

Child Support Guidelines Drafting Advisory Committee Meeting
June 19, 2014
Brynhild Haugland Room, State Capitol Building

Members Present: Jim Fleming (chairman), Brad Davis, Jamie Goulet, Lisa Kemmet, Sherry Mills Moore, Sen. Oley Larsen, Paulette Oberst, Cynthia Schaar, Judge Jay Schmitz, Referee Dale Thompson, Darcy Turcotte, Rep. Robin Weisz, Bill Woods.

Members Absent: None.

Visitor: Lee Bjerklie.

Fleming called the meeting to order and, at his request, members briefly introduced themselves. Oberst disseminated the "final" minutes from the May 12th meeting.

The committee then began discussing the remaining issues that had been identified so far for the committee's consideration.

Issue: Consider whether to revise the provision about employment being unavailable within 100 miles of the obligor's place of residence to account for the increasing popularity of telecommuting.

Discussion: Oberst said this issue had been submitted by a regional child support office using a scenario in which an obligor had been living in rural North Dakota but had been employed "offsite" for an out-of-state company and could likely continue to work for "offsite companies" while still continuing to live in rural North Dakota. The regional office thought that the guidelines should give guidance on what is it meant by employment opportunities being unavailable within 100 miles of the obligor's place of residence and suggested the ability to work "over the computer" may need consideration.

Oberst said that she didn't think a change is needed and drew the committee's attention to a Supreme Court decision from 1999, Richter v. Houser, wherein the Supreme Court had interpreted the provision in question in the context of an obligor whose career (as a cable lineman) had historically required him to re-locate to places where the work was. The Supreme Court held that, under the circumstances, it was unrealistic not to look at job sites beyond the 100 mile radius of the obligor's community.

Oberst added that the provision in question is in the imputation section of the guidelines so it's only applicable if an obligor is unemployed or underemployed. If, for example, an obligor is telecommuting but is not unemployed or underemployed, the provision is not applicable. Moore said that if someone is working from home through telecommuting, the place of employment is the home, even if the employer is in another state.

The committee discussed that a similar scenario occurs with oil field workers who maintain a residence in one place but work elsewhere (i.e., where the drilling is

occurring). Goulet said that the language in the guidelines could become an issue at some point in the future when oil companies begin pulling out of the state.

Fleming wondered if Richter would be decided the same way today and asked if we should “codify” the Richter decision in the guidelines. He envisioned that the 100-mile rule would remain but that the obligor’s work history would be taken into consideration. If the obligor has historically traveled for work, the obligor would have to come forward with evidence to show that work opportunities are no longer available.

Referee Thompson said that he had relied on the Richter decision in a recent case.

After additional discussion, the committee determined that a change to the guidelines is not necessary so this issue will be dropped from further consideration.

Issue: Revisit imputation based on minimum wage: instead of being based on 167 hours (50 weeks per year), change to 173 hours (52 weeks per year).

Discussion: There was no support expressed for making this change. Schaar said that she was not inclined to increase support obligations for this population. She said many of the individuals to whom minimum wage is imputed have sketchy work histories, sometimes as a result of drug and alcohol issues, and would be unable to pay the increased support amount. Thompson said that in his area of the state there are a lot of minimum wage imputations and the obligations are already hard to collect; increasing the support amount would make collections impossible. Woods agreed that increasing the minimum wage imputation would just add to the arrears balances. Fleming said that changing the base from 50 to 52 weeks per year would send a message that minimum wage workers are not entitled to have a vacation day or sick day.

The committee decided to drop this issue from further consideration.

Issue: Consider whether equal residential responsibility and extending parenting time provisions should be mutually exclusive.

Discussion: Oberst explained that this issue was identified from a divorce case in which the parents had equal residential responsibility for their children based on each parent having the child for 182 or 183 nights per year, depending on the year. On top of that, each parent was given an extended parenting time adjustment based on having the child for 182 or 183 nights per year. Oberst said it appears that the parents were given double consideration for the custody arrangement. She said it seems inconsistent that a parent should be treated as having parenting time for the same night that the parent is supposedly exercising residential responsibility.

The committee requested a draft for the next meeting to provide that equal residential responsibility and extended parenting time are mutually exclusive.

Issue: Give direction on how to calculate child support when equal residential responsibility is ordered for some but not all children.

Discussion: Oberst said that they are seeing orders wherein the parents have multiple children and they have equal residential responsibility for only some of the children. The guidelines define equal residential responsibility to mean that parents share equal residential responsibility for all their children for 50 percent of the time. Oberst said that when she has been asked how to calculate support when the equal residential responsibility order only covers some of the children, her answer has been to treat the parent with responsibility for more of the children for more of the time as the “obligee” for purposes of receiving child support. The other parent is the “obligor” who is ordered to pay support for all the children and would be entitled to the extended parenting time adjustment, if applicable. Oberst said this answer is not popular because the parents want to be able to offset their support obligations. However, if the custody arrangement doesn’t meet the definition of equal residential responsibility, an offset is not authorized.

Judge Schmitz and Rep. Weisz thought the parents should be entitled to an offset of their obligations. Judge Schmitz said that in the scenario where the parents have three children, they share equal residential responsibility for two, and Mom has primary responsibility for one, the support should be calculated with Dad having an obligation for all three children, Mom having an obligation for two children, and then the obligations should be offset.

A draft will be prepared for the committee’s consideration at the next meeting.

Issue: Consider whether to revise the equal residential responsibility calculation to reduce each parent’s obligation by 50 percent before doing the offset (or reduce the offset by 50 percent) as way to recognize that each parent has the child 50 percent of the time.

Discussion: Davis said he submitted this issue at the request of a parent who has an equal residential responsibility arrangement and feels that the guidelines don’t take into account that he has the children half the time.

Oberst said she thinks the guidelines do take the residential responsibility arrangement into account by requiring that an obligation be established for each parent. If a parent exercises the primary caretaker role for a child half the time, it means that the parent is not in the primary caretaker role for the other half of the time. And when a parent is in the primary caretaker role, that parent is caring for the whole child, not just half a child.

Rep. Weisz said the number one complaint he hears as a legislator is from parents who say they have their children half the time but still have to pay child support.

Moore said that one parent might have substantially more income than the other parent and, if so, the child should not have a lifestyle change every time the child goes from one parent’s home to the other.

Goulet described a case where the parents have equal residential responsibility. They have set up a joint account into which each parent contributes \$50 per month and each parent has a debit card allowing the parent to make withdrawals.

Fleming said the guidelines are premised on one parent being in the primary caretaker role, either half of the time or for the majority of the time, and while in that role, the parent provides "support" by providing the primary care. The other parent provides "support" by making a monetary contribution.

Since there was little or no support for the proposal, the committee determined that the issued should be dropped from further consideration.

Issue: Analysis of deviations.

Discussion: Oberst explained that federal regulations require that the review of the guidelines include an analysis of the application of and deviations from the guidelines to ensure that the deviations are limited.

Oberst explained that the methodology for the deviations analysis began with drawing a random sample of support orders to review. Support orders entered on or after January 1, 2012, provided the universe from which the random sample of 261 orders was drawn. The randomly selected orders were printed from Odyssey and then the paragraphs relating to child support were reviewed. Some of the orders selected turned out to be not applicable to the deviations analysis so in the end there were 251 orders that were reviewed for possible deviations.

Oberst said that she identified a total of six orders containing seven deviations (one order had two deviations). One deviation (an upward deviation for the child's tuition at a private school) is clearly authorized under the guidelines. Another (downward) deviation purported to be based on a situation over which the obligor lacks control and which requires the obligor to incur a continued or fixed expense but Oberst said that based on the description in the order she thought it was questionable whether this was a legitimate deviation. The remaining deviations were essentially created by the parents. These "parent-created" deviations were all the result of stipulations and all but one resulted in reducing a parent's obligation.

Oberst said that the results of the deviations analysis are consistent with those from prior quadrennial reviews. She said she was surprised that the sample didn't turn up at least one order with a downward deviation for parenting time travel expenses and one order with an upward deviation for child care costs. Moore and Turcotte said that in their experience, child care costs were more likely to be addressed by the parents' agreement to split the costs instead of through a deviation to the support obligation.

It was also noted that changes made during the last quadrennial review have affected the deviation for parenting time travel expenses. This deviation is now allowed only when the obligor is responsible for all the travel expenses.

With respect to the courts' sanctioning the "parent-created" deviations, Judge Schmitz said that there is some value on having peace between the parties. Referee Thompson said that in his experience, the parties will come to court together with an agreement, usually seeking that the support amount be reduced.

Issue: Awaiting Supreme Court decision in Shae v. Shae case to consider effect on deviation for high-income obligor.

Issue: Consider whether to revise the schedule of amounts to extend beyond net income of \$12,500 per month.

Discussion: Fleming noted that a decision in Shae v. Shae has not been handed down yet so we may not have any insight from the Supreme Court before the deadline to commence rulemaking. Fleming said that when there is a high-income obligor, there are two extremes that a court can follow when establishing support. At one extreme, the court could apply the deviation for a high-income obligor and set the obligation based on the same percentage of the obligor's net income as at the top of the schedule. For example, the schedule tops out at net monthly income of \$12,500. For three children, the obligation at that income amount is \$4,250 per month or 34 percent of the net income. The court could apply the same 34 percent to the obligor's off-the-schedule net income. This is the approach used by the trial court in Shae. At the other extreme, the court could treat the schedule as a cap on the obligation. For example, support could be set at \$4,250 per month for three children even if and no matter by how much the obligor's monthly net income exceeds \$12,500.

Judge Schmitz thought that there should be a cap on support obligations and Woods said that in the tribal court he is seeing it a lot that the court treats the schedule amount as a cap.

Moore said she is not sure there should be a "hard cap," because of situations where, for example, there is a disabled child. On the other hand, she noted that when a child support obligation is set at a high amount because of the high income of the obligor, it can result in a redistribution of wealth to the obligee who receives the support and does it out or, for example, could bank it.

Schmitz said that the deviation for high income obligors should be revised to provide more control over how much can be ordered.

The committee's discussion segued into possible changes to the schedule of amounts. The schedule currently tops out at net monthly income of \$12,500. Judge Schmitz and Oberst commented that the schedule should be expanded to top out at \$25,000. Oberst said that a net income of \$25,000 per month works out to an annual income of \$300,000. She thinks that if the schedule is expanded to \$25,000 a significant number of obligors who are now considered to be "high income" and subject to a deviation would be covered by the schedule, which should lead to more certainty and consistency about how much support is ordered. Weisz offered that the percentage to be ordered

could be cut in half for the next \$25,000 in monthly income and cut in half again for the next \$25,000 after that.

Fleming suggested modifying the schedule so that the percentage of child support to the obligor's net income starts to taper off at the \$10,000 per month income level and decreases by some percentage for every \$1,000 increase in net income. As a variation on Fleming's idea, Rep. Weisz suggested that the percentage decrease by one percentage point for every two levels on the schedule.

Fleming said that for the next meeting there will be a draft to review that will increase the schedule to \$25,000, start phasing down the percentage at the \$10,000 level, and revise the deviation to specify that it must be based on a child's demonstrated needs.

Issue: Consider whether to revise the deviation for a high-income obligee to specify it can only be used when the obligee is an individual.

Discussion: This issue was submitted by the Jamestown regional child support office based on their experience in a case where a child was placed in foster care and the office had to secure a support obligation from the former custodial parent. The parent's attorney argued that the parent should be entitled to a downward deviation in the obligation because the "obligee" in the case is the State and the State's income is more than three times higher than the parent's income. Schaar added that the attorney's argument was not persuasive to the court.

Some members commented that the attorney's argument was creative but it was not a surprise that it was unsuccessful. Under the circumstances, the committee was of the opinion that a change to the guidelines is not needed so this issue will be dropped from further consideration.

Issue: Consider whether to revise subsection 6 of section 9 when split primary residential responsibility (or equal residential responsibility?) applies in light of the decision in Nuveen v. Nuveen.

Discussion: Oberst explained that this issue was identified when the Supreme Court decision in Nuveen v. Nuveen was handed down. In Nuveen, the parents had split primary residential responsibility for their children. An obligation was determined for each parent, then the obligations were offset, and then the trial court added an amount representing an upward deviation to the offset amount because the father has a high income. The father argued that it was improper to determine the deviation after offsetting the support obligations. In response, the Supreme Court said that the father had failed to provide any authority that specifically requires the court to apply the deviation before the offset.

Oberst said that the guidelines specify how deviations are to be applied (e.g., for upward deviations, as an increase to the child support amount and for downward deviations, as a reduction to net income). She said that if the guidelines had been

applied correctly, the court would have determined each parent's presumptively correct obligation, then accounted for any deviations and then the offset would have happened at the end.

Draft amendments to subsections 6 and 8 of section 9 to clarify that any deviations must be addressed before the offset will be prepared for the committee's consideration at the next meeting.

Issue: Consider whether to authorize a deviation for situations where the obligor's housing costs consume a disproportionate share of available income.

Discussion: Fleming said that housing costs have skyrocketed in the oil patch. He added that the Department of Human Services recognizes the impact on its employees in that region by including an "oil patch add-on" in the salaries paid to its employees.

Sen. Larsen said that there is still a housing and rental crunch in Minot. Despite all the building that has been going on, costs haven't come down.

Turcotte described a situation that she is aware of from her professional experience where the parents have equal residential responsibility for their children, they both live in the same area, and both have roughly the same earnings. However, the mother pays \$1,000 more in rent than the father and there is no consideration under the guidelines for her situation.

Fleming said the reason he suggested a deviation is so the judge can sort out if the obligor is really feeling the squeeze because of the housing market. Judge Schmitz said he was uncertain what kind of information would be presented to the judge so the judge could determine if the deviation should apply. He said that, as a judge, he needs to be presented with facts so that he can make the required findings for a deviation.

Moore said that it is likely possible to find out what average housing costs are in a community but it would not always be easy to do. Thus, having a deviation for housing costs could possibly be exploited. She said such a deviation could be subject to a lot of manipulation. Unless there is data on housing costs readily available and reliable, the courts would be guessing all the time.

Moore added that there are lots of lifestyle issues that come into play with housing costs so it could lead to courts having to make some value judgments about how nice a home an obligor is entitled to have.

Davis said he is not sure if there needs to be a deviation. He said housing costs are an issue in some areas but not in others and even where they are an issue, they will eventually level off. If a deviation is created, he thinks it would have to be similar to the existing deviation for the obligor's health care needs where there are very specific conditions that must be met in order for the deviation to be applicable.

Davis and Oberst think if there is a downward deviation for the obligor's housing costs, there should be a corresponding upward deviation for situations where the children have increased needs because the obligee is feeling the housing market squeeze.

The committee determined not to pursue an amendment to the guidelines so this issue will be dropped from further consideration.

Issue: Analyze economic data on the cost of raising children.

Discussion: Oberst explained that federal regulations require that the review of the guidelines include consideration of economic data on the cost of raising children. She said she used a USDA publication, Expenditures on Children by Families – 2012, as the source document for this item. The information in the publication comes from the 2005-2006 Consumer Expenditure Survey that was administered by the U.S. Census Bureau. Approximately 28,000 households were interviewed for the survey. The 2005-2006 survey was updated to 2012 dollars using the Consumer Price Index.

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 \$38,670, the data indicates that it will cost \$171,420 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 \$39,390, the total cost to raise a child from birth to age 17 is \$143,160. Finally, for single-parent families with an average before-tax income of \$26,900, the total cost to raise a child from birth to age 17 is \$161,220.

The most expensive category of expenditures is housing across all income levels. The second most expensive category varies by income level: child care and education is second for households in the middle and higher income levels and food is second for households at the lower income level.

Moore commented that the expenditures on housing as reported in the USDA publication seem to be very low, as do expenditures for health care.

Woods said that in theory the guideline amount should cover 50 percent of the cost of raising a child but for low-income obligors, such an amount is not necessarily going to be collected. Judge Schmitz agreed that child support orders have to be realistic based on what income is available to go around.

Next, the committee took up discussion of two issues for consideration that had been raised since the May 12th meeting.

Issue: Consider effect, if any, on self-employment income from ratcheting down the three-year rule for review and adjustment.

Discussion: Fleming had asked to review the timeframes in section 5, regarding net income from self-employment, to see if they would be affected if Child Support begins conducting reviews more frequently than once every three years.

Oberst said there are not really any timeframes in section 5 except for the provision (subsection 4) that requires averaging the most recent five years of activity. The number of years averaged then affects the loss analysis in subsections 6 and 7 if those subsections are applicable. Fleming said that these timeframes do not appear to be at odds with ratcheting down the three-year rule for conducting reviews. Thus, this issue will be dropped from further consideration.

Issue: Consider the treatment of “gains” as gross income for child support purposes.

Discussion: Moore asked that this item be discussed by the committee. She provided the following scenario: parties are getting divorced and the party who will be the child support obligor sells some property to pay his or her property settlement obligations. The sale results in a capital gain. A year or so later, the support obligation is being reviewed and the capital gain appears on the obligor’s most recent tax return and is treated as gross income for child support purposes. Moore said that when the capital gain is nonrecurring, as is likely in this scenario, it seems particularly unfair to include in the obligor’s gross income.

Moore said that the issue is in part driven by using tax returns to document income for child support purposes and it’s also a timing issue. The capital gain appears on the tax return so it becomes included in gross income. On the other hand, if an obligor were to sell his or her car, the proceeds from that sale would not be included in gross income. People are making legitimate financial transactions and are getting caught up in child support issues as a result.

Moore said that a related issue is how to account for the lump sum received as a capital gain. Should it be treated as income only in the year it was realized? Or amortized over two or more years? If amortized, how many years should it be spread over?

Rep. Weisz said that when a depreciable asset is sold, it results in a capital gain. However, if the asset were traded instead of sold, there would not be a capital gain. He thinks that a capital gain resulting from the sale of an asset should not be treated as income for child support. Judge Schmitz added that children are not necessarily entitled to share in every cent realized by the obligor.

Schaar said she doesn’t agree with Rep. Weisz and Davis also expressed some reservations about categorically excluding gains. He thought there were some types of gains that would be appropriate to include. He said sometimes the sale of property is

clearly part of the obligor's self-employment activity and, accordingly, should be included.

It was also noted that nonrecurring capital gains could be excluded using the same logic for excluding nonrecurring bonuses.

Fleming suggested that a solution might be to carve out the types of gains that should not be included in gross income. For example, an exclusion could be created for gains realized from the sale of assets to fund a property settlement.

Next, the committee discussed outstanding issues from the May 12th meeting.

Issue: Consider whether to make some adjustment when the obligor receives Basic Allowance for Housing (BAH) and Basic Allowance for Subsistence (BAS).

Issue: Consider whether to exclude BAS ("food allotments") and BAH ("housing allotments") from gross income since they are not subject to income tax.

Issue: Consider whether to exclude BAH-equivalent from gross income when the obligor lives in base housing and doesn't actually receive BAH as part of his or her paycheck.

Issue: Consider whether to exclude (or limit?) various allowances paid to military members stationed overseas.

Discussion: Oberst said that following the May 12th meeting, she did some research on-line to get information about monthly BAH rates at different localities. She found a website (www.militaryhub.com) that publishes BAH rates for 2014 for military installations in the United States. She said there were too many installations to do a look-up for all of them so she randomly selected installations from various parts of the United States to try to get a good cross-section representation of what is allowed where for a hypothetical E4 service member without dependents. The BAH at the Minot air force base (\$1,113) exceeds the BAH at Grand Forks (\$789) and it is roughly comparable with the BAH at the Dover air force base in Delaware (\$1,029) and the Lewis-McChord joint base in Washington state (\$1,068).

Oberst said that the overseas housing allowance (OHA) for military installations outside the United States can be markedly higher than the BAH at installations within the country, which apparently reflects the higher cost of living in some of these countries. Plus, in addition to the actual OHA, overseas assignments appear to include allowances for utilities and maintenance and a move-in-housing allowance. Using just the Ramstein air force base in Germany and the Aviano air force base in Italy as examples, the total housing-related allowances are \$2,800 and \$3,624, respectively.

Members discussed creating an exclusion or deduction for overseas housing-related allowances that exceed the BAH at the Minot air force base. It was noted that anyone

doing a guidelines calculation would have to determine what the rate is at the Minot air force base at a given time. Goulet said the rate is subject to change based on the local housing market. She said that the information is available on-line but cautioned that the site is moved frequently, probably for security reasons, so a practitioner will not be able to locate it once and then bookmark it for future reference.

Oberst said she assumes that some of these overseas assignments are considered highly desirable and could be considered a “dream assignment.” If so, she said she is not in favor of making an accommodation for a service member who should have known that the location would have a higher cost of living but actively sought the assignment anyway.

After further discussion, it was decided to prepare a draft for the next meeting that would use the Minot air force base as the benchmark and would exclude housing-related allowances that exceeded the Minot rate.

Issue: Consider whether to explicitly allow a deduction from gross income for dental and vision insurance.

Discussion: Oberst said that she consulted the on-line glossary at www.healthcare.gov to see how broadly “health insurance” is defined. In other words, is it defined broadly enough to categorically include dental and vision coverage? She said the definitions for “health coverage” and “health insurance” refer generically to “health care costs” without specifying what is intended to be included within that terminology.

With respect to Sen. Larsen’s observation at the May 12th meeting that dental and vision coverage are essential elements under the Affordable Care Act, she also found information on the site that said every health insurance plan sold in the Marketplace will offer ten essential benefits, including “pediatric services,” which, in turn, includes “dental care and vision care for kids.”

Oberst said it is her recommendation that if the committee wants to ensure a deduction for dental and vision coverage, which appears to be the common practice among committee members who do calculations, then it should be written into the guidelines. Accordingly, a draft will be prepared for consideration at the next meeting.

Issue: Consider whether to amend subsections 6 and 7 of section 5 (the “loss analysis” subsections) so that losses from one self-employment activity can reduce income from another self-employment activity subject to the same limitations that already exist for reducing non-self-employment income by self-employment losses.

Discussion: Oberst’s suggestion that a draft be prepared for the next meeting was accepted.

Issue: When an obligor is incarcerated and has a disability, consider how to reconcile the requirement for imputing income to an incarcerated obligor with a separate provision

that prohibits imputing income to an obligor who receives certain types of disability payments.

Discussion: Oberst's suggestion that a draft be prepared for the next meeting was accepted.

The committee then reviewed the drafts that had been requested at the May 12th meeting.

(Note: Sen. Larsen had to leave the meeting so he did not participate in reviewing the draft amendments.)

Draft: Authorize a deviation for military members who are on temporary assignment and who need to maintain two residences as a result.

Discussion and decision: The committee did not have suggestions for further changes. Rep. Weisz moved to adopt the draft amendments and Judge Schmitz seconded.

In favor of motion ("yes" votes): Rep. Weisz, Davis, Moore, Judge Schmitz, Turcotte, Referee Thompson, Fleming.

Opposed to motion ("no" votes): Goulet, Schaar, Kemmet, Oberst, Woods.

Motion passed.

(Note: Rep. Weisz had to leave the meeting so he did not participate in reviewing the remaining draft amendments.)

Draft: Change the lodging deduction from \$63 to \$83.

Draft: Clarify that employee expenses must be unreimbursed and create a non-commuter mileage deduction.

Discussion and decision: Judge Schmitz thinks that the "and" should be an "or" and also suggested that the phrase "during working hours" is unnecessary. With those changes made, Moore moved to adopt the draft amendments and Turcotte seconded.

In favor of motion ("yes" votes): Oberst, Goulet, Davis, Moore, Judge Schmitz, Turcotte, Schaar, Referee Thompson, Kemmet, Woods, Fleming.

Opposed to motion ("no" votes): None.

Motion passed.

Draft: Conform the treatment of the child's exemption and child tax credit.

Discussion and decision: The committee did not have suggestions for further changes. Schaar moved to adopt the draft amendments and Kemmet seconded.

In favor of motion ("yes" votes): Oberst, Goulet, Davis, Moore, Judge Schmitz, Turcotte, Schaar, Referee Thompson, Kemmet, Woods, Fleming.

Opposed to motion ("no" votes): None.

Draft: Authorize using the two most recent tax returns to determine the amount to impute.

Discussion and decision: Committee members were concerned that, as drafted, the amendments would exclude consideration of the current year's earnings. Therefore, a re-draft will be prepared for the committee's consideration at the next meeting.