Modification of Child Support in Georgia: Key Facts

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Introduction

So, you have a child support order in place. You are either paying or receiving. But times have changed since the child support was set and there have been significant financial changes for you or the other parent. Either the current award is insufficient based on new circumstances or you are struggling to pay due to subsequent changes. What do you do?

If your financial circumstances have changed or the needs of the child have changed, you can seek a modification of the child support award under specific circumstances.

The key issues for qualifying for a hearing on changing the child support you pay (noncustodial parents) or the amount you receive (custodial parents) are related to:

- **Timing issues, and**
- **Material changes in circumstances**
- **Making it official**

Note: Georgia statutes will be references at times in this article. Georgia code is known at OCGA or Official Code of Georgia Annotated. In code citations, "§" means "section." Code sections can be found on the web at:

http://www.legis.ga.gov/en-US/default.aspx

The link there is found under "Georgia Government" and then "Georgia Code." When looking for a code section, type in the number of the section, such "19-6-15" for the child support guidelines section.

Court opinions can be found at leagle.com (yes, there is an "a" in the URL).

Timing Issues

First, if you have never filed for a modification, there is no waiting period. For example, if six months after a divorce, the noncustodial parent loses a job and can only find work at notably lower pay, the noncustodial parent can file for a modification immediately if there has been no prior request for a modification.

But the rules change if you have previously filed for a modification—whether the request was granted or not.

- **If you have previously asked for a modification, there generally is a two-year waiting period—but there are exceptions.**

Basically, if you have previously asked for a modification, there generally is a two-year waiting period after the entry of the court order for the previous modification request. However, there are exceptions to this rule (discussed below). The exceptions can make a big difference in being able to file for another modification without waiting two years—and it can be very important if income has changed sharply.

Here is the key statute section on modification of child support in Georgia:

OCGA § 19-6-15(k):

(k) Modification.

(1) Except as provided in paragraph (2) of this subsection, a parent shall not have the right to petition for modification of the child support award regardless of the length of time since the establishment of the child support award unless there is a substantial change in either parent's income and financial status or the needs of the child.
(2) No petition to modify child support may be filed by either parent within a period of two years from the date of the final order on a previous petition to modify by the same parent except where:

(A) A noncustodial parent has failed to exercise the court ordered visitation;

(B) A noncustodial parent has exercised a greater amount of visitation than was provided in the court order; or

(C) The motion to modify is based upon an involuntary loss of income as set forth in subsection (j) of this Code section.

(3) (A) If there is a difference of at least 15 percent but less than 30 percent between a new award and a Georgia child support order entered prior to January 1, 2007, the court may, at its discretion, phase in the new child support award over a period of up to one year with the phasing in being largely evenly distributed with at least an initial immediate adjustment of not less than 25 percent of the difference and at least one intermediate adjustment prior to the final adjustment at the end of the phase-in period.

(B) If there is a difference of 30 percent or more between a new award and a Georgia child support order entered prior to January 1, 2007, the court may, at its discretion, phase in the new child support award over a period of up to two years with the phasing in being largely evenly distributed with at least an initial immediate adjustment of not less than 25 percent of the difference and at least one intermediate adjustment prior to the final adjustment at the end of the phase-in period.

(C) All child support service's case reviews and modifications shall proceed and be governed by Code Section 19-11-12. Subsequent changes to the child support obligation table shall be a reason to request a review for modification from child support services to the extent that such changes are consistent with the requirements of Code Section 19-11-12.

So, if you've never had a modification (just divorced somewhat recently or an order was established for the first time in an unwed situation), the two-year rule does not apply. You can ask for a modification if there has been a material in either party's income or financial status or if the needs of the child have changed.

Exceptions to the Two-Year Rule

As noted above in OCGA § 19-6-15(k) and in (j) [seen below], the exceptions to the two-year rule are:

- A noncustodial parent has failed to exercise the court ordered visitation;
- A noncustodial parent has exercised a greater amount of visitation than was provided in the court order;

- A parent suffers an involuntary termination of employment, has an extended involuntary loss of average weekly hours, is involved in an organized strike, incurs a loss of health, becomes incarcerated, or similar involuntary adversity resulting in a loss of income of 25 percent or more.

Many are not aware of these exceptions—including attorneys. For those who have filed for a modification within two years, it can be important to review these exceptions. One should compare actual parenting time to court ordered parenting time. If income has fallen sharply, one should see if the 25 percent threshold is met for the exception to apply.

OCGA § 19-6-15(j):

> ***(j) Involuntary loss of income.***
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> **(1)** In the event a parent suffers an involuntary termination of employment, has an extended involuntary loss of average weekly hours, is involved in an organized strike, incurs a loss of health, becomes incarcerated, or similar involuntary adversity resulting in a loss of income of 25 percent or more, then the portion of child support attributable to lost income shall not accrue from the date of the service of the petition for modification, provided that service is made on the other parent. It shall not be considered an involuntary termination of employment if the parent has left the employer without good cause in connection with the parent's most recent work.
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> **(2)** In the event a modification action is filed pursuant to this subsection, the court shall make every effort to expedite hearing such action.
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> **(3)** The court may, at its discretion, phase in the new child support award over a period of up to one year with the phasing in being largely evenly distributed with at least an initial immediate adjustment of not less than 25 percent of the difference and at least one intermediate adjustment prior to the final adjustment at the end of the phase-in period.

Properly Invoking Subsection j for Preventing Accrual of Arrearages on Lost Income

Appellate opinion indicates that merely asking for a modification is not the same as asking the court to prevent arrearages from accruing against lost income (when the loss is 25 percent or greater). The modification petition must specifically mention seeking relief as found in section j and not just ask for a modification under section k.

Morgan v. Bunzendahl, 729 S.E.2d 476, 316 Ga. App. 338 (2012):

> 2. Morgan also contends that the trial court erred in its application of *Galvin* to these facts, and we agree. OCGA § 19-6-15(j)(1) provides that
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> > [i]n the event a parent suffers an involuntary termination of employment, has an extended involuntary loss of average weekly hours, is involved in an organized strike, incurs a loss of health, or similar involuntary adversity resulting in a loss of income of 25 percent or more, then the portion of the child support attributable to lost income shall not accrue from the date of the service of the petition for modification, provided that service is made on the other parent.
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> (Emphasis supplied.) In *Galvin,* the Supreme Court interpreted this provision as follows:
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> > . . . . . The statute is not applicable to an action in which nothing but modification of child support is sought.
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> . . . . .

McFADDEN, Judge, concurring in the judgment only.

I am inclined to read our Supreme Court's decision in *Galvin,* supra, to hold that OCGA § 19-6-15(j) is applicable only to modification actions in which the movant has made the showing and sought the relief specified in that subsection and to find that Thomas Galvin had not done so. But I am in doubt.

Because I concur in the judgment only, our decision today is not binding on the trial courts. Ct.App. R. 33(a). I respectfully suggest that this issue merits further consideration by our Supreme Court.

As noted immediately above, however, this opinion is not binding on the trial courts (but many may use it for guidance).

The safe approach—when income falls 25 percent or more—is to invoke both sections j and k, seeking relief from a modification and from stopping accrual of arrearages on lost income.

Material Changes

- The showing of a change in income or financial status or a change in the needs of the child is a threshold requirement for modification. One does not have to prove all of these or even a change of income and a change in financial circumstances. One only has to prove a change in one of these issues.

Wingard v. Paris, 511 S.E.2d 167 (1999):

> Modification of a permanent award of child support is governed by OCGA § 19-6-19(a), which provides that an award "shall be subject to revision upon ... showing a change in the income and financial status of either former spouse or in the needs of the child or children." (Emphasis supplied.) Here, the trial court failed to give meaning to the statutory word "or," and erroneously imposed an additional burden on Wingard by requiring her to prove both a change in financial status as well as a change in the child's needs.
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> The showing of a change in financial status or a change in the needs of the child under OCGA § 19-6-19(a) is a threshold requirement. See *Pearson v. Pearson*, 265 Ga. 100, 101, 454 S.E.2d 124 (1995). In a modification proceeding, the trial court must first determine whether there has been such a change in financial status or the child's needs "as would support a *reconsideration* of the level of [the supporting spouse's] obligation to provide financial support for the parties' child." (Emphasis supplied.) *Miller v. Tashie*, 265 Ga. 147, 149(2), 454 S.E.2d 498 (1995).

Examples of Change in Income, Financial Status, and Needs of the Children

<u>Examples of changes in income:</u>

Change in income is measured from the entry of the last child support order (including prior modifications) to "today." If there was no change in child support at the latest modification hearing, the starting point is the entry of the order in which child support was modified.

Changes in income are likely obvious but they can include one of the below examples.

- Hours worked drops significantly for an hourly employee;
- Bonuses are reduced;
- Fringe benefits increase or decrease—such as with or without use of company car.

- Changes in income can be for business or economy reasons or for personal issues limiting ability to work.

Example of changes in financial status:

This can reflect changes in assets or expenses.

- Capital gain or loss—whether in the financial sector or real estate or other; can include the sale of any asset;
- Receive an inheritance;
- Expenses jump from unexpected change in medical needs;
- Mortgage payment rises significantly from adjustable rate mortgage;
- Has to take on all or part of expenses for caring for an elderly relative (e.g., mother or father);
- Overall change in financial status does not have to be one thing—can be a combination of expenses or change in assets.

Examples of material change in needs of the children:

- Multiple children initially and one reaches age 18 or is over 18 and graduates from high school;
- Initially child care expenses but these drop off as child starts going to school;
- Sharp increase in health insurance costs;
- Change in medical expenses;
- Child struggles in school and needs tutoring.

These are only examples—this list is not exhaustive.

Making the Modification Official

A Modification that Is from An Agreement between the Parties Is Not Valid Until Approved by the Court

Although a mother and father can agree to a modification on their own, it must be approved by the court or it is not valid. The current, court-approved child support order remains in effect until the new agreement is approved by the court. Essentially, one may come to a modification agreement with the other parent, and believe that the agreement is valid. But it is not. If the other party decides to not uphold the agreement, that party can seek contempt for not meeting its terms. That is, is a new agreement lowers child support paid by the noncustodial parent, the agreement is not approved, then the custodial parent still has the right to file a contempt complaint for partial nonpayment of child support. It is very important that any agreement between the parties be approved by the judge and entered into the court record.

While parties are free to enter into an agreement purporting to modify [a] child support obligation, that agreement becomes enforceable only when incorporated in an order of the court.
Wright v. Burch, 771 S.E.2d 490; 331 Ga. App. 839 (2015):

> As our Supreme Court has held, however, a modification action "is the sole means by which a child support award included in a divorce decree may be modified." *Robertson v. Robertson,* 266 Ga. 516, 517(1), 467 S.E.2d 556 (1996). "While the parties are free to enter into an agreement purporting to modify [a] child support obligation, that agreement becomes enforceable only when incorporated in an order of the court." Id. (citation omitted). This trial court was authorized to conclude that the parties had agreed to submit the settlement agreement to the court.

Other Issues Related to Modifications

Child Support Calculations Start from Scratch with a Modification Hearing

With a modification, each determination of child support starts fresh and deviations must be justified and meet procedure from scratch. In the below appellate opinion, an earlier deviation for miscellaneous child rearing expenses as a case specific example of the earlier deviation being set aside at a modification and requiring it be evaluated anew and complying with procedure from scratch.

East v. Stephens, 740 S.E.2d 156, 292 Ga. 604 (2013):

> When Leon East and Donia Stephens were divorced in 2002, they entered a settlement which was incorporated into their divorce decree. By their settlement, East and Stephens agreed that Stephens would have custody of their two minor children, and East would pay $125 each week to Stephens as child support and would reimburse Stephens for certain miscellaneous expenses that she incurred for the benefit of the children, including "one-half of the minor children's school expenses." East later petitioned for a modification of the decree, and the trial court granted that petition in part in March 2011, directing East to pay $904 each month to Stephens as child support. The order of modification said nothing expressly about miscellaneous expenses, but it specified that any and all other provisions of the incorporated settlement "not modified herein shall remain in full force and effect."
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> "Child support guidelines apply not only to initial determinations of child support, but also to modification actions," *Eubanks v. Rabon,* 281 Ga. 708, 711(2), 642 S.E.2d 652 (2007) (citations and punctuation omitted), and the type of expenses at issue in this case are governed by the child support guidelines. See OCGA § 19-6-15(i)(2)(J)(ii); *Turner v. Turner,* 285 Ga. 866, 867-868(2), 684 S.E.2d 596 (2009). So, contrary to one of the findings of the court below, it clearly had jurisdiction to modify the miscellaneous expense provision as part of its modification of child support pursuant to the guidelines. And in fact, the court exercised that authority when, in an interlocutory order that governed the obligations of the parties while the petition to modify was pending, the court directed that the miscellaneous expense provision "shall no longer apply." Having established the court's *authority* in this regard, we will next more closely examine the court's *duties* under the statutory child support guidelines.
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> Those guidelines must be considered by any court setting child support, "are a minimum basis for determining the amount of child support[,] and shall apply as a rebuttable presumption in all legal proceedings involving the child support responsibility of a parent. OCGA § 19-6-15(c)(1)." *Roberts v. Tharp,* 286 Ga. 579, 580(1), 690 S.E.2d 404 (2010) (punctuation omitted). Accordingly, the court below was *required* to apply the guidelines to any redetermination of child support. Id.; *Turner,* 285 Ga. at 867-868(2), 684 S.E.2d 596. And when child support is redetermined under the guidelines, an obligation to reimburse miscellaneous child rearing expenses cannot be continued or imposed unless the court deviates in its order of modification from the presumptive child support amount by complying with OCGA § 19-6-15(i)(2)(J)(ii) and making written findings as required by OCGA § 19-6-15(i)(1)(B). *Turner,* 285 Ga. at 868(2), 684 S.E.2d 596.

Risk from Other Party Filing a Counterclaim for Child Support to be Modified in the Other Direction

When a petition for modification is filed, the other parent has the right to ask the court to evaluate case facts in his or her favor and then modify child support in the other direction. That is, the noncustodial parent argues for and requests a downward modification, but the custodial parent argues circumstances for an increase in child support. The opposite also can occur—the custodial parent petitions for an increase in child support, but the noncustodial parent asks the court to modify downward instead. So, it is important that one asking for a modification have strong case facts supporting his or position.

The Failure to Comply with a Child Support Order Does Not Bar a Modification

If one files for a downward modification while being behind on making child support payments, some opposing parties may argue that it is inappropriate to get a modification hearing if the noncustodial parent is behind in paying child support. This view invokes the so-called "clean hands" doctrine. However, it is well established that being behind on child support does not prevent a noncustodial parent from asking for a downward modification. The clean hands doctrine does not apply—the focus is on whether there has been a change in financial status.

Scott v. Perkins, 497 S.E.2d 21, 230 Ga. App. 496 (1998):

> The fact that a parent has not complied with his obligations under a divorce decree does not automatically bar that parent from seeking modification of child support due to changed circumstances. OCGA § 19-6-19(a) provides that a child support order "shall be subject to revision upon petition filed by either former spouse showing a change in the income and financial status of either former spouse or in the needs of the child or children." The statute further provides that, "[a]fter hearing both parties and the evidence, the jury, or the judge where a jury is not demanded by either party, may modify and revise the previous judgment ... in accordance with the changed income and financial status of either former spouse or in the needs of the child or children ... if such a change in the income and financial status is satisfactorily proved so as to warrant the modification and revision." OCGA § 19-6-19(a). "The final decision of whether to modify the award is within the discretion of the trier of fact." Marsh v. Marsh, 243 Ga. 742, 256 S.E.2d 442 (1979).
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> Thus, OCGA § 19-6-19(a) identifies the factors to be considered by the court in assessing a petition for modification of child support: (1) the changed income and financial status of the parents and (2) the needs of the children. See *Miller v. Tashie*, 265 Ga. 147, 149, 454 S.E.2d 498 (1995). Nothing in the statute indicates that noncompliance with the petitioner's obligations under the existing divorce decree bars an action for modification of such obligations. Indeed, such a rule would defeat the very purpose of the statute, as a parent who has a legitimate need for modification due to an adverse change in financial condition is likely to have failed to meet his current support obligations.

Documents Needed

To file for a modification, there is a minimum list of documents needed. These include but may not be limited to:

- A proposed child support worksheet
- A domestic relations financial affidavit
- Recent pay stubs, income tax filings, or other documents showing a material change in income
- Evidence related to specific expenses or assets that show a change in financial status
- Evidence related to specific expenses that show a material change in the children's needs

One should make sure that incomes match between the financial affidavit and the worksheet. Worksheet and financial affidavit expenses also should match any specific documents showing change in the needs of the children or in financial status.

Summary

Be sure to discuss these issues with an attorney to see how they fit with your specific circumstances. Rogers Economics can help evaluate financial circumstances to see if material change requirements are met. Income issues and needs of the child can be more complex than initially believed. Special exceptions to the two-year rule should be applied when appropriate. Also, a child support worksheet and financial affidavit must be submitted with a petition for modification. They will need to support arguments for material change. Rogers Economics has many years of experience in assisting with their

preparation. In addition, a party likely has deviations that apply but the court grants deviations generally only when requested and argued. Preparing documents and arguments for deviations is important—even when the deviations are the same ones existing in the award at the time of the modification request. Remember, deviations must be argued from scratch in a modification hearing. Statute requires "starting over" with just the new presumptive award and re-arguing any applicable old deviations and arguing any new deviations.

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