

# Work-related Childcare Expenses: A Black Hole in the Child-Support Universe

by Christopher Musulin

When calculating child support, issues frequently arise concerning both the necessity and cost of work-related childcare, as the inclusion of work-related childcare can add hundreds of dollars to the weekly child support obligation.

In fact, there should be little, if any, debate concerning these issues. The New Jersey child support guidelines specifically recognize the necessity of work-related childcare as an essential component of the income shares concept. Additionally, the underlying data used to construct the basic awards, as well as numerous learned sources, offer highly accurate standards for reasonable work-related childcare expenses for school-age children, toddlers and infants.

## Why is Work-related Childcare Added to the Basic Award?

In accordance with Rule 5:6A, the child support guidelines must be used as a rebuttable presumption in all establishment and modification actions. The net cost of work-related childcare is an expense that may be added to the basic child support obligation.<sup>1</sup>

The New Jersey Administrative Office of the Courts contracted with Policy Studies, Inc., to fulfill certain requirements pursuant to the Family Support Act of 1988, including periodic review and updates of child support guideline protocols.<sup>2</sup> On March 30, 2004, Policy Studies, Inc., also known as PSI, submitted a report titled "New Jersey Economic Basis for Updated Child Support Schedules" to the Administrative Office of the Courts, containing the most recent economic data related to child-rearing costs.<sup>3</sup>

According to the PSI report, in the states utilizing the Betson-Rothbarth measurements of costs, questions were raised about the treatment of various expenditures related to child rearing, which included work-related childcare, the marginal cost of medical coverage, and different costs attributable to children during their teenage years.

With regard to work-related childcare, the report offers the following discussion:

The proposed New Jersey support schedule presented in this report excludes the costs of child care. Instead, in the child support calculation, the actual costs are prorated between the parents based on their relative proportions of net income and added to the basic support obligation. There are several reasons for this approach:

- They represent a large variable expenditure and are not incurred by all households; usually only in households with a working custodial parent and one or more young children.
- Where child care costs occur, they generally represent a large proportion of total child expenditures, particularly in households with children under 6 years of age.
- Treating child care costs separately maximizes the custodial parent's marginal benefits of working. If not treated separately, the economic benefits of working are reduced substantially. One of the principles incorporated into the Income Shares model is that the method of computing a child support obligation should not be a deterrent to a participation in the work force.<sup>4</sup>

By excluding work-related childcare from the basic award and splitting it between the litigants, the New Jersey child support guidelines are specifically designed to minimize the economic impact of work-related childcare on the custodial parent and actively encourage participation in the productive workforce. Even if a custodial parent earns minimum wage, both the Betson-Rothbarth and PSI research and modeling assume parents will share the fixed, variable and controlled costs

related to rearing children in proportion to their incomes. The entire rationale of the income shares concept fails unless both parents maintain a source of income to share child-rearing expenses.

This clear public policy rationale weighs heavily against any argument that the custodial parent should not work because the cost of work-related childcare may exceed his or her actual net income. While there may be exceptions such as large numbers of children, a child or children with extraordinary special needs or other unusual circumstances, in most cases a custodial parent starting at minimum wage will gradually increase their income; accrue essential work-related benefits; and garner the self-esteem related to independence, achievement, and self-sufficiency. Their ability to share in child-rearing expenses will improve over time, as expenses significantly increase with the age of the child.

### **What is the Reasonable Cost for Work-related Childcare: Standards and Resources**

Litigants often debate the reasonableness of the cost associated with work-related childcare. The issue is addressed in multiple reports by PSI, and has been the subject of numerous learned studies both in the United States and throughout the world.

The 2004 PSI report provides an analytical framework to calculate reasonable work-related childcare for school-age children, as extrapolated from the Rothbarth estimation technique.

Since the [Consumer Expenditures Survey] itemizes child care expenditures, an adjustment can be made directly to EC/C. For example, Table I-4 at the end of this appendix shows that for two-child households in the \$60,000-\$75,000 income range, EC/C = 34.62 percent. Child care (CC) as a proportion of consumption for that same income range is 3.14 percent (1.57 percent x 2 children). For this income range, a revised EC/C which excludes child care costs is:

$$\text{Revised EC/C} = 34.62 - 3.14 = 31.48 \text{ percent.}^5$$

The Consumer Expenditures Survey (CEX) is based on research funded by the U.S. Department of Health and Human Services, and is considered the most reliable

data available estimating expenditures on children. "EC" stands for expenditures on children, and "C" stands for total family consumption expenditures.

Under the example provided above, reasonable work-related childcare for two school-age children in a family earning between \$60,000 and \$75,000 per year is between \$1,884 and \$2,355 annually. This is the assumed expense for before-school and after-school programs for children ages six through 13.

As the above measurements address work-related childcare for only school-age children, it is necessary to turn to other standards to determine reasonable full-time, work-related childcare costs for toddlers and infants in the state of New Jersey. While there are multiple studies profiling the cost of work-related childcare in the United States and throughout the world,<sup>6</sup> the Sept. 2009 study conducted by the New Jersey Association of Childcare Resources and Referral Agencies (NJACCRRRA) is considered the benchmark for purposes of determining the actual cost of full-time work-related childcare from infancy until full-time school placement. The report is based on data gathered from 1,832 center-based programs located in 424 different municipalities in the state of New Jersey. The report contains the extraordinary finding that the average annual price of toddler and infant care is *higher* than the annual tuition at a four-year New Jersey public college.<sup>7</sup>

According to the NJACCRRRA report, the average weekly cost for full-time center-based childcare varies from \$212.25 to \$420 for infants, and from \$173.25 to \$404.34 for toddlers up to the age of five. The highest cost in the state of New Jersey is in Hunterdon County, and the lowest cost is in Salem County. After age five, with entry into full-time school, the costs drop significantly and become more consistent with the CEX estimates described above.<sup>8</sup>

### **Additional Issues Regarding Work-related Childcare**

#### **Should the Court Consider Under-the-Table Work-related Childcare Expenses?**

Arguments are frequently made that work-related childcare should only be considered if it is declared for tax purposes or paid to a licensed childcare provider. In fact, most jurisdictions treat the expense liberally, with few limitations, because of the overwhelming public policy encouraging both parents to be employed and to share in child-rearing expenses.

For example, the *Michigan Child Support Formula Manual* considers work-related childcare based upon "the established pattern of childcare" existing during cohabitation or prior to filing a petition in the court system.<sup>9</sup> In effect, the *status quo* existing during the viable portion of the relationship constitutes a presumption regarding the reasonableness of the expense. Many other states that employ the income shares concept utilize a similar presumption, at least at the *pendente lite* phase of the litigation.

### The IRS and Work-related Childcare

Pursuant to Internal Revenue Code Section 21, a divorced or legally separated parent exercising residential custody may claim a household and dependent care credit for a child who is under the age of 13 or physically or mentally incapable of caring for him or herself irrespective of age. This persuasive authority creates an age threshold for the consideration of work-related childcare.<sup>10</sup> The ability of the taxpayer to claim work-related childcare can continue indefinitely with a disabled child. It should be noted the expense is reduced by any dependent care benefits paid by an employer. Many employers offer this benefit, which is excluded from gross income and is often not memorialized on a regular pay stub. Inquiry should be made through discovery regarding the existence of such benefits.

### Work-related Childcare Subsidies

The state of New Jersey Department of Human Services issues subsidies for working parents with children up to the age of 13 or with special needs, who meet certain income and asset criteria.<sup>11</sup> The program issues vouchers, with a nominal copayment, to utilize licensed childcare centers maintaining contracts with the state of New Jersey. In modest income situations, this governmental benefit can significantly ameliorate the cost of work-related childcare. This should also be the subject of discovery.

### NJRE 803(c)(6)

Another common issue relates to the level of proof required concerning work-related childcare expenses. New Jersey Rule of Evidence 803(c)(6), the business records exception to the hearsay rule, permits the introduction of invoices, registration materials and contracts for childcare services both in motion practice and at trial. The litigant can certify or testify regarding the details in the selection process; the involvement or lack of involvement of the other parent; and provide copies of canceled checks, as well as other details related to work-related childcare.

### Childcare Expenses Incurred While Finding Work

Although not specifically addressed in the Court Rules, the strong public policy underlying the income shares concept supports the argument that childcare expenses incurred while searching for employment should be included in the child support guidelines calculations. Query whether a similar analysis should apply to someone in a rehabilitative situation seeking education.

The PSI report does note the difficulty inherent in distinguishing work-related childcare from childcare incurred for other purposes.<sup>12</sup>

### Conclusion

According to data maintained by the Administrative Office of the Courts and PSI, between 15 and 20 percent of all dissolution and non-dissolution cases involve work-related childcare issues. The attendant analysis need not be cloaked in uncertainty; guidance is available. Much like the Court Rules direct courts to refer to historic earnings and labor statistics to determine appropriate income models, the CEX and the NJACCRRRA report provide standards for what constitute reasonable work-related childcare expenditures. Additionally, the entire New Jersey child support guidelines system is premised upon an income shares concept that assumes work-related childcare is not a luxury, but rather a necessity. ■

*Christopher Musulin is the founder and partner with Musulin Law Firm.*

---

## Endnotes

1. Work-related childcare is considered in the calculation of child support in all but five jurisdictions in the United States. More than half of the jurisdictions that consider childcare deem it a mandatory deduction, while others treat it as permissive or a basis for deviation from guidelines. Linda D. Elrod and Robert G. Spector, A Review of the Year in Family Law: Working Toward More Uniformity in Laws Relating to Families, *Family Law Quarterly* Winter 2011 44.4 (2011): 512-13.
2. Policy Studies, Inc., based in Denver Colorado, engages in the administration and access management of public and governmental programs across America, with emphasis on child support enforcement and integrated consulting services. The company product and resource profile can be found at [www.policy-studies.com](http://www.policy-studies.com).
3. This data has been subsequently updated, but the attending commentary and analysis remain valid. Jane C. Venohr and Tracy E. Griffith, *New Jersey Economic Basis for Updated Child Support Schedule*, Rep. Denver: Policy Studies, Inc., 2004.
4. Appendix I-5.
5. Appendix I-6.
6. See, e.g., John Iceland and David C. Ribar, *Measuring the Impact of Child Care Expenses on Poverty*, Rep. Washington, D.C.: Population Association of America, 2001. *Parents and the High Cost of Child Care*, Rep. Child Care Aware of America, 2012. Herwig Immervoll and David Barber, *Can Parents Afford to Work? Childcare Costs, Tax-Benefit Policies and Work Incentives*, Rep. Vol. 1932. Bonn, Germany: Institute for the Study of Labor, 2006. Print. Discussion Paper Set.
7. Diane Dellano LCSW, and Theresa McCutcheon, MSW, *The High Price of Child Care: A Study Profiling the Cost of Care Within Licensed Centers in New Jersey*, Rep. Trenton, NJ: New Jersey Association of Child Care Resource and Referral Agencies, 2009.
8. See accompanying chart.
9. Michigan Child Support Formula Manual §3.06(A).
10. Of note, the Michigan Child Support Formula Manual contains a presumption that childcare is needed until Aug. 31 following the child's 12th birthday. §3.06(D).
11. [www.nj.gov/humanservices/dfd/programs/child/](http://www.nj.gov/humanservices/dfd/programs/child/).
12. Appendix I-3.