

# **Georgia Child Support Commission, 2005: Child Cost Schedule and Parenting Time Adjustment Issues<sup>©</sup>**

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## **Introductory Comments**

Child support guidelines are legal presumptions. In a legal presumption, proving one set of facts leads to concluding another set of facts unless rebutted. In child support guidelines, the set of facts to be proven may include parental income, parenting time shares, and the number of children and the facts concluded include presumptive child costs and a parent's share of child costs. Importantly, there are higher standards for constructing legal presumptions compared to mere social policy. Social policies focus heavily on various values and preferences. Legal presumptions are required to not be arbitrary and should have a sound empirical basis. Legal presumptions are required to have a basis in fact that is related to what is presumed. More detail on standards for legal presumptions follows in a later section. However, the analysis in this paper should be viewed in the context of establishing an empirically valid legal presumption—not a social policy that may have arbitrary features.

## **Background of the cost schedule and parenting time adjustment issue**

- HB 221 of the 2005 Georgia Legislative Session establishes new child support guidelines, effective July 1, 2006 pending final approval by the 2006 Georgia Legislative Assembly.
- HB 221 has built in parenting time adjustments with the concepts of credit percentages and add-on percentages coming from Tennessee's presumptive child support guidelines.

The basic ideas for HB 221's parenting time adjustments include:

- 1) Assume that "standard parenting time" typically falls within a range from 61 to 99 "days" for the non-custodial parent. The cost schedule already assumes standard parenting time and there is no parent time adjustment (zero percentage) to the basic child support obligation.
- 2) After a non-custodial parent reaches a threshold of 100 days and up to 182 or more days, the non-custodial parent receives credit for parenting time from 10 percent up to 50 percent of the obligor's share of standard child costs.

- 3) When a non-custodial parent has 60 days or less, an add-on percentage is included in the presumptive award, starting with 10 percent and increasing up to 35 percent of the obligor's share of standard child costs.

For the parenting time credit percentages and add-on percentages to have an existing underlying basis, the cost schedule must be based on already taking standard parenting time into account. Otherwise, the underlying facts of the cost table do not exist in application and it would be economically unjust and inappropriate to apply a cost table without those adjustments with percentages that assume those adjustments. Because the underlying facts would not exist in application, it likely would be a due process violation to apply such parenting time percentages that assume a standard parenting time adjustment in the cost table but the cost table has no such adjustments.

The House Judiciary Committee revised the original HB 221 to be based on the Tennessee Income Shares guideline with the anticipation of including an Income Shares cost table similar to that of Tennessee but adjusted to Georgia conditions. This rework of the original bill was largely due to proposals for these changes by the study committee of the Georgia Judicial Council of Superior Court Judges and its consultant. The original HB 221 was based upon a cost schedule with no built in adjustments and with parenting time credits starting with marginal parenting time amounts. The cost schedule and parenting time percentages were consistent with each other's underlying facts in the original HB 221. With the adoption of the Tennessee version of Income Shares as the blue print for HB 221, there is every indication that the study committee of the Council of Superior Court Judges and the House Judiciary Committee acted on these changes with the assumption that Tennessee's cost schedule included built in parenting time adjustments and that Georgia's table would be nearly identical once Georgia's state income tax was taken into account (Tennessee has no state income tax and that results in Tennessee tax payers having more net income for a given level of gross income than Georgia counterparts). Even though there are indications that the study committee of the Georgia Council of Superior Court Judges expected a standard Income Shares cost schedule to become part of HB 221, there is no such specific requirement in the legislation nor is there any indication of such a belief by members of the Georgia House or Georgia Senate.

The basis questions to be addressed on the issue of the cost table to be developed for HB 221 include:

- Does a standard cost table (Income Shares or otherwise) have standard parenting time "built in?"
- If the standard cost table does not have standard parenting time built in, what adjustments are needed for the cost table to have the same underlying facts as the parenting time adjustment percentages?

### Parenting Time Credit and Add-on Percentages: Tennessee and Georgia HB 221

Tennessee Days (Non- custodial)	Tennessee Credit (-) & Add-on Percent <sup>1</sup>	Georgia HB 221 Days (Non- custodial)	Georgia HB 221 Credit (-) & Add-on Percent
0-8	+35%	0-8	+35%
9-23	+30%	9-23	+30%
24-38	+20%	24-38	+20%
39-53	+10%	39-60	+10%
54-120	0%	61-99	0%
121-136	-10%	100-136	-10%
137-151	-20%	137-151	-20%
152-166	-30%	152-166	-30%
167-181	-40%	167-181	-40%
182+	-50%	182+	-50%

#### Does a standard cost table (Income Shares) have standard parenting time “built in?”

The following belief regarding Income Shares and parenting time is frequently disseminated:

One of the most important variables in determining the proper amount of child support is the form of custody ordered by the court. Embedded in the child support guidelines of all the states is the presumption that the court will order "standard visitation" of 20% overnight visitation with the noncustodial parent. This 20% figure is based on 73 days: every other weekend (52 days), plus two weeks in summer (14 days), plus Mother's Day or Father's Day (1 day), plus Thanksgiving or Christmas (2 days), plus birthdays (2 days), plus a miscellaneous day (1 day). ... When the parents have some form of shared physical custody that is over this 20%, the presumption embedded in the guidelines no longer applies, and an adjustment to the support order should be made.

Source: Laura W. Morgan, web article, [www.supportguidelines.com](http://www.supportguidelines.com), “Child Support Guidelines and the Shared Custody Dilemma,” version June 6, 2005, originally published June 1999.

<sup>1</sup> The Tennessee approach applies credit percentages and add-on percentages to the obligor’s obligation. This differs sharply from the Arizona approach which applies credit percentages (starting with near zero parenting time) to the total standard cost amount (from the cost schedule). The Tennessee and Georgia HB 221 approach of applying percentages to the obligation rather than total standard cost conflicts with what the actual economic costs are and are likely due process and equal protection violations. This issue is largely (but not entirely) separate from the issue of adjusting the cost table to reflect the same assumptions as the credit and add-on percentages for parenting time.

## **Income Shares Cost Tables Assume No Parenting Time Adjustments**

- **The developer of Income Shares, Robert G. Williams, specifically states in the original manual issued by the federal government for developing child support guidelines that the Income Shares costs tables are based on intact family data and are allocated between the parents according to intact family costs. That is, all of the child costs in the cost tables are assumed to be in one household--there are no built in parenting time adjustments.**

The Income Shares model calculates child support as the share of each parent's income estimated to have been allocated to the child if the parents and child were living in an intact household. A basic child support obligation is computed based on the combined income of the parents (replicating total income in an intact household).

Robert G. Williams, *Development of Guidelines for Child Support Orders*, U.S. Department of Health and Human Services, Office of Child Support Enforcement, September 1987, p. II-68.

- **Robert Williams, developer of Income Shares, stated in testimony before the 1998 Georgia Commission on Child Support that Income Shares has no adjustments for visitation in the cost tables.** From the transcript of Robert Williams before the 1998 Georgia Commission on Child Support:

Mr. Rogers [commissioner]: What's the underlying assumption on the visitation distribution, parenting time distribution for your data?

Dr. Williams: There is no underlying assumption for parenting time distribution.

Mr. Rogers: I mean do you assume that the noncustodial parent gets the child 15, 20, 25 percent of the time.

Dr. Williams: There is no assumption. The income shares model is based on intact families, and then what that is doing is it's leading a lot of states to look at either shared physical custody adjustments or, in some cases, a visitation adjustment. I don't like the word, but I use it because it's a commonly-used word. For example, two states, Arizona and New Jersey, have recently implemented adjustments that really cover a lot of what would normally be considered routine visitation situations.

Transcript, Georgia Commission on Child Support, Atlanta, Georgia, May 1, 1998, pp. 76-77; transcript by Bull & Associates, Certified Court and Deposition Reporters, Atlanta, Georgia.

- **An Ohio appeals court has confirmed that Income Shares has no built in adjustment for standard visitation.**

See *Thomas D. Vliek, Plaintiff-Appellant v. Kristina G. Myllykoski, Defendant-Appellee*, Accelerated Case No. 97-L-300, Court of Appeals of Ohio, Eleventh Appellate District, Lake County, December 11, 1998.

Second, appellant says there is no statutory basis for the proposition that the worksheet "presumes" a standard visitation order, so that deviation is necessary when there is no visitation. He argues that each court has its own conception as to what constitutes a "standard" order of visitation. Two months may be standard in Lake County, but another amount might be standard elsewhere. He also says that visitation for a newborn is highly irregular, so the magistrate could not "presume" the juvenile court would order a standard two months visitation if it had been asked to decide that issue.

These arguments have some merit. We agree that nothing in the structure of the Child Support Worksheet set forth in R.C. 3113.215(E), or in the terms of R.C. 3113.215 "presume" a standard, two-month visitation order. In fact, the opposite is true. If the magistrate's "presumption" that the Worksheet accounted for two months of visitation were valid, then the trial court would be instructed in the Worksheet to divide the annual child support obligation by ten to arrive at the amount of support to be paid each month. The magistrate's rule would reflect only ten months of child support obligations (spread out over twelve payments), and two months off when the child spends time with the obligor spouse pursuant to a visitation order, during which the obligor spouse pays the child care expenses directly instead of to the residential parent. Line 28 of the Worksheet actually directs the court to divide the annual child support obligation of the payor spouse by twelve. In our view, that means the payor spouse owes his child support all twelve months of the year, and the Worksheet makes no implied allowances for a standard, two-month visitation order.

- **Policy Studies, Inc. (PSI) continues to document that visitation costs of a non-custodial parent are not taken into account in Income Shares cost schedules. Examples are found in recent reports by PSI.**

From Economic Basis for Updated Child Support Schedule, State of Arizona, February 6, 2003, submitted to Supreme Court, State of Arizona, submitted by Policy Studies Inc., Denver, Colorado, p. 36:

(7) Visitation costs are not factored into the schedule. Since the Schedule is based on expenditures for children in intact households, there is no consideration given for visitation costs. Taking such costs into account would be further complicated by the variability in actual visitation patterns and the duplicative nature of many costs incurred for visitation (e.g. housing, home furnishings).

**What is the broad implication of using a standard cost schedule such as done in Tennessee with parenting time assumptions that differ?**

- Essentially, for the standard parenting time situation, there will be no parenting time adjustment even though the non-custodial parent incurs child costs.
- For above average parenting time situations, the non-custodial parent will receive less than the factually correct adjustment for parenting time.
- For below average parenting time situations, the non-custodial parent is required to pay on child costs exceeding 100 percent even though the custodial parent never incurs more than 100 percent of child costs.
- Most importantly, for any given situation, the underlying facts of either the cost schedule or the parenting time credits and add-ons do not exist in application and each conflict with the other. Such an arrangement is arbitrary and without economic basis.

Before looking at examples of this problem, it is useful to compare the Tennessee combination of cost schedule and parenting time credits with standard principles of legal presumptions.

### **Standards and Principles for Consideration for Adoption of Components of Georgia Child Support Guidelines as Per HB 221, 2005 Georgia Legislative Session<sup>2</sup>**

**What is a presumption? Noun: “an inference as to the existence of a fact not certainly known that the law requires to be drawn from the known or proven existence of some other fact.” Dictionary.com.** A child support guideline is a presumption regarding child costs.

#### **What legal standards apply to a legal presumption?**

- **There should be a rational relationship between the underlying facts (study or other basis) of the presumption and the presumed facts.**

A statutory presumption cannot be sustained if there is no rational connection between the fact proved and the fact presumed... *Leary v. United States* 395 U.S. 6, 23 L Ed 2d 57, 89 S Ct 1532 (1968).

- **A presumption should not be arbitrary.**

A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Bailey v. Alabama* 219 U.S. 219, 233, *et seq.* Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property. ... *McFarland v. American Sugar Co.*, 241 U.S. 79, 86. Cited in

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<sup>2</sup> This section is heavily reliant upon contributions by John Remington Graham (constitutional law consultant, Minnesota and Quebec); Richard Keck (attorney, Atlanta, GA); William C. Akins (attorney, Lawrenceville, GA); and Daryl G. LeCroy (attorney, Atlanta, GA).

*Manley v. State of Georgia* 279 U.S. 1; 49 S. Ct. 215; 73 L. Ed. 575; 1929 LEXIS 33 (1929).

- **A regulation of economic nature (such as a state child support guideline intended to comply with federal regulations) should have a valid empirical basis.**

“agency actions must be reversed as arbitrary and capricious when the agency fails to examine the relevant data and articulate a . . . rational connection between the facts found and the choice made.” *Sierra Club v. Martin*, 168 F. 3d 1 (11<sup>th</sup> Cir., 1999).

- **The underlying facts of the presumption must exist in application.**

See *Leary v. United States*, 395 U.S. 6 at 32-37 (1969), at page 38:

“... it quickly becomes apparent that the legislative record does not supply an adequate basis upon which to judge the soundness of the ‘knowledge’ part of the presumption. We have therefore taken other materials into account as well, in an effort to sustain the presumption. In so doing, we have not confined ourselves to data available at the time the presumption was enacted in 1956, but have also considered more recent information, in order both to obtain a broader general background, and to ascertain whether the intervening years have witnessed significant changes which might bear upon the presumption’s validity.”

At footnote 68:

“A statute based upon a legislative declaration of fact is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge, a court must, of course, be free to re-examine the factual declaration. See *Block v. Hirsh*, 256 US 135, 154-155, 65 L Ed 865, 870, 41 S Ct 458, 16 ALR 165 (1921); *Communist Party v. S.A.C.B.*, 367 US 1, 110-114, 6 L Ed 2d 625, 697, 699 (1961).

- **A child support presumptive award must be fully rebuttable.**

From Code of Federal Regulations, 45 CFR 302.56(f):

(f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.

See also *Vlandis v. Kline*, 412 U. S. 441 at 445-446 (1973); *Manley v. Georgia*, 279 U. S. 1 at 6 (1920), and *Western & Atlantic R. R. v. Henderson*, 279 U. S. 629 at 642-644 (1929)

- **Child support guidelines should be based on needs of the children and the parents' ability to pay.**

See *Willingham v. Willingham*, 261 Ga. 674, 675 (1991); *Walker v. Walker*, 260 Ga. 442, 443 (1990); *Arrington v. Arrington*, 261 Ga. 547 (1991).

- **Child support guidelines should be based on a standard of equal duty of support, reflecting each parent's financial resources.**

See *Smith v. Smith*, 626 P.2d 342 (Or. 1980), *Melzer v. Witsberger*, 480 A.2d 991 (Pa. 1984) and *Conway v. Dana*, 318 A.2d 324 (Pa. 1985).

The parenting time credit percentages and associated parenting times (overnights) are arbitrary—there is no valid empirical basis. The combination of the unadjusted cost schedule and parenting time credit and add-on percentages is arbitrary and has no empirical basis. The underlying facts of one or the other must always not exist in application because they conflict with each other. The Tennessee combination establishes a lower duty of support for the custodial parent and higher duty of support for the non-custodial parent.

- **Basically, the cost schedule and parenting time credit percentages and add-on percentages of Tennessee's child support guidelines violate almost all key principles regarding legal presumptions (except perhaps the rebuttability requirement).**
- **Should Georgia's HB 221 guidelines incorporate a standard cost table and retain enacted parenting time credit and add-on percentages, then Georgia's child support guidelines also would violate the same key principles of legal presumptions.**

**What is a detailed example of the outcome of Tennessee's approach that uses an unadjusted cost schedule with parenting time credit/add-on percentages that have standard parenting time as the starting point?**

**Example: Two children, father has no parenting time; Father's monthly gross income: \$2,000; Mother's monthly gross income, zero:**

State of Tennessee--Child Support Worksheet			
<b>PART II. Basic Support Obligation</b>	COLUMN A	COLUMN B	COLUMN C
	Mother	Father	Combined
1 Monthly Gross Income	\$0.00	\$2,000.00	
1a Self-employment tax paid	\$0.00	\$0.00	
1b Credit for pre-existing child support orders	\$0.00	\$0.00	
1c Credit for in-home children	\$0.00	\$0.00	
1d Credit for not-in-home children	\$0.00	\$0.00	
2 Adjusted Gross Income (AGI)	\$0.00	\$2,000.00	\$2,000.00
3 Percentage Share of Income (PI)	0.0%	100.0%	100.0%
4 Basic Child Support Obligation (BCSO)			\$592.00
<b>Part III. Parents' Share of Support Obligation</b>			
Standard Parenting			
5 Each parent's share of the BCSO	\$0.00	\$592.00	
Split Parenting			
6a Mother's obligation for children for whom father is the PRP			
6b Father's obligation for children for whom mother is the PRP			
<b>PART IV. Parenting Time Adjustment</b>			
7a Number of days per calendar year with children supported by this order with whom the ARP spends 121 or more days per calendar year			
7b Parenting time adjustment percentage			
8a Number of days per calendar year with children supported by this order with whom the ARP spends 53 or fewer days per calendar year			0
8b Parenting time adjustment percentage			35%
9 Adjustment in ARP's support obligation for parenting time		\$207.20	
10 Each parent's share of the adjusted BCSO	\$0.00	\$799.20	
Part V. Additional Expenses			
11a Children's portion of health insurance premium	\$0.00	\$0.00	
11b Work-related childcare	\$0.00	\$0.00	
11c Total additional expenses	\$0.00	\$0.00	\$0.00
12 Each parent's share of additional expenses	\$0.00	\$0.00	
13 Adjusted Support Obligation (ASO)	\$0.00	\$799.20	\$799.20
14 Enter amount of payroll deduction from lines 11a and/or 11b or direct payments from line 11a	\$0.00	\$0.00	
15 Subtract line 14 from line 13. Enter remainder.	\$0.00	\$799.20	
<b>Part VI. Presumptive Child Support Order/Modification of Current Support</b>			
16 Presumptive Child Support Order (PCSO)		\$799.20	

- **Essentially, the children are with the mother 100 percent of the time and the mother incurs 100 percent of the costs. Based on the cost schedule, 100 percent of the costs is \$592. However, the father pays \$799.20—135 percent of the costs.**

For the cost schedule to result in the correct outcome, the cost table must be reduced by the percentage necessary for when 35 percent is added that the result is 100 percent of total costs. This cost figure is the reciprocal of 135 percent or 1 divided by 1.35 or .7407 of the standard cost table.

- **That is, the standard cost table must be reduced by 25.93 percent to be consistent with an add-on percentage of 35 percent for the obligor having zero parenting time. This reduction is separate from any adjustment for state income taxes (Tennessee has no state income tax).**

**How does Tennessee’s presumptive award for zero parenting time compare to that for other states?**

**Awards in Selected Southeastern States: Two Children, Obligor  
Has No Parenting Time, Father’s Monthly Gross  
Income--\$2,000, Mother’s Gross Income--Zero**

<b>State</b>	<b>Presumptive award</b>
Tennessee, presumptive	\$799.20
Tennessee, adjusted to GA income tax* (what standard Income Shares would produce with HB221 add-on percentage)	\$768.03
Alabama	\$495.00
Georgia, midpoint, obligor only guideline	\$500.00
North Carolina	\$574.00
South Carolina	\$542.00
Virginia	\$523.00

\*Reduced by Georgia’s 3.9 percent income tax rate at this gross income level, single tax payer status, standard deduction and exemption.

**Awards in Selected Southeastern States: Two Children, Obligor  
Has No Parenting Time, Father’s Monthly Gross  
Income--\$4,000, Mother’s Gross Income--Zero**

<b>State</b>	<b>Presumptive Award</b>
Tennessee, presumptive	\$1,386.45
Tennessee, adjusted to GA income tax* (what standard Income Shares would produce with HB221 add-on percentage)	\$1,317.82
Alabama	\$849.00
Georgia, midpoint, obligor only guideline	\$1,000.00
North Carolina	\$967.00
South Carolina	\$876.00
Virginia	\$861.00

\*Reduced by Georgia’s 5.0 percent income tax rate at this gross income level, single tax payer status, standard deduction and exemption.

- Essentially, the Tennessee combination of a standard cost schedule with add-on percentages for little or no parenting time for the obligor produce the highest awards in the Southeast for modest income obligors with no parenting time and low/no income custodial parents.
- This approach (potentially adopted by HB 221 in Georgia, dependent on final cost table adopted) produces the highest awards for middle income obligors.
- Further review will find that this approach (potentially adopted by HB 221 in Georgia, unless there is an adjustment) produces some of the highest obligations in the country for obligors with moderate income, custodial parents with little income, and with the obligor having little or no parenting time.

**Conclusions**

- To be economically sound, if HB 221 parenting time credits and add-on percentages are retained, the cost schedule for HB 221 must be reduced by about 25 percent relative to a cost table that assumes 100 percent of the costs are incurred by the custodial parent. This is necessary regardless of whether a cost schedule is produced by Policy Studies, Inc. or by some other expert.
- The commission may want to consider rewriting the parenting time adjustment section of HB 221 to follow the Arizona plan in which parenting time adjustments start out assuming zero parenting time—just as the standard cost table assumes. Such an approach is more economically sound and still incorporates equal duty of support features that the text of HB 221 implies.

- If the position of the state is to encourage the involvement of both parents in the lives of their children—non-custodial as well as custodial, some parenting time will occur with both parents and it is economically appropriate to presumptively include recognition of both parents' costs related to parenting time. A guideline without a presumptive adjustment for parenting time conflicts with a state policy of encouraging both parents' involvement. A presumptive parenting time adjustment is consistent with the fact that parenting time for the non-custodial parent occurs in the vast majority of cases.