

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

Prospective child support is the support ordered to be paid for the support of the child in the future. However, the court of appeals has held that all orders for prospective support must be effective as of the date the complaint seeking support was filed unless the trial court makes specific finding of fact to support 'deviating' from the general rule. *Ex. rel. Miller v. Hinton*, 147 NC App 700 (2001). This means that *prospective* support generally includes amounts ordered for a period of time *before* the support order is entered, but only that time period between the date of the filing of the complaint and the time of the entry of the child support order. And of course, GS 50-13.4 provides that the amount of prospective support generally is determined by application of the child support guidelines.

But what about orders for support for a period of time before a complaint or motion for support is filed?

Retroactive Support

Child support ordered for a period of time before a complaint is filed is called *retroactive support*. *Briggs v. Greer*, 136 NC App 294 (2000). Also referred to as 'prior maintenance', it can be ordered when a custodial parent seeks reimbursement from the noncustodial parent for expenditures made on behalf of a child before the action was commenced. *Taylor v. Taylor*, 118 NC App 356 (1996).

Retroactive support is intended to compensate a custodial parent for amounts expended on behalf of a child that should have been paid by the other parent. Because the other parent's obligation to support a child does not arise until a child is born, retroactive support does not include expenses incurred before the child's birth. The only pre-birth expenses that can be ordered reimbursed are those medical expenses authorized by GS 49-15. *Loosvelt v. Loosvelt*, 760 SE2d 351 (NC App, 2014)(trial court erred in including cost of nursery expenses and maternity clothes).

How far back can we go?

The three-year statute of limitation found in GS 1-52(2) applies to a claim for retroactive support. *Napowska v. Langston*, 95 NC App 14 (1989). This means that a plaintiff can seek recovery of expenditures made three years or less before the action for support was filed. *Napowska* also provides that the doctrine of laches does not apply to a request for retroactive child support because the public policy concern about stale claims is adequately addressed by the three-year statute of limitation.

How do we determine the amount?

There has been some controversy concerning how retroactive support is calculated but the General Assembly has settled the issue.

The claim for prior maintenance arose at common law – it was not created by statute and still is not expressly authorized by statute. Cases recognizing a custodial parent’s right to reimbursement require that the award be based upon proof of amounts actually paid on behalf of the child, proof that the amounts actually were paid by the custodial before the support action was instituted and proof that such expenditures were reasonable and necessary. *Loosvelt, State ex. Rel. Fisher v. Lukinoff*, 131 NC App 642 (1998); *Savani v. Savani*, 102 NC App 496 (1991). In addition, because the noncustodial parent is liable only for his or her fair share of the actual expenses, the court also is required to find the defendant’s ability to pay during the time period for which retroactive active support is sought. *Loosvelt; State ex. rel. Fisher; Savani*.

In 2011, the Conference of Chief District Court Judges amended the child support guidelines to provide that retroactive support can be calculated using *either* evidence of actual expenditures and the defendant’s ability to pay *or* by applying the child support guidelines. Applying the guidelines means “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 sought and the guidelines in effect at that time.” 2011 and 2015 Child Support Guidelines.

The court of appeals, however, believed the Conference of Chief Judges overstepped its authority in changing the common law and held in *Respass v. Respass*, 232 NC App 611 (2014), that retroactive support must be based on evidence of actual expenditures.

In response to *Respass*, the General Assembly amended GS 50-13.4(c1) to provide that the Conference of Chief Judges “shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations, including retroactive child support obligations” S.L. 2014-77. While the effective date of the amendment was July 22, 2014, GS 50-13.4(c1) now actually states that this authority was “effective July 1, 1990.”

So it appears settled that retroactive support can be calculated using either evidence of actual expenditures or by applying the guidelines.

What if there was a contract or order for support in effect when the complaint or motion was filed?

While it is clear that a court can enter an order for *prospective* child support even when the parties have an unincorporated separation agreement that includes child support, *see Pataky v. Pataky*, 160 NC App 289 (2003), the court cannot enter an order for *retroactive* support for a period of time that agreement was in effect, absent an emergency situation. *Carson v. Carson*, 199 NC App 101

(2009). The *Carson* court did not elaborate on circumstances that might constitute an “emergency situation” other than to say that such a situation might exist where a parent is prohibited from seeking a court-ordered increase due to an accident or illness.

Similarly, when a court modifies an existing child support order, the new support amount can be made payable from the time the motion to modify was filed or from any time thereafter. *Mason v. Erwin*, 157 NC App 284 (2003); *Mackins v. Mackins*, 114 NC App 538 (1994). A retroactive modification, meaning a modification of amounts due before the motion to modify was filed, would violate the rule prohibiting modification of vested arrears found in GS 50-13.10. *Mackins*.