The debt has been assigned to another entity, voluntarily, by operation of law, or otherwise, except for debts assigned pursuant to §408(a)(3) of the Social Security Act, or any such debt that has been assigned to the federal government or one of its state or political subdivisions; or

(2) The debt is merely labeled as support, unless the liability is actually in the nature of support. 11 USC §523(a)(5).

The state court’s determination of whether divorce debts were support and maintenance did not preclude subsequent determinations by the bankruptcy court that the debts were not in the nature of support and maintenance for purposes of determining the dischargeability in bankruptcy of the debts. See Matter of Dennis, 25 F3d 274, 277–278 (5th Cir 1994). Although bankruptcy courts usually defer to state court judges regarding family law matters, In re MacDonald, 755 F2d 715, 717 (9th Cir 1985), findings in a judgment labeling an obligation as support are reviewable to determine whether the obligation is actually in the nature of support. Hogie v. Hogie, 527 NW2d 915, 918–919 (SD 1995); see Nelsen v. Nelsen, 444 NW2d 302 (Minn App 1989). Attorney fees and educational expenses for the children may qualify as nondischargeable support. See In re Chang, 163 F3d 1138 (9th Cir 1998), cert. denied, 526 US 1149 (1999); In re Seixas, 239 BR 398 (9th Cir BAP 1999).
The Bankruptcy Reform Act of 1994 categorized support as a priority debt, enabling the trustee to pay support from assets of the estate before paying general unsecured creditors. Congress amended the automatic stay provision of §362(b)(2) by excepting from the stay (1) an action to determine paternity and (2) an action to establish or modify an order for “alimony, maintenance, or support.” In addition, an action for collection of support from non-estate property still remains exempt from the stay. 11 USC §362(b)(2). Collection from property of the debtor’s estate by or on behalf an obligee remains a violation of the automatic stay. See In re McGinty, 119 BR 290 (Bankr MD Fla 1990) (effort to seize IRA funds awarded in divorce without obtaining relief from automatic stay resulted in harsh penalty).

When an obligee’s former husband filed bankruptcy, discharging an equalizing judgment, his obligation to pay certain debts under the dissolution judgment, and an award of attorney fees in favor of obligee (for defense of prior motions to modify brought by her former husband), obligee successfully obtained remedy in the state circuit court by modifying and increasing the child support obligation. Howell and Hooyman, 171 Or App 545, 547, 16 P3d 1173 (2000), rev. denied, 332 Or 239 (2001). Among the factors considered by the court were the debts wife now had to pay and the tax-free nature of husband’s income.

The Bankruptcy Code prevents the avoidance of any judicial lien that secures a debt for support. 11 USC §522(f)(1). This provision was intended to supplement the reach of the United States Supreme Court holding in Farrey v. Sanderfoot, 500 US 291, 111 S Ct 1825, 114 L Ed2d 337 (1991). In Farrey, supra, the debtor husband in a Chapter 7 proceeding was prevented from avoiding a judicial lien on real property.
granted pursuant to a divorce decree that extinguished the parties’ tenancy in the property.

The Bankruptcy Code provides that debts for support have seventh priority unless obligee agrees to a different treatment. 11 USC §507(a)(7). An obligor spouse who wishes to use a Chapter 13 plan to restructure support payments might not gain approval of a plan because the full amount of arrearage must be paid in full under 11 USC §507(a)(7). In a Chapter 7 proceeding, lawyers representing obligees should use due diligence to ensure that ongoing monthly support obligations are being paid out of postpetition earnings. An obligee may file a priority claim before the trustee commences distribution to creditors, as in *In re Pacific Atlantic Trading Co.*, 33 F3d 1064 (9th Cir 1994); however, the claim may be disallowed if proof of the claim is not timely filed, 11 USC §502(b)(9).

To prevent trustees from suing to avoid and recover support payments as preferential payments, Congress amended the Bankruptcy Code to expressly provide that payments by the debtor for support obligations are no longer avoidable preferences, provided that the obligation is not assigned voluntarily or by operation of law. 11 USC §547(c)(7). The congressional amendments giving increased protection to spouses for child and spousal support obligations under the priority and avoidance statutes do not apply to obligations assigned under any statute, rule, or document. 11 USC §547(c)(7)(A).

**COMMENT:** When a parent is faced with substantial prejudgment and postjudgment support debts, an argument can no longer be made that “equitable consideration” permits discharge of the past obligation to the county or the state. *Cf. In re Ramirez*, 795
F2d 1494, 1498–1499 (9th Cir 1986). Prejudgment arrearage owed to a county or other governmental agency as reimbursement for support payments may not be discharged under either a Chapter 7 or a Chapter 13 proceeding. *In re Cervantes*, 219 F3d 955 (9th Cir 2000) (Chapter 13); *In re Leibowitz*, 217 F3d 799 (9th Cir 2000) (Chapter 7). When the choice lies between forcing a parent to pay the past statutory state debt and permitting the parent to pay current support obligations to his or her children without being unduly hindered, lawyers are now limited to the state court remedy of seeking a downward variance from the presumed child support amount based on the parent’s special financial hardship. OAR 137-050-0760(1)(f).

Lawyers should also be aware that postjudgment support debts owed to the state or county are also nondischargeable under §523(a)(5) of the Bankruptcy Code. 11 USC §523(a)(5)(A). See *In re Cervantes*, 212 BR 643, 649 (Bankr ND Cal 1997), aff’d, 229 BR 19 (9th Cir BAP 1998).

**COMMENT: Section §523(a)(15) of the Bankruptcy Code permits a nondebtor spouse to file an adversary proceeding objecting to the debtor’s discharge of debts incurred in the course of the divorce or separation, excluding support obligations. This section, together with Ninth Circuit cases, illustrates that the bankruptcy forum will continue to be used to litigate the substance of dissolutions, including support issues. For example, in *In re Siragusa*, 27 F3d 406, 408 (9th Cir 1994), the court held that a state court may reconsider support issues after a property settlement has been discharged in bankruptcy, noting that the
discharge altered both wife’s need and husband’s ability to pay additional support. In *In re Futoran*, 76 F3d 265 (9th Cir 1996), a trustee successfully brought an adversary proceeding to set aside as an avoidable preference a lump-sum payment of future spousal support obligations made in exchange for cancellation of a marital termination agreement. These cases illustrate the need for a lawyer to exercise careful thought and drafting skill when negotiating and finalizing dissolution settlements involving substantial assets that are interrelated with child and spousal support obligations.

§9.11-3  Life Insurance

To protect obligees against the financial effects resulting from the untimely death of an obligor, the legislature enacted provisions to encourage obligors to obtain life insurance adequate to provide for the continued support of obligees. ORS 107.810–107.830. During the dissolution proceedings, a court may order an obligor to purchase or maintain a life insurance policy on his or her life naming obligee as beneficiary. ORS 107.820(1)–(2). In addition, a court order for the payment of spousal or child support, no matter when entered, creates an insurable interest in the party awarded the right to receive the support. ORS 107.820. Obligee is authorized to purchase life insurance on the life of obligor and the court may require obligor to undergo a physical examination. Awards of a share of a pension or retirement plan are similarly insurable. ORS 107.820(3). Premiums on the life insurance policy must be paid as outlined in ORS 107.830.

The 2007 Commentary to former OAR 137-050-0333(1)(b) discussed whether “an adjustment to child support [should] be allowed
when a party is required to provide life insurance.” The drafters of the guidelines indicate doubt whether a downward adjustment to the presumed amount of child support is appropriate. The drafters felt that the “decision is better left to the fact finder for a case by case determination as to whether the additional expense [of a life insurance monthly premium] places an unnecessary burden on the obligated parent.” See, OAR 137-050-0760(1)(f).

If obligee or obligee’s lawyer serves a certified copy of the judgment on the insurance company, identifies the policy involved, and requests notice of any action undertaken by the insured obligor to reduce policy benefits or to change the beneficiary designation, the insurance company must notify obligee of any such action by the insured obligor. Either party may request notice when the premiums have not been paid. ORS 107.820(6).

A certified copy of the judgment should be served on the registered agent of an insurance company by registered mail, return receipt requested. Thereafter, if a change in beneficiary designation or a reduction of benefits occurs without notice to obligee, the lawyer will be protected from any potential malpractice claims. See Seim v. Soriano, 94 Or App 67, 71, 764 P2d 591 (1988). The lawyer should specifically identify by number any existing policies of an obligor to be maintained as security for support in the judgment. See Seim, supra. If obligor is ordered to obtain life insurance, the lawyer should ensure compliance. When no proof of obligor’s compliance is forthcoming, contempt should be pursued without unreasonable delay.

Life insurance is modifiable by the court when such insurance is statutorily required to protect the party awarded child or spousal support.
ORS 107.135(1)(a); ORS 107.820; Simmons and Simmons, 138 Or App 230, 234, 907 P2d 1134 (1995). A third party, other than the spouse receiving support, cannot be designated as trustee when the insurance secures payment of child support. ORS 107.820(1); Stuart and Stuart, 107 Or App 549, 553–554, 813 P2d 49 (1991).

Where a party has a support obligation under a 50% shared parenting-time schedule, the court is authorized to require that party to purchase insurance, even though that party does not have a net child support obligation. ORS 107.106, 107.820(2); Willey and Willey, 155 Or App 352, 357, 963 P2d 141 (1998).

COMMENT: The Willey holding makes it possible for the court to require both spouses to provide life insurance when they undertake a 50-50 shared custody child support obligation, notwithstanding ORS 107.820(2). The legislature should clarify when it is appropriate for the court to order the purchase of life insurance for parties exercising equal (50-50) custodial and split custodial schedules.

It is a common practice for lawyers to include within stipulated judgments of dissolution a provision providing remedy to an obligee in the event that obligor dies without designating the appropriate beneficiary or maintaining sufficient life insurance. The following paragraph is frequently included in judgments and is intended to address the problem following the death of obligor:

A constructive trust shall be imposed over the proceeds of any insurance owned by a party at the time of [his/her] death if that party fails to maintain life insurance as set forth herein, or if the insurance is in force but another beneficiary is designated to receive the funds. If there
are no insurance proceeds or insufficient proceeds to satisfy the obligations set forth herein, that party’s obligation shall survive [his/her] death and shall constitute a priority claim on [his/her] estate and on any of [his/her] assets at the time of [his/her] death. (Emphasis added).

Historically, life insurance/constructive trust provisions did not merge into the judgment of dissolution because the maintenance of such life insurance, at the time of an obligor’s death, came under the future acts exception to the doctrine of merger. See *Finlay-Wheeler v. Rofinot*, 276 Or 865, 868, 556 P2d 952 (1976); *Waterman v. Armstrong*, 291 Or 551, 553–554, 558–559, 633 P2d 774 (1981) (requirements of property settlement agreement that father pay all son’s medical expenses and provide health and accident insurance coverage to son for his lifetime are acts other than payment of money and therefore did not merge into dissolution decree). Accordingly, in *Carothers v. Carothers*, 260 Or 99, 101–102, 488 P2d 1185 (1971), on the death of an obligor who failed to comply with provisions of a judgment requiring him to maintain life insurance, an obligee had a remedy against the estate of obligor.

In *Sinsel v. Sinsel*, 47 Or App 153, 614 P2d 115 (1980), an “obligor made his second wife the sole beneficiary under his only life insurance policy. In doing so, he breached his duty to maintain life insurance for the benefit of his daughter and his former wife under a dissolution judgment.” *Oregon Pac. State Ins. Co. v. Jackson*, 162 Or App 654, 659, 986 P2d 650 (1999) (citing *Sinsel*). The court of appeals in *Sinsel* “imposed a constructive trust because the obligor changed beneficiaries on a policy after the policy had been identified to satisfy the requirement of the dissolution judgment.” *Id.*
However, in *Jackson, supra*, 162 Or App at 659, a constructive trust was not imposed because obligor changed the beneficiary designation *before* his court-ordered obligation to maintain life insurance arose and when “[t]here was no evidence that the policy had been identified to satisfy an anticipated obligation in the dissolution proceeding.” The court reasoned that for the court to impose a constructive trust, the “plaintiff was required to prove that defendant had either actual or constructive notice that [the decedent’s] acts were wrongful in nature.” *Id.*

The Oregon Supreme Court in *Tupper v. Roan*, 349 Or 211, ____ P3d ____ (2010), further defined the circumstances in which a former spouse may sue an inappropriately designated beneficiary on unjust enrichment and money had and received theories. The court held that an ex-spouse may acquire an equitable interest in a life insurance policy acquired after dissolution, if the dissolution judgment created an obligation that “in some fashion clearly identifie[d] that policy as one of its objects.” *Id.* at 226.

In *Tupper*, the crucial wording “any insurance,” was found to meet the “identity” test creating an equitable interest. The phrase “any insurance” is set forth in the sample language regarding the imposition of a constructive trust above. Such wording, the court held, “contemplates a failure on [obligor’s] part to carry out the obligation...as described” and, when the failure occurs, imposes a constructive trust on “any” insurance policy owned by obligor at his or her death. *Id.* at 227.

The phrase “any” such life insurance was found by the *Tupper* court to support the claim of an ex-spouse to an inappropriately designated beneficiary to make a claim for money had and received. *Id.*
at 228–229. To prevail on an unjust enrichment claim, an ex-spouse must also demonstrate that decedent’s beneficiary (1) did not give valuable consideration for being named beneficiary and (2) had actual or constructive notice of decedent’s obligation to name the plaintiff–ex-spouse as beneficiary. *Id.* at 227 n 8.

When possible, counsel should specifically identify life insurance policies, in addition to using the all-inclusive phrase “any” in reference to any other insurance the obligor might obtain when the policies are to be maintained to secure either a child or spousal support obligation. Counsel should also serve a certified copy of the judgment on the life insurance company identified. To prevent the result in *Tupper*, counsel should insure obligor’s compliance with the life insurance provision by requiring periodic proof of compliance and also by requiring notification of non-compliance by the insurer. See, ORS 107.820(5)(6).

Under current law, in a suit for marital dissolution, separation, annulment or modification, the court may enforce the terms of life insurance/support-constructive trust remedies set forth in a stipulated judgment signed by both parties, a judgment resulting from a settlement on the record, or a judgment incorporating a marital settlement agreement:

1. As contract terms using contract remedies;
2. By imposing any remedy available to enforce a judgment, including but not limited to contempt; or

In *McIntire v. Lang*, 241 Or App 518, ____ P3d ____ (2011), the parties’ stipulated judgment contained wording meeting the “identity”
test creating the equitable interest. The court imposed a constructive trust, even though the stipulated judgment provided no support award for the child. No contract ambiguity existed because “the judgment can be understood to require life insurance to serve each parent’s general obligation” to provide for the child, citing ORS 109.010. Id. at 525–526. The estate’s equitable defense, that husband failed to “protect his interests” by complying with ORS 107.820(5)(6) (delivery, notification and curing of default provisions), was trumped by the public policy of ORS 107.820, ensuring that divorcing parties support their children. McIntire, supra, 241 Or App at 527.

CAVEAT: Notwithstanding the contract remedies available pursuant to ORS 107.104(2), practitioners should not rely upon this statute in seeking a remedy where the obligor is deceased. The statute and its concomitant legislative policy may not assist a plaintiff seeking a remedy against “a person who is not a party to the agreement”—namely, the second wife, policy beneficiary. Tupper, supra, 349 Or at 219. The equitable claims of unjust enrichment and money had and received—even though sometimes fraught with proof problems—are the preferred vehicles for impressing a constructive trust remedy in such “breach” of marital settlement insurance cases.

ERISA governs life insurance beneficiary designations when life insurance is provided as part of an employee welfare benefit plan. Section 514 of ERISA mandates that its provisions supersede any and all state laws regarding any employee plan benefit. 29 USC §1144; Egelhoff v. Egelhoff, 532 US 141, 121 S Ct 1322, 149 L Ed2d 264 (2001) (federal ERISA law preempted relevant Washington statute that automatically
revoked spouse beneficiary designation on divorce; ERISA plan proceeds awarded to former spouse rather than to decedent’s children by prior marriage). Although the Ninth Circuit has yet to decide the issue, the Fifth and Seventh Circuits have held that as a matter of federal common law, divorce invalidates the beneficiary designation in favor of a former spouse, absent service of an order requiring a beneficiary designation in his or her favor. See, also, Weaver v. Keen, 43 SW3d 537 (Tex App 2001), aff’d on different grounds, 121 S.W.3rd 721 (Tex. 2003) (former spouse’s “specific knowing and voluntary” waiver of interest in ERISA plan was enforceable under federal common law); Brandon v. Travelers Ins. Co., 18 F3d 1321, 1326 (5th Cir 1994); Fox Valley & Vic. Const. Wkrs. Pension F. v. Brown, 897 F2d 275, 281–282 (7th Cir 1990). Cf. Lyman Lumber Co. v. Hill, 877 F2d 692, 693–694 (8th Cir 1989) (former spouse entitled to plan proceeds because divorce decree did not specifically refer to and modify beneficiary interest). The Sixth Circuit, however, has concluded that ERISA requires that plan benefits be paid in accordance with the beneficiary designation documents and instructions governing the plan, whatever the marital status of the beneficiary and participant obligor. McMillan v. Parrott, 913 F2d 310, 311–312 (6th Cir 1990). No state may legislatively invalidate plan beneficiary designations in favor of a former wife. Egelhoff, supra.

Federal courts have affirmed the imposition of a constructive trust on distributed assets when paid in contravention of a beneficiary designation required by a limited judgment prohibiting a change in beneficiary designations, even when the plan was not served with the order before the death of obligor. Central States, SE and SW Areas Pension v. Howell, 227 F3d 672, 678–679 (6th Cir 2000) (ERISA does
not preempt imposition of constructive trust after benefits are distributed, although benefits must be paid in accordance with beneficiary designation). If ERISA does not preempt the imposition of a constructive trust after the death of an obligor, state law controls.

The court does not have the authority to require an obligor to designate either a former wife or children as beneficiaries of a National Service Life Insurance Policy, notwithstanding the provisions of ORS 107.820. See In re Marriage of Olson, 52 Or App 695, 700, 629 P2d 834 (1981). Such life insurance policies are made available to veterans as a result of their military service. Federal law governs the designation of the beneficiary and provides that a veteran may, without consent, designate any beneficiary of his or her choice. 38 USC §1917(a). See, e.g., Hoffman v. United States, 391 F2d 195 (9th Cir 1968); Tierney v. United States, 315 F Supp 1073 (D Mass 1970).

§9.11-4 Termination or Suspension of Child Support When Parenting Time Withheld

Child support may be terminated or modified on “[a] showing that the parent or other person having custody of the child or a person acting in that parent or other person’s behalf has interfered with or denied without good cause the exercise of the parent’s parenting time rights.” ORS 107.431(1)(d). The statute is intended to be a tool in resolving parenting-time disputes by giving the court discretion to terminate child support. Kempke and Kempke, 151 Or App 434, 440–441, 949 P2d 1239 (1997).

One of the first cases relieving an obligor of child support because of a former wife’s interference with visitation was Levell v. Levell, 183 Or 39, 190 P2d 527 (1948). In Levell, the former wife moved to
California with her new husband and the court found that her obstruction of obligor’s right of visitation when he came to California constituted a violation of the Oregon judgment. *Id.* at 48. The court commented that it was “not disposed to deprive the children of the benefit of the contributions which are required from the [obligor] under the decree of the court without evidence satisfactorily showing that those contributions are no longer necessary for the proper maintenance and support of the children” *Id.* at 49. The court may relieve an obligor of his or her child support obligation “[i]f the welfare of the children does not require that the [obligor] continue with his contributions to their support.” *Id.* at 50.

More recently, courts have been very reluctant to terminate child support when a custodial parent withholds parenting time. *Dooley and Dooley*, 30 Or App 989, 569 P2d 627 (1977) (support not withheld even though children refused to see obligor, either on their own volition or because of urging of obligee). Courts repeatedly use the rationale that “support obligations are for the benefit of the dependent child, not the parent,” *Kempke*, supra, 151 Or App at 441 (quoting *State ex rel Juv. Court of Louisiana v. McIntyre*, 97 Or App 56, 775 P2d 329 (1989)), and that such action would be tantamount to terminating obligor’s parental relationship with the child and would punish the child, *Christiansen and Christiansen*, 161 Or App 528, 535, 984 P2d 371 (1999).

Situations do arise, however, when courts find it appropriate to suspend support. Before the enactment of ORS 107.431, the court of appeals reversed an order of child support when the noncustodial parent was unable to locate the custodial parent and his children even though he diligently searched for them. *Hardin and Hardin*, 31 Or App 1011, 1013, 571 P2d 1294 (1977). See, also, *French v. French*, 112 Or App 138, 142,
827 P2d 944 (1992) (suspending obligor’s child support obligations when obligee was found in contempt for interfering with obligor’s visitation rights and obligor satisfied the requirements of ORS 107.431(1)); June and Golub, 172 Or App 384, 18 P3d 1107 (2001) (suspending father’s child support obligation when mother was in willful contempt of the parenting-time provisions of the parties’ dissolution judgment).

PRACTICE TIP: Lawyers seeking to terminate or modify child support based on the willful withholding of parenting time should combine such a request with an order to show cause for contempt. On appellate review, substantial evidence will support the court’s findings of contempt. A request should be made by obligee to review de novo the trial court’s judgment suspending child support, with deference given to the trial court’s assessment of the credibility of the parties. See, ORS 19.415(3)(b). When seeking a trial court ruling, obligor’s lawyer should argue that support should be suspended to motivate obligee to cooperate in the process of reestablishing the relationship between obligor and the child. See June, supra, 172 Or App at 385. Lawyers should also advise their clients that during suspension of child support, obligor should deposit the child support money in an interest-bearing account in the event obligor’s motion is unsuccessful. This action will also demonstrate that obligor comes into court with “clean hands.” Theoretically, a motion to terminate child support should be easiest if obligee is on public assistance and refuses parenting time. The child will not be punished because obligee will continue receiving the grant. Courts will be more reluctant if obligor has unclean hands (e.g., is in arrears). To overcome the argument that the court should not “punish the
child,” the lawyer for obligor might argue that while direct support to obligee is terminated, obligor will deposit child support into a guardianship account as long as access is refused. When parenting time resumes, the guardianship should be suspended and an order entered placing the money in a restricted account and releasing the money to the child when he or she turns 18. *Cf.* SLR 9.055 (Multnomah) (relating to settlement of personal injury or wrongful death claims).

§9.11-5 Uniform Trial Court Rules

In a domestic relations proceeding in which child support or spousal support is an issue, a Uniform Support Declaration (set forth in the Appendix to the UTCRs) must be filed by each party. If no party seeks spousal support or deviation from the uniform child support guidelines, the parties must complete the declaration and required attachments, such as wage stubs, but parties need not complete any of the schedules or attachments to the schedules. UTCR 8.010(5); see UTCR 8.040(3), 8.050(1). In lieu of a USA, the DCS or DA may file a declaration with specified information. UTCR 8.010(6), 8.050(4).

If child support is an issue, the DCS worksheets described in UTCR 8.060 must also be filed. UTCR 8.060(1).

Every proposed order or judgment providing for or modifying support must state the due date of the first support payment to be made, the means of payment, and the person to whom payment must be made. UTCR 8.020.

**COMMENT:** To date, the UTCR requirement that a prescribed format for a child support order be followed has not countermanded prior rulings of the Oregon Court of Appeals to the
effect that a change in circumstances is to be measured from the date of an order, when “the issue of child support [could] be fairly raised at the time of the preceding” action, whether or not the prior order addressed child support and followed the format set forth in the UTCR. See *Nelson and Nelson*, 27 Or App 167, 170–171, 555 P2d 806 (1977); *D’Ambrosio v. D’Ambrosio*, 15 Or App 435, 515 P2d 1353 (1973). An order that does not address child support and that does not comply with the UTCR may nonetheless serve to limit the ability of an obligee to obtain a later modification, absent a showing of an unanticipated substantial change in financial circumstances. This result may be particularly harsh if the prior order addressed only parenting time.

At least seven days before a hearing for prejudgment relief or to modify a judgment, the opposing party must also serve and file a Uniform Support Affidavit on the moving party if support is to be an issue. UTCR 8.040(4), 8.050(3).

**PRACTICE TIP:** It makes little sense for obligee to provide the information requested in Schedule 1 of the Uniform Support Declaration as required by UTCR 8.010(5)(b). Doing so would seemingly only provide information by which the opposing party could rebut the presumed basic amount of support. On the other hand, if the lawyer represents an obligor and does not have that information, it may be appropriate to depose obligee.

§9.11-6  Modifiability of Child Support

In *McInnis & McInnis*, 199 Or App 223, 110 P3d 639, rev. granted, 338 Or 681 (2005), the court of appeals addressed the issue of
the parties’ ability to contract to make spousal support nonmodifiable. The *McInnis* case should not be interpreted as guiding precedent for drafting nonmodifiable custody or child support orders, as such agreements would violate the statutory authority of the court and public policy.

For example, “although the statutory phrase ‘substantial change in economic circumstances’ applies to modifications of both child support and spousal support, the criteria for modification of the two kinds of support are ‘substantially different . . . , because the family relationships are different.’” *Nieth & Nieth*, 199 Or App 330, 337, 111 P3d 746, clarified, adhered to on recons., 200 Or App 582 (2005) (quoting *Weber & Weber*, 337 Or 55, 68 n 8, 91 P3d 706 (2004)). In drafting nonmodifiable support provisions, the lawyer must heed the policy differences with regard to modification of spousal as opposed to child support:

The initial spousal support determination is based on the parties’ predissolution standard of living [*Weber*, 337 Or] at 65. An upward modification of spousal support is not based on the improved financial condition of the obligor; rather, it ‘is based more properly on considerations of the payee spouse’s increased needs and the payor spouse’s concomitant ability to meet them. [*Weber*, 337 Or] at 65–66.

The policy behind child support is different. ORS 25.275(2)(a) provides that a “child is entitled to benefit from the income of both parents to the same extent that the child would have benefitted had the family unit remained intact or if there had been an intact family unit consisting of both parents and the child.” Unlike spousal support, the objective of which is to freeze and preserve the parties’ predissolution standard of living, child support retains more flexibility. For example, child support modification proceedings occur in . . . cycles. . . .
Because a child support award is an attempt to simulate the economic benefits that the child would enjoy had the family remained intact, modification based solely on a change of the economic circumstances of the obligor is not necessarily improper. See Weber, 337 Ore. at 68, 68 n 8.

Nieth, 198 Or App at 337–338.

With the enactment of ORS 107.104 and 107.135(15) (discussed in §9.49), parties may now enter into enforceable settlement agreements extending the duration of child support past the age of 21, notwithstanding the provisions of ORS 107.108. Reeves and Elliott, 237 Or App 126, 131–132, ___ P3d ___ (2010) (such agreements neither violate the law nor contravene public policy).

Although parties are free, by settlement agreement, to stipulate to the nonmodifiability of the amount of child support, “[c]ourts always ‘are at liberty to reject the parties’ agreement’ and to require support in the amount required by the guidelines formula.” ORS 25.280; Grile and Grile, 138 Or App 630, 633, 909 P2d 1248 (1996); Petersen and Petersen, 132 Or App 190, 201–202, 888 P2d 23 (1994); Wood and Wood, 106 Or App 192, 806 P2d 722 (1991). However, a presumptive support amount may be rebutted by a nonmodifiability settlement agreement. OAR 137-050-0760(1)(l); Reich and Reich, 176 Or App 442, 454–455, 32 P3d 904 (2001). The support amount will not be rebutted if “the enforcement of such an agreement could be contrary to public policy.” Mock and Sceva, 143 Or App 362, 367 n 1, 923 P2d 1310 (1996).

A common practice is for parties to stipulate to a review of child support at some point in the future, without the necessity of establishing
an unanticipated substantial change in circumstances. For instance, parties often agree that when spousal support is scheduled to step down or terminate, child support may be reviewed without the need of establishing an unanticipated substantial change of circumstances. Such an agreement facilitates bringing the child support into compliance with the presumed guideline child support amount, while also considering the then-current circumstances of the parties. As is more fully discussed in §9.27, a scheduled stepping down or termination of spousal support is not a change of circumstances. See Shlitter & Shlitter, 188 Or App 277, 287–288, 71 P3d 154 (2003). In the absence of an agreement to allow review, if there is no other basis to establish an unanticipated substantial change of circumstances, an obligee, when spousal support steps down, may indeed receive less child support than the guidelines would presume. That problem can, of course, be remedied by administrative review if the last judgment for child support is more than three years old. An administrative review more than three years from the prior support judgment does not require the establishment of an unanticipated substantial change in circumstances. ORS 25.287(1)(d).

Oregon appellate courts have not squarely addressed the question of stipulations to review child support without the need to establish an unanticipated substantial change in circumstances. However, such stipulations authorizing review have been expressly approved in the context of spousal support. The court has balanced the intrusion into its authority to decide issues related to spousal support against its desire to give effect to the parties’ agreement. See §9.35; McDonnal and McDonnal, 293 Or 772, 779, 652 P2d 1247 (1982).
If at the time of trial it is clear that spousal support will step down, the parties, as an alternative to a stipulation to review, may simply input all factors affecting child support, including the parties’ incomes. The original judgment should contain the child support amount that will take effect attendant with the step-down in spousal support. However, the Oregon Supreme Court, in *Picker v. Vollenhover*, 206 Or 45, 72, 290 P2d 789 (1955), cautioned that future changes in the amount of support should not be set forth in the initial award:

In particular, [the trial court] should not in the original decree provide for future changes in the quantum of support based on the single criterion of the change in the amount of the earnings of the defendant. The original decree retains its vitality unless and until the court on proper showing finds that on all of the evidence presented a change in support is required. A provision such as [the one here] is not only based on speculation as to future events,—it is also based on the assumption that a change in one only of the many circumstances which may be relevant to the issue shall be conclusive.

**COMMENT:** Given that both the *Shlitter* case and the *Picker* case, *supra*, suggest it is beyond the authority of the dissolution trial court to increase child support when spousal support steps down as ordered by the trial court, a legislative cure of the problem, by amending ORS 25.287(1) to allow administrative review of child support when spousal support decreases, may be appropriate.