TOC

Chapter 3: **Child Support**

Part 1. Liability and Amount

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Part 1. Liability and Amount

I. Liability for Child Support

A. Parents Are Primarily Liable for Support

1. Subject to the exceptions discussed in Sections I.B, C, and D, below, the general rule is that only the father and mother are legally responsible for the financial support of a minor child. A judge may not order support to be paid by a person who is not the child's parent or by an agency, organization, or institution standing *in loco parentis* absent evidence and a finding that such person, agency, organization, or institution has voluntarily assumed the obligation of support in writing. [G.S. 50-13.4(b).]
    a. The parents (natural or adoptive mother and father) of a minor child are primarily and jointly liable for the support of their child. [*See Plott v. Plott,* 313 N.C. 63, 326 S.E.2d 863 (1985); *Nisbet v. Nisbet,* 102 N.C. App. 232, 402 S.E.2d 151 (citing *Plott*), *review denied,* 329 N.C. 499, 407 S.E.2d 538 (1991); *Gunter v. Gunter,* 228 N.C. App. 138, 746 S.E.2d 22 (2013) (**unpublished**) (upholding dismissal of mother's motion for child support from mother's husband at time child was born based on stipulation that he was not the father even though he was listed as father on the birth certificate; to be liable for support, mother's husband would have had to voluntary assume the obligation of support in writing as required by G.S. 50-13.4(b)).]
    b. Although both parents are jointly responsible for the support of their minor child, each parent's legal obligation to support his child depends on the parent's relative ability to provide support. [*See Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985) (an equal duty to support does not necessarily mean the amount of child support is to be automatically divided equally between the parties); *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E.2d 581 (1986) (support for minor children is an obligation shared by both parents according to their relative abilities to provide support and the reasonable needs and estate of the child).]
2. The general rule applies to a child born out of wedlock once paternity is established.
    a. After paternity of a child born out of wedlock has been legally established in a civil action under G.S. 49-14, the child's father and mother are liable for the child's support to the same extent as the father and mother of a legitimate child. [G.S. 49-15, *amended by* S.L. 2013-198, § 23, effective June 26, 2013.]
    b. For the effect for support purposes of an affidavit of parentage filed with the district court pursuant to G.S. 110-132 or an affidavit of paternity executed pursuant to G.S. 130A-101(f), see *Paternity*, Bench Book, Vol. 1, Chapter 10.

3. The obligation of parents for support is not affected by agreement of the parents or by other circumstances.

   a. A parent's legal obligation to support her minor child may not be waived, released, or contracted away by the child's parents or caretakers. [*See Stanly Cty. Dep't of Soc. Servs. ex rel. Dennis v. Reeder,* 127 N.C. App. 723, 493 S.E.2d 70 (1997) (father's agreement to execute a consent to adopt in exchange for mother's express waiver and relinquishment of past and prospective child support void as against public policy); *Cartrette v. Cartrette*, 73 N.C. App. 169, 325 S.E.2d 671 (1985) (father could be required to pay support after mother began to receive public assistance for the child, even though father not required to pay support in parties' consent judgment); *Brinkley v. Brinkley*, 135 N.C. App. 608, 522 S.E.2d 90 (1999) (father not entitled to a credit for the amount he paid above his court-ordered child support obligation or for the amount due him under the parties' equitable distribution judgment); *cf. Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003) (establishing a rebuttable presumption that a mutually agreed upon amount of child support in an unincorporated separation agreement is just and reasonable), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

   b. The significant, separate income or estate of a minor child does not relieve a parent of the responsibility to support the child to the extent he is able to do so. [*Gowing v. Gowing*, 111 N.C. App. 613, 617, 432 S.E.2d 911, 913 (1993) ("If a parent can support his minor children, the trial court must refuse to diminish or relieve him of his obligation to provide for his children if the sole ground for that relief is that the children have their own separate estates"); *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991) (trial court was correct in refusing to "diminish or relieve" the father of his obligation to provide for his children simply because the children had their own separate estates); *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984) (no error when court did not consider substantial trust accounts of each child; under G.S. 50-13.4(b), application of the separate property of minors need only be resorted to "if appropriate").]

   c. A noncustodial parent's legal obligation to support his child generally is not dependent or contingent on whether the custodial parent allows him to visit the child or to exercise visitation rights pursuant to a court order. [*See Appert v. Appert*, 80 N.C. App. 27, 341 S.E.2d 342 (1986) (the right to receive child support is independent of the noncustodial parent's right to visitation); *see also Sowers v. Toliver,* 150 N.C. App. 114, 562 S.E.2d 593 (2002) (trial court erred when it terminated father's obligation to pay support based on mother's refusal to allow father's visitation with the child).]

   d. The fact that a court may consider contributions of a third party to support a deviation from the N.C. Child Support Guidelines does not in any way relieve a parent of her obligation to provide support. [*Guilford Cty. ex rel. Easter v. Easter,* 344 N.C. 166, 473 S.E.2d 6 (1996) (while contributions of a third party, in this case, maternal grandparents, could be considered upon remand in determining whether to deviate from the child support guidelines, the court noted that mother continued to be responsible for support of her child).] For more on third-party contributions as a factor justifying deviation, see Section IV.D.1.c, below.

B. Grandparents Are Not Responsible for Support of a Grandchild Except in Limited Circumstances

1. A grandparent is not, solely by virtue of his status as a grandparent or the fact that he has legal or physical custody of a grandchild or stands *in loco parentis* with respect to a grandchild, legally responsible for supporting his grandchild. [G.S. 50-13.4(b).] Sections I.C.2 and 3, below, detailing when a stepparent is or may be responsible for support and the secondary nature of that obligation, are applicable to a grandparent.
2. When a grandparent will or may be liable for support.
   a. A grandparent will be responsible for support if the grandparent voluntarily assumes the obligation of support in writing. [G.S. 50-13.4(b).] See Section I.C.2, below, on requirements of a writing.
   b. In addition, a grandparent may be liable for the support of her grandchild if either of the grandchild's parents is a minor unemancipated child. [G.S. 50-13.4. *See Whitman v. Kiger*, 139 N.C. App. 44, 533 S.E.2d 807 (2000), *aff'd per curiam*, 353 N.C. 360, 543 S.E.2d 476 (2001).]
      i. The parents of a minor unemancipated parent share the minor unemancipated parent's primary child support responsibility, the court determining the proper share, until the minor unemancipated parent is emancipated or reaches the age of 18. [G.S. 50-13.4(b).]
      ii. If both of the grandchild's parents were unemancipated minors at the time the grandchild was conceived, the maternal and paternal grandparents share primary responsibility for the grandchild's support until both of the grandchild's parents are emancipated or reach the age of 18. [G.S. 50-13.4(b); *Whitman v. Kiger*, 139 N.C. App. 44, 533 S.E.2d 807 (2000) (maternal and paternal grandparents found primarily responsible for infant grandchild born to minor unemancipated parents), *aff'd per curiam,* 353 N.C. 360, 543 S.E.2d 476 (2001).]
      iii. If only one of the grandchild's parents was an unemancipated minor at the time the grandchild was conceived, the maternal and paternal grandparents are liable for any unpaid child support arrearages owed by the grandchild's adult or emancipated parent until the grandchild's other parent is emancipated or reaches the age of 18. [G.S. 50-13.4(b).]

         EXAMPLE: Mother is a minor, father is an adult.

         The parents of the minor mother (the maternal grandparents) share her child support responsibility until she turns 18 or becomes emancipated.

         Both the maternal and paternal grandparents are liable for any unpaid child support arrearages owed by the adult father until the minor mother reaches 18 or is emancipated. After the minor mother turns 18 or is emancipated, the maternal and paternal grandparents are no longer responsible for any support arrearages of the adult father but continue to be liable for arrearages that accrued before the mother turned 18 or was emancipated.

         EXAMPLE: Mother is a minor aged 16, father is a minor aged 15.

Both the maternal and paternal grandparents share primary responsibility for the grandchild's support until both minor parents are 18 or are emancipated. If the mother and father are not emancipated, both maternal and paternal grandparents will be responsible for the grandchild's support until the father turns 18. In other words, the maternal grandparent's responsibility does not end when their child, the mother, turns 18 but, in this case, when the father turns 18.

C. Stepparents Are Not Responsible for Support of a Stepchild Except in Limited Circumstances

1. A stepparent is not, solely by virtue of his status as a stepparent or the fact that he has legal or physical custody of a stepchild or stands *in loco parentis* with respect to a stepchild, legally responsible for supporting his stepchild.
2. When a stepparent will or may be liable. A stepparent may be ordered to pay child support for her stepchild if the stepparent has voluntarily assumed, in writing, the obligation to support her stepchild. [G.S. 50-13.4(b). *See Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994).]
    a. Typically, the status of *in loco parentis* ceases after the marriage has been terminated either by death or divorce. [*Moyer v. Moyer*, 122 N.C. App. 723, 471 S.E.2d 676, *review denied,* 344 N.C. 631, 477 S.E.2d 41 (1996).]
    b. Thus, absent a written agreement to do so, a stepparent is generally not obligated to support a stepchild after divorce. [*See Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994) (stepfather who agreed in separation agreement to support stepchildren obligated to do so; stepfather voluntarily extended his status as *in loco parentis*).]
    c. A stepparent's written assumption of a support obligation with respect to a stepchild must be executed and acknowledged in the same manner as a separation agreement pursuant to G.S. 52-10.1. [*See Moyer v. Moyer*, 122 N.C. App. 723, 471 S.E.2d 676 (handwritten unacknowledged agreement in which defendant agreed to pay child support for a stepchild "until more permanent arrangements were decided upon" not executed with requisite formalities; agreement could not be basis for support order), *review denied,* 344 N.C. 631, 477 S.E.2d 41 (1996).]
3. When a stepparent is liable for support under G.S. 50-13.4(b), the obligation is secondary to that of the child's natural or adoptive parents. [*See Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994).]
    a. This generally means that a stepparent who has agreed in writing to support her stepchild is required to provide support only to the extent that the child's parents are unable to provide support sufficient to meet the child's reasonable needs. [*See Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994) (remanding for a determination as to the needs of stepchildren and the ability of their respective natural parents to meet these needs; if the court found that their needs exceeded the ability of their natural parents to meet those needs, then and only then would stepfather be secondarily responsible for the deficiency).]
    b. A stepparent's child support obligation is not determined through application of the N.C. Child Support Guidelines. [N.C. Child Support Guidelines, 2015 Ann. R.

N.C. 49 (effective Jan. 1, 2015, applicable to child support actions heard on or after that date) (hereinafter referred to as 2015 Guidelines); *Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994) (use of guidelines would equate the duties and obligations of a person secondarily liable with those of persons primarily liable).] Where appropriate, N.C. Child Support Guidelines, 2011 Ann. R. N.C. 49 (effective Jan. 1, 2011) (hereinafter referred to as 2011 Guidelines) and 2006 Ann. R. N.C. 49 (effective Oct. 1, 2006) (hereinafter referred to as 2006 Guidelines) will be cited. For more on the 2015 Guidelines, see Cheryl Howell, *We Have New Child Support Guidelines*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 28, 2015), http://civil.sog.unc.edu/we-have-new-child-support-guidelines.

D. Persons and Agencies In Loco Parentis

1. A person (a grandparent where the parents are not unemancipated minors, a relative, a guardian, or a caretaker), other than a child's parent, or an organization, institution, or agency, other than a state or county agency that is responsible for a child's support under a law other than G.S. 50-13.4, that has legal or physical custody of a child or that stands *in loco parentis* with respect to a child is not, solely by virtue of that fact, legally responsible for the child's support.
2. When a person who is not the child's parent, or an agency, organization, or institution standing *in loco parentis* is or may be liable for support. A court may order a person, agency, organization, or institution that stands *in loco parentis* with respect to a child to support the child if the person, agency, organization, or institution standing *in loco parentis* has voluntarily agreed in writing to support the child. [G.S. 50-13.4(b).]
3. Like the support obligation of a stepparent under G.S. 50-13.4(b), the support obligation of a person, agency, organization, or institution standing *in loco parentis* is secondary to that of the child's natural or adoptive parents. [G.S. 50-13.4(b).]
4. The child support obligation of persons or agencies who are secondarily liable for child support is not determined through application of the child support guidelines. [2015 Guidelines.]

II. Amount, Scope, Duration, and Termination of Parents' Support Obligation

A. Amount and Scope of Child Support Obligation

1. The amount and scope of a parent's legal obligation to support his minor child under G.S. Chapter 50 depends primarily on the child's reasonable needs related to health, education, and maintenance (shelter, food, clothing, child care, transportation, etc.) and on the relative ability of the parent to provide support. [G.S. 50-13.4(c).] A minor is any person who has not reached the age of 18 years [G.S. 48A-2.] and has not been legally emancipated pursuant to G.S. Chapter 7B, Article 35.
2. In determining the amount of a parent's child support obligation, a court must apply the child support guidelines unless the amount of child support determined under the guidelines would exceed or not meet the reasonable needs of the child considering the relative

ability of each parent to provide support, or would be otherwise unjust or inappropriate. [G.S. 50-13.4(c); 2015 Guidelines. See Section III, below, for more on the guidelines.]

3. When the court orders a parent to pay child support in an amount other than that determined under the child support guidelines, the court must consider the child's needs, the estates and earnings of the child and the child's parents, the child care and homemaker contributions of each parent, the conditions and accustomed living standards of the child and the child's parents, and other facts of the particular case. [G.S. 50-13.4(c), (c1). See Section IV, below, for more on deviating from the guidelines.]
4. A parent may assume, through executing a legally binding contract or agreement, a child support obligation that is greater in amount or scope than that imposed by G.S. Chapter 50 or other state laws. [See Section II.B.4, below; *see also Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (establishing a rebuttable presumption that a mutually agreed upon amount of child support in an unincorporated separation agreement is just and reasonable), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).] See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

B. Duration of Child Support Obligation

1. The general rule is that absent an enforceable contract or agreement, a parent has no legal obligation to support a child who has reached the age of 18 and is not in primary or secondary school.
2. The general rule is based on G.S. 50-13.4(c), which provides that payments ordered for the support of a child terminate when the child reaches 18, with the following exceptions:
   a. Payments stop upon the child's emancipation by court order or marriage. [G.S. 50-13.4(c)(1).]
      i. A 16- or 17-year-old child may be emancipated by court order. [G.S. 7B-3500 *et seq.*]
      ii. A married minor child is emancipated. [G.S. 7B-3509.]
   b. If the child is in primary or secondary school when the child reaches age 18, payments continue until the child
      i. Graduates,
      ii. Ceases to attend school on a regular basis,
         (a) For a case finding that this provision does not require full-time attendance, see discussion of *Malone v. Hutchinson-Malone*, 784 S.E.2d 206 (N.C. Ct. App. 2016), in Section II.B.4.b, below.
      iii. Fails to make satisfactory progress in school, or
      iv. Reaches age 20,

      whichever occurs first, unless the court in its discretion orders that payments cease at age 18 or before high school graduation. [G.S. 50-13.4(c)(2).]
         (a) "[A]s a general rule, [G.S.] 50-13.4(c)(2) establishes the minimum duration of [a] child support obligation under North Carolina law." [*Malone v. Hutchinson- Malone*, 784 S.E.2d 206, 209 (N.C. Ct. App. 2016).]

(b) An order terminating support, whether upon the occurrence of one of the events in G.S. 50-13.4(c)(2) or pursuant to an enforceable contract or separation agreement, should include an effective date or otherwise set out clearly the date the obligation terminates. [*Malone v. Hutchinson-Malone*, 784 S.E.2d 206 (N.C. Ct. App. 2016) (for effective appellate review, the appellate court must be able to ascertain from the trial court's order the effective date of the termination of child support).]

c. If the child is enrolled in an innovative high school program authorized under Part 9 of Article 16 of G.S. Chapter 115C, payments terminate when the child completes her fourth year of enrollment or when the child reaches the age of 18, whichever occurs later. [G.S. 50-13.4(c)(3), *added by* S.L. 2012-20, § 2, effective Oct. 1, 2012, and applicable to actions or motions filed on or after that date).]

3. Effect of one child's emancipation, graduation from high school, or reaching the age of majority under an order for support of multiple children.

a. A parent's obligation to pay the entire amount of child support due under an order that requires a lump sum amount of child support for more than one child is not terminated or reduced by termination of the parent's legal duty to support one of the children (for example, by virtue of a child's emancipation, graduation from high school, or reaching the age of majority). [*Craig v. Craig,* 103 N.C. App. 615, 406 S.E.2d 656 (1991) (father had no authority to unilaterally modify the amount of child support upon older child turning 18 when support order did not allocate amount for each individual child and was silent as to any reduction in support upon one child reaching age 18).]

b. The payor may not unilaterally terminate or proportionally reduce his child support payments but must file a motion seeking modification of the order pursuant to G.S. 50-13.7. [See *Modification of Child Support Orders*, Part 3 of this Chapter.] The fact that a parent's legal obligation to support one of several children has terminated may constitute a substantial change of circumstances warranting modification of an existing support order. [*See Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991) (supporting parent must apply to trial court for modification when one of two or more minor children for whom support is ordered reaches age 18 and support is not allocated by child).]

4. Parents can agree to support and other obligations that exceed or differ from statutory requirements.

a. A parent may, by entering into a legally binding contract or agreement with the child's parent or other parties, obligate herself to support the child after the child has reached the age of 18 (or is otherwise emancipated) and is no longer in primary or secondary school (for example, by agreeing to pay all or part of the cost of the child's college expenses or by providing support for an adult disabled child). See Section II.E, below, discussing liability for college expenses.

b. The court of appeals has stated that parties may contract to pay more than guideline support or to pay support for a longer period than required by G.S. 50-13.4(c)(2), but if the amount of support or its duration is "less generous" than required by the statute, the obligee "may still recover child support up to the amount and duration

required under the statute." Thus, when a duration provision in an incorporated separation agreement is "less generous" than the provision in G.S. 50-13.4(c)(2), the statute controls. [*Malone v. Hutchinson-Malone*, 784 S.E.2d 206, 209 (N.C. Ct. App. 2016) (footnote omitted) (quoting *Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996)) (trial court found that child, after reaching age 18, was not attending school full-time and terminated father's child support obligation based on an incorporated separation agreement providing for support to continue if child, who had special needs, was a "full-time" student or until child reached age 20; G.S. 50-13.4(c)(2) only requires that child attend school on a "regular" basis for child support to continue until age 20; since statute was more generous than the contract provision, trial court erred when it granted father's motion to terminate support because child was not attending school full-time). *But cf. Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (parties are free to contract to any amount of support they deem appropriate, subject to the right of either party to seek a court order for support; before ordering child support in accordance with the guidelines, the court must find that the party seeking a support order has rebutted the presumption that any amount of support agreed to by the parties in a separation agreement is an appropriate and reasonable amount of support; if the presumption is not rebutted, court must order support as provided in the agreement between the parties), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004).]

c. For procedure when parties have executed an agreement regarding support, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Sections I.G.6 and III.

C. Support of a Special Needs or Disabled Child

1. There is no separate statute addressing support of a disabled child. The provisions of G.S. 50-13.8 that formerly required a parent to support a child who, upon reaching the age of majority, was mentally or physically incapable of self-support, were repealed in 1979. [*See Jackson v. Jackson*, 102 N.C. App. 574, 402 S.E.2d 869 (1991) (the law does not now require parents to support their disabled child after majority).]
2. Support of a disabled child is determined under G.S. 50-13(c) the same as for any other child. [*See Hendricks v. Sanks*, 143 N.C. App. 544, 547, 545 S.E.2d 779, 781 (2001) (stating that "[t]o treat a mentally disabled child any differently than a mainstream child in terms of support obligations would be patently unfair, against public policy and not in keeping with the legislative directive").]
3. Thus, the general rule in G.S. 50-13.4(c) applies to a disabled child, that is, absent an enforceable contract or agreement, a parent has no legal duty to support a child who is over the age of 18 and not in primary or secondary school.
4. However, the special circumstances of a disabled child can be considered when determining whether support is required after the child reaches 18 but before the child reaches 20. For example, a child with Down Syndrome was found to be making satisfactory progress toward graduation, requiring a parent to continue support after the child reached 18 pursuant to G.S. 50-13.4(c), even though the child would not receive a traditional diploma. [*Hendricks v. Sanks*, 143 N.C. App. 544, 545 S.E.2d 779 (2001).]

5. For an example of an agreement by a parent to support a disabled child past the age of majority, see *Martin v. Martin,* 180 N.C. App. 237, 636 S.E.2d 340 (2006) (**unpublished**) (parent's obligation in a 1994 consent order to support a child with Down Syndrome beyond the age of majority remained enforceable after a 1997 modification of the amount of support; the 1997 order, which included language that except as modified, prior orders remained in full force and effect, modified and controlled only the amount of child support, leaving the durational terms of the 1994 order in full effect), *review denied,* 361 N.C. 220, 642 S.E.2d 444 (2007).]

D. Termination of a Child Support Obligation

1. Termination of a parent's obligation to pay support. A parent's obligation to pay child support generally terminates when the child reaches the age of 18, subject to some exceptions. [See Section II.B, above, on duration of a child support obligation.] A parent's obligation to support a minor unemancipated child terminates:
   a. On the child's death; [G.S. 50-13.10(d)(1).] the parent, however, remains liable for child support arrearages that accrued before the child's death;
   b. On the supporting party's death, [G.S. 50-13.10(d)(2).] absent a binding contract or agreement;
      i. The parent's estate, however, remains liable for child support arrearages that accrued before the parent's death. [*See Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981) (order awarding payment of past due child support from father's estate to the extent not barred by the ten-year statute of limitations affirmed), *review denied,* 304 N.C. 728, 288 S.E.2d 381 (1982).]
      ii. A parent may create in a separation agreement an obligation to furnish child support that survives the parent's death and becomes an obligation of the parent's estate. [*See Bradshaw v. Smith*, 48 N.C. App. 701, 269 S.E.2d 750 (1980) (recognizing that father's common law duty to support his children terminated on his death but finding that father had by separation agreement obligated himself to pay support, which obligation survived his death and for which his estate was liable).]
      iii. For enforcement of a claim against a decedent's estate (1) for child support pursuant to a contract or agreement or (2) for payment of arrears, see *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section X.
   c. On entry of a final order terminating a parent's parental rights pursuant to G.S. Chapter 7B; [G.S. 7B-1112.]
      i. A termination of parental rights order does not relieve the parent of liability for child support arrearages that accrued before the date the parent's rights were terminated. [*See Moore Cty. ex rel. Evans v. Brown,* 142 N.C. App. 692, 543 S.E.2d 529 (2001) (discussing legal authority of department of social services to pursue payment of past due public assistance under G.S. 110-135 from a father whose rights had been terminated); *see also* G.S. 48-1-106 (parents whose parental relationship was terminated by adoption decree remain liable for past due payments for child support) and G.S. 50-13.10 (vesting of past due child support).]

d. On entry of a final decree of adoption; [G.S. 48-1-106.]

i. Adoption does not relieve the former parent of liability for child support arrearages that accrued before the child's adoption. [G.S. 48-1-106(c); *Michigan ex rel. Pruitt v. Pruitt*, 94 N.C. App. 713, 380 S.E.2d 809 (1989) (children's subsequent adoption by their stepfather did not affect their father's pre-adoption obligation to provide support for his children).]

ii. A parent's relinquishment of the child for adoption or consent to adoption does not terminate the parent's legal duty to support the child. [G.S. 48-3-607(c) and 48-3-705(d); *Stanly Cty. Dep't of Soc. Servs. ex rel. Dennis v. Reeder*, 127 N.C. App. 723, 493 S.E.2d 70 (1997) (where his parental rights had not otherwise been terminated, defendant's obligation to provide child support continued until entry of a final adoption order).]

e. On entry of an order granting relief from an order of child support, based upon a determination that the obligor is not the child's father; [G.S. 50-13.13, *added by* S.L. 2011-328, § 3, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date).]

i. A motion or claim for relief pursuant to this statute must be filed within one year of the date the movant knew or reasonably should have known that he was not the father of the child. [G.S. 50-13.13(b).] Notwithstanding this provision, any person who would otherwise be eligible to file a motion or claim was allowed to file a motion or claim pursuant to this act prior to Jan. 1, 2013. [S.L. 2011-328, § 4.]

ii. A motion seeking relief from a child support obligation pursuant to G.S. 50-13.13 must be verified and shall state all of the following:

(a) The basis, with particularity, on which the moving party believes that he is not the child's father;

(b) The moving party has not acknowledged paternity of the child or acknowledged paternity without knowing that he was not the child's biological father;

(c) The moving party has not adopted the child, has not legitimated the child pursuant to G.S. 49-10, 49-12, or 49-12.1, or is not the child's legal father pursuant to G.S. 49A-1;

(d) The moving party did not act to prevent the child's biological father from asserting his paternal rights regarding the child. [G.S. 50-13.13(b).]

iii. When a motion for relief is filed pursuant to this statute, notwithstanding G.S. 8-50.1(b1), a court must order the moving party, the child's mother, and the child to submit to genetic paternity testing if the court finds good cause to believe that the moving party is not the child's father and that he may be entitled to relief under G.S. 50-13.13. [G.S. 50-13.13(d).]

iv. The court may grant relief from prospective child support if paternity has been set aside pursuant to G.S. 49-14 or 110-132 or if the moving party proves by

clear and convincing evidence, and the court sitting without a jury finds both of the following:

(a) The results of a valid genetic test establish that the moving party is not the child's biological father [G.S. 50-13.13(f)(1).] and

(b) The moving party either (i) has not acknowledged paternity of the child or (ii) acknowledged paternity without knowing that he was not the child's biological father. [G.S. 50-13.13(f)(2).] For the definition of "acknowledging paternity" for purposes of G.S. 50-13.13(f), see G.S. 50-13.13(f)(2)a.–d.

v. Defendant failed to establish the good cause required for court-ordered genetic testing pursuant to G.S. 50-13.13(d) when an earlier order, in accordance with defendant's motion, found that when child was conceived, mother told defendant she was sexually active with at least two other men and had used the Internet to seek sexual partners and that mother told defendant he was the father. Other findings supporting denial of testing, which defendant did not challenge, were that mother and defendant signed an affidavit of parentage on the day child was born and defendant had filed motions for custody of the child and participated in mediation. [*Guilford Cty. ex rel. Ijames v. Sutton*, 230 N.C. App. 409, 753 S.E.2d 397 (2013) (**unpublished**).]

vi. Form AOC-CV-673, Order Granting or Denying Relief from Child Support Obligation, may be used.

f. Incarceration of parent or change in custody. A parent's obligation to pay child support pursuant to a court order does not become past due and no arrearage accrues when:

i. The parent is incarcerated, is not on work release, and has no resources from which child support can be paid; [G.S. 50-13.10(d)(4).] there must be evidence in the record on these points; [*Orange Cty. ex rel. Byrd v. Byrd*, 129 N.C. App. 818, 501 S.E.2d 109 (1998) (suspension of support obligation reversed; no evidence in record on which trial court could find dates of incarceration or defendant's ineligibility for work release).] or

ii. The child is living with the parent pursuant to a valid court order or an express or implied written or oral agreement transferring primary custody to the parent. [G.S. 50-13.10(d)(3).]

g. Reconciliation of parents.

i. The reconciliation of a husband and wife does not invalidate the provisions of a **court order** requiring either party to pay support for their minor child (but payments coming due under court order do not vest pursuant to G.S. 50-13.10(d)(3) during the period that the child lives with the parties). [*See Walker v. Walker*, 59 N.C. App. 485, 297 S.E.2d 125 (1982) (court stating that defendant may, upon a proper showing, be entitled to relief from support payments that fell due during the period of reconciliation); *see also Latham v. Latham*, 74 N.C. App. 722, 329 S.E.2d 721 (1985) (once a court has acquired jurisdiction over the custody or support of a minor child, remarriage of the parties to each other does not divest

a court of its continuing jurisdiction over a child for purposes of determining custody or child support).]

ii. Reconciliation terminates executory child support obligations under **an unincorporated separation agreement** between a husband and wife. [*See Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991).] See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1, for more on the effect of reconciliation on support provisions in a separation agreement.

2. Effect of arrearage existing at time support obligation terminates.

a. If an arrearage for child support or fees exists at the time that a child support obligation terminates, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. [G.S. 50-13.4(c).]

b. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court. [G.S. 50-13.4(c).]

E. Liability for College Expenses

1. The general rule is that, absent an enforceable contract or agreement, a parent has no legal obligation to support a child who has reached the age of 18 and is not in primary or secondary school. [See G.S. 50-13.4(c) and Section II.B, above, on duration of a child support obligation; *Shaffner v. Shaffner*, 36 N.C. App. 586, 588, 244 S.E.2d 444, 446 (1978) (emphasis added) (a court's authority to affect the custody of, and to require reasonable support for, minor children continues only as long as the parents' legal obligation to support exists, and "is limited in scope to agreements whose terms provide for the maintenance and support of a child *during his minority*").]

2. A parent may, however, enter into a legally binding contract or agreement with the child's other parent or with other parties to support his child after emancipation and past majority, by paying all or part of the child's college expenses. An unincorporated agreement for support of a child *past her majority* may not be modified absent the consent of the parties and is enforceable at law as any other contract. [*Shaffner v. Shaffner*, 36 N.C. App. 586, 244 S.E.2d 444 (1978) (citing *Church v. Hancock,* 261 N.C. 764, 136 S.E.2d 81 (1964)) (agreement to pay weekly support until children each reached age 21, college expenses not mentioned).]

3. A parent agreed to pay all or part of a child's college expenses in the following cases:

a. *Barker v. Barker,* 228 N.C. App. 362, 363, 745 S.E.2d 910, 912 (2013) (defendant in civil contempt of consent order that required him to pay 90 percent of children's college expenses "as long as they diligently applied themselves to the pursuit of education"); *Ross v. Voiers,* 127 N.C. App. 415, 490 S.E.2d 244 (ex-husband in civil contempt for noncompliance with consent order in which he agreed to pay all college expenses of parties' daughter), *review denied,* 347 N.C. 402, 496 S.E.2d 387 (1997); *Sharpe v. Nobles,* 127 N.C. App. 705, 493 S.E.2d 288 (1997) (in divorce decree, father agreed to deposit $50/month for child's college education; father in civil contempt of order that required him to make a catch-up payment of $4,100 and to provide certified copy of deposit to former wife); *Smith v. Smith*, 121 N.C. App. 334, 465

S.E.2d 52 (1996) (defendant in contempt of consent judgment in which he agreed to pay for child's college, technical school, or other educational opportunities past the high school level; agreement to pay college expenses was in the nature of child support, so court was authorized to award attorney fees when father failed to make payments). *Cf. Powers v. Powers,* 103 N.C. App. 697, 407 S.E.2d 269 (1991) (court reversed an award of attorney fees to wife after finding husband in contempt of consent judgment requiring him to pay for child's college expenses, holding that order was not for "child support").

b. *Wilson v. Wilson,* 214 N.C. App. 541, 714 S.E.2d 793 (2011) (court enforced agreement of father in incorporated separation agreement to continue monthly child support payments while children enrolled and in good standing in college or trade or technical school); *Williams v. Williams,* 97 N.C. App. 118, 387 S.E.2d 217 (1990) (father's obligation in separation agreement incorporated into Canadian divorce decree to support children beyond age of 18 while attending university, college, or accredited educational institution could be enforced through Uniform Reciprocal Enforcement of Support Act); *Blount v. Lemaire*, 232 N.C. App. 521, 757 S.E.2d 527 (2014) (**unpublished**) (not paginated on Westlaw) (when father agreed in incorporated separation agreement to pay college expenses for "room, board and tuition" and "reasonable spending money" for each child, trial court properly entered money judgment for college costs father failed to pay).

c. *Altman v. Munns,* 82 N.C. App. 102, 345 S.E.2d 419 (1986) (father bound by unincorporated separation agreement to pay for daughter's college expenses); *Martin v. Martin,* 204 N.C. App. 595, 696 S.E.2d 925 (2010) (**unpublished**) (defendant properly ordered to perform his obligation to pay one-half of child's college expenses; when the parties intended for all provisions of the unincorporated separation agreement to be independent of each other, a breach by plaintiff of the provisions allowing defendant visitation would not excuse defendant's performance of the provision requiring him to pay one-half of children's college expenses).]

4. For enforcement by contempt of a parent's agreement to pay college expenses, and for award of attorney fees related to enforcement, see *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section VII.

III. Child Support Guidelines

A. Federal Law

1. Background.

a. The current federal requirements regarding child support guidelines were enacted by Congress in the Family Support Act of 1988. [Pub. L. No. 100-485, 102 Stat. 2343.]

b. The federal Child Support Enforcement Amendments of 1984 [Pub. L. No. 98-378, 98 Stat. 1321.] required states to adopt child support guidelines but did not require state courts or administrative agencies to use guidelines when entering child support orders.

2. Federal requirements.
    a. As a condition of receiving federal funding for the state's Temporary Assistance for Needy Families (TANF) and child support enforcement (IV-D) programs, federal law requires each state to:
        i. Establish, by statute or by judicial or administrative action, guidelines governing the amount of child support orders within the state and
        ii. Review its child support guidelines at least once every four years to ensure that their application results in the determination of appropriate orders for child support. [42 U.S.C. § 667(a).]
    b. Federal law requires that each state's child support guidelines:
        i. Take into consideration all earnings and income of a child's noncustodial parent;
        ii. Be based on specific descriptive and numeric criteria and result in a computation of the parent's child support obligation; and
        iii. Address how the parents will provide for the child's health care needs, through health insurance coverage and/or through cash medical support in accordance with 45 C.F.R. § 303.31. [45 C.F.R. § 302.56(c).]
3. Federal law requires state guidelines to set presumptive amount.
    a. Federal law provides that a state's child support guidelines must create a presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the child support award determined by applying the guidelines is the correct amount of child support to be awarded under state law. [42 U.S.C. § 667(b)(2); 45 C.F.R. § 302.56(f).]
    b. This presumption, however, may be rebutted by a finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case (based on criteria established by the state). [45 C.F.R. § 302.56(g).]
    c. With respect to the presumption, federal law requires that:
        i. The state's criteria for rebutting the presumptive application of the child support guidelines consider the child's best interests and
        ii. Findings rebutting the presumptive application of the child support guidelines state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines. [45 C.F.R. § 302.56(g).]

B. State Law

1. State law, enacted in response to the federal requirements outlined above, requires the North Carolina Conference of Chief District Court Judges to:
    a. Prescribe uniform statewide presumptive guidelines for computing the child support obligations of parents, including retroactive support obligations;
    b. Develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate; and
    c. Review the guidelines at least once every four years and modify them to ensure that their application results in appropriate child support awards. [G.S. 50-13.4(c1),

amended by S.L. 2014-77, § 8, effective July 22, 2014, to add "retroactive support obligations," discussed in Section III.B.1.a, above.]

C. North Carolina's Child Support Guidelines

1. North Carolina's first uniform statewide child support guidelines were adopted in 1987.
   a. The 1987 Guidelines were based on the "percentage of income" model (for example, a parent was required to pay 17 percent of her income for one child, 25 percent for two children, or 29 percent for three children).
   b. Application of the 1987 Guidelines was permissive rather than mandatory until 1989.
2. In 1990, the Conference of Chief District Court Judges adopted new mandatory, presumptive child support guidelines based on the "income shares" model. For the meaning of "income shares," see Section III.E, below.
   a. The 1990 child support guidelines were revised in 1991, 1994, 1998, 2002, 2006, 2010, and 2014.
   b. The guidelines revised in 2010 apply to child support actions **heard** on or after Jan. 1, 2011. For more on the revisions effective Jan. 1, 2011, see Cheryl Daniels Howell, *2011 Revisions to the North Carolina Child Support Guidelines*, Fam. L. Bull. No. 24 (UNC School of Government, Dec. 2010) (hereinafter 2010 Howell Bulletin), www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf.
   c. The guidelines revised in 2014 apply to child support actions **heard** on or after Jan. 1, 2015. For more on the 2015 Guidelines, see Cheryl Howell, *We Have New Child Support Guidelines*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 28, 2015), http://civil.sog.unc.edu/we-have-new-child-support-guidelines.
3. North Carolina's guidelines set a presumptive amount of support.
   a. Support set pursuant to the guidelines is conclusively presumed to meet the reasonable needs of a child, considering the relative ability of each parent to provide support. [2015 Guidelines.]
4. North Carolina's child support guidelines are constitutional.
   a. North Carolina's child support guidelines have been upheld as constitutional. [*Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007) (guidelines not unconstitutional based on the Supremacy Clause of the U.S. Constitution; guidelines as applied did not violate noncustodial parent's equal protection rights, nor did they violate his substantive or procedural due process rights), *review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144 (2008).]

D. Application of the Child Support Guidelines

1. When guidelines must be applied.
   a. State law expressly requires judges to apply North Carolina's child support guidelines as a rebuttable presumption:
      i. When determining a parent's child support obligation in civil actions for child support pursuant to G.S. 50-13.4; [G.S. 50-13.4(c).]

ii. When the court enters an order for support based on affidavits of parentage executed by the putative father and mother under G.S. 110-132(a); [G.S. 110-132(b).]

iii. In juvenile proceedings involving abused, neglected, or dependent children; [G.S. 7B-904(d).]

iv. In a criminal action for nonsupport of a child born out of wedlock; [G.S. 49-7.]

v. In criminal prosecutions involving a parent's failure to support his child; [G.S. 14-322(e).] and

vi. When requiring a parent to pay child support as a condition of probation in a criminal case. [G.S. 15A-1343(b)(4).]

b. The guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent, including orders entered in criminal and juvenile proceedings, orders entered in Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C) proceedings, orders entered in domestic violence (G.S. Chapter 50B) proceedings, and voluntary support agreements and consent orders approved by the court. [2015 Guidelines.]

c. The 2011 Guidelines clarified that the guidelines must be used when temporary child support is ordered as a form of relief in a domestic violence protective order entered pursuant to G.S. Chapter 50B.

d. The guidelines must be used when the court enters a temporary or permanent child support order in a noncontested case or in a contested hearing. [2015 Guidelines.]

e. Prospective child support is normally determined under the guidelines. [*State ex rel. Gillikin v. McGuire,* 174 N.C. App. 347, 620 S.E.2d 899 (2005) (citing *Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 442 (1995), *rev'd on other grounds,* 343 N.C. 50, 468 S.E.2d 33 (1996)).]

i. Prospective support means support to be paid from the date of the filing of the complaint or motion seeking support forward in time. [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998).]

ii. Retroactive support means support owed for a time period before a complaint or motion seeking support is filed. [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998).] For discussion of the application of the guidelines to retroactive support, see Section VII.D, below.

f. The 2015 Guidelines apply to cases heard on or after Jan. 1, 2015. This means that the 2011 Guidelines apply to cases heard before Jan. 1, 2015, even if an order is entered after that date. [*Accord State ex rel. Goodwin v. Williams,* 163 N.C. App. 353, 593 S.E.2d 123 (2004) (1998 Guidelines applied to case decided and announced in open court before effective date of 2002 Guidelines, even though order was actually entered after the effective date of the 2002 Guidelines).]

2. Certain findings are not required when support is set at the guideline presumptive amount.

a. When the court sets support in accordance with the guidelines, specific findings regarding a child's reasonable needs or the relative ability of each parent to provide support are not required. [2015 Guidelines; *Browne v. Browne*, 101 N.C. App. 617,

400 S.E.2d 736 (1991) (absent a timely and proper request for a variance from the guidelines, support set consistent with the guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education, and maintenance).]

b. However, when a court considers a request for deviation, the court must make findings as to the child's reasonable needs for support and the parents' ability to provide support, even if the court decides against deviation. See Section IV.G.2, below.

3. Findings are not required when adjustments are made to the presumptive amount for extraordinary expenses.

a. "[E]xtraordinary child-related expenses . . . may be . . . ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest." [2015 Guidelines.] This language first appeared in the 2002 Guidelines and was a substantial change from the 1998 Guidelines.

b. Cases applying the 1998 and 1994 Guidelines have not required courts to make findings as to the needs of the child, the parents' ability to pay, or the reasonableness of the expenses, when making adjustments for extraordinary expenses.

i. *Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003) (citing *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000)) (adjustment for extraordinary expenses was not a deviation from the support guidelines but was, rather, a discretionary adjustment to the presumptive amount, so trial court not required to make specific findings regarding the child's needs or the parents' ability to pay the extraordinary expenses); *Biggs* (absent a party's request for deviation, trial court was under no obligation to render findings of fact as to the child's needs and the noncustodial parent's ability to pay when father was ordered to pay prospective private school expenses; court adjusted the presumptive guideline amount for those expenses but did not deviate).]

c. Cases applying the 2002 and 2006 Guidelines, relying on *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000), have not required findings in the case of extraordinary expenses.

i. *Ludlam v. Miller,* 225 N.C. App. 350, 364, 739 S.E.2d 555, 563 (2013) (quoting *Biggs v. Greer*, 136 N.C. App. 294, 298, 524 S.E.2d 577, 581–82 (2000)) ("[A]bsent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses." (applying 2006 Guidelines)); *Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**) (trial court did not deviate from the presumptive guidelines but, rather, adjusted guideline amounts to account for the extraordinary expense of private schooling; under *Biggs*, trial court not required to make findings as to whether private school was reasonable, necessary, and in the children's best interest; mother's argument that the 2006 Guidelines required these findings rejected); *Herriman v. Gaston Cty. ex rel. Herriman*, 179 N.C. App. 225, 633 S.E.2d 890 (2006) (**unpublished**) (citing *Biggs*) (trial court did not deviate from guidelines when it found that children's

private school tuition was an extraordinary expense, and thus court was under no obligation to render findings of fact; 2002 Guidelines applicable).]

ii. *Cf. Parnell v. Parnell*, 189 N.C. App. 531, 659 S.E.2d 490 (2008) (**unpublished**) (when a party requests deviation, the trial court is required to make findings regarding extraordinary expenses; recognizing the general rule in *Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003), and *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000), set out in Section III.D.3.b.i, above, but limiting it to cases in which deviation was not requested).]

iii. For more on extraordinary expenses, see Section III.L.5, below.

4. When the guidelines are not applicable. The guidelines do **not** apply with respect to:

a. Child support orders entered against stepparents or other parties who are secondarily liable for child support. [2015 Guidelines. *See Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994).]

5. Application of the guidelines when there is an unincorporated separation agreement.

a. For prospective support.

i. Prospective support means support to be paid from the date of the filing of the complaint or motion seeking support forward in time. [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998).]

ii. When a valid, unincorporated separation agreement determines a parent's child support obligations, in a subsequent action for child support, the court must base the parent's prospective child support obligation on the amount of support provided under the separation agreement, rather than the amount of support payable under the child support guidelines, unless the court determines, by the greater weight of the evidence, taking into account the child's needs and the factors enumerated in the first sentence of G.S. 50-13.4(c), that the amount of support under the separation agreement is unreasonable. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004); 2015 Guidelines.]

iii. For more about setting prospective support when there is an unincorporated separation agreement, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.G.6.

b. For retroactive support.

i. Retroactive support means support owed for a time period before a complaint or motion seeking support is filed. [*State ex. rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998).]

ii. Where a valid, unincorporated separation agreement sets out the obligations of a parent for support and the parent fully complies with that obligation, a trial court is not permitted to award retroactive child support in an amount different than the amount required by the unincorporated agreement absent an emergency situation. [*Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (citing *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E.2d 487 (1963)) (interpreting 2006 Guidelines) (time period in *Carson* for which support was sought was three years prior to the filing of the complaint, during which time parties had an

unincorporated separation agreement that was not being breached; trial court erred by using guidelines to determine retroactive support when unincorporated separation agreement was in effect and was not being breached); 2015 Guidelines.] The 2011 and 2015 Guidelines provide that "if a child's parents have executed a valid, unincorporated separation agreement that determined a parent's child support obligation for the period of time before the child support action was filed, the court shall not enter an order for retroactive child support or prior maintenance in an amount different than the amount required by the unincorporated separation agreement" without mentioning an exception for an emergency. Case law allows retroactive support in an amount different than the amount in an unincorporated separation agreement in an emergency situation. [See *Fuchs, Biggs v. Greer,* 136 N.C. App. 294, 524 S.E.2d 577 (2000), and other cases cited in *Carson*.]

iii. The rule cited above, that a trial court cannot alter the terms of a valid, unincorporated separation agreement retroactively absent an emergency situation, applies to provisions in the agreement concerning payment of the child's medical expenses. [*Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (when there was no evidence that father had breached the provisions of the agreement regarding payment of medical expenses, trial court could not order father to retroactively pay expenses different than the ones parties had agreed on).]

iv. The "emergency" may concern the child but could also arise when the custodial parent is prohibited from seeking a court-ordered increase in child support because of an accident or illness. [*Carson v. Carson,* 199 N.C. App. 101, 108 n.5, 680 S.E.2d 885, 890 n.5 (2009).]

v. For more on this point, see 2010 Howell Bulletin, www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf.

c. Incorporated agreements are court orders subject to modification only upon a showing of changed circumstances. [*Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005) (considering request to modify child support provisions in an incorporated agreement).] For a discussion of the modifiability of child support provisions in an incorporated separation agreement, see *Spousal Agreements,* Bench Book, Vol. 1, Chapter 1.

E. Income Shares Model

1. North Carolina's child support guidelines are based on the "income shares" model (used by approximately thirty-three states). [2015 Guidelines.]

a. The income shares model is the prevailing model for child support guidelines in the United States. [See "Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting," 37 Fam. L.Q. 165 (2003–2004); Child Support Guideline Models By State, http://www.ncsl.org/research/human-services/guideline-models-by-state.aspx.]

2. The income shares model is based on the concept that child support is a shared parental responsibility and that a child should receive the same proportion of parental income he would have received if the child's parents lived together. [2015 Guidelines.]
3. The schedule of basic child support obligations is based primarily on an analysis of economic research regarding family expenditures for children. [2015 Guidelines; *see* 2010 Howell Bulletin, www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf.]
4. Using these guidelines, a parent's basic child support obligation generally decreases as a percentage of the parent's income as the parents' combined income increases.

F. Low-Income Parents

1. The N.C. Schedule of Basic Support Obligations (Form AOC-A-162, North Carolina Child Support Guidelines, at 7–18) incorporates a self-support reserve based on the federal poverty level for an individual.
   a. The self-support reserve is reflected in the shaded area of the schedule of basic support obligations. [Form AOC-A-162, at 7.]
   b. The self-support reserve is intended to allow low-income noncustodial parents to retain enough of their income to meet their own basic needs before they are required to pay more than a minimal amount of child support.
2. When a noncustodial parent's adjusted gross income falls within the shaded area in the guidelines' schedule of basic support obligations, the parent's presumptive child support obligation is the amount shown in the shaded area of the schedule considering only the obligor's income. [2015 Guidelines.]
3. When the self-support reserve applies, child-related health insurance premiums and child care expenses are not prorated between the parents and added to or subtracted from the obligor's basic child support obligation. In these cases, child care expenses and health insurance premiums should not be used to calculate the child support obligation. [2015 Guidelines.]
4. However, the guidelines provide that the payment of child care expenses, health insurance premiums, and other extraordinary expenses by either parent may be the basis for a deviation in a self-support reserve case. [2015 Guidelines.]
5. While the guidelines do not specifically state that extraordinary expenses are not prorated between the parties in a self-support reserve case, the 2011 and 2015 Guidelines do state in the Self-Support Reserve section that payment of extraordinary expenses may be a basis for deviation, indicating that extraordinary expenses should not be prorated. [*But see Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**) (applying 2006 Guidelines) (that the parent's income qualifies for the self-support reserve does not require a court to exclude extraordinary expenses not specifically mentioned in the guidelines section on low-income parents, such as private school tuition, from the calculation of the obligor's child support obligation; trial court on remand to recalculate the mother's child support obligation; appellate court noting that if mother's gross income is within the shaded area of schedule of basic support obligations, pursuant to the guidelines, she is obligated to pay her portion of private school tuition because tuition, unlike child care and health insurance premiums, is not specifically excluded in the section dealing with parents with low incomes). *Cf. Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013)

(applying 2011 Guidelines) (in self-support reserve case, trial court did not abuse its discretion when it did not require father to contribute to private school expenses based in part on his inability to pay; appellate court acknowledged that trial court may have mistakenly thought that ordering father to pay private school expenses would have constituted a deviation).]

6. The self-support reserve is applied only in cases involving primary custody (when Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody, is used) and cannot be used in cases involving shared or split custody (when Worksheet B, Form AOC-CV-628, Child Support Obligation Joint or Shared Physical Custody, or Worksheet C, Form AOC-CV-629, Child Support Obligation Split Custody, is used). [2015 Guidelines.]
7. Even when an obligor's income falls within the shaded area in the guidelines' schedule of basic support obligations, the trial court may order that uninsured medical or dental expenses in excess of $250 per year or other uninsured health care costs be paid by either parent or both parents in such proportion as the court deems appropriate. [2015 Guidelines.]

G. Parents with High Combined Incomes

1. The N.C. Child Support Guidelines cannot be used to determine the supporting parent's child support obligation if the parents' combined adjusted gross incomes exceed $25,000 per month ($300,000 per year). [2015 Guidelines.]
2. When the parents' combined adjusted gross incomes exceed $25,000 per month, the court must determine each parent's child support obligation on a case-by-case basis and should set support in an amount as to meet the reasonable needs of the child, having due regard for the relative abilities of the parties to provide support and for other facts of the case as provided in the first sentence of G.S. 50-13.4(c). [2015 Guidelines (for a more complete statement of the factors that a court should consider in high-income cases pursuant to the 2015 Guidelines, see Section III.G.3, immediately below); *Pascoe v. Pascoe,* 183 N.C. App. 648, 645 S.E.2d 156 (2007) (application of a case-by-case standard for high-income cases has been repeatedly upheld); *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 596 S.E.2d 285 (2004) (trial court granted considerable discretion in its consideration of the factors in G.S. 50-13.4(c) when presumptive guidelines did not apply because of high combined income), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662 (2005); *Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (earlier version of guidelines not applicable when parties' combined annual income exceeded $150,000), *superseded by statute on other grounds as stated in Williamson v. Williamson,* 142 N.C. App. 702, 523 S.E.2d 729 (2001).]
3. The 2015 Guidelines clarify that support in high-income cases is set considering all factors listed in G.S. 50-13.4(c), stating that the court should set support "in such amount as to meet 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." [*See Zurosky v. Shaffer,* 236 N.C. App. 219, 763 S.E.2d 755 (2014) (citing *Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014)) (in high-income cases in which the guidelines are not applicable, when determining prospective or retroactive

child support, a trial court must consider the factors in G.S. 50-13.4(c).] See also the cases discussed in Section VII.D, below, for other requirements when determining retroactive support.

4. In a high-income case, the trial court is not bound by, and should not consider, the guidelines in determining a parent's child support obligation. The trial court is required to order support based on particular facts and circumstances of the case. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006) (rejecting parent's argument that trial court was required to "mathematically extrapolate" his support obligation from the amounts provided in the guidelines). *But see Davis v. Davis,* 156 N.C. App. 217, 575 S.E.2d 72 (2003) (**unpublished**) (in high-income case, the amount of child support awarded cannot be lower than the maximum basic child support obligation in the guidelines); 2015 Guidelines (stating that the "schedule of basic child support may be of assistance to the court in determining a minimal level of child support"); *Derian v. Derian,* 223 N.C. App. 210 (2012) (**unpublished**) (citing the guideline language quoted just above and also included in the 2011 Guidelines and *Pascoe v. Pascoe,* 183 N.C. App. 648, 645 S.E.2d 156 (2007)) (trial court order confirming arbitrator's award of guideline amount for support in high-income case affirmed based on arbitrator's findings that mother's claimed child support expenses were unreasonable when she was living beyond her means and child was only with her 50 percent of the time; father also ordered to pay for private school and tutoring, to maintain health insurance, and to pay all uninsured costs).]

5. In determining child support obligations where the presumptive guidelines do not apply, a trial court must take into consideration a parent's court-ordered financial obligation to another child born of a subsequent marriage. [*Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662 (2005).]

6. In high-income cases, as in other cases, the trial court must make a finding as to a party's actual present income when awarding prospective support. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (when only findings as to father's income were (1) that the amount of average gross monthly income listed in father's financial affidavit was $25,000, which trial court "clearly assumed" was significantly lower than his actual income, based on monthly expenditures of $87,000, and (2) that father's income was substantial, matter was remanded for findings as to the actual monetary value of father's income).]

7. In high-income case, findings as to the reasonable needs of the children were not sufficient when order set out, without any itemization, a lump sum amount for the reasonable needs of the children over a four-year period, gave no indication of the methodology used or the facts the trial court considered, and made no findings as to the individual costs and expenses likely to be incurred for each child in the future. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006) (fact that court made findings regarding the parties' particular estate, earnings, conditions, and accustomed standard of living did not remedy the absence of findings as to the children's reasonable needs); *Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (findings were not sufficient to support an award of $7,343/month in child support when any findings made established that child's actual present needs, based on mother's actual historical expenditures, were $2,194/month; an award of prospective support may be made by estimating the child's needs based upon the higher standard of living made possible by a high-income parent's means if detailed

findings are made to support the award; on remand, trial court to make findings, with a monetary value, as to the child's reasonable needs in light of the ability of the parents to provide support).]

8. Where the father failed to assign error to the finding setting out the child's monthly needs while in his custody or to other findings as to child's reasonable needs, the trial court did not, in a high-income case, abuse its discretion when it failed to award the father an "offset" for the expenses he paid while the child was in his custody. [*Pascoe v. Pascoe,* 183 N.C. App. 648, 645 S.E.2d 156 (2007) (father was required to pay monthly support and the child's expenses while in his custody).]

H. Determining a Parent's Child Support Obligation under the Child Support Guidelines

1. The first step in determining a parent's child support obligation under the guidelines is to determine each parent's actual present **gross income**. [See Section III.I, below.]
   a. Although North Carolina's schedule of basic support obligations is based on net income (gross income minus federal and state income and payroll taxes), the net income ranges have been converted to gross income ranges by factoring in federal and state income and payroll taxes.
   b. A parent's child support obligation should be based on the parent's actual income at the time the child support obligation is determined. [*Harnett Cty. ex rel. De la Rosa v. De la Rosa,* 770 S.E.2d 106, 112 (N.C. Ct. App. 2015) (quoting *Respess v. Respess,* 232 N.C. App. 611, 630, 754 S.E.2d 691, 704 (2014) (generally, child support is determined by a party's actual income at the time the award is made); *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006) ("[g]enerally, a party's ability to pay child support is determined by that party's actual income at the time the award is made"), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007); *Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001) (trial court erred when it included income from a part-time job parent no longer held when order entered); *Holland v. Holland,* 169 N.C. App. 564, 610 S.E.2d 231 (2005) (error to use 2001 income for 2002 order; however, court of appeals noted that with appropriate findings, the trial court could have used the 2001 information to determine father's income from his farming business for purposes of computing his child support obligation); *Moore v. McLaughlin,* 772 S.E.2d 14 (N.C. Ct. App. 2015) (**unpublished**) (trial court erred when it calculated father's income by averaging his income for the years 2010 through 2013 with no findings to support a deviation, instead of using father's income at the time of the hearing); *Bledsoe v. Bledsoe,* 227 N.C. App. 224, 741 S.E.2d 927 (2013) (**unpublished**) (when defendant testified as to her earnings for the first three months of 2012, trial court erred when it based child support order on her 2011 earnings; order did not appear to consider the 2012 earnings and did not include the findings required by *Holland* to support using earnings from a prior year).]
   c. See Sections III.J.2 and III.J.5, both below, discussing when income may be imputed to a parent and when a court may average a parent's income to determine actual present income.
2. The second step in determining a parent's child support obligation is to determine allowable deductions from a parent's gross income to get the parent's **adjusted gross income**.

A parent's presumptive child support obligation is based primarily on his adjusted gross income. [See Section III.K, below.]

3. Finally, if applicable, **adjustments** to a parent's basic child support obligation may be made—certain expenditures may be added to the obligation and prorated between the parties, and certain deductions may be subtracted from the obligation. [See Section III.L, below.]
4. When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy. [*Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (a trial court has "great discretion" in establishing amount of child support to be awarded); *State ex rel. Williams v. Williams,* 179 N.C. App. 838, 635 S.E.2d 495 (2006); *Felts v. Felts,* 192 N.C. App. 543, 665 S.E.2d 594 (**unpublished**) (citing *Williams*), *review denied,* 362 N.C. 680, 670 S.E.2d 232 (2008).]

I. Gross Income

1. Gross income is income before deductions for federal or state income taxes, Social Security or Medicare taxes, health insurance premiums, retirement contributions, or other amounts withheld from a parent's income. [2015 Guidelines.]
2. The determination of gross income is a conclusion of law rather than a finding of fact. [*State ex rel. Midgett v. Midgett,* 199 N.C. App. 202, 680 S.E.2d 876 (2009) (determination requires the application of fixed rules of law).]
3. Included in gross income.
   a. Gross income includes income from any source, including but not limited to the following:
      i. Income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.);
      ii. Ownership or operation of a business, partnership, or corporation;
      iii. Rental of property;
      iv. Retirement or pensions;
      v. Interest, trusts, capital gains, or annuities;
      vi. Capital gains;
      vii. Social Security benefits of the parent;
      viii. Workers' compensation benefits;
      ix. Unemployment insurance benefits;
      x. Disability pay and insurance benefits;
      xi. Gifts or prizes; and
      xii. Alimony and maintenance received from a person who is not a party to the pending child support action. [2015 Guidelines.]
   b. "Income" has been construed broadly. [*See Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005) (including income from personal injury settlement and rejecting

argument that awards compensating "pain and suffering" should be excluded from definition of income for child support purposes).]

c. A court may consider all available sources of income. [*Moore v. Onafowora,* 208 N.C. App. 674, 703 S.E.2d 744 (2010) (citing *Burnett v. Wheeler,* 128 N.C. App. 174, 493 S.E.2d 804 (1997)); *Hinshaw v. Kuntz,* 234 N.C. App. 502, 760 S.E.2d 296 (2014) (must include bonuses as income where court finds parties likely to continue to receive bonuses in the future, even if the children's reasonable needs can be satisfied without including bonus income).]

d. Veterans Administration benefits and Social Security benefits received for the benefit of a child as a result of the disability or retirement of either parent are income to the parent on whose earnings record the benefits are paid. [2015 Guidelines (adding Veterans Administration benefits).]

   i. The amount of the benefit is deducted from that parent's child support obligation. [2015 Guidelines.]

   ii. Earlier versions of the guidelines provided otherwise. [*See* N.C. Child Support Guidelines, 1999 Ann. R. N.C. 32 (effective Oct. 1, 1998), and *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999) (guidelines prohibited trial court from considering disability payments received on behalf of a child as income to the noncustodial parent in determining that parent's presumptive support amount).]

   iii. A North Carolina court does not have authority to order a parent to transfer to the other parent past Social Security disability payments made to that parent on behalf of their children. [*O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008) (citing *Brevard v. Brevard,* 74 N.C. App. 484, 328 S.E.2d 789 (1985)) (noting that two later appellate opinions conflict with *Brevard*).]

   iv. The 2015 Guidelines provide that if the amount of Veterans Administration benefits and Social Security benefits received by the child is based on the obligor's disability or retirement and exceeds the obligor's child support obligation, no order for prospective support should be entered unless the court decides to deviate. Therefore, a trial court cannot order a custodial parent to pay any portion of the Social Security or Veterans Administration monies to the noncustodial parent. For more on this point, see 2010 Howell Bulletin, www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf (discussing Social Security benefits), and Cheryl Howell, *We Have New Child Support Guidelines,* UNC Sch. of Gov't: On the Civil Side Blog (Jan. 28, 2015), http://civil.sog.unc.edu/we-have-new-child-support-guidelines (discussing addition by 2015 Guidelines of Veterans Benefits received by a child as income).

   v. Employer contributions toward future Social Security payments for an employee are specifically excluded from income. [2015 Guidelines.] See Section III.I.4, below.

e. Alimony or maintenance received from a person who is not a party to the pending child support action. [2015 Guidelines.]

   i. Cost-free housing has been considered a form of maintenance, the value of which is to be included as gross income. [*Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (trial court did not err in including as income $300 per month,

which was the value of father's free housing from his parents). *See also State ex rel. Williams v. Williams*, 179 N.C. App. 838, 635 S.E.2d 495 (2006) (vehicle and housing payments made by plaintiff's father were maintenance or gift income).]

ii. A friend's consistent and recurring deposits to a parent's bank account, when parent provided no documentation or other evidence supporting his assertion that the deposits were loans, were properly considered income to that parent as either gifts or maintenance. [*Onslow Cty. ex rel. Eggleston v. Willingham,* 199 N.C. App. 755, 687 S.E.2d 541 (2009) (**unpublished**) (deposits occurred continuously over a period of two to three months immediately preceding the hearing).]

f. Gifts.

i. Cost-free housing and cost-free use of a car have been considered gift income includable in gross income. [*State ex rel. Williams v. Williams,* 179 N.C. App. 838, 635 S.E.2d 495 (2006) (trial court to recalculate plaintiff's income to take into account payments made by plaintiff's father on her behalf for rent and a car, when plaintiff testified that father would continue to make rent payments through the end of the lease period and until the car was paid for); *Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005) (cost-free housing properly considered a form of gross income valued at $300 per month).]

ii. A friend's consistent and recurring deposits to a parent's bank account, when parent provided no documentation or other evidence supporting his assertion that the deposits were loans, were properly considered income to that parent as either gifts or maintenance. [*Onslow Cty. ex rel. Eggleston v. Willingham,* 199 N.C. App. 755, 687 S.E.2d 541 (2009) (**unpublished**) (deposits occurred continuously over a period of two to three months immediately preceding the hearing).]

iii. Gift income will not be included as income to a parent based on the mere allegation of the other parent, even if the trial court finds the recipient parent not credible. [*Lee Cty. Dep't of Soc. Servs. ex rel. Martin v. Barbee*, 181 N.C. App. 607, 640 S.E.2d 447 (2007) (**unpublished**) (order including $20,000 gift income to father from his parents, based on mother's "belief" that parents continued practice of annual gifts after parties' divorce, reversed for lack of evidence, even though trial court found father's testimony about the matter not credible; father's lack of credibility did not relieve mother of her burden to offer competent evidence to support the allegation of gift income).]

g. Veterans benefits, military pensions and retirement benefits, military pay and allowances, state and federal retirement benefits, and other pensions and annuities. [2015 Guidelines (including as gross income Veterans Administration benefits, retirement or pensions, and annuities).]

i. A servicemember's basic allowance for housing (BAH) should be included as gross income for purposes of calculating child support. [*Cumberland Cty. ex rel. State of Washington v. Cheeks,* 786 S.E.2d 432 (N.C. Ct. App. 2016) (**unpublished**) (BAH was paid on father's behalf for rent and utilities and

substantially reduced his personal living expenses).] For more on *Cheeks*, see Cheryl Howell, *Child Support: Maintenance and Gifts Are Actual Income??* UNC Sch. of Gov't: On the Civil Side Blog (May 13, 2016), http://civil.sog.unc.edu/child-support-maintenance-and-gifts-are-actual-income.

h. Not yet classified as income or nonincome.

i. No North Carolina court has decided whether educational grants are income under the guidelines. [*McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (where trial court classified a school grant to father of $1,800 as income but failed to make sufficient findings, matter was remanded; trial court did not find whether funds qualified as a means-tested public assistance program, whether they significantly reduced father's personal living expenses, or whether there were any limits on use of the funds), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007).]

4. Excluded from gross income.

a. Employer contributions toward future Social Security and Medicare payments for an employee. [2015 Guidelines (this language was added in the 2011 Guidelines).] For a case decided under the 2006 Guidelinesand holding that payments made by an employer toward an employee's future Social Security and Medicare benefits may not be considered as income for the purpose of determining child support obligations, see *Caskey v. Caskey,* 206 N.C. App. 710, 698 S.E.2d 712 (2010) (Medicare and Social Security taxes that employers are required to pay do not provide a parent with immediate access to additional funds that could be used to pay child support).

b. Amounts that are paid by a parent's employer directly to a third party or entity for health, disability, or life insurance or retirement benefits and are not withheld or deducted from the parent's wages, salary, or pay. [2015 Guidelines.]

c. Benefits received by a parent from means-tested public assistance programs, including Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI), Electronic Food and Nutrition Benefits, and General Assistance. [2015 Guidelines.]

i. Because Supplemental Security Income (SSI) payments are not considered in initial child support calculations, defendant's SSI payments could not be considered in determining his ability to pay in a related contempt proceeding. [*Cty. of Durham ex rel. Wood v. Orr,* 229 N.C. App. 196, 749 S.E.2d 113 (2013) (**unpublished**).]

d. Income of a person who is not a parent of the child for whom support is being determined, regardless of whether that person is married to or lives with the child's parent or has physical custody of the child. [2015 Guidelines. *See Kennedy v. Kennedy*, 107 N.C. App. 695, 421 S.E.2d 795 (1992) (father considered to have received only one-half of rental income from property held as tenants by the entirety with his current wife).]

e. Alimony that is received by a parent from a spouse or ex-spouse who is the other parent involved in the pending child support action. [2015 Guidelines (including as gross income alimony or maintenance received from persons other than the parties to the instant action).]

f. Adoption assistance subsidies for special needs children are not income of the parents but constitute money received by the children. [2015 Guidelines (specifically excluding these payments from income for the first time and codifying the holding in *Gaston Cty. ex rel. Miller v. Miller,* 168 N.C. App. 577, 608 S.E.2d 101 (2005) (such payments are a resource of the adopted child, not a subsidy to the parents; North Carolina Administrative Code and the Adoption Assistance Agreement between the county and the parents so provided)).]

g. Child support payments received on behalf of a child other than the child for whom support is being sought in the present action. [2015 Guidelines.]

i. NOTE: The 2006 Guidelines did not exclude from a parent's income support received by that parent for other children. Thus, child support received by a parent for another child was included as income to the parent in *New Hanover Child Support Enforcement ex rel. Dillon v. Rains*, 193 N.C. App. 208, 666 S.E.2d 800 (2008) (noting, however, that in the majority of states reviewed, support received for one child is excluded from income when determining the support obligations for another child). [*But cf. Orange Cty. ex rel. Clayton v. Hamilton,* 213 N.C. App. 205, 714 S.E.2d 184 (2011) (stating that *Rains* did not endorse the use of child support as income and holding, in a case decided under the 2006 Guidelines, that the trial court properly refused to include child support received for children from a later marriage in the custodial mother's income).]

ii. The 2011 Guidelines changed the result in *Rains* for child support matters heard on or after Jan. 1, 2011. [*See Orange Cty. ex rel. Clayton v. Hamilton,* 213 N.C. App. 205, 211 n.2, 714 S.E.2d 184, 189 n.2 (2011) (noting that 2011 Guidelines specifically disallow as income child support received for a child other than the child for whom support is being sought).]

5. Income from self-employment or operation of a business.

a. In the case of income derived from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, gross income is gross receipts minus ordinary and necessary expenses required for self-employment or business operation. [2015 Guidelines; *Head v. Mosier,* 197 N.C. App. 328, 677 S.E.2d 191 (2009) (to calculate gross income derived from self-employment, ordinary and necessary business expenses required for self-employment or business operation are subtracted from gross receipts).]

b. Income from self-employment or operation of a business includes or may include the following:

i. A cash reserve account (retained earnings) of a corporation that a parent partially owned, even though the account was encumbered by an agreement between the parent and a creditor bank that restricted a portion of the cash reserves from being paid to the parent as salary. [*Barham v. Barham*, 127 N.C. App. 20, 487 S.E.2d 774 (1997) (that cash reserve account was available to the parent was evidenced by the parent's decision to pledge those funds to the bank in exchange for business financing; court also found that encumbered portion of the cash reserve account did not constitute an ordinary and necessary expense

under guidelines definition), *aff'd per curiam,* 347 N.C. 570, 494 S.E.2d 763 (1998).]

ii. Undistributed net income of a closely-held (Subchapter C) corporation or partnership may be attributed to a parent who is a shareholder or partner if the parent could require distribution by virtue of the parent's legal interest in the corporation or partnership and if retention of the income by the corporation or partnership is not reasonably necessary for business purposes. [*See Cauble v. Cauble*, 133 N.C. App. 390, 515 S.E.2d 708 (1999) (father owned a controlling interest in a corporation so that he might have directed distribution of corporate profits to his benefit).]

iii. In-kind payments and expense reimbursements (including, for example, free housing, use of a company car, or reimbursed meals) received by a parent in the course of employment, self-employment, or operation of a business are counted as gross income if they are significant and reduce the parent's personal living expenses. [2015 Guidelines; *Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002) (no error when trial court added $250 per month to father's gross income since he had the benefit of a company car).]

c. Ordinary and necessary business expenses.

i. Ordinary and necessary business expenses do not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the court to be inappropriate for determining gross income. [2015 Guidelines; *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992) (per the guidelines, accelerated depreciation is not to be deducted from a parent's gross income as an ordinary and necessary business expense). *See also Holland v. Holland,* 169 N.C. App. 564, 610 S.E.2d 231 (2005) (trial court erred by treating all depreciation as accelerated depreciation, which, under *Tise*, is not allowed as a deduction from a parent's business income).]

ii. A trial court has discretion to deduct from a parent's monthly gross income the amount of straight line depreciation allowed by the Internal Revenue Code. [*Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992). *See also Holland v. Holland,* 169 N.C. App. 564, 610 S.E.2d 231 (2005) (trial court erred by treating all of father's farm equipment depreciation as nondeductible accelerated depreciation and by failing to exercise its discretion to deduct from father's gross income straight line depreciation allowed by Internal Revenue Code).]

iii. In the context of businesses involving the rental of real property, ordinary and necessary business expenses generally include expenses for repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest. Payments on the principal amount of a mortgage loan are not considered ordinary and necessary business expenses. [*Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992).]

iv. A court may refuse to allow a parent to deduct business expenses for a home office or personal vehicle, bad debts, depreciation, and repayment of the principal on a business loan if it determines that the expenses are not appropriate for

the purpose of determining gross income under the guidelines. [*Cauble v. Cauble*, 133 N.C. App. 390, 515 S.E.2d 708 (1999) (no error when court disallowed bad debt and depreciation expenses claimed by Subchapter C corporation); *Kennedy v. Kennedy*, 107 N.C. App. 695, 421 S.E.2d 795 (1992) (no error when court disallowed expenses for utilities, phone, truck lease, insurance, home and truck maintenance, and personal property taxes claimed by self-employed musician/father; expenses would have been incurred by father whether or not he was in the music business); *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992) (no deduction for payments on mortgage principal secured by rental property).]

v. Case remanded for further findings when the trial court failed to make findings on evidence presented by a self-employed father as to his business expenses. [*New Hanover Child Support Enforcement ex rel. Dillon v. Rains*, 193 N.C. App. 208, 666 S.E.2d 800 (2008) (order did not reference the $33,000 that father claimed as business expenses and did not include findings on father's evidence that he often used his personal account to cover business expenses).]

6. Income received on an irregular, nonrecurring, or one-time basis.

a. When income is received on an irregular, nonrecurring, or one-time basis, the court may average or prorate the income over a specified period of time or require the parent to pay as child support the same percentage of the parent's nonrecurring income as that paid with respect to the parent's recurring income. [2015 Guidelines.]

b. There is no guidelines provision that instructs a trial court to treat regular income and irregular or nonrecurring bonus income separately. [*Hinshaw v. Kuntz,* 234 N.C. App. 502, 760 S.E.2d 296 (2014) (pursuant to the guidelines provision mentioned immediately above, a trial court is to average or prorate irregular or nonrecurring bonus income, which is then included in the calculation of child support, or order a parent to pay the same percentage of child support from nonrecurring income as the parent pays from regular or recurring income).]

c. The guidelines do not require a trial court to include nonrecurring income in its child support calculations. [*Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013) (court has discretion in this matter). *Cf. Hinshaw v. Kuntz,* 234 N.C. App. 502, 760 S.E.2d 296 (2014) (it was error to fail to include recurring bonus income in the trial court's calculation of the parties' base incomes and the overall child support award).]

d. Mere fact that a nonrecurring payment has occurred, in the absence of evidence that the payment was "income," is not sufficient by itself to be considered as nonrecurring income for calculation of child support. [*McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007).]

e. Inheritance.

i. No abuse of discretion when trial court did not include father's inheritance of $368,487 in its child support calculations. [*Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013) (citing *Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005)) (trial court has great discretion in this determination, and father had complied with consent order that required him to place 15 percent of inheritance into trust for the children).]

f. Workers' compensation payment.

i. A one-time lump sum workers' compensation payment paid to the father was income. [*Felts v. Felts,* 192 N.C. App. 543, 665 S.E.2d 594 (**unpublished**) (not paginated on Westlaw) (workers' compensation lump sum settlement of $125,000 constituted "one-time, nonrecurring" income to the father under the guidelines), *review denied,* 362 N.C. 680, 670 S.E.2d 232 (2008); *Freeze v. Freeze*, 159 N.C. App. 228, 582 S.E.2d 725 (2003) (**unpublished**) (trial court erred by failing to include a lump sum workers' compensation settlement as income attributable to father).]

ii. Trial court did not abuse its discretion when it, after determining that father's workers' compensation lump-sum settlement of $125,000 constituted "one-time, nonrecurring" income to the father, averaged the award over twenty-nine months to determine father's modified child support payment. Under the guidelines, the trial court could either average the settlement over a specified period of time or require father to pay as child support a percentage of the settlement equal to the percentage of his recurring income paid for child support. [*Felts v. Felts,* 192 N.C. App. 543, 665 S.E.2d 594 (**unpublished**) (not paginated on Westlaw) (period of time included the seventeen-month period before father received the settlement, during which time he made no child support payments, and the twelve-month period after receipt of the award until entry of the court's order), *review denied,* 362 N.C. 680, 670 S.E.2d 232 (2008).]

g. Personal injury settlement.

i. Lump sum accident settlement placed in a family trust was "nonrecurring income" within the meaning of the guidelines. [*Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005) (no error in treating entire trust principal as nonrecurring income under the guidelines, rejecting father's argument that only the interest income generated by the trust should be considered).]

h. Other.

i. Sale of the marital house distributed to mother for $249,000 was not nonrecurring income to her without evidence by father that receipt of the sales price was "income." [*McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (court reserved for another day the decision about how to treat, for child support purposes, the type of "gain" the mother received from the sale of a distributed marital asset because there was no evidence of gain offered in this case), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007).]

7. Income verification.

a. Income statements of the parents should be verified through documentation of both current and past income. Suitable documentation of current earnings (at least one full month's worth) includes pay stubs, employer statements, or business receipts and expenses. Documentation of current income must be supplemented with a copy of the parent's most recent tax return to provide verification of earnings over a longer period. [2015 Guidelines.]

b. In a IV-D or non-IV-D child support case, a written statement (or an employment verification form generated by the IV-D Automated Collections and Tracking

System) signed by the employer of a parent who is obligated to pay child support is admissible in a proceeding to establish, modify, or enforce a child support order to prove the amount of the obligor's gross income. [G.S. 110-139(c1).]

i. A "IV-D case" is a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the federal Social Security Act, as amended, and Article 9 of G.S. Chapter 110. [G.S. 110-129(7).] "IV-D" references the program's legal authorization under Title IV-D of the Social Security Act.

ii. A "non-IV-D case" is any case, other than a IV-D case, in which child support is legally obligated to be paid. [G.S. 110-129(7).]

c. A court may impose sanctions against a parent who fails to provide suitable documentation of his income upon motion of a party or by the court on its own motion. [2015 Guidelines. *See State ex rel. Midgett v. Midgett,* 199 N.C. App. 202, 680 S.E.2d 876 (2009) (citing the guidelines provision requiring income verification and noting that sanctions may be imposed for noncompliance).]

d. Father's stipulation that he would not raise inability to pay child support as a defense did not relieve him from full disclosure of his financial condition. [*Shaw v. Cameron,* 125 N.C. App. 522, 481 S.E.2d 365 (1997) (error for trial court to limit the scope of discoverable information; to determine father's child support obligation under guidelines, mother was entitled to discover value and nature of father's interest in any partnerships or corporations and terms of any trust of which he might be beneficiary, as well as amount of related income).]

J. Imputed Income—Use of Earning Capacity

1. General rule.

a. The general rule is that a parent's child support obligation is determined by that parent's **actual** income at the time the award is made or modified. [*Moore v. Onafowora,* 208 N.C. App. 674, 703 S.E.2d 744 (2010) (citing *Head v. Mosier,* 197 N.C. App. 328, 677 S.E.2d 191 (2009)); *Frey v. Best,* 189 N.C. App. 622, 659 S.E.2d 60 (2008) (citing *Goodhouse v. DeFravio,* 57 N.C. App. 124, 290 S.E.2d 751 (1982)); *McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (citing *Atwell v. Atwell,* 74 N.C. App. 231, 328 S.E.2d 47 (1985)), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007); *State ex rel. Godwin v. Williams*, 163 N.C. App. 353, 593 S.E.2d 123 (2004); *Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001).]

b. Under the guidelines, child support calculations are based on the parents' current incomes at the time the order is entered and not as of the time of remand, and they are not based on the parent's average monthly gross income over the years preceding the original trial, unless the average income is used to determine actual present income. [*State ex rel. Midgett v. Midgett,* 199 N.C. App. 202, 680 S.E.2d 876 (2009). *See also State ex rel. Williams v. Williams,* 179 N.C. App. 838, 635 S.E.2d 495 (2006) (trial court erred in basing defendant's income on a statement in defendant's bankruptcy filing made more than eighteen months before entry of the child support order).] See Section III.J.5, below, for discussion of circumstances allowing for child

support to be determined based on a parent's average monthly income for years prior to the hearing.

2. However, case law and the 2015 Guidelines provide that a parent's **capacity to earn** may be used in some circumstances.
   a. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize the parent's child support obligation, the court may calculate child support based on the parent's potential, rather than actual, income. [2015 Guidelines.]
      i. For more on imputing income to a voluntarily unemployed parent, see Cheryl Howell, *Imputing Income: Voluntary Unemployment Is Not Enough,* UNC Sch. of Gov't: On the Civil Side Blog (Sept. 18, 2015), http://civil.sog.unc.edu/imputing-income-voluntary-unemployment-is-not-enough. For more on the bad faith requirement, see other posts by Professor Howell:
         (a) *Imputing Income: So What Is Bad Faith?* UNC Sch. of Gov't: On the Civil Side Blog (Oct. 7, 2015), http://civil.sog.unc.edu/imputing-income-so-what-is-bad-faith.
         (b) *And They Said It Again: Never Use Earning Capacity Without Bad Faith,* UNC Sch. of Gov't: On the Civil Side Blog (Apr. 22, 2016), http://civil.sog.unc.edu/and-they-said-it-again-never-use-earning-capacity-without-bad-faith.
   b. Potential income may not be imputed to a parent who is physically or mentally incapacitated or who is the primary custodian for a child who is under the age of three years and for whom child support is being determined. [2015 Guidelines; 2011 Guidelines precluded imputing income to a parent who was "caring" for a child under the age of 3.]
3. When determining whether a parent has disregarded marital and parental obligations, a court is to consider whether the parent
   a. Failed to exercise his reasonable capacity to earn,
   b. Deliberately avoided her family's financial responsibilities,
   c. Acted in deliberate disregard for his support obligations,
   d. Refused to seek or to accept gainful employment,
   e. Willfully refused to secure or take a job,
   f. Deliberately failed to apply herself to business,
   g. Intentionally depressed his income to an artificial low, or
   h. Intentionally left employment to go into another business. [*Johnston Cty. ex rel. Bugge v. Bugge,* 218 N.C. App. 438, 722 S.E.2d 512 (2012) (citing *Wolf v. Wolf,* 151 N.C. App. 523, 526–27, 566 S.E.2d 516, 518–19 (2002)); *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (citing *Wolf*), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006)).]

4. Requirement of "bad faith."
   a. An intentional reduction in income, without more, is not sufficient to impute income. Some type of "bad faith" is required. The rule that a trial court cannot impute income absent a finding of bad faith "applies throughout the entire child support determination." [*Lasecki v. Lasecki*, 786 S.E.2d 286, 299 (N.C. Ct. App. 2016).] For more on this case, see Cheryl Howell, *And They Said It Again: Never Use Earning Capacity Without Bad Faith,* UNC Sch. of Gov't: On the Civil Side Blog (Apr. 22, 2016), http://civil.sog.unc.edu/and-they-said-it-again-never-use-earning-capacity-without-bad-faith.
   b. "Bad faith" has been recognized as a general term given to situations that trigger the earning capacity rule. The court of appeals has used the terms "bad faith" or "an absence of good faith" interchangeably and has found bad faith or otherwise imputed income based on evidence that a party deliberately suppressed income to avoid family responsibilities or acted in deliberate disregard of her obligation to provide reasonable support.
      i. Bad faith or absence of good faith. [*Metz v. Metz*, 212 N.C. App. 494, 711 S.E.2d 737 (2011) (for court to impose earning capacity rule, evidence must show that actions of party that resulted in reduced income were not taken in good faith); *Moore v. Onafowora,* 208 N.C. App. 674, 703 S.E.2d 744 (2010) (citing *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006)) (without a finding of bad faith, law of imputation is not applicable); *Frey v. Best,* 189 N.C. App. 622, 659 S.E.2d 60 (2008) (citing *Goodhouse v. DeFravio,* 57 N.C. App. 124, 290 S.E.2d 751 (1982)) (earning capacity rule must be based on evidence that tends to show the parent's actions resulting in reduction of income were not taken in good faith); *Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (citing *Bowers v. Bowers*, 141 N.C. App. 729, 541 S.E.2d 508 (2001)) (before earning capacity may be used as the basis of an award, there must be a showing that actions that reduced the party's income were taken in bad faith, to avoid family responsibilities), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004); *Sharpe v. Nobles,* 127 N.C. App. 705, 493 S.E.2d 288 (1997) (before using the earning capacity rule, there must be a showing that the actions which reduced a party's income were not taken in good faith); *Andrews v. Andrews,* 217 N.C. App. 154, 719 S.E.2d 128 (2011) (when father voluntarily resigned from one position and took another earning substantially less, without considering his ability to meet his child support obligation, it was error for court to conclude that father acted in good faith), *review denied,* 365 N.C. 561, 722 S.E.2d 595 (2012).]
      ii. Party deliberately depressed income to avoid family responsibilities or deliberately acted in disregard of an obligation to provide support. [*See Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (mother's "naive indifference" to her children's need for financial support was intentional and willful and showed a deliberate disregard of her responsibility to support her children, justifying imputing income to her), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006); *McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (findings supported conclusion that father had deliberately suppressed his income

and acted in deliberate disregard of his obligation to provide reasonable support to his children), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007); *Wolf v. Wolf,* 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002) (father's unemployment was voluntary and in "conscious and reckless disregard" of his duty to provide court-ordered child support); *Cook v. Cook*, 159 N.C. App. 657, 583 S.E.2d 696 (2003) (whether or not "bad faith" is the term used, an intentional reduction in income is not sufficient to support the use of earning capacity rule unless reduction is proven to have been made to avoid a child support obligation); *Kowalick v. Kowalick*, 129 N.C. App. 781, 501 S.E.2d 671 (1998) (before considering a party's earning capacity, trial court must make a finding that the party deliberately depressed his income in bad faith or otherwise disregarded his child support obligation); *Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**) (not paginated on Westlaw) (citing *Roberts*) (father's "naive indifference" to his ability to support his children on his meager salary as a part-time trainer and coach, and his willful refusal to take or secure other employment, warranted decision to impute income; father's investment income, which he had lived on during the marriage, had been significantly depleted as a result of losses and withdrawals for his monthly expenses after separation and divorce).]

c. A party's proscribed intent, being a mental attitude, must ordinarily be proven, if proven at all, by circumstantial evidence. [*Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006).]

d. A determination of bad faith in conjunction with suppression of income is best made on a case-by-case basis. [*Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (citing *Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004)), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006); *Metz v. Metz,* 212 N.C. App. 494, 711 S.E.2d 737 (2011) (citing *Pataky*).]

e. A party seeking a modification of child support based on a reduction in income has the burden of proving that the reduction in income was not the result of bad faith. [*Andrews v. Andrews,* 217 N.C. App. 154, 719 S.E.2d 128 (2011) (citing *Mittendorff v. Mittendorff,* 133 N.C. App. 343, 515 S.E.2d 464 (1999)), *review denied,* 365 N.C. 561, 722 S.E.2d 595 (2012); *Mason v. Erwin,* 157 N.C. App. 284, 579 S.E.2d 120 (2003) (citing *Mittendorff*).]

5. A trial court may, in some circumstances, average a parent's prior income without "imputing" income to that parent.

a. The trial court's mere use of the phrases "earning capacity" or "past income" does not automatically transform the order into one that "imputes" income to a parent. [*Hartsell v. Hartsell,* 189 N.C. App. 65, 657 S.E.2d 724 (2008) (court did not impute income when it based father's income on his present earnings from all available sources of income).]

b. The trial court did not impute income to a father when it calculated his income based on his present earnings as a teacher and on his average monthly income during the year prior to the hearing from a part-time grading business. [*Hartsell v. Hartsell,* 189 N.C. App. 65, 657 S.E.2d 724 (2008) (income from grading business determined from

actual earnings in year before hearing, which trial court reasonably concluded father could continue to earn, based on finding that employment was available in grading business at time of hearing).]

c. Trial court's averaging of father's income from his two prior tax returns to calculate his income at the time of the hearing was not an impermissible imputing of income to father where it was clear that the evidence was used to determine his present actual income. [*Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006) (where parent's documentation of his income in 2003 was inadequate and highly unreliable, no abuse of discretion when trial court averaged income from 2001 and 2002 tax returns to find gross monthly income at the time of the hearing). *See also Zurosky v. Shaffer,* 236 N.C. App. 219, 763 S.E.2d 755 (2014) (citing *Diehl*) (trial court's use of father's net income from 2003–2008 to determine father's actual income in 2013 upheld when trial court found father's reported income was not credible; findings in support of unreliability of father's evidence included that father overstated his monthly tax payments, contended that he operated at a significant deficit each month, failed to report significant expenditures, and presented conflicting evidence as to his postseparation work habits); *Moore v. Onafowora,* 208 N.C. App. 674, 703 S.E.2d 744 (2010) (when father submitted incomplete financial records for 2008 and 2009 but more complete records for 2007, trial court did not abuse its discretion when it used father's 2007 average monthly income to determine his gross monthly income in 2009; trial court properly considered father's income from all available sources).]

d. If a trial court's findings do not clearly indicate whether the trial court averaged income because of a lack of evidence of current income or whether the court improperly imposed the earning capacity rule without making a finding of bad faith, the matter may be reversed. [*See Reaves v. Reaves,* 174 N.C. App. 839, 622 S.E.2d 523 (2005) (**unpublished**) (when father presented no evidence of his current income, trial court averaged income based on tax returns for the most recent two years for which returns had been filed; matter reversed when findings insufficient for appellate court to determine whether trial court had devised an appropriate method of determining father's current income, given the lack of evidence, or whether it improperly imposed the earning capacity rule without a finding regarding bad faith).]

e. For a case distinguishing *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006), and *Hartsell v. Hartsell,* 189 N.C. App. 65, 657 S.E.2d 724 (2008), see *State ex rel. Midgett v. Midgett,* 199 N.C. App. 202, 680 S.E.2d 876 (2009) (reversing decision in which court determined husband's income based on wife's testimony as to husband's earnings, on average, from commercial fishing and towing and crushing cars over the course of their twelve-year marriage; income figures presented encompassed a number of years, not one or two prior years as in *Diehl* and *Hartsell*, there was no finding that husband had failed to provide tax returns as in *Diehl* and *Hartsell*, and court did not find that husband had the current ability to generate the income from those enterprises that he had earned in prior years, as the court had found in *Hartsell*).

6. Determining the amount of imputed income.

a. The amount of potential income imputed to a parent must be based on the parent's employment potential and probable earnings level, based on the parent's recent work

history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. [2015 Guidelines.]

b. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 40-hour work week. [2015 Guidelines.] To impute income at minimum wage, a trial court must find bad faith. [*State ex rel. Godwin v. Williams*, 163 N.C. App. 353, 593 S.E.2d 123 (2004) (trial court erred when it imputed income to full-time college student at the minimum wage of $5.15 per hour, on a full-time basis, without findings as to deliberate or bad faith conduct to suppress his income or otherwise avoid his child support obligation).] For a related article, see Cheryl Howell, *Imputing Income: Voluntary Unemployment Is Not Enough,* UNC Sch. of Gov't: On the Civil Side Blog (Sept. 18, 2015), http://civil.sog.unc.edu/imputing-income-voluntary-unemployment-is-not-enough.

c. Trial court did not err when it imputed to father a monthly gross income of $18,867, his monthly salary as a nurse anesthetist, even though father could no longer be employed in that capacity, having lost his licenses as a nurse anesthetist and nurse practitioner. [*Metz v. Metz,* 212 N.C. App. 494, 711 S.E.2d 737 (2011) (evidence showed that father had $355,000 under his control, including some $40,000 in cash, and that father had, by the time the matter was heard, withdrawn $40,000 from retirement accounts that were not included in his financial affidavits).]

d. Trial court did not err when it determined father's potential income based primarily on the amount father spent monthly on expenses, which father paid from amounts earned as a part-time trainer and coach, as well as from investment income and withdrawals from investment accounts. [*Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**) (proper to conclude that father's probable earning level would equal the amount on which he was actually living). *Cf. Harnett Cty. ex rel. De la Rosa v. De la Rosa,* 770 S.E.2d 106 (N.C. Ct. App. 2015) (trial court improperly based its determination of the amount to impute on father's living expenses, which were being paid by his parents).]

e. A trial court is not authorized to determine the amount of imputed income based on its determination of a degree of bad faith. [*Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013) (finding as to bad faith was unclear but suggested that the trial court had concluded that while the bad faith of both unemployed parents was insufficient to impute income at the parents' prior income levels, the degree of bad faith was sufficient to impute income to each parent at minimum wage; this was error, as trial court must base amount of imputed income on the parent's earning potential).]

7. Imputing income to a parent who is voluntarily unemployed.

a. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. [2015 Guidelines.]

b. The determination of whether to impute income to a parent who is voluntarily unemployed is a determination based in part on the conduct of the parent. [*Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (citing *Wolf v. Wolf*, 151 N.C.

App. 523, 566 S.E.2d 516 (2002)), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006).] Other factors to be considered are set out in Section III.J.3, above.

c. Mother's "naive indifference" to her children's need for financial support was intentional and willful and showed a deliberate disregard of her responsibility to support her children, justifying imputation of income to her. [*Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006).]

d. Income was properly imputed to unemployed former teacher/mother based on findings that mother had (1) not applied for a teaching position in Mecklenburg County in the past three years despite stating in a verified motion to modify support that she had, (2) resigned from a teaching position in Union County without having found another job, and (3) told father that mothers did not have to pay child support. [*Lueallen v. Lueallen,* 790 S.E.2d 690 (N.C. Ct. App. 2016).]

e. Without finding that a voluntarily unemployed parent depressed her income in bad faith, it is error to impute income. [*Nicks v. Nicks*, 774 S.E.2d 365 (N.C. Ct. App. 2015) (citing and quoting *Works v. Works*, 217 N.C. App. 345, 719 S.E.2d 218 (2011)) (voluntarily unemployed physician mother left medical practice to care for child with severe emotional problems and filed a motion to modify child support paid by father; in denying mother's motion to modify, trial court erred when it imputed income to mother without finding that she had depressed her income in bad faith).]

8. Imputing income to a parent who is voluntarily underemployed.

a. See Section III.J.7.a, immediately above, for 2015 Guidelines provision on imputing income to a parent who is voluntarily underemployed.

b. When father worked only one day a week at a driving range, earning $260 a month, had not sought other work, and showed no intention of contributing significantly to his sons' financial needs, trial court properly imputed income to father. [*McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (matter remanded for additional findings regarding the proper amount to be imputed), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007).]

c. Even though there was no evidence that father intentionally reduced his income to avoid his child support obligation and sincerity of his religious beliefs was not questioned, when father voluntarily resigned his position as an engineer earning $172,000 per year plus benefits to start a church at an annual salary of $52,800 without benefits and testified that he did so without considering his ability to meet his child support obligation, trial court erred when it concluded that father acted in good faith and reduced his child support obligation. [*Andrews v. Andrews,* 217 N.C. App. 154, 719 S.E.2d 128 (2011), *review denied,* 365 N.C. 561, 722 S.E.2d 595 (2012).]

d. No error in imputing income to father when findings demonstrated father's "naïve indifference" to his ability to support his children on his meager salary as a part-time trainer and athletic coach. Father in bad faith refused to obtain "gainful employment" after his formerly substantial investment assets had been significantly depleted by withdrawals and losses. [*Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**) (not paginated on Westlaw) (though father's primary job during the marriage was to manage his investments, situation was such that father would be

unable to support himself and his children if his investments continued to decrease; still, father did not increase his work load or seek additional employment).]

9. Imputing income to a parent who was fired.
   a. Income from a position from which father was terminated was imputed to him; court found father was voluntarily unemployed because his actions at work, taken in conscious and reckless disregard of his duty to provide support, irritated and embarrassed his employer, resulting in an "entirely predictable termination." [*Wolf v. Wolf*, 151 N.C. App. 523, 528, 566 S.E.2d 516, 519 (2002) (father's motion to reduce child support denied).]
   b. Trial court did not err when it imputed to father a monthly gross income of $18,867, his monthly salary while working as a nurse anesthetist; father's unemployment was the foreseeable result of being criminally convicted for the sexual abuse of his child. [*Metz v. Metz,* 212 N.C. App. 494, 711 S.E.2d 737 (2011) (rejecting (1) father's argument that the loss of his job and related licenses was involuntary and not the result of bad faith on his part and (2) father's attempt to distinguish *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002), based on the fact that the actions that resulted in his termination did not occur at work).]
10. Imputing income to a parent who voluntarily retired.
   a. No error in imputing income to able-bodied 52-year-old father who retired after current wife won a lottery; father voluntarily depressed his income in deliberate disregard of support obligation. [*Mason v. Erwin*, 157 N.C. App. 284, 579 S.E.2d 120 (2003).]
   b. Trial court properly imputed income to father who decided to take early retirement at age 51 when his child was three; father chose to remain unemployed by refusing to seek employment, despite his many skills, and remained eligible to work for his former employer, a municipality, without decreasing his retirement benefits. [*Osborne v. Osborne*, 129 N.C. App. 34, 497 S.E.2d 113 (1998).]
11. Imputing income to a parent who quit his job.
   a. No error in imputing income to mother when she voluntarily and in bad faith stopped working as a real estate agent. [*King v. King,* 153 N.C. App. 181, 568 S.E.2d 864 (2002) (her explanation for not working, that time involved in trial of child support matter interfered with her ability to work, was rejected by court).]
   b. Error for trial court to impute earnings to father merely because he resigned from his employment when resignation was not in bad faith. [*Cook v. Cook*, 159 N.C. App. 657, 583 S.E.2d 696 (2003).]
   c. When mother had quit her part-time job as a nurse and was not employed when support order was entered, trial court was required to make findings as to whether she deliberately depressed her income before imputing income. [*Parnell v. Parnell,* 189 N.C. App. 531, 659 S.E.2d 490 (2008) (**unpublished**).]
12. Imputing income to a parent who earns less from new employment.
   a. Father's failure to look for work that would pay him what he made before his position was eliminated was not deliberate suppression of income or other bad faith action; his former "earning capacity" could not be used to impute income to him. [*Sharpe*

v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997) (after father's position as district director was abolished, father twice took lower-paying positions with the same company). *Compare Tardani v. Tardani,* 201 N.C. App. 728, 689 S.E.2d 601 (2010) (**unpublished**) (bad faith found where parent accepted job as a manager trainee even though he had experience as a manager).]

13. Imputing income to a parent attending school.
    a. Defendant who voluntary resigned from his job to attend graduate school full-time did not act in bad faith when he continued to provide adequate support for his children; earnings from former job not imputed to him. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004).]
    b. In case involving teen father who left part-time and summer jobs to attend college full-time in another city, trial court erred in imputing income when it failed to find that father had depressed his income in bad faith. [*State ex rel. Godwin v. Williams*, 163 N.C. App. 353, 593 S.E.2d 123 (2004).]
    c. When entering permanent child support order, trial court properly imputed to unrepresented father amount of income father earned from full-time job he held when temporary child support order was entered. Trial court found that father had in bad faith quit the full-time job two weeks after entry of the temporary order to pursue an associate degree at a community college, so that when permanent order was entered, father's income consisted only of a G.I. bill benefit of approximately $1,000/month. [*Cumberland Cty. ex rel. Rettig v. Rettig,* 231 N.C. App. 170, 753 S.E.2d 740 (2013) (**unpublished**).]
    d. A voluntary decrease in income resulting from a parent's return to school may be considered to support a finding of changed circumstance in a modification proceeding, without a finding of bad faith, if the movant also shows a change in child-oriented expenses. [*See Schroader v. Schroader,* 120 N.C. App. 790, 463 S.E.2d 790 (1995) (custodial mother who left full-time job to attend college full-time could claim resulting reduction in income, even though voluntary, as a changed circumstance in a proceeding to modify the noncustodial father's child support obligation if she showed change in child's expenses); *Fischell v. Rosenberg,* 90 N.C. App. 254, 368 S.E.2d 11 (1988) (court erred in refusing to consider, as a change of circumstance, fact that income of father, the custodial parent, had been reduced by his voluntary termination of employment to return to school; order denying motion to increase mother's support obligation affirmed, however, based on father's failure to present evidence of child-oriented expenses at the time of the prior hearing).]

14. Imputing income to a parent based on rental income.
    a. If a parent fails to make a good faith effort to obtain the best and highest rental income from rental property, a trial court would be required to utilize the potential income, rather than the actual income, from the rental property in determining the parent's monthly gross income. [*Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992); *Stein v. Brasington*, 233 N.C. App. 240, 758 S.E.2d 707 (2014) (**unpublished**) (citing *Lawrence*) (trial court properly imputed income to mother from her interest in a rental property based on the income generated by the property, determined by

mother's testimony about weekly rental rate and number of weeks per year property was rented, minus mortgage payments and expenses for upkeep and maintenance; imputation proper based on trial court findings that mother was evasive at trial about her finances and was unable to account for several large bank deposits; trial court also found, which was unchallenged on appeal, that mother was deliberately suppressing her income and was voluntarily underemployed when she held a nursing degree from Duke University but worked at an Apple store for $10/hour).]

15. Other.
    a. Error for trial court to impute income to father from investment account after father restructured his portfolio from holdings that produced more income to holdings that would favor long-term growth; finding that father deliberately reduced his income not sufficient to justify application of earning capacity rule when court made no finding as to father's motive in changing his investment strategy. [*Cook v. Cook*, 159 N.C. App. 657, 583 S.E.2d 696 (2003).]
16. A trial court must make sufficient findings to justify applying the earning capacity rule.
    a. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. [2015 Guidelines. *See also Hartsell v. Hartsell,* 189 N.C. App. 65, 77, 657 S.E.2d 724, 731 (2008) (quoting *Beall v. Beall,* 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)) (a child support award based on capacity to earn must include "a proper finding that the [party] is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children"); *Frey v. Best,* 189 N.C. App. 622, 659 S.E.2d 60 (2008) (citing *Goodhouse v. DeFravio,* 57 N.C. App. 124, 290 S.E.2d 751 (1982)) (capacity to earn may be the basis of an award of child support if it is based upon a proper finding that a parent is deliberately depressing his income or is otherwise acting in deliberate disregard of his obligation to provide reasonable support for his family); *Bowers v. Bowers*, 141 N.C. App.729, 541 S.E.2d 508 (2001) (earning capacity rule can only be used when there are findings, based on competent evidence, to support a conclusion that the supporting spouse or parent is deliberately suppressing her income to avoid family responsibilities).]
    b. Proper findings made in case not imputing income.
        i. Decision not to impute income to mother upheld when finding that mother did not act in bad faith was supported by evidence showing that shortly after separation, mother worked extra shifts as a part-time restaurant hostess while friends provided child care at no cost; that after mother began receiving postseparation support and temporary child support, mother paid for child care at the same hourly rate that she made as a hostess so she discontinued the extra shifts; mother had sought other work extensively during the recession but a higher salaried job was not available to her, and mother's only option to increase her salary, by working extra weekend shifts at the restaurant, was rejected because, with alternating weekend custody, mother would sacrifice most of her custodial

time with daughter and costs of child care would equal her earnings for the extra shifts. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011).]

c. Proper findings made in cases imputing income.

i. Findings that husband's unemployment was voluntary and that he had acted in "bad faith" based on a "conscious and reckless disregard" of his duty to provide court-ordered child support sufficient to impute income to father. [*Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002) (father's motion to reduce child support properly denied, noting trial court's "extensive findings of fact" outlining circumstances of father's termination and supporting conclusion that father was voluntarily unemployed).]

ii. Findings sufficient to establish father's naïve indifference to children's need for support when court found that father had failed to exercise his reasonable capacity to earn because he had lived during the marriage on income from his separate investments, which had been significantly depleted as a result of losses and withdrawals for his monthly expenses after separation and divorce, and that father had not sincerely tried to find employment to make up for the decrease in investment income. [*Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**).]

d. Findings as to bad faith/deliberate suppression not made.

i. When it was not clear from the order whether the trial court found that plaintiff and defendant had acted in bad faith but left the "general impression" that the trial court found no bad faith, the order was reversed and remanded. [*Ludlam v. Miller,* 225 N.C. App. 350, 358, 739 S.E.2d 555, 560 (2013).]

ii. Trial court erred when it imputed income to husband of $500 per month from commercial fishing and $625 per month from towing and crushing cars without making the requisite findings of bad faith or deliberate suppression of income. [*State ex rel. Midgett v. Midgett,* 199 N.C. App. 202, 680 S.E.2d 876 (2009).]

iii. Trial court made no findings as to defendant's present earnings or as to defendant's reduction of income in bad faith; order that imputed income reversed. [*Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456 (2005).]

iv. When the trial court made no findings that defendant was deliberately depressing his income or indulging in excessive spending to avoid family responsibilities, trial court erred in calculating child support based on defendant's capacity to earn. [*State ex rel. Williams v. Williams,* 179 N.C. App. 838, 635 S.E.2d 495 (2006).]

v. Trial court erred when it imputed income to full-time college student at the minimum wage of $5.15 per hour, on a full-time basis, without findings as to deliberate or bad faith conduct to suppress his income or otherwise avoid his child support obligation. [*State ex rel. Godwin v. Williams*, 163 N.C. App. 353, 593 S.E.2d 123 (2004).]

vi. Error for trial court to calculate child support based on each party's "earning capacity"; order did not include any findings as to whether either party deliberately suppressed her income to avoid support obligation. [*Bowers v. Bowers,*

141 N.C. App. 729, 541 S.E.2d 508 (2001); *Parnell v. Parnell,* 189 N.C. App. 531, 659 S.E.2d 490 (2008) (**unpublished**) (when mother had quit her part-time job as a nurse and was not employed when support order was entered, trial court was required to make findings regarding her earning capacity, including whether she deliberately depressed her income, before imputing income).]

vii. Trial court erred in imputing any amount of income to self-employed musician/father; no evidence in the record to support a finding that father deliberately depressed his income. [*Kennedy v. Kennedy*, 107 N.C. App. 695, 421 S.E.2d 795 (1992).]

e. Findings as to amount of imputed income not made.

i. Trial court found that year before father's arrest he earned $100,000, and imputed a current income of $50,000, or half of the previous salary, but made no findings to support imputing half his former salary, as opposed to some other fraction or amount. [*Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (affirming decision to impute income to father but remanding for findings setting out how the trial court arrived at the amount to be imputed).]

ii. A finding that "[n]o evidence was presented that [father] could not work more hours" at his employment was not sufficient to support imputing $1,040 per month of additional income to father. The trial court made no findings that full-time work was available at father's current place of employment, as to the availability of other full-time jobs that would pay father the same hourly wage as his part-time job, or as to the effect of father's status as a part-time student. [*McKyer v. McKyer,* 179 N.C. App. 132, 148, 632 S.E.2d 828, 837 (2006) (affirming trial court's conclusion that income could be imputed to father but remanding for additional findings regarding the proper amount to be imputed), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007); *Stein v. Brasington*, 233 N.C. App. 240, 758 S.E.2d 707 (2014) (**unpublished**) (citing *McKyer*) (trial court erred in imputing $50,000 of income to mother based on her nursing degree when trial court made no findings as to mother's occupational qualifications, the availability of nursing positions in the community, or the typical starting salary of a nurse; moreover, trial court imputed $50,000 based on mother's testimony that she had applied for a hospital information technology job with that starting salary).]

iii. Trial court erred when it halved the figures provided by wife as to husband's income from commercial fishing and towing and crushing cars without making any findings or conclusions to support the decision to reduce the amounts provided by wife. [*State ex rel. Midgett v. Midgett,* 199 N.C. App. 202, 680 S.E.2d 876 (2009).]

f. Findings sufficient to support decision to impute income but basis used to determine amount of imputed income not proper.

i. When findings about father's deliberate disregard of his responsibility to support his children supported the trial court's decision to impute income to him but trial court improperly based its determination of the amount to impute on father's living expenses, which were being paid by his parents, and there were no findings because no evidence had been presented on the factors normally

used to determine the amount of imputed income, the appellate court reversed both the trial court's imputation of income and the award of child support based upon the imputed amount of income. [*Harnett Cty. ex rel. De la Rosa v. De la Rosa,* 770 S.E.2d 106 (N.C. Ct. App. 2015) (remand for additional findings was not appropriate when there was no evidence as to (1) father's earning capacity, (2) father's occupational qualifications other than military service, (3) type of work father did while in military service and whether military service had prepared him for some type of work outside the military, (4) father's education or work history prior to military service, or (5) prevailing job opportunities and earning levels in the community).]

17. Effect of prior finding as to deliberate depression of income or deliberately acting in disregard of obligation to provide support.
    a. Finding that in 2001 father was "not voluntarily reducing or minimizing his income to avoid his financial obligations to his family" did not preclude a contrary finding four years later. [*McKyer v. McKyer,* 179 N.C. App. 132, 147, 632 S.E.2d 828, 837 (2006), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007).]

K. Adjusted Gross Income

1. A parent's presumptive child support obligation is based primarily on her adjusted gross income.
2. Adjusted gross income is a parent's gross income minus allowable deductions for the support of children other than those for whom support is being determined. [See lines 1a and 1b of Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody, and related instructions (subtracting payments made by a parent under a pre-existing child support order for other children of that parent and the amount of the parent's financial responsibility for other children living with that parent to arrive at monthly adjusted gross income).] NOTE: Form AOC-CV-627 (Rev. 1/15) continues to refer to a "pre-existing" order even though 2015 Guidelines speak of an existing court order.
3. Deductions allowed from gross income to determine monthly adjusted gross income:
    a. Child support payments made by a parent under an existing court order, separation agreement, or voluntary support arrangement for a child other than the child for whom support is being determined, regardless of whether the child or children for whom support is being paid was/were born before or after the child or children for whom support is being determined in the pending action. [2015 Guidelines and related worksheets; *Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001).] NOTE: This paragraph in the 2006 and 2011 Guidelines, set out immediately below, referred to child support payments made by a parent under a "pre-existing" order. Cases based on those guidelines did the same but still should be relevant under the 2015 Guidelines.
        i. A pre-existing support order is a child support order that is in effect when a child support order in the pending action is entered or modified, regardless of whether the children for whom support is being paid under the pre-existing order are older or younger than the children for whom support is being determined in the pending action. [2006 and 2011 Guidelines; *Buncombe Cty. ex rel.*

Blair v. Jackson, 138 N.C. App. 284, 531 S.E.2d 240 (2000) (a pre-existing child support order is a child support order that is in existence at the time a child support order is entered or modified in the case presently before the trial court).]

ii. The deduction allowed for amounts paid pursuant to a pre-existing child support order applies when support is being determined in a case involving one father and children born to multiple mothers. [*Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) (rejecting father's argument that the deduction allowed in the guidelines for support paid pursuant to a pre-existing order should not apply in such a situation).]

iii. For an example of a trial court's determination of adjusted gross income when an individual fathered five children by three mothers and the county child support enforcement agency moved to modify support for all five children in a consolidated proceeding, see *Buncombe County ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000).]

b. Child support payments made pursuant to a voluntary support arrangement for a child other than the child for whom support is being determined if consistent payments have been made for a reasonable and extended period of time. [2015 Guidelines.]

i. Payments for medical insurance premiums made pursuant to a voluntary support agreement for defendant's other children (i.e., children other than child for whom support was being determined) constituted child support under the guidelines and should have been deducted from defendant's gross income to determine his monthly adjusted gross income. [*Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001) (holding applicable to premiums paid pursuant to either an order or a private agreement).]

c. The guidelines specify that payments made toward child support arrears are **not** deducted from the gross income of the supporting parent. [2015 Guidelines.]

d. A parent's financial responsibility for her natural or adopted children (other than the child for whom support is being determined) who currently reside with the parent. [2015 Guidelines; *Kennedy v. Kennedy*, 107 N.C. App. 695, 421 S.E.2d 795 (1992) (trial court erroneously failed to take into account father's responsibility for his 2-year-old daughter from his present marriage).]

i. For cases heard on or after Jan. 1, 2011, the parent's deduction for the parent's other children living with that parent is equal to the basic child support obligation shown in the child support schedule based on the number of other children and the parent's income. [2015 Guidelines; 2011 Guidelines.] The income of that child's other parent is not considered, regardless of whether that parent resides in the home. [*See* 2010 Howell Bulletin, www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf.]

ii. For cases heard before Jan. 1, 2011:

(a) If the "other parent" of the parent's "other children" lived with the parent, the parent's deduction for the "other children" was equal to one-half of the basic child support obligation shown in the child support schedule based on the number of "other children" and the combined incomes of the parent

and the "other parent" of the "other children." [2006 Guidelines and related worksheets.]

(b) If the "other parent" of the parent's "other children" did not live with the parent, the parent's deduction for the other children was equal to the basic child support obligation shown in the child support schedule based on the number of other children and the parent's income. [2006 Guidelines and related worksheets.]

(c) Trial court's findings were sufficient as to the deduction from gross income each party received for other children living with the parties. [*New Hanover Child Support Enforcement ex rel. Dillon v. Rains*, 193 N.C. App. 208, 666 S.E.2d 800 (2008) (trial court found that parents had one other biological child residing in their respective homes and worksheet indicated that each parent received a deduction based on his or her financial responsibility for that child).]

4. Deductions not allowed from gross income to determine monthly adjusted gross income.

a. Alimony payments made by a parent to any person may be considered as a factor to vary from the final presumptive child support obligation. [2015 Guidelines.]

b. Amounts deducted from a parent's income for federal or state income taxes, Social Security or Medicare taxes, health insurance premiums, retirement contributions, or other amounts withheld from income. [2015 Guidelines.]

c. For cases heard on or after Jan. 1, 2011, the guidelines specify that payments made towards child support arrears are **not** deducted from the gross income of the supporting parent. [2015 Guidelines; 2011 Guidelines.]

L. Adjustments for Child Care, Health Insurance, Health Care, and Other Extraordinary Expenses

1. Generally.

a. Incorporation of adjustments for extraordinary expenses in the guideline amounts in a child support order does not constitute a deviation from the guidelines, but rather is deemed a discretionary adjustment to the presumptive amounts set forth in the guidelines. Because there is no deviation, no findings of fact regarding the classification are required, but findings to support the amount so classified are required. [*Biggs v. Greer,* 136 N.C. App. 294, 524 S.E.2d 577 (2000) (court not required to make findings to support classification of private school as an extraordinary expense under the guidelines); *Doan v. Doan,* 156 N.C. App. 570, 577 S.E.2d 146 (2003) (no abuse of discretion in classifying the child's ice-skating expenses as extraordinary under the guidelines, but matter remanded for findings as to amount of monthly expenses).] See Section III.D.3, above.

b. In cases involving primary custody (Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody), work-related child care costs, health insurance premiums for a child, and other extraordinary child-related expenses paid by a noncustodial parent are subtracted from that parent's total child support obligation. [See lines 8–9 of Worksheet A and instructions.]

c. In cases involving joint or shared physical custody (Worksheet B, Form AOC-CV-628, Child Support Obligation Joint or Shared Physical Custody), a parent's child support obligation is adjusted if she pays more than her fair share of work-related child care costs, health insurance premiums, or other extraordinary child-related expenses. [See lines 10–13 of Worksheet B and instructions.]

2. Child care costs. Reasonable child care costs are not considered unless they are, or will be, paid by a child's parent due to employment or a job search or, [2015 Guidelines.] in other words, in order for that parent to obtain or retain employment. Reasonable child care costs that are, or will be, paid by a parent due to employment or job search are added to the basic child support obligation and prorated between the parents based on their respective incomes. [2015 Guidelines.]

   a. Child care expenses are not considered unless they are paid by a child's parent (or by the parent's employer via payroll deductions from the parent's wages). Therefore, child care provided by an employer or paid by a government agency on behalf of a child's parent is not considered.

   b. Other reasonable child care costs, such as costs incurred while the custodial parent attends school, may be a basis for deviation. [2015 Guidelines.]

   c. The court may also consider actual child care tax credits received by a parent as a basis for deviation. [2015 Guidelines.]

3. Health insurance costs. The amount that is, or will be, paid by a parent (or a parent's spouse) for health insurance (medical, or medical and dental) for a child for whom support is being determined is added to the parents' basic child support obligation and prorated between the parents based on their respective incomes. [2015 Guidelines.] The guidelines clarify that amounts paid by a spouse of a parent for insurance are included in the basic child support obligation and prorated between the parties.

   a. This provision does not apply in cases involving primary custody (Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody) in which an obligor's income falls within the shaded area of the schedule of basic support obligations. [Worksheet A, Side Two, Instructions for Completing Child Support Worksheet A.]

   b. Payments for health insurance premiums are not considered unless they are paid by the child's parent or stepparent. Payments that are made by a parent's (or stepparent's) employer for health insurance on behalf of the child and are not deducted from the parent's (or stepparent's) wages are not considered. [2015 Guidelines; *Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013) (guidelines clearly anticipate that insurance may be provided by a stepparent).]

   c. When a child for whom support is being determined is covered by a family policy, only the portion of the premium attributable to that child's coverage is considered. If this amount is not available or cannot be verified, the total cost of the premium is divided by the number of persons covered and multiplied by the number of covered children for whom support is being determined. [2015 Guidelines.]

   d. For more on health insurance, see Section VII.C.2, below.

4. Uninsured medical or dental expenses or other uninsured health care costs. In any case, including those where the parent's income falls within the shaded area of the child support

schedule, a court may order either parent or both parents to pay a child's uninsured medical or dental expenses in excess of $250 per year or other uninsured health care costs in such proportion as the court deems appropriate. [2015 Guidelines.]

a. Uninsured health care costs include reasonable and necessary costs related to orthodontia, dental care, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders. [2015 Guidelines.]

b. A provision in the 2002 Guidelines allowing the court to order parents to pay uninsured health care costs in proportion to their respective incomes was considered not to alter in any way a trial court's discretion to apportion these expenses and not to require a court to "follow a certain formula nor prescribe what [a court] 'should' or 'must' do." [*Holland v. Holland,* 169 N.C. App. 564, 571, 610 S.E.2d 231, 236 (2005); *Weisberg v. Griffith,* 171 N.C. App. 517, 615 S.E.2d 738 (2005) (**unpublished**) (a trial court is vested with discretion in determining how uninsured health care costs are to be divided; guidelines do not conclusively establish the allocation of uninsured health care expenses) (interpreting provision in 2002 Guidelines in context of unincorporated separation agreement).]

c. A decision by a trial court not to allocate uninsured medical or dental expenses consistent with the parents' respective incomes would not constitute a deviation from the guidelines requirement of findings as to why application of the guidelines would be "unjust or inappropriate." [*Holland v. Holland,* 169 N.C. App. 564, 610 S.E.2d 231 (2005) (considering the 2002 Guidelines).]

d. When a court decides to deviate from the guidelines, it is "perfectly proper" for the court to use a method other than a comparative income analysis when apportioning uninsured medical expenses. [*Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (citing *Lawrence v. Nantz,* 115 N.C. App. 478, 445 S.E.2d 87 (1994)) (order upheld that required unemployed mother to whom minimum wage income was imputed to pay one-half of children's uninsured medical expenses), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006).]

e. When trial court did not address how uninsured health care expenses were to be divided and did not determine mother's breach of contract claim that father had failed to reimburse her for children's extracurricular and uninsured medical expenses, matter was remanded for further findings and conclusions. [*Weisberg v. Griffith,* 171 N.C. App. 517, 615 S.E.2d 738 (2005) (**unpublished**).]

f. For more on uninsured medical or dental expenses and other uninsured health care costs, see Section VII.C.1, below.

5. Other extraordinary expenses. Except as noted above, expenses related to a child's attending a special or private elementary or secondary school to meet the child's particular educational needs, expenses for transporting the child between the parents' homes, and other extraordinary child-related expenses may be added to the parents' basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines that the expenses are reasonable, necessary, and in the child's best interest. [2015 Guidelines.]

a. The list of extraordinary expenses in the guidelines is not exhaustive of the expenses that can be included under this section. [*Mackins v. Mackins,* 114 N.C. App. 538, 442 S.E.2d 352, *review denied,* 337 N.C. 694, 448 S.E.2d 527 (1994).]

b. The trial court has the discretion to determine what expenses constitute extraordinary expenses, the amount of these expenses, and with the exception of payments for professional counseling or psychiatric therapy which must be apportioned in the same manner as the basic child support obligation, how the expenses are to be apportioned between the parties. [*Mackins v. Mackins,* 114 N.C. App. 538, 549, 442 S.E.2d 352, 359 (trial court did not abuse its discretion in determining that expenses for a learning center for the children were an extraordinary expense; the applicable version of the guidelines provided that payment for professional counseling or psychiatric therapy for diagnosed mental disorders was to "be apportioned in the same manner as the basic child support obligation and ordered paid as the Court deems equitable"), *review denied,* 337 N.C. 694, 448 S.E.2d 527 (1994).]

c. Allocation of extraordinary expenses is not a deviation.

   i. The incorporation of adjustments for extraordinary expenses in a child support order does not constitute a deviation from the child support guidelines, but rather is a discretionary adjustment to the presumptive amounts set forth in the guidelines. [*Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013) (citing *Biggs v. Greer,* 136 N.C. App. 294, 524 S.E.2d 577 (2000)) (recognizing that trial court erroneously believed that requiring father to pay part of private school costs would be a deviation but upholding result); *Doan v. Doan,* 156 N.C. App. 570, 577 S.E.2d 146 (2003) (citing *Biggs*) (no abuse of discretion in classifying the child's ice-skating expenses as extraordinary under the guidelines); *Biggs* (applying the 1994 Guidelines, trial court adjusted the guideline amount to account for the extraordinary expense of private schooling but did not deviate from the guidelines when it ordered parents to share costs of private school).] See Section III.D.3, above.

d. Findings.

   i. Findings as to the amount of the extraordinary expenses have been required. [*Doan v. Doan,* 156 N.C. App. 570, 577 S.E.2d 146 (2003) (citing *Biggs v. Greer,* 136 N.C. App. 294, 524 S.E.2d 577 (2000)) (no abuse of discretion in classifying ice-skating expenses as extraordinary under the guidelines but remanding for findings as to amount of monthly expenses).]

   ii. Findings that the expenses are "reasonable, necessary, and in the child's best interest" have not been required. [*Ludlam v. Miller,* 225 N.C. App. 350, 363, 739 S.E.2d 555, 563 (2013) (appellate court upheld an order not requiring father to contribute to the costs of private school; order stated as a finding that the trial court was not determining that private school expenses were reasonable, necessary and in the child's best interest); *Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**) (citing *Biggs v. Greer,* 136 N.C. App. 294, 524 S.E.2d 577 (2000)) (trial court not required to make findings as to whether private school was reasonable, necessary, and in the children's best interest; trial court did not deviate from the presumptive guidelines, but rather adjusted guideline

amounts to account for the extraordinary expense of private schooling; mother's argument that the 2006 Guidelines required these findings was rejected); *Herriman v. Gaston Cty. ex rel. Herriman*, 179 N.C. App. 225, 633 S.E.2d 890 (2006) (**unpublished**) (citing *Biggs*) (trial court did not deviate from guidelines when it found that children's private school tuition was an extraordinary expense and thus was under no obligation to render findings of fact; 2002 Guidelines applicable).] For more on the findings required when support is set at guideline presumptive amount, see Section III.D.2, above.

iii. One appellate decision has held that when a party requests deviation, the trial court is required to make findings regarding extraordinary expenses along with all other needs of the child. [*Parnell v. Parnell*, 189 N.C. App. 531, 659 S.E.2d 490 (2008) (**unpublished**) (recognizing the general rule in *Doan v. Doan,* 156 N.C. App. 570, 577 S.E.2d 146 (2003), and *Biggs v. Greer,* 136 N.C. App. 294, 524 S.E.2d 577 (2000), but limiting it to cases in which deviation was not requested).]

iv. For more findings in cases considering extraordinary expenses, see Section III.D.3, above.

e. Private school and related education expenses.

i. No abuse of discretion when father not required to pay part of children's private school expenses because father, who fell in self-support reserve category, did not have the income to pay those expenses. [*Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013).]

ii. Trial court did not err when it included as extraordinary expenses, and apportioned between the parents, the cost of private school tuition, mother's work-related child care costs, and costs for the child's summer camp. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011).]

iii. Private school expenses paid from a trust created and funded by child's parents, who treated the trust as a separate legal entity, were not considered extraordinary expenses incurred by either parent, or by the parents jointly, for purposes of establishing child support. [*Davis v. Davis,* 156 N.C. App. 217, 575 S.E.2d 72 (2003) (**unpublished**).]

iv. Fact that children's grandparents had paid private school tuition in the past did not relieve mother of obligation to pay her share of that expense. [*Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**).]

v. Fact that a parent's income qualifies for the self-support reserve does not relieve the parent of the obligation to pay extraordinary expenses. [*Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**) (applying 2006 Guidelines); 2011 Guidelines (payment of extraordinary expenses by either parent in a self-support reserve case may be a basis to deviate from the guidelines). *Cf. Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013) (applying 2011 Guidelines) (trial court appeared to erroneously believe that it would need to deviate from the guidelines to order father in self-support reserve case to pay extraordinary expenses).] The 2015 Guidelines contain the same language on this point as the 2011 Guidelines.

f. Visitation-related travel expenses.

i. The trial court is vested with discretion to make adjustments to the guideline amounts for extraordinary expenses, and the determination of what constitutes such an expense is likewise within its sound discretion. [*Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003); *Foss v. Miller,* 235 N.C. App. 655, 764 S.E.2d 699 (2014) (**unpublished**) (citing *Doan*) (the extent to which a parent's expenses, or expected expenses, for visitation-related travel should be recognized as an extraordinary expense, and the manner in which they should be recognized, is a matter committed to the sound discretion of the trial court).]

ii. In *Meehan v. Lawrance,* 166 N.C. App. 369, 602 S.E.2d 21 (2004), the trial court did not abuse its discretion when it allowed father a credit for travel expenses related to visitation with the minor children. *Cf. Foss v. Miller,* 235 N.C. App. 655, 764 S.E.2d 699 (2014) (**unpublished**) (no abuse of discretion when trial court failed to allow as an extraordinary expense the estimated costs of children's travel to California for visitation with their mother; *Foss* distinguished *Meehan* on the ground that evidence in *Meehan* showed expenses that father had actually incurred, while the accuracy of the evidence of the projected travel costs in *Foss* was questionable).]

M. Child Support Worksheets

1. A parent's child support obligation under the guidelines must be determined by using one of the three child support worksheets that are part of the child support guidelines.

2. Regardless of whether the court enters a child support order determined pursuant to the child support guidelines or deviates from the guidelines, a copy of the worksheet used to determine a parent's presumptive child support obligation should be attached to the child support order, be incorporated by reference into the child support order, or be included in the case file. [2015 Guidelines; G.S. 52C-3-305(c).]

a. An appellant should include the guidelines worksheet in the record on appeal. [*Lueallen v. Lueallen,* 790 S.E.2d 690 (N.C. Ct. App. 2016) (citing *Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001)) (appellate court unable to review trial court's calculation of mother's child support obligation without a worksheet in the record); *Hodges* (worksheet not included; appellate court unable to determine with certainty the amount placed in defendant's gross income column); *Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013), and *Hess v. Hermann-Hess,* 228 N.C. App. 281, 748 S.E.2d 773 (2013) (**unpublished**) (citing *Ludlam*) (when the records on appeal in both cases included the worksheet, no prejudicial error arising from the trial court's failure to attach the worksheet to the child support order).]

3. The child support worksheets must include the incomes of both parents, regardless of whether one parent is seeking child support from the other parent or a third party is seeking child support from one or both parents. [2015 Guidelines.]

a. The income of a person who is not the child's parent should not be included on the child support worksheet used to determine the child support obligation of the child's parent. [2015 Guidelines.]

b. The child support worksheets may not be used to determine the child support obligation of a stepparent or other party who is secondarily responsible for a child's support. [2015 Guidelines.]

4. The worksheet used will depend on how much time a child spends with each parent.
   a. According to G.S. 50-13.2, the amount of time allowed in a child custody order for electronic visitation cannot be considered in calculation of child support. [G.S. 50-13.2(e).]
5. Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody, must be used when one parent (or a third party) has primary physical custody of all of the children for whom support is being determined. [2015 Guidelines.]
   a. Worksheet A should be used if the child lives with one parent (or a third party) for 243 nights or more during the year. [2015 Guidelines; Form AOC-CV-627 should be used when the obligee has physical custody of the child(ren) involved in the pending action for a period of time that is more than two-thirds of the year (243 nights or more during the year).]
   b. Primary physical custody is determined without regard to whether a parent has primary, joint, or shared legal custody of a child. [2015 Guidelines.]
   c. Worksheet A may not be used if a parent has primary physical custody of one or more of the children for whom support is being determined and the parents share custody of one or more children, or if primary custody of two or more children is split between the parents.[2015 Guidelines.]
   d. When Worksheet A is used, a child support obligation is calculated for both parents, but a child support order is entered only against the noncustodial parent. [2015 Guidelines.]
6. Worksheet B, Form AOC-CV-628, Child Support Obligation Joint or Shared Physical Custody, must be used if the parents share custody of all of the children for whom child support is being determined or if one parent has primary physical custody of one or more of the children and the parents share custody of another child. [2015 Guidelines.]
   a. Worksheet B should be used only:
      i. When the parents share joint physical custody of at least one of the child(ren) for whom support is sought;
      ii. If one parent has sole legal custody but, in fact, the parents exercise joint physical custody of the child(ren);
      iii. If both parents have custody of the child(ren) for at least one-third of the year and the situation involves a true sharing of expenses, rather than extended visitation with one parent that exceeds 122 overnights. [Form AOC-CV-628.]
   b. Worksheet B cannot be used when a parent and a nonparent share custody of a child.
   c. The self-support reserve for low-income parents cannot be applied when Worksheet B is used. [2015 Guidelines.]
   d. Parents share custody of a child if the child lives with each parent for at least 123 nights during the year and each parent has financial responsibility for the child's

expenses during the time that the child lives with that parent. [2015 Guidelines; Form AOC-CV-628.]

e. The mere fact that a parent has visitation rights that allow the child to spend more than 123 nights per year with the parent is not sufficient, standing alone, to constitute shared custody. [*See Maney v. Maney*, 126 N.C. App. 429, 431, 485 S.E.2d 351, 352 (1997) (where trial court found that "the sharing of costs is the primary focus for determining the sharing of custody and the mere fact that the child[ren] [are] physically in one parent's home for the purposes of sleeping as a[n] accommodation should not be conclusive for purposes of setting child support obligations"); *Cabbs v. Cabbs*, 222 N.C. App. 316, 729 S.E.2d 731 (2012) (**unpublished**) (not paginated on Westlaw) (citing *Maney* and *Mason v. Freeman*, 188 N.C. App. 165, 654 S.E.2d 833 (2008) (**unpublished**)) (trial court not required to use Worksheet B, even if father had children 130–140 nights during the year, when findings demonstrated no "true sharing" of expenses and that mother "clearly assumes responsibility for the bulk of the children's expenses").]

f. A parent does not have shared custody of a child if he has visitation rights that allow the child to spend less than 123 nights per year with the parent and the other parent has primary physical custody of the child. [2015 Guidelines; Form AOC-CV-628.]

g. Shared custody is determined without regard to whether a parent has primary, shared, or joint legal custody of a child. [2015 Guidelines.]

h. In cases involving shared custody, the parents' combined basic child support obligation for all of the children for whom support is being determined (regardless of whether a parent has primary, shared, or split custody) is increased by 50 percent (multiplied by 1.5) and is allocated between the parents based on their respective incomes and the amount of time the children live with the other parent. [2015 Guidelines; see line 5 of Worksheet B, Form AOC-CV-628.]

i. The amount of time that the children live with the other parent is calculated by multiplying the number of children (including any children for whom custody is not shared) by 365 and determining the percentage of nights each child (including a child for whom custody is not shared) lives with each parent. [See lines 7–8 of Worksheet B, Form AOC-CV-628.]

j. In cases involving shared custody, an adjusted child support obligation is calculated for both parents, the lower child support obligation is subtracted from the greater, and the parent with the greater child support obligation is ordered to pay the difference whether she is designated as a custodial or noncustodial parent. [2015 Guidelines; lines 9–14 of Worksheet B, Form AOC-CV-628.]

7. Worksheet C, Form AOC-CV-629, Child Support Obligation Split Custody, must be used when primary physical custody of two or more children is split between the parents. [2015 Guidelines.]

a. Split custody occurs when one parent has primary custody of at least one of the children for whom support is being determined and the other parent has primary custody of the other child or children. [2015 Guidelines; Form AOC-CV-629 is used when there is more than one child involved in the pending action and each parent has physical custody of at least one of the children.]

b. A parent (or third party) has primary physical custody of a child if the child lives with that parent (or custodian) for 243 nights or more during the year. [2015 Guidelines.]

c. Worksheet C cannot be used when the parents share custody of one or more of the children and have primary physical custody or split custody of another child. [2015 Guidelines.]

d. The self-support reserve for low-income parents cannot be applied when Worksheet C is used. [2015 Guidelines.]

e. In cases involving split custody, the basic child support obligation is determined with respect to all of the children but is not multiplied by 1.5 and is not adjusted for the amount of time the children live with each parent. [See lines 4–6 of Worksheet C, Form AOC-CV-629.]

f. In cases involving split custody, a child support obligation is calculated for both parents, the lower child support obligation is subtracted from the greater, and the parent with the greater child support obligation is ordered to pay the difference whether he is designated as a custodial or noncustodial parent. [2015 Guidelines; lines 6–11 of Worksheet C, Form AOC-CV-629.]

IV. Deviating from the Child Support Guidelines

A. What Does or Does Not Constitute a Deviation

1. What constitutes a deviation. A court deviates from the guidelines when it

   a. Orders support in an amount different than the guideline amount. [*See, e.g., State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 620 S.E.2d 899 (2005) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)) (a decision not to order prospective support is a deviation from the guidelines, and the order must make findings to support decision to deviate).]

   b. At least one case has held that an order providing for prospective support to begin on a date other than the date of the filing of the complaint or the first of the month following the filing of the complaint is a deviation from the guidelines. [*Albemarle Child Support Enforcement Agency ex rel. Miller v. Hinton,* 147 N.C. App. 700, 556 S.E.2d 634 (2001) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)) (there is an implied presumption that prospective child support payments begin at the time of the filing of the complaint; it is error to order prospective support to begin at any other time without making findings required for deviation).]

2. What does not constitute a deviation. A court does not deviate from the guidelines when it

   a. Makes adjustments in the guideline amount for extraordinary expenses. [*Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003); *Biggs v. Greer,* 136 N.C. App. 294, 524 S.E.2d 577 (2000).] However, when a parent's income qualifies for the self-support reserve, payment of extraordinary expenses by either parent may be a basis for deviation, which would require findings of fact. [2015 Guidelines.] See Section III.F, above, for more on low-income parents.

B. Procedure to Request Deviation

1. Who may initiate, form of request.
   a. A party may request deviation in an original pleading.
   b. A party may request deviation by motion [2015 Guidelines.] if the party gives at least ten days' written notice. [*Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991).]
   c. A court may deviate from the guidelines on its own motion if it makes the required findings. [2015 Guidelines. *See Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000) (pursuant to the guidelines, in the absence of a request from the parties, the court may award child support in an amount different from that dictated by the official child support guidelines); *Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) (citing *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991)).]
2. Failure to make timely request for deviation may be waived.
   a. A party's failure to give timely notice of a request to deviate may be waived when evidence related to deviation is introduced without objection. [*Scotland Cty. Dep't of Soc. Servs. ex rel. Powell v. Powell*, 155 N.C. App. 531, 573 S.E.2d 694 (2002) (evidence offered by defendant in support of his request at the hearing for deviation, about pre-hearing living arrangements of the plaintiff and the children, was initially excluded but subsequently admitted, without objection, and both parties introduced, without objection, other evidence of the children's needs and the parties' relative ability to provide support; failure to give proper notice of request to deviate waived); *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991) (defendant's failure to give timely and proper notice of his request for deviation waived when evidence in support of deviation admitted without objection).]
   b. When failure to timely request deviation is waived, if the parties introduce without objection evidence relating to the reasonable needs of the child for support and the relative ability of each parent to pay support, the trial court must find facts and enter conclusions on this evidence. [*Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991).]

C. Standard for Deviation

1. A court may deviate from the guidelines if it finds, by the greater weight of the evidence, that application of the guidelines:
   a. Would not meet or would exceed a child's reasonable needs considering the relative ability of each parent to provide support or
   b. Would otherwise be unjust or inappropriate. [G.S. 50-13.4(c); 2015 Guidelines.]
2. The burden is on the moving party to show that the guidelines do not meet or that they exceed the reasonable needs of the children or are otherwise unjust or inappropriate. [*Row v. Row*, 158 N.C. App. 744, 582 S.E.2d 80 (2003) (**unpublished**).]
3. If a party requests deviation but fails to present evidence of the reasonable needs of the children or how the guidelines would not meet or would exceed those needs, the trial

court does not err when it denies deviation based on insufficient evidence. [*Row v. Row,* 158 N.C. App. 744, 582 S.E.2d 80 (2003) (**unpublished**).]

4. A trial court is not required to deviate from the guidelines no matter how compelling the reasons to do so. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (dicta) (citing *Stephenson v. Bartlett*, 355 N.C. 354, 408, 562 S.E.2d 377, 413 (2002)), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

D. Factors That May Justify Deviation

1. The following have been cited in appellate decisions as factors that may justify deviating from the guidelines:
   a. A parent's actual, bona fide financial inability to pay the amount of support determined pursuant to the guidelines; [*Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) (remand necessary when support set pursuant to the guidelines amounted to 66 percent of father's gross income).]
   b. A parent's extraordinary medical expenses related to the parent's current spouse; [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998) (district court allowed deviation based on cancer of defendant/father's wife; case reversed and remanded for insufficient findings as set out in Section IV.F.7, below).]
   c. Contributions (cash or in-kind) received from a third party for a child's support. [*Hartley v. Hartley,* 184 N.C. App. 121, 645 S.E.2d 408 (citing *Guilford Cty. ex rel. Easter v. Easter,* 344 N.C. 166, 473 S.E.2d 6 (1996)) (court must examine the extent and nature of the contributions of a third party in order to determine whether a deviation from the guidelines is appropriate), *appeal dismissed,* 654 S.E.2d 475 (2007); *Easter* (even though grandparents were under no "legal obligation" to provide support, trial court could consider their contributions when determining whether to deviate from the guidelines); *Scotland Cty. Dep't of Soc. Servs. ex rel. Powell v. Powell*, 155 N.C. App. 531, 573 S.E.2d 694 (2002) (quoting *Easter*) (while third-party contributions will not always support deviation, the trial court should have such evidence at its disposal).] While *Easter* holds that contributions from a third party *may* be considered by a trial court when it contemplates a deviation from the guidelines, a deviation is not always necessary, even when a third party provides some support to the minor child. [*Davis v. Davis,* 156 N.C. App. 217, 575 S.E.2d 72 (2003) (**unpublished**) (when calculating father's monthly child support obligation, trial court properly declined to consider that child's private school expenses were paid by a trust created and funded by the child's parents; if dentist/father was not paying the trust for rental of the practice's equipment, he would have had a higher income).]
2. Factors that do not, without more, justify deviation.
   a. Receipt of Social Security benefits by children for the death of a stepparent, in this case their mother's husband, cannot be the sole basis for deviating from the guidelines and lowering father's support obligation. [*Hartley v. Hartley,* 184 N.C. App. 121, 645 S.E.2d 408 (trial court erred when it reduced father's support obligation based upon Social Security payments made directly to the children without finding that father was unable to provide support), *appeal dismissed,* 654 S.E.2d 475 (2007).]

b. When electronic visitation is authorized in a custody order pursuant to G.S. 50-13.2(e), the amount of time electronic visitation is used shall not be a factor in setting child support.

3. The 2015 Guidelines cite the following as examples of situations in which deviation may be warranted:

a. When one parent pays 100 percent of the child support obligation and 100 percent of the health insurance premium for the child;

b. When the self-support reserve applies (see North Carolina Child Support Guidelines, Form AOC-A-162, at 7 for the Schedule of Basic Support Obligations) and either parent pays child care, health insurance premiums, or other extraordinary expenses;

c. When the custodial parent incurs child care expenses while attending school;

d. When a parent receives actual child care tax credits;

e. When either party pays alimony to an ex-spouse (payment may be considered as a factor for deviation); or

f. **When a parent pays child support for two or more families under two or more child support orders, separation agreements, or voluntary support arrangements.** [Language above is in bold type in the 2015 Guidelines to emphasize that deviation should be considered in these cases.]

E. Procedure Upon Request for Deviation

1. When a party requests deviation, the court must have a hearing and must make findings as to the child's reasonable needs for support and the parents' ability to provide support.

a. "[U]pon request of any party" for deviation, the court must hear evidence and make findings with respect to the child's reasonable needs for support and "the relative ability of each parent to provide support." [G.S. 50-13.4(c); *Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999) (G.S. 50-13.4(c) requires findings as to reasonable needs of parties' child and the parties' relative ability to provide support upon a party's request for deviation); *Gowing v. Gowing,* 111 N.C. App. 613, 432 S.E.2d 911 (1993) (the findings required by the language in G.S.50-13.4(c), see the beginning of this subsection, may be satisfied by consideration of the factors listed in G.S. 50-13.4(c) and repeated in G.S. 50-13.4(c1); the list of factors set out in Section IV.E.3, below, defines the general category of facts relating to the child's reasonable need for support and the relative ability of each party to provide support and should be included in the findings the court makes when requested to deviate from the guidelines); *Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005) (citing *Gowing*) (the factors set out in G.S. 50-13.4(c) and (c1) should be included in the findings if the trial court is requested to deviate); *Parnell v. Parnell,* 189 N.C. App. 531, 659 S.E.2d 490 (2008) (**unpublished**) (because mother requested deviation, trial court was required to make the findings required under G.S. 50-13.4(c) and *Gowing*).]

2. When considering deviation, whether based on a request by a party or on the trial court's own motion, the trial court must:

a. Determine the presumptive child support award under the guidelines;

b. Hear evidence, and from the evidence find the facts relating to the reasonable needs of the child and the relative abilities of the parents to meet those needs;

c. Determine by the greater weight of the evidence whether the presumptive award 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; and

d. Make findings to allow effective appellate review. [*Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999). *See also Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007) (the trial court shall hear evidence, make findings relating to the reasonable needs of the child for support and the relative ability of each parent to provide support; if the court determines by the greater weight of the evidence that application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate, it may deviate; upon deviation, it must make findings as required by statute), *review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 624, 129 S. Ct. 144 (2008); *Foss v. Miller,* 235 N.C. App. 655, 764 S.E.2d 699 (2014) (**unpublished**) (order that addressed amount needed to provide health insurance for the children but did not address amount needed for their education, maintenance, or other expenses did not contain findings sufficient for appellate review).]

e. See Section IV.F, below, for discussion on the findings required when the court allows a request for deviation; Section IV.G, below, for discussion on the findings required when the court does not deviate or denies a request for deviation and for discussion on when the court must make findings when there has been no request for deviation.

3. In finding, per G.S. 50-13.4(c), "the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support," the trial court must consider:

a. 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

b. Other facts of the particular case. [G.S. 50-13.4(c), (c1); *Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220 (2005) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)). *See also Scotland Cty. Dep't of Soc. Servs. ex rel. Powell v. Powell*, 155 N.C. App. 531, 573 S.E.2d 694 (2002) (trial court's conclusion as to whether to deviate from the presumptive amount of child support must be based on factual findings specific enough to indicate to a reviewing court that the judge below took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the children and the parents).]

F. Findings Required When Court Allows a Request for Deviation

1. Following its determination that deviation is warranted, *in order to allow effective appellate review,* the trial court *must* enter written findings of fact*:*

a. Stating the presumptive child support amount under the guidelines;

b. Determining the reasonable needs of the child and the relative ability of each parent to provide support;

c. Supporting the conclusion that the presumptive amount of child support determined by application of the guidelines would exceed, or would not meet, the reasonable needs of the child or would be otherwise unjust or inappropriate; and

d. Stating the criteria that justify varying from the guidelines and the basis for the amount of child support ordered as a result of the deviation. [G.S. 50-13.4(c); 2015 Guidelines; *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (citing *Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005)), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006); *Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005); *Rowan Cty. Dep't of Soc. Servs. ex rel. Brooks v. Brooks*, 135 N.C. App. 776, 522 S.E.2d 590 (1999); *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999); *Widenhouse v. Crumpler*, 177 N.C. App. 150, 627 S.E.2d 686 (**unpublished**), *review denied,* 360 N.C. 545, 635 S.E.2d 63 (2006).]

2. Deviating without making required findings is reversible error.

   a. Deviating from the guidelines without making the required findings or without making findings based on sufficient evidence in the record constitutes reversible error. [*See Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005) (it was not enough that trial court heard testimony and received documentation detailing the reasonable needs of the children; when trial court failed to make the necessary findings regarding the children's reasonable needs, case was reversed and remanded).]

3. Findings insufficient: no findings as to reasonable needs of the child for support and the relative ability of each parent to pay support.

   a. *Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005) (in modification proceeding, findings addressed health insurance costs and the lack of any need for private school but contained no specific findings regarding the children's maintenance or additional health and educational expenses; though order stated that the children's needs had not changed, there was no finding, and no record evidence, of what those expenses had been previously; without knowing what the children's reasonable expenses were, court of appeals could not review the trial court's decision to deviate or the amount ultimately awarded).

   b. *Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (court deviated from the guidelines as to father's nonrecurring income, consisting of personal injury settlement proceeds placed in trust; there were no findings regarding the reasonable needs of the child, no specific consideration of what amount was necessary for the child's health, education, and maintenance, no findings as to actual expenditures, and no indication that trial court considered the accustomed standard of living of the child and the parties—thus there were no findings as to the reasonableness of the expenses in light of that standard of living; without those findings, appellate court unable to determine whether the lump sum awarded from the trust would exceed the child's reasonable needs or fail to meet them).

   c. *Guilford Cty. ex rel. Easter v. Easter*, 344 N.C. 166, 473 S.E.2d 6 (1996) (trial court's downward deviation based on third-party contributions remanded to trial court

because trial court had failed to make findings as to reasonable needs of the children and the relative ability of each parent to provide support).

d. *Cumberland Cty. ex rel. State of Washington v. Cheeks*, 786 S.E.2d 432 (N.C. Ct. App. 2016) (**unpublished**) (trial court erred when it deviated from the guidelines without making findings of fact and considering the child's needs for support).

4. Findings insufficient: no basis for the amount of support ordered.

a. *Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005) (when the order did not explain why the court ordered support in an amount that exceeded the guideline amount by $500, matter remanded for court to explain how it determined the amount ordered and whether the amount is supported by competent evidence).

b. *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (findings were not sufficient to indicate the basis for the amount ordered when findings did not explain how the court decided upon $800 in monthly support; case remanded for findings as to the basis for the amount ordered), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006).

5. Findings insufficient: failure to find amount of presumptive support.

a. *Widenhouse v. Crumpler*, 177 N.C. App. 150, 627 S.E.2d 686 (**unpublished**) (not paginated on Westlaw) (trial court did not calculate the presumptive guideline amount; findings that "the presumptive guideline amounts for child support . . . is [sic] unjust or inappropriate and would not meet the reasonable needs of the minor children" and that "it would be burdensome and inaccurate for the Court to calculate child support according to the presumptive guidelines" because different worksheets might be used for the two children, were inadequate to permit effective appellate review of whether deviation was justified), *review denied,* 360 N.C. 545, 635 S.E.2d 63 (2006).

6. Findings insufficient: failure to justify decision to deviate.

a. *State ex rel. Horne v. Horne*, 127 N.C. App. 387, 489 S.E.2d 431 (1997) (court ordered downward deviation based on live-in boyfriend's earnings; findings did not determine what, if any, contributions mother's boyfriend made to children or household and on what basis; findings established only that boyfriend earned $16.61 per hour for forty hours a week; without findings regarding extent and nature of boyfriend's contributions, court of appeals could not review appropriateness of decision to deviate).

b. *State ex rel. Nelson v. Jeffers,* 171 N.C. App. 366, 615 S.E.2d 435 (2005) (**unpublished**) (not paginated on Westlaw) (order contained no finding as to what factor made the guideline amount unjust or excessive; finding that "[t]he Judge deviated from the Guideline amount[,]" was "simply not sufficient" to allow appellate court to determine whether trial court abused its discretion in deviating from the presumptive child support amount).

7. Findings insufficient: failure to make several required findings.

a. *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999) (in modification proceeding, trial court allowed downward deviation apparently due to father's disability; matter remanded for entry of new child support order when order failed to find what

guideline amount would be, what child's reasonable needs were, and that presumptive guideline amount would be "unjust or inappropriate"), *disapproved of on other grounds by O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008).

b. *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 646, 507 S.E.2d 591, 594 (1998) (emphasis in original) (internal quotation marks omitted) (order allowing downward deviation lacked specific findings necessary to justify deviation; trial court made findings relating to child care contributions, health insurance costs, and relative ability of each party to pay but failed to include findings regarding child's reasonable needs, including his education, maintenance, or accustomed standard of living; order did not include findings that showed that the court had considered whether the presumptive amount "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").

c. *Rowan Cty. Dep't of Soc. Servs. ex rel. Brooks v. Brooks*, 135 N.C. App. 776, 522 S.E.2d 590 (1999) (order allowing deviation remanded for additional fact-finding when order did not identify presumptive amount of support and did not analyze the reasonable needs of the two minor children, other than finding that child care costs for one child were reasonable; moreover, court's finding as to the reason for deviating was limited to a conclusion that deviation was "reasonable and fair").

d. *Gowing v. Gowing,* 111 N.C. App. 613, 432 S.E.2d 911 (1993) (trial court's findings failed to justify deviation from the guidelines or to provide a basis for the denial of an award where court found that the child was the beneficiary of settlement money that exceeded his needs but made no findings regarding the reasonable needs of the child for support, the earning capacities or incomes of the parties, the relative ability of each parent to pay support, and the child care and homemaker contributions of the plaintiff).

8. Findings required to support decision not to order prospective support.

a. Generally, prospective support is payable from the date a support claim is filed, with payments to start the month thereafter. [See *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.H.7.]

b. A decision not to order prospective support is a deviation from the guidelines, and the order must include findings of fact to support the decision to deviate. [*State ex rel. Gillikin v. McGuire,* 174 N.C. App. 347, 620 S.E.2d 899 (2005) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)) (trial court found that prospective child support back to the date of the filing of the complaint was owed but did not order payment thereof because court unable to determine amount due to receipt by both parents of disability income during relevant period; decision not to order prospective support required findings to support deviation).]

G. Findings Required When Court Does Not Deviate or Denies a Request for Deviation

1. Generally, when the court does not deviate from the guidelines and orders child support in an amount determined pursuant to the guidelines, the amount ordered is conclusively presumed to meet the reasonable needs of a child considering the relative ability of each

parent to provide support, and specific findings regarding a child's reasonable needs or the relative ability of each parent to provide support are not required. [2015 Guidelines.]

a. Unless requested to deviate, the trial court is not required to take evidence, make findings of fact, or enter conclusions of law "relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support;"

b. The trial court is only required to hear such evidence as may be necessary for proper application of the presumptive guidelines; and

c. Support consistent with the guidelines "is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education and maintenance." [*Scotland Cty. Dep't of Soc. Serv. ex rel. Powell v. Powell*, 155 N.C. App. 531, 536, 573 S.E.2d 694, 697 (2002) (quoting *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991)). *See also Head v. Mosier,* 197 N.C. App. 328, 677 S.E.2d 191 (2009) (citing *Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999)) (absent a request for deviation, when the court determines child support based on the guidelines, the court generally is not required to make specific findings regarding the child's reasonable needs and the parents' ability to provide support).]

2. However, when the trial court receives a request to deviate, or when evidence is introduced regarding the needs of the children or the ability of the parents to pay, the trial court must make findings of fact to allow effective appellate review. [*Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 288 n.7, 531 S.E.2d 240, 243 n.7 (2000) (even though G.S. 50-13.4(c) and the 1998 Guidelines require findings only when the trial court deviates from the guidelines, an order denying a party's request for deviation must include sufficient findings and conclusions to allow appellate review of the court's determination that deviation was not warranted); *Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002) (citing *Blair*) (acknowledging that effective appellate review requires findings to support denial of a party's request for deviation).]

   a. Other cases have upheld a denial to deviate based on findings as to reasonable needs of the children and the relative ability of the parents to provide that amount. [*See Scotland Cty. Dep't of Soc. Servs. ex rel. Powell v. Powell*, 155 N.C. App. 531, 573 S.E.2d 694 (2002) (decision not to deviate upheld based on specific findings as to the reasonable needs of the children and the relative ability of each party to provide that amount, which demonstrated that trial court based its decision not to deviate on the interplay between those two considerations); *Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002) (findings as to the incomes of both parties and the reasonable needs of the children supported trial court's denial of father's request to deviate).]

   b. According to *Blair,* the trial court is to make substantially the same findings when it allows a request for deviation and when it denies a request for deviation. [*See Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) (after determining that deviation is either warranted or unwarranted, the trial court must enter written findings showing the amount of guideline support, the reasonable needs of the child, and the relative ability of each party to provide support and stating that application of the guidelines would exceed or would (or would not) meet the reasonable needs of the child or would (or would not) be unjust or inappropriate;

remand necessary when order denying deviation did not find whether guideline support would exceed, meet, or fail to meet the reasonable needs of the children or whether support pursuant to the guidelines would be unjust or inappropriate).]

c. Moreover, findings are required by G.S. 50-13.4(c) upon the **request** of any party for deviation. [*Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999) (in case denying father's request for deviation, trial court's findings were inadequate; although court made findings as to reasonableness of some of father's claimed expenses, it did not make findings as to reasonable needs of parties' child or of parties' relative ability to provide support; G.S. 50-13.4(c) requires these findings upon a party's request for a deviation).]

3. Even if no request for deviation was made, the court must make findings as to the child's reasonable needs for support and the parents' ability to provide support if evidence is introduced on those issues.

a. Findings as to the reasonable needs/parents' relative ability to provide support are required when deviation has not been requested if the court hears evidence as to these issues. [*Scotland Cty. Dep't of Soc. Servs. ex rel. Powell v. Powell*, 155 N.C. App. 531, 573 S.E.2d 694 (2002) (citing *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991)) (no deviation requested in initial pleadings but both parties introduced, without objection, evidence of the children's needs and the parties' relative ability to provide support; trial court was required to find facts and enter conclusions on the evidence); *Gowing v. Gowing,* 111 N.C. App. 613, 432 S.E.2d 911 (1993) (when parties failed to object to evidence of child's needs and their relative ability to provide support, parties waived their rights to notice of a request, and the trial court was free to deviate from the guidelines upon proper findings); *Browne* (even though neither party had requested a hearing on reasonable needs/parents' relative ability to provide support, since evidence on those issues was introduced without objection, trial court was required to find facts and enter conclusions on the evidence).]

4. If neither party requests deviation or introduces evidence relating to the reasonable needs of the child, there is no basis for the court to deviate from the guidelines. [*See Cumberland Cty. ex rel. State of Washington v. Cheeks*, 786 S.E.2d 432 (N.C. Ct. App. 2016) (**unpublished**) (not paginated on Westlaw) (*citing Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 741 (1991)) (in a case where neither party introduced evidence on the reasonable needs of the child for support, the court of appeals held that the trial court erred when it "chose to deviate" from the guidelines without a request to deviate having been made and without making findings as to the reasonable needs of the child for support; in footnote 1, the court of appeals noted in dicta that without a request for deviation, a trial court may only consider deviation if both parties present evidence on the reasonable needs of the child without objection and the trial court hears that evidence).]

H. Standard of Review on Appeal from Deviation

1. Deviation from the child support guidelines upon a party's request will not be disturbed on appeal absent a clear abuse of discretion. [*Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)),

review denied, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144 (2008); *Hartley v. Hartley,* 184 N.C. App. 121, 645 S.E.2d 408 (citing *Lukinoff*), *appeal dismissed,* 654 S.E.2d 475 (2007); *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999).]

2. A clear abuse of discretion means only if "manifestly unsupported by reason." [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998) (quoting *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985)). *See also Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005) (when reviewing deviation, abuse of discretion standard means the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision).]

V. Child Support Payments

A. Frequency, Due Date, and Vesting of Payments

1. A court may order that child support be paid by lump sum payment, by periodic payments, by transfer of title or possession of personal property, or by a security interest in or possession of real property. [G.S. 50-13.4(e).]
   a. NOTE: When a child support order grants the custodial parent exclusive possession of the marital residence, it is good practice to provide in the order that possession lasts only until entry of the final equitable distribution order.
   b. The court of appeals has found that a directive for payment of private school tuition is a "periodic payment, whether [plaintiff] chooses to pay it once a year, once a semester or over ten months[.]" [*Smith v. Smith*, 785 S.E.2d 434, 438 (N.C. Ct. App. 2016) (construing *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39 (2005)).]
2. All child support orders entered on or after Oct. 1, 1999, must require that child support payments be made on a monthly basis and that monthly child support payments are due and payable on the first day of each month. [G.S. 50-13.4(c); S.L. 1999-293, § 3.] [See *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.H.7, citing cases, including *State ex rel. Gillikin v. McGuire,* 174 N.C. App. 347, 620 S.E.2d 899 (2005) (payment of prospective support from date complaint or motion filed).]
3. Notwithstanding this requirement, child support payments may be withheld and paid via income withholding on a weekly, biweekly, semimonthly, or other basis consistent with the pay period established by the obligor's employer.
4. Each child support payment is vested when it becomes due and may not thereafter be vacated, reduced, or modified in any way or for any reason except as otherwise provided by law. [G.S. 50-13.10(a). See *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, *Modification of Child Support Orders*, Part 3 of this Chapter, and *Enforcement of Child Support Orders*, Part 4 of this Chapter.]
5. Pursuant to G.S. 50-13.10(b), an unpaid, vested, past due child support payment has the full force, effect, and attributes of a judgment of this state except as follows:
   a. A child support arrearage may not be entered on the judgment docket unless it has been reduced to judgment pursuant to G.S. 50-13.4(f)(8) or unless it is perfected as a lien pursuant to G.S. 44-86.

b. A writ of execution may not be issued to collect a child support arrearage unless it has been reduced to judgment pursuant to G.S. 50-13.4(f)(8) or unless it is perfected as a lien pursuant to G.S. 44-86. See *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section V for more on execution.

c. A child support arrearage does not constitute a lien against real property unless it has been reduced to judgment pursuant to G.S. 50-13.4(f)(8) or unless it is perfected as a lien pursuant to G.S. 44-86. See *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section VI for more on liens.

6. A child support payment does not become due or vested if it would otherwise have accrued:

   a. After the child's death;

   b. After the obligor's death;

   c. During any period when the child is living with the obligor pursuant to a valid court order or an express or implied written or oral agreement transferring primary custody to the obligor; or

   d. During any period when the obligor is incarcerated, is not on work release, and has no resources with which to make the payment. [G.S. 50-13.10(d).]

7. The provisions of G.S. 50-13.10 apply to child support orders entered in civil child support proceedings under G.S. 50-13.4 *et seq*., child support orders entered in paternity proceedings under G.S. 49-14 *et seq*., and voluntary support agreements approved under G.S. 110-132 and 110-133. [G.S. 50-13.10(c).]

B. Payment via Immediate Income Withholding

1. All new and modified child support orders, civil or criminal, entered in IV-D cases must include a provision ordering that income withholding take effect immediately (rather than being implemented only if an obligor becomes delinquent in paying child support). [G.S. 110-136.3(a).] For definition of a IV-D case and a non-IV-D case, see Section III.I.7, above.

   a. G.S. 110-136.3 and 110-136.4 require the trial court to order wage withholding in IV-D cases and eliminate the discretion the trial court generally has to establish an appropriate remedy. [*Guilford Cty. ex rel. Norwood v. Davis*, 177 N.C. App. 459, 629 S.E.2d 178 (2006) (when trial court failed to order wage withholding in a IV-D case, matter reversed and remanded for entry of immediate withholding pursuant to G.S. 110-136.4).]

   b. This requirement does not apply if the obligor is unemployed, the amount of the obligor's disposable income is unavailable, or both parties agree to an alternative method of payment. [G.S. 110-136.4(b).]

2. All civil and criminal child support orders initially entered on or after Jan. 1, 1994, in non-IV-D cases must include a provision ordering that income withholding take effect immediately unless:

   a. The parties agree in writing to an alternative method of payment;

b. The court finds, considering the obligor's employment history and record of meeting financial obligations in a timely manner, that there is a reasonable and workable plan that ensures consistent and timely payments by an alternative method of payment; or

c. The court finds good cause not to require immediate income withholding. [G.S. 110-136.3(a); 110-136.5(c1).]

3. When an obligor's employer or income payor receives a notice of income withholding, the employer or payor must:

a. Begin withholding child support from the obligor's disposable earnings or income, as required by the notice of the obligation to withhold, from the first payment that is due for the pay period that occurs fourteen days following the date the notice was served on the payor and

b. Send the child support payment to the State Child Support Collection and Disbursement Unit within seven business days of the date the obligor is paid. [G.S. 110-136.8(b).]

4. Income withholding is discussed in more detail in *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, *Modification of Child Support Orders*, Part 3 of this Chapter, and *Enforcement of Child Support Orders*, Part 4 of this Chapter.

C. Centralized Collection and Disbursement of Child Support Payments

1. Before Oct. 1, 1999, almost all court-ordered child support payments were made through the clerk of superior court.

2. The 1996 federal welfare reform law required states, as a condition of receiving federal funding for child support enforcement under Title IV-D of the Social Security Act, to establish a statewide, centralized unit to collect and disburse child support payments in all IV-D cases and in non-IV-D cases in which a child support order was initially entered on or after Jan. 1, 1994, and payments were made via income withholding. [42 U.S.C. § 654B.]

3. All child support payments made on or after Oct. 1, 1999, in (1) a IV-D case, (2) a non-IV-D case via income withholding (regardless of when the order was entered), or (3) other non-IV-D cases other than those in which the court directs that payments be made directly to the obligee, must be made through the State Child Support Collection and Disbursement Unit established pursuant to G.S. 110-139(f). [G.S. 15A-1344.1(a); 50-13.4(d); 50-13.9(a); 110-136.8(b)(1); 110-139(f).]

4. The fact that child support payments in a non-IV-D case are made through the State Child Support Collection and Disbursement Unit does not convert the case from a non-IV-D to a IV-D case or require a IV-D agency to provide child support enforcement services with respect to the case.

5. When the State Child Support Collection and Disbursement Unit receives a child support payment from an obligor, it must disburse the payment to the child's custodial parent or other party entitled to receive the payment, unless a court order requires otherwise. [G.S. 50-13.9(b).]

6. When child support payments are made via income withholding, the employer or payor may retain a $2.00 processing fee for each withholding, even if the amount withheld

is insufficient to satisfy the full amount required by the income withholding notice. [G.S. 110-136.6(a).]

7. Federal law requires that child support payments received by the State Child Support Collection and Disbursement Unit be disbursed to the appropriate payee within two business days of receipt. [42 U.S.C. § 654b(c)(1).] Similarly, G.S. 52C-3-318(a) requires a support enforcement agency or tribunal of this state to "disburse promptly" amounts received pursuant to a support order.

D. Priority of Child Support Payments

1. Federal law requires that income withholding for current and past due child support be given priority over any other process, attachment, garnishment, or withholding against the same income. [42 U.S.C. § 666(b)(7).]
2. Claims for current and past due child support via income withholding or state tax refund offset take priority over claims by the state Department of Health and Human Services for reimbursement of medical assistance under Medicaid provided to a child whose parent has failed to provide court-ordered health insurance. [G.S. 108A-70(a).]
3. In Uniform Interstate Family Support Act (UIFSA) cases, payment of child or spousal support has priority over payment of fees, costs, and expenses. [G.S. 52C-3-312(b), 52C-1-101(21) (definition of "support order"), *both amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

E. Distribution and Disbursement of Child Support Payments in IV-D Cases

1. Federal law governs the distribution of child support payments in IV-D cases. [42 U.S.C. § 657.]
   a. The federal distribution rules do not apply to child support payments in non-IV-D cases.
   b. The federal distribution rules do not address the allocation of child support payments when an obligor owes child support for two or more families, other than to provide that payments collected via two or more income withholding orders must be allocated. [See Section V.F, below.]
   c. The federal distribution rules do not address the priority of child support payments vis-à-vis spousal support– or child support–related costs or fees.
   d. The federal distribution rules do not address the distribution or disbursement of spousal support payments.
   e. Special distribution rules apply with respect to child support collected in IV-D cases by intercepting an obligor's federal income tax refund and to collections in IV-D cases in which a child receives IV-E (referencing the program's legal authorization under Title IV-E of the federal Social Security Act) foster care assistance. For definition of a IV-D case and a non-IV-D case, see Section III.I.7, above.
2. The federal distribution rules (1) classify child support payments as either current support, past due support, or future support and (2) classify assigned and unassigned child support arrearages in cases involving children who currently receive public assistance or who formerly received public assistance.

3. Under the federal distribution rules, all child support payments received in IV-D cases are treated first as payment of current support for the month in which the payment is received and then as payment for past due support arrearages, regardless of whether the payment is designated as a payment of current or past due support.
4. Payment of support when child has never received public assistance. If the child for whom support is owed has never received public assistance, all current and past due support is paid to the child's custodial parent or other person entitled to receive the child support payment.
5. Payment of support when child receives or has received public assistance. The federal distribution rules determine whether all or part of a child support payment for a child who is currently receiving public assistance or who formerly received public assistance is to be paid to the child's custodial parent (or other person entitled to receive the payment) or is to be retained to reimburse the government for public assistance paid on behalf of the child.
    a. If the child for whom support is owed **currently** receives public assistance:
        i. Current child support will be retained to reimburse the government for public assistance paid on behalf of the child;
        ii. Payments of past due support will be retained to reimburse the government for public assistance paid on behalf of the child or paid to the child's custodial parent or other person entitled to receive the payment if the government has not been reimbursed for all public assistance paid on behalf of the child.
    b. If the child for whom support is owed **formerly** received public assistance:
        i. Current child support will be paid to the child's custodial parent or other person who is entitled to receive the payment;
        ii. The classification of child support arrearages as "never assigned," "unassigned pre-assistance," "conditionally assigned," etc., determines whether past due support will be disbursed to the child's custodial parent (or other person entitled to receive the support arrearages) or whether it will be retained to reimburse the government for public assistance paid on behalf of the child.
6. If neither the obligor, nor the individual obligee, nor the child resides in North Carolina, upon request from the support enforcement agency of this state or another state, the support enforcement agency of this state or a tribunal of this state must:
    a. Direct that the support payment be made to the support enforcement agency in the state in which the obligee is receiving services and
    b. Issue and send to the obligor's employer a conforming income-withholding order or an administrative notice of change of payee, reflecting the redirected payments. [G.S. 52C-3-318(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
7. A North Carolina support enforcement agency receiving redirected payments from another state pursuant to a law similar to G.S. 52C-3-318(b), set out immediately above, must furnish to a requesting party or tribunal of the other state a certified statement by the custodian of the record of the amount and dates of all payments received. [G.S. 52C-3-318(c), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

F. Allocating Child Support Payments Among Two or More Families

1. "Allocation" refers to the process of crediting all or part of a child support payment by an obligor to the obligor's child support obligation for a particular case when the obligor owes child support in two or more cases.
2. Allocation of child support payments made via income withholding.
    a. Federal law. When an obligor is subject to two or more income withholding orders requiring payment of support for children in two or more families, federal law requires states to allocate child support payments collected via income withholding. [45 C.F.R. § 303.100(a)(5).]
    b. State law. When an obligor is subject to two or more income withholding orders requiring payment of support for children in two or more families, state law provides that:
        i. Withholding for current support has priority over withholding for past due support [G.S. 110-136.7; *Guilford Cty. ex rel. Gray v. Shepherd*, 138 N.C. App. 324, 532 S.E.2d 533 (2000) (trial court erred in prorating payments under an order for current support and under an order requiring payments toward past due support only; priority must be given to the order for current support).] and
        ii. When there are two or more orders for current support, child support payments made via income withholding must be allocated among the families in proportion to the total amount of child support owed under the orders. [G.S. 110-136.7.]
3. Allocation of child support payments that are not made via income withholding.
    a. Federal law does not govern the allocation of child support payments that are not made via income withholding.
    b. State law does not expressly provide for the allocation of child support payments that are not made via income withholding.
    c. The N.C. Department of Health and Human Services has adopted policies requiring the State Child Support Collection and Disbursement Unit to:
        i. Aggregate all child support payments (other than those collected by intercepting an obligor's income tax refund or those made to purge an obligor's contempt or to satisfy a lien or judgment) made by an obligor who is required to pay child support for two or more families and
        ii. Allocate those payments among multiple child support cases based upon the amount the obligor owes for current child, spousal, or medical support, the amount that the obligor is required to pay for support arrearages, and the "type" of arrearage owed.

G. Child Support Payment Records

1. Prior to Oct. 1, 1999, most child support payments in IV-D and non-IV-D cases were made through the clerk of superior court and the clerk's office maintained official child support payment records (generally using the Administrative Office of the Courts'

computerized Support Enforcement System (SES)) for both IV-D and non-IV-D cases. For definition of a IV-D case and a non-IV-D case, see Section III.I.7, above.

2. Federal law now requires that child support payments in all IV-D cases and in many non-IV-D cases be made through the State Child Support Collection and Disbursement Unit and that the unit maintain records showing the receipt of payments from parents, employers, and other states and disbursements to custodial parents and other obligees, the state IV-D agency, and the IV-D agencies of other states.
   a. Federal law also requires the unit to furnish to any parent, upon request, timely information on the current status of support payments made through the unit under an order requiring payments to be made by or to the parent.
   b. Records of payments made prior to Oct. 1, 1999, have been transferred from clerks' records and the SES system to the computerized Automated Collection and Tracking System (ACTS) used in IV-D cases, which is linked to the unit.
3. In a IV-D case, the IV-D agency must maintain records showing the amount of each child support payment received from or on behalf of the obligor and the date each payment was received. [G.S. 50-13.9(b1)(3).]
4. In a non-IV-D case:
   a. In the past the clerk of superior court was required to maintain records showing the amount of each child support payment received from or on behalf of the obligor and the date each payment was received. [G.S. 50-13.9(b2)(3).]
   b. Effective Jan. 1, 2007, G.S. 50-13.9(b2)(3), set out immediately above, was repealed. [G.S. 50-13.9(b2), *amended by* S.L. 2005-389, § 1 and S.L. 2006-264, § 97.] Effective Jan. 1, 2007, the clerk of superior court maintains all official records and all case data concerning child support matters previously enforced by the clerk. [G.S. 50-13.9(b2)(2), *amended by* S.L. 2005-389, § 1 and S.L. 2006-264, § 97.]
   c. In non-IV-D cases in which child support payments are made through the State Child Support Collection and Disbursement Unit, the clerk's payment records are based solely on data transferred to the SES via the ACTS from the collection and disbursement unit. Effective Jan. 1, 2007, the provision requiring the State Child Support Collection and Disbursement Unit to notify the clerk of all payments made in non-IV-D cases was repealed. [G.S. 50-13.9(b2), *amended by* S.L. 2005-389, § 1 and S.L. 2006-264, § 97.]
5. Records admissible as evidence.
   a. Payment records maintained by the designated child support enforcement agency to monitor the obligor's compliance with or to enforce child support orders in the case are, when properly authenticated, admissible as evidence in an action to establish, enforce, or modify a child support order. [G.S. 50-13.9(b1)(3).]
   b. A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of the facts asserted therein and is admissible to show whether payments were made. [G.S. 52C-3-315(c).]

6. Credit for miscellaneous payments.
    a. A court may order the clerk of superior court or a IV-D agency to enter a child support payment on the clerk's or agency's records if the child support payment was not received by the State Child Support Collection and Disbursement Unit but was actually received by the party to whom it was owed and if the payment is evidenced by a canceled check, money order, or contemporaneously executed and dated written receipt. [G.S. 50-13.10(e).]
    b. If an obligor is required to pay child support for the same child or children under a child support order in North Carolina and under a child support order issued by a tribunal of another state or a foreign country, a North Carolina tribunal must credit amounts North Carolina collects for a particular period under any child support order against amounts owed for the same period under any other child support order issued by a tribunal of this state, another state, or a foreign country. [G.S. 52C-2-209, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

VI. The Child Support Enforcement (IV-D) Program

A. Federal Law (Title IV-D of the Social Security Act)

1. Title IV-D of the federal Social Security Act (42 U.S.C. §§ 651 *et seq.*) establishes the child support enforcement (IV-D) program, authorizes federal grants to states to administer state child support enforcement (IV-D) programs, and imposes legal requirements related to paternity and child support on states as a condition of receiving federal IV-D funding.
2. Congress enacted Title IV-D in 1975. Title IV-D has been amended by the Child Support Enforcement Amendments of 1984, the Family Support Act of 1988, the Omnibus Budget Reconciliation Act of 1993, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and the Child Support Performance and Incentives Act of 1998.
3. Federal regulations promulgated by the U.S. Department of Health and Human Services' (DHHS) Office of Child Support Enforcement (OCSE) supplement the requirements set forth in Title IV-D of the Social Security Act. [*See* 45 C.F.R. §§ 301–310.]

B. Federal Child Support (IV-D) Requirements

1. Federal law imposes a number of requirements on states as conditions of receiving federal funding for state child support enforcement (IV-D) and Temporary Assistance for Needy Families (TANF) programs. For example, federal law requires states to:
    a. Establish and use child support guidelines as a rebuttable presumption in entering child support orders; [42 U.S.C. §§ 667(a), (b).]
    b. Operate a central child support case registry;
    c. Operate a unit for the collection and disbursement of payments under support orders; [42 U.S.C. § 654b.]
    d. Operate a state new hire directory; [42 U.S.C. § 653a.]
    e. Enact the Uniform Interstate Family Support Act; [42 U.S.C. § 666(f).]

f. Allow a civil action to establish the paternity of a child to be filed any time before the child's 18th birthday; [42 U.S.C. §§ 666(a)(5)(A), 668.]

g. Enact laws regarding genetic paternity testing; [42 U.S.C. § 666(a)(5)(B).]

h. Adopt procedures governing the voluntary acknowledgment of paternity; [42 U.S.C. § 666(a)(5)(C).]

i. Collect child support via income withholding; [42 U.S.C. § 666(b).]

j. Impose liens for delinquent child support; [42 U.S.C. § 666(a)(4).]

k. Adopt procedures authorizing the State to withhold or suspend, or to restrict the use of, drivers' licenses, professional and occupational licenses, and recreational and sporting licenses of individuals who owe past due child support or who fail after notice to comply with subpoenas or warrants relating to paternity or child support proceedings; [42 U.S.C. § 666(a)(16).] and

l. Prohibit the retroactive modification of vested, past due child support arrearages. [42 U.S.C. § 666(a)(9)(C).]

2. Some of the child support requirements imposed on states by federal law apply only to IV-D agencies or to IV-D cases. Others, however, require states to enact specific paternity and child support laws that apply generally to non-IV-D as well as IV-D cases.

   a. As a result, paternity and child support law—once governed exclusively by state law—has become increasingly "federalized" and uniform.

   b. A number of North Carolina's statutes regarding paternity and child support (including most of the statutory provisions codified in Article 9 of G.S. Chapter 110) were enacted to comply with federal requirements imposed by the federal IV-D law. [*See* G.S. 110-140(a) (providing that G.S. Chapter 110, Article 9, Child Support, is not intended to conflict with any provision of federal law or to result in the loss of federal funds).]

3. Constitutional challenges arising from the federal requirements.

   a. At least two federal appellate courts have held that the imposition by Congress of federal child support requirements on states as a condition of receiving federal IV-D funding is not an unconstitutional exercise of federal authority and does not violate the constitutional rights of states. [*Kansas v. United States*, 214 F.3d 1196 (10th Cir.), *cert. denied,* 531 U.S. 1035, 121 S. Ct. 623 (2000); *Hodges v. Thompson,* 311 F.3d 316 (4th Cir. 2002) (per curiam) (conditioning a state's receipt of federal funding under Title IV-D on its establishment and operation of an automated data processing/information retrieval system and a state child support disbursement unit was constitutionally valid under the Spending Clause and the Tenth Amendment), *cert. denied,* 540 U.S. 811, 124 S. Ct. 53 (2003).]

   b. Federal child support requirements under Title IV-D, however, do not necessarily create legal rights that can be enforced against the state by IV-D clients in state or federal court. [*See Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353 (1997) (holding that Title IV-D does not give individuals a federal right to force a state agency to substantially comply with Title IV-D).]

C. IV-D and Non-IV-D Cases

1. All paternity and child support cases pending in North Carolina courts can be classified as either IV-D cases or non-IV-D cases.
   a. A IV-D case is a case in which services have been applied for or are being provided by a child support enforcement (IV-D) agency. [G.S. 110-129(7).]
   b. A non-IV-D case is any case, other than a IV-D case, in which child support is legally obligated to be paid. [G.S. 110-129(8).]
2. Over time, the status of a paternity or child support case may change from non-IV-D to IV-D (for example, if a child for whom support has been ordered begins receiving public assistance) or from IV-D to non-IV-D (for example, if a IV-D client requests that the client's IV-D case be closed, the child is no longer receiving public assistance, and the obligor does not owe any permanently assigned child support arrearages to the state).
3. The IV-D or non-IV-D status of a pending paternity or child support case may affect the judicial procedure that the parties and court must follow in the pending action or the judicial remedies that are available.

D. IV-D Agencies

1. Federal law requires each state, as a condition of receiving federal IV-D funding, to designate a single state agency to administer, or to supervise the local administration of, the state's IV-D program.
   a. North Carolina's Department of Health and Human Services' Division of Social Services (DSS) is responsible for North Carolina's child support program. The Child Support Services (CSS) Section exists within DSS. [CSS webpage: https://www2.ncdhhs.gov/DSS/cse/geninfo.htm.]
   b. There are currently (October 2016) 101 Child Support Offices in North Carolina: 76 offices operated under the authority of a county department of social services; 7 offices operated under the authority of a revenue department or a county manager; 17 offices operated under contract with private companies; and 1 tribal office. [CSS webpage: https://www2.ncdhhs.gov/DSS/cse/geninfo.htm.]

E. IV-D Clients

1. IV-D clients (families served by IV-D agencies) can be divided into three broad categories.
   a. **Current assistance cases** involve children in families that currently receive public assistance (Aid to Families with Dependent Children (AFDC), Temporary Assistance for Needy Families (TANF), or IV-E (Social Security Act foster care assistance)). In these cases, the child's right to child support has been partially assigned to the state.
   b. **Former assistance cases** involve children in families that formerly received public assistance (AFDC, TANF, or IV-E). These cases can be further subdivided into two categories:
      i. Cases in which the obligor still owes child support arrearages that remain assigned to the state and

ii. Cases in which any remaining child support arrearages are no longer assigned to the state and instead are owed to the child, custodial parent, or caretaker.

c. **Never assistance cases** involve children in families that have never received AFDC, TANF, or IV-E for a dependent child. In these cases, the child's right to support, other than medical support rights in the case of children covered by Medicaid, is not assigned to the state.

2. The IV-D program is required to provide child support services on behalf of all children who receive (or have received) federally funded cash assistance under the state's Work First (TANF) program (or the former AFDC program) or foster care assistance under Title IV-E of the Social Security Act.

a. Families that receive public assistance (AFDC, TANF, or IV-E) are not required to apply for IV-D services or to pay a IV-D application fee or costs.

i. IV-D cases involving families that receive public assistance are referred to the IV-D agency by the county social services department when the family begins receiving public assistance.

ii. Families that receive Work First (TANF) assistance must cooperate with the IV-D agency in locating a child's absent parent, determining paternity, establishing a child support obligation, and collecting child support.

b. The acceptance of public assistance on behalf of a dependent child constitutes an assignment **to the state or to the county from which assistance was received** of the child's right to any child support that accrued before the child began receiving TANF cash assistance as well as any child support that will accrue during the period of time that the child receives TANF cash assistance (not to exceed the amount of TANF or AFDC cash assistance paid on behalf of the child). [*See* G.S. 110-137 (assignment of support rights up to the amount of public assistance paid); 42 U.S.C. § 608(a)(3); *see also State ex rel. Crews v. Parker*, 319 N.C. 354, 354 S.E.2d 501 (1987) (assignment was only for amount of support provided through AFDC; grandmother who had raised child since birth entitled to intervene to assert right to receive compensation from father for years grandmother had supported child before receiving AFDC benefits).]

c. When a family ceases receiving public assistance, the IV-D agency must continue providing child support enforcement services, subject to the same conditions and on the same basis as in the case of other individuals to whom services are furnished. [42 U.S.C. § 654(25).]

d. The IV-D program must provide medical support enforcement services as well as child support services on behalf of all children who receive or have received health care under the state's Medicaid program. [45 C.F.R. §§ 302.33(a)(1)(ii), (a)(5).]

3. The IV-D program is required to provide child support services on behalf of any other child (regardless of whether the child has ever received public assistance) if the child's custodial parent or caretaker files a written application requesting child support enforcement services and pays a $25 application fee ($10 if the individual applying for services is indigent as defined in G.S. 110-130.1(a)). [G.S. 110-130.1(a); 45 C.F.R. § 302.33.]

F. IV-D Services

1. The IV-D program must provide the following child support services to all eligible families:
   a. Locating absent parents who owe child support;
   b. Establishing the paternity of children born out of wedlock;
   c. Establishing child support orders;
   d. Enforcing child support orders;
   e. Reviewing and modifying child support orders;
   f. Establishing, enforcing, and modifying medical support orders;
   g. Providing legal services related to these child support services; and
   h. Collecting, distributing, and disbursing child support payments.
2. "Any county interested in the paternity and/or support of a dependent child . . . may take up and pursue any paternity and/or support action commenced by the mother, custodian or guardian of the child." [G.S. 110-130.]
   a. The language "take up and pursue" refers to intervention. [*Hunt v. Hunt*, 784 S.E.2d 219 (N.C. Ct. App. 2016).]
   b. G.S. 110-130 and other statutes cited in the *Hunt* opinion give the State Child Support Enforcement Agency an unconditional right of intervention when a person has accepted public assistance on behalf of a dependent child, has applied for and pays a fee for child support collection services, or has requested assistance for collection of spousal support while also receiving child support services. [*Hunt v. Hunt*, 784 S.E.2d 219 (N.C. Ct. App. 2016).]
   c. A motion by New Hanover Child Support Enforcement Agency to intervene made more than three years after the entry of the initial child support order was timely when filed less than a month after mother had contracted for child support services. [*Hunt v. Hunt*, 784 S.E.2d 219 (N.C. Ct. App. 2016).]
3. The IV-D program is not allowed to:
   a. Provide assistance to a child's parent or caretaker in establishing or enforcing a child custody order.
   b. Assist in establishing a spousal support obligation. [G.S. 110-130.2.] A IV-D agency must collect spousal support for a spouse or former spouse if it is enforcing a child support order on behalf of a child who lives with the spouse or former spouse and a spousal support order has been entered on behalf of the spouse or former spouse. [G.S. 110-130.2.]
   c. Use federal IV-D funding to obtain a judgment for a public assistance debt pursuant to G.S. 110-135 when the amount of the debt is not based on the parent's obligation under an existing child support order. [U.S. Dep't of Health & Human Servs., Office of Child Support Enforcement, Use of Presumptive Child Support Guidelines to Establish and Collect Support, Action Transmittal 93-04 (Mar. 22, 1993), www.acf.hhs.gov/programs/cse/pol/AT/1993/at-9304.htm.] A IV-D agency may, however, establish and enforce a child support obligation on behalf of a child

whose right to child support has been assigned to the state or county providing support pursuant to G.S. 110-137.

4. Relationship betweeen IV-D attorney and IV-D client.
   a. The attorney representing a IV-D agency in a paternity or child support proceeding is an attorney of record only in the paternity or child support proceeding and is not, by virtue of her appearance in the pending paternity or child support proceeding, an attorney of record in any related proceeding involving child custody, visitation, or similar matters. [*See* G.S. 110-130.1(c).]
   b. The provision of legal services related to the establishment of paternity or the establishment, enforcement, or modification of child support orders on behalf of a IV-D client by an attorney employed or retained by a IV-D agency is insufficient, in and of itself, to create an attorney-client relationship between the attorney who represents the IV-D agency and the client served by the IV-D agency. [*See* G.S. 110-130.1(c).]
   c. For extensive discussion of the parties and their legal relationship in a child support enforcement action, see John L. Saxon, *Who Are the Parties in IV-D Child Support Proceedings? And What Difference Does It Make?* Fam. L. Bull. No. 22 (UNC School of Government, Jan. 2007) (hereinafter 2007 Saxon Bulletin), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb22.pdf

VII. Other Issues Related to Child Support

A. Hague Child Support Convention

1. On Aug. 30, 2016, the United States signed the Instrument of Ratification for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (the Convention). [Vicki Turetsky, Commissioner, Office of Child Support Enforcement (CSE), U.S. Dep't of Health & Human Servs., Admin. for Children and Families, Office of CSE, U.S. Ratification of Hague Child Support Convention, DCL-16-11, Dear Colleague Letter (Aug. 30, 2016), http://www.acf.hhs.gov/css/resource/us-ratification-of-hague-child-support-convention (hereinafter 2016 Dear Colleague Letter).]
2. As a result of U.S. ratification of the Convention, the United States is to have a treaty relationship with thirty-one countries in which the Convention is already in force, including the European Union. [2016 Dear Colleague Letter.]
3. The 2016 Dear Colleague Letter sets out the following as highlights from the Convention:
   a. The Convention will greatly speed up the enforcement of U.S. orders. It limits the circumstances under which a court can review and object to an order. It requires recognition of a U.S. order unless a respondent timely raises a challenge, and it limits available objections that the respondent may raise to those similar to ones now allowed under U.S. law.
   b. The Convention recognizes U.S. due process requirements. It allows a challenge to recognition of a foreign support order if there was a lack of notice and an

opportunity for a hearing. It allows a challenge if the order does not comply with U.S. jurisdictional rules. And it allows a court to refuse recognition of an order if it is manifestly incompatible with public policy.

c. The Convention requires treaty countries to provide free legal assistance in child support cases. Title IV-D agencies in the U.S. already provide such assistance, but now other Convention countries must provide cost-free services to U.S. residents.

d. The Convention provides standardized procedures and timeframes. Each Convention country must follow certain procedures to recognize and enforce child support orders. They must meet certain timeframes for allowing a challenge to an order and for providing status updates. Additionally, there are recommended standardized forms that will reduce the need for a country to request additional information.

4. The provisions adapted from the Convention that could not be readily integrated into G.S. Chapter 52C, Articles 1 through 6, are set out in G.S. Chapter 52C, Article 7, G.S. 52C-7-701 through 52C-7-713. [Official Comment (2015), G.S. Chapter 52C, Article 7.]

B. Child Support Hearing Officers (Expedited Process)

1. In 1985, the U.S. Department of Health and Human Services promulgated a federal regulation requiring states to use expedited administrative or quasi-judicial procedures to establish and enforce child support orders. [45 C.F.R. § 303.101 (enacted May 9, 1985, and since amended).]

a. This regulation allowed states to use administrative law judges, administrative hearing officers, magistrates, masters, or other quasi-judicial officers, but not judges, to hear and determine cases involving the establishment and enforcement of child support orders. [45 C.F.R. § 303.101(a) (enacted May 9, 1985, and since amended).] Federal law, however, also allowed the U.S. Department of Health and Human Services to waive this requirement if a state showed that it could establish and enforce child support orders in a timely manner using its regular judicial procedures.

b. The prohibition on using judges and regular judicial procedures to establish and enforce child support orders was repealed on December 23, 1994. [59 Fed. Reg. 66,204 (Dec. 23, 1994).]

2. In order to comply with this former federal requirement, the North Carolina General Assembly enacted legislation in 1985 (G.S. 7A-178, 7A-183, and 50-34 through 50-39) authorizing the appointment of magistrates, assistant clerks of superior court, and clerks of superior court as child support hearing officers authorized to hear and decide cases involving the establishment and enforcement of child support orders in districts in which the federal expedited process requirement was not waived. This legislation was never implemented in any judicial district but has not been repealed, despite the 1994 amendment to the federal regulation.

C. Medical Support

1. Medical, hospital, dental, or other health care expenses.

a. A child support ordered entered in a civil action for child support or a written agreement between the parties may require either or both parties to pay all or

part of the child's medical, hospital, dental, or other health care–related expenses. [G.S. 50-13.11(a).]

i. Counseling services must be provided by a licensed therapist before a court can enforce payment provisions in a consent agreement. [*See Blanton v. Fitch,* 150 N.C. App. 200, 562 S.E.2d 565 (2002) (trial court erred when it ordered father to reimburse mother one-half the cost of counseling services provided to children by a fee-based pastoral counselor and social worker, when the person was not licensed or certified in North Carolina in either capacity; under consent order, parents were each responsible for one-half of uninsured medical bills, including dental, orthodontist, doctor, psychological, hospital, and prescribed medications).]

b. A parent may not be required to obtain or maintain health insurance for a child or to pay premiums for health insurance for a child under this section. [*Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) ("medical support" does not include health insurance; court may order parent to obtain "health insurance" only pursuant to G.S. 50-13.11(a1)).] Health insurance is required by G.S. 50-13.11(a1), discussed in Section VII.C.2, below.

c. Treatment of uninsured health care costs under the guidelines.

i. When a parent's child support obligation is determined under the child support guidelines, including those cases where the parent's income falls within the shaded area of the child support schedule, a court may order either parent or both parents to pay a child's uninsured medical or dental expenses in excess of $250 per year or other uninsured health care costs (including reasonable and necessary costs related to orthodontia, dental care, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders) in such proportion as the court deems appropriate. [2015 Guidelines.]

2. Health insurance.

a. If the court enters a child support order in a civil action for child support, the judge **must** order the child's parent or other responsible party to maintain health insurance for the benefit of the child if it is available at a reasonable cost. [G.S. 50-13.11(a1); 2015 Guidelines (court must order either parent to obtain and maintain medical health insurance coverage for a child if it is actually and currently available to the parent at a reasonable cost); 2011 Guidelines (court *may* order either parent to obtain and maintain health insurance coverage).]

b. The court may require one or both parties to maintain dental insurance for a child. [G.S. 50-13.11(a); 2015 Guidelines (same language as the statute).]

c. Health insurance for the benefit of a child is considered reasonable in cost if it is available at a cost to the parent that does not exceed 5 percent of the parent's gross income. In applying this standard, the cost is the cost of (1) adding the child to the parent's existing coverage, (2) child-only coverage, or (3) if new coverage must be obtained, the difference between the cost of self-only and family coverage.

[G.S. 50-13.11(a1), *amended by* S.L. 2015-220, §§ 1, 3, effective Aug. 18, 2015, and applicable to orders issued or agreements entered into on or after that date.]

i. Note that language in the 2015 Guidelines referring to language in G.S. 50-13.11(a1) before the amendment effective August 2015 has been superseded by the current language in G.S. 50-13.11(a1). Language tracking G.S. 50-13.11(a1) was added to the 2015 Guidelines.

ii. For more on the changes to G.S. 50-13.11(a1) related to reasonable cost, see Cheryl Howell, *Child Support: When Is Health Insurance Available at a Reasonable Cost?* UNC Sch. of Gov't: On the Civil Side Blog (Sept. 11, 2015), http://civil.sog.unc.edu/child-support-when-is-health-insurance-available-at-a-reasonable-cost.

d. Under former G.S. 50-13.11(a1), health insurance was considered reasonable in cost if it was available through the parent's or party's employment or through group health insurance, regardless of service delivery mechanism. The following cases considered former G.S. 50-13.11(a1) and were subject to earlier guidelines:

i. Insurance that can be obtained through employment is presumptively reasonable in cost. [*Buncombe Cty. ex rel. Frady v. Rogers*, 148 N.C. App. 401, 559 S.E.2d 227 (2002); 2006 and 2011 Guidelines (health insurance is considered reasonable in cost if it is employment-related or other group health insurance, regardless of delivery mechanism).]

ii. G.S. 50-13.11(a1) recognizes that a party may have access to insurance that is reasonable in cost, other than insurance that is available through employment. [*Buncombe Cty. ex rel. Frady v. Rogers*, 148 N.C. App. 401, 559 S.E.2d 227 (2002).]

iii. A similar provision in the 2011 Guidelines has been interpreted to mean that a parent with access to employment-related or other group health insurance has access to reasonably priced insurance as a matter of law. [*Reams v. Riggan*, 224 N.C. App. 78, 735 S.E.2d 407 (2012) (this interpretation does not preclude a trial court from determining that some other health insurance is also reasonably priced).]

iv. The trial court must make specific findings of fact regarding the availability of reasonably priced health and dental insurance. [*Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013) (remanding order that required mother to continue to provide health and dental insurance without finding that insurance was currently available to mother at a reasonable cost and that did not identify the source of the insurance).]

(a) If insurance was being provided by mother's new husband's employment, as the court of appeals assumed, the guidelines anticipate that insurance may be provided through a stepparent, and such coverage can be considered as reasonably priced insurance if appropriate findings are made. [*Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013).]

(b) There would be no inherent error in ordering mother to pay insurance premiums for coverage provided through her husband's employer. However,

the mother, and not her husband, is legally responsible for paying the premiums. [*Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013).]

v. An order requiring a party to obtain health insurance for a child when insurance is not available through the party's employment does not constitute a deviation from the guidelines under G.S. 50-13.4(c). [*Reams v. Riggan*, 224 N.C. App. 78, 735 S.E.2d 407 (2012).]

e. Allocation of premium payments.

i. The amount that is, or will be, paid by a parent (or a parent's spouse) for health insurance (medical, or medical and dental) for the children for whom support is being determined is added to the basic child support obligation and prorated between the parents based on their respective incomes. [2015 Guidelines.] For more on adjustments to the guideline amount of support for providing health insurance, see Section III.L.3, above.

ii. A noncustodial parent who pays more than his share of the cost of providing health insurance for the child is given a credit against his child support obligation for payment of health insurance premiums in excess of his share. [Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody; Worksheet B, Form AOC-CV-628, Child Support Obligation Joint or Shared Physical Custody; Worksheet C, Form AOC-CV-629, Child Support Obligation Split Custody.]

f. Failure to provide coverage ordered or agreed upon. If a party who is required to provide health insurance for a minor child fails to do so, the party is liable for any health, hospital, or dental expenses that are incurred after the date of the order or agreement that would have been covered had the required insurance been in force. [G.S. 50-13.11(e).]

g. Responsibilities of the employer or health insurer providing coverage.

i. If a court order requires a parent to provide health insurance coverage for a child and the parent is eligible for family health insurance coverage through the parent's employer or a health insurer, the employer or insurer must:

(a) Allow the parent to enroll an eligible child covered by the order under family coverage without regard to enrollment season restrictions;

(b) Enroll an eligible child covered by the order upon the application of the child's other parent, a IV-D agency, or a Medicaid agency if the employed or insured parent fails to enroll the child;

(c) Not disenroll or eliminate coverage of the child unless the order is no longer in effect, the child is enrolled in a comparable health plan, or the employer has eliminated family health benefit plan coverage for all its employees. [G.S. 58-51-120(b); 108A-69.]

ii. When a child is covered under the noncustodial parent's health insurance plan, the health insurer must:

(a) Provide the custodial parent with any information necessary to obtain covered benefits for the child;

(b) Permit the custodial parent, or a health care provider with the custodial parent's consent, to submit claims for covered services without the noncustodial parent's approval;

(c) Make payments on claims submitted by or on behalf of the custodial parent directly to the custodial parent, the provider, or the N.C. Department of Health and Human Services. [G.S. 58-51-120(c).]

iii. A health insurer may not refuse to enroll a child under a parent's health benefit plan because the child:

(a) Was born out of wedlock,

(b) Is not claimed by the parent as a dependent on the parent's federal income tax return, or

(c) Does not reside with the parent or within the insurer's service area. [G.S. 58-51-120(a).]

iv. If a custodial or noncustodial parent is required by court order to provide health benefit plan coverage for a child and the parent is eligible for family health benefit plan coverage through an employer, the parent's employer must withhold from the parent's compensation the employee's share, if any, of premiums for health benefit plan coverage, not to exceed the maximum amount permitted under the federal Consumer Credit Protection Act, and must pay that amount to the health insurer. [G.S. 108A-69(b)(4).]

h. Responsibilities of employer or insurer when plan covered by ERISA.

i. A group health plan or employee health benefit plan that is covered by the federal Employee Retirement Income Security Act (ERISA) must comply with a medical support order issued pursuant to G.S. 50-13.11(a1) if the medical support order is a qualified medical child support order (QMCSO). [29 U.S.C. § 1169(a)(1).]

ii. A QMCSO must:

(a) Include the name and address of the child recipient and the plan participant, [29 U.S.C. § 1169(a)(3)(A).]

(b) Describe the type of health care coverage that must be provided to the child recipient, [29 U.S.C. § 1169(a)(3)(B).] and

(c) State the period of time covered by the order. [29 U.S.C. § 1169(a)(3)(C).]

iii. An employer or insurer must provide benefits under a parent's health care plan to an eligible child in accordance with a QMCSO. [29 U.S.C. § 1169(a)(1).] A QMCSO may not require a health insurer to provide any benefit that is not otherwise provided under the parent's health care plan, except as required by 42 U.S.C. § 1396g-1 and G.S. 58-51-120. [29 U.S.C. § 1169(a)(4).]

3. Dental insurance. A court may require one or both parties in a civil child support proceeding to maintain dental insurance for a child. [G.S. 50-13.11(a1); 2015 Guidelines (same language as the statute).]

4. Medical expenses related to a child's birth and the mother's pregnancy.

   a. An order entered in a criminal nonsupport proceeding involving a child born out of wedlock, or in a civil action to determine the paternity of a child born out of wedlock, may require the child's father to pay medical expenses related to the child's birth and the mother's pregnancy. [G.S. 49-8(4) (necessary expenses of birth of the child and suitable medical attention for mother) and 49-15 (medical expenses incident to the pregnancy and the birth of the child), *amended by* S.L. 2013-198, § 23, effective June 26, 2013.]

   b. G.S. 49-15 limits recovery of prebirth expenses to medical expenses and does not authorize an award for other expenses incurred before birth. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (rejecting mother's claims for nursery expenses and the cost of maternity clothes before child was born).]

D. Retroactive Support (also called "Prior Maintenance")

1. Generally.

   a. "Prior maintenance" is the term used, in the absence of an existing child support order, for support awarded prior to the date a civil action for child support is filed. [*Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000) (using term "retroactive child support"). *See also State ex rel. Fisher v. Lukinoff,* 131 N.C. App. 642, 507 S.E.2d 591 (1998) (retroactive support means support owed for a time period before a complaint or motion seeking support is filed).]

   b. A claim for prior maintenance may be brought by a child's custodial parent or caretaker seeking reimbursement from the child's noncustodial parent for actual, reasonable, and necessary expenditures made by the custodial parent or caretaker for the child's care prior to the date a civil action for child support was commenced against the noncustodial parent. [*See Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 442 (1995), *rev'd on other grounds,* 343 N.C. 50, 468 S.E.2d 33 (1996).]

   c. The three-year statute of limitations established under G.S. 1-52(2) has been applied to a claim for prior maintenance. [*See Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882 (plaintiff can seek recovery of expenditures that occurred three years or less before date action was filed for support of her child born out of wedlock; rejecting defendant's argument that plaintiff was not entitled to retroactive child support under G.S. 49-15 for expenditures incurred before defendant's paternity was established), *review denied,* 325 N.C. 709, 388 S.E.2d 460 (1989).]

   d. The doctrine of laches is not applicable to bar an action for retroactive child support. [*Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882 (the public policy concern about stale claims is adequately addressed by the three-year statute of limitations applied to claims for prior maintenance), *review denied,* 325 N.C. 709, 388 S.E.2d 460 (1989).]

   e. A claim for prior maintenance is legally distinct from a claim for child support pursuant to G.S. 50-13.4. A claim for prior maintenance, however, may be joined as a separate claim in a civil action with a claim for child support pursuant to G.S. 50-13.4.

f. A claim for prior maintenance, or retroactive support, does not include expenses incurred before the child's birth. The only prebirth expenses allowed are medical expenses pursuant to G.S. 49-15. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (citing *Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011), and *Freeman v. Freeman,* 103 N.C. App. 801, 407 S.E.2d 262 (1991)) (since parent's obligation for support arises when the child is born, order allowing as retroactive support nursery expenses and cost of maternity clothes reversed).]

2. Prior maintenance is often referred to as "retroactive child support."

   a. Referring to prior maintenance as "retroactive child support" may be confusing, as "retroactive child support" is also used to refer to a retroactive increase in the amount provided in an existing support order. [*See Zurosky v. Shaffer,* 236 N.C. App. 219, 763 S.E.2d 755 (2014) (citing *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000)) (discussing the "two varieties" of retroactive child support).] For a discussion about awarding retroactive support when there is an existing order, see *Modification of Child Support Orders,* Part 3 of this Chapter, Section II.G.4.

   b. Adding to the confusion is the occasional incorrect use of the term "retroactive child support." [*See Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 442 (1995) (noting that trial court erred in classifying support due from time claim was filed to date of trial as "retroactive child support"), *rev'd on other grounds,* 343 N.C. 50, 468 S.E.2d 33 (1996).]

3. Calculating amount of the award for prior maintenance for the period before a civil action for child support is filed.

   a. In cases involving a parent's obligation to support her child for a period before a child support action was filed (i.e., cases involving claims for "retroactive child support" or "prior maintenance"), a court may determine the amount of the parent's obligation:

      i. By determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought or

      ii. Based on the parent's fair share of actual expenditures for the child's care. [2015 Guidelines.]

   b. Until 2011, it appeared that the decision on whether to award prior maintenance based on the guidelines or on a parent's fair share of actual expenditures was discretionary under the guidelines. However, in 2011, cases began to require that an award of retroactive child support be determined based on the parent's actual expenditures for the child during the period for which retroactive child support was sought, based in part on concerns that the Conference of Chief District Judges had exceeded its authority in formulating the guideline provision providing for retroactive support to be based on the guidelines. [*Hinshaw v. Kuntz,* 234 N.C. App. 502, 760 S.E.2d 296 (2014) (citing *Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011)); *Respess v. Respess,* 232 N.C. App. 611, 629, 754 S.E.2d 691, 703 (2014) (citing *Robinson* and *Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009)) (reversing an award of retroactive child support calculated pursuant to the guidelines, stating that the 2011 Guidelines provision allowing retroactive support to be calculated

pursuant to the guidelines or actual expenditures "conflicts with the holding of *Robinson*"); *Robinson* (appellate court cited statement from 1989 case that retroactive child support payments are only recoverable for amounts actually expended on the child's behalf without citing or discussing the guideline provision allowing retroactive support to be based on the guidelines; appellate court reversed order for retroactive support that had no findings as to actual expenditures made on behalf of the children during period for which retroactive support was sought).]

c. In direct response to *Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014), G.S. 50-13.4(c1) was amended to clarify that the authority of the Conference of Chief District Judges to prescribe statewide presumptive guidelines for the computation of child support obligations includes retroactive support obligations. [G.S. 50-13.4(c1), *amended by* S.L. 2014-77, § 8, effective July 22, 2014, to add "retroactive support obligations."]

   i. The 2015 Guidelines retained the language from the 2011 Guidelines that provides that in cases involving a parent's obligation to support a child for a period before a child support action was filed, a court may determine the amount of the parent's obligation:

      (a) By determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought or

      (b) Based on the parent's fair share of actual expenditures for the child's care. [2015 Guidelines.]

d. In a recent case in which the 2015 Guidelines were not applicable, an award of retroactive child support was determined based on the parent's fair share of actual expenditures for the child's care. [*See Moore v. McLaughlin,* 772 S.E.2d 14 (N.C. Ct. App. 2015) (**unpublished**) (retroactive child support for period between July 23, 2010, and Feb. 14, 2012, the date the action was revived after being discontinued twice, was to be determined based on evidence of father's actual expenditures for the child).]

e. For more on retroactive support, see Cheryl Howell, *Retroactive Child Support: What Is It and How Is the Amount Determined?* UNC Sch. of Gov't: On the Civil Side Blog (Apr. 1, 2016), http://civil.sog.unc.edu/retroactive-child-support-what-is-it-and-how-is-the-amount-determined.

4. Award based on actual expenditures.

   a. The amount of prior maintenance awarded by the court based on actual expenditures must be based on the amount of the actual, reasonable, and necessary expenditures by the custodial parent or caretaker for a child's care and the noncustodial parent's financial ability to pay her fair share of those expenses. [*Stanley v. Stanley*, 118 N.C. App. 311, 454 S.E.2d 701 (1995) (trial court must calculate defendant's share of the monies actually expended by plaintiff for the care of the child during the relevant period); *Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (a party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child and evidence that such expenditures were reasonably necessary).]

b. Retroactive child support is calculated by considering reasonably necessary expenditures made on behalf of the child by the party seeking support and the defendant's ability to pay during the period in the past for which retroactive support is sought. [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998); *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991) (award of retroactive child support must take into account defendant's ability to pay during the period in the past for which reimbursement is sought); *Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (citing *Savani*) (order awarding retroactive support in a high-income case reversed when it did not include findings as to father's ability to pay during the time period for which reimbursement was sought, clarifying for the trial court on remand that the time period for which reimbursement is sought is not when the matter is heard but is the period in the past during which the expenses were incurred).]

c. Retroactive support may not be awarded for a period of time when the parties were complying with payment obligations contained in an unincorporated separation agreement absent a showing of an emergency. [*Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (it is error to award retroactive child support in excess of the terms of an unincorporated separation agreement absent an emergency situation); *Hinshaw v. Kuntz,* 234 N.C. App. 502, 760 S.E.2d 296 (2014) (citing *Carson*) (when father was making child support payments, as provided in a valid unincorporated separation agreement, until mother filed a complaint for child support, and even when he voluntarily increased his support payments after wife's alimony expired, trial court was not authorized to award retroactive support; mother's argument, that pursuant to the agreement father's obligation for support expired when his obligation to pay alimony expired, was rejected).] For a discussion of the application of the guidelines in cases involving retroactive support in the context of an unincorporated separation agreement, see Section III.D.5.b, above.

d. Burden of proof.

   i. The party seeking retroactive child support must present sufficient evidence of actual expenditures made on behalf of the child and that those expenditures were reasonably necessary. [*State ex rel. Fisher v. Lukinoff,* 131 N.C. App. 642, 507 S.E.2d 591 (1998) (citing *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991)).]

   ii. Once proof of reasonably necessary actual expenditures under G.S. 50-13.4(c) is made, the trial court must reimburse plaintiff for her past expenditures "(1) to the extent she paid father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before . . . the date she filed her claim for child support." [*State ex rel. Fisher v. Lukinoff,* 131 N.C. App. 642, 648, 507 S.E.2d 591, 595 (1998) (quoting *Napowsa v. Langston*, 95 N.C. App. 14, 21, 381 S.E.2d 882, 886, *review denied,* 325 N.C. 709, 388 S.E.2d 460 (1989)).]

e. Proof of expenditures.

   i. "Contrary to defendant's assertion that plaintiff's affidavit did not constitute evidence of actual expenditures, an affidavit is recognized by this court as a basis of evidence for obtaining support." [*Savani v. Savani*, 102 N.C. App. 496, 502, 403 S.E.2d 900, 904 (1991) (plaintiff's affidavit setting out the expenses she incurred

while child in her custody, supplemented by testimony at trial for period not covered by affidavit, was sufficient basis for order reimbursing her for past support).] For more on financial affidavits, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.F.6.

ii. A party seeking retroactive support based on actual expenditures must provide "actual evidence" as to the date or dates the expenses were incurred. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (citing *Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009)) (mother's evidence showed the amount paid and the relevant merchant but not the date the expenses were incurred; as evidence failed to show that submitted expenses were incurred prior to filing of the complaint, order for the listed expenses reversed).]

f. Allocation of retroactive child support expenses between the parties.

i. The measure of the noncustodial parent's liability to the custodial parent is the amount actually expended by the custodial parent that represents the noncustodial parent's share of support. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (citing *Hicks v. Hicks,* 34 N.C. App. 128, 237 S.E.2d 307 (1977)) (order requiring father to reimburse mother 100 percent of her expenditures was remanded for determination of portion that should be allotted to mother); *Napowsa v. Langston,* 95 N.C. App. 14, 381 S.E.2d 882 (mother entitled to be reimbursed for past expenditures to the extent she paid father's share of those expenditures), *review denied,* 325 N.C. 709, 388 S.E.2d 460 (1989).]

g. Findings.

i. What findings and conclusions in support of an award of retroactive support based on actual expenditures must include.

(a) Findings in support of an award of retroactive child support must include the actual expenditures made on behalf of the child between the relevant dates; judge must also determine that the actual expenditures were reasonably necessary. [*McCullough v. Johnson*, 118 N.C. App. 171, 454 S.E.2d 697 (1995) (citing *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991)).]

(b) A trial court's award of retroactive child support must be based on findings adequate to show that plaintiff paid defendant's share of child support as determined under G.S. 50-13.4(c). [*Napowsa v. Langston,* 95 N.C. App. 14, 381 S.E.2d 882, *review denied,* 325 N.C. 709, 388 S.E.2d 460 (1989).]

h. Findings sufficient to support an award of retroactive support based on actual expenditures.

i. *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991). Evidence in the record supported trial judge's findings of amount of expenditures over eleven-month period and that amount was reasonable under the circumstances taking into account plaintiff's income, the needs of the child, the income of the defendant, and the accustomed standard of living of the child with defendant.

i. Findings not sufficient to support an award of retroactive support based on actual expenditures.

i. *McCullough v. Johnson,* 118 N.C. App. 171, 172, 454 S.E.2d 697, 697–98 (1995). Finding, which was actually a conclusion, that a "reasonable amount of past child support, for the period Sept. 1, 1992, through Dec. 31, 1992, is $500 per month" insufficient to support an order for retroactive child support. NOTE: Period covered was after complaint for support was filed, so support was actually prospective support and not retroactive support.

ii. *Napowsa v. Langston,* 95 N.C. App. 14, 381 S.E.2d 882, *review denied,* 325 N.C. 709, 388 S.E.2d 460 (1989). Trial court's findings were insufficient to support award of retroactive child support absent findings as to parties' estates, earnings, conditions, and accustomed standard of living.

j. What findings and conclusions in support of a decision to deny a motion for reimbursement of actual expenditures must include.

i. *State ex rel. Fisher v. Lukinoff,* 131 N.C. App. 642, 649, 507 S.E.2d 591, 596 (1998). A trial court may not simply "decline" to award plaintiff retroactive child support "unless its findings support that plaintiff is not so entitled." When a party seeking retroactive child support puts forth ample evidence of her actual expenditures on the minor's behalf, to deny retroactive support the court's findings must support its conclusion that the party is, in essence, entitled to no sum of reimbursement.

k. Findings not sufficient to support denial of a motion for reimbursement of actual expenditures.

i. *State ex rel. Fisher v. Lukinoff,* 131 N.C. App. 642, 507 S.E.2d 591 (1998). When order contained no findings relating to plaintiff's actual expenditures despite a twenty-nine-page affidavit of expenses submitted by plaintiff, and no findings as to the reasonableness thereof or to the defendant's ability to pay during the three-year period at issue (including the extent to which plaintiff paid defendant's share), order's findings were insufficient to support its conclusion that plaintiff should receive no amount of reimbursement from defendant.

ii. *Orange Cty. ex rel. Dashman v. Dubeau,* 175 N.C. App. 592, 624 S.E.2d 433 (2006) (**unpublished**). Findings inadequate to support decision to deny mother's motion for retroactive support when there was only cursory mention of the total amount mother expended without any specific mention of the nature of the expenditures; there was no specific mention of the reasonableness of the expenditures, only of a "generous standard of living enjoyed" by mother during the relevant time period; and there was no mention of father's ability to pay during the three-year period at issue, nor any determination of the extent to which mother had paid father's share.

5. Award based on guidelines.

a. If retroactive support is to be awarded based on the guidelines, the 2015 Guidelines provide that the guideline amount is set "by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought."

b. This means that the trial court sets the amount of retroactive support based on both the income of the parties at the beginning of the time period for which support is sought and the guidelines in effect at that time. [See 2010 Howell Bulletin, www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf.]

c. However, retroactive support may not be awarded for a period of time when the parties were complying with payment obligations contained in an unincorporated separation agreement, absent a showing of an emergency. [*Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (it is error to award retroactive child support in excess of the terms of an unincorporated separation agreement absent an emergency situation).] *See* 2015 Guidelines. See Section III.D.5.b, above, for discussion of the application of the guidelines in cases involving claims for retroactive support when there is an unincorporated separation agreement.

6. Attorney fees.

a. Trial court has discretion to award attorney fees pursuant to G.S. 50-13.6 in proceedings for retroactive child support. [*Napowsa v. Langston,* 95 N.C. App. 14, 381 S.E.2d 882, *review denied,* 325 N.C. 709, 388 S.E.2d 460 (1989).]

b. It was error to award attorney fees in connection with a mother's claim for retroactive child support when the trial court did not find that defendant "refused" to pay an adequate amount of support as required by G.S. 50-13.6 in support only cases. [*Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (where appellate court was unable to ascertain the portion of fees based on an improperly granted retroactive child support award, case was remanded for findings as to fees attributable to the award of prospective child support, which was upheld).]

c. When father maintained that there would have been no award of arrears for retroactive child support, and thus no award of attorney fees for that claim, if the court had properly credited father's postseparation payments as payment of retroactive support rather than as payment of marital debt, award of attorney fees was vacated for findings classifying and valuing the challenged postseparation payments. [*Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011).] See Section VIII.A, below, for more on attorney fees.

7. For a retroactive increase in the amount of child support provided in an existing order, see *Modification of Child Support Orders,* Part 3 of this Chapter.

E. Public Assistance Debt

1. The responsible parent (or responsible parents) of a child is liable to the state for reimbursement of public assistance paid by the state on behalf of the child. [G.S. 110-135.]

2. What "public assistance" includes.

a. The term "public assistance" clearly includes cash assistance paid on behalf of a dependent child under the state's Aid to Families with Dependent Children (AFDC) program or Temporary Assistance to Needy Families (TANF) program, called Work First and probably includes IV-E (referencing the program's legal authorization under Title IV-E of the federal Social Security Act) foster care assistance.

b. It is unclear whether public assistance includes state foster care assistance paid pursuant to G.S. 108A-48 or other public assistance or social services provided to a dependent child.

3. Relationship between G.S. 110-135 and 50-13.4.

a. An action to recover a public assistance debt created under G.S. 110-135 is legally distinct from a claim for child support pursuant to G.S. 50-13.4. An action to collect a public assistance debt pursuant to G.S. 110-135, however, may be joined as a separate claim in a civil action with a claim for child support pursuant to G.S. 50-13.4 brought by a IV-D agency when a child's right to child support has been assigned to the state pursuant to G.S. 110-137. For definition of a IV-D case and a non-IV-D case, see Section III.I.7, above.

i. G.S. 110-135 must be read and applied *in pari materia* with G.S. 110-137. Any child support payments received from a noncustodial parent and retained by the state pursuant to an assignment under G.S. 110-137 offsets dollar-for-dollar the noncustodial parent's public assistance debt under G.S. 110-135. It is not necessary to bring an action under G.S. 110-135 against a noncustodial parent when the noncustodial parent has been required to pay child support under a valid child support order throughout the entire period of time that the child received public assistance and the child's right to child support has been assigned to the state under G.S. 110-137.

ii. Although a IV-D agency may establish and enforce a child support obligation on behalf of a child whose right to child support has been assigned to the state pursuant to G.S. 110-137, federal IV-D funding may not be used to obtain a judgment for a public assistance debt pursuant to G.S. 110-135 when the amount of the debt is not based on the parent's obligation under an existing child support order. [U.S. Dep't of Health & Human Servs., Office of Child Support Enforcement, Use of Presumptive Child Support Guidelines to Establish and Collect Support, Action Transmittal 93-04 (Mar. 22, 1993), www.acf.hhs.gov/programs/cse/pol/AT/1993/at-9304.htm.]

4. The State of North Carolina or the county from which assistance is received is the real party in interest in a claim for reimbursement of public assistance under G.S. 110-135. [G.S. 110-137; 110-135; *State ex rel. Crews v. Parker*, 319 N.C. 354, 354 S.E.2d 501 (1987) (the state or county is the real party in interest in an action to recover public assistance up to the amount provided when the child's right to support has been assigned to the state or county as a condition of receiving public assistance pursuant to G.S. 110-137; grandmother who had raised child since birth was entitled to intervene to assert right to receive compensation from father for years grandmother had supported child before receiving AFDC benefits).] For extensive discussion of the parties and their legal relationship in a child support enforcement action, see 2007 Saxon Bulletin, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb22.pdf.

5. The county attorney or an attorney retained by the state or county is responsible for representing the state in actions brought pursuant to G.S. 110-135. [G.S. 110-135.]

6. A claim under G.S. 110-135 must be filed within five years of receipt of the last payment of public assistance on behalf of the child. [G.S. 110-135. *See State ex rel. Terry v. Marrow,* 71 N.C. App. 170, 321 S.E.2d 575 (1984).]
7. The court may deny the state's claim based on laches, estoppel, or other equitable defenses. [*See Moore Cty. ex rel. Evans v. Brown*, 142 N.C. App. 692, 543 S.E.2d 529 (trial court had discretion to consider the equity of granting Moore County Department of Social Services' motion to pursue father for public assistance debt; trial court's denial of the motion due to equitable considerations affirmed), *review denied,* 353 N.C. 728, 550 S.E.2d 780 (2001); *State ex rel. Gillikin v. McGuire,* 174 N.C. App. 347, 620 S.E.2d 899 (2005) (citing *Moore Cty. ex. rel Evans*) (in determining whether to order reimbursement under G.S. 110-135 for public assistance previously paid on behalf of a child, the trial court is vested with considerable discretion to consider both law and equity).]
8. In its initial consideration of a claim for reimbursement of past public assistance, the trial court did not err when it denied a request for reimbursement of past paid public assistance based on the fact that, during the fifteen-year period assistance was paid on behalf of the child, multiple other persons had been named as potential fathers and defendant had not been named. [*State ex rel. Gillikin v. McGuire,* 174 N.C. App. 347, 620 S.E.2d 899 (2005) (court allowed to consider equitable factors in determining whether to order reimbursement). *But cf. Orange Cty. ex rel. Harris v. Keyes,* 158 N.C. App. 530, 581 S.E.2d 142 (2003) (error for trial court to forgive past public assistance debt owed to the State of North Carolina for period before defendant knew of the minor child's existence when defendant had agreed in a voluntary support agreement to reimburse the state for public assistance provided for that period; trial court had no legal basis to retroactively modify father's vested child support arrears).] For modification of an order providing for reimbursement of past paid public assistance, see *Modification of Child Support Orders*, Part 3 of this Chapter, Section II.H.4.a.
9. A conviction under G.S. 14-322 for failure to support established paternity and collaterally estopped defendant from relitigating the issue of paternity in a later civil action by the state for reimbursement of public assistance. [*State ex rel. Lewis v. Lewis,* 311 N.C. 727, 319 S.E.2d 145 (1984) (defendant's conviction under G.S. 14-322 necessarily required a finding that defendant was the father of the children whose support was at issue; the State of North Carolina was administering the child support enforcement program for the county that brought the subsequent civil action, so the parties in the civil action were identical or in privity with the parties in the criminal action).] NOTE: When *Lewis* was decided, the standard of proof for a civil paternity action was beyond a reasonable doubt, allowing application of collateral estoppel. Collateral estoppel may not be used when the two actions have different standards of proof. [Sara DePasquale, Fathers and Paternity: Applying the Law in North Carolina Child Welfare Cases 60–61 (UNC School of Government, 2016).]
10. The amount of the public assistance debt owed by a responsible parent under G.S. 110-135 is equal to the lesser of (1) the amount of public assistance paid on behalf of the child; (2) the amount of child support that the responsible parent was required to pay on behalf of the child during the period in which the child received public assistance; or (3) the amount of support that the responsible parent was financially able to provide during the period in

which the child received public assistance. [See Section VII.E.3, above; *State ex rel. Terry v. Marrow,* 71 N.C. App. 170, 175, 321 S.E.2d 575, 578 (1984) ("The only limitations in G.S. 110-135 on the extent of reimbursement for which judgment may be obtained relate to the defendant's financial ability to furnish support during the relevant period of time").]

a. It is error to calculate the amount of past paid public assistance from the date of the original demand notice to a defendant. [*Guilford Cty. ex rel. Manning v. Richardson,* 149 N.C. App. 663, 562 S.E.2d 67 (2002) (obligation to support a child born out of wedlock begins on birth of the child, not when defendant's paternity is judicially determined).]

11. Reduction in past due public assistance debt.

a. Pursuant to an amendment to G.S. 110-135 effective Dec. 13, 2005, past due public assistance debt is subject to a one-time two-thirds reduction if:

i. The debt is at least $15,000;

ii. The responsible parent continues to be obligated to pay current child support;

iii. The state and the responsible parent agree and the court approves the agreement after an inquiry into the responsible parent's financial status; and

iv. The responsible parent makes each court-ordered child support payment for a twenty-four-month period, including payments due on child support arrears. [G.S. 110-135, *amended by* S.L. 2005-389, § 2.]

b. If the responsible parent is late or defaults on any single payment during the twenty-four-month period, there is no reduction in the public assistance debt. [G.S. 110-135, *amended by* S.L. 2005-389, § 2.]

c. The reduction of public assistance debt set out in G.S. 110-135 is in addition to other remedies available to the state for the retirement of the debt. [G.S. 110-135, *amended by* S.L. 2005-389, § 2.]

VIII. Attorney Fees

A. Attorney Fees

1. Authorization.

a. G.S. 50-13.6 allows a court in its discretion to award reasonable attorney fees in an original action for support or for custody and support, including a motion in the cause to modify or vacate, to an interested party acting in good faith who has insufficient means to defray the expense of the suit. [G.S. 50-13.6; *Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (trial court has considerable discretion in allowing or disallowing attorney fees in child support cases).]

b. Fees also are authorized to an interested party, as deemed appropriate under the circumstances, upon a finding that the supporting party has initiated a frivolous action or proceeding. [G.S. 50-13.6.] See Section VIII.A.11, below.

c. G.S. 52C-3-312(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, provides that if an obligee prevails, a responding tribunal in North Carolina may assess against an obligor filing fees, reasonable attorney fees, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the initiating or the responding state or foreign country, except as provided by other law. Attorney fees may be taxed as costs and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs, and expenses.

d. Attorney fees may be awarded under a separation agreement entered into pursuant to G.S. 52-10.1 that provides for attorney fees, unless the provision is otherwise contrary to public policy. [*Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (citing *Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995)).]

2. Discretion as to award and amount.

a. The trial court has the discretion to award attorney fees once the statutory requirements of G.S. 50-13.6 have been met. [*Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (citing *Atwell v. Atwell,* 74 N.C. App. 231, 328 S.E.2d 47 (1985)).]

b. The amount of attorney fees to be awarded rests within the sound discretion of the trial judge. [*Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002); *Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (citing *Burr*).]

c. The trial court has discretion to award less than the total amount claimed by an attorney. [*See Kuttner v. Kuttner,* 193 N.C. App. 158, 666 S.E.2d 883 (2008) (order awarding only a portion of mother's attorney fees upheld).]

d. Trial court has no discretion in an action for child support to award legal fees pursuant to a contingent fee contract. [*Davis v. Taylor,* 81 N.C. App. 42, 344 S.E.2d 19, *review denied,* 318 N.C. 414, 349 S.E.2d 593 (1986).] Such contracts in child support cases are void as against public policy.

3. Type of proceedings in which fees awarded. An award of attorney fees is proper in:

a. An action or proceeding for the custody, support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support. [G.S. 50-13.6.]

b. A contempt proceeding for willful failure to pay child support. [*Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002). *See also Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996) (obligor ordered to pay obligee's attorney fees in case enforcing consent judgment providing for payment of college expenses).]

c. Proceedings for retroactive child support. [See Section VII.D.6, above.]

4. When request for an award of fees is properly made.

a. A request for attorney fees may be properly raised by a motion in the cause subsequent to the determination of the main action. [*In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411, *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986) (request for fees in a custody case pursuant to G.S. 50-13.6).]

b. There is no requirement that a party first pay attorney fees before seeking an award pursuant to the statute. [*Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (denying as irrelevant father's motion to compel mother to answer a discovery request that sought proof that she had paid her attorney fees).]

c. The court of appeals has noted that no case has imposed a time limitation for the filing of a motion for attorney fees in a child custody and child support action pursuant to G.S. 50-13.6, except that a proper notice of appeal divests the trial court of jurisdiction to enter an order for fees while the appeal is pending. [*Bramblett v. Bramblett,* 218 N.C. App. 454, 721 S.E.2d 763 (2012) (**unpublished**) (order awarding attorney fees upheld against claim that request was not timely when it was not included in complaint and was asserted more than a year after complaint filed; motion for fees was filed after conclusion of hearing on child custody and support, and trial court heard and ruled on motion before entry of an order in the custody and support action and prior to any appeal); *Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (when a custody order is appealed, the trial court loses jurisdiction to consider a request for attorney fees arising out of the custody case).] *But see Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013), discussed in *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.I.

i. Note, however, that for attorney fees to be included in the amount withheld from a supporting party's income, the court of appeals has held that such a claim should be asserted before entry of the withholding order. [*Glatz v. Glatz,* 98 N.C. App. 324, 390 S.E.2d 763 (denial of motion for attorney fees filed three months after entry of the income withholding order affirmed; G.S. 110-136.6(a), allowing court costs and attorney fees to be included in amount withheld, "clearly contemplates" that such claims be asserted before entry of the income withholding order), *review denied,* 327 N.C. 427, 395 S.E.2d 677 (1990).]

ii. For a discussion of a trial court's jurisdiction to enter an order for attorney fees after appeal of the underlying child support order, see *Procedure for Initial Child Support Orders,* Part 2 of this Chapter, Section I.I.6.

5. Ability of party to pay award of fees.

a. The plain language of G.S. 50-13.6 contains no requirement that a trial court make a finding of ability to pay on the part of the person being ordered to pay before attorney fees may be awarded in a custody and support action. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (although some cases have "mentioned" an obligor's ability to pay an award of fees under G.S. 50-13.6, the statute requires no such finding); *Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (citing *Van Every v. McGuire,* 348 N.C. 58, 497 S.E.2d 689 (1998)) (before awarding fees to mother in custody and support action, trial court was not required to find that father had resources available to pay the fees); *Webster v. Webster*, 182 N.C. App. 767, 643 S.E.2d 84 (2007) (**unpublished**). *But see Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (2009) (trial court findings were sufficient to establish father's ability to pay a portion of attorney fees awarded to child's grandparents); *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (affirming trial court's order requiring mother to pay half of father's attorney fees based, in part, on conclusion that mother had the means to pay half), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006);

Cunningham v. Cunningham, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (affirming the trial court's award of attorney fees but remanding the issue of defendant's ability to pay a final, lump sum fee award of $17,000 in light of a new equitable distribution order entered in the case).]

6. Insufficient means to defray litigation expenses.

   a. A party has insufficient means to defray the expenses of a suit when he is unable to employ adequate counsel in order to proceed as a litigant to meet the other spouse as a litigant in the suit. [*Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002).]

   b. In determining whether a party has insufficient means to defray the expenses of the suit, the trial court should focus on both the disposable income of the spouse seeking fees and on her separate estate. [*Van Every v. McGuire,* 348 N.C. 58, 497 S.E. 2d 689 (1998) (trial court also may compare the estates of the parties, as set out in Section VIII.A.6.c.i, below); *Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (citing *Van Every*) (findings failed to take into account plaintiff's liquid estate of $88,000 and focused instead on her negative disposable income to justify award of fees), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 523 S.E.2d 729 (2001); *Murn v. Murn*, 723 S.E.2d 583 (N.C. Ct. App. 2012) (**unpublished**) (citing *Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002)) (plaintiff was without sufficient means to pay fees when fees were approximately four times her monthly gross income and evidence showed that defendant owed child support arrearages of $12,036, which meant that plaintiff had to assume majority of financial responsibility for shared monthly basic child support obligation of $4,438.50, which took vast majority of her monthly income).]

      i. Fact that a party has a substantial separate estate does not automatically negate her right to attorney fees, but to award fees in such a case, the trial court must find that the use of the separate estate to pay litigation expenses would amount to an unreasonable depletion of that estate. [*Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (citing *Chused v. Chused*, 131 N.C. App. 668, 508 S.E.2d 559 (1998)) (findings insufficient when court failed to find that use of plaintiff's separate estate to pay her attorney fees would result in an unreasonable depletion of her estate and failed to determine whether plaintiff was an interested party acting in good faith), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 523 S.E.2d 729 (2001); *Chused* (where court did not make findings addressing whether mother's estate would be unreasonably depleted if she had to pay her attorney fees, order requiring defendant to pay fees was reversed and remanded).]

      ii. Plaintiff did not meet the statutory requirement of insufficient means to defray the expense of the suit when evidence established that she had a net estate of $665,652 and substantial income. [*Hudson v. Hudson,* 299 N.C. 465, 263 S.E.2d 719 (1980).]

   c. A district court may determine that a party has sufficient means to defray costs of an action without considering the estate of the other party. [*Taylor v. Taylor*, 343 N.C. 50, 468 S.E.2d 33 (1996) (mother had means to defray expenses where her monthly income exceeded her expenses, she received $1.2 million in property settlement,

and no unreasonable depletion of her estate would be required to pay attorney fees; rejecting mother's argument that this determination requires consideration of the relative estates of the parties); *Osborne v. Osborne*, 129 N.C. App. 34, 497 S.E.2d 113 (1998) (citing *Taylor*) (a court is not required to compare the parties' relative estates before attorney fees are awarded).]

i. Though not required, a comparison of estates is permitted. [*Van Every v. McGuire,* 348 N.C. 58, 60, 497 S.E. 2d 689, 690 (1998) (emphasis in original) (that G.S. 50-13.6 "does not *require* the trial court to compare the relative estates of the parties does not automatically mean that it does not *allow* or *permit* the trial court to do so in a proper case"); *Bookholt v. Bookholt*, 136 N.C. App. 247, 253, 523 S.E.2d 729, 733 (1999) (citing *Van Every*) (noting that a trial judge is not required to compare the separate estates of both parties in determining the propriety of attorney fees but may do so under appropriate circumstances; on remand, trial court could "if it so chooses" compare the separate estates of the parties to determine whether requiring plaintiff to pay her attorney fees would result in an unreasonable depletion of her estate), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 523 S.E.2d 729 (2001); *Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (addressing conclusion in custody and support action that plaintiff had insufficient means to defray expenses of the suit, noting that plaintiff was unemployed, and that her attorney fees alone "far exceeded" the value of her few assets combined, while defendant had monthly income of close to $11,000).]

d. Findings regarding insufficient means to defray expenses.

i. Determination that party has insufficient means to defray expenses must be supported by findings. [*Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (findings were sufficient as to plaintiff's income but remand was required when trial court made no findings as to her expenses or her assets and estate); *Church v. Decker*, 231 N.C. App. 514, 753 S.E.2d 742 (2013) (**unpublished**) (citing *Dixon v. Gordon,* 223 N.C. App. 365, 734 S.E.2d 299 (2012)) (matter remanded when defendant testified as to the value of her home, vehicle, and retirement accounts and as to amount of her annual salary but trial court failed to make findings that would support determination of insufficient means).]

ii. Finding that mother not able to defray litigation expenses upheld; mother had been paying all uninsured medical expenses for the past two years, and she had outstanding balances on those expenses at the time of the hearing. [*Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002); *Mason v. Erwin,* 157 N.C. App. 284, 579 S.E.2d 120 (2003) (in support only suit, trial court made necessary findings, which were buttressed by other findings, specifically, that plaintiff wife had debts totaling more than $3,700 and it took her six months to save the money necessary to pay her attorney's retainer).]

iii. *But see Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (no finding as to plaintiff's ability to defray expenses but findings sufficient, as trial court found that minor children did not have the ability to pay and plaintiff was acting on their behalf).

7. Reasonableness of fees awarded.
   a. A trial court, considering a motion for attorney fees under G.S. 50-13.6, is permitted, but is not required, to take judicial notice of the customary hourly rates for local attorneys performing the same services and having the same experience as the attorney representing the party seeking the fee award. This would satisfy the party's obligation to provide evidence as to the reasonableness of his attorney's hourly rate. [*Simpson v. Simpson,* 209 N.C. App. 320, 328 n.2, 703 S.E.2d 890, 895 n.2 (2011) (matter of first impression) (proceeding to modify child custody) (the court of appeals "stress[ed]", however, in a footnote that the better practice is for parties to provide evidence of the customary local rates rather than depending upon judicial notice).]
   b. The reasonableness of attorney fees is not gauged by the fees charged by the other side. [*Kuttner v. Kuttner,* 193 N.C. App. 158, 666 S.E.2d 883 (2008) (plaintiff who was ordered to pay defendant's fees unsuccessfully argued that defendant's fees must be unreasonable because they were much higher than those charged by his own counsel).]
   c. Findings as to reasonableness of fees.
      i. To support the reasonableness of an award of attorney fees, the trial court must make findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers. [*Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (order awarding attorney fees must include findings as to the basis of the award, including the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested); *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**) (where the trial court failed to make findings as to the reasonableness of mother's attorney fees, as well as other required findings, award of fees was reversed and issue remanded for further findings).]
      ii. The trial court must make a finding of "reasonableness" regarding the nature and scope of the legal services rendered and the skill and time required. [*Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (trial court did not err in awarding attorney fees of $55,000 when it made numerous findings relating to the skill and expertise of plaintiff's counsel and plaintiff's entitlement to have counsel of a certain caliber to meet defendant and his attorney on an equal footing), *rev'd per curiam on other grounds for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002).]
      iii. Court made proper findings as to the reasonableness of attorney fees in case finding former husband in contempt for failing to pay child support. [*Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002) (trial court found that $6,000 in fees and costs was reasonable for the original hearing and appeal and that hourly rate and time expended as reflected in attorney's affidavit were reasonable).]
      iv. No abuse of discretion when trial court determined number of hours for wife's counsel based on an extensive discussion with her counsel as well as careful

consideration of the attorney's affidavit stating the number of hours he worked on wife's custody and support claims. [*Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005). *Cf. Murn v. Murn,* 723 S.E.2d 583 (2012) (**unpublished**) (when there were no findings as to the number of hours the attorney worked, order for fees was reversed and remanded for findings on the reasonableness of the fees awarded).]

8. Whether party must be successful in the underlying action.

   a. There is no requirement in G.S. 50-13.6 that a party seeking fees in an action for child support or custody be the prevailing party. In many cases awarding fees pursuant to G.S. 50-13.6, whether the recipient of fees is the prevailing party is not raised or discussed. *Cf.* G.S. 52C-3-312(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, which provides that if an obligee prevails, a responding tribunal in North Carolina may assess against an obligor reasonable attorney fees.

   b. One case has specifically rejected the argument that because a party did not prevail in an action involving support and custody the party was not entitled to an award of fees pursuant to G.S. 50-13.6. [*See Burr v. Burr,* 153 N.C. App. 504, 570 S.E.2d 222 (2002) (father sought support and mother sought to modify custody; trial court continued primary custody with father and allowed mother visitation and ordered her to pay current and past support; award of fees to mother upheld, rejecting argument that because mother did not prevail at trial award of attorney fees was improper).] Custody cases are in accord. [*See Wiggins v. Bright,* 198 N.C. App. 692, 679 S.E.2d 874 (2009) (father ordered to pay mother's attorney fees when father's motion for contempt for mother's failure to comply with custody order was denied; order for fees affirmed, as fees were authorized by G.S. 50-13.6 and trial court made required statutory findings as to good faith and insufficient means, making it immaterial whether the recipient of fees was either the movant or the prevailing party; G.S. 50-13.6 requires only that recipient be "an interested party;" father's argument that party awarded fees must have prevailed is contrary to *Burr*); *cf. Baumann-Chacon v. Baumann,* 212 N.C. App. 137, 138 n.1, 710 S.E.2d 431, 432 n.1 (2011) (stating in a footnote that "Plaintiff's claim for attorney's fees rests on [G.S.] 50-13.6 and 50-16.4, which authorize such relief in the event that a litigant successfully prosecutes child support, child custody, or spousal support claims and meets any other applicable conditions for such an award" and thus "rises or falls" with those claims).]

   c. One case has upheld an award of fees under G.S. 50-13.6 when "[n]either party was a clear winner or loser." [*Hennessey v. Duckworth,* 231 N.C. App. 17, 21, 752 S.E.2d 194, 198 (2013) (2012 consent order resolved custody and child support claims; mother's claim for attorney fees under G.S. 50-13.6 allowed, father's claim for attorney fees denied; in considering whether the award of fees was precluded by a 2009 unincorporated separation agreement providing that the losing party in any enforcement action was solely responsible for all legal fees and costs, court found it difficult to say who was the "losing party" and who was the "prevailing party" when each party had prevailed on some issues; after court determined that the separation agreement was not applicable, award of fees to mother under G.S. 50-13.6. was upheld when trial court's conclusions as to good faith and insufficient means were supported by adequate findings, which were supported by affidavits and record evidence).]

d. Some appellate cases have reversed an award of fees when the underlying order for support is reversed or remanded on appeal. [*Kowalick v. Kowalick*, 129 N.C. App. 781, 501 S.E.2d 671 (1998) (citing *Walker v. Tucker*, 69 N.C. App. 607, 317 S.E.2d 923 (1984)) (when order decreasing amount mother paid in child support and denying her request for modification of alimony was remanded for findings, award of attorney fees to father was also reversed; father would have to show on remand that he was successful on those claims before being awarded fees); *Walker* (citing *Daniels v. Hatcher,* 46 N.C. App. 481, 265 S.E.2d 429 (1980)) (because portion of the order increasing child support payments was vacated, the award of attorney fees to plaintiff also must be vacated); *Mullen v. Mullen*, 79 N.C. App. 627, 339 S.E.2d 838 (1986) (citing *Walker*) (reversing award of attorney fees because portion of order increasing child support was reversed on appeal), *superseded by statute on other grounds as stated in Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999); *Daniels*, 46 N.C. App. at 485, 265 S.E.2d at 432 (when order increasing father's child support payment was reversed for insufficient findings, order for fees in mother's favor was also reversed, with fees to be reconsidered "only when and if the issue of whether plaintiff is entitled to an award of increased child support is determined in her favor").]

9. Other findings.

a. Findings are required when the court awards attorney fees and also when it denies fees.

i. Trial court is required to make findings of fact to support an award of attorney fees made pursuant to G.S. 50-13.6. [*Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002).]

ii. Where an award of attorney fees is prayed for but denied, the trial court must provide adequate findings of fact for the appellate court to review its decision. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006) (citing *Gowing v. Gowing,* 111 N.C. App. 613, 432 S.E.2d 911 (1993)) (order denying request for attorney fees must contain findings supporting the court's decision; order that contained no findings relating to the denial of mother's request for fees, such as whether she had acted in good faith or had insufficient means to defray expenses, was remanded for findings); *Gowing* (trial court committed error when it made no findings of fact to support denial of attorney fees).]

b. Additional finding required in support only actions.

i. Where the action is solely one for support, the court may award attorney fees to an interested party if it finds "that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding." [G.S. 50-13.6; *Hudson v. Hudson,* 299 N.C. 465, 263 S.E.2d 719 (1980) (second sentence of G.S. 50-13.6 applies solely in a support only suit); *Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005) (before awarding fees in an action solely for child support, court must make the required finding under the second sentence of the statute); *Burr v. Burr,* 153 N.C. App. 504, 570 S.E.2d 222 (2002) (citing *Hudson*) (stating that a factual finding regarding refusal to provide support is only necessary

when child support is not determined in the same proceeding with child custody).]

ii. Determining whether action is for support only or for support and custody.

(a) A case is considered one for both custody and support when both of those issues were contested before the trial court, even if the custody issue is resolved prior to the support issue being decided. [*Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005) (citing *Taylor v. Taylor,* 343 N.C. 50, 468 S.E.2d 33 (1996)) (when support issue was heard, custody was at issue; even though parties had resolved custody by consent by the time child support order was entered, for attorney fees purposes, the case was considered one for both support and custody).]

(b) An action was for both custody and support when mother's custody claim was pending when case was called for hearing and was not addressed until entry of the order from which appeal was taken. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (even though father's pleading admitted that it was in child's best interest for primary custody to be awarded to mother, and appellate court acknowledged that both parties may have believed and acted as if they had resolved the custody claims before entry of the order, order on appeal was the first and only order that granted legal and physical custody of the child to mother; award of fees to mother upheld).]

(c) An action was for both custody and support, even though the custody issue was "resolved in basically 15 minutes" at trial. [*Theokas v. Theokas*, 97 N.C. App. 626, 630, 389 S.E.2d 278, 280, *review denied,* 327 N.C. 437, 395 S.E.2d 697 (1990). *See also Taylor v. Taylor,* 343 N.C. 50, 468 S.E.2d 33 (1996) (citing *Lawrence v. Tise*, 107 N.C. App.140, 419 S.E.2d 176 (1992)) (an action is properly characterized as one for "custody and support" where both custody and support actions were before trial court when case was called for trial, even though custody issue was quickly settled).]

(d) An action was for both custody and support where wife sought increase in support and husband sought modification of custody. [*Fellows v. Fellows,* 27 N.C. App. 407, 219 S.E.2d 285 (1975).]

(e) Where issue of custody had been settled by the judgment of the court some five months prior to entry of child support judgment, action to determine child support was action for support only. [*Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E.2d 99 (1984) (noting that what was important was not how the custody issue was settled or when but that it was settled and was not at issue when the judgment concerning support was entered). *See also Hudson v. Hudson,* 299 N.C. 465, 263 S.E.2d 719 (1980) (custody was initially raised but was disposed of in a consent order and was not at issue when support order was entered).]

iii. Whether support is adequate.

(a) Support can be inadequate even when it is paid as required by a consent judgment. [*Mason v. Erwin*, 157 N.C. App. 284, 579 S.E.2d 120 (2003)

(finding that defendant had failed to provide adequate support was upheld, even though defendant paid support as required by a consent judgment; consent judgment did not require support pursuant to the guidelines). *See also Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (support that father paid pursuant to an unincorporated separation agreement was not adequate).]

(b) Support was inadequate based on finding that needs of the children exceeded the amount of support voluntarily paid by plaintiff prior to the hearing. [*Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002).]

iv. Refusal to pay.

(a) In support only case, trial court erred in awarding attorney fees to wife without making finding that former husband had refused to provide adequate support under the circumstances existing at the time the action was initiated. [*Gibson v. Gibson,* 68 N.C. App. 566, 316 S.E.2d 99 (1984); *Thomas v. Thomas,* 134 N.C. App. 591, 518 S.E.2d 513 (1999) (court failed to make specific finding that father refused to provide child support adequate under the circumstances existing at the time of the institution of this action; no findings that mother was acting in good faith or that her means were insufficient to defray the expenses of the suit were made).]

(b) A parent can be considered to be refusing to pay adequate support for a time period after a complaint for support is filed even though the parent paid the amount agreed upon by the parties in an unincorporated separation agreement. [*See Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (while amount paid pursuant to unincorporated agreement is presumed adequate for time period before action is commenced, trial court was ordered on remand to make proper finding as to whether defendant refused to pay what was adequate after action for support was filed).]

c. Findings in combined actions.

i. Since attorney fees are not recoverable in an action for equitable distribution (ED), in a combined action, the trial court's findings of fact must reflect that the attorney fees awarded are attributable only to the alimony or child custody and/or support claims. [*Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (when trial court failed to make findings reflecting the fees attributable to the alimony and child support portions of the case, appellate court was unable to determine whether the trial court erred by awarding fees for the ED portion of the case).]

ii. Order was upheld that excluded attorney fees for the ED portion of a case and directed husband to pay a portion of the approximately 75 percent of wife's attorney fees that were attributable to the custody, child support, and alimony portions of the case, even though the fee affidavits did not label every charge as being attributable to a particular issue. [*Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005) (since services were adequately described, the trial court could compare the time spent on each issue at trial and the evidence presented with the line-item services on the fee affidavits to rationally determine

proper apportionment of fees). *See also Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (when plaintiff was entitled to attorney fees related to her motions to increase alimony and for payment of child support arrears, both of which were authorized by statute, the trial court was not required to set out amount of fees incurred as to each issue).]

10. Cases with sufficient findings include:
    a. *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006). Order requiring mother to pay half of father's attorney fees supported by findings as to father's inadequate monthly income, the reasonableness of father's attorney fees, the increase in fees because of mother's failure to provide support after being asked to do so, and by further findings that father did not have sufficient assets to pay his fees and that mother had the means to pay the half ordered.
    b. *Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting), *rev'd per curiam on other grounds for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002). Court found plaintiff to be an interested party who acted in good faith in bringing the action and who did not have sufficient funds with which to employ and pay counsel to handle case that spanned six-year period; court also found the fee award "reasonable and appropriate" and made numerous findings as to the skill and expertise of plaintiff's counsel.
11. Award of attorney fees in frivolous action by supporting party.
    a. If the court finds as a fact that the supporting party has initiated a frivolous action, it may order the payment of reasonable attorney fees to an interested party as deemed appropriate under the circumstances. [G.S. 50-13.6.]
    b. Father's action for custody and support was frivolous when he had not seen child since the date of separation, had not paid support or contributed to child's other expenses, and owed retroactive support and money for retroactive expenses. [*Doan v. Doan,* 156 N.C. App. 570, 577 S.E.2d 146 (2003).]
12. Award of attorney fees pursuant to provisions in a separation agreement.
    a. Attorney fees may be barred by an express provision in a premarital agreement so long as the agreement is performed. [G.S. 50-16.6(b).]
    b. Provisions within separation agreements requiring the payment of attorney fees upon a breach by one of the parties are not inconsistent with the public policy in this state. [*Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995).] For a custody and child support case finding that attorney fees provision in an unincorporated separation agreement was not applicable when the action was not one for breach or specific performance and awarding attorney fees pursuant to G.S. 50-13.6, see *Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013).
    c. Therefore, provisions for attorney fees are enforceable as provided by the agreement. [*Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995).]
    d. For more on attorney fees provisions in a separation agreement, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

13. Standard of review on appeal of an award of attorney fees.
    a. Whether statutory requirements necessary to support an award of attorney fees in a child custody and support suit have been met is a question of law, reviewable on appeal, and only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney fees awarded. [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980); *Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (citing *Hudson*); *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Doan v. Doan,* 156 N.C. App. 570, 577 S.E.2d 146 (2003).]
    b. The trial court is granted considerable discretion in allowing or disallowing attorney fees in child support cases. Generally, an award will only be stricken if the award constitutes an abuse of discretion. [*Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002); *Leary v. Leary,* 152 N.C. App. 438, 567 S.E.2d 834 (2002).]
14. Award of fees for services performed on appeal.
    a. An award of attorney fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse. [*Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981) (husband had taken three appeals concerning alimony and custody award to wife, the last of which challenged the trial court's award of fees to wife incurred, in part, for representation by her attorney in the North Carolina Court of Appeals, the North Carolina Supreme Court, and the U.S. Supreme Court; after citing G.S. 50-13.6, allowing award of attorney fees in child support and custody cases, and G.S. 50-16.4, allowing award of attorney fees in alimony cases, the court noted that "there is nothing in our statutory or case law that would suggest that a dependent spouse in North Carolina is entitled to meet the supporting spouse on equal footing, in terms of adequate and suitable legal representation, at the trial level only"); *McKinney v. McKinney,* 228 N.C. App. 300, 745 S.E.2d 356 (2013) (citing *Fungaroli*) (award of appellate attorney fees in child custody and support matters pursuant to G.S. 50-13.6 is within trial court's discretion and extends to any appeal of those matters, whether interlocutory or final; award of $26,000 for fees incurred on appeal upheld), *review denied,* 367 N.C. 288, 753 S.E.2d 678, *review dismissed,* 367 N.C. 288, 753 S.E.2d 679 (2014).]
    b. The requirements of the statute authorizing an award of fees must be satisfied when awarding fees for services performed on appeal. [*See Fungaroli v. Fungaroli*, 53 N.C. App. 270, 280 S.E.2d 787 (1981) (award authorized by findings that wife was dependent, was entitled to the relief sought, and was without sufficient means to defray expenses of the suit); *see also Adams v. Adams,* 167 N.C. App. 806, 606 S.E.2d 458 (2005) (**unpublished**) (dependent spouse's motion to court of appeals for award of attorney fees for appeal remanded for finding that she was without sufficient means to afford such fees and for determination of the fee).]
    c. The appellate court cannot make the award. [*Tilley v. Tilley,* 30 N.C. App. 581, 227 S.E.2d 640 (1976) (mother in child support action, whose request for fees for the trial court proceeding was denied, a decision from which no appeal was taken, requested appellate court to award fees incurred for services performed by her attorney on

appeal; G.S. 50-13.6 authorizes trial court to order payment of counsel fees but does not so authorize a reviewing court). *See also Messina v. Bell,* 158 N.C. App. 111, 581 S.E.2d 80 (2003) (plaintiff's request for attorney fees on appeal pursuant to G.S. 6-21.1, allowing award of attorney fees in small verdict cases, remanded for trial court to make appropriate findings and to enter an award).]

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