

Child Support: Deviating from the Guidelines

Recently, in [Kincheloe v. Kincheloe, N.C. App. \(June 15, 2021\)](#), the North Carolina Court of Appeals engaged in a lengthy discussion of the law relating to the entry of orders that deviate from the [Child Support Guidelines](#), giving me an excuse to post this short review of that law. To summarize at the beginning of my post rather than at the end, there are two key points to keep in mind when entering child support orders. First, any provision in an order that contradicts or is different than the specific terms or instructions in the [Guidelines](#) constitutes a deviation, and second, any deviation must be supported with detailed findings of fact regarding the reasonable needs of the children and the relative ability of the parents to pay support.

What constitutes a deviation?

The [Guidelines \(p. 1\)](#) state:

“North Carolina’s child support 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 UIFSA proceedings, orders entered in civil domestic violence proceedings pursuant to G.S. Chapter 50B, and voluntary support agreements and consent orders approved by the court). The guidelines do not apply to child support orders entered against stepparents or other persons or agencies who are secondarily liable for child support. ...

The guidelines must be used when the court enters a temporary or permanent child support order in a non-contested case or a contested hearing.”

The court of appeals consistently has held that any order that does not comply with any of the provisions of the [Guidelines](#) is a deviation. Obviously, an order requiring a child support payment in an amount different than the amount specified by the [Guidelines](#) is a deviation, so any upward or downward adjustment to the amount of support required by the [Guidelines](#) must be supported by all the required findings of fact for deviation. 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).

In addition, the court of appeals 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).

In the recent [Kincheloe](#) decision, the court of appeals concluded that the trial court deviated from the [Guidelines](#) because the trial court ordered father to pay a percentage of a bonus that was different than the percentage required by the Guidelines. The [Guidelines](#) require that non-recurring lump-sum payments be included as income and provide that the court “may average or prorate the income over a specified period of time or require obligor to pay a percentage of the non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.” Because the trial court ordered father to pay a percentage of the bonus that was not the percentage of his recurring income paid for support, the trial court deviated from the [Guidelines](#).

When can the court deviate?

The court can consider deviation when requested by a party. A party may request deviation in an original pleading or a party may request deviation by motion if the party gives at least ten days’ written notice. *Browne v. Browne*, 101 N.C. App. 617 (1991). However, 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 (2002); *Browne v. Browne*, 101 N.C. App. 617 (1991).

In addition, a court can deviate from the [Guidelines](#) on its own motion if it makes the findings required to support deviation. [Guidelines](#); see *Biggs v. Greer*, 136 N.C. App. 294 (2000).

The [Guidelines](#) authorize deviation when the court finds by the greater weight of the evidence, that application of the [Guidelines](#) would not meet or would exceed a child’s reasonable needs considering the relative ability of each parent to provide support or would otherwise be unjust or inappropriate. [G.S. 50-13.4\(c\)](#); [Guidelines](#).

The following have been cited in appellate decisions as factors that may justify deviating from the [Guidelines](#):

- 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 (2000)
- A parent’s extraordinary medical expenses related to the parent’s current spouse; *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642 (1998)
- Contributions (cash or in-kind) received from a third party for a child’s support. *Hartley v. Hartley*, 184 N.C. App. 121 (citing *Guilford Cty. ex rel. Easter v. Easter*, 344 N.C. 166 (1996))

The [Guidelines](#) also explicitly identify the following as examples of situations in which deviation may be warranted:

- When one parent pays 100 percent of the child support obligation and 100 percent of the

- health insurance premium for the child;
- When the self-support reserve applies and either parent pays childcare, health insurance premiums, or other extraordinary expenses;
- When the custodial parent incurs childcare expenses while attending school;
- When a parent receives actual childcare tax credits;
- When either party pays alimony to an ex-spouse; or
- When a parent pays child support for two or more families under two or more child support orders, separation agreements, or voluntary support arrangements.

Findings required to support deviation or to support denial of request to deviate

The court in [Kincheloe](#) set out the four categories of findings of fact the court must include in any order deviating from the Guidelines. All findings of fact must be supported by evidence in the record.

- First: the court must find the amount of the obligation pursuant to the [Guidelines](#);
- Second, the court must make findings determining the reasonable needs of the child and the relative ability of the parties to provide support;
- Third, the trial court must support the conclusion that the amount of support due pursuant to the [Guidelines](#) is inadequate or excessive, or that application of the [Guidelines](#) is otherwise unjust or inappropriate, and
- Fourth, the order must explain the basis on which the court determined the amount of support ordered.

Generally, when a court applies the [Guidelines](#) to determine support, the trial court is not required to make findings of fact about the needs of the children or the ability of the parties to pay. However, if a party requests deviation and offers evidence of the needs of the child and the ability of the parties to pay but the court nevertheless determines deviation is not appropriate, the court must make all the same findings that are required when the court decides to deviate. *Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 288 n.7 (2000); *Leary v. Leary*, 152 N.C. App. 438 (2002).