2019 Child Support Update

Colorado Bar Association Family Law Section
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2019 Statutory Changes

I. Word Change Throughout

Many instances of "shall" changed to "must" throughout the statute. The authors/speakers surmise that this change may relate back to the question of whether "shall" always denotes mandatory action. See, for example, *People v. Back*, 412 P.3d 565, 569 (Colo.App. 2013):

> Accordingly, under certain circumstances, the word " shall" can also mean " should," " may," or " will." *See Verrier v. Colo. Dep't of Corr.,* 77 P.3d 875, 878 (Colo. App. 2003) (the word "shall" generally has a mandatory connotation but " also can mean 'should,' 'may,' or 'will'")... *Black's Law Dictionary* 1499 (9th ed. 2009) (one definition of the word " shall" means " [h]as a duty to" or " more broadly, is required to," which is " the mandatory sense that drafters typically intend and that courts typically uphold" ; the word " shall" can also mean " [s]hould" or " [m]ay").

II. Disability/Retirement Income, C.R.S. §14-10-115(11)(c), effective July 1, 2020

A. Current C.R.S. §14-10-115(11)(c) changes "shall" to "must" regarding reduction of support obligation due to receipt of derivative benefits due to disability of non-custodial party:

> In cases where the custodial parent receives periodic disability benefits granted by the federal "Old-age, Survivors, and Disability Insurance Act", 42 U.S.C. sec. 401 Et Seq., on behalf of dependent children due to the disability of the noncustodial parent or receives employer-paid retirement benefits from the federal government on behalf of dependent children due to the retirement of the non-custodial parent, the non-custodial parent's share of the total child support obligation as determined pursuant to subsection (8) of this section ~~shall~~ MUST be reduced by an amount equal to the amount of such benefits.

B. Current C.R.S. §14-10-115(11)(c) re-numbered to C.R.S. §14-10-115(11)(c)(III).

C. C.R.S. §14-10-115(11)(c)(I) added, requiring noncustodial parent to notify custodial parent (and CSS unit, if a party) within 60 days of receiving notice of disability benefits for the child:

> If the non-custodial parent receives periodic disability benefits granted by the federal "Old-age, Survivors, and Disability Insurance Act", 42 U.S.C. sec. 401 Et Seq., due to the disability of the noncustodial parent or receives employer-paid retirement benefits from the federal government due to the retirement of the noncustodial parent, the noncustodial parent shall notify the

custodial party, and the delegate child support enforcement unit, if a party to the case, within sixty days after the noncustodial party receives notice of such benefits.

D. C.R.S. §14-10-115(11)(c)(II) added, requiring custodial parent to apply for dependent benefits of the child(ren) within 60 days after receiving notification of the noncustodial parent's disability benefits per section 115(11)(c)(I):

> Absent good cause, the custodial parent must apply for dependent benefits for the child or children within sixty days after the custodial parent receives notification pursuant to subsection (11)(c)(I) of this section, and shall cooperate with the appropriate federal agency in completing any application for benefits.

III. Multiple Children/Different Schedules (the old IRM Quam issue), C.R.S. §14-10-115(8)(g), effective July 1, 2020

Under the pre-July 1, 2020 methodology set forth in *In re the Marriage of Quam*, 813 P.2d 833 (Colo. App. 1991), a formula was applied for complex visitation schedules involving separate and distinct (but at times overlapping) schedules for children. *IRM Quam* also addresses whether a shared custody calculation or sole custody calculation is to be applied, once the number of overnights for all children is determined via the formula.

Effective July 1, 2020:

C.R.S. §14-10-115(8)(g):

> For purposes of calculating child support, when two or more children are included in the child support worksheet calculation and the parties have a different number of overnights with two or more of the children, the number of overnights used to determine child support is determined by adding together the number of overnights for each child and then dividing that number by the number of children included in the child support worksheet calculation.

IV. Public School Fees (and definitions), C.R.S. §14-10-115(11)(a)(I), effective July 1, 2020

Prior to the 2019 legislation, the child support statute was silent as to school costs, other than school expenses "to meet the particular educational needs of the children." There was uncertainty whether these rising mandatory school costs were to be paid by the party receiving support (under the argument that school costs had been calculated in the amount of basic child support) or were additional costs to be shared by the parties. The Child Support Commission confirms that the economic models used to generate the child support model did not consider the rapid, recent increase in mandatory public school fees set by many school districts to meet costs not covered by taxpayers. These additional costs must shared by the parties.

A. With the 2019 legislation, effective July 1, 2020, public mandatory school fees "must be divided between the parties in proportion to their adjusted gross income." C.R.S. §14-10-115(11)(a)(I).

B. "Mandatory school fees" are defined at C.R.S. §14-10-115(3)(c.5) as "fees charged by a school or school district, including a charter school, for a child attending public primary or secondary school for activities that are directly related to the educational mission of the school, including but not limited to laboratory fees; book or educational material fees; school computer or automation-related fees, whether paid to the school directly or purchased by a parent; testing fees; and supply or material fees paid to the school. 'Mandatory school fees' does not include uniforms, meals, or extracurricular fees."

V. Exceptions to Voluntary Unemployment or Underemployment, C.R.S. §14-10-115(5)(b)(I), (I.5), **effective July 1, 2019**

A. The 2019 legislation changes the exceptions to voluntary unemployment or underemployment set forth at C.R.S. §14-10-115(5)(b)(I). Effective July 1, 2019, income MUST (rather than shall) be imputed except for a parent of a child under the age of 24 months (rather than 30 months) or when a parent is incarcerated for 180 days or more, rather than 365 days or more:

> C.R.S. §14-10-115(5)(b)(I). If a parent is voluntarily unemployed or underemployed, child support ~~shall~~ MUST be calculated based on a determination of potential income; except that a determination of potential income ~~shall~~ MUST not be made for:
>
> (A) A parent who is physically or mentally incapacitated; ~~or~~ (B) A PARENT WHO is caring for a child under the age of ~~thirty~~ TWENTY-FOUR months for whom the parents owe a joint legal responsibility; or (C) An incarcerated parent sentenced to ~~one year~~ ONE HUNDRED EIGHTY DAYS or more.

B. The 2019 legislation modifies the exception to voluntary underemployment set forth at C.R.S. §14-10-115(5)(b)(III)(C) when a parent is enrolled in an educational program:

a parent is not deemed "underemployed" if: …

(C) The parent is enrolled FULL-TIME in an educational OR VOCATIONAL program ~~that~~ OR IS EMPLOYED PART-TIME WHILE ENROLLED IN A PART-TIME EDUCATIONAL OR VOCATIONAL PROGRAM, BASED ON THE INSTITUTION'S ENROLLMENT DEFINITIONS, AND THE PROGRAM is reasonably intended to result in a degree or certification within a reasonable period of time; ~~and that~~ COMPLETING THE PROGRAM will result in a higher income; ~~so long as~~ the ~~educational~~ program is a good faith career choice that is not intended to deprive the child of support; and ~~that~~ THE PARENT'S PARTICIPATION IN THE PROGRAM does not unreasonably reduce the AMOUNT OF CHILD support available to a child.

C. When income is to be imputed, effective July 1, 2019, the statute enumerates circumstances at C.R.S. §14-10-115(5) which must be considered by the court or child support enforcement unit:

> (b)(I.5) If the court or delegate child support enforcement unit imputes income pursuant to this subsection (5), the provisions of subsection (5)(b.5) of this section apply.
> …
> (b.5) (I) Except as otherwise provided in this section, if the court or delegate child support enforcement unit determines that a parent is voluntarily unemployed or underemployed or employment information is unreliable, the court or delegate child support enforcement unit shall determine and document, for the record, the parent's potential income. (II) In determining potential income, the court or delegate child support enforcement unit shall consider, to the extent known, the specific circumstances of the parent, including consideration of the following information, when available:
> (A) The parent's assets;
> (B) Residence;
> (C) Employment and earnings history;
> (D) Job skills;
> (E) Educational attainment;
> (F) Literacy;
> (G) Age;
> (H) Health;
> (I) Criminal record;
> (J) Other employment barriers;
> (K) Record of seeking work;
> (L) The local job market;
> (M) The availability of employers hiring in the community, without changing existing law regarding the burden of proof;
> (N) Prevailing earnings level in the local community; and
> (O) Other relevant background factors in the case.

VI. Low Income Adjustments, C.R.S. §§ 14-10-115(6)(b), 115(7)(a)(II)(B), 115(7)(a)(II)(C), effective July 1, 2020

A. The 2019 legislation changed the adjustment to a parent's gross income for responsibility of non-joint children for low income parents. Prior to July 1, 2020, a parent with gross income of $1,900 or more would receive a reduction from his or her gross income for non-joint children living with him or her at 75% of the Guidelines, and a parent with gross income of $1,900 or less would receive a reduction from gross income for non-joint children based upon the low-income adjustment of 115(7)(a)(II). **Effective July 1, 2020**, this credit at 75% of the Guidelines for non-joint children begins for incomes at $1,500, and there is no longer such credit for parents with incomes of less than $1,500:

C.R.S. § 14-10-115(6)(b). The amount of the adjustment must not exceed the schedule of basic support obligations listed in this section. ~~For a parent with a gross income of one thousand nine hundred dollars or less per month, the adjustment is seventy-five percent of the amount calculated using the low-income adjustment described in sub-subparagraphs (B) and (C) of subparagraph (II) of paragraph (a) of subsection (7) of this section based only upon the responsible parent's income, without any other adjustments for the number of other children for whom the parent is responsible.~~ For a parent with gross income of more than one thousand ~~nine~~ FIVE hundred dollars per month, the adjustment is seventy-five percent of the amount listed under the schedule of basic support obligations in ~~paragraph (b) of subsection (7)~~ SUBSECTION (7)(b) of this section that would represent a support obligation based only upon the responsible parent's income, without any other adjustments for the number of other children for whom the parent is responsible. The amount calculated as set forth in this ~~paragraph (b)~~ SUBSECTION (6)(b) must be subtracted from the amount of the parent's gross income prior to calculating the basic support obligation based upon both parents' gross income, as provided in subsection (7) of this section.

B. **Effective July 1, 2020**, the gross monthly income self-support reserve is raised to $1,500 from $1,100. Rather than implementing the low income adjustment based upon combined incomes of $1,100 or less, the adjustment is based upon the obligor's income alone. If the obligor's gross monthly income is between $650 and $1,500, the child support obligation is $50 for one child, $70 for two, $90 for three, $110 for four, $130 for five, and $150 for six. This adjustment still applies only for Worksheet A calculations. C.R.S. § 14-10-115(7)(a)(II)(B).

C. **Effective July 1, 2020**, for the obligor with a gross monthly income of between $650 and $1,500, the obligor's child support obligation may be adjusted to include a share of the work-related and education related child care costs, health insurance, extraordinary medical expenses, and other extraordinary adjustments, provided the total obligation with adjustments do not exceed 20% of the obligor's gross monthly income. C.R.S. § 14-10-115(7)(a)(II)(C).

D. **Effective July 1, 2020,** an obligor with monthly adjusted gross income of $650 or less must pay $10 each month, regardless of the number of children and regardless of the number of overnights. C.R.S. § 14-10-115(7)(a)(II)(D).

VII. Notice of Verified Entry of Support Judgment, C.R.S. §§ 14-10-115(5)(b)(I), (I.5), effective July 1, 2019

The 2019 legislation now requires that a copy of the Verified Entry of Support Judgment be provided to all parties pursuant to C.R.C.P. 5.

New Case Law

A. ***In re Marriage of Alvis***, 2019 COA 97 (June 27, 2019) – Uninsured medical expenses ($250/child/year)

The Colorado Court of Appeals has found that the first $250.00 per child per year is part of "a shared basic child support obligation" and that, in a shared parenting time situation, neither the party paying child support nor the party receiving child support may seek reimbursement for the first $250.00 in medical expenses paid per child per year. "Each parent must pay uninsured medical expenses incurred during his or her parenting time, until the total for each child reaches $250, at which time the parents may seek reimbursement in proportion to their adjusted gross incomes." *In re Marriage of Alvis*, 2019 COA 97 (June 27, 2019).

The *Alvis* case involved parents with a near-equal parenting time schedule. The Court's opinion does not appear to apply to a "Worksheet A" situation:

> We are not persuaded otherwise by *In re Marriage of Marson*, 929 P.2d 51, 52-53 (Colo. App. 1996) (construing prior version of statute which defined extraordinary medical expenses as those in excess of $100 for a single illness or condition), and *In re Marriage of Finer*, 920 P.2d 325, 330 (Colo. App. 1996) (same). In those cases, divisions of this court assumed that the "custodial" parent was obliged to pay the excluded amount of uninsured medical expenses. But the question of how to characterize and allocate this expense was not squarely before either division. In any event, we do not view those cases as necessarily inconsistent with our conclusion. It makes sense for a "custodial" parent (in modern-day parlance, the parent who has exclusive or near-exclusive physical care of the child) to be responsible for paying the child's ordinary living expenses (with the financial assistance of the other parent). Here, though, neither mother nor father qualifies as the "custodial" parent, and thus the reasoning of *Marson* and *Finer* does not apply.

B. ***In re Marriage of Garrett and Heine*****,** 2018 COA 154 (Colo. App. 2018) – Retroactive child support pursuant to C.R.S. 14-10-122(5).

On November 1, 2018 the Colorado Court of Appeals resolved a conflict that had existed between two cases: *In re Marriage of White*, 240 P.3d 534 (Colo.App. 2010) and *In re Marriage of Emerson*, 77 P.3d 923 (Colo.App. 2003). *In re White* held that the Court could modify the obligation of an obligor but could not impose a child support obligation on a party who had been an obligee. *In re Emerson* held that the Court could not only modify the obligation of an obligor, but could also impose a child support obligation on a party who had been an obligee.

In *In re Marriage of Garrett and Heine*, 2018 COA 154 (Colo.App. November 1, 2018), the Court held:

> "We conclude that the General Assembly's 2013 amendments to section 14-10-122(5) legislatively overrule *White*. Therefore, we further conclude that that statute allows a court to retroactively enter a child support order against either parent, as of the date of a change in physical care of a child, regardless of the parent's status as an obligor or obligee under the existing child support statute."

Potential Issues on the Horizon

A. Minimum Wage when Enrolled in a Full-Time Educational Program

The Child Support Commission's Report included a recommendation concerning minimum income for a full-time student:

> If a paying parent attends full-time post-secondary school (including a university, college, community college, or vocational school), the current statute does not clearly state a minimum duty of support. While the Commission lauds pursuit of education that will lead to more lucrative and diverse work opportunities, the child still needs support during the school years. The Commission felt the current law was too ambiguous in requiring some contribution by the school-attending parent. The Commission recommends, absent evidence to the contrary, that the attendee be presumed to be able to earn income equivalent to full-time minimum wage… This determination may not be true in all cases, so such imputed income can be rebutted by evidence to the contrary, with actual income or income history used instead. Report pages 18 and 22.

This recommendation was not included in clear language in HB 19-1215.

B. Overnight Calculations (change to Worksheet A/Worksheet B methodology)

In the Colorado Child Support Commission's July 2019 Final Report, the Commission voted to "smooth out the impact of parenting time on support amounts, based on a slight incremental reduction in the monthly support obligation (MSO) for each additional overnight stay with the non-majority-time parent." Report page 5. This recommendation was included in the original version of HB 19-1215 but, according to the Commission Report, "this part of the bill was withdrawn due to implementation costs." As the Report summarized: The final version of the bill resulted in "removing the Oregon S-Curve from the bill, leaving unaddressed the question of credit for overnights of fewer than 92 by the paying parent, due to programming costs and some community objections." Report page 6.

C. Interest Rate on Child Support

Colorado and three other states (Kentucky, Washington, and Vermont) charge the highest interest rate on child support nationally at 12 percent. Kentucky only charges interest when the debt is referred to the Department of Revenue for enforcement. Washington caps interest at 12 percent but leaves the judge to exercise discretion in setting the interest rate. There are concerns that the higher interest rate creates more debilitating debt for parents already struggling.

D. Uniform Parentage Act (2017)

The Child Support Commission has formed a subcommittee to discuss which parts of the 2017 version would affect child support.

E. There has been a preliminary suggestion to move 19-4 and 19-6 paternity cases to the Domestic Relations Court once paternity has been established (as occurs in Dependency and Neglect cases).

F. There has been discussion of rewriting the income assignment statute (C.R.S. §14-14-111.5) in order to simplify the statute and possibly eliminate any outdated requirements.

Link to Child Support Commission Website/Meeting Schedule

The schedule for Colorado Child Support Commission meetings can be found at the following website:

https://www.colorado.gov/pacific/cdhs-boards-committees-collaboration/child-support-commission