

**Child Support Guidelines – Quadrennial Review
Advisory Committee
June 29, 2010
Sakakawea Room, State Capitol Building – Bismarck, ND**

Members present: Jim Fleming, Brad Davis, Sen. Tom Fischer (by conference call for part of the meeting), Tom Johnson, Lisa Kemmet, Sherry Mills Moore, Tammy Ness, Paulette Oberst, Cynthia Schaar, and Rep. Robin Weisz.

Members absent: Judge Donald Jorgensen, Referee Dale Thompson, and Bill Woods.

Visitor: Marie Hanken

Call to order: Fleming, as chairman, called the meeting to order.

Introductions: Since this was the first meeting attended by Rep. Weisz, Fleming asked members to briefly introduce themselves. Weisz is the chairman of the Legislative Assembly's House Human Services Committee.

Minutes of the June 15th meeting: Fleming said that draft minutes from the June 15th meeting had been emailed to members on the previous day. He asked members to review the draft minutes and let him know of any corrections by July 5th. He said the minutes would be considered approved, subject to any comments submitted.

Binder materials: Oberst handed out the following materials to be inserted in the binder – meeting notice [to be inserted at Tab 2], final minutes from the May 26th meeting [to be inserted at Tab 3], and revised list of issues for consideration [to be inserted at Tab 7]. As before, the revised list of issues for consideration is organized into sections for new and pending items, completed items for which drafts have been accepted, and completed items which the committee decided to drop from further consideration or for which no further action by the committee was required.

Oberst said that more materials would be handed out as additional items are discussed.

Review of issues for consideration, including drafts prepared in advance to facilitate discussion:

Issue: Perform "cost of raising children" analysis required by federal regulations.

Issue: Consider whether to use something other than USDA data in performing the "cost of raising children" analysis.

Issue: Consider whether schedule favors the rich and the poor and, if so, make revisions. (Substantive change.)

Oberst handed out a document entitled "Analysis: Cost of Raising Children" [to be inserted at Tab 9 in the binder]. She explained that federal regulations require that each quadrennial review of the guidelines include consideration of economic data on the cost of raising children.

Oberst said that the economic data that will be used for the discussion comes from the United States Department of Agriculture (USDA). The USDA compiles information on expenditures on children by families and issues this information in the form of a report. The USDA has been doing this every year since 1960. The most recent report was issued in June 2010. The information in the report comes from the 2005-2006 Consumer Expenditure Survey that was administered by the U.S. Census Bureau for the U.S. Department of Labor. Approximately 28,000 households were interviewed for the survey. The 2005-2006 survey was updated to 2009 dollars using the Consumer Price Index.

Oberst said that this information is widely used by IV-D programs as part of reviewing a state's child support guidelines. It is also often used by foster care programs in determining foster care payment rates. Oberst said there is no requirement to use the USDA data to consider the cost of raising children. Data from other sources may be used instead. There are, however, advantages to using the USDA data. For example, it is readily available, it is very current, it is impartial, and, since the USDA has been gathering this information since 1960, it is based on an established methodology.

The USDA report captures information about expenditures on children in the following categories: housing, food, transportation, clothing, health care, child care and education, and miscellaneous items. The data is broken out by region of the country and by two-parent versus single-parent households.

Oberst then reviewed in more detail information about expenditures by two-parent families in the urban Midwest, which includes North Dakota. For example, for a family with an average before-tax income of \$36,010, the data indicates that it will cost \$158,250 to raise a child from birth to age 17. By comparison, for a two-parent family in the rural United States with an average before-tax income of \$36,380, the total cost to raise a child from birth to age 17 is \$130,710. Finally, for single-parent families with an average before-tax income of \$25,130, the total cost to raise a child from birth to age 17 is \$149,760.

The most expensive category of expenditures is housing, followed by food and child care and education.

Oberst also handed out a document that shows the schedule of amounts in the guidelines as both a dollar amount and as a percentage of net income. For example for an obligor with one child and a monthly net income of \$1,000, the dollar amount for support is \$250 and its percentage of net income is 25 percent. She said this chart shows how the amount as a percentage of net income increases, then levels off, and

then decreases. For example, for one child, the amount as a percentage of net income is 14 percent at the lowest point (net income of \$100 or less). It gradually increases to 25 percent at the \$1,000 point and then gradually decreases.

Oberst said that the last time a change was made to the schedule of amounts was effective in 2003 when the top of the chart was increased from "\$10,000 or more" to "\$12,500 or more." Davis wondered whether the schedule should be increased at the high end. Otherwise, he said, we may be creating an artificial ceiling for the high-income obligor. Oberst said this is not necessarily so, since there is an allowable upward deviation for an obligor whose income exceeds \$12,500.

There was some discussion about whether to change the schedule of amounts with respect to very low-income obligors. Several members noted that for the obligor whose net income is \$1,000 per month and who has one child, the support amount is \$250, which leaves only \$750 for rent, groceries, and other living expenses. Moore said this is a very tough situation since \$750 is not enough to live on but, on the other hand, \$250 is not enough to raise a child on.

Weisz suggested making some modest adjustments to smooth out the schedule at the \$1,000, \$1,100, and \$1,200 points. For example, under his proposal, for one child, the percentage would top out at 23 percent instead of 25 percent.

Fleming said that it would be good to know how the schedule of amounts was established in the first place. Without that background information, any adjustments to the schedule would be somewhat arbitrary.

Moore made a motion to recommend that the Department of Human Services (DHS) revisit the appropriateness of the peak percentages in the schedule. Schaar seconded the motion and all members voted "yes."

Oberst handed out a document that shows child support obligations determined under obligor versus income shares models at various income levels. This information was obtained from a survey of state guidelines conducted by a professor at Indiana University. Oberst said the information is from 2005 so it is somewhat dated but it is the most recent information available from this source. This information might be useful in comparing outcomes under different state guidelines. For example, when the obligor's gross income is \$2,640 per month, the child support obligation for two children under North Dakota's obligor model was \$610 versus \$649 under South Dakota's income shares model.

There was no interest expressed in looking at economic data from non-USDA sources regarding the cost of raising children.

Issue: Revisit imputation based on 60% of statewide average earnings and 90% of greatest average gross monthly earnings within a 24-month look back period? (Substantive change.)

Fischer said that he had a previous conversation with Fleming regarding using the Job Service of North Dakota publication, Wages for North Dakota Jobs, to determine statewide average earnings for purposes of deciding whether an obligor is presumed to be underemployed. He said that as a result of this conversation, his earlier questions had been answered.

In response to a question from Fischer about how many people change jobs for the purpose of avoiding child support, Schaar estimated that this is a very small number, perhaps one to two percent.

Moore said that being able to impute income stops people from quitting a job just to avoid child support. Because of imputation, there is no advantage to the obligor to do this and private attorneys counsel their clients accordingly.

Weisz said that several constituent inquiries he has received concern calculating child support based on overtime and second jobs. Ness agreed. She said she has clients who have taken on a second job to make ends meet but then those wages are included in that person's income in determining his or her child support obligation so the person is unable to get ahead.

Fleming said that child support is a percentage of the obligor's income. Therefore, an increase in the obligor's income does not equal a dollar-for-dollar increase in the child support obligation. He also said that a legislative change in 2009 changed the treatment of irregular overtime and nonrecurring bonuses. Instead of addressing those items as a deviation, they are considered, or not, in determining net income.

Fleming also noted that the previous guidelines committee recommended several substantive changes regarding imputation. For example, the look back period for imputing income based on the obligor's previous earnings was reduced from 36 to 24 months. Though the recommendations were accepted and eventually incorporated into the guidelines, it is possible that they are still taking root. He suggested that the members may want to allow some more time for the effect of those changes to be felt before making further changes.

Fleming asked if any member wanted to propose further changes to the provisions regarding imputing income based on 60 percent of statewide average earnings or 90 percent of greatest average earnings within a 24-month look back period. No proposals were suggested. Therefore, this issue will be dropped from further consideration.

Issue: Reconsider appropriateness of imputing income based on minimum wage to incarcerated obligors? (Substantive change.)

Oberst handed out an article from the Child Support Report (CSR) regarding prisoner re-entry initiatives. The CSR is published by the federal Office of Child Support Enforcement. This particular article describes the programs in several states that help newly released offenders find jobs and access other community services.

Fleming said that this article is typical of the literature regarding inmates who are also child support obligors. Nationally, lots of time and resources have been spent on this population group and it has been the subject of much discussion and literature. However, the focus of the efforts has been more on how to work with obligors once they have been released from incarceration, not as much on how to set their obligations while incarcerated.

Fleming added that North Dakota's IV-D program has some of its own initiatives in place. For example, becoming incarcerated is a basis for an early review of the obligor's child support order. Other initiatives include interest suspension and an interface with the Department of Corrections to track the status of inmate obligors (e.g., date of release, name of parole officer).

Fischer said that incarcerated obligors can build up arrears in a hurry, which will affect them when they get out of prison. He said the dilemma is that on one hand, incarceration is intended to punish an individual who has committed a crime. On the other hand, if society is serious about also rehabilitating that individual, consideration needs to be given to working with him or her upon release.

Weisz said that in a previous legislative session, a bill was introduced that would have prohibited a child support reduction based on the obligor's incarceration. Fleming said he recalled that bill and that while it failed to pass, it did provide an opportunity for discussion of the issue.

Schaar said that frequently the arrears that accrue while the obligor is incarcerated are uncollectible. Moore acknowledged this but said that to provide otherwise means that the burden for supporting the child falls on the other parent, the one who didn't do anything wrong.

Fleming said this appears to be an issue on which members don't have consensus. Weisz said that this may be a subject on which the Legislative Assembly should weigh in.

Weisz suggested looking at a methodology whereby the obligation would never exceed one based on minimum wage imputation and would be phased down to zero within a certain number of years (e.g., five years). Several implementation issues with this approach were discussed, such as how to provide for the phase-down in the order itself so it wouldn't be necessary to go back to court each year.

Moore made a motion to recommend that DHS develop a pro-rated schedule for incarcerated obligors whereby the obligation would be eventually phased down. Weisz seconded the motion and all members voted "yes."

Issue: In response to Supreme Court decisions (e.g., Verhey v. McKenzie), revise subsection 10 to specify that it may apply even if the obligor's status as "unemployed" is conceded? (Substantive change.)

Oberst handed out a document that contained excerpts from the Supreme Court decisions in Minar v. Minar, 2001 ND 74, and Interest of D.L.M., 2004 ND 38, both of which were cited in Verhey. In Minar, a majority of the Supreme Court held imputing income at 100 percent of previous earnings when an obligor has made a voluntary job change is not applicable when the obligor is concededly unemployed. In these situations, income must be imputed in accordance with section -07(3), which includes imputing at 90 percent of previous earnings.

Oberst said that she thinks the dissent in Minar made the better argument. The dissent argued that the majority opinion encouraged obligors to remain unemployed (e.g., by going back to school) after voluntarily changing jobs by becoming unemployed. These obligors would be imputed at most at 90 percent of previous earnings. On the other hand, the obligor who went back to work at a lower-paying job would be faced with imputation at 100 percent of previous earnings.

Fleming said he had previously drafted a proposed amendment to address the interpretation in the line of cases from Minar through Verhey. His draft would clarify that for purposes of applying section -07(10), a voluntary change in employment can include becoming unemployed.

Ness made a motion to accept the draft. Oberst seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: Consider whether to add disability benefits paid by the Railroad Retirement Board (RRB) to the list of benefits that would preclude imputing income.

Fleming reminded the members that at the previous meeting, they had approved a draft whereby income could not be imputed to an obligor who was receiving SSI, social security disability, or worker's compensation payments. Moore had raised the question of whether disability benefits paid by the RRB should be included on that list.

Oberst said she had done some research on the RRB website and learned that there are two kinds of disability benefits payable through the RRB. "Occupational benefits" are payable if the worker is unable to work at his or her regular railroad job. "Total and permanent disability" is payable if the worker is unable to work in any kind of regular job.

Oberst recommended that if RRB benefits are going to be added to the list of benefits that preclude imputing income, the amendment specify that the preclusion is limited to the "total and permanent disability" benefits.

Moore made a motion to further amend section -07(7) by adding "Railroad Retirement Board total and permanent disability benefits" as new subdivision d. Kemmet seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: Consider whether the guidelines can address how to get multiple families into court at the same time to "level the playing field." (Substantive change.)

Oberst said this issue had been added to the list of issues for consideration based on a request from Bill Woods. She added that Thompson had noted at the first meeting that it will not always be possible to get all the families in a multiple-family situation before the court at the same time. For example, the orders may have been filed in different counties or judicial districts or even issued by different jurisdictions. Oberst said that to the extent this is a problem, it is not an issue that can be addressed through changes to the guidelines.

Since there was no further discussion, this issue will be dropped from further consideration.

Create new rebuttal reason (upward deviation) for obligor whose income is decreased on paper because of depreciation. Required to implement 2009 HB 1329, section 3. (Substantive change.)

Fleming reminded the members that 2009 legislation (HB 1329) directed DHS to adopt a new deviation reason for situations in which the obligor's ability to pay support is increased because his or her income is decreased due to depreciation expenses.

Weisz said that depreciation expense reduces income, which is a tax advantage. Plus, as the taxpayer makes principal payments on the depreciable property, the taxpayer is building equity. Weisz said that he thinks obligors are investing in depreciable property for the tax advantages. That there is also an advantage with respect to child support is a side benefit. Weisz said that possibly one way to determine if the obligor is manipulating depreciation expenses to reduce the child support obligation is to see if the depreciation exceeds the tax liability.

Fleming suggested creating a deviation reason that would be applicable if the obligor's net income was based on imputation. For example, if the obligor's income was so far reduced by depreciation expenses that the obligor was presumed to be underemployed and, thus, income was imputed, the court could apply the deviation and order a higher child support obligation. Fleming also suggested that the deviation adjustment be made

to the obligor's net income rather than to the presumptively correct child support amount.

Moore made a motion to draft language for a deviation reason whereby its applicability would be tied to whether income was imputed and that any adjustment resulting from applying the deviation be to the obligor's net income rather than to the child support amount. Ness seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Next meeting: The fourth (and final) meeting is scheduled for Monday, July 19th. Members will be advised of the location for this meeting at a later date.

Action Item: Research previous guidelines rulemaking histories for information on how the schedule of amounts was established.