

**Child Support Guidelines Drafting Advisory Committee Meeting
May 12, 2014
Brynhild Haugland Room, State Capitol Building**

Members Present: Jim Fleming (chairman), Brad Davis, Jamie Goulet, Lisa Kemmet, Sherry Mills Moore, Sen. Oley Larsen, Paulette Oberst, Cynthia Schaar, Referee Dale Thompson, Darcy Turcotte, Rep. Robin Weisz, and Bill Woods.

Member Absent: Judge Jay Schmitz

Visitor: Lee Bjerklie

Fleming called the meeting to order and welcomed the committee members. At Fleming's request, members briefly introduced themselves. As part of their introductions, several members noted that they are accustomed to doing child support calculations using the guidelines. Bjerklie explained that she is the customer service administrator for Child Support and she is participating as a visitor because she would like to know more about the guidelines in order to better assist the program's customers.

Fleming said that the committee is an advisory committee, which means it will submit recommendations to the executive director for the Department of Human Services regarding amendments to the guidelines. Historically, the committee's recommendations have been accepted by the executive director and a rulemaking process commences, which ultimately results in amended guidelines.

Fleming said that the guidelines provide the formula for calculating child support obligations. An actual order for child support, based on application of the guidelines, is set by the court and is subject to the court's continuing jurisdiction, which means it can be modified from time to time.

Fleming said that one of the services Child Support provides is to review support obligations for possible modification. By law, Child Support must review a support obligation upon request of a parent at least once every three years, although a number of exceptions have been identified through program policy as meriting an early review. Fleming said that Child Support will be increasing the frequency of doing reviews by moving from a three-year review timeframe to a two-year timeframe as a way to keep support obligations more consistent with an obligor's ability to pay. He said the program is exploring whether to increase the frequency of reviews even more (for example, once per year) but some private attorneys have expressed concerns about their clients having to litigate deviations from the guidelines annually.

In response to a question from Rep. Weisz about how the frequency of reviews affects deviations from the guidelines, Fleming explained Child Support does not advocate either for or against a deviation from the presumptively correct guideline amount. In a review situation, a parent who had previously secured a deviation from the guideline

amount would have to go to court to argue for keeping it and the other parent would have another opportunity to resist it. Referee Thompson noted that sometimes a deviation is related to the obligor's income so, in a review situation, the reason for the deviation might still exist but the amount might need to change if the obligor's income has changed.

Moore said that she would not want Child Support to do reviews more frequently than once every two years. She said that not only would deviations need to be re-litigated but the obligor's gross income would have to be re-litigated too. She said that after a support order is entered, parties need some time to settle down before they are off and running with new litigation. A review of the child support obligation could potentially stir up other issues, such as one party wanting to re-litigate parenting time.

Oberst provided an overview of the federal and state laws and regulations that affect the child support guidelines. Among other things, the guidelines must be used to determine the presumptively correct amount of child support to be ordered. Also, the child support guidelines must be reviewed at least once every four years to ensure that their application results in determining an appropriate child support amount.

Oberst then provided an overview of North Dakota's guidelines. The guidelines are agency rules and are published in the Administrative Code. Oberst said that although section -01 is titled "Definitions," it actually contains the formula for getting from "gross income" to "net income," which is the amount on which the child support obligation will be based. Other sections of interest include section -05, regarding determining net income for self-employed obligors, section -07, regarding imputing income based on earning capacity when obligors are unemployed or underemployed, section -08.2, regarding determining child support when the parents share equal residential responsibility for their children, and section -10, regarding the schedule of child support amounts to be ordered according to the obligor's net income and the number of children to be covered by the support order.

Oberst also provided an overview of the agency rulemaking process. She explained that the rulemaking process to amend the guidelines must be commenced by August 1, 2014. The rulemaking process will include a public hearing and a further opportunity for public comment. In addition, Child Support has historically kept the rulemaking process open until the conclusion of the next upcoming legislative session in case any guidelines-related legislation is enacted, which can then be incorporated into the final amended guidelines.

The committee then began discussing the issues that had been identified so far for the committee's consideration.

Issue: Consider whether to make some adjustment when the obligor receives Basic Allowance for Housing (BAH) and Basic Allowance for Subsistence (BAS).

Issue: Consider whether to exclude BAS (“food allotments”) and BAH (“housing allotments”) from gross income since they are not subject to income tax.

Issue: Consider whether to exclude BAH-equivalent from gross income when the obligor lives in base housing and doesn’t actually receive BAH as part of his or her paycheck.

Issue: Consider whether to exclude (or limit?) various allowances paid to military members stationed overseas.

Discussion: Oberst explained that several issues relating to obligors who are in the military had been submitted for the committee’s consideration. The issues came from different sources but one thing they all have in common is that certain military members receive allowances, especially housing allowances, in addition to their pay and these allowances are included in gross income for child support purposes. Other military members live on base and are provided housing for themselves and their families; the value of this housing is included in their gross income as “in-kind income.” The issues submitted reflect a perceived concern that BAH or base-provided housing artificially inflates the obligor’s gross income.

Rep. Weisz said that some military members may be paying a mortgage on a home in the States when, without being given a choice, they are transferred overseas. Although they receive a housing allowance for their overseas residence, they must still pay the mortgage on the home back in the States.

Goulet said that there is a difference between a duty station and a temporary assignment. She said that if a military member is stationed overseas, for example in London, for four years, but still maintains a home and mortgage in the States, that is a personal choice made by the obligor. Moore said that the military member might rent out the house in the States, make money from the rental income, and come out financially ahead as a result.

Weisz said that military members include individuals in the National Guard who might be called up to serve overseas for up to 18 months. These individuals would have to maintain their homes and their families in the States while they are serving overseas.

Woods added that military members can’t always take their families along when assigned to a duty station and sometimes the family cannot remain in base housing in the States when the military member is stationed overseas. In these situations, the military member would have to maintain two residences.

Davis said that when a military member receives BAH or base-provided housing, it results in a true increase in spending ability. Woods agreed that in reality the result is that the military member’s income is freed up for other purposes. Fleming said that the military member receives a salary; the BAH or in-kind income is not the military member’s only income.

In response to a question about how BAH is determined, Goulet said it depends on the military member's rank, whether he or she has dependents, and prices in the local rental market. The more expensive the local rental market, the more BAH the military member will receive.

It was noted that although the issues, as identified, pertain to obligors who are military members, housing allowances and in-kind income in the form of employer-provided housing occur in other situations. Oil field workers who live in "man camps" and farm hands were cited as examples of civilians who commonly receive in-kind income in the form of employer-provided housing.

Moore suggested that if the guidelines were to make some accommodation for military members, it could be accomplished through a deviation. Referee Thompson said that a deviation must be shown to be in the best interests of the child and it is hard to understand how an accommodation that results in reducing the child support obligation could ever be in the child's best interests. Fleming said an argument can be made that it is in the child's best interests for the obligor not to be left penniless.

Fleming said that for the next meeting, information will be obtained about different BAH rates for different localities for comparison purposes. Also, he asked for draft amendments that would authorize a deviation for military members who are on temporary assignment and who need to maintain two residences as a result.

Issue: Consider whether to increase the deduction for lodging to match the state rate of \$75.00 (actually \$74.70) that was effective 10/1/13.

Discussion: Oberst explained that the guidelines currently allow a deduction from gross income of up to \$63 per night for lodging expenses incurred when an obligor is required to travel as a condition of employment. At the last quadrennial review of the guidelines, in 2010, the committee decided to conform the deduction to the amount that OMB was reimbursing state employees who incurred in-state lodging expenses when they traveled for their employment (i.e., "state rate"). This decision was made with the acknowledgment that obligors are not necessarily state employees and could not necessarily secure lodging at the state rate.

Oberst said that OMB's current state rate for reimbursement is \$74.70, although exceptions (increases) are allowed for lodging in cities and counties in the state's oil patch. OMB's state rate, in turn, is based on 90 percent of the GSA rate for in-state lodging. The GSA rate is adjusted periodically, which means that the state rate is also adjusted from time to time.

There was some discussion about whether it would be preferable for the guidelines to reference the state rate instead of specifying an amount. That way, the deduction allowed under the guidelines would automatically change as the state rate is adjusted. However, the downside is that anyone applying the guidelines would have to locate the state rate such as, for example, by searching OMB's website.

After some further discussion, the committee agreed with Fleming's suggestion to provide for a lodging deduction based on the GSA, which is currently \$83, instead of the state rate. A draft to change the lodging deduction from \$63 to \$83 will be prepared for consideration at the next committee meeting.

Issue: Consider whether to clarify that when the tax exemption for a child is one-half of an exemption, then the associated child tax credit should be one-half of the child tax credit as well.

Discussion: Oberst explained that this issue relates to calculating the deduction for the hypothetical federal income tax obligation. This internal calculation includes consideration of tax exemptions for the children of the obligor. For example, when the parents alternate the child's tax exemption, the guidelines require that an amount equal to one-half of the exemption be used in the calculation. The internal calculation also includes consideration of the child tax credit for each child for whom an exemption was considered. However, the child tax credit language does not provide for using an amount equal to one-half of the child tax credit in situations where one-half of the exemption was used. This means there can be a disconnect in the internal calculation between how an exemption for a child is considered and how the child tax credit for the same child is considered. Oberst said it is her understanding that many individuals who do guidelines calculations use one-half of the child tax credit when one-half of the child's exemption is called for and, in fact, Child Support's automated system and on-line calculator have been programmed accordingly. The proposal is to amend the guidelines to conform the treatment of the child tax credit to the treatment of the child's exemption.

Goulet said that she has appeared before a judge who refuses to apply one-half of the child tax credit because the guidelines do not specifically authorize that treatment.

After further brief discussion, the committee requested draft amendments to conform the treatment of the child's exemption and child tax credit.

Issue: Consider whether to allow a mileage deduction from gross income for individuals who use their own vehicle for work and are not self-employed.

Issue: Consider whether to provide explicit direction on whether gas and vehicle maintenance are allowed deductions for individuals who use their own vehicle for work and are not self-employed.

Discussion: These issues, in the alternative, were submitted by Goulet. In response to a question from Oberst, Goulet said that they were not intended to address commuting expenses (i.e., mileage-related costs incurred by an obligor for driving back and forth to work). Instead, they were intended to address situations where an obligor must drive from one place to another during the work day and must use his or her own

vehicle to do so. An example is an oilfield service worker who must drive from one well site to another during his or her shift.

In general, committee members were supportive of creating a deduction for these types of mileage expenses although it was noted that there should be a requirement that the obligor have documentation of the mileage (e.g., mileage log) and there were some questions about what mileage rate should be allowed.

Regarding placement of a mileage deduction, it seems logical to include such a deduction in the same existing provision that allows deductions for special equipment or clothing and lodging expenses required as conditions of employment (i.e., subdivision h of subsection 6). In the course of this discussion, Fleming asked if it is intended that these expenses be unreimbursed employee expenses since the guidelines are not explicit. Oberst responded that she assumes these are unreimbursed expenses since it would not be necessary to allow deductions if these expenses were reimbursed by the obligor's employer.

Draft amendments to clarify that these employee expenses must be unreimbursed and to create a non-commuter mileage deduction will be prepared for the next meeting.

Issue: Consider whether to explicitly allow a deduction from gross income for dental and vision insurance.

Discussion: This issue was submitted by Goulet who noted that the deduction allowed in the guidelines for "health insurance" does not explicitly include dental and vision insurance.

Several members who regularly do guidelines calculations said that they do or would consider dental and vision insurance when calculating the deduction for health insurance. Sen. Larsen said that dental and vision coverage are included in the essentials elements of a health insurance plan under the Affordable Care Act.

Fleming said that research will be done before the next meeting to determine how broadly "health insurance" is defined under the Affordable Care Act and at that time the committee can decide whether to pursue a clarifying change to the guidelines.

Issue: Current spouse of an obligor says she doesn't like the formula for determining net income from self-employment because it causes her income to be disclosed to the obligee.

Discussion: Oberst explained that Child Support had been contacted by the spouse of a self-employed obligor whose support order was being reviewed for possible modification. The regional Child Support office had prepared a guidelines calculation based on the obligor's income, which had been documented by a joint tax return for the obligor and his spouse. In other words, the joint tax return included the spouse's income. The worksheet used by Child Support, which mirrors the formula in the

guidelines for determining net income from self-employment, includes a field for identifying any of the total income on the tax return that is not income of the obligor. The income that does not belong to the obligor is then deducted from total income so it is not considered in determining the obligor's net income from self-employment and, ultimately, the support obligation. The spouse's share of the total income was entered in this field on the worksheet and the worksheet was eventually included in the paperwork that was served on the obligee as part of the motion to modify the support order. The spouse felt that it was an invasion of her privacy for the obligee to see her income on the worksheet.

Some members felt that what happened in the new spouse's situation was a natural outcome and is to be expected when marrying someone who has a support obligation that is subject to the court's continuing jurisdiction and is therefore subject to change. Moore said that if a new spouse doesn't want the obligee to see his or her income as reflected on a joint tax return, an option would be for the new spouse and the obligor to file separate tax returns. Schaar and Davis said that the obligee is entitled to see Child Support's guidelines calculation, and the supporting documentation, so that the obligee can make an informed decision to either accept or challenge the calculation.

The committee decided that the issue should be dropped from further consideration.

Issue: Consider whether to amend subsections 6 and 7 of section 5 (the "loss analysis" subsections) so that losses from one self-employment activity can reduce income from another self-employment activity subject to the same limitations that already exist for reducing non-self-employment income by self-employment losses.

Discussion: Oberst explained that the guidelines have explicit provisions for limiting the situations in which an obligor's loss from a self-employment activity can be used to reduce income that is not from self-employment. On the other hand, the guidelines do not address whether or when a loss from one self-employment activity can be used to reduce income from a different self-employment activity. Thus, it is possible that a loss from Self-employment Activity A could be used to reduce income from Self-employment Activity B without any limitation. This can result in disparate treatment of self-employment losses depending on whether the income to be reduced is not from self-employment versus from a different self-employment activity.

Rep. Weisz and Fleming noted that there is another subsection of section 5 that specifies that a self-employment activity that produces a loss is presumed to be a hobby. Oberst explained that this presumption is rebuttable and the loss analyses subsections essentially assume that the hobby presumption has already been rebutted.

Some members expressed a preference for consistency by making the loss analysis provisions the same regardless of whether the income to be reduced is from self-employment or is not from self-employment. Because of the hobby presumption provision, other members were not sure there is a problem that needs to be fixed. In

the end, the committee did not take any action so this issue will be carried forward for more discussion at the next meeting.

Issue: Consider creating stronger language regarding the requirement to calculate a separate average net self-employment income for each separate self-employment activity.

Discussion: Oberst explained that this issue was submitted by a staff attorney for a regional child support unit. The attorney is aware that the guidelines already require that the average of the most recent five years of each self-employment action must be used to determine net income from self-employment. The attorney thought it might be helpful to have some “I mean it language” to emphasize the requirement.

After some discussion, the committee felt that it was not necessary to pursue a change to the guidelines so this issue will be dropped from further consideration.

Issue: Consider the effect, if any, on imputing income if Child Support ratchets down its general rule about conducting reviews at three year intervals upon request of a party.

Discussion: Fleming explained that Child Support will review support orders upon request of a party once every three years. However, Child Support has also identified a number of situations that merit an exception to the three-year rule. In these situations, upon request, Child Support will conduct a review even if the order is not yet three years old. However, even in an exception situation, the order must be at least one year old so that a change in circumstances does not have to be shown. Fleming briefly discussed the identified exceptions. He noted that the exceptions often come in pairs, which means that if one exception is likely to be invoked by the obligor, there is a counter-balancing exception that would likely be invoked by the obligee.

Fleming said that Child Support is looking at changing the three-year rule to something shorter, such as two years.

Kemmet asked if the exceptions would be eliminated if the rule was ratcheted down to two years. In response, Fleming said that he would like the program to do away with the exceptions. In response to a question from Rep. Weisz about what options would exist for the parties if the exceptions were eliminated, Fleming said that the parties would still have the option to pursue a modification of the support order without Child Support’s assistance.

In response to a question from Rep. Weisz about whether shortening the three-year rule would be a workload issue for Child Support, Fleming said he thinks the additional time spent on reviewing orders more often would be offset by the time saved in having to enforce those orders later. The enforcement challenges will be lessened if the orders are “right-sized,” meaning more reflective of the obligor’s ability to pay.

The committee considered the timeframes in the imputation section of the guidelines, specifically the two-year look-back periods referenced in subsections three and eleven. Reducing the timeframe for conducting reviews from three years to two years would be consistent with the provisions in the guidelines.

Since it doesn't appear that changes to this section of the guidelines would be needed, Fleming said that this issue can be dropped from further consideration. However, Fleming added that Child Support would continue to consider changes to its review and adjustment policies. He also asked that an issue be added for the next meeting for the committee to consider any timeframes in the self-employment section to see if that section would be affected by shortening the three-year rule.

Issue: When an obligor is incarcerated and has a disability, consider how to reconcile the requirement for imputing income to an incarcerated obligor with a separate provision that prohibits imputing income to an obligor who receives certain types of disability payments.

Discussion: Oberst explained that this scenario arose in a case serviced by the Bismarck regional child support unit. When she discussed the scenario with the staff attorney, they both were of the opinion that the obligor's having a disability (which is a permanent condition) should "trump" the obligor's incarceration (which is a temporary condition). However, there is nothing in the guidelines that either expressly authorizes or prohibits that determination. Oberst said she and the attorney felt that a hierarchy should be established for the conflicting provisions.

Oberst added that in reviewing the various imputation provisions when this issue arose, she discovered that a similar conflict could arise when an obligor is a minor (wherein the guidelines provide for imputing at no more than one-half of the federal hourly minimum wage) and is also receiving supplemental security income (wherein the guidelines prohibit imputing income).

It was also noted that the provision that prohibits imputing income is drafted in such a way that its application depends on the obligor receiving certain types of disability payments. At least some disability payments terminate or are suspended when an obligor becomes incarcerated, which means that they are not being received during the incarceration period.

Committee members were supportive of a hierarchy that prioritizes disability status over incarceration. Fleming said the issue could be resolved by looking at the internal structure of the section. The committee did not take any action so this issue will be carried over for further discussion at the next meeting.

Issue: When imputing income at 90 percent of previous earnings, consider a revision that authorizes using the two most recent tax returns to determine the amount to impute.

Discussion: Oberst said that this issue was submitted by a staff attorney at a regional Child Support office. She noted that the staff attorney is proposing a change to subsection 3. Language similar to the language that is being proposed for change is also found in subsection 11 but the attorney is not proposing conforming changes to subsection 11 and Oberst said it is not clear if the omission is intentional. Several members, including Davis and Goulet, said they agreed with the concept proposed by the staff attorney. Accordingly, draft amendments will be prepared for consideration at the next meeting.

Issue: Consider whether to authorize imputing income at 110 percent of statewide average earnings to an obligor who fails to provide financial information in a support establishment situation.

Issue: Clarify that “statewide” refers to North Dakota.

Oberst explained that the issue of imputing income at 110 percent of statewide average earnings was submitted by a private attorney. The scenario related by the private attorney was that he was representing the soon-to-be obligee in a divorce action. The soon-to-be-obligor had moved out of state and failed to respond to requests for financial information. The private attorney is frustrated that the guidelines only authorize imputing income at 60 percent of statewide average earnings for similarly-situated individuals because he feels the obligor is rewarded for failing to comply with discovery rules.

Discussion: Fleming said he has concerns about increasing amounts that can be imputed to an obligor. He said that imputing income can result in obligations being inflated, which, in turn, leads to receivables being inflated. He noted that child support receivables exceed \$300 million. He also thinks that obligations based on imputed income create unreasonable expectations on the part of obligees. He would prefer using discovery tools to obtain actual financial information from obligors.

It was noted that the private bar does not have access to the same type of financial information, such as quarterly wage data, that is available to Child Support. Even so, Moore said that in her experience, when parties are getting divorced, financial information is generally able to be secured. She said these are parties who have been living together and filing joint tax returns so the obligee likely knows where the obligor is working and what he or she is earning. In response to a question from Fleming, Moore said that courts can and sometimes do impose monetary sanctions against a party who is not complying with discovery rules but just because a sanction is imposed does not necessarily mean that the party will pay it.

It was also noted that in a modification situation, the guidelines authorize imputing income to an obligor based on the obligor’s net income having increased at the rate of ten percent per year since the support order was entered if the obligor fails to provide financial information. Davis said that if an obligor’s income has not been increasing at the rate of ten percent per year, the provision is intended to get the obligor’s attention

and motivate the obligor to provide financial information so a calculation based on actual income, instead of imputed income, can be performed. However, it is becoming more common that the obligor's income has actually increased by more than ten percent per year. In these situations, the obligor may be motivated to ignore requests for financial information and let income be imputed based on an increase of ten percent per year because that results in a better deal for the obligor.

On the related issue of whether "statewide" means the State of North Dakota, Oberst suggested that this might be addressed through a policy interpretation instead of amendments to the guidelines.

Following some additional discussion, the committee asked for draft amendments authorizing imputation at 100 percent and at 110 percent of statewide average earnings for obligors who are uncooperative in establishment situations.