Child Support Guidelines

Quadrennial Review

Meeting Minutes – June 8, 2022

Members present: Jim Fleming, Brad Davis, Betsy Elsberry, Jamie Goulet, Lisa Kemmet, Lacey Marklevitz, Paulette Oberst, Sherri Peterson, Sen. Kristin Roers, Cynthia Schaar, Deb Suhr, Bill Woods.

Member absent: Rep. Robin Weisz.

Visitors: Laura Hermanson, Mary Cervinski, Erica Shively, Steve Eckroth, Dean Gerving.

Minutes from June 1st meeting: Oberst said that she had made three technical corrections to the minutes based on comments from Goulet. Fleming asked if there were any further corrections. It was noted that one remark attributed to Elsberry should have been attributed to Woods. With that additional correction, the minutes are considered finalized and approved.

Schedule for meeting: Fleming thanked the members for their participation during the June 1st meeting and noted that the group made good progress on working through the list of issues for consideration. He said that the progress made today on the remaining issues will determine if we need a fourth meeting. (The third meeting is already scheduled for June 10th.) Fleming said that the list of issues for consideration so far had been compiled by the Child Support program. He asked members to give thought to any additional issues that should be considered by the group. Woods said he has an issue that he would like to discuss later in the process.

Continue discussion of remaining issues for consideration: Fleming said that there are several issues related to self-employment and to deviations to discuss, as well as draft amendments requested at the previous meeting to review.

> Note: For purposes of these minutes, items are summarized in the order in which they appear in the list of issues for consideration, which is not necessarily the order in which they were discussed.

Item #1: Consider the treatment of IRC section 457 deferred compensation plans.

Oberst and Schaar explained that this item was added to the list of issues for consideration due to a misunderstanding. Schaar submitted the item on behalf of a private attorney who actually wanted the committee to consider the treatment of IRC section 179 depreciation but mistakenly cited IRC section 457. Thus, the item will be dropped from further consideration.

Item #3: Increase the deduction for health insurance premiums.

This item was carried over from the previous meeting. Fleming had asked members to give some thought between meetings to whether and how to give effect to an increased deduction for health insurance premiums.

There was a general consensus that reducing the child support obligation by the premium amount on a dollar-for-dollar basis was not appropriate. Fleming suggested using a multiplier instead. Elsberry and Roers offered up a multiplier of 125 percent of the premium for discussion purposes.

Elsberry said that she had been thinking of the topic more from the perspective of the noncustodial parent than the custodial parent. Authorizing a bigger deduction could incentivize the noncustodial parent to provide health insurance for the children. However, custodial parents are often willing to provide the coverage and pay the premium costs because they feel they can't take the risk that the children will not have coverage.

Marklevitz shared her experience in her case. The other party changed jobs often and was inconsistent in paying child support. Therefore, she felt compelled to maintain the health insurance so there would be reliable coverage.

In response to a question from Peterson about how the guidelines treat health insurance that is obtained through the marketplace, Davis said he was not aware that a noncustodial parent could apply for dependent coverage through the marketplace.

The group also briefly discussed the obligor versus income shares model for guidelines because, under income shares, health insurance is a separate component of the obligation and typically prorated between the parties based on their respective incomes.

Fleming said there is a perception of fairness with the income shares model but, operationally, it would mean double the income gathering and extensive costs to re-program Child Support's automated system.

Schaar and Davis pointed out that there are still inequities with an income shares model, including that it does not consider the in-kind contributions of the custodial parent.

Elsberry said that how the guidelines currently address health insurance may be on the right track and doesn't need to be changed. Roers feels the group is not comfortable that we have enough information about unintended consequences to make any changes now.

It was noted that Child Support will have another chance to look at treatment of dependent health insurance under the guidelines when the program resumes its project on medical support rulemaking.

This item is dropped from further consideration.

Item #6: Revise the definition of "self-employment" to specify that it includes any activity that generates business gains from a self-employment activity.

Some members questioned what this revision would add since the definition of "self-employment" already specifies that it includes "business gains." Elsberry questioned why a change would be needed. Goulet thought the revision would be redundant and Fleming agreed.

Initially, the group did not take any action on this item but, as discussion on the issues related to self-employment progressed, they circled back to the definition. Fleming suggested adding that self-employment means employment "in one or more related activities." See Item #13, below. Roers made a motion, seconded by Davis, to amend the definition of "self-employment" consistent with Fleming's suggested language. All voting members who were present voted "yes," so the motion passed. Oberst will prepare a draft amendment for review at the next meeting.

Item #8: Create a general instruction to specify how nonrecurring income that is still includible in gross income should be treated.

At the previous meeting, the group requested a draft that would amend the definition of "gross income" to exclude early withdrawals from retirement accounts.

In response to a question from Oberst about whether a tax return would indicate the type of withdrawal from a retirement account, Peterson explained that this would be shown on the applicable 1099 form, box 7. She said there is a difference between a regular withdrawal from a retirement account and an early withdrawal and another factor is whether the retirement account funds were deposited pre-tax or post-tax. Kemmet said that an example of an early withdrawal occurs when an individual cashes in his or her retirement account at the time of a job change.

Roers made a motion, seconded by Woods, to approve Oberst's draft amendment excluding early withdrawals from retirement accounts from gross income. All voting members voted "yes," so the motion passed.

Item #10 and Item #25. Both regarding specifying the number of parenting time nights in the court order.

At the previous meeting, the group requested a draft amendment that would disallow the extended parenting time adjustment on a prospective basis if the number of parenting time overnights is not specified in the order.

Oberst acknowledged the operational challenges in determining parenting time overnights when not specified in the order but expressed concern with disallowing the adjustment for that reason. She said it would unfairly penalize an obligor who would be entitled to the adjustment because of an error made by his or her attorney. She said she would support moving existing language about specifying the number of overnights

from the general instructions into the extended parenting time section where it would hopefully not be overlooked and, therefore, omitted from the order.

Roers noted that the existing language requires that the order must specify the number of parenting time overnights and she asked how this requirement is enforced. Fleming responded that the expectation is for voluntary compliance by the practitioner. Roers questioned the effectiveness of using "must" if there is no enforcement and asked whether "should" would be better language. Fleming said that using "should" would not be considering proper drafting.

Fleming said that failure to specify the number of parenting time overnights could be treated as a training issue. He said he has been asked to make a presentation to the Family Law section of the bar in October and he could add this item to the materials he plans to cover. Kemmet and Schaar also asked that the training include encouraging the private bar to file their child support calculations in the court record.

Roers made a motion, seconded by Davis, to move existing language about specifying the number of overnights from the general instructions to the extended parenting section. All voting members present voted "yes" so the motion passed.

Item #12: Preclude using a loss from self-employment to further reduce self-employment income if the loss has been considered in arriving at total income (for IRS purposes) for the same self-employment.

The guidelines authorize using a self-employment loss to reduce other income under certain conditions. Peterson said there should be some fenceposts to limit using the loss to reduce other income. Oberst agreed, otherwise it would be a free for all.

Goulet was unsure what was intended by emphasizing the "same" self-employment in the issue for consideration. The guidelines only allow a loss to be used to reduce income from a different source – e.g., from wages or from a different self-employment activity.

Roers wants to retain the provisions allowing self-employment losses to reduce other income and she asked if the issue had been submitted to save having to do some work.

After further discussion, the group determined there was not enough information to act upon so the issue was dropped from further consideration.

Item #13: Amend the definition of "net income from self-employment" to specify that it includes gains resulting from the self-employment activity.

Elsberry asked if this issue is an attempt to undo the decision in the *Gerving v. Gerving* case.

Fleming invited Steve Eckroth and Erica Shively to offer their comments. Eckroth introduced himself as an accountant with Eide Bailly. He said that changes to the tax

code in 2018 require that trading equipment, such as farm equipment, is treated as a sale of the property and reported as a gain so it makes the income appear inflated.

Shively said that trading farming equipment is part of the farming operation and the gains should be included in the overall determination of self-employment income from the farming operation. It would be a different scenario if the obligor was an implement dealer whose business was selling farm equipment. Goulet agreed that the guidelines don't delineate all of the different parts of a farming operation.

Fleming said that the question for the group was whether its intent is to confirm the ruling in *Gerving* or undo it with a rule change. He said it appears the group is leaning toward the former. Roers asked if we need to add something to the guidelines to make the group's intent clear and said she thought it might help to do so. Fleming agreed and suggested adding some language to the definition of "self-employment" to specify that it means employment in one or more related activities resulting in earning income.

There was some additional discussion about whether it would help to try to define an "activity" or whether that would just make the definition more complicated.

In response to a question from Elsberry, Fleming clarified that he intended for his suggested language to codify that issue from the *Gerving* decision. See Item #6, above for more information regarding Fleming's motion, including the vote.

Item #14: Specify that recurring capital gains or losses resulting from a self-employment activity are included in the calculation of income from that activity (i.e., added to or subtracted from the income of that activity.

Fleming asked how this item was different from Item #13. Oberst said that several of the items related to the *Gerving* decision were identified by different internal Child Support workers so there was some overlap.

The group approached this item by looking at how self-employment income is calculated under the guidelines. Oberst said the starting point is "total income" for IRS purposes (currently, line 9 on the IRS 1040 form). Then there are certain reductions from total income and certain add-backs. Peterson explained how capital gains appear on the tax forms (on Schedule D) and described how they eventually get folded into total income.

Roers said it seems that the guidelines already account for the inclusion of capital gains and suggested that the group move on. There being no further discussion, this item was dropped from further consideration.

Item #15: Consider the treatment of IRC section 179 depreciation.

Schaar explained that she had submitted this item on behalf of a private attorney based on a case where the section 179 depreciation made a big change in the obligor's income.

Peterson said that section 179 depreciation is a special depreciation allowance whereby property can be fully expensed in the year of purchase rather than depreciated over the years of its useful life. Thus, the result can be to zero out a person's income for that year. Schaar said the private attorney who asked her to submit the item for consideration had suggested that the depreciation allowance be added back over time, like straight-line depreciation.

Peterson said that not all property is subject to section 179 depreciation. The property must be business property of a type that qualifies for the special depreciation allowance. Also, there are maximum dollar limits for section 179 depreciation but those limits are pretty high. In some situations, the section 179 depreciation allowance can be carried over to future tax years or can be subject to recapture and, if so, the recaptured amount is treated as ordinary income to the taxpayer.

In response to a question about the benefits of using the section 179 depreciation allowance instead of the regular treatment of depreciation, Woods said it could be useful for the obligor when the children before the court were older.

In response to a question from Oberst, Peterson explained that section 179 depreciation shows up on a separate line on a K-1 form but ultimately does get captured on Schedule C or Schedule F.

Davis and Oberst talked about the historical treatment of depreciation under the guidelines. In earlier versions of the guidelines, depreciation was added back to the obligor's income but there was a deduction allowed for principal payments made on the applicable property. Davis said that, operationally, this treatment was problematic because obligors didn't have records of the principal payments while the depreciation could be determined from the tax return. Therefore, obligors were subject to the add-back but did not get the benefit of the deduction. Also, there wasn't a single amount that could be identified as the principal payment because, as payments were made over time, the ratio of principal to interest shifted.

The group noted the existence of a deviation for situations where the obligor's income was reduced to the point that income was imputed to him or her.

Since there was no motion to amend the guidelines, this issue was dropped from further consideration.

Item #16: Consider whether 80 percent should be changed to 90 percent to match the loss analysis when three or more years are averaged.

This item will be tabled until after discussing the remaining imputation items.

Item #17. Specify how long an obligor needs to have worked at a profession before imputing income based on work history and occupational qualifications.

Members reviewed the draft amendment Oberst had prepared based on discussion at the previous meeting. The draft amendment specified that the obligor must have

worked at the profession/occupation within the last three years and for at least 12 months.

For purposes of imputing income based on 60 percent of statewide average earnings for persons with similar work history and qualifications, Davis favored making a distinction between the obligor's career versus an occupation that was taken on as a trial for something new.

Fleming said he has concerns about making the assessment formula-driven instead of based on the judgment of the practitioner. Oberst said she has concerns about unintended consequences, especially with the requirement that the obligor have worked in the particular field for at least 12 months. This could mean that the person doing the guidelines calculation couldn't consider certain employment just because of timing issues, such as if the obligor was new to the field, even though it is a career-type employment.

Since there was no motion to amend the guidelines, this issue was dropped from further consideration.

Item #19: Revisit imputation based on 90 percent of the obligor's greatest average gross monthly earnings.

Oberst reviewed the hypothetical guidelines calculations that the group had requested at the previous meeting. She did two sets of hypothetical calculations: one set was based on a farm laborer and the other set was based on an elementary school teacher in the Minot school district. For each set, she did two calculations. The first calculation was based on imputing income under the current guidelines (minimum wage, 60 percent of statewide average earnings, and 90 percent of historical earnings). The second calculation was based on potential amendments for imputing income (minimum wage, 75 percent of statewide average earnings, and 75 percent of historical earnings).

For both sets of hypotheticals, under the current guidelines, imputing at 90 percent of historical earnings produced the highest value. For both sets of hypotheticals using the potential amendments, imputing at 75 percent of statewide average earnings produced the highest value. But, surprisingly, the bottom-line child amount was not materially different. Oberst said there is no way to know if this outcome would hold true across more scenarios.

Regarding possibly eliminating historical earnings as a basis for imputed income, Davis said he doesn't want to give up using real earnings as a basis and this would be true whether the value was 90 percent or 75 percent.

Fleming said he has concerns about increasing the value for statewide average earnings from 60 percent to 75 percent because that could force the obligor to live in a place he or she doesn't want to live.

Goulet said that the current rules for imputing income don't just create enforcement problems for Child Support but they also saddle the obligor with uncollectible arrears.

Since there was no consensus, the item was tabled for the following meeting and can be considered again in light of the court order analysis of orders with imputed income.

Item #22: Expand the preclusion against imputing income to situations where the obligor is earning more than minimum wage and is neither underemployed nor unemployed.

Goulet reviewed the proposed amendments she had prepared. She noted her preference for the first alternative because she feels it is clearer. She also opened discussion on how the imputation provisions in the guidelines affect obligors who are retired – because they have reached retirement age or have retired from the military or have embraced the FIRE movement (financial independence, retire early) and are living off their investments. These individuals are unemployed and, under the general rule, income must be imputed to them. But they are unemployed because they don't "need" to work and they have income that doesn't come from earnings from working.

In contrast, she described a case where the obligor became unemployed because of the pandemic and his enhanced unemployment compensation exceeded the minimum wage equivalent. This is an individual to whom income would be imputed under the general rule but the exception to imputing income might preclude it.

Oberst noted that the imputation provisions in the guidelines are very broad, taking in mostly everyone who is unemployed no matter the reason. Fleming said the broad coverage of the imputation provisions was purposeful. Fleming suggested that instead of focusing on whether the obligor is not underemployed or is unemployed, the test should be whether the obligor is earning more than a minimum wage equivalent and those earnings are similar to or greater than the statewide average earnings for his or her occupation. Roers said this would fix the double-negative issue with the current language but doesn't make a substantive change.

Roers made a motion, seconded by Elsberry, for an amendment consistent with Fleming's proposed language. All voting members voted "yes," so the motion passed.

Item #26: Clarify that the deviations for "increased needs" or "increased ability" may only be applied to increase the presumptively correct child support obligation.

Oberst said that Child Support has seen orders that seem to turn certain deviations on their heads. She thinks it should go without saying a deviation premised on the increased needs of the child or increased ability of the obligor to pay is intended to result in an increase to the presumptively correct child support amount. She thinks it is a misapplication of the guidelines when, for example, the obligor cites the upward deviation for the child's medical needs (disabling condition/chronic illness) to support paying less than the presumptively correct amount because the obligor is paying the child's uncovered medical bills. Fleming disagreed; he said if the obligor is meeting the

child's increased needs, then it is appropriate for that to be recognized in determining the child support obligation.

Since there was no motion to amend the guidelines, this issue was dropped from further consideration.

Item #27: Consider creating a downward deviation when the child is living outside the parental home at government expense.

Fleming said this issue arose from a case where the child was a student at the School for the Deaf (Devils Lake). The custodial parent, per the court order, was a custodial parent in name only.

A member said this situation seemed similar to a Supreme Court case that was considered during the 2018 quadrennial review. Oberst agreed; in 2018, the committee considered the effect of the *Schiele* decision on the guidelines. In *Schiele*, the child lived at the Life Sills and Transition Center (Grafton). The Supreme Court held that the parent with primary residential responsibility was entitled to receive child support from the other parent even though the child did not live in either parent's home. The 2018 advisory committee did not take any action with respect to the decision.

The committee requested a draft amendment that would create a downward deviation when the child resides outside the home at government expense but support is not assigned. Oberst will prepare a draft amendment for consideration at the next meeting.

Item #28: Create a downward deviation when the obligor is required to pay educational or child care expenses.

Oberst thinks that creating downward deviations when the obligor has a reduced ability to pay support because he or she is responsible for the child's educational or child care costs is more logical than using the existing upward deviations in a way not intended.

The committee requested that Oberst prepare draft amendment for consideration at the next meeting.

Item #29: Eliminate the deviation for situations where the obligor's income was substantially reduced because of depreciation.

Davis said he doesn't believe this deviation belongs in the guidelines because depreciation is a legitimate business operating expense and it evens out over time. He made a motion to strike this deviation, which died for lack of a second. Accordingly, this issue is dropped from further consideration.

Item #30: Specify how to calculate adjustments for deviations.

Schaar said she submitted this item on behalf of a private attorney. Unfortunately, the private attorney did not offer any suggestions for how to implement this item. It was noted that that the guidelines already specify whether a deviation is to be applied to the presumptively correct child support obligation or to the obligor's net income. Also, some

of the deviations already have conditions attached (e.g., the downward deviation for parenting time travel expenses is only applicable if the obligor is responsible for all those expenses).

By consensus, this item was dropped from consideration.

Item #31: Authorize the use of the deviation for situations where the parents' respective obligations are similar in split custody cases too.

Oberst said that the deviation is presently only applicable in equal residential responsibility cases when the difference in the parties' obligations is modest (i.e., not exceeding $75). She said that split custody cases are calculated similarly under the guidelines – an obligation is calculated for each parent and then the obligations are offset. For consistency, she suggested that this deviation be allowed for both equal residential responsibility and split custody cases.

There was a side discussion about how the program counts collections in offset cases. The smaller obligation is treated as fully collected and the greater obligation is treated as partially collected, up to the amount of the smaller obligation. Currently, we are watching with concern what the federal Office of Child Support Enforcement might do with respect to offset cases. If the feds only allow the net difference to be treated as a collection – because that is the only amount paid through the SDU – this will have a negative effect on performance measures.

Elsberry made a motion, seconded by Davis, to expand the deviation to be authorized in split custody cases. All voting members who were present voted "yes," so the motion passed. Oberst will prepare a draft amendment to be reviewed at the next meeting.

Item #34: Specify whether to impute income or not in an intact family situation when one of the parents is unemployed or underemployed.

Under the guidelines, when a child enters foster care or guardianship care and the parents are together (i.e., intact), then their incomes must be combined and treated as the income of the obligor. Davis said he is aware that this provision is being interpreted and applied differently within the program when one parent is unemployed and he is looking for consistency.

Schaar and Kemmet do not impute income to the unemployed parent. Goulet will impute income to the unemployed parent and then combine the imputed income for that parent with the actual income of the other parent. While acknowledging potential collectability issues, she feels that if income is not imputed to the unemployed parent, he or she gets a pass, which is inequitable when both have the ability to work.

Oberst said that the approach used by Schaar and Kemmet probably has a better outcome for the family but Goulet's approach is the better interpretation given that the guidelines do include imputed income within the definition of gross income.

Fleming proposed amending the guidelines to specify that, in this context, income includes imputed income if applicable. Roers made a motion, seconded by Davis, for an amendment consistent with Fleming's proposed language. All voting members who were present voted "yes," so the motion passed. Oberst will prepare a draft amendment to be reviewed at the next meeting.

Next meeting: The next meeting will be on Friday, June 10th.