

Minutes of the
Department of Human Services
Child Support Guidelines Drafting Advisory Committee

Tuesday, June 11, 2002
Fort Union Room, State Capitol
Bismarck, North Dakota

Chairman Barbara Siegel called the meeting to order at 8:00 a.m.

Members present: Calvin Bergenheier, Brad Davis, Representative William Devlin, Senator Tom Fischer, Melissa Hauer, Sherry Mills Moore, Blaine Nordwall, Paulette Oberst, Judge Thomas Schneider, Barb Siegel (Chairman), Michelle Skaley, and Paul Wohnoutka.

Barb Siegel noted there are ten items included on the agenda for consideration, two of which are review of the deviation information and cost of raising children analysis.

Barb Siegel asked that members review the agenda and offer any suggested changes. Paul Wohnoutka asked that two additional items be included for discussion: (1) the issue of offsetting employment income with business losses and (2) first year depreciation (Section 179). Siegel noted that the two items could be discussed when reviewing the draft proposed amendments to the self-employment section of the guidelines.

Barb Siegel distributed draft copies of the June 6, 2002, meeting minutes. She asked that committee members let her know of any errors or omissions so that any necessary changes can be made before the minutes are issued in final form.

Barb Siegel distributed copies of draft amendments (dated 06/10/02) which were prepared in response to the committee's requests during the last meeting. Siegel noted the document is cumulative so it also contains the revisions accepted as proposed amendments at the last meeting. Siegel expressed interest in reviewing all proposed amendments and then, if possible, voting on all amendments at one time.

- § 75-02-04.1-01(5)(b). A revision was made to clarify that deferred income should not be counted twice, for example, at the time of establishment (if currently deferred) and again at the time of review (if that previously deferred income is received at that time). There was consensus that this amendment, as drafted, could be included in the group of proposed amendments to be considered for approval by the committee.
- § 75-02-04.1-01(5)(b). A revision was made to include all types of refundable tax credits in the list of examples of gross income. There was consensus that this amendment, as drafted, could be included in the group of proposed amendments to be considered for approval by the committee.

- § 75-02-04.1-01(7)(a). The revisions clarify that income which is not subject to federal income tax or which has been reduced by deductions allowed in arriving at adjusted gross income will be excluded from the determination of the hypothetical federal tax obligation. Paul Wohnoutka provided a review of the draft proposed amendments. He gave examples of items which are subtracted from total income in arriving at adjusted gross income: student loan interest, moving expenses, and alimony. Barb Siegel clarified that this revision may increase the support award, depending on amount of excluded income. Excluding income in this calculation will have the effect of reducing the hypothetical tax obligation, leaving more income on which to base the support award.

Barb Siegel asked if the phrase "by the obligor" could be removed from the draft amendment since the earlier part of the sentence refers to the obligor's gross income. Wohnoutka and several other members agreed the phrase could be removed. There was consensus that the amendments, redrafted as discussed, could be included in the group of proposed amendments to be considered for approval by the committee.

- § 75-02-04.1-01(7)(a)(3). The amendment provides a description of the proper deduction for exemptions for children when calculating the hypothetical federal tax obligation. Blaine Nordwall suggested the draft amendment be redrafted for clarity. Sherry Mills Moore suggested breaking -07(a)(3) into three subdivisions. There was some discussion about the best way to draft the section. Barb Siegel asked the committee if there was consensus for the three basic concepts and, if so, suggested the Department complete the drafting outside of the committee meeting. At Judge Thomas Schneider's request, Siegel reviewed the three concepts which would be incorporated into a redraft: (1) when there is a court order, the number of exemptions would be as provided for in the order; (2) if an exemption is allowed to be claimed by the custodial and noncustodial parent in alternating years, the exemption is prorated; and (3) when there is no court order providing for the treatment of the exemptions (or when it is not known if such a court order exists), the current guidelines provisions would apply. There was agreement that this proposed amendment should be voted on separately from the other proposed amendments.

Blaine Nordwall made a motion that the Department work on a redraft to incorporate the three basic concepts discussed. Sherry Mills Moore seconded the motion. Barb Siegel asked for a roll call vote. A roll call vote was taken and the motion was carried unanimously with all members present and voting.

- § 75-02-04.1-01(7)(a)(4). The revision clarifies that federal income tax liability is reduced by the child tax credit only when a child for whom an exemption was considered in -01(7)(a)(3) is eligible for the child tax credit. There was consensus that this amendment, as drafted, could be included in the group of proposed amendments to be considered for approval by the committee.

- § 75-02-04.1-01(7)(c). The revision adds “self-employment tax” to the list of hypothetical obligations to be deducted from gross income. Barb Siegel noted there is an extra word, “tax,” which should be removed so that the revision states in part, “. . . income that is subject to FICA, RRTA, medicare tax or self-employment tax.” There was consensus that the amendments, redrafted as discussed, could be included in the group of proposed amendments to be considered for approval by the committee.
- § 75-02-04.1-01(10). A new subsection was added to define self-employment. Discussion of the proposed amendment was delayed for discussion along with the amendments to § 75-02-04.1-05.
- § 75-02-04.1-02(1). The proposed amendment provides a needed change in order to harmonize the instruction with the new proposed section which addresses child support determinations in equal physical custody situations. There was consensus that this amendment, as drafted, could be included in the group of proposed amendments to be considered for approval by the committee.
- § 75-02-04.1-01(10) and § 75-02-04.1-05. Paul Wahnoutka provided a review of the draft proposed amendments, starting with the definition. A new subsection (–01(10)) was added to define self-employment.

After much discussion relating to the definition of self-employment and how it affects –05, it was agreed that the definition may need to be broadened with respect to the activities that are included in “self-employment.” Barb Siegel suggested that “self-employment” could be broadly defined in –01(10) and then the method for determining net income from self-employment could be addressed in –05.

Paul Wahnoutka continued review of the amendments to –05. It was generally agreed that the phrase “or a business” could be deleted if self-employment is broadly defined in the definition section. Similarly, language relating to significant control could be deleted in –05 if included in the definition in –01(10).

Paul Wahnoutka provided a proposed formula for including a portion of C corporation income in the obligor’s income in those situations where the obligor exercises significant control over the C corporation. The formula takes into account the obligor’s ownership interest and also recognizes the fact that C corporation income is taxed twice: the corporation pays tax on its own income and the owners of the corporation pay tax on income that is distributed to them. According to the proposed formula, the C corporation income that would be treated as income of the obligor for child support purposes would be based on the corporation’s taxable income less its federal tax liability multiplied by 70% of the obligor’s ownership interest.

Barb Siegel asked if the committee agreed with including C corporation income in the child support determination. Brad Davis questioned how much C corporation income the obligor really can access. Blaine Nordwall observed it would become a factual determination based on the level of control the obligor exercises and the potential for manipulation. If the obligor exercises significant control, it could be assumed the money is available to the obligor. If the obligor does not exercise significant control, it could be assumed the money is not available to the obligor. Paul Wohnoutka noted that currently 100% of the income of a partnership or S corporation is treated as income of the obligor for child support purposes yet the question of control could also be an issue with partnerships and S corporations. He suggested there should be consistent treatment of C corporations, S corporations, and partnerships. Nordwall observed that the public policy reason for doing so is so that the form of the business does not dictate different treatment in determining child support.

There was further extensive discussion about self-employment. Barb Siegel asked for consensus that the Department work with Paul Wohnoutka and attempt a redraft of the section. Wohnoutka asked for clarification from the committee about including 100% of S corporation and partnership income. Sherry Mills Moore stated there is a need to make adjustments for partnerships and S corporations. The general consensus of the committee was to limit includible income to that over which the obligor exercises control. Each situation will require a factual determination. Moore suggested using tax returns as a starting point; the individual obligor could then come forward with something to demonstrate that income is not actually distributed in accordance with the showing on the tax return. There was consensus that the Department, with the assistance of Paul Wohnoutka, offer a redraft which provides consistent treatment, to the extent possible, of C corporation, S corporation, and partnership income.

The committee also discussed the issue of offsetting employment income with business losses. This practice could significantly affect the child support award.

Paul Wohnoutka observed that when an individual has a primary occupation (i.e., that which is consuming most of his or her time for 30-40 hours per week), self-employment losses should not be allowed to offset the income from the primary occupation. He also noted that some self-employed people are showing losses for tax purposes while still significantly building up net worth in their businesses. Senator Tom Fischer expressed concern with dictating what people can and cannot do. Barb Siegel responded that the guidelines do not attempt to tell people what they can and cannot do. The guidelines merely determine the amount that will be paid for child support. She reminded the committee that only a portion of income is paid for child support. Sherry Mills Moore stated that people can live as they wish, but if there are children involved, those children need to be supported before the parents can live out their dreams.

Representative William Devlin expressed concern about paper losses. Paper losses are different than actual cash expenses in that, with paper losses, the actual amount of money people have to live on is not being reduced. Senator Tom Fischer stated agreement that it is criminal for someone to cause a business loss for purposes of reducing child support, but does not want to be put into a position of drawing the line.

Sherry Mills Moore suggested that this may connect to the imputation of income section of the guidelines. Moore and Blaine Nordwall acknowledged that disregarding losses but including profits defeats the purpose of averaging. Nordwall stated there may be some value in considering imputation of income if the losses offset employment income to a great enough degree. This may require another presumption of underemployment to be added.

As an alternative, Sherry Mills Moore suggested the issue could be addressed in the deviation section of the guidelines, specifically –09(2)(g) and (2)(h) relating to assets and asset transactions. For example, losses would be included but an upward deviation would be authorized. Representative William Devlin suggested this may be an issue which needs to be addressed legislatively. After much discussion, there was consensus that there should be no change at this time.

Barb Siegel suggested removing the self-employment issues from the group of proposed amendments to be considered by the committee collectively and address the self-employment issues separately. Such was agreed.

- § 75-02-04.1-09(2)(i). The amendment replaces the word “solely” with “predominantly” and provides that the court take into consideration court-ordered visitation as well as actual expenses and practices of the parties when determining the deviation for visitation travel expenses. There was consensus that this amendment, as drafted, could be included in the group of proposed amendments to be considered for approval by the committee.
- § 75-02-04.1-09(2)(l). The amendments eliminate the deviation when two or more children are in Foster Care due to the proposed amendments to –11 and adds a deviation for atypical overtime wages or nonrecurring bonuses as required by state law. There was consensus that these amendments, as drafted, could be included in the group of proposed amendments to be considered for approval by the committee.
- § 75-02-04.1-09(5). The revision adds spousal support payments as a factor which cannot be a basis for a downward deviation pursuant to –09(2)(j). There was deliberate use of the term “payments” as opposed to “obligations.” There was consensus that this amendment, as drafted, could be included in the group of proposed amendments to be considered for approval by the committee.

- § 75-02-04.1-11. The proposed amendments cause changes to the Foster Care provisions such that those provisions will be similar to the provisions that existed in the 1991 guidelines. The effect of the amendments will significantly reduce obligations established in many Foster Care situations. The changes will allow the noncustodial parent (previously the custodial parent) to retain more funds for the purpose of maintaining the home for the child's return.

Barb Siegel pointed out that the reference to determining the support obligation through -06 and -06.1 in -11(l) was removed because the proposed amendments would consider children in the home of the obligor in the calculation. There was some discussion about retaining reference to -06.1 (for a parent who owes a separate duty of support for a child who lives outside the parent's home), but it was ultimately decided that it would be unnecessary because completing the multiple family calculations would logically occur.

Barb Siegel also noted a pre-existing grammatical error in -11(1) should be corrected as follows: "In all other cases, each parent is treated as an obligor, and each parent's support obligations must be separately determined."

There was consensus that this amendment, redrafted as discussed, could be included in the group of proposed amendments to be considered for approval by the committee.

- § 75-02-04.1-14. The amendments address applicability of the child support guidelines in situations involving equal physical custody. Sherry Mills Moore suggested adding a phrase to make it clear that a child support obligation would be calculated for each parent assuming the other parent "is the custodial parent" rather than "had primary custody" and that the difference is the amount paid. Barb Siegel suggested similar language be used to describe the difference as used in the split custody section of the guidelines (-03) for consistency reasons. It was also noted that this new provision may be moved to another place within the guidelines and, if so, it would be renumbered accordingly. There was general agreement to these suggested changes.

Judge Thomas Schneider requested clarification as to the federal requirements mandating this change (i.e., whether it is a condition of receiving federal reimbursement) and asked for confirmation that a child support obligation would need to be calculated even if the parties agreed to no child support. Barb Siegel explained that although the federal requirements do mandate that the child support guidelines be applicable in every child support determination to ensure state plan approval, that is not the reason the situation was initially brought to the committee's attention for consideration. The committee has discussed the facts in the Knutson case. The committee has heard about the possibility of parties pursuing and agreeing to equal physical custody for the purpose of avoiding child support. Also, it is the right of a child to receive child support; parents may not contract away this

right. There was consensus that this amendment, redrafted as discussed, could be included in the group of proposed amendments to be considered for approval by the committee.

Paul Wohnoutka made a motion that the revisions found in the June 10, 2002, draft amendments document, along with the further revisions discussed today, excluding those relating to self-employment, be accepted as proposed amendments. Sherry Mills Moore seconded the motion. Barb Siegel asked for a roll call vote. A roll call vote was taken and the motion was carried unanimously with all members present and voting.

Item 1: Definitions, § 75-02-04.1-01(5)(b)

Military subsistence payments

Consider whether to limit the amount of military subsistence payments includible in gross income to the amount the military member/obligor would receive if stationed in North Dakota.

(Due to another commitment, Blaine Nordwall and Melissa Hauer were not present for discussion of this item.)

At Barb Siegel's request, Brad Davis provided an overview of the issue. An issue has been raised regarding limiting the amount of certain military subsistence allowances (such as for housing) to the level which would be received if the military member/obligor was stationed in North Dakota even when the military member/obligor is stationed elsewhere and actually receiving a higher allowance. Some allowances are in the form of cash payments; others are in the form of in-kind income (e.g., living on base in military housing). Davis noted that Grand Forks and Minot regions are seeing military obligors who are stationed overseas who have subsistence income making up more than one-third of their income. Calvin Bergenheier noted that some military members have no control over where they live. For example, due to their rank, they may be required to live on the military base.

Barb Siegel noted that it was at the initiation of the Minot regional office that military subsistence payments were specifically included in the definition of gross income in the past.

After much discussion it was determined that it appeared the issue is primarily related to the allowances in the form of in-kind income rather than to allowances provided in the form of cash payments. Discussion also occurred as to how the value of the in-kind income is determined. Davis stated the military assigns a monetary value to the allowances according to where the military member is stationed. Barb Siegel and Paulette Oberst questioned whether the value assigned for purposes of in-kind income in child support determinations necessarily must equal the value established by the military.

Barb Siegel also observed that allowing for a value based on being stationed in North Dakota even if stationed elsewhere could cause inequities in other areas. She gave an example of a noncustodial parent who lives rent-free in California with a boyfriend. In this situation the value of housing in California is much higher than the value of housing in North Dakota yet for purposes of assessing in-kind income, the value would be based on California's standards, not North Dakota's.

Brad Davis stated that he believes the regional child support enforcement units are calculating in-kind income for allowances according to what the allowance would be worth in cash if actually paid in cash. He described a possible double effect on the military obligor: first, the in-kind allowance is treated as gross income and, second, the in-kind allowance is not subject to federal income tax which reduces the deduction for the hypothetical federal income tax obligation. Davis suggested considering the possibility of treating in-kind income as subject to federal income tax in order to increase the deduction for the hypothetical federal income tax obligation.

Representative William Devlin suggested that instead of proposing an amendment in regard to subsistence payments, Child Support Enforcement issue an interpretation providing direction on how to value such. It was agreed the committee would not request a proposed amendment to address this item for consideration.

Item 2: Definitions, § 75-02-04.1-01(6)

In-kind income

Consider whether contributions received from an obligor's parent, grandparent, aunt, uncle, or cohabitant should be excluded from in-kind income unless the obligor is employed by the relative or cohabitant.

Barb Siegel explained that in-kind income is included in examples of gross income in -01(5)(b) and defined in -01(6). At Siegel's request, Sherry Mills Moore provided an overview of the issue which stemmed from, but is not limited to, a particular case. She noted that including in-kind income received from an obligor's spouse was eliminated when imputing income based on earning capacity was added to the guidelines. However, in-kind income received from an obligor's boyfriend continues to be included in gross income. She views this as inconsistent. Moore also noted she sees a distinction between free housing provided by an employer versus a relative.

Barb Siegel asked Judge Thomas Schneider what he is seeing in practice as far as in-kind income. He responded that occasionally he has a case where the obligor is not working and living with someone who is. Sherry Mills Moore stated that should be resolved by imputing income to the non-working obligor. Moore suggested restricting in-kind income to that from an employer or which is otherwise employment-related.

Paul Wohnoutka cautioned the committee about accidentally excluding in-kind income resulting from bartering. Some members observed that typically bartered income is not disclosed or discovered. Melissa Hauer shared that she had a case where a person

lived his whole by bartering. Sherry Mills Moore suggested adding the phrase, "from employment or income-producing activity" to the definition of in-kind income in –01(6) so it would state, in part, "In-kind income" means the receipt from employment or income-producing activity of any valuable right, . . ." There was consensus that "incoming-producing activity" includes bartering. Moore observed that "income" does not have to be cash. There was consensus the committee would review a draft amendment limiting in-kind income to employment or income-producing activity.

Scheduling of Future Meeting

Senator Tom Fischer stated that he had to leave at 11:30. Since the committee's work will not be completed by the end of the scheduled meeting today, the members reviewed schedules and, after much effort due to scheduling conflicts, scheduled a meeting for Tuesday, June 25, 2002, from 8:30 – 3:00. Barb Siegel will reserve a room and let the members know where the next meeting will be held. Calvin Bergenheier will not be able to attend, but will be connected by telephone. Senator Tom Fischer excused himself from the meeting.

Item 4: Definitions, § 75-02-04.1-01(7)(d)

Medical insurance premiums

- a. Consider revision to language regarding the medical insurance deduction to clarify that it is only intended to apply to the number of insured/insurable children for whom support is being determined.

Barb Siegel provided a review of the calculation of the medical insurance deduction when determining net income. She provided an example: If the health insurance premium is \$300 and the obligor and two children are covered by the insurance, the \$300 premium is divided by the three individuals covered under the policy and multiplied by the number of children before the court. The result is a deduction from gross income.

A handout was distributed which provides an overview of the issue as well as some scenarios related to the issue for consideration. Paulette Oberst provided an explanation of the issue. Typically, the obligor will get a deduction from gross income for a portion of the premium payment (i.e., the portion "associated" with covering the children). However, in a scenario where several children are before the court and at least one child is uninsurable because of health problems, the mathematical result of the calculation is that the obligor may end up with a deduction for the full amount of the premium, including the portion "associated" with covering the obligor. The question is whether or not that is an unintended consequence. In response to a question from Blaine Nordwall, Oberst responded that she is unsure how likely this is to happen.

Blaine Nordwall commented that it is not common for a child to be uninsurable. Melissa Hauer observed that under HIPAA, the child likely couldn't be excluded from coverage but if so, only temporarily. Blaine Nordwall observed that there may be a waiting period

for enrollment, but the situation should work itself out over time. In addition, he stated that if a child is uninsurable, likely a deduction for medical expenses of a child allowed under subsection -01(7)(e) would be applicable. Brad Davis stated that he believes the committee should propose an amendment to change the possibility of a result wherein the obligor gets a deduction for his or her portion of the premium payment.

There was a suggestion that the calculation include reference to "insurable" children although some members expressed concern with use of that language. Sherry Mills Moore suggested the Department prepare a proposed amendment for the committee's review. Representative William Devlin stated his agreement that the obligor should not get a deduction for health insurance premiums for himself or herself. There was consensus the Department would draft a proposed amendment.

Item 4: Definitions, § 75-02-04.1-01

Medical insurance premiums

- b. Consider revision to the formula for determining the deduction for health insurance premiums in situations where health insurance is available to the obligor only at no cost but where there is a cost for adding the obligor's children to the policy.

This issue involves the same section, -01(7)(d), as the previous issue. At Barb Siegel's request, Calvin Bergenheier provided an overview of the issue. He related that in his situation, his employer provides medical insurance for him at no cost. It cost him \$200 to add his daughter, changing his plan from a single to a family plan. However, he got credit for only \$100 in the calculation for determining the health insurance premium deduction.

Brad Davis noted that people were calculating the health insurance deduction in a variety of ways before the calculation was set out in the guidelines. Davis stated that he doesn't disagree with Calvin Bergenheier's proposal; the concept may be sound, but a change would result in the deduction being more difficult to determine. Sherry Mills Moore suggested no change to the guidelines. Barb Siegel suggested that the current calculation could be the default and that it be left up to the obligor to provide information that would result in a different deduction. It is reasonable for the burden of providing such information to fall on the person who has access to the information. Melissa Hauer suggested adding the phrase, "associated with that particular premium payment, if known." Consensus of the committee was that the Department draft a proposed amendment similar to Melissa's language

Item 6: Definitions, § 75-02-04.1-01

Employee retirement contributions

- Consider whether to allow voluntary retirement contributions to be deducted from gross income and, if so, whether there should be a limit on the amount that may be deducted from gross income and what documentation should be required.

At Barb Siegel's request, Calvin Bergenheier provided a review of the issue. He related that he recently learned that Senator Conrad believes social security will run out by the year 2039. Given this, he proposed that the obligor should be allowed to deduct a portion of earnings, such as 5%, to be set aside for retirement. Sherry Mills Moore asked for clarification if this was to be applicable only in situations where the obligor had no other retirement options such as through employment. She asked what his opinion is when the obligor has retirement through employment. Bergenheier responded that the employer's contribution would offset or fulfill the 5% allowance. Blaine Nordwall stated that he possibly could agree with the basic premise, but is not sure of a good solution. For example, 5% of what--gross or net?

Sherry Mills Moore observed that a FICA deduction is provided. She further stated that retirement savings should not occur on the backs of children. Barb Siegel also noted that many items are not allowed as deductions from gross income; that does not make them "bad" expenses, it just means that they are expenses which may not be deducted from gross income for determining child support. Calvin Bergenheier stated that if retirement savings occurred before the divorce, those savings should continue afterward as well. Brad Davis stated that, post-divorce, if there is only so much money available and there is a choice between supporting the child and saving for retirement, the decision has to be made in favor of the child.

Paul Wohnoutka observed that the guidelines are generally allowing for deductions for things out of control of the obligor and generally not allowing deductions for discretionary items. Paulette Oberst noted that deductions from gross income generally fall into categories: those items which are beyond the obligor's control, such as income taxes; those items which directly benefit the child, such as health insurance; and those items which further the obligor's employment, such as mandatory union dues. Voluntary retirement savings do not fall into any of these categories. The consensus of the committee was that it would not request draft amendments to address this issue for consideration.

Barb Siegel will mail draft proposed amendments and meeting minutes from today's meeting for the committee's review prior to the next meeting.

The meeting was adjourned at 12:10 p.m.