

**SUMMARY OF COMMENTS
RECEIVED IN REGARD TO PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CH. 75-02-04.1
CHILD SUPPORT GUIDELINES**

A public hearing was held on November 16, 2006, in Bismarck, concerning proposed amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines.

Six individuals provided written comments only during the comment period. Fourteen individuals provided oral comments at the public hearing. Four of the individuals who provided oral comments also provided written comments. In all, comments were received from 20 individuals.

Individuals making oral comments were asked to state their name for the record and print their name and address on a sign-in sheet. Some of these individuals did not provide the written notations. Identification of these individuals is based on the recording of oral testimony. We have attempted to provide a likely spelling of their names.

Some commentors identified themselves as representing a particular entity or group. The list of commentors below identifies the entity or group, where applicable. The commentors, their address (if provided), and the entity or group represented (if applicable) were:

1. Jon Aman, 51 N. Stanley Dr., Lincoln, ND 58504
2. Todd Schock, 609 Sudbury Ave., Bismarck, ND 58503
3. Mike Oster, 515 6th Ave. N., Cleveland, ND 58424
4. Terrill Epps, 409 W. Meadow, Mandan, ND 58554
5. Lucas Hoff, 8969 31st St. SW, Richardton, ND 58652
6. Roland Riemers, 108 Cairns Ave., Emerado, ND 58228
7. Mitchell Sanderson, 1951 29th St. S. Apt. 10, Grand Forks, ND 58201
8. Deb Vaagen, Fargo, ND 58078
9. Susan Beehler, 702 14th St. NW, Mandan, ND 58554
10. Dan Frank, 2211 175th Ave. NE, Baldwin, ND 58521
11. Sheri Gartner, P.O. Box 714, Mandan, ND 58554
12. Paul Case, 527 N. 19th St., Bismarck, ND 58501
13. Lawrence Bill, Jr., Falkirk, ND
14. Myrna Meidinger
15. Sheila K. Keller, Staff Attorney, Regional Child Support Enforcement Unit, P.O. Box 5518, Bismarck, ND 58506

16. Marnie R. Soggie, Staff Attorney, Regional Child Support Enforcement Unit, P.O. Box 5518, Bismarck, ND 58506
17. Pamela A. Nesvig, Staff Attorney, Regional Child Support Enforcement Unit, P.O. Box 5518, Bismarck, ND 58506
18. Jackson Lofgren, Staff Attorney, Regional Child Support Enforcement Unit, P.O. Box 5518, Bismarck, ND 58506
19. David Geiss
20. Lee A. Christofferson, District Judge, Northeast Judicial District, P.O. Box 70, Devils Lake, ND 58301

I. Comments Unrelated to the Child Support Guidelines

Some commentors offered comments that are not related to the child support guidelines. Some of these comments could be grouped into categories (e.g., comments relating to review of child support orders) and are addressed in the following paragraphs. Other comments were truly miscellaneous and were offered by only one commentor. Those comments are summarized and addressed in this paragraph. One commentor stated that bias exists within the child protective services program. The commentor also stated that child abuse reports filed in a case in which there had been a custody dispute between the parents was given a low priority by investigators. This commentor also said that people who have child support obligations might not be able to get a conventional home loan because banks treat child support as a debt, like credit card debt. One commentor objected to the term "deadbeat dad," a term that does not appear anywhere in the guidelines. One commentor thinks that state laws allowing the suspension of an obligor's driver's license if the obligor owes past-due support make no sense. One commentor suggested that the State maintain a "pool of mediators" who can be assigned to the parties in divorce or child support actions so that both parties could sit down and work on solutions based on their particular needs and receive answers to their questions. These comments are acknowledged. However, comments that address issues that do not directly relate to the child support guidelines cannot be resolved or even constructively addressed in this summary. No change based on these comments is recommended.

A. Accounting for Child Support Payments Received

One commentor noted that there are sanctions available if an obligor doesn't pay child support but there is no requirement for an obligee to put money aside for a child or to account for where the money goes. He said that in his case child support is withheld from his income but his sons "won't see it" and that "money can just be taken and blown." Another commentor said that when his daughter comes to visit, he has been taking her to get her hair cut and this is making him wonder where the child support that he pays is going. A third commentor thinks there should be some specifications about how child support payments are used but does not want a system where parents have to save every receipt.

No change based on these comments is recommended. The Department of Human Services (Department) has no authority to establish, by rule, a mechanism to either ensure that child support payments are actually spent on the child or to require an obligee to account for how child support payments are used.

B. Review of Child Support Orders

Two commentors disagree with the Department's policies and procedures regarding review of child support orders. One of the commentors suggested that a person should be able to request a review any time there is at least a fifteen percent change in his or her income. The other commentor said that he went five years without a review.

No change based on these comments is recommended. The review of child support orders by the Department's child support enforcement division is governed by state and federal laws. In general, according to state law, each child support order must be reviewed pursuant to a request from a party no less frequently than 36 months after the order was established or last reviewed or modified. N.D.C.C. § 14-09-08.4. Through policy, the child support enforcement division has identified a number of situations which merit a review, even if it has been less than 36 months since the order was entered or last reviewed. These situations include determination of disability, incarceration, activation for military duty, changes in the cost of providing health insurance, and decrease in income resulting from an obligor's involuntary job loss or demotion. In other words, when one of these identified situations exists, the child support enforcement division will conduct a review upon request of a party, even if it is not required to do so by law.

Either party may request a review by applying for child support services and submitting a written request to have the child support order reviewed.

Individuals who want to pursue a modification of a support obligation but don't want to apply for child support services and don't want to hire a private attorney can file a *pro se* motion for modification. The Supreme Court has developed forms for self-represented parties who are seeking modification of child support. These forms are available on the Supreme Court website at <http://www.ndcourts.com>.

C. Custody Issues

One commentor thinks that there should be legislation requiring joint custody if neither parent is a danger to the children. Another commentor thinks that both parents need to be involved in their children's lives and asserted that custody is being used as a "money maker" by the custodial parent.

No change based on these comments is recommended. The guidelines are a mechanism for determining the correct amount of child support to be paid. There is nothing in the guidelines that precludes a district court from awarding joint custody to

the parents. Nor do the guidelines preclude both parents from being involved in their children's lives.

II. Comments About the Rulemaking Process for the Child Support Guidelines

Seven commentors criticized the Department's administrative rulemaking process as it pertains to the child support guidelines. They variously described the process as controlled and pointless. They described the guidelines drafting advisory committee as being hand-picked, made up of special interests or having conflicts of interests, having little real input from the people affected by the guidelines, not making the changes the public really wants, not going far enough to address "the real problem," or (on the other hand) not limiting changes to the areas that the public is really interested in. One of these commentors, who observed the committee at work, said that the "greed" he saw from committee members was "totally outrageous." Two of these commentors want the guidelines to be put in the hands of the legislature rather than in administrative rule. Other comments focused on making the process, including meetings of the advisory committee, open to the public at all times. One of the commentors suggested that the Department notify all affected individuals of meetings by letter or email.

No change based on these comments is recommended. Pursuant to N.D.C.C. § 14-09-09.7, the legislature has directed the Department to establish child support guidelines. The legislature can at any time remove this responsibility from the Department but, to date, has not chosen to do so. But this does not mean the legislature has been silent or inactive regarding the guidelines. That body has repeatedly examined the guidelines and has adopted changes when it saw a need to do so. For example, one of the changes made during the 2007 session was to authorize a deviation from the presumptively correct guideline amount in situations where the net income of the obligee is at least three times higher than the net income of the obligor. The Department will implement this change through a separate rulemaking project.

The administrative rulemaking process is prescribed by several statutes with which the Department complied. According to N.D.C.C. § 14-09-09.7(4), the Department, when conducting the quadrennial review of the guidelines, must convene a drafting advisory committee that includes two legislators appointed by the chairman of the Legislative Council. The Department convened this committee in the spring of 2006. Sen. Tom Fischer of Fargo and (now former) Rep. William Devlin of Finley were appointed as the legislator members. The remaining members were selected by the Department to represent a cross-section of perspectives and areas of expertise. In addition to representatives from the Department, the committee included three individuals from the judiciary, a private attorney, the administrator of a regional child support enforcement unit, an obligor, and an obligee.

The committee met three times in May and June of 2006. These meetings were open to the public. The committee considered a number of issues that had been identified by various sources for consideration for possible amendment and eventually forwarded several recommendations for amendments to the Department. In addition, as required

by federal regulation at 45 C.F.R. § 302.56(h), the committee considered economic data on the cost of raising children and analyzed case data, gathered through sampling, on the application of and deviations from the guidelines. For the benefit of the public who wished to observe the committee at work, meeting notices, including date, time, location, and topics to be considered, were filed with the Secretary of State and were posted at the child support enforcement division's office and at the place of the meeting for each meeting day as required by N.D.C.C. § 44-04-20. In addition, meeting notices were mailed to individuals who had previously asked to be included on a mailing list maintained by the child support enforcement division.

Once the Department adopted proposed amendments, a public comment period was established and a public hearing was scheduled, published in newspapers, and held, all in accordance with N.D.C.C. §§ 28-32-10 through 28-32-12.

III. Comments About the Guidelines Model

Three commentors urged the Department to adopt an income shares model for the guidelines. One of these commentors specifically referenced the guidelines in effect in Arizona, which, according to the commentor, are based on income shares, times shares, and cost shares. A fourth commentor, while not specifically advocating for an income shares model noted that in these times, both parents need to work to make ends meet and that the state needs to change with the times to maintain a fair and equal system of child support enforcement.

No change based on these comments is recommended. On an issue as fundamental as the guidelines model, the Department would take its direction from the legislature. The legislature is aware that the guidelines are based on the obligor model. In addition, during several past legislative sessions, the legislature considered and defeated bills that would have mandated a change to an income shares model. The most recent income shares bill to be defeated was SB 2289 introduced in the 2005 session.

IV. Specific Comments Relating to Proposed Amendments to the Child Support Guidelines

A. N.D. Admin. Code §§ 75-02-04.1-01(3) and -01(5)(a)(1): Four commentors disagreed with the proposed amendments excluding subsidized adoption payments from the definitions of "children's benefits" and "gross income." These commentors believe the proposed amendments will create disparate treatment because cases involving subsidized adoption children will be treated differently than cases involving children whose adoptions are not subsidized and will also cause the adoptive parents to reap a financial windfall. If a child whose adoption is subsidized subsequently enters the foster care system, these commentors also believe that excluding the subsidy will result in a double burden on taxpayers who end up paying for the subsidy as well as for the costs of the foster care placement.

One commentor noted that these proposed amendments will not affect a majority of the individuals to whom the guidelines apply.

No change based on these comments is recommended. The purpose of the subsidized adoption program is to promote adoptions of children with special needs, including children with physical, emotional, or mental disabilities. There is a significant probability that some of these children will receive services from the foster care system at some point. If so, the adoptive parents may become liable for child support. Including the subsidized adoption payment in the determination of a child support obligation may have a chilling effect on an individual's willingness to adopt a special needs child. This is inconsistent with the public purpose of promoting these adoptions.

B. N.D. Admin. Code § 75-02-04.1-01(7)(h): One commentor stated that increasing the deduction for lodging expenses from \$30 to \$50 per night was a step in the right direction but felt that \$50 was still not enough, especially for obligors who work out of state. The commentor suggested providing for a deduction of \$50 per night or actual documented costs, whichever is greater. Four other commentors agreed that \$50 is not enough. Three of these commentors variously suggested that the deduction be based on the amount of the hotel allowance paid to legislators or to state employees or that it be tied to the lodging allowance for federal government employees.

One commentor apparently agrees with the proposed amendment, although he thinks that the rest of the proposed amendments "should just be scrapped entirely."

One commentor apparently thinks that \$50 is sufficient provided documentation is available. This commentor suggested allowing a deduction of "up to \$50 with receipts."

Based on these comments, we recommend a revision to the proposed amendments to allow for a lodging deduction of \$50 per night or actual documented lodging costs, whichever is greater.

Revised proposed amendment:

- h. Employee expenses for special equipment or clothing required as a condition of employment or for lodging expenses incurred when engaged in travel required as a condition of employment (limited to ~~thirty~~ fifty dollars per night or actual documented lodging costs, whichever is greater); and

C. N.D. Admin. Code § 75-02-04.1-02(8): Two commentors disagreed with proposed amendments allowing the trial court to consider new circumstances if those circumstances materially affect the support obligation and if they have changed in the recent past. One of these commentors questioned whether the result would be accurate. The other commentor expressed concern that consideration would only be given to new circumstances if it would lead to an increase in the child support obligation.

No change based on these comments is recommended. The purpose of these amendments is to clarify that the trial court has discretion to extrapolate income of the obligor if the court determines that evidence of an obligor's recent past circumstances is not a reliable indicator of his or her future circumstances. In these situations, an accurate obligation may be more likely to result from extrapolating current income than from using old income that was earned under circumstances that no longer exist. Extrapolating income could result in either a higher or lower obligation, depending on whether the change in circumstances was for the better or the worse.

D. N.D. Admin. Code §§ 75-02-04.1-03 and -08.2: Three commentors disagreed with proposed amendments that provide for suspending the offset of support in split and equal physical custody situations for any months in which a supported child is on public assistance and support rights have been assigned to the State. One of these commentors did not see any justification for the change. Another commentor favored recalculating the obligations instead of just discontinuing the offset to avoid adversely affecting the support available for other children in a parent's home. The third commentor said the proposed amendments only affect welfare cases and do not affect informal changes of custody, such as when the obligee becomes incarcerated or goes into treatment and leaves the child in the care of the obligor or other family members.

One commentor neither agreed nor disagreed with the proposed amendments but asked for a detailed explanation and example of what the changes mean.

No change based on these comments is recommended. The proposed amendments are in response to the opinion in Simon v. Simon, 2006 ND 29, 709 N.W.2d 4, wherein the Supreme Court held that the offset provision applies in all split and equal physical custody cases, including cases where one parent receives TANF and assigns child support rights to the state.

The proposed amendments reiterate the Department's position that the offset provision is a payment method only and is intended for the administrative convenience of the parents. It is not intended to reduce either parent's child support obligation or the amount of support that is assigned to the State if a parent begins to receive public assistance.

The proposed amendments do not preclude the court from ordering split custody or equal physical custody when it determines that such an arrangement is in the children's best interests. In the minority of cases where split custody or equal physical custody is ordered, and where one party begins to receive public assistance, the proposed amendments will discontinue the offset of the parents' obligations during the time that public assistance is being received. For example:

Parent 1 was awarded physical custody of Child A. Parent 2 was awarded physical custody of Child B. Based on Parent 1's income, Parent 1's obligation for Child B is \$250. Based on Parent 2's income, Parent 2's obligation for Child A is \$330. Initially, neither parent receives public assistance. Their obligations

are offset with Parent 2 paying the difference of \$80 (\$330 – 250) to Parent 1. Subsequently Parent 1 begins to receive public assistance for Child A and assigns Child A's child support rights to the State. At this point the offset is discontinued. Parent 1 is responsible for paying \$250 to Parent 2 and Parent 2 must now pay \$330, which is assigned to the State. When Parent 1 no longer receives public assistance, the offset will resume.

E. N.D. Admin. Code §§ 75-02-04.1-05(6)(c) and -05(7)(c): Proposed amendments are recommended to the provisions addressing whether a self-employment loss can be used to reduce income that is not related to self-employment. The purpose of these proposed amendments is to conform to proposed amendments to N.D Admin. Code §§ 75-02-04.1-07(3)(c) and -07(10), discussed below. These proposed conforming amendments were inadvertently overlooked previously.

Proposed conforming amendments:

6. When less than three years were averaged under subsection 4, a loss resulting from the averaging may be used to reduce income that is not related to self-employment only if the loss is not related to a hobby activity and monthly gross income, reduced by one-twelfth of the average annual self-employment loss, equals or exceeds the greatest of:
 - c. An amount equal to eighty percent of the obligor's greatest average gross monthly earnings, calculated without using self-employment losses, in any twelve consecutive months beginning on or after ~~thirty-six~~ twenty-four months before commencement of the proceeding before the court.

7. When three or more years were averaged under subsection 4, a loss resulting from the averaging may be used to reduce income that is not related to self-employment only if the loss is not related to a hobby activity, losses were calculated for no more than forty percent of the years averaged, and monthly gross income, reduced by one-twelfth of the average annual self-employment loss, equals or exceeds the greatest of:
 - c. An amount equal to ninety percent of the obligor's greatest average gross monthly earnings, calculated without using self-employment losses, in any twelve consecutive months beginning on or after ~~thirty-six~~ twenty-four months before commencement of the proceeding before the court.

F. N.D. Admin. Code § 75-02-04.1-05(9): Four commentators disagreed with the proposed new subsection clarifying that net income from self-employment is subject to the deductions from gross income in N.D. Admin. Code § 75-02-04.1-01. These commentators are concerned that an argument will be made to allow for deductions that have already been considered in determining net income from self-employment, thus

resulting in a double deduction. They propose adding qualifying language to specify that the deductions from gross income in N.D. Admin. Code § 75-02-04.1-01 are allowed unless they have already been deducted when calculating net income from self-employment.

Given the nature of the deductions from gross income allowed under N.D. Admin. Code § 75-02-04.1-01 (e.g., hypothetical federal and state income tax obligations, hypothetical payroll tax obligations, children's health insurance and medical expenses, and various employee expenses), it is not likely that these deductions would be involved in determining net income from self-employment. However, the commentors are correct in noting that there is no intent to allow for double deductions. To avoid unintended consequences, we recommend a revision to the proposed amendment consistent with the commentors' suggested language.

Revised proposed amendment:

9. Net income from self-employment is an example of gross income and is subject to the deductions from gross income set forth in subsection 7 of section 75-02-04.1-01, to the extent not already deducted when calculating net income from self-employment.

One commentor thought the proposed amendment appears reasonable but believes it would help if the guidelines would clarify "self-employment" instead of leaving it up to the court to define.

No change based on these comments is recommended. The guidelines already include a definition for "self-employment" that the court must apply. See N.D. Admin. Code § 75-02-04.1-01(10).

G. N.D. Admin. Code §§ 75-02-04.1-07(1)(b), -07(2)(a), and -07(3)(b): Four commentors disagreed with the proposed amendments that would consider statewide average earnings instead of prevailing amounts earned in the community for purposes of imputing income when an obligor is unemployed or underemployed. These commentors think that using statewide average earnings is unfair because there is significant variation in wages, geography, and other conditions across North Dakota. One of these commentors also thinks that using statewide average earnings will cause obligors to move away to find different jobs.

No change based on these comments is recommended. There is no question that wages and other conditions vary across North Dakota. Using statewide average earnings is a way to acknowledge and adjust for those variations in the cases in which imputing income is applicable.

From an operational perspective, statewide average earnings are more likely to be readily accessible and available than prevailing amounts earned in a particular community. For example, Wages for ND Jobs, a publication of Job Service North

Dakota, contains statewide average wages for over 2,000 occupations from 911 operator to zoologist. But the only “communities” for which wage information is generally available through this publication are Bismarck, Fargo-Moorhead, and Grand Forks. For communities not listed in this publication, prevailing wage information may need to be obtained through discovery or other means that will drive up the cost of litigating child support cases.

H. N.D. Admin. Code § 75-02-04.1-07(3)(c): Five commentors disagreed with the proposed amendment to reduce the look-back period from 36 to 24 months when income is being imputed based on 90% of the obligor’s previous earnings. Four of these commentors think the look-back period should remain at 36 months. These commentors are concerned that reducing the look-back period could limit the income information available for consideration. The commentors note, for example, that if the child support enforcement division is conducting a review during the first four months of the year, the obligor’s tax return for the most recent tax year may not yet be available. The commentors also suggest that it is logical to keep the look-back period at three years since the child support enforcement division generally conducts reviews at three-year intervals. The fifth commentor thinks the look-back period should not be greater than the most recent 12-month time period.

No change based on these comments is recommended. The purpose of imputing income is to determine a child support obligation based on the obligor’s earning capacity, not merely his or her inclination. Since prior earnings are a reliable indicator of earning capacity, it is appropriate to have a look-back period that exceeds the most recent 12-month period. On the other hand, the longer the look-back period, the more likely it is, due to changes in the general economy or in particularly volatile professions, that the “older” earnings may no longer be a reliable indicator. By reducing the look-back period to 24 months, the proposed amendment provides a mechanism for considering historical earnings from a limited period of time that is still likely to be reflective of the obligor’s earning capacity.

The timing issues referenced by the four commentors who want the look-back period to remain at 36 months potentially exist for all guidelines calculations, not just for calculations wherein income is imputed based on the obligor’s previous earnings. Similarly, while it is true that the child support enforcement division generally conducts reviews at three-year intervals, the guidelines are not only applicable in cases involving the child support enforcement division or in cases involving reviews. For example, the guidelines are equally applicable in cases where a child support obligation is being established and the parties are represented by private attorneys. Thus, it is not particularly logical to tie the look-back period to the frequency with which the child support enforcement division conducts reviews.

I. N.D. Admin. Code § 75-02-04.1-07(7): Two commentors expressed qualified agreement with the proposed amendment to limit imputed income to one-half of 167 times the federal hourly minimum wage in cases where the obligor is a minor or is under age 19 but still enrolled in and attending high school. These commentors think the

proposed amendment does not go far enough – they think imputed income should be limited whenever the obligor is going to school, regardless of the obligor's age.

No change based on these comments is recommended. A high school diploma is a minimum qualification for almost all types of employment. Without it, it may be impossible to obtain employment or to advance in many fields. Given how crucial a high school diploma is to an individual's future earning capacity, the public policy behind the proposed amendment is to prevent a young obligor from dropping out of high school to work full-time to meet a support obligation based on, for example, imputing a full-time minimum wage income.

But once a high school diploma has been received (or if an obligor reaches age 18 but is no longer working toward a high school diploma), it is reasonable to expect an obligor to pursue full-time employment. Working less than full-time to pursue a higher education should not come at the expense of contributing to the support of the obligor's minor child.

J. N.D. Admin. Code § 75-02-04.1-07(9): Two commentors disagreed with the proposed amendment adding another condition that must be met before imputation can be based on an assumption that the obligor's net income has been increasing by ten percent per year since the date of the last order. Pursuant to the proposed amendment, imputation on this basis can only occur in a review situation where the obligor has been uncooperative in providing financial information and such information cannot be reasonably obtained from any other source.

No change based on the comments is recommended. The commentors appear to be misunderstanding what the proposed amendment will do. The proposed amendment actually serves to limit the situations in which the amount to be imputed is based on an assumption that the obligor's net income has been increasing at the rate of ten percent per year since the last order was entered. This appears to be the outcome that the commentors want.

K. N.D. Admin. Code § 75-02-04.1-07(10): Four commentors disagreed with reducing the look-back period from 36 to 24 months.

No change based on these comments is recommended. The reasons for reducing the look-back period discussed in the previous paragraphs are equally applicable to this section.

Five commentors disagreed with the proposed amendment defining "voluntary change in employment." Four of these commentors think that the proposed amendments will likely result in the district court never imputing income at 100% of the obligor's previous earnings if the obligor has changed fields. These commentors also expressed concern that including the obligor's "stated reason for unemployment or underemployment" will require the court to make an initial finding of either unemployment or underemployment, something that is not currently required. The fifth commentor's concerns run in the

opposite direction. He thinks the district court will automatically assume that the obligor changed employment for the purpose of reducing child support and thus impute income on this basis.

Under the current guidelines, the district court must determine whether the obligor made a voluntary change in employment that resulted in a reduction of income. A “yes” determination is a prerequisite to imputing income based on 100% of the obligor’s previous earnings. The proposed amendments are intended to promote consistency by giving the district court a list of factors to consider, in light of case specifics, to aid in determining whether the obligor made a voluntary change in employment for the purpose of reducing his or her child support obligation. The “stated reason for unemployment or underemployment” is just one of several factors on the list. Neither this factor nor any other factor is intended to be paramount. Some factors may not be applicable in a particular case. Other factors not specifically listed may nevertheless need to be considered because they are relevant in another case. However, the first four commentors are correct that applicability of this provision is not dependent upon a showing that the obligor is unemployed or underemployed. There is no intent to change this. Thus, to avoid possible unintended consequences, we recommend a revision to the proposed amendment to replace the “stated reason for unemployment or underemployment” to “stated reason for change in employment.”

Revised proposed amendment:

§10. Notwithstanding subsections 4, 5, ~~and 6, and 7,~~ if an obligor makes a voluntary change in employment resulting in reduction of income, monthly gross income equal to one hundred percent of the obligor’s greatest average monthly earnings, in any twelve consecutive months beginning on or after ~~thirty-six~~ twenty-four months before commencement of the proceeding before the court, for which reliable evidence is provided, less actual monthly gross earnings, may be imputed without a showing that the obligor is unemployed or underemployed. For purposes of this subsection, 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 change in employment, likely employment status if the family before the court were intact, and any other relevant factors. The burden of proof is on the obligor to show that the change in employment was not made for the purpose of reducing the obligor’s child support obligation.

Two commentors disagreed with the proposed amendment putting the burden of proof on the obligor to show that the change in employment was not made for the purpose of reducing the obligor’s support obligation.

No change based on these comments is recommended. The factors to be considered by the district court are largely focused on the obligor. Examples include the obligor’s work history, education, age, and health. The obligor is in the best position to provide

evidence regarding these factors. Thus, it is not unfair to require the obligor to carry the burden of proof.

One commentor asserted that if an obligor is fired, it will be considered a voluntary change in employment. This commentor suggested that there should be leeway in the guidelines so as not to consider every obligor who has been fired as having made a voluntary change in employment for the purpose of reducing the child support obligation.

No change based on this comment is recommended. While the fact that an obligor was fired may be a relevant factor to consider, there is nothing in the language of the proposed amendment that would require the district court to conclude that someone who was fired made a voluntary change in employment for the purpose of reducing the child support obligation.

L. N.D. Admin. Code § 75-02-04.1-13: Two commentors agreed with the proposed amendments to correct two typographical errors in this section.

No change based on the comments is recommended because the commentors didn't seek any change.

V. General Comments Relating to the Child Support Guidelines (Not Relating to Proposed Amendments)

A. Constitutionality of the Child Support Guidelines: One commentor asserted that the child support guidelines are unconstitutional.

No change based on this comment is recommended. The commentor did not cite a single case wherein the North Dakota Supreme Court has held that the guidelines are unconstitutional. The commentor's assertion is incorrect.

B. Overtime: Three commentors think that child support should be based on income for a forty-hour workweek only. A fourth commentor said that the employees at his company are no longer receiving as many overtime hours as they used to, yet their obligations have not been reduced. Another commentor said that overtime is common in his industry and that it can vary from 400 to 500 hours one year and 100 hours the next year. He went on to say that if a support obligation is reviewed during a year of high overtime, the new obligation will be too high.

No change based on these comments is recommended. Overtime pay falls within the broad definition of gross income in the guidelines and also within the definition of income at N.D.C.C. § 14-09-09.10(9) and is properly considered in determining an obligor's ability to pay child support. In addition, if the obligor's family were intact and if the family had extra income as a result of overtime pay, the children would likely benefit from the extra income. It is reasonable, therefore, that the obligor's children also benefit from overtime pay when the family is no longer intact.

In recognition of the fact that overtime pay is not always constant, the guidelines provide a safety net. Pursuant to N.D. Admin. Code § 75-02-04.1-09(2)(l), the district court has discretion to deviate downward from the presumptively correct support amount if the obligation was calculated by including atypical overtime wages over which the obligor doesn't have significant influence or control.

C. In-kind Income: One commentor thinks that in-kind income needs to be redefined altogether.

No change based on this comment is recommended. The commentor did not identify any specific problem with the current definition, nor did he provide a suggested alternative definition.

One commentor said that the amount of in-kind income should be limited.

No change based on this comment is recommended. In-kind income is already limited by source. According to its definition, in-kind income only refers to certain items, such as the use of property at no charge or at a reduced charged, that are received in connection with the obligor's employment or other income-producing activity.

D. Split Custody: One commentor described his situation wherein he and his ex-wife had split custody of their three children. Then the child who lived with the commentor moved back to live with the ex-wife to help care for the two children in her home. The commentor complained that his title went from "split custodial parent" to noncustodial parent and his child support doubled even though he is still doing the same things for his children.

No change based on this comment is recommended. As defined in the guidelines, "split custody" means that the parents have multiple children together and each parent has custody of at least one of those children. When the child in the commentor's home moved back to live in the ex-wife's home, which change was presumably in the children's best interests, a split custody arrangement ceased to exist. Thus, the commentor was no longer eligible for the offset provision in the split custody section of the guidelines.

E. Self-employment: Two commentors criticized the manner in which net income from self-employment is calculated under the guidelines. One of these commentors thinks that calculations should be based only on net profit of a business, not on its gross business income. The other commentor related his own experience wherein the district court allegedly based the commentor's support obligation on gross, rather than net, business income.

No change based on these comments is recommended. The internal calculation to determine net income from self-employment provides for deducting all operating expenses of the obligor's business, including depreciation expenses. If the district court fails to deduct operating expenses from gross business revenues, the flaw is not in the

guidelines but, instead, in the court's application of the guidelines. In this situation, the obligor's remedy was to appeal the court's decision.

F. Multiple-Family Cases: One commentator criticized the guidelines for failing to have safeguards in place to protect other children in the obligor's home. This commentator also said that the guidelines give preference to children from the first family and neglect children from a second family. A second commentator also thinks that second families are being deprived because of the child support paid to the first family. Another commentator described his situation wherein he is the custodial parent of a child for whom he does not receive very much support because the other parent is disabled. He is also an obligor in another case and he mentioned that it is difficult and stressful because he has to "shell out a lot of money" for the child in the other case.

No change based on these comments is recommended. First, no change was proposed to N.D. Admin. Code §§ 75-02-04.1-06 and -06.1, the multiple-family sections. Since 1995, the multiple-family sections have provided a mechanism to consider and adjust for other children of the obligor to whom the obligor owes a duty of support. The multiple-family adjustment essentially allows a deduction for the cost of supporting other children of the obligor that is calculated and based on the same schedule as the calculation for the children of the obligor before the court in a particular child support action. So not only do the multiple-family sections give consideration to other children of the obligor, including children in the obligor's home, they also reflect a departure from the "first family" preference that existed under the guidelines prior to 1995.

In addition to the multiple-family sections, N.D. Admin. Code § 75-02-04.1-11, regarding child support for children in foster care or guardianship care, has a mechanism to account for all other children of the obligor (i.e., siblings of the child in foster care or guardianship care), including other children living in the obligor's home.

G. Imputation of Income Based on Earning Capacity: One commentator said that income should be imputed based on North Dakota's minimum wage instead of on earning capacity.

No change based on this comment is recommended. As part of the guidelines review, the child support enforcement division analyzed a random sample of court orders entered on or after July 1, 1999, to determine how often income is imputed to the obligor and, when it is imputed, what basis is used for the imputation. The analysis indicated that in the orders wherein income had been imputed, by far the most common basis for imputation (81% of the occurrences) is minimum wage. In other words, the outcome the commentator is seeking is already happening most of the time.

One commentator, who is self-employed, criticized imputing income to self-employed obligors based on wages for employees in the same occupation as reflected in the Job Service publication, *Wages for North Dakota Jobs*. The commentator described the many differences between self-employed obligors and those who work for someone else. For example, self-employed obligors have to pay operating expenses for their business, and

they do not receive benefits, such as health insurance or paid sick leave. The commentor also noted that self-employed individuals use the tax laws to their advantage – they compute their net income so to pay the least amount of taxes as legally possible.

No change based on these comments is recommended. The purpose of the child support guidelines is to determine a child support amount that is commensurate with the obligor's ability to pay. In certain situations, this will result in imputing income to the obligor. If an obligor is reducing his or her net income for tax purposes such that this net income amount is not reflective of the obligor's ability to pay support, imputing income based on what employees in the same occupation are earning is not inappropriate.

H. Extended Visitation: One commentor suggested that the adjustment for extended visitation should be based on the number of visitation hours instead of visitation nights. Another commentor questioned the origin of the 164 visitations nights per year, which is one of the extended visitation thresholds. A third commentor thinks that extended visitation should be addressed because of the many hardships and problems it creates but did not specify any particular hardship or provide an example of any particular problem.

No change based on these comments is recommended. First, no change was proposed to N.D. Admin. Code § 75-02-04.1-08.1, regarding extended visitation. More significantly, the extended visitation adjustment originated from 1999 SB 2039 wherein the legislature directed that the guidelines consider extended periods of time a minor child spends with the obligor. The Senate Judiciary Committee included a statement of intent that provided in part that "extended periods of time" means situations where the parties will have joint physical custody with the child residing with each parent close to equal time. The statement of intent further defined "close to equal time" as meaning that each parent has physical custody of the child as least 45% of the time. Thus, the threshold of 164 visitation nights per year can be traced back to the statement of intent (45% of 365 equals 164).

The Department chose to develop the extended visitation adjustment based on the number of court-ordered visitation nights for operational reasons: for purposes of a threshold, nights are easier to count than days or hours. Once a child goes to bed at night, the child usually remains in the same place throughout the night. On the other hand, during the day, the child may be in several places, including at school and at a child care provider. Basing an extended visitation adjustment on days or hours would likely lead to situations where parents present dueling calendars or dueling clocks. This in turn would lead to increased litigation and drive up the costs of applying the guidelines.

I. Incarcerated Obligors: Two commentors expressed concern with treatment of incarcerated obligors under the guidelines. One of these commentors said he has seen too many prisoners "hit" with child support based on what they earned before they went

to prison. The other commentor said that incarcerated obligors will continue to be criminals or will flee the jurisdiction because of the child support debt they accrued.

No change based on these comments is recommended. Although the guidelines do not specifically address incarcerated obligors, the Supreme Court has interpreted the guidelines (specifically N.D. Admin. Code § 75-02-04.1-07(6), to which no substantive amendment is being proposed) to provide that minimum wage is to be imputed to an incarcerated obligor whose earnings in confinement are less than minimum wage and who has no other income and is not eligible for work release. Surerus v. Matuska, 548 N.W.2d 384 (N.D. 1996). The Supreme Court noted that imputing minimum wage to an incarcerated obligor promotes the strong public policies of protecting the child's best interests and preserving the obligor's legal and moral duty to support his or her children. At the same time, imputing minimum wage recognizes the obvious difficulty that an incarcerated obligor faces in meeting his or her support obligations.

Thus, in general, an obligor whose support order is being established while the obligor is incarcerated will not be "hit" with an obligation based on higher pre-incarceration earnings. Instead, the order will likely be based on imputing minimum wage. An incarcerated obligor with an existing support order based on higher pre-incarceration earnings can apply for child support services and request review and adjustment of that order. Again, in general, the adjusted order will likely be based on imputing minimum wage.

J. Disabled obligors: One commentor noted that an obligor might become temporarily disabled and unable to work. The commentor cited individuals receiving chemotherapy for cancer or treatment for substance abuse as examples. She said that these situations are not addressed in the guidelines and that there should be an administrative mechanism for temporarily reducing the obligations of these individuals.

No change based on these comments is recommended. First, the Department has no authority, through rulemaking, to reduce or terminate a support obligation, either on a temporary or permanent basis.

In addition, the guidelines do address disabled obligors who are unable to work enough to earn the equivalent of a full-time minimum wage income. In these situations, the district court has discretion to impute income at less than would otherwise be required for an unemployed or underemployed obligor. This discretion extends all the way to imputing income at zero to these obligors. Furthermore, this discretion is not limited just to situations where the obligor is permanently disabled. Upon an appropriate showing, there is nothing to preclude the district court from applying this provision to an obligor who is temporarily disabled.

K. Criteria for Rebuttal of Guideline Amount: Two commentors criticized the section of the guidelines that provides criteria for rebuttal of the presumptively correct amount. One of these commentors asserted that the rebuttal criteria (also referred to as deviation reasons) "mainly list ways to increase the support amount." The other

commentor said that rebuttal criteria should be more fully spelled out and that such criteria is not useful because an individual cannot rebut the guideline amount "if you have no idea what it takes in." This commentor also remarked that he had been ordered to take out a life insurance policy to secure payment of the support upon his death. He said that based on his age, the insurance was cost prohibitive. Furthermore, he said he received no consideration on his child support obligation for this requirement (e.g., his obligation was not reduced to account for the insurance premiums).

No change based on these comments is recommended. First, no change was proposed to N.D. Admin. Code § 75-02-04.1-09, regarding rebuttal criteria. State law provides that the presumptively correct guideline amount may be rebutted if a preponderance of the evidence establishes that, applying criteria established by the Department which take into consideration the best interests of the child, the guideline amount is not correct. N.D.C.C. § 14-09-09.7(3). Under the current guidelines, 12 allowable deviation reasons are clearly and fully "spelled out." Of the twelve, eight are upward deviations, which means that the district court has discretion to increase the presumptively correct child support amount based on certain increased needs of the child or on the obligor's increased ability to pay support. Examples of upward deviations include increased needs of children with disabling conditions or chronic illness and increased needs of children related to child care costs incurred by the obligee. The remaining four deviation reasons are downward deviations, which means that the district court has discretion to take action that results in a decrease to the presumptively correct child support amount based on the obligor's reduced ability to pay support. Examples of downward deviations include reduced ability to pay support due to visitation travel costs incurred by the obligor and reduced ability to pay support due to situations over which the obligor has little or no control that require the obligor to incur a continued or fixed expense for other than subsistence needs, work expenses, or daily living expenses. In addition, during the 2007 legislative session, the Legislature passed a bill that included a new downward deviation reason applicable in situations where the net income of the obligee is at least three times higher than the net income of the obligor. This statutory provision will be implemented through a separate rulemaking project and will bring the number of downward deviations up to five.

Although application of deviation reasons is discretionary with the district court, some direction is specified within the section as a way to achieve a measure of consistency. For example, with an upward deviation, the adjustment must be made to the child support amount and with a downward deviation, the adjustment must be made to the obligor's net income. As a further example, the downward deviation for situations over which the obligor has little or no control that require the obligor to incur a continued or fixed expense is not applicable if the situation arises out of spousal support, discretionary purchases, or illegal activity. Arguably, this deviation reason would have been applicable to the commentor who complained about being ordered to purchase life insurance to secure his child support obligation, provided a proper showing and persuasive argument was made to the district court.

Under the circumstances, it is not clear in what respect the deviation section is not already sufficiently "spelled out."

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