

ADVISORY OPINION 9
GEORGIA COMMISSION ON DISPUTE RESOLUTION

Executive Summary

This Advisory Opinion focuses on a Georgia Court of Appeals case and the practice of negotiating past-due child support. The case prohibits any action by the court or the parties that reduces the total amount of child support owed under an existing court order. First, the total arrearage amount must be accurately calculated using the existing child support order and records of payments made and received. Only then can any repayment plan for child support owed be negotiated or ordered. If past-due child support cannot be accurately determined, then no negotiations around its repayment can occur; instead, a court must hold a hearing to determine the true amount of past-due child support. ADR programs and mediators are encouraged to inform parties prior to mediation that they must bring with them copies of the existing child support order and records of child support payments made and received.

Helping parties to calculate and negotiate arrearages in child support payments has been a common practice among Georgia mediators for many years. The exact amount of past due child support can be difficult to compute as parties' records may be incomplete or lacking, or the parties may have informally agreed to alternative arrangements. Often, as part of a settlement, parties agree upon an estimated arrearage amount that may be lower than the actual amount.

In March 2015, the Georgia Court of Appeals, in *Wright v. Burch*, 331 Ga. App. 839, 771 S.E.2d 490 (2015), issued a decision that requires a significant change to this long-standing practice around the calculation and negotiation of child support arrearages. The Court held that neither a trial court nor the parties could reduce the total amount of child support owed under an existing court order. Only a repayment schedule of the past-due child support can be ordered by the court or negotiated by the parties, as long as the amount of the arrearage can be accurately determined.

To help Georgia mediators to understand the *Wright* case and to prevent them from unwittingly violating the case's holdings, the Commission on Dispute Resolution issues this advisory opinion.

I. What does *Wright* Say?

The parties in *Wright* finalized their divorce in Tennessee in 2003. As part of their agreement, they stipulated that any changes to the terms of their divorce must be made by written agreement of the parties. In May 2013, Wright filed a petition to domesticate the Tennessee divorce decree in Georgia and for money paid and received. The parties agreed in writing to reduce the amount of Burch's past-due child support and submitted the modification to the trial court, which made their agreement an order of the court.

The Court of Appeals affirmed that this modification procedure was correct. However, the Court found that the parties' 2013 agreement and the trial court's order were invalid because they attempted to reduce the amount of child support arrearage Burch owed Wright. A court "cannot simply forgive or reduce the past-due amount owed under a valid child support order," the Court of Appeals wrote, and it ordered the trial court to hold a hearing to determine "the proper amount of any child support arrearage as of the date of the hearing, but disregarding the parties' purported settlement of October 2013 as to such arrearage." *Wright*, 331 Ga. App. at 845. The trial court is then free, the Court ruled, to enter an order laying out a payment schedule of that arrearage, as long as the best interests of the parties' children are met.

Domestic relations mediators must be clear that, under *Wright*, any court order or any party agreement that reduces the total amount of child support arrearage is void because such a reduction "constitutes an improper, retroactive modification of support obligations." *Id.* at 844. *Wright* also made clear that a trial court is authorized only to determine the "true amount" or "proper amount" of the arrearage at issue and to enter orders for repayment. *Id.* at 845. That is, once the total arrearage is accurately calculated, only the repayment schedule, not the total arrearage, can be modified by party agreement or court order.

II. What Does *Wright* Require in Mediation?

It is common for parties (and their attorneys) to come to a mediation without having filled out the financial affidavits required to finalize a divorce or child support modification. Likewise, parties seeking to file a contempt action for nonpayment of child support often attend mediation without records confirming any child support payments made or received, or without a copy of the existing child support order.

Wright requires that any negotiations on the repayment (not the amount) of child support arrearage must be based on an accurate calculation of child support owed. What is a mediator to do if the total arrearage cannot be determined because the parties do not have the necessary information? Can the parties simply agree on a good faith estimate of the arrearage amount? Can the court itself make a good faith estimate? *Wright* says no.

III. What Issues Can Be Mediated?

The role of the mediator is to help the parties determine an accurate amount of child support and assist them in crafting a repayment plan. If parties bring to the mediation session copies of the existing child support orders along with documentation of monies paid and received, then the mediator can help the parties with calculating an accurate amount of arrearage. This total amount can then be used in determining the schedule for repayment.

However, if this key information is not available, then the total amount of arrearage cannot be accurately determined and parties cannot formally agree on an estimated amount. The court will have to hold a hearing to determine the actual arrearage amount. In these cases, until the hearing, the mediator may want to look for alternative solutions such as a temporary agreement so that the custodial parent is receiving some child support. In addition, the mediator

can facilitate discussion of the underlying cause for the missed payments and work to devise a plan for future action.

IV. Recommendations and Suggested Best Practices

If the opportunity arises, mediators should inform the parties and their attorneys directly (or through the court ADR program staff) that any claims regarding unpaid child support must be supported by a copy of the existing child support order and records showing child support payments made and received. It is not enough for both parties to simply agree on an estimated arrearage amount. If there is no way for parties to calculate the actual child support arrearage, then the arrearage amount must be reserved for judicial determination. However, this does not limit the parties' ability to negotiate a repayment schedule for an amount to be determined later by the court.

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