

SUPPORT FOR ADULT CHILDREN ATTENDING SCHOOL

-PROBLEMS & PRACTICE-

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1. A BRIEF HISTORY OF THE OBLIGATION TO SUPPORT AN ADULT CHILD

There is no common law obligation to support adult children. Under Oregon law, the obligation to support an adult child in Oregon is a creature of statute found primarily in ORS 107.108 although that is not the only statute.

CAVEAT: ORS 109.010 provides that “[p]arents are bound to maintain their children who are poor and unable to work to maintain themselves; and children are bound to maintain their parents in like circumstances.” Though it is unlikely that this provision could justify support for a child attending school over the age of 21 unless the child was “poor and unable to work,” counsel should be aware of this possibility.¹

ORS 109.155(4) authorizes courts to order parents who never married to support their children attending school.

ORS 108.110 gives courts authority to order married parents to support their children attending school.

Prior to the Vietnam era of the late 1960's and early 1970's, a minor, by definition, was a child under the age of 21. Court ordered child support was to the age of 21 because that child was considered a “minor” and not an adult. In the political upheavals that faced the country at that time, a movement began. It was believed that if a child was old enough to “die for his country” in Vietnam, then that child should be treated as an adult. Many states lowered the drinking age to 18 (although political movements like M.A.D.D have reversed that trend back to 21), the age to vote was

¹ See *Haxton and Haxton*, 68 Or App 218, 680 P2d 1008 (1984), *Kenyon and Kenyon*, 41 Or App 591, 598 P2d 1225 (1979), *Westby and Westby*, 30 Or App 431, 567 P2d 145 (1977) *Mota and Mota*, 66 Or App 439, 674 P2d 90 (1984) & *Whitlow and Whitlow*, 25 Or App 765, 550 P2d 1404 (1976).

lowered to 18 as was the ability to enter into contracts.

This created a quandary for the thousands of divorce Judgments that required child support to be paid for “minor” children. Those children between the ages of 18 and 21 were no longer minors. In addition, there were decrees that required child support through the age of 21 yet new Decrees were ending child support for children at 18. In essence, there was the risk of 2 classes of children: those whose parents were divorced when a minor was defined as “under 18” and those children whose parents were divorced when a minor was defined as “under 21.”

A legislative solution was to continue child support for an adult child under the age of 21 if that child was attending school and that became the genesis of the current ORS 107.108. From that legislation grew a few cases that are still cited to solve logistical issues. In *Quinby and Quinby*, 41 Or App 633, 598 P2d 1284 (1979), the court held that the failure to include the *over 18* language in the original order does not bar its inclusion in a modification because, although children have not yet reached the age of 18, a support decree can be properly modified to provide for child support after the age of 18 if the child is attending school.

In *Quinby* the court would not infer an intent to support adult children where the Decree was silent. However, it appears that the right to modification was absolute due to the legislative change.

CAVEAT: Even now, it is better practice to order in the original Judgment that child support continue between the ages of 18 and 21 for children attending school, rather than leave the original decree silent on the point even where the children may be presently less than 18 years old.

This is not unlike the present provision of ORS 107.108 that provides that orders

that pre-date the October 3, 1997 effective date of the ORS 107.108 major revision could be modified to include these provisions.² It is assumed that these provisions automatically apply to new support orders but since the statute still uses discretionary language, one should not assume this is the law.

2. THE STATUTORY OBLIGATION TO SUPPORT ADULT CHILDREN

A. Pre-October 1997: To fully understand and interpret “pre-1997” cases, it is important to understand how the present law differs from the prior statute. Prior to the 1997 legislative changes the right to support for an adult child under 21 years of age was less restrictive. There were no GPA requirements, no reporting requirements, no automatic provisions and there was no a right to have the support paid directly to the child.

(1) ORS 107.108 (pre- October 1997) read, in part, as follows:

In addition to any other authority of the court, **the court *may* enter an order against either parent, or both of them, to provide for the support or maintenance of a child attending school . . .**

If the court provides for the support and maintenance of a child attending school pursuant to this section, **the child is a party for purposes of matters related to that provision.**

As used in this section, **"child attending school" means a child of the parties who is unmarried, is 18 years of age or older and under 21 years of age and is a student regularly attending**

² *By statute, such a modification action will not allow support increases or decreases to be bootstrapped onto the motion unless a separate change of circumstances is being shown. It is better practice to file a separate motion to modify and join them for hearing.*

school, community college, college or university, or regularly attending a course of professional or technical training designed to fit the child for gainful employment. A child enrolled in an educational course load of less than one-half that is determined by the educational facility to constitute "full-time" enrollment is not a "child attending school."

B. OCTOBER 1997 CHANGES TO ORS 107.108: In an attempt to resolve problems regarding children's abuse of the child attending school issue³, the growing demand that adult children gain more control over their support and the failure of accountability in the statute, a compromise was reached in 1997 legislature. As a result, ORS 107.108 was radically amended in 1997 by addition of the following key provisions. ORS 107.108 as of October 1997, reads in part, as follows:

- 1) Court ordered child support for an adult child, that is paid through DHR, would be required to be paid directly to the child, instead of the parent, unless good cause was shown.⁴
- 2) When there are multiple children the adult child's portion is to be an equal pro-rata share *unless otherwise ordered*.⁵
- 3) An adult child eligible for support under ORS 107.108 as a "child attending school now has requirements to remain eligible. *The child must*
 - a) *maintain a "C" or better grade average;*
 - b) *notify the paying parent when that child was no longer*

³ Sometimes children would enroll but not attend class just to get apartment money.

⁴ OAR 461-200-5120 addresses Support for A Child Attending School involving Orders Entered On or After October 4, 1997. Appendix IV states that support would be paid directly to the child unless good cause is found... which may include: (a) The child is in the care of the Oregon Youth Authority (OYA); (b) The child provides written authorization for distribution to the obligee; or (c) The court, hearings officer or administrator orders otherwise.

⁵ This again points out the necessity of rebutting the presumed equal division.

eligible; and

c) submit a DHR form (which has since been created by DHR) to prove eligibility, to the parent and DHR which shows “all the information necessary to establish eligibility” and that form must be submitted within the first month of each term or semester.

4) Failure of an adult child to comply with any of the requirements, and upon written notice from the paying parent, results in the end of the direct DHR payments. Further and most important, that fact will constitute a substantial change of circumstances for purposes of modifying the existing support order.⁶

C. ORS 107.108 IN 2002

ORS 107.108 does not authorize a trial court to order a parent to pay college expenses separate and apart from or in addition to child support. *Wiebe and Wiebe*, 113 Or App 535, 833 P2d 333 (1992).⁷ Therefore, one must look to the statute, Oregon Administrative Rules and the case law for guidance on how to address child support for a child attending school. To argue rebuttal it is important to understand the language and history of the current OAR 107.108.

3. THE RIGHT TO RECEIVE SUPPORT

ORS 107.108 states that the court may enter an order for the support or maintenance of a child attending school. Thus it merely creates a *right to seek* child

⁶ Note that if there is more than one child, full support is still collected, just none of it can go to the non-complying adult child ever again unless the obligor requests it. ORS 107.108(6)

⁷ “...The educational expenses of a child may justify a deviation from the presumed amount of child support provided by the guidelines, ORS 25.280; OAR 137-50-330(2), but those expenses are a part of, and not in addition to, a child support obligation and are subject to the statutory limitations of such an obligation.”

support even though the child is an adult. As in all the relief contained in ORS 107.105 (the divorce Judgment statute), the statute merely confers upon the court the right to make an award, it does not require support. It is discretionary.

CAVEAT: There is no Oregon case where the sole issue before the court was whether a court could deny child support and not have that denial of support held as an abuse of discretion. For example, under ORS 107.105(), spousal support *may* be awarded if it is appropriate and the statute lists many factors to consider. The application of those factors to the facts determines whether there is an abuse of discretion in whether an award is made and if so, the amount and duration of the award.

ORS 107.105 and ORS 107.108 contain no similar standards for the court to use in determining whether child support should or should not be granted. Though the current ORS 107.108 has standards by which support can be terminated, the statute still starts by stating that “support may be granted if...”

Though the appellate decisions seem to take it as gospel that child support must be ordered, nothing in the statute requires it.

In Mallory and Mallory, 30 Or App 533, 567 P2d 1051 (1977) the court held that absent a requirement in a decree or Judgment requiring payment for adult children attending school, a parent has no obligation to support an adult child because the support statute is not self-executing.

CAVEAT: Is this still the law under the current ORS 107.108 and OAR guidelines? Since the statute is, by it's terms, discretionary it should be. **It is important to note that the DOJ may not share that position.** ORS 107.108, on it's face remains discretionary and ORS 107.108(7) allows modification to adds the requirements found in subsections 4 through 6 to pre -10/4/97 orders but that does not address the question. OAR 461-200-5120 discusses how the Child Support Program (CSP) will apply ORS 107.108 but the rule does not modify court orders. By definition, the OAR defines how the CSP will apply ORS 107.108 in “...its official billing, accrual, distribution, and record keeping functions for ongoing support...”

None of these statutes or rules addresses statutory rights.

4. OAR REBUTTAL CRITERIA APPLICABLE TO CHILDREN ATTENDING SCHOOL

A. CALCULATING SUPPORT. Although ORS 107.108 creates the right to obtain child support for an adult child, it gives no guidance on the calculation other than the 1997 revision providing for an equal pro-rata share of some unidentified calculation when there are multiple children. In this case, the adult child's portion was to be an equal pro-rata share *unless otherwise ordered*.⁸

CAVEAT: It is important to note that a pro-rata division is not mandated though the D.O.J. and the employment division ALJ's treat it as such when they handle such cases. By definition in the statute, the court has the authority to order allocation to the adult child of a greater or lesser portion of the support obligation.

To actually calculate the base child support one must utilize the OAR support guidelines found in [OAR 137-050-0310 to OAR 137-050-0490](#). Unfortunately the initial guidelines were woefully deficient in that they actually made no specific provision for children attending school. Other than discussing a pro-rata division of the "presumed" level of support, the OAR did not explain what should happen for adult children. The OAR were modified, effective October 15, 1994, to address children attending school as a rebuttal criteria.

B. REBUTTAL APPLICATION TO ORS 107.108

The Guideline committee, in its 1994 review of the child support policies,

⁸ This again points out the necessity of rebutting the presumed equal division.

calculations and administrative rules, determined there was no way to create a rule that would be just and equitable in its application to all children attending school. The committee recognized that each adult child created a unique circumstance. A child's needs at Harvard are different than at OSU or at a Community College. The amount of grants and scholarships, family educational trusts and a myriad of other factors made it impossible to draft a specific rule that treated all adult children fairly impossible.

Therefore, the committee opted to add "a child attending school" as a rebuttal criteria that would allow a deviation from the presumed amount of support based on the unique facts present in each case. This remains the state of the law today.⁹

1) **OAR 137-050-0330(2)(a)** provides in part that:

"The amount of child support to be paid as determined in section (1) subsections (a) through (h) is presumed to be the correct amount. This presumption may be rebutted by a finding that the amount is unjust or inappropriate based upon the criteria set forth in paragraphs (A) through (P) of this subsection. . .

⁹ In *Seever & Seever*, 124 Or.App. 54, 861 P.2d 1038, 1040-1041 (1993) the court of appeals addressed this issue, post *Wiebe*. The Husband argued that the trial court was without authority to order him to pay his daughter's college expenses in addition to child support. In its letter opinion, the trial court said:

"This Court will deny the petition by [wife] to require the [husband] to separately pay the college education costs of the child of the parties * * *. The Court will, however, depart from the child support guidelines for the period of time that the child is in college and justify that departure by reason of the increased cost of the college education of the said child."

The appellate court cited *Wiebe and Wiebe*, 113 Or.App. 535, 833 P.2d 333 (1992) and said that in Wiebe they had suggested that the educational expenses of a child may justify a deviation from the presumed amount of child support provided by the guidelines and the trial court's order follows that suggestion.

- 2) Subsection (L) lists as a rebuttal criteria, “Evidence that a child who is subject to the support order is not living with either parent or is a “child attending school” as defined in ORS 107.108.”¹⁰

The result of this expansion of the OAR rebuttal criteria allowed the court to calculate the entire child support award by factoring the costs related to a “child attending school” which could include tuition costs, whether the child lived at home, scholarships, how the child attending school costs impacted the other support needs, etc. The only requirement was that the court still needed to make appropriate rebuttal findings.

CAVEAT: Pursuant to OAR **137-050-0330(2)(a)** and (b), the Judgment must *recite as part of the findings the presumed amount, the reasons for the variance from the guidelines and that the presumed amount is unjust or inappropriate;*

____ Pursuant to OAR **137-050-0330(2)(b)** the court must determine a new support amount *by attributing an appropriate dollar adjustment to each rebuttal criteria relied upon*

____ **C. RECOMMENDED PROCEDURES FOR REBUTTAL ARGUMENTS**

Once you decide to seek rebuttal, your preparation for hearing should be the same whether it is an ALJ support hearing or a Court support hearing. From this

¹⁰ Although this change in the OAR gave the court specific authority to rebut the presumed support amount due to a child attending school, it did not protect the obligor parent from abuse by the obligee parent or the child. For example, if a child registered for 6 units at a community college, never attended class and flunked all subjects, the child would still be eligible for support under ORS 107.108 because the definition of “attending school” is not defined by participation or success. That was one reason for the 1997 legislative changes.

author's experience, the difference is not in the preparation but in the reception. Circuit Judges are much more willing to rebut based on a factual record than ALJ's. Despite claims by ALJ's that they do consider rebuttal arguments, it is hard to find Dom-Rel attorneys who have had any success in convincing an ALJ to actually rebut. On the other hand, it is rare to find a lawyer who has not had a judge rebut the presumed amount when presented appropriate facts.

This fact of life becomes particularly important when one considers that any special consideration to be given a child attending school, pursuant to the OAR, requires a finding and application of the rebuttal criteria.

This authors RECOMMENDED procedure is as follows:

- 1) Present a trial memorandum that summarizes the presumed amount, the appropriate rebuttal criteria and the facts that will be produced that support rebuttal.
- 2) Prepare a support calculation exhibit that shows the presumed amount, the applicable rebuttal criteria, the amount you want attributed to each criteria and the rebutted amount you seek.
- 3) Prepare exhibits that support the facts applicable to rebuttal.
- 4) Anticipate and defend against claims by the other party as to why rebuttal is not appropriate.

5. PRESERVING YOUR RECORD FOR APPEAL

The appellate case law in Oregon is replete with cases where denial of rebuttal

is upheld or sent back for further proceedings. There are few opinions reciting detailed rebuttal findings that the Court found appropriate. Yet in reading the cases that reject rebuttal it becomes fairly clear that the court is not insensitive to rebuttal. Rather, the appellate courts are very sensitive to the requirement that the trial court follow the OAR requirements in deviating from the presumed amount.

For example, in *McGinley and McGinley*, 172 Or.App. 717 (2001) the court rejected rebuttal because there were no required findings.¹¹ Since the OAR require such a finding before the court can rebut, the trial lawyer lost because the rules were not followed.

A recent instructive case where a written opinion, reciting detailed rebuttal findings, upholding a rebuttal upwards is *Howell & Hooyman*, 171 Or.App. 545, 16 P3rd 1173 (2000). The brief for that case and the decision are attached in the appendix. Though that case is not a “child attending school” case, the rebuttal approach is equally applicable to all rebuttal cases. This case provides a clear example of how following the above proscribed procedure can result in the court granting rebuttal and

¹¹ In *McGinley and McGinley*, 172 Or.App. 717 (2001) the court said that Although the trial court may have had legitimate reasons to deviate from the guidelines, it had to enter findings to justify its decision to do so. See ORS 25.280 (creating a rebuttable presumption that the support amount determined under the guidelines is the correct amount and providing that "a written finding or a specific finding on the record [172 Or.App. 736] that the application of the formula would be unjust or inappropriate in a particular case" will be sufficient to rebut the presumption); OAR 137-050-0330(2)(a) (1997) (reiterating the requirement of findings to rebut the presumption). Accordingly, we vacate the child support award for son and remand it to the trial court for entry of findings or modification according to the guidelines.” 19 P.3d 954 at 965

the appellate court the decision.

6. OTHER QUESTIONS INVOLVING ADULT CHILDREN ATTENDING SCHOOL

A. Is there an obligation to support an adult child who is not in school.

The answer is YES!!! ORS 109.010 provides that “[p]arents are bound to maintain their children who are poor and unable to work to maintain themselves; and children are bound to maintain their parents in like circumstances.”

B. Is there an obligation to support an adult child who is cohabiting against your wishes?

The answer is Yes!!! In *Sandlin and Sandlin*, 113 Or App 48, 831 P2d 64 (1992) the court held that the right to support as a “child attending school” cannot be lost by a child's involvement in unmarried adult conjugal relationship with another.

C. Is there an obligation to pay child support to an adult child who refuses to communicate or treat the obligor with respect?

The answer is Yes but maybe it shouldn't be!!! See *Smith and Smith*, 44 Or App 635, 606 P2d 694 (1980) the court held that a child's refusal to visit an obligor parent did not affect the obligor's support obligation where the dissolution decree was modified to require the obligor to continue child support payments to an 18-year-old son as long as son was "child attending school" within the meaning of ORS 107.108.

CAVEAT: If the principle behind the child support guidelines is that a child should be able to enjoy the lifestyle he or she would have had as if the parents had stayed together, then why should a parent who is divorced be required to support an adult child who he or she would not support if the parents were still together?

D. Is support due during the summer when a child may be working instead of going to school?

The answer is Yes!!! When a child is about to reach 18 years of age the obligee parent or the child must notify the obligor parent of the educational plans. Support is normally due during the summer between school terms yet beware that in *Riback and Riback*, 59 Or App 670, 651 P2d 1089 (1982) held that in the absence of notification to a non-custodial parent that the child high school graduate will enter college that fall, the support obligation for a child who reaches 18 ceases during summer months between graduation from high school and entry into college. See also OAR 461-200-5120 in Appendix IV.

E. If support for an adult child is terminated, can it be reinstated if the obligor parent objects?

The answer is probably not but what the heck!!! In *Eusterman and Eusterman*, 41 Or App 717, 598 P2d 1274 (1979) the court held that even if support terminates because the Judgment did not provide for support for an adult child, the support could be reinstated (prospectively) even after termination. The court held that beginning to attend school is a change of circumstances authorizing modification of the support decree to allow for support for an adult child.

Is this still good law? The post 1997 version of ORS 107.108 states that the failure of an adult child to comply with any of the reporting and grade requirements (upon written notice from the paying parent) results in the end of the direct DHR payments and that fact will constitute a substantial change of circumstances for

purposes of modifying the existing support order.

Interesting is the fact that the statute, though saying it constitutes a change of circumstances, does not mandate termination but does mandate cessation of the direct distribution of funds. By implication the statute mandates termination particularly if interpreted with the OAR's.

Many Judges, despite this rule, will reinstate if a child resumes eligibility status.

G. Are there other grounds by which child support can be terminated for an adult child, even if they meet all the other criteria (i.e. grades and reporting)?

The answer is yes!!! ORS 107.108 defines a "child attending school" as a child of the parties who is unmarried, is 18 years of age or older and under 21 years of age and is a student regularly attending school, community college, college or university, or regularly attending a course of professional or technical training designed to fit the child for gainful employment. Thus, by statute, marriage terminates support.

ORS 107.135 also provides that the court can terminate a duty of support toward any minor child who has become self-supporting, emancipated or married, thus expanding the ground to terminate support.

H. Is it constitutional to require a divorced parent to support an adult child attending school when a non-divorced parent has no such obligation?

The answer is Yes!!! This argument over the constitutionality of statutes requiring a divorced parent to support an adult child attending school has involved the application of the equal protection clause and other clauses of the United States Constitution. The Oregon Supreme Court in *Crocker and Crocker*, 332 Or. 42, 22 P.3d

759 (2001) held that:

“The legislature has the authority to enact legislation regarding marriage, divorce, and paternity, as well as parental support of and educational duties toward children. See, e.g., *State v. Bailey*, 115 Or. 428, 236 P. 1053 (1925) (statute criminalizing husband's failure to support wife and children was valid exercise of legislative power). Thus, the legislature had authority to enact the type of legislation at issue here.”

_____. **I. Is a child expected to earn part of his or her own keep?**

_____The answer is “not usually” unless it clearly can be shown that it rebuts the guideline amount!!!_The Supreme Court recently recited these facts recently:

“At the trial court hearing, father introduced evidence that his daughters' combined annual income the previous year had been approximately \$6,200. Mother testified that she had earned approximately \$3,900 the previous year. Father apparently believes that, because each of his daughters had earned almost as much as their mother had earned, the trial court abused its discretion in failing to find the children no longer needed support from father. See ORS 25.280(7) (“needs of the child” to be considered in determining whether presumed amount of support rebutted). Father is mistaken.

In addition to the amount of the children's income, the record in this case contains evidence that father and mother have only part-time jobs and that both earn either the minimum wage per hour or only slightly more than the minimum wage. Mother testified that, even with the children's newspaper route money, the family's financial situation is “tight.”

Father introduced no evidence that his daughters' income diminished their need for support from him. On this record, the trial court did not abuse its discretion in holding that the formula in ORS 25.280 established the correct amount of father's child support obligation.” Redler and Redler 330 Or. 51, 996 P.2d 963, 968 (2000)

Note that the court did not reject the concept of rebutting for a child's income but

ted the child's income to diminishing the child's need for support from the father.¹²

J. Is there an obligation to pay for a very expensive college?

The answer is maybe!!! As noted above in *Wiebe* the court held that there is no obligation to pay for college, the law only discusses an obligation to pay support for a child attending school through the age of 21. The court said that "...The educational expenses of a child may justify a deviation from the presumed amount of child support provided by the guidelines, ORS 25.280; OAR 137-50-330(2), but those expenses are a part of, and not in addition to, a child support obligation and are subject to the statutory limitations of such an obligation." Therefore, irrespective of the cost of the school, the obligation will end at 21 unless there is a stipulation or agreement for support to extend beyond that date.

Some judges, in determining how much to rebut upwards for college expenses, look at where the parents went to school. If the parents went to Stanford and Princeton, many judges will feel an upward rebuttal for a comparable a school is appropriate. Conversely, if the parents did not go to college, there may be much less

¹² In Cunningham and Cunningham, 74 Or App 311, 702 P2d 1157 (1985) the court stated that "Husband also claims that the trial court erred in ignoring the children's incomes, which were \$400 per month for one and \$100 per month for the other child at the time of trial. Because those incomes were derived from the summer employment of full-time students, the trial court did not err in refusing to consider them in determining husband's child support obligation.

Also look at the Court of Appeals Decision in Redler, 153 Or App 135, 956 P2d 232 (1998) and Lawhorn and Lawhorn, 119 Or.App. 225, 850 P.2d 1126 (1993).

sympathy for a rebuttal upwards for private school or even a state school.

K. To what extent do the guidelines apply when there are multiple children, some of whom are under age 18?

The answer is that it is anyone's guess!!! In July of 2002 the Oregon Academy of Family Law Practitioner's put on a CLE that discussed not only children attending school but the complication when the family may consist of child attending school, a shared custody child and a non-shared custody child. The guidelines provide no guidance.¹³

L. Does attending a non-accredited Bible College constitute "attending school" under the statute.

The answer can be yes!!! ORS 107.108 applies to students "regularly attending school, community college, college or university, or regularly attending a course of professional or technical training designed to fit the child for gainful employment." A bible college is a "school." Interestingly, the statute does not require accreditation. Similarly a military school should qualify.

M. How does a child's scholarship to college affect the support calculation?

Following the reasoning of the cases cited above, a scholarship which decreased the "needs of the child" may justify a deviation downward. If the scholarship covers room and board as well and tuition, then there would be a very good argument. A scholarship that just pays for books and tuition would probably not result in deviation

¹³ Questions may be directed to Bill Allen of Salem who researched the topic for that CLE.

from the presumed level of support.

N. If the child is over 18 in June and not attending school in the fall but resumes school in January, can the child receive support later as “a child attending school?”

The answer is a qualified no!!! There are no appellate cases yet on the subject, however ORS 107.108(6) requires the support distribution to stop if a child fails to comply with any of the requirements imposed by the statute and it cannot be reinstated without the obligor’s request. Among those requirements in ORS 107.108(4)(c) is that the required information must be submitted within the 1st month of each term. OAR 461-200-5120 (5) allows the CSP to continue collection and distribution during a “normal break” between academic terms. Skipping a term is not a normal break. OAR 461-200-5120(14) puts the burden on the obligor to object in writing and to assert that the child does not qualify (i.e. in September).

O. Is the GPA requirement per term or Cumulative?

There is no definitive answer!!! ORS 107.108 states the student “...must maintain the equivalent of a C average or better” and nothing more. The reporting requirement is by term but it does not distinguish between **the** term and overall GPA. OAR 461-200-5120(4)(b) defines GPA as a cumulative GPA of a “C” or better, however the statute does not require such a broad reading.

P. How would support be calculated in a partial shared situation?

There is no definitive answer!!! However, the Division of Child Support has circulated an internal memo dated 4-21-00 which states:

“We are often asked for the position of the Division of Child Support as to how to calculate child support when one (or more) child(ren) are in a regular custody situation and the other is shared between the parties. The Division recommends calculating child support as follows. All references are to the child support worksheets as attached to the guidelines.

Compute a regular child support calculation for all children. On line 6, divide the Basic Child Support Obligation by the number of children and multiply that figure by the number of children in the regular custody of the custodial parent. Carry through the calculation for the divided amount using child care and insurance expenses for the number of children in the parent’s regular custody. This should give you the support amount for the children in the regular custody of the obligee.

Transfer the remainder of the Basic Child Support Obligation to line 5 on the Shared Custody worksheet. Complete the calculation for the other child using any child care and insurance expenses for that child (using prorated figures). This will give you the support amount for child in the shared custody of the parties. Add both support amounts together for the total child support obligation (If the amount in the shared custody calculation is owed to the custodial parent, you will need to subtract this from the regular child support obligation instead of adding).

I believe this formula follows the technical spirit of the guidelines.”¹⁴

Q. How do I add the Adult Child as a party, does it matter and Should the obligor move to require the obligee to pay support to the child?

There is a certain amount of confusion on this topic. ORS 107.108(3) merely says that: “If the court provides for the support and maintenance of a child attending school pursuant to this section, the child is a party for purposes of matters related to that provision.” ORS 107.108(3)

It is not discretionary. The child is a party. The statute does not say they are a necessary or indispensable party and certainly any evidence about the qualifications to

¹⁴ Memo To: Ronelle Shankle, Manager, Policy and Program Services, DCS Administration, From: Shani L. Fuller, Research Analyst, DCS Administration, Date: April 21, 2000, Subject: Calculating Support in Partial Shared Custody Situation

receive support could be made by either parent with supporting evidence. Since the statute declares they already are a party (by operation of law) if the Judgment already provides for support pursuant to ORS 107.108 then no motion to add the adult child is necessary.¹⁵ On the other hand, as a party, they should be served with any motions to modify which affect their right to receive support and once they are 18, their name should be added to the heading of your pleading.

Many lawyers file a motion to add the child as a party but unless the Judgment is the rare one that does not provide for support for children over 18 this step seems redundant since it accomplishes nothing that the statute has not already done.

Some lawyers file a motion to add them as a party but put in their order that the child does not need to file an appearance.

From a more practical standpoint the real question arises from ORS 107.108(1) which allows a court to order support for a “child attending school” from either or both parents. Many ALJ’s take the position that unless the child seeks support from both parents, they will only order adult child support from the prior obligor. On the other hand, nothing in the statute bars an order requiring both parents to pay support if sought by the other parent. [the state has decided they will not seek such orders]

Since the statute grants the court jurisdiction to award support from either parent, the obligor could file a motion seeking an order requiring both parents to pay support for a child attending school and even if the child objects, the court has the authority to enter

¹⁵ Motion to add would be appropriate if the judgment did not provide for support after the age of 18.

such an order. The child support guidelines presume the custodial parent is also contributing (i.e. directly by providing a home). If that child is not living at home then the presumptions in the guidelines are overcome and the court should order the custodial parent to provide support to the child. If the original judgment has no court ordered obligation from the obligee, the only way to create such an obligation is to move to modify pursuant to ORS 107.108 to require the obligee to become a 2nd obligor.

R. Even where there is no deviation upwards for college expenses, must the adult child's share always be a pro-rata share and be paid to the adult child?

The answer is no!!!. ORS 107.108(4) specifically says that support should be pro-rated but then directs DHR to adopt rules to "...define good cause and circumstances under which the administrator or hearings officer may allocate support by other than a pro-rated share..." It also permits support to be paid directly to the obligee parent "for good cause." The OAR define such good cause, in part, as a court order. If you can convince the court that child is too irresponsible to handle the money, this is "good cause" and support can still be paid to the obligee parent. Where a child is susceptible to obligor parental pressures it may be better for the child to have the obligation be due to an obligee parent.

CONCLUSION

_____The legislature can create statutes, governmental agencies can draft Administrative Rules and the DOJ's and ALJ's can interpret these statutes and rules as they see fit. However, it is the trial lawyer's responsibility to assert and defend the

application of child support obligations as they relate to parents and adult children. Creatively applying the facts to the actual law can create just and equitable results for all concerned. Never assume the presumed amount of support is just and appropriate. Each family's case should be viewed with an eye toward applying rebuttal criteria. Failure to do so not only does your client an injustice but it emboldens those who believe that child support is simply a mathematical calculation. Each family's needs require more from the judicial system and more from the lawyer.

Home - H:\CLE\Oregon State Bar\Child Support - children attending school6.wpd

APPENDIX - I

Minor Child Support Rebuttal Upwards Upheld in Howell & Hooyman

Former husband filed post-divorce motion for reduction of his child support obligation, and former wife responded seeking an increase. The Circuit Court, Marion County, C. Gregory West, J., increased former husband's level of support, and former husband appealed. The Court of Appeals, Edmonds, P.J., held that: (1) circuit court correctly declined to apply administrative rule governing social security or veteran's benefit payments received on behalf of a child in calculating former husband's child support obligation; (2) circuit court properly declined to consider money and services that former wife's domestic partner contributed to her household; and (3) upward adjustment in former husband's income to reflect that such income was not subject to income tax was appropriate.

Affirmed.

Husband appeals the trial court's modification of the child support award in this case. > ORS 107.135(1)(a). He argues that, rather than increasing his obligations, the court should have reduced them. We affirm.

Wife received custody of the parties' two children in 1989 as part of the dissolution of their marriage. At the same time, the court divided the parties' property, awarded wife an equalizing judgment against husband, required husband to pay child support and awarded wife attorney fees. Since then, there has been additional litigation over a number of issues. Among other things, that litigation resulted in further awards of attorney fees in wife's favor. Husband, who is totally disabled, has not paid the equalizing judgment or any of the attorney fee awards; in 1997, he discharged all of his marital and other non child support obligations, in excess of \$100,000, in a chapter 7 bankruptcy. His current child support payments are made through mandatory deductions from his income, which consists primarily of Veterans Administration and Social Security disability payments that approximate \$3,583 per month. Wife has gross monthly income from her employment of \$2,504.

In 1995, the court increased the award of child support to \$722 per month, an action that we affirmed on appeal. > Howell-Hooyman and Hooyman, 143 Or.App. 313, 922 P.2d 1263, rev. den. > 324 Or. 394, 927 P.2d 600 (1996). In November 1998, husband moved to have the award reduced, and wife responded by seeking an increase. After a hearing in April 1999, the court increased the award to \$841 per month, although the presumed support level was \$624.54 per month. In doing so, the court recognized, among other things, that, as a result of husband's bankruptcy, the equalizing judgment would not be satisfied. Instead, wife must pay a number of debts, including sizeable attorney fees arising from this litigation that the court had previously ordered husband to pay. Husband's assignments of error deal with alleged errors in the court's adjustment of his support obligation.

> [1] In his first assignment of error, husband attacks the trial court's failure to follow the procedure established in [171 Or.App. 548] > OAR 137-050-0405 for taking into consideration the Social Security income that wife receives directly on account of the children. The difficulty with husband's argument is that the rule on which he relies did not become effective until March 1, 1999. Father initiated this proceeding in November 1998. > OAR 137-050-0335 provides that new rules, repealed rules, and amended rules concerning the formula for determining child support "shall be applied to the computation of child support obligations on actions in which the initiating motion or petition is filed with the court * * * after the effective date of these rules." > (FN1) The court correctly declined to apply > OAR 137-050-0405.

> [2] In his second assignment of error, husband argues that the trial court failed to consider

money and services that wife's current domestic partner contributes when it raised husband's child support obligation above what the formula would otherwise provide. In light of wife's overall situation, and of the irregularity and uncertainty of those contributions, the court did not err. > (FN2)

> [3] Finally, husband argues that the trial court erred when it adjusted his income upward to reflect the fact that it is not subject to income tax. > (FN3) > OAR 137-050-0330(2)(a) authorizes a trial court to adjust the presumed amount of child support (the amount that the formula would provide) if the presumed amount is unjust or inappropriate under the criteria that the rule describes. Under > OAR 137-050-0330(2)(a)(O), [171 Or.App. 549] one of those criteria is the "tax advantage or adverse tax effect of a party's income or benefits [.]". In > Hoag and Hoag, 122 Or.App. 230, 235, 857 P.2d 208 (1993), we declined to read into the rules a requirement to consider the tax consequences of the nature of a party's income in determining that party's gross income. However, as husband notes, we decided > Hoag before the adoption of > OAR 137-050-0330(2)(a)(O). Although that rule does not change the computation of gross income for purposes of the basic child support formula, it does permit the trial court to take the taxable or non-taxable nature of a party's income into account in determining whether to adjust the level of the support that the formula would otherwise provide. In light of the overall financial situation of the parties, the trial court did not err in doing so in this case.

Affirmed.

> (FN*) Deits, C.J., vice Warren, S.J.

> (FN1.) Before March 1, > 1999, OAR 137-050-0335 provided that new rules applied only to computation of child support "on actions initiated after the effective date of these rules." The rule was amended at the same time as the adoption of > OAR 137-050-0405 to provide that changes applied only "on actions in which a motion or petition, other than a petition for de novo review" is filed after the effective date of the change. 38 Or. Bulletin No. 2 (Feb. 1999) at 113. The rule was further amended to its current version effective September 1, 1999. 38 Or. Bulletin No. 10 (Oct. 1999) at 88. Because > OAR 137-050-0405 does not apply to this proceeding under any version of > OAR 137-050-0335, we do not need to decide which is the governing version for this case.

> (FN2.) The third assignment of error concerns the trial court's failure to apply > OAR 137-050-0400, concerning nonjoint children, to the \$180 per month that husband gives to his daughter by a previous marriage. However, that daughter is 21 years old, and the payments are, thus, not the result of father's legal responsibility for the daughter. The rule does not apply.

> (FN3.) Husband testified that some of his income is actually taxable but that the taxable amount is too low to require him to file a tax return.

16 P.3d 1173, 171 Or.App. 545, Marriage of Howell, In re, (Or.App. 2000)
----- Excerpt from pages 16 P.3d 1173-16 P.3d 1175.

APPENDIX - II
Howell & Hooyman Brief Excerpts

RESPONSE TO ASSIGNMENT OF ERROR NO. 2
THE COURT DID NOT ERR IN DECLINING TO REBUT THE PRESUMED
AMOUNT OF CHILD SUPPORT DOWNWARD FOR EVIDENCE OF OTHER INCOME OR A
DOMESTIC ASSOCIATE.

ARGUMENT

The trial court did not err in declining to rebut the child support guidelines downward due to additional income of wife or consideration of a domestic partner.

Husband is correct that OAR 137-050-0320 (2)(a) includes as rebuttal criteria other available resources of the parent and financial advantage from a domestic partner. Husband also acknowledges by his argument that rebuttal of the guidelines is appropriate in this case and wife agrees.

However, all the rebuttal criteria are discretionary with the trial court. OAR 137-050-0320 (2)(a) provides that the presumed amount of child support “may” be rebutted and that the court shall recite the “findings which explain the reason for the variance.” Here, the trial court properly considered the evidence and found the presumed amount of support unjust and inappropriate based upon articulated and certain findings. Those findings were specified in the court’s Judgment. Appellant’s Brief, A-29-31. The court then determined that in light of all of the evidence and the criteria the court found applicable a net rebuttal upward was appropriate.

The court is not required to rebut the child support amount for every alleged criteria. In addressing the issue of rebuttal in Tofte and Tofte, 134 OrApp 449, 454, 895 P2d 1387, 1390 (1995) the court stated “[n]othing in the rule requires the trial court to rebut the presumptively correct amount of child support.”

Furthermore, unlike the following cases in which remand was appropriate because the trial court failed to make specific and detailed findings regarding the purposes for rebuttal, here the court stated the exact reasons for its decision to rebut the presumed amount of child support: See Rossi and Rossi, 128 OrApp 536, 544, 876 P2d 820 (1994). Perlenfein and Perlenfein, 316 Or. 16, 25-26, 848 P2d 604 (1993); Hay and Hay, 119 OrApp 372, 374, 850 P2d 410 (1993); Lawhorn and Lawhorn, 119 OrApp 225, 229, 850 P2d 1126 (1993).

The court’s specific findings virtually mirror the language contained in OAR 137-050-0320 (2)(a). In rebutting the guideline amount of support upward, the court made the following findings:

- “7. The presumed amount of child support is **unjust and inappropriate** and the court rebuts the amount of support upward to \$841 per month.
8. The applicable rebuttal criteria are as follows:
 - S. **Respondent’s gross income of \$3,583 is tax free.** Assuming a potential 30% tax rate (the rate used in the prior court order), if the income were to be taxable, the comparable taxable income would be \$5,118.57 for support purposes.
 - B. The Petitioner has **special financial hardships resulting from the Respondent’s failure to pay** the following court ordered obligations:
 - 1) December 29, 1993 \$2,300 money Judgment (plus accrued interest) awarded her in the Judgment but not paid;
 - 2) October 10, 1993 \$5,319 child support arrearage (plus accrued interest) of which only a small portion has been paid;
 - 3) December 1990 attorney fee Judgment of \$795 (plus accrued interest) not paid;
 - 4) December 20, 1990 attorney fee judgment of \$995

- 5) (plus accrued interest) not paid;
 - 6) July 1995 attorney fee Judgment of \$8,639 (plus accrued interest) not paid;
 - 7) March 13, 1998 attorney fee Judgment of \$4,362 (plus accrued interest) not paid;
 - 8) The mutually incurred \$428 Mobil Oil debt he was required to pay in the divorce which Petitioner had to pay;
 - 9) The mutually incurred \$2,948 William Goode Judgment he was required to pay in the divorce which petitioner had to pay.
- C. The Petitioner has **special financial hardships from Respondent's bankruptcy** which did not discharge Petitioner's obligations but which did end Respondent's obligation to pay all of the above except the child support arrearage.
- D. Petitioner's **ability to provide for the necessities of herself and the children** is reduced as a result of Petitioner's financial obligations arising from the Respondent's failure to pay the above.
- E. **The Respondent's increase in income and the reduction of debt as a result of his bankruptcy have improved his ability to pay support.**

Appellant's Brief, A-29-31 (Judgment of Modification: Emphasis added).

These very specific rebuttal findings are exactly what the child support guidelines envision as a procedure for rebutting the presumed amount of child support. Here, the court took into account the "nuances" of this case and set support accordingly. See Glithero and Glithero, 326 Or 259, 951 P2d 682 (1998) where the Oregon Supreme Court noted that ". . . the court is not powerless to take into account the nuances of a particular case." Glithero, 326 Or 265, 951 P2d 685.

The court should take note that *Husband misstates the testimony of wife on page 10 of his brief* where he writes "Respondent testified at the hearing that she receives a cash payment of about \$500 per month from her cohabitant" As reflected in the transcript, the actual evidence in the record is as follows: Wife's actual testimony was that Mr. Valdez provides her with "between two and \$500 a month. Tr. 22. Further in the hearing the following question and answer of wife took place:

- "Q: You already said that Mr. Valdez, *when he feels like it*, will give you 500 bucks, right?
- A. Okay."

Tr. 96. (Emphasis added)

When asked the question "Do you have any kind of agreement with Mr. Valdez at all about a continuing contribution towards your household expenses?" wife responded "No". Tr. 28. She also testified that Mr. Valdez spent his money on "his bills." Tr. 24.

The evidence that Mr. Valdez resided with wife and contributed occasionally to the household expenses was present in the record. The court made a finding in the Judgment that "Petitioner has a domestic partner". Appellant's Brief, A-29. The court correctly did not find that his sporadic contributions required rebuttal.

The fact that the court did not provide an overall rebuttal downward for this minimal contribution does not justify remand or recalculation. The court simply took the totality of the criteria and made a net rebuttal upward. Rebuttal is discretionary and in the present case the court did not err in its application of the criteria.

**APPENDIX - III
SAMPLE REBUTTAL SUPPORT EXHIBIT**

		Parent 1	Parent 2
B1	Gross Monthly Income (enter minimum wage if on TANF)	\$2,800.00	\$12,500.00
B2	Add Spousal support received. Subtract spousal support pd.	\$2,000.00	(\$2,000.00)
B5A	Social Security benefits received for child		
B4	Subtotal gross income (without Soc. Security)	\$4,800.00	\$10,500.00
A4	No. of joint children for whom support sought	3	
	No. of non-joint children for whom support ordered (pd)		
A4	Total non-joint children (not stepchildren)	0	0
B3	Subtract credit for non-joint children	\$0.00	\$0.00
B4	Adjusted Gross Monthly Income	\$4,800.00	\$10,500.00
B5	Each Parents % of Adjusted Gross Income	31.37%	68.63%
B6	SUPPORT from lookup table (both parents)	\$2,425.00	\$2,425.00
B6A	Work related child care costs		
EF	Subtract calculated child care credit	\$0.00	
B6B	Recurring medical expenses only		
	No. children in daycare (under 13 or with disability)		
B7	TOTAL Child Support Obligation (both Parents)	\$2,425.00	
B8	Each parents child support obligation	\$760.78	\$1,664.22
B9	Presumed Child Support Obligation		\$1,664.22
B10	Cost of health insurance for joint children only (pro rata)		\$20.00
B11	Portion of insurance added or deducted	\$0.00	(\$6.27)
B12	TOTAL PRESUMED SUPPORT ORDER		\$1,657.94

REBUTTAL APPLICATION under OAR 137-050-0330

(2)(a)(J)	There is a financial advantage from a spouse or other person in the household in a relationship similar to marriage or domestic partnership. Husband is remarried and his spouse earns over \$200,000 per year.	\$200
(2)(a)(L)	There is a child attending school or not living at home. The child is attending private college and also has a trust fund for college.	\$1,000
	Total Adjustment -	\$1,200
	>>>>	
	REBUTTED AMOUNT	\$2,858

APPENDIX - IV
**SPECIAL ADMINISTRATIVE RULES REGARDING CHILD SUPPORT
FOR A CHILD ATTENDING SCHOOL**

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 461. DEPARTMENT OF HUMAN SERVICES, ADULT AND FAMILY SERVICES DIVISION
DIVISION 200 OREGON CHILD SUPPORT PROGRAM

Current through February 15, 2002

461-200-5120 Support for Child Attending School - Oregon Orders Entered On or After October 4, 1997

(1) The purpose of this rule is to define how the Child Support Program (CSP) will apply the provisions of > ORS 107.108, regarding support or maintenance for a child attending school, in performing its official billing, accrual, distribution, and record-keeping functions for ongoing support when:

(a) The most recent order or modification for support was entered on or after October 4, 1997;
and

(b) The order or modification provides for support until the child is age 21 so long as the child is a child attending school in accordance with > ORS 107.108.

(2) The terms used in this rule shall have the meanings set out in > OAR 461-200-5110.

(3) The CSP shall perform its official billing, accrual, distribution, and record-keeping functions for each child on a support obligation who qualifies as a child attending school after attaining age 18, unless the child:

(a) Has failed to comply with the provisions set out in section (4) of this rule and the CSP has received a written objection from the obligor; or

(b) Has failed to provide written notification as provided in section (6) of this rule.

(4) Beginning with the first full term or semester after the child attains age 18, or the first full term or semester after a pre-October 4, 1997 order is modified to include post October 4, 1997 provisions as set out in > ORS 107.108, whichever occurs later:

(a) The child must submit the completed CSP Child Attending School Compliance Form to the obligor and to the CSP. The completed compliance form must be received by the obligor and the CSP within 30 calendar days from the first official day of classes for each term or semester. If the 30th day falls on a state holiday, a Saturday, or a Sunday, the compliance form must be received by the next working day. For schools which do not have traditional terms or semesters, or have courses which last longer than six months, the CSP may require that a compliance form be submitted "quarterly" in addition to within 30 calendar days from the first day of class.

(b) The child must maintain the equivalent of a cumulative "C" grade average or better as defined by the school or, if the child is still attending high school the child may have either a cumulative "C" grade average or better or a "C" grade average or better for each term or semester after attaining age 18;

(c) The child must submit, to the obligor and to the CSP, copies of the grades for the last term or semester and a list of courses in which the child is currently enrolled;

(d) If there has been a finding and order of non-disclosure on behalf of the child pursuant to > ORS 25.020, the child may send the obligor's copy of the documents to the CSP for the CSP to forward to the obligor. The child must submit a copy of the documents to the CSP per the time periods set out in subsection (a) of this section. The CSP shall redact the following information prior to sending a copy of documents to the obligor:

(A) Residence, mailing or contact address including the school name and address;

(B) Social security number;

(C) Telephone number including the school telephone number;

(D) Driver's license number;

(E) Employer's name, address and telephone number; and

(F) Name of registrar or school official.

(5) When a child is attending school and a "normal break" occurs between academic terms at the school, the obligor will continue to owe ongoing support and the CSP shall continue official accounting functions throughout such break if the CSP records show that the child intends to resume classes at the start of the first regular academic term following the break. The CSP may require the child to provide additional documentation if at least 120 days have passed since the end of the child's last term or semester.

(6) At least 30 days prior to the child's 18th birthday, the CSP shall send written notification to the obligee, the child, and, if appropriate, the Oregon Youth Authority (OYA) that unless the obligee or the child sends written notification to the CSP prior to the child's 18th birthday that the child will continue to attend school, the CSP will terminate official accounting functions effective the date the child attains age 18.

(7) Upon receipt of the written notification from the obligee or the child that the child will continue to attend school, the CSP will send the Child Attending School Compliance Requirements, along with a copy of the Child Attending School Compliance Form, to the parties and the child. Such notice shall:

(a) List all of the compliance requirements to continue to receive support as a child attending school.

(b) Include objection information;

(c) Advise the parties of their right to a change in circumstance modification in accordance with > OAR 461-200-3420;

(d) Include distribution information for distributing support directly to the child; and

(e) Include information for the child to make a claim of risk for non-disclosure of information pursuant to > ORS 25.020 and > OAR 461-200-1160.

(8) The CSP shall distribute support directly to the child unless good cause is found to distribute support in some other manner. For purposes of this section "good cause" may include:

(a) The child is in the care of the Oregon Youth Authority (OYA);

(b) The child provides written authorization for distribution to the obligee; or

(c) The court, hearings officer or administrator orders otherwise.

(9) When there are multiple children for whom support is ordered, the amount paid directly to the child under section (8) of this rule shall be a prorated share.

(10) If a child attending school is in the care of OYA, any and all reporting duties of the child as outlined in this rule shall be the duty of OYA.

(11) The CSP shall terminate official accounting functions on the case when one of the following conditions occurs:

(a) The obligee or child fails to provide written notification as required under section (6) of this rule;

(b) The child has failed to comply with section (4) of this rule, and the obligor has submitted a written objection under section (14) of this rule;

(c) During a normal school break, the child has failed to provide additional documentation as requested under section (5) of this rule;

(d) The child sends written notice that the child no longer qualifies as a child attending school; or

(e) The child fails to provide a valid compliance form within 30 calendar days from the date of a written notice from the CSP advising that an authorized representative of the school sent a written notice to the CSP that the child no longer qualifies as a child attending school.

(f) The child fails to provide a valid compliance form within 30 calendar days from the date of a written notice from the CSP advising that OYA has notified the CSP that the child is no longer in the care of the OYA.

(12) Once the CSP terminates official accounting functions on the case, the official accounting functions cannot be resumed except as provided in section (15) of this rule.

(13) When the CSP receives written notification from the child or authorized representative of the school that the child is no longer qualifies as a child attending school or notification from OYA that the child is no longer in the care of OYA, the CSP shall terminate official accounting functions on the case for any such child effective the date the notice is received by the CSP.

(14) If an obligor submits a written objection asserting that the child no longer is attending school, the CSP shall review the official records for compliance. The CSP will presume that the child's statutory reporting requirements as outlined in section (4) of this rule have been fulfilled if the CSP has record of a completed compliance form with any required documentation for the current or most recent, as appropriate, term or semester.

(a) If compliance has occurred according to CSP records, the CSP shall send a copy of the proof of compliance to the obligor. If there has been a finding and order of non-disclosure on behalf of the child pursuant to > ORS 25.020, the CSP shall redact the following information prior to sending a copy to the obligor:

- (A) Residence, mailing or contact address including the school name and address;
- (B) Social security number;
- (C) Telephone number including the school telephone number;
- (D) Driver's license number;
- (E) Employer's name, address and telephone number; and
- (F) Name of registrar or school official.

(b) If compliance has not occurred according to CSP records, the CSP shall terminate official accounting functions on the case for any such child effective the date the CSP receives the obligor's written objection and shall notify all parties of this termination.

(15) In any case, up until the child attains the age of 21, the CSP shall resume official accounting functions upon receipt of a written statement from the obligor that the obligor wishes to continue paying ongoing support for such child. If such verification occurs, the CSP shall inform all parties and resume its official accounting functions effective the payment due date following receipt of such verification. If the obligor later decides to stop paying ongoing support for such child, the obligor shall provide a written statement to the CSP and the CSP shall terminate official accounting functions on the case for any such child effective the date the CSP receives the obligor's written statement and shall notify all parties of this termination.

(16) In any case, the CSP shall honor the provisions of a court or administrative order to reinstate or terminate the duty of support to a "child attending school" under > ORS 107.108.

(17) If the most recent order or modification for support cites > ORS 107.108 or otherwise provides for support of a "child attending school," the CSP shall follow the provisions of > ORS 107.108 and this rule, regardless of other child attending school provisions that may be in the support order.

APPENDIX - V
SAMPLE "BOILER PLATE" LANGUAGE FOR SUPPORT JUDGMENT

CHILD SUPPORT.

A. Guideline level: The guideline level of support for the parties' child is established at \$466 per month from the Husband pursuant to Exhibit "2".

B. Identification of Adult children: The parties' child is an adult child eligible for support pursuant to ORS 107.108 and is therefore entitled to direct payment of support; however, the parties agree that support should be paid to Wife so long as _____ resides in Wife's home.

C. Support for adult child. Wife shall have judgment against Husband on account of child support in the sum of \$466 per month; provided, however, should _____ reside on his own and be eligible for support, support will be paid directly to him the first day of the month following his establishment of a separate residence.

D. Support shall continue through a normal break (such as summer vacation) for a child who attended school during the prior academic term and who intends to return to school after the break.

E. Due Date. Support shall be due on the first day of each month beginning August 1, 2002.

F. Recipient of payments. All support shall be paid directly to Wife at _____, or such other address as he shall specify in writing.

G. Conditions of support for adult children. Child support shall continue until the age of 21 if _____ is qualified to receive child support as a "child attending school" as defined by Oregon Statute, case law and as further described below.

1. Currently a "child attending school" is defined in ORS 107.108 to mean a child of the parties who is unmarried, is 18 years of age or older and under 21 years of age and is a student regularly attending school, community college, college or university, or regularly attending course for vocational or technical training designed to fit the child for gainful employment.

2. Currently a child enrolled in an educational course load of less than one half that determined by the educational facility to constitute "full time" is not a "child attending school."

3. The obligation to pay support for an adult child pursuant to the current ORS 107.108 shall only continue for so long as said child is eligible and said statute is held to be in effect and constitutional.

4. For any adult child to be eligible for direct payment of support, said child must qualify as a "child attending school" pursuant to ORS 107.108 and said statute currently provides that the child must:

A. maintain a "C" or better grade average;

B. notify the paying parent(s) when the child is no longer eligible for support; and

C. submit a Department of Justice (hereafter DOJ) form to prove eligibility, to both the parent and DOJ which shows all the information necessary to establish eligibility for support. Said form

must be submitted within the first month of each term or semester.

5 Failure of an adult child to comply with any of the above requirements, and upon written notice from the paying parent, will result in the end of the direct payments for the adult child. Said fact will also constitute a substantial change of circumstances for purposes of seeking a modification of the existing child support order and terminating any support obligation for the adult child. However, support may be reinstated upon enrollment and meeting the other criteria described herein.

6 Support paid by either parent for a child not eligible for support shall be returned to the paying parent.

H. Notice to DOJ. Each party and each adult child eligible for support shall notify Department of Justice, Child Support Services, P.O. Box 14506, Salem Oregon 97309 of any changes in that party or child's home or business address set forth below within 10 days after such change.

I. Notice to Obligor. The adult child eligible for support shall notify the parents when that child receives income from his own gainful employment, marries, becomes emancipated or enters military service if one of these events occurs during a period in which the parties are required to contribute to the support of the child.

J. Deductions & Tax Credits. Wife is awarded the dependency deductions and tax credits for the parties' child. The other parent shall not claim said child on his tax return unless this provision is modified by the court or the parties execute the appropriate federal forms to assign the right to claim those deductions and credits.

APPENDIX VI
PAUL SAUCY EXAMPLE OF STIPULATED COLLEGE PROVISION
WITH STATE COST CAP

4.5 HUSBAND shall pay for not less than **one-half** of four years of college education expenses for **FIELD**(kids 1st names). WIFE shall pay the other one-half.

4.5.1 Neither party shall be obligated to pay more each year for a child's college expenses than that parent's percentage of what is charged by the University of Oregon for room and board for a student living on campus including: tuition, books, laboratory fees, campus parking and other similar expenses routinely incurred by a student in college. The benchmark shall be the figure published annually by the University's admission office as a student's "estimated expenses" for the school year that the child will be attending.

4.5.2 Each party shall pay one-half of any fee charged for standardized testing required for admission, along with reasonable instructional costs incurred to prepare for these tests, application fees, and reasonable transportation to and from prospective colleges for the child for the purpose of interviews and gathering information. This expense shall be in addition to any monthly support obligation.

4.5.3 Each party shall assist the child in applying for all scholarships, grants, financial aid, loans, or stipends for which the child may be eligible, and shall execute without delay as well as provide any financial and other information required for such applications.

4.5.4 The payment for educational expenses shall continue as long as the child is carrying a course load of not less than 12 credit hours at an accredited institution of higher learning, remains in good academic standing, maintains an attendance and personal record satisfactory to the institution, and maintains at least a "C" (2.0 grade point) average.

4.5.5 The obligation to pay for a child's college education is in addition to and is not limited by any statutory provision regarding the payment of child support, including the provisions of ORS 107.108 or ORS 107.415. However, payments made for college expenses shall be considered a credit against the monthly support obligation due the child. The obligation shall not extend beyond a child's twenty-fourth birthday.

4.5.6 Husband and Wife are aware that the court, in a dissolution of marriage proceeding, has authority to order child support only until a child is 21 years of age and only then if that child is attending school. The parties intend by this provision of their judgment of dissolution to create a separate contract between them for the future education of their children even though it is set forth herein, this contract does not merge into the judgment of dissolution but it shall be enforceable by the courts.

APPENDIX VII
SAMPLE FEIBLEMAN LANGUAGE FOR STIPULATED COLLEGE SUPPORT
FOR PRIVATE SCHOOL

POST-HIGH SCHOOL EDUCATIONAL EXPENSES

The parties agree to equally share the post-high school education expenses for _____ and _____, 1983, as follows:

A. **OBLIGATION.** Each party shall pay for one-half (1/2) of all reasonable expenses necessary for _____ and _____ to obtain a Bachelors Degree or further education. Such obligation shall terminate upon each child reaching the age of 25.

B. **CONDITIONS.** The following conditions apply to this requirement:

2.A. The child receiving post-high school secondary education assistance must complete any educational programs prior to that child attaining age 25. The parties shall pay the actual cost for each child's college or advanced degree expenses including, but not limited to, tuition, books, laboratory fees, campus parking, room, board, fees, and travel expenses, subject to the conditions herein. The benchmark obligation shall be that charged by Santa Clara University for room and board for a student living on campus unless the parties mutually agree, in writing, to another level of obligation. The benchmark shall be the figure published annually by Santa Clara University's admission office as a student's "estimated expenses" for the school year that the child will be attending, provided however that under no circumstances shall the benchmark figure to be used by the parties exceed \$40,000 in any 12 month period.

2.2 Each party shall assist each child in applying for all scholarships, grants, financial aid, loans, or stipends for which that child may be eligible, and shall execute without delay as well as provide any financial and other information required for such applications.

2.3 To obtain this support from the parties the child must carry a course load of not less than 12 credit hours at the institution of higher learning in furtherance of whatever degree that child is pursuing, maintains an attendance and personal record satisfactory to the institution, and maintains at least a passing grade point average. The child must also be enrolled in a course of study, in a good faith attempt to obtain an education, except for summers.

2.4 The obligation to pay for a child's college education is in lieu of any statutory provision regarding the payment of child support, including the provisions of ORS 107.108 or ORS 107.415.

2.5 The parties acknowledge that the requirement to be a "full time student" is more stringent than those imposed by statute but as a condition herein the parties have also agreed to pay for more years of education at a higher cost than is required by statute.

C. **SURVIVAL OF AGREEMENT AFTER STIPULATED JUDGMENT.** Both parties agree that this Agreement shall survive the subsequent Stipulated Judgment of Dissolution of Marriage and have independent legal significance. These specific agreements are legally binding contracts, entered into for good and valuable consideration. Reference to this agreement in the Stipulated Judgment of Dissolution of Marriage shall not void this agreement as a separately enforceable contract. In the future, either party may enforce these agreements in this or any other Court of competent jurisdiction.

4. **ATTORNEY FEES ON ACTION.** In the event of suit or action to enforce this agreement, the prevailing party at trial or appeal shall be entitled to reasonable attorney fees, costs and expenses.

APPENDIX VIII

OAR 461-200-5110 CHILD ATTENDING SCHOOL DEFINITIONS

461-200-5110 Child Attending School Definitions

As used in > OAR 461-200-5120 and > OAR 461-200-5125, the following terms have the meanings outlined below:

(1) "Child attending school" means a child of the parties who is unmarried, is 18 years of age or older and under 21 years of age and is a student regularly attending school. Unless the child otherwise qualifies as a child attending school, a child attending school does not include:

(a) A member of the Army, Navy, Air Force, Marine Corps, or Coast Guard (collectively known as the "armed forces") who is serving on active duty; or

(b) A member of the National Guard who is serving full-time National Guard duty.

(2) "Class order" means a monthly child support order amount for multiple children that does not specify an amount of support per child.

(3) "Normal break" means:

(a) Summer semester or term;

(b) The period of time between graduation from or completion of high school and the beginning of the next regularly scheduled term, semester, or course of study at a school;

(c) The period of time between the end and beginning of regularly scheduled consecutive school semesters, terms, or courses of study; or

(d) Any other scheduled break between courses of study that is defined by the school as a normal break.

(4) "Quarterly" means annual quarters ending on March 31, June 30, September 30, and December 31. This is the reporting schedule the CSP may require for a child who is attending a school which does not have traditional terms or semesters, or has courses which last longer than six months.

(5) "Regularly attending" means the child is enrolled in an educational course load of at least half-time as defined by the school.

(6) "School" means any of the following:

(a) An educational facility such as a high school, community college, four-year college, or university;

(b) A course of vocational or technical training, including Job Corps, designed to fit the child for gainful employment;

(c) A high school equivalency course, including (but not limited to), a GED program; or

(d) A school in grade 12 or below, including home schooling approved by the local school district.

(7) "Termination of official accounting functions" means the Child Support Program shall cease to perform billing, accrual, distribution, and record-keeping functions for ongoing support with regard to the child attending school. If the order is a class order and there is an additional child(ren) for whom ongoing support is still ordered, termination of official accounting functions means:

(a) Any support paid directly to such child will cease and will be redirected to the obligee; and

(b) Support accrual for such child will be prorated to the other child(ren) for whom ongoing support is still ordered.

APPENDIX IX
OAR 461-200-5125 RULES FOR PRE - 10/4/97 ORDERS

461-200-5125 Support for Child Attending School - Oregon Orders Entered Prior to October 4, 1997

(1) The purpose of this rule is to define how the Child Support Program (CSP) will apply the provisions of > ORS 107.108 regarding support or maintenance for a child attending school, in performing its official billing, accrual, distribution, and record-keeping functions for ongoing support when:

(a) The last order or modification for support was entered prior to October 4, 1997; and

(b) The order or modification provides for support until the child is age 21 so long as the child is a child attending school in accordance with > ORS 107.108.

(2) The terms used in this rule shall have the meanings set out in > OAR 461-200-5110.

(3) The CSP shall perform its official billing, accrual, distribution, and record-keeping functions for each child on a support obligation who qualifies as a "child attending school" after attaining age 18, unless the obligee or the child has failed to provide written notification as provided in sections (5) and (11) of this rule.

(4) When a child is attending school and a "normal break" occurs between academic terms at the school, the obligor will continue to owe ongoing support and the CSP shall continue official accounting functions throughout such break if the CSP records show that the child intends to resume classes at the start of the first regular academic term following the break.

(5) At least 30 days prior to the child's 18th birthday, the CSP shall send written notification to the obligee, the child, and, if appropriate, the Oregon Youth Authority (OYA) that unless the obligee or the child sends written notification to the CSP prior to the child's 18th birthday that the child will continue to attend school, the CSP will terminate official accounting functions effective the date the child attains age 18.

(6) Upon receipt of the written notification from the obligee or the child that the child will continue to attend school, the CSP will send the Child Attending School Compliance Requirements to the parties and the child. Such notice shall:

(a) List all of the compliance requirements to continue to receive support as a child attending school;

(b) Include objection information;

(c) Advise the parties of their right to a change in circumstance modification in accordance with > OAR 461-200-3420; and

(d) Include information for the child to make a claim of risk for non-disclosure of information pursuant to > ORS 25.020 and > OAR 461-200-1160.

(7) Support shall be distributed to the child only upon order of the court or written permission of the obligee.

(8) The obligor, obligee and a child who has attained age 18 and is a child attending school may enter into a written agreement to apply the provisions which are applicable to support orders and

modifications entered on or after October 4, 1997, as outlined in > OAR 461-200-5120.

(9) The CSP shall terminate official accounting functions on the case when one of the following conditions occurs:

(a) The obligee or child fails to provide written notification as required under section (5) of this rule;

(b) The obligor has submitted a written objection under section (11) of this rule and the obligee or child has failed to provide compliance documents as required by that section;

(c) The obligee or child sends written notice that the child no longer qualifies as a child attending school; or

(d) The obligee or child fails to provide a valid compliance form within 30 calendar days from the date of a written notice from the CSP advising that an authorized representative of the school sent a written notice to the CSP that the child no longer qualifies as a child attending school.

(e) The child or the obligee fails to provide a valid compliance form within 30 calendar days from the date of a written notice from the CSP advising that OYA has notified the CSP that the child is no longer in the care of the OYA.

(10) When the CSP receives written notification from the obligee, child or authorized representative of the school that the child is no longer enrolled in school at least half time or notification from OYA that the child is no longer in the care of OYA, the CSP shall terminate official accounting functions on the case for any such child effective the date the notice is received by the CSP.

(11) If an obligor submits a written objection asserting that the child no longer is attending school, the CSP shall send written notification to the obligee and child that the CSP must receive a completed CSP Child Attending School Compliance Form within 30 calendar days from the date of the CSP written notification.

(a) If a valid compliance form is received by the CSP within 30 days, the CSP will send a copy to the obligor. If there has been a finding and order of non-disclosure on behalf of the child pursuant to > ORS 25.020, the CSP shall redact the following information prior to sending a copy to the obligor:

(A) Residence, mailing or contact address including the school name and address;

(B) Social security number;

(C) Telephone number including the school telephone number;

(D) Driver's license number;

(E) Employer's name, address and telephone number; and

(F) Name of registrar or school official.

(b) If the compliance form is not received within 30 days or does not show that child is in compliance, the CSP shall terminate official accounting functions on the case for any such child effective the date the CSP receives the obligor's written objection, and shall notify all parties of this termination.

(12) The CSP shall resume official accounting functions for the child anytime prior to the child

attaining the age of 21, if the obligee or child submits a valid CSP Compliance Form showing that the child is currently enrolled in school at least half time.

(a) Official accounting functions shall resume effective the date the CSP receives the completed form.

(b) The enforcing agency shall establish arrears in accordance with > OAR 461-200-3240, only upon the request of the obligee.

(13) In any case, up until the child attains the age of 21, the CSP shall resume official accounting functions upon receipt of a written statement from the obligor that the obligor wishes to continue paying ongoing support for such child. If such verification occurs, the CSP shall inform all parties and resume official accounting functions effective the payment due date following receipt of such verification. If the obligor later decides to stop paying ongoing support for such child, the obligor shall provide a written statement to the CSP. The CSP shall treat such statement as an objection received under section (11) of this rule.

(14) In any case, the CSP shall honor the provisions of a court or administrative order to reinstate or terminate the duty of support to a "child attending school" under > ORS 107.108

(15) If the most recent order or modification for support cites > ORS 107.108 or otherwise provides for support of a "child attending school," the CSP shall follow the provisions of > ORS 107.108 and this rule, regardless of other child attending school provisions that may be in the support order.

APPENDIX X

Recent Supreme Court Case on Rebuttal and Child's Income

Redler and Redler
330 Or. 51, 996 P.2d 963 (2000)

The issue in this case is whether the Court of Appeals erred in affirming a judgment of the trial court that increased the child support obligation of petitioner (father). > Redler and Redler, 153 Or.App. 135, 956 P.2d 232 (1998). We limit our review to questions of law, > ORS 19.415(4), and affirm the Court of Appeals.

Father and mother's 19-year marriage was dissolved in October 1990. At the time, the parties had five minor children, all of whom resided with mother. The trial court found that father's gross monthly income was \$6,416, and it ordered him to pay child support in the amount of \$1,576 per month. Father appealed, and, in March 1992, the Court of Appeals held that the trial court had misapplied the child support guidelines. See > ORS 25.270 to > ORS 25.280 (establishing child support guidelines). Accordingly, the Court of Appeals remanded the case for recalculation of father's child support obligation. > Redler and Redler, 112 Or.App. 203, 208, 827 P.2d 1363 (1992).

In July 1992, before the trial court had recalculated father's child support obligation, father filed a motion for an order to show cause under > ORS 107.135 > (FN1) why his child support obligation should not be reduced. Father's motion stated that the parties' two oldest children no longer resided with mother and that father had experienced "[a] substantial and unanticipated decline" in his income and ability to pay support. In September 1992, after a hearing on father's motion, the trial court found that father's two oldest children were not living with mother, that there had been substantial and [330 Or. 55] unanticipated changes in father's circumstances, that father's gross monthly income had dropped to \$1,144, and that, under the formula, his child support obligation should be reduced to \$218 per month. The court also held that father was entitled to credit for payments that he had made since the divorce decree in 1990 and that, because father was in arrearage on his support payments, the credit to which he was entitled reduced his support arrearage to \$12,219.20.

In 1995, the Support Enforcement Division of the Department of Justice (SED) initiated this proceeding under the two-year review provision of > ORS 25.287 (1997), > (FN2) seeking to bring father's child support obligation into compliance with the state's child support guidelines. > OAR 137-050-0320 to > OAR 137-050-0490. > (FN3) SED alleged that father's child support obligation of \$218 per month was not in substantial compliance with the child support formula set out in > OAR 137-050-0330 and that under > ORS 25.287 his support obligation should be modified to \$453 per month beginning in November 1995. > ORS 25.280 provides:

"In any judicial or administrative proceeding for the establishment or modification of a child support obligation [under specified statutory provisions], the amount of support determined by the formula * * * shall be presumed to be [330 Or. 56] the correct amount of the obligation. This shall be a rebuttable presumption and a written finding or a specific finding on the record that the application of the formula would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption. The following criteria shall be considered in making the finding:

"(1) Evidence of the other available resources of a parent;

"(2) The reasonable necessities of a parent;

"(3) The net income of a parent remaining after withholdings required by law or as a condition of employment;

"(4) A parent's ability to borrow;

"(5) The number and needs of other dependents of a parent;

"(6) The special hardships of a parent including, but not limited to, any medical circumstances of a parent affecting the parent's ability to pay child support;

"(7) The needs of the child;

"(8) The desirability of the custodial parent remaining in the home as a full-time parent and homemaker;

"(9) The tax consequences, if any, to both parents resulting from spousal support awarded and determination of which parent will name the child as a dependent; and

"(10) The financial advantage afforded a parent's household by the income of a spouse or another person with whom the parent lives in a relationship similar to husband and wife."

(Emphasis added.)

After a hearing conducted by the Employment Department, see > ORS 416.419(2)(b) (providing for hearing by Employment Department), the referee found that father's potential gross monthly income was \$1,039 and that the presumed amount of his child support obligation under the formula set out in > OAR 137-050-0330 was \$345. Father attempted to rebut the presumption in > ORS 25.280 that the formula establishes the correct amount of a child support obligation by introducing evidence that his two minor daughters who resided with mother were employed as newspaper [330 Or. 57] carriers. He contended that their earnings made them self-supporting. The referee found that the children's income did not make them self-supporting and that the total child support obligation based on the potential earnings of both father and mother "will provide little more than the necessities" for the children. The referee held that, although the children's earnings "undoubtedly provide clothing, recreation, and other personal items that they otherwise would have to do without," their earnings were "not a basis" for reducing father's share of the support obligation.

Father appealed to the circuit court. See > ORS 25.316(5) (providing for appeal to circuit court for hearing de novo). At the hearing before that court, mother testified that she had earned approximately \$3,900 the previous year (gross) and that her two daughters had earned approximately \$3,300 and \$2,900, respectively, from their newspaper routes. Based on mother's testimony, father argued that mother was not providing support for the children. The trial court disagreed, reasoning that, "[i]f the children are living with [mother] and they are living in her home, she's paying support." Father then argued that, under > ORS 107.415, > (FN4) he was entitled to credit against his support arrearage because his daughters had received income from their gainful employment. The trial court refused to consider the daughters' income for that purpose.

At the conclusion of the hearing, the trial court found that father's gross monthly income was \$1,000 and that the presumed amount of his child support obligation under the formula set out in > OAR 137-050-0330 was \$300 per month. > (FN5) [330 Or. 58] The court held that father was not entitled to credit against his child support arrearage. It did not find that it would be unjust or inappropriate in this case to apply the formula.

Father appealed to the Court of Appeals. > ORS 19.415(3). In a split en banc decision, the

Court of Appeals affirmed. That court held that "[n]othing in the language of [> ORS 25.280] requires the courts or referees to take any action if they decide not to depart from the amount presumed correct under the formula." > Redler, 153 Or.App. at 140, 956 P.2d 232. (Emphasis in original.)

> [1] The first question is whether, in this proceeding under > ORS 25.287 (1997) to modify a child support obligation, the Court of Appeals erred in upholding the trial court's refusal to consider the children's income as part of father's argument that, under > ORS 107.415, father is entitled to credit against his support arrearage. For the reasons that follow, we hold that the Court of Appeals did not err.

> ORS 25.287 (1997) explicitly provided that, in a proceeding to modify a child support obligation, "[t]he court, the administrator or the hearings officer shall not consider any issue * * * other than when the support obligation became effective and whether it is in substantial compliance with the formula * * *." By contrast, the issue in a proceeding under > ORS 107.415 is whether the noncustodial parent is entitled to restitution because the custodial parent failed to notify the noncustodial parent that the child receives income from the child's employment or if the child is married or enters the military service. The wording of > ORS 25.287 (1997) makes clear that not all matters that are appropriate for consideration in a proceeding under > ORS 107.415 are appropriate for consideration in a proceeding to modify a child support obligation. Even assuming that father is entitled to restitution under > ORS 107.415(2), that entitlement does not affect the amount of his child support obligation under > ORS 25.280.

In this case, father sought to introduce the amount of his children's income to establish his entitlement to credit [330 Or. 59] against his support arrearage under > ORS 107.415. The trial court properly refused to consider the children's income for that purpose, and the Court of Appeals majority correctly affirmed the court's refusal to do so.

We turn to father's argument that the Court of Appeals erred in affirming the trial court's failure to find that it would be unjust or inappropriate in this case to apply the formula in determining father's child support obligation. Father's argument is that, because he introduced uncontroverted evidence that his daughters' combined income from their newspaper routes was \$6,200, he succeeded in rebutting the presumption in > ORS 25.280 and the trial court should have made a finding to that effect. The state responds that the trial court and the Court of Appeals did not err, because "a party challenging the presumptively correct [formula] amount on the basis of children's income has the dual burdens of coming forward with evidence and of persuading the tribunal to depart from the [formula] amount," which father in this case failed to do.

> [2]> [3] Whether the trial court erred in failing to find that it would be unjust or inappropriate to apply the formula in this case requires us to construe > ORS 25.280 to determine the intent of the legislature regarding application of the formula. We follow the familiar methodology summarized in > PGE v. Bureau of Labor and Industries, 317 Or. 606, 610-12, 859 P.2d 1143 (1993). At the first level of analysis, we examine the text and context of the statute. The text is the best evidence of the legislature's intent. If the legislature's intent is clear from the first level of analysis, then no further inquiry is necessary. > Id. at 611, 859 P.2d 1143. We give words of ordinary usage their plain, natural, and ordinary meaning, > id., and we give words that have a well-defined legal meaning their legal meaning, > Stull v. Hoke, 326 Or. 72, 78, 948 P.2d 722 (1997).

> ORS 25.280 applies to any judicial or administrative proceeding to establish or to modify a child support obligation. In such a proceeding, the statute provides that the formula "shall be presumed to be the correct amount of the obligation." > ORS 25.280. However, the presumption is "a rebuttable presumption * * *." > Id. A written finding or a specific finding made on the record "that the application of the [330 Or. 60] formula would be unjust or inappropriate" is sufficient to rebut the presumption. > Id. The statute lists ten criteria that "shall be considered" in making the finding that it would be unjust or inappropriate to apply the formula in a particular case. > Id.

> [4] ORS chapter 25 does not define the term "presumption." However, the term has a well

established legal meaning. OEC 308 provides:

"In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

A rebuttable presumption is one that may be overcome if the party against whom the presumption is directed submits probative evidence that the nonexistence of the presumed fact is more probable than its existence. See > Masee and Masee, 328 Or. 195, 204, 970 P.2d 1203 (1999) (so stating). The party seeking a departure from the presumed amount of a child support obligation under the formula has the burden of rebutting the presumption in > ORS 25.280.

> [5] > ORS 25.280 permits a departure from the presumptively correct amount of support only if it would be "unjust or inappropriate in a particular case" to apply the formula. See > Eck v. Market Basket, 264 Or. 400, 406, 505 P.2d 1156 (1973) (determining whether "unjust" to allow amendment of pleadings requires exercise of discretion). The text of > ORS 25.280 makes clear that, to make a finding that application of the formula would be unjust or inappropriate in a particular case, there must be evidence in the record to support the finding. Nothing in the context of > ORS 25.280 casts doubt on that conclusion. We therefore hold that the party seeking to rebut the presumption in > ORS 25.280 has the burden of coming forward with probative evidence that would support a finding that it would be unjust or inappropriate to apply the formula in establishing a child support obligation.

However, as noted, the presumption can be rebutted. To the extent that the Court of Appeals' decision implies [330 Or. 61] that it never would be error to fail to find that the presumption had been rebutted, we disagree. There might be circumstances in which a party submits such probative evidence that it would be an abuse of discretion not to find that it would be unjust or inappropriate to apply the formula. However, that is not the situation in this case.

> [6] At the trial court hearing, father introduced evidence that his daughters' combined annual income the previous year had been approximately \$6,200. Mother testified that she had earned approximately \$3,900 the previous year. Father apparently believes that, because each of his daughters had earned almost as much as their mother had earned, the trial court abused its discretion in failing to find the children no longer needed support from father. See > ORS 25.280(7) ("needs of the child" to be considered in determining whether presumed amount of support rebutted). Father is mistaken. In addition to the amount of the children's income, the record in this case contains evidence that father and mother have only part-time jobs and that both earn either the minimum wage per hour or only slightly more than the minimum wage. Mother testified that, even with the children's newspaper route money, the family's financial situation is "tight." Father introduced no evidence that his daughters' income diminished their need for support from him. On this record, the trial court did not abuse its discretion in holding that the formula in > ORS 25.280 established the correct amount of father's child support obligation.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.
> (FN*) Appeal from Jackson County Circuit Court. > 153 Or App 135, > 153 Or.App. 135, 956 P.2d 232 (1998).

> (FN**) Kulongoski and Riggs, JJ., did not participate in the consideration or decision of this case.

> (FN1.) > ORS 107.135 provides, in part:

"(1) The court has the power at any time after a decree of * * * dissolution of marriage * * * upon the motion of either party * * * to:

"(a) Set aside, alter or modify so much of the decree as may provide for the * * * support and welfare of the minor children * * *.

" * * * * *

"(2) In a proceeding under this section to reconsider the spousal or child support provisions of the decree, the following provisions apply:

"(a) A substantial change in economic circumstances of a party * * * is sufficient for the court to reconsider its order of support."

> (FN2.) > ORS 25.287(1) (1997) provided, in part:

"If more than two years have elapsed since the entry of a support order * * * and the support obligation is not in substantial compliance with the formula established by this chapter, [SED] * * * may initiate proceedings to modify the support obligation to insure that the support obligation is in accordance with the formula established by this chapter. The court, the administrator or the hearings officer shall not consider any issue in the proceeding other than when the support obligation became effective and whether it is in substantial compliance with the formula established by this chapter. If the court, the administrator or the hearings officer finds that more than two years have elapsed since the entry of the support order and the support obligation is not in substantial compliance with the formula established by this chapter, the court, the administrator or the hearings officer shall modify the support order so that the amount of support to be paid is in accordance with the formula established by this chapter, whether or not there has been a substantial change of circumstances since the entry of the current support order."

(Emphasis added.) The legislature amended > ORS 25.287 in 1999 in ways that are not relevant to the issues in this case. Or Laws 1999, ch 735, § 1.

> (FN3.) > ORS 25.275(1) directs SED to "establish by rule a formula for determining child support awards in any judicial or administrative proceeding." The formula appears in > OAR 137-050-0330.

> (FN4.) > ORS 107.415 provides, in part:

"(1) If a party is required by a decree of a court in a domestic relations suit * * * to contribute to the support * * * of a minor child while the other party has custody thereof, the custodial parent shall notify the party contributing such money when the minor child receives income from the gainful employment of the child * * *.

"(2) Any custodial parent who does not provide notice, as required by subsection (1) of this section may be required by the court to make restitution to the contributing party of any money paid, as required by the decree. * * * "

> (FN5.) The state conceded at oral argument before this court that the final amended judgment contained a scrivener's error regarding father's monthly income and that father's monthly support obligation under the formula should be \$233 per month, not \$300 per month. At this court's suggestion, the state filed a motion in the trial court for an order to correct the amended judgment. The trial court subsequently entered a corrected amended judgment nunc pro tunc on January 9, 1997, reflecting that amount.

COMMENTS FROM A.G.

