CHAPTER TWELVE – MODIFICATION OF CHILD SUPPORT OBLIGATIONS

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INTRODUCTION

Today's child support program focuses on promoting child well-being and family self-sufficiency in addition to collecting and enforcing child support. This holistic approach depends on responsive child support services, working in collaboration with other family resources to increase the reliability of child support payments. Part of this approach includes ensuring that child support orders are modified appropriately in order to realistically reflect the noncustodial parent's actual ability to pay support.

Federal regulations require all state and tribal child support orders to be based on descriptive and numeric criteria that result in a child support calculation. The three guideline models in use today factor in variables, such as the income and needs of the parents; the cost of raising children; and the cost of health insurance, child care, and other necessary expenses.[1] Because these variables change with time, it is important to review child support orders periodically to ensure they continue to reflect realistically the parties' financial situations. This chapter discusses grounds for the modification of support orders; federal review and adjustment requirements; jurisdiction to modify; and ways to keep support order amounts realistic.

TRADITIONAL GROUNDS FOR MODIFICATION

Traditionally, no modification could be granted unless there was a material change in facts or circumstances since the date of the last order. State law usually imposed no restrictions on the frequency of such modification requests. The relevant factor for the tribunal was whether there had been the requisite change in circumstances. What constituted a change in circumstances sufficient to modify the order depended on state law and the tribunal's application of the law to case facts.[2]

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[1] For more information on child support guidelines, *see* Chapter Ten: Establishment of Child Support and Medical Support Obligations.

[2] *See, e.g., Mann v. Hall*, 962 S.W.2d 417, 420 (Mo. App. 1998) (a child support award can only be modified on a showing of changed circumstances so substantial and continuing as to make the terms of the award unreasonable, *citing Buckman v. Buckman*, 857 S.W.2d 313, 316 (Mo. App. 1993)); *In re Marriage of Kolstad*, 630 N.W.2d 276 (Wis. App. 2001) (where a stipulated agreement was not working out as the parties had expected because the father's income fluctuated and the expenses of the children had increased as they got older, the petitioner had proven a substantial change to merit modification). States following the Model Marriage and Divorce Act require a showing of changed circumstances "so substantial and continuing as to make the terms [of the decree] unconscionable." Model Marriage and Divorce Act (amended

With a "change in circumstance" standard, most modification requests required an evidentiary hearing before a court. There were many barriers to the timely modification of orders, including a lack of timely access to courts; the expense of hiring an attorney; a reluctance to "rock the boat;" and a fear of other issues being raised, such as custody and parenting time.

FEDERAL REQUIREMENTS

Family Support Act of 1988

Congress recognized the need to standardize the process of child support order modification with the passage of the Family Support Act of 1988.[3] It required states, as a condition of receiving federal funds, to move from advisory support guidelines to presumptive guidelines and to use these guidelines in both the establishment and modification of support orders. Any deviation from the guideline amount required the decision maker to make a finding that the application of the guideline would be unjust or inappropriate in the particular case. The law required that states review their guidelines at least once every four years to ensure that their application continued to result in fair orders. In addition, the Family Support Act required that states review child support orders in all TANF, IV-E foster care, and Medicaid cases at least once every three years.[4] The exception was that review was not required if it would not be in the best interest of the child. The Act also required child support agencies to review all Title IV-D[5] non-public assistance cases at the request of either parent at least once every three years. The Family Support Act set forth detailed notice requirements to ensure that parents in child support cases knew of their right to request a review and to appeal any results of the review.[6]

Personal Responsibility and Work Opportunity Reconciliation Act of 1996

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[7] further revised the review and adjustment provisions. First, it eliminated the requirement that all IV-D public assistance cases must be reviewed at least once every three years. Instead it required procedures for the

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1973), § 316, https://www.uniformlaws.org/viewdocument/final-act-with-comments-54?CommunityKey=c5a9ecec-095f-4e07-a106-2e6df459d0af&tab=librarydocuments.

[3] Family Support Act of 1988, Pub. L. No. 100-485, § 103, 102 Stat. 2343, 2346.

[4] Family Support Act of 1988, Pub. L. No. 100-485, § 103(b), 102 Stat. 2343, 2346 (codified at 42 U.S.C. § 666(a)(10) (2018)).

[5] Title IV-D refers to the child support program enacted in 1974 as part IV, paragraph D of the Social Security Act. Social Security Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2351. For more information about the formation and structure of the IV-D child support program, *see* Chapter One: Child Support in the United States.

[6] Family Support Act of 1988, Pub. L. No. 100-485, § 103(c)(10)(C), 102 Stat. 2343, 2346 (codified at 42 U.S.C. § 666(a)(10)(C) (2018)).

[7] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 351, 110 Stat. 2105, 2239.

review of IV-D public assistance cases at least once every three years, upon request of the state.[8] Second, it allowed states to establish a reasonable quantitative standard based on either a fixed dollar amount or percentage or both as a basis for determining whether an inconsistency between the existing child support award amount and the guideline amount is adequate grounds for a parent or the state to petition for adjustment of the order.[9] Finally, PRWORA allowed states to adopt procedures for three-year reviews that do not require a change in circumstances or a percentage of difference from the prior order.[10]

Deficit Reduction Act of 2005

The Deficit Reduction Act of 2005 (DRA)[11] made additional changes to the review and adjustment requirements by reinstating the former Family Support Act provisions for mandatory review and adjustment in TANF cases. Under the DRA, states must have laws requiring the use of procedures to review and, if appropriate, adjust child support orders in TANF cases at least once every three years. No proof of a change in circumstances is necessary for this review.[12]

States can use any of three different methods for the review:

- Child support guidelines,[13]
- Application of a cost-of-living adjustment in accordance with a formula developed by the state,[14] or
- Use of automated methods to identify orders eligible for review, conduct the review, identify orders eligible for adjustment, and apply the appropriate adjustment under any threshold that might be established by the state.[15]

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[8] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 351, 110 Stat. 2105, 2239 (codified at 42 U.S.C. § 666(a)(10)(A) (2018)).
[9] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 351, 110 Stat. 2105, 2239 (codified at 42 U.S.C. § 666(a)(10)(B) (2018)); 45 C.F.R. § 303.8(c) (2019). *See, e.g.*, Fla. Stat. § 61.14(1)(c) (2019) (the IV-D agency shall seek a modification and the modification shall be made without a requirement of change of circumstance if new guideline amount is a change of at least 10%, but not less than $25 from the current order); Ind. R. of Ct., Child Support Rules and Guidelines, Guideline 4 (2020) (hereinafter Ind. Child Support Guidelines) (child support order may be modified if amount ordered at least 12 months earlier differs from presumed guideline amount by more than 20%); Vt. Stat. Ann. tit. 15, § 660(b) (2019) (more than a 10% change in guideline amount is a real, substantial, and unanticipated change of circumstance).
[10] 42 U.S.C. § 666(a)(10)(A)(iii) (2018).
[11] Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.
[12] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7302, 120 Stat. 4, 145 (codified at 42 U.S.C. § 666(a)(10) (2018)).
[13] 42 U.S.C. § 666(a)(10)(A)(i)(I) (2018).
[14] 42 U.S.C. § 666(a)(10)(A)(i)(II) (2018).
[15] 42 U.S.C. § 666(a)(10)(A)(i)(III) (2018).

Federal Regulations

Regulations governing review and adjustment of child support orders are at 45 C.F.R. § 303.8. They address an adjustment, where appropriate, of the financial amount of a support order. Federal regulations also provide that addressing a child's health care needs in an order, through health insurance or other means, must be an adequate basis under state law to petition for an adjustment of the order, regardless of whether an adjustment in the amount of child support is necessary.[16]

On December 20, 2016, OCSE published the Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs final rule ("Final Rule").[17] It has significant impact on child support guidelines and the review and adjustment of orders.

The Final Rule's goals included increasing regular, on-time payments to families and reducing the accumulation of unpaid child support arrears.[18] The Final Rule requires that the support obligation or recommended support obligation amount be based on the actual earnings, income, and ability to pay of the obligor parent in the specific case.[19] OCSE expressed concern that some states had reduced their case investigation efforts and routinely set orders based on imputed income that bore no relation to the noncustodial parent's present circumstances or sustained ability to pay support.[20] The regulations require state IV-D agencies to use tools, such as investigations, case conferencing, interviews with both parties, appear and disclose procedures, parent questionnaires, testimony, and electronic data sources to determine income of an obligor.[21] Child support agencies should apply these tools in modification cases as well as establishment cases. The Final Rule noted that orders issued in IV-D cases should not reflect a lower threshold of evidence than applied in private cases represented by legal counsel.[22]

OCSE's guiding focus in making the regulatory changes was "the fundamental principle that child support obligations are based on the noncustodial parent's ability to pay."[23] Of particular concern was the imputation of income. The Final Rule provides that if earnings and income information is unavailable or insufficient in a case, the agency must have procedures for gathering available information about the specific circumstances of the noncustodial parent, including factors listed in 45 C.F.R. § 302.56(c)(1)(iii).[24] The

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[16] 45 C.F.R. § 303.8(d) (2019).
[17] Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492 (Dec. 20, 2016).
[18] *Id*.
[19] 81 Fed. Reg. 93,517 (Dec. 20, 2016).
[20] 81 Fed. Reg. 93,492, 93,516 and 93,519 – 93,520 (Dec. 20, 2016).
[21] 45 C.F.R § 303.4(b)(1) (2019).
[22] 81 Fed. Reg. 93,517 (Dec. 20, 2016).
[23] 81 Fed. Reg. 93,492, 93,522 (Dec. 20, 2016).
[24] 45 C.F.R. § 303.4(b)(2) (2019).

Final Rule requires that states document the factual basis for the support obligation or the recommended support obligation in the case record.[25] Imputation in a modification proceeding is most likely to arise when the obligor requests a reduction in support and the tribunal finds that the parent has voluntarily reduced their income. In that circumstance the tribunal may impute income to the parent, which may result in a denial of the modification request. [26] However the trial court cannot impute a higher income based on the obligor's degree of bad faith in reducing income. If the trial court determines that a party has deliberately depressed income or otherwise acted in bad faith and, as a consequence, the court decides to impute income, the court must still base imputed income on the parent's employment potential and probable earnings level based on such factors as the parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community.[27]

The Final Rule also makes significant changes with regard to medical support and incarceration as bases for modification. First, the Final Rule removes a previous requirement that, for purposes of review and adjustment, a child's eligibility for Medicaid could not be considered sufficient to meet the medical support needs of the child.[28]

> [W]hen an order lacks a medical support provision, the situation warrants immediate attention for modification to remedy the medical support issue. By removing the sentence in § 303.8(d) which previously required States to review and adjust support orders to address health care coverage for child(ren) eligible for or receiving Medicaid benefits, we are making the requirement for review and adjustment less restrictive.[29]

Second, the Final Rule requires states to address incarceration in three areas related to review and adjustment:

- If a state establishes a reasonable quantitative standard based on either a fixed dollar amount or percentage or both as a basis for determining whether an inconsistency between the existing child support award amount and the amount of support determined as a result of a review is adequate grounds for petitioning for adjustment of the order, such reasonable quantitative standard cannot exclude incarceration as a basis for determining whether an inconsistency between the existing child support order amount and the amount of

[25] 45 C.F.R. § 303.4(b)(4) (2019).
[26] 45 C.F.R. § 302.56 (2019). For a detailed discussion of the Final Rule and its changes related to support guidelines, including imputation of income, *see* Chapter 10: Establishment of Child Support and Medical Support Obligations.
[27] *See Harnett County ex rel. De la Rosa v. De la Rosa,* 770 S.E.2d 106 (N.C. App. 2015).
[28] 45 C.F.R. § 303.8(d) (2019).
[29] 81 Fed. Reg. 93,492, 93,540 (Dec. 20, 2016).

support determined as a result of a review is adequate grounds for petitioning for adjustment of the order.[30]

- A state may elect in its state plan to initiate a review of an order after learning that a noncustodial parent will be incarcerated for more than 180 calendar days without the need for a specific request.[31] If the state does not make such a selection within 15 business days of when the IV-D agency learns that a noncustodial parent will be incarcerated for more than 180 calendar days, the state must provide notice to both parents informing them of the right to request the state to review and, if appropriate, adjust the order. Neither the notice nor a review is required if the state has a comparable law or rule that modifies a child support obligation upon incarceration by operation of state law.[32]

- State child support guidelines must provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders.[33]

Federal Modification Requirements Governing Tribes

A tribe or tribal organization must include in its Tribal IV-D plan[34] reference to tribal law, code, regulations, or other evidence that provides for the establishment and modification of child support obligations.[35] However, unlike a state, the tribe or tribal organization is not required to have specific review and adjustment procedures.

Tribes with IV-D child support programs are also required to establish one set of child support guidelines by law or tribunal action for establishing and modifying child support obligations.[36] These guidelines must be based on descriptive and numeric criteria and take into consideration the needs of the child and the earnings and income of the noncustodial parent.[37] Like those governing state child support programs, regulations governing tribal programs require that the guidelines serve as rebuttable presumptions of the correct amount and that the tribe review the guidelines once every four years. However, unlike states, tribes may also permit non-cash payments to satisfy a support obligation or unassigned arrearage.[38]

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[30] 45 C.F.R. § 303.8(c) (2019).
[31] 45 C.F.R. § 303.8(b)(2) (2019).
[32] 45 C.F.R. § 303.8(b)(7)(ii) (2019).
[33] 45 C.F.R. § 302.56(c)(3) (2019).
[34] The tribal IV-D program was established in law by PRWORA; see *supra* footnote 7. Not every federally recognized tribe has a IV-D program and a tribe does not have to have a IV-D program to have child support services for its tribe.
[35] 45 C.F.R. § 309.90 (2019).
[36] 45 C.F.R. § 309.105(a)(1) (2019).
[37] 45 C.F.R. § 309.105(b) (2019).
[38] 45 C.F.R. § 309.105(a). For more information about tribal child support programs, *see* Chapter Three: State, Local, and Tribal Roles in the Child Support Program.

PROHIBITION AGAINST RETROACTIVE MODIFICATION

Federal law provides that every child support installment becomes a judgment by operation of law as it comes due and is not subject to retroactive modification ("Bradley" Amendment (1986)).[39] This prevents modification of a support order for any period prior to the date of filing of the request for modification and notice to the other party.[40] However, a few states have enacted narrowly tailored statutory exceptions.[41] Additionally, courts have in some cases ordered retroactive modification of orders due to specific circumstances.[42] Other courts have concluded that any retroactive modification that precedes notice to the other party violates federal law and public policy.[43]

JURISDICTION

The tribunal must have proper jurisdiction to modify an order; otherwise, the modified order will be unenforceable. The authority of a court to modify a child support order that it issued is derived from the court's continuing jurisdiction over its own order. Not only does a court retain subject matter jurisdiction over its

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[39] Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9013, 100 Stat. 1874, 1973; 42 U.S.C. § 666(a)(9) (2018); 45 C.F.R. § 302.70(a)(9) (2019).

[40] 45 C.F.R. § 303.106 (2019).

[41] *See* Fla. Stat. § 61.30(11)(c) (2019) (a modification based on a parent's failure to regularly exercise the time-sharing schedule in a parenting plan or order, not caused by the other parent, is retroactive to the date the noncustodial parent first failed to regularly exercise the court-ordered or agreed time-sharing schedule); Ind. Child Support Guidelines, Guideline 4, Commentary (2020) (the modification may relate back to a date before the petition to modify was filed in two situations: when the parties have agreed to and carried out an alternative method of payment that substantially complies with the spirit of the decree; or when the obligated parent assumes custody of the children, provides necessities, and exercises parental control to extent there is a permanent change of custody).

[42] *See Centanni v. Centanni*, 973 A.2d 404 (N.J. Super. 2008) (a retroactive modification was granted because the noncustodial parent waited to file a motion to modify support after the death of a child so that the custodial parent could grieve). *See generally* Laura E. Shapiro, James M. Cordes, *Retroactive Child Support: Conflicting Decisions and Practical Advice,* Colo. Law., Aug. 2012, at 91.

[43] *See Stover v. Bruntz,* 218 Cal.Rptr.3d 551 (Cal. App. 2017) (trial court erred in giving obligor credit for child care payments made prior to his filing his motion for modification); *Elwood v. Parker*, 77 N.E.3d 835, 838 (Ind. App. 2017) (obligor's claim that he was entitled to some amount of equitable mitigation of support arrears based on laches or estoppel after the custodial parent waited 20 years to enforce their divorce order was in essence a request for retroactive modification. The primary purpose of the rule against retroactive modification is to protect the welfare of children. "We know of no public policy in favor of protecting delinquent child support obligors."); *In re. Marriage of Barone,* 996 P.2d 654 (Wash. App. 2000) (it would be inappropriate to give credit for arrears accumulated when the child was with the obligor, even though the child was placed with the obligor pursuant to a protective order and the obligor paid all the child's expenses during that time; the protective order did not constitute a *de facto* modification).

order, it also usually retains personal jurisdiction over the parties.[44] Personal jurisdiction also requires compliance with state law or court rule regarding service of the modification pleading. States using administrative procedures for review and adjustment must also provide proper notice and an opportunity to respond to the request for modification.

If the parties live in different jurisdictions, a state tribunal will apply the rules within Uniform Interstate Family Support Act (UIFSA) regarding modification jurisdiction. See the discussion herein. There is no federal requirement that tribes operating IV-D child support programs enact UIFSA. Rather, tribes are governed by the Full Faith and Credit for Child Support Orders Act (FFCCSOA).[45] FFCCSOA contains rules that states and tribes must follow regarding modification jurisdiction. Therefore, both states and tribes adhere to the same provisions regarding continuing, exclusive jurisdiction.[46]

Sometimes, in an attempt for one tribunal to hear all issues dealing with the child, a party may file a petition to modify both custody and support terms. If it is an intergovernmental case, the child support attorney should be prepared to point out to the court that the jurisdictional bases to modify a child custody order found in the Uniform Child Custody Jurisdiction and Enforcement Act are not the same as the jurisdiction to modify a child support order under UIFSA or FFCCSOA.[47]

REPRESENTATION

OCSE policy has long held that a IV-D attorney does not represent individual parties. Rather, the IV-D attorney represents "the agency in court or administrative proceedings with respect to the establishment and enforcement of orders of paternity and support."[48] Identification of the state or child support agency as the client of the IV-D attorney has practical as well as ethical implications. For example, if the individual parent is not a client, there is no conflict of interest when the agency provides child support services to both parents, including modification of the support order.[49] Because the IV-D attorney

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[44] *See* Mo. Rev. Stat. § 452.370.6 (2019) ("The court shall have continuing personal jurisdiction over both the obligee and the obligor of a court order for child support…for the purpose of modifying such order.")

[45] Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 108 Stat. 4063 (1994) (codified as amended at 28 U.S.C. § 1738B (2018)). *See also* 45 C.F.R. § 309.120(b) (2019).

[46] For more information on tribal jurisdiction, *see* Chapter Three, State, Local, and Tribal Roles in the Child Support Program. For information about a tribe's laws and procedures for modification, *see* Office of Child Support Enforcement, Intergovernmental Reference Guide, Section K, Modification and Review/Adjustment (Dec. 31, 2019), https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=2

[47] For a detailed discussion, *see* Chapter 13: Intergovernmental Child Support Cases.

[48] 45 C.F.R. § 303.20(f)(1) (2019). .

[49] For a more in-depth discussion, *see* "Who is the Client?" in Chapter Four: Ethical and Regulatory Requirements Governing Attorneys in the Child Support Program.

represents the child support agency, and the agency's position on whether a modification is appropriate may not always be the same as the parent's position, in some cases a parent seeking a change in the support amount may decide to hire legal counsel or use *pro se* procedures that the state or local jurisdiction provides.[50] Because the nuances of representation may not be clear to opposing counsel or the bench, it is important for IV-D attorneys to know their jurisdiction's relevant statutory provisions and ethical canons and be prepared to explain the boundaries of their role. In some jurisdictions, IV-D attorneys have written notices of representation outlining their roles that they include in pleadings and communications with recipients of IV-D services.

APPLICATION OF MODIFICATION STANDARDS

Just as states have different guidelines for calculating child support orders, they have various standards for modifying those orders.[51] Some of the most commonly used standards are discussed below. Cases also regularly uphold the ability of a trial court to modify an order, despite parties' agreements to the contrary. A Maryland court, for example, struck down an agreement by the parties not to pay support, which stated "this may not be modified by any court." The court held that, regardless of any agreement, child support is always modifiable.[52] Cases also uphold the authority of the court to modify an order in an

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[50] Local courts or bar associations often have *pro se* modification forms available by mail, in person, or online. Other sources are also available to assist parents with *pro se* modifications. *See, e.g.*, American Bar Association, Legal Services Division, https://www.americanbar.org/groups/legal_services/flh-home/flh-other-resources/ (last visited Feb. 5, 2021) (information about the law or tools states offer to help solve simple legal problems). *See also* Office of Child Support Enforcement, Project to Avoid Delinquencies, *Child* Support Fact Sheet #2: *Providing Expedited Review and Modification Assistance* (June 2012): Office of Child Support Enforcement, Project to Avoid Delinquencies, *Child Support Fact Sheet #4: "Voluntary Unemployment," Imputed Income* (June 2012), and the accompanying *"Voluntary Unemployment," Imputed Income, and Modification Laws and Policies for Incarcerated Noncustodial Parents* (July 2012).

[51] For information about state-specific modification standards and procedures, *see* Office of Child Support Enforcement, Intergovernmental Reference Guide, Section K, Modification and Review/Adjustment (Dec. 31, 2019), https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1. *See also* Office of Child Support Enforcement, Changing a Child Support Order (2017).

[52] *See Guidash v. Tome*, 66 A.3d 122 (Md. App. 2013). *See also Wright v. Burch*, 771 S.E.2d 490 (Ga. App. 2015) (trial court erred when it failed to consider whether the modification the parties had agreed to was in the child's best interest); *Holbrook v. Holbrook*, 976 A.2d. 990 (Me. 2009) (a child support agreement that limited recalculation of support, without deviation, was void as against public policy because it limited the court's discretion where the parties' incomes were higher than the guidelines). *But see In re Marriage of Matar and Harake,* 300 P.3d 144 (Or. 2013) (A contractual provision by which a party agrees not to seek judicial action does not deprive a court of its authority; rather, it waives the party's right to seek the court's exercise of that authority. Nor does a parent's agreement not to seek modification of child support even where a substantial change in circumstances has occurred violate public policy. Appellate court cites three reasons for reaching that conclusion).

amount contrary to the parties' agreement if the court finds that such modification is in the best interest of the child.[53]

Threshold Change in Support Amount

Historically, state legislation and case law required a substantial change in circumstances in order to seek modification of a support order. PRWORA, however, also allows modification of a support order "if the amount of the child support award under the order differs from the amount that would be awarded in accordance with the guidelines."[54] As a consequence, most state child support guidelines expressly permit modification when there is a threshold difference between the current support amount and the presumptive guideline amount. This threshold amount might be expressed as a percentage or dollar amount or both and often works together with a state's standard for a change in circumstances.[55]

Establishment of a threshold difference might not, in and of itself, be a sufficient basis for modification. The decision maker can examine other factors as well, including the purposefulness of a party's actions that might have caused the change in income. See the discussion below.

Many states allow for modification under guidelines pursuant to review and adjustment, without meeting a threshold change or showing a change in circumstances, if the requisite time – usually three years – has passed.[56]

Almost all state guidelines with modification timeframes or thresholds exclude cases where the support amount in the most recent order was based on a deviation from the guidelines.[57]

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[53] *See, e.g., In re Watkins*, 95 N.E.3d 1184 (Ill. App. 2017) (private agreements to modify child support without court approval are unenforceable).

[54] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 351, 110 Stat. 2105, 2239 (codified at 42 U.S.C. § 666(a)(10)(A)(i)(I) (2018)).

[55] *See, e.g.*, Alaska R. Civ. P. 90.3(h)(1) (15%); Fla. Stat. § 61.30(1)(b) (2019) (for orders reviewed by the child support agency, if the amount of the child support award under the order differs by at least 10% but not less than $25 from the amount that would be awarded under this section, the department must seek to have the order modified and any modification must be made without a requirement for proof or showing of a change in circumstances); Ind. Child Support Guidelines, Guideline 4 (2020) (order may be modified if amount of support ordered at least 12 months earlier differs from guideline amount presently computed by more than 20%; Me. Rev. Stat. Ann. tit.19A, § 2009(3) (2019) (if existing order varies more than 15% from guideline amount presently computed, it is considered a substantial change in circumstances); Ohio Admin. Code § 5101:12-60-05(D) (2020) (adjustment is appropriate if new guidelines amount is more than 10% different than existing obligation). For a complete list of state child support guideline thresholds, *see* Office of Child Support Enforcement, Intergovernmental Reference Guide, Modification/Review and Adjustment, question K3 (Dec. 31, 2019), https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1.

[56] *See, e.g.,* Ariz. Rev. Stat. Ann. § 25.503(G) (2019) (three years); Me. Rev. Stat. Ann. tit. 19-A, § 2009(3) (2019) (three years).

[57] *See, e.g.,* Ala. R. Jud. Admin. 32 (A)(3)(c) (2019); Cal. Fam. Code § 4065(d) (2019) (if parties have stipulated to an order below the guidelines, no change in circumstances is required to

Where states have changed from one guideline model to a different one, legislation may provide that enactment of the new guideline does not constitute a substantial change in circumstances warranting a modification.[58]

Change in Circumstances

With the passage of time, the circumstances of families' and children's lives change, often dramatically. As these changes occur, child support orders should also change to reflect accurately the incomes of the parents and the needs of the children. Although federal law sets a minimum timeframe of three years for a review and adjustment, upon request, without the necessity of showing a change in circumstances, it also requires states to have procedures under which a party may request a review outside the three-year cycle, or such shorter cycle as the state may determine; in that circumstance, the requesting party must demonstrate a substantial change in circumstances that would warrant an adjustment of the order in accordance with the state's guidelines.[59]

Not all changes in circumstances constitute a substantial change in circumstances for modification of child support purposes. As noted earlier, most state statutes define a certain variance from the guideline amount as constituting the required change in circumstances. Sometimes the "change in circumstance" standard is further defined in state statute. For example, under Vermont law, if the child support order has been modified within the past three years, the order may only be modified "upon a showing of a real, substantial and unanticipated change of circumstances."[60] In other states, it is case law that amplifies the "change of circumstance" standard.[61] Some courts require changed circumstances so substantial and continuing as to make the terms of the existing award unreasonable.[62]

Tribal codes also often address requirements for modification of a child support order, though there are no federal regulations requiring tribal IV-D programs to have specific review and adjustment procedures. For example, the tribal code for the Swinomish Indian Tribal Community authorizes a modification upon a showing of a change of circumstances that is substantial and continuing as provided for by tribal law; such a change is presumed if support as calculated under the child support schedule would vary by 15% from the existing order of

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modify the order to guideline amounts or higher); Tenn. Rule of Dep't of Human Servs., Child Support Servs. Div. § 1240-2-4.05(3) (2005).

[58] *See* 750 Ill. Comp. Stat. 5/510(a) (West 2018) (state changed from a Percentage-of-Income model to an Income Shares model. The legislation prohibits parties from claiming that a disparity in child support obligations under the prior guidelines and the amended guidelines constitutes a substantial change in circumstances justifying modification of child support).

[59] 42 U.S.C. § 666(a)(10)(B) (2018).

[60] Vt. Stat. Ann. tit 15, § 660(a)(1)(2019). Vermont further defines a "real, substantial, and unanticipated change of circumstance" in Vt. Stat. Ann. tit 15, §§ 660 (b) and (c).

[61] *See In re Marriage of Connelly,* 2020 Ill. App. (3d) 180193, No. 3-18-0193, WL 359492 (Jan. 22, 2020).

[62] *See Mann v. Hall*, 962 S.W.2d 417 (Mo. App. 1998).

support. The code also allows for modification of a support obligation, without a showing of changed circumstances, if it has been at least one year since the order was issued and the petitioning party proves one of four very specific circumstances.[63] The Law and Order Code of the Ponca Tribe of Nebraska permits modification of a child support order if the movant proves to the court by a preponderance of the evidence that there are grounds for the modification as provided in the tribal code.[64]

Burden of proof. The burden of proof is typically on the party seeking modification. To meet the burden, the party seeking modification must present evidence to support the allegation of changed circumstances.[65] For example, a noncustodial parent seeking a reduction in support due to a reduction in income should present pay stubs or other documentation of the reduced income or inability to work.[66] A custodial parent seeking an increase in support due to increased needs of the child should present itemized bills demonstrating the increased costs for the child.

Factors that may constitute changed circumstances. The most common reasons that a parent may seek a modification of a support order are a change in income; a change in circumstances such as incarceration an increase in the child's expenses; a change in the amount of parenting time; and a change in the support obligation for one child when the order involves multiple children.

Changes in income. Any increase in income is not a sufficient basis for modification. Usually courts require that the increase be significant enough to constitute a substantial change in circumstances.[67] If an obligor's income has

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[63] Swinomish Indian Tribal Community, Swinomish Child Support Guidelines § 7-06.070 (2020), https://www.narf.org/nill/codes/swinomishcode/7_6.pdf. *See also* Eastern Band of Cherokee Indians, Cherokee Code § 110-2I(a) (2019), https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/codes/code_of_ordinances?nodeId=THCHCO_CH110CHSUEN (last visited Feb. 5, 2021); Eastern Band of Cherokee Indians, Cherokee Code § 110-2I(a) (2019), https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/codes/code_of_ordinances?nodeId=THCHCO_CH110CHSUEN (last visited Feb. 5, 2021); Sisseton-Wahpeton Sioux Tribal Code, Child Support § 34C-08-01 (2019).

[64] Ponca Tr. of Neb. Law and Order Code § 4-6-20 (2019), https://www.poncatribe-ne.org/wp-content/uploads/2019/06/law_codetitle_v4_190501.pdf. The code lists six grounds for modification. For more information on tribal laws, *see* Native American Rights Fund, National Indian Law Library, Tribal Law Gateway, https://www.narf.org/nill/triballaw/index.html (last visited Feb. 5, 2021).

[65] *See, e.g.*, *Selby v. Smith*, 193 S.W.3d 819 (Mo. App. 2006) (court of appeals reversed the trial court "Judgment of Modification," finding that the custodial parent failed to meet his burden of proving a substantial change in circumstances, as the record only reflected vague and unsupported allegations of his inability to support the children without an increase in support, and just evidence of an increase in the noncustodial parent's income was not enough); *Brose v. Copeland*, 2013 Ohio 3399 (Ohio App. Aug. 5, 2013) (the court did not allow modification because specific evidence of income, such as pay stubs, receipts, tax returns, were not submitted).

[66] *See Lackey v. Lackey,* 217 So. 3d 943 (Ala. App. 2016).

[67] *See Budrawich v. Budrawich,* 115 A.3d 39 (Conn. App. 2015).

increased substantially, that increase alone can sometimes justify an increase in support under state law. Some courts, for example, have held that children are entitled to share in their parents' good fortune.[68] When a custodial parent informs the agency of new employment of the obligor, resulting in much higher income, it may be appropriate for the child support attorney to seek an increase in support to allow the children to share in the improved standard of living of the obligor. However, the attorney should be familiar with case law in their jurisdiction and be prepared to present evidence of the needs of the child; while holding that children have a right to share in each parent's standard of living, a number of courts have also found that child support must be set in an amount that is reasonably related to the realistic needs of the children.[69]

A party may also seek a modification where there has been a reduction in income. Usually reduced income is the basis for a noncustodial parent to seek a lower support amount. It is appropriate for the child support attorney to consider the reason for the reduction of income. For example, courts have reduced a support obligation due to a disability that prevents a parent from working.[70] Courts have also reduced a support order where the obligor lost employment through no fault of their own, and the obligor diligently sought re-employment.[71] On the other hand, courts have held that where a reduction in income is voluntary, it cannot be the basis for a downward modification.[72]

Although not frequent, it may be possible for a reduction in the custodial parent's income to result in an increase in support that the obligor must pay. At least one state court has held that a decrease in the custodial parent's income, together with an increase in the child's expenses, meets the burden of showing a substantial change in circumstances to warrant an upward modification.[73]

Incarceration. Historically, incarceration was not a basis for modification in many states. Courts held that because imprisonment is the result of an intentional criminal act, incarceration and the loss of income were voluntary acts not justifying a modification. In recent years, courts began reconsidering that position, holding instead that incarceration creates a substantial change of

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[68] *Miller v. Schou*, 616 So. 2d 436 (Fla. 1993). *See also Nash v. Nash*, 307 P.3d 40 (Ariz. App. 2013) (child support should permit the children of two parents of considerable wealth to continue to enjoy the reasonable benefits they had when the parents were married).
[69] *See, e.g., Wilson v. Inglis,* 554 S.W.3d 377 (Ky. App. 2018) (the appellate court referred to the analysis as the "Three Pony Rule," that is, no child, no matter how wealthy their parents, needs more than three ponies.).
[70] *Rodriguez v. Mendoza-Gonzalez*, 96 A.D.3d 766, 946 N.Y.S. 2d 204 (2012).
[71] *See, e.g., Matter of Fanizzi v Delforte-Fanizzi,* 164 A.D.3d 1653 (N.Y. App. Div. 2018).
[72] *See Andrews v. Andrews*, 719 S.E.2d 128 (N.C. App. 2011) (where a noncustodial parent quit his job as an engineer to start a church, the court did not allow the downward modification. The court found that while the noncustodial parent's religious beliefs may be sincere, the lower paying job was not taken in good faith because he failed to consider his child support obligation). *See also* 45 C.F.R. § 302.56(c)(3) (2019) (state guideline must provide that incarceration may not be treated as voluntary unemployment in modifying support orders).
[73] *See, e.g.*, *In re Marriage of Angell*, 328 S.W.3d 753 (Mo. App. 2010).

circumstances justifying review and possible modification of the child support order.[74] Many states' guidelines also began to specifically address the impact of incarceration on support. In addition to addressing whether incarceration constitutes changed circumstances, some states enacted statutes allowing the state child support office to independently file a motion to modify a child support order in a IV-D case if a noncustodial parent was going to be incarcerated for a certain time period[75] or suspending the child support order by operation of law upon incarceration.[76]

Noting that "three-quarters of states have eliminated treatment of incarceration as voluntary unemployment in recent years,"[77] the Final Rule that OCSE published in December 2016 prohibits treatment of incarceration as a form of "voluntary unemployment."[78] The change includes situations where the noncustodial parent is incarcerated for a crime against the child or custodial parent or for intentional failure to pay support. In explaining the regulatory change, OCSE pointed out that for noncustodial parents, the "collateral consequences of the treatment of incarceration as voluntary unemployment include uncollectible debt, reduced employment, and increased recidivism."[79] OCSE also noted studies showing that there is a lower likelihood that parents

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[74] *See, e.g.*, *El Dorado Cnty. Dep't of Child Support Servs. v. Nutt*, 167 Cal. App. 4th 990, 84 Cal. Rptr. 3d 523 (2008) (lower court correctly denied incarcerated obligor's motion to modify an order by closing the case. The lower court had found he owed support but reserved jurisdiction on the amount based on his current lack of income. Obligor had subsequently asked that the child support case be closed and his theoretical obligation to pay support or health insurance costs in the future be eliminated because he had no money, no prison job, and no prospect of ever having one. "Though perhaps unlikely, it is not impossible that Nutt will have the ability or opportunity in the future to generate an income with which he may provide some support or health insurance for his child. The court did not err in finding he has an obligation to do so, even if that obligation cannot be satisfied now."); *Mackowiak v. Harris*, 204 P.3d 504 (Idaho 2009) (trial court was correct in reducing the noncustodial parent's child support obligation to zero because he was incarcerated); *Hopkins v. Stauffer*, 775 N.W.2d 462 (Neb. App. 2009) (the noncustodial parent is incarcerated and a change in law saying incarceration is now an involuntary reduction in income for purposes of modification, was a material change in circumstances); *Nash v. Herbster*, 932 A.2d 183 (Pa. Super. 2007) (an inmate may seek modification or suspension of a child support order while in prison); *Plunkard v. McConnell*, 962 A.2d 1227 (Pa. Super. 2008) (incarcerated noncustodial parent was permitted to modify his support order because he had no resources to pay his support); *P.M. v. B.M.*, No. 13-0068, 2013 W. Va. LEXIS 1103 (W.Va. Supreme Court, Oct. 18, 2013) (memorandum decision) (the lower court was correct in lowering the incarcerated noncustodial parent's income to $50 per month, based on the change to his income while in prison). *See also* Daniel R. Meyer and Emily Warren, *Child Support Orders and the Incarceration of Noncustodial Parents,* Institute for Research on Poverty, University of Wisconsin–Madison (December 2011).

[75] *See, e.g.,* Vt. Stat. Ann. tit. 15, § 660(a)(2) (2019) (incarceration for more than 90 days).

[76] *See, e.g.,* Cal. Fam. Code § 4007.5(a) (2019) (child support judgment shall be suspended for any period exceeding 90 days in which the obligor is incarcerated; with exceptions); Md. Code Ann., Fam. Law § 12-104(b) (2019) (no child support accrues during any period where, *inter alia*, obligor is sentenced to a term of imprisonment for 18 consecutive months or more).

[77] Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,526 (Dec. 20, 2016).

[78] 45 C.F.R. § 302.56(c)(3) (2019).

[79] 81 Fed. Reg. 93,492, 93,526 (Dec. 20, 2016).

who accumulate debt during periods of incarceration will work and pay support upon release.[80]

Child's expenses. If a child's expenses have increased, and will remain fairly constant at the higher level, it may be appropriate for the child support attorney to seek a modification of support.[81] This is especially true if the child has increased medical expenses due to a sustained illness or injury.[82] When a child has medical needs, it may be necessary for the attorney to present expert testimony on the child's disability and the expenses associated with the child's care. Other examples of increased expenses are private tuition expenses where the parents have agreed to such education for the child.[83] In those cases it may be necessary for the attorney to present written evidence of an agreement between the parties, or have the custodial parent testify about the parents' prior discussions. Where modification is sought due to increased expenses, the attorney will also need to present evidence documenting such expenses.[84]

Parenting time. Visitation was once universally used to describe the time that the noncustodial parent spent with their child(ren) based on a court order or legal agreement. While some states, like Louisiana and Maryland, still use the term "visitation,"[85] many states have amended their statutes to replace the term. For example, several states, such as Minnesota and North Dakota, use the term "parenting time."[86] Florida refers to a "time sharing schedule" rather than visitation[87] No matter the terminology, states are becoming increasingly aware of the link between healthy families, consistent payment of child support, and parenting time. For this reason, many states have added parenting time adjustments to their child support guidelines, linking the amount of parenting time

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[80] *See* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration,*43 No. 1 Judges' J. 5 (Winter 2004); Alexes Harris, Heather Evans, & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Soc. 1753, 1753-1799 (2010).

[81] *See, e.g., In re Marriage of Putzler*, 985 N.E.2d 602 (Ill. App. 2013) (upward modification due to the increased needs of the children was appropriate); *Best v. Oliver*, 296 So. 3d 140 (Miss. App. 2020) (upward modification due to increased expenses of teenage daughter was appropriate); *Strange v. Strange*, 43 So. 3d 1169 (Miss. 2010) (upward modification of the order was appropriate, due to increased expenses of the child for school uniforms and extracurricular activities).

[82] *See, e.g., In re Marriage of Angell*, 328 S.W.3d 753 (Mo. App.2010) (upward modification was appropriate due to the child's significant and on-going need for counseling and medication); *In re W.M.R.,* No. 02-11-00283-CV, 2012 Tex. App. LEXIS 9097 (Texas App. Nov. 1, 2012) (the court appropriately modified the noncustodial parent's order due to the child's increased medical expenses from muscular dystrophy).

[83] *See, e.g., Walton v. Snyder*, 984 So. 2d 343 (Miss. 2007) (educational needs of children may be properly considered to justify an increase in support); *Kaplan v. Bugalla*, 188 S.W.3d 632 (Tenn. App. 2006) (modification of the order to include private school tuition expenses was appropriate).

[84] *See Mason v. Robertson,* 524 S.W.3d 452 (Ark. Ct. App. 2017).

[85] La. Civ. Code Ann. art. 136 (2018); Md. Code Ann., Fam. Law § 1-201 (2019).

[86] Minn. Stat. § 518.155 (2019); N.D. Cent. Code § 14-09-00.1 (2019). S*ee also* Colo. Rev. Stat. § 14-10-103 (2019) (changed from "visitation" to "parenting time" in 1993).

[87] Fla. Stat. § 61.13 (2019).

to the amount of support ordered.[88] These guidelines also often include rules for modification of child support orders, due to changes in parenting time. In some cases, parents will enter into parenting time agreements. State laws and guidelines differ widely on whether parenting time agreements must be court-ordered or may be informal (such as a mediated agreement) in order to be considered as the basis for a modification.[89]

Some guidelines allow for modification if a parent fails to exercise their court-ordered time-sharing schedule, deeming such failure a "substantial change in circumstances for purposes of modification."[90] Other state guidelines allow for a reduction in support during a certain time period when the child is residing with the noncustodial parent.[91] In the absence of a specific guideline provision, courts have addressed whether changes in parenting time constitute a change in circumstances for purposes of modification.[92]

Termination of support obligation. Another common basis for a modification is when an order establishes one support amount for multiple children and the support obligation for one of the children ends. The support obligation may terminate due to the child's emancipation or because the child has reached the age of majority under state or tribal law. If the support is stated

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[88] *See, e.g.,* N.J. Ct. R., Appendix IX-A 13 and 14.b (2019). For more information on shared parenting time, *see* Chapter Fifteen: Access and Parenting Time.

[89] For more information on shared parenting time, *see* Chapter Fifteen: Access and Parenting Time.

[90] *See, e.g.*, Alaska R. Civ. P. 90.3(b)(1)(E) (2020); Fla. Stat. § 61.30(11)(c) (2019); Iowa Child Support Guidelines, Iowa Ct. R. 9.9 (2018).

[91] *See, e.g.*, Minn. Stat. § 518A.38(5) (2019) (child support may be reduced); Mo. Rev. Stat. § 452.340.2 (2019) (obligation of parent ordered to pay support abates, in whole or in part, for periods of time greater than 30 consecutive days that other parent has voluntarily relinquished physical custody of child to parent ordered to pay support).

[92] *See, e.g.*, *Hart v. Hart,* 836 S.E.2d 244 (N.C. App. 2019*)* (the significant change in the parties' custodial arrangement alone was sufficient to warrant modification of the existing support order); *McCulloh v. Drake*, 105 P.3d 1091 (Wyo. 2005) (a change from shared custody to primary custody in the mother should be rebuttably presumed to be a change in circumstances to warrant a modification). *Cf. In re Marriage of Connelly*, 2020 Ill. App. 3d 180193, No. 3-18-0193, WL 359492 (Jan. 22, 2020) (appellate court held it is inappropriate to reduce an obligor's child support obligation simply because the noncustodial parent enjoyed substantial time with his children: "Although a noncustodial parent will conceivably incur additional costs when caring for children, a reduction in child support is unnecessary unless the costs are shown to be excessive or uncommon."); *In re Marriage of Wengielnik*, No. 3-18-0533, 2020 Ill. App. 3d 180533, 2020 WL 29784 (Jan. 2, 2020) (appellate court upheld trial court's denial of obligor's request to reduce support based on an increase in parenting time. "Troubling in this matter was the attempt to show a substantial change in circumstances via the production of a calendar showing Matthew's overnights and nothing else. There was no discussion about how the change in parenting time impacted the parties from a financial perspective or whether there was a change in the child's needs. Without some evidence about either of these issues, the trial court is left to guess who is shouldering the financial burden of raising the child or whether the child would suffer detriment from a modification in support. While it may seem implicit that an increase in parenting time automatically includes an increase in expenses for the parent exercising additional time, trial courts are not in the position to make such bold assumptions.").

as a global sum, the obligor has no right to unilaterally reduce payments.[93] Whether the support obligation for a child has terminated is an evidentiary one.

Other factors. Statutes may list additional factors as bases for modification of the support order. For example, Iowa's statute lists 11 factors for the court to consider in determining whether there is a substantial change in circumstances, including receipt by a party of an inheritance, pension, or other gift; changes in the medical expenses of a party; changes in the physical, mental, or emotional health of a party; and remarriage of a party [94] Courts have also found different situations to be a change in circumstances justifying a modification of the support order.[95]

Other courts have considered and rejected modification of support orders, even after finding a change in circumstances. Courts have declined to modify orders where the change in circumstances was receipt of public assistance by the custodial parent absent evidence that the parent was not on assistance in her prior state of residence;[96] and the temporary institutionalization of a minor child.[97]

Cost of Living Adjustment

As noted earlier, federal legislation allows states to use a cost-of-living adjustment (COLA) as a way to meet the periodic review and adjustment requirement.[98] COLAs can be a good way to ensure that child support orders keep up with inflation without the necessity of a tribunal hearing. Because they are automated, they are inexpensive to implement. However, a study conducted by the Lewin Group concluded that COLAs often result in a small adjustment. Because they serve a different purpose than traditional review and adjustment or modification, they cannot correct an inappropriate order or a change in circumstances.[99] States with laws allowing COLAs also have mechanisms that allow a party to seek modification of a child support order on grounds other than the automatic COLA, or laws that allow parties to ask for a review of the COLA before it is implemented.[100] In states that use COLAs, the law specifies the

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[93] *Dillingham v. Ramsey*, 837 S.E.2d 129 (N.C. App. 2019).
[94] Iowa Code § 598.21C (2019).
[95] *See Italiano v. Rudkin (Italiano)*, 683 A.2d 854 (N.J. Super. 1996) (common law change of circumstances for modification includes an increase in the cost of living, a change in the contributing spouse's income, a subsequent illness or disability, the noncontributing spouse's cohabitation with another, subsequent employment of the noncontributing spouse, changes in federal income tax law, and maturation of children).
[96] *See Mohammed v. Rojas,* 898 N.W.2d 396 (Neb. App. 2017).
[97] *R.C. v. J.S.*, 957 A.2d 759 (Pa. 2008).
[98] 42 U.S.C. § 666(a)(10)(A)(i)(II) (2018).
[99] *See* Karen Gardiner, John Tapogna, & Michael Fishman, the Lewin Group with ECONorthwest, Automated Cost-of-Living Adjustments of Child Support Orders in Three States (2001). *See also* OCSE-DCL-01-22: *Research Findings on Automated Cost-of-Living Adjustments in Minnesota, New York and Vermont* (May 2, 2001).
[100] *See, e.g.,* Iowa Code §§ 598.21C(7) (2019) and 252H.24 (2019) (the Child Support Recovery Unit can alter an order based on a COLA if both parties subject to the order agree and sign a required agency form); N.Y. Fam. Ct. Act § 413-a (McKinney 2019).

standard that must be used for the adjustment. The most common standard is the Consumer Price Index for all urban consumers.

Other states have held that COLAs are void as against public policy. They argue that, because a COLA is tied to national inflation rates and economic indicators, it might not accurately reflect an obligor's changes in income and ability to pay support.[101]

Because a COLA is an automatic, self-executing adjustment to the support amount, application of the COLA is not a modification by the tribunal that requires compliance with UIFSA Section 205 Continuing, Exclusive Jurisdiction to Modify Child-Support Order or Section 611 Modification of Child-Support Order of Another State.[102]

Expedited Review and Adjustment

Many states have recognized the benefit of using automation to review and adjust orders.[103] These programs – plus parent outreach, streamlined modification procedures, website assistance, and online modification forms – are just a few of the ways states can help families with modifications. Child support attorneys can assist child support agencies in developing streamlined review and adjustment procedures and in developing *pro se* forms, where appropriate.

Intergovernmental Modification

A court or an agency's authority to modify a support order issued by another state, or to modify its own order when parties no longer reside there, is governed by laws applying to interjurisdictional cases: UIFSA[104] and FFCCSOA.[105] Both laws have similar requirements regarding modification jurisdiction.[106] In an intergovernmental support case, it is crucial that the child support attorney review the facts – including where the parties and child are living – to determine which state or tribe has jurisdiction to modify. Under UIFSA Section 205 Continuing, Exclusive Jurisdiction to Modify Child-Support Order, a state has continuing, exclusive jurisdiction if (1) at the time of the filing of the request for modification, the state is the residence of the obligor, individual obligee, or the child for whose benefit the support order is issued; or (2) even if the state is no longer the residence of the obligor, obligee, or child, the parties

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[101] *See, e.g.*, *In the Matter of Donovan*, 871 A.2d 30 (N.H. 2005); *In re Marriage of Lee*, 310 P.3d 845 (Wash. App. 2013).
[102] For a more detailed discussion, *see* Chapter 13: Intergovernmental Child Support Cases.
[103] For more information about state review and adjustment programs, *see* Office of Child Support Enforcement, Project to Avoid Delinquencies, *Child Support Fact Sheet #2: Providing Expedited Review and Modification Assistance* (June 20, 2012).
[104] Unif. Interstate Family Support Act (2008). For more information about intergovernmental child support, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[105] Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 108 Stat. 4063 (1994) (codified as amended at 28 U.S.C. § 1738B (2018)).
[106] For additional information, *see* Chapter Thirteen: Intergovernmental Child Support Cases.

consent in a record or in open court that the tribunal in the issuing state may continue to exercise jurisdiction to modify its order. A similar provision is in FFCCSOA.[107]

If there is no tribunal with continuing, exclusive jurisdiction, then the party seeking modification must register the support order in a state – other than the petitioner's state – that has jurisdiction over the respondent; usually that means registering the support order in the state where the respondent lives.[108] This approach is referred to as "playing away."[109] Note, however, that UIFSA allows the parties to consent for a state with personal jurisdiction over one of the parties or the state where the child resides to assume modification jurisdiction.[110] Another exception to the "play away" rule is if all the parties reside in the registering state and the child does not reside in the issuing state. In that situation, UIFSA Section 613, Jurisdiction to Modify Child-Support Order of Another State When Individual Parties Reside in This State, applies.

To request registration and modification or modification and enforcement of an order, the child support attorney should ensure the initiating agency files the required intergovernmental forms.[111]

Choice of law. UIFSA Section 611, Modification of Child-Support Order of Another State, includes choice of law provisions. Modification of a registered order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by the registering state.[112] That means the tribunal that has properly assumed jurisdiction to modify will apply its own support guidelines. The section also addresses duration of support. The duration of the support obligation is governed by the law of the state that issued the initial controlling order. The registering tribunal is prohibited from modifying the duration of support unless the law of the issuing state provides for its modification. Furthermore, once the obligor has fulfilled the support obligation under the initial controlling order, the registering tribunal cannot impose a further obligation of support.[113]

One issue that may arise is modification in the context of a global support order. State support guidelines differ in whether the amount is reduced (sometimes referred to as "stepped down") when one child reaches the age of majority. For example, the state guideline may provide that the amount is reduced

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[107] 26 U.S.C. § 1738B(d) (2018).
[108] Unif. Interstate Family Support Act § 611(a)(1) (2008); 26 U.S.C. § 1738B(i) (2018). The child support attorney should pay close attention to the nonresidency requirement. Courts have made it clear that a petitioner may register an order in their own state for the purpose of modifying custody terms, but that such registration is not proper for the purpose of modifying child support terms in the order.
[109] See Comment to Unif. Interstate Family Support Act § 611 (2008).
[110] Unif. Interstate Family Support Act § 611(a)(2) (2008).
[111] Office of Child Support Enforcement, Intergovernmental Forms Matrix (Dec. 26, 2019).
[112] Unif. Interstate Family Support Act §§ 303(1) and 611(b) (2008).
[113] Unif. Interstate Family Support Act § 611(c) and (d) (2008).

to the guideline amount for the remaining children when the oldest reaches the age of majority. Assume State A issues a support order for children of different ages. Under that state's laws or support guidelines, there is no reduction or "step down" of support when each child reaches the age of majority. Nor does the order provide for such a reduction. The order is registered in State B for modification. State B's laws or support guidelines do provide for a reduction in support as each child reaches the age of majority. When State B applies its law or guidelines to modify the support amount, it provides for a reduction in support each time a child reaches the age of majority under State A's laws. Such a modification is not an impermissible modification of State A's duration of support. In the context of modification, the "step down" or reduction in the support amount based on a child's reaching the age of majority is a change to the amount of support and does not affect the duration of support, so long as the order maintains the issuing state's (State A's) age of majority.

Once a registered support order has been modified, what interest rate applies to arrears? UIFSA addresses arrears that accrued prior to the registration, consolidated arrears post registration and determination of the controlling order, and arrears that may accrue prospectively under the modified current support amount. For arrears that accrued prior to registration, the law of the state that issued the registered support order determines the accrual of interest under the order.[114] In the rare situation where there are multiple valid support orders, the law of the state that issued each order governs the calculation of interest and arrears under that issuing state's order.[115] Once a tribunal properly assumes jurisdiction and modifies the support order of another state, the modified order becomes the new controlling order. Although the duration of support does not change, it will be the law of the state that issued this controlling order that prospectively governs the interest on any consolidated arrears under prior orders as well on arrears that may accrue in the future.[116]

ADMINISTRATIVE MODIFICATION OF JUDICIAL ORDERS

Based on their definitions of "court" and "tribunal," FFCCSOA and UIFSA provide for administrative modification of judicial orders in interjurisdictional cases. The determination of the appropriateness of administrative modification of a judicial order in any state will be based on state law, particularly the state constitution.[117]

[114] Unif. Interstate Family Support Act § 604(a)(2) (2008),
[115] Unif. Interstate Family Support Act § 207(f) (2008).
[116] Unif. Interstate Family Support Act § 604(d) (2008).
[117] For additional information, *see* Chapter Six: Expedited Judicial and Administrative Processes.

CONCLUSION

The life of a child support order can be long, seeing a child from infancy up to adulthood. During that time, the circumstances of the parties and the needs of the child can change dramatically. Child support agencies have a responsibility to ensure that child support orders are as realistic as possible when they are established and remain so throughout their existence. For this reason, agencies must reach out to families needing help with modification of orders. This help may take several forms, including providing parents with information about state or local court websites containing *pro se* modification forms and instructions; referring parents to legal service providers; and providing online forms or information on the agency's website. Child support attorneys most often play a role in cases that require hearings regarding changed circumstances. In such cases, the role of the attorney for the child support agency is to present evidence to ensure the support order is appropriate based on the parties' incomes or ability to pay, the needs of the child, and the application of the support guidelines in light of all relevant facts. Statutes and case law will provide the attorney with examples of what factors tribunals in a particular jurisdiction conclude are a sufficient basis for modification.

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CHAPTER TWELVE

TABLE OF STATUTES AND AUTHORITIES

Statutes, Rules, and Regulations	Page

Statutes, Rules, and Regulations **Page**

Tribal Rules and Codes **Page**

Case Law **Page**

Model Codes **Page**