

Child Support Guidelines Advisory Committee

May 23, 2006

10:00 – 3:00

Missouri River Room, State Capitol

Members present: James Fleming, Paulette Oberst, Representative William Devlin, Senator Tom Fischer, Howard Walth, Brad Davis, Sherry Mills Moore, Judge John McClintock, Diane Hellman, Melissa Hauer, Robert Freed, Judge El Marie Conklin (arrived 10:30 a.m.), Carol Cartledge, Brenda Peterson, and Tove Mandigo

Members absent: Tricia Steffan

Welcome Chairman Fleming welcomed the group and expressed appreciation for members' participation.

Introduction of committee members Members introduced themselves and talked a little bit about their affiliation with child support, and their experience with past guidelines committees.

Fleming said he is "new blood" as far as the guidelines committee. He is the Deputy Director and attorney for the state Child Support Enforcement office. Prior to that, he was the program's attorney through the Attorney General's office. He has children at home.

Oberst is the Policy Administrator with the state Child Support Enforcement office. She has been with the program for 20 years – beginning at one of the Regional Child Support Enforcement offices. She has participated in past guidelines committees.

Cartledge is with Temporary Assistance for Needy Families (TANF) policy. She has been on the receiving end of child support. She is new to the guidelines process.

Hellman works with Community Options and is a custodial parent.

Freed was involved with a prior guidelines committee. He has been both a custodial parent and a noncustodial parent.

Moore is an attorney in private practice, representing both custodial parents and noncustodial parents. She has participated in past guidelines committees. She has children over the age of majority.

Rep. Devlin is one of two legislators on the committee. He participated in the last guidelines committee. He serves in the House on the Human Services Committee.

Sen. Fischer is one of two legislators on the committee. He participated in the last guidelines committee. He serves in the Senate on the Appropriations Committee and the Appropriations Subcommittee on Human Services. He has been involved with child support-related legislation. He was a noncustodial parent for 13 years.

Mandigo is with the Executive Office of the Department of Human Services (DHS). She has been given, by proxy, the responsibility for the lead of economic assistance policy and child support enforcement programs. She has children over the age of majority.

Walth said he has been a noncustodial parent for about a decade. He is new to the guidelines committee process. He stated appreciation for the opportunity to participate.

Hauer is an attorney for DHS. She participated in the last guidelines committee. She usually helps draft the proposed administrative rules. She has children at home.

Davis is the Administrator of the Dickinson Regional Child Support Enforcement office. He has been involved in past guidelines committees. He has children at home and in college.

Judge McClintock is a district judge. Referees handle most of the child support cases in his district. He has children at home and in college.

Peterson works with Medicaid policy. She has children at home and in college.

Barb Siegel is sitting as a nonmember taking notes. She is the Policy Analyst with the state Child Support Enforcement office. She has been involved in past guidelines committees.

Fleming noted that a variety of different perspectives are represented on the committee membership. He said there are two missing members: Steffan and Judge Conklin. He said Judge Conklin will be arriving later. She is with Three Affiliated Tribes. Three Affiliated Tribes was just approved for direct federal funding to start up a Tribal IV-D program. Fleming also noted he was glad to have the TANF (Cartledge) and medical assistance (Peterson) programs represented as the committee works through the various issues.

Fleming said there are three meetings scheduled so far for this committee. Later, will be tentatively scheduling a fourth meeting, in case it is needed.

Fleming noted the committee meetings are public meetings. Notice of the meeting was provided to the Secretary of State as required. Public hearings on proposed administrative rules will come later in the process. Fleming noted that a district judge has asked to address the committee about child support "offsets;" he said this will likely occur at the next meeting.

Role of the committee Fleming said the committee's role is advisory to DHS. Historically, everything past committees have recommended has ended up in the proposed administrative rules. This committee plays a very important role.

Description of administrative rulemaking process Hauer provided an overview of the administrative rulemaking process. She said once the rulemaking process starts,

the process usually takes six to nine months. The rulemaking process starts from the point in which there are draft administrative rules that have been recommended by this committee and accepted by DHS. There are notice requirements and a comment period which often involves a public hearing. After the comment period expires, DHS will review every comment made and document responses to the comments. The draft rules may be changed in response to comments. An Attorney General's opinion is sought regarding the legality of the proposed rules. The rules are filed with the Legislative Council. The Administrative Rules Committee has to review the rules. The Administrative Rules Committee holds a hearing on the rules. Sometimes, the rules are carried over for a second hearing.

Summary of background materials (previously provided to committee members)

Fleming referenced background materials previously sent to members.

Fleming stated the guidelines apply any time mom and dad don't live together – like situations of divorce, paternity, or separation. The child support guidelines are applied by the Child Support Enforcement program and by the private bar. Ultimately, it goes to the court; the judiciary is ultimately who decides what amount will be ordered. Fleming also mentioned modifications. Generally, the Child Support Enforcement program will do reviews of orders, for possible modification, every three years. Modifications can also be done privately. A material change of circumstances generally must be shown if it has been less than one year.

Oberst reviewed material relating to the child support guidelines, beginning with the statutory authority. Federal law at 42 U.S.C. § 667 requires states to develop and maintain child support guidelines. She said each state develops their own guidelines; there are no "national" guidelines. States vary how the guidelines are established. In North Dakota, they are established through administrative rule. The federal law requires there be a rebuttable presumption that the guideline amount is the correct amount of child support to be awarded. Oberst said the committee would be talking about criteria for rebutting this presumption at another meeting.

Federal regulation at 45 C.F.R. § 302.56 then tracks the federal law, but fleshes it out. Oberst reviewed some of the applicable federal regulations including that states must have only one set of guidelines; what the guidelines must include at a minimum; and the four-year guidelines review.

State law regarding the guidelines is at N.D.C.C. § 14-09-09.7. Oberst reviewed some of the applicable state law provisions including that it is the responsibility of DHS to establish the guidelines; there are certain requirements the guidelines must consider; and the four-year guidelines review provisions including the DHS advisory committee which is this group.

Oberst said the current guidelines took effect in August 2003. These guidelines had been provided to the members. North Dakota's guidelines are based on the "obligor" model, with means only the income of the noncustodial parent is taken into

consideration. The guidelines calculations begin by determining gross income, then taking certain deductions for, for example, taxes/FICA/Medicare. The guidelines also have sections for special provisions such as multiple families, extended visitation, imputing income, self-employment, and foster care. Once net income is determined, it is applied to a chart which looks at that net income and number of children.

Copies of guidelines forms had also been provided. Oberst provided an overview. These forms were developed by the Child Support Enforcement program to help do the guidelines calculations. The forms include a Financial Affidavit used to gather financial information; a worksheet; and various schedules (which address special calculations like self-employment). Oberst mentioned the Supreme Court has also developed an on-line child support guidelines calculator. It is available through the Supreme Court's Web site.

Fleming handed out an agenda, saying it was similar to the one that was previously emailed to members.

Fleming noted that rulemaking must be commenced by August 1, 2006; therefore, that is the timeframe for this committee's work product. He mentioned that Friday, June 2nd, is the next scheduled meeting.

Overview of issues for consideration Fleming provided a brief review of the issues for consideration. He said there will be an opportunity for members to add issues as well. He asked if any members had issues to add at this time.

- Sen. Fischer asked that treatment of overtime and bonuses be added.
- Moore asked that division of out-of-pocket expenses in equal custody situations (e.g., if they should be divided, how they should be divided) be added.
- Walth asked that extended visitation issues be added.
- Rep. Devlin asked that the definition of "community" within the imputation section be added.
- Moore brought up an issue that she said may not fall under the guidelines but is annoying to clients – why are we asking for noncustodial parent asset information if the guidelines are income-based?

Fleming said that "imputed income" will be considered by this committee and therefore, Rep. Devlin's add-on issue will be considered at that time. He noted that the rest of the add-on issues will be looked at in future meetings.

Overview of agenda Fleming briefly reviewed the agenda and noted that the plan was to clean up some of the smaller items and address a few more issues.

Schedule fourth meeting (if needed) The members consulted their calendars and a fourth meeting was scheduled, in case it is needed, for Monday, July 24, 2006.

Begin discussion of issues for consideration Fleming said this is a policy-making group so he encourages open discussion. When the members get done with a topic there will need to be a motion to recommend a change to the guidelines and a roll call on the motion will be done. This will be done in this manner because these are open meetings. At today's meeting, there will most likely not be a whole lot of motions because there is no draft language to look at and vote on. The committee will start, next meeting, reviewing and voting on draft language. He mentioned that having a lot of different points of view is healthy.

Judge Conklin asked why the child support guidelines don't take the custodial parent's earning capacity into consideration. Fleming said there is a place in the guidelines that recognizes the custodial parent's contribution of in-kind support. There are other states that have "income shares," a model which takes into consideration both parents' incomes. Legislation for an income shares approach has been proposed a number of times, but never passed.

Mandigo said there was a past legislative session in which there was a lot of discussion about the possibility of changing to an income shares model. Many scenarios were run, both in and out of DHS; the result was there was not a lot of difference in the amount of support that would be ordered under one model vs. the other, but there was a high cost to making the change. Amounts were also compared with those in other states, that used different models.

Fleming said that the guidelines look at a variety of information. Under an income shares model, the time to do a calculation would be doubled because one would need to gather information from two parties instead of one. That was part of the reason for the cost. Sen. Fischer stated that he disagreed that it would double the time needed. He said he favors income shares; he thinks it is the fair way to do it. He said Rep. Devlin has a model from Delaware that, while it can't be looked at during this process, maybe it will be looked at during the next legislative session.

Davis said he doesn't want anyone to think that his opposition to income shares is fiscal, although he said it was true that it would double the amount of information that would need to be collected and would increase the time needed. He said, however, that that is not his underlying concern. He likes the idea that the current guidelines recognize the in-kind support the custodial parent provides; income shares ignores that in-kind support. He feels that type of in-kind support must be considered. If a dollar amount would be assigned to that in-kind support, it would probably exceed what some noncustodial parents would pay. He said he may not be opposed to income shares if it could address this concern. He also said that comparison calculations were done before, and can be done again. Wondered if the taxpayers are willing to foot the bill if the only result is perception of fairness. Walth asked if Davis was implying that the noncustodial parent doesn't provide in-kind support as well. Davis said that he was not implying that at all; he feels there is a value to in-kind support and income shares doesn't consider in-kind support from either parent.

Moore said that any time one requires more information in private practice or child support offices, one is increasing the number of opportunity for disputes, which can be emotionally difficult and expensive and ultimately can negatively affect the child. She said she understands there is an appearance of fairness. She said Minnesota recently changed to income shares and they are already having difficulties. She said she has talked to attorneys in other states with incomes shares and they have found there is not much difference in the results.

Fleming noted that when the program's customer service staff takes calls, the caller may begin by complaining about the obligor model but, when it comes down to it, it is not the model they are most concerned with – it is how often the order is looked at. The program is issuing policy changes that will allow more frequent reviews of orders upon a parent's request.

Rep. Devlin said he expects income shares will be introduced next legislative session. He said if child support staff must look at two complete sets of information under income shares, it will cost more money. He said he is reluctant about this if counties are paying the tab, which would be the case under the current structure. If the program were to be state-administered, he would then perhaps consider it. Does not want this to affect the local taxpayers. Rep. Devlin mentioned the model that Delaware uses; it contains a self-sufficiency allotment.

Judge Conklin noted this information was helpful because there will need to be explanations as to why the Tribe chooses a certain model. Fleming noted that if income shares is chosen from the beginning it would avoid the on-going discussion that the state is having.

Hauer said that she used to practice law in Washington state (which uses an income shares model). When she moved to North Dakota, she at first thought the obligor model was odd. But, after a while, she saw advantages. It is easier to apply, plus there are not so many modifications. In Washington, there were many modifications (i.e., requests when mom's income changed and requests when dad's income changed). There is a negative affect on the parties and the judiciary when parties are constantly going back in to deal with child support.

Fleming noted that when one looks at arrears, one understands that it is not so much about collection, as much as how it was entered initially. He gave examples of the effect of defaults. If you get the right number at the front-end, it reduces problems later. Hellman commented that when she was going through the child support process, there wasn't a lot of information. Feels there should be clear information for parents. Example - What will this mean to me as a CP? As an NCP?

Fleming said that, so far, the legislature has said "no" to income shares.

Section -13 Application

- **Issue: Consider whether to make two technical corrections to the language:**
1) “is ~~rebuttedly~~ **rebuttably** presumed” and 2) “~~actions arriving~~ **arising out of divorce.**” After brief review of this issue, there was general consensus that these technical corrections should be drafted for action at the next meeting.

Section -03 Split Custody and Section 08.2 Equal Physical Custody

- **Issue: Consider the effect of the Supreme Court’s opinion in Simon v. Simon on the offset language.** Fleming provided a general explanation of the issue. Assume mom and dad have two children and those are the only children. Each parent was given custody of one child. If one looks at the current guidelines language, a separate calculation is done using each parent’s income to arrive at two obligations – one for each parent. The two are then “netted out” and the difference is what is to be paid by the parent with the higher obligation. The section on split custody has been in effect since 1991 and wasn’t changed until the last guidelines review when “obligation” and “amount” were clarified – that each parent has an obligation and the amount is just the “net” amount left after the offset.

When one parent goes on TANF, the right to support is assigned. Prior to the last change, one could have read the language that only the “net” amount remaining after the offset would be assigned. After the change, DHS interpreted it to mean that each parent has an obligation and that the full amount of the obligation, intended for the child on TANF, would be assigned, not just the “net” amount. There was, however, a recent Supreme Court decision that said only the “net” amount was assigned.

Oberst said there were a lot of handouts on this issue. A copy of the North Dakota Supreme Court decision, Simon v. Simon, was provided, as well as the interpretation issued by the Child Support Enforcement program (CI-03-12-01, dated January 16, 2004).

Davis asked if the last guidelines committee didn’t accomplish what it thought it had in this area? Oberst said the last committee probably didn’t really get to the point of complete resolution of the specific issue of assignment in these cases.

Fleming talked a little bit about situations in which this could open the door to welfare fraud.

Oberst reviewed another handout which provides two scenarios. Under the Simon decision, the assigned amount would only be the “net” amount (i.e., the difference between the two obligations), rather than the full amount of the obligation. In Scenario 1, mom’s obligation (owed to dad) is \$378 and dad’s obligation (owed to mom) is \$443. If mom and the child in mom’s home go on TANF, under Simon, the assigned amount would be \$65 (i.e., the difference between mom’s obligation and dad’s obligation, with dad’s obligation being the higher of the two) instead of the full

amount of \$443. In Scenario 2, with the same obligations, but this time with dad and the child in dad's home going on TANF, under Simon, the assigned amount would be \$0 instead of the full amount of \$378 because the person who went on assistance (i.e., dad) has the higher obligation.

Moore pointed out that since this was a Supreme Court decision, that is the way it is. Oberst said if we like the decision, we can leave the language as it is. If we don't like the decision, we can take a look at addressing it in the guidelines.

Freed said one often sees that it is obligations based on imputed minimum wage, so there is an obligation based upon minimum wage for both mom and dad; if each are on TANF, what is one going to do? These would be tough situations. Fleming said that even if it is a person to whom income has been imputed at minimum wage, that is done because the person is able to generate that type of income. Freed said that they may be both actually earning minimum wage and each has a child in the parent's home the parent needs to support, plus pay support for the child in the other home.

Fleming wondered if it might be better to look at this issue as a collection issue, rather than a guidelines issue. For example, perhaps there could be a policy that would allow forgiveness of arrears in certain situations involving split custody and assignment.

In response to a question from Moore, Cartledge said TANF allows the amount of child support paid for other children to be deducted from income for eligibility purposes. Cartledge noted there are sometimes problems because of the different definitions between Child Support Enforcement (which looks at the court order) and TANF (which looks at who has physical custody the majority of the time). Oberst said the situations Cartledge described are really equal physical custody issues, rather than split custody issues. Fleming said that TANF is an assistance program; not tied up in the court.

Davis asked if there was any idea of what the financial effect on the state would be if it is left with the Supreme Court decision of only assigning the "net" amount. Fleming said that since the Simon decision, the state office has kept track of the offsets that happened, that wouldn't have happened otherwise. Fleming explained how the process works with the state's automated system, FACSES (Fully Automated Child Support Enforcement System), both before Simon and after Simon. Fleming said he believed that since a worker is now monitoring how many offsets there are that wouldn't have happened otherwise, a ballpark figure could be pulled together. Davis said he was asking this because he was wondering if it will cost more to fix than to leave it alone. He also provided some situations in which one parent could get a "raw deal," if the full amount would be assigned rather than the "net" amount. For example: parent with higher obligation is paying the full amount of the obligation, but is not receiving support from the other parent.

Fleming said the state office can identify the numbers since Simon. He said he thinks this may be a "Pandora's box" and gave the example of equal physical custody. If the guidelines are not changed, and only the "net" amount is assigned, the taxpayers will take a hit on it. It also presents an opportunity for fraud. He asked that members keep in mind that the parent's full obligation is only the amount that was based on what their income would allow. The parents are not being asked to pay any more than they would if the other child, for example, would be emancipated. Fleming said that Judge Bekken doesn't believe the full amount should be assigned and wants to address the issue with this committee.

Moore expressed having mixed feelings on this issue. She said she is not sure she likes the fact that now the children in both homes are depleted. In addition, people are unhappy when they need to go from paying one amount of child support to leap up to another amount. Their situations haven't improved, yet they have to pay more. She thinks this is perhaps one of the things for which the state may want to take the fiscal impact.

In response to a question from Judge McClintock, Cartledge said that TANF is temporary. Receipt of TANF is limited to five years, unless it is a person in a reservation county.

In response to a question from Moore, Cartledge said she wasn't sure what the average time of TANF was. She said it does vary. Mandigo added that persons often go on and off of assistance.

McClintock wondered if there had been any discussion about just allowing the full obligation to accrue as an arrearage. Fleming said that to do so would still need a guidelines change because arrears wouldn't accrue under Simon.

Freed said he thinks that the Simon decision allows the parties to manipulate the situation. He thinks there could be many more Simon-type situations when parties learn of the effect of the decision.

Rep. Devlin said he is thinking that we should fix the hole. He thinks there will be a lot of people taking advantage of this (i.e., of only the "net" amount being assigned).

Davis said there is supposed to be a finding of the net income of each parent and the obligation for each parent. He sees orders that just order \$XXX, without the accounting of how it was developed. Wondered if that could be required, but then said that, technically, it already is required. Oberst mentioned that during the review of orders that will be discussed at a later meeting, one will see that the requirement to include the information in the findings, is not consistently being met.

Moore said that is really linked to the judges. What really stops it is when the court says it needs a W2, for example. Attorneys know they should supply, but they want

to make the clients happy. Judge McClintock said that he understands that if he sends it back, it will probably cause problems so tends to say "ok" if parties agree.

Moore said it is really pretty easy, if make parents prove the numbers.

Sen. Fischer said he doesn't know why we would let the parent off the hook for the full amount of the obligation. He thinks each should pay the full amount.

Fleming said this was the hardest discussion on today's agenda. He asked that the members ponder what we really want to do.

Cartledge said that, in her experience, splitting custody of children was more for both to get TANF than for child support purposes.

After taking a lunch break, Fleming said he hoped everyone had a chance to consider what direction the committee should go with this issue. The Simon decision says only the "net" amount is assigned. One option is to leave the guidelines alone in this regard and this would remain the result. A second option would be to make a change so there is no offset allowed if either or both parents are on TANF. A third option would be to make a change so there is no offset allowed in any split custody case.

Fleming reviewed some of the pros and cons to each option. If the rule is not changed (i.e., only the "net" amount is assigned), a pro is that the parent not on assistance does not get "penalized" for the other parent going on assistance. A con is that there is very little, if anything, to assign. If the rule is changed so that offset is not allowed if either or both parents are on TANF, a pro is that the convenience to parties when not on assistance continues. Cons are that processing would need to change depending on whether a parent is on assistance or not (e.g., income withholding would need to be amended, etc., because there are different amounts "due" at different times), and parent would know when the other parent goes on assistance – something that is otherwise kept confidential. If the rule is changed so there is no offset allowed in any split or equal physical custody case, a pro is that there is a constant amount that each parents knows he or she will need to pay each month. A con is that the convenience to parents is removed for all and there is no guarantee that the other parent will pay.

In response to a question from Judge McClintock, Oberst said the interpretation issued by Child Support Enforcement was that the full amount of the obligation would be assigned, not just the "net" amount. When issuing it, it was felt there was adequate support in the rulemaking history. If the offset is on and off, depending on assistance status, there is some difficulty for processing.

Judge McClintock asked if that was the position of DHS? Fleming said it could best be described as the position the state office had for interpreting the guidelines. He said he is not sure there is a DHS position at this time as to which way to go on this one. He said there isn't a pre-determined position on this. On one hand, there are

reasons that indicate the full amount should be assigned. On the other hand, uncollectible arrears may accrue.

Peterson, following up on a comment made by Fleming regarding a parent knowing if the other parent is on assistance, expressed concern that this was confidential information. Fleming said that it was confidential information, but in this case it could be disclosed because the DHS confidentiality policy allows it to be if it is needed for the administration of the program, which it would be if the offset would go off and on depending on TANF status. Hauer confirmed this, and added that this is statutory language as well.

Sen. Fischer asked what the difference was, number-wise, between noncustodial parents and custodial parents on TANF. Cartledge responded that one needs to be a caretaker to be on assistance. Sen. Fischer said in this situation there is dual custody.

In response to a question from Moore, Cartledge said if physical custody is truly 50/50, no one should get TANF. Neither parent would qualify because there is no "deprivation."

There was some discussion about the fact that some situations end up being that the first parent to apply, qualifies for TANF. There was also some discussion about the fact that TANF rules do not look at the court order. Cartledge said that since court order and actual aren't always the same, to rely on the court order for TANF could be damaging. Other discussion included Moore wondering if perhaps the equal physical custody provision should be done away with. Fleming mentioned that custody issues aren't dealt with by Child Support Enforcement. Cartledge mentioned that TANF does pursue fraud if feel there is fraud in a case. Moore said some of it is based on a parent's perception of what the situation is, and not fraud.

Fleming asked, for sake of moving the issue forward, if anyone thought there were any more than three options mentioned previously.

Moore questioned whether TANF benefits should be counted as gross income in these situations.

Fleming asked for a straw poll on where members were on this issue, giving the three options. Option 1 (only the offset amount is assigned, per Simon) received one vote. Option 2 (the offset would be allowed, but not in cases where either or both parents are on assistance) received a few more votes than Option 1. Option 3 (the offset would not be allowed in any case) received the most votes. Fleming asked that a change be drafted for Option 2 (offset turning on/off). The first option would require no change and the third option would be easy to draft because it would just mean removing the language regarding the offset. He said the committee can look at scenarios and show what would happen with various options, at the next meeting. He said the committee can also look at how many offset/assignment situations there have been.

In response to a question from Freed, Fleming said that assignment follows the child. Freed said that if each parent goes on assistance, both of their support obligations are being assigned. Fleming said the amount they are paying is the same as they would need to pay if there was no sibling at all. Freed said, however, that each parent also has a child to support in his or her own home. Fleming mentioned a similar situation that has arisen in which the former custodial parent became incarcerated, and the former noncustodial parent now has the child. There is a downside with each of the options. Hellman asked if there were perhaps solutions to the downsides? Freed wondered if we should again be looking at "pass-throughs." (States used to "pass-through" the first \$50 of a child support collection to those on assistance.) Fleming mentioned that the feds are looking at pass-throughs again.

Fleming stated that Carol Olson, Executive Director of DHS, has said the Child Support Enforcement program can explore ways to write-off debts when obligors are on assistance. Fleming said there is a need to look at the collectibility of the arrears. Each sibling has the right to support. Should one child suffer because the other child goes on assistance? Fleming said the state office felt they were on firm ground with their interpretation. Freed said it doesn't do any good in some situations to say that arrears will be forgiven. For example, when an employer is identified, income withholding will be issued and the amount will be collected.

Freed asked how much the options would cost, administratively? For example, if go with the offset on/off option, he thinks that fixing the problem may cost more than the fiscal impact of giving up the full assigned amount. Fleming said that having two obligations (i.e., no offset) would be the easiest administratively. Moore pointed out that the program would have to collect on two obligations instead of one. For example, income withholding would have to be issued on two cases instead of one. Fleming said that the income withholding process is fairly automatic. He added that the program was making the on/off option work before the Simon case.

In response to a question from Sen. Fischer, Fleming said the on/off option should not lead to more court involvement. The obligation of each parent would remain the same whether the offset option was on (if no assistance) or off (if assistance).

Judge McClintock and Peterson thought that perhaps the split custody/assistance situation wasn't a very common occurrence.

Section -01 Definitions

- **Issue: Consider whether subsidized adoption payments are "children's benefits" as defined by the guidelines. Also, consider how subsidized adoption payments should be treated when the adoptive parents separate or divorce or when the adopted child enters foster care.** Oberst said this issue was identified by a few sources. Subsidized adoption payments are payments of financial assistance that go to parents adopting a special needs child. These payments are paid regardless of parents' income. Some of these children are at

high risk to go into a foster care placement. The subsidized adoption payments would probably be considered income under the guidelines definition.

Oberst then reviewed the definition in the guidelines of "children's income" and said that subsidized adoption payments would very likely be counted as income to the parents if, for example, the child goes into foster care or when the parents subsequently separate. "Children's benefits" are also then credited against the obligation. Therefore, there are a few things that need to be looked at. Should subsidized adoption payments be counted as income in the first place? The subsidized payments are made to encourage people to adopt special needs children.

In response to a question from Brad, Oberst said the payments continue until the child ages out or, if funds are available, until age 21 if the child is in school.

Mandigo said this has been a concern of the Executive Office. There are parents willing to take a special needs child, then parents are told that they will be charged more than what they receive in subsidized adoption payments. Fleming asked about situations in which the parents separate and one parent receives the subsidized adoption payments. Fleming said that if there is a divorce, one parent will get custody and the subsidized payments. What would the noncustodial parent pay in child support? Davis asked what Carol Olson's position was. Mandigo said that the subsidy goes to the parent with the child to take care of the child and that child's extraordinary expenses. If the noncustodial parent is picking up the same type of expenses, that would be a different situation.

Moore said it seems the parents are getting the subsidy because they have additional special expenses. Perhaps, then, they shouldn't be included in income.

Based on a question from Walth, there was some discussion about whether a parent continues to receive the payment if the child goes into a Foster Care placement. Mandigo noted that, often, the placement cost is higher than the subsidy. Walth said that it seems like the subsidy should follow the child. Later, Mandigo called Children and Family Services staff to get some additional information. She then shared some general information about the subsidized adoption program with the group.

Cartledge said there may be another danger in counting it as income. What else should then be counted as income? Would subsidized guardianship payments be counted, for example? Oberst said that would be a different situation because in subsidized guardianship we are dealing with guardians, not adoptive parents.

Oberst said that in the scenario in which there is Foster Care and an intact family – there would probably be a joint obligation. Then subsidized adoption payments would be counted as income, with a credit then given against the resulting obligation. This would be consistent with treating the payments as "children's

benefits" like social security. Freed noted that in social security, the money is coming in to the state, where the subsidized adoption payments do not.

Mandigo said that in the past, DHS has looked at these cases individually and when see fit, DHS doesn't pursue child support.

Fleming wondered if the parent's obligation wouldn't be lower if subsidized adoption payments were counted as income (as a "children's benefit), because they are then allowed the credit on the obligation, than if the payments were not counted as income. Oberst said that the point is that the parent, if subsidized adoption payments were not counted as income, would have both their income and their subsidized adoption payments at their disposal.

Rep. Devlin wondered if perhaps we needed to add a sentence to say that these payments are not income.

Davis wondered if perhaps the Child Support Enforcement program should not get a referral when the child goes into foster care. Oberst wondered why we would treat the same payments (subsidized adoption payments) differently if the child goes into foster care, than we would if there would be a divorce.

Considerable discussion followed.

Sen. Fischer said he thought the subsidy should follow the child.

Fleming said that it may be helpful to have additional information on how subsidized adoption payments work. He said there seems to be some consensus that we shouldn't get away from holding parents responsible but look at taking the subsidized adoption payments out of the picture.

Mike Schwindt, Director of the Child Support Enforcement program within DHS introduced himself. He said this particular issue has been a struggle. Part of the answer depends on in which county you are. It is not done consistently within the structure. The decision as to whether to increase or decrease the payments is up to each county social services. Sen. Fischer wondered, then, if it shouldn't be made to be consistent.

Judge McClintock said it appears there is some discretion within the subsidized adoption program. Perhaps it should be left out of the guidelines as a "children's benefit."

Davis said that it seems like it should be neither (not counted as income and no credit given) or both (counted as income and credit given).

Fleming said that, based on general consensus, something would be drafted that would back it out of income and remove it as a "children's benefit." In dealing with

the income issue, will have to ensure it is consistent with the statutory definition of income. He said this will be looked at before the next meeting.

- **Issue: Consider whether “refundable tax credits” should be excluded from gross income.** This issue was submitted by the Dickinson regional office. The term “refundable tax credits” was added as an example of gross income during the last guidelines review. Prior to that, “earned income tax credit” was included as an example of gross income. Because it is one of other refundable tax credits, it was decided that all should be treated the same. Therefore, “earned income tax credit” was changed to “refundable tax credits.” It is a dollar-for-dollar reduction of the tax liability. If the tax is reduced to zero, the extra credit is “refunded” to the taxpayer. The issue before the committee now, is whether “refundable tax credits” should be removed entirely. Davis said that he was throwing the issue out there for discussion. He mentioned that he is bothered by the idea of imputing income that could affect the credits. There is also the argument that “refundable tax credits” are like a means-tested benefit, and in that way, shouldn’t be included.

Fleming asked if the money goes back to the noncustodial parent, shouldn’t it be counted as income? Oberst asked whether we shouldn’t think about this as a “reverse tax?” Hauer said she thinks, however, it is in the nature of a means-tested benefit. Judge McClintock thought one should look at the intent of the credit to begin with; this is such a low-income person, that the government is helping the person out. Freed said that the noncustodial parent still has the money in hand that should be used to help support the child. Hauer said it is still like TANF: means-tested. Freed said tax credits are available to those with higher income levels, unlike TANF. Mandigo wondered if, by counting it as income, if we would be punishing the family who makes the lowest amount of income.

Davis said there is a further complication. If one gets the credit, it is included in income. Often, however, it is part of a joint tax return (noncustodial parent and new spouse) – then what?

Fleming said to not count it would be like providing a way of preserving self-reserve versus saying this is money available to the noncustodial parent that should be counted as income for child support purposes.

After more discussion, Rep. Devlin said he was leaning toward excluding them, but would like to see what the income levels and amounts were.

After still further discussion, it was decided there would be a draft for next meeting which would take it out as an example of gross income. Fleming said a vote can then be taken.

Rep. Devlin asked that someone please bring the charts showing the amounts.

- **Issue: Consider whether to clarify that an obligor to whom income is imputed based on earning capacity is entitled to deductions from gross income (such as for hypothetical federal and state income tax obligations and FICA/Medicare obligations) in light of the Supreme Court's opinion in Kobs v. Jacobson.** Oberst explained that this arose in a case that went to the Supreme Court involving losses in self-employment, imputed at minimum wage. The Supreme Court said the attorney did the calculation wrong, when indeed the calculation was done under the guidelines. The Supreme Court apparently neglected to see that imputed income was considered gross income, and thus subject to the allowable deductions. Oberst noted the list of examples of gross income already includes imputed income. Then the guidelines state that net income is gross income less certain deductions. So, it is difficult to say how to clarify this, when it already says it.

Freed suggested a draft that would address it in section -07. Brief discussion followed. Fleming said the state office will take a look at this to see where it may be best addressed if it is decided it is needed.

- **Issue: Consider whether to clarify that an obligor who has net income from self-employment is entitled to deductions from gross income (such as for hypothetical federal and state income tax obligations and self-employment tax obligations).** Oberst said the same situation applies with self-employment income as applies to the previous issue regarding imputed income. So, if one is addressed, perhaps both should be. Fleming said this can also be prepared for next time.
- **Consider how to treat in-kind income when income is also being imputed based on earning capacity.** Oberst provided a scenario in which an underemployed noncustodial parent is getting housing through his or her employer. During the last guidelines review, there was a change to limit "in-kind" income to those related to employment or income-producing situations. We are subtracting actual income from imputed income so the income is not counted twice. What should be subtracted from imputed income when in-kind income is involved? What are "earnings" for this purpose? In-kind income brought this issue up this time, but it could also be other types of "other" income.

Oberst handed out two scenarios to illustrate the difference it makes in the amount of total income. In both Option #1 and Option #2, income is imputed at \$10,320 (minimum wage) and, of that amount, \$7,000 is actual income. In both options, there is \$2,400 of in-kind income.

In Option #1, the \$7,000 of actual income and \$2,400 of in-kind income is added together to come up with "actual gross annual earnings" of \$9,400 which is then subtracted from the minimum wage imputed amount of \$10,320 for a "presumed imputed annual income" of \$920. "Gross annual employment income" would be \$7,920 (\$7,000 actual plus \$920 imputed). "Other gross annual income" would be

\$2,400 (in-kind). \$7,920 plus \$2,400 would be \$10,320 for “total gross annual income.”

In Option #2, the \$7,000 of actual income only is considered “actual gross annual earnings” and it is then subtracted from the minimum wage imputed amount of \$10,320 for a “presumed imputed annual income of \$3,320. “Gross annual employment income” would be \$10,320 (\$7,000 actual plus \$3,320 imputed). “Other gross annual income” would be \$2,400 (in-kind). \$10,320 plus \$2,400 would be \$12,720 for “total gross annual income.”

In response to a comment from Davis, Oberst said that, under both options, in-kind income is included in gross income.

Mandigo asked if imputing income was federally required. Fleming indicated that it wasn't but asked one to imagine what could happen if there was no ability to impute.

In response to a question from Fleming, Oberst said she thinks a change in language is needed to clarify, if Option #1 is the way the committee wants to go.

Sen. Fischer asked how often imputation is used. Oberst responded that there would be information available at the next meeting regarding that.

In response to a question from Sen. Fischer, Oberst said imputation allows child support to be based on earning capacity, rather than inclinations.

Davis commented that it seems to him that a vast majority of imputations are at the minimum wage level.

Mandigo commented about a case that came to the attention of the DHS Executive Office. She said there seems to be something wrong with an idea that someone that is working 60 to 80 hours per week needs to continue to do that.

Hauer commented that it comes down to looking at employment history.

Fleming said the imputation rules will be looked at during the next meeting. For this issue, we are just looking at how the calculation is done when there is income that is not earned income (e.g., in-kind).

- **Issue: Consider whether the calculation to determine the deduction from gross income for the hypothetical federal income tax obligation should be revised to specifically address the scenario where there is a court order allocating the dependency exemption as to the children before the court and the obligor also has other children not covered by a court order.** Oberst said this issue came up as a result of a change made with the last revision of the guidelines. When doing calculations for hypothetical federal tax, additional exemptions come into play. Last time, for example, it was addressed what to do when parents are alternating the exemption. Addressed what to do if there was a

court order stating who would get the exemption and what to do if there was no court order stating who would get the exemption. What was done was basically an "either or" situation. If court order then. . . or if no court order then. . .

After the changes were implemented, a regional child support enforcement office had a case in which there was a court order stating who had the exemptions for the child of the court order, but the obligor also had two children from his current marriage for whom, of course, there was no court order stating who had the exemptions. Therefore, the question came up as to how many children should count for exemptions in this situation. Child covered by court order would fall under -01(7)(a)(3)(a), but what about the children in the obligor's home? Policy interpretation on this was that it should be one exemption because there is a court order and there is one child pursuant to that ((3)(a)) and that (3)(b) didn't apply. This was based on the belief that it is an "either or" not "both" situation. The court, however, ruled there should be three exemptions: one child counted under (3)(a) and two children counted under (3)(b).

Oberst reminded the group that what works for tax purposes (i.e., higher exemptions means less taxes) has the opposite affect for child support (i.e., less taxes means more available for child support).

Fleming wondered if the "or" (between (3)(a) and (3)(b)) should be replaced with an "and?" Oberst wondered if there would be any other unintended consequences if this were done. The issue is there is no court order for the children in the obligor's home.

At that point, there was general consensus that the exemptions should be for all of the children, not just the child of the court order.

Freed said that perhaps the obligor should get only partial exemption for the children in the home because there is also the obligor's wife, and they are probably filing jointly. Oberst said to remember that this is a hypothetical calculation. Moore said this was meant to be a hybrid of reality and hypothetical. She said she thinks that Freed's issue should probably be addressed.

Sen. Fischer commented that it seems this is too complicated. Rep. Devlin agreed, saying it was too long and complicated. He said it should be simplified and made more concise. It was decided this would be a staff assignment for next time.

- **Issue: Consider whether the deduction from gross income for lodging expenses, which is currently limited to \$30 per night, should be revised upward.** Oberst said this issue arises when an obligor has to travel for employment and has lodging expenses. An inquiry on the rate allowed was received from a legislator on behalf of a constituent.

Freed and Moore commented that perhaps the rate should be linked to the state rate. There was some discussion about whether it should be in the guidelines as dollar-specific (i.e., \$50) or by reference.

In response to a question from Rep. Devlin, if the amount is less, the lesser amount is considered ("limited to" language).

General consensus was that it should be dollar specific - \$50. There was some additional discussion about "plus tax" issue, but that may vary from place to place. It was decided that a draft would be prepared for next meeting.

- **Issue: Consider whether to create a deduction from gross income for unreimbursed employee expenses that the obligor can claim for federal income tax purposes when itemizing deductions.** Davis said this issue involves what to do if the obligor is not in a position to itemize. There was some discussion as to what unreimbursed employee expenses wouldn't be on the tax return if there was no itemization. Because there was uncertainty about how these expenses appeared on tax returns, it was decided that there will be an attempt to clarify this between now and the next meeting. This may make the issue moot.

At this point, it was decided that the rest of the agenda would be carried over to the next meeting.

Next meeting Friday, June 2, 9:00 – 5:00, Fort Union Room. (Post meeting note: The start time was subsequently changed to 8:00.)

Adjourned at 3:00.