



Child Support Bulletin – November 2016

Equal Residential Responsibility

Judgments establishing a child support obligation based on equal residential responsibility for the child often do not meet the requirements of the child support guidelines. In many cases, it is simply a flaw in expression, but in others is an inappropriate attempt by the parties to avoid or manipulate the amount of the obligation. The type of residential responsibility for the child, primary or equal, is not relevant to the Child Support Program, as long as any obligation is properly determined under the child support guidelines and expressed in the judgment.

Here are some examples of language from judgments:

1. Mom will have the children during the week and every other weekend. Dad will have the children every other weekend and two months in the summer. Based on the parents' equal residential responsibility of the child, ...
2. The parties have equal residential responsibility. Based on their respective net incomes, and after applying the child support guidelines, the monthly amount due is \$200 per month.
3. Parent A is a doctor; parent B is underemployed and thus has income imputed at minimum wage. Based on equal residential responsibility and the equal income of the parties, there shall be no child support obligation.

Although the examples above are exaggerated for purposes of illustration, they reflect very common issues.

The child support guidelines assume that a parent with primary residential responsibility fulfills his or her child support obligation by providing day-to-day care for the child and covering all the child's expenses that are NOT covered by the child support owed by the other parent. N.D. Admin. Code § 75-02-04.1-02(1). Thus, it is not necessary or beneficial to gather income information to quantify the child support obligation of the parent with primary residential responsibility. However, this assumption does not hold true in a case with equal residential responsibility, so a guideline calculation needs to be conducted for each parent. As a result, when properly applied, the child support guideline for equal residential responsibility case functions much like an income shares child support model used in several other states.

Example #1 is a situation where the allocation of parenting time is not close to equal, and in some cases suggests the parties are attempting to commit a fraud on the court. Originally, the guidelines defined equal residential responsibility as “exactly fifty percent of the time,” but the definition was changed in 2011 to be less literal and give the court more flexibility. “Equal residential responsibility” now means “an equal amount of time as determined by the court.” N.D. Admin. Code § 75-02-04.1-08.2. The 2011 Child Support Guidelines Advisory Committee adopted the following statement of intent to explain the change:

In response to the recent decision in Thornton v. Klose [2010 ND 141], the intent of the committee recommendation is to preserve existing case law that does not allow parties to create an illusion of equal primary residential responsibility, to preserve existing case law that determines whether equal primary residential responsibility exists by the specific language of the judgment, and to permit a proposed equal primary residential responsibility schedule under this section without requiring the court or parties to calculate the specific number of hours for each parent.

(Emphasis added). The change allows the court to determine that the parenting time for each parent is functionally equal, without counting days and hours, yet does not authorize the label “equal residential responsibility” to be used fictitiously.

Example #2 is extremely common. The child support guidelines require that the income and obligation of each parent be expressed in the judgment. N.D. Admin. Code § 75-02-04.1-08.2 (“a child support obligation must be calculated and specifically ordered for each parent”). See also N.D. Admin. Code § 75-02-04.1-02(10) (each child support order “must include a statement of the net income of the obligor used to determine the child support obligation, and how that net income was determined”). However, in practice, those amounts are often omitted. In many cases, the guidelines calculation for each parent can be found in the findings of fact and conclusion of law and is supported by evidence in the record; the flaw is merely in the expression of the obligations, especially if those calculations are not incorporated by reference in the final judgment. Unfortunately, in many other cases, the parties appear to have come up with a net monthly amount that they agree to owe, without any support from the income of the parties or the child support guidelines. At worst, the child support obligations are pulled from thin air; at best, the judgment does not allow the parties or the court to determine in the future whether the income of one or both parents has changed to the point where their obligation needs to be changed.

Example #3 also clearly involves a fiction on the court, plus legal error. The incomes of the parents are clearly not equal. In addition, each parent has a legal obligation to support his or her child for the duration of the child’s minority, whether or not the obligation is determined under the guidelines and quantified by the court. This is reiterated by the child support guidelines, which require that an obligation be determined for each parent with equal residential responsibility and that the net

difference between the two obligations is merely the amount that needs to be paid. Further, the payment offset is required to be discontinued when the right to support is assigned to the state, yet the language in Example #3 does not list the amount each parent needs to pay when the payment offset is suspended.

If the parties in Example #3 do not want to establish a child support obligation and there is no case pending with the Child Support program, it would be preferable for the court and the parties to postpone the establishment of a child support obligation indefinitely by providing: "The issue of child support shall be reserved but may be established on a prospective basis at a later date." This is similar to language used by Child Support on a regular basis when a parent is receiving Medical Assistance for the child (and thus requires establishment of paternity, if needed, and a medical support obligation) but declines child support services. Reserving the issue is different from a complete waiver, which is prohibited by case law and N.D.C.C. § 14-09-09.32, and the reference to establishment "on a prospective basis" avoids a future scenario where a parent retroactively becomes liable for child support for the period of time when the duty to support was reserved.

In order for a court to be able to follow the child support guidelines in cases where the parents have equal residential responsibility, the parties or their attorneys need to provide the court with five numbers to be included in the final judgment: 1) mom's net monthly income; 2) mom's child support obligation as determined under the guidelines, including any deviation; 3) dad's net monthly income; 4) dad's child support obligation as determined under the guidelines, including any deviation; and 5) the net difference that must be paid during the months when neither parent's obligation is assigned.

To assist the court, the private bar, and litigants in creating equal residential responsibility arrangements, the following model language is suggested to avoid the common pitfalls discussed above (with the highlighted amounts revised to reflect case facts in the record and the parent with the greater income):

Based on net monthly income of \$1,750, Mom's child support obligation for one child is \$400 per month. Based on net monthly income of \$3,625 per month, Dad's child support obligation for one child is \$685 per month. Mom and Dad have equal residential responsibility for their child so their support obligations may be offset for payment purposes. This means the lesser obligation of \$400 owed by Mom will be subtracted from the greater obligation of \$685 owed by Dad. Dad is responsible for paying the difference of \$285.

If child support rights become assigned because the child receives public assistance, the offset is no longer allowed. Each parent will be responsible for paying the full amount of the parent's obligation as long as the assignment is in effect.

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