

Guidelines
Drafting Advisory Committee
1 - 5 p.m., June 9, 1998
(Rev. 06/22/98)

Participants: Blaine Nordwall, Patricia Lund, Paul Wohnoutka, Representative Eliot Glassheim, Senator Jack Traynor, Judge William McLees, Robert Freed, Sherry Mills Moore, Paulette Oberst, and Barb Siegel.

Barb Siegel asked the members to introduce themselves by sharing with the group the expertise they bring to the committee including their professional and, if they wish, their personal experience in child support.

Blaine Nordwall: involved with the child support guidelines since the Department of Human Services (DHS) began developing guidelines

Pat Lund: divorced 12 years ago, father of her children refuses to pay child support, has testified at interim committee

Paul Wohnoutka: expertise area is tax preparation, no child support experience

Senator Traynor: serves on the interim Child Support Committee, attorney

Judge McLees: serves as district court judge, has served on the bench for about 20 years, much court time is consumed by family law issues

Bob Freed: serves as judicial referee (for 2 ½ years), practiced privately immediately following law school representing both parties, worked at the Devils Lake Regional Child Support Enforcement Unit, and then as a private prosecutor in Jamestown for 6 years working on many child support cases, is an obligor, has a brother and sister who are both custodial parents

Sherry Mills Moore: has practiced law for approximately 20 years, represents custodial parents and noncustodial parents, has never paid or received child support, served on the last advisory guidelines committee

Paulette Oberst: administrator for the Bismarck Regional Child Support Enforcement Unit (since 1991), has worked a total of 12 years in the Child Support Enforcement Unit as a staff attorney or administrator, can provide a perspective on amount of time spent on calculations and the process of calculating child support awards

Barb Siegel: served as chairperson of last guidelines committee, works with guidelines regularly in her job as Policy Administrator for the State Child Support Enforcement Division, is married to an obligor

Representative Glassheim: serves as chairman of the interim Child Support Committee, divorced 10 years ago, amicable divorce with joint custody.

Senator Traynor needed to leave early and, therefore, the group took care of some general housekeeping items. Because of members' tight schedules, Barb Siegel asked that the group schedule future meetings. Barb Siegel noted that by statute, initial rule-making proceedings must be commenced with a notice of proposed adoption, amendment, or repeal by August 1, 1998.

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Two future meetings were scheduled:

Monday, June 22, 1998, 5:30 - 9:30 p.m.

Monday, July 13, 1998, 10 a.m. - 5 p.m. (A meeting was previously scheduled for this day, but was expanded to start at 10 a.m. rather than the original schedule of 1 p.m.)

Both meetings will be in the same location--the Child Support Conference Room in Northbrook Mall.

Blaine Nordwall provided an overview of the history of the child support guidelines and the rule-making process.

DHS is contracting with the University of North Dakota (UND) to gather information regarding guidelines deviations in court orders. Such information must be analyzed in order to fully comply with the federal requirement regarding guidelines four-year reviews. This contract will be discussed in more detail when the relevant section of the guidelines is reviewed. In response to a question, Blaine Nordwall responded that administrative rules essentially have the same force and effect of law (N.D.C.C. 28-32).

Discussion occurred regarding the role of the committee. Barb Siegel noted that this committee is advisory in nature. The Legislature has delegated responsibility of establishing guidelines to DHS. The plan is for the committee to discuss issues, strive for general consensus, Blaine Nordwall will draft rules, and DHS will review. When the Executive Director has approved the proposed rules, the rule making process has officially begun.

Barb Siegel reviewed with the group the scope of the guidelines review and noted there are existing federal laws, regulations, and state statutes of which the committee needed to keep in mind. Barb Siegel suggested a section by section review of the guidelines, discussing potential matters for consideration, as submitted by the members, at the time the relevant section is reviewed. There was agreement to proceed in that manner.

Members discussed some general and philosophical issues which would not be covered in the section by section review.

Obligor versus income shares model. Bob Freed stated he has heard the concern about an obligor versus an income shares model many times, usually from the noncustodial parent. He stated that while the end result is very similar, there is a *perceived* fairness to the income shares model. Blaine Nordwall noted there is a presumption that the custodial parent also contributes to the support of the child. The

fact that the custodial parent isn't asked to provide support in a precise detailed amount is what causes concern.

There is a piece in the guidelines that states the custodial parent is substantially contributing to the support of the children. This contribution is not just in terms of money. Custodial parents contribute in other ways too, e.g., day to day caring for children, commitments, etc. This is very valuable to the child.

Barb Siegel stated that she would be uncomfortable recommending a change to an income shares model; income shares models have been introduced and soundly defeated during past legislative sessions. Representative Glassheim stated the interim Child Support Committee is also studying the guidelines. He stated that it looks as if they are going to recommend no change to the guidelines model. The perception of unfairness does exist, but it is just too difficult to change. He noted that DHS and the judicial system will not support a change. Senator Traynor stated that noncustodial parents are saying, "I have to provide bedroom, clothes, etc." This is an issue to be discussed under extended visitation.

Judge McLees said there is definitely a *perceived* fairness to the income shares model. He stated he is satisfied that the obligor model is fair and both parents are mutually supporting the children. Judge McLees stated he is not in favor of changing the model. Hearings would be more lengthy and complex.

Barb Siegel noted that if the model were to be changed, another population (custodial parents) may be expressing concerns about the "fairness." She noted that while noncustodial parents have a dollar certain obligation, custodial parents do not know what financial needs will need to be met and don't have the advantage of a sum certain. Bob Freed stated that a change from an obligor model to an income shares model does not in itself change the amount of child support to be paid. What will change the amount of support to be paid is the actual chart* and calculations. Several members openly expressed agreement to this statement. The general consensus of members was that there will not be a recommendation to change from an obligor model to an income shares model.

*Blaine Nordwall described how the numbers on the chart came to be, specifically noting there is a mathematical basis for the numbers in the chart. Several years ago, Thomas Espenshade calculated the cost of supporting children in modest means (correlates to approximately \$1,000 net/month) and well-off means (correlates to approximately \$10,000 net/month) for 1, 2, and 3 children. This study was used to figure a trend. All numbers for monthly incomes between \$1,000 and \$10,000, and for

larger families, are an extrapolation of the original numbers. Amounts under \$1,000 per month are solely based on ability to pay because these amounts simply would not be enough to support a child. Philosophy with these lower numbers is that parents who provide monetary support for their children are better parents--are more involved in child's life thus should provide some level of monetary support.

(Senator Traynor left at 2:15 to attend a Garrison Diversion Project meeting.)

Accounting of Child Support Paid and Cap on Level of Support Ordered. Bob Freed stated that noncustodial parents report that they wouldn't mind paying support if they knew support was being used for supporting the child. He also stated that at some point, higher child support awards go beyond supporting the child. Representative Glassheim mentioned that this issue will be on his committee's agenda for the 22nd. Sherry Mills Moore emphasized that requiring an accounting of how child support is used would be very intrusive to a parent. Custodial parents would be asked to document the child's life, but not in a baby book. The court has made a decision to place a child with a particular parent, which implies that this parent will do what is best for the child. Representative Glassheim stated we don't want millions and millions of receipts.

The members discussed that the potential for increased feuding between parties is enormous. It is a function of parenting to be responsible; we don't want to add a burden to parenting. It is impractical; who would monitor and enforce? A member suggested possibly setting a level (cap) at which an accounting would be required. Blaine Nordwall stated that DHS has no authority to require people to record an accounting of how support is spent, within the child support guidelines. Regarding a cap on support paid, Barb Siegel stated that the wealthy may be paying a very small percentage of their income (e.g. 2%), versus the middle and low income noncustodial parents paying a much higher percentage (e.g. 20%). This would not seem to be good policy.

Representative Glassheim suggested that at some upper income level, possibly X% of the payment must go into some account for future support, versus making all current support available for current maintenance. Blaine Nordwall stated that the law requires support to be paid to the clerk or, in the future, to the State Disbursement Unit (SDU). Within a certain period of time, the clerk (SDU) must then pay the support to the obligee. Any such mandate to set aside a certain amount would have to be ordered on the obligee.

Sherry Mills Moore stated that when looking at higher payment amounts (e.g., \$1,700/month), one must also look at what the noncustodial parent is left with (e.g. \$8,300), which is a significant amount of money. Bob Freed stated this is an issue of certainty versus fairness. If the judiciary is given discretion to set aside amounts for future use, then certainty is eliminated.

Judge McLees stated he has no interest in micro-managing a custodial parent's decision on how to spend the child support. This may maintain a control of the noncustodial parent over the custodial parent. Sherry Mills Moore stated that she would go for certainty every time. Blaine Nordwall stated that providing judicial discretion is encouraging people to bring issues to court; this just fills courtrooms. If something like this is done, it should be based on some solid facts. Judge McLees noted that he often hears this accounting issue from noncustodial parent who are in arrears and is often just another excuse for nonpayment. Blaine Nordwall emphasized we need to look at science and the number of potentially affected cases. Sherry Mills Moore offered that in her private practice she comes across cases which go off the upper end of the chart only 2 to 3 times per year. Paulette Oberst estimated that there have been only 2 such cases during her time with the Unit. Representative Glassheim stated he is convinced there should be no cap; we have no authority to tell custodial parents how to spend money. We have responsibility to establish guidelines to set support amounts. Judge McLees stated he is in favor of no cap. Paul Wohnoutka agreed. General consensus of the committee was at those upper income levels, the parties need to work out the issues or the courts need to.

The committee then began the section by section review of the guidelines:

75-02-04.1-01(01). Language should be added to the definition to clarify that 'child' does not mean step child. A few members noted there has been confusion in the past in this area. There was general consensus the definition should be clarified.

75-02-04.1-01(02). No change.

75-02-04.1-01(03). Are survivor's benefit's "children's benefits"? Survivor's benefits should be included in the definition of children's benefits. That way they can be added to income, then deducted later. Noncustodial parent is deceased so when does this become an issue? Usually in multiple children cases where one child goes into foster care.

Example, mom, child1, child2, child3, child4, dad is deceased. \$800 mom's benefit, \$200 benefit for each of the 4 children. Child4 goes into foster care. If you don't include 4th child's benefit as income to mom, then no credit is given to

that amount later. To mom's advantage, the benefit for the child going into foster care would be included in mom's income (because when you add the benefit, then you subsequently deduct that amount under -02(11)). Mom would pay \$106 ($\$306 - \$200 = \106) by including the 4th child's benefit in her income versus \$282 ($\$282 - \$0 = \282) when not including the 4th child's benefit in her income.

Possible language for a revision in this area may be to add language like, 'including benefits made under Title II of the SSA.' or "... derivative of the alive or deceased parent's benefits. . ." Blaine Nordwall will draft something for the committee's review.

A problem may occur when a parent is disabled and both parents are noncustodial parents (i.e., foster care). The benefit shouldn't be counted as income and deducted by each parent. There is a need to figure out how to use benefit only once. If deceased, count payment with surviving spouse. If not deceased, count only for *one* parent. The main concern of the group is to stop using the benefit twice (once by each parent).

Regarding the following issue from the Potential Matters for Consideration document, "Clarify 'children's benefits' do not apply if children receive benefits due to obligee, only due to obligor," the committee determined there was no need for such clarification. The committee felt this is answered in the first sentence of 75-02-04.1-01(3).

75-02-04.1-01(04). Who is the custodial parent? What happens if the split is exactly 50:50? This point was discussed during the last review of the guidelines and consensus was that the split is rarely, if ever, actually 50:50. Representative Glassheim stated he wanted a rule to provide for no payment of support by either party when there is an exact 50:50 split custody. Blaine Nordwall observed that in those cases where there is an order for 50:50 custody, in reality there is not a 50:50 split. Although it is not beyond comprehension, in reality there are not 50:50 splits. This definition, as written, accounts for this theory. One person is labeled as custodial parent for the purpose of this rule. It does not preclude any family from deciding on joint custody. Sherry Mills Moore noted that joint custody can truly mean anything from a very small amount of time to quite a large amount of time being spent with one of the parents. This definition is strictly for guidelines' purposes only.

Paul Wahnoutka questioned what would happen in a case where Parent1 has the child 55% of the time and has income of \$120,000; Parent2 has the child 45% of the time and has income of \$12,000. On its face, it might appear it is inappropriate for Parent2 to have to pay Parent1. However, following mathematical calculations, Parent2 (the

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parent with the child the lesser amount of time) would pay Parent1 (the parent with the child the greater amount of time) \$250 per month.

If this issue would be litigated, there would need to be a time calendar. Sherry Mills Moore pointed out that a 50:50 split actually only lasts as long as the parties are content. She also stated, "Don't let the tail wag the dog"—don't put a price tag to child time. Judges need to decide which of the two fit parents is the best fit parent. Barb Siegel also noted that child support is not a right of the custodial parent and visitation is not a right of the noncustodial parent. Both are rights of the child; it is best if the two are kept separate.

Blaine Nordwall noted that particularly women feel looked down upon for giving up custody and, therefore, prefer to have the term "joint custody" in the order. The label "joint custody" is a term which means nothing as far as the actual time spent with each child. Allowing for the term "joint custody" eliminates many battles. Several members openly agreed this is true.

Blaine Nordwall offered consideration could be given to a deduction based on proportion of nights (not days) to make an adjustment *after* the support obligation is calculated. Giving the deduction *prior* to calculation of support amount becomes incredibly complex. This could possibly be included as a deviation.

Members discussed whether such a deduction would be based on visitation as ordered or visitation as it actually happens. It would be based upon the order for visitation. The question then becomes, can the order be modified based on what actually occurs. Unable to build into orders some kind of magic that adjusts the support amount based on actual time spent with each parent—the parties must go to court. This will undoubtedly lead to more disputes. This would invite disputes between parties. The group also discussed at what point does visitation go beyond "visitation"? This is very difficult to define. Blaine Nordwall related that DHS has been involved in similar discussions in the past and the discussion has been that up to 66 days would not count because that would be ordinary visitation of every other weekend and 2 weeks in the summer.

Parents will be motivated to argue over visitation if there is a dollar amount attached to visitation. This dispute will, in some cases, be without regard to the amount of time the parent actually intends to spend with the child, since establishments would be based upon the order, not necessarily on reality. Although some noncustodial parents have voiced their desire to have a deduction for visitation, such a provision may actually harm their chances at significant visitation time as the custodial parent may argue against it for financial reasons.

Blaine Nordwall stated we could address this, but it would take a formula. Drafting would not be a problem, but we have to consider the law of unintended consequences. Group agreed that Blaine Nordwall will draft some changes to account for extended visitation times and possibly a change to the definition of 'custodial parent.'

75-02-04.1-01(05). Income is defined by statute (N.D.C.C. § 14-09-09.10(8)). There is no discretion in this area. The committee discussed removing everything after the first sentence because the itemizing is sometimes understood to limit the types of income. We have not seen any evidence that the Supreme Court believes the list is all inclusive. During the last guidelines review, items were added. There is value to keeping the list. Consensus was to do nothing to remove the examples, and items should be added to limit arguments. It may also be good to add a phrase such as, 'Examples of gross include x, x, x . . .'

Blaine Nordwall reviewed the Supreme Court decision of Hendrickson vs. Hendrickson, in which it was decided that an employer's contributions to an obligor's pension plan, family health insurance premiums provided by the employer, and the employer's contribution to a tax deferred savings plan are properly included as gross income. Members agreed that limits need to be placed on this. Members discussed that the value of such benefits should be included only when the noncustodial parent has ability to significantly control or influence. Group discussed what happens with cafeteria plans where the employee can determine allocation of amounts, but cannot turn benefit into cash for current use. The use of the allocation may include a 401K plan. Ideas offered were (1) available to all employees in the same class and (2) concentrate on "significant control" and "influence." Blaine Nordwall will draft something for the advisory committee to consider.

Barb Siegel called the meeting to close at its scheduled time.

Representative Glassheim stated he would like time set aside at the next meeting for discussion regarding imputing income. Barb Siegel noted this.

Blaine Nordwall stated he will attempt to draft ahead to facilitate discussion at the next meeting. If drafts are prepared far enough in advance to allow for the mailing to committee members prior to the next meeting, Barb Siegel will do so.

The next meeting will be June 22, 1998, in the evening. Barb Siegel will send a reminder to members.