Reforming Georgia's Child Support Guidelines: Adding a Presumptive Self-Support Reserve for Basic Needs & Related Issues

Explanation & Commentary for Proposed Legislation

October 26, 2019

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> 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. . . Any award, termination, or modification of child support without concern for those issues falls short of the mandate of the law.
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> *Scherberger v. Scherberger*, 260 Ga. 635, 398 S.E.2d 363 (1990)

> Yet the burden on the one paying support should not be so heavy as to preclude the ability to support oneself and one's other dependents.
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> *Smith v. Smith*, 626 P2d 342 (1981)

I. Introduction: Why the Increased Attention on Self-Support Needs

Federal regulations were revised on January 19, 2017 and included significant changes to the requirements states must meet in order to receive federal child support monies.[2] These are largely focused on low-income cases and on ensuring noncustodial parents' self-support (basic) needs while reducing the use of imputed income.

The guidelines now must explicitly take into account ability to pay that is consistent with the noncustodial parent retaining enough income to meet basic needs. Income no longer can be imputed on a rote basis. Explicit procedural steps must be met to evaluate the noncustodial parent's specific circumstances.

However, Georgia currently does not explicitly take into account the subsistence needs of the noncustodial parent during child support determinations. Additionally, the low-income deviation envisioned by statute is almost never used by courts.[3]

Moreover, in determining appropriate child support awards, many judges continue to automatically "impute" income to noncustodial parents, assuming that they have income at full-time minimum wage levels even when evidence fails to show that level of income or shows that they are unemployed. This

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[2] Amended 45 CFR 302.56 became effective January 19, 2017. See *Federal Register*, Vol. 81, No 244, 93492 (first column).

[3] See Jane Venohr, *Review of Georgia Child Support Guidelines*, Center for Policy Research, October 2, 2018 (revised). See Exhibit 17 on page 36, which indicates that in the federally mandated case study, zero percent deviations for the low-income factor were made by the courts.

blind use of imputed income often conflicts with Georgia's current statute, which was amended in July 1, 2018 to require consideration of actual income and unique ability to pay.

The proposed changes to this code section, if enacted, would alleviate these problems. Key provisions of the proposed legislation would:

(1) Amend Georgia's Basic Child Support Obligation (BCSO) table and create a formula for presumptive calculations that preserves self-support income (limiting the presumptive order to available income above poverty level);

(2) Require written explanations, when imputing income, that show compliance with legally-required steps for imputation; and

(3) Institute a process of automatic review and modification of child support orders when a parent is incarcerated and unable to make payments. This conforms to the intent of new federal regulations. New regulations do not allow treating incarceration as voluntary unemployment which, in the past, opened the door for courts to impute income.[4] For an obligor that is incarcerated, income should always or generally be zero, meaning the award should be zero. But if an award existed prior to incarceration, the award continues (and is unpayable with arrearages accruing) until there is a modification.

As explained in this commentary, proposed changes to the child support guidelines would make child support more efficient and improve outcomes—financial and relational—for low-income families. Furthermore, federal regulations must be met in order for Georgia to qualify for continued federal funds through the U.S. Department of Health and Human Services' IV-D Program.[5]

II. MOTIVATION FOR NEW LEGISLATION

A. Academic Studies Indicate Ability-to-Pay Calculations Benefit Children and Custodial Parents—Not Just Noncustodial Parents

At face value, some may be concerned that self-support calculations will leave custodial parents with too little support. However, numerous studies indicate that making the necessary changes to the guidelines will provide long-term benefits to all involved—including low-income custodial parents and the parents' children.

Key points from studies:

- When orders are set beyond noncustodial parents' ability to pay (as under Georgia's current guidelines), children and custodial parents receive little—frequently $0—in child support.
- Inability to pay results in compounding child support arrearages—which also cannot be paid.

[4] The Georgia Supreme Court ruling of *Staffon v. Staffon*, 587 S.E.2d 630, 277 Ga. 179 (2003) was the pre-2017 legal standard on the issue of incarceration and unemployment—this opinion established that unemployment was voluntary when due to incarceration. This meant income that did not exist nor could exist (while incarcerated) could be imputed to an alleged existing income for child support. Proposed legislation would limit the strongly lingering practice (post new regulations) of courts to impute income to incarcerated obligors by mandating written findings for compliance with required steps for imputing income.

[5] "The purpose of this Action Transmittal [AT-93-04] is to clarify Federal policy regarding the use of guidelines for establishing all prospective support awards and support awards for prior periods. It also makes clear, effective October 13, 1989, that reimbursement of public assistance through the IV-D program must be based on support obligations established using presumptive guidelines." Office of Child Support Enforcement, Administration for Children & Families, U.S. Department of Health & Human Services, "Use of Presumptive Child Support Guidelines to Establish and Collect Support," AT-93-04.

- Affordable child support orders—even if in low amounts—results in more child support actually received by custodial parents in low-income situations.
- Cutting arrearages results in greater long-term income growth for noncustodial parents and in greater long-term child support payments.
- High arrearages frequently lead to parental incarceration, whereas cutting arrearages decreases recidivism and improves relationships between parents and children.

Excerpts from the Federal Register, summarizing national research:

Federal Register, Vol. 79, No. 221, November 17, 2014, p. 68555:

> [R]esearch suggests that support orders based on imputed income often go unpaid because they are set beyond the ability of parents to pay them. The result is high uncollectible arrears balances that can provide a disincentive for obligors to maintain employment in the regular economy. Inaccurate support orders also can help fuel resentment toward the child support system and a sense of injustice that can decrease willingness to comply with the law. The research supports the conclusion that accurate support orders that reflect a noncustodial parent's actual income are more likely to result in compliance with the order, make child support a more reliable source of income for children, and reduce uncollectible child support arrearages.

Federal Register, Vol. 79, No. 221, November 17, 2014, p. 68553:

> Consistent child support payments can help custodial families achieve economic stability, which is especially important to the millions of low- and moderate-income families served by the Child Support Enforcement program. However, basic fairness requires that child support obligations reflect an obligor's actual ability to pay them.

Federal Register, Vol. 79, No. 221, November 17, 2014, p. 68554:

> States like California and Washington have found that the direct result of establishing support obligations that exceed the ability of obligors to meet them is unpaid arrearages. Most arrearages are owed by noncustodial parents with earnings under $10,000 and are uncollectible. Research finds that high arrearages substantially reduce the formal earnings of noncustodial parents and child support payments in economically disadvantaged families, while reducing unmanageable arrearages can increase payments.
>
> Accumulation of high arrearage balances is often associated with incarceration, because parents have little to no ability to earn income while they are incarcerated, and little ability to pay off the arrearages when released due to lack of employment.

National Child Support Enforcement Association Policy Statement, *Setting Current Support Based on Ability to Pay*, (January 30, 2013) [6]:

> As a general rule, child support guidelines and orders should reflect actual income of parents and be changed proactively to ensure current support orders reflect current circumstances of the parents and to encourage regular child support payments. Presumed or default orders should occur only in limited circumstances.

B. Federal Regulations Require that State Guidelines Take Into Account Self-Support Needs

Following research and expert consensus, federal regulations were adopted that include new standards for child support guidelines to address subsistence needs of noncustodial parents.

[6] *Available at* http://www.ncsea.org/documents/Ability_to_Pay-final.pdf.

- **Subsistence Needs Formula in the Presumptive Calculation**

In particular, federal regulations now require that states implement a formula or table that results in a computation of the presumptive award, and that formula or table must include a subsistence needs calculation.

From 45 CFR 302.56:

> § 302.56 Guidelines for setting child support orders.
>
> (c) The child support guidelines established under paragraph (a) of this section must at a minimum:
>
> (1) Provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay that:
>
> (i) Takes into consideration all earnings and income of the noncustodial parent (and at the State's discretion, the custodial parent);
>
> (ii) Takes into consideration the basic subsistence needs of the noncustodial parent (and at the State's discretion, the custodial parent and children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State;
>
> . . .
>
> (4) Be based on specific descriptive and numeric criteria and result in a computation of the child support obligation.

Notably, the federal rules require, both in explicit language and intent, that all child support orders be affirmatively and *presumptively* based on evidence of actual ability to pay. This change was meant to prohibit or limit income *imputation*—assuming there to be income or ability to pay in the absence of evidence.[7] Georgia courts, however, frequently impute income equivalent to full-time minimum wage earnings while ignoring evidence of unemployment and inability to pay.

Furthermore, the federal rules seek to increase uniformity and fairness in setting support orders and limit the use of deviations. The rules thus require that order calculations for low-income people must be *incorporated* into the presumptive calculation, in the way that self-support reserves are incorporated into basic obligation tables; and calculations for low-income people must be guided by "specific descriptive and numeric criteria." This means that subsistence needs must be determined, and relied upon, as part of the presumptive calculation.[8] Furthermore, state guidelines must prescribe, descriptively and numerically, how those subsistence needs are to be determined and relied on.

Georgia's current guidelines allow for (but do not require) a low-income *deviation*. But this deviation is not incorporated into the basic obligation table or presumptive order calculation. Rather, it is wholly discretionary and treated as aberrational—a deviance from the presumptive calculations—rather than presumptive itself.[9] Finally, the low-income deviation is not based on any "specific descriptive and numeric criteria." Instead, parents are required to furnish evidence proving and persuading the court to

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[7] "Before child support programs were computerized, imputation of income was used as the basis for establishing support obligations because limited information was available to decision-makers. Today, however, States have access to multiple interstate data systems … that can verify when a noncustodial parent has a new job, is claiming unemployment insurance benefits, or has quarterly wage information available. Data, not assumptions, are a more accurate method of determining the income and resources of noncustodial parents." *Federal Register*, Vol. 70, No. 221, p. 68555 (Nov. 17, 2014).

[8] *See Federal Register*, Vol. 70, No. 221, p. 68555 (Nov. 17, 2014) ("The IV-D agency must *use the guidelines and take into consideration the obligated parent's ability to pay*, *or justify the deviation* from the application of the guidelines" [emphasis added]).

[9] This contradicts the explicit requirements and intent of the federal rules, which make ability to pay the basis of the *presumptive* calculation and deviations an exception to that ability-to-pay-based presumption, not the other way around. *See id.*

depart from the presumptive calculations, and judges are freely able to grant or deny these deviations at their unguided discretion.

- **Defining Subsistence Needs**

Additionally, commentary in the Federal Register indicates that subsistence needs must be defined, but Georgia code does not define subsistence needs.

From the *Federal Register*, Vol. 79, No. 221, November 17, 2014, p. 68555:

> Additionally, we propose a new criterion as § 302.56(c)(4). We propose that State guidelines take into consideration the noncustodial parent's subsistence needs (as defined by the State in its guidelines) and provide that amounts ordered for support be based upon available data related to the parent's actual earnings, income, assets, or other evidence of ability to pay, such as testimony that income or assets are not consistent with a noncustodial parent's current standard of living. "Subsistence" is defined in the Merriam-Webster dictionary as, "the minimum (as of food and shelter) necessary to support life." A number of States incorporate a self-support reserve into their guidelines to recognize the noncustodial parents' subsistence needs. See PIQ–00–03 (September 14, 2000).[10] For example, New Jersey defines a self-support reserve as the amount of income that the State determines is necessary to ensure that a noncustodial parent "has sufficient income to maintain a basic subsistence level and the incentive to work so that child support can be paid."[11] This reserve amount is either disregarded or used to adjust the child support obligation so the noncustodial parent is able to meet his basic needs.

These comments are made as a consistent acknowledgment of 45 CFR 302.56(c)(4), which requires that guidelines use "descriptive and numeric criteria" to produce a specific computation of the presumptive award.

C. Georgia Statutes and Court Precedent also Require that Ability to Pay be Part of Presumptive Support Calculations

The traditional standard for child support determination requires a finding regarding the needs of the child *and* a determination of whether the obligor has the ability to pay an appropriate share of the child's needs. The Income Shares guidelines did not eliminate Georgia code that requires child support to be based on needs and ability to pay. This code section is OCGA § 19-6-1(c):

> In all other cases in which alimony is sought, alimony is authorized, but is not required, to be awarded to either party in accordance with the needs of the party and the ability of the other party to pay.

Based on "plain English," this code section appears to apply to alimony and not to child support. However, "alimony" in the Georgia code has a long history of being a broad legal term that includes child support. This code section has been interpreted, in cases cited below, to include child support as a form of broadly-defined alimony. Neither of the pieces of enacted legislation that implemented the Incomes

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[10] PIQ–00–03, *State IV–D Program Flexibility with Respect to Low Income Obligors—Imputing Income; Setting Child Support Orders and Retroactive Support; Compromising Arrearages; Referral to Work-Related Programs and Other Non-traditional Approaches to Securing Support,* available at: http://www.acf.hhs.gov/programs/css/resource/state-iv-d-program-flexibility-low-income-obligors.

[11] Rules Governing the Courts of New Jersey, Appendix IX–A *Considerations in the Use of Child Support Guidelines,* Section 7.h., Self-Support Reserve, available at: http://www.judiciary.state.nj.us/csguide/app9a.pdf

Shares guidelines changed OCGA § 19-6-1(c), leaving intact the language and effect of the statute regarding needs and ability to pay.[12]

There is a long line of case law in Georgia that the final consideration for child support determination focuses on "needs and ability to pay." These cases apply OCGA § 19-6-1(c) together with pre-Income Shares OCGA § 19-6-15.

Most succinct may be the Georgia Supreme Court opinion in *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.

In addition, numerous other cases, before and after *Scherberger*, confirm this rule.[13]

In sum, Georgia law—longstanding code as well as appellate opinion—makes clear that trial courts are obligated to consider both the children's needs and the parent's ability to pay. Without a self-support calculation (already required by federal law), courts are not meeting this state-based duty to base determination of child support on needs and ability to pay.

However, the lingering use of the *Staffon*[14] philosophy for imputed income in incarcerated situations and courts' "wishful" thinking on job prospects for low skilled workers point to the importance of creating presumptive formulas for maintaining self-support needs of the obligor and mandating written proof of following required steps when imputing income.

D. The Current Method of Using a Low-Income Deviation Is Not Working and Not Meeting the Intent of Federal Regulations

- **Failure of Low-Income Deviations**

Every four years, Georgia is required by federal regulations to conduct a study of child support cases in the state. This is directed by the Georgia Child Support Commission. The most recent study was conducted in 2018, when researchers sampled 1,900 child support cases from over 17 counties. Remarkably, the 2018 case study data showed *zero* low-income deviations, despite the fact that a significant percentage of the cases involved low-income noncustodial parents. If the deviation is not

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[12] The two enacted legislative bills that implemented the Income Shares guidelines were House Bill 221, of the 2004 Georgia legislative session, and Senate Bill 382, of the 2005 Georgia legislative session.

[13] *E.g., Esser v. Esser*, 277 Ga. 97 (2003) ("the trial court [must] . . . determine whether [an agreed child support award] is sufficient based on the child's needs and the parent's ability to pay"); *Georgia Department of Human Resources v. Sweat*, 276 Ga. 627, 631 (2003) ("'The trial court is obligated to consider . . . the children's needs and the parent's ability to pay'"); *Swanson v. Swanson*, 276 Ga. 566, 567 (2003) (when "parties enter into a settlement agreement . . . which includes an award of child support, courts remain obligated to consider whether the child support award is sufficient based on the needs of the child and the noncustodial parent's ability to pay"); *Betty v. Betty*, 274 Ga. 194 (2001); *Hoodenpyl v. Reason*, 268 Ga. 10, 11 (1997) ("the trial court will be able to make a determination of support that best balances the children's needs and the parent's ability to pay"); *Arrington v. Arrington*, 261 Ga. 547 (1991) ("The trial court is obligated to consider . . . the children's needs, and the parent's ability to pay"); *Walker v. Walker*, 260 Ga. 442, 443 (1990) ("The trial court's duty is to allocate resources based upon need and ability to pay"); *James v. James*, 246 Ga. 233 (1980) (the trial court may order the custodial parent to pay child support to the noncustodial parent to provide for the children's needs on visitation with the noncustodial parent); *McClain v. McClain*, 237 Ga. 80, 83 (1976) (child support is subject to the court's "wide discretion . . . taking into consideration the needs of the child and the station in life of the parties").

[14] *Staffon v. Staffon*, 587 S.E.2d 630, 277 Ga. 179 (2003).

being used to recognize and maintain subsistence income, then Georgia's current approach is not working.

In practice, the 2018 study data shows, rebutting the presumptive award in low-income situations has become an *operationally irrebuttable* presumption. This risks violating constitutional due process, and may also fail to comply with federal regulations.

Key appellate opinion affirms the importance of a presumption being operationally rebuttable. *See Manley v. Georgia*, 279 U.S. 1, 49 S.Ct. 215 (1929). A presumption that is irrebuttable or denies a realistic opportunity for rebuttal violates the U.S. Constitution's Due Process Clause.

> 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.[15]

Given case study data demonstrating that low-income deviations are never or very rarely applied, combined with the lack of a self-support reserve or other formal ability-to-pay determination in the presumptive order calculation, it appears that current application of Georgia's guidelines risks offending Constitutional due process protections. Georgia courts, in practice, are unwilling to apply low-income deviations. Therefore, low-income parents are unable to assert their due process rights and, even when those parents raise an inability-to-pay defense, the federal requirement to base the order on the ability to pay is not honored.

Since courts are operationally unwilling to apply low-income deviations, the Georgia Legislature should adopt statutory changes to make adjustment formulas presumptive for these issues. Further (as noted above), adopting such statutory changes is necessary to comply with federal regulations.

By making the self-support reserve calculation part of the presumptive award, addressing this issue moves from the "may" category of a deviation to the "shall" category of the presumptive calculation.

- **Neglecting Low-Income Parents in the BSCO Table**

Georgia has one of the highest Basic Child Support Obligation (BCSO) tables in the country at the low-income level. Georgia's BCSO table, established in 2007, was based on unadjusted data from studies conducted by David Betson of the University of Notre Dame, using statistics from the Consumer Expenditure Survey. It is well known that at low-income levels, income is sharply under-reported and spending overstated. Betson attempted to solve this problem by setting spending at no more than 100 percent of income. This still left child costs (spending) dramatically high relative to income, resulting in a high cost table. Most states "cover up" this problem with self-support adjustments, ensuring that the somewhat-artificially inflated high costs of child-rearing do not make noncustodial parents insolvent and unable to pay. However, Georgia did not implement any sort of self-support reserve to counteract the inflated child support costs. Therefore, since the initial BCSO table was established, low-income noncustodial parents in Georgia have been ordered to pay child support based on overstated child cost estimates.

Moreover, Georgia's BCSO does not include presumptive support amounts for parents who have very low incomes, instead beginning the presumptive award table at $800 per month combined gross income. For a low-income family making less than $800 per month, e.g. $500 per month, the noncustodial parent would nonetheless be required to pay the same presumptive amount as a parent in a family making $800 per month. Essentially, indigent parents are ignored by Georgia's BCSO, but are still forced to pay the same amount that more affluent parents can afford.

- **Practical Impact of Not Having a Self-Support Reserve Calculation**

In Georgia, some courts clearly are not reviewing ability to pay when ordering child support awards in low-income and modest-income situations. Case studies from 2018 and 2014 reveal the negative impact

[15] *Manley*, 279 U.S. 1 at 6, 49 S.Ct. at 217.

of high order amounts on noncustodial parents' ability to meet basic needs after paying that child support.

Exhibit 1 shows key results from the case study for the 2018 guideline review; Exhibit 2 shows key results from the study conducted for the 2014 guideline review. Percentages represent the proportion of noncustodial parents falling below the poverty threshold after the final award is subtracted from income. As seen in common practice among different states, alternative dollar amounts are chosen for minimal subsistence income. Common choices by various states are: 100 percent of the federal poverty threshold, 110 percent of the poverty threshold, and 120 percent of the poverty threshold. Comparisons are shown below of after-child-support gross income with respect to the three differently-defined subsistence levels.

According to both studies, about one-fourth of noncustodial parents are pushed below merely 100 percent of the poverty level by the child support order. This percentage rises as the subsistence income definition rises to 110 percent and 120 percent of the poverty guideline. In the latest case study, almost 40 percent of noncustodial parents have less than 120 percent of poverty level income after the presumptive order is deducted.

In sum, there have been two case studies for quadrennial reviews in 2014 and 2018, and both studies indicate that a deviation approach to addressing self-support needs has not worked. The deviation approach has had time to prove that it is a viable approach to ensuring self-support income for the noncustodial parents, but it has not to proven to be effective.

Furthermore, a key point to note is that gross income in these calculations very often includes imputed income. It is difficult to quantify, but if the imputed income does not reflect actual, spendable income, then the case study results are even worse. This is why imputing income must follow federal regulations to help ensure that child support income is more than "pretend income," created by the court arbitrarily.

Exhibit 1.

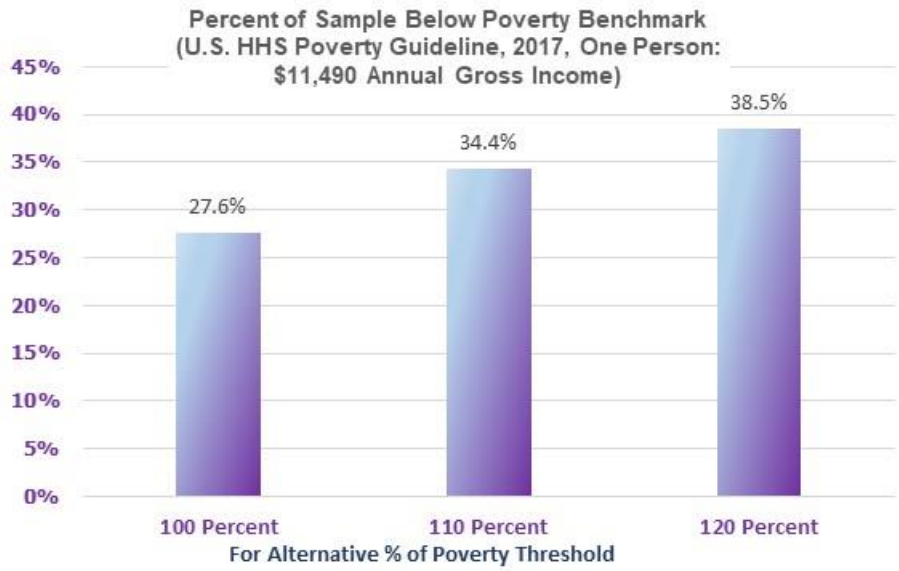
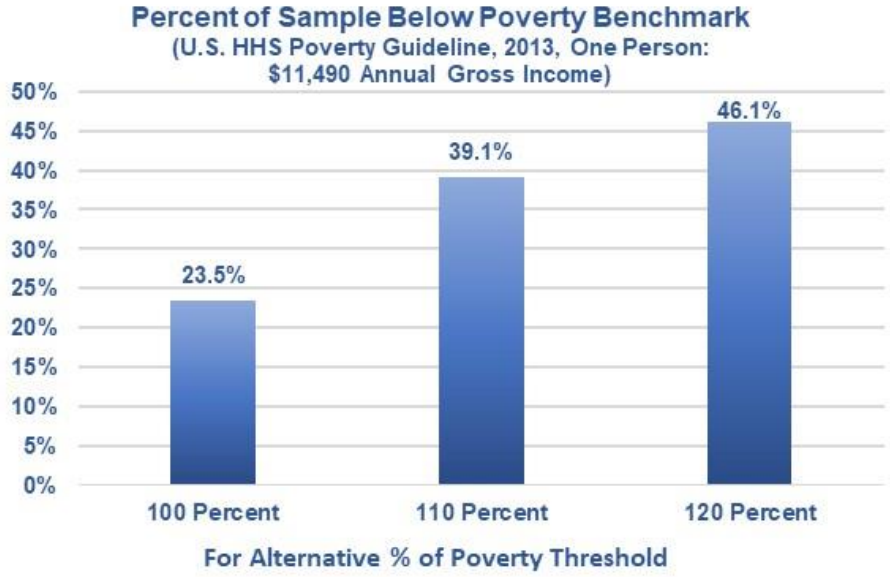


Exhibit 2.



- **Georgia's Guidelines Must Include a Self-Support Formula**

The evidence is overwhelming that a self-support formula is necessary both to comply with the language and intent of federal regulations, aimed at increasing child support payment and improving fairness, and to produce support orders based on the actual ability of the parent to pay, thereby making child support effective for the children who receive it.

Surrounding states have built-in self-support reserves within their Basic Child Support Obligation (BCSO) tables. Georgia has not done so, and therefore has vastly higher BCSO amounts at low-income levels. *See* Exhibit 3 (below).

Exhibit 3.

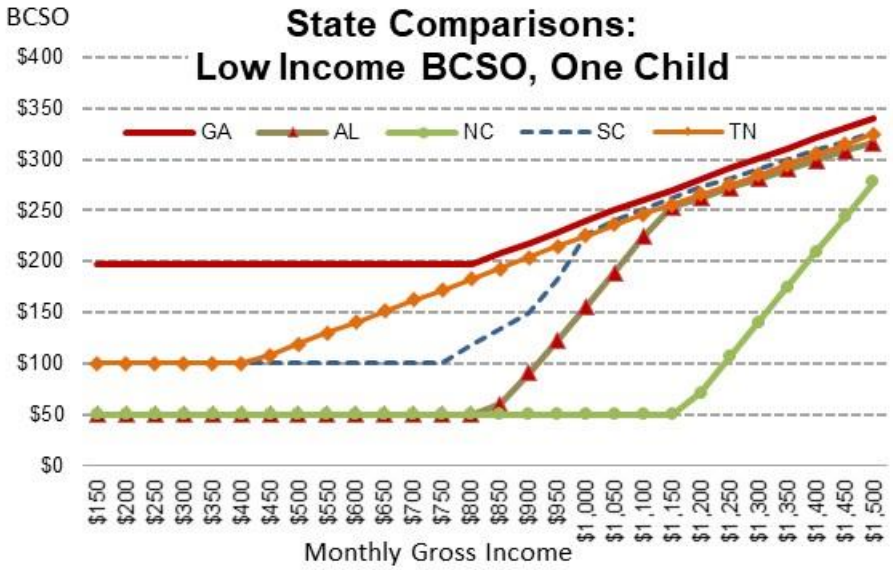


Exhibit 3 shows the low-income portion of Georgia's and surrounding states' BCSO amounts for one child. Georgia's low-income BCSO amounts are notably higher, reflecting the lack of a self-support adjustment. The states shown on the graph have variously updated their BCSO tables, but Georgia has not updated its table. North Carolina has the most current revision, which includes a self-support reserve based on 2014 data for the federal poverty threshold and 2015 tax code.[16]

III. Implementing Self-Support Calculations in Child Support Guidelines

As noted in the Introduction above, proposed legislation would improve Georgia's child support guidelines in three key ways:

(1) Amending Georgia's Basic Child Support Obligation (BCSO) table and establishing a formula for presumptive calculations to preserve self-support income, requisite to self-sufficiency and sustained support payments;

(2) Requiring written explanations when income has been imputed, to show compliance with required steps for consideration of ability to pay; and

(3) Establishing a process of automatic review and modification of child support orders when a parent is incarcerated beyond 90 days and thus unable to make payments.

This Section III, including subsections A, B, and C (below), will outline how the BCSO table could be amended, and a formula implemented, to define and preserve self-support income, ensuring that low-income noncustodial parents have income sufficient to care for themselves and make sustained child support payments long-term.

Subsequently, Section IV will discuss why written explanations for imputed income are necessary and advantageous, both in order to bring practice into compliance with federal and state law and to make child support orders fair and effective.

Section V will summarize the need and benefit of automatic review and modification for cases where a noncustodial parent is incarcerated and unable to make support payments.

A. Creating a BCSO Table with a Self-Support Reserve

All states surrounding Georgia, and the majority of states around the country, include a self-support reserve in their BCSO table. The purpose of the self support reserve is to allow the noncustodial parent a remaining amount of income after the noncustodial parent's payment of child support to live at a sustainable, basic needs level. Georgia can readily adopt changes to its BCSO to define and include self-support needs, making changes only to the low-income portion of the table.

States typically use the following procedure to incorporate a self-support reserve into the child support schedule.

One starts with a standard BCSO table with no self-support adjustments to the cost figures at low income levels. These numbers are based directly on the underlying economic study but are biased upward at moderate income levels due to underreporting of income and other factors.

> Step 1: Calculate a BCSO as if it were based on noncustodial parent income only. This is comparable to the custodial parent income being zero and noncustodial income being equal to combined income. Compare gross income in the BCSO table to the self-support reserve amount.

[16] Surrounding states that have self-support reserves based on gross income are: Alabama, North Carolina, South Carolina, and Tennessee. Florida also has a self-support reserve, but the child cost table uses net income and the table figures are not directly comparable. As an example of significant differences between Georgia and states with self-support reserves built into the child cost table, for $800 income, the BCSO amounts are: Georgia, $197; Alabama, $50; North Carolina, $50; South Carolina, $117; and Tennessee, $183.

Then at each gross income level in the table, there is a net income figure calculated based on standard payroll taxes for a noncustodial single person. At each gross income level bracket, net income is compared to monthly poverty threshold income. If net income is less than the poverty threshold, the cost amount is the minimum award—which is $50 in the proposed self-support adjusted BCSO.

Step 2: If net income is above the poverty threshold, the award is based on only income over the poverty threshold—the available income. If the remaining income is greater than $50, then compute the following: subtract from net income the amount of the self-support reserve and multiply the difference by a proportion ranging from .90 for one child to .95 for six children (increasing by .01 for each additional child).

Step 2 is applied until the noncustodial income only BCSO is equal to the standard, unadjusted table BCSO. Then the standard, unadjusted table BCSO is retained in the table.

For the award calculation, compare the amounts from the two computations—the noncustodial income only award and the standard award based on the pro-rated BCSO using both parents' incomes and take the lower amount as the support obligation.

The multiplication in Step 2 is included to ensure that: (1) the marginal tax rate (referencing child support as a tax—the decades-old, original connotation for welfare reimbursement) on increasing earnings is less than 100 percent (so that there is continued incentive to work); and (2) the support obligation increases slightly as the number of children due support increases. This latter factor assumes that noncustodial parents with more children should incur a higher obligation than those with fewer children.

The adjusted award is part of the self-support section of the BCSO but replaces the standard BCSO amount for combined income. Frequently, this portion of the BCSO is shaded and is referenced as the "shaded section."

At low income levels, the presumptive award is the lesser of the self-support based award (with noncustodial parent income only and the adjusted cost table) and the award using combined income. If the custodial parent has sharply higher income than the noncustodial parent, the combined income award could be lower than the self-support (noncustodial income only) award.

Finally, the presumptive cost table includes a minimum order award amount. If, after subtracting the self-support reserve from gross income, remaining income is less than $50 per month, a minimum order of $50 per month is presumed. *[Note: the $50 minimum differs from current Georgia code, but the minimum can be changed readily. The minimum award varies by state with some states allowing a presumptive zero dollar award if income suggests that.]*

The below helps to explain the above steps.

The multiplication factor in the self-support BCSO is included to ensure that: (1) the marginal tax rate for child support (referencing child support as a tax—the decades-old, original connotation for welfare reimbursement) on increasing earnings is less than 100 percent (so that there is continued incentive to work); and (2) the support obligation increases slightly as the number of children due support increases. This latter factor assumes that noncustodial parents with more children should incur a higher obligation than those with fewer children.

New proposed code specifically sets self-support amounts for the custodial parent as well as for the noncustodial parent. In some cases in which there are large minus deviations or even a large presumptive credit such as for health insurance, the award may become negative after deviations make an initially positive presumptive award (the noncustodial parent is shown as the paying parent) into a

negative final award. If the final award is negative (in the NCP column), then the custodial parent becomes the paying parent. The self-support reserve is in that case applied to preserve the custodial parent's sufficiency income.

Exhibit 4 shows a proposed BCSO table, amended to include a self-support reserve (using 2018 data). Pursuant to this amended BCSO table, a parent with income below the poverty level is presumptively obliged to pay only the minimum child support order (here $50). As income rises above the poverty level, presumptive orders increase, reflecting ability to pay higher amounts. In the table, the shaded section reflects when the self-support calculated award is less than the current presumptive award. Therefore, the lower self-support BCSO replaces the current BCSO amount.

The shaded sections represent essentially obligor-only amounts—as if the custodial parent has zero income. For these portions of the BCSO, the presumptive award would be the lesser of the obligor-only amount and obligor's presumptive share of the combined income. The non-shaded portion of the BCSO table matches the amounts in the current BCSO table, since the obligor has enough income to meet self support needs and pay the prorata share of the BCSO. The below is based on the 2019 federal poverty guideline amount for one adult at $12,490 annually or $1,040.83 monthly and multiplied by 1.15 to take into account payroll taxes.

Exhibit 4.

Adjusted Gross Inc.	One	Two	Three	Four	Five	Six
$800	$50	$50	$50	$50	$50	$50
$850	$50	$50	$50	$50	$50	$50
$900	$50	$50	$50	$50	$50	$50
$950	$50	$50	$50	$50	$50	$50
$1,000	$50	$50	$50	$50	$50	$50
$1,050	$50	$50	$50	$50	$50	$50
$1,100	$50	$50	$50	$50	$50	$50
$1,150	$50	$50	$50	$50	$50	$50
$1,200	$50	$50	$50	$50	$50	$50
$1,250	$50	$50	$50	$50	$50	$50
$1,300	$50	$50	$50	$50	$50	$50
$1,350	$50	$50	$50	$50	$50	$50
$1,400	$50	$50	$50	$50	$50	$50
$1,450	$58	$59	$60	$60	$61	$62
$1,500	$93	$94	$95	$96	$97	$98
$1,550	$127	$129	$130	$131	$133	$134
$1,600	$162	$164	$165	$167	$169	$171
$1,650	$196	$198	$201	$203	$205	$207
$1,700	$231	$233	$236	$238	$241	$243
$1,750	$265	$268	$271	$274	$277	$280
$1,800	$300	$303	$306	$310	$313	$316
$1,850	$334	$337	$341	$345	$348	$352
$1,900	$367	$371	$375	$379	$384	$388
$1,950	$401	$405	$410	$414	$419	$423
$2,000	$434	$439	$444	$449	$454	$458
$2,050	$446	$473	$478	$483	$489	$494
$2,100	$455	$507	$513	$518	$524	$529

$2,150	$465	$541	$547	$553	$559	$565
$2,200	$474	$575	$581	$588	$594	$600
$2,250	$483	$609	$616	$622	$629	$636
$2,300	$492	$643	$650	$657	$664	$671
$2,350	$501	$677	$684	$692	$699	$707
$2,400	$510	$711	$719	$726	$734	$742
$2,450	$519	$740	$753	$761	$769	$777
$2,500	$528	$752	$787	$796	$804	$813
$2,550	$537	$765	$821	$830	$839	$848
$2,600	$547	$778	$856	$865	$874	$884
$2,650	$556	$791	$890	$900	$909	$919
$2,700	$565	$804	$924	$934	$944	$955
$2,750	$574	$816	$947	$969	$980	$990
$2,800	$583	$829	$962	$1,004	$1,015	$1,025
$2,850	$592	$842	$977	$1,039	$1,050	$1,061
$2,900	$601	$855	$992	$1,073	$1,085	$1,096
$2,950	$611	$868	$1,006	$1,108	$1,120	$1,132
$3,000	$620	$881	$1,021	$1,139	$1,155	$1,167
$3,050	$629	$893	$1,036	$1,155	$1,190	$1,203
$3,100	$638	$906	$1,051	$1,172	$1,225	$1,238
$3,150	$647	$919	$1,066	$1,188	$1,260	$1,273
$3,200	$655	$930	$1,079	$1,203	$1,295	$1,309
$3,250	$663	$941	$1,092	$1,217	$1,330	$1,344
$3,300	$671	$952	$1,104	$1,231	$1,355	$1,380
$3,350	$679	$963	$1,117	$1,246	$1,370	$1,415
$3,400	$687	$974	$1,130	$1,260	$1,386	$1,451
$3,450	$694	$985	$1,143	$1,274	$1,402	$1,486
$3,500	$702	$996	$1,155	$1,288	$1,417	$1,522
$3,550	$710	$1,008	$1,168	$1,303	$1,433	$1,557
$3,600	$718	$1,019	$1,181	$1,317	$1,448	$1,576
$3,650	$726	$1,030	$1,194	$1,331	$1,464	$1,593
$3,700	$734	$1,041	$1,207	$1,345	$1,480	$1,610

However, it should be noted that using a BCSO with a self-support reserve is only intended to preserve self-support income if there are no child care costs and no health insurance premium. Some states have an additional calculation that takes into account the noncustodial parent's share of these costs.

Finally, a statutory mandatory minimum award may undermine the legal and practical necessity of preserving self-support income. Additionally, a mandatory minimum may create an operationally irrebuttable presumption—a potential due process violation that is out of compliance with federal law and regulations.

Exhibit 5.

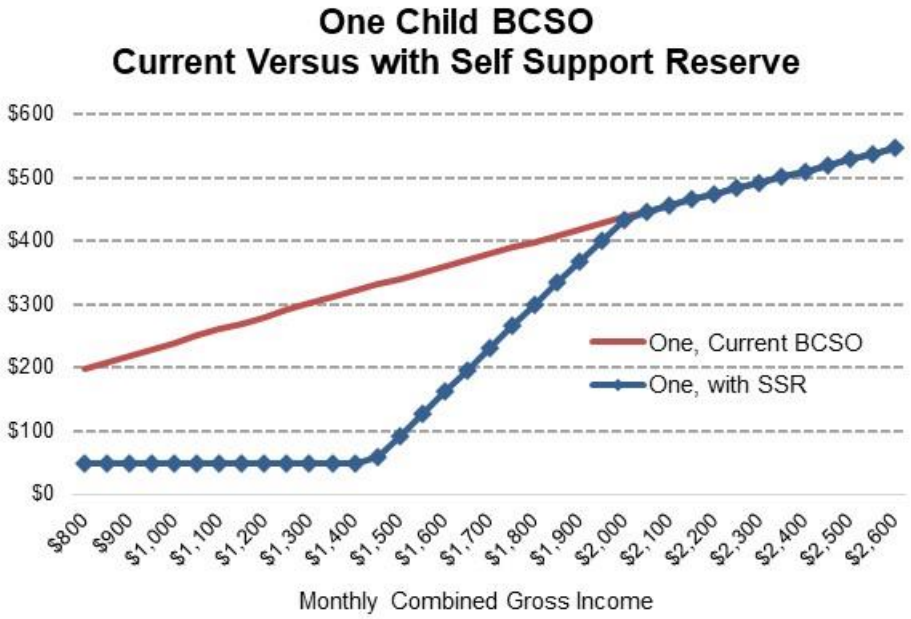
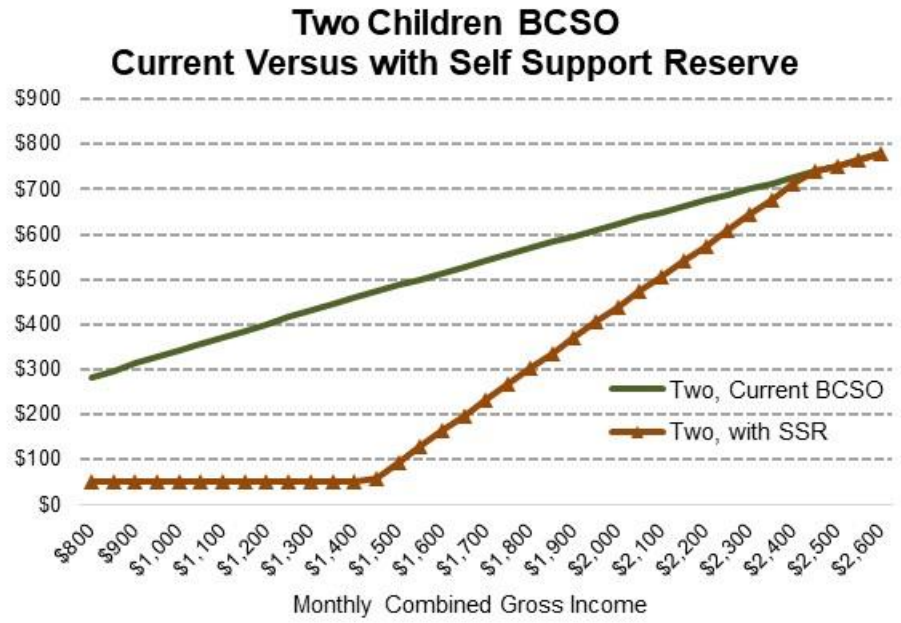


Exhibit 6.



B. Finalizing the Self-Support Calculation After BCSO and Added Expenses

Adjusting the BCSO table to preserve self-support is a good start to ensuring that noncustodial parents are left with income sufficient for meeting basic needs and fulfilling support payment obligations. However, this adjusted cost table does not take into account any added child costs for health insurance premiums, child care, or other extraordinary expenses. To fully ensure that the guideline formula for self-support does the job intended, all of the noncustodial parent's allocated child costs must be compared to available income after deducting self-support income. Proposed legislation does this by

setting the award as the lesser of available income (no less than zero dollars) and the preliminary child support award (the BCSO allocation plus allocation of other costs to the noncustodial parent).

This calculation can result in very low or even zero dollar awards. However, this approach is necessary to meet the federal and state standard of ability to pay. Furthermore, formulas that focus on actual income and specific costs, rather than hypotheticals, produce orders that are more appropriate to the family's circumstances and more likely to result in fulfilled payment obligations.[17]

The comparison of the two awards is important for cases in which the custodial parent becomes the paying parent. Proposed new code specifically sets self-support amounts for the custodial parent as well as for the noncustodial parent. In some cases in which there are large minus deviations (applied to the noncustodial parent's obligation) or even a large presumptive credit such as for health insurance, the award may become negative after deviations make an initially positive presumptive award (the noncustodial parent is shown as the paying parent) into a negative final award. If the final award is negative (in the NCP column), then the custodial parent becomes the paying parent. The self-support reserve is in that case applied to preserve the custodial parent's sufficiency income.

C. Special Deviation after Subsistence Calculation in Presumptive Award

The proposed legislation includes a special deviation to allow the court to enter an increased award even after income is shown to be at or below self-support thresholds. The deviation would take into account the noncustodial parent's special living circumstances, such as living with parents or having means-tested income or some similar factor. This deviation is consistent with Judge John Simpson's (Coweta Judicial Circuit) suggested "right-size orders model."[18] This model looks at an extensive list of factors to determine needs and ability to pay—including for very low-income circumstances. A presumptive subsistence-preserving calculation provides a better starting point for the right-size model approach than a presumptive calculation without such preservation of subsistence income. Furthermore, making preservation of subsistence income be the norm, with deviations the exception from the norm due to unusual circumstances—rather than making low-income deviations the primary basis for protection of subsistence income (as Georgia now attempts to do)—better effectuates the intent of federal regulations.[19] Preservation of subsistence income is meant to be the norm; deviations are meant to be applied in exceptional circumstances.

IV. Requiring Written Explanation for Imputed Income—Ensuring Courts Do Not Skip Mandatory Steps for Income Determination and Imputation

Findings from Georgia's two latest studies of child support cases, as well as appellate opinion, make apparent that courts frequently impute income without explaining how they determined the amount of

[17] The U.S. Department of Health & Human Services has found that states increasingly order zero dollar awards due to ability to pay limitations. *See* Elaine Sorensen, "Exploring Trends in the Percent of Orders for Zero Dollars," Office of Child Support Enforcement, U.S. Department of Health & Human Services (Apr. 2018). One of the key reasons for a jump in zero dollar awards is increased focus on ability to pay.

[18] *See* John Simpson, Rachel Goldberg, & Allie Reynolds, *Individualizing Child Support Orders for Poor Non-Custodial Parents* (Apr. 12, 2019).

[19] "We propose that State guidelines take into consideration the noncustodial parent's subsistence needs … and provide that amounts ordered for support be based upon available data related to the parent's actual earnings, income, assets or other evidence of ability to pay, such as testimony that income or assets are not consistent with a noncustodial parent's current standard of living. […] We recognize, however, that some noncustodial parents may not make support payments because they are unwilling to do so. An example of this would be a noncustodial parent who, despite good educational credentials and marketable job skills, simply refuses to work. In this situation the court may deviate from the guidelines." *Federal Register*, Vol. 79, No. 221, p. 68555 (Nov. 17, 2014).

imputed income. Imputed income is a central source of child support nonpayment and high arrearages—noncustodial parents cannot pay child support out of income that they do not actually have.[20]

Federal regulations implemented in 2017 seek to reduce the problem of excessive imputed income by requiring detailed steps when imputing income. However, without written explanations of how they have followed those steps and determined the appropriately-imputed income, courts regularly ignore federal and state requirements for how income may be imputed. *Without a requirement for written explanation, many courts will continue to arbitrarily impute income with no oversight or accountability.*

Adding a requirement for a written explanation when imputing income is good government, creating a mechanism for accountability. Courts may still impute income, but only after following the law and explaining the decision to impute in writing.

The use of imputed income should be *rare*, as urged by the National Child Support Enforcement Association (NCSE):

> As a general rule, child support guidelines and orders should reflect actual income of parents and be changed proactively to ensure current support orders reflect current circumstances of the parents and to encourage regular child support payments. Presumed or default orders should occur only in limited circumstances. The ideas and proposed legislation and regulations [discussed in the policy paper] are identified as policy issues that would benefit the child support program and the families it serves.[21]

Multiple studies, as well practical experience, prove that when orders accurately reflect real income, noncustodial parents have fewer problems with arrearages, and are able to focus more on job development and making regular payments—thus serving the child's best interest.[22]

Furthermore, appellate opinion confirms how little accountability is currently required of courts when they impute income.

In *Bankston v. Lachman*, for example, a trial court imputed income to a noncustodial parent in the amount of $3,000 per month. The noncustodial parent contended that the court erred in imputing income to him because it did not ascertain the reasons he was earning less than the court thought he should earn. The appellate court agreed that "the mere fact that earning potential exceeds actual earnings is not enough to impute income." However, the appellate court affirmed the lower court's decision to impute income, without determining whether the imputation was appropriate, due to its finding that written explanations are not required.

> OCGA § 19-6-15(f)(4)(D) does not require a trial court to make written findings as to why it decided to impute income to a spouse. It merely directs "the court or the jury [to] ascertain the reasons for the parent's occupational choices and assess the reasonableness of these choices in light of the parent's responsibility to support his or her child and whether such choices benefit the child." *Compare* OCGA § 19-6-15(i)(1)(B) (court or jury shall make written findings when deviating from the presumptive amount of child support).
> […]

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[20] *See Federal Register*, Vol. 79, No. 221, p. 68555 (Nov. 17, 2014)("Research suggests that support orders based on imputed income often go unpaid because they are set beyond the ability of parents to pay them. The result is high uncollectible arrears balances that can provide a disincentive for obligors to maintain employment in the regular economy").

[21] National Child Support Enforcement Association Policy Statement, *Setting Current Support Based on Ability to Pay,* (Jan. 30, 2013), *available at* http://www.ncsea.org/documents/Ability_to_Pay-final.pdf.

[22] *Federal Register*, Vol. 79, No. 221, p. 68555 (Nov. 17, 2014)("The research supports the conclusion that accurate support orders that reflect a noncustodial parent's actual income are more likely to result in compliance with the order, make child support a more reliable source of income for children, and reduce uncollectible child support arrearages").

> It cannot be said that the trial court did not ascertain the reasonableness of husband's occupational choice simply because it did not make explicit findings in that respect.[23]

In appellate cases like *Bankston*, *Neal*, and *Friday*,[24] courts conclude that, because there is no requirement to "make explicit findings" or produce written explanation, the lower courts imputation decisions must be judged to be reasonable. But reasonableness precisely depends on a decision deriving from factual findings and analysis. Not showing explicit findings and written explanations should never serve as proof of reasonableness, or else few if any decisions could ever be held *unreasonable*. Importantly, under Georgia statutes and federal regulations, it is not just an issue of reasonableness but of required procedure.

This lack of reasonableness and proper procedure is, in fact, the state of affairs in Georgia courts today. Imputations decisions are made routinely and perfunctorily, without particular findings of fact or analysis, and those decisions are almost never deemed to be unreasonable or incorrect, even when parents are extremely impoverished and unable to pay. Without a requirement for courts to document findings and explain imputation decisions in writing, trial courts have no incentive to conform their behavior to federal and state law, while appellate courts have no ability to evaluate and overturn unreasonable lower court decisions, absent a written explanation requirement. (Appellate courts typically evaluate procedure based on lower court transcripts, but transcripts are usually unavailable in low-income cases). The lack of written findings explains the near-nonexistence of low-income support orders among the 2014 and 2018 Georgia case data, as well the absence of appellate case law overturning or modifying lower court imputation decisions.

In order to enforce legal requirements regarding income imputation and permit judicial oversight, statutes must require courts to include written explanations with their imputation decisions.

V. Automatic Review and Modification of Orders When Parent is Incarcerated

Finally, Georgia's guidelines should require automatic review and modification for incarcerated parents. Already, federal regulations require state agencies to either (a) initiate automatic review and modification, without request, when a parent is incarcerated for more than 180 days; or (b) provide notice to the incarcerated parent that she or he has a right to apply for review and modification of their order.[25] It is appropriate that all child support orders (not just agency cases) have the same or better procedures for modification when an obligor is incarcerated.

Georgia administrators have chosen to provide notice rather than initiate automatic review of orders of incarcerated parents, ostensibly with the goal of saving time and money (providing notice results in significantly fewer modification cases than would result from automatic review). However, by choosing to provide incarcerated parents with notice of their right to apply, rather than initiate automatic review, Georgia is contributing to high child support enforcement costs and failing to support—often *harming*—children who have incarcerated parents. (Furthermore, evidence suggests that Georgia is failing to carry out even its current notification policy.)

Research makes clear that high arrearages and unpayable orders ultimately lead to increased unemployment, compounding debt, and heightened risk of incarceration—all of which not only undermines child support payment but also damages parent-child relationships.[26] When a parent in is

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[23] *Bankston v. Lachman*, 286 Ga. 459, 689 S.E.2d 301 (2010). *See also Neal v. Hibbard*, 770 S.E.2d 600, 296 Ga. 882 (2015)("[The noncustodial parent] also notes that the court did not make written findings regarding the imputation of income. However, 'OCGA § 19-6-15(f)(4)(D) does not require a trial court to make written findings as to why it decided to impute income to a spouse.'" [internal citations omitted]); *Friday v. Friday*, 294 Ga. 687 (2014)(same).

[24] *See id.*.

[25] 45 CFR § 303.8(b)(2), § 303.8(b)(7)(ii).

[26] *Federal Register*, Vol. 79, No. 221, p. 68554, 68559 (Nov. 17, 2014).

incarcerated, they typically have no income and thus cannot make child support payments. It is thus very common for incarcerated parents to leave prison with $30,000-$40,000 or more in unpaid child support, with no means to pay upon release.[27]

Effective review and modification of child support orders is essential to ensuring that unnecessary arrears do not build and child support is paid. Georgia law, OCGA 19-6-15(j), allows a parent to apply for modification of his or her order if he or she has suffered a substantial change in circumstances, such as an involuntary loss of income of 25 percent or more. However, many low-income parents do not know that they have a right to apply for modification nor how to navigate the complicated application process. Studies find that, in states that require affirmative applications and steps to modify orders, incarcerated parents rarely apply for modification and even more rarely get their orders modified.[28]

Though Georgia recently changed its law, in response to federal requirements, so that incarceration is no longer considered "involuntary unemployment," incarcerated parents continue to miss payments and arrears continue to compound, unless and until the incarcerated parent applies for modification of his or her order. Given that incarcerated parents typically do not know their rights and lack access to documents that DCSS and courts require for modification, the vast majority of incarcerated parents in Georgia never apply, or will never be granted, modification of child support so that their orders accurately reflect their lack of income. The staggering debt that results from this lack of modification makes reentry less likely to be successful. Even worse than that, it hurts the children who never see the support—financial, physical, and emotional—that they need from their parent.

The proposed legislation would institute, through Georgia's child support guidelines, a process for automatic review and modification of child support orders of parents who are incarcerated for three months or longer. Such automatic review and modification would meet the requirements of federal law, and also produce more sensible and just outcomes—for the parent, the children, the family, and the community.

VI. Concluding Comments

Child support determination is an important process that must take into account both the child's needs and the parents' ability to pay. In fact, however, this dichotomy is false. As academic studies and practical experience confirm, setting orders that are beyond a parent's ability to pay ultimately hurts the child, while setting orders that accurately reflect real income and ability to pay results in greater and more sustained long-term support, as well as better parent-child relationships. In sum, ensuring that orders reflect the ability of a parent to pay also serves the best interests of the child.

Other benefits of ability-to-pay calculations include:

- Reduced costs to taxpayers from lower rates of incarceration (incarceration costs taxpayers an average of $21,000 per year[29] for every parent incarcerated, adding to Georgia's jail incarceration rate—second highest in US[30]).

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[27] *See Federal Register*, Vol. 79, No. 221, p. 68554 (Nov. 17, 2014)("Accumulation of high arrearage balances is often associated with incarceration, because parents have little to no ability to earn income while they are incarcerated, and little ability to pay off the arrearages when released due to lack of employment").

[28] *Federal Register*, Vol. 79, No. 221, p. 68559 (Nov. 17, 2014).

[29] *The State of Corrections in Georgia*, Georgia Center for Opportunity (Sept. 29, 2014), available at https://georgiaopportunity.org/state-corrections-georgia/.

[30] Jessica Szilagyi, *Georgia Comes in 2nd for Jail Incarceration Rates*, GEORGIAPOL.COM (Mar. 31, 2017), https://www.georgiapol.com/2017/05/31/georgia-comes-2nd-jail-incarceration-rates/. *See also* Correctional Control 2018: Incarceration and Supervision by State, Prison Policy Initiative (2018), https://www.prisonpolicy.org/reports/correctionalcontrol2018.html?fbclid=IwAR13m2Vadglu5STv8rCXsC8KGf0m_yrUbpH5pp4LGx4ittY4cbK_PfXiTkc; *Report of the Georgia Council on*

- Continued receipt of federal funds for complying with new federal regulations—otherwise, Georgia risks not fully complying with rules to get federal funds for child support programs.
- Greater accountability of elected officials with the requirement for written explanations when imputing income (this is a "good government" proposal).
- Greater stability of low-income neighborhoods, including fathers more willing and able to spend time with their children when not worrying about arrest for child support debt.

To achieve these better outcomes—for parents, communities, and children—the proposed legislation would incorporate a self-support reserve into Georgia's child support calculation process, defining and preserving a parent's subsistence income so that they can maintain employment, care for their children and family members, and fulfill their payment obligation long-term. Secondly, the proposed legislation would ensure that income imputation actually involves consideration of parents' individual circumstances and reflects parents' ability to pay, as state and federal law already mandate, by requiring courts to provide written explanations for their imputation decisions. Finally, the proposed legislation would initiate a process of automatic review and modification of support orders when a parent is incarcerated, so that unpayable arrears do not accrue and the parent is able to make payments and support their children when she or he returns to society.

These changes to Georgia's guidelines would put our state in greater conformity to federal law and regulations, a prerequisite to disbursement of federal child support funds. More importantly, it would make Georgia's child support system more fair and effective—giving reality to Georgia's promise and duty to ensure that low-income children are supported.

Questions or Comments? Contact:

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Criminal Justice Reform (Feb. 2018), https://dcs.georgia.gov/sites/dcs.georgia.gov/files/related_files/site_page/2017-2018%20Report%20of%20the%20GA%20Council%20on%20Criminal%20Justice%20Reform.pdf (noting that Georgia's overall incarceration rate is among the highest in the country and world).