

Guidelines
Drafting Advisory Committee
10:00 a.m. - 5:30 p.m., July 13, 1998

Barb Siegel, chairman, called the meeting to order at 10:00 a.m., July 13, 1998.

Members present: 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 reminded the committee of their role as an advisory body. The committee has the task of making recommendations to the Department of Human Services for amendments to the guidelines. She also noted that this meeting has been determined by an Attorney General's opinion issued last Friday to be open to the public. Members of the public are welcome to be present at the meeting, but no public exhibits or testimony will be received. Public comment will be solicited during the rule-making process.

Barb Siegel inquired as to whether there were any errors or omissions to the June 9 meeting notes other than those noted at an earlier meeting. None being offered, she declared the notes of the June 9 meeting approved as amended at the June 22 meeting.

Barb Siegel inquired as to whether there were any errors or omissions to the June 22 meeting notes. None being offered, she declared the notes of the June 22 meeting approved as distributed to the members.

Barb Siegel briefly reviewed the prepared agenda. She inquired whether the committee wished to discuss the open meeting issue prior to beginning their committee work. Blaine Nordwall briefly reviewed the Attorney General's opinion establishing this meeting as open to the public. He noted that this meeting was arranged as open to the public prior to the issuance of the Attorney General's opinion. As a required remedy included in the opinion, Blaine Nordwall provided the Secretary of State notice of the June 22 meeting. Although not a required remedy, he also provided notice, at Barb Siegel's recommendation, of the June 9 meeting. Blaine Nordwall also noted that although the opinion had not yet been issued, his meeting with Paul Wohnoutka was treated as a subcommittee meeting, and notice of that meeting was provided to the Secretary of State. Notes of that meeting have been prepared. Blaine Nordwall stated his belief that the committee has complied with the stated remedy of the Attorney General's opinion, for the June 22 meeting.

The committee then began its discussion concerning the economic data on the cost of raising children.

The publication entitled, Expenditures on Children by Families, 1997 Annual Report compiled by the United States Department of Agriculture (USDA), was used as a basis in the committee's analysis. Blaine Nordwall provided an abbreviated review of the information provided in the various tables of the report. The tables provide statistical information about the cost of raising children. Table 1 provides the estimated annual expenditures on a child by husband-wife families for overall United States. Additional tables provide information for various areas of the United States. E.g., Table 5 provides information for urban Midwest and Table 6 for rural areas. The tables are separated into three before-tax income categories. The report includes a calculated average for each of the income categories. The tables provide for a break down of expenditures by age of the child and provide an allocation of total expenditures to different expense categories such as child care, housing, food, etc. It was noted that information in Tables 1 through 6 is based on a two child, husband-wife family and Table 7 is based on a two child, single parent family.

Blaine Nordwall observed that the most significant tables for the committee's consideration are probably Tables 1 (overall United States), 5 (urban Midwest) and 6 (rural areas). He noted that data in Table 7 may be skewed a little by the fact that there are fewer family members to whom to allocate expenditures. This takes into account economies of scale. It was also pointed out that income levels are quite different in this table than in others.

Blaine Nordwall stated that information from these tables can be converted with reasonable accuracy to net income and then applied to the current child support guidelines in order to derive a comparison of the results of application of the guidelines to the cost of raising a child. Since the tables are based on a two child family, extrapolation of the numbers is required. Total expenditures can be divided by 18 to arrive at a per year cost of raising a child, and that result by 12 to arrive at a per month cost.

Blaine Nordwall suggested running calculations using the average on Table 6 (rural areas), noting that most of North Dakota could fall into this category.

Exercise 1: Using the average income on Table 6 (rural areas) of \$47,800. \$47,800 less \$6,900 standard deduction (married filed jointly) less \$10,600 (\$2,650 exemption x 4) = \$30,300. \$30,300 income to be applied to the tax tables. \$47,800 less \$4,541 (federal taxes for married filing jointly) less \$636 (state tax) less \$3,657 (FICA and Medicare) = \$38,966. This equates to \$3,247 net monthly income. Applying the \$3,247 net monthly income to the guidelines results in \$604 child support

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for one child, \$920 child support for 2 children, and \$1,097 child support for 3 children.

The annual cost of raising a child is \$8,132 (\$146,370 divided by 18 years). According to expenditure calculations the cost of raising one child is \$840 ($\$8,132 \times 1.24 = \$10,083$ divided by 12 months). \$1,355 for two children ($\$8,132 \times 2 = \$16,264$ divided by 12 months), and \$1,565 for three children ($\$8,132 \times .77 = \$6,262$ divided by 12 months = $\$522 \times 3$ children)

Results Comparison:

\$604 current guidelines, \$840 per expenditure data (1 child)

\$920 current guidelines, \$1,355 per expenditure data (2 children)

\$1,097 current guidelines, \$1,565 per expenditure date (3 children)

Under current guidelines, the non-custodial parent would pay 72% of cost of raising one child; 68% of cost of raising two children; and 70% of cost of raising three children.

There was discussion about the costs included in the tables. The committee reviewed the summary of categories of household expenditures on page 2 of the report. Blaine Nordwall observed that our guidelines appear to provide for a substantial, but not complete amount of the cost for raising a child at this income level.

Barb Siegel commented that an average income of \$47,800 is considerably higher than the norm for North Dakota. Several members agreed and the committee then followed the same exercise for the lower income level.

Exercise 2: Using the average income on Table 6 (rural areas) of \$22,400. \$22,400 less \$6,900 standard deduction (married filed jointly) less \$10,600 ($\$2,650$ exemption $\times 4$) = \$4,900 income to be applied to the tax tables. \$22,400 less \$739 (federal tax for married filing jointly) less \$103 (state tax), less \$1,714 (FICA and Medicare) = \$19,844 net income. This equates to \$1,654 net monthly income. Applying the \$1,654 net monthly income to the guidelines results in \$362 child support for one child, \$497 child support for two children, and \$588 child support for three children.

The annual cost of raising a child is \$5,822 (\$104,790 divided by 18 years). According to expenditure calculations the cost of raising one child is \$602 ($\$5,822 \times 1.24 = \$7,219$ divided by 12 months), \$970 for two

children ($\$5,822 \times 2 = \$11,644$ divided by 12 months) and \$1,121 for three children ($\$5,822 \times .77 = \$4,483$ divided by 12 months = $\$374 \times 3$ children).

Results Comparison

\$362 current guidelines, \$602 per expenditure data (1 child)
\$497 current guidelines, \$970 per expenditure data (2 children)
\$588 current guidelines, \$1,121 per expenditure data (3 children)

Under current guidelines, the non-custodial parent would pay 60% of the cost of raising one child, 51% of the cost of raising two children, and 52% of the cost of raising three children.

These exercises consider the next to the lowest, by a substantial amount, comparisons that could be done. Any table other than "urban Midwest" would give us higher expenditures and a greater difference between the guideline amount and the expenditure data.

Looking at Table 7 with one parent household, the costs of raising a child are significantly higher. Differences between the guideline amount and the expenditure data would increase if using the data from Table 7.

Representative Glassheim noted that the calculations do indicate fairness to both parties. Barb Siegel noted that the intent of this exercise is to show how our current guidelines compare to the costs of raising a child. This information may be useful to the committee during discussions of other sections of the guidelines.

The committee then moved on to the next agenda item of reviewing draft amendments. Committee members were previously provided with two sets of amendments: (1) amendments regarding extended visitation, dated July 1 and (2) miscellaneous amendments, dated July 9. The amendments were drafted based on previous discussions and issues identified as potential areas of consideration.

Extended Visitation: Blaine Nordwall noted that all examples the committee discussed previously were based on one child. When there is more than one child and all children do not visit the non-custodial parent at the same time, accounting for these differing times of visitation can get complicated and the previously discussed formula proved unworkable. There is considerable likelihood, especially as children get older and become involved in activities, that children will not visit the non-custodial parent at the same time. Blaine Nordwall was able to come up with a method of accounting for

differing visitation times and he provided an explanation of each of the amendment versions.

Blaine Nordwall drafted three separate amendment versions which would add new subdivision I to subsection 2 of section 75-02-04.1-09 (deviation list). As an item included in the deviation list, all versions provide for judicial discretion. Version C allows the most judicial discretion and, based on previous committee discussions, is the least desirable. None of the three versions consider differing visitation times for multiple children. Because of the likelihood of this to occur, the concept reflected in all three versions is seriously flawed.

The remaining amendments drafted would not fall in the deviation list. The Version A amendment to create new section 75-02-04.1-08.1 establishes a trigger point concept in which only nights over a certain number are counted. The number of nights in the draft are arbitrary. A common visitation schedule (every other weekend and 2 weeks in the summer) would coincide with the use of 66 total annual visitation nights. The Version B amendment to create new section 75-02-04.1-08.1 establishes a trigger point as well, but all nights are counted. The drafts do incorporate the committee's apparent strong preference for certainty and consistency. Necessarily, draft amendments considering differing visitation times for multiple children are more detailed, however, than those versions which do not consider differing visitation times.

Blaine Nordwall related that Barb Siegel had provided him with information about treatment of visitation in other states. He noted that if we follow a practice used in several income shares states that provide a specific calculation method, if visitation does not reach 1/3 of the time, the non-custodial parent's support obligation is actually increased. Barb Siegel reported that in other states which consider visitation time in the child support calculation, common "trigger" levels are 30%, 35%, 128 overnights, etc. All are considerably higher than the 18% of total nights associated with a 66 overnight trigger.

Representative Glassheim suggested that we focus on Version B which creates new section 75-02-04.1-08.1. He stated his satisfaction of Blaine Nordwall's work in producing the draft amendments.

Bob Freed stated that the non-custodial parent makes a substantial contribution during times of extended visitation. He likened the contribution of the non-custodial parent to the contribution the custodial parent provides during times when the child is not visiting the non-custodial parent. He questioned whether any member of the committee disagreed with him. One member questioned his definition of "extended" visitation. He responded that this would be two months in the summer. Barb Siegel responded that

during times of extended visitation, the non-custodial parent does contribute, but that contribution does not completely replace the custodial parent's contribution during that time. Paulette Oberst also noted that the custodial parent's contribution does not end during the time of this visitation. Sherry Mills Moore stated that the non-custodial parent may be able to "make do" during a short time such as two months. When the child visits, it is reasonable to get by with less than what the custodial parent can do for long periods of time. Blaine Nordwall questioned if the non-custodial parent spends more for housing during the two months of visitation. There was general consensus that the non-custodial parent's housing costs do not increase, but food costs would.

Bob Freed presented a hypothetical scenario in which the custodial parent gets 2/3 of the child support amount during times of visitation after 30 consecutive or 66 total nights (30/66). However, if visitation is exercised during the first 30/66 days, then the custodial parent gets \$0 child support and all unforeseen expenses are the responsibility of the custodial parent. He reasoned that anyone would look at this and laugh. He stated that it should not be that if the label is changed from custodial parent to non-custodial parent, it is then fair. Bob Freed also questioned why the custodial parent does not pay the non-custodial parent during the times of extended visitation. Sherry Mills Moore noted that responsibility has to start somewhere. It has to lie with the adult, not the child who was born. Senator Traynor asked Bob Freed if he felt the present system reduces non-custodial parents's rights to exercise their visitation. Bob Freed responded that he does not see this. He went on to say, however, he is seeing that some non-custodial parents are financially strapped and are not able to do fun things with their children and that children experience a reduced standard of living during the time they visit the non-custodial parent. He offered a scenario where the child experiences a reduced standard of living during visitation in a case where the non-custodial parent's income is minimal—at a \$1,000 per month level with child support paid from that income. Sherry Mills Moore responded that at a \$1,000 level of monthly income, there is meager standard of living, but it does not have to do with extended visitation. She sees many families who have learned to spend free, fun, quality time with their children. The concern with any of these formulas is how to calculate the child support award; the burden is on the people who calculate the support awards. She acknowledged there may need to be an allowance for extremely significant times of visitation. However, she stated emphatically she would prefer to provide more financial stability for a child for ten months than for two and in the home where the child spends the most time.

Pat Lund stated, "where there's a will, there's a way." Her ex-husband does not call to see his children. This is his choice. He only makes \$1,200 per month. That is also his choice. Low income parents can find ways to spend quality time with their children. She does this now and has done this in the past. There are things that can be done to

create quality time. Paul Wohnoutka noted this issue has previously been discussed. One thing that bothers him about not having any trigger time, is that battles between the parties are likely. He noted that in the existing guidelines, there is an assumption of some amount of visitation. If we start counting days from zero, we are messing with part of the foundation of the guidelines chart.

Barb Siegel mentioned that the committee previously discussed the probability of increased litigation and disputes between the parents. Sherry Mills Moore stated that a lot of cases will fall over the 66 days of visitation and that going with 66 days would affect a significant number of cases. Barb Siegel shared information from a recent Ohio news article which stated that judges, on an average, were ordering 83 - 112 nights of visitation per year. Paulette Oberst noted that review and adjustment cases may turn into visitation and custody battles. Sherry Mills Moore stated that 66 days is not anywhere near as high as it should be.

Senator Traynor questioned whether a guidelines change to allow for visitation credit can be prospective only, that is only for orders established in the future. Sherry Mills Moore indicated she does not believe this would be fair. Blaine Nordwall said laws of this type usually are not found unconstitutional if you can articulate a reason for treating people differently, but questioned whether there is a reason for being prospective in nature. Blaine Nordwall suggested that maybe if each parent had a child at least 40% of the time, with both parents providing a complete home for the child, it would be appropriate to make an allowance.

Barb Siegel stated that she thought many orders include the "reasonable visitation" language and wondered how that approach would be affected. Orders would need to define visitation in detail. A member asserted that reasonable orders for reasonable people would be out the window. Parties may be forced into disputes. Bob Freed suggested that providing no allowances for visitation would be perpetuating unfairness. Senator Traynor stated that he sees the committee has two issues to address: (1) what do you do with parents who come in and say I have had the children 90 days per year for the past x years and (2) what about orders in effect now? We need to look at the prospective nature of this rule. He further observed that nothing we do here will cure the problem. He suggested that a proposed amendment may need to be issued to let the public have a chance to review and comment on the issue—a starting point so to speak.

Barb Siegel provided additional information from the Ohio news article. In other states' experiences (Washington specifically mentioned), many judges changed their minds about credit for visitation. Parents were dueling days for dollars. Custodial parents

were withholding visitation and non-custodial parents were asking for more time. Ohio increased a trigger to 130 nights (23%) before an adjustment would be made.

Representative Glassheim stated his interest in bringing this issue to closure. Sherry Mills Moore stated her interested in hearing Judge McLees's (who would not join the meeting until after lunch) opinion on the subject. Barb Siegel stated that motions for drafting advice would be received as the last order of business due to the interrelatedness of the guidelines issues.

The committee broke for a ½ hour lunch. Judge McLees joined the committee at the time the meeting resumed following the lunch break.

The committee began their review of the remaining draft amendments which were mailed to committee members on July 9, 1998. The remaining draft amendments are grouped by subject matter and labeled as Items 1 through 6. The organization was intended to aid the process of review by attempting to group items by subject matter and possibly simplify the voting process on the advice to be provided to the Department of Human Services. Some of the amendments were discussed previously and consensus was reached.

Item 1, an amendment to subsection 1 of section 75-02-04.1-01, was discussed by the committee in a previous meeting and consensus was reached. Further discussion did not occur.

Item 2 included amendments to subsection 3 of section 75-02-04.1-01 and section 75-02-04.1-11. Pieces of this item were discussed by the committee in a previous meeting.

Barb Siegel questioned the language change to subdivision 3 of section 75-02-04.1-11. Per the amendment the child support in a foster care case would be capped at the point of foster care costs *meeting the child's needs* rather than at the cost of *foster care*. Prior to the amendment, the language limited the amount to the foster care payment made to the provider and would not include medical expenditures. The cost of *foster care* includes clothing, room, board, travel expenditures, etc. This amendment provides for inclusion of medical expenditures.

Bob Freed expressed concern that it might be argued by obligors that the payment made to an expensive facility is more than what is needed in meeting the child's needs. This may lead to proving that actual foster care payments do not exceed the "child's needs." This amendment should not end up causing litigation of "appropriate services." The purpose of the section is determining if and at what point a cap applies. There

needs to be language that consists of what the costs are, for a child in foster care. A possible amendment would be "exceed the cost of foster care and any other expenses needed to meet the child's needs."

Barb Siegel raised an issue about the proper application of the guidelines when multiple children (e.g.: two children) go into foster care at the same time. Should the amount from the chart for two children be used and then divided in half or should the amount for one child be used twice? There is a significant difference in the result. There is the issue of children entering foster care and returning to the home at different times. The committee agreed proper application under current guidelines would be to use the 1 child amount twice—one time for each. The guidelines state that each child is treated as an obligee and each obligation determined separately.

Bob Freed asked the committee if a child in foster care constitutes a "special needs child" and should a deviation apply? Paulette Oberst and Bob Freed both indicated they have never seen such application. The committee generally agreed that "special needs" really speaks to function of mental or physical illness, developmental delays, etc. Most children placed in foster care have some type of disorder. Paulette Oberst believes "special needs" could apply all the time. When children enter foster care, it is already a traumatic time for parents and parents are usually already challenged financially. Although it is possible for the special needs deviation to be applied to cause an upward deviation to the amount, there was virtually no support for such application. One of the long term goals of foster care is to get the child back into the home. Increasing the financial burden may have a negative effect on this goal although it was also suggested that such financial responsibility may also be a motivator to see that the child returns home.

Both Paulette Oberst and Bob Freed expressed their desire for the current guidelines to be changed when multiple children are in foster care. It becomes complicated though by children entering and exiting foster care at different times. Blaine Nordwall suggested the committee provide advice to the Department by identifying the problem and drafting should occur later. Drafting will be complicated. As the guidelines are currently written, it is easy, but there was general consensus that it may be appropriate for there to be an allowance for a downward deviation when multiple children are involved. Paulette Oberst noted that foster care cases are complicated and each case is unique. She stated she suspects that this is the only time she will agree that the court should have discretion to deviate from the guidelines. Judge McLees agreed it may be appropriate for judicial discretion in this area.

Item 3 included amendments to subsections 5, 7, and 8, and new subsection 11 of section 75-02-04.1-01; new subsection 12 of section 75-02-04.1-02; and amendments

to section 75-02-04.1-05. The committee previously discussed some of the amendments included in Item 3. Paul Wohnoutka and Blaine Nordwall worked on these amendments together when they met on July 1. "Lesser of" language was added to 75-02-04.1-01(7)(a) to define the amount of the reduction of gross income by federal taxes. Under the amendment, the lesser of two numbers would be used: subsection (a)(1) actual federal income taxes based on the tax return or subsection (a)(2) the federal income tax obligation based on application of the standard deduction for a single individual.

Paulette Oberst questioned how this works in practice. Are two calculations required in each case to determine which method provides for the "lesser" amount? Judge McLees also indicated he understood the amendment to require two separate calculations. Paulette Oberst stated that in a case where an individual itemized on the tax return, she could determine the lesser of the two amounts because she could easily calculate what the tax obligation is based on application of the standard deduction for a single individual. However, it would be difficult, if not impossible to go the other direction. Blaine Nordwall indicated it was not the intent to require two separate calculations. If the non-custodial parent has actually itemized, then that amount is used. If the non-custodial parent has not filed an itemized tax return, there has to be an assumption that the standard deduction provides the lesser tax liability. Blaine Nordwall also noted that ordinarily the amount from the actual tax return would be used. An example of when the standard deduction would be used would be for individuals who have not filed or have a flawed tax return, etc.

Paul Wohnoutka noted the easiest and most consistent way of determining the reduction for federal income taxes is to use subsection (a)(2). His personal preference would be to strike subsection (a)(1) and use only subsection (a) (2). To use actual amounts for non-custodial parents who have itemized--maybe they have home mortgages--is saying those non-custodial parents should pay more child support because they have less taxes than those who live in an apartment. Barb Siegel questioned what is happening in practice now. There was general consensus that this was the most well liked of the two methods and several members indicated support for removing subsection (a) (1).

Sherry Mills Moore questioned why standard deduction was selected rather than the head of household deduction which provides for a higher income and lower taxes. Paul Wohnoutka responded that if a person is actually a head of household, the taxes will be less than they would be using the standard deduction. The standard deduction gives the non-custodial parent the benefit of the doubt and will provide for a smaller obligation.

It was stated that clarification regarding filing status was needed. If "current tax filing status" language should be used, what is the definition of "current"? For example, should current be defined as the filing status as of the date of the court determination? Discussion occurred as to whether the deduction should be tax obligation or actual taxes paid. The amount taken out of checks for taxes is usually more than the tax obligation. Paul Wohnoutka also noted there are issues relating to child care credits/deductions. There is an issue about the gross/net income used for determining a child support obligation is a different amount than used for determining taxes. Adjusted gross income could be much less than the amount available on which to determine child support. The effect would not allow a non-custodial parent to pay less child support. Adjusted gross income should be used as defined by IRS, using current income, not by the tax return which picks up historical income.

Blaine Nordwall offered an amendment to the committee. Discussion occurred relating to eligible exemptions. For example, if one child is before the court, but the non-custodial parent claims three children for tax purposes, is one exemption used or three? Members discussed that the exemptions would apply if the parent counted the child for taxes, regardless of whether the child was before the court or not. The more exemptions, the lower the tax liability, thus, the higher the income used to calculate child support resulting in a higher support award. Blaine Nordwall asked if the committee's discussion was this: Use an exemption for the non-custodial parent and any child (out of the home) the non-custodial parent is entitled to claim an exemption for and a portion of the exemption for any child in the home (proportionate share). The consequence of altered child support is as much a possibility of rounding than it is in these deductions. Consensus was for an exemption for the non-custodial parent and any child that parent can lawfully claim for IRS purposes. This should not result in material change in award. Consensus was reached to exclude section 1, however, Bob Freed voiced his disagreement.

75-02-04.1-01(7)(b) was amended to reduce gross income by the lesser of actual state tax or 14% (North Dakota's state tax). The subsection was amended to address non-custodial parents who come from other states, some of which, for example, have a zero state income tax (such as South Dakota). Paul Wohnoutka stated that he has manually calculated taxes under other states' tax laws; it is complicated. It was suggested to go with a straight 14% rather than the "lesser of" language. Bob Freed disagreed and offered a scenario of a non-custodial parent from a 30% tax state (such as California). A member commented that the idea is to achieve simplicity and certainty. Judge McLees stated that he prefers the straight 14%. We are establishing obligations in North Dakota. This supports use of 14%. Blaine Nordwall questioned the materiality of this issue. Representative Glassheim indicated his support of 14%. The committee considered three options: (1) actual; (2) 14%; (3) the lesser of. There was general

consensus that 14% is preferred and should be part of the formal drafting advice to the Department of Human Services. Blaine Nordwall quickly drafted language and offered it to the committee. The committee indicated their agreement that the draft accurately reflects the committee's wishes.

There was additional discussion about which tax table should be used. \$35,900 at single and \$50,000 at married is the level where you will see larger differences in taxes. Consensus was reached for using single tax filing status and the tax table for single individuals, not general tax table language.

75-02-04.1-01(7)(e) was amended to clarify the reduction of gross income by medical expenditures. The amendment clarifies this subsection deals with chronic, and likely to continue to occur, not episodic expenditures.

75-02-04.1-01(7)(h) was amended to remove the language regarding actual lodging costs if they are less than \$30 per night. Non-custodial parents do not provide evidence of lesser actual lodging costs. It is not practical.

75-02-04.1-01(7)(i) was added to deal with employer reimbursed out-of-pocket expenses that the committee felt should not be included.

75-02-04.1-01(7)(j) was added to address concerns related to including employee benefits. Cafeteria plan monies would not be counted unless the money could be used by the employee. Special benefits provided to one employee and not to others (i.e. in lieu of a raise) would indicate influence or input; therefore, would be included. It was generally agreed that income not available to the non-custodial parent should not be counted in net income. This amendment would clarify that. The committee noted an error in the amendment text that needs to be corrected: "... influence ~~on~~ or input . . ."

75-02-04.1-01(7)(k) was added to state that if income is used in a prior year, then it should not be used in the year realized. Sherry Mills Moore suggested that this should be limited to determining the support of the child under current consideration. Some discussion followed. Sherry Mills Moore offered a case scenario: \$10,000 into deferred compensation. That money is included in income in 1995 when determining a support award. Then individual marries and has a child and now in 1998 divorces. As written, this language implies that the \$10,000 would not be included again. She indicated the language is too loose. Blaine Nordwall noted that this section was added to work with the new subsection (7)(l) which follows: It was agreed that more discussion on this will occur when reviewing the self-employment section.

75-02-04.1-01(7)(l) was added and more discussion on this will occur when reviewing the self-employment section.

Section 75-02-04.1-01(8) was amended to address a potential loophole. Paul Wohnoutka stated the term "employs" is a potential loophole. Representative Glassheim questioned if the effect is you cannot legitimately reinvest in your business, which could ultimately and in the future, benefit the child. Judge McLees responded that the child needs support now. Blaine Nordwall questioned when you reinvest in your business, what assurance is there that the business will be around to provide for the child's future support.

Paul Wohnoutka stated that prior to the amendment, the non-custodial parent could hide income in the business until after the child is beyond 18 and then withdraw the money. This limitation is no different than employed individuals who pay off their mortgage early and put money in a retirement account. This practice will also provide income in the future. Non-custodial parents who aren't self-employed individuals don't get a shot at "investment" in a business to reduce current income.

Section 75-02-04.1(11) was added to define rental income.

A new subsection 12 was added to 75-02-04.1-02 to reinforce the notion that you do not deduct an amount unless that amount had been included as income in the first place.

Senator Traynor questioned whether professional license expenses are deducted from income. There was general consensus that if the license is required for employment, it would be used like union dues and an allowable deduction from gross income. There was general consensus to add language to address and that the term "occupational license" will be used.

The committee discussed amendments to 75-02-04.1-05(1) and (2) along with 75-02-04.1-01(7)(k) and (l).

Barb Siegel shared some information from Brad Davis, Administrator of the Dickinson RCSEU. Paul Wohnoutka stated that as the guidelines are currently written add unnecessary complexity.

The committee discussed amendments to 75-02-04.1-05(3) and (5). The 125% allows for substantial increase in value. Some benchmark is needed; 125% is appropriate and should be nothing lower. Example, a non-custodial parent could decide to keep calves to increase herd size, or contract to provide grain in December with a check paid in

January. This would have the effect of not allowing reduction in child support by holding commodities. Use income from labors of the year. This is relative to value, not bad debt that lays on the books. If deferring \$1,000 then the next year \$1,250 could be deferred.

The current guidelines use of depreciation and principal payments would be eliminated.

75-02-04.1-05(6). Rental property, as defined by proposed subsection 11 of 75-02-04.1-01, is property that the non-custodial parent is able to control. It would be property owned by the non-custodial parent and spouse or corporation. If non-custodial parent is in a position to manipulate, then income can be diverted into another's hands.

"Income imputed based on the obligor's assets" language should be removed from the draft amendment to 75-02-04.1-01. This was removed during the last guidelines review and was added as a deviation.

Paulette Oberst expressed concern about net income used twice and in different ways. Subsection 6 only comes into account if there are multiple owners. Sherry Mills Moore said it would be more clear if it said "final net" or "net net". The committee stated understanding of intent, but agreed it can be read wrong. Blaine Nordwall stated that "net income from rents" is a phrase previously defined and thus necessary. Likewise, the phrase, "obligor's rental property" is an important part of this section. Paul Wohnoutka suggested that Blaine Nordwall work on the language after the meeting. Blaine Nordwall reminded the group that public comment will be gathered. Judge McLees noted that by and large, the amendments made a great improvement to this section.

The amendments labeled Item 4 were reviewed. These include amendments to section 75-02-04.1-06 and provide for a change in the multiple family calculation. The amendments provide for similar deduction as are allowed for other families. There have been concerns expressed over the years about whether the amount of deduction allowed is appropriate.

Section 75-02-04.1-06(4) requires imputation of income be applied to a new spouse in multiple family situations. Current policy recognizes the new spouse's responsibility to support, solely for the purpose of calculating the responsibility for support of the child, in common, in the house. Section 75-02-04.1-06 was added last time the guidelines changed and the section is a benefit to the non-custodial parent. However, imputation of the new spouse's income could have the effect of increasing the child support award. Bob Freed made the analogy of calculating a deduction using a new spouse's income

to that of income shares. Blaine Nordwall explained the calculation in determining the deduction is for just that, nothing more. What is the deduction difference? Bob Freed did a quick analysis on the white board applying the new amendment. At \$1,000, the difference would be a percentage of either \$150 (now) and \$209 (amendment). The goal is to strike a balance between the custodial parent's view that the children should not receive less because the non-custodial parent has more children and the non-custodial parent's view that a deduction should be provided to recognize that all children need support. Sherry Mills Moore stated that parents need to think about their responsibilities to support their children. Paul Wahnoutka stated the need to look out for children of second marriages. Balance needs to be reached. Blaine Nordwall noted the Supreme Court's decision in the past, on this issue was "first family first." Allowances for multiple families moves away from that philosophy.

The Item 5 amendment regarding imputation of income was reviewed. This item includes amendments to 75-02-04.1-07. It was drafted merely to address a specific case, *Nelson v. Nelson*. If a non-custodial parent voluntarily leaves employment, that should not become the child's problem. The amendment would allow imputing at what was previously earned when there was voluntary employment change. When the imputation of income section was added during the last guidelines change, the intent was not to exclude these situations. Bob Freed stated he would like to see 75-02-04.1-07(3)(c) be amended to reflect any 12 consecutive months versus any twelve months. Could be construction workers, etc. There was general consensus for this change. "Consecutive" will also be added to -07(9).

The committee then moved on to the agenda item of reviewing each section of the guidelines which was not previously discussed by the committee.

75-02-04.1-03. No change recommended.

75-02-04.1-04. No change recommended.

75-02-04.1-08. This section regarding income of spouse addresses income for purposes of determining support, rather than for the purpose of determining a deduction.

75-02-04.1-09. Blaine Nordwall noted that federal and state law requires a deviation to be found to be in the best interest of the child. Some states allow a deviation in shared custody situations. Blaine Nordwall questioned whether there really can be a showing that it is in the best interests of the child to reduce the child's standard of living.

Blaine Nordwall will draft a deviation for children entering foster care in cases where more than one child of the non-custodial parent are receiving foster care. Bob Freed stated (2)(i) provides for credit for travel expenses, but not for motel expenses. He expressed his disagreement. Blaine Nordwall stated that current language does not preclude use of other travel expenses. There was general consensus on that. It should not be construed to include meals, however. You have to eat no matter where you are.

Bob Freed asked why it is necessary to establish a high and low hypothetical in multi-family calculations. Blaine Nordwall offered the history. The first family before the court is not necessarily the first family in existence. *Bergman v. Bergman*. Usually the court has only one of the cases before them, not all of them. The process treats each obligee as a "first family" (the high) and as a "last family" that has support calculated after all other support obligations are calculated and deducted (the low). Averaging these two numbers strikes a balance and treats the multiple families fairly.

Barb Siegel asked if the committee felt a need to further review 75-02-04.1-01(7)(k) and (l). Paul Wahnoutka suggested a change to (l), "... included in calculating net income. . ." The phrase in (k), "has been included in net income," is important. This should not include five year income averaging. Sherry Mills Moore noted that there is a comment period available. If we see a lot of confusion, then changes can be made.

Barb Siegel requested that the committee begin the process of making motions for the purpose of providing drafting advice to the Department of Human Services. She reminded the committee its role is advisory in nature. Public comment will be solicited during the rule-making process. Each comment received during that process is fully considered.

Representative Glassheim moved to approve Items 1 and 2 of the July 9, 1998, amendments including changes discussed.* The motion was seconded by Sherry Mills Moore and was unanimously carried.

* Items 1 and 2 changes discussed:

- ▶ 75-02-04.1-09. Provide for allowance of a downward deviation when two or more of an obligor's children are in foster care.
- ▶ 75-02-04.1-11(3). Provide for inclusion of all costs associated with maintaining the child in foster care when determining when and at what level the child support payment is capped.

Representative Glassheim moved to approve Item 3 of the July 9, 1998, amendments including changes discussed.* The motion was seconded by Bob Freed and was unanimously carried.

* Item 3 changes discussed:

- ▶ 75-02-04.1-01(5). Remove the phrase, "income imputed based on the obligor's assets."
- ▶ 75-02-04.1-01(7)(a). Remove "lesser of" language; provide for clarification that adjusted gross income is defined by the Internal Revenue Code (IRC); provide for use of the most recently published tax tables; provide for allowable exemptions as one for the obligor and one for each child whom the obligor may claim an exemption.
- ▶ 75-02-04.1-01(7)(b). Provide for reduction of income for state income tax at a straight 14% of the federal amount in subdivision a.
- ▶ 75-02-04.1-01(7)(f). Provide for occupational license fees, if required as a condition of employment, as an allowable reduction of income.
- ▶ 75-02-04.1-01(7)(l). Correct the transposition error of the IRC cite from 197 to 179. Revise phrase as follows, "previously included in calculating net income from self-employment."

Representative Glassheim moved to remove the last sentence as drafted (Section 4 of Item 4 of the July 9, 1998, amendments), from 74-02-04.1-06(4) which provides for imputation of income of the other parent in the home when calculating the deduction for the obligor for children in the obligor's home. The motion was seconded by Paul Wohnoutka. Voting yes: Bob Freed, Representative Glassheim, Pat Lund, and Senator Traynor. Voting no: Judge McLees, Sherry Mills Moore, Blaine Nordwall, Paulette Oberst, Paul Wohnoutka, and Barb Siegel. The motion failed.

Representative Glassheim moved to approve Item 4 of the July 9, 1998, amendments. The motion was seconded by Judge McLees and was unanimously carried.

Sherry Mills Moore moved to approve Item 5 of the July 9, 1998, amendments including changes discussed.* The motion was seconded by Bob Freed. Voting yes: Bob Freed, Pat Lund, Judge McLees, Sherry Mills Moore, Blaine Nordwall, Paulette Oberst, Senator Traynor, Paul Wohnoutka, and Barb Siegel. Voting no: Representative Glassheim. The motion carried.

* Item 5 change discussed:

- ▶ 75-02-04.1-07(3)(c) and (9). Provide for use of twelve consecutive months when imputing income at 90% of an underemployed or

unemployed obligor's greatest average earnings and at 100% of the earnings of an obligor who has voluntarily changed employment.

Bob Freed moved to recommend the second Version B of the July 1, 1998, extended visitation amendments which would create a new section 75-02-04.1-08.1 to the guidelines with the trigger points (bracketed numbers in 75-02-04.1-08.1(1)) at: 24 of 30 consecutive nights or 66 total annual visitation nights. The motion was seconded by Senator Traynor. Voting yes: Bob Freed and Senator Traynor. Voting no: Representative Glassheim, Judge McLees, Sherry Mills Moore, Blaine Nordwall, Paulette Oberst, Paul Wahnoutka, and Barb Siegel. Absent for vote: Pat Lund. The motion failed.

Representative Glassheim moved to recommend the second Version B of the July 1, 1998, extended visitation amendments which would create a new section 75-02-04.1-08.1 to the guidelines with the trigger points (bracketed numbers in 75-02-04.1-08.1(1)) at: 60 of 80 consecutive nights or 90 total annual visitation nights. The motion was seconded by Paul Wahnoutka. Bob Freed stated that this would essentially shut out credit for out-of-state non-custodial parents. Barb Siegel reminded the committee that discussion last meeting indicated general consensus was for possible credit for extreme visitation (i.e., shared custody). Representative Glassheim stated his hope is for the best interest of the child; the good feel you are going to create in the non-custodial parent, a sense of fairness, will be a benefit in the long run. Paul Wahnoutka stated that 66 days is already built into the guidelines and that the gap between 66 and 90 is pretty small. Voting yes: Representative Glassheim and Pat Lund. Voting no: Bob Freed, Judge McLees, Sherry Mills Moore, Blaine Nordwall, Paulette Oberst, Senator Traynor, Paul Wahnoutka, and Barb Siegel. The motion failed.

There was discussion about the importance of providing something for public comment. It was generally recognized there is a lack of solid support for extended visitation credit.

Paul Wahnoutka moved to recommend the second Version B of the July 1, 1998, extended visitation amendments which would create a new section 75-02-04.1-08.1 to the guidelines with the trigger points (bracketed numbers in 75-02-04.1-08.1(1)) at: 60 of 90 consecutive nights or 120 total annual visitation nights. The motion was seconded by Blaine Nordwall. Voting yes: Representative Glassheim, Pat Lund, Judge McLees, Sherry Mills Moore, Blaine Nordwall, Paulette Oberst, Senator Traynor, Paul Wahnoutka, and Barb Siegel. Voting no: Bob Freed. The motion was carried with a majority supporting the motion.

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Blaine Nordwall moved to recommend the second Version B of the July 1, 1998, extended visitation amendments which would create a new section 75-02-04.1-08.1 to the guidelines with the fraction (bracketed number in 75-02-04.1-08.1(2)(c)) at $\frac{1}{2}$. The motion failed for lack of a second.

Senator Traynor moved to recommend the second Version B of the July 1, 1998, extended visitation amendments which would create a new section 75-02-04.1-08.1 to the guidelines with the fraction (bracketed number in 75-02-04.1-08.1(2)(c)) at $\frac{2}{3}$. Representative Glassheim seconded the motion. Voting yes: Representative Glassheim, Pat Lund, Judge McLees, Sherry Mills Moore, Senator Traynor, and Paul Wohnoutka. Voting no: Bob Freed, Blaine Nordwall, Paulette Oberst, and Barb Siegel. The motion was carried, with a majority supporting the motion.

Blaine Nordwall moved that the Guidelines Drafting Advisory Committee dissolve upon adjournment. Paul Wohnoutka seconded the motion and was carried, with all members present voting yes. Absent for vote: Bob Freed.

Barb Siegel adjourned the meeting at approximately 5:30 p.m.