

Taming the Guessing Game:

Child Support and Variable Income

BY BRYAN D. SULLIVAN

The benefits of using a predetermined percentage of gross income for additional child support orders under the recently enacted income shares model.



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WHEN A SUPPORTING PARENT HAS VARIABLE INCOME, ATTORNEYS MAY consider drafting an order that contains both a base child support obligation in a specific dollar amount and an additional child support obligation as a percentage of income. This article reviews the applicable provisions of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), explores the use of a predetermined percentage of gross income for additional child-support orders under the income shares model, and provides practical advice for legal practitioners when drafting such orders.

The case for gross income percentages

The authority of the court to enter percentage-based child support orders is contained within section 505 of the IMDMA.¹ Section 505(a)(2) implements the new statutory guidelines based upon the income shares model. Section 505(a)(3)(A) defines “gross income” as follows:

(A) ... [T]he total of all income from all sources, except “gross income” does not include (i) benefits received by the parent from means-tested public assistance programs, including, but not limited to Temporary Assistance to Needy Families, Supplemental Security Income, and the Supplemental Nutritional Assistance Program or (ii) benefits and income received by the parent for other support, survivor benefits, and foster care payments. Social security disability and retirement benefits paid for the benefit of the subject child must be included in the disabled or retired parent's gross income for purposes of calculating the parent's child support obligation, but the parent is entitled to a child support credit for the amount of benefits paid to the other party for the child. “Gross income” includes maintenance treated as taxable income for federal income tax purposes to the

payee and received pursuant to a court order in the pending proceedings or any other proceedings and shall be included in the payee's gross income for purposes of calculating the parent's child support obligation.²

Section 505(a)(3)(B) defines “net income” as follows:

(B) ... [G]ross income minus either the standardized tax amount calculated pursuant to subparagraph (C) of this paragraph (3) or the individualized tax amount calculated pursuant to subparagraph (D) of this paragraph (3), and minus any adjustments pursuant to subparagraph (F) of this paragraph (3). The standardized tax amount shall be used unless the requirements for an individualized tax amount set forth in subparagraph (E) of this paragraph (3) are met³

Section 505(a)(5) provides for a percentage-of-income amount:

(5) If the net income cannot be determined because of default or any other reason, the court shall order support in an amount considered reasonable in the particular case. The final order in all cases shall state the support level in dollar amounts. *However, if the court finds that the child support amount cannot be expressed exclusively as a dollar amount because all or a portion of the obligor's net income is uncertain as to source, time of payment, or amount, the court may order a percentage amount of support in addition to a specific dollar amount and enter such other orders as may be necessary to determine and enforce, on a timely basis, the applicable support ordered.*⁴

Accordingly, the court must order child support in a specific dollar amount that it considers reasonable. When the supporting

1. 750 ILCS 5/505.

2. *Id.* at § 5/505(a)(3)(A). This definition of “gross income” is also applied for purposes of calculating maintenance: “For purposes of this Section, the term “gross income” means all income from all sources, within the scope of that phrase in Section 505 of this Act” 750 ILCS 5/504(b-3).

3. *Id.* at § 5/505(a)(3)(B).

4. *Id.* at § 5/505(a)(5) (emphasis added).

TAKEAWAYS >>

- Several factors are at play when a supporting spouse's income is variable; finding an agreed-upon methodology to calculate child support can become litigious. Basing support calculations on gross income and percentages of income is a good start.

- When several gross-income options are possible, a staggered- or tiered-percentage structure may minimize the possibility of child support overpayment.

- Regardless of any agreement to address variable-income problems, permitting the review and retroactive modification of additional child support may be the only way to avoid overpayment in certain variable-gross-income scenarios.

USING A PREDETERMINED PERCENTAGE OF GROSS INCOME FOR ADDITIONAL CHILD SUPPORT OFFERS A SIMPLE WAY TO CURB FUTURE LITIGATION.

parent's net income fluctuates, the court may establish a percentage amount to capture income in excess of the income on which the base obligation is calculated. Such an order can eliminate the need for the obligee to seek increases in child support when the income of the supporting parent increases.⁵

This percentage may be taken from gross or net income. However, accurately computing the target percentage of net income may require a negotiated methodology. When parties cannot agree on how to calculate net income, orders of this kind may provoke future litigation. On the other hand, relying on gross income requires a much simpler calculation. Accordingly, additional child support orders based on a percentage of gross income may limit future litigation.

Variable-gross-income scenarios

The advent of the income shares model has changed the calculation of child support in Illinois. To illustrate the use of a predetermined percentage of gross income for additional child support orders under this model when only the supporting parent has variable income, consider the following example:

Jane and John Doe, parents together of two minor children, are going through a divorce. Jane has the majority of parenting time; John has less than 146 overnights each year with their children. Jane's gross income is \$50,000 per year. John

earns \$100,000 per year, plus variable bonuses and commissions. Under the income shares model, with Jane filing as head of household and deducting the individualized tax amount with no itemized deductions, and with John filing single and deducting the individualized tax amount with no itemized deductions, John would pay Jane \$16,260 per year (\$1,355 per month) in base child support. Accordingly, John's base child support obligation represents approximately 16.26 percent of his base gross income.

For a detailed breakdown of John Doe's child-support obligation, calculated from his gross income with Family Law Software, see "Exhibit A" in the PDF version of January 2019's Illinois Bar Journal. All exhibits to this article also may be viewed at law.isba.org/2rAI2IA. Note: No adjustment for the payment of health insurance premiums for the children has been made pursuant to section 505(a)(4)(E).

One approach to establishing a provision for additional child support based upon the above example would be to require John to pay 16.26 percent of any gross income in excess of \$100,000. However, this method is problematic because John may overpay child support. For example, if John receives gross income of \$50,000 in excess of his base pay of \$100,000, John would pay \$8,130 to Jane in additional child support. John's total annual child support obligation would then equal \$24,390. However, if we recalculate John's child support obligation with John earning a gross income of \$150,000 per year, John would pay Jane only \$20,988 per year for child support—a difference of \$3,402 per year.

For the entire calculation based on John Doe earning a gross income of \$150,000, see "Exhibit B" in the PDF of January's Illinois Bar Journal or at law.isba.org/2rAI2IA.

The more John Doe earns, the more pronounced his overpayment becomes when his entire gross income is based

on the initial 16.26 percent ratio. For example, if John receives gross income of \$100,000 in excess of his \$100,000 base salary, John would pay \$16,260 to Jane for the additional child support. John's total annual child support obligation would then equal \$32,520. However, if we recalculate John's child support obligation with John earning a gross income of \$200,000 per year, John would pay Jane only \$24,984 per year. In other words, applying the 16.26 percent ratio to the additional \$100,000 results in an overpayment of \$7,536 per year.

For the entire calculation based on John Doe earning a gross income of \$200,000, see "Exhibit C" at law.isba.org/2rAI2IA.

Let's say John has a tremendously successful year and receives \$150,000 in commissions and bonuses in addition to his base salary of \$100,000. Applying 16.26 percent to the extra \$150,000 results in a total support obligation of \$40,650. However, John pays Jane only \$28,200 per year (\$2,350 per month) when child support is recalculated with John earning \$250,000 in gross annual income. Here, the overpayment amounts to \$12,450 per year.

For the entire calculation based on John Doe earning a gross income of \$250,000, see "Exhibit D" at law.isba.org/2rAI2IA.

Tiered approaches

To avoid such overpayments, we can prorate John's additional child support percentage depending on how much additional income John earns above his base salary. The percentage may be tailored to the amount of additional income that the parties anticipate John will receive.

5. Similarly, now that the court must consider the income of *both* parents under the income shares model, percentage-based child support orders can also eliminate the need for the obligor to seek decreases in child support when the income of the obligee increases in the future. However, this article does not address orders that provide for the automatic reduction of child support under these circumstances.

For example, John has agreed to provide \$16,260 a year in child support based on his gross annual income of \$100,000. Using his base salary as a reference point, consider the following options:

- If John earns \$150,000, he would pay an additional \$4,728 in annual child support—approximately 9.5 percent of his \$50,000 in additional income. So, John could agree to pay 9.5 percent of any gross income in excess of \$100,000.
- When child support is recalculated with John earning a gross income of \$200,000, John would pay annual child support of \$24,984—an additional \$8,724 in child support based on an additional gross income of \$100,000—approximately 8.7 percent of the additional income. Based on this assumption, John could pay 8.7 percent of any gross income in excess of \$100,000.
- When John earns a gross income of \$250,000, his child support would total \$28,200—an additional \$11,940 (approximately 8 percent of the extra income above base). So, John may agree to pay 8 percent of any gross income in excess of \$100,000.

The examples above assume a good-faith estimation of how much John will earn above his base salary. But we also may use a multitiered approach. As before, we begin with John earning a gross income of \$100,000 per year and paying \$16,260 in base annual child support. However, this time:

- When child support is recalculated with John earning a gross income of \$150,000, he would pay \$20,988 in annual child support. This represents an additional \$4,728 (9.5 percent) on the first \$50,000 of additional gross income.
- If John's gross income is \$200,000, John would pay an additional \$3,966 (8 percent) on the second \$50,000 of additional income. Therefore, John would pay 8 percent of any gross

income in excess of \$150,000, up to \$200,000.

- Should John earn a gross income of \$250,000, he would pay an additional \$3,216 (6.4 percent) in child support on the third \$50,000 of additional income. So, John pays 6.4 percent of any gross income in excess of \$200,000.

I have used \$50,000 increments for illustrative purposes, with each increment being charged a different percentage in child support. The size of the increments may be adjusted and tiers may be added or subtracted depending on the present circumstances of the parties and the anticipated future growth of the supporting parent's income.

Very high-income cases

If John earns extraordinarily high bonuses and commissions, we may request a cap on John's child support obligation to avoid a windfall to Jane. Prior to the adoption of the income shares model, under the prior iteration of section 505, there was a rebuttable presumption that the court should apply the minimum child support guidelines. However, Illinois courts noted that a rote application of the guideline percentages in high-income cases could produce child support obligations out of proportion to the needs of the children.⁶ In such cases, the court deviated from the guidelines pursuant to section 505(a)(2), which stated:

- (2) The ... guidelines shall be applied in each case unless the court finds that a deviation from the guidelines is appropriate after considering the best interests of the child in light of the evidence, including, but not limited to, one or more of the following relevant factors:
- (a) the financial resources and needs of the child;
 - (b) the financial resources and needs of the parents;
 - (c) the standard of living the child would have enjoyed had the marriage not been dissolved;
 - (d) the physical, mental, and emotional needs of the child; and
 - (d-5) the educational needs of the child.

WHEN THE SUPPORTING PARENT EARNs EXTRAORDINARILY HIGH INCOME, CONSIDER ESTABLISHING A CAP ON ADDITIONAL CHILD SUPPORT.

If the court deviates from the guidelines, the court's findings shall state the amount of support that would have been required under the guidelines, if determinable. The court shall include the reason or reasons for the variance from the guidelines.⁷

Under the new income shares model, pursuant to section 505(a)(3.3), there is still a rebuttable presumption that the guideline amount should be applied. However, section 505(a)(3.4), which governs deviation from the guidelines, also provides as follows:

(3.4) ... In any action to establish or modify child support, whether pursuant to a temporary or final administrative or court order, the child support guidelines shall be used as a rebuttable presumption for the establishment or modification of the amount of child support. The court may deviate from the child support guidelines if the application would be inequitable, unjust, or inappropriate. Any deviation from the guidelines shall be accompanied by written findings by the court specifying the reasons for the deviation and the presumed amount under the child support guidelines without a deviation. These reasons may include:

- A) extraordinary medical expenditures necessary to preserve the life or health of a party or a child of either or both of the parties;
- B) additional expenses incurred for a child subject to the child support order who has special medical, physical, or developmental needs; and

6. See, e.g., *In re Marriage of Scafuri*, 203 Ill. App. 3d 385 (2d Dist. 1990); *In re Marriage of Bush*, 191 Ill. App. 3d 249 (4th Dist. 1989).

7. 750 ILCS 5/505(a)(2).

(c) any other factor the court determines should be applied upon a finding that the application of the child support guidelines would be inappropriate, after considering the best interest of the child.⁸

Accordingly, as before, in cases where the supporting parent earns significant income, the court may deviate from the guidelines. Under the prior child support guidelines, the court could consider “the financial resources and needs of the parents” as a basis for a deviation. Now, although the legislature did not expressly reference the financial means of parents as a basis for deviating from the statutory guidelines, the court may rely on any factor “the court determines should be applied upon a finding that the application of the child support guidelines would be inappropriate, after considering the best interests of the child.”

When the supporting parent earns extraordinarily high income, and the parties’ combined adjusted net income exceeds the uppermost level of the Income Shares Schedule (see law.isba.org/2Rj1Bj5), the presumptive amount of child support is dictated by section 505(a)(3.5), which provides as follows:

A court may use discretion to determine child support if the combined adjusted net income of the parties exceeds the highest level of the schedule of basic child support obligation, except that the basic child support obligation shall not be less than the highest level of combined net income set forth in the schedule of basic child support obligation.”

The uppermost level of the schedule relates to combined adjusted net monthly

income from \$29,975 to \$30,024.99 (\$359,700 to \$360,299.88 annually). At these levels, the presumptive basic child support obligation for two parents living in the same household with two minor children is \$3,289 per month (\$39,468 per year).

Where the court caps child support at the top of the schedule, the maximum a supporting parent would ever be required to pay for child support is \$39,468 per year, which would be achieved only if the nonsupporting parent did not contribute to the combined adjusted net incomes of the parties. Any such contribution by the nonsupporting parent, whether actual or imputed, would reduce the maximum obligation of the supporting parent.

Back to John and Jane Doe

In John and Jane’s case, let’s see what happens when we establish John’s maximum additional child support obligation with this cap in mind. Jane’s net income in our example equals \$3,528 per month (see “Exhibit A” at law.isba.org/2rA121A). When Jane contributes a net income of \$3,528 per month, John would need to contribute a net income of \$26,496.99 per month for the parties to achieve a combined adjusted net income of \$30,024.99 per month. At \$26,496.99 per month, John’s income would represent 88.2 percent of the parties’ combined adjusted net income of \$30,024.99 per month. Therefore, so long as we do not adjust this percentage in Jane’s favor if John’s net income exceeds \$26,496.99 per

month, John’s maximum annual child support obligation to Jane should not exceed \$34,810.78 ($\$39,468 \times .882$). To arrive at this cap, John would need to pay additional child support of \$18,550.78 per year ($\$34,810.78 - \$16,260$).

If John anticipates arriving at the maximum child support obligation, we may construct an additional child support percentage based on the top margin. Here, we begin with John earning a base gross income of \$100,000 and a base net income of \$74,172 per year, paying \$16,260 in base child support annually (see “Exhibit A”). To arrive at the cap, as previously stated, John would need to contribute a net income of \$26,496.99 per month to the combined adjusted net income of the parties, which equals \$317,963.88 per year. We then determine how much annual gross income John must earn to contribute this sum. It turns out John must earn a gross annual income of approximately \$512,000 per year (\$42,667 per month)—an additional \$412,000 to his base income of \$100,000.

For the entire calculation based on John Doe earning a gross income of \$512,000 see “Exhibit E” at law.isba.org/2rA121A.

Now, to tie it all together, \$18,550.78 represents 4.5 percent of \$412,000. John would then pay 4.5 percent of any gross income in excess of \$100,000, subject to a cap on additional child support of \$18,550.78 per year.

Limitations

As demonstrated above, using a percentage of gross income for additional child support orders minimizes the risk of overpayment. Even still, such orders present certain limitations. For instance, each of the noted examples assumes that Jane’s income is static. As a result, John may overpay additional child support if Jane contributes more than \$3,528

ISBA RESOURCES >>

- Nancy Chausow Shafer & Margaret A. Bennett, *Breaking Up Is Harder to Do*, 106 Ill. B.J. 28 (Dec. 2018), law.isba.org/2PXCwhQ.
- Hannah Friedle, *New Illinois Supreme Court Rule Clarifies Attorneys’ Role When Divorce Collaborative Processes Fail*, In the Alternative (Nov. 2018), law.isba.org/2QstaiQ.
- Lisa Nyuli, *Stock Options & Restricted Stock in Divorce Cases*, Family Law (Sept. 2017), law.isba.org/2FJiG5q.

8. *Id.* at § 505(a)(3.4).
9. *Id.* at § 505(a)(3.5).

per month (\$42,336 per year) to the parties' combined adjusted net incomes. Additionally, the individualized tax amounts of the parties may change. For example, the filing status of a party may change, a party may itemize deductions, and new tax laws may be enacted among other possibilities. The values under the Income Shares Schedule also may change to adjust for inflation or deflation. If these values increase, but the net incomes of John and Jane remain the same, John would underpay child support. If these values decrease, but the net incomes of John and Jane remain the same, John would overpay child support.

The only way to eliminate the risk of overpayment and underpayment of additional child support when using a predetermined percentage of gross income would be to permit the review and retroactive modification of additional

child support. However, this approach may result in extensive litigation, which we are attempting to avoid.

One final note: Whether we set additional child support orders on a percentage of net income or a percentage of gross income, these orders should: 1) designate a due date for the additional child support; 2) require the exchange of financial documentation to confirm the amount due; and 3) specify how payment will be made.

Additional child support orders may be payable in accordance with the supporting parent's pay periods or at another specified interval (monthly, quarterly, biannually, annually, etc.). Such orders may require the exchange of pay stubs, income tax returns, and other financial documents by a certain date. Lastly, additional child support may be paid directly or through the Illinois State Disbursement Unit.

Conclusion

Using a predetermined percentage of gross income for additional child support offers a simple way to curb future litigation. However, we should be aware of the limitations of such orders and take steps to protect our clients. When representing a supporting parent, note the impact of additional income on his or her total child support obligation. I would recommend establishing at least one additional reference point when calculating the gross percentage to minimize the risk that the supporting parent will overpay child support. A tiered approach may further minimize this risk. When the supporting parent earns extraordinarily high income, consider establishing a cap on additional child support. **EB**

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