

A Primer on Deviating for a Child Support Award[©]

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Introduction

Child support guideline awards are not written in stone. Whether you are a noncustodial or custodial parent, you have the right to ask the court to make an award that is different from what is called the presumptive award—if your case facts indicate that the presumptive award is not appropriate. The presumptive award is the default award based on certain required inputs into the award formula. Such inputs include monthly income and the number of children and possibly other factors that vary somewhat by state.

There is never a guarantee that the court will diverge from the standard award, but understanding and applying the proper procedure for “deviating” can boost the odds of an award that is more appropriate for your situation. If the court enters an award that diverges from the default award due to certain circumstances in a case, this is referred to as deviating. Just a few examples of deviations are travel expenses for exchanging the children between parents, parenting time of the noncustodial parent, and the reasonable needs of the child in high income situations (more examples below). Are there factors in your child support case that the court should consider that are not automatically taken into account and how does your attorney bring these issues before the court? First, what is the “presumptive” child support award?

What are child support guidelines and why are they “presumptive?”

Child support guidelines are legal formulas to help the court decide what a child support award should be in a given case. Federal regulations provide much of the foundation for the generalities of how state child support guidelines operate. The regulations mostly conform to the traditional legal concept of rebuttable presumption. We’ll explain the idea of rebuttable later.

Each state (this includes Washington, D.C. and U.S. territories) is required to have a formula that presumptively determines what a child support award should be in a given case. It is mandatory that the formula be applied to every case to determine an initial calculation for the award. By presumptive, this means that the statutory formula results in a child support award amount that the court will put into the child support order unless one of the parties (parents) convinces the court that another amount is more appropriate based on case circumstances.

Here’s an example guidelines being presumptive from Georgia’s child support guidelines (OCGA § 19-6-15(c)(1)):

(c) Applicability and required findings.

(1) The child support guidelines contained in this Code section are a minimum basis for determining the amount of child support and shall apply as a rebuttable presumption in all legal proceedings involving the child support responsibility of a parent.

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- Presumptive means it is a default award that can only be overridden with the court's discretion through deviation arguments. All states require determining what the presumptive award is (a specific dollar amount) before a deviation can be made. Essentially, the presumptive award is the default award if no deviation request is made and accepted by the court.

Any financial factor in your case that is not part of your state's presumptive calculation is a potential deviation factor—one that is discretionary.

What is the presumptive award based upon?

Generally, the presumptive award is based on the income of the noncustodial parent or both of the parents, the number of children, and the cost of medical insurance for the child. Federal law requires that the presumptive formula be based at least on the noncustodial parent's income and include the cost of medical insurance for the child if it is available to at least one parent at a reasonable cost. It is permitted to base the award on both parents' income instead of just the noncustodial parent's income. The vast majority of states use both parents' income.

Some states presumptively also include the cost of work-related day care, the noncustodial parent's share of parenting time, and government benefits for the child (an example is Social Security related to a child's disability). Each state's guidelines specifically say what is included presumptively. Basically, when checking out your state's presumptive formula, look for whether income is combined parental income (Income Shares) or just that of the noncustodial parent (percent of obligor income method). Note that some states use before-tax income and some states use after-tax income. Then check to see if day care and parenting time is presumptive or an optional deviation adjustment.

Summary of What Goes into a Presumptive Award

All States

- Number of children in the case
- Income of the noncustodial parent or both parents
- Health insurance premium for the child if reasonably affordable

Some States

- Cost of work-related child care
- The noncustodial parent's parenting time
- Government benefits for a child—generally treated as being applied toward a noncustodial parent's cash award obligation

Every financial factor of your case that is not listed above is a potential deviation factor. If child care costs, noncustodial parenting time, and government benefits are not specifically listed in the presumptive calculation in your state, they are discretionary deviation factors.

What is a rebuttable presumption?

According to Wikipedia, a rebuttable presumption is "an assumption made by a court, one that is taken to be true unless someone comes forward to contest it and prove otherwise." With child support guidelines being rebuttable, that means you have the opportunity to rebut—or set aside—the presumptive award based on case facts. The final award is not unchangeable from the initially determined presumptive award.

What is a deviation?

Child support law has developed some of its own specific language. In most legal situations where there is a presumption, the relevant concept is rebuttal and that is still true for child support cases. But for child support, instead of calling an alternative award (to the presumptive award) a rebuttal award, it is called a deviation award.

- A deviation is simply how much a specific case factor not already included in the presumptive calculation causes the court to change the dollar amount of the award.

For example, if the presumptive award is \$700 per month and the court determines that the noncustodial parent's travel expenses to exercise parenting time should result in a \$100 downward adjustment in the award, the deviation is \$100. A final child support award is the combination of the presumptive award and the deviations (which can be up or down or a combination of up or down factors)—which in this example is \$600 after the \$100 downward deviation for travel expenses.

What are some examples of deviations that might apply for noncustodial parents and for custodial parents?

This is an interesting question and the examples vary significantly by state. Some states include economic issues presumptively that other states put in the possible deviation category. For example, some states have presumptive calculations for a noncustodial parent's share of parenting time while other states simply say that the court can consider the noncustodial parent's parenting time as a potential deviation.

Here is a list of examples of deviation factors from a variety of states:

- High income (many states have a presumptive ceiling on an award but do allow argument for higher awards to take into account an appropriate standard of living)
- The noncustodial parent's share of parenting time (if not part of the presumptive calculation)
- Premiums for the children's dental and vision care insurance (often separate from presumptive health insurance)
- Travel expenses for exercising parenting time
- Low income for the noncustodial parent (but a presumptive calculation in many states)
- Life insurance premiums when for the child's benefit
- Child care tax credits
- Child dependency exemptions
- Special educational expenses—this could be for special needs or for private tuition in high income cases
- Special expenses—this category is wide-ranging and could include anything from special medical needs to special activities that enhance the development of the child. Some examples of the latter are summer camp; music or art lessons; travel; school sponsored extracurricular activities, such as band, clubs, and athletics.
- Additional dependent children not a part of the case (from another relationship). Some states make presumptive adjustments to income for dependent children not a part of the case before the court and other states leave as a deviation.
- Government benefits for the child (such as Social Security disability benefits) if not already presumptive
- Mortgage payments made for the child's benefits—with the payment often a partial offset to cash award

Not all states list potential factors for a deviation—some merely state you have the right to ask for a deviation if circumstances make the presumptive award “unjust or inappropriate.” This phrase comes specifically from federal regulations—45 CFR 302.56(g).

- The bottom line is that all states must allow nonspecific (not in the list) deviations for any factor that could result in the presumptive award being unjust or inappropriate.

How do you think about what might be deviation factors for your case?

There are probably two things at a minimum to consider.

First, review your state’s list of deviation factors in its guidelines. Some deviation factors may apply to your case.

Second, think about financial factors for your case that render the presumptive award unjust or inappropriate—or excessive or inadequate—but are not listed in your state’s guidelines. The guidelines must be fully rebuttable—meaning any relevant factor can become a deviation factor.

What are the generalities about potential deviation factors not listed? The traditional pre-guidelines era (most states did not implement presumptive guidelines until a 1989 deadline set by the federal government) standard for determining child support was “needs and ability to pay.” That is, the needs of the child and the ability of the parents to pay were evaluated on a case-by-case basis. Nearly all states have retained this standard in current guidelines as a basis for rebuttal—or deviating. This applies to any listed deviation factors or factors not listed.

The following are two examples of appellate opinions on needs and ability to pay. The first is from a prominent case involving the entertainer, Sean Combs—a.k.a. “Diddy.” From *In the Matter of Misa Brim v Sean Combs*, 2005 N.Y. App. Div. LEXIS 3489.

In calculating the award of child support to the mother under Family Court Act § 413, the Support Magistrate erred in basing the award in part on the amount of child support the father paid for his other child by a different woman, particularly where no evidence was presented as to that child’s expenses, resources, and needs. To this end, in high income cases, the appropriate determination under Family Court Act §413(f) for an award of child support on parental income in excess of \$ 80,000 should be based on the child’s actual needs and the amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties (see *Anonymous v Anonymous*, 286 A.D.2d 585, 729 N.Y.S.2d 890).

An appellate case from Georgia states the principle rather concisely, *Scherberger v Scherberger*, 260 Ga. 635, 398 S.E.2d 363 (1990):

In all cases child support must be assessed by some calculation of the needs of the child and the ability of the parent to pay. *Clavin v. Clavin*, 238 Ga. 421 (233 S.E.2d 151) (1977). Any award, termination, or modification of child support without concern for those issues falls short of the mandate of the law.

- Generally, anything that affects (a) the child’s needs or (b) a parent’s ability to pay can be a deviation factor.

Your case could have a situation that the court should consider as a deviation that typically is not listed in state code as a potential deviation factor. Not every deviation factor that the court can consider is listed in code. What are some examples of uncommon deviation factors not typically listed in code? Most deviation factors listed in code are related to the child's needs.

Examples of atypical deviation factors are:

- A parent providing support to his or her parent (the child's grandparent), thereby reducing available income
- Special medical needs for a parent (diabetic supplies as an example), also reducing available income

And since the guidelines must be 100 percent rebuttable (otherwise, that is a violation of both due process and federal regulations), you can think "out of the box" about deviations that are appropriate. For example, if day care expenses are part of the presumptive calculation, that means that presumptively the cash award includes a share for day care expenses. But it likely makes more sense that day care should be on a reimbursement basis. Being on a reimbursement basis could help either the custodial or noncustodial parent. That is, actual expenses could go up or down and a locked in award would not be fair. Curiously, because child support guidelines must be fully rebuttable, you should be permitted to even argue that a presumptive part of the award not be included in the cash award if appropriate.

What do you have to do to get a deviation?

The first rule in court is that generally you can't have it unless you ask for it. For this issue, you have to argue for a deviation for the court to award a deviation. This means your attorney needs to know what deviations might apply for your case and what procedures must be followed to get the deviation. Your attorney should be made aware of any case facts that could justify a deviation and your attorney should consider arguing for deviations on those case facts.

Following procedure

States have legal procedures that must be followed to rebut (set aside) the presumptive child support award or obtain a deviation. The court cannot award a deviation just because it wants to do so. Procedure must be followed or the deviation award could be at risk of being set aside if there is an appeal. States vary somewhat in terms of how detailed they are in terms of procedure. However, the deviation requirements in North Carolina's are about average.

From North Carolina's guidelines:

The guidelines must be used when the court enters a temporary or permanent child support order in a non-contested case or a contested hearing. The court upon its own motion or upon motion of a party may deviate from the guidelines if, after hearing evidence and making findings regarding the reasonable needs of the child for support and the relative ability of each parent to provide support, it finds by the greater weight of the evidence that application of the guidelines would not meet, or would exceed, the reasonable needs of the child considering the relative ability of each parent to provide support, or would otherwise be unjust or inappropriate. If the court deviates from the guidelines, the court must make written findings (1) stating the amount of the supporting parent's presumptive child support obligation determined pursuant to these guidelines; (2) determining the reasonable needs of the child and the relative ability of each parent to provide support; (3) supporting the court's conclusion that the presumptive amount of child support determined under the guidelines is inadequate or

excessive or that application of the guidelines is otherwise unjust or inappropriate; and (4) stating the basis on which the court determined the amount of child support ordered.

North Carolina's procedure focuses on the outcome of the overall award in terms of the child's needs and parent's ability to pay. Other states have appellate opinion that focuses on specific deviations rather than on the overall final award.

Federal regulations have a special requirement that the court consider the best interest of the child when deciding to deviate or not. Here's the applicable Code of Federal Regulations (45 CFR 302.56(g)):

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

While some states include specific language in child support guidelines that the court must "consider" the best interest of the child when determining an award, other states misrepresent the federal requirement as an absolute finding that the deviation award is in the child's best interest. There is a difference between considering the child's best interest versus finding the award absolutely is in the child's best interest. The issue can be one of reduced ability to pay (resulting in a reduced award) being appropriate on a needs and ability to pay basis but not in the child's best interest in terms of dollars awarded.

Overall, a state's child support deviation procedure generally requires:

- Making the presumptive calculation
- Evidence supporting and a finding of fact on the deviation factor. This can be on the child's needs overall or just on the deviation factor itself (including on ability to pay of the parents).
- A showing that the presumptive award is unjust or inappropriate or excessive or inadequate
- A written explanation of why the court deviated
- Either a showing that the child's interests have been considered or that the deviation is in the child's best interest

Some states have additional requirements. For example, Georgia requires a finding that the deviation does not impair the custodial parent's ability to provide the basic needs of the child.

These requirements result in work divided between what the judge does and what the attorney does. Your attorney should be sure that evidence is provided to the court to support the deviation, show how the presumptive award is unjust or inappropriate, and explain how the child's best interest is considered (or how the award is actually in the child's best interest, depending on guideline language).

Be sure to check your state's specific procedural requirements for the court to enter a deviation award. Although the procedure sounds a little complicated, family law attorneys and courts are familiar with a state's requirements and arguing a deviation should not be so complex in application for most cases. Each state generally has appellate opinion that concisely states what proper deviation procedure is for cases that were appealed because one or more steps were omitted.

- It is very important that your attorney follow proper procedure when arguing a deviation. On appeal, it is not uncommon that a deviation award be reversed (denied) by the appellate court if the trial court did not follow proper procedure for awarding a deviation from the presumptive award.

Benefits of economic exhibits

Part of the requirements for deviation is to show that the presumptive award is unjust or inappropriate. One way to do that can be with economic exhibits. They can focus on either the needs of the child (costs) or on ability to pay. An exhibit should show the size financially of the deviation factor and how it fits into needs and ability to pay analysis and then into the "unjust and inappropriate" standard. An exhibit based on case facts has at least two favorable effects toward deviating. It gives the judge the foundation for a written finding on why the court deviated and it gives the judge a numerical idea of how much the deviation should be. Procedurally, findings by the court generally must have some basis in evidence presented to the court.

Potential Impact of Economic Exhibits

- Provides a basis for a written finding on why the court deviated
- Gives the judge an estimate of how much the deviation should be

As an example, a relatively common deviation factor is for travel expenses for exercising parenting time. While it may be most equitable for the court to order parents to alternate travel to exchange the child between residences, it is not always possible due to work schedules or other factors. When one parent incurs most of the financial burden of travel, how do you argue it before the court with case facts that show the presumptive award to be unjust and not in the child's best interest (because the presumptive award does not take this factor into account)? Of course, the answer is with an appropriate economic or financial exhibit. The below is an example that might be applied based on parents sharing the travel costs in proportion to shares of combined gross income.

An Example of an Economic Exhibit for a Deviation: The Noncustodial Parent's Travel Expenses for Parenting Time

As example, let's assume some reasonable circumstances for a noncustodial parent (NCP) that must travel significantly to swap out the children with the custodial parent. The custodial parent earns \$4,500 gross income per month and the noncustodial parent earns \$5,000. The NCP travels every two weeks except during summer and Christmas vacations, resulting in 20 trips per year. It is 225 miles per round trip. The vehicle gets 25 miles to the gallon (from federal web site) and gasoline costs \$2.75 per gallon. It costs \$55 per hotel night (one each trip) and meals cost \$10 more while traveling than when not traveling. Table 1 summarizes the travel costs.

Table 1. Deviation for Travel Expenses for Exercising Parenting Time, Input Information	Custodial Parent	Noncustodial Parent
1. Round trips per year by "car"	0	20
2. Miles per round trip	0	225
3. Estimated miles per gallon	0	25
4. Estimated price per gallon of gasoline	\$0.00	\$2.75
5. Hotel nights per year	0	22
6. Hotel expenses per night	\$0.00	\$55.00
7. Airline trips per year	0	0
8. Air fare per round trip	\$0.00	\$0.00
9. Travel meals cost per trip by car	\$0.00	\$10.00
10. Travel meals cost per trip by air	\$0.00	\$0.00
11. Other travel expenses per round trip by car (misc. other than gasoline, hotel, and food)	\$0.00	\$0.00
12. Other travel expenses per round trip by air (car rental, parking fees, etc.)	\$0.00	\$0.00

Table 2 summarizes annual travel costs by category. Gasoline costs reflect miles per trip divided by the mileage rate of the car times the price of gas times the number of trips. Other category totals are simply cost per trip times the number of trips annually. Total annual travel expenses are rather substantial at \$1,905.00.

Table 2. Travel Expenses for Exercising Parenting Time, Annual		
Cost Information, Annual	Custodial Parent	Noncustodial Parent
13. Gasoline costs, annual	\$0.00	\$495.00
14. Hotel expenses, annual	\$0.00	\$1,210.00
15. Air fare expenses, annual	\$0.00	\$0.00
16. Travel meals cost by car, annual	\$0.00	\$200.00
17. Travel meals cost by air, annual	\$0.00	\$0.00
18. Other travel expenses per round trip by car (misc. other than gasoline, hotel, and food), annual	\$0.00	\$0.00
19. Other travel expenses per round trip by air (car rental, parking fees, etc.), annual	\$0.00	\$0.00
20. Total travel expenses, annual	\$0.00	\$1,905.00

Table 3 converts the annual travel cost numbers into monthly figures to use for a deviation calculation. As seen below the total monthly travel expense averages \$158.75 per month.

Table 3. Travel Expenses for Exercising Parenting Time, Monthly			
Cost Information, Monthly	Custodial Parent	Noncustodial Parent	Combined or Total
21. Gasoline costs, monthly	\$0.00	\$41.25	
22. Hotel expenses, monthly	\$0.00	\$100.83	
23. Air fare expenses, monthly	\$0.00	\$0.00	
24. Travel meals cost by car, monthly	\$0.00	\$16.67	
25. Travel meals cost by air, monthly	\$0.00	\$0.00	
26. Other travel expenses per round trip by car (misc. other than gasoline, hotel, and food), monthly	\$0.00	\$0.00	
27. Other travel expenses per round trip by air (car rental, parking fees, etc.), monthly	\$0.00	\$0.00	
28. Total travel expenses, monthly	\$0.00	\$158.75	
Allocation of Travel Expenses Between Parents	Custodial Parent	Noncustodial Parent	Combined or Total
29. Gross income	\$4,500.00	\$5,000.00	\$9,500.00
30. Percent share of combined gross income	47.37%	52.63%	
31. Each parent's share of other parent's travel expenses	\$75.20	\$0.00	

Table 3 apportions the \$158.75 between the two parents according to shares of gross income. The custodial parent should pay 47.37 percent of the travel expenses—or \$75.20. This would be a \$75.20 downward deviation for the noncustodial parent.

A good feature of this exhibit (the three tables together) is that it is understandable, shows that the final number is not just made up, and clearly gives the judge a foundation for the deviation. Similar exhibits can be made for parenting time, child tax credits, dependency exemptions, child care tax credits, insurance premiums for dental and vision care, high income needs, and other factors. While deviations are always discretionary, they carry more weight when you can explicitly show how you came up with your requested deviation amount.

High Income Situations

High income situations deserve a little extra commentary. Cases involving high income frequently are appropriate for deviations. Whether there is a presumptive ceiling affects whether the custodial or noncustodial parent is more interested in a high-income deviation in a particular state.

If a state's child support guideline has a presumptive ceiling (for example a child cost table stops at a certain level of income), then a custodial parent likely will see the child's needs as exceeding the presumptive cost amount.

If a state's child support guideline has no ceiling (for example, if the presumptive award is based on a percentage of the noncustodial parent's income and the noncustodial parent's income is very high), then the noncustodial parent is likely to see the presumptive award as excessive and being an inappropriate transfer of wealth.

In either situation, an approach based on needs and ability to pay is an economically sound way to argue a deviation. That is, what are reasonable child costs in a high income situation that takes into account an appropriate lifestyle? A deviation argument that follows traditional needs

and ability to pay analysis would establish a budget for the child—including high income housing (the neighborhood matters) on a marginal cost basis. That is, what would be an appropriate home for the child (with the standard of living being in between the two parents' incomes), what would the custodial parent spend on housing alone, and what is the difference between the target standard of living housing for the child and the custodial parent's own housing? Such could be applied to various cost categories for the child and the methodology would be appropriate for either the custodial or noncustodial parent.

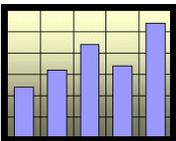
Summary

Parents (custodial and noncustodial) involved in child support litigation often can be frustrated in the belief that the state's child support presumptive award is not fair for their case. But child support guidelines and the right of due process (presumptions must be rebuttable) allow you and your attorney to argue for an award that more fully takes into account your specific circumstances. The bottom line is that a child support award should take care of a child's needs in the households of both parents and take into account parental ability to pay.

To request a deviation:

- Talk to your attorney about what differs in your case from your state's presumptive formula,
- Provide documentation to your attorney about your deviation circumstances,
- Try to create an exhibit (data table) showing the financial size of your deviation factor, and
- Ask your attorney if he or she is following your state's procedure for requesting a deviation.

Note: This article is for educational purposes only.



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