

Child Support Guidelines Advisory Committee
June 20, 2006
8:00 - 3:15
Board Room – Workforce Safety and Insurance

Members present: James Fleming, Paulette Oberst, Representative William Devlin, Senator Tom Fischer, Howard Walth, Sherry Mills Moore, Judge John McClintock, Diane Hellman, Melissa Hauer, Robert Freed, Carol Cartledge, Judge El Marie Conklin, Brenda Peterson, Brad Davis, and Tove Mandigo.

Members absent: None

Roll call of members All members present.

Approval of minutes of previous meetings Fleming said the minutes for the first two meetings were previously distributed by Barb Siegel via email. He asked if members had any additions or corrections. Hearing none, Fleming stated both sets of minutes stand as approved.

Review drafts requested at previous meeting Fleming said that several drafts were prepared based upon requests made during the last meeting. The new draft language was incorporated in the guidelines in a document [DRAFT: 06/19/06]; this document was distributed to members.

Fleming pointed out some technical changes made in regards to subsidized adoption payments on page 2 of the DRAFT: 06/19/06 document. He said these are slight changes made from the language reviewed last time. He asked members to review to see if the language looked okay, and asked if anyone wanted to revisit the issue. Hearing no comments, Fleming moved on.

- **Fluctuating income clarification and extrapolation based on recent changes.** Fleming pointed out draft language under Section -02 (subsection 7) on page 10 of the DRAFT: 06/19/06 document. This has to do with fluctuation of income. The language was drafted to reflect the request of the Committee at the last meeting to clarify that this applies to both employed and self-employed individuals.

Sen. Fischer asked how “recent past,” on page 11 of the DRAFT: 06/19/06 document, is defined. Fleming said that was not specifically discussed last time, and it is not defined anywhere. Sen. Fischer wondered if it may be one of those things that may be debated. Moore said this will be fact-specific. In response to a question from Davis, Fleming said this language (“have changed in the recent past . . .”) was drafted to cover “extrapolation.” Last year’s income may not be accurate if there was a recent change. Sen. Fischer asked if Davis thought this could be a problem. Davis said there may be some recent changes one may want to consider. Moore said it gives ability the to extrapolate when there have been recent changes. Fleming asked Judge McClintock what he thought of the latitude (“consideration may

be given. . .”). Judge McClintock said he doesn’t see a problem with the language. The court could consider if there is better information. This wouldn’t strap a judge or referee. Davis also said he thinks the language is okay. He said he wanted it clarified, because of Supreme Court decisions, when there may be extrapolation and when there may not be extrapolation. He said he feels that if there was a change, and it is not reflected in the past year, it should be considered. Moore said she thinks that is what the language does.

Sen. Fischer made a motion to recommend the changes, as drafted. Moore seconded the motion. Roll call was taken and the motion carried (15 yays, 0 nay, and 0 absent and not voting).

- **Allocation of specific expenses in equal physical custody situations.** Fleming pointed out draft language under Section -02 (subsection 1) on page 9 of the DRAFT: 06/19/06 document. This was drafted based on an agenda item from last time to clarify the allocation of specific expenses of the child, in equal physical custody situations. This had originally been an issue raised by Moore. She said the more she considers it, the more she thinks it is perhaps best left alone for now. She is concerned that the draft language could be misinterpreted. She does not want it to appear that allocating does not apply in situations other than equal physical custody situations. Fleming asked if there was a motion to recommend the change. There was no motion and the issue will be removed from consideration.

Overview of revised issues for consideration A “Revised Issues for Consideration” document was disseminated.

Discussion of issues for consideration

Section -07 Imputing income based on earning capacity. This was a carry-over item from the previous meeting. Fleming said the staff assignment from last time was to look at issues regarding imputation. He reviewed the draft language found on pages 22 – 28 of the DRAFT: 06/19/06 document.

This draft language would provide a significant simplification; it would get rid of the “six-tenths” and “90%” imputation provisions. In response to a question from Moore, Fleming said imputation under this draft would occur in situations of income under minimum wage, or situations involving a voluntary change.

The “voluntary change” provision draft language was reviewed. As drafted, a voluntary change is a change in employment made for the purpose of reducing the child support obligation. Fleming gave Walth’s situation, discussed in the previous meeting, as an example. Walth made a decision to take a lower paying job and the decision was not made for the purpose of avoiding child support. Therefore, under this draft language, his income would be based on his new lower paying job.

Moore wondered, then, when imputation (other than at minimum wage) would ever be done. She thinks everyone can come up with a reason to say the change was made for a reason other than to avoid paying child support. She wondered who would ever say it was to avoid child support? Moore said if the policy choice is to allow people to voluntarily reduce their income, and that is more important than ensuring children are supported at the level they are accustomed to being supported, let's say it as it is and be up-front about it. In essence, she said, we are getting rid of imputation. She said we shouldn't pretend it is getting at anyone but those earning less than minimum wage.

Fleming asked if it would change Moore's opinion if the burden of proof was on the noncustodial parent (i.e., to show that the change was not to reduce the child support obligation). Moore said she would feel better about it, but she still thinks the result will be the same. She said she feels this would be moving it from an objective standard to one for which there will be more litigation.

Davis said the question is – when is the change okay and when is it not okay. He said he sees it all of the time in the oil fields. People want to do the work for a few years, but they don't want to do it forever. On the other hand, there are those that make decisions to change jobs that are not okay. He gave a recent example of a noncustodial parent who quit to work at Bonanza 28 hours per week because it was too stressful. He thinks there are some situations that everyone can understand. That a person cannot be reasonably expected to do it indefinitely. Should they be stuck forever with that amount? He also gave an example of a military person who could reenlist.

Sen. Fischer said that we are meddling by imputing in these situations.

Davis said one needs to consider whether the person would make the same voluntary change decision if they needed to look at the child every day, and needed to feed and clothe the child.

More discussion ensued.

Davis said the idea is to impute for those that make arbitrary decisions. Sen. Fischer said that if a determination is made that the change was intentionally made to reduce child support, imputation could be done. Davis said that that determination would be very difficult, if not impossible, to prove. Sen. Fischer asked how many people this really involves. Moore said it is difficult to say because one cannot be sure how many are not making the changes because the imputation rule is out there in its present form. She pointed out that these rules are for people who don't behave appropriately.

Considerable discussion ensued.

Mandigo said she is bothered by the fact that the Supreme Court says to support children to the best of the parent's ability. And yet, no one says that to her. She said she could move to another state and make more money, but no one tells her she needs

to do that. She said it seems there is a different standard for those that are divorced than those in an intact family. She said she feels we should be able to determine the magnitude of the problem. In response to a request from Fleming, Oberst reviewed the statistics from the Court Order Analysis in the area of Imputation of Income (disseminated and reviewed at the last meeting). Oberst said imputation occurred in 25% of the orders reviewed. Of those, 81% were imputed at minimum wage.

Considerable discussion ensued.

Moore said these are situations in which the state steps in. The state must step in, in divorces. She said she doesn't like telling people how to live their lives and if all parents would behave appropriately, there wouldn't be a need to.

Issue: Consider whether the definition of "community" for purposes of imputing income should be revised.

Issue: Consider whether 60% ("six-tenths") of prevailing amounts earned in the community by persons with similar work history and occupational qualifications should be removed as a basis for a presumption of underemployment and as a basis for the amount to be imputed. (If so, consider whether conforming changes will be needed elsewhere.) If not removed, consider whether the 60% ("six-tenths") threshold should be changed.

Issue: Consider whether the 36-month (three-year) look-back period when imputing income based on prior earnings should be changed.

Fleming said the 60% (or "six-tenths") is not really used anymore. Moore disagreed and said she uses it and that the Supreme Court has allowed it to be done quite easily. She said that Job Service North Dakota (JSND) data could be looked to for this. Oberst said it is getting more difficult to get the information from JSND. She handed out an excerpt from a JSND publication. It provides hourly and annual wages, divided by regions of the state. She said the information is getting less and less complete. "Carpet Installers" was used as an example; there are only "statewide" and "Fargo-Moorhead" numbers provided. Oberst added that by far imputations are being done at minimum wage.

Fleming noted the draft language retains the 10% per year increase if the noncustodial parent does not cooperate in a review situation. Moore wondered about the establishment cases. Fleming asked how many situations there are where we can't find any income information. Davis said there were not many situations; they were mostly out-of-state situations. He said they seldom use the "six-tenths," "90%," or "100%" provisions. He said, however, that he would hate to lose those provisions, although he understands Sen. Fischer's concerns. He said he doesn't think he wants the whole imputation tool thrown away, as there are egregious situations. If there are problems with the current provisions, he would prefer we see how we can fix the tool.

Discussion continued.

Davis said just because a noncustodial parent doesn't want to do something any longer, they should not be rewarded. Fleming mentioned there may be legitimate job changes. Perhaps just use imputation if actual income is not there or there is underemployment. Moore said she thinks there are plenty of people that reduce income in order to pay less child support. She said they are willing to do that, even if it means their personal income will be reduced – just to get even. She doesn't think we should ignore that group of people. She said we need to consider the number of noncustodial parents that are behaving because the current rule is in place. She would find it very disturbing if we were to get rid of this. She feels if the policy choice is made now to allow noncustodial parents to voluntarily change jobs without consequences, we will be back in four years to change it again because we left that door open.

In response to a comment from Judge McClintock about setting a presumption and then placing the burden on the noncustodial parent, Moore said she thinks the presumption should be left as it is, then leave it to the noncustodial parent to prove otherwise. Moore referred to the information that had been sent out regarding other states' imputation provision. She said there is more "wiggle" room.

Fleming gave some suggestions as to how Moore's idea could be implemented on page 26 on the DRAFT: 06/19/06 document.

In response to a question from Davis, Oberst said the noncustodial parent would be considered, under the draft language, to be underemployed only if income was under minimum wage.

After some discussion of how the draft language would apply in various situations, Oberst provided a brief summary of the draft provisions. If unemployed or underemployed, imputation would be at minimum wage unless an exception applies (e.g., disability). If the noncustodial parent's income was reduced because of a voluntary change, income may be imputed at 100%; the draft language also includes a definition of "voluntary change" which is a change made for the purpose of reducing the child support obligation.

In response to a comment from Davis, Oberst asked him if he wasn't concerned about proof problems with the "six-tenths" provision. Davis said it at least gives them something in those situations. He said it seems the bigger problem is in those situations in which the noncustodial parent made a lot of money, but now made a change in employment resulting in less income for legitimate reasons, and now we do a 100% imputation. Oberst pointed out that there is a "may" in the current rule – income "may" be imputed at 100% - it is within court discretion. Moore pointed out that the "fall-back" position is the 90%.

Fleming noted this also raises Rep. Devlin's issue of the definition of "community."

Sen. Fischer wondered how JSND gets the information on the "statewide" numbers, if they don't have it for the other areas.

Rep. Devlin said his problem is with the 100 miles found within the definition of "community." Finley is equal distance from Fargo and from Grand Forks and there may be a big difference in wages between those communities – which one would be used? He also mentioned a situation in which the noncustodial parent was living in Finley because he could not afford the housing in Fargo.

Discussion ensued.

In relation to "voluntary change," Fleming wondered if the "reasonable person" standard should be used. Judge McClintock thought putting in a presumption would work. Sen. Fischer said it could be left with the court. A member commented that the noncustodial parent would then need to show the change was for a "noble" purpose. Sen. Fischer said it is very easy to find a way to get fired. Moore commented that if you are fired because you stole, would that be voluntary? Sen. Fischer wondered if it would be voluntary if fired because the noncustodial parent was late for work. How much time does a court have to deal with these situations? How much time would be needed to research? Judge McClintock said the issues would be in the hands of the parties.

There was some discussion about a parent's decision to go to school. Mandigo said that, many times in intact families, one of the parents may want to go to school but can't because they have children that need to be supported. Can't just say "I want to do a life change." Consideration has to be that the children need to be supported. Davis said the question is whether the custodial parent can weather the storm while the noncustodial parent goes back to school. Even though there may be a long-term benefit, the question is – can the custodial parent support the child now?

Freed gave the Alaska oil field worker example from a past meeting. It may end up that the noncustodial parent's income would be imputed at minimum wage under the draft, even though he now may be making \$30,000 per year. Fleming said there could then be a review after one year.

Fleming said he sensed, at this point, there won't be consensus but asked if anyone wanted to make a motion so the group has a sense of where to go. Walth made a motion, with a second from Sen. Fischer, in regards to the draft language. In response to a question from Moore, Fleming said this was a non-binding vote. He clarified that this would focus the discussion on some of the general concepts such as the "six-tenths" and "90%" provisions; the use of

minimum wage imputation; application to non-cooperative noncustodial parents; voluntary changes; and work on language and exceptions. This vote was to focus the discussion, was not a final vote to make a decision. Voice vote with "ayes" carrying.

Fleming said that, in regards to Section -07, the change in subsection 1(a) overstrikes the definition of "community" because it is only used in the "six tenth" provision and that provision is abandoned. In its place, this subsection would provide that "earnings" include in-kind income (previous meeting discussion).

Subsection 1(b) is amended to state that a noncustodial parent is presumed to be "underemployed" if income is less than minimum wage (rather than tying it to the prevailing amounts earned in the community). Moore asked if that would be the only time the noncustodial parent would be presumed to underemployed? Fleming said that and if there was a "voluntary change." Freed said that there are not many jobs that pay only minimum wage anymore.

Subsection 2 is revised to state that minimum wage is imputed if unemployed or underemployed.

In regards to subsection 3(a), exceptions to imputation were reviewed. Moore wondered why the disability exception was limited to those who receive Social Security Administration (SSA) benefits. Fleming said this would prompt noncustodial parents to apply if they haven't already. Moore said there is so much more that goes into making SSA determinations. We could end up imputing to someone who is disabled because they, for some reason, don't qualify for SSA benefits. Hauer agreed saying some individuals, for example, aren't eligible for SSA benefits because the quarters of coverage aren't there. Peterson said the individual may get Supplemental Security Income (SSI). Moore said she thinks that if the noncustodial parent can prove disability to the court, that should be enough. Fleming said a drafting change would be considered to remove language that follows "hourly minimum wage." (The deleted language would be "and the disability has been confirmed by a program with responsibility for making disability determinations such as the social security administration.")

Subsection 3(b) addresses the issue of what should happen if the noncustodial parent is a minor and still in school. The draft language would place imputation at minimum wage for 20 hours per week, rather than for 40 hours per week. It encourages the noncustodial parent to stay in high school and get a degree. Freed wondered about those attending adult learning schools such as South Central in Bismarck. If a student only goes to school for a couple of hours per day, should it still be limited to 20 hours per week? Oberst said research has been done in this area, relating to purposes for extending child support past the age of 18; South Central is a "real" high school.

Subsection 4 contains language borrowed from another section. Regional IV-D offices suggested this be looked at because the IV-D program has sources, to obtain income information, other than directly from the noncustodial parent. This draft language would say that income would be imputed if the noncustodial parent fails to provide the information and the information cannot be obtained from other sources.

Fleming explained what was overstruck in the current subsection 7. Overstruck here is the provision that says if the noncustodial parent fails to provide the information, income is imputed at the greatest of "minimum wage," "six-tenths," or "90%." Moore said this is a heck of a deal – don't turn in your tax returns and you will only get imputed at minimum wage. She said a loophole was being created for some. Fleming said today there are three standards. The "minimum wage" standard may be too low. Can't apply the "90%" standard because no income. Left with "six-tenths" standard – would there really be a difference between the "six-tenths" result and the "minimum wage" result? Moore said there would be a difference in some cases. Even at six-tenths, it would be more than it would be at minimum wage. She said it seems to be an odd fall-back position, when a noncustodial parent doesn't cooperate. Fleming wondered if that wasn't where discovery came in – wouldn't the parties need to tell the court? Freed said one would be surprised at how many parties ignore what the court says. Fleming asked Moore if she would want, then, to retain the "six-tenths" provision. Moore said the "six-tenths" should be retained as well as the "90%" for situations in which there is an old tax return. She said otherwise it is making it more difficult for those that are cooperating, and the others are getting away with it. Fleming noted that the IV-D program has more sources to get the information than does the private bar. Oberst wondered how the private bar was getting the information needed, in divorces, for spousal support and property division. Moore said they use loan applications, but that information is not always useful.

Considerable discussion ensued.

Fleming said he was hearing some good reasons to keep the three-prong ("minimum wage," "six-tenths," "90%") test in the guidelines. Moore agreed but said maybe the "six-tenths" needed to be increased, for noncompliers. Why should a noncustodial parent get a 40% reduction for not cooperating? Fleming said some language would be drafted on a break. He said existing subsection 7 had been overstruck, but perhaps there is a role for those provisions.

The language in subsection 5 is new language regarding voluntary changes of employment. Fleming pointed out the language that states a voluntary change in employment is a change made for the purpose of reducing the obligor's child support obligation, taking into consideration the obligor's work history, education, health, age, stated reason for unemployment or underemployment,

likely employment status if the family before the court was intact, and any other relevant factors. He said there was an attempt to work in a "good faith" provision. He said there was previous discussion that this would be more palatable if the burden would be on the noncustodial parent to show the change was made in good faith and not to avoid child support.

The underscored language in subsection 6 was voted on last time (to clarify that imputed income is subject to deductions).

Fleming said he has made two notes regarding changes needed to the draft language. He said he has heard there is a need to consider a baseline, other than just minimum wage, for establishment cases. Also, he said he has heard there is a desire for the burden to be on the noncustodial parent, in relation to voluntary changes. Fleming asked if there were any other refinements besides these two.

There was some discussion, including Hellman wondering if there would be too much paperwork if, when there was a change (voluntary or not), there would be a ratcheting up until it was caught up. Oberst noted that there would be a big retroactive balance at the end. Walth wondered about averaging. Fleming said these options were looked at but were hard to implement in the review process. There was some discussion of averaging the imputed income with the actual income. Fleming mentioned that perhaps changing the three-year "look-back" period to, for example, one or two years should be considered. For the Alaska noncustodial parent, it would limit the look-back period. Rep. Devlin said he thought this may be good. Moore said the three-year look-back was used to link to those planning ahead for the proceeding. In response to a question from Walth, Fleming said under the draft language, the Alaska noncustodial parent's income, if he moved back to North Dakota in good faith, would be imputed at minimum wage if he was now making less than minimum wage. Walth wondered if, referring to the new three-year review rule exceptions, the noncustodial parent could ask for a review. Fleming said he could. Moore observed that the opposite may be true; that is, the noncustodial parent would be better off waiting to request a review until his "old" Alaska income is not in the look-back period.

Rep. Devlin said he understands the frustration with the Alaska situation and that we don't like telling people they need to move back to Alaska. He said, however, this may be better with state administration and consistent treatment. He said we may be creating more loopholes than we are fixing. It may be like opening Pandora's Box, if we get rid of these imputation provisions.

Discussion then turned to whether the definition of "community" for purposes of imputing income should be revised. Moore wondered what a reasonable commute would be. Rep. Devlin wondered about having the courts get involved

if there are questions. Moore said the noncustodial parent could perhaps show they have a good reason for a more limited commute area. Walth wondered if it had to be geographically based? He asked about using a certain percentage of a statewide average. Fleming asked what members thought about that idea; it could be, for example, 60% of the statewide average. Moore said it seems to her there are two issues – how far and how much. She said she thought the 100 miles was so parents could be in relatively close proximity to the children. Mandigo said that miles don't always tell the story. For example, Bismarck to Beulah is a typical commute. She wondered if it was possible to look at what is a "normal" commute?

Fleming said perhaps we should follow Moore's idea a bit. One gets into imputation section by being unemployed or underemployed. Perhaps use different definition of "community" when determining if someone is underemployed. Draw the "community" circle smaller to determine if someone is underemployed. But then, when looking at how much to impute in a case, draw the "community" circle bigger. Davis asked, then, how one would know what a carpet layer would make in Dickinson (back to the unavailability of some data)? Fleming asked if perhaps we should look at a statewide average. Walth gave some examples using the JSND handout. Freed said this would be a bigger issue if it wasn't set at "six-tenths".

Fleming said that the "six-tenths" would not be limited to "community," but rather, would be based on statewide. This would allow us to rely on JSND data. For purposes of deciding whether an individual is underemployed, would we want to use the same standard? Moore and Walth thought perhaps it should be the same standard for both.

Fleming asked about what should be done with the third prong ("90%"), in relation to the three-year "look-back" ("... in any twelve consecutive months beginning on or after thirty-six months before commencement of the proceeding. .)? Moore wondered if it shouldn't be softened. Rep. Devlin wondered about using 18 months. Perhaps two years; could use two years' worth of tax returns. Moore said the "before commencement" language would still be needed.

Fleming said he feels there is general agreement on one through three. He said "community" wouldn't be needed because looking at a statewide average. We would stick with "six-tenths" because now we are looking at a statewide average.

Mandigo asked what would happen with the noncustodial parent who is working overtime for the last nine months, and then decides he or she doesn't want to any longer. It would be a voluntary reduction. Moore said a court may consider the person underemployed. Oberst explained the different result if the action

was involuntary (i.e., person got laid off) or voluntary (i.e., person decided to not continue to work overtime). Mandigo said this seemed okay, as long as there is some room in there.

Issue: Consider whether income should be imputed and, if so, in what amount to the following: incarcerated obligors, disabled obligors, minor obligors.

Fleming said the draft language retains the language regarding obligors with disabilities.

Fleming asked what members thought about limiting imputation to 20 hours per week for minor obligors? Moore said she doesn't have much experience in that area. Davis said someone pays for children of minor parents. Choices need to be made because the children need support. Moore remarked that high school students are making more money than they used to. Oberst said this was on the list because there was an imputation for high school student noted during the court order analysis, and she hadn't been aware this was being done. After some discussion, Fleming said he is hearing that this should be another imputation exception – if income is imputed, it should be based on 20 hours per week. Moore said that perhaps another exception is needed for the three-year review policy. Fleming said it would already be addressed by "changed income."

In regards to how the draft language addresses incarcerated noncustodial parents, Fleming said income would be imputed at minimum wage. Moore stated that some incarcerated individuals have income. Fleming said some incarcerated individuals are imputed at 90%. Reintegration into the community is tougher if come out with big arrears. He said the person is not going to jail to avoid paying child support. Freed said it was still a voluntary action. Moore said that case law back to 1996 says for those individuals without any other earnings, imputation would be at minimum wage. Sen. Fischer wondered how many go back because of violating probation – due to child support. Fleming said there were not many. There was an interest in strengthening the probation requirement to support the children. In response to a question from Moore, Fleming said it would be at a higher amount if the actual was higher than minimum wage. Oberst clarified that Supreme Court case law is minimum wage imputation, so no change would be needed to the guidelines if want it to continue status quo.

Issue: Consider whether to clarify that income based on a 10% per year increase may be imputed to a noncooperative obligor in a review situation only if income information is not available from other sources or through other means. This was discussed earlier. There was consensus that it should be clarified that income should not be imputed at 10% per year increase unless information was not received from any source. Davis said he thinks the 10% should be increase to 15%. He also said it is important that the information is

complete. Fleming noted that the draft language incorporates the word "reliable."

Issue: Consider whether to define "voluntary change in employment" for purposes of imputing income at 100% of the obligor's previous earnings. Fleming said this was previously discussed. Back to "good faith" and "bad faith." There was general consensus that the burden to show it was in good faith was on the noncustodial parent. Fleming said this will be drafted.

Issue: Consider whether to clarify that income may be imputed at 100% of the obligor's previous earnings where the obligor has made a voluntary change in employment whether or not there is a showing that the obligor is unemployed or underemployed. Oberst said this issue arose out of a Supreme Court case several years ago. The issue has to do with the fact the guidelines say income "must" be imputed at the greatest of the three prongs, but income "may" be imputed at 100% if voluntary change. She said this has not actually turned out to be a significant problem. She said if no one has a desire to address, this issue will be removed from consideration. No member asked that it be addressed so it will be removed from consideration.

Section -08.1 Adjustment for extended visitation Fleming said there are three items under this section, per Walth's request. The section provides for a deduction for extended visitation. The visitation must be scheduled by court order to exceed 60 of 90 consecutive nights, or an annual total of 164 nights. He briefly reviewed the section and explained how the calculation is performed. It is based on a 32% deduction. Each monthly total is averaged over the whole year; the obligation does not change month-to-month.

Issue: Consider whether the extended visitation adjustment should be based on the number of visitation days rather than nights. Walth said the provision requires "nights" be counted. His concern is especially with those with different work schedules. He, for example, had 24-hour shifts. His order was written for "days," therefore was not considered. In response to a question from Fleming, Walth said he didn't get extended visitation-related material in the mail. Fleming called upon Barb Siegel, who had previously worked on the extended visitation issue. Siegel said one of the primary reasons for choosing "nights" over "days" was that nights were much more countable. Generally, the child is one place during the night; parents don't usually rouse children in the middle of the night to change residences. However, during the day, it was quite likely the child could spend time in both residences. Moore said there is also the need for nighttime accommodations. If look at days, would have to determine who has the child during day care, during camp, etc. Walth stated understanding of the reasons but said it just didn't fit his firefighting schedule. Freed wondered about counting hours, instead of nights or days. Moore said this will bring up issues relating to dueling calendars. Rep. Devlin wondered if it was possible to look at eight-hour blocks of time, instead of nights or days. Judge McClintock

wondered if it could be nights – but days would be considered depending on work schedule. Moore said she didn't like the thought of hours, or blocks of hours. Walth suggested looking at the next issue. He said perhaps doing something with that would help.

Issue: Consider whether the extended visitation thresholds (60 of 90 consecutive nights or an annual total of 164 nights) should be revised. Fleming asked members to refer to materials sent to them on June 12, 2006. Attachment #2 includes 1999 S.B. 2039 (#2A) and a Statement of Intent which accompanied the bill (#2B). Fleming briefly reviewed the information.

Davis said the guidelines assume some amount of visitation, and thus, it is built in. Fleming called upon Siegel for an overview of the 1998 – 1999 activity relating to extended visitation. Siegel said the guidelines advisory committee had difficulty in reaching consensus as to how extended visitation should be addressed. In the end, the committee ended up voting for a compromise position, primarily for the purpose of getting something in the proposed rule that could be commented upon. However, there was no sort of consensus found in the comments received during the proposed rule comment period. The 1999 legislature addressed the issue in S.B. 2039. The Statement of Intent addressed the two areas of primary concern: summer visitation (60 of 90), and close to equal custody (45% of the time). This was before the section on equal physical custody was added to the guidelines. Based on the law and the Statement of Intent, the guidelines were then revised to incorporate the provisions. Devlin said he recalled some discussion during the legislative session as to if "consecutive" was meant to address the 60 days or to address the 90 days. Siegel said that indeed had been raised; the "consecutive" refers to the 90 days. Therefore, the threshold is met if there is court-ordered visitation for any 60 days within a 90 consecutive day period.

In response to a question from Freed, Fleming said a Statement of Intent is only binding for the biennium. However, it would not be wise to do rulemaking that conflicts with a Statement of Intent. Sen. Fischer commented that the law could be changed. He said perhaps something should be put together that can be looked at the next legislative session. Fleming thought a law change would be better than a rule change in this area. Fleming did state that this would not work well in an income shares environment. Davis noted that this issue was addressed prior to there being a section on equal physical custody. Moore agreed that adding that section really helped those people affected.

Since Walth had not received the material that was mailed prior to the meeting, it was decided to continue discussion later in the day to give him a chance to review.

Issue: Consider whether the formula for determining the extended visitation adjustment should be revised. Fleming said the materials also included information about how the 32% level of deduction was determined. Walth said it was difficult to argue with the numbers it was based upon.

Section -10 Child support amount

Issue: Consider economic data on the cost of raising children as required by federal regulations. This includes consideration of whether the schedule amounts should be changed and, if so, how. Oberst handed out a document entitled "Analysis: Cost of Raising Children." Federal regulations require the guideline's review include consideration of economic data on the cost of raising children. The source of the economic data is from the United States Department of Agriculture (USDA), in their Expenditures on Children by Families, 2005, publication. It was just published in April 2006. Oberst noted that a lot of Child Support Enforcement programs use this data in their reviews. The USDA looks at husband-wife families, as well as single-parent families and what they spend on children in different areas of the country. For purposes of our review, Oberst said we will be looking at the information for "husband-wife urban midwest" (which includes North Dakota) at Table 5; information for "husband-wife rural" at Table 6; and "single-parent overall United States" at Table 7. For each table, there is a corresponding page which includes scenarios. The scenarios look at before-tax income levels for one, two, and three children in a variety of areas: annual gross income; annual net income (after taxes); monthly net income; annual cost of raising child; monthly cost of raising child; guideline amount; and ratio of guideline amount to monthly cost of raising child. The table numbers are based on two children, but there is a formula for calculations for other than two children.

Oberst noted the results of this analysis are very similar to the results from the last review. At that time, the only change made to the schedule was to the top end of the schedule (to increase it to include guideline amounts for \$10,100 to \$12,500 or more).

In response to a question from Walth, Oberst said the schedule ends with "\$12,500 or more." Moore said there is a deviation available for situations in which the noncustodial parent's monthly net income exceeds \$12,500, so it is court discretion.

Fleming asked what the information was telling the members. Some discussion occurred. At lower income levels, there is more of a discrepancy between the guideline amount and the expenditure amount. Davis noted that at the lower levels, the custodial parent is providing financial support plus in-kind support, and the noncustodial parent is providing just a portion of the financial support. Therefore, he said, the guideline's presumption that the custodial parent's contribution is in-kind support doesn't really hold up. In response to a question

from Davis, Oberst said she wasn't sure what the increase, if any, has been over time.

In response to a question from Freed, Siegel said it appeared some of the reason for the huge discrepancy between the two husband-wife tables and the single-family table was that the husband-wife tables had three income groups where the single-family table only had two income groups.

Freed asked if someone can say why the 70% statistic is ok. Is there a justification for paying over 50%? Davis said he looks at it as a 100% contribution would be appropriate, and the other parent is providing in-kind support.

Walth asked why the percentage isn't the same across all income levels. Davis said the guidelines were not designed to meet certain percentages. Judge Conklin pointed out that these percentages are just where they ended up; there wasn't an effort to shoot for them to be at the level. In response to a question from Davis, Oberst said there are still state comparisons of guideline amounts. Davis noted that, generally, North Dakota's guideline amounts tended to be in the lower one-third of the nation.

Fleming asked if anyone wanted to do anything with this section. Moore said it seemed that the numbers were tracking like they have been so it doesn't seem like a change is needed. Based on comments from Freed, Fleming said this topic would be raised again after lunch to give members some time to review the tables if they wished.

Preceding a lunch break, Fleming gave an overview of what to expect after the break. More on expenditures. More on visitation. The rest would be medical support.

Back to discussion on **Section -07 Imputing income based on earning capacity**. After lunch, Fleming handed out a revised draft of the imputation section and explained this is how it would look with changes discussed earlier. The members reviewed the new draft and discussion occurred based upon that document.

Moore said she thought subsection 1(b) was supposed to include the "six-tenths" concept. Fleming said he thought we were going to stick with the "six-tenths" concept, but apply it to statewide data. Oberst said the "six-tenths" is included in subsection 2, as drafted. The definition of "underemployed" (in subsection 1(b)) is when income is less than the statewide average earnings. The noncustodial parent is presumed to be underemployed if income is less than "six-tenths" of the statewide average earnings or minimum wage. There was some discussion about the difference between the two (subsection 1(b) and subsection 2).

There was some discussion that “significantly” needs to be added back in subsection 1(b).

In subsection 3(b), the “community” concept was replaced with the “statewide average earnings” concept. In subsection 3(c), “thirty-six” was changed to “twenty four” (“... in any twelve consecutive months beginning on or after twenty-four months before commencement of the proceeding. . .”).

Subsections 4, 5, and 7 are unchanged.

Subsection 6 language was removed because the “community” concept was removed. The subsection now addresses the minor parent imputation limitation.

Subsection 8 adds the language that the 10% imputation need not be done if sufficient information can be reasonably obtained from sources other than the noncustodial parent.

Subsection 9 retains the voluntary change concept, but adds that the noncustodial parent has the burden of proof to show that the change was not made to reduce the child support obligation.

Fleming then reviewed how these changes address the pending issues for consideration and asked if there was any discussion.

Davis asked what purpose subsection 1 has ever served. Oberst said it defines underemployment for purposes of imputation. Subsection 2 creates the presumption of underemployment.

Sen. Fischer asked, in regards to the voluntary change provision, whether the court will have latitude to decide whether or not the change was for the purpose of reducing the obligation. Fleming said the term “voluntary” in this subsection, is not the same as what it usually means. A voluntary change is defined to mean that it is a change in employment made for the purpose of reducing the child support obligation. Fleming said in Walth’s situation, it would be at 90% for a two-year look-back. Moore added that it could also be six-tenths. Sen. Fischer said what bothers him is that there are situations out there that need to be addressed. Davis said he thinks the draft language now contains provisions to do that. Moore agreed, adding it addresses it, there are good reasons. Oberst pointed out that the voluntary change provision still contains a “may” (not a “must”). In response to a question from Sen. Fischer, Moore said that means the court has latitude. Davis wondered who was ever going to admit the change was for the purpose of reducing their child support obligation. Also, are we saying that as long as the change wasn’t for the purpose of reducing, we are okay with obligors voluntarily changing jobs? Moore said for those individuals, they would get the 90%, instead of the 100%, and they would get it for two years. Oberst mentioned the Logan Supreme Court decision. Under this draft language, it would probably be imputed at

90% instead of 100%, with a look-back of two years instead of three. In response to a question from Davis, Oberst said the new draft subsections 4, 5, and 6 are exceptions already.

Fleming summarized changes as follows. From "community" concept to "statewide." Narrowing of the "voluntary change" provision to those made in bad faith. Look-back further limited (from three years to two years).

Fleming asked if there was a motion to accept this re-draft. He said there may need to be some tweaking to the language because the Supreme Court has tied the "community" concept to incarcerated individuals. He said this would be done, as necessary, after the meeting.

Fleming asked for discussion on the disability determination. There are those that don't have any proof of disability. Davis said he sees a lot of letters from doctors for people who aren't eligible for SSA benefits, or who have pending Social Security applications for SSA benefits. Moore said she thinks there are other ways to prove disability, than to limit it to SSA determinations. Fleming mentioned that Vocational Rehabilitation will do that sort of thing. Davis said that was the good thing about SSA – it is an assurance it is a legitimate situation. Fleming said DHS can see if there is a sufficient third party that can make these determinations. Moore said that is what the court does - listens to the evidence and makes a decision. She said she would not like to see people having to hire physicians. Fleming said he knows of active hunters with a doctor's letter. He said he also knows we are risking making the exception rule the general here. Hauer said Medicaid uses a review team. She said, ultimately, decisions are made by the physicians on the review team. Decisions can be appealed to administrative judge, then to district court, and finally, to the Supreme Court.

Oberst said in subsection 9, one does not have to show unemployment or underemployment – just "voluntary change." If show the change was voluntary, then income may be imputed at 100%. In response to a question from Moore, Oberst said subsections 2 and 3 need to be linked to unemployment or underemployment. Can impute under subsection 9 if someone made a voluntary change – whether or not the individual is unemployed or underemployed.

Moore made a motion to recommend the changes, as drafted. Hellman and Judge McClintock seconded the motion. Roll call was taken and the motion carried (15 yays, 0 nay, and 0 absent and not voting).

Back to discussion on **Section -10 Child support amount**. Freed said he did some calculations and came up with some interesting results. He shared his results when he did extended visitation calculations with the current multiplier, with the multiplier doubled, and with the multiplier tripled. He then compared those with costs of raising children. He said he thinks there needs to be more eligible cases for the extended visitation credit, as well as a higher multiplier. Fleming said he had thought Freed was

going to review the data for assessing the schedule amounts; but it sounded like it was more for the extended visitation credit.

Fleming asked if there were any suggestions for changes to the schedule. None were voiced.

Back to discussion on **Section -08.1 Adjustment for extended visitation**. Walth said he had a chance to review the previously mentioned materials. He said he sees that a lot of his concerns were addressed in the previous years' guidelines committee meetings. As far as the definition, he thinks to change it would be too confusing. With the thresholds, he understands there is the Statement of Intent. He would, however, like to see the thresholds lowered. Perhaps something can be pursued legislatively.

More discussion followed.

Davis wondered about a sliding scale; the more nights, the higher the multiplier. Moore thinks parents pursuit of more visitation is driven more by how much time each parent should spend with the child, than what it would do with the child support amount. On the other hand, the equal physical custody provision has made pursuing that worthwhile.

There was some discussion about how much visitation was already "built in" to the guidelines. A previous guidelines committee had considered the concept that a common visitation schedule may be 66 days (every other weekend and two weeks during the summer).

Fleming said, in regard to the 32% multiplier, it was developed by DHS Research and Statistics based on economic data, by looking at what expenses leave the custodial parent's home when the child is not in the home; 68% of expenses stay in the home whether or not the child is in the home and 32% of the expenses go with the child.

Walth said his opinion was to leave the definition and the multiplier alone, and look only at the thresholds. In response to a question from Fleming, Walth confirmed that he was talking about a legislative change regarding the thresholds.

Moore said she thinks it is perhaps mostly the summer visitation parents who have concerns. Walth said he thinks the other threshold (164 nights) is too high, and he would be more interested in seeing that decreased. Davis said perhaps if there are indeed 66 days of visitation "built in," then perhaps look at credit for any number above that number.

Fleming said he would send legislative history to Walth.

Nothing further was expressed for extended visitation.

Medical support Fleming introduced Mike Schwindt, the Director of the Child Support Enforcement program, who joined the meeting for this discussion.

Issue: Consider whether to create provisions for “dollar specific medical support obligations” in addition to the child support amount in situations where the obligee will be providing private health insurance at a cost or where private health insurance is not available to either the obligee or obligor.

Issue: Additional medical support-related issues.

Fleming provided two handouts. One handout is a list of health insurance options considered by DHS (“Health Insurance Menu”). He said there has been more emphasis on medical support by the state and the federal government. There will soon be a federal performance measure regarding medical support. It will look at how many children are insured. He said we need to improve our enforcement of medical support. As far as guidelines-related medical support, Fleming referred to the second handout which provides a draft of a new guidelines section entitled “Medical child support amount – credit for private health insurance coverage.”

Fleming then reviewed the first handout. First look to obligee to provide if available at no or nominal cost. Then, look to obligor, if available at “reasonable cost.” The problem is with the current federal definition of “reasonable cost.” It is considered to be at “reasonable cost” if it is through a group basis or through an employer. Under that definition, there is a possibility that the noncustodial parent could get hit with a significant bill for premiums on top of child support.

Fleming said the program enforces the insurance requirement through the use of the federally mandated National Medical Support Notice (NMSN), where appropriate. If health insurance is available through an employer, it is enforced through the NMSN. Noncustodial parents who say they cannot afford the insurance through their employer, can look for coverage under another group plan. DHS is exploring whether we can get a list of child-only policies that could be made available as options. So, for example, if an NMSN is issued to a noncustodial parent’s employer, the noncustodial parent can protest that it is too expensive. The noncustodial parent could then be steered toward a child-only policy as an option to the perhaps more expensive family policy through the employer.

Fleming said other options are being explored across the country. Some other options may require waivers from federal requirements. One option may be SCHIP buy-in. Some discussion occurred about SCHIP. The state picks up the tab with federal contribution. There is no asset test, but there is an income test. If income is too high, some states have allowed a phase-out of the subsidy. The question, then, is how does the judge allocate to both parties. Perhaps assess a value for each month of coverage and the guidelines could address the noncustodial parent’s contribution. Those are some of the options being

explored to improve children's access to health insurance in North Dakota. He said there are things that would require legislation.

Mandigo cautioned to be careful of what one asks for. A child-only policy with a very high deductible doesn't do much good. She said the other thing about SCHIP is that it is fee for service. Therefore, there isn't the problem of doctors and dentists not wanting to participate, unlike with Medicaid. SCHIP coverage isn't as complete as Medicaid coverage, but it is good.

Sen. Fischer noted that if we were to be allowed to buy in to SCHIP, the pool would be larger and the premium should be lower.

Fleming mentioned that a regional child support office had been admonished in the past for "endorsing" one particular plan. Therefore, a list would be preferred. Mandigo said the problem will be getting the list. She said the Office of the Insurance Commissioner used to maintain a list, but doesn't any longer.

Fleming asked Freed if he thought a list would be helpful in enforcing medical support. Freed said he thought it would absolutely be helpful. Perhaps the list could be provided to the noncustodial parent and the court could tell the noncustodial parent to go get the coverage and follow-up in 30 days.

There was some discussion about the Caring Program.

There was some discussion about the cost of SCHIP.

Davis said his office does give noncustodial parents the opportunity to get alternative coverage. He noted that some of the policies are good for one child coverage, but not for coverage of multiple children.

Fleming referred members back to the handout. The first handout is how the program is planning to promote medical support. The second handout is draft guidelines language for discussion purposes. He then reviewed the draft. The noncustodial parent would be required to pay a separate amount for medical support. The medical support amount would be equal to 10% of the child support amount. The exception would be that the medical support amount would not be due if the child is covered by the noncustodial parent, or covered by the custodial parent at no or nominal cost. The coverage must be at least the "basic coverage" as defined in N.D.C.C. § 14-09-08.20. To receive credit, the noncustodial parent must provide sufficient proof of the insurance coverage, along with the address to submit claims. Moore asked if this would have to be done every month. Fleming said that was a good point; he hadn't intended that when drafting. His intent was that it would have to be on file with the Clerk of Court. The credit would be discontinued if the noncustodial parent would fail to respond to a written request for confirmation of the coverage within 30 days.

Freed asked about a noncustodial parent who has it one month, and then drops it. Should be able to retroactively charge for those months in which credit was given, but coverage wasn't provided. Davis mentioned the possibility of "co-owners" and "co-insureds" having to do with notification of determination of coverage and assuring notices of terminations.

Peterson asked about what happens if the child goes on Medicaid. Fleming said the amount would be assigned. There was some discussion about what would happen if the medical support amount was higher than the assigned amount.

Walth wondered why divorced parents would be required to provide health insurance coverage if intact parents were not. In response to a question from Walth, Oberst said there was a deduction available for medical support in the guidelines.

Fleming asked about the possibility of something in the guidelines requiring the noncustodial parent to contribute. Oberst said quite a few other states require a medical support amount in the guidelines. Some states tie it to the obligation amount, and others tie it to income.

There was some discussion that orders often just parrot the requirements of N.D.C.C. § 14-09-08.10. There is a federal and state requirement that medical support must be addressed in all child support orders. Moore said medical support was usually addressed in the orders; enforcement is a huge issue.

Freed said he is a little concerned about the 10% in the preliminary draft. The noncustodial parent may likely say he or she will pay the 10% (which would be, for example, \$16 per month for a minimum wage obligation) rather than the \$80 per month for a child-only policy.

Considerable discussion followed.

Mandigo reminded members that we are only really talking about those with one child. In response to a question from Mandigo, Fleming said the medical support amount could be used by the custodial parent to purchase insurance, to use for medication, etc. In response to a follow-up question from Mandigo, he said the medical support amount would not be in a separate "pot."

Fleming said the original intent with the medical support issue was to put something on the table so it would get in the proposed rules and could be responsive to legislation. He said it has been suggested that a policy of this scope should wait to see what the legislature does.

Walth said he was playing devil's advocate, but he doesn't like the 10% idea. If there were to be such a thing, he would like to see proof that it is being spent on insurance. Perhaps the noncustodial parent is thinking the custodial parent is using it to purchase health insurance and all of a sudden there is some medical catastrophe and the noncustodial parent finds out it wasn't being used for insurance. The hospital will come after the noncustodial parent anyway. He said he worries about accountability.

Issue: Consider whether the calculation to determine the deduction from gross income for health insurance premiums should be revised to account for health insurance provided by the obligor to his or her adult children.

Fleming explained that this issue was raised by a legislator. Some brief discussion occurred. Moore said the focus in the guidelines is on non-adult children. This isn't considered in anything else, and wondered why it should be considered here. Parents are required to support up to age 18. In response to some comments and questions, Oberst said if the court order requires the coverage, then the coverage would be considered.

The meeting was wrapped up by Fleming and Schwindt thanking members for their service.

Fleming said draft minutes from this meeting will be emailed to members, with a deadline for comments. If no comments are received by the deadline, the minutes will be considered approved.

Adjourned at 3:15.

Committee dissolved.