

Minutes of the
Department of Human Services
Child Support Guidelines Drafting Advisory Committee

Wednesday, May 29, 2002
Fort Totten Room, State Capitol
Bismarck, North Dakota

Chairman Barbara Siegel called the meeting to order at 10:30 a.m.

Members present: Calvin Bergenheier, Brad Davis, Representative William Devlin, Senator Tom Fischer, Melissa Hauer, Sherry Mills Moore, Blaine Nordwall, Paulette Oberst, Barb Siegel (Chairman), and Michelle Skaley.

Members absent: Judge Thomas Schneider and Paul Wohnoutka.

Chairman Barb Siegel welcomed the committee members and expressed appreciation from the Department of Human Services for their commitment to the critical task ahead.

Barb Siegel asked that members review the agenda and offer any suggested changes. Siegel noted that the issues for consideration listed on the agenda were taken from a larger list of issues identified thus far. Today's agenda includes about one third of those issues. Similar issues were grouped together to provide for a logical review of the issues. Siegel also stated that Paul Wohnoutka, who is an accountant by trade, could not attend today. He served on the last guidelines advisory committee and his expertise, especially in the areas of self-employment and taxes, was very helpful to the committee. The items on today's agenda were chosen in an attempt to avoid issues where it was expected the committee would most benefit from Wohnoutka's expertise. Siegel noted that Judge Thomas Schneider was hoping he could attend the meeting today; however, he contacted Siegel yesterday to inform her of a scheduling conflict.

No changes to the agenda were offered so the committee proceeded with the agenda as drafted.

Barb Siegel asked the members and the recorder to introduce themselves by sharing with the group their professional or personal experience relating to child support.

Barb Siegel: Has been the Policy Administrator of the Child Support Enforcement Division of the Department of Human Services for more than 10 years. This is the third time serving as chairman of the Guidelines Drafting Advisory Committee. She is married to a former noncustodial parent whose children are now over the age of 18.

Terry Peterson: Is an Assistant Policy Administrator for the Child Support Enforcement Division of the Department of Human Services. She has been with the Child Support Enforcement Division for almost 18 years in a variety of positions. She will

be serving as recorder for the Guidelines Drafting Advisory Committee meetings. She served in this capacity during the 1998 review as well.

Blaine Nordwall: Is the Director of the Office of Economic Assistance Policy Division of the Department of Human Services. Clients of programs he supervises depend on receipt of child support. He also noted he has children so pays a lot of support, but is still married to their mother. The support he pays is just not court ordered.

Brad Davis: Has been the Administrator of the Southwest Area Child Support Enforcement Unit in Dickinson for over 17 years. This is his first time serving on the Guidelines Drafting Advisory Committee. He has been particularly interested in child support guidelines from the beginning when the child support guidelines were mere suggested minimum amounts of contribution. He has four children and, like Blaine Nordwall, is contributing much support although his family is intact and the support is not court ordered.

Michelle Skaley: Has been a Legal Assistant in the Bismarck Regional Child Support Enforcement Unit for about one year. She is learning about the guidelines in her work. She has a 6-year-old son and is a custodial parent.

Calvin Bergenheier: Has no professional child support experience, but has personal experience. He has a 12-year-old daughter and has paid support since she was born. He recently went through a review and adjustment of his support order with the Dickinson Regional Child Support Enforcement Unit.

Sherry Mills Moore: Has been an attorney for 23 years, almost all of which has been in family law. She works with custodial parents, noncustodial parents, grandparents, and children. On a volunteer basis, she is also a family law lobbyist for the State Bar. She has been married for 27 years and has an intact family. She served on the last two guidelines advisory committees and is familiar with the time prior to guidelines.

Senator Tom Fischer: Is a Senator for District 46 in Fargo. He was a noncustodial parent for 13 years. This is his first time on the Guidelines Drafting Advisory Committee. He serves on the Human Services Committee in the Senate.

Representative William Devlin: Is a Representative for District 23 which includes the area from near Devils Lake to Finley. He has served three sessions on the Human Services Committee in the House. He also served 15 years on a county social service board. His children are adults.

Melissa Hauer: Is an attorney with the Department of Human Services. Prior to this, she was in private practice for five years, some of which was spent in family law.

Paulette Oberst: Is an Assistant Policy Administrator for the Child Support Enforcement Division of the Department of Human Services. One of the areas she works with in this capacity is the child support guidelines. She has been with the Child Support Enforcement Division for about three years. Prior to that, she worked at a regional office, starting in 1986, first working as an attorney and later as the administrator. She has kind of grown up with the guidelines. She also served on the 1998 Guidelines Drafting Advisory Committee.

Barb Siegel expressed appreciation of the appointment of the two legislators. She also noted that Melissa Hauer will be the primary drafter of the recommended proposed amendments.

Barb Siegel provided an overview of the requirements relating to the child support guidelines and the periodic review of those guidelines.

- 42 U.S.C. § 667. Requires each state to have guidelines. Guidelines may be established by law or by judicial or administrative action. Barb Siegel noted that in North Dakota, pursuant to state law, the Department of Human Services establishes the guidelines in administrative rules. Requires guidelines to be reviewed at least every four years, which is what we are doing now. Requires guidelines to be available to courts and that there be a rebuttable presumption that the guideline amount is the correct amount of child support. Requires any deviation to be in accordance with specific criteria and that a specific finding be made.
- 45 CFR § 302.56. Much is a repeat of federal law. Does provide more specific requirements. Sets forth a minimum of what the guidelines must contain. They must: take into consideration income of the noncustodial parent; be based on descriptive and numeric criteria; and provide for the health care needs of the child. It also requires that criteria for deviation must take into consideration the best interests of the child. Regarding the review of the guidelines, the regulation requires that states must consider economic data on the cost of raising a child and must analyze case data to ensure deviations from the guidelines are limited. Barb Siegel noted that the Child Support Enforcement Division is in the process of pulling together this information and it will be available at a future meeting.
- N.D.C.C. § 14-09-09.7. Requires the Department of Human Services to establish child support guidelines in administrative rules. Sets forth some provisions the North Dakota child support guidelines must include. Currently, the guidelines meet all requirements. Subsection 4 requires a four-year review. Rulemaking must be commenced by August 1, 2002. The statute requires the Department to convene a Drafting Advisory Committee. Barb Siegel brought to the committee's attention the contingent effective date of N.D.C.C. § 14-09-09.7. Subsection (1)(f) was added during the 2001 legislative session to include rebuttable criterion for atypical income and nonrecurring bonuses in the list of required provisions. The effective date requires that if rulemaking is complete prior to August 1, 2003, that earlier date is the effective date. However, if legislation is introduced and passed during the 2003 session, the rulemaking process can remain open to address any legislative changes, resulting in one effective date for all changes.

Barb Siegel reminded the committee of its role. It is advisory in nature and will make recommendations to the Executive Director of the Department of Human Services. The public is welcome to attend the committee's meetings, but no public exhibits or testimony will be received. Public comment will be solicited during the rulemaking process.

Barb Siegel expressed her preference for an open discussion. She stated, for example, that she will be looking for a general consensus for preparation of draft proposed amendments. Final decisions relating to whether or not a proposed amendment should be recommended to the Executive Director will be made through a role call vote, majority rules. She encouraged the members to feel free to bring up issues for consideration and to ask questions any time during the meetings.

The committee then undertook the task of scheduling future meetings. Barb Siegel noted the scheduling process to this point has been extremely challenging. Neither of the two tentative dates selected earlier will work for Judge Thomas Schneider. She noted that evening meetings might be an alternative to day meetings if it is too difficult to schedule day meetings. Siegel offered a few suggestions for dates. She noted that it was important to have time between meetings for drafting proposed amendments. After much discussion, times were chosen for two future meetings. They are as follows:

8:30 – 5:00, Thursday, June 6

8:00 - noon, Tuesday, June 11

Barb Siegel asked that Melissa Hauer provide an overview of the Administrative Rulemaking process. Hauer reported that once draft amendments are received from this committee and approved by the Executive Director of the Department of Human Services, a notice is published in newspapers, including hearing dates and times. Likely there will be two hearings—one in Bismarck and one in Fargo. After 30 days from the date the notice is published, the hearings will be held. After the last hearing there is another 30-day wait to allow individuals to submit written comments. When this time expires all comments are reviewed and every comment is summarized and consideration is given to what to do in response to each comment. This is a lengthy process. Likely we will be in the midst of the legislative session at this time. Upon completion of the review, the proposed amendments are sent to the Attorney General's office for an opinion as to their legality. Then, the proposed amendments are provided to the Executive Director for formal adoption. The amended rules are published by the legislative council and are effective 30 days after publication.

Barb Siegel provided a broad section-by-section review of the guidelines.

Barb Siegel distributed an updated list (dated May 28, 2002) of issues for consideration. The list sent previously was compiled by the Child Support Enforcement Division over the past several years for this committee's consideration. This updated list includes any issues submitted by committee members. This updated list is a source document. Each item includes a notation of who presented the issue or how the issue arose for consideration. The items on this source document will not be discussed in the order they appear in the document; rather items will be grouped for sake of discussion. Siegel welcomed the committee members to identify issues for consideration. An issue may or may not be discussed immediately, depending on the nature of the issue and its relatedness to other issues for consideration.

Mike Schwindt, Director of the Child Support Enforcement Division, arrived at the meeting. He offered a welcome to the committee members and thanked them for agreeing to participate on the committee.

The committee then began the process of reviewing the issues as provided in the agenda.

Item 1: Determination of Support Amount - General Instructions, § 75-02-04.1-02(7).
Documentation of Income.

Barb Siegel noted the section has been read two different ways—one way looks at the word “sufficiently” being tied to the “other information” phrase and another way looks at the word “sufficiently” being tied to the documentation of income. Blaine Nordwall noted that the intent was to refer to how documentation should be done and agreed the language could be improved upon. Nordwall noted that rearranging the sentence so that it reads, “Income must be sufficiently documented. . .” removes the ambiguity. Consensus of the group was to have Melissa Hauer draft an amendment moving the placement of the word “sufficiently” to immediately precede the word it modifies (“documented”).

Item 2: Imputing Income Based on Earning Capacity, § 75-02-04.1-07(2)(b).
Presumption of Underemployment Based on Minimum Wage.

Barb Siegel distributed a copy of IC-CO-00-10. Siegel explained an Informational Communication (IC) is an established way for the Child Support Enforcement Division to communicate with the Regional Child Support Enforcement Units. This IC provides an interpretation of a guidelines provision. Such ICs are also posted on the Child Support website under the guidelines section so are available to the public. This issue actually arose through the Administrative Rules Committee. A question was asked relating to the applicable time period for this provision of the guidelines (i.e., “167 times the federal hourly minimum wage”). The interpretation in the IC is that the time period is monthly; however, the guidelines do not specifically state this. Doing calculations set forth in the IC shows it would only be reasonable to assume it refers to a monthly time period. A suggestion may be to clarify the language in (2) to state, “An obligor is presumed to be underemployed if the obligor’s monthly gross income from earnings is less than:” Siegel noted that she does not believe this is controversial. The question is whether or not we want to clarify this. Blaine Nordwall asked about the possibility of applying subsection (2)(a) annually. If so, “monthly” may need to be worked into (2)(b) instead. Siegel noted a comparison to subsection (3)(b) in which there is reference to monthly. Nordwall commented that he believed it would be better to provide clarification in the guidelines rather than having to rely on a separate piece of paper—the IC.

The committee discussed applicable timeframes for several of the subsections. Would there be an occasion to apply a time period other than monthly? Sherry Mills Moore responded no. Brad Davis responded he has not had it happen, but there is a possibility someone could argue the point. Moore suggested “monthly” should be added to (2)(b), but not (2)(a). She does not feel strongly about the rest. The

suggestion was made that the reference be added to (3)(a) and removed from the introductory paragraph of subsection (3). The committee referred to and considered the possible effect of the "annualize" section of the guidelines (§ 75-02-04.1-02(6)). Davis said he has never had a situation where someone argues to use one low month or one high month regarding the six-tenths provision. The committee came to a consensus for adding the "monthly" reference to (2)(b), eliminating it from the introductory paragraph of (3), adding it to (3)(a), and eliminating it from (3)(b). Siegel suggested placing the reference in (2)(b) at the beginning of the sentence so it states, "A monthly amount equal to one hundred sixty-seven times the federal hourly minimum wage." Consensus was reached; Melissa Hauer will prepare a draft amendment.

The committee broke for lunch at 11:50 a.m., to reconvene at 12:45 p.m.

Barb Siegel called the meeting back to order at approximately 12:45 p.m.

Item 3: Adjustment for Extended Visitation, § 75-02-04.1-08.1.

Number of Visitation Nights.

Barb Siegel provided some history of the section on extended visitation. The last Guidelines Drafting Advisory Committee initially discussed the issue of a 50:50 split, i.e., when two parents share equal time. The consensus was that a 50:50 split is rare and that extended visitation was more common. It was by far the biggest and most controversial subject during the last review of the guidelines. There were strong opinions as to the varying degrees of how much time and how much of a deduction. In the end, the committee was not able to arrive at a consensus and the recommended proposed amendment was a compromise. The comments received during the rulemaking comment period resulted in no consensus. An Interim Legislative Committee studying child support issues was meeting at around this same time. That committee introduced a legislative bill on this subject during the 1999 session. The Department of Human Services (Barb Siegel) provided testimony before the Senate and House Judiciary committees and the bill did pass, with amendment, adding subsection (1)(e) to N.D.C.C. § 14-09-09.7.

The Senate Judiciary Committee also provided a written Statement of Intent to direct the Department of Human Services in defining the thresholds for meeting 'extended visitation' provisions. The written intent clearly establishes the two thresholds: "60 out of 90 consecutive days" or "close to equal time," the later meaning physical custody at least 45% of the time. During committee work, the Senate Judiciary Committee provided direction that extended visitation provisions be part of the regular part of the guidelines rather than applied as a deviation. The two thresholds are a part of the current guidelines found at § 75-02-04.1-08.1(1).

The Department of Human Services then turned to its Research and Statistics Division for assistance in establishing a deduction amount. USDA reports of costs of raising a child were used. The reports include a break down of costs of raising children by category. The analysis included costs that leave the custodial parent's home when the

child leaves the home to visit the noncustodial parent. The fractional number of ".32" is the result of the Department's research. Application results in a deduction from the child support amount because of extended visitation.

After the guidelines were finalized, questions were received regarding practical application of the new section. Barb Siegel asked that Paulette Oberst review two identified issues.

1. When multiplying as described in subsection (2)(c), the result is a fractional number of visitation nights and the question becomes what, if anything, to do with those fractional nights. One option is to follow standard rounding rules, similar to the direction provided in the guidelines general instructions for determinations relating to monetary amounts, which this is not. Truncating is another option. Paulette Oberst noted that she believed the decision would not make a material difference in the result. The issue actually came up while designing the automated system. At that time, a decision was made for use of standard rounding rules for purposes of programming the system. Several members openly agreed with the rounding decision. The committee reviewed language in § 75-02-04.1-02(4) and (5). The more we move to automation, the more important it is to be clear. Barb Siegel noted we could chose to do nothing or to give direction in the guidelines. Options would be to add direction to § 75-02-04.1-02 or § 75-02-04.1-08.1. If indeed it applies only to § 75-02-04.1-08.1, it is probably a better place to incorporate. Sherry Mills Moore agreed it would be easier to find in § 75-02-04.1-08.1. Blaine Nordwall asked if the problem is because the system can't calculate if there are too many positions beyond the decimal or if we are trying to arrive at a whole number of nights. Siegel responded that if a decision such as this is made which is not explicitly laid out in the guidelines, the preference is to run it by the committee. Discussion occurred as to whether there would be any additional changes to this section. Siegel responded that we are indeed looking at the possibility of proposing amendment to the section for another reason (second issue).
2. The question is how many visitation nights do you count and multiply by .32. The question came up through discussion with a private attorney. Paulette Oberst provided an example to explain the issue. The parties in the example agreed an extended visitation threshold had been met; the disagreement came in counting the number of nights. One party said count all nights; one party said count only those nights associated with the threshold.

As a result, an interpretation was issued. Barb Siegel distributed a copy of IC-CO-01-13. The interpretation was to count all visitation nights once the threshold is met. This has always been the Child Support Enforcement Division's interpretation of this provision and was not contemplated another way. Prior to the question being posed, the form developed by the Child Support Enforcement Division to facilitate the calculations was designed using total nights. Unlike the rounding question previously discussed, this interpretation could be material. Siegel

stated she believes all nights should be counted. Calvin Bergenheier stated this makes common sense. Blaine Nordwall noted this is consistent with the premise of identifying the costs that move with the child. Brad Davis offered that a way to look at the question is whether to give credit for all days or only the portion in excess of the threshold; and suggested a comparison to the noncustodial parent who just marginally misses the threshold who gets credit for zero nights. Sherry Mills Moore stated that is the definition of a threshold—either you make it or you don't. She said it was her understanding that when you're in, you're in.

Blaine Nordwall stated that he does not understand how a conclusion based on the language of the guidelines could be arrived at anything other than counting all the nights. He asked what the basis of the party's argument was for counting only some of the nights? Paulette Oberst responded that the call was from the attorney who believed all nights should be counted so did not have the details of the other's argument. Oberst also noted that likely the question arose only because it was the 60 of 90 threshold that was met rather than the 164 nights. Senator Tom Fischer noted that the costs of the custodial parent during the school year are higher than costs of the noncustodial parent who has the children in the summer. He also noted the shopping pattern for two days of visitation does not change. Representative William Devlin then stated that he is not at all sure the intent of the 60 of 90 was to count all days. He provided an example of a noncustodial parent meeting the 60 of 90 day threshold and having an additional 12 nights of visitation would not result in a total of 72 nights. He believes they were looking, during the interim committee, at extended visitation periods in a block. He doesn't believe they were looking at credit for short periods of time of visitation. Senator Fischer confirmed he was looking at long blocks of time. Siegel distributed and reviewed the Statement of Intent provided by the 1999 Senate Judiciary Committee.

Blaine Nordwall observed that the significance is this: if you get 61 nights (during a block period) and then add every other weekend and a few holidays, the total number of nights could easily be double the number of nights associated with the 60 of 90 threshold but still be nowhere near the 45% threshold. This is not decimal dust. There is disparity between those who get 60 consecutive nights of visitation and those who don't. Nordwall stated the goal is to look for a middle ground. Brad Davis suggested possibly considering what is normal or customary and give credit for anything above that amount. Barb Siegel reminded the committee of the parameters provided in the Statement of Intent.

Representative William Devlin stated the primary concern he was aware of was the blocks of time issue. Barb Siegel responded that she did not recall that discussion with the Senate Judiciary Committee included specific consideration as to the issue of total nights versus nights only associated with the 60 of 90 threshold. Sherry Mills Moore, who was also at the committee meetings, agreed. Siegel thinks as long as 60 of 90 is the threshold, we could limit the nights counted or count all nights and still be in compliance with the Statement of Intent. Moore questioned if there really is a

difference. Blaine Nordwall observed that a substantial obligation on the chart could be a couple hundred dollars per month difference--not typical--but possible.

Representative William Devlin noted he was not thinking that the deduction would be spread over the year, but rather that the deduction would occur at the time of the extended visitation. Sherry Mills Moore noted that it would be an administrative nightmare if payments and receipts changed during visitation times. Blaine Nordwall responded that the vast amount of support is paid through income withholding. Not spreading it across the year would mean giving a different income withholding order to the employer during those times. Spreading the deduction out across the year obliges people to budget and provides stability for both households. Custodial parents have to save money over the summer and noncustodial parents have to save money over the winter if there is a summer visitation arrangement. Senator Tom Fischer noted that housing costs don't go away from the custodial parents over weekends. Nordwall explained that is why the fractional number of .32 is used.

Barb Siegel offered an example: 100 nights. Income of \$2000. Child support without extended visitation is \$411 per month. If 60 nights extended visitation counted, child support is \$390. Difference of \$21 if only 60 counted. If total nights counted was 100, the result is \$374 vs \$411, for a difference of \$37. Representative William Devlin again stated that he does not believe the intent was to add all the nights over the year although he acknowledged this was discussion during the interim committee and it was the Senate Judiciary Committee who provided the Statement of Intent. Sherry Mills Moore commented that this only counts nights. It is an attempt to measure involvement of parent. We don't want everyone running around with Palm Pilots connected to their children. She is inclined to say threshold is met or not. Calvin Bergenheier commented that a parent who couldn't get visitation credit might say that he doesn't want to visit the child then. That would not benefit the child. He said he's not saying this happens, but it might. Blaine Nordwall asked if this affects behavior of parents. Probably not. There is a correlation between payment of support and being involved in a child's life. Bergenheier noted that this could be a difference if travel expenses are significant. Siegel explained there is a deviation available for travel related visitation costs.

Barb Siegel stated possible options are to count all nights or just those associated with the threshold. Brad Davis stated that he hasn't seen more than a handful of these situations. Sherry Mills Moore noted she is not seeing a lot of people manipulating the system to get the credit because it doesn't make sense for the children. Siegel asked, if the committee feels the language refers to total number of nights (i.e., not limited to nights meeting the 60 of 90 threshold) if nothing is done in the guidelines? Moore observed that if we don't propose a change, we won't get any comments. Siegel stated that if we wanted to clarify that it should be a total number of nights, we could easily fix in drafting by including the word "total" in subsection 2(c). If the number of nights is limited to the number of nights associated with the 60 of 90 threshold, that threshold would be different than the 164 threshold.

Senator Tom Fischer observed that if there has been only one question about this raised, he would recommend not making a change. Another option would be significantly change it and wait for comments. Siegel reminded the committee of the IC interpretation. Is the committee comfortable with interpretation? Moore stated that she believes that is what it means anyway; she was not aware of the interpretation. There was consensus of the committee that no draft amendment be requested.

Item 4: Consider Whether and How to Create a New Section to be Used When the Court Orders "Joint" or "Shared" Custody.

Barb Siegel asked Brad Davis to provide an overview. Davis distributed a related handout. Siegel mentioned that this issue was looked at by two previous guidelines committees. The first time no change was made. The second time, the committee decided to address the more common occurrence – extended visitation. Davis related that the Regional Child Support Enforcement Units are always asked for issues for consideration. This year the units also attempted to provide proposed solutions instead of just problems. The units do a lot of guidelines calculations. He noted that the label in the handout is a little misleading. It may be better labeled 'equally shared' or 'equally split.' There are rare instances where true intent of parties is that child is with each half of the time—parents live two blocks apart. Sherry Mills Moore suggested that the language 'equal physical custody' would be needed. There are lots of orders with 'joint custody' or 'shared custody' language that don't actually mean the child is with the parents an equal amount of time.

If the extended visitation calculation is used when the parties are close to a 50:50 split, it must be determined who is the custodial parent and who is the noncustodial parent. This could be different from year to year. Brad Davis said the proposal was similar to calculations performed in split custody determinations rather than deciding to look at one of the parties as the custodial parent and one of the parties as the noncustodial parent. Davis reviewed the scenarios in the packet he distributed. To make this work, the proposal would be a threshold—meet it or not meet it, based upon whether an order contains the 'magical' phrase. He also stated one would do equally shared calculations and not extended visitation calculations--never both calculations. Doesn't know how this interplays with legislative intent. Barb Siegel reviewed notes from last Guidelines Drafting Advisory Committee meeting (page 6 of the June 9, 1998 meeting). Sherry Mills Moore asked if there wasn't a 50:50 split recent Supreme Court decision. Paulette Oberst suggested she may be thinking of Knutson. Basically, the court said the equal custody arrangement was outside of the guidelines and thus the guidelines don't apply. Blaine Nordwall stated this may create a problem with compliance with federal law. It was noted that the Supreme Court didn't address section -02(9) of the guidelines which states a determination of a child support obligation is appropriate in any matter where the child and the child's parents do not reside together. Melissa Hauer asked what is the rationale for making one parent pay the other if there is a 50:50 split. Nordwall responded that the premise is an attempt to leave the child in a similar or most nearly similar position had the child lived with both parents. It is basically a shift in wealth.

Calvin Bergenheier asked how the guidelines consider situations where the custodial parent is married to someone who makes a lot of money? Child is in better position financially than with the noncustodial parent. Nordwall responded that he is relating to something which cannot be considered – stepparents are not legally financially responsible for a stepchild.

Barb Siegel stated that if we are truly looking at 50:50 split, if there actually is such a thing, she may be uncomfortable with saying neither parent should pay. Brad Davis said their workgroup never considered that neither parent would pay child support. Can split custody determinations really be made applicable with only one child? Sherry Mills Moore commented about considering thinking about it mathematically as one half a child with each parent. Blaine Nordwall noted that the committee is obliged with the Statement of Intent to limit our discussion to exact 50:50 split. Nordwall noted that because we count nights, this is a mathematical impossibility. 365 days per year cannot be evenly divided. Davis stated that custody schedule is per court order which is rarely what it actually is. Call it equal, even if it actually is not according to a calendar. Would have to be clear there was intent for custody to be equal. Siegel asked if there would be a need to define such an arrangement in the statute as well as in the guidelines? There are possible lame duck issues with existing orders but that is true with many issues. May need to level the playing field by having one parent pay another. Moore stated that she has been long unhappy with tying visitation to money. Melissa Hauer stated that the cases she has seen are situations where the incomes of the two parents are fairly equal. Davis noted that if the income is exactly equal, then no payment. He also noted he is not seeing any cases in his caseload, but it is apparently more prevalent in the Red River Valley. Moore stated she does have some private cases. Nordwall noted he has actually seen only one such order. Moore stated she is seeing more than what she used to see. Nordwall stated he does not understand the rationale of attorneys saying to judges there is no custodial parent. Moore responded that the situation doesn't meet the definition of custodial parent in the guidelines. Siegel observed that the guidelines contemplate a custodial parent. Nordwall stated that close to equal time actually means equal time in the Statement of Intent. Nordwall suggested looking at what the Supreme Court actually said in the Knutson case. Hauer offered to have her assistant get a copy for the committee.

Barb Siegel suggested that general instructions subsections -02(1) and -02(9) as well as section -13 will need to be reviewed if the committee moves in the direction of changes in 50:50 splits. Blaine Nordwall agreed that if there are actually cases like this we need to make sense with it in the guidelines and ensure federal regulations are met. Siegel suggested it might be helpful to look at what other states are doing in similar situations. Nordwall noted that it will be important to keep in mind the wide disparity of the different states' models. Siegel suggested starting by looking at obligor models with similar extended visitation situations. Sherry Mills Moore cautioned, "don't let the tail wag the dog that much" with this. Brad Davis agreed that yes, only look at 50:50 split. Davis shared some information. Wisconsin has a graduated chart. If going with split

custody where both incomes are looked at, need to decide which other provisions of the guidelines apply.

Blaine Nordwall suggested that the committee consider if this should be addressed before determining how to address it, especially since an equal split is mathematically impossible. Nordwall suggested the committee should really talk about implications. Nordwall noted the reason guidelines and federal law exist in the first place is there were real disparate levels of power between the custodial and noncustodial parents. Guidelines were intended to correct this problem. We would leave people power to say we have 50:50 split even if it isn't actually happening. Melissa Hauer questioned the need to modify the statute to look at both parent's income during a review. Discussion occurred as to whether we would have two noncustodial parents in a 50:50 split because we have to determine an obligation for both.

A copy of the Knutson decision was received. Barb Siegel reviewed some relevant areas with the committee. Parties stipulated that each parent would have custody for equal amount of times and that neither parent would receive child support from the other parent. Mother later sought to set aside the decree. On appeal, the Supreme Court said that the guidelines don't address situations where parents share equal custody and when guidelines don't address a situation, the trial court must issue an order based on child's needs and parents' ability to pay. Blaine Nordwall stated we should address in the guidelines in such a way that courts cannot avoid using the guidelines. Calvin Bergenheier stated his preference for the judge making a determination based on evidence. Sherry Mills Moore stated that usually parties have agreed. Brad Davis stated they have agreed with custody arrangement and no child support. No child support because they can get away with that. Davis contemplated that we can direct the court in these situations. Paulette Oberst questioned how these cases get back to court. Moore responded that over time reality of where the child is changes and it becomes a financial issue. Davis reported that Grand Forks and Fargo attorneys are seeing noncustodial parents who are paying support and still are raising children and paying a large amount of the costs, getting only the extended visitation deduction. Nordwall observed this really is an issue about someone becoming unhappy and usually this will be for money reasons.

Barb Siegel observed that the Supreme Court said the guidelines don't apply. If we feel that is fine, then the committee would take no action. Both Blaine Nordwall and Siegel agree, however, this may be a problem with federal requirements.

Between meetings, the Child Support Enforcement Division will look at other states, will have contact with the Feds, and ensure a copy of the Knutson decision is provided to committee members. At this point, there will be no draft. If material is compiled in enough time, information will be shared with members prior to meeting.

Representative William Devlin noted that if we do nothing then we have, in essence, income shares which the legislature has repeatedly rejected. Blaine Nordwall responded that this is true for 50:50.

Item 5: Determination of Support Amount – Split Custody, § 75-02-04.1-03.

Consider Addressing Treatment of Extended Visitation Adjustment in Split Custody Cases.

Barb Siegel distributed IC-C0-00-09 and asked Paulette Oberst to review the issue. This issue was identified shortly after the guidelines were adopted. There was a case which involved extended visitation and split custody. The question posed was which calculation is done first. Interpretation was issued that the extended visitation calculation is done first. It was felt there was pretty firm ground for this interpretation. In the split custody section it says to determine the amount of support for each and then offset for a difference. Any internal calculations need to be done first. Oberst noted that it is speculated that this question was posed because the attorney was probably looking for guidance and came across § 75-02-04.1-06.1(5)(b) which provides guidance relating to order of calculations in multiple family and extended visitation situations. A seasoned attorney with experience in split custody probably wouldn't have had the question. Siegel said there are valid reasons for the specified order of calculations in multiple family situations that do not exist in split custody situations. Siegel stated she feels clarification is not necessary but did want to bring it to the committee's attention since the guidelines do not specifically provide direction and an interpretation was issued. Blaine Nordwall noted that the split custody section included provisions for an offset so you have to do all other calculations first. The offset is just a device so people don't have to write two checks. Consensus of the committee is to suggest no change.

Item 6: Determination of Support Amount – Split Custody, § 75-02-04.1-03.

Consider Revising Language to Clarify That the Amount Paid by the Parent with the Greater Obligation to the Parent with the Lesser Obligation is a "Transfer" Payment, Not the "Child Support Obligation".

Paulette Oberst provided a review of the issue. There is uncertainty about meaning of language in last sentence of -03. In split custody, guidelines require that a support amount be determined for each parent then the lesser amount is subtracted from the greater and the parent owing the greater amount pays the difference to the other parent. The difference is referred to as the child support amount. Is the difference intended to be the "child support amount" or merely a transfer payment established for administrative ease? Two issues need special consideration: (1) Assignment of support rights when a family receives TANF. For example, if Dad's child support is \$500 and Mom's child support is \$400 and Mom goes on TANF and assigns her child support, is \$500 assigned? Or is \$100 (the difference that Dad pays to Mom), the amount that is assigned? Or, if Dad goes on assistance and assigns his child support, there is no money coming through the State Disbursement Unit to "assign." (2) Review and Adjustment. According to statute, must pursue adjustment if the order amount is less than 85% of the guidelines amount as per the review. Question for review and adjustment is what is being compared? Dad's old amount to Dad's new amount and

Mom's old amount to Mom's new amount or it is a comparison of the old difference to the new difference? This can be critical. Has caused a lot of confusion. Really Dad owes support and Mom owes support. Paying the difference is simply for convenience of the parties. Blaine Nordwall stated he doesn't like the term "transfer payment" because it means something in particular in economics. He also noted he thinks there is a serious consideration with this issue. Consensus of the committee is that each owes an obligation and each amount is the actual child support amount. Nordwall pointed out that, in addition to consideration of assignment in the TANF program, the amount of the deduction allowed in the Child Care program is also an issue. Sherry Mills Moore asked if this needs to be addressed in the guidelines or if this is a program issue and an assignment issue. Barb Siegel stated that she thought it was a guidelines issue in that the guidelines references "child support amount" as the amount of the difference. Nordwall observed that the really smart thing to do is for each parent to pay the calculated amount. In review and adjustment situations, the 85% test would then apply to each obligation. Brad Davis countered that then the problem would be one wouldn't pay. Using the previous example, a parent who should come out \$100 ahead could end up coming out \$300 behind.

The committee took a break at 2:50. Senator Tom Fischer excused himself from the meeting due to another commitment. Blaine Nordwall and Melissa Hauer also excused themselves to attend a short meeting with the Executive Office. The committee reconvened at 3:30 p.m.

The committee continued its discussion of Item 6. Another term to use to refer to the difference is "offset amount." Possibly fix language in the guidelines in line with consensus of the committee and deal with the implementation problems outside of the guidelines. Blaine Nordwall suggested that records could be maintained to reflect both obligations and offset would be normal practice unless there is an assignment of support. Barb Siegel asked whether special wording in the court order would be necessary? It is unclear. Siegel asked what language would be appropriate for this section? Melissa Hauer suggested change to the last sentence only and we wouldn't have to coin a phrase: "The difference is the ~~child support~~ amount owed by the parent with the greater obligation to the parent with the lesser obligation."

Brad Davis stated that in practice in review and adjustment situations, he used the offset amount when applying the 85% test, rather than applying it against Mom's and Dad's obligations separately. What if one parent's obligation is outside of the range of the 85% test and one parent's obligation is not? The committee reviewed the statutory language. Blaine Nordwall stated he believed it was not inconsistent with statute to review the whole order, otherwise it just doesn't make sense.

Blaine Nordwall stated that if there is an assignment, then there shouldn't be an offset. Implies obligations are mutual. If assignment, obligations are not mutual. Would like to see a draft that would call them something different, and add something regarding the review and adjustment and the fact that the offset is not applicable when there is an

assignment to the state. Barb Siegel noted that if there is assignment at time of entry of the order, it is different than if the assignment comes up later. Nordwall suggested there could possibly be system programming to activate obligations of each parent upon assignment. Siegel noted that immediate notice to each party would be very important. Brad Davis noted that income would likely be imputed to the TANF recipient who likely couldn't pay. Then we would ask the other parent to pay the whole obligation. Nordwall acknowledged the concern. Nordwall also observed that it probably is not wise to reprogram FACES for the likely small number of split custody cases. Sherry Mills Moore suggested that split custody situations are more likely to occur when children are older. Her sense is that people who receive benefits are more likely to have younger children. Nordwall acknowledged validity.

On a separate note, Sherry Mills Moore suggested that the word "sole" be removed. Barb Siegel noted that the "split custody" definition would need to be revised as well then. May want to substitute 'physical' with 'sole'. Blaine Nordwall suggested that since we do define custodial parent, a grammatical alteration would be to simply use 'custody.'

The committee discussed possible language changes as follows:

A child support amount obligation must be determined for the child or children in each parent's sole custody. The lesser amount obligation is then subtracted from the greater. The parent with the greater obligation shall pay the difference is the child support amount owed by the parent with the greater obligation.

Blaine Nordwall suggested that the section may need to be crafted with subsections due to the assignment concern. Possibly leave first sentence. Subsection 1 would say except for subsection 2. Subsection 2 would say what would happen if there is an assignment. Melissa Hauer will prepare a draft along these lines as well as the committee's other suggested language changes.

Item 7: Determining the Cost of Supporting a Child Living with the Obligor, § 75-02-04.1-06, and Determination of Support Amount in Multiple-Family Cases, § 75-02-04.1-06.1.

Consider Clarifying That Other Children of the Obligor Refers Only to Minor Children
Paulette Oberst provided an overview of the issue for consideration. In an establishment case, the noncustodial parent had adult children from other relationships. The judge said the multiple family calculation had to apply because it wouldn't be fair to the other obligees (i.e., the mothers of other children) if he didn't. There is also a Supreme Court decision to consider. The Zarret decision involved a support obligation for college and graduate school expenses for adult children. The Supreme Court said those payments were in the nature of child support and that the multiple family provision applied. The question is do we need to clarify that we are talking about minor children? Blaine Nordwall requested confirmation that current support is really what we are talking about. Barb Siegel stated that was correct. Siegel offered, as an example, that a disabled child may be attending school through age 21 and ongoing support is ordered.

In that case, the noncustodial parent should be eligible for a multiple family deduction as long as the ongoing support is ordered (i.e., until the child is 21). She also noted that it did not seem right that a noncustodial parent who has paid all ordered support to not get a similar break as a noncustodial parent who neglected the obligation and accumulated arrears. Sherry Mills More noted we also wouldn't have custodial parents trying to raise minor children on less. Section 75-02-04.1-06.1 may be a good place to fix. "Current support" is possible alternate language. "Current" can mean paid up. The committee discussed if "current support" could be interpreted to include an order for an arrears payment. Another possibility for alternate language is "ongoing support obligation." Nordwall questioned whether there is a distinction made relating to income withholding and arrears payments. N.D.C.C. § 14-09-09.30 uses "currently monthly support obligation" which does not include arrears payments. Melissa Hauer suggested that another way to address this is to state this amount does not include arrears payments. Nordwall suggested that use of statutory language might help, e.g., 'owes current monthly support obligation.' It provides for a sound reason for saying this is what this means. It could be worked into (1)(a).

The general consensus of the group was that the multiple family calculation should be limited to those situations where there is only a current duty of support, not including any arrears. Barb Siegel stated that if there was a similar issue with children living with the noncustodial parent, the language should also be added to (1)(b). If children in home are 24 years old, there shouldn't be a deduction. Reason this may be currently addressed in the guidelines is the guidelines refer to the 'cost of supporting a child' and definition of 'child' says 'owes a duty of support.' Difference is that § 75-02-04.1-06.1(1)(a) doesn't use the term 'child.' § 75-02-04.1-06 and -06.1(1)(b) does use the term 'child.' Brad Davis questioned treatment of situation where a parent voluntarily agrees to support. How is that really different than agreeing to let an adult child live at home and provide support? Davis conceded he actually is comfortable with this, it just seems odd.

Blaine Nordwall suggested that we want to create a new subsection which would say that these calculations are only applicable to cases where there is a 'current monthly support obligation.' Nordwall suggested that in § 75-02-04.1-06.1 we add a general instruction by creating a new subsection to § 75-02-04.1-06.1. This new subsection would state that calculations must be made with respect to only current monthly support obligations. Consensus was reached for drafting this type of amendment.

Item 8: Determining the Cost of Supporting a Child Living with the Obligor, § 75-02-04.1-06, and Determination of Support Amount in Multiple-Family Cases, § 75-02-04.1-06.1.

Consider revising language in § 75-02-04.1-06 to eliminate potential ambiguity when child support determination involves multiple families and split custody.

Paulette Oberst provided an overview of the issue. Private attorney raised the issue that there is a potential for differing interpretations. At the beginning of the section, there is language which makes it clear that a 'child living with the obligor' is not intended

to include a split custody child (i.e., a child who is also a child of the obligee). The private attorney suggested carrying this qualifying language through to the end of the section. The committee agreed that clearly § 75-02-04.1-06 is intended to only apply to multiple family, not to split custody, but possibly could clarify. If child living with obligor is also child of the obligee, split custody section (-03) must be used. Consensus of the group was to look at a draft consistent with the suggested language offered in the agenda. The language follows:

“The cost of supporting a child living with the obligor, who is not also a child of the obligee, may be deducted from net income under subsection 4 of section 75-02-04.1-06.1 and is determined by applying the obligor’s net income and the total number children living with the obligor, who are not also children of the obligee, to whom the obligor owes a duty of support, to section 75-02-04.1-10.”

Chairman Barb Siegel announced that the committee’s next meeting is scheduled next week.

The meeting was adjourned at 4:40 p.m.