

Guidelines
Drafting Advisory Committee
5:30 - 9:30 p.m., June 22, 1998

Participants: Blaine Nordwall, Patricia Lund, Paul Wahnoutka, Representative Eliot Glassheim, Senator Jack Traynor, Judge William McLees, Robert Freed, Sherry Mills Moore, Paulette Oberst, and Barb Siegel.

Barb Siegel asked for comments regarding the notes from the last committee meeting. Two changes were requested. The notes will be updated and disseminated to the members.

Barb Siegel stated there have been some questions from the general public about whether this advisory committee meeting is open to the public. The response has been no, this committee serves as an advisory workgroup and public comment will be solicited during the rule-making process. Blaine Nordwall offered a brief explanation of the Attorney General's instructions regarding open meetings. When an agency is headed by a single individual, as the Department of Human Services (DHS) is, a workgroup, such as this one, is not a governing body with decision making power and therefore is not subject to the open meeting requirement. The Executive Director of DHS ultimately makes all decisions.

The committee then began their work by reviewing the amendments, drafted by Blaine Nordwall and dated June 17, 1998, based on the committee's discussions at the June 22, 1998, meeting:

75-02-04.1-01(01). The committee agreed the amendment was appropriate.

75-02-04.1-01(03). The committee agreed the amendment was appropriate.

75-02-04.1-01(05). The committee discussed the amendments. Bob Freed noted that due to tax offset or other reasons, it is possible to be eligible for, but not *receive* an income tax credit. The group discussed and agreed it would be appropriate to revise the draft language as follows: "child support payments received from any source except the custodial parent, earned income tax credits **received**,"

Bob Freed asked about Foster Care cases where the parent claims an income tax credit, but rightfully should not do so because the child is not in the home for at least six months of the year. Bob Freed suggested that it may be appropriate to add language such as "may be eligible for" to avoid including ill-got benefits which later may have to be repaid. Barb Siegel pointed out that there may be other benefits, such as workers' compensation or unemployment benefits, which have been gained wrongfully. Where would application of this reasoning stop? Blaine Nordwall agreed.

75-02-04.1-01(07)(i). The committee discussed the draft change. There was concern voiced about the text between the commas which states, "to the extent the employee cannot lawfully liquidate the benefit." Representative Glassheim offered that today the interim Child Support Committee discussed the fact that some benefits can lawfully be liquidated, but with penalties. Blaine Nordwall responded that this is the purpose of the "to the extent" language. Sherry Mills Moore questioned whether "liquidate" can mean the employee can borrow against the benefit. The committee discussed that borrowing does make the money available to the individual, but as the amendment is drafted, borrowing against the benefit would not be included. Paul Wahnoutka suggested that "currently liquidate" should replace "lawfully liquidate" since all benefits can eventually be *lawfully* liquidated, but not all can be *currently* liquidated.

A member questioned why the language "included in gross income" was used. Blaine Nordwall responded that the language was included because there have been cases where the court deducted the amount, but did not include the amount in gross income. This is obviously an error and this language would clarify that a deduction would only be given if it had been included in the first place.

Barb Siegel asked if it would be beneficial to add language that would clarify the benefits would need to be the same or similar to those received by co-workers. Representative Glassheim stated that the interim Child Support Committee, in their draft amendments, added the word "plan" after the word "benefit" to indicate a benefit is for a group of employees rather than for an individual employee. Representative Glassheim's committee also discussed including "non cash" language in the gross income section. Blaine Nordwall explained this committee should appropriately address this issue in the definition of "net income," as the draft amendments do, rather than address it in the definition of "gross income." This is because income is statutorily defined. Who the burden of proof lies with was also discussed.

Blaine Nordwall offered to draft changes to address the committee's comments. Also, Paul Wahnoutka will give this issue more thought and the members were asked to forward any specific language suggestions to Blaine Nordwall. Paul Wahnoutka and Blaine Nordwall indicated they will work together to develop draft amendments for the committee's review.

75-02-04.1-09(2)(l). This new subsection would allow a deviation from the guidelines for extended visitation. Bob Freed expressed concern that usually there will not be 30 days of consecutive visitation. Unless proximity of the two parents is not relatively close, usually the other parent will get the child for a weekend or two. Sherry Mills Moore stated that it makes sense for the guidelines to presume a certain amount of visitation.

Bob Freed suggested that the new subsection should end after the word "child" in the third line of the draft. This would have the effect of removing the limit to the deviation and giving the court complete discretion in this area. Blaine Nordwall and several other members firmly disagreed. This would remove the significant advantage of certainty, of the child support guidelines.

Blaine Nordwall stated that we are not talking about balancing the custodial and noncustodial parents' benefits. We have to think about both visitation and support as the child's benefits. Paul Wohnoutka stated that this issue becomes trading dollars for children. He stated he has serious reservations about exchanging child support dollars for visitation. Barb Siegel also expressed concern about additional disputes between the parties. Sherry Mills Moore stated she would never want to see something as discretionary as Bob Freed suggested. To directly tie child support with visitation is something that should never happen. Blaine Nordwall stated he drafted this piece with certainty in mind. Being able to calculate different things with some certainty is very critical. This has been a comment to him from many different entities over the years.

Representative Glassheim stated that it is hard to justify not having the money follow the child. Several members suggested that the custodial parent still has costs that continue, i.e., maintaining the home. Paulette Oberst said that theory is as old as child support. If there is enough money to go around in both homes it is different than when one of the parents cannot afford to have the child for visitation. The members understand there is no way the guidelines can be written to address every situation, but there was general consensus that the guidelines need to be able to be administered and there needs to be certainty.

The members reviewed an example of visitation:

The parents live in different states and the child travels to the noncustodial parent's state by way of air. The child is school age. Visitation is 2 months in the summer (61 nights running from June 15 - August 15), 7 days during Christmas break, and 4 other days for a total of 72 days. The monthly support obligation is \$250.

Following the draft amendments, the calculation is as follows:
 $31 \text{ days} * (61 \text{ nights} - 30 \text{ nights}) \times .001852 = .057412 \times \$250 = \$14.35$
 $\$14.35 \times 12 \text{ months} = \172.20 for an annual amount of reduction
 $\$250 - \$14.35 = \$235.65$, rounded to leave a \$236 monthly obligation.

*The total number of nights minus 66 or the number of consecutive nights minus 30, whichever gives the larger deduction, is the number to be used.

The reason for the exclusion of the first 30 days is to support the concept of extended visitation. If it is not in excess of 30 days, it isn't *extended* visitation. Thirty days is an arbitrary number.

Barb Siegel stated there are many cases where the custodial parent does not receive close to what is needed to raise a child. We need to be concerned about what allowance for this deviation could do to families and to the welfare rolls. Blaine Nordwall commented that poverty does discourage visitation. The biggest problem is not how to slice the pie, but that the pie is often too small.

Representative Glassheim suggested setting X days of visitation—a trigger time. He stated that he wants to give the feeling of fairness to both parties. The committee conceded that all this does is cause the parties to strive for marginally one side of the trigger or the other. Senator Traynor questioned what is really happening when the child visits the noncustodial parent. Is the noncustodial parent being creative with accommodations, etc? Sherry Mills Moore stated her clients do not say that they can't take their kids because of financial concerns. Sometimes there are day care concerns. Usually there are relatives who want the child during this extended visitation time. Parents are creative. Some take vacation or use grandma or aunt. One member commented that logically there ought to be some relief, but it is impossible to develop provisions without causing other serious problems or concerns.

(Senator Traynor excused himself from the meeting.)

Barb Siegel asked if there was any general consensus on this issue. She asked for each member's input. Paulette Oberst stated she is not in favor of a downward deviation for visitation time. It is important to recognize the custodial parent always has continued costs. She is not concerned about giving a break for day care. She is not in favor of giving discretion to the court. This would cause judge shopping. If we would need to make a change, it should not be discretionary. Any formula must be simple and able to be explained. Visitation should not be a deal breaker. She is not hearing that people cannot afford to exercise visitation. Rather, 20-25% of her office's child support cases are in locate; those noncustodial parents are not exercising visitation. Sherry Mills Moore stated she would like some kind of accommodation for truly extended visitation situations (e.g., 49/51% split). It should be simple with very little discretion. She suggested that rather than a deviation for visitation, there should be a deduction for day care costs incurred during visitation time. Bob Freed stated such significant visitation is not ordinary and would respond to only the exception, rather than the routine case. He stated he wants a deduction for visitation or an abatement of child support. He stated understanding of the argument of certainty versus discretion. He wants some discretion, however, because he feels each case is so different from

one another. Judge McLees stated he tends to agree with Sherry Mills Moore and agreed there should be limited discretion. Representative Glassheim stated a deviation needs to be simple and easy with no discretion. He indicated a 49/51 split seems a little much, but supports a *significant* amount of time. The amount of time in the draft is not bad, but the formula is difficult to explain. He would like some change with the least harm. Paul Wohnoutka stated he has a concern about the parties fighting over days here and days there, and people not exercising their visitation as provided in the order. He sees the unfairness and noted the importance of the vast majority of cases versus the exception cases. He stated he wants no change. Pat Lund stated she agrees totally with Paul Wohnoutka. What is extended? There will be controversy. There are too many gray areas. Needs to be simple. Thinks there should be no change to the guidelines in this area. Blaine Nordwall stated that this is a solution in search of a problem. Problems at a *significant level* occur so seldom. Prefers no change to the guidelines in this area. However, if it is addressed, it has to be in narrow types of case, then we won't be talking number of nights, we will be talking about a half a year. Barb Siegel stated she is not in favor of a change to the guidelines to allow deductions or deviations due to visitation. Prefers that child support and visitation are kept as separate as possible.

Barb Siegel suggested that Blaine Nordwall draft something that addresses the 49/51 time (or some significant amount), deals with the certainty issue, and addresses the issue of scheduled (ordered) versus actual.

Sherry Mills Moore stated that this is probably going to be the toughest issue the committee has to deal with. Representative Glassheim said the interim Child Support Committee does not plan to recommend anything in this area to the legislature. He stated he expected that any such change would be met with a split in opinions, just like this committee.

Blaine Nordwall stated that this is a device to deal with the unusual cases. If we are to address this issue for the majority of the cases, then the guideline amounts should be reduced as a whole. The guidelines already take into account a certain amount of visitation.

Several members agreed any deduction given needs to be year-round. Allowances cannot be made for noncustodial parents failing to save for the time when the child comes to visit. Also, difficulty in administration increases.

Bob Freed suggested this could be addressed in the section where the visitation/transportation deviation is addressed.

Again the committee discussed the issue of sum certain versus uncertainty. There are many unanticipated expenses that occur throughout the year, not just during the visitation. Financially, it is often a much higher risk to be the custodial parent than a noncustodial parent. As a practical matter, to the extent the committee does address this, the committee is reducing the standard of living for the child in the home the child spends most of the time.

Blaine Nordwall will take another cut at drafting an amendment. He will try to simplify it.

Per Representative Glassheim's request at the June 9 meeting, the committee briefly discussed imputation of income:

Representative Glassheim stated it disturbs him that someone can be determined to earn a certain amount when it is not actually happening. The guidelines dictate what a person ought to earn. Sherry Mills Moore pointed out the guidelines only require what needs to be paid, not what needs to be earned.

Many members voiced disagreement with Representative Glassheim's view on imputation. Imputation of income encourages employment until the parent is not financially responsible for the children any longer. Noncustodial parents have committed to their responsibility as a parent. Some become conveniently unemployed or under employed at time of order establishment in order to reduce their support obligation. Several members were vocal that this can and does occur. One member noted that some noncustodial parents state they are not employed and hide their income. Representative Glassheim indicated it is not OK to hide income, but it is OK to decide not to work or work in a lower paying job. Blaine Nordwall responded that there is no difference for the child between earning it and hiding it, and deciding not to earn it. There is a difference between wanting to earn, but not being able to do so, and not wanting to earn. The most common imputation of income is imputing at minimum wage. Barb Siegel stated that a custodial parent should not have an increase in financial responsibility for raising the child simply because the noncustodial parent makes the decision not to work. Representative Glassheim stated he has no problem with the state providing support to children whose noncustodial parent chooses not to work and the custodial parent is unable to do so alone. Paul Wohnoutka and several other members were adamantly opposed to the idea that children should receive welfare because the noncustodial parent refuses to work.

(Representative Glassheim excused himself from the meeting.)

The committee then continued with the section-by-section review of the guidelines, beginning where the committee ended at the June 9 meeting:

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75-02-04.1-01(05). The committee discussed whether foster care payments received (by foster care parents who have a child in foster care) would be included as income when determining the support obligation for the child placed in foster care. Yes, foster care payments received would be included as income, but it was decided that no amendment was needed.

The committee discussed a case where the noncustodial parent was required to temporarily relocate for employment reasons and was paid duplicate living expenses by his employer. It was a review and adjustment case and the resulting child support order, with counting the duplicate living expenses as income, more than quadrupled the prior order. The group agreed it is income. Should all or some, however, be deducted from gross income? Blaine Nordwall will draft something to address this issue. Possibly will amend language in subdivision h of subsection 7 to remove "but not reimbursed by the employer."

The committee discussed whether employment related travel expenses, e.g. airfare, would be counted in gross income. No, this is a reimbursement. The definition of income is in statute; this committee cannot change that. May need to add another deduction to clarify that if reimbursement income is added it is later deducted. Blaine Nordwall will draft something for the committee's review.

The committee briefly discussed truckers' meals. Tax code changes shouldn't really change the effect of the guidelines. The committee will discuss this further under the self-employment section.

75-02-04.1-01(06). No change.

75-02-04.1-01(07). Barb Siegel noted that it is likely subdivision a and b will need a lot of discussion. Sherry Mills Moore questioned whether you look at income before or after alimony. This can make a huge amount of difference. Paul Wohnoutka suggested a language change to subsection a and b as follows: ". . . based on ~~application of the applicable~~ standard deductions and tax tables;" The committee agreed there needs to be clarification in this area. Does "standard" deduction mean according to IRS definition, or does "standard" mean usual, i.e., mortgage interest? Paul Wohnoutka agreed to assist Blaine Nordwall in drafting some acceptable clarification language. Look at pay stubs for income, but at tax forms for tax liability. Sherry Mills Moore questioned how child care credit works into this.

Barb Siegel called the meeting to close at its scheduled time.

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If draft amendments are prepared far enough in advance to allow for the mailing to committee members prior to the next meeting, Barb Siegel will do so.

The next meeting will be Monday, July 13, 1998, 10 a.m. - 5 p.m.