Child Support Guidelines – Quadrennial Review
Advisory Committee
June 15, 2010
Sakakawea Room, State Capitol Building – Bismarck, ND

Members present: Jim Fleming, Brad Davis, Tom Johnson, Lisa Kemmet, Sherry Mills Moore, Tammy Ness, Paulette Oberst, Cynthia Schaar, and Referee Dale Thompson.

Members absent: Sen. Tom Fischer, Judge Donald Jorgensen, Rep. Robin Weisz, and Bill Woods.

Visitor: Marie Hanken.

Call to order: Fleming, as chairman, called the meeting to order.

Minutes of May 26th meeting: Fleming asked if anyone had any comments to the draft minutes of the May 26th meeting, which had been previously disseminated via email. Hanken noted that her name had been misspelled. No other comments were noted. Fleming said the minutes would be revised to correct the spelling of Hanken's name and then disseminated in final form.

Binder materials: Oberst handed out the following materials to be inserted in the binder – revised Table of Contents, meeting notice [to be inserted at Tab 2], revised list of issues for consideration [to be inserted at Tab 7], and drafts of proposed amendments [to be inserted at Tab 10]. With respect to the revised list of issues for consideration, it has been reorganized into sections for new and pending items, completed items for which drafts had been accepted, and completed items which the committee decided to drop from further consideration.

Oberst said that additional materials would be handed out as additional items are discussed.

Review of issues for consideration, including drafts that had been requested and drafts prepared in advance to facilitate discussion:

Issue: Specifically include "royalties" [and rents] in the list of examples of gross income? (Clarifying change.)

Fleming said he re-drafted section -01(5)(b) to include "royalties" and "rents" in the list of examples of gross income. He asked if the committee wished to discuss this draft.

Oberst said that she has concerns with possibly creating unintended consequences if these items are added to the list. She said that income from rental property and royalties are already included in the definition of "self-employment" found in

be entitled to a deduction for the actual costs. In the same manner, if the obligee shows that the obligor's lodging expenses are actually less than the state rate, the obligor would be entitled to a deduction for the actual costs.

Moore made a motion to accept the draft, which Schaar seconded. Kemmet made a motion, which Oberst seconded, to substitute Moore's motion with a motion to amend the draft to substitute $63 for the reference to the state reimbursement rate. All members voted in favor of the amendment and then all voted in favor of the amended motion. Thus, this change will be incorporated into the recommended revised guidelines.

Issue: Clarify that if extended visitation applies, the visitation schedule must be set out in the court order and may not be at odds with the definition of extended visitation?

Fleming said he prepared a draft to revise section -02(10), which is in the general instructions, to include a requirement that if extended parenting time is ordered, the order must specify the number of parenting time nights.

Schaar made a motion to accept the draft. Moore seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: Specify that imputed income be reduced not only by actual gross earnings but also by amounts received in lieu of actual earnings, such as unemployment compensation, workers' compensation, retirement or disability payments, veterans' benefits, and earned income tax credit? (Substantive change.)

Fleming said he prepared a draft to revise section -07(1)(a) to include amounts received in lieu of actual earnings (e.g., social security benefits, workers' compensation benefits, unemployment insurance benefits, and veterans' benefits) and earned income tax credits within the definition of "earnings" for purposes of imputing income.

Schaar made a motion to accept the draft. Moore seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: Revisit the deduction for the hypothetical state income tax obligation? (Substantive change.)

Fleming said he prepared a draft to revise section -01(7)(b) regarding the deduction for a hypothetical state income tax obligation. He said he had contacted the state tax department to see if the percentage in the current formula (14% of the hypothetical federal income tax obligation) should be changed to something more in line with current state income tax law. The tax department advised that it is not as simple as changing

equal physical custody cases. But she strongly disfavors the reimbursement part. She said this could be a set-up for conflict between the spendy parent who incurs a child-related expense and then turns around and expects the thrifty parent to pay his or her "share" of that cost.

The members discussed further revisions to Fleming's draft, such as removing some lead-in language and removing the second part regarding reimbursement.

Moore made a motion to accept the draft as revised by the discussion. Schaar seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: In light of the recent decision in Davis v. Davis, consider whether to revise subsection 11 regarding crediting children's benefits as a payment toward the support obligation in situations in which that would create an overpayment. (Substantive change.)

Fleming said he prepared a draft to amend section -02(11) to specify that a court has discretion whether to order an obligee to repay the obligor in situations where crediting the obligor for children's benefits results in an overpayment. He said this draft was prepared in response to a recent Supreme Court decision, Davis v. Davis, 2010 ND 67. In Davis, the obligor continued to pay child support while his application for social security disability payments was pending. When his application was eventually approved, his children received lump sum dependent's benefits. The obligor received credit toward his child support obligation for these benefits. Since he was current in his payments, crediting the dependent's benefits resulted in an overpayment. He brought an action for conversion against the obligee to recover the amount of the overpayment. The Supreme Court, with one dissent, sided with the obligor, holding that the plain language in the guidelines requires that the obligor be reimbursed. Fleming said the Supreme Court's decision was unexpected; Child Support Enforcement has previously taken the position that the district court has discretion whether and how to deal with an overpayment created by crediting children's benefits toward the obligation. Fleming added that the Davis decision was based on unusual facts since the obligor was current in his payments for the period of time covered by the lump sum dependent's benefits. In most cases, the obligor is in arrears so there is a debt to which the children's benefits can apply.

There was considerable discussion about the provision in the guidelines and the draft amendment. Ness thinks the provision is needed because otherwise the obligor would be paying twice (by making actual payments and because of the dependent's benefits), which would not be fair. Davis said the provision gives an obligor a disincentive to continue making actual payments while the disability application is pending, even if the obligor has the financial ability to do so. Oberst said the Supreme Court decision is problematic for obligees who may not even know a disability application is pending and, thus, wouldn't know they should be "banking" the actual child support payments in case

Furthermore, since information in this publication is based on survey responses, it is not necessarily complete for each listed occupation. Oberst referred members to the Miscellaneous tab in the binder to see an excerpt from the publication, which had been included for illustration purposes. The excerpt shows earnings for registered nurses in the Bismarck and Fargo-Moorhead metropolitan statistical areas. Therefore, it is not useful for determining earnings for registered nurses in, for example, Grand Forks or Devils Lake or Williston. This is true even though there are obviously some registered nurses in those communities.

Because of the limitations in using the publication to determine earnings in the community, the guidelines advisory committee that met in 2006 recommended a switch from the "community" concept to a "statewide average earnings" concept since that information is widely available, pretty much no matter what the occupation. In other words, the publication could still be useful.

Schaar said that many people don't seem to fully understand the concept of imputing income based on 60% of statewide average earnings. For example, they seem to focus on the statewide average part and ignore the fact that the presumption for un- or under-employment is only triggered if earnings are less than 60% of the statewide average for a particular occupation.

Moore said that while imputation may be unpopular in some circles, it does serve as an impediment for some obligors who might otherwise do something inappropriate. For example, if an obligor knows that income will be imputed based on earning capacity, the obligor might decide to continue working instead of quitting his or her job.

No action was taken on this item. Instead, the item was tabled for further discussion at the next meeting.

Issue: Reconsider appropriateness of imputing income based on minimum wage to incarcerated obligors? (Substantive change.)

Fleming referred members to the Miscellaneous tab in the binder for information regarding incarcerated obligors. In North Dakota, prior to the guidelines, the Supreme Court had held that incarceration was a voluntary and self-induced act on the part of the obligor which did not justify a modification of the support obligation. Since the guidelines have been in effect, the Supreme Court has held that income should be imputed at minimum wage to an incarcerated obligor who has no other income, is not eligible for work release, and whose earnings are less than minimum wage.

The treatment of incarcerated obligors in other states varies considerably. In some states, incarceration is treated as an involuntary act and, therefore, not a basis for imputation. In other states, courts have held that since incarceration is the result of illegal conduct, which was a voluntary act, imputation is appropriate. A third group of

majority of regional units were basing calculations on the obligor's actual income since an independent entity had previously determined that the obligor was disabled. At least one regional unit was routinely imputing income to the disabled obligor and then leaving it up to the obligor to go to court and make a showing that his or her disability precluded full-time employment.

Fleming said it seemed redundant to require an obligor to make a disability showing to the court when he or she had previously made that same showing to the agency paying the disability payments. Amending the guidelines in this area will standardize operations among the regional child support enforcement units and also save court time.

Moore asked why veterans' disability and railroad disability payments were not also on the list as precluding imputation of income. Oberst said that veterans' disability payments were not included because an obligor can have a certain percentage of disability related to his or her veteran status (e.g., 10% service-related disability) yet still be fully employed. Oberst said this is not intended to mean income must be imputed to someone receiving veterans' disability payments. It just means that someone receiving veterans' disability payments is not categorically exempt from imputation. The obligor in this situation can still try to make a showing to the court that imputation is inappropriate pursuant to section -07(4)(b). She said she will check into how disability determinations are made for railroad workers.

Schaar made a motion to accept the draft with the understanding that railroad disability payments will be added to the list later, if appropriate. Moore seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: In response to Supreme Court decisions (e.g., Verhey v. McKenzie), revise subsection 10 to specify that it may apply even if the obligor's status as "unemployed" is conceded? (Substantive change.)

Fleming said he prepared a draft to amend section -07(10) to clarify that income may be imputed at 100% of previous earnings to an obligor who made a voluntary change in employment for the purpose of reducing his or her support obligation even if that change in employment was becoming unemployed.

Oberst said there is a line of Supreme Court cases wherein the Supreme Court has held that when an obligor is conceded to be unemployed, section -07(3) must be used for imputing income because section -07(9) [now section -07(10)] does not apply. This holding was most recently articulated in Verhey v. McKenzie, 2009 ND 35. It was previously articulated in Minar v. Minar, 2001 ND 74, and Interest of D.L.M., 2004 ND 38. In Verhey, the Supreme Court said it was declining the obligee's invitation to revisit the holdings in Minar and D.L.M.

Fleming said he prepared a draft to amend section -09(2) to create a new rebuttal reason to address the situation where an obligor's ability to pay support is increased because his or her income, on paper, is decreased because of depreciation. He also made conforming changes to sections -09(6), (7), and (8) to specify that the deviation would be added to the presumptively correct child support amount.

Oberst hand out a document [to be inserted at the Miscellaneous tab in the binder] that provides more information about depreciation under North Dakota's guidelines and other states' guidelines.

Under North Dakota's current guidelines, depreciation may not be added back when determining the obligor's income. This has been the rule since 1999. Previously, depreciation expenses were added back to income but the obligor's principal payments on the depreciable items were allowed as deductions. Davis said the previous approach was not very workable; the add-back for depreciation could be taken from the obligor's tax return but the deduction for principal payments depended on the obligor providing documentation that he or she often didn't have.

Oberst said that treatment of depreciation varies considerably from state to state. Some state guidelines allow a deduction for straight-line depreciation only. Other state guidelines do not allow any deduction for depreciation. Still other state guidelines allow for court discretion regarding the treatment of depreciation.

There was discussion regarding how depreciation is a legitimate business expense for tax purposes and that it provides tax advantages. It was also noted that while the actual depreciation expense is not a cash expense for the obligor, the principal payments on the equipment that is being depreciated does represent cash out of pocket for the obligor.

No action was taken on this item. It was tabled for further discussion at the next meeting.

Issue: Establish an "alternative minimum obligation" of $100 per month for obligors who are incarcerated, or still in high school, have no work history, or whose work history for each of the past three years indicates that the obligor has always earned less than minimum wage? Would also require amendment to the schedule of amounts in section -10. (Substantive change.)

Issue: Amend schedule to provide for an "alternative minimum obligation" of $100 per month? (Substantive change.)

Fleming said that except with respect to imputing income to incarcerated obligors – which will be discussed further at the next meeting – it appears that these items were essentially addressed in the general discussion about imputing income.

Child Support Guidelines – Quadrennial Review
Advisory Committee
June 15, 2010
Sakakawea Room, State Capitol Building – Bismarck, ND

Members present: Jim Fleming, Brad Davis, Tom Johnson, Lisa Kemmet, Sherry Mills Moore, Tammy Ness, Paulette Oberst, Cynthia Schaar, and Referee Dale Thompson.

Members absent: Sen. Tom Fischer, Judge Donald Jorgensen, Rep. Robin Weisz, and Bill Woods.

Visitor: Marie Hanken.

Call to order: Fleming, as chairman, called the meeting to order.

Minutes of May 26th meeting: Fleming asked if anyone had any comments to the draft minutes of the May 26th meeting, which had been previously disseminated via email. Hanken noted that her name had been misspelled. No other comments were noted. Fleming said the minutes would be revised to correct the spelling of Hanken's name and then disseminated in final form.

Binder materials: Oberst handed out the following materials to be inserted in the binder – revised Table of Contents, meeting notice [to be inserted at Tab 2], revised list of issues for consideration [to be inserted at Tab 7], and drafts of proposed amendments [to be inserted at Tab 10]. With respect to the revised list of issues for consideration, it has been reorganized into sections for new and pending items, completed items for which drafts had been accepted, and completed items which the committee decided to drop from further consideration.

Oberst said that additional materials would be handed out as additional items are discussed.

Review of issues for consideration, including drafts that had been requested and drafts prepared in advance to facilitate discussion:

Issue: Specifically include "royalties" [and rents] in the list of examples of gross income? (Clarifying change.)

Fleming said he re-drafted section -01(5)(b) to include "royalties" and "rents" in the list of examples of gross income. He asked if the committee wished to discuss this draft.

Oberst said that she has concerns with possibly creating unintended consequences if these items are added to the list. She said that income from rental property and royalties are already included in the definition of "self-employment" found in

section -01(10) and that "net income from self-employment" is already included in the list of examples of gross income. She said that treating rental income and royalties as self-employment income for guidelines purposes ensures that the income will be averaged for up to a five-year period to account for fluctuations and that operating expenses will be deducted. She said that, for example, if "royalties" are listed among the examples of gross income, it will be unclear whether the amount to be included is the gross revenue from royalties without consideration of operating expenses and, if so, this would conflict with their treatment under the self-employment section.

Oberst said that in response to an action item from the May 26th meeting, she had researched whether royalties and rental income are subject to self-employment tax under the Internal Revenue Code. She said it appears that these items are not subject to self-employment tax. Oberst explained that both rental income and royalties are reported on the IRS Schedule E. The revenues are reported, by property, on lines 3 and 4, respectively. Expenses are deducted. Eventually, the "net" rental or royalty income is carried over to the IRS 1040 form where it is recorded on line 17 and is included in the taxpayer's total income. Oberst handed out copies of the IRS 1040 form and Schedule E for illustration purposes [to be inserted at the Miscellaneous tab].

After further discussion, the members agreed not to pursue a change to the guidelines. This issue will be dropped from further consideration.

Issue: Revisit the amount of the deduction for lodging expenses? (Substantive change.)

Fleming said he re-drafted section -01(7)(h) to provide for a deduction from gross income for lodging expenses based on the state rate for lodging reimbursement or actual documented lodging costs. Because the state rate is subject to change, the draft references the state rate without specifying a dollar amount. The current state rate is $63.

Kemmet said she prefers that the dollar amount be specified. That way, an individual doing a guidelines calculation does not have to refer to an external source to determine the amount to deduct at a given time. In response to a question from Oberst, Kemmet confirmed that the lodging deduction on the guidelines calculator on Child Support Enforcement's automated system is a worker-entered number. Therefore, there are no system issues whether the guidelines reference the state reimbursement rate or specify an actual dollar amount.

Johnson noted that the draft allows for alternatives – the state reimbursement rate or actual documented costs. He asked if the intent is that the obligor would be allowed to use the alternative that results in the larger deduction. Thompson said he envisions that the state reimbursement rate would be the default unless either party makes a showing of actual documented costs. For example, if the obligor comes in with documentation showing that his or her actual lodging expenses exceed the state rate, the obligor would

be entitled to a deduction for the actual costs. In the same manner, if the obligee shows that the obligor's lodging expenses are actually less than the state rate, the obligor would be entitled to a deduction for the actual costs.

Moore made a motion to accept the draft, which Schaar seconded. Kemmet made a motion, which Oberst seconded, to substitute Moore's motion with a motion to amend the draft to substitute $63 for the reference to the state reimbursement rate. All members voted in favor of the amendment and then all voted in favor of the amended motion. Thus, this change will be incorporated into the recommended revised guidelines.

Issue: Clarify that if extended visitation applies, the visitation schedule must be set out in the court order and may not be at odds with the definition of extended visitation?

Fleming said he prepared a draft to revise section -02(10), which is in the general instructions, to include a requirement that if extended parenting time is ordered, the order must specify the number of parenting time nights.

Schaar made a motion to accept the draft. Moore seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: Specify that imputed income be reduced not only by actual gross earnings but also by amounts received in lieu of actual earnings, such as unemployment compensation, workers' compensation, retirement or disability payments, veterans' benefits, and earned income tax credit? (Substantive change.)

Fleming said he prepared a draft to revise section -07(1)(a) to include amounts received in lieu of actual earnings (e.g., social security benefits, workers' compensation benefits, unemployment insurance benefits, and veterans' benefits) and earned income tax credits within the definition of "earnings" for purposes of imputing income.

Schaar made a motion to accept the draft. Moore seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: Revisit the deduction for the hypothetical state income tax obligation? (Substantive change.)

Fleming said he prepared a draft to revise section -01(7)(b) regarding the deduction for a hypothetical state income tax obligation. He said he had contacted the state tax department to see if the percentage in the current formula (14% of the hypothetical federal income tax obligation) should be changed to something more in line with current state income tax law. The tax department advised that it is not as simple as changing

the percentage since state income tax liability is no longer calculated as a function of federal income tax liability.

Fleming said that the draft he prepared was based on internal discussion with Oberst and he called on Oberst to explain. Oberst said that for guidelines purposes, a "federal taxable income" amount is determined pursuant to section -01(7)(a)(1)-(3). She said this amount could then be applied to the North Dakota tax table for a single filer to determine a hypothetical state income tax obligation. She said the advantage of this method would be that the starting point is an already-determined amount. Also, there would be a symmetry with the hypothetical federal income tax obligation because both obligations would be based on applying this amount to the applicable tax table. She said the result would still be a hypothetical amount – for example, everyone would be considered a single filer regardless of actual filing status – which is how the calculation was purposefully designed many years ago. She added that changing the method of calculating the hypothetical state income tax obligation would require programming changes to Child Support Enforcement's automated system, to the Supreme Court's guidelines calculator, and, presumably, to any commercial guidelines calculators that have been purchased by the private bar.

Kemmet said that she is not in favor of a change to the guidelines if that would require re-programming the automated system. In the meantime, guidelines calculations would have to be done manually and Kemmet said there are too many calculations for that to be feasible. Moore added that manual calculations are more prone to error.

The members discussed some options, such as leaving the framework for the formula in place but changing the percentage from 14% to, for example, 13%. However, it was determined that choosing another percentage would essentially be arbitrary. At least retaining 14% has a historical basis in state law.

There was consensus among the members that since the deduction is intended to be a hypothetical amount anyway, it can remain unchanged. Thus, this issue will be dropped from further consideration.

Issue: Revisit the equal physical custody provision regarding its effect on parental responsibility for expenses of the children, such as child care and school activity fees. (Substantive change.)

Fleming said he prepared a draft to amend section -02(1) to specifically provide that ordering equal physical custody does not preclude the court from apportioning specific expenses between the parents (e.g., day care costs or school activity fees) or from ordering reimbursement to a parent who has incurred a disproportionate share of these expenses.

Moore said she favors the first part of the draft (i.e., allowing apportionment of specific expenses) because many of the assumptions inherent in the guidelines don't apply in

equal physical custody cases. But she strongly disfavors the reimbursement part. She said this could be a set-up for conflict between the spendy parent who incurs a child-related expense and then turns around and expects the thrifty parent to pay his or her "share" of that cost.

The members discussed further revisions to Fleming's draft, such as removing some lead-in language and removing the second part regarding reimbursement.

Moore made a motion to accept the draft as revised by the discussion. Schaar seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: In light of the recent decision in Davis v. Davis, consider whether to revise subsection 11 regarding crediting children's benefits as a payment toward the support obligation in situations in which that would create an overpayment. (Substantive change.)

Fleming said he prepared a draft to amend section -02(11) to specify that a court has discretion whether to order an obligee to repay the obligor in situations where crediting the obligor for children's benefits results in an overpayment. He said this draft was prepared in response to a recent Supreme Court decision, Davis v. Davis, 2010 ND 67. In Davis, the obligor continued to pay child support while his application for social security disability payments was pending. When his application was eventually approved, his children received lump sum dependent's benefits. The obligor received credit toward his child support obligation for these benefits. Since he was current in his payments, crediting the dependent's benefits resulted in an overpayment. He brought an action for conversion against the obligee to recover the amount of the overpayment. The Supreme Court, with one dissent, sided with the obligor, holding that the plain language in the guidelines requires that the obligor be reimbursed. Fleming said the Supreme Court's decision was unexpected; Child Support Enforcement has previously taken the position that the district court has discretion whether and how to deal with an overpayment created by crediting children's benefits toward the obligation. Fleming added that the Davis decision was based on unusual facts since the obligor was current in his payments for the period of time covered by the lump sum dependent's benefits. In most cases, the obligor is in arrears so there is a debt to which the children's benefits can apply.

There was considerable discussion about the provision in the guidelines and the draft amendment. Ness thinks the provision is needed because otherwise the obligor would be paying twice (by making actual payments and because of the dependent's benefits), which would not be fair. Davis said the provision gives an obligor a disincentive to continue making actual payments while the disability application is pending, even if the obligor has the financial ability to do so. Oberst said the Supreme Court decision is problematic for obligees who may not even know a disability application is pending and, thus, wouldn't know they should be "banking" the actual child support payments in case

the application is eventually approved and lump sum dependent's benefits are received to supplant the actual payments.

The consensus of the members was that the draft should be approved but that some changes to the language should be made first. Moore made a motion to approve the draft provided the "has discretion" language was changed to "may." Schaar seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: Revisit imputation based on 60% of statewide average earnings and 90% of greatest average gross monthly earnings within a 24-month look back period? (Substantive change.)

Oberst explained that this item had been added to the list based on a remark by Sen. Fischer at a meeting of the medical support workgroup, of which he is a member. At that medical support workgroup meeting, it was mentioned that the child support guidelines would soon be up for review. Sen. Fischer asked that imputation be put on agenda for the guidelines advisory committee to discuss.

Fleming said that he had a recent conversation with Sen. Fischer at which Sen. Fischer indicated he had some concerns with the "statewide average earnings" concept as it pertains to imputing income based on earning capacity. Fleming called on Oberst for background information.

Oberst said that one way for the presumption of unemployment or underemployment, which leads to imputation, to be triggered is if an obligor's earnings are less than 60% of statewide average earnings for persons with similar work history and occupational qualifications. Once the presumption has been triggered, 60% of state wide average earnings is also one of the bases for determining how much income is actually to be imputed.

Prior to adoption of the statewide average earnings concept (which was recommended by the guidelines advisory committee that met in 2006), the presumption was triggered by, and the amount to actually be imputed was based on, 60% of earnings in the community for persons with similar work history and occupational qualifications. The "community" was defined as being within 100 miles of the obligor's place of residence.

For many years, a Job Service publication was the source for determining earnings in the community for numerous occupations. However, this publication has gone through several reformattings over the years. Now, it provides regional earnings information for numerous occupations. The only cities (i.e., metropolitan statistical areas) for which information is provided are Bismarck, Fargo-Moorhead, and Grand Forks. Therefore, it is not helpful for determining earnings in, for example, Williston.

Furthermore, since information in this publication is based on survey responses, it is not necessarily complete for each listed occupation. Oberst referred members to the Miscellaneous tab in the binder to see an excerpt from the publication, which had been included for illustration purposes. The excerpt shows earnings for registered nurses in the Bismarck and Fargo-Moorhead metropolitan statistical areas. Therefore, it is not useful for determining earnings for registered nurses in, for example, Grand Forks or Devils Lake or Williston. This is true even though there are obviously some registered nurses in those communities.

Because of the limitations in using the publication to determine earnings in the community, the guidelines advisory committee that met in 2006 recommended a switch from the "community" concept to a "statewide average earnings" concept since that information is widely available, pretty much no matter what the occupation. In other words, the publication could still be useful.

Schaar said that many people don't seem to fully understand the concept of imputing income based on 60% of statewide average earnings. For example, they seem to focus on the statewide average part and ignore the fact that the presumption for un- or under-employment is only triggered if earnings are less than 60% of the statewide average for a particular occupation.

Moore said that while imputation may be unpopular in some circles, it does serve as an impediment for some obligors who might otherwise do something inappropriate. For example, if an obligor knows that income will be imputed based on earning capacity, the obligor might decide to continue working instead of quitting his or her job.

No action was taken on this item. Instead, the item was tabled for further discussion at the next meeting.

Issue: Reconsider appropriateness of imputing income based on minimum wage to incarcerated obligors? (Substantive change.)

Fleming referred members to the Miscellaneous tab in the binder for information regarding incarcerated obligors. In North Dakota, prior to the guidelines, the Supreme Court had held that incarceration was a voluntary and self-induced act on the part of the obligor which did not justify a modification of the support obligation. Since the guidelines have been in effect, the Supreme Court has held that income should be imputed at minimum wage to an incarcerated obligor who has no other income, is not eligible for work release, and whose earnings are less than minimum wage.

The treatment of incarcerated obligors in other states varies considerably. In some states, incarceration is treated as an involuntary act and, therefore, not a basis for imputation. In other states, courts have held that since incarceration is the result of illegal conduct, which was a voluntary act, imputation is appropriate. A third group of

states have abandoned the voluntary versus involuntary analysis and focus on practical issues, such as whether the obligor has other resources available for paying support.

It was noted that in some states, including Minnesota, a support obligation is not established, for even a nominal amount, while an individual is incarcerated.

Kemmet said that giving an incarcerated obligor a break by not establishing a support obligation might be seen as rewarding bad behavior but the reality is that an obligation, even based on minimum wage is likely going to be uncollectible. Oberst said that she would prefer to base an inmate's obligation on his or her actual income only. She said she used to be comfortable with imputing minimum wage to inmates but that was before the minimum wage increased three times in as many years. Now, a minimum wage imputation for one child is $266. Thompson added that often times the incarcerated obligor has multiple cases so the total of all his or her obligations is much more than $266. This results in accumulating thousands of dollars of arrears and often the obligor seems to give up on ever being able to pay off the arrears. Johnson agreed, noting that he has hired individuals who owe arrears and they often have a way of failing to show up for work once the income withholding order catches up with them.

Moore said that maybe the issue isn't whether or how much support is established for inmates but rather how the accrued amount is enforced once the inmate is released. Fleming mentioned that Child Support Enforcement tries to work with current and former inmates, such as with respect to interest suspension and review and adjustment.

Schaar suggested a compromise between imputing at minimum wage and a zero obligation. Oberst said one such compromise might be imputation at one-half of minimum wage, the same as it is for obligors who are still minors who need to get through high school.

No action was taken on this item. Further research on how other state's guidelines address incarcerated obligors was requested for the next meeting.

Issue: Specify that income may not be imputed to an obligor who is receiving Supplemental Security Income payments? (Substantive change.)

Issue: Consider whether to limit imputation of income in situations in which the obligor is receiving social security disability payments (e.g., limit imputation to the number of hours for which a doctor has released the obligor for work). (Substantive change.)

Fleming said he prepared a draft to amend section -07(7) to preclude imputation of income if the obligor is receiving SSI payments, social security disability payments, or workers' compensation payments.

Fleming said this was an area where the regional child support enforcement units were taking inconsistent approaches to the guidelines' calculations for these individuals. The

majority of regional units were basing calculations on the obligor's actual income since an independent entity had previously determined that the obligor was disabled. At least one regional unit was routinely imputing income to the disabled obligor and then leaving it up to the obligor to go to court and make a showing that his or her disability precluded full-time employment.

Fleming said it seemed redundant to require an obligor to make a disability showing to the court when he or she had previously made that same showing to the agency paying the disability payments. Amending the guidelines in this area will standardize operations among the regional child support enforcement units and also save court time.

Moore asked why veterans' disability and railroad disability payments were not also on the list as precluding imputation of income. Oberst said that veterans' disability payments were not included because an obligor can have a certain percentage of disability related to his or her veteran status (e.g., 10% service-related disability) yet still be fully employed. Oberst said this is not intended to mean income must be imputed to someone receiving veterans' disability payments. It just means that someone receiving veterans' disability payments is not categorically exempt from imputation. The obligor in this situation can still try to make a showing to the court that imputation is inappropriate pursuant to section -07(4)(b). She said she will check into how disability determinations are made for railroad workers.

Schaar made a motion to accept the draft with the understanding that railroad disability payments will be added to the list later, if appropriate. Moore seconded the motion and all members voted "yes." Thus, this change will be incorporated into the recommended revised guidelines.

Issue: In response to Supreme Court decisions (e.g., Verhey v. McKenzie), revise subsection 10 to specify that it may apply even if the obligor's status as "unemployed" is conceded? (Substantive change.)

Fleming said he prepared a draft to amend section -07(10) to clarify that income may be imputed at 100% of previous earnings to an obligor who made a voluntary change in employment for the purpose of reducing his or her support obligation even if that change in employment was becoming unemployed.

Oberst said there is a line of Supreme Court cases wherein the Supreme Court has held that when an obligor is conceded to be unemployed, section -07(3) must be used for imputing income because section -07(9) [now section -07(10)] does not apply. This holding was most recently articulated in Verhey v. McKenzie, 2009 ND 35. It was previously articulated in Minar v. Minar, 2001 ND 74, and Interest of D.L.M., 2004 ND 38. In Verhey, the Supreme Court said it was declining the obligee's invitation to revisit the holdings in Minar and D.L.M.

Oberst said she does not agree with the Supreme Court holdings. A voluntary change in employment made for the purpose of reducing one's child support obligation can result from going from employment to unemployment, just as it can result from going from a high-paying job to a low-paying job. She does not believe the guidelines drafters ever intended to preclude section -07(10) from applying to situations in which the obligor is voluntarily unemployed.

No action was taken on this item. The committee requested more information from the decisions in Minar and D.L.M. for the next meeting.

Issue: Amend subdivision j of subsection 2 to clarify that the hardship deviation is not available for continued or fixed expenses due to the obligor's pursuit of post-secondary education? (Substantive change.)

Fleming said he prepared a draft to amend section -09(5) to provide that a downward deviation for circumstances beyond the obligor's control is not applicable if the obligor's ability to pay is impacted because he or she is going to college.

Oberst said this item was added to the list of issues for consideration because an obligor had argued, unsuccessfully, for a deviation based on the fact that he was going to college and had no employment income.

Sentiment was expressed that while getting a college degree might benefit the child in the long run because the parent might be able to get a better job, this should not necessarily occur at the expense of the child's current needs. Moore said that in North Dakota, parents are not required to pay support while their children are in college. Therefore, it would seem inconsistent to give a parent a break regarding his or her support obligation because the parent is going to college.

Schaar said she can agree with the philosophy behind the proposed amendment but thinks it is misplaced. She doesn't see how going to college could ever be considered a circumstance beyond the obligor's control.

Thompson said he does not think all post-secondary education is the same. He said he might be inclined to treat an obligor who is taking a short vocational course differently than an obligor who is pursuing a four-year degree.

No action was taken on this item. Information on how other states' guidelines address the college student obligor was requested for the next meeting.

Issue: Create new rebuttal reason (upward deviation) for obligor whose income is decreased on paper because of depreciation. Required to implement 2009 HB 1329, section 3. (Substantive change.)

Fleming said he prepared a draft to amend section -09(2) to create a new rebuttal reason to address the situation where an obligor's ability to pay support is increased because his or her income, on paper, is decreased because of depreciation. He also made conforming changes to sections -09(6), (7), and (8) to specify that the deviation would be added to the presumptively correct child support amount.

Oberst hand out a document [to be inserted at the Miscellaneous tab in the binder] that provides more information about depreciation under North Dakota's guidelines and other states' guidelines.

Under North Dakota's current guidelines, depreciation may not be added back when determining the obligor's income. This has been the rule since 1999. Previously, depreciation expenses were added back to income but the obligor's principal payments on the depreciable items were allowed as deductions. Davis said the previous approach was not very workable; the add-back for depreciation could be taken from the obligor's tax return but the deduction for principal payments depended on the obligor providing documentation that he or she often didn't have.

Oberst said that treatment of depreciation varies considerably from state to state. Some state guidelines allow a deduction for straight-line depreciation only. Other state guidelines do not allow any deduction for depreciation. Still other state guidelines allow for court discretion regarding the treatment of depreciation.

There was discussion regarding how depreciation is a legitimate business expense for tax purposes and that it provides tax advantages. It was also noted that while the actual depreciation expense is not a cash expense for the obligor, the principal payments on the equipment that is being depreciated does represent cash out of pocket for the obligor.

No action was taken on this item. It was tabled for further discussion at the next meeting.

Issue: Establish an "alternative minimum obligation" of $100 per month for obligors who are incarcerated, or still in high school, have no work history, or whose work history for each of the past three years indicates that the obligor has always earned less than minimum wage? Would also require amendment to the schedule of amounts in section -10. (Substantive change.)

Issue: Amend schedule to provide for an "alternative minimum obligation" of $100 per month? (Substantive change.)

Fleming said that except with respect to imputing income to incarcerated obligors – which will be discussed further at the next meeting – it appears that these items were essentially addressed in the general discussion about imputing income.

Since there was no further discussion on these items, they will be dropped from further consideration.

Next meeting: Fleming reminded members that they had been asked to save June 29th as a possible date for the third meeting. He said that date may pose a conflict for Rep. Weisz. Fleming asked members to look at their calendars for July to determine an alternative to June 29th. Oberst noted that a July meeting will have to be held early enough to allow Child Support Enforcement to complete the regulatory analysis and other required documents and still meet the August 1st deadline to commence rulemaking. The third meeting was tentatively scheduled for July 19th. (Post-meeting note: The third meeting was officially scheduled for June 29th. Members are asked to keep open July 19th in case a fourth meeting is needed.)

Action Items:

1. Do additional research on how other state's guidelines address incarcerated obligors.

2. Research disability determinations for railroad workers and make further revisions to section -07(7), if appropriate.

3. Do additional research on the Supreme Court's holdings and rationales in Minar and D.L.M.

4. Research how other states' guidelines address the college student obligor.