

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

Public hearings were held on September 17, 2002, in Bismarck, ND, and September 19, 2002, in Fargo, ND, concerning proposed amendments to North Dakota Administrative Code Chapter 75-02-04.1, Child Support Guidelines. Written comments on these proposed amendments could be offered through 5:00 p.m., October 21, 2002.

Six individuals made comments at the public hearings. Thirteen individuals submitted written comments during the comment period. Commentors were:

1. Luke Davis, P.O. Box 5731, Grand Forks, ND, 58206-5731.
2. Peggy Gundvagen, P.O. Box 1242, Bismarck, ND 58502.
3. Margaret Kottre, P.O. Box 2518, Bismarck, ND 58502-2518.
4. Roland Riemers, Box 14702 Grand Forks, ND 58208.
5. Steve Dawson, Box 814, Fargo, ND, 58108.
6. Gary Hangsleben, P.O. Box 14222, Grand Forks, ND 58208.
7. Dan Bertsch, Fargo Regional Child Support Enforcement Unit, P.O. Box 2806, Fargo, ND, 58108-2806.
8. Dennis Edward Johnson, McKenzie County State's Attorney, P.O. Box 1288, Watford City, ND, 58854.
9. Jackie Knutson.
10. Blaine Nordwall, Director, Economic Assistance Policy, North Dakota Department of Human Services, 600 East Boulevard Avenue, Bismarck, ND, 58505-0250.
11. Mark A. Hendrickson, Huether's Villa #18, Dickinson, ND, 58601.
12. Sheila K. Keller, Staff Attorney, Bismarck Regional Child Support Enforcement Unit, P.O. Box 5518, Bismarck, ND, 58506.
13. Marnie R. Soggie, Staff Attorney, Bismarck Regional Child Support Enforcement Unit, P.O. Box 5518, Bismarck, ND, 58506.
14. Mandy R. Dendy, Staff Attorney, Bismarck Regional Child Support Enforcement Unit, P.O. Box 5518, Bismarck, ND, 58506.
15. Robert W. Martin, Staff Attorney, Bismarck Regional Child Support Enforcement Unit, P.O. Box 5518, Bismarck, ND, 58506.
16. R-KIDS.
17. Paulette Oberst, Assistant Policy Administrator, Child Support Enforcement, N.D. Dept. of Human Services, P.O. Box 7190, Bismarck, ND, 58507-7190.

18. Jan DeRemer, Attorney at Law, The Woman's Law Office, P.O. Box 14715, Grand Forks, ND, 58208-4715.
19. Robert J. Schultz, Conmy Feste Ltd., P.O. Box 2686, Fargo, ND 58108-2686.

## SUMMARY OF COMMENTS

### 75-02-04.1-01. Definitions.

Comment: One commentor talked about the definition of gross income and expressed that some judges are totally unfamiliar with the guidelines and they will do their own thing. The commentor thought, under gross income, that the guidelines should clearly spell out that actual income should be considered and not loans or imputing income based on expenditures.

Response: No change was made based on this comment. The definition of gross income is very broad; however, it does not include loans and while income may be imputed based on earning capacity, income is not imputed based on expenditures.

Comment: One commentor thought that section 75-02-04.1-01(4) (the definition of custodial parent) conflicts with how it is actually used in split custody and equal custody cases where the obligor is defined by the parent with the larger child support obligation and by default the custodial parent becomes the parent with the smaller obligation rather than being defined by who is actually the caregiver.

Response: No change was made based on this comment. No change was proposed to this subsection.

Comment: One commentor noted that section 75-02-04.1-01 includes deferred income in the definition of gross income. The commentor felt that deferred income is not disposable income. The commentor also objected to including tax credits in the definition of gross income for the same reason; the obligor does not have access to this money but it will be included in income when the child support amount is calculated.

Response: No change was made based on this comment. The commentor misunderstands the proposed change. To avoid double counting, the proposed change provides that the receipt of previously deferred income will not be counted again as income if it was previously counted as income when deferred. This is a limitation to what will be included in gross income, not an expansion. The change made regarding tax credits is to clarify that **refundable** tax credits will be included as an example of gross income.

Comment: One commentor suggested that section 75-02-04.1-01(5)(b) be revised to remove the word “refundable”. The commentor thought that this would add to income money that was already considered.

Response: No change was made based on this comment. This change is only a clarification that whenever there is a refundable tax credit, it is included in gross income. Also, this subsection describes examples of gross income but it is not an all inclusive list. An amount that meets the broad definition of gross income will be treated as such, even if it does not specifically appear on the list of examples in this subsection.

Comment: One commentor felt that although the change to section 75-02-04.1-01(6) regarding in-kind income is to clarify that courts should not consider “in-kind income” from family members (spouses, parents, girlfriend, boyfriend), unless the obligor is employed by that family member, this could limit the information that the court should rely on in determining the obligor’s ability to earn.

Response: No change was made based on this comment. A court is not precluded from imputing income based on earning capacity. This change narrows the definition of in-kind income, but income from these sources could still be included as another form of gross income (e.g., perhaps as a gift).

Comment: Another commentor strongly disagreed with restricting in-kind income only to that received “from employment or income-producing activity.” Doing so, the commentor felt, would deprive those children whose non-custodial parent pays no rent or board because they have housing provided by a parent or relative.

Response: No change was made based on this comment. A court is not precluded from imputing income based on earning capacity.

Comment: Several commentors noted that section 75-02-04.1-01(7)(b) describes a hypothetical state income tax but North Dakota no longer calculates its state income tax based on 14% of the federal tax obligation but is instead using a formula which results in increased tax obligation. The commentors felt that the state tax deduction used for calculating net income for child support purposes should be calculated as it is actually calculated for state income tax purposes.

Response: No change was made based on these comments. The child support guidelines have required the calculation of a hypothetical tax obligation, in part because of the simplicity of the calculation. When the state tax obligation changed to the current formula there was testimony during the legislative session in which the change was passed, that the actual state personal income tax

obligation would continue to be an amount that was very close to what was required under the 14% of federal obligation formula.

Comment: One commentor felt that the amendment to section 75-02-04.1-01(7)(a)(3)(a) would actually increase the obligor's net income, which increases the child support amount, which increases the money returned to the Department by the Federal Government.

Response: No change was made based on this comment. This change does not necessarily increase a child support obligation; in some cases it may decrease the obligation and in other cases it may increase it. The objective was merely to clarify how tax exemptions for children will be used in calculating an obligation, for example, when parties alternate the exemptions or when there will be an allocation between the parties of tax exemptions in the future such as when the parties are in the process of getting a divorce.

Comment: One commentor believed that the proposed change to section 75-02-04.1-01(7)(a)(4) should read "provided the obligor is eligible for the child tax credit."

Response: The change suggested by the commentor has been made as follows:

7. a.

- (4) Tax tables for a single individual for the most recent year published by the internal revenue service, reduced by one child tax credit for each child's exemption considered under paragraph 3 provided such child is a qualifying child for purposes of the child tax credit;

Comment: Several commentors felt that the language in section 75-02-04.1-01(7)(d) regarding health insurance is confusing. Subsection one requires that the premium payment is divided by the total number of persons covered, or if known, by the total number of persons associated with the premium paid. Subdivision two of this subsection then requires that this amount be multiplied by the total number of insured children for whom support is being sought. The commentors felt that although it seems to be intended to cover those situations where an employer pays the obligor's portion of the insurance premium, and the obligor then has to make the additional payments to cover any additional persons to be covered, it is the second portion of this subsection that leads to the confusion. For example: The employer pays the coverage on the obligor, and then the obligor has to pay \$100.00 to cover two children. The change in the provision would result in the following:

$$\$100.00/2 \text{ children} = \$50.00/\text{child}.$$

But, if the facts were changed slightly and the employer paid only a portion of the obligor's coverage, the commentators thought it is unclear which way it is to be calculated. If the employer paid \$50.00 toward the obligor's coverage and the obligor had to pay \$25.00 toward his/her own coverage, and then also had to pay \$100.00 to cover two children, the commentators questioned which calculation method is to be used. This situation would actually fall into both possible calculations:

$$\$25.00 + \$100.00 = \$125.00/3 \text{ persons} = \$41.77 \text{ per person}$$

or

$$\$100.00/2 \text{ children} = \$50.00 \text{ per child}$$

The commentators noted that under the current guideline provision, the first calculation would be performed. But, with the addition of the provision regarding dividing the payment by the total number of persons associated with that premium payment, it could also result in the second calculation, since it is known that the additional \$100.00 premium is associated with the child.

The commentators felt that since it can almost always be determined what the difference in cost is between a single policy and a single and dependents or family coverage, one can almost always argue the second calculation, thus making the first calculation unnecessary. The commentators noted that if this was not what was intended, then there should be some clarification. If the second calculation is intended to cover just certain situations, then the language needs to be changed.

Response: The following clarification was made based on these comments:

7.

- d. A portion of premium payments, made by the person whose income is being determined, for health insurance policies or health service contracts, intended to afford coverage for the child or children for whom support is being sought, determined by ~~dividing the payment by the total number of persons covered and multiplying the result times the number of such children;~~

(1) If the cost of single coverage for the obligor and the number of persons associated with the premium payment are known:

(a) Reducing the premium payment by the cost for single coverage for the obligor;

- (b) Dividing the difference by the total number of persons, exclusive of the obligor, associated with the premium payment; and
  - (c) Multiplying the result times the number of insured children for whom support is being sought; or
- (2) If the cost of single coverage for the obligor is not known:
- (a) Dividing the payment by the total number of persons covered; and
  - (b) Multiplying the result times the number of insured children for whom support is being sought;

Comment: One commentor stated in regard to section 75-02-04.1-01(7)(d)(2), Calculation of Health Insurance Premiums, that there are few, if any, health insurance policies that cover family members that are based on the number of children being insured. The commentor felt that the cost of insuring one child is typically the same as insuring ten. The commentor noted that while requiring a spouse to contribute to the premium if step-children are being insured is a fair result, a parent providing health insurance should receive credit for the share of all children being insured to whom they have a duty to support. Considering the fact that every \$100 deduction only reduces child support a mere \$16 for a single child, the increased perception of fairness is a minimal effect on the child support obligation.

Response: No change was made based on this comment. The goal of the proposed change was to provide a deduction for insured children who are before the court (i.e. for whom support is being sought). Stepchildren or children who are not before the court are not to be included in this calculation.

Comment: One commentor felt that the restriction in section 75-02-04.1-01(7)(h) regarding employee expense deductions from net income which limits lodging to \$30.00 per night was too low.

Response: No change was made based on this comment because no change was proposed to this subdivision.

#### **75-02-04.1-02. Determination of Support Amount - General Instructions.**

Comment: One commentor felt that the assumptions in section 75-02-04.1-02(1) that calculations are based on one parent being the primary caregiver conflict

with how calculations are actually made and de facto defined with split custody and equal custody cases, where the obligor is defined by the parent with the larger child support obligation and by default the custodial parent becomes the parent with the smaller obligation rather than being defined by who is actually the caregiver.

Response: No change was made based on this comment. In the majority of cases, there will be a primary caregiver but not in cases in which parents have equal physical custody of their child or children. That is why the exception for equal physical custody situations was added to this subsection.

#### **75-02-04.1-05. Determination of Net Income From Self-Employment.**

Comment: One commentor questioned whether the proposed changes eliminated the use of self-employment losses. The commentor was particularly concerned about obligors who use losses from "hobby" businesses such as horse breeding or part-time auto rebuilding and sales. The commentor asked that the rule be clarified.

Response: The commentor correctly identified an issue that requires clarification. The North Dakota Supreme Court in *Wilhelm v. Wilhelm*, 543 N.W. 2d 488 (N.D. 1996), held that expenses of a hobby, even if treated as a business for tax purposes, may not be treated as business expenses in calculating child support obligations. To provide that clarification, we have added subsections 6, 7, and 8 to section 75-02-04.1-05 as follows:

6. When less than three years were averaged under subsection 4, a loss resulting from the averaging may be used to reduce income that is not related to self-employment only if the loss is not related to a hobby activity and monthly gross income, reduced by one-twelfth of the average annual self-employment loss, equals or exceeds the greatest of:
  - a. A monthly amount equal to one hundred sixty-seven times the hourly federal minimum wage;
  - b. An amount equal to six-tenths of prevailing gross earnings of persons with similar work history and occupational qualifications who work in any place within one hundred miles [160.93 kilometers] of the obligor's actual place of residence;  
or
  - c. An amount equal to eighty percent of the obligor's greatest average gross monthly earnings, calculated without using self-employment losses, in any twelve consecutive months

beginning on or after thirty-six months before commencement of the proceeding before the court.

7. When three or more years were averaged under subsection 4, a loss resulting from the averaging may be used to reduce income that is not related to self-employment only if the loss is not related to a hobby activity, losses were calculated for no more than forty percent of the years averaged, and monthly gross income, reduced by one-twelfth of the average annual self-employment loss, equals or exceeds the greatest of:

- a. A monthly amount equal to one hundred sixty-seven times the hourly federal minimum wage;
- b. An amount equal to six-tenths of prevailing gross earnings of persons with similar work history and occupational qualifications who work in any place within one hundred miles [160.93 kilometers] of the obligor's actual place of residence; or
- c. An amount equal to ninety percent of the obligor's greatest average gross monthly earnings, calculated without using self-employment losses, in any twelve consecutive months beginning on or after thirty-six months before commencement of the proceeding before the court.

8. For purposes of subsections 6 and 7, an activity is presumed to be a hobby activity if the result from averaging is a loss. The presumption may be rebutted if the obligor shows that the activity is not done primarily for enjoyment purposes, is a vocation and not an avocation and, in the context of the child support obligation, there is a reasonable expectation that the children will receive long-term benefits.

These new provisions only apply if there is also "regular" income (e.g., wages, salary, etc.). Self-employment losses are allowed to offset regular income in certain situations provided the self-employment loss is not associated with a hobby activity. If a loss results from averaging the self-employment activity, the activity is presumed to be a hobby. As such, the loss may not be used to offset regular income. However, if the obligor shows that the activity is not a hobby (i.e., rebuts the presumption), the analysis will continue. If the obligor is successful in showing that the activity is not a hobby, and if there are three to five years of self-employment income to average, the loss may be used to offset regular income provided losses did not occur in more than 40% of the years averaged and the amount remaining after the offset is equal to or greater than the amount that would be imputed to an underemployed obligor. If the obligor is successful in showing that the activity is not a hobby but there are only one or

two years of income from the activity to average (e.g., because it's a new venture), the test is less stringent. This is in recognition of the fact that new self-employment ventures often incur losses at the beginning.

Comment: Several commentors thought that the changes to section 75-02-04.1-05 regarding the self-employment provisions were designed to treat income from all forms of self-employment more equally, but they felt that the language is confusing. The commentors felt this was especially true in subsection (1)(a)(2) of this section. The commentors questioned whether definitions were needed, or maybe references to tax forms or instructions would be of help. The commentors suggested rearranging the subsection as follows:

(2) That the income of the partnership or small business corporation which is not available and has not yet been distributed to the obligor, if such income is produced by a partnership or a small business corporation for which an election under 26 U.S.C. section 1362(a) is in effect and over which the obligor is not able to exercise direct or indirect control to a significant extent;  
and . . .

The commentors further noted that as to subsection (1)(b)(3), a problem arises in the ability to obtain the necessary documentation to be able to determine whether or not the corporation pays its own taxes. If an obligor does not provide the corporate tax returns, the commentors stated that there is no way to obtain them from any other source. They felt that the structure of the paragraph should be added to the previously calculated amount is closer to the beginning of the paragraph.

Response: No change was made based on this comment. The change suggested merely rearranges the section; it does not make any substantive change. In addition, the problem perceived by the commentors can be dealt with by gaining information through the discovery process afforded by the rules of civil procedure.

Comment: One commentor felt that section 75-02-04.1-05 needs to be rewritten or clarified. The commentor wanted to know if it was the intent to allow the reporting of multiple self-employment entities all in one lump sum. The commentor believes that the reporting of self-employment income should be itemized for each entity to scrutinize and eliminate "hobby" losses and thinly disguised tax shelters. Consequently, the commentor did not believe that subsection three should be removed and did not like the proposed changes to subsection four. The commentor also did not understand the specification of "70%" in (1)(b)(3).

Response: No change was made based on these comments. Multiple self-employment entities may not be reported in one, lump sum. As subsection four

states, each self-employment activity must be averaged separately. Subsection three of this section was removed because the intent was to create a broader definition of net income from self-employment. The 70% requirement in subdivision b of subsection one is a hypothetical formula intended to address a number of variables involved when there is a sale of corporation stock or distribution of dividends of a C corporation over which the obligor is able to exercise direct or indirect control to a significant extent. This percentage is designed to take into account the fact that the rate of tax is different for stock sales than for dividends. The variables are: 1) the tax rate that will apply to the second tax (sale or distribution); 2) the timing of when the second tax will occur (and the related present value of that future tax); and 3) while a person may be able to directly or indirectly control a corporation to a significant extent, he or she may not have total control. A 30% reduction was inserted to take these variables into account (100% less 30% equals 70% is counted when calculating net income from self-employment).

Comment: Several commentors thought that there are two subsections four in section 75-02-04.1-05.

Response: No change was made based on this comment. The first subsection four (the already existing subsection four), will now move up to subsection three because all of the existing subsection three is being deleted. There is an overstrike through the number four of existing subsection four but it is difficult to see.

Comment: One commentor noted that section 75-02-04.1-05 provides: "net income from self-employment means total income for internal revenue services purposes only . . . ." The commentor felt that the courts do not look at that definition closely and that the guidelines should consider actual income and not expenditures and other dreamed up sources of income.

Response: No change was made based on this comment. The Department cannot control how courts apply the guidelines. The guidelines do take expenditures into account, for example, in the calculation of self-employment income.

Comment: One commentor noted that section 75-02-04.1-05(5) deals with averaging self-employment income pursuant to subsection four and that "no amount may be included in income for one year that was previously included in income for any year during the period being averaged." The commentor felt that business income may fluctuate considerably and did not understand why the guidelines would not afford a broader look at the income.

Response: No change was made based on this comment. The guidelines allow for averaging of self-employment income over a five-year period to take into account fluctuations in income. Subsection five of this section merely provides a

method which will avoid duplication of income in averaging when it is distributed at some later date.

Comment: One commentor felt that the revisions to this section are going to hurt those that are self-employed.

Response: No change was made based on this comment because none was suggested. The commentor did not specify how the revisions might hurt self-employed obligors.

**75-02-04.1-06.1. Determination of Support Amount in Multiple-Family Cases.**

Comment: Several commentors noted that the addition of subsection seven to section 75-02-04.1-06.1 reads that, when determining support in a multiple family situation, the only children other than the ones for whom support is being calculated who will be included in the calculations will be those for whom a current child support obligation has actually been established. The commentors questioned if the intent was to consider only those children to whom a support obligation would be owed. If so, the obligor would not receive credit for children to whom he owes a legal duty of support but for whom no court order has been established. The commentor felt the intent was to make sure that the obligor receives consideration for those children to whom he or she owes a duty of support according to statute and not to children who are of age. Therefore, the commentor felt, the language of this provision should state that only children for whom an obligor owes a duty of support and which children fall within the requirements of N.D.C.C. section 14-09-08.2, which deals with the duration of child support obligation, or as outlined in a court order if the duration is extended, are to be considered in this calculation. The commentors felt that this would eliminate those children who are adults, are deceased, or have been adopted.

Response: The following change was made based on this comment:

7. When determining a support amount under paragraph one of subdivision a of subsection four, consider only children to whom an obligor owes a current monthly support obligation pursuant to a support order and other children under the age of eighteen to whom an obligor owes a duty of support.

Comment: Another commentor felt that section 75-02-04.1-06.1(7) could be interpreted in a way that was not intended. The commentor felt that the change was made to clarify that only other minor children of the obligor could be considered in multiple-family cases. The commentor noted that the term "minor children" was used for purposes of discussion, but did not necessarily suggest that this term be incorporated into the proposed amendments. The commentor

was concerned that this new provision could be interpreted to limit consideration of other children of the obligor to only those children who are covered by a support order.

Response: A change was made to address this comment as noted in the response preceding this comment.

#### **75-02-04.1-07. Imputing Income Based on Earning Capacity.**

Comment: One commentor noted that section 75-02-04.1-07 requires review of both parents' income in a split custody arrangement and the commentor felt that this is something that should be done in all cases. Both parents should be responsible for the cost of raising our children.

Response: No change was made based on this comment. The child support guidelines recognize that the obligee parent, as custodial parent, makes a substantial monetary and nonmonetary contribution to the child's basic care and needs by virtue of being a custodial parent. The commentor appears to be advocating an income share model approach to calculating income which has been studied, considered, and rejected by several North Dakota legislative assemblies.

Comment: One commentor felt that section 75-02-04.1-07 created a problem when, for example, before a divorce a couple worked two or three jobs each and child support is based upon this elevated income. The commentor thought that there should be a category of over-employment and the obligation should be cut off at a 40-hour workweek.

Response: No change was made based on this comment. Imputing income assures that a parent supports his or her children to the best of his or her abilities and not simply to his or her inclinations. The child support guideline definition of "underemployment", which triggers imputation of income, is tied to earning capacity and not to the amount of time an obligor works.

Comment: One commentor noted that section 75-02-04.1-07(9) refers to voluntary change of employment. The commentor thought voluntary change of employment should not "counted against" an obligor if we were just looking at hours of a work week, if you are working over 40 hours a work week and are making the same hourly wage.

Response: No change was made because no change was proposed to this subsection.

#### **75-02-04.1-08.1. Adjustment for Extended Visitation.**

Comment: One commentor apparently thought that since the text of section 75-02-04.1-08.1 was not included in the proposed rules it had been stricken. The commentor wanted to know why credit for extended visitation was eliminated and not provided for anywhere else unless the parent has equal custody.

Response: Section 75-02-04.1-08.1 has not been stricken. Language proposed to be deleted is noted with overstrike and new language is underlined. This section is not included in the proposed amendments because nothing in that section is being amended.

### **75-02-04.1-08.2. Equal Physical Custody - Determination of Child Support Obligation.**

Comment: One commentor understood the reasoning behind the proposed changes in section 75-02-04.1-08.2 but felt that using "parenting time" would better serve the purpose of meeting the constitutional equal protection clause of the 14<sup>th</sup> Amendment in the U.S. Constitution. The commentor thought that changing the words "equal physical custody" to "parenting time" gets rid of the requirements for the judges assigning custody. The commentor was concerned that since neither parent is considered an obligor, that section 75-02-04.1-07(9) would not apply to sections 75-02-04.1-08.2 and 75-02-04.1-03. The commentor also wanted to note that since we see it feasible to review both parent's income on equal custody cases that considering both parent's income for all other cases would be feasible as well.

Response: No change was made based on these comments. There is no Constitutional right to, or protection of, "parenting time". Furthermore, changing the wording from "equal physical custody" to "parenting time" would not change the substance of the proposed rule. In addition, the commentor appears to be advocating an income shares model of child support calculation which has been considered, and rejected, by numerous North Dakota legislative assemblies.

Comment: One commentor noted that section 75-02-04.1-08.2 deals with cases in which each parent has equal physical custody and provides a method for determining a child support obligation in such cases. Otherwise, the commentor noted, the parties argue that chapter 75-02-04.1 is inapplicable on the theory that the guidelines did not address the issue of support where parents jointly share physical custody of their child for equal amounts of time. The commentor noted that the proposed new section establishes a methodology for determining support amounts in cases of equal physical custody, and thus assures the guidelines establish a "rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that amount of the award which would result from the application of such guidelines is the correct amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded." However, the commentor noted, that the proposed section does not indicate which of the two parents sharing equal

physical custody is to be treated as the “obligor” or the “obligee” for purposes of applying other sections of chapter 75-02-04.1.

The commentor further noted that there were two problems apparent on the face of the proposed new section. First, the commentor felt that the proposed new section does not indicate which of the two parents sharing equal custody is to be treated as the “obligor” or the “obligee” for purposes of applying other sections of chapter 75-02-04.1, or for that matter, for the purposes of applying statutory provisions found in Title XIV of the Century Code. Second, the commentor felt that the proposed rule does not specify when the calculation described in this proposed new section is to be made in: (a) cases in which one of the divorcing parents owes a currently established obligation to children with a parent other than the divorcing spouse (implicating section 75-02-04.1-06); (b) subsequent determinations of support obligations to children with a parent other than divorced spouse in the equal physical custody case (also implicating section 75-02-04.1-06); (c) determinations of support amounts when some but not all of the children of a couple are subject to an equal physical custody order (implicating both section 75-02-04.1-03, concerning split custody cases, and 75-02-08.1, concerning extended visitation).

The commentor then offered this example to illustrate these problems:

Mother and father are jointly parents of three children, Beta, Gamma, and Delta. Mother is also the parent of a fourth child, Alpha, who lives with Alpha’s father. Mother and father secure a custody order that provides for Beta to live with father 365 nights of the year, Gamma to live with father 185 nights of the year, and for Delta to live with father precisely half of the time.

In order to address the first problem, the commentor suggested adding language that identifies each parent, in an equal physical custody situation, as both an obligor or an obligee. Proposed new section 75-02-04.1-08.2 implicitly creates that arrangement, because an obligation is calculated for each parent assuming the other parent is a custodial parent. The commentor noted that making this explicit will eventually save some divorcing party the cost of litigation to establish that what is implicit was also intended. The commentor felt that this could be accomplished by adding two sentences to proposed new section 75-02-04.1-08.2

“Each parent is an obligor to the extent of that parent’s calculated obligation. Each parent is an obligee to the extent of the other parent’s calculated obligation.”

The commentor felt that the second problem was more complex. The commentor felt that it involves determining the appropriate support amount when there are different provisions applicable to each child. In order to avoid causing litigation, it is important to clarify what policy applies, and it is also important to

provide instructions for the order in which necessary calculations must be undertaken. Finally, the commentor noted, the result should reflect that the proposed section is intended primarily to discourage those who see equal physical custody as a means of avoiding paying child support.

The commentor felt that it may be helpful to revise the third sentence to provide:

“Each parent’s child support obligation must be calculated under this chapter assuming the other parent is the custodial parent of any child subject to an equal physical custody order.”

The commentor felt that this at least makes it clear that consideration of the entire chapter must be contemplated when calculating each parent’s support obligation, and also makes clear that the assumption of the other parent is the custodial parent only applies with respect to children subject to the equal physical custody order.

Response: The following change was made based on this comment:

**75-02-04.1-08.2. Equal physical custody - determination of child support obligation.** A child support obligation must be determined as described in this section in all cases in which a court orders each parent to have equal physical custody of their child or children. Equal physical custody means each parent has physical custody of the child, or if there are multiple children, all of the children, exactly fifty percent of the time. A child support obligation for each parent must be calculated under this chapter assuming the other parent is the custodial parent of the child or children subject to the equal physical custody order. The lesser obligation is then subtracted from the greater. The difference is the child support amount owed by the parent with the greater obligation. Each parent is an obligee to the extent of the other parent's calculated obligation. Each parent is an obligor to the extent of that parent's calculated obligation.

Comment: One commentor felt that the language in this new section may not adequately address child support calculations in situations where there are multiple children and “equal physical custody” has been ordered for some, but not all, of those children. The commentor felt that the language may need further consideration.

Response: A change was made based on this comment as addressed in the response preceding this comment.

Comment: One commentor felt that inclusion of section 75-02-04.1-08.2 will increase custody disputes because some parents will request joint custody in order to avoid paying child support. The commentor felt that shared custody inevitably impoverishes children when one parent agrees to nominal shared custody and little child support in a misguided attempt to avoid a custody fight.

The commentator felt that giving a reduction for extended visitation was enough of a concession along these lines.

Response: No change was made based on this comment. The proposed change was made to ensure that the state of North Dakota's child support program meets the federal requirement that all states have in place guidelines that apply to all situations involving the support of children. This change was designed to address situations in which people were using equal physical custody to avoid the payment of child support. The change provides a methodology for setting support in cases where a court has ordered equal physical custody.

Comment: One commentator expressed concerns regarding section 75-02-04.1-08.2 in that he felt many court orders provide that in situations where the parties share custody equally neither party will pay child support to the other. The commentator was concerned that if the proposed revision to the guidelines regarding equal physical custody is applied, not only to new cases, but also to existing files, it may have a perverse effect. The commentator thought that under the proposed revision to the guidelines in situations where parents' income is similar, the resulting child support obligation would be negligible, often times less than \$100 per month. If the payment of child support relieved the obligor from paying one-half of the expenses for the children, the end result would be that the obligee would be in a worse situation financially by receiving child support than she would be without receiving it. If, on the other hand, the parties' incomes were dissimilar, the proposed change could result in a significant child support obligation. If the obligor was also obligated pursuant to the previous court order to pay 50% of the expenses for the children, it could result in a windfall for the obligee. The commentator noted that if the guidelines are only applied prospectively, the parties would be free to make determinations as to each parent's contribution towards their children's expenses taking into consideration both the receipt and payment of child support.

Response: No change was made based on this comment. The proposed change was made to ensure that the state of North Dakota's child support program meets the federal requirement that all states have in place guidelines that apply to all situations involving the support of children. This change was designed to address situations in which people were using equal physical custody to avoid the payment of child support. This change provides a methodology for setting support in cases where a court has ordered equal physical custody.

Comment: One commentator thought that section 75-02-04.1-08.2 looked very nice. The commentator thought that it was basically a cost-sharing model that looks at the income of both parents.

Response: No change was made based on this comment because no change was suggested.

Comment: One commentor noted section 75-02-04.1-08.2 defines equal physical custody as: “[e]qual physical custody means each parent has physical custody exactly fifty percent of the time.” The commentor felt that it is impossible for there ever to be an arrangement in which each parent has custody of the child exactly fifty percent of the time. The commentor wanted to know if fifty percent means fifty percent of nights, days, hours, or minutes.

Response: No change was made based on this comment. It is not impossible to define equal physical custody. When this section was being drafted, actual court orders were reviewed which granted each parent physical custody exactly fifty percent of time. Equal physical custody could be accomplished by an order which states simply that each parent will have physical custody of the child or children exactly fifty percent of the time. The proposed change was merely to address how to apply the guidelines if parties do succeed in gaining equal physical custody of their children pursuant to court order. If anything less than equal physical custody is ordered, the provisions regarding extended visitation may apply, assuming the requirements for extended visitation are met.

#### **75-02-04.1-09. Criteria for Rebuttal of Guideline Amount.**

Comment: One commentor felt that one of the most disturbing proposals was in section 75-02-04.1-09. The commentor wanted to know why is, if the rebuttal is for an increase, it is to be added directly to the child support amount owed each month, but if the rebuttal is for a reduction in child support, the adjustment is made to the obligor's net income. The commentor felt that this was totally unfair.

Response: No change was made based on this comment. The amendments make it clear that some of the factors used to rebut the presumptively correct amount of child support will be added to or deducted from the obligor's net income and some of the factors will be added to the actual support amount. In general, if the language in the deviation was focused on the needs of the child, the amount is to be added to the child support obligation. If the language of the deviation was focused on the ability of the obligor to pay, then the addition or reduction is to the obligor's net income. These concepts are consistent with previous intent of the guidelines.

Comment: One commentor asked that subsections six and seven be changed. The commentor suggested that either subsection six needed to read: “For purposes of subdivision a through l of subsection 2. . .” and remove subsection seven, or subsection six needs to read: “For purposes of subdivisions a through l of subsection 2, any adjustment shall be made to the obligor’s net income” and remove subsection seven. The commentor felt that this was unfair treatment and

the 14<sup>th</sup> Amendment of the U.S. Constitution, Equal Protection, was not being applied.

Response: No change was made based on this comment. The amendments make it clear that some of the factors used to rebut the presumptively correct amount of child support will be added to or deducted from the obligor's net income and some of the factors will be added to the actual support amount. In general, if the language of the deviation was focused on the needs of the child, the amount is to be added to the child support obligation. If the language of the deviation was focused on the ability of the obligor to pay, then the addition or reduction is to the obligor's net income. These concepts are consistent with previous intent of the guidelines.

Comment: One commentator suggested that subsections five, six, and seven of section 75-02-04.1-09 be moved to other places. The commentator felt that subsection 5 should be part of subsection one and subsections six and seven should be inserted where applicable.

Response: No change was made based on this comment. Although the comment is unclear, it seems that the commentator is addressing placement of the new material in this section. The new material could have been placed anywhere in this section. But these new subsections were placed where they were because, from a drafting standpoint, they are most easily understood where they are.

Comment: One commentator felt that the proposed changes to section 75-02-04.1-09 did not clearly define several key factors to be used in determining child support obligations, for instance, the "reduced ability to pay" and "practices of the parties". The commentator felt that verification should be required of the obligor when claiming expenses for deviation of child support guidelines for visitation. The commentator also felt that this section does not clearly define travel expenses.

Response: No change was made based on this comment. The proposed changes do provide direction by requiring courts to take into consideration the amount of court ordered visitation and also by requiring courts to consider historical, actual travel expenses and practices whenever that information is available in a particular case.

Comment: One commentator felt that costs of visitation should be more clearly spelled out. The commentator thought that travel costs should be limited to 35 cents a mile and hotel rooms. The commentator thought that expenses are only allowed for a specified court-ordered visitation. If you have just "reasonable visitation", that is not included so if the parent is driving a hundred miles every week to visit the child, he cannot take off his visitation expenses because the court only ordered "reasonable visitation."

Response: No change was made based on these comments. The proposed changes require courts to consider the amount of court ordered visitation and historical, actual travel expenses and practices whenever that information is available in a particular case.

Comment: One commentor noted that section 75-02-04.1-09(1)(a) lists the subsistence needs, work expenses, and daily living expenses of the obligor. the commentor felt that court do not seriously look at these. The guidelines should include a reasonable amount for the obligor's living expenses.

Response: No change was made based on this comment because no change was proposed. The support amounts contemplated by the guidelines take into account the subsistence needs, work expenses and daily living expenses of the obligor.

Comment: One commentor noted that section 75-02-04.1-09(2) provides “. . . deviation from the guidelines is the interest of this supported children . . .” The commentor felt that this is an impossible standard to meet.

Response: No change was made based on this comment. Courts have the discretion to determine what is in the best interest of a child. For example, courts often find that a deviation for travel expenses, which facilitate a parent being able to visit his or her child, is in the best interest of the child and will therefore allow a deviation for those expenses.

Comment: One commentor noted that section 75-02-04.1-09 (2) states “[t]he presumptions that the amount of child support that would result from the application of this chapter, except for this subsection, is the correct amount of the child support is rebutted only if the preponderance of the evidence establishes that a deviation from the guidelines is in the best interest of the supported children . . . .” The commentor wanted to know who is the state of North Dakota or any other agency to tell him, their father, what is in his children's best interest? The commentor did not think anyone was capable, other than his ex-wife, and if they cannot agree, some mediator, of telling him what is in the best interest of his children. The commentor wanted this language removed.

Response: No change was made based on this comment. A determination as to what is in the best interest of a child is made by a court. Any deviations that may be made from the presumptively correct child support amount indicated in the guidelines would be the result of a judge's order, not the Department's determination. Furthermore, federal regulations and state law require that criteria for rebuttal of the guidelines take into consideration the best interests of the child.

Comment: One commentor noted that section 75-02-04.1-09 does not contain anything that says an obligation will be reduced based upon an emergency situation. The commentor apparently felt that there should be a process by

which he could make a phone call, or file some paperwork to amend his child support order on short notice.

Response: No change was made based on this comment. Child support orders are court orders and, as such, they may only be amended by a court. The law already provides for modification of a child support order upon a change of circumstance as described by the commentor.

Comment: One commentor felt that the exceptions listed in section 75-02-04.1-09(2)(a) should be deleted regarding children older and younger. The commentor stated that if they are younger, they need childcare and if they are older they need a car or whatever.

Response: No change was made based on this comment. This subdivision does not deal with the needs of children based on age. It is unclear what the commentor intends and no change was suggested.

Comment: One commentor noted that section 75-02-04.1-09(2)(f) relates to the cost of childcare purchased by the obligee for reasonable purpose of employment, job search, education, or training. The commentor thought that these were a voluntary expense as are medical costs. The commentor stated that he has seen obligors totally crushed by ex-spouses who run up tremendous medical bills as a means of punishing the obligor.

Response: No change was made based on this comment. The deviation for childcare expenses must be tied to employment in order to be granted therefore the expense is not voluntary as the commentor suggests. With respect to medical expenses for the children, an obligor who provides health insurance or pays actual medical expenses is entitled to a deduction from gross income for such expenses.

Comment: One commentor noted that section 75-02-04.1-09(g) "the increased ability of an obligor who is able to secure additional income from assets to provide child support" has been addressed by the supreme court of North Dakota has ruled in the past the standard is if you have assets awarded to you in a divorce case, you are not required to sell those assets to meet your living expenses.

Response: No change was made based on this comment. The child support guidelines do not require an obligor to sell his or her assets to pay child support. The guidelines do, however, take into consideration the assets of an obligor that will increase his or her ability to pay support.

Comment: One commentor objected to the proposed language in section 75-02-04.1-09 (2)(l) because she felt that the proposed language would increase the

arguments about overtime and bonuses ending and the matter should be left to judicial discretion.

Response: No change was made based on this comment. It was necessary to address the issue of overtime and bonuses because 2001 Senate Bill No. 2373 required it.

Comment: One commentor felt that the change in section 75-02-04.1-09(5) not permitting spousal support to be deducted from income for purposes of deviating from a guideline calculation is unconscionable in light of the fact spousal support is included in the definition of income.

Response: No change was made based on this comment. The proposed change means an obligor cannot claim a hardship deviation due to the payment of spousal support. If that would be allowed, it would result in less child support being paid which in turn would mean that children would be financing spousal support.

#### **75-02-04.1-10. Child Support Amount.**

Comment: One commentor felt that in regard to the child support chart in section 75-02-04.1-10, the relatively large steps up at the lower end of the chart should be eliminated. The commentor felt that particularly in the \$700 - \$1,000 NMI range, the steps are double or more than the \$16 increase (for one child) for each \$100 increase of NMI from \$1,000 up. The commentor felt that the steps should be smaller over a broader range of income until we get to the point we currently have from the \$1000 NMI level and up. The commentor noted that if there is going to be a big step in child support in order to get to those levels it should be at higher levels rather than at the sub-poverty levels.

Response: No change was made based on this comment. The schedule is based on the needs of children and the ability of an obligor to pay, except at the lower end of the schedule where the amounts effectively consider only the obligor's ability to pay support

Comment: One commentor felt that section 75-02-04.1-10 required corrections to two of the new schedule amounts. The first is in the column for one child, at the \$11,600 monthly net income level, the child support amount should be \$1,957, instead of \$1,956. In the column for five children, at the \$10,600 monthly net income level, they believe that the child support amount should be \$4,260 instead of \$4,261.

Response: The suggested changes were made.

**75-02-04.1-11. Parental Responsibility for Children in Foster Care or Guardianship Care.**

Comment: Several commentors noted that the suggested new language in section 75-02-04.1-11 makes it appear that only the parent from whose home the child left to enter foster care or guardianship care will be entitled to the new formula for calculating child support. However, the commentors noted, there are cases in which neither parent is ordered to pay support at the time that child enters care, and the parents are not residing together. Therefore, the commentors felt that an obligation must be established for each parent and this section needs to be consistent in the method used to calculate the obligations.

The commentors offered two separate suggested changes to subsections of this section. The first suggestion treats all children the same, even if the obligor owes a duty of support to children who do not live in the obligor's home. Basically, all children are considered at one time. There would be no multi-family calculations under section 75-02-04.1-06.1:

75-02-04.1-11. . . .

1. In order to determine monthly net income, it is first necessary to identify the parent or parents who have financial responsibility for any child entering foster care, and to determine the net income of those financially responsible parents:
  - a. If the parents reside together, and neither parent has a duty to support any child who does not either reside with the parents or receive foster care or guardianship care, the income of the parents must be combined and treated as the income of the obligor.
  - b. In all other cases, each parent is treated as an obligor, and each parent's support obligation must be separately determined.
2. The number of children to be counted, when determining the obligation for a child or children in foster care or guardianship care, is the total number of children to whom a parent owes a duty of support. This includes the child or children entering foster care or guardianship care, as well as all other children to whom a parent owes a duty of support.
3. The net income and total number of children, as described in subsection two, are applied to section 75-02-04.1-10 to determine the child support amount. That amount is divided by the total number of children, as described in subsection two, to determine the child support obligation for each child in foster care or guardianship care.

The commentors then offered an example in applying this type of provision: A parent has one child entering foster care, has two other children in the home, and

has another minor child with another parent. The net income for the parent whose obligation is being determined is \$1,000.00 per month. This would be applied to the chart for a total of four children, which would result in an obligation of \$390.00. This is divided by four, to reach a per child amount of \$97.50. The amount of \$97.50 would be the amount to be paid in child support for the child entering foster care.

The commentators offered the second suggested change to this section which would incorporate the multi-family calculations back into the equation:

75-02-04.1-11. . . .

1. In order to determine monthly net income, it is first necessary to identify the parent or parents who have financial responsibility for any child entering foster care, and to determine the net income of those financially responsible parents:
  - a. If the parents reside together, and neither parent has a duty to support any child who does not either reside with the parents or receive foster care or guardianship care, the income of the parents must be combined and treated as the income of the obligor.
  - b. In all other cases, each parent is treated as an obligor, and each parent's support obligation must be separately determined.
2. The number of children to be counted, when determining the obligation for a child or children in foster care or guardianship care, is the total number of children residing in the obligor's home and to whom the obligor owes a duty of support, plus the child or children entering foster care or guardianship care.
3. The total number of children, as described in subsection two, are to be treated as one obligee. The net income, the total number of children, as described in subsection two, and all other children to whom the obligor owes a duty to support are applied to section 75-02-04.1-10 in accordance with section 75-02-04.1-06.1, the multiple family section, to determine the child support amount. That resulting amount is divided by the number of children, as described in subsection two, to determine the child support obligation for each child in foster care or guardianship care.

The commentators noted that the same scenario provided above can be applied to this suggested change in the language. The two children residing with the parent, and the child entering foster care would be treated as one obligee. Then the multi-family calculations would be used as follows:

Net Income:	\$1,000.00		
	Children in Home/ Entering Care	Other Obligee	Other Obligee

Child Support Amount	\$350.00	\$250.00
Obligor's Net Income		
Reduced by Other		
Obligations From		
Line 1.	\$750.00	
Support Amount	\$232.00	
Line 1 + Line 3	\$582.00	
Line 4 /Line 2	\$291.00	
Line 5 Divided by		
Number of Children Per		
Subsection 2 To Get		
Per Child Obligation	\$97.00	
Line 6 Times the Number		
Of Children Entering		
Care	\$97.00	

The commentors noted that the suggested changes in the first proposal make for much easier calculations. But, the second proposal is more in line with the calculations that are performed in cases that do not involve foster care or guardianship care circumstances. In the particular scenario outlined above, the difference in methods of calculation do not make a material difference in the outcome. Various factual situations had not been applied by the commentors to the two methods so it is not known if this outcome was just a fluke based on the number of children or the net income that was used or if similar results would occur under all circumstances.

Response: The change described below after the next comment was made to address concerns about this section.

Comment: Another commentor noted concerns that the proposed revisions to section 75-02-04.1-11 may not adequately address the determination of child support obligations for children entering foster care from a variety of family living arrangements. The commentor offered the following example: in a non-intact family situation, it may be clear how to calculate a child support obligation for the parent with whom the child had been residing prior to entering foster care. However, it is less clear how to apply the guidelines if a child support obligation must also be established for the other parent (i.e. the parent with whom the child had not been residing). The commentor believes that the language herein may need further consideration.

Response: Based on this comment, the following change was made:

**75-02-04.1-11. Parental responsibility for children in foster care or guardianship care.** It is important that parents maintain a tie to and responsibility for their child when that child is in foster care. Financial responsibility for the support of that child is one component of the maintenance of

the relationship of parent and child. Parents of a child subject to a guardianship order under North Dakota Century Code chapter 27-20 or 30.1-27 remain financially responsible for the support of that child.

1. In order to determine monthly net income, it is first necessary to identify the parent or parents who have financial responsibility for any child entering foster care or guardianship care, and to determine the net income of those financially responsible parents. If the parents of a child in foster care or guardianship care reside together, and neither parent has a duty to support any child who does not either reside with the parents or receive foster care or guardianship care, the income of the parents must be combined and treated as the income of the obligor. In all other cases, each parent is treated as an obligor, and each parent's support obligations obligation must be separately determined. ~~If an obligor under this section has a child living with the obligor, the support obligation must be determined through applications of sections 75-02-04.1-06 and 75-02-04.1-06.1.~~
  
2. ~~Each child in foster care or guardianship care is treated as an obligee, and support obligations must be separately determined for each such child~~ Unless subsection 3 applies to the obligor, the net income and the total number of children are applied to 75-02-04.1-10 to determine the child support amount. That child support amount is then divided by the total number of children to determine the child support obligation for each child in foster care or guardianship care. For purposes of this subsection, the "total number of children" means:
  - a. If a child entering foster care or guardianship care resides in the obligor's home, the total number of children residing in the obligor's home to whom the obligor owes a duty of support, including the child or children entering foster care or guardianship care, plus any other full siblings of the child or children entering foster care or guardianship care to whom the obligor owes a duty of support who are not residing in the obligor's home; or
  
  - b. If no child entering foster care or guardianship care resides in the obligor's home, the child or children entering foster care or guardianship care plus the full siblings of the child or children entering foster care or guardianship care to whom the obligor owes a duty of support.
  
3. If an obligor owes a duty of support to any child other than the child or children described in subdivision a or b of subsection 2, as

applicable to that obligor, the support obligation must be determined through application of section 75-02-04.1-06.1 such that:

- a. The total number of children, as described in subdivision a or b of subsection 2, as applicable to that obligor, are treated as one obligee; and
  - b. The amount resulting from the application of section 75-02-04.1-06.1 for the children described in subdivision a or b of subsection 2, as applicable to that obligor, is divided by the total number of such children to determine the child support obligation for each child in foster care or guardianship care.
4. For purposes of subsection 2, a full sibling of the child or children entering foster care or guardianship care is a brother or sister who has both parents in common with the child or children entering foster care or guardianship care.

#### **Miscellaneous Comments.**

Comment: One commentor felt that the guidelines were too complex. The commentor suggested that the guidelines be kept simple.

Response: Changes have been made as noted in the rest of this document to simplify and clarify the guidelines. No changes were made based on this comment because no specific problems were identified nor were specific changes suggested.

Comment: One commentor wrote in support of changes made to and clarification of child support guidelines, particularly concerning joint physical custody. The commentor noted that she was manipulated into settling out of court for little of the marital assets and joint custody.

Response: No change was made since these comments were of a general nature and were supportive of the changes proposed.

Comment: Two commentors felt that there should have been more than two public hearings. One commentor thought that the public hearings had not been advertised to inform the public of the meetings. The commentors were also concerned about the times that the hearings were held.

Response: State law requires that one public hearing be held to allow public comment on proposed administrative rules. The Department held two public

hearings to allow public input into these rules. State law also requires that notice of the public hearing be published in all County newspapers and the Department also complied with that requirement. As was indicated to the commentors at the public hearings, the Department is also required by state law to accept written comments during the comment period and to give them the same consideration given to comments made during public hearing. Therefore, any individual who wanted to provide comments was not required to attend any of the public hearings and could provide written comments at his or her convenience.

Comment: One commentor wanted to know why the Department of Human Services is in charge of making the rule changes. The commentor stated that the Department receives the majority of its income from child support collected through the state child support unit. The commentor felt that this makes the Department biased to increase the child support as it adds more income for the Department.

Response: No change was made to the proposed rules because none was suggested. The Legislature has designated the Department of Human Services as the state agency responsible for the administration of the child support program in North Dakota.

Comment: One commentor felt that the committee charged with reviewing the guidelines should include "average people".

Response: No change was made to the proposed rules because none was suggested. The committee that reviewed the guidelines and made recommendations regarding amendments included an obligor, an obligee, two legislators (one of whom was an obligor himself), an accountant, an attorney who concentrates in family law, a judge, a regional child support enforcement unit administrator, and four employees of the Department.

Comment: One commentor felt that the guidelines do not address when a child becomes an adult. The guidelines do not automatically require termination of the support obligation when a child becomes an adult.

Response: No change was made based on this comment. The duty to provide support to one's child does not necessarily end when that child reaches age 18. For example, the law provides that a child support obligation will continue for a child who has reached age 18 but who has not graduated from high school. Furthermore, child support obligations can be continued beyond a child's eighteenth year or graduation from high school, for example, in order to provide a post-secondary education or support for a child with special needs.

Comment: One commentor suggested that the Department determine the cost of raising a child. The commentor felt that child support may be well above the cost of raising a child. He felt the guidelines should address this cost and that any

child support that the court orders to be paid above the cost of raising a child should be spent on the child by the obligor. The commentor felt that this would allow this additional child support to go directly to the child by purchasing things for the child or to be spent during visitations for the child. The commentor felt that this would assure that this money would go for the child rather than raising the standard of living for the custodial parent.

Response: No change was made based on this comment. The guideline amounts were calculated based on the cost of raising a child. The guidelines are premised on the obligor's income, not on the obligee's earnings or needs. Furthermore, it is assumed that the support that is paid to the custodial parent will be used for the child's current expenses.

Comment: One commentor thought that if a child is in foster care and the child support that the parents are required to pay is in excess of the foster care costs, the Department of Human Services keeps the additional money. The commentor wanted to know why the State keeps this additional money.

Response: No change was made based on this comment. A parent remains financially responsible for support of a child in foster care. Any excess goes to the legal custodian as required by 45 C.F.R. § 302.52(b)(2).

Comment: One commentor felt that the public is unaware of the dangers that exist for children in a sole custody relationship. He questioned why we continue to have a sole physical custody relationship in this state. He noted that women are more vicious than men; they are just as likely to initiate physical violence as men and will more often resort to weapons such as knives and guns. The commentor noted that when the father goes to the state's attorney office for enforcement for the visitation interference law, they refuse to enforce it.

Response: The Child Support Guidelines do not address the issues with which the commentor is concerned. Custody of a child, whether joint or sole, is an issue that will be decided by a court of law if the parties cannot agree among themselves. Likewise, interference with child visitation is something that can only be addressed in a court of law and not by the Child Support Guidelines.

Comment: Several commentors noted that North Dakota Century Code section 14-09-08.4 states the child support review should be no less frequently than every thirty-six months. The commentors stated that the child support agency will not review a child support order unless it is over 36 months.

Response: State law requires the child support agency to review child support orders no less frequently than thirty-six months after the establishment of the order unless one of the exceptions listed in that section pertains. State law does not place any burden on state resources to perform such a review any earlier than 36 months after the order is entered.

Comment: One commentor felt that child support should not be connected to the welfare system. The commentor thought that child support guidelines came about because of single parents on welfare and it was only later decided to apply these guidelines to all situations regardless of whether the custodial parent was receiving welfare. The commentor felt that supporting one's child should have nothing to do with feeding the welfare system, in other words, paying for a government program.

Response: No change was made based on this comment because federal and state laws require that North Dakota develop and implement guidelines that are applicable whether or not a custodial parent receives welfare.

Comment: One commentor thought that 15 U.S.C. § 1673(b)(2), the part of the Federal Law and Consumer Credit Protection Act, should be mentioned in the guidelines regarding child and spousal support should not exceed 50% of such individual's disposable earnings in any week. The commentor noted that disposable income, under federal law, is income after taxes are taken off and he thought the North Dakota guidelines should recognize this federal law and incorporate it someplace into the rules.

Response: No change was made based on this comment. The law referred to by the commentor is a consumer credit protection law and does not apply to the establishment of child or spousal support. Although not related to the guidelines, when enforcing a support order through income withholding, state law provides that the amount to be withheld may not exceed fifty percent of the obligor's disposable income from the income payer.

Comment: One commentor noted that N.D.C.C. section 14-09-08.9 provides that each judgment or order issued by the court in this state which includes an order of child support must include a statement advising the right to request a review. The commentor wanted to know who was going to do the review? The commentor thought that it should probably be spelled out someplace in the rules.

Response: No change was made based on this comment. The law cited by the commentor is clear; it gives both the obligor and obligee the right to request review of a child support order by the child support agency.

Comment: One commentor had a comment regarding children sharing the wealth of parents in later years. He felt that parents do not have to share their wealth with their children and only have to take care of basic needs such as food, housing, medical care.

Response: No change based on this comment was made. Child support is designed to provide a level of support to children based on the resources of the parent. It is based on the fact that children living in intact households do benefit

from the increased resources of their parents and the child support obligation is designed to approximate that occurrence by requiring a larger support amount from those obligors who have larger incomes.

Comment: One commentor felt that the guidelines are unfair or when they are fair they are applied poorly.

Response: No change based on this comment was made because no change or suggestion was made as to how the guidelines could be drafted differently to preclude courts from applying them poorly.

Comment: One commentor thought that North Dakota should grant a jury trial for all family court matters, for child support, child custody, and child visitation.

Response: No change was made based on this comment. The Department does not have the authority to grant jury trials.

Comment: One commentor felt that Counties and the State should enforce child visitation in the same manner that child support is enforced. The commentor felt that a custodial parent who denies custody or visitation should be found in contempt of court and at each court hearing a court-appointed attorney should be provided for both parties. The commentor stated that he would like to see more mothers jailed for contempt of court for interfering with visitation.

Response: No change was made based on these comments because they do not relate to the child support rules under consideration. Only the judicial system may enforce child visitation orders, enter contempt of court orders, and provide court-appointed attorneys. The Department does not have authority to provide any of these services.

Comment: One commentor noted that we do not have a debtors prison in the United States, but some states, other than North Dakota, are putting parents who are behind in child support in prison for one or two years, or they try to take their licenses away and so forth. The commentor thought that this is un-American and against the Constitution.

Response: No change was made based on this comment because it does not relate to the calculation of a child support obligation nor does it address any of the proposed amendments to the guidelines.

Comment: One commentor noted that court judges try to protect their discretionary power against child support guidelines. The commentor noted that the guidelines limit the judge's discretion, reduces his power and authority, and is demeaning to his judicial status.

Response: No change was made based on this comment because the Department is required by state and federal law to promulgate child support guidelines and the comment does not identify any way in which the guidelines improperly interfere with judicial discretion.

Comment: One commentator felt that courts should consider the age, health of the parties, the station or status of the parties involved, the educational status, the income, the occupations, the earning capacity, and the amount and sources of income for both parents when setting child support and visitation. The commentator felt that these things were not considered in court when child support enforcement is being pursued.

Response: No change was made based on this comment. As noted above, the child support guidelines do not address child visitation issues. The child support guidelines are designed to allow the trial court to balance the needs of the children and the ability of the parent to pay child support. Trial courts can, and do, take into consideration the factors mentioned by the commentator when setting child support.

Comment: One commentator felt that the value of services provided by the custodial parent should be a factor and also the financial status of each parent and the standard of living of each parent should be taken into account when the so called guidelines of child support in each state are filed with the clerk of court.

Response: No change was made based on this comment. The child support guidelines recognize that both parents owe a duty of support to their children. The guidelines take into account that a custodial parent makes a substantial monetary and nonmonetary contribution to the child's basic care and needs by virtue of being a custodial parent. The noncustodial parent's obligation is the recognition of what that parent owes to support his or her child in addition to what the custodial parent provides.

Comment: One commentator felt that there needs to be a financial statement, an affidavit signed and notarized by the ex-wife and the ex-husband. This would list all assets, income, expenses, free gifts, welfare and welfare fraud, prostitution, dinners and clothes that are bought and any boyfriend or girlfriend plus their income. The commentator further noted that if the financial statement is not provided by each ex-spouse, it should be considered perjury and the other party should be jailed if they are not telling the truth.

Response: No change was made based on this comment. Parties to a child support proceeding are already required to provide financial information to the court in order to allow it to determine the appropriate child support amount. The income of the custodial parent is not relevant in a child support determination because, as noted in the response preceding this response, the guidelines assume that a custodial parent makes a substantial contribution to a child's

needs. The North Dakota Legislative Assembly has considered changing the child support system to an income share model as is apparently advocated by the commentor and it has rejected that system on several occasions.

Comment: One commentor stated that we need to connect child visitation to child support. The commentor recommended enforcement mechanisms in place to reduce child support and welfare payments when visitation is denied.

Response: No change was made based on this comment. Both child support and visitation are rights that belong to the child. Children need support whether or not visitation occurs. Reducing child support because visitation does not take place as scheduled hurts only the child. A parent may seek the assistance of the court to enforce visitation if necessary.

Comment: Several commentors felt that an obligor should be able to file a motion to modify child support when circumstances change.

Response: No change was made based on this comment because child support orders are already subject to modification upon a change of circumstances and in periodic reviews as well.

Comment: One commentor felt that in contempt of court proceedings, the non-custodial parent is threatened with jail time or loss of his license and so forth. The commentor felt that the obligor must know about the court order but a lot of these orders are sent out to addresses that have been changed and it is a violation of the person's civil rights to hold him in contempt. Also, the commentor noted, the person has to intentionally refuse to make payment without a good explanation and the father in most of these cases must be able to pay or it is a violation of the constitution.

Response: No change was made based on this comment because it does not address the child support guideline amendments under consideration. These are issues to be resolved, if necessary, by the judiciary.

Comment: One commentor believed that interest was being charged on all child support arrearages.

Response: No change was made based on this observation. The commentor is correct. As with any judgment, interest has always accrued on unpaid child support obligations. In the past, courts calculated interest due on arrears and, beginning in 2002, the state child support disbursement unit may calculate interest as provided for in North Dakota Century Code section 14-09-25.

Comment: One commentor stated that a lot of the time due process rights are violated and there should be a hearing first. Other forms of attachment of funds, assignment, garnishment, and private creditors come into effect. The commentor

noted that he felt it violates the Consumer Credit Protection Act concerning payroll deductions, bonuses, unemployment compensation, worker's compensation benefits, disability benefits, commissions, retirement benefits and so forth. The commentor felt that a person should get a bond or insurance and lien some property or land, which is first claimed by a bank or creditors. The commentor further noted that you could also have a lien put on your property by family members or a friend or borrow money on it as an equity loan. There are also federal and state tax refunds that are taken by the tax intercept program and the ex-wife or the ex-husband when they are before the courts in these child support enforcement hearings.

Response: No change was made based on these comments. It is not clear what the commentor was even trying to suggest. The commentor did not cite or reference a particular section of the guidelines nor did he suggest how the guidelines could be revised to deal with these concerns.

Comment: One commentor suggested that "we" should file complaints against judges, attorneys, guardian ad litem, social workers, clerks of court, sheriffs, the police, doctors, psychologists, and other professionals and report them to their professional review boards and make them lose their practice. In addition to filing complaints, the commentor felt that we should also file lawsuits against them and place liens on their property.

Response: No change was made based on this comment. It is unclear what the commentor is even referring to and how this relates to the proposed amendments to the child support guidelines.

Comment: One commentor would like the state of North Dakota and the courts to consider the option of adoption if the parent who wants custody of the child cannot provide for the child. That parent, who is usually the mother, should put the child up for adoption or have a change of custody to the father.

Response: No change was made based on this comment. The guidelines do not determine which parent will receive custody of children and they do not deal with issues such as requiring the termination of parental rights and adoption.

Comment: One commentor submitted 75 points entitled "Child Support in America."

Response: None of these points addressed a specific section of the proposed amendments nor did they suggest specific revisions to the concepts proposed in these amended guidelines. To the extent that any particular point could be deemed to address or suggest some sort of change, they have been addressed above.

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