

**Minutes of the**  
**Department of Human Services**  
**Child Support Guidelines Advisory Committee**  
**June 6, 2018**  
**9:10 – 4:30**  
**Fort Union Room, State Capitol**

**Members present:** Jim Fleming, Brad Davis, Jamie Goulet, Lisa Kemmet, Leah duCharme, Betsy Elsberry, Senator Oley Larsen, Paulette Oberst, Sherri Peterson, Cynthia Schaar, Referee Scott Griffeth, Tara Fuhrer (present for part of the meeting), Representative Robin Weisz (present for part of the meeting)

**Members absent:** Judge Gary Lee and Bill Woods

**Welcome** Chairman Fleming welcomed the committee members and expressed appreciation for the members' time and participation.

**1. Introduction of members.**

Members introduced themselves and talked about their affiliation with child support, including the cost of raising children, and their experience with past guidelines committees.

Beth Dittus is sitting as a nonmember taking notes. She is an attorney and works in the Policy Unit at the Central Child Support Office. Fleming explained Dittus's role to the group and noted that detailed minutes are important for purposes of recording the legislative history. He indicated they are a useful reference for the program if questions come up in the future.

Fleming mentioned that Rep. Weisz would be joining the group later. Fleming said Rep. Weisz has served on past guidelines committees and that typically a representative and a senator serve on the committee.

The group discussed a time to break for lunch.

Fleming acknowledged the presence of a visitor, Jay Hansen, from Minot. Hansen is interested in the issue of equal residential responsibility calculations on the meeting agenda. Hansen's mother, Mary Hansen, was also present as a visitor.

Fleming noted the committee meetings are public meetings, but not public hearings, and that there are three meetings scheduled for this committee. Fleming indicated that usually the agenda is addressed in chronological order, but we may address the issue of equal residential responsibility calculations today since we have a visitor who is interested in the discussion on that topic.

## **2. Overview of legal authorities and rulemaking process.**

Fleming referenced background materials provided to members and gave an overview of the authority references.

Fleming stated that federal law at 42 U.S.C. § 667 requires each state to develop its own child support guidelines. The guidelines are applied by the Child Support Division and the private bar. Therefore, the committee tries to maintain a balance of input from Child Support, the judiciary, and the private bar. Fleming said in North Dakota the guidelines are established by administrative rule and there will be a public hearing this fall before the rules are finalized.

Fleming discussed the regulation at 45 C.F.R. § 302.56 that tracks federal law. Fleming stated that in December 2016, the federal Office of Child Support Enforcement (OCSE) completed a very long rulemaking process. The guidelines section was changed for the first time in decades. There were some changes made to the guidelines last year, in part because of the new federal regulations.

Fleming said that one of the changes to the federal regulations required states to take into consideration the subsistence needs of the noncustodial parent by incorporating a low-income adjustment, such as a self-support reserve. North Dakota uses the obligor model which uses a percentage of the income of the obligated parent. For example, if the child support obligation is about 25% of the income, the other 75% is the self-support reserve. However, a change was still made to reflect that a net monthly income of under \$700 would result in no obligation.

Fleming indicated OCSE was also concerned that there are states that are applying imputation too aggressively. Fleming said that imputation has been in the guidelines for a long time and explained what imputation means. If a parent does not respond to the action, it is easy to pursue imputation and oftentimes imputation results in the entry of a child support obligation at an unrealistic level. The risk is that if it is done too aggressively, it results in an order that the obligor cannot pay. Fleming indicated that OCSE is requiring states to look at all circumstances of the obligor. This may not require a change in North Dakota because we currently look at all the obligor's circumstances. The program does its best to fill in any gaps in the evidence, which the amended regulation confirms is the proper role for imputing income.

Fleming said the state must publish on the internet and make accessible to the public all reports of the guidelines and include a copy of the guidelines in the state plan.

Fleming went over the requirements of 45 C.F.R. § 302.56(h) and informed the group that the state must consider economic data on the cost of raising children and analyze case data on the application of and deviations from the child support guidelines, as well as the rates of default and imputed child support orders and orders determined using

the low-income adjustment. Certain case data must be used in the state's review of the guidelines to ensure that deviations from the guidelines are limited and amounts are appropriate. Meaningful opportunity for public input must be provided.

Fleming went over the state law regarding the guidelines at N.D.C.C. § 14-09-09.7, noting that it is the responsibility of the Department of Human Services to establish the guidelines and there are certain requirements the guidelines must consider, including consideration of gross income and extended periods of time the child spends with the obligor. The guidelines may not take into consideration cases of atypical overtime wages or nonrecurring bonuses. Fleming said there is a presumption that the child support amount resulting from the guidelines is the correct amount of support. The presumption may be rebutted.

Fleming said North Dakota uses the obligor model. Typically, the obligor model and the income shares model result in a similar obligation. The income shares model has been introduced to the legislature in the past and has failed.

Fleming indicated a copy of the child support guidelines were included in the materials provided to members. There are 16 sections in the guidelines. The guidelines are amended every four years based mainly on the advice of the committee.

Fleming indicated that last year there were some additional changes made, in part, based on the new federal regulations discussed earlier. Fleming noted some examples of the changes: income may no longer be imputed to obligor inmates, Section -04 addressing the minimum support level was repealed, and Section -10 addressing the child support amount was changed so that a net monthly income of \$700 or less resulted in a \$0 obligation.

Fleming discussed the history of the child support amount table in Section -10. It used to stop at \$10,000 or more. Fleming explained that with the oil patch activity, there were some obligors that were making much more, so the table was ultimately expanded to address obligor's making up to \$25,000 or more. The percentage generally goes down as the income gets higher. For example, the percentage of income that ends up being the obligation for an obligor making \$25,000 or more is not going to be the same percentage as an obligor earning \$10,000 or some lower amount.

Fleming asked if the group had any questions about the purpose of these meetings in general or for today. There were no questions asked.

Oberst indicated that there is a preliminary list of issues for consideration in the provided materials. The items on the list were submitted internally by child support staff. Some items were the result of inquiries received at the central office and were noted for discussion at this meeting. Committee members may also raise issues to be addressed.

Oberst said she created talking points for some of the issues. The talking points were also included in the material provided. If a child support worker on the committee submitted an item, that person may be asked to provide some additional information for consideration.

### **3. Child Support Guidelines Section -01 Definitions.**

**Issue: Consider whether/how provisions in the federal Tax Cuts and Jobs Act of 2017 (TCJA) affect the determination of gross income and net income:**

**Spousal support received is no longer taxable income. Section -01(4)(b), includes “spousal support payments received” as an example of gross income. (Also, no longer deductible to the spouse who pays spousal support.)**

Oberst indicated that in our current guidelines, spousal support payments received are included in obligor’s gross income for child support purposes. However, there is no deduction from gross income for spousal support paid. Oberst referenced the discussion items in the issues for consideration. The first discussion item is if the parent who pays child support receives spousal support, should there be an exclusion from gross income? (If so, would need to remove “spousal support payments received” from the list of examples of gross income.) The second discussion item is if the parent who pays child support also pays spousal support, should there be a deduction from gross income?

Schaar asked how often spousal support is being ordered. duCharme indicated it is ordered in less than half of the cases she handles. Elsberry agreed and said that because the court has a large amount of discretion as to when it orders spousal support and at what amount (there is no formula, unlike child support), parties are hesitant to go after it and will typically address the financial issue through property division or some other means. duCharme agreed that property division is often used as an alternative to spousal support.

Fleming asked if the equivalent of spousal support is ever ordered in a nonmarriage situation. Elsberry and duCharme indicated they have not seen it.

Fleming said that although spousal support may not be frequently ordered, since there are still going to be cases where it is, we need to determine whether it should remain in the definition of gross income. Elsberry and duCharme agreed.

Fleming indicated that it seems like it does need to stay in the definition of gross income. Peterson said she thinks it should stay in the definition of gross income. She indicated that, for example, alimony is still wage type income; it is quote/unquote wages.

Fleming said that since it is no longer included as taxable income, he wasn’t sure if we should consider it in determining the hypothetical tax obligation. Oberst noted that the

higher the hypothetical deduction for the income tax, the lower the net income that translates to the child support obligation. Fleming referred the group to page two of the guidelines which outlines what the hypothetical federal income tax obligation is based on: the obligor's gross income, reduced by that part of the obligor's gross income that is not subject to federal income tax and reduced by deductions allowed in arriving at adjusted gross income under the Internal Revenue Code, and applying the standard deduction for tax filing status of single, exemption for the obligor, exemption for the child, tax tables for a single individual, and the child tax credit.

In response to a question from duCharme, Oberst said that if the child support obligor is receiving spousal support, it is now included as gross income for child support purposes to the obligor. We would start with gross income that includes the spousal support received, but if it is no longer subject to income tax, it would come out of the calculation of the hypothetical tax liability. Oberst said there are situations where the obligor may be the one paying the spousal support. Spousal support paid will not be tax deducted.

Peterson said the new tax implications will only be applied regarding spousal support to divorces that occur after December 31, 2018. The divorces from this year are grandfathered in. Goulet said when people are doing their taxes next year they will have to walk in with their court orders to be able to keep track of that.

Ref. Griffeth said since spousal support orders are court-ordered, spousal support ought to be deducted.

Davis said recognizing the deduction would reduce the tax and increase the child support. If the obligor is paying \$12,000 in spousal support and it reduces the taxable income by that amount, then they would have a lower taxable income, lower tax would increase the net income.

duCharme said it seems like the guidelines, how they are written now, will match what will happen in 2019. Multiple members agreed.

The group consensus was that no changes should be made.

**Standard deduction substantially increased, personal/dependent exemptions eliminated, child tax credit increased. Section -01(6)(a) regarding determination of hypothetical federal income tax obligation includes these items in the calculation.**

Oberst indicated she drafted a scenario for this issue included in the provided materials. Alpha owes support for one child. Alpha's gross income, all from wages and all subject to federal income tax is \$36,000 per year. By court order, Alpha is authorized to claim the child as an exemption for tax purposes. Alpha's deduction for federal and state income taxes is calculated as provided in the chart. Oberst went over the information in the chart and differences between the 2017 tax-related amounts and the 2018 tax-

related amounts. The standard deduction in 2018 is higher, but there are no exemptions for Alpha and the child. Oberst explained the dependency exemption and child tax credits are related. If there are no dependency exemptions, the tax credits are zero, which is reflected in the 2018 tax-related amounts. Oberst indicated it doesn't appear there is much difference to the tax amount with the change in the deduction and the exemption, but how we treat our child tax credit is where we really see the difference in how the hypothetical federal tax deduction is computed. The higher the tax, the lower the income for purposes of determining child support.

duCharme stated the child tax credit will increase. Oberst said yes.

Peterson said Internal Revenue Service rules say the custodial parent is the parent with whom the child lives with the longest and they claim the child, unless a release is signed. The noncustodial parent could still get the credit, but not the exemption. When there are divorced parents, the custodial parent basically has the authority to say who gets to claim the exemption and the child tax credit goes along with that.

duCharme said in her practice she sees the exemptions alternated every year and she could see the child tax credit being alternated going forward with the new law change.

Peterson noted the change with the exemption is only to 2025 and then it will go away, unless there are additional law changes. Peterson said there also may be more changes in this area prior to the end of the year and the income threshold for getting the child tax credit has been drastically increased.

duCharme inquired if the guidelines could refer to the dependency exemption and tax credit as an and/or. The dependent exemption is going to go away but you could still alternate the child tax credit.

Peterson noted there is also a family tax credit for \$500. Peterson indicated she wasn't sure if that followed the child tax credit or not. A lot of information is not available yet because publications are still being updated.

Goulet asked if there are a certain number of children you can claim the credit for. Peterson said no.

In response to a question from Goulet, Peterson explained what forms needed to be filled out if the noncustodial parent is providing health insurance for the children.

Fleming inquired if in the scenario provided the tax credit is listed as zero because in the guidelines it is tied to claiming the exemption. Oberst responded, yes, we need to do something with this. Oberst proposed potentially disconnecting the tax credit from the exemption. duCharme suggested maybe keeping both in since the rules may change again

Davis indicated the hypothetical obligation should be kept as accurate as possible. Davis said we know that it is not going to be real because it's based on what a single person would pay every time, but as far as the eligible deductions, we ought to be as accurate as we can.

Fleming indicated the purpose of a hypothetical is to not spend a lot of time trying to get as close as we can. Fleming referred to the definition of net income in the guidelines. Fleming proposed eliminating 01(6)(a)(2) and (3), since the exemptions don't exist and amending (4) as appropriate where it is connected to the exemption. Fleming proposed changing the language in (4) to be an amount equal to one-half of the child tax credit across the board. Fleming noted that there is a double negative, if the obligor gets credit for the child tax credit, their tax liability is decreased, their taxable income is increased, and the obligation is higher. Elsberry commented that it may be true, but not dollar for dollar.

Oberst proposed retaining some of the logic in (3)(b) that tells you how you are going to count the children. Oberst explained that the dependency exemption for the children is an area that Child Support had comments about how to count the children when the child support calculator was rolled out. The process is complicated. Oberst indicated that when there is a court order that addresses it, sometimes it is simpler. However, when there are children in the obligor's home, it's not court ordered, or its alternated, that's when it can get more complicated. Oberst said she understands were Fleming is coming from regarding trying to simplify it.

Kemmet inquired if it was possible to just exclude the child tax credit completely. Kemmet said it would be much simpler and easier for everyone to understand. Oberst agreed that it might be a good idea.

Goulet said it is more important that we are accurate if we include it this time because these are large amounts we are talking about this time: \$2,000 per child.

Kemmet proposed only considering the federal and state tax and leaving the exemptions and tax credits out of the calculation. duCharme said a judge could still address them in an order though. Kemmet acknowledged this and indicated it just wouldn't be considered in the child support calculation.

Fleming inquired if the group was now considering repealing most of the language in the sections 01(6)(a)(2), (3), and (4). Oberst said yes.

Fleming said the motion to expect at the next meeting would be to repeal (2), (3), and (4)(a) and (b), but prior to reviewing that motion, Oberst will run some different scenarios in the guidelines with different income levels and number of children. Oberst will provide the scenarios and Peterson can assist with whatever additional information is needed.

Davis indicated he was concerned about the large difference in income that will not be considered for tax purposes.

Fleming said it will be easier to think about once we have some examples and see the numbers, since it is hard to determine how it ultimately affects the obligation amount.

**Issue: Consider whether to change the calculation of the hypothetical state income tax obligation in light of potential changes to the calculations of the hypothetical federal income tax obligation. Section -01(6)(b) provides that the hypothetical state income tax obligation is a function (14%) of the hypothetical federal income tax obligation.**

Oberst referred the group back to the scenario in the issues for consideration that was just discussed. Oberst said under the guidelines state tax liability is a function of the federal tax liability. During the 2002 quadrennial guidelines review, a Certified Public Accountant (CPA) on the committee said the bottom line wouldn't change much if the guidelines continued to reflect the state tax deduction at 14 percent of the federal liability, without regard to the child tax credit. Based on that information, the committee at that point went with the 14 percent figure. Oberst noted that if we are now looking at changing how we calculate the federal tax liability, we should probably look at changing the state tax liability.

Peterson said the changes to the federal shouldn't make a difference regarding the state tax.

Rep. Weisz joined the meeting. Fleming welcomed him and gave an overview of what the committee had discussed throughout the morning and the topic currently being discussed.

Oberst indicated we haven't changed the basis of the state tax liability calculation in a long time, but since we are looking at the federal, we may want to look at it. Oberst said we need to find out if the 14 percent is something we still want to go with or not and how we go about figuring out how to do that.

Peterson indicated she would like to run some numbers to see if there needed to be a change. Peterson will run some numbers prior to the next meeting for the group's consideration.

**Issue: Consider limiting the deduction for health insurance coverage for the child to situations where the obligor is ordered to provide the coverage and the obligee is not also providing coverage. In other words, there would be no deduction allowed for the obligor if his/her coverage creates a duplicate coverage situation for the child. Section – 01(6)(d).**

Oberst indicated there were no talking points planned for this issue; it was submitted by Davis for consideration. In a court order analysis that was recently done, there was a surprising number of cases where both parents are providing insurance.

Davis said if an obligor is providing insurance, we are to give the obligor credit for the child's share of the premium. The applicable statute says the custodial parent is to provide insurance if available at no or nominal cost and if insurance is not available to the custodial parent, then the noncustodial parent is to provide insurance if available at reasonable. Davis explained that if the custodial parent is providing insurance at no or nominal cost, but the noncustodial parent still chooses to provide insurance that creates a double coverage situation, he doesn't think the noncustodial parent should be entitled to the deduction. The custodial parent is already meeting the requirement of the statute by providing the coverage at no or nominal cost. Davis said that it didn't make sense to give the obligor credit when they are providing insurance at their own choice, not as a requirement of the statute. Davis feels obligors shouldn't get a deduction for something they are not required to be doing. Goulet indicated it may not make a difference in the calculation in some cases but may in others. Davis agreed.

duCharme disagreed and said it is an actual expense for the obligor and the family gets a benefit with the double coverage. Kemmet said if the obligor is going to cover the child, the obligor should get the deduction.

Ref. Griffeth said in the cases before the court, coverage is very fluid. There is often no notice when coverage changes between the parents. Ref. Griffeth felt that if we can incentivize the obligor to put the coverage on the child, that is a good thing and we should give the obligor that credit, even if it is a double coverage result.

Fuhrer said as a state employee she has family coverage, but it doesn't cover dental, vision, etc. If two parents are each required to cover half of the unpaid expenses, it can get difficult because the parents have to continuously figure out when and how that amount is paid.

Sen. Larsen said health insurance plans are changing. For example, in some situations you cannot buy a group policy, each life is its own premium. Sen. Larsen provided examples of the costs of different plans for a child only. The plans are getting very expensive.

Fleming said if the obligor is ordered to provide coverage and is doing what they are ordered to do, even if it is duplicate coverage, they ought to get credit for that.

Davis noted that it is the custodial parent that has the responsibility first and if the custodial parent fulfills that responsibility, the requirement is met. In response to a question from Fuhrer, Davis went over the language in the statute which says the custodial parent is to provide coverage if it is available at no or nominal

cost. If not available to the custodial parent at no or nominal cost, then the noncustodial parent is to provide coverage at reasonable cost. Fleming noted that the statute defines being reasonable in cost as available to the obligor through employment.

Davis described a scenario where custodial parent has insurance through state employment and then noncustodial parent, as the obligor, adds them to a policy anyway to give duplicate coverage and doesn't necessarily have to under statute. Davis said the obligor should not get credit in this situation. Kemmet disagreed. Kemmet said we don't know the situation. Double coverage may be beneficial if the child has a medical issue that the additional insurance would cover.

Sen. Larsen indicated some parents like the double coverage because, for example, one coverage will cover the injury and another the general office visit.

Schaar said she doesn't see cases very often where the duplicative coverage is an issue. Usually the issue is that neither parent has coverage. Davis indicated he doesn't see these scenarios that often and it usually isn't a large amount, but it is something he has seen over the years.

Fleming asked if this issue was big enough to make a change. Ref. Griffeth indicated he thought we should incentivize duplicate coverage. Schaar said we should not make a change.

Davis indicated he was fine with no change being made.

Sen. Larsen had a hypothetical question for the group. If an obligor has a supplemental plan, the child develops cancer, and the obligor is paid benefits from the supplemental plan: are the benefits received considered gross income to the obligor? Peterson said she has seen some situations where the customer does claim the income on a 1099 form, but the expenses it was used for end up canceling it out. Fleming showed on the screen what the examples of gross income are in the guidelines. Sen. Larsen read information online to the group that said the income from the benefits is not taxable income if the premium was not deducted from your income.

The group consensus was there would be no change made.

**Issue: Consider changing the deduction for health insurance coverage for the child to allow for the obligor's share of the premium in situations where the obligor must obtain coverage for himself/herself as a condition of obtaining coverage for the child. Section -01(6)(d).**

Fleming read the next issue for consideration.

Oberst said this issue arose in a Bismarck case. The obligor indicated that to cover his children through his employer, he had to get a family policy. However, he didn't want to

get coverage for himself. The obligor felt this way despite the requirements of the Affordable Care Act at that point. Oberst said the obligor was perturbed that the calculation that creates the deduction from his gross income didn't include the portion of the premium attributable to his own coverage.

Oberst indicated she drafted a scenario for illustration purposes which was included in the materials. Alpha is ordered to provide health insurance for two children. To secure coverage for the children through his employer, Alpha must enroll in family coverage at a cost of \$700 per month (\$8,400 per year). Alpha's deduction for health insurance is calculated under the current guidelines (when cost of single coverage is unknown), the deduction is \$5,600, calculated as follows: premium payment divided by the total number of individuals covered times the number of children covered. Under the issue for consideration, the deduction would be \$8,400, calculated as follows: premium payment divided by the total number of individuals covered times Alpha plus the number of children covered. Oberst said the question is should we change the way we calculate the deduction for health insurance premiums to account for coverage for the obligor as well.

Oberst explained a second scenario which was also included in the materials. Alpha is ordered to provide health insurance for two children by his ex-spouse. Alpha is remarried and has a child in his home by his current spouse. To secure coverage for the two children in the order, Alpha must enroll in family coverage at a cost of \$700 per month (\$8,400 per year). Alpha's deduction for health insurance is calculated under the current guidelines (when cost of single coverage is unknown), the deduction is \$3,360, calculated as follows: premium payment divided by total number of individuals covered times number of children covered. Under the issue for consideration the deduction would be \$5,040, calculated as follows: premium payment divided by total number of individuals covered times Alpha plus number of children covered.

Oberst noted that the Bismarck case obligor's court order preceded the tax law changes, so there is no longer a tax penalty for not having health insurance coverage. Therefore, this issue may now be moot.

Peterson said a deduction for the children is important, but obligor should not get a deduction for himself.

Sen. Larsen said this is a moot point now because the obligor won't get penalized for not covering himself or herself. There is a trend going toward more child only policies.

Fleming asked if the consensus of the group was that no change was appropriate. The group unanimously agreed no change would be made.

Fleming indicated the group was going to skip forward to the equal residential responsibility discussion.

## **9. Child support Guidelines Section -08.2 Regarding Equal Residential Responsibility.**

**Issue: Consider whether to change the formula for determining the support to be paid. A proposal is to reduce each parent's obligation by half for the reason that each parent has the children in the parent's care for 50 percent of the time; this proposal assumes that the "other" 50 percent of the obligation should be considered paid in kind.**

Fleming explained how the obligations are calculated now. If each parent has the children, functionally, 50 percent of the time, they are both an obligor and an obligee. An obligation is therefore established for each parent. Fleming said a point was raised which recognized that in these cases, half of the obligation of each parent is met in kind by the parent having the child in their home half of the time. Under the calculations for equal residential responsibility, the obligation now uses the full guidelines amount. Fleming proposed that because the child is in the parent's home half of the time, maybe their obligation should be cut in half.

Kemmet and Schaar questioned what would happen if there is an assignment.

duCharme said she likes how the offset is done now.

Ref. Griffeth said this is a slippery slope. What about a 60/40 split? Ref. Griffeth said we should either follow the guidelines or change it based on the amount of parenting time. Elsberry said if we deviate from the amount in these cases, we should also deviate in those cases where the parent has the child 40 percent of the time and so on.

Ref. Griffeth said he sees equal residential responsibility orders coming back for amendment frequently because one parent says the other parent doesn't take their parenting time or actually have the children 50 percent of the time.

Fleming said the dilemma with addressing those cases with parenting time short of a 50/50 split is that the custodial parent's expenses up to a certain threshold are still the same. In 1998, the Department of Human Services did a statistical analysis of the point at which the custodial parent's costs are reduced. Fleming indicated that an obligor who has extended visitation just under the threshold does incur expenses, but the perspective needs to be the amount owed to maintain the standard of living with the custodial parent. To proportionally divide the costs is hard to do without going to an income shares model and the legislature has rejected the idea of going to an income shares model multiple times in the past.

Ref. Griffeth said he would not change the current way equal residential responsibility is calculated. He said it is as fair as anything we could come up with.

Schaar was concerned about when there is an assignment and questioned what the parents would be responsible for if there was an assignment. The state is entitled to repayment for costs of keeping children in foster care. Schaar questioned if there was anything in the federal regulations that prohibited change the equal residential responsibility section in the way being proposed.

Oberst said there is nothing in the federal regulations that would preclude the committee from amending 08.2 in the way being proposed. If the child support obligation is half, what is assigned is the half, because that would now be the obligation amount.

duCharme questioned the purpose of reducing the offset by one-half. Fleming explained the offset is for payment purposes only.

Goulet noted the talking point in the provided materials where the proposal was outlined. Oberst indicated the talking point displays how we do it currently, which Fleming previously described. The proposal is simply that each parent's obligation would become half. The two smaller amounts would then be offset for payment purposes.

duCharme said then all other costs should be split equally between the parties. Schaar agreed. Oberst said there is language in -02(1) which indicates the court is not precluded from apportioning the other expenses, such as child care expenses and school activity fees, between the parents. duCharme indicated there should be a presumption in the guidelines that these expenses be split.

Fleming indicated that from Child Support's perspective, the program collects what the net amount difference is on the order. Fleming said the offset is just about bureaucracy, instead of having both parties making payments. The one that owes the greater owes the difference.

Elsberry believes if we change -08.2, we would need to also make proportional changes to how we calculate for obligors who don't have equal.

Sen. Larsen asked if Jay Hansen could speak on this. Hansen is a visitor and obligor. Fleming welcomed Hansen to speak.

Hansen said his situation is that he has his three daughters. Hansen and his ex-wife have equal residential responsibility of the three daughters and he has them in his home every other week. Hansen is ordered to pay \$2,700 per month in child support. His ex-wife is ordered to pay \$700 per month in child support. After the offset, he ends up making payments in the amount of \$2,000 per month. Hansen said in addition to the child support obligation, he pays for the children's clothes, splits medical expenses, lunch tickets, and half of everything else.

Considerable discussion followed.

Davis said he had an obligor with a similar situation. The obligor said he pays for everything when they are with the obligor and 50 percent of expenses they incur with the other parent.

Hansen said he and his ex-wife split costs for the children's care outside of school attendance and split dental bills. Hansen indicated that about twice per year, he and his ex-wife go over expenses.

Fleming noted the guidelines are based on percentage of income rather than quantifying the actual expenses because there would be no end to the litigation if actual expenses were argued.

Ref. Griffeth said Hansen's income and his ex-wife's income are very disparate. If the children want the same wardrobe at the mom's house, the difference Hansen pays is what makes that possible. Ref Griffeth said this section should be left alone.

Sen. Larsen questioned if parents would get along better and come together more if there was a change to this section.

Peterson indicated her step-son is in a similar situation. He pays the other parent \$800 per month after the offset in a 50/50 situation. The other parent then gives some of the money back to her step-son. Peterson recognized this wouldn't work in every situation.

Fleming said that Child Support doesn't keep track of the average difference in the amount of child support paid between the parents in these types of cases. For three children at \$2,700 per month would mean there is a net monthly income under the guidelines of \$8,000. \$700 for three children reflects a net monthly income of \$2,100 per month. There is quite a range of income in this scenario.

duCharme questioned if any other language would be added to address what would be done after the offset. duCharme indicated she would like to keep the equal language the way it is and then add language that there is a presumption that extracurricular expenses are shared equally.

Hansen said his attorney told him that he was required to pay half of the expenses. duCharme said typically the parents are ordered to split the expenses but when she has said this to clients before, she has gotten questioned on it. duCharme would like to see language in the guidelines which reflects that each parent should have to pay half of the expenses. Fleming said that the guidelines should not get in the way of how additional expenses are covered.

Weisz said he thought some credit should be given in cases where parents have the shared responsibility. In some cases, it might make sense to do a 50 percent reduction, but in others it might not be appropriate. We should take into consideration the additional costs of the custodial parent.

Fleming indicated that dividing it in half was his idea. Even though the custodial parent's share is more in kind generally, in equal considerations there is no in kind credit given.

Goulet asked Hansen if paying his ex-wife \$1,000 per month instead of \$2,000 per month would make a difference for the children. Hansen responded that his wife recently inherited a significant sum of money.

Ref. Griffith said reducing the amount makes a difference in the ex-wife's day to day available funds. In response, Weisz said the ex-wife only has the children half the time. Goulet said \$1,000 is a lot of money in this case. But in most cases, it would not make as big of a difference. duCharme agreed there was a big disparity in income in Hansen's case. Weisz indicated if the income is the same, it won't make much of a difference.

Oberst noted the deviation in the guidelines which applies when the obligee's net income is at least three times greater than the obligor's net income has been applied in equal residential responsibility situations.

Hansen said when the math is done, his ex-wife is left with a higher amount of income available for the children and he is left with lower. Hansen would like to see each parent left with the same percentage of the income going toward the care of the children.

Weisz asked how long this formula has been in place. Oberst said since 2003.

Fleming said a frequent issue that results from equal residential responsibility cases that we see at Child Support is that the parents stipulate to incomes that result in a zero-amount due after offset because they don't want Child Support to be involved. Usually, parents have relatively similar earnings and it comes out close. It's uncommon to have such big disparities in income.

Fleming said the group should all take some time to think about this issue further over lunch. Fleming and Sen. Larsen expressed gratitude to Hansen for his attendance and participation.

Fleming began the discussion again after a lunch break, indicating that it struck him that in these types of cases, the full obligation ought to be discounted by half. However, he recognized that in foster care cases, cutting in half won't work because both parents should have to pay the full amount when the child is in the care of a third party. Weisz asked if Child Support knows how many equal residential responsibility cases include financial situations that reflect such extreme disparities in income. Fleming responded that we have never quantified how many exist. Fleming said in most cases, there is not that big of a disparity of income, like the one that exists in Hansen's case. duCharme said she has had cases with large disparities but it is hard to say how many

or what percentage. However, she has no problem with the section the way it is currently written. Ref. Griffeth added that it is atypical to see an offset of more than \$300. Elsberry said even in a situation where one parent is awarded primary residential responsibility, an obligation of \$2,700 is not typical. Fleming indicated that the average child support obligation amount is about \$330 per month for one child.

Peterson proposed creating an exception; if there is a certain income disparity, it would trigger the use of a different formula. Oberst indicated a deviation could be created. Sen. Larsen said he would be in favor of a deviation.

Weisz said he thinks the committee should change the general formula. This would make sense since changing the formula would not affect most cases where there is little income disparity but would change it for those cases with a large income disparity. Weisz said he thinks we should just cut the obligation in half as originally proposed.

duCharme said part of the purpose of the equation is to equalize the standard of living. The offset takes into account the differences of the parties.

Kemmet said she never really sees a disparity in income similar to Hansen's case. She doesn't feel it is appropriate to change the guidelines based on a case that barely ever happens.

Fleming said it is unusual to have a disparity that is meaningful. Often, the obligation amounts are so similar the parents are looking for ways to get to a zero amount after offset.

Sen. Larsen and Weisz indicated they thought the committee should adopt the proposal cutting the obligations in half. Kemmet said she disagreed because it is only a very small number of cases that this would actually make a difference in.

Fleming said that there is no credit given in the current guidelines for the in kind support being provided by parents in equal residential responsibility situations.

Fuhrer said she has her children one week on, one week off, 50/50. She understands there are issues with who pays what for extras.

In response to an inquiry from Fuhrer, Fleming gave an overview of the scenario in the issues for consideration. Fleming went over what the proposal for the change is and what the difference would make.

Schaar was concerned about only having a half obligation in foster care cases. Oberst indicated that she was not that concerned about the application in foster care cases. Foster care cases are supposed to be short term and the goal is to get the children back into the home.

Fleming inquired if there was any consensus among the members about making a change, and the group appeared to be divided on whether a change should be made. A proposal will be written and brought forward at the next meeting and members will vote at that time.

Sen. Larsen would like to know how many cases would be affected by this. Fleming said it would be helpful to know what the average disparity is.

Elsberry indicated that if equal residential responsibility parents are going to get an in kind credit for having their child 50 percent of the time, then someone who has their child for 40 percent of the time should also get in kind credit. Fleming indicated Elsberry could raise this as another issue for the committee to consider.

Davis indicated it has been a long time since the extended visitation credit has been discussed. Schaar said the extended visitation adjustment has almost become meaningless.

Ref. Griffeth proposed considering a different scenario: if you have your children less than a certain percentage, then you should have to pay even more.

duCharme said if we are going to take away half the child support, then we need to address how extra expenses are divided. Private practitioners often fight about who will be responsible for those extra costs. The offset takes care of the basic standard of living, gets it as equal as possible for the children. By reducing it to 50 percent, we are taking it away from the children, so who is taking care of that and by what means? duCharme proposed leaving the language as is and then adding a rebuttable presumption that all other expenses be split equally. Oberst indicated we could consider changing the language that currently does not preclude the court from apportioning specific expenses.

Fleming said he sees duCharme's point. Fleming said he viewed the language not precluding the court from apportioning specific expenses as applying more to extracurricular activities (e.g., hockey) and not from things like rent or groceries.

Goulet said she would be fine putting this type of presumption language in the guidelines but does not want to have to include language in IV-D child support orders about how extra expenses will be split.

Fleming said the guidelines establish the minimum contributions for the parents. It doesn't prevent the parents from paying more. Fleming said he doesn't want Child Support to get in the business of negotiating the potential additional expenses for things such as extracurricular activities. Oberst said she doesn't want Child Support to negotiate or enforce those additional expenses either. Oberst noted the language we have in the guidelines now hasn't caused any problems this far.

Schaar said she hears about parents going to court over payment of additional expenses often. Elsberry said the economics of litigation come into play. Pursuing an order to show cause to enforce payments for additional expenses is a significant expense and the parent has to consider that they are going to have to co-parent with the other parent for the rest of their lives.

Ref Griffeth said there are some parents who may be angry, that will sign the child up for many new activities to increase expenses for the other parent. Ref. Griffeth questioned how we would determine what additional expenses should be split or how that would be enforced.

Fleming said typically the parties Child Support sees are not married and some can barely afford to take care of the basics for the child. The reality in these cases is the custodial parent needs to be able to pay rent and buy groceries. With the average child support order at \$330 per month, obligors are by and large not wealthy. Child Support's customer base is generally low income. Fleming recognized, however, that the guidelines apply to all parents. The paradigm is shifting where parents are willing to co-parent and work it out nonjudicially. duCharme and Elsberry said they weren't sure whether that is true because they don't see those people. Elsberry noted that there is the family mediation program that is available to those people who can agree and work it out.

Fuhrer left the meeting.

Fleming asked if there was consensus among the group whether a change should be made and there was no consensus at that point. Fleming said something will be put in writing to endorse the 50 percent idea and then it will be considered and voted on at a later meeting.

**Issue: Consider adding a "subject to documentation" requirement to the provision allowing a deduction for actual medical expenses of the child. Section - 01(6)(e).**

Rep. Weisz questioned if this was really an issue in a lot of cases. Schaar indicated she has customers that have said they pay for certain costs and she is suspicious.

Davis said his office asks people to include information on the financial affidavit and then be prepared to back it up with documentation if it is questioned later. Schaar said that is what they usually do also.

Fleming said, if you doubt it, then make them provide the documentation. This would be true of a lot of things in the guidelines. Child Support is not required to take one parent's word over the other.

Rep. Weisz asked if Child Support had the ability to require documentation. Schaar and David both indicated it does.

Davis said he doesn't want to have to go through all of the paperwork that would be required in every case if this language was added. Schaar agreed.

The group consensus was that no change should be made.

**Issue: Consider removal of the deduction for “union dues . . . if required as a condition of employment” given that 25 states, including North Dakota, have right-to-work laws. Alternatively, consider defining what “required as a condition of employment” means. Section -01(6)(f).**

Oberst indicated this issue was submitted by the Bismarck regional office.

Kemmet said if an obligor produces a pay stub that shows deductions for union dues and says it is required, they should get credit for it. If the obligor can show their employer is withholding it, then they should get credit. Obligors are not given a choice whether it is withheld. Some obligors are making way more money because of the fact they are in the union. The obligor should be incentivized for working in the union and making much more money than they otherwise would.

Goulet said she pays union dues and they are not a condition of her employment.

Schaar thinks we should leave the language alone. It happens so seldom in her jurisdiction that she doesn't think it's worth the change.

Fleming said he pays union dues, but it is by choice. Child Support shouldn't give obligors breaks for something they are choosing to pay. Fleming is satisfied with the language now. Goulet agreed.

Kemmet acknowledged it might be a bigger problem in the Bismarck region than in others.

The group consensus was that no change would be made.

**Issue: Consider whether to change the deduction for lodging expenses and non-commuting mileage. Section -01(6)(h)(2) and (3).**

Fleming read the applicable section. Oberst noted the “subject to documentation” language was added purposefully in a past review. Oberst indicated, historically, the deduction has been tied to what the General Services Administration (GSA) rate is for federal employees. Oberst said the lodging rate for GSA has increased. As of October 1, 2017, the GSA rate for lodging in North Dakota

will be \$93. The use of a vehicle has gone down. Oberst said the mileage rate is 56 cents per mile.

Goulet said they dealt with this issue in several cases. In one case, an obligor was traveling 900 miles per week and it was documented. It was all noncommuting and nonreimbursed. The obligor had two work sites. Schaar questioned how many cases like that Goulet has seen. Goulet said not many, only a few cases she can think of.

Peterson said changes will be made on unreimbursed employee expenses for tax purposes. As far as this issue goes for the tax return, the item on the Schedule A is gone and if they do get reimbursed, it is supposed to be reported on the W2. Peterson indicated she will get more information on this issue because she couldn't remember the details exactly.

Fleming said for the next meeting they will have proposed draft changes to this section so that the group can vote by roll call.

**Issue: Consider whether to allow obligors who don't itemize for tax purposes to deduct their employee expenses to create parity with those obligors who do itemize. Section -01(6)(i).**

Davis said he understands individuals will not be able to do this anymore. Peterson said she is going to find out more information on this. Peterson explained that as far as itemizing goes, it is now gone from the tax return.

Fleming said this issue will be addressed at the next meeting, so Peterson has a chance to review more information.

#### **4. Child Support Guidelines Section -02 General Instructions.**

**Issue: Consider whether to specify how nonrecurring income (that is not excluded) should be treated in determining gross income. Suggestions include requiring that the amount meet a certain threshold or was received within a certain look-back period before it is included.**

Oberst indicated this item was submitted by the Fargo office. Oberst indicated nonrecurring bonuses are already specifically excluded from the definition of gross income if the obligor doesn't have significant influence or control. Also excluded are nonrecurring capital gains. Oberst indicated the issue raised in Fargo dealt with nonrecurring income that is not already specifically excluded. An example is an obligor that has a work-related injury and instead of getting weekly benefits from worker's compensation, the obligor got a lump sum payment. The question became, should that amount be amortized over a length of time? This raised additional questions about whether it should only be included if the amount reached a certain level. Oberst indicated the Fargo office was looking for the guidelines to provide more direction.

Oberst indicated she is struggling with this issue because sometimes the purpose of the lump sum payment can make a difference. For example, if an obligor loses a limb it may be appropriate to amortize that payment over the course of the obligor's life because they would never get income for loss of that limb again.

duCharme said she was trying to think of another situation that is not already addressed in the guidelines. Kemmet suggested winning the lottery as a similar once in a lifetime example.

Oberst said some types of income lend themselves more logically to amortization than other types. For example, winning the lottery would likely not happen more than once in a lifetime. If an obligor wins the lottery in 2018, the court order could reflect an obligation for a certain period of months and when that period ended, a separate obligation amount moving forward. The guidelines say to include the lump sum, but the courts are left to decide how to do it.

Goulet said the amount of the lump sum would make a difference to her. Oberst indicated not every case is a windfall type of situation.

Fleming referred to Section-09(2)(h) which addressed a deviation from the amount due to the increased ability of an obligor, who is able to secure additional income from assets. Oberst indicated it is a deviation in the guidelines, but ultimately the court will decide whether it applies.

Schaar indicated amortization in the loss of limb case makes sense but she doesn't know what to do with the lottery winning example.

In response to a question from Fleming, Oberst said that collectively it doesn't seem the group was able to come up with anything helpful to address the issue raised by the Fargo office. The group agreed.

The group consensus was that no change would be made.

**Issue: Consider addressing extrapolation of income.**

Fleming indicated he was contacted by a legislator to address extrapolating income, but he needs to be in contact with that person again before he is ready to move forward on the discussion. Fleming read a quote from Korynta v. Korynta, 2006 ND 17: ". . . unless the trial court makes a determination that evidence of an obligor's recent past circumstances is not a reliable indicator of his future circumstances, the trial court must not extrapolate an obligor's income under N.D. Admin. Code § 75-02-04.1-02(8)."

Oberst indicated the court can extrapolate if the tax return is not a reliable indicator of earning ability. Oberst gave an example of an obligor who was working as a Certified Nursing Assistant and then became a Registered Nurse. It would not be appropriate to

use the tax return during the time the obligor was a Certified Nursing Assistant. It would be more accurate to extrapolate the current income of the obligor as a Registered Nurse moving forward. duCharme said she likes the idea of being able to extrapolate.

Fleming will try to get in touch with the legislator that brought this item forward and address it at the next meeting.

**Issue: Consider removal of Section -02(9) if it can be interpreted as “forcing” parents to have a child support obligation, even against their wishes.**

Oberst said this issue arose in a case that came out of the Devils Lake region.

Fleming said there are places in the state where the judiciary requires the parties to step forward with an obligation. Goulet mentioned that committee member Judge Lee may want to be present for this issue.

Fleming said he is considering proposing to the legislature the law be clarified to say that staying an obligation is a permitted option. If you have unmarried parents who break up and don't get assistance, no one is forcing them to court to get an obligation. Fleming indicated that if the rules don't allow divorced parents to stay an obligation, there is an argument to be made that they are being treated differently because of marital status. Since there is a difference in judicial approach across the state, there is a need for a law change.

Oberst indicated that in the case out of the Devils Lake region that prompted this, the judge specifically cited this section in the guidelines.

Ref. Griffeth brought up N.D.C.C. § 14-09-09.32 which indicates that an agreement to waive child support is void and unenforceable. Fleming said the purpose of that statute is to make sure current or future child support is not waived because of abuse or coercion. Fleming noted there is a difference between a waiver of support and what is being discussed here, which is an agreement to reserve the child support.

Fleming asked Ref. Griffeth how he would respond to the point about discriminating against parents based on marital status by not allowing divorced parents the ability to reserve the issue of child support. Ref. Griffeth said that is the first time the question has been posed to him. Ref. Griffeth indicated one possible solution is to clarify that if child support is reserved, when a parent brings a motion to establish child support, child support is ordered retroactively back to the date it was reserved.

Schaar said there are cases where the custodial parent comes in when the child is 16 and wants support back to date of birth. Child support doesn't assist with that. Ref. Griffeth said he doesn't like the idea of kicking the can down the road; child support should be addressed right away.

Fleming said there is a trend for parents going nongovernmental. There is an increase in births to unwed parents and more people are not wanting government intervention; parents want to figure it out on their own.

Ref. Griffeth said philosophically he disagrees with reserving child support but is fine with it if it is being done consistently statewide. Fleming said he thinks the program needs to bring this issue to the legislature because of the variety across the state. Reserving child support is about whether/when you apply the guidelines, not what the guidelines say.

Ref. Griffeth said there are other nuances being allowed that if the parties are residing together with the child, they can suspend child support. Ref. Griffeth said he didn't believe N.D.C.C. § 14-09-09.32 allows that, but parents are doing it. Fleming said he respects the right to disagree and reiterated that in his opinion, there is a distinction between a suspension and a waiver.

Fleming indicated the issue will be discussed again at the next meeting when Judge Lee is present.

#### **5. Child Support Guidelines Section -05 Regarding Self-employment.**

**Issue: Consider whether to strengthen the requirements for documenting income from self-employment. One suggestion is to require the obligor to produce the same profit and loss statements that the obligor provides to his or her banker. Section -05(3).**

Schaar said this came from some members of the private bar who indicated people are not always honest on their tax return and they wanted self-employed obligors to provide documents given to their banker. duCharme indicated parties could get that information through discovery.

Schaar indicated it would be an easy addition for Child Support to put the request on the financial affidavit. Schaar said she is not seeing as many surprising tax returns which are not consistent with how someone lives, as she used to. Elsberry said she sees some parents with a brand new pick up or a brand new shop, paid in cash, but the tax return indicates a low amount of income.

In response to a question from Ref. Griffeth, Fleming said if obligors are cash poor but asset rich, there is a deviation available.

Fleming indicated that the guidelines provide that if tax returns are not available or do not reasonably reflect the income from self-employment, profit and loss statements which more accurately reflect the current status must be used.

Schaar said the language referenced by Fleming is good enough and no further change needed.

The group consensus was no change would be made.

**Issue: Consider whether to change the general rule for averaging income to three years (down from five years). Section -05(4).**

Fleming informed the group that Child Support is now reviewing orders every 18 months as a matter of policy, regardless of the federal minimum of every three years. The idea is it is more responsive to the rises and falls of income of the obligors.

Schaar indicated if the obligor requests the review, they have to provide the income information up front. Child Support is doing reviews more often so information must be provided.

Fleming said once Child Support is asked to do a review, there is a timeframe that needs to be met.

Goulet questioned if there is still a benefit to five years for the average. Davis indicated most of the time the self-employment has been in existence for less than five years. Schaar agreed and said she sees many cases with less years available. Davis said that in cases with self-employed farmers, it is usually helpful to have five years of income information since the income can vary.

Ref. Griffeth said from the bench he would rather see five years of income than three.

The group consensus was no change would be made.

**6. Child Support Guidelines Section -07 Regarding Imputing Income Based on Earning Capacity.**

**Issue: Consider the effect of removing the definition of “underemployed” while retaining the presumption of underemployment. Section -07(1)(b) and (2).**

Oberst gave background information about this item. There were changes through rulemaking in 2017 that took effect in 2018. These changes were discussed by Fleming earlier. This issue was one of the things that was considered but ended up not being changed. In the guidelines, there is a definition of underemployed and a presumption of underemployment. Oberst said this raises questions: Is this redundant? Are both necessary? Do we have obligors that are underemployed but do not meet the presumption? Does it help to have both? What will happen if we remove the definition but keep the presumption?

duCharme asked what the opposition to removing the definition was. Davis indicated the definition is helpful in determining whether the obligor is underemployed. Fleming said the difference is between the definition and the presumption. For example, the obligor may not meet the presumption, but may still be found to be underemployed by the court. Oberst explained that although not presumed to be underemployed, an obligor could be found factually underemployed by the court.

Fleming said some of the discussion in the program was that removing the definition would take away the opportunity to argue that the obligor was underemployed if the obligor doesn't meet the presumption. It is a finding of fact the court must make and if so, wages can be imputed.

Oberst indicated she was unsure how often it happens that an obligor is argued to be underemployed if they do not meet the presumption. Ref. Griffeth said he has never seen the argument made that someone is underemployed without meeting the presumption. Goulet indicated she doesn't think Minot or Williston uses Section 07(1)(b) but does use the presumption.

Fleming suggested removing the language indicating the underemployment is presumed. Davis said if you take the presumed away there is no presumption to rebut and then you would impute based on past income that is no longer realistic.

Oberst indicated there were several IV-D attorneys that wanted to keep the definition and the presumption. Fleming said he is not a fan of the proposed change and doesn't think what we have is broken, but if we do change it we could remove language that removes the possibility of an obligor being between the definition and the presumption.

The group consensus was no change would be made.

**Issue: Consider whether to shorten the look-back period when imputing income based on previous earnings. Section -07(3)(c).**

Davis said he would leave it alone. It is helpful in getting an accurate income.

Kemmet questioned why we are looking back so far. She said it seems like Child Support cherry picks when to use older income. Goulet agreed that Child Support is looking back too far.

Davis said the last time it was shortened, it didn't work, and it ended up going back to the longer look-back period. Many times, when a review is being done at the beginning of the year, the longer look back period is helpful.

Oberst said she had previously proposed the look-back period to be the current calendar year and the previous calendar year and got push back. One reason there was opposition was because of the practicalities of using information from the tax

returns. Oberst explained that it can be more difficult for reviews started at the beginning of the year if the obligor has not yet done taxes for the previous year. In response to a question from duCharme, Oberst indicated one reason in support of changing it to a shorter period was so that an obligor was not held hostage to an income from past years that is no longer accurate.

Considerable discussion followed.

Davis said the only time this issue is coming up is in those cases when Child Support must impute because the obligor is not cooperating and providing information.

duCharme said from a private practice standpoint, she sees no reason to change it.

Goulet said sometimes workers in her office are telling obligors not to request a review if they are unemployed or underemployed because income from two years ago when they were making more money would be taken into consideration. Ref. Griffeth noted the obligor is given an opportunity to establish that the income no longer reflects the situation.

Kemmet said we should take into consideration that Child Support must enforce these orders after they are entered. If orders are set above an obligor's actual ability to pay, it is an enforcement nightmare.

Oberst said there are some people in other professions that are currently unemployed and now must have income to them imputed at the highest of those three choices, so we are pulling in wages from two years ago. Davis said using two year old income doesn't typically happen if the obligor is cooperating. Oberst questioned how Davis gets around it if the obligor is unemployed. Davis said there is no way around it.

Kemmet said the look-back period should be shortened because she does see situations where the obligor is unemployed and doesn't think it is fair to use income from two years ago. Some of the obligors from the oil field quit because they are tired of living in a man camp and want to spend more time with their family. Kemmet doesn't believe they should be penalized for that.

In response to a question, Oberst noted there are exceptions to imputing, but the exception must be met.

Schaar indicated she doesn't see the problem with having to impute based on income from two years ago that often.

Kemmet said another thing she sees is obligors who have aged and are unable to continue working in the oil fields; their bodies are beat up from doing hard labor.

Oberst indicated that there may be jobs available in the oil field, but there may be many people vying for those jobs, so the obligor is unable to obtain it. Ref. Griffith indicated if the obligor comes into court and shows that a good effort to find work has been made and has failed, he would not penalize that obligor.

Fleming asked if there is a reason in the guidelines that income could not be imputed to an obligor who is “worn out” from the job. Committee reviewed Section -07(4)(b) and determined that it wouldn’t apply. Fleming proposed adding language at the end of Section -07(5) that addresses the physical demands of the job now being too much for the obligor to continue.

Fleming noted that looking back as far as the guidelines do can undermine doing 18 month reviews in certain situations.

Davis indicated the North Dakota Supreme Court has said that an obligor has a duty to provide for the child based on ability, not inclination. If an obligor chooses to change professions and work for less, then the obligor does so with the knowledge that he or she is going to have to support the children based on his or her old ability for at least a certain period. Oberst noted that the Supreme Court based the opinions Davis was referencing on the look-back period in the guidelines at the time the cases were decided.

Goulet said she supports shortening the look-back period. Goulet indicated that a lot of the obligors in the oil field are being “black balled” now because of criminal activity, drugs, etc., but they still won’t settle for a job paying less than they were making. Goulet said she doesn’t like setting obligations so high based on the obligor’s old income because it sets them up to fail.

Oberst reiterated the reasoning behind using the current calendar year and two previous years was so that there would be two years of tax returns available. The reasoning was mainly operational.

Fleming said the group should discuss this issue further at the next meeting.

**Issue: Consider, when imputing income based on the obligor’s failure to furnish reliable information, the applicability of the “upon reasonable request” language. Section -07(6).**

Oberst indicated this item was submitted by a former Child Support attorney, who has since retired. An obligor had moved to reduce his child support obligation and was represented by counsel. The obligee was also represented. The state was a party in interest. The obligor moved to reduce child support but didn’t come forward with financial information. The judge looked at Section -07(6) and determined that income could not be imputed to the obligor at 100 percent because the obligor didn’t fail to

provide information upon request. The obligor was the moving party, so no one technically requested information from him.

In response to a question from Fleming, Oberst indicated the 10 percent rule is gone but there is still Section -07(6).

Oberst indicated the judge could have dismissed the motion since the obligor didn't carry his burden of proof, but instead ended up imputing income under Section -07(3). Oberst was unsure what information was provided in support of the motion; there may have been an affidavit with some information. In response to a question from duCharme, Oberst indicated Child Support did not conduct any discovery and took a back seat since the motion was brought by the obligor and both parties were represented. Oberst indicated she isn't sure if this issue can be fixed in the guidelines.

The group consensus was no change would be made.

#### **7. Child support Guidelines Section -08 Regarding Income of Spouse.**

**Issue: Consider whether “may not” would be more appropriate than “should not.”**

Ref. Griffeth and Schaar proposed changing the language to “shall not”.

The group agreed the language at issue will be changed to “shall not”.

#### **8. Child support Guidelines Section -08.1 Regarding Extended Parenting Time.**

**Issue: Consider whether to change “nights” terminology to “overnights” throughout.**

Goulet said the problem arose in a case where an obligor insisted that because he had the children until 8:00 pm, that was considered a night, even though he didn't have the children overnight. Sen. Larsen said he supports the idea of changing the terminology to overnight.

Oberst indicated the change would only appear in three places and then a conforming change in another section.

The group agreed the change should be made.

#### **10. Child support Guidelines Section -10 Regarding Schedule of Amounts.**

**Issue: Consider whether to increase the self-support reserve.**

Oberst indicated the Social Security Income (SSI) threshold has increased to \$750. Per the rules of the guidelines, this number would round up to \$800. The question is whether to increase the self-support reserve to \$800.

Kemmet asked if the SSI threshold increases often and if so, by how much. Oberst said it does increase often, but not usually by this much.

Fleming said this issue does not affect able-bodied people. It only applies to people who have a proven limited ability to work.

In response to a question from Ref. Griffeth, Oberst noted that SSI is not treated as income under the guidelines. An SSI recipient, whose only source of income is SSI, would have an income of \$0.

The group agreed to increase the amount to \$800.

Weisz left the meeting.

### **Issues committee members would like to raise.**

#### **Extended visitation.**

duCharme and Elsberry indicated they would like to look at Section -08.1 but didn't have a specific suggestion for how to change it at this point. Oberst noted the numbers are based on research regarding the amount of funds that leave the custodial parent's home when the obligor is exercising parent time. Fleming said the obligor doesn't get a break on the child support amount until it results in savings to the custodial parent. The threshold, the statistics behind it, and the formula have to do with the point at which the custodial parent saves money based on the visitation and should not get the child support. There is a 32 percent multiplier because the research showed that 68 percent of custodial parent's costs remain regardless of the visitation.

In response to a question from Kemmet, Oberst indicated it was the committee that met in 1998 that did the research and it showed up in the 1999 guidelines.

duCharme asked if the group could look up what other jurisdictions do for this issue in the guidelines. Fleming indicated Texas might be a good place to look. duCharme said that she appreciates Minnesota's approach because it does take into consideration the parenting time and she therefore gets less push back from clients on the numbers.

#### **Child care deviation.**

Fleming asked duCharme about child care expenses, and she indicated she has thought about addressing child care expenses through the guidelines in a way other than the current deviation but doesn't have a proposed solution about how to address it

at this meeting. duCharme indicated the deviation is not really used and child care is now typically addressed separately.

Fleming asked who is typically responsible for paying the daycare. duCharme said the parties usually agree upon the allocation of daycare expenses and it is articulated in a separate section of their judgment. The allocation of daycare expenses depends on the financial circumstances of both parties. Schaar said sometimes daycare is split between the parties.

duCharme asked Ref. Griffeth if he hears arguments for upward deviations regarding daycare. Ref. Griffeth said no. Ref. Griffeth said he does hear arguments on daycare sometimes. The lowest price on daycare doesn't always mean the best interest of the child, so if he heard an argument that indicated the other party could have found it cheaper, it would not be persuasive.

Fleming asked duCharme what element of the existing guidelines is earmarked for daycare beyond what she would deviate. Daycare is a necessity for the child.

duCharme indicated most of her cases settle and daycare is commonly addressed as an issue separate from child support.

Fleming questioned if any members outside the Fargo district see the deviation used. duCharme said they just address it separately, not as a deviation. Elsberry said she treats it as a separate issue and addresses it in her initial pleadings to make sure the court addresses it in the final judgment.

In response to a question, Oberst indicated she wasn't sure if daycare was a consideration in making the schedule of amounts.

### **Effect of self-support reserve on multiple family calculations.**

Davis questioned how the self-support reserve affects the multiple family calculation. Davis said he will bring a sample so that we can discuss this at the next meeting.

### **Multiple family calculations.**

Ref. Griffeth indicated he had requests from private counsel about a more understandable means of calculating the multiple family adjustment. Oberst indicated the language in the guidelines is challenging but that when people call and ask questions, she has walked them through the calculation and they got it right away. Oberst noted that when doing the calculation manually, it starts to make sense more quickly than just plugging numbers into a calculator. Kemmet indicated she would like to see an increase in the adjustment when there are multiple families involved.

Fleming noted there is a section on the website of resources for attorneys that would explain things you might otherwise hear from Child Support at a training. There are resources that people can use to learn more about child support.

Fleming thanked everyone for participating and being at the meeting.

**11. Date of next meeting.**

June 20<sup>th</sup> at 9:00, Fort Union Room, State Capitol.

**12. Adjourned.**

Meeting adjourned at 4:30 pm.