Child Support Guidelines

Quadrennial Review

Meeting Minutes – June 1, 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: Mary Cervinski, Laura Hermanson.

Introductions: Fleming asked each member to introduce himself or herself. He explained that about half of the committee members are employees of the child support program, including Marklevitz who is representing the custodial parent perspective. Only four of the Child Support employees, including Marklevitz, will be voting members. All the non-Child Support participants will be voting members.

Overview of legal authorities and rulemaking process: Fleming provided a high-level overview of the process whereby the guidelines are amended. The guidelines are agency rules so there is a statutory process that involves an opportunity for public comment on proposed amendments, review by the Attorney General's office as to legality, and consideration by the Administrative Rules Committee of the Legislative Assembly. It is also customary to hold the proposed amendments open through the next upcoming legislative session in case any bills are passed that would affect the substance of the guidelines. If so, the changes required by those bills can be included in the pending rulemaking rather than having to start a new rulemaking project. Thus, based on historical practices and timeframes, amended guidelines will likely become effective in mid-2023.

Begin discussion of issues for consideration: By way of background, Fleming explained that Child Support staff in the legal and guidelines units have identified a list of issues for consideration for potential amendments to the guidelines. That list is the source document for the meeting's discussion. Fleming noted that the guidelines are applicable in IV-D (Child Support) cases and nonIV-D cases alike so the list of identified issues need not be considered final. He invited non-Child Support members to contact him with their ideas for additional issues for consideration. Any additional ideas will be included on an updated list for discussion at a subsequent meeting.

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

This item was tabled for discussion at a subsequent meeting.

Item #2. Specify how to assess a value for in-kind income.

Schaar said that the issue of how to value in-kind income doesn't happen often. In her experience, it is most often seen in cases where the obligor is treated as an employee on a family farm and is furnished with housing, utilities, and transportation. She said that private attorneys and courts are taking different approaches to determining a value for these items (e.g., housing is valued according to rents in the community).

Kemmet and Goulet said that another perk sometimes provided by an obligor's employer is use of a cell phone, which might be reflected in the obligor's paystub.

In response to a question from Woods about whether it would be helpful to know how other states treat in-kind income under their guidelines, Fleming said that would be doubtful since guidelines are all state-specific. Oberst noted that North Dakota's definition of in-kind income limits applicability to employment or income-producing situations and not to family or personal situations. She also speculated that difficulties in valuing housing, etc., are not necessarily caused by lack of a formula within the guidelines but rather by failure to provide evidence for the court to consider.

By consensus, the committee decided not to pursue this item further.

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

For discussion purposes, Oberst shared a document she had prepared showing how health insurance is addressed under the current guidelines (as a deduction from gross income according to a formula) versus how it might be addressed in amended guidelines (using the same formula but as a dollar-for-dollar downward adjustment to the child support amount). Under her scenario, the child support amount would be significantly reduced if health insurance is considered as a downward adjustment to the child support amount. She said she sees this as a two-part inquiry: from a public policy perspective, does it make sense to increase the deduction for health insurance and, if so, how should it be accomplished.

Committee members had different opinions. Davis said that adjusting the child support amount to account for health insurance means that the child is effectively paying for his or her own insurance coverage. Woods thinks that the proposed change would weaponize health insurance because it would reduce the child support obligation for an obligor who wants to pay less in child support. Goulet noted that obligors often have fluid job histories, which affects the availability and cost of employer-provided health insurance. This means obligees are distrustful that obligors will provide it on a sustained basis. Also, if the premium is high, it could drive the child support down to zero.

Fleming said the concept made him nervous. First, because some obligors would rather provide health insurance than pay child support to an ex-spouse and, second, because these obligors would be motivated to make purchasing decisions about health insurance (e.g., higher deductible to secure a lower premium).

On the other hand, Elsberry thinks that increasing the deduction for health insurance would encourage parents to provide insurance, which would save money for the families in the form of lower out-of-pocket costs. She said that during negotiations, health insurance is really important and she speculated that some obligees would be willing to take a hit and receive less child support in exchange for getting health insurance coverage for the children.

Schaar said that a possible solution would be to create a deviation when the obligor is providing health insurance and the premium is excessive. Peterson wondered if there could be a cap on the adjustment for health insurance so it wouldn't wipe out the child support completely (e.g., no more than a fifty percent reduction of the child support amount).

Fleming said that even if the guidelines are changed, the state law still requires that the obligee be ordered to provide health insurance if its available at no or nominal cost and, if not, then the obligor is responsible for the coverage if it is available at reasonable cost. He noted that Child Support is planning on doing separate rulemaking regarding medical support which is expected to alter which parent will be ordered to provide the insurance coverage and when. It would be logical to consider the deduction for health insurance under the guidelines in the context of the separate rulemaking.

The committee did not take any action on this item. Fleming suggested that members think about it before the subsequent meetings and we can revisit the item to see if there is a way to achieve consensus.

Item #4 and Item #5. Update the deduction for mileage and for lodging expenses.

Fleming said that the amounts allowed as deductions are derived from OMB policies for reimbursement for use of a personal vehicle for professional travel and for lodging. Since these amounts, especially reimbursement for mileage, are subject to change more than once every four years, Roers asked why the guidelines don't just reference the OMB policies rather than specify amounts. Fleming said he considered this as an alternative as well. Child Support would make an effort to keep informed about changes to OMB policies and would publish updated amounts on our website so they would be available to practitioners. Kemmet said she didn't want to go outside of the guidelines to look for the amounts allowed as deductions.

After some additional discussion, Elsberry made a motion, seconded by Roers, to amend the guidelines to increase the mileage deduction to 58.5 cents per mile and the lodging deduction to $96 per night. All voting members voted "yes" so the motion passed. Oberst will prepare drafts for review at a subsequent meeting.

Item #6. Revise the definition of self-employment.

This item was tabled for discussion at a subsequent meeting.

Item #7. Create a general instruction authorizing the court to accept an agreement between the parties for the obligor to pay more than the presumptively correct amount.

The discussion on this item had three parts. First, there was a question whether the situation should be addressed as a deviation instead of in the general instructions.

Second, some members were concerned that this authorization would be exploited in equal residential responsibility cases as a way to get the respective obligations to net to zero.

Third, Elsberry said that, in the interests of fairness, if parties can stipulate to the obligor paying more than the presumptively correct amount, they should likewise be able to stipulate to paying less.

Fleming said he does not consider this to be an area that needs fixing but that if a change is proposed, he would want it to be inapplicable in equal residential responsibility cases.

Elsberry made a motion to amend the guidelines as presented in the issue for consideration. The motion died for lack of a second.

Since there was no further discussion, this issue will be dropped from further consideration.

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

Oberst noted that the guidelines already specify that certain types of nonrecurring income are excluded from gross income. Specifically, atypical overtime and nonrecurring bonuses are excluded provided the obligor/employee doesn't have significant influence or control over them. Nonrecurring capital gains are also expressly excluded from gross income.

Oberst went on to explain that when this issue was identified internally, the example provided was an obligor who withdrew funds from a 401k plan. Kemmet agreed that this is a scenario she also sees when she is doing guidelines calculations. It was observed that withdrawing funds from a 401k plan is a drastic action, given the potential penalties for early withdrawals and tax consequences, and usually indicates a significant financial need.

The discussion shifted from how to treat nonrecurring income to whether more types of nonrecurring income, such as early withdrawals from retirement accounts, should be expressly excluded from consideration.

The committee did not put this item to a vote but the consensus was to consider draft amendments excluding withdrawals from retirement accounts from gross income at a subsequent meeting.

Item #9. When income fluctuates, limit the period of time sufficient to reveal the likely extent of fluctuations to five years.

Davis said he would like to align the general instruction regarding fluctuating income with the provision in the self-employment section that provides for averaging self-employment income over a five-year period. He said that, for most, incomes tend to rise over time so the farther back one looks for fluctuations, the more likely to include lower incomes that are no longer accurate.

Davis made a motion, seconded by Roers, to limit consideration of fluctuating income to five years. All voting members voted "yes" so the motion passed. Oberst will prepare a draft for review at a subsequent meeting.

Item #10. Move language about specifying the number of overnights in extended parenting time cases to section -08.1.

Discussed in conjunction with Item #25, below.

Item #11. Limit the applicability of the split custody provision to cases where there is a court order for split primary residential responsibility.

In response to a question from Sen. Roers, Oberst explained that "split custody" means the parents have multiple children together and each parent has primary physical custody for at least one child.

Under the current guidelines, a support obligation is determined for each parent for the children in the other parent's home. Then the respective obligations are offset, for payment purposes, so that the parent with the greater obligation pays the difference to the parent with the lesser obligation.

Several members advocated for requiring that there be a court order for split primary residential responsibility before calculating a child support obligation for each parent and then offsetting the obligations. Requiring a court order would align split custody cases with equal residential responsibility cases, where the guidelines have always required that there be a court order for each parent to have equal residential responsibility of their children. Having a requirement for a court order would lessen the uncertainty about whether the split custody calculation is appropriate, especially when the parents disagree about which parent has physical custody of which children.

Goulet noted operational challenges when one parent applies for services and asserts that informal split custody exists. If Parent A applies for services to establish support for Child 1, then Parent B is the obligor as to Child 1. However, Parent A is the obligor as to Child 2 and we don't have income information to determine Parent A's obligation. Oberst noted that we have the same challenges obtaining income information in equal residential responsibility cases, despite the requirement for a court order.

Schaar said that when a parent applies for services and asserts that informal equal residential responsibility exists, she will prepare guidelines calculations in the

alternative: one set of calculations based on the applicant for services being the "custodial parent" and the second set based on the parties having equal residential responsibility. Then the court will determine if equal residential responsibility exists and issue an order accordingly.

Fleming said requiring a court order in equal residential responsibility cases makes sense because of the nuances. It could be a close call as to whether there is equal residential responsibility and the court is in a position to make the call. He said that in a typical case where a parent applies for our services and asserts that he or she is the custodial parent, we take the applicant's word and pursue support against the other parent accordingly. We don't require the applicant to have a court order for custody before we will proceed. He doesn't see why there is a need for a court order when an applicant for services asserts that he or she has physical custody of at least one of the parties' joint children.

No action was taken by the committee so this item will be dropped from further consideration.

Items #12 through #16. All related to self-employment.

These items were tabled for discussion at a subsequent meeting.

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

Under the current guidelines, for purposes of determining if an obligor is presumed to be underemployed, one of the tests is whether the obligor's earnings are less than 60 percent of statewide average earnings for persons with similar work history and occupational qualifications. Likewise, when an obligor is unemployed or underemployed, the general rule for imputing income includes a prong for imputing an amount equal to 60 percent of North Dakota's statewide average earnings for persons with similar work history and occupational qualifications.

Davis said that often obligors have extensive work histories; they may have worked in several different fields, sometimes for long periods of time and other times just for a short while. He said that he doesn't want to impute income to someone based on a job he or she had for only six months and six years ago.

A side issue was raised regarding occupations that require licensure as a qualification. For example, would it be appropriate to impute income based on 60 percent of statewide average earnings for a nurse if the individual had lost his or her nursing license?

The committee did not put this item to a vote but there was consensus to consider draft amendments that the work history have been within the past three years and held for at least 12 months.

Item #18. Consider how a large increase in federal minimum wage would affect ability to pay an obligation based on a minimum wage imputation.

Oberst said that the "Raise the Wage" bill before Congress would increase the federal hourly minimum wage to $15 per hour over five years. She shared a document she had prepared that compared the support amount for one child based on the current minimum wage amount ($7.25 per hour) versus hypothetical minimum wage amounts of $10 per hour, $12 per hour, and $15 per hour. Roers said that she doesn't think Congress will pass a bill increasing the federal minimum wage for at least the next six years (i.e., not during the remainder of the current administration or during the next administration).

Schaar said she isn't aware of any jobs in her area that actually only pay minimum wage. Even fast food restaurants are having to pay more than minimum wage to attract workers.

No action was taken on this item and it will be dropped from further consideration.

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

Goulet had identified this item as an issue for consideration. She suggested two options for how the item might be addressed. The first is to eliminate 90 percent of previous earnings as a basis for imputing income. The second is to impute at 75 percent of previous earnings instead of 90 percent.

Fleming noted that even before imputing income was authorized under the guidelines, the Supreme Court had held that obligors needed to pay support based on their ability and not just their inclination.

Regarding the lookback period for capturing previous earnings, Elsberry suggested that we might shorten it to one year. Under the current guidelines, the lookback period is the current calendar year and the two previous calendar years. The lookback period had been shortened at one time so as to not capture so many "old" earnings. This proved to be unworkable because, based on timing issues, sometimes it wasn't possible to get a tax return for the obligor to document the previous earnings. Thus, a longer lookback period was restored to increase the likelihood of being able to get at least one tax return for the obligor.

A lot of the discussion on this item was focused on obligors who have worked in the oil patch. Oil patch employment is highly prone to booms and busts. During boom periods, employment is plentiful and earnings are high, especially when overtime is factored in. Accordingly, child support obligations for employees in the oil patch are also high. On the other hand, during bust periods, which can come on suddenly, layoffs occur and it is unlikely that an obligor will be able to replicate oil patch earnings at another type of job, which means the obligor will probably fall behind on child support payments.

Davis also noted that oil patch jobs are typically very physical and sometimes obligors cannot handle the physical demands on a long-term basis, which means they end up looking for work in other fields for less money. Goulet also mentioned that there is a drug culture among oil patch workers and some obligors are unwilling to go back to work in the oil patch because the environment triggers their addiction issues. Finally, she noted that oil patch technology improves with each boom period, which means that fewer bodies are needed to do the work so employers can be more selective in who they hire.

Goulet said that there is a place for imputing income but it can result in inflated orders that are not collectible. And since Child Support is doing reviews at 18-month intervals, we are still pulling in older and higher income through the lookback period. As an aside, Goulet said that the statewide average earnings for oil patch workers as reported in the Job Service North Dakota publication are understated. The reported earnings probably represent a base but almost surely don't take overtime into account.

The group considered whether there would be merit in reducing 90 percent for previous earnings to 75 percent and at the same time increasing the percent for statewide average earnings from 60 percent to 75 percent. This way, the two prongs would be aligned. Kemmet suggested that we look at some hypothetical calculations for 75/75 prongs. Accordingly, Oberst will prepare some scenarios for review at the next meeting.

Item #20. Specify what "proceeding" means for purposes of the lookback period.

Goulet explained that she had previously asked Oberst for input on the meaning of "proceeding" in a review and adjustment case and Oberst said it meant the date of the motion. Fleming said he agreed. Goulet pointed out that this interpretation leads to a difference in establishment cases versus review and adjustment cases. In establishment cases, the proceeding is commenced when the noncustodial parent is served with the summons and complaint. It is this point at which the noncustodial parent is on notice that there will be a support obligation. In review and adjustment cases, the point at which the parties are sent the post-review findings is when they are on notice that the support obligation will change. The actual motion to adjust the obligation may not be served until months after the post-review findings.

Kemmet and Suhr said that there would not be an issue if the case proceeds promptly from post-review notice to motion; issues arise when and because of delays. Oberst cautioned against conflating the starting point for the lookback period for imputing income with the effective date of the adjusted obligation. Davis said that there are often operational issues when completing a calculation based on imputed income near the end of a calendar year. As one crosses over from one year to the next, an "old" year drops off the lookback period so there is a dilemma whether to complete the calculation near the end of the year or hold it until the beginning of the next year.

Fleming suggested deleting the "before commencement of the proceeding" language from the guidelines. In effect, the lookback period would be determined by when the

practitioner sits down to do the calculation. He made a motion accordingly, which was seconded by Roers. All voting members voted "yes" so the motion passed. Oberst will prepare a draft for review at a subsequent meeting.

Item #21. Require a doctor's statement that the obligor is unable to work and that the obligor has applied for social security benefits before imputing income can be precluded.

Davis, Kemmet, and Suhr described the operational difficulties with applying this particular provision in the guidelines as currently written. As currently written, income may not be imputed to an obligor if he or she has current medical records confirming that the obligor has a sufficiently severe disability that precludes gainful employment that would produce at least a minimum wage income.

The members said that the records don't always come from a doctor. They are not sure if those records should be considered if they are from, for example, a social worker. Second, they said it is rare that medical records will actually expressly say that the obligor is unable to work. More likely, the records will say that the obligor cannot lift more than XX pounds or sit or stand or more than XX hours. This means the records are open to interpretation as to whether or to what extent the obligor is unable to work. Third, some obligors provide the equivalent of a banker's box of medical records, including every x-ray ever taken, which means that the worker has to sort through them to try to determine which, if any, are relevant.

Roers said that medical records need not come only from medical doctors. In addition to medical doctors, other medical professionals (e.g., nurse practitioners, occupational or physical therapists) have the training and qualifications to assess whether or to what extent their patients/clients are unable to work. She added that it is not a surprise that medical professionals usually don't come right out and say that an individual cannot work; the question of ability to work is more complex.

Fleming suggested that the issue of receiving voluminous records to sort through could be addressed by changing the guidelines to replace "records" with "a statement." Davis made a motion accordingly, which was seconded by Woods and passed by a voice vote. Oberst will prepare a draft for review at a subsequent meeting.

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 described the case that caused her to identify this item as an issue for consideration. In her case, the obligor was unemployed but was receiving enhanced unemployment benefits to the point where his "earnings" for purposes of imputing income exceeded a minimum wage equivalent. She thought it was appropriate to impute income the obligor but also thought the guidelines did not allow for it.

After hearing the explanation, members understood the issue but had doubts that amending the provision in question would solve the problem. Members also struggled with the language in the provision in question because it is written as a double negative, which made it confusing to parse.

Taking the committee's discussion into consideration, Goulet offered to draft some language for consideration at a subsequent meeting.

Item #23. Preclude imputing income if the obligor has an 80 percent disability rating, down from a 100 percent rating.

Roers said that because of how the Veteran's Administration calculates disability ratings, it is almost impossible for an obligor to receive a 100 percent rating. Davis made a motion to replace "100" with "80," which was seconded by Roers and passed by a voice vote. Oberst will prepare a draft for review at a subsequent meeting.

Item #24. For extended parenting time, replace "to exceed an annual total of 100 overnights" with "101 or more overnights."

Goulet explained that she identified this item as an issue for consideration based on a case wherein the obligor's parenting plan specified exactly 100 overnights for the year. The obligor's private attorney asserted that the obligor was entitled to the adjustment for extended parenting time.

Members expressed some mixed feelings about making the change since the language, as written, is not ambiguous. Schaar thought that making a change would do no harm. Fleming and Oberst did not want to make a change for the reason that it would appear to be pandering to a frivolous argument (i.e., would give the erroneous impression that the private attorney's argument had credence in the first place).

The committee took no action so this item will be dropped from further consideration.

Item #25. Disallow the adjustment for extended parenting time if the number of parenting time nights is not specified in the order.

Davis, Kemmet, and Suhr explained that it is problematic to calculate the extended parenting time adjustment if the number of overnights is not specified in the order and they urged disallowing the adjustment if the number is not specified. Schaar agreed that the calculation is difficult if the number of visitation nights isn't specified. As an example, Davis described a parenting plan wherein the obligor's summer parenting time begins when school lets out; he said he has no idea when school ends, which means he has no idea how to count the number of parenting time overnights.

The guidelines already include a general instruction that the order must specify the number of parenting time overnights. Elsberry said it would be unfair to deny an extended parenting time adjustment when the threshold is met just because the practitioner overlooked a single sentence in the general instructions.

Oberst said she understands the difficulty in applying the provision when the number of overnights is not specified. Also, to determine the adjustment, it's not enough that the threshold is met; the number of overnights, once the threshold is met, is part of the calculation. Thus, it's not just a matter of scanning the parenting plan to get a sense of whether the threshold is met; the threshold is just the beginning.

Having said this, Oberst is concerned about unintended consequences if the adjustment is disallowed because the number of parenting time nights isn't specified. The threshold for the extended parenting time adjustment was significantly liberalized effective January 1, 2019. There are sure to be orders entered before that date that didn't specify the number of parenting time nights because the previous thresholds were not met so it was not necessary to get to that level of detail. However, if such an order was up for review and adjustment and the current threshold is met, the obligor should get the benefit of the adjustment, even if it means counting up the number of overnights.

Fleming said that if the guidelines are amended to disallow the adjustment when the number of overnights are not specified in the order, it would have to be on a prospective basis. He would not be comfortable with retroactive effect (to January 1, 2019).

The committee did not take formal action on the item but will consider a draft at a subsequent meeting that would disallow the adjustment on a prospective basis when the number of parenting overnights is not specified in the order. Oberst will prepare a draft for review at a subsequent meeting.

Items #26 through #31. All relating to deviations.

These items were tabled for discussion at a subsequent meeting.

Item #32. Consider whether to raise or lower the self-support reserve.

The current self-support reserve is $800 or less, which means that obligors whose income is within this range will have a zero-dollar obligation. The self-support reserve is pegged to the SSI standard payment for an individual. For 2022, the SSI standard payment for an individual is $841. Based on rounding conventions under the guidelines, retaining the self-support reserve at "$800 or less" remains appropriate. However, based on a discussion between Fleming and Roers, it was determined that we will look at the SSI standard payment for an individual when it is updated for 2023. Since the rulemaking will still be open at the beginning of 2023, the schedule of amounts can still be amended to line up with the new SSI standard payment, if necessary.

Item #33. Update cross-reference.

The section on determining child support for children in foster care or guardianship care incudes a cross-reference to N.D.C.C. ch.27-20, the Uniform Juvenile Court Act. This chapter was repealed by the 2021 Legislative Assembly and replaced by N.D.C.C. ch. 27-20.1, Guardianship of a Child. It was moved by Roers, seconded by Elsberry, and

passed by a voice vote to update the cross-reference in the guidelines. Oberst will prepare a draft for review at a subsequent meeting.

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

This item will be discussed at a subsequent meeting.

Item #35. Labor market analysis.

This item is required by federal regulations and was discussed along with the items on imputing income. Oberst shared information from JSND publications on unemployment rates; annual wages by county, region, and occupation; professions with greatest demand for workers; skill levels of occupations; and benefits offered by employers. There was no discussion and no action taken on this item.

Item #36. Impact of guidelines on obligors and obligees with incomes below 200 percent of poverty level.

This item will be discussed at a subsequent meeting.

Item #37. Analysis of factors that influence employment and compliance rates.

This item is required by federal regulations and was discussed along with the items on imputing income. Oberst shared information on various barriers to employment, which can be expected to negatively impact compliance with support orders, and some programs that are in place to address some of the barriers (e.g., Child Support's PRIDE program). There was no discussion and no action taken on this item.

Item #38. Analysis of case data on default and imputed orders.

This item will be discussed at a subsequent meeting.

Item #39. Analyze cost of raising children.

This item will be discussed at a subsequent meeting.

Item #40. Analyze application of and deviations from the guidelines.

This item will be discussed at a subsequent meeting.

Date of next meeting: The next meeting is scheduled for Wednesday, June 8, 2022.