

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

Thursday, June 6, 2002
Sakakawea Room, State Capitol
Bismarck, North Dakota

Chairman Barbara Siegel called the meeting to order at 8:30 a.m.

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

Barb Siegel asked the committee members who were absent from the May 29, 2002, meeting to introduce themselves and share their experience relating to child support.

Paul Wohnoutka: Is a CPA in public accounting. He has 27 years of experience. He has no actual direct contact with child support. He did, however, serve on the 1998 guidelines drafting advisory committee.

Judge Thomas Schneider: Is a judge in the South Central District. Has been a judge (city, county, and district) for 20 years. He is in his 8th year as a district judge. He presides over many domestic cases, including child support cases.

Barb Siegel stated that there is an ambitious agenda for today. Paul Wohnoutka needs to excuse himself from 1:00 – 3:00 this afternoon; therefore, she suggested the committee discuss items that the committee will benefit most from Wohnoutka's accounting and tax expertise when he is available.

Barb Siegel asked that members review the agenda and offer any suggested changes. No changes to the agenda were offered so the committee proceeded with the agenda as drafted.

Barb Siegel asked for any changes to the last meeting minutes. It was noted that a comment attributed to Senator Tom Fischer (regarding recommendation of no change because only one question was received on the issue) should have been attributed to Representative William Devlin. However, both legislators agreed no change was necessary to the meeting minutes. Siegel declared the May 29, 2002, minutes as previously distributed to the members approved.

Barb Siegel moved on to previous business and distributed copies of draft amendments which were prepared in response to the committee's requests during the last meeting. Siegel expressed interest in reviewing all proposed amendments and then, if possible,

vote on all of the amendments at once. Siegel and Melissa Hauer provided a review of each of the drafted amendments.

- § 75-02-04.1-01(10). The definition of "Split custody" was revised to exclude the term "sole" in relationship to custody.
- § 75-02-04.1-02(7). Placement of the modifier "sufficiently" was moved to immediately precede the word it modifies ("documented").
- § 75-02-04.1-03. The drafted amendment incorporates two ideas: (1) to differentiate between the obligation and the payment, i.e., the 'offset' amount and (2) to eliminate application of the 'offset' if either parent has assigned the right to receive child support to a governmental entity.

Barb Siegel asked if a "governmental entity" is intended to be broader than the TANF and Foster Care programs. Melissa Hauer responded that yes that was the intent. Her intent was to include other states. Blaine Nordwall stated he does not believe there would be any harm in expanding beyond TANF and Foster Care. Representative William Devlin questioned if "assigned" is used in a legal sense. He questioned whether someone could simply assign to any governmental entity and if so, if there was something that could prevent that. It was suggested that if the committee's concern was to eliminate the offset when assignment was required for eligibility purposes to simply say that. Nordwall responded that it is difficult to know when the program requirements might change or what other states might call their programs. Blaine reminded the committee that the amendment, as it reads, says only that there will be no offset. Each parent still has an obligation.

Sherry Mills Moore suggested language to the new subsection 1 to say the offset is applicable when a parent has not been required to assign but expressed concern that it may be interpreted that an offset may not be done even if assignment, which occurred in the past, is no longer in effect. In response, Barb Siegel suggested using "is not required to assigned" to make the language current tense. Brad Davis stated that he struggles with the fact that guidelines are used for establishment of orders and assignment could occur later.

Barb Siegel stated the committee could stop after saying two obligations exist; there was overwhelming consensus at the last meeting that two obligations do exist. During implementation we would need to look at how to manage it. The order would have to include two amounts. Brad Davis observed that there should be a mechanism to be able to do this on FACES and there would have to be the authority to do this. Siegel suggested that the court order language would have to say something along the lines of 'If either parent at any time assigns . . .' Davis stated he does not want to muddy the waters in the guidelines if this can be dealt with otherwise.

Blaine Nordwall expressed concern about making the provision overly broad. He offered two suggestions for alternate language: 'if or when required by law' or 'is required by law.' Barb Siegel stated that Brad Davis's point from the last meeting about imputing income to a parent on public assistance and then that parent not being able to make the payment is well taken. The other parent is then left with the obligation to pay the full amount without benefit of the 'offset.' This issue exists today, we are just not enforcing those full amounts. Blaine Nordwall suggested that the committee needs to put into perspective how many cases this provision really could affect. There are less than 3,000 families receiving TANF and relatively few split custody orders. There are many, many more child support cases. This language will affect a very small number, i.e., a tiny handful of cases in comparison.

Barb Siegel stated there are some implementation issues, but acknowledged there may be a limit as to what can be done in the guidelines with this issue. This proposed language is only intended to clarify something that already exists. Judge Thomas Schneider stated that he does not feel the language is actually clarifying. Brad Davis stated agreement. The parent who is doing what he or she is supposed to do is the parent who may be disadvantaged. Judge Schneider stated he believes the issue needs to go back to court. There is a need to give parents notice that the obligation for payment will change. Blaine Nordwall reminded the committee that the obligation is already established; only the payment changes. Judge Schneider again stated he believes the issue should go to court for purposes of notice. Nordwall agreed that it would be troubling to parents to have the *payment* amount change; they don't care as much about the obligation changing.

Blaine Nordwall asked if we have rule that we will offset these amounts, what is the basis that we do not offset anymore? The guidelines say we do the offset. Brad Davis stated that as long as there is an offset it is fine, but if there is an assignment, then maybe we need to allow for multiple family calculations. Nordwall repeated that the rule says you do the offset. What is gained by going back to court? What if circumstances have not changed? For example, let's say Mom is still unemployed so imputed income would be appropriate, but now Mom is on TANF. Sherry Mills Moore stated that eliminating the offset could be putting one parent in a bad position and they have really done nothing—i.e., the other parent is the one who assigned the child support. Barb Siegel stated that a concern about bringing it back to court is that families go on and off TANF frequently. Judge Thomas Schneider observed this also means that parents' payments change frequently as TANF opens and closes. This is also bad. A member suggested that possibly the governmental entity should maybe just have a reduced amount (the 'offset' amount) to absorb. Nordwall responded that if this affected a significant number of TANF cases, he would be extremely concerned. However, he acknowledged this really will affect only a relatively small number of cases.

Sherry Mills Moore questioned why benefits are not considered income. Blaine Nordwall responded that it is because it has been defined that way. The benefits are

means tested. Nordwall also stated that when income is imputed, it is imputed at a good deal more than what is paid to a family through the TANF program. Actually the TANF family only gets about one half of what imputed income would be. Moore requested confirmation that income is imputed at minimum wage to a TANF person. Barb Siegel responded yes, if the person is able to work and does not otherwise meet any of the exclusions for imputing income. She also noted this is true for anyone, TANF recipient or not.

Barb Siegel observed that several members expressing concerns suggested eliminating the assignment part of the draft amendment for this section. Blaine Nordwall acknowledged that there is no good solution to this issue. Senator Tom Fischer stated that he would just as soon leave the decision to judges. He stated that he has a real problem with amounts changing from month to month. Nordwall verbalized that he believes the whole committee has reached a consensus that we all have a problem with that.

Blaine Nordwall suggested that the committee could fix the confusing reference to the 'obligation' and the 'amount' so that each means something and then leave the current offset language in the guidelines unchanged. Barb Siegel reviewed what this would mean. The draft amendments would remain a part of the introduction and the rest of the draft amendment relating to elimination of the offset upon assignment would be rejected so the section would state, "Determination of child support obligation – Split custody. A child support obligation must be determined for the child or children in each parent's custody. The lesser obligation is then subtracted from the greater. The difference is the child support amount owed by the parent with the greater obligation." There was general consensus that this amendment, redrafted as discussed, could be included in the group of proposed amendments to be considered for approval by the committee.

- § 75-02-04.1-06. The phrase, "who are not also children of the obligee" was added near the end of the section to make it clear that children of a split custody situation are not considered in the calculation under this section.
- § 75-02-04.1-06.1(7). This subsection was added to clarify an issue relating to multiple obligees; that application of the multiple family calculation for duties owed to multiple obligees applies only when there is an obligation for current support—not arrears. Barb Siegel suggested adding the term "support" so there is reference to "current monthly support obligation" consistent with the phrase used in statute (N.D.C.C. § 14-09-09.30).

Barb Siegel related that at last meeting the committee discussed whether or not the new subsection should apply to -06 (children in the obligor's home) also. As drafted, it really doesn't. If child is in home, there is no current support obligation, that is, no court order. However, in -06 the term 'child' is used, which may help. Brad Davis stated the focus of the draft amendment should be the 'child,' not the obligation.

Alternate language possibly is, "only children for whom an obligor owes a current monthly support obligation." Blaine Nordwall reminded the committee of the desire to avoid using "minor" child and "current" support. "Minor" child is not always correct (there may be a current support obligation for a child who is not a minor) and "current" really has two meanings.

Barb Siegel suggested leaving the language as drafted in the new subsection 7, but in -06, add 'minor' or similar language. Blaine Nordwall asked if a 20-year old child is in the household, does that count? It shouldn't count. However, if a child who is 18 and in high school, that does count? Simply moving from minority to majority isn't necessarily a bright line. Siegel noted there could be disparate treatment if the noncustodial parent who owes a duty of support to multiple obligees is not given a deduction when voluntarily (not under a support order) providing college expenses to the child, but a noncustodial parent providing college expenses to a child in his or her home is given a deduction. People who provide such support by choice are not going to get a credit under -06.1 but would under 06? Nordwall acknowledged this is true. Siegel reminded the committee that the focus of this issue was to address the issue of multiple obligees. We have not had questions on -06. The second part of the -06 calculation does get into -06.1. Siegel suggested that we may we want to limit applicability to calculations relating to multiple obligees.

It was suggested that a phrase be added to the new draft subsection 7 which would limit its applicability to multiple obligee calculations. Sherry Mills Moore commented that this section of the guidelines is much more usable because of the forms developed by Child Support.

The committee arrived at consensus for the following alternate language for the new draft subsection 7: "Only children for whom an obligor owes a current monthly support obligation may be considered when determining a support amount under subsection (4)(a)(1)." Consensus of the group was that this amendment, as redrafted, could be included in the group of proposed amendments to be considered for approval by the committee. Blaine Nordwall noted there may have be technical changes as needed to properly refer to 'subsection,' 'subdivision,' etc.

§ 75-02-04.1-07(2) and (3). Amendments were drafted to clarify the applicable time period for this provision of the guidelines. Barb Siegel reported that notes of some members of the committee conflicted as to where "monthly" was to be removed. The committee agreed that in addition to the proposed draft amendment, the reference to "monthly" in the introductory paragraph of (3) and (3)(b) should be removed. There was general consensus that this amendment, with these two changes, could be included in the group of proposed amendments to be considered for approval by the committee.

Sherry Mills Moore made a motion that the revisions found in the June 4, 2002, document of draft amendments with the revisions discussed today be accepted as

proposed amendments. Senator Tom Fischer seconded the motion. Barb Siegel asked for a roll call vote. A roll call vote was taken and the motion was carried unanimously with all members present and voting.

Barb Siegel distributed copies of an updated document of issues for consideration to include those submitted by Paul Wohnoutka and Calvin Bergenheier.

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

It was decided it might be helpful to initially discuss all self-employment agenda items at one time.

Item 1: Determination of Net Income from Self-Employment, § 75-02-04.1-05.

Consider whether to revise the language in –05(1) to clarify the definition of net income from self-employment.

Item 2: Determination of Net Income from Self-Employment, § 75-02-04.1-05.

Definition of “obligor’s business”.

- a. Consider whether and how to treat income of a corporation controlled by the obligor.
- b. Consider clarifying what constitutes income from self-employment (e.g., rental income).

Item 3: Determination of Net Income from Self-Employment, § 75-02-04.1-05.

Five-year average of self-employment income.

- a. Consider treatment of negative income (i.e., losses) from self-employment.
- b. Consider when and how to impute income to a self-employed obligor if the result of the five-year average indicates the obligor is underemployed.

Item 4: Determination of Net Income from Self-Employment, § 75-02-04.1-05.

Travel, meals, and entertainment.

Consider whether to limit the amount for travel, meals, and entertainment that must be added back to the obligor’s income to the amount that the obligor can deduct for tax purposes.

Barb Siegel distributed a packet of tax forms for the committee’s reference while discussing self-employment and other issues. Siegel asked Paulette Oberst to provide an overview of the self-employment provisions in the current guidelines.

Paulette Oberst reported that the 1999 revisions raised a number of questions in regards to determining net income from self-employment. The starting point in the determination is total income for IRS purposes, of the obligor and the obligor’s business. Total income can be found on Line 22 of Form 1040. Once at this starting point, some items are subtracted—mainly income which is not from self-employment. This is so that

other income is not counted twice. For example, employment income is counted elsewhere. Also, some things are added to the starting point—those things are listed in the guidelines. Examples are travel, meals, and entertainment and payments made to a member of the obligor's household if the payment exceeds the fair market value of the service performed by the household member. Previously, adjusted gross income was used as the starting point and depreciation was added back in. Now depreciation is considered as a business expense similar to other operating expenses. The current guidelines also require averaging business income over five years, providing that information is reasonably available and the business is operated on a substantially similar scale over time. Previously, the averaging requirement was limited to farm income.

Barb Siegel related that Paul Wohnoutka suggested revision to the introductory paragraph to subsection 1 so it states, "Net income from self-employment means total income . . . of the obligor and the obligor's business, reduced by the amount, if any, of that total income that is not the obligor's income ~~from self-employment~~ or is included elsewhere in gross income, plus." This would, for example, take out income of the obligor's spouse (if a joint return) and income that is going to be counted elsewhere such as interest and dividends. Wohnoutka stated he is concerned about the definition of self-employment. For example, is rental income self-employment or not? According to the IRS, the answer is no. The language of the guidelines makes it appear that it should be included in self-employment income. His concern is using terminology regarding the obligor's income "from self-employment." He also suggested that we should look at what is happening with partnerships and Sub S corporations and use those concepts in looking at C corporations. He briefly described differences between these entities. For example, with C corporations, the corporation pays taxes on its income. In partnerships and Sub S corporations, the individual pays taxes on the income. Income from those entities is included on line 22 of Form 1040. He provided an example of four brothers in a farming operation. Each brother draws out \$20,000 and leaves \$30,000 in the business. Each brother is taxed on \$50,000.

Paul Wohnoutka also discussed control and ownership issues. A sole proprietor has total control of the business but with a partnership or Sub S corporation, an individual does not necessarily have control of how much is taken out of the business. There may be a differential based on the level of ownership. Barb Siegel noted there was a Supreme Court decision which started to address this subject.

Barb Siegel asked if there are general rules in a partnership. Paul Wohnoutka stated that the rules are as defined in the partnership agreement. Siegel stated she is trying to think about the level of control which might exist to manipulate income for guidelines purposes. Wohnoutka responded that the "garden variety" partnership is an equal split based on ownership. However, sometimes one person is allocated a bigger slice because that person puts in the required capital or is doing more of the work.

Line 22 already considers quite well what should happen in S corporations and partnerships. However, in C corporations, we aren't picking up what is not taken out of the corporation. Judge Thomas Schneider stated if income is taken out, it will be taxed. Paul Wohnoutka responded that eventually that will be true. Sherry Mills Moore observed that this could be after the children are 18. Wohnoutka noted that if income is left in a C corporation, it doesn't escape tax, but it does escape guidelines calculations. Wohnoutka suggested that a simple calculation could be done to bring C corporations into the guidelines calculation. Blaine Nordwall stated that the question of whether a business organization or entity is subject to the obligor's control as referenced in -05(3) cannot be made by a mathematical calculation.

Paul Wohnoutka asked how the definition of the obligor's business in -05(3) relates to -05(1). Blaine Nordwall responded that -05(1) would not apply if it cannot be shown that the obligor has control of the business such that it is considered the "obligor's business" as defined in -05(3). Melissa Hauer observed that if someone has a C corporation, that person is not self-employed. She questioned how -05 would apply to this person. Paulette Oberst stated that this was a topic of discussion at a recent Family Law Seminar. There were two schools of thought: some people thought that a person who has a C corporation is an employee of the corporation and is not self-employed while other people thought that a person who is the sole or possibly majority shareholder in a C corporation would be able to exercise the control addressed in -05(3).

Paul Wohnoutka stated he thinks the definition of "obligor's business" is great, but so what since you can't get to the income of a C corporation for -05(1). Calvin Bergenheier stated that he thinks there is a need to have consistency. If money was put back into the business before the divorce, then the individual should continue to be able to return money to the business after the divorce. The goal is to keep the child at same financial level as if Mom and Dad were still together. Wohnoutka stated that his point is well taken, however, if you take a C corporation and a sole proprietorship and compare the two, with each leaving the same amount in the business each year, one's income is counted and the other's is excluded. This is not consistent.

Barb Siegel asked if the committee's general feeling is that self-employment under -05 should include C corporation income. Sherry Mills Moore stated that she thinks so. Brad Davis stated that he does not think we can necessarily answer that. He believes a decision would need to depend on the level of ownership. Blaine Nordwall stated that he thinks the definition of the obligor's business was intended to address that, i.e., to distinguish General Motors from a small business. Judge Thomas Schneider related the need to refer to the definition of 'control' of the business. Davis stated that it is reasonable to assume you have to leave some money in a business. The question is what amount is reasonable.

Barb Siegel asked about leaving it to court discretion whether to include income of a C corporation. Judge Thomas Schneider responded that if you want to make it simple,

count the income but he also noted there are many reasons to leave money in a business.

Barb Siegel asked what the committee thought about including C corporation earnings and then having a downward deviation to be used in the court's discretion. Another option might be not to include C corporation earnings but then have an upward deviation to be used in the court's discretion. A problem with the second option is that the burden would be on the obligee to show why an upward deviation would be appropriate but the obligee may not have access to the information needed to make this showing to the court. Sherry Mills Moore stated that she believes there is already a deviation available; she referred to the upward deviations related to assets and asset transactions. Siegel stated she believes there is a need for a general rule and then an opportunity for court discretion. Siegel stated that, if the idea of a deviation in this area is used, her preference would be to include the income and then allow for a downward deviation. Calvin Bergenheier stated he believes it should be the other way around. Brad Davis stated that he prefers it not be part of a deviation.

Paul Wohnoutka again said that a simple formula could be developed for including income of a C corporation. This raised the question of what corporate income amount should be looked at in the formula. Paulette Oberst related a question from a judge in the Grand Forks area. The judge was looking at including corporation income in the guidelines calculation but he didn't know what amount to use. The definition in -05(1) refers to "total income" for IRS purposes, of the obligor and the obligor's business. There is a "total income" figure on the corporate tax return. However, this represents corporate income before deducting any operating expenses, etc. "Total income" as reflected on a corporate income tax return would not be the correct amount to use for guidelines purposes. The consensus of the committee at this point was to look at a formula to include C corporation earnings when the obligor has control over the business (i.e., when -05(3) applies). Barb Siegel asked for Wohnoutka to help with a formula.

Calvin Bergenheier stated that if he is married and is putting money back (10%) into his business and then he divorces, he should still be able to put back 10%. Brad Davis stated that he is putting money back because he can. But if he needed the money to support his children, he would not. Bergenheier stated that a decision to put money back into the business should not have to change when there is a divorce. Paulette Oberst said that prior to divorce, those decisions about the business were made mutually; after the divorce, the mutual decision-making probably no longer exists and that decisions made prior to the divorce may have to be re-evaluated. Sherry Mills Moore stated that what Bergenheier really is talking about is making the business grow, not keeping it operating—paying expenses. This is not allowed anywhere else. Barb Siegel asked if there is general consensus for Paul Wohnoutka to offer a simple calculation which would be used after the control issue is determined.

Paul Wohnoutka sees a formula as an addition to -05(1). Melissa Hauer asked if it would help to take out the word "self-employment" if that is seen as too limiting. Wohnoutka suggested "Determination of net income from obligor's business" for the title of the section. Judge Thomas Schneider stated he does not want to remove the "self-employment" term. This led to a discussion of the treatment of rental income. Wohnoutka stated that rental income is not self-employment income. Yet Wohnoutka and Blaine Nordwall agreed that rental income is subject to manipulation and that it should be subject to averaging. Barb Siegel stated that no matter what it is called, it will be included in gross income. If it is labeled as self-employment income, then it will be averaged. Otherwise, only rental income for the most recent year will be looked at.

Paul Wohnoutka said it was important to be aware that self-employment taxes relate to "self-employment." He does not think, for guidelines purposes, that self-employment income should be defined by whether self-employment taxes are paid. Blaine Nordwall stated there is too much weight placed on "self-employment." The committee needs to look at the control and manipulation factor and whether it makes sense to average a particular type of income.

Sherry Mills Moore said that "self-employment" seems to have a more narrow definition than we would like. She pointed out and suggested use of the fluctuating income provision in -02(7) to average income when it seems appropriate. You would get the same result whether it is averaged as self-employment income under -05 or as fluctuating income under -02(7). She said that they usually have several years of tax returns available anyway so income could be averaged. Paulette Oberst said that this may be true in divorce cases but that the IV-D program doesn't always have multiple years of tax returns to look at. Brad Davis asked, where is the line? What is averaged and what is not? Paul Wohnoutka suggested using "determination of net income from self-employment and other ventures." He stated that "self employment" is a limiting term but that maybe we could add some more words to expand its applicability.

With respect to income averaging, Brad Davis observed there can be ventures of different time periods. Sherry Mills Moore said to average each venture separately. Paul Wohnoutka agreed. Brad Davis agrees also but asked if that needs to be stated or is it just implied. Barb Siegel stated that she thinks current language could be read to mean to do averaging separately. -05(5) says "to extent that information is reasonably available." Davis suggested language clarifying that you do an average of each business operation. The consensus of the committee is to average each business operation separately if appropriate under the "substantially similar scale" language.

Agenda Item 2a – Paul Wohnoutka will do some drafting to the effect that if the control test in -05(3) is met, then C corporation earnings will be included in the calculation in -05(1). **Agenda Item 2b** – Some nontraditional types of income need to be included in the self-employment section but we may need to stay away from the term "self-employment" if it is too limiting. Blaine Nordwall suggested referring to the determination of "net business income" instead. Wohnoutka suggested referring to the

determination of "net income from self-employment and other ventures." Another suggestion is to continue to refer to "self-employment" but define it as including nontraditional types of income and list some of those types similar to the definition and examples of gross income in -01(5). Barb Siegel stated that she would prefer to have the definition in -01 instead of in -05 so it has broader applicability. The group's consensus is to add a definition in -01 for self-employment and look at the 1040 form (specifically lines 12, 17, 18, 21) for possible items to include in a list of examples of self-employment. Nordwall issued a reminder to also include language relating to control in the definition.

Agenda Item 3 – Barb Siegel distributed handouts to illustrate the treatment of losses from self-employment and asked Paulette Oberst to summarize the issue. Oberst stated that the issue of how to treat losses from self-employment has been raised many times from a variety of sources. When averaging business income over 5 years, some or all of those years could be loss years and the resulting five-year average could also be a loss (i.e., a negative amount). We have been hearing that the losses often result from large depreciation expenses. The handout illustrates some of the options for how to handle the losses, but should worn A shows a straight average in which the loss years are included and offset the gain years. Under Option B, loss years are not factored into the average; in effect, they are treated as zero. Under Option C, income based on minimum wage is imputed to the obligor for the loss years. Paul Wohnoutka suggested a new Option D: start with Option A and if the resulting five-year average is less than a minimum wage amount, impute income to that obligor. Brad Davis believes Option D is in line with the consensus of the regional offices. Sherry Mills Moore and Wohnoutka do not think it is realistic to exclude loss years. Davis suggested that if the obligor has no other income, Option D should be used. But if the obligor has other income, that other income should be combined with the self-employment loss and if the obligor is underemployed, income should be imputed. The consensus of the group was that self-employment losses should be included in the five-year average.

Discussion then focused on the treatment of losses from self-employment when the obligor also has income from other sources, such as earned income. Paulette Oberst asked if a loss from self-employment should be able to be used to offset earned income. Brad Davis described a recent case where his office had unsuccessfully argued that a self-employment loss can't be used to reduce other income. Barb Siegel also described a case where the obligor had a full-time job earning \$40,000 per year but the losses from his farming operation on the side almost completely consumed his earned income.

Blaine Nordwall suggested that if self-employment losses are used to reduce earned income we should see if the obligor is underemployed and, if so, income will probably be imputed at 90% of earnings. However, if an obligor is working at two jobs, the obligor is probably not considered underemployed. It would be necessary to create a new presumption of underemployment for these situations. Michelle Skaley said that her personal case is exactly like the situation being described. The obligor has wages from working for his father but he is also showing huge losses every year from the

farming venture he has on the side. Those losses were allowed to offset his wages. The obligor expects his farming venture to start turning a profit in ten years but by then her child will be sixteen. Brad Davis asked if what the obligor really wants to do should drive what the child support obligation will be by allowing self-employment losses to reduce employment income. Nordwall noted that farming and ranching are favored in the tax code. Losses shown on paper are not real losses in the pocketbook. Senator Tom Fischer noted that it can sometimes take years to get out of a farming operation. He said we need to look at honest people who are trying to better themselves and that we should not be telling them they have to go into other businesses. Computations need to be based on reality. Nordwall stated that imputed income is based on the obligor's ability to earn. Minimum wage is at the bottom. Other considerations include what the obligor has been trained to do and the obligor's earnings history. Senator Tom Fischer noted that not all cases are cut and dry and there is not always somebody at fault. He does not have a problem with imputing income but does have a problem with not considering the obligor's losses. He would prefer to use incentives rather than punishment. Davis asked where a line would be drawn. If someone has sufficient earned income to sustain a certain lifestyle, would a loss be allowed to reduce that earned income? Barb Siegel stated she is especially concerned about self-employment losses offsetting wages since the current guidelines no longer add back depreciation expenses. Child support amounts have gone down as a result. Depreciation is an expense on paper. We need to consider the 1999 changes when we consider making further changes at this time. Sherry Mills Moore stated that depreciation is a legitimate business expense. Davis also disagreed regarding the effect of not adding back depreciation any longer. He believes that under the previous guidelines we had inflated obligations because we were adding back depreciation but were not routinely deducting principal payments because obligors often lacked the documentation needed to substantiate the principal payments. Siegel noted that we are not going to resolve this issue. With respect to agenda item 3a, she asked if there is a need to clarify in the guidelines that loss years can offset gains when computing the average. Sherry Mills Moore believes the guidelines already say that and suggested that a policy interpretation be issued. The consensus of the committee is that no changes will be made based on items 3a or 3b and that the committee agrees that losses from self-employment may offset self-employment income.

The committee broke for lunch at 12:25 p.m. to reconvene at 1:00 p.m.

Barb Siegel called the meeting back to order at approximately 1:00 p.m.

Barb Siegel provided a review of the pre-lunch discussion. We really like certainty, which usually leads to consistency. But sometimes we can't achieve certainty in the guidelines and really need to have court review. It depends on the situations in the cases you are looking at. Sometimes the guidelines calculation will be done one way or another, depending on who is doing it. If the parties mutually agree, fine. If parties don't agree, they go to court. Senator Tom Fischer agreed. Representative William

Devlin expressed concern that some parents may agree, but one party may not fully understand.

Item 19: Parental Responsibility for Children in Foster Care or Guardianship Care, § 75-02-04.1-11.

Consider application of extended visitation concept to foster care situations.

Barb Siegel provided a brief review of what happens when a child goes into Foster Care. Child Support Enforcement gets a referral for pursuit of child support. If there is an intact family and a child goes into Foster Care, child support is pursued based on the combined income of the parents. If there is a non-intact family and a child goes into Foster Care, many times an order for one parent to pay child support already exists. Child support is pursued against the other parent. For example, Dad is ordered to pay child support to Mom. When the child goes into Foster Care, support that Dad pays for that child is assigned. The regional child support enforcement unit then pursues an order for Mom to pay support. Foster care is typically very expensive. Most often, court ordered obligations do not come close to covering the cost of care. However, the obligation is still based on ability to pay.

Barb Siegel stated that something frequently discussed is reunification. After the guidelines were finalized in 1999, the Stark CSSB director became aware of the extended visitation credit and asked if something similar couldn't be applied in Foster Care cases. The reason is that the custodial parent must maintain the home for the child to return to. Barb Siegel cautioned the committee that it is not always known whose home the child will go to after leaving Foster Care. Blaine Nordwall asked if the request for consideration was asking about making an adjustment based on actual visitation days. Barb Siegel responded that no, it was a request for consideration of the concept only. Barb Siegel read an excerpt from a November 9, 1999, letter from Larry J. Bernhardt.

"We understand that there is now a process in place wherein a percentage (such as 68%) is used to determine child support responsibility if the child is residing 60 of the last 90 days with the parent responsible to pay child support. Since in the majority of the cases, the plan for a child in foster care is to be reunified with the parent, wouldn't it be appropriate to use a percentage for that child support as well? The argument that the parent has to maintain the living arrangements in order for the child to return, so there should be some allowance to allow funds to maintain the arrangement."

Calvin Bergenheier suggested that maybe only credit should be given to the custodial parent because that would be the only parent who would have to maintain the home. Brad Davis stated that Mr. Bernhardt is looking for relief for parents of children in Foster Care. Applying the concept of extended visitation has some merit, but he doesn't believe Mr. Bernhardt or any of the other CSSB directors are stuck on this particular concept. He thinks Mr. Bernhardt would be equally happy with any relief to custodial parents who have to maintain a home. In response to a question from Judge Thomas Schneider, Blaine Nordwall stated that Foster Care maintenance payments aren't reduced when the child returns home for brief overnight visits; there is no appreciable

savings to the state. Judge Schneider clarified that the state would continue to pay the same amount, but would give the parent a deduction. Nordwall stated that the amount of child support paid in relationship to the cost of Foster Care is very different in most cases anyway. The only real impact is on the custodial parent. Brad Davis suggested that the committee consider other items relating to Foster Care before continuing consideration of this item.

Item 20: Parental Responsibility for Children in Foster Care or Guardianship Care, § 75-02-04.1-11.

Consider how imputation provisions (section -07) apply when child from intact family (where parents' incomes are combined and treated as income of a single obligor) is placed in foster care.

Brad Davis stated that he is requesting direction on the proper application of the guidelines in this area. Section -11 talks about how to deal with and how to calculate child support for children in Foster Care. The way he has been doing it is if criteria in – 11(1) for intact families is met, he combines the income of the parents and then applies the rest of the guidelines, such as imputation provisions, to the combined income. For example, if the parents' combined income is \$25,000, the parents are not considered underemployed or unemployed even if one parent is not working. Other regions are calculating differently in that if one parent is unemployed, income is imputed to that parent and then the incomes are combined to apply the rest of the guidelines. Barb Siegel stated that she would have said to do it the way the other regions are doing it because this treats them the same as non-intact families. Paulette Oberst asked for clarification about how other regions are doing the calculations. Davis stated he is befuddled now after discussion with the other regions on how to apply tax, etc.

Barb Siegel provided an example of an intact family where Mom is unemployed and Dad is employed making \$25,000 per year. Since Mom is unemployed, income may be imputed to her, possibly based on minimum wage of \$10,320 per year. Then the parents' incomes would be combined. Siegel stated that she thought the reason for combining the incomes was for convenience to Mom and Dad so two payments are not required. Judge Thomas Schneider stated that he does not agree with that interpretation. Paulette Oberst stated that she used to do the calculations like Brad Davis. Siegel observed that this would mean an intact family would pay less in child support than a non-intact family would pay. Sherry Mills Moore observed that for an intact family, Brad Davis' method may produce a healthier result since, in addition to losing a child to Foster Care, the family is not being asked to change some mutual decisions they may have made about Mom staying at home instead of working. Davis stated that in an intact family, if a multiple family calculation is needed, the parents are treated as separate obligors. Davis acknowledged that this can create a cliff effect. He likes the way he has been doing it, but does understand there can be a real difference in the result. Siegel asked if the committee is comfortable with combining the income of the two parents and then determining whether there is an unemployment/ underemployment situation. And, if so, is there a reason for intact families to pay less?

Consensus of the committee was that the income of the intact parents must be combined prior to applying imputation provisions and that the guidelines already allow for this so an interpretation issued by Child Support Enforcement could sufficiently provide direction requested.

Item 21: Parental Responsibility for Children in Foster Care or Guardianship Care, § 75-02-04.1-11.

Consider whether to treat all children in foster care as if they are in the household of one obligee and prorate the support obligation among those children rather than determining a separate obligation for each child in foster care.

Brad Davis suggested that if the assumption is, in most cases, to return the child to the household the child left, maybe the notion that the new noncustodial parent (previously the custodial parent) should be treated the same as the existing noncustodial parent should be abandoned. We are now operating on the notion those households should be treated alike when they are really different. Davis provided an example of what happens when a child from a non-intact family is placed in Foster Care. If there is an existing support order for three children and one of the children goes into Foster Care, one third of the support is assigned. On the other hand, the previous custodial parent's obligation is set for one child, which results in a higher obligation, even if the parents' incomes are at the same level. This really favors the existing noncustodial parent and penalizes the previous custodial parent, even though there was an attempt to try to equalize them in guidelines.

He described a proposal for establishing a support obligation based on all the children in the parent's household and then prorating that obligation among the children from the household who go into Foster Care.

Paulette Oberst asked if Brad Davis is really suggesting a return to the 1991 guidelines as they related to Foster Care. Barb Siegel agreed that is what it sounds like to her. Siegel stated that the 1998 guidelines committee considered making a change to the calculation when there were multiple children in Foster Care. However, instead, a criteria was added to allow a downward deviation when there are multiple children in Foster Care. The primary reason it was decided that the issue of multiple children in Foster Care be handled this way was because children do not go in and out of Foster Care at the same time. She acknowledged there is disparity in comparison: child support for two children at a \$1,000 net income level is \$300 (i.e., \$150 per child) whereas for one child it is \$250. This is why a deviation was added during the last guidelines revision -- to address multiple children in Foster Care.

Brad Davis stated that the custodial parent paid less under the 1991 guidelines. Then the guidelines were changed to put the custodial parent on equal footing with the noncustodial parent. The intent was to establish an obligation for the custodial parent and then recalculate the obligation of the noncustodial parent. However, this is not

happening. By the time the noncustodial parent's obligation is reviewed, the child is out of Foster Care.

Blaine Nordwall observed that these cases come in all shapes and sizes. A small number of cases are for intact families. Some are not. Some are blended families. There are children in and out of homes. The current guidelines cover all the bases.

Brad Davis stated that when there is an intact family, we treat income as one. If one parent has another child, however, calculations are completed separately. Davis stated there is a need to eliminate the separate obligation for each child to answer the concern of item 21.

Barb Siegel stated that if Mom has a child in the home who does not belong to Dad (of the child in Foster Care), Mom and Dad must be treated as separate obligors and the multiple family calculation must be done for Mom. Maybe there is a way to combine the income of Mom and Dad after the multiple family calculation is completed; however, there is a problem in that the multiple family calculation is a result, not a deduction.

Barb Siegel observed there seems to be a possible shift back to the 1991 guidelines. We moved away from those guidelines because custodial parents were paying less than noncustodial parents. Changes have been made to the Foster Care area of the guidelines since 1991 to try to achieve balance. However, maybe the custodial parent's obligation should be lower due to the need to maintain the household for the child's return.

Barb Siegel asked Brad Davis for confirmation of her understanding of the proposal. If there are four children in the home and one goes into Foster Care, determine the support obligation for four children and divide that amount by four. No multiple family calculation would be done because in essence there already is a consideration of multiple children.

Someone suggested that the deviation reason for multiple children in Foster Care would need to be eliminated if the committee proceeds in this way. Blaine Nordwall asked what would happen in the case with one child with father, one in Foster Care, and two remaining with the custodial parent. Brad Davis responded that he would calculate the custodial parent's obligation for three, not four, children and prorate. Nordwall observed that language describing this will be challenging to draft.

Judge Thomas Schneider stated that he sees all kinds of calculations. It is amazing how many different interpretations exist. He stated that it would be helpful if there was one clear method of calculation. Blaine Nordwall agreed that certainty is very helpful. Representative William Devlin stated that the guidelines are hard to understand. His experience is that he finds someone who can explain, but the practice differs from judicial district to judicial district. Representative Devlin acknowledged the Child

Support program is moving in the right direction. Over the years, the number of calls he has received relating to child support has been drastically reduced.

Barb Siegel requested a draft in line with Brad Davis' proposed concept for item #21. Blaine Nordwall issued a reminder that the draft should include the elimination of the deviation for multiple children in Foster Care. Davis will work with Melissa Hauer as needed on drafting a proposed amendment. The 1991 guidelines would be a good place to start with language.

Item 22: Consider whether and how to create a new section to be used when the court orders "joint" or "shared" custody. (Continued discussion).

Barb Siegel provided an overview of discussions from the last meeting. The committee was provided with a relevant excerpt from the Knutson case. Siegel did contact the federal regional child support office and discussed the concern with the federal requirements. As expected, the Fed's response was that the guidelines must apply in all cases. The Fed's referenced the federal requirement and a portion in a preamble to a Federal Register. It would be very questionable to say that neither parent pays if equal time. Blaine Nordwall stated that he read the Knutson case briefs. Decision states that the current child support guidelines do not govern when shared on equal basis but no citation was provided. It is difficult to understand how they reached that conclusion. What could be included in the guidelines that would result in a different conclusion? Melissa Hauer said she listened to the oral argument, but has not read the briefs. She questioned who has the child the greater portion of time.

Husband said the time was equal. Blaine Nordwall stated that the recitation of fact doesn't provide anything specific. He suspects the fact is that split is not actually equal.

Barb Siegel reminded the committee of the written Statement of Intent provided during the 1999 legislative session. Guidelines need to be very specific, applicability relates only when there is exact 50:50 split otherwise the Statement of Intent would apply. Blaine Nordwall stated that it would seem to be a mathematical impossibility.

Barb Siegel and Brad Davis read relative excerpts from several orders gathered from regional child support offices since the last meeting. There are some very creative divisions of a child's time attempting a 50:50 split. One actually divided the time over a two-year period since 365 days cannot be divided equally. Blaine Nordwall observed that we may be seeing families using equal custody to avoid use of the guidelines or to come up with something along the lines of a split custody type calculation which the Supreme Court specifically prohibited. Nordwall related that misapplication of the guidelines is not as troubling as the ones which state guidelines are not applicable. This would not meet federal requirements.

Barb Siegel stated that the state office researched how other states deal with a 50:50 split. Not surprisingly, income share model states often look at both parents' income and prorate based upon time. Other states frequently provided for a deviation to

address the issue. Siegel distributed a document providing a summary for several states (Arkansas, California, Massachusetts, Minnesota, Washington D.C., Hawaii, New Mexico, Kansas, Idaho, and New Jersey). At Siegel's request, Paulette Oberst provided a review of the information.

Barb Siegel stated that necessarily the extended visitation calculation must apply unless there is an exact 50:50 split. One possible suggestion would be the use of a threshold defined in terms of "at least 182 nights each." Blaine Nordwall observed that if people concoct orders like the one reviewed where the parties laid out the division over a two-year period, a new guidelines section, as opposed to addressing in the deviations section, should be created to address the issue. Paulette Oberst expressed interest in using nights. Nordwall observed that it doesn't work when you use a 2-year period or a 4-year period to create a 50:50 split. Brad Davis stated that he believes there is a need to look at the intent of the judge and the parties to have a 50:50 split for determining when to do the new calculation. The court order has to have the "magic" language. Sherry Mills Moore stated she does not want to use nights. That doesn't fit into people's lives. Orders will simply say 182 nights, but need to be able to say Thanksgiving through end of school year, etc.

Sherry Mills Moore again stated her displeasure of tying money to children. She stated that she believes if a 50:50 split is addressed in the guidelines, there will be fewer and fewer equal splits because people are doing it now to avoid child support. Since Moore was involved in the legislative process relating to the Statement of Intent, Barb Siegel asked Moore's opinion about compliance with the Statement of Intent with doing something besides extended visitation for 50:50. Sherry Mills Moore responded that she believes that would fit. She also observed that the Statement of Intent was issued prior to the Knutson Supreme Court decision. Moore again stated her belief that we will see fewer "equal" splits because now there will be a price tag attached. The extended visitation provision didn't significantly effect custody/visitation decisions.

The committee reached consensus that this item would not be dealt with in the deviation section. It will be a new section. The section must include reference to "50%." Sherry noted that "equal" is a feel-good word used in court orders. There needs to be more math to it. The court order must be 50%. The calculation for determining child support would be to calculate what each parent would owe as if each parent had "sole" custody (without using the word "sole"). Barb Siegel recommended also avoiding the terms "obligee," "obligor," "custodial parent," or "noncustodial parent"). Language should just reference "parent." Subsection -02(1) would have to add to the end of the subsection something like: "except as provided for in 'new subsection'" The committee agreed no change would need to be made to -02(9) or -13.

Blaine Nordwall related that the challenge will be when one of those 50:50 parents comes in and applies for TANF.

Item 23: Criteria for Rebuttal of Guideline Amount, § 75-02-04.1-09.

Atypical overtime and nonrecurring bonuses

Barb Siegel explained that this issue for consideration must be incorporated into the guidelines due to a new statute: N.D.C.C. § 14-09-09.7(1)(f). Siegel suggested possibly creating a new deviation using similar language as in other deviations, i.e., "increased ability" or "reduced ability". Siegel observed, however, that currently the "reduced ability" language now relates to expenses to be considered rather than to income that is not to be considered. Blaine Nordwall suggested language that states, "The reduced ability of the obligor to provide support when calculations of the obligation otherwise reflect consideration of atypical overtime wages or nonrecurring bonuses over which the obligor does not have significant influence or control." Consensus of group was for Melissa Hauer to draft an amendment as Nordwall suggested.

Item 24: Criteria for Rebuttal of Guideline Amount, § 75-02-04.1-09.

Visitation travel expenses

a. Consider effect of Tibor v. Tibor ruling that deviation at -09(2)(i) applies only if visitation is scheduled by court order.

Barb distributed a copies of the Tibor decision. Paulette Oberst provided an overview of the decision and the dissent filed by Justice Sandstrom. Basically, the decision stated that the travel expenses deviation was limited to expenses incurred during "court ordered" visitation, similar to the extended visitation provision. Although the travel expense provision existed before the extended visitation provision, and there was no intent at the time the extended visitation was added to apply the restriction to the deviation, there may be some merit to the majority's conclusion. One of reasons for tying extended visitation to court order language was to avoid dueling calendars. There may be symmetry to this provision.

The committee could decide to do nothing and Tibor will hold. Or, the committee could choose to provide proposed amendments to support the majority's decision. Or, the committee could choose to provide proposed amendments to support the minority's opinion. Barb Siegel stated that the travel expense provision has existed for a long time and was never intended to tie to a court order until Tibor.

Judge Thomas Schneider stated that it would be difficult to craft a court order without facts in advance. It seems, there must be a tie to a court order. If no expenses are actually incurred, then it needs to return to court. Blaine Nordwall stated that this is why it is part of the deviation list as opposed to part of a formula. Consideration must be given to how far apart the parties live, where they live, how often travel will occur, etc.

Barb Siegel asked for the committee's input as to whether or not the deviation should be tied to a court order. Sherry Mills Moore stated that it is tempting. Blaine Nordwall stated that it seems reasonable to tie such a deviation to court order. Judge Thomas Schneider agreed.

Sherry Mills Moore asked if it is possible to have establishments tied to court order and reviews based on history? Barb Siegel and Judge Thomas Schneider expressed some agreement with this concept.

Sherry Mills Moore stated that history is more important than anticipated costs. Purpose of deviation is to allow financial ability of noncustodial parent to visit child. There was general consensus to take into consideration the visitation scheduled by a court order, but to also consider actual visitation expenses *when* such history is available.

Judge Thomas Schneider stated he hears arguments about travel expenses incurred "solely" for the purpose of visitation (-09(2)(i)). Sherry Mills Moore suggested that the term "primarily" might be better. There was agreement that "solely" is too restrictive. Final committee consensus was a preference for a word stronger than "primarily" and less restrictive than "solely." "Predominantly" is a probable alternate as it is a stronger term than "primarily." Blaine Nordwall noted that the dictionary definition indicates the term "predominant" is a better term because it means the reason is more important than all others.

Item 24: Criteria for Rebuttal of Guideline Amount, § 75-02-04.1-09.

Visitation travel expenses

- b. Consider whether to specify allowable visitation travel expenses (e.g., transportation costs) and nonallowable visitation travel expenses (e.g., meals).
- c. Consider whether to establish a threshold which must be exceeded for visitation travel costs to be allowable (e.g., a certain number of miles per trip or per year).

At Barb Siegel's request, Brad Davis provided summary of the two issues for consideration. A certain amount of visitation is normal and a certain amount of travel expenses is implied. The question is should travel expenses be only those which exceed "normal." Should there be a threshold below which travel costs are considered normal? Also, an issue is what exactly is included in travel expenses related to visitation? Include motel, airfare, food, fuel, etc? Meals and lodging and entertainment of the child are also questions. He recently had a case where the judge approved all such expenses, and more, incurred by the obligor.

Senator Tom Fischer expressed his preference for travel and motel only. Brad Davis questioned whether or not there should be a threshold. Since the deviation reduces the child support amount, in essence, the child is paying for the visitation. However, the needs of the child don't change with visitation. Sherry Mills Moore suggested that transportation expenses are sort of a given. Meals do cost more when traveling, but should work into a threshold. Maybe lodging could be included because lodging wouldn't be needed if visitation occurred at home. The problem is that it takes away

from the child. Calvin Bergenheier commented that meals should be allowable because the noncustodial parent must eat meals out when visiting.

Barb Siegel asked if the committee would like to limit expenses and how. There was consensus to include transportation and lodging expenses and not include entertainment related expenses. There was no general consensus as to expenses relating to meals. Representative William Devlin asked if the courts look at when airline tickets were purchased. Judge Thomas Schneider confirmed. Court has to make decision on reasonableness and best interest of the child.

Representative William Devlin stated his desire to use a term so court can include or not include items as needed. Brad Davis suggested using "reasonable transportation and lodging expenses." He doesn't believe meals should be included. He observed that if the income were reduced by the expenses it wouldn't be so bad, but it is a problem to deduct the expenses from the child support amount. Consensus of the committee was to use "predominantly" to describe travel expenses and suggest no other change.

Barb Siegel noted that a Tuesday agenda item includes discussion relating to deviations being applied to income or child support

Item 25: Rebuttal Criteria, § 75-02-04.1-09.

Consider whether spousal support ordered to be paid by the obligor should be excluded as a factor which may permit a downward deviation pursuant to -09(2)(j)

Sherry Mills Moore stated she has recently argued point in court four times, although each time the court ruled in her favor. The net effect is that spousal support is paid by child support. It seems there is a need to clarify. Barb Siegel explained that HB 1407 (1999 legislative session) would have required the guidelines, if it had passed, to consider spousal support paid to the obligee by the obligor.

Blaine Nordwall ask how, if at all, the fact that if the obligor receives spousal support and the support would count as income bears on the issue. Judge Thomas Schneider observed that it is interesting concept to look at income and figure out spousal support first. This could get a person into a circle. Barb Siegel noted there was concern expressed by a regional child support unit attorney that sometimes spousal support is a part of the property division and it would not be right to allow the spousal support obligation to reduce the child support. Sherry Mills Moore and Siegel stated that, if anything were to be reduced because of the existence of the other, spousal support should be reduced, not child support. Siegel suggested that if the limitation was added to the guidelines, it would probably be best addressed in -09(5), which already provides some limits to (j). There was consensus that the section would state, ". . . arises out of spousal support payments, discretionary purchases, or illegal activity."

Item 4: Self-Employment, § 75-02-04.1-05.

Consider whether to limit the amount of travel, meals, and entertainment that must be added back to the obligor's income to the amount that the obligor can deduct for tax purposes.

At the request of Barb Siegel, Brad Davis provided a review of the issue. Davis asked for clarifying language to make sure only portion which was included in the first place is added back. Paul Wahnoutka stated that the limits are 100% for travel and 50% for meals. There was some discussion about this being a manipulation area. Blaine Nordwall observed that in regard to meals, you have to eat no matter where you are. Wahnoutka stated that what he sees in practice is meals and travel; not much entertainment. Nordwall asked if the meal item includes the person's own meal as well as the other person's meal. Wahnoutka confirmed and explained that this was a contributing factor for IRS cutting limit in half.

Brad Davis stated that his concern was the possibility of inclusion of artificial income. Paul Wahnoutka stated there is very little entertainment deducted on tax returns now days. Davis observed that meals and entertainment are on one line of the tax form so it could not be separate anyway. Barb Siegel explained the attempt to put self-employed and regular employed obligors on equal footing. She questioned if this was a highly manipulated area. Wahnoutka responded that manipulation in this area is probably not any more than anywhere else. Siegel expressed her concern that there are self-employed obligors who need to travel who have legitimate expenses. How much difference does this make to the bottom line? This is only one calculation in many. Davis stated difference likely would not be significant. Consensus of the committee was to eliminate -05(1)(a)(2) and rewrite subsection 1 so it states in part, "if any, of that total income that is not the obligor's income or is an amount otherwise included in gross income."

Item 5: Definitions, § 75-02-04.1-01.

- a. Consider whether to include "additional child tax credit" (line 63 of IRS 1040 form) as an example of gross income.

Paulette Oberst provided some background as to how this issue arose. The question is whether the child tax credit should be included in gross income. References to the child tax credit can be found in two places: line 48 and line 63. It appears the refundable tax credit is similar to earned income credit. Should the additional child tax credit be treated as gross income since it is similar to earned income tax credit? Paul Wahnoutka responded that yes, it would be appropriate to count the refundable child tax credit on line 63 and that it can be referred to as the "additional child tax credit." To clarify the language in the guidelines, reference to "earned income tax credits" in -01(5)(b) could be replaced with "refundable tax credits." This would include all refundable tax credits, including earned income tax credits and additional child tax credits. The key term is "refundable." There was consensus of the committee to look at a draft which includes the changed language as discussed.

Item 5: Definitions, § 75-02-04.1-01.

b. Consider whether to clarify that the child tax credit in the hypothetical tax calculation is the "regular" child tax credit (line 48 of the IRS 1040 form).

Paulette Oberst reviewed the issue and the possible need to clarify the meaning of the child tax credit included in the calculations of the hypothetical tax. It references the child tax credit on Line 48. Paul Wohnoutka stated that it would be appropriate to refer to it as a "regular tax credit;" -01(7)(a)(4) is not referring to the refundable kind. Wohnoutka offered that the guidelines could use tax terms: "nonrefundable tax credit." Blaine Nordwall suggesting including the clarification on the worksheet. Consensus of the committee was the reference in -01(7)(a)(4) refers to the regular tax credit which is found on Line 48 of the current tax form. Clarification can be provided by Child Support Enforcement through development of forms or through issuance of an interpretation.

Item 5: Definitions, § 75-02-04.1-01.

c. Consider whether the child tax credit in the hypothetical tax calculation only applies if the obligor is entitled to such credit for tax purposes (e.g., if child is under the age of 17).

Paulette Oberst provided background to the issue. Not every child is a "qualifying" child for the child tax credit. For example, a child has to be under the age of 17. Barb Siegel reminded the committee that the calculation is intended to provide a "hypothetical" result. Should the tax credit be allowed even if the child is not eligible? Or, should -01(7)(a)(4) be clarified so that the tax credit is allowed only if the child is eligible? Consensus of the committee was to request a draft making a change so that the income is reduced only when there is eligibility for the child tax credit.

Item 6: Definitions, § 75-02-04.1-01.

Definition of "child"

Consider effect of Johnson v. Johnson (equitable adoption) case.

Barb Siegel distributed an excerpt from the Johnson Supreme Court decision. Paulette Oberst explained that, under Johnson, the guidelines would not preclude including a child who is equitably adopted. Should the definition of "child" be changed to limit to statutory adoptions? If not, it could be that someone could be held responsible for support of a child that is not their own. Such a change would simply mean adding "statutory" in front of "adoption." Sherry Mills Moore observed that the facts in Johnson were unusual. Blaine Nordwall suggested making no change. There has not been a lot of child support cases arising out of the Johnson decision. Consensus of committee was to take no action.

Item 7: Definitions, § 75-02-04.1-01.

Tax exemptions for children

a. Consider, in case of establishment, how allocation of future tax exemptions for children should affect calculation of hypothetical tax obligations.

Barb Siegel provided an overview of this issue. An example was given of a divorce where there is a disclosed tax return, all children will be claimed (tax return was filed when the couple was still married) and all children would be counted, since that is what

is required under the guidelines. The number of children claimed is very likely to change because of the divorce. Is this acceptable? Sherry Mills Moore asked if joint return, how do you know who gets the credit? Siegel stated that as the guidelines read, the exemptions would go to obligor because all children were claimed on the disclosed tax return. Moore stated that she uses what is actually going to be claimed. Discussion continued with item 7.

Item 7: Definitions, § 75-02-04.1-01.

Tax exemptions for children

b. Consider, in case of modification, whether or how allocation of the hypothetical tax obligations would be affected if the obligor is entitled to claim the children as exemptions in alternating years.

Barb Siegel provided an overview of this issue. Do we need to consider situation where custodial and noncustodial parent claim exemption in alternating years? Sherry Mills Moore reported that she prorates the exemption. Siegel stated that she believes the guidelines currently don't allow that. The guidelines clearly state what to count for exemptions if a tax return is disclosed and what to count if a tax return is not disclosed. Several members expressed interest in being able to prorate. There was general consensus for changing the guidelines to equal practice since it is logical. Siegel related the reason for the current language was an attempt to simplify the process.

It was discussed that with changes to exemptions and tax credits, this really can make a difference. Brad Davis stated that if assumptions would need to be made about how many exemptions may be claimed, the IV-D offices would have to assume that the parent who has physical custody of the child would get the tax exemptions.

After much discussion about possible amendments to the section, it was agreed that Brad Davis would work with Melissa Hauer on some revised language. The language would attempt to address that the number of exemptions allowed pursuant to a court order may be used. If there is no court order or it is not known, language currently in the guidelines would apply.

Item 7: Definitions, § 75-02-04.1-01.

Tax exemptions for children

c. Consider clarifying language in section –01(7)(a)(3) to show that a “child” actually claimed on a disclosed income tax return” refers to a child as defined in section –01(1).

Barb Siegel stated that a question has been raised as to whether there was an intent to mean something different in the two references to “child” in –01(7)(a)(3). The

consensus of the committee was that they hold the same meaning. It was agreed that the phrase, "as defined in this section," would be added after the first reference to "child" so -01(7)(a)(3), would state, "One additional exemption for each child, as defined in this section, actually claimed on a disclosed income tax return or one additional exemption for each child, as defined in this section, if a tax return is not disclosed; and"

Item 8: Definitions, § 75-02-04.1-01.

State income tax obligation

Consider the effect of HB 1399 on the calculation of the hypothetical state income tax obligation.

Barb Siegel distributed a copy of HB 1399 and IC-CO-01-08. Siegel provided a review of the issue. The current hypothetical state tax calculation under -01(7)(b) requires calculation at the rate of 14% of federal tax. HB 1399, passed in the 2001 legislative session, changed the way state tax is calculated. Does -01(7)(b) need to be changed to reflect a different calculation? It would seem that if a change is made, the complexity would increase with the no resulting significant difference in the hypothetical tax obligation. Paul Wohnoutka stated that he believes a 14% calculation is still appropriate. The consensus of the committee was to retain the 14% calculation for determining the hypothetical state tax obligation.

Item 9: Definitions, § 75-02-04.1-01.

Consider the need to address treatment of self-employment tax.

Paulette Oberst provided a brief review of the issue and explained that the current guidelines do not address the treatment of self-employment tax. She provided information relating to employed and self-employed individuals.

The question is how to address the issue if the committee decides to address it. There is an argument for allowing half of the amount of the tax and there is another argument for allowing the whole amount of the tax. The argument for half of the amount purports that the wage earner pays for half and the employer pays for half. The argument for using the whole amount is that the self-employed earner actually pays the whole amount. Paul Wohnoutka stated that he favors the allowance of the whole amount because that is the actual out of pocket expense. Sherry Mills Moore stated her agreement.

Consensus of the group was to request an amendment to add "self-employment tax" to the list of hypothetical obligations found in -01(7)(c).

Item 10: Definitions, § 75-02-04.1-01.

Deferred income

Consider effect of the possibility of "double counting" deferred income.

Paulette Oberst explained the possibility of double counting deferred income, once at the time of establishment if deferred at that time and again at the time of review if that previously deferred income is received at that time. Blaine Nordwall stated that the intent was that both currently deferred income and receipt of previously deferred income

would be counted. Seems there would be very limited number of cases where it would happen that the same income would be counted twice. There was general agreement that it would be very unlikely that it will happen since it would be for the same child, with income deferred at time of establishment and income received during review year.

Should the guidelines limit inclusion of deferred income received to only that portion which was not included previously? Representative William Devlin commented that interest may accrue. Several members expressed their desire to not have the income counted twice. Sherry Mills Moore noted that if income was counted twice, it would be incumbent on obligor to make the argument. It is also important to keep in mind that this would have to apply 'for that child.'

Paulette Oberst noted that there is a possibility that previously deferred income could be less later. It won't always be the scenario where more money is received than what was invested. Sherry Mills Moore suggested that limiting language such as "to extent not previously included" be added to the reference to previously deferred income. Judge Thomas Schneider stated that one could make the argument that the current guidelines do not intend to count the income twice—it is simply in list of examples of gross income.

Blaine Nordwall suggested adding the clarification in a parenthetical for drafting purposes. Judge Thomas Schneider observed that a good argument should result in not counting the income twice. Consensus of committee was to look at a draft adding a concept something like: receipt of previously deferred income (to the extent not previously included in calculation of support for this child).

Item 11: Definitions, § 75-02-04.1-01.

Loans

Consider whether loans should be included in the definition of gross income.

Barb Siegel distributed a copy of the Lohstreter decision. The question is whether loans should be included in income. Paulette Oberst provided background to the issue. Sherry Mills Moore observed that such a situation involves a factual determination. A judge needs to decide if money is a loan or not. Consensus of the group was that loans should not be included in income because the money has to be paid back. Therefore, no draft amendments were requested.

Next meeting will be next Tuesday from 8:00 a.m. – noon. Barb Siegel asked that the committee members bring their calendars in the event another meeting needs to be scheduled.

The meeting was adjourned at 5:30 p.m.