

**Child Support Guidelines – Quadrennial Review
Advisory Committee
July 19, 2010 – Draft
Workforce Safety and Insurance Boardroom – Bismarck, ND**

Members present: Jim Fleming, Brad Davis, Sen. Tom Fischer, Tom Johnson, Lisa Kemmet, Sherry Mills Moore, Tammy Ness, Paulette Oberst, Cynthia Schaar, Referee Dale Thompson, Rep. Robin Weisz, and Bill Woods.

Member absent: Judge Donald Jorgensen.

Visitors: Marie Hanken and Paul Schumacher.

Call to order: Fleming, as chairman, called the meeting to order. He noted that this will be the committee's final meeting.

Minutes of the June 29th meeting: Fleming noted that draft minutes from the June 29th meeting had been previously disseminated via email. He asked if there were any changes needed. Since no changes were requested, Fleming said the minutes are approved. They will be disseminated in final form.

Remarks by Paul Schumacher: Fleming said that Paul Schumacher, who had been an observer at previous meetings, had requested some time to address the committee. Schumacher provided some background about his personal situation, including that he is ordered to pay child support. He described some of his experiences in dealing with Child Support Enforcement. He also had some suggestions for what he believes would result in a "more balanced set of guidelines." Schumacher provided a written transcript of his remarks [to be inserted at the Miscellaneous tab in the binder].

Binder materials: Oberst handed out the following materials to be inserted in the binder: meeting notice [to be inserted at Tab 2], final minutes from the June 15th meeting [to be inserted at Tab 3], and revised list of issues for consideration [to be inserted at Tab 7]. As before, the revised list of issues for consideration is organized into sections for new and pending items, completed items for which drafts have been accepted, and completed items which the committee decided to drop from further consideration or for which no further action by the committee was required.

Oberst said that additional materials would be handed out as additional items were discussed.

Review of issues for consideration:

Issue: Consider whether schedule favors the rich and the poor and, if so, make revisions. (Substantive change.)

Fleming reminded members that at the last meeting, a motion had been approved to recommend that the Department of Human Services (DHS) revisit the appropriateness of the peak percentages in the schedule. Fleming said that, across the board, the peak percentage occurs at the \$1,000 monthly net income level. After that point, the percentage either begins to decrease or it levels off for a while and then begins to decrease. Using the column for one child as an example, the percentage of child support as a function of monthly net income is 25 percent at \$1,000 and 24 percent at \$1,100.

In response to the action item from the previous meeting regarding how the schedule of amounts had been established, Oberst said that she had researched the rulemaking history for what became the first presumptively correct set of guidelines. She said the amounts for the low-income obligors (i.e., those with net income of \$1,000 or less) were essentially taken from the Minnesota child support guidelines in effect at the time. She said she found a page from the Minnesota IV-D manual that contained the Minnesota "Child Support Payment Guideline." The schedule of percentages on that page basically matches the percentages that formed the basis for the schedule of amounts for low-income obligors in North Dakota's 1991 guidelines. There are some handwritten notes on the page indicating that consideration was given to reducing the Minnesota percentages by two percentage points for the North Dakota guidelines but that never materialized. Another handwritten note on that page says "need may be assumed in this range."

For the remainder of the schedule in the North Dakota guidelines (i.e., net income levels of more than \$1,000 per month), a formula was used to fill in the amounts. The amount at the \$10,000 net income level (at that time, this was the top end of the schedule) was pre-determined. Then the number of \$100 increments between \$1,000 and \$10,000 was calculated. The difference between the amounts at the \$1,000 and \$10,000 levels was divided by the number of increments. This incremental amount was added to the amount for the previous level and so on up the schedule. After all the calculations were made, the incremental amounts were rounded to the nearest dollar.

Fleming said that at the time of the 1991 guidelines, the peak percentage occurred at the net income level that corresponded to 150 percent of minimum wage income. He said that if the same logic were followed today, given that minimum wage has increased, the peak percentage would be pushed out to the \$1,600 net income level (instead of at the \$1,000 net income level). He said his proposal for revisiting the peak amount as per the recommendation from the last meeting has two parts. First, push out the peak to \$1,600. The net income levels below \$1,600 would be phased down and the net income levels above \$1,600 would be re-phased according to the same formula described above. Second, the peak percentage would be reduced by two percentage points (e.g., for one child, the peak percentage would be 23 percent instead of 25 percent). Fleming said this proposal would not make abundant changes but it would provide relief to the lower income obligors.

Fleming asked if members wanted to revisit the recommendation adopted at the previous meeting in light of his proposal and explanation. There was some additional discussion. For example, Ness wondered if it is still appropriate to use the Minnesota guidelines as a benchmark after all these years. In the end, no new or different proposals were suggested.

Issue: Revisit the dependents' exemptions provisions in calculating the hypothetical federal income tax deduction to specifically address how to count multiple children when some are covered by an order and some are not. (Substantive change.)

Oberst explained that the committee that met in 2002 recommended changes to these provisions to address a few specific situations, such as if the parties were in the process of getting divorced and the future allocation of the dependents' exemptions would be addressed in the judgment. The provisions were structured as "or" statements: section -01(7)(a)(3) applies if there is a court order addressing the dependents' exemptions or section -01(7)(a)(3)(b) applies if there is no court order addressing the dependents' exemptions. The guidelines do not specifically address what to do if there is a court order allocating the dependents' exemptions for some, but not all, of the obligor's children. This omission has resulted in different interpretations.

It was also noted that for guidelines purposes, the more dependents' exemptions that figure into the calculation, the lower the hypothetical federal income tax obligation and the higher the net income amount.

Fleming said that national health care reform legislation provides that the parent who claims a child as a dependent for tax purposes will also be responsible for certifying that the child has health insurance. In the future, this provision may affect which parent wants to claim the child. Claiming the child for tax purposes may no longer be so advantageous, although it is much too early to know how this will shake out.

Kemmet and Davis felt that if the obligor has children who would be covered by the multiple-family calculation, there should be dependents' exemptions for those children, in some amount. Kemmet added that she thinks the dependent's exemption for any child for whom the exemption is not addressed by court order should be equal to one-half of the "normal" exemption amount.

Fleming moved to accept Kemmet's suggestion to provide for one-half of a dependent's exemption for each child of the obligor whose dependency exemption is not covered by a court order. Moore seconded the motion and all members voted "yes."

Issue: Specify how to assess income to the obligor when the obligor and a new spouse earn income jointly, such as when they operate a business together. (Substantive change.)

This item was added to the list of issues for consideration at Davis' request. He said there is a problem in determining the income of the obligor when the obligor is self-employed and the obligor's current spouse also has a role in operating the self-employment activity. He said it becomes difficult to know how to allocate the income of the business between the obligor and the spouse.

Davis said the case specifics can vary. Sometimes the current spouse "marries into" a business that had been previously established and operated by the obligor. Sometimes the current spouse is an active partner in the business while other times his or her role is limited to, for example, doing the bookkeeping. Davis said he recognizes there are legitimate tax reasons, relating to social security, for apportioning some of the business income to the current spouse. On the other hand, for guidelines purposes, he doesn't want to see the obligor just divest himself or herself of half the business income.

Oberst said that because these situations are so fact-specific, she doesn't think the guidelines can prescribe only one particular way to apportion the business income. She said that ultimately the court will make a finding of fact as to how much of the business income is attributable to the obligor. Moore agreed that these situations can be addressed within the existing processes. She said she doesn't know what kind of language or formula could be incorporated into the guidelines to cover these varied cases.

Since there was no motion to amend the guidelines, this issue was dropped from further consideration.

Issue: Revisit the calculation for the extended visitation adjustment. (Substantive change.)

Schaar had asked that the extended visitation calculation be added to the list of issues for consideration. For background information, Oberst handed out a packet of materials related to extended visitation. The packet contains 1999 SB 2039, which directed that the guidelines include consideration of extended periods of time a child spends with the obligor; the Senate Judiciary Committee's Statement of Intent, explaining that the extended visitation provision should consider situations in which the obligor has visitation for 60 of 90 consecutive days or in which the parties have joint physical custody close to equal time (defined as each parent having physical custody at least 45 percent of the time); an excerpt from the Summary of Comments to the 1999 guidelines, including data from the DHS Research and Statistics division showing that approximately 32 percent of the cost of caring for a child is associated with expenses that are not incurred during the child's temporary absence from the family home; and an excerpt from meeting minutes from the previous quadrennial review during which the extended visitation adjustment was discussed in detail with no recommendations for changes.

Fleming said that given the Statement of Intent, DHS is not in a strong position to propose changes in administrative rule that are contrary to that statement. This is true even though the Statement of Intent is not legally binding any longer. It still represents the Legislative Assembly's "last word" on this issue.

Schaar said that the requirement for court-ordered visitation for 60 of 90 consecutive nights is particularly problematic. Some judges are applying the "consecutive" qualifier to the wrong timeframe (i.e., these judges are requiring that there be 60 consecutive days of visitation). Oberst said this provision is mostly intended to cover the summer visitation situation. For example, there are 92 days for the months of June through August. If visitation is ordered for more than 60 days within this timeframe, the extended visitation adjustment is applicable, even if the 60 days are not consecutive.

Instead of a change to the guidelines, Oberst suggested that this problem might be addressed through an official policy interpretation issued by Child Support Enforcement.

It was also noted that at the second meeting, the members approved a draft amendment to the general instructions that would require a child support order that includes an extended parenting time (i.e., visitation) adjustment to specify the number of parenting time nights.

Since there was no motion to amend the guidelines (beyond the amendment already recommended), this issue was dropped from further consideration.

Issue: Consider whether any changes should be made to the equal physical custody provision in light of the recent Supreme Court decision in Thornton v. Klose, 2010 ND 141.

Fleming explained that in Klose, the parties had stipulated that for child support purposes, the equal physical custody provision was to apply to their case. However, the specified custody schedule, to which they also stipulated, was not truly equal. When their support order was later reviewed by the Jamestown regional IV-D office, the staff attorney calculated child support in accordance with equal physical custody. The father objected, claiming that by the terms of the custody provision, he actually had the child for the greater proportion of the time. In the end, the Supreme Court agreed with the father and ruled that the custody schedule "is not custody "exactly fifty percent of the time" as explicitly required for "equal physical custody" under N.D. Admin. Code § 75-02-04.1-08.2."

In a concurring opinion, Justice Maring expressed frustration with the definition of "equal physical custody." In her opinion, the equal physical custody provision would be better for families if the measurement was based on days or nights, similar to the way extended visitation is based on court-ordered visitation nights.

Moore, Schaar, and Ness all commented that nailing down a rigid schedule for transferring custody between the parents does not always work best for the families because it eliminates flexibility.

Fleming said that because of the way equal physical custody is defined in the guidelines, the Supreme Court analyzed the case under the mistake of law standard of review. He suggested amending the guidelines so that whether equal physical custody exists would be a finding of fact and would be subject to the clearly erroneous standard of review. He said this would give trial courts more flexibility to look at the whole custody situation instead of just focusing narrowly on the specific number of days or hours for each parent.

Thompson and Moore thought it would be helpful to remove “exactly” as the qualifier for 50 percent of the time. Fleming suggested replacing the “exactly fifty percent” language with something less specific, such as “half of the time,” or by referring to custody “in the aggregate.” Weisz suggested defining equal physical custody as each parent having custody for at least 48 percent of the time.

For discussion purposes, Fleming provided a draft to revise section -08.2 to replace the “exactly fifty percent of the time” language with “for an equal amount of time as determined by the court” language. He also provided a statement of intent for the committee’s consideration. According to the statement of intent, the committee’s recommendation underlies three goals: 1) to preserve existing case law that does not allow parties to create an illusion of equal physical custody; 2) to preserve existing case law that whether or not equal physical custody exists is determined by the court order; and 3) to permit a proposed equal physical custody schedule to exist without requiring either the court or the parents to calculate the specific number of hours for each parent.

Oberst said she has some concerns with the draft language. She said for example, that she would have no problem agreeing that the parties have custody for an “equal amount of time” if the differential is one day or two days. But what if the differential is ten days, or 30 days, or 45 days? At what point would it be clearly erroneous for a trial court to determine that an unequal division of custody is nevertheless equal for purposes of the guidelines?

It was also suggested that a slight change be made to the statement of intent to better clarify the members’ intent, although without changing the substance of Fleming’s draft. As changed, the statement of intent is as follows:

Statement of Intent: In response to the recent decision in Thornton v. Klose, the intent of the committee recommendation is to preserve existing case law that does not allow parties to create an illusion of equal primary residential responsibility, to preserve existing case law that determines whether equal primary residential responsibility exists by the specific language of the judgment, and to permit a proposed equal primary residential responsibility schedule under

this section without requiring the court or parties to calculate the specific number of hours for each parent.

Moore noted another concern with the draft language. At a previous meeting, members voted to accept a draft that updated terminology by, for example, replacing "physical custody" with "primary residential responsibility." Upon further reflection, she said there is a problem with referring to "equal primary residential responsibility." She said "primary residential responsibility" is defined in law as having more than 50 percent residential responsibility. Therefore, residential responsibility cannot be both "equal" and "primary." The terms are incompatible.

After further discussion, Schaar made a motion to accept Fleming's draft amendment and statement of intent, subject to the revisions that were discussed. Moore seconded the motion and all members voted "yes." These changes will be incorporated into the recommended revised guidelines.

Issue: Amend subdivision j of subsection 2 to clarify that the hardship deviation is not available for continued or fixed expenses due to the obligor's pursuit of post-secondary education? (Substantive change.)

Oberst handed out a document summarizing some research on the treatment of college student obligors under other states' guidelines. According to her findings, the majority of state courts that have considered the issue have held that an obligor's decision to leave employment and go back to school is a voluntary choice that subjects the obligor to imputed income. On the other hand, some state courts use a good faith test. Income is not imputed if the obligor's decision to go back to school, though voluntary, was made in good faith and not for the purpose of reducing the child support obligation.

Oberst said this research is not necessarily on point to the issue under consideration. In North Dakota, imputation is not just limited to voluntary or bad faith unemployment or underemployment. If an obligor is unemployed or underemployed because he or she has gone back to school, the obligor is subject to income imputation. The issue under consideration is whether that imputed income can then be reduced through the hardship deviation.

Members expressed mixed feelings on this issue. It was noted that in tough economic times, going back to school becomes an attractive alternative. Woods noted that people might enroll in college to get other benefits that go along with enrollment. Thompson said that going back to school does not always mean enrolling in a four-year degree program. Sometimes it means pursuing a trade school education that can be completed in a couple of years or less. He added that some obligors just won't make it if they have to work and go to school. Fleming said he might look differently at the young obligor with a young child than at the older obligor whose children are almost grown. In the former situation, the young child would actually benefit in the long run if the obligor had a higher earning power as a result of going to college. Oberst wondered

if student loans or other financial aid could be increased to account for the support obligation. Moore suggested that if the college student obligor situation is not presenting a big problem, it should be left alone.

Since there was no motion to amend the guidelines, this item was dropped from further consideration.

Issue: Consider whether and how to specify when the deviation for visitation travel expenses may be allowed if, for example, the parties meet halfway. (Substantive change.)

This item was identified by Schaar. She said there is a great deal of inconsistency, from court to court, when it comes to applying the visitation travel deviation. One judge, for example, might not allow a deviation if the parents meet halfway while a different judge will allow a deviation under those circumstances. Another area of inconsistency has to do with the amount of the deviation. To determine costs for mileage, some courts will use the North Dakota mileage reimbursement rate as a guide while other judges will use the federal government's rate.

Davis said he would consider moving visitation travel costs out of the deviation section and addressing them as a deduction from gross income. But he said he also believes there should be limits on when the deviation (or deduction) is allowed.

Thompson said that by reducing the obligor's net income for visitation travel costs, which results in reducing the support amount, the child is actually subsidizing the visitation costs through "lost" child support. Several members expressed agreement with Thompson.

Schaar moved to draft an amendment to the visitation travel deviation to limit its applicability to situations in which the obligor is court-ordered to be solely responsible for the visitation travel costs. Davis seconded the motion and all members voted "yes."

Issue: Consider whether to revise the deviation for child care? (Substantive change.)

Fleming said he put this issue on the list of issues for consideration because an interim legislative committee, at a recent meeting, heard testimony from a private attorney who said an area of concern in family law is that often the court-ordered child support amount doesn't even cover the obligee's child care costs. Fleming said the guidelines committee may wish to consider whether there is a way to amend the child care deviation to address the private attorney's concerns.

In response to a question from Moore, Oberst confirmed that the deviations analysis (discussed at the first meeting) did not turn up any child care deviations in the random

sample. She said she recalls that child care deviations, in small numbers, have turned up in random samples in previous quadrennial reviews.

Moore said that a certain level of child care costs is anticipated and, accordingly, included in the presumptively correct child support amount. She added that child care is one of the areas that is sometimes covered outside of the child support context. For example, each parent might be ordered to pay half the child care costs with the obligor reimbursing the obligee for his or her share or with each parent paying his or her half directly to the child care provider.

Moore referenced the USDA report on the cost of raising children (discussed at the third meeting) and said that it might provide an indication of a "normal" amount of child care costs. She suggested making that report available to parents so that, for example, an obligee whose actual child care costs exceed the amounts reflected in the USDA report could pursue a child care deviation.

Since there was no motion to amend the guidelines, this item was dropped from further consideration.

Issue: Specify that section -11 applies to children in psychiatric residential treatment facility (PRTF) placements as well as foster care or guardianship care? (Clarifying change.)

Oberst said this issue was identified by the Minot regional IV-D office. By way of background, she explained that a child in a PRTF placement is considered to be in foster care according to the child welfare program. Such a child is in an out-of-home placement and legal custody has been removed from the parents. For purposes of the child support program, however, the child's case is treated as a Medicaid case, not as a foster care case. The reason for this is that PRTF placements are funded with Medicaid dollars, not foster care dollars. On the child welfare side, this is not significant. On the child support side, it is highly significant because it means, for example, that child support is not assigned.

In response to a question from Oberst, Kemmet, Davis, and Schaar all said they would apply section -11 in calculating an obligation for a parent of a child in a PRTF placement. Oberst said she agrees that section -11 is not limited to cases in which a foster child is in a paid foster care placement. She said she does not believe a change to the guidelines is required. To the extent that there are still any questions from staff in the regional IV-D offices, it can be addressed internally as a training issue.

No further action was taken.

Issue: Clarify what it means to be an "intact family." For example, if one spouse has a child from another relationship in the home (i.e., stepchild to the other spouse), is this an intact family? (Clarifying change.)

This issue was identified by Davis based on a case in the Dickinson regional IV-D office. In that case, a child was removed from the parental home and placed in foster care. The child's parents are married and living together. Also living in the home was the mother's child from a previous relationship. When it was time to secure a support obligation for the parents of the foster care child, the question of whether the child was from an intact home was raised.

By way of background, under the guidelines, if the child is from an intact home, the incomes of the parents are combined and the support obligation is based on the combined incomes. Otherwise, each parent is treated as a separate obligor and a support obligation is established for each parent based on that parent's income. Often, although not always, the obligation based on the parents' combined incomes will be lower than the total of the parents' separate obligations.

For purposes of the guidelines, an intact family means the parents of the foster child live together and neither parent has a duty to support any child who does not either live with the parents or receive foster care.

In the Dickinson regional IV-D office case, the district court determined that the foster child came from an intact family and set an obligation based on the parents' combined incomes. Davis and Oberst agreed that a literal reading of the guidelines supports this interpretation. They also agreed that this interpretation is not consistent with their understanding of the intent of the intact family provision. Treating the family as intact when there is a stepchild in the home is not consistent with the fact that the husband does not owe a duty of support to the stepchild. Oberst and Davis think that there should have been an obligation established against the husband for the foster care child and a separate obligation against the wife, taking into consideration that the wife also owes a duty of support to the child from her previous relationship.

Schaar made a motion to draft an amendment to the guidelines to clarify that the intact family provision is not applicable if either parent is responsible for the support of a child from another relationship, whether or not that other child is living in the parent's household. Moore seconded the motion and all members voted "yes."

Issue: Clarify how child support will be determined in situations where there are multiple children, some of whom enter foster care from the obligor's home and some who enter foster care from someone else's home. (Clarifying change.)

Oberst said this issue was identified by the Minot regional IV-D office. They had a case in which multiple children were placed in foster care at the same time. The children all had the same mother but there were several different fathers. The children were also

living in different households before they entered foster care; one child was living with the mother and the other children were living with other relatives. When trying to apply the guidelines to calculate a support obligation for the mother, the Minot regional IV-D office was unsure how to proceed since the guidelines do not specifically address the situation where children enter foster care from both the parent's home and from other homes. Oberst said that when she discussed the case with the Minot regional IV-D attorneys, she suggested that they do several alternative calculations and then defer to the wisdom of the court.

Oberst said she is hesitant to amend the guidelines to try to address such a fact-specific case. She is concerned that trying to draft for unique case specifics can be confusing and can have unintended consequences. She doesn't think that rules can be crafted to anticipate and address every possible combination of facts.

Since there was no motion to amend the guidelines, this item was dropped from further consideration.

Miscellaneous: Fleming handed out a document that shows principal, interest, and total receivables as of June 30, 2010. From 2009 to 2010, the total receivables for the IV-D portion of the caseload decreased from approximately \$222 million to approximately \$220 million. In other words, the balance is being paid down and is heading in the right direction. Some of the decrease is because the statutory judgment interest rate has been decreasing for the past few years. Some of the decrease is due to "right-sizing" the child support obligations. If the obligations are reflective of the obligor's ability to pay, the obligation will be more collectible.

Adjournment: Since there was no further business, Fleming thanked the committee members for their work and adjourned the meeting. The committee is dissolved.