

## Prospective Child Support: What is it and how is the amount determined?

In the post "[Retroactive Support: What is it and how is the amount determined](#)", I wrote that the law defines retroactive support as support due for the time before a complaint or motion seeking support is filed, *Briggs v. Greer*, 136 NC App 294 (2000), and that the amount of retroactive support owed by an obligor can be determined based either on the Child Support Guidelines or on the parent's share of actual expense incurred on behalf of the child during a period of time in the past. [NC Child Support Guidelines, March 1, 2020, p. 2.](#)

On the other hand, prospective support is defined as support due from the time a complaint or motion seeking support is filed forward in time. *Ex. rel. Miller v. Hinton*, 147 NC App 700 (2001)(there is an implied presumption that prospective support begins at the time of filing). This means that *prospective* support generally includes amounts due for the period of time *before* the support order is entered, but only that time period between the date of the filing of the complaint or motion and the time of the entry of the child support order. *Mason v. Erwin*, 157 NC App 284 (2003)(it is clear that new amount of child support resulting from a modification is due from the time of filing of the motion); *Cole v. Cole*, 149 NC App 427 (2002)(prospective support begins at the time of filing).

### How is the amount of prospective support determined?

Prospective support is determined by application of the guidelines, unless the court deviates from the guidelines upon finding that application of the guidelines is unjust or inappropriate. G.S 50-13.4(c) provides that:

"The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered."

Further, prospective support is set based on the circumstances, including the income of the parties, at the time of the child support hearing. *Simms v. Boger*, 264 N.C. App. 442, 453 (2019).

### Does this mean that prospective support must be ordered from the time of filing and in the

## **same amount as the award going forward from the hearing?**

As stated in the *Ex. rel. Miller v. Hinson* case cited above, there is an implied presumption that prospective support will be ordered from the time of filing forward in time and, as the court reiterated in the *Simms* case cited above, prospective support generally is set based on the income of the parties at the time of the hearing. This means that there is a presumption that the amount of support set by the court based on the income of the parties at the time of the hearing is payable from the time the complaint or motion seeking support was filed forward in time.

However, the court of appeals also has stated on occasion that judges have discretion to order that prospective support payments begin at a different date or that the amount of support due from the date of filing until the date of the hearing may be different than the award going forward in time without also addressing when it is appropriate to do so or addressing how to set the amount of support for the time from filing if not in the amount set from the hearing date forward. See e.g. *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 596 S.E.2d 285 (2004) (affirming court order that made permanent support payable as of two weeks before trial started, but not back to the date complaint was filed).

However, in *State ex rel. Fisher v. Lukinoff*, 131 NC App 642 (1998), the court addressed the issue directly and stated:

"This Court has held for purposes of computing child support, the portion of the award "representing that period from the time a complaint seeking child support is filed to the date of trial," is "in the nature of prospective child support." [citations omitted] Since prospective child support is to be awarded for the time period between the filing of a complaint for child support and the hearing date, Section 50–13.4(c) applies and requires application of the Guidelines with respect to that period. ... [citations omitted] **Thus, the court must make adequate findings to justify deviating from the Guidelines for the time period between the filing of plaintiff's complaint and the hearing date, as it was required to make findings to "justify varying from the guidelines" [if it orders support to begin at a time other than the date of filing]. See G.S. § 50–13.4(c).**"

See also *State ex rel. Miller v. Hinton*, 147 NC App 700 (2001)(guidelines are required from time of filing unless court deviates after determining amount is unjust or otherwise inappropriate)

These cases hold that, just as prospective support going forward from the date the court enters the award, prospective support owed for the time between filing and the entry of the order must be based on the guidelines unless the court makes findings to support deviation. If the court concludes deviation is appropriate, the alternative amount ordered must be supported with findings to show the alternative is appropriate given the financial circumstances of the parties and the needs of the children during the time covered. The court in *Fisher* explained:

“As we hold that the trial court did not determine [the child's] reasonable needs including his education, maintenance, or accustomed standard of living in deviating from the Guidelines in its award of child support commencing [on the day following the hearing on permanent support], the court's failure to provide child support for the time period between plaintiff's filing of her complaint and the trial date is also not adequately justified to support deviation from the Guidelines. We therefore remand to the trial court for findings concerning the “reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.” G.S. § 50–13.4(c1).”

The court cited the *Fisher* opinion in *State ex. Rel. Miller v. Hinton*, 147 NC App 700 (2001), to support this statement:

“After careful examination of the record, we conclude that the trial court in the present case made the same error as the trial court in *Fisher*, in that the trial court provided no rationale as to why the child support award did not begin at the filing of the complaint. Unless the trial court finds that beginning the prospective child support payments on the date the complaint was filed would be “unjust or inappropriate” and there is evidence in the record to support this finding, it is error to order prospective support to begin at any other time.”

Most recently, in *Simms v. Boger*, 264 N.C. App. 442 (2019), the court of appeals reversed and remanded where the trial court determined that because the income of the payor had changed over the time the motion to modify was pending, support for that time period should be set based on an application of the guidelines to the income of the parties for each separate year before the hearing. The court of appeals did not discuss deviation specifically but held the trial court erred by not setting support based on the income of the parties at the time of the modification hearing without much more explanation as to why the amount ordered for the time before the modification hearing was appropriate under the circumstances.

### **What if a temporary order had been entered while the matter was pending?**

Prospective child support payments begin at the time of the filing of the complaint even when a temporary support order has been in effect while the case was awaiting trial on the permanent order. In *Cole v. Cole*, 149 N.C. App. 427, 562 S.E.2d 11 (2002), the court of appeals rejected defendant's argument that a temporary consent order entered shortly after the action was filed established his support obligation while action was pending. See also *Miller v. Miller*, 153 NC App 40 (2002)(no error for trial court to order permanent prospective support payable for time temporary order was in place; trial court gave payor appropriate credit for amounts paid pursuant to the temporary order).

