

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

Tuesday, June 25, 2002
Fort Totten Room, State Capitol
Bismarck, North Dakota

Chairman Barbara Siegel called the meeting to order at 8:30 a.m.

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

Members absent: Judge Thomas Schneider.

Barb Siegel reported that Judge Thomas Schneider contacted her yesterday to let her know that he would not be able to attend today's meeting due to a scheduled jury trial that has not been settled. Siegel stated she expects today's meeting to be the last meeting of this Guidelines Drafting Advisory Committee and that she anticipates finishing by noon.

Barb Siegel distributed copies of revised June 6, 2002, meeting minutes. Draft minutes for the June 6 meeting were distributed at the June 11 meeting without a full review due to time constraints. Since then a few revisions were made to those draft minutes. Some revisions were technical in nature and others were made for clarity. Siegel reviewed each of the revisions: A phrase was added on page 9 for clarity; a missing word was added on page 11; a phrase was added on page 12 for clarity; additional discussion regarding the 1998 guidelines committee was added on page 15; and a few technical changes were made on page 16. Siegel asked for any other concerns, errors, or omissions relating to the minutes. None were noted. Siegel declared the June 6, 2002, meeting minutes, as revised, approved.

Barb Siegel asked the committee members if there were any concerns, errors, or omissions relating to the June 11, 2002, meeting minutes that she had mailed to committee members previously. None were expressed and Siegel declared those minutes approved.

Barb Siegel asked that the members review the agenda and offer any suggested changes. Paulette Oberst asked that one item relating to outdated cross-references be added to the agenda for discussion.

Barb Siegel distributed copies of the draft amendments (dated 06/24/02) that were prepared in response to committee's requests during the last meeting. The committee reviewed each draft amendment.

- § 75-02-04.1-01(7)(a)(4). The revisions address the number of exemptions for children to be used in determining the deduction for the hypothetical federal income tax obligation.
- § 75-02-04.1-01(7)(d). The revisions were made for the two reasons discussed at the June 11, 2002, meeting. The first revision is intended to eliminate the possibility of the obligor receiving a deduction for that portion of a health insurance premium associated with the obligor when a child before the court is uninsurable. The second revision is to address the situation where the obligor has insurance coverage under a single policy at no cost but does incur a cost for obtaining coverage for a child under a family policy. The premium cost is "associated" with the child but, pursuant to the mathematical formula in the current guidelines, the obligor is credited with only a portion of that premium cost. Sherry Mills Moore noted a typographical error—the second 'if' should be 'of' so the subdivision states, "Dividing the payment by the total number of persons covered or, if known, by the total number if of persons associated with that premium payment;"
- § 75-02-04.1-07(1)(b). Although the minutes do not reflect a specific request for this amendment, Melissa Hauer noted the revision was made with the intent to address income from bartering. Sherry Mills Moore stated disagreement with the revision and questioned whether the proposed amendment was actually changing more than intended. Paul Wohnoutka and Blaine Nordwall stated agreement with Moore. Through a voice vote, there was unanimous committee agreement that the proposed amendment be removed from further consideration.
- § 75-02-04.1-01(10) and § 75-02-04.1-05. The revisions define what constitutes self-employment and how to calculate self-employment income. At Barb Siegel's request, Melissa Hauer provided a review of the revised definition of self-employment. The definition is quite similar to the definition included in the draft amendment considered at the last meeting. Paulette Oberst then provided a review of the revisions to –05. The starting point (total income from line 22 of 1040 form) remains the same. Total income is then reduced by the two items described in subsection (1)(a) and increased by the items in subsection (1)(b). The items in subdivisions 1 and 2 of subsection (1)(b) are included in the current guidelines. Subdivision 3 of subsection (1)(b) is a new item. Subsection 3 of the current guidelines is eliminated because of the broad self-employment definition. To avoid duplication of income, a new subsection 5 is added to provide that an amount included in income in one year will not also be included in income in a subsequent year during the period being averaged. With respect to income-averaging, language is added to clarify that each self-employment activity is to be averaged separately and that averaging can be done over a shorter period than five years if a particular

self-employment activity has been operated on a substantially similar scale for less than five years. Finally, language in several subsections relating to “business” or “business operations” is revised to expand the focus more generally to “self-employment” or “self-employment activities.”

Barb Siegel noted the revisions attempt to treat income from partnerships, S corporations, and C corporations as similarly as possible. The revisions also clarify what is considered self-employment for guidelines purposes.

In response to a question from Senator Tom Fischer, Paul Wohnoutka explained that the new subsection 5 is intended to address a scenario where, for example, the obligor has significant control of a partnership or S corporation such that the income of that entity is included as income of the obligor in a particular year even if it is not all distributed and then, in the following year, that undistributed income is distributed. New subsection 5 is intended to ensure that the income is not counted again in the following year when it is distributed.

Sherry Mills Moore expressed concern about language relating to payments made to a member of the obligor’s household. She is concerned that this language is too loose. Her concern is that a payment made to a member of the obligor’s household by someone other than the obligor could end up being treated as income of the obligor. She suggested using language such as “payments made by the obligor to a member of the obligor’s household . . .” Melissa Hauer questioned how such a revision would affect a corporation situation. Blaine Nordwall agreed this is a critical point. He suggested the Department come up with a correct object so language could say something along the lines of ‘payments made from XX to XX.’ There was committee consensus to prepare a draft in line with this discussion.

Representative William Devlin asked whether the reference to ‘substantial part of the time’ in -05(2) ever has become an issue. Brad Davis and Barb Siegel both indicated that they are not aware of this being a problem. Sherry Mills Moore also stated she has not heard an argument regarding the ‘substantial part of the time’ language. Representative Devlin stated that if the issue is not coming up, a revision isn’t necessary.

Ms. Moore made a motion that the revisions found in the June 24, 2002, draft amendments document, along with the further revisions discussed today, be accepted as proposed amendments. Mr. Wohnoutka seconded the motion. Barb Siegel called for a role call vote. A role call vote was taken and the motion was carried unanimously. (One member was absent for the vote: Judge Thomas Schneider.)

New agenda item: Definitions, § 75-02-04.1-01(8) and (9)

Paulette Oberst noted the definitions for 'obligee' and 'obligor' contain outdated cross-references to North Dakota Century Code subsections. Legislative changes made during the 1997 legislative session caused the renumbering of subsections in N.D.C.C. § 14-09-09.10. Updating the subsection cross-references in the guidelines could be easily accomplished, but could also quickly become outdated again with further legislative changes. Oberst suggested that the guidelines definitions simply contain a general cross-reference to N.D.C.C. § 14-09-09.10. Blaine stated agreement. The committee agreed it was best to remove the subsection cross-references.

Item 1: Definitions, § 75-02-04.1-01(5) and Imputing Income Based on Earning Capacity, §75-02-04.1-07

Net income

Consider revision to definition of net income (and examples of gross income) to reflect that income imputed at the rate of 10% per year in a review and adjustment proceeding (due to obligor noncooperation) is already a net amount.

At Barb Siegel's request, Paulette Oberst provided a review of the issue. During the last review of the guidelines, language was added to -07(8)(b) to clarify that when income is imputed at a rate of a 10% increase per year, it is *net* income. In -01(5)(b) 'income imputed based upon earning capacity' is included in the list of examples of gross income. There is a possibility some may interpret the income imputed at the 10% increase rate to be gross income and further reduce that amount in an attempt to arrive at a net income amount. This is not a concern for calculations completed in IV-D cases because the automated system recognizes this imputed income amount as a net amount. However, it may be a concern for others.

Paulette Oberst stated a change could be made to -01(5)(b) or to -01(7) to clarify this. However, she would be reluctant to remove the reference to imputed income from the examples of gross income in -01(5)(b). Furthermore, making a change to -01(7) could also be problematic because -01(7) essentially defines 'net income' as a series of deductions from gross income. Paul Wohnoutka observed that in -07 the figure is clearly net and questioned how big of a problem this really is. Barb Siegel observed that imputed income at a rate of 10% really is not income based on 'earning capacity'; it is, however, included in the title of -07. Paulette Oberst added that most people don't have incomes that increase by 10% per year; this provision is intended to provide obligors with an incentive to cooperate with the review and adjustment process. Brad Davis stated that if the obligor doesn't agree with the imputed income figure, the obligor is not asking for deductions, but rather is forthcoming with actual financial information. Sherry Mills Moore suggested clarifying this on the forms developed by Child Support Enforcement and possibly issuing a policy interpretation. Paul Wohnoutka stated he does not think the current guidelines language is problematic. Moore stated she prefers no change unless there is a real problem. There was committee consensus that no change would be proposed.

Calvin Bergenheier stated he needed to excuse himself from the meeting as he had another commitment.

Item 2: Definitions, § 75-02-04.1-01(7)(e)

Actual medical expenses

Consider whether language should be revised in light of Jarvis v. Jarvis and N.D.C.C. § 14-09-08.10.

Barb Siegel distributed two documents: (1) the current version of N.D.C.C. § 14-09-08.10 and the 1997 legislative changes to the section and (2) excerpts from the majority opinion and the dissent in Jarvis v. Jarvis. Barb Siegel compared the 1997 legislative changes to N.D.C.C. § 14-09-08.10 and the 1998 Jarvis decision which was based on the pre-1997 version of N.D.C.C. § 14-09-08.10. Siegel specifically noted Justice Sandstrom's dissent and that concern has been raised that because of the 1997 legislative changes, the dissent is now applicable.

Barb Siegel asked the committee for their thoughts as to whether or not uninsured medical expenses are already considered in the presumptively correct guideline amount. According to the majority opinion, the answer is no. According to the dissent, the answer is yes. Considering the 1997 legislative changes to N.D.C.C. § 14-09-08.10, does the dissent apply? Sherry Mills Moore stated that, in general, ordinary medical expenses are usually split equally between the parents. However, it is becoming an issue in more and more cases; obligors are providing receipts for medical expenses paid and are seeking deductions from gross income for those medical expenses. Siegel stated the concern was raised by a private attorney. Paulette Oberst reported that she had followed up with the private attorney who raised the issue. The private attorney had represented the obligor and had argued that the dissent in Jarvis is now controlling. The private attorney did not prevail at the trial court level and the obligor chose not to appeal due to a change in his situation

Representative William Devlin asked how many times this has come up. Barb Siegel shared that this has been brought to her attention a number of times but mostly the issue was raised as a question for clarification. Siegel stated she is comfortable with proposing no change, but felt it was important to bring the issue to the committee's attention. Brad Davis stated that he has not been seeing a problem in this area and does not think the amendment to N.D.C.C. 14-09-08.10 changed anything. Siegel noted she does not disagree with that position. The committee agreed to no proposed change.

Item 3: Minimum Support Level, § 75-02-04.1-04

Consider whether to establish a minimum support amount (e.g., \$14 per month).

At Barb Siegel's request, Brad Davis provided a review of the issue. Davis noted that sometimes the resulting support obligation is very small (e.g., \$4.00 per month). It was noted, for example, that a very small child support obligation could occur as a result of a

downward deviation. Davis questioned at what point it becomes ridiculous to require the payment to be made because it is not worth processing the payment. He related the issue to a small state tax liability and not having to pay if the tax liability is less than \$5.00 or \$10.00. Blaine Nordwall stated he is not certain the committee has authority to make such a change. Representative William Devlin and Senator Tom Fischer agreed this is not something that can really be changed through administrative rule. Nordwall also noted that typically creditors expect payment even if the bill is small. Senator Fischer posed a question of what \$5.00 or \$10.00 buys and further observed that it always buys something. Siegel agreed she is uncomfortable saying the custodial parent and child do not need the support if it is a small amount. There was consensus to no proposed change.

Item 4: Criteria for Rebuttal of Guideline Amount, § 75-02-04.1-09

Consider, for each rebuttal criteria, the appropriate manner to calculate an amount for the deviation (i.e., add to or deduct from income or the guidelines amount)

At Barb Siegel's request, Paulette Oberst provided a review of the agenda item. The decision in Tibor v. Tibor includes language to the effect that the guidelines do not direct whether the deviation is to be applied to the child support amount or to the obligor's income. Specifically, Tibor states in part, "Until § 75-02-04.1-09(2)(i) is amended to identify the method of deviation, the trial court may use its discretion to determine whether visitation travel expenses may be deducted directly from the child support obligation or from the noncustodial parent's gross monthly income to calculate net income." Barb Siegel noted the significance of the language, "Until . . . is amended to identify the method of deviation . . ."

Paulette Oberst explained that even prior to the Tibor decision, Child Support Enforcement had identified this as an issue and had completed an internal exercise of reviewing each of the deviations to determine the appropriateness of applying the deviation to the child support amount or the income amount. A general rule could be used: if the deviation language is focused on the increased needs of child, the deviation should be applied to the child support amount and if the deviation language is focused on the increased or decreased ability of the obligor to pay, the deviation should be applied to the income amount. There is one exception to the general rule. Because of the way the guidelines table in -10 is constructed, the only way to really give effect to an upward deviation when the obligor has monthly net income in excess of \$10,000 is to apply the deviation to the child support amount. Sherry Mills Moore expressed agreement with these concepts. Blaine Nordwall observed that these concepts were consistent with previous intent of the guidelines.

Paulette Oberst noted that applying the general rule, -09(2)(a), (c), (d), (e), and (f) would affect child support while -09(2)(g), (h), (i), (j), (k), and (l) (as revised previously) would affect income. The exception to the general rule would be reflected in -09(2)(b). Barb Siegel noted that the method of deviation can make a significant difference and she has seen it time and time again where a downward deviation occurred from the child support

amount instead of from income. Sherry Mills Moore observed that what guidelines do best is reduce squabbling. If specificity is provided, squabbling is reduced.

Barb Siegel suggested adding language to –09 which states something like: “For purposes of subdivisions a, b, c, d, e, and f of subsection 2, any adjustment must be made to the child support amount resulting from application of this chapter. For purposes of subdivisions g, h, i, j, k, and l, any adjustment must be made to the obligor’s net income.” Siegel also asked for committee confirmation that the deviation adjustments to income are to be made to net income. There was general consensus with that approach. The committee agreed a proposed amendment should be drafted consistent with the discussion.

Item 5: Criteria for Rebuttal of Guideline Amount, § 75-02-04.1-09

Analyze case data on deviations from the guidelines pursuant to federal regulations at 45 C.F.R. § 302.56(h).

Barb Siegel distributed the “Deviations Analysis” document and Paulette Oberst reviewed highlights of the analysis.

Blaine Nordwall noted the results of the deviation analysis indicate a disproportionate number of deviations for certain judges and asked if the analysis included how many orders a judge entered as compared to the number of orders with deviations. The analysis did not include this information. Nordwall did note, however, there are very few deviations in the East Central judicial district and there certainly are a large number of cases in that district.

Barb Siegel compared the committee discussion and decision related to agenda item four to the results of the deviations analysis. According to the deviations analysis, many deviations pursuant to -09(2)(i), (j), (k), and (l) (in the current guidelines) were applied to the child support amount but now would be applied to income.

Barb Siegel noted the committee may want to consider removing a current deviation if it is not being used or may want to consider adding deviation criteria. Siegel noted that the committee had already recommended some changes to –09 which address issues raised by the deviations analysis. For example, proposed changes would address the adjustment from child support versus income and other changes would address foster care related issues. The deviations analysis indicated that there are some “judicially created” deviations not authorized in the current guidelines. One such “judicially created” deviation is based on the parties’ agreement. The committee specifically discussed this item. Sherry Mills Moore expressed strong opinion that it would not be her preference to add a deviation criterion for this reason. The committee agreed no amendments should be proposed.

Item 6: Child Support Amount, § 75-02-04.1-10

Review information relating to the cost of raising children and consider whether numbers found within the guidelines chart should be adjusted.

Barb Siegel distributed two documents: (1) Percentage Changes/Expenditures on Children and (2) Comparisons of Cost of Raising a Child and Guideline Amounts. Regarding the Percentage Changes/Expenditures on Children document, Siegel explained that the chart in -10 has not changed since 1991 except for two errors which were corrected previously. Siegel contacted Mr. Mark Lino from USDA and he provided the percentage changes for expenditures on children from 1991 and 2001. The information he provided is reflected in the handout.

The information shows the percent of increase in the costs to raise a child. Sherry Mills Moore noted the information is compounded. Brad Davis observed the he had not realized how low the guidelines are in relation to the cost of raising a child.

Barb Siegel reviewed Report 1 (Husband-Wife Families/Urban Midwest) of the handout, Regarding the Percentage Changes/Expenditures on Children, in detail and explained how the other reports (Report 2: Husband-Wife Families/Rural and Report 3: Single-Parent Families/Overall US) were similar. Information from the USDA publication Expenditures on Children by Families, 2001 Annual Report was converted to net income and the income was then applied to the current child support guidelines. This allows a comparison of guideline amounts to the cost of raising a child. Siegel reviewed each of the results comparisons.

Barb Siegel noted the national trend is to especially take into consideration the guideline amount when the obligor has a very low income. North Dakota has taken this factor into consideration since the beginning. The guidelines chart is based on the Espenshade model. It is a variable percentage of income. Lower income obligors pay a smaller percentage of income than higher income obligors because there was concern that obligors need to have enough money remaining for subsistence. Blaine Nordwall shared the history of the guidelines chart and specifically noted that up to \$1,000 per month, the sole consideration is the obligor's ability to pay, not the child's needs. Above \$1,000 income, the child's needs begin to be taken into consideration. Barb Siegel noted that at the lowest income levels, 14% of income is the support amount as compared to 20% at the \$2100 income level.

Paul Wohnoutka observed the top income of the chart stops at \$10,000 and suggested the top of the scale be increased. Barb Siegel noted that currently incomes of more than \$10,000 may be dealt with through a deviation (-09(2)(b)). Sherry Mills Moore agreed the top end of the chart should be expanded. She is seeing many more cases meeting the chart ceiling than she used to see. Blaine Nordwall reminded the committee of the history of the chart and how the top end of the scale was designed. Blaine Nordwall questioned how high to go. Sherry Mills Moore stated that her preference would be to expand the chart to a net income level of \$12,500 per month.

Nordwall stated that, mathematically, it would be a simple matter to expand the top end of the scale.

The committee also discussed the lower end of the scale and Representative William Devlin observed it actually costs a lot more than the guideline amount to raise a child. Sherry Mills Moore agreed there is a point where there simply is not enough money to go around. Blaine Nordwall agreed that below \$1,000, the amount is really symbolic; it is a way to get the noncustodial parent in the habit of making payments.

Barb Siegel observed that many of the changes to the guidelines that have been, and are being, made result in a reduction of child support. Examples include multiple family deductions and extended visitation credit. Several members expressed strong agreement that guideline amounts are not too high.

Blaine Nordwall made a motion to amend the table to add \$100 increments for net income amounts between \$10,000 and \$12,500, inclusive, by continuing the mathematical calculation that increases the existing increments between \$1,000 and \$10,000 for each of the six family sizes and to conclude the chart with the phrase, "or more" and to amend -09(2)(b) accordingly. Sherry Mills Moore seconded the motion. Barb Siegel called for a role call vote. A role call vote was taken and the motion was carried unanimously. (Two members were absent for the vote: Judge Thomas Schneider and Calvin Bergenheier.)

Representative William Devlin made a motion to remove the specific code subsection cross-references in the definitions of 'obligee' and 'obligor' and, for each of the deviation reasons, to indicate the method of application consistent with the committee discussion. Senator Tom Fischer seconded the motion. Barb Siegel called for a role call vote. A role call vote was taken and the motion was carried unanimously. (Two members were absent for the vote: Judge Thomas Schneider and Calvin Bergenheier.)

Barb Siegel reflected on committee work. Although a review of the guidelines can, at times, be a frustrating task, the committee has accomplished a lot. In addition to clarifying language and addressing a multitude of issues, the committee has recommended changes that will have significant impact including a re-write of the self-employment section; a new section for shared equal custody; a re-write of the foster care section; and providing instructions for application of each deviation criteria.

Barb Siegel stated that draft proposed amendments will be distributed to committee members. The minutes from today's meeting will also be distributed. Sherry Mills Moore stated she would like to see a summary of changes if such is compiled for another purpose. Melissa Hauer said she would be doing a summary for another purpose. There was discussion about the anticipated effective date of the guidelines. Blaine Nordwall noted that, for practical purposes, the effective date is delayed to allow consideration of any legislative changes that might occur during the 2003 session. It is unwise to complete the rulemaking process if legislative changes affecting the

guidelines are anticipated. Therefore, it is anticipated at this point that the effective date of amendment to the guidelines would be August 2003.

Barb Siegel expressed appreciation to the committee members for their service and declared the committee dissolved.

The meeting was adjourned at 11:30 a.m.