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**Child Support Guidelines Advisory Committee**

**June 2, 2006**

**8:00 – 1:30**

**Fort Union Room, State Capitol**

**Members present:** James Fleming, Paulette Oberst, Representative William Devlin, Senator Tom Fischer, Howard Walth, Sherry Mills Moore, Judge John McClintock, Diane Hellman, Melissa Hauer, Robert Freed, Carol Cartledge, and Tove Mandigo

**Members absent:** Judge El Marie Conklin, Brenda Peterson, Brad Davis, and Tricia Steffan

Chairman Fleming called the meeting to order.

Fleming stated he believed Steffan will be resigning from the committee due to time issues.

A number of members indicated they would not be able to stay until 5:00. Fleming said the meeting would end by 3:00.

Fleming handed out an agenda, and briefly reviewed it as well as provided a review of items for the next meeting. He said one of the big topics for today's meeting is imputation, and issues relating to imputation. No one responded when Fleming asked if there were any additional items for consideration.

Sen. Fischer said there are two initiated measures circulating for signatures in North Dakota and wondered if everyone had a copy of the federal response regarding the impact on North Dakota's funding if the initiated measures were successful. (One measure is called the Joint Custody and Shared Parenting Initiative, and the other is called the Family Law Reform Initiative.) As members did not have copies, Mandigo had copies made of the federal response as well as a document showing the "Projected Potential Loss of Federal Monies" and distributed them to members.

Fleming provided an overview of what the initiatives would do. Cases would start with the presumption of equal custody (50%) – this would be the default unless one parent is determined to be unfit. There are a number of provisions that would affect guidelines as well. For example, the child support amount would be agreed to in a "parenting plan" and the income that could be used to determine child support would be limited. The federal response is that several provisions would be out of compliance with federal requirements. This would mean a loss of \$70 million in federal revenue.

Fleming asked if Walth would like to add anything to the discussion of the initiated measures. Walth said he has had some involvement with the Joint Custody and Shared Parenting Initiative. He said there is a group of noncustodial parents who want equal custody of their children. He said he does not necessarily agree with all of the provisions relating to child support.

Sen. Fischer said that while he opposes the initiated measures, he understands some of the issues. There are times when inappropriate decisions are made by custodial parents in relation to the noncustodial parent and child. He said he went to a meeting and it appears there are misunderstandings. He said there was talk about the parenting plan being "optional" and yet the measure says "shall."

Fleming said there is language about the amount of child support being based on the needs of the child and the feds require guidelines look at, at least, the income of the noncustodial parent.

Moore, in commenting on the Family Law Reform measure, said it was difficult to understand. In commenting on the Joint Custody and Shared Parenting Initiative, she said that no matter what supporters say was intended by the language, attorneys and others will need to follow the language that is actually in the measure. She said every single custody determination would need to be redone. There would be lots of court time needed as well.

Fleming reviewed some other problems that would occur if the measures were successful. He also added that there can be shared custody cases today.

**Review drafts requested at previous meeting** A number of drafts were prepared based upon requests and discussions at the last meeting. The draft language was incorporated in the guidelines in a document [DRAFT: 06/01/06]; this document was distributed to members. A second document, "Draft Guideline Changes after May 23, 2006, Meeting and Recommendations from CSE staff," was also distributed. Drafts were reviewed and, if appropriate, acted upon.

- **Technical** On page 41 of the DRAFT: 06/01/06 document – Section 13, two technical changes would replace "rebuttedly" with "rebuttably" and "arriving" with "arising." State Child Support Enforcement staff recommend these changes be approved. Sen. Fischer made a motion that these changes be recommended. Moore seconded the motion. Roll call vote was taken and the motion carried (11 yays, 0 nays, 4 absent and not voting).
- **Offsets in split custody and equal physical custody cases** On pages 12 and 28 of the DRAFT: 06/01/06 document – Sections 3 and 8.2, additional language was added so that the "offset" provision in split custody and equal physical custody would not be allowed in public assistance assignment cases (the on/off offset option from the first meeting). Fleming said there are two other options to consider that were discussed at the last meeting: leave alone (which would mean only the post-offset amount would be assigned), or allow no offsets whatsoever.

In response to a question from Sen. Fischer as to whether the drafted on/off option would lead to more court action, Fleming said he wouldn't see that happening. The

obligations would remain the same. This would only change the administrative payment of the obligations.

Fleming reviewed some information (numbers and dollar amounts) relating to offsets. He said the numbers were understated because there are offsets that are not being done correctly. Many offset orders fail to identify the net income and obligation of each parent and only list the "net" difference. The numbers only reflect those that are being done correctly. He said when Simon v. Simon was rendered, the state office began tracking cases (since February 2006). In February and March, there were four offsets each month for a total per month of \$878. In April, there were ten offsets for \$1,944. In May, there were eight offsets for \$1,278. On June 1, there were four offsets.

Moore said these amounts sound pretty small to be too concerned about. Fleming reminded the group that one of the options being discussed is for the Department of Human Services (DHS) to eat the cost (i.e., only get an "offset" amount when assigned). He did say, however, that these numbers will not stay this low. When offsets are done correctly, and people figure out what happens under assignment, we are sure to see an increase.

Moore said perhaps there needs to be court education to ensure that an obligation is established for each parent. There is a need to stop fraud. Judge McClintock said he tries to avoid antagonism and feels if the parties stipulate, why should he get involved in this? He said that if he doesn't accept the stipulations, it will raise other problems. For example, the parties will just stipulate to equal amounts of income. Moore said that if she would know that the court would require something to back up the stipulation, she would ensure the parties submit the information.

Sen. Fischer said he was under the impression that this was a big deal; the statistics, however, don't show that.

Mandigo asked when the incorrect offsets would get cleaned up? Fleming said there will be training with the clerk of court this Fall. He said all of the offset cases come to him for guidance as to what should be done. Clerks of court are trained and notes are sent to private attorneys. Moore stated she doubts the Simon case rings a bell with practitioners. She said as far as parties planning for child support, she doesn't think they have figured out what can be done, and how, on this one. She thinks that perhaps a memo to the courts would go further than other things.

Fleming said the language as drafted would not disturb the whole world. It would only change for those in which there is public assistance assignment. Those with split custody and equal physical custody would still be able to use the administrative offset, as long as there was no public assistance assignment. This would protect from public assistance fraud by people creating these situations to avoid paying assigned money to the state.

Fleming said he has seen cases where the parties have said they both have the same income so there is \$0 to be paid under the offset. Some discussion followed.

Judge McClintock mentioned that he doesn't see many equal physical custody cases. On the other hand, Moore says she is seeing a big push for them. Fleming said some regional administrators are seeing the equal physical custody becoming a standard, and there ends up being no child support order in place. One party applies for TANF and the state gets involved. In divorces, we are geared to say we will step aside while the parties privately settle the divorce. The parties agree that they have the same income and that neither parent will pay the other child support. The child support attorney then gets involved and tries to pursue support but is told that there is equal physical custody and there is a "net out" of nothing or next to nothing. Parent receives "free" TANF.

Moore said there is a problem that is bigger than this, and that is that noncustodial parents are not always forthcoming with true income. Fleming said he doesn't know how successful we would be in convincing courts to take a close look at stipulations and start sending them back.

Fleming said Judge Wefald had come into the state office and there was a discussion; there have been changes noted since then. Sen. Fischer wondered about having state office staff attend a judicial conference. Moore said she thinks sometimes judges would welcome guidance.

Judge McClintock noted there may be "judge shopping" and noted that all judges would need to come on board on these things. Moore said that she recognizes that lawyers are responsible too.

Fleming asked if we are going to lower one obligation because a party is on TANF? Cartledge said she thinks we should preserve the full amount under assignment. Walth asked what was in the best interest of the child? Which option would guarantee the child the best support obligation? He said he doesn't care about what the state loses. Fleming reviewed the split custody scenarios covered in the last meeting. He said for the sibling in dad's care, the dad is paying out money for his obligation hoping mom pays her obligation. Mom on TANF should be whole, as she is receiving TANF. Child in mom's care will have TANF and mom will be trying to come up with her obligation. Moore said she thought the Simon case would possibly result in the best scenario for the child because the state is taking the fiscal hit. If assign the whole amount, the parent on TANF is obviously experiencing a financial crisis and the other parent is paying his or her full obligation and probably not getting any money from the other parent – two households impacted. Fleming said there is no denying that both households are impacted; however, the state would not otherwise be able to offset TANF costs and there may be parents with money sitting in their pockets. Sen. Fischer said there will be a downside no matter which option is chosen; he said he doesn't think we can cure all of it.

Fleming reminded the group that there was also the option of no offset provision at all, whether or not there is public assistance. The parties would be used to paying \$X per month for each of their obligations. Some further discussion occurred.

In response to a question from Freed, Fleming said before the Simon case, the worker would look at the offset list, then look to see if a party was on TANF and, if not, then the offset was applied and credit was given on both cases for the amount of the lower obligation. If there was TANF, there was no credit given to the offset and parents received notice that the offset is now "off" and the income withholding would be amended for the full amount of the obligation. He also said he is not aware of complaints being received from these parents.

Fleming reminded the group that the language as drafted would turn the offset provision off in situations of public assistance.

In response to a question from Hellman, Moore said we would see more equal physical custody under the initiated measure, therefore, more offset situations.

Rep. Devlin thought perhaps the offset should be turned off at time of public assistance, otherwise we would be treating these parents differently.

Rep. Devlin made a motion that the language as drafted regarding offsets be recommended. This language would allow the offset of amounts in split custody and equal physical custody unless there is a public assistance assignment in which case there would be no offset allowed. Cartledge seconded the motion. Judge McClintock commented that we could see how this on/off option worked and take a look at it again at the time of the next review to see what the impact was. Rep. Devlin agreed, adding that it could also be looked at sooner if needed. Roll call vote was taken and the motion carried (10 yays, 1 nay, 4 absent and not voting).

- **Refundable tax credits** On page 3 of the DRAFT: 06/01/06 document – Section 1, exclude "refundable tax credits" from list of examples of gross income. State child support enforcement staff do not recommend this change. The list is of examples only. Removing it from the list would not change anything as these are just examples. An additional exclusion from the definition of gross income would be necessary. In addition, there is a legal requirement for child support guidelines to consider all income of the obligor and refundable tax credits are income. Also, there was a reason to change the guidelines to include it in the list of examples at the time of last guidelines revision. In response to a question from Rep. Devlin, Davis had placed it on the list to be considered but Davis is absent from this meeting. Fleming asked if there was a motion to recommend the change (excluding "refundable tax credits" from the list of examples of gross income). Hearing none, this issue was removed from the list of possible changes.

- **Imputed income subject to deductions** On page 26 of the DRAFT: 06/01/06 document – Section 7, clarify that imputed income is subject to deductions the same as other forms of gross income. In the Kobs v. Jacobson Supreme Court decision, it neglected to back out deductions from imputed income. The state child support enforcement staff is neutral as to this change. It is likely not necessary, however it would remove any suggestion that the Kobs case precludes deductions from imputed income. This clarification was made in an added subsection (10) to Section 7. After only brief discussion, Moore made a motion to recommend the change and Walth seconded the motion. Roll call vote was taken and the motion carried (12 yays, 0 nays, 4 absent and not voting).
- **Net income from self employment subject to deductions** On page 17 of the DRAFT: 06/01/06 document –Section 5, clarify that net income from self employment is subject to deductions the same as other forms of gross income. This is similar to the prior issue except deals with net income from self employment instead of imputed income. Moore made a motion to recommend the change and Freed seconded the motion. Roll call vote was taken and the motion carried (12 yays, 0 nays, 4 absent and not voting).
- **Subsidized adoption payments** On page 2 of the DRAFT: 06/01/06 document – Section 1, exclude subsidized adoption payments from consideration of obligor gross income and definition of children’s benefits. The state child support enforcement staff recommend this change. These subsidy payments are considered, although they are not means-tested, “public assistance” for federal tax purposes. By excluding them, then, we would not be at odds with the statutory definition of income. The draft language states that “children’s benefits” do not mean benefits from public assistance programs that are means tested or provided in the form of subsidy payments made to adoptive parents under the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272); the payments are likewise also excluded under the definition of “gross income.”

Walth stated he feels subsidized adoption payments should follow the child. Fleming said the payments follow the parents who are responsible for the children; whoever has custody is the payee.

Freed said, under the draft language, a parent receiving the subsidized adoption payments would not have the payments counted as income. Only their other income would be counted. They would be getting the payments for a child with special needs, and yet the child is not in the home. Fleming said that Children and Family Services has some rules. There is the expectation that the subsidy to the parents remains appropriate. There is also recognition that the parents, even though the child is not in the home, must maintain a home for the child to come back to. It is expected the parents can show they are using the money to support the child.

Moore asked if the subsidized adoption staff could look at the subsidized adoption payment, but it not be part of child support calculation? Fleming said this was so and also mentioned that subsidized adoption payments can increase.

Mandigo said DHS is looking at these on a case-by-case basis at this time. She said DHS is giving parents the payments because DHS wants them to be subsidized.

Freed said that even if the subsidized adoption payments would be counted, it would still leave around 75% of the payments to be used by the parents. In follow-up to what Fleming said about the parents needing to maintain a home for the child, Freed cautioned that this argument could also apply in other nonsubsidized adoption situations. Fleming said that is not the reason for excluding the payments from income. It is the reason why Children and Family Services may adjust the amount of the payments. Children and Family Services will adjust the grant up or down if the parents' expenditures go up or down. DHS can decide, on a case-by-case basis, if this is not a good case to take forward. He noted this is only a problem when assignment is in place. If there is a divorce, the noncustodial parent would not be getting the subsidized adoption payments, therefore there is no need to consider whether it is income or not. Freed said that was not necessarily true; the custodial parent could have a child go into foster care. Fleming said but, even then, the state would be the payee. He said what the program was finding in these cases is that Child Support Enforcement gets there first, then the parents go back to Children and Family Services and asks for the subsidy to be adjusted upward because of additional expenses (child support). Discussion continued. Freed wondered why not allow the payments to count as children's benefits and income if the payments get bumped up. Mandigo said DHS will look at it case-by-case; if no bump up, it may be decided not to pursue. Fleming said it may be counterproductive to have the state spend time and money to collect just to have the parents get the subsidy increased.

Freed wondered about the reference to federal law in the draft language. He wondered what would happen if the reference changed. Fleming said that could be looked at, possibly by incorporating language that would cover a future law.

Rep. Devlin asked if there are any other subsidy payments made to adoptive parents that we would unintentionally affect. Fleming said since the draft language limits it to "public assistance" it should be okay.

In response to a question from Mandigo, Oberst said a child's SSI wouldn't be considered income because it belongs to the child.

There was some discussion on changes to the draft language. Rep. Devlin made a motion to recommend the draft language under "children's benefits" and "gross income" so that subsidized adoption payments would be excluded, with the following

change to the draft language: there would be a period after “parents” and the phrase “under the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272)” would be removed. The motion was seconded by Judge McClintock. Roll call vote was taken and the motion carried (12 yays, 0 nays, 4 absent and not voting).

- **Treatment of in-kind income when income is imputed** On page 22 of the DRAFT: 06/01/06 document – Section 7, ensure in-kind income is identified, in the imputation section, as being “earnings.” This has to do with how to treat in-kind income when income is being imputed based on earning capacity. Child support enforcement staff recommend this change because it is felt it is a helpful clarification and ensures in-kind income, not just “earnings,” has value. Income is considered when determining whether an obligor is unemployed or underemployed, and in-kind income is equivalent to other earnings that are clearly considered. This would ensure a noncustodial parent gets credit for not only actual income, but for in-kind income as well, in the calculations surrounding imputation. The scenarios from the last meeting were briefly reviewed. Freed made a motion to recommend the change, as drafted. Sen. Fischer seconded the motion. Roll call was taken and the motion carried (11 yays, 1 nay, and 4 absent and not voting).
- **Lodging expenses** On page 8 of the DRAFT: 06/01/06 document – Section 1, increase the deduction for certain lodging expenses from \$30 per night to \$50 per night. This change is recommended by state child support enforcement staff. Walth made a motion to recommend the change as drafted. Freed seconded the motion. Motion carried (12 yays, 0 nays, and 4 absent and not voting).

Regarding the issue discussed at the last meeting relating to the **hypothetical federal tax obligation**, Fleming said that once gross income is identified one looks at various deductions, including hypothetical federal tax obligation. The guidelines address how many exemptions are used to determine the hypothetical federal tax obligation. Oberst said the issue that was identified was that 01(7)(a)(3)(a) (children covered by a court order) and (3)(b) (children not covered by a court order) were written in the alternative and a question arose when a noncustodial parent had a child whose exemption was covered by a court order and two children in his home whose exemptions were not covered by a court order. If we only give one exemption for the child under (3)(a) and no exemptions for the children under (3)(b), are we leaving some children out of the calculation, that should be included? She said there are some changes that could be done to expand (3)(a) to cover situations like this; it would, however, make the subsection longer and wordier.

Walth asked how the second family fits into this. Is the increase in support then offset somewhere else? Oberst said that in the particular case in which this issue arose, the difference between considering the two children under (3)(b) in addition to the child under (3)(a) versus not was about \$24 or \$28 per month. This is because it is an internal calculation so it does not necessarily greatly affect the bottom line. Fleming said to remember we are dealing with a hypothetical, which is not always the actual, all

along. Fleming asked if the committee requests a draft for next time. Judge McClintock said the previous proposal was to change the “or” to an “and” between (3)(a) and (3)(b).

Moore wondered if perhaps it should just look at the children addressed in a court order. That would simplify the language and would eliminate other issues. Freed said to perhaps just include children who are subject to the court order. Walth said he didn't think the children in the noncustodial parents house should be considered at all.

Fleming asked if the regional child support enforcement offices were struggling with this issue. Oberst said that there were isolated situations and no pattern of concern. Moore said she doesn't see a problem with the current language. Fleming asked if there was a request for a draft for the next meeting. Hearing none, Fleming said this would be removed from the list of possible changes.

## **Discussion of issues for consideration**

### **Section -01 Definitions**

- **Issue: Consider whether to create a deduction from gross income for unreimbursed employee expenses that the obligor can claim for federal income tax purposes when itemizing deductions.** This issue is a carryover from the last meeting. Oberst said there were discussions on this issue between last meeting and this meeting. Davis may want to bring this issue back up if he still feels it needs to be addressed. Oberst said Davis is somewhat concerned there are employee expenses for which some noncustodial parents are getting a deduction and some are not. She said his concern has to do with perhaps (looking at – 01(7)(h)), if the noncustodial parent was incurring these types of expenses and not being reimbursed they were a deduction from gross income, but the noncustodial parent who is reimbursed is not provided a deduction unless the expenses fall within the adjustments in arriving at adjusted gross income for tax purposes (01)(7)(i). Oberst said she told Davis she didn't think –01(7)(h) was limited to unreimbursed expenses, the language just says “Employee expenses,” therefore she doesn't think a change is needed. Moore agreed, saying she thinks the language covers it; that is, the language is not limited to unreimbursed. Oberst also pointed out an existing subsection in –02 which states that no amount may be deducted to determine net income unless that amount is included in gross income. Fleming proposed that the committee spend no more time on this issue today. If Davis feels there is something that should be brought back to the committee on this issue, that can be done at the next meeting. There was consensus on that.

Prior to continuing with discussion on “Discussion of issues for consideration,” Fleming said he wants the committee to look at “**Discussion of recent changes to CSE program policy relating to conducting reviews (additional exceptions to the 36-month interval).**” Fleming said the committee will begin talking about fluctuating income and imputation issues and he thought it would be helpful to review this recent policy change first. The program has been implementing a three-year rule on the

Review and Adjustment of orders. There has been a recent policy change to this, issued via AC-CO-05-08 and dated May 31, 2006. This Action Communication was provided to members. Fleming said the state, during the last legislative session, talked about how the program can be more responsive in this area. This policy change will mean we will look at more situations when determining to do a review more frequently than every three years.

Oberst said there are a couple of items in the policy she would like to highlight. These included the situation when the order was entered without financial information and the order was entered based upon a default amount which may not be reflective of the actual situation. Parties to these orders would no longer need to wait three years to qualify for a review. A review may be done earlier, and the order can be modified to be more in line with reality. In response to a question from Freed, Oberst said that this policy change would allow the order to be reviewed before three years; it does not provide for changing the amount back in time. Fleming mentioned the Bradley amendment.

Oberst continued to review some of the situations addressed in the policy including situations involving incarceration, military activation, health insurance provisions, and job change situations. It is believed that most requests for reviews under these situations will be made by the noncustodial parent, rather than the custodial parent, because the noncustodial parent is aware when his or her own situation changes. This is the program's attempt to be more responsive. Moore stated she thinks this change is excellent and felt it will make more people happy.

Fleming asked that members remember this policy change as the committee moves to looking at fluctuating income and imputation. He said the policy will be responsive to concerns about imputation.

Freed thought the item in the policy about incarceration may be confusing. For example, he noted inmates are eligible for time for good behavior.

Fleming said, of the reviews conducted by the program, 17% of orders end with a downward modification, 30% end with no change, and the balance end with an upward modification.

In response to a question from Hellman, Oberst said the program only "automatically" reviews orders when there is TANF or Foster Care; otherwise reviews are only done at the request of one of the parties. Freed noted that parties receive a notice asking if they wish to request a review. Fleming emphasized that a request can come from either the custodial parent or the noncustodial parent.

Freed noted the item in the policy about the change for medical coverage. It states, in relevant part, that the noncustodial parent "has now been providing coverage at a cost of at least \$100 per month. . ." This may be result in only about a \$25 change in the

guideline amount (assuming generally 25% of net income goes to child support), and wondered if it was worth it for that amount. Oberst noted that this is a new policy, and any problems with implementation will be noted and the policy can be revisited if necessary.

In response to a question from Sen. Fischer, Fleming said the committee can look at the imputation provisions in the guidelines with the understanding of this new policy direction which DHS is taking.

Oberst mentioned that pro se modification forms are being developed through the Supreme Court. She also mentioned the on-line calculator through the Supreme Court that these pro se parties could use. Moore stated she felt the on-line calculator was of limited usefulness because there are no forms.

In response to a question from Sen. Fischer, Freed said parties are often not represented by an attorney at modification hearings. Sen. Fischer mentioned a case in which the ex-spouse requested reviews every year because of the noncustodial parent's bonuses, and the noncustodial parent always sought counsel. Mill Moore said parties frequently may get advice from an attorney, but the attorney does not necessarily go to court with the party.

### **Section -02 General Instructions**

- **Consider whether to clarify when documentation reflecting fluctuating income must be provided in nonself-employment situations.** This issue is a carryover from the last meeting. Fleming referred members to subsections 7 and 8 of the guidelines' General Instructions section (-02). These two subsections were reviewed. Fleming said subsection 7 states that where gross income is subject to fluctuation, particularly in instances involving self-employment, information reflecting and covering a period of time sufficient to reveal the likely extent of fluctuations must be provided. He noted the language states "particularly in instances involving self-employment," but does not limit it to self-employment situations.

Oberst said this was Davis' issue as well as another regional office's. There is a concern that the guidelines are not specific enough with regard to what is required in nonself-employment situations. She said she doesn't think the guidelines preclude that the additional information is required in nonself-employment situations. She said she thinks what the regional offices are getting at is when should an averaging be done in nonself-employment situations? Closest the guidelines get is subsection 7; implies that there is averaging. As far as whether or not averaging can be done for nonself-employed people, Oberst said the guidelines absolutely allow it. She said one regional office wants a formula that can be used to determine if it should be done. In essence, they want a formula to determine whether the calculation should be done.

Freed wondered if a noncustodial parent at the low end of the commission cycle may be determined to be underemployed. Oberst reviewed the presumptions relating to underemployment and said that it wouldn't be a given that the noncustodial parent is underemployed because of lower commissions.

Moore thought perhaps there should be clarification, although perhaps not in the manner of a calculation. Under the current language, one is not sure when the court will buy into it or not. In response to a question, Moore said there tends to be more comfort level with "recent past" than with "averaging."

There was general consensus that draft language should be available for review at the next meeting. Some discussion about drafting a change ensued. One suggestion was to strike out the "particularly in instances involving self-employment" to clarify that it would apply to nonself-employment as well. Another suggestion was to change the language to actually say it applies to both self-employment and nonself-employment. Hauer will draft something for the next meeting.

- **Consider whether to clarify situations when income may be extrapolated to an obligor.** This issue is a carryover from the last meeting. Fleming referred members to subsection 8 of the guidelines' General Instructions section (-02). This subsection states that calculations are ordinarily based on past circumstances because those circumstances are typically a reliable indicator of future circumstances. It goes on to state, however, that if circumstances that materially affect the obligation are very likely to change in the near future, consideration may be given to the likely future circumstances. Fleming said the program sometimes sees situations that could fall under this latter provision (regarding future circumstances) not always presented in court. Freed wondered if this would be more of an appeal issue than a guidelines issue.

Moore said the Supreme Court has made it clear that extrapolation should not be done. However, what do you do then if, for example, you know the noncustodial parent is going to get a raise. A noncustodial parent could be going to court in April, he or she is a state employee, and it is known that there will be an X% raise effective July 1. The court can be reluctant to apply it when it is in the future. Oberst said she doesn't think the guidelines prohibit it. Oberst wondered if it was perhaps more of a failure with the evidence. Judge McClintock said the past is the better indicator and there would have to be a very good situation for considering otherwise.

Moore says the problem comes in when there is an impression that a partial year is not allowed.

There was some discussion about the Supreme Court decisions that involved "extrapolation," and other discussion.

Fleming said the language will be looked at to see if something can be drafted to clarify.

**Section -07 Imputing Income Based on Earning Capacity** Fleming said all of the issues on imputation will be looked at together.

- **Issue: Consider whether the definition of “community” for purposes of imputing income should be revised.**
- **Issue: Consider whether 60% of prevailing amounts earned in the community by persons with similar work history and occupational qualifications should be removed as a basis for a presumption of underemployment and as a basis for the amount to be imputed. (If so, consider whether conforming changes will be needed elsewhere.) If not removed, consider whether the 60% threshold should be changed.**
- **Issue: Consider whether the 36-month lookback period when imputing income based on prior earnings should be changed.**
- **Issue: Consider whether income should be imputed and, if so, in what amount to the following: incarcerated obligors, disabled obligors, minor obligors.**
- **Issue: Consider whether to clarify that income based on a 10% per year increase may be imputed to a noncooperative obligor in a review situation only if income information is not available from other sources or through other means.**
- **Issue: Consider whether to define “voluntary change in employment” for purposes of imputing income at 100% of the obligor’s previous earnings.**
- **Issue: Consider whether to clarify that income may be imputed at 100% of the obligor’s previous earnings where the obligor has made a voluntary change in employment whether or not there is a showing that the obligor is unemployed or underemployed.**

Fleming provided an overview of the imputation section found in –07.

In response to a question from Mandigo regarding occupational qualifications, Oberst said the phrase isn’t defined. She gave an example, however, of an LPN vs. RN nurse. Mandigo wondered about, for example, a woman who went to college but stayed home with the children during the marriage and wasn’t employed using the education. She said it seemed that it would be wrong to impute based on the qualifications. Hauer stated the provision states work history and occupational qualifications.

Mandigo said she wonders when do we tell people what they should earn. She is concerned with this. Moore said parents need to support children to the capacity they can. Moore also added that there are situations in which a noncustodial parent will actually quit a job or get a lesser job just out of spite. She says it does happen. The children may have, during the marriage, had the benefit of things, and now the noncustodial parent may say they will be making sure they themselves are happy and “too bad for the kids.” Noncustodial parents can do what they want to do, but they need to support their children. She wondered what some of the most common complaints

were with imputation. At that point, the group began looking at individual issues within the imputation section.

Subsection 1 defines "Community" as any place within 100 miles of the noncustodial parent's residence. Should this be revised? Moore thought that it is appropriate to look at a commute range but 100 miles may be too far.

There was then discussion regarding whether 60% of prevailing amounts earned in the community by persons with similar work history and occupational qualifications should be removed as a basis for a presumption of underemployment and as a basis for the amount to be imputed. If so, whether conforming changes would be needed elsewhere. If it is not removed, whether the 60% threshold should be changed. Fleming said one option is to just look at imputing minimum wage. Also, it has been suggested to look at whether the 60% should be removed or changed.

Sen. Fischer said the whole imputation issue bothers him. He said he would rather give the court and the program the tools to ferret out the problem individuals and deal with the others at minimum wage. He said telling people what to do bothers him and those that do it on purpose should be dealt with. He wonders how many people do it on purpose. Mandigo said it is more than one thinks. Moore asked how one would measure who is doing it on purpose. How do you look at purity of heart and what their motivations are? Judge McClintock wondered who would have the burden of showing that. Sen. Fischer said one would look to the court and the program. Mandigo said what bothers her are situations like this. A trucker, because at one point he or she drove all over the country, is supposed to continue to drive all over the country. All truck drivers, however, are not required to do that – just him or her, because he or she did it at one point. There was some discussion about how there would be room in the guidelines to look at situations like that. As well as what amount would actually be imputed. Walth shared his story. He was with the Fire Department for 14 years. He couldn't see doing that type of work in the future, so he went to nursing school. His child support was imputed at 100% based on his Fire Department job because the change was voluntary.

Fleming asked the group to look at a handout entitled "Court Order Analysis." On page three, it shows information relating to imputed income. The breakdown shows that income was imputed in 25% of the sampled orders; not imputed in 60% of the orders; it was unknown in 12% of the orders; and it was nonapplicable in 2% of the orders. Of those in which income was imputed, 81% were imputed at minimum wage; one was imputed at 60% of prevailing amounts in the community; one was imputed based on 90% of previous earnings; one was based on 100% of previous earnings (voluntary job change); 11% were based on a 10% per year increase (uncooperative obligor); and 4% fell into an "other" category.

Fleming said one can see imputing at minimum wage is by far the most common. In response to a question from Moore, Fleming said he was not suggesting getting rid of imputation. There are times when imputation should be done, like when a parent

decides to stay at home, or for some other voluntary changes. There are, however, others who are burned out and would make the change even if the family was intact. Hauer wondered if situations won't be helped by the new policy on more frequent reviews. Moore also said that parties can go back in after one year, without having to show a material change of circumstances. Sen. Fischer remarked that one year could add up to a lot of money. Mandigo said that often people don't know they can go into court by themselves (pro se). Rep. Devlin remarked that often the parties are afraid to do so. Moore commented that if one is going to make a change in one's life, one needs to do a lot of planning. As part of this, may also have plan for child support, get representation, etc. Mandigo said that these are areas that are getting into the initiated measures. Noncustodial parents are upset because they believe the custodial parent is getting an attorney (i.e., through the program). Moore said that was not accurate, though; the program does not represent either party. Mandigo agree and said that it was a perception out there.

There was discussion on some voluntary change of employment situations. Moore asked what other states do with the "voluntary" provision? Oberst wondered if perhaps we need a definition of "voluntary?" Fleming wondered if perhaps "good faith" was better language. Freed commented that the decision to have children came first and if the children are the most important . . . Sen. Fischer and Fleming made comments about whether the role of the guidelines was to keep it at the highest level or at a level that it would have been if the family was intact. Moore commented that if a family is intact, there is a conversation between the spouses. For example, the spouses may talk about whether they want one of them to change employment that would reduce income because they feel a hit now may be worth it in the long run. The problem is that one can't presume that level of cooperation and communication with broken families. There are people actively trying to avoid their obligations. A "good faith" provision would subject it to litigation.

Judge McClintock wondered if the committee's task wasn't to look at general situations and the purpose to do what is good for the majority of situations. There are cases that will have to come to the court for a decision. He felt the committee needed to look at the majority of cases. Much discussion followed. Sen. Fischer said whether or not to make a recommendation to DHS is up to this committee. Moore said you cut the widest swath you can and adjust it for those who don't fit into it. If not, this committee and the guidelines review is the relief valve. Fleming noted that the court can depart from the guidelines in some areas, if it is in the best interest of the child to do so. Freed mentioned the "certainty" vs. "discretion" issue. There would be a lot of court time spent to determine what is "good faith" and what is not. After even further discussion, Mandigo said she thought the committee should perhaps look at what other states do in this area. Fleming reminded members that the policy for more frequent reviews will help in this area, as long as the policy stays in effect. There was also some discussion, based upon a comment from Sen. Fischer, about the possibility of a "phase-in" over three years, then a review would be conducted.

Sen. Fischer gave a scenario involving a noncustodial parent who had been an oil worker in the oil fields in Alaska and now lives in North Dakota. Child support was based on what he was making in Alaska. There was discussion about that scenario. Freed noted that the income, under the guidelines, would only be 60% of what an oil worker in the noncustodial parent's community in North Dakota would earn. If the job ended, it would not be considered a "voluntary" change. Both Sen. Fischer and Rep. Devlin said they recognized they usually only hear one side of the situation.

In response to a question from Judge McClintock, the imputation area was not looked at in depth during the last review. Some wondered if we are trying to fix something that is not broke. Moore says this just tends to be an unpopular provision. Sen. Fischer wondered what its origin was. Moore said perhaps the group can look at some alternative for "voluntariness" and what other states do with imputation. Children cost money when they are in the house and when they are out of the house.

It was decided that information from other states would be looked at, and some options would be explored, before the next meeting.

Walth said what he has heard is opposite from what he has heard today. For example, a noncustodial parent is paying \$3,500 per month to an ex-wife who used to work outside the home when married to the noncustodial parent and now stays home. Under income shares, imputed income to the custodial parent based on earning capacity would be good.

After a lunch break, Hauer provided members with a copy of Washington state's guidelines provision for imputed income. There was brief discussion about the language.

### **Section -08.2 Equal Physical Custody**

- **Issue: Consider whether the guidelines should address the division of expenses for children for whom equal physical custody has been ordered.** This item was added per Moore's request, and she provided a brief explanation of the issue. When people have equal physical custody and are offsetting child support, there is a big question as to whether the parties also must split other costs. She provided some examples and said she wasn't sure if this should be a guidelines issue or not, but wanted to raise it as it has been an issue. She suggested that perhaps there should at least be a presumption that the costs (e.g., day care) would be shared equally between the parties. She said this comes up from time-to-time.

Hellman said that in her case, she is considered the custodial parent, but in the decree it says the parties will split costs. The noncustodial parent provided the health insurance, since he had it available to him, and she provided for the day care. What wasn't in there was a provision for parochial school, which she ended up covering. She said she thought that was how others were done. Moore said that typically one can't go there in the non-equal physical custody cases because some

of those things are to be covered by the child support. She said, however, division of these types of costs does come up with the equal physical custody cases.

Fleming said that if both parties are considered to be both custodial parents and noncustodial parents, is there the same inference that each, as a custodial parent, would cover what is normally covered by the custodial parent?

Moore commented that she doesn't think there is necessarily authority to request the court to address these costs. In response to a question from Sen. Fischer, Moore said these expenses include things like day care and school lunches. Walth wondered if it would be prorated according to the obligation proration. Moore said she thought that perhaps it would not say they share equally, only that they share. Or, she said, it can be left alone.

Fleming referred the group to subsection 1 under the General Instructions section (-02). Except as provided for the equal physical custody section, for guidelines calculations, there is an assumption that one parent acts as a primary caregiver and the other parent contributes a payment of child support to the child's care. He thought perhaps this issue could be addressed somewhere in the General Instructions section. Moore said she would be okay with it being addressed there. If examples are provided, it should be for day care and school costs; she would recommend leaving extracurricular activity costs out. Fleming said that perhaps the language would just indicate that the door is open for the court to address those costs. In response to a question from Judge McClintock, Moore said she wants the language just to make it clear to the court that this can be done.

Fleming wondered if these costs would be enforceable as child support arrears? Moore wondered if they perhaps could be treated like medical costs? Fleming said it could be done so it is enforceable if the costs were reduced to a judgment.

After further discussion, Moore said another option is to leave it alone and see if it becomes more of a problem. Fleming commented that equal physical custody is becoming common in the Jamestown area; close to being a standard. Moore said if addressing it would lead to other problems, she would be okay with not addressing it.

Sen. Fischer wondered how it could be limited as it could be very expensive. Moore said she would just like the court to know it can be addressed. She would like to see the basics listed as examples.

In response to a question from Fleming, Moore said she's never had a court say "no" if it was presented. However, the issue is she doesn't know if there is authority to pursue.

It was decided that Fleming would draft some language and email it to Moore.

### **Section -09 Criteria for Rebuttal of Guideline Amount**

- Issue: Analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines as required by federal regulations. Fleming said the feds want states to look at how and when deviations occur. Oberst said the same sample was used for this as was previously discussed. The group was asked to go back to the Court Order Analysis handout. The section on deviations begins on page four. She said there is a disclaimer to this information. All too often the court order is not specific enough to tell whether there was a deviation or not. This is a problem because state law requires there to be a finding in these situations. Based upon court order sampling review, there were only 12 orders identified with a definite deviation. Based on that, we are talking about a small number of deviations. She asked that members keep that in mind when looking at the rest of the percentages – regarding more detail on those 12, since the universe is now so few. Of those 12, four were deviations sanctioned by the guidelines (two were upward deviations for child care costs and two were downward deviations for visitation travel costs) and eight were deviations not sanctioned by the guidelines (i.e., judicially created). Oberst noted there is value at looking at the deviations not sanctioned by the guidelines to see if any trends can be spotted or if there may be a need to add to the deviation list. Of the judicially-created deviations, three referenced ordinary medical expenses for the children. In two orders, the increase to the amount was so the custodial parent could provide health insurance. In another order, the increase to the child support amount was to pay for the child's orthodontic expenses.

Oberst said the program usually does not pursue a deviation; that is typically left to the parties to argue. Not surprisingly, then, it was found that most deviations occurred in orders that were entered privately.

There was then some discussion on medical issues, particularly about health insurance coverage. The discussion included such things as the custodial parent being able to add the child on as a dependent. There was also discussion about single vs. single plus dependent vs. family coverage. Mandigo said that DHS is trying to figure out how DHS can give the ability for the obligor to buy into SCHIP (Healthy Steps). There was some general information shared on what SCHIP was. Rep. Devlin mentioned that the Caring Program was available as well. Mandigo noted that the Caring Program provides less coverage than SCHIP and there is also a fee for service.

Fleming said some east coast states have been able to make it so any willing parent can buy into the program for their children.

Mandigo said the problem isn't just if there is insurance or not. It is what type of insurance. The child may be covered but it may be for catastrophic only and the children are going without health care.

Sen. Fischer said if there is success on getting buy-in to SCHIP to \$150 per month for full coverage, he doesn't think there would be too many people that will say they don't want to do that. Fleming said there is a child-only policy available through BlueCross/BlueShield for \$72 per month. It includes preventive types of coverage.

Sen. Fischer remarked that the insured are paying for the uninsured at a rate of over \$1,000 per year. Providers are shifting the costs of the uninsured to the insured. It is being paid one way or the other. That is one of the reasons for high health insurance premiums.

There was considerable continued discussion on health coverage.

Fleming noted that the program is in charge of enforcing medical support.

Oberst said that the analyses of deviations, to the extent there was a trend, showed an attempt to address children's medical needs. Does the committee want to create a deviation along those lines? The committee, however, will be looking at medical support at the next meeting, so perhaps it would be best left until then.

Fleming said this analysis is required. Oberst said it is to look at if the deviations are being abused; it appears not to be a problem because there are a minimum amount of deviations.

- **Issue: Consider whether a formula should be developed to determine the amount of the downward deviation for visitation travel costs.** The issue was submitted by Davis. Oberst said this is the deviation that was tinkered with last review to add language to say it would take into consideration the court order for visitation as well as history. This would take it a bit further. Oberst said Davis is looking for a formula that would determine what the deviation amount would be. She thought perhaps Davis thought a formula would assist in keeping people out of court. She said, however, that it was difficult to stay out of court in the deviation area. Walth wondered if the state mileage rate couldn't apply here as well. Judge McClintock said parties often share out-of-state air travel, so one doesn't run into these problems often. Fleming asked if there was a request for a draft? Moore said she can't imagine how this could be a one-size-fits-all formula. She said if the costs are not shared, a deviation can be pursued. There was no request for a draft on this issue.
- **Issue: Consider whether the treatment of overtime and bonuses should be changed.** This was added at Sen. Fischer's request. He said he has had a couple people wonder if it is possible to look at this issue. The overtime and bonuses are not always consistent. In one case, the noncustodial parent is called into court to have child support adjusted upward whenever his overtime and bonuses increase. Some feel none of it should go to child support. Some feel a different rate should apply.

Moore said that with the clarifications this committee is recommending regarding fluctuating income, applying to both self-employed and nonself-employed, she feels that will go a long ways in addressing these situations. Fleming said the ability to extrapolate and average out covers these situations. Fleming reviewed the current deviation which allows for a downward deviation for atypical overtime and bonuses. Judge McClintock asked if the noncustodial parent got stuck with one year because of a big bonus. Sen. Fischer said no averaging was done. The noncustodial parent wants a redetermination every year to save attorney costs. He has probably been getting advice between court appearances.

There was general consensus that the previous recommendation to clarify the fluctuating income subsection would address these situations and no draft was requested.

### Miscellaneous

- **Although not a guidelines issue per se, Child Support Enforcement is seeking the Committee's input on whether we should revise our prior period support policy.** Fleming said the state is spending more time determining what is collectible and what is not collectible. It is believed that building unrealistic obligations is not helpful. What some states are exploring is prior support. In North Dakota, the program goes back to the date of assistance (or birth of child, whichever is later) or date of application for services (or birth of child, whichever is later). The program does not, for example, go back to the child's birth if the child was born prior to assistance or application. Does that seem sensible or should this policy be changed? In response to a question from Moore, Oberst said the state was not considering going back further; if anything, the state was thinking of limiting it more (e.g., x number of months). In response to a comment from Mandigo, Fleming said this has to do with what the program seeks, not what the courts may do.

Moore said she does not like the thought of delays benefiting the noncustodial parent. That is, she doesn't feel stalling should benefit the person stalling. She said she would not like to see the policy change. One doesn't want to reward delay at the expense of the child.

Mandigo commented that she didn't like that there were, in some cases, all of a sudden big arrears, and its affect on credit bureau reporting, for example. Fleming said the state can provide a brief update on what the program does with "retroactive" support.

There was some discussion about effective dates being the date of the motion. This is because that is the point at which the noncustodial parent is put on notice.

- **Issue: Although not part of the guidelines, discuss whether the Financial Affidavit developed by Child Support Enforcement to secure information from**

**obligors should continue to include a section on assets.** Moore said she doesn't understand why someone has to tell their ex-spouse, through the Financial Affidavit, that they have assets. She said she could understand it pre-imputation when the guidelines looked more at asset-shifting. Under the 1991 guidelines, there was a section about imputing based on assets. However, she questions why we are currently gathering that information. If it has to do with the upward deviation allowed when a noncustodial parent can secure additional income from assets, the program doesn't pursue deviations, they are done privately. She feels it should be done, as appropriate, through discovery. Freed wondered if there were times when income-producing assets won't be picked up elsewhere (like tax returns).

Fleming said that this was technically not a guidelines issue but said the program will take a hard look at it.

Fleming briefly reviewed items to be done for the next meeting.

Walth brought up visitation issues. The definition of "extended visitation" states it is a visitation order that exceeds 60 of 90 nights, or an annual total of 164 nights. His order was written to address "days" not "nights." Fleming said the numbers came from legislative intent. This issue has been discussed before and the past committee minutes will be helpful. He said those minutes will be provided to members so they can be reviewed prior to the next meeting.

Fleming said that there will be a "big time" discussion on medical support at the next meeting. He said the committee would be looking at a menu of options. It can perhaps be an add-on if the noncustodial parent does not provide coverage. It would be dollar-specific. Sen. Fischer said access is the key part of it.

**Next meeting** Tuesday, June 20, 9:00. There is a possibility that the time will be changed to 8:00. Fleming will check with Davis and Conklin.

**Adjourned** at 1:30.