

Child Support Guidelines Drafting Advisory Committee Meeting
July 18, 2014
Brynhild Haugland Room, State Capitol Building

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

Members Absent: Sen. Oley Larsen and Bill Woods

Visitor: Lee Bjerklie

At Fleming's request, Moore gave an overview of the Supreme Court's opinion in the Shae v. Shae case, which was decided on July 17th. With respect to high-income obligors, Moore said the opinion clearly says that a trial court cannot apply a straight percentage based on the top schedule amount without evidence of the needs of a child. With respect to self-employment losses, the Supreme Court declined to adopt the obligee's argument that self-employment losses may not be used to offset other self-employment income. With respect to capital gains, Moore said the decision confirms that capital gains are to be included in determining an obligor's gross income.

The committee then began to review drafts that had been prepared for the meeting.

Draft: For military obligors, use the Minot air force base as the benchmark for housing-related allowances and exclude from gross income any housing-related allowances that exceed the Minot rate.

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

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

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

Motion passed.

Draft: Carve out types of gains that should not be included in gross income.

Discussion and decision: Oberst said she had prepared a draft, for discussion purposes, that would exclude nonrecurring gains from gross income unless the gain results from the sale or exchange of a capital asset connected with the obligor's trade or business.

Schmitz and Moore said they did not like the draft language. Based on the language, for example, a farmer who sells land would not be entitled to an exclusion. Moore said

that including capital gains in gross income effectively amounts to a redistribution of wealth. Schmitz agreed and said that if the gain is included in the obligor's gross income, the child effectively gets a share of the proceeds. Schmitz said that the child is not necessarily entitled to share in the proceeds. He said that we should not allow a child's right to support to morph into the child having the right to share in all the obligor's income. He said that a capital gain should be treated like an asset, not income.

Thompson said some members seem to be assuming capital gains are always associated with high-income obligors and that including the capital gain in the obligor's gross income will result in a windfall for the obligee and child.

Fleming said that if the obligor is able to live off the proceeds from the sale that resulted in the capital gain, it would be unfair to exclude it as it would allow the obligor to artificially deflate his or her income. Fleming said that a capital gain is not like an unliquidated asset. It is cash and it is taxed and it should not be treated differently than any other type of income.

Schmitz moved to exclude all nonrecurring capital gains from gross income and Moore seconded.

In favor of motion ("yes" votes): Weisz, Moore, Schmitz, and Thompson.

Opposed to motion ("no" votes): Davis, Goulet, Oberst, Turcotte, Schaar, Kemmet, and Fleming.

Motion failed.

Fleming moved to reconsider the committee's rejection of Schmitz' motion and Moore seconded.

In favor of motion ("yes" votes): Weisz, Davis, Moore, Schmitz, Turcotte, Schaar, Thompson, and Fleming.

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

Motion passed.

Fleming moved to have a new vote on Schmitz' previous motion to exclude all nonrecurring capital gains from gross income and Moore seconded.

In favor of motion ("yes" votes): Weisz, Davis, Moore, Schmitz, Turcotte, Schaar, Thompson, and Fleming.

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

Motion passed.

Draft: Authorize inclusion of premiums for dental and vision insurance in the health insurance deduction.

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

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

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

Motion passed.

Draft: Revise the look-back period for imputing income based on the obligor's previous earnings.

Discussion and decision: Oberst said she had prepared a second draft based on discussion from the previous meeting wherein concern had been raised about not inadvertently excluding consideration of the current year's income. Also, members' consensus was that the language should refer to "two previous calendar years" instead of "two most recent calendar years." With that change made, Moore moved to adopt the draft amendments and Kemmet seconded.

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

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

Motion passed.

Draft: Revise the provisions for imputing income to an obligor who does not cooperate by providing financial information in an establishment case.

Discussion and decision: Oberst said she had prepared two drafts for the committee's consideration. In one draft, income would be imputed to a noncooperative obligor based on 100 percent of statewide average earnings for similarly situated obligors. The second draft was the same except that imputation would be at 110 percent of statewide average earnings.

Fleming said he doesn't agree with imputing income to obligors in this situation. He said imputing income can result in uncollectible arrears, which is a drain on resources. He said that attorneys should use available discovery tools to determine the obligor's income.

Moore said that discovery is not effective for some obligors and attempting to get them to comply with discovery requests is costly. Judge Schmitz agreed. He said there

needs to be something with teeth to get the attention of uncooperative obligors. By being uncooperative, these individuals are raising the costs for everyone else.

Fleming said that if a change is made to the guidelines, he would implement a policy within the program that staff attorneys would need his permission before they used the provision. He would ensure that they attempt discovery first.

There was further discussion about imputing at 100 percent versus 110 percent. Schaar moved to adopt the version with 100 percent and Turcotte seconded.

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

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

Motion passed.

Draft: Create a hierarchy for imputing income when the obligor is both a minor and disabled or both incarcerated and disabled.

Discussion and decision: Oberst said she had prepared a draft whereby the obligor's disability would "trump" minority or incarceration and, therefore, income could not be imputed.

The committee did not have suggestions for further changes. Judge Schmitz moved to adopt the proposed amendments and Kemmet seconded.

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

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

Motion passed.

Draft: Preclude using the extended parenting time adjustment when the parties have equal residential responsibility for their children.

Discussion and decision: Oberst said she had prepared a draft to amend the extending parenting time section to expressly preclude its application when the equal residential responsibility section applies.

The committee did not have suggestions for further changes. Schaar moved to adopt the proposed amendments and Moore seconded.

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

Opposed to motion (“no” votes): None.

Motion passed.

Draft: Create a methodology for calculating support when the parents have equal residential responsibility for some, but not all, of their children.

Discussion and decision: Members suggested minor revisions to the draft. Instead of “to cover all” the suggestion was to use “for” and in the next line, the suggestion was to remove “all.” With these changes made, Moore moved to adopt the draft amendments and Schaar seconded.

In favor of motion (“yes” votes): Rep. Weisz, Oberst, Goulet, Davis, Moore, Judge Schmitz, Turcotte, Schaar, Referee Thompson, Kemmet, and Fleming.

Opposed to motion (“no” votes): None.

Motion passed.

Draft: Revise the loss analysis provisions when determining net income from self-employment.

Discussion and decision: Oberst said she prepared a draft whereby a loss from Self-employment Activity B could be used to reduce income from Self-employment Activity A under the same circumstances as non-self-employment income could be used to reduce income from Self-Employment Activity A.

The committee did not have suggestions for further changes to the language except to conform the language for the look-back period to match the language used in the imputation section. The committee did discuss at length when these provisions would apply and the intended purpose. With the conforming change to the look-back period made, Schaar moved to adopt the draft amendments and Schmitz seconded.

In favor of motion (“yes” votes): Rep. Weisz, Oberst, Goulet, Davis, Moore, Judge Schmitz, Turcotte, Schaar, Referee Thompson, Kemmet, and Fleming.

Opposed to motion (“no” votes): None.

Motion passed.

Draft: Specify how deviations are to be applied in equal residential responsibility cases.

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

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

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

Motion passed.

Draft: Add limiting language to the deviation for high-income obligors.

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

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

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

Motion passed.

Draft: Revise the schedule of amounts to include net income up to \$25,000 per month.

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

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

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

Motion passed.

The committee's business was concluded. Fleming thanked members for their participation and adjourned the meeting.