CHAPTER 75-02-04.1
CHILD SUPPORT GUIDELINES
ANNOTATED

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75-02-04.1-01. Definitions.

1. "Child" means any child, by birth or adoption, to whom a parent owes a duty of support.

2. "Child living with the obligor" means the obligor's child who lives with the obligor most of the year.

3. "Children's benefits" means a payment, to or on behalf of a child of the person whose income is being determined, made by a government, insurance company, trust, pension fund, or similar entity, derivative of the parent's benefits or a result of the relationship of parent and child between such person and such child. Children's benefits do not mean benefits received from public assistance programs that are means tested or provided in the form of subsidy payments made to adoptive parents.

4. a. "Gross income" means income from any source, in any form, but does not mean:

   (1) Benefits received from public assistance programs that are means tested such as the temporary assistance for needy families, supplemental security income, and supplemental

nutrition assistance programs, or that are provided in the form of subsidy payments made to adoptive parents;

(2) Employee benefits over which the employee does not have significant influence or control over the nature or amount unless:

(a) That benefit may be liquidated; and

(b) Liquidation of that benefit does not result in the employee incurring an income tax penalty;

(3) Child support payments; or

(4) Atypical overtime wages or nonrecurring bonuses over which the employee does not have significant influence or control.

b. Examples of gross income include salaries, wages, overtime wages, commissions, bonuses, employee benefits, currently deferred income, dividends, severance pay, pensions, interest, trust income, annuities income, gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, distributions of retirement benefits, receipt of previously deferred income to the extent not previously considered in determining a child support obligation for the child whose support is under consideration, veterans' benefits (including gratuitous benefits), gifts and prizes to the extent they annually exceed one thousand dollars in value, spousal support payments received, refundable tax credits, value of in-kind income received on a regular basis, children's benefits, income imputed based upon earning capacity, military subsistence payments, and net income from self-employment.

c. For purposes of this subsection, income tax due or paid is not an income tax penalty.

5. "In-kind income" means the receipt from employment or income-producing activity of any valuable right, property or property interest, other than money or money's worth, including forgiveness of debt (other than through bankruptcy), use of property, including living quarters at no charge or less than the customary charge, and the use of consumable property or services at no charge or less than the customary charge.

6. "Net income" means total gross annual income less:

a. A hypothetical federal income tax obligation based on the obligor's gross income, reduced by that part of the obligor's gross income that is not subject to federal income tax and reduced by deductions allowed in arriving at adjusted gross income under the Internal Revenue Code, and applying:

(1) The standard deduction for the tax filing status of single;

(2) One exemption for the obligor;

(3) (a) One additional exemption for each child, as defined in this section, that the obligor is allowed to claim pursuant to a court order unless the obligor and obligee alternate claiming the exemption for the child pursuant to the court order, in which case, an amount equal to one-half of the exemption; and

(b) For each child, as defined in this section, for whom there is no court order allocating the exemption or for whom it is unknown whether there is such an order, an amount equal to one-half of the exemption if that child is actually claimed on a disclosed tax return or an amount equal to one-half of the exemption if a tax return is not disclosed; and

(4) Tax tables for a single individual for the most recent year published by the internal revenue service, reduced by one child tax credit for each child's exemption considered under paragraph 3, provided such child is a qualifying child for purposes of the child tax credit;

b. A hypothetical state income tax obligation equal to fourteen percent of the amount determined under subdivision a without reduction for child tax credits;

c. A hypothetical obligation for Federal Insurance Contributions Act (FICA), Railroad Retirement Tax Act (RRTA) tier I and tier II, medicare, and self-employment tax obligations based on that part of the obligor's gross income that is subject to FICA, RRTA, medicare, or self-employment tax under the Internal Revenue Code;

d. A portion of premium payments, made by the person whose income is being determined, for health insurance policies or health service contracts, intended to afford coverage for the child or children for whom support is being sought, determined by:

(1) If the cost of single coverage for the obligor and the number of persons associated with the premium payment are known:

(a) Reducing the premium payment by the cost for single coverage for the obligor;

(b) Dividing the difference by the total number of persons, exclusive of the obligor, associated with the premium payment; and

(c) Multiplying the result times the number of insured children for whom support is being sought; or

(2) If the cost of single coverage for the obligor is not known:

(a) Dividing the payment by the total number of persons covered; and

(b) Multiplying the result times the number of insured children for whom support is being sought;

e. Payments made on actual medical expenses of the child or children for whom support is sought to the extent it is reasonably likely similar expenses will continue;

f. Union dues and occupational license fees if required as a condition of employment;

g. Employee retirement contributions, deducted from the employee's compensation and not otherwise deducted under this subsection, to the extent required as a condition of employment;

h. Employee expenses for special equipment or clothing required as a condition of employment or for lodging expenses incurred when engaged in travel required as a condition of employment (limited to sixty-three dollars per night); and

i. Employer reimbursed out-of-pocket expenses of employment, if included in gross income, but excluded from adjusted gross income on the obligor's federal income tax return.

7. "Obligee" includes, for purposes of this chapter, an obligee as defined in North Dakota Century Code section 14-09-09.10 and a person who is alleged to be owed a duty of support on behalf of a child.

8. "Obligor" includes, for purposes of this chapter, an obligor as defined in North Dakota Century Code section 14-09-09.10 and a person who is alleged to owe a duty of support.

9. "Parent with primary residential responsibility" means a parent who acts as the primary caregiver on a regular basis for a proportion of time greater than the obligor, regardless of descriptions such as "shared" or "joint" parental rights and responsibilities given in relevant judgments, decrees, or orders.

10. "Self-employment" means employment that results in an obligor earning income from any business organization or entity which the obligor is, to a significant extent, able to directly or indirectly control. For purposes of this chapter, it also includes any activity that generates income from rental property, royalties, business gains, partnerships, trusts, corporations, and any other organization or entity regardless of form and regardless of whether such activity would be considered self-employment activity under the Internal Revenue Code.

11. "Split parental rights and responsibilities" means a situation where the parents have more than one child in common, and where each parent has primary residential responsibility for at least one child.

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Law Implemented: NDCC 14-09-09.7, 50-09-02(16); 42 USC 667

Equitable Adoption

The child support guidelines do not preclude the imposition of a child support obligation on one who has equitably adopted a child. ***Johnson v. Johnson***, 2000 ND 170, 617 N.W.2d 97.

Gross Income

The guidelines definition of income is very broad and includes income from any source. ***Shipley v. Shipley***, 509 N.W.2d 49 (N.D. 1993); ***Helbling v. Helbling***, 541 N.W.2d 443 (N.D. 1995); ***Longtine v. Yeado***, 1997 ND 166, 567 N.W.2d 819.

The definition of gross income under the child support guidelines is very broad and specifically includes "gifts and prizes to the extent they annually exceed one thousand dollars in value." ***Lohstreter v. Lohstreter***, 2001 ND 45, 623 N.W.2d 350.

Gross income includes all income, including temporary work. ***Dufner v. Dufner***, 2002 ND 47, 640 N.W.2d 694.

Under the guidelines, a court must first calculate an obligor's gross income. ***Richter v. Houser***, 1999 ND 147, 598 N.W.2d 193.

Income under the guidelines is broad and is meant to include any form of payment to the obligor, regardless of source, as long as such payment is not specifically excluded under the guidelines. ***Entzie v. Entzie***, 2010 ND 194, 789 N.W.2d 550.

Deductions

There is no deduction from gross income for nonrecurrent payments. ***Helbling v. Helbling***, 541 N.W.2d 443 (N.D. 1995).

Employee Benefits

Trial court did not err in failing to include obligor's employer's contributions to obligor's retirement account in obligor's gross income where obligee did not show that obligor had significant influence or control over the nature or amount of the contributions or that they could be liquidated without a tax penalty. ***Oldham v. Oldham***, 2004 ND 62, 667 N.W.2d 196.

Trial court erred by not considering employment benefits and in-kind income received by obligor where obligor's corporation pays many of his personal expenses and provides benefits including payment of his personal legal expenses and medical and life insurance. ***Halberg v. Halberg***, 2010 ND 20, 777 N.W.2d 872.

Loans

Loans are not included in the definition of gross income. ***Lohstreter v. Lohstreter***, 2001 ND 45, 623 N.W.2d 350.

Moving Expenses

Employer reimbursement of moving expenses is a source of income that should be included in child support calculations. ***Helbling v. Helbling***, 541 N.W.2d 443 (N.D. 1995).

Relocation expense reimbursement is not proper measure of moving expense deduction in calculating net income where obligor failed to prove moving expenses. ***Id***.

Overtime

It is reversible error for court not to consider overtime in calculation of gross income. ***Shaver v. Kopp***, 545 N.W.2d 170 (N.D. 1996).

Personal Injury Awards

Personal injury settlement is includable in gross income. Guidelines do not authorize a deduction for nonrecurrent payments and our law and public policy dictate that children should share in the obligor's receipt of such payment. ***Otterson v. Otterson***, 1997 ND 232, 571 N.W.2d 648.

Trial court did not abuse its discretion in allocating obligor's lump sum personal injury settlement when it divided the net settlement amount by the number of months remaining in the child's minority and found that the resulting amount was deemed to be available to the obligor for child support purposes. ***Dupay v. Dupay***, 2010 ND 87, 782 N.W.2d 42.

Spousal Support

For purposes of computing child support, gross income includes spousal support payments received by the obligor. ***Mahoney v. Mahoney***, 1997 ND 149, 567 N.W.2d 206; ***Corbett v. Corbett***, 2001 ND 113, 628 N.W.2d 312; ***Heinz v. Heinz***, 2001 ND 147, 632 N.W.2d 443.

If a noncustodial parent is entitled to spousal support, the child support guidelines necessarily contemplate that trial courts decide the spousal support issue before deciding the spousal support recipient's child support obligation. When the child support guidelines are considered in the context of a spousal support award, an award of spousal support calculated primarily to offset and negate a child support obligation is inappropriate. ***Corbett v. Corbett***, 2001 ND 113, 628 N.W.2d 312.

In-Kind Income

In-kind income from a spouse may not be included in the obligor's income. The 1995 amendments to the guidelines were intended to replace consideration of in-kind income from a spouse with the process of imputing income based on earning capacity under § 75-02-04.1-07. ***Otterson v. Otterson***, 1997 ND 232, 571 N.W.2d 648.

A party seeking to have items included as in-kind income must give evidence of the value of the items before the court may include those items in calculating an obligor's gross income. ***Wilhelm v. Wilhelm***, 1998 ND 140, 582 N.W.2d 6; ***Schiff v. Schiff***, 2000 ND 113, 611 N.W.2d 191.

Trial court erred by not considering employment benefits and in-kind income received by obligor where obligor's corporation pays many of his personal expenses and provides benefits including payment of his personal legal expenses and medical and life insurance. ***Halberg v. Halberg***, 2010 ND 20, 777 N.W.2d 872.

Insurance Proceeds

Profits from auction of farm machinery and capital gain realized from insurance proceeds from a house fire are gross income. ***Longtine v. Yeado***, 1997 ND 166, 567 N.W.2d 819.

Net Income

A proper finding of net income is essential to a determination of the correct amount of child support under the guidelines. ***Schleicher v. Schleicher***, 551 N.W.2d 766 (N.D. 1996); ***Schumacher v. Schumacher***, 1999 ND 149, 598 N.W.2d 131; ***Olson v. Olson***, 2002 ND 30, 639 N.W.2d 701.

Deferred Income

Guidelines drafters specifically declined to define net income by reference to federal income tax policies for deferred income. ***Longtine v. Yeado***, 1997 ND 166, 567 N.W.2d 819.

Depreciation

Depreciation deductions may not be added back in when determining an obligor's net income from self-employment under the guidelines. ***Torgerson v. Torgerson***, 2003 ND 150, 669 N.W.2d 98, ***Kobs v. Jacobson***, 2005 ND 222, 707 N.W.2d 803; ***Clark v. Clark***, 2006 ND 182, 721 N.W.2d 6.

Discretionary Retirement Contributions

Discretionary contributions to retirement plans are not deductible from gross income. ***Hallock v. Mickels***, 507 N.W.2d 541 (N.D. 1993).

Medical Expenses

Payments by the obligor for the children's actual medical expenses are deductible from the obligor's gross income. ***Withey v. Hager***, 1997 ND 225, 571 N.W.2d 142; ***Donarski v. Donarski***, 1998 ND 128, 581 N.W.2d 130.

Taxes

The child support guidelines mandate the application of the standard deductions and tax tables to calculate the obligor's income, regardless of the obligor's actual practices in withholding or filing taxes. ***Hallock v. Mickels***, 507 N.W.2d 541 (N.D. 1993); ***Hoverson v. Hoverson***, 2001 ND 124, 629 N.W.2d 573.

Decisions Under Prior Law

Obligor could not calculate standard deduction and use tax tables under fictitious filing status for purposes of determining net income. ***Smith v. Smith***, 538 N.W.2d 222 (N.D. 1995).

Employer's contributions to an obligor's pension plan, family health insurance premiums provided by the employer, and the employer's contribution to a tax deferred savings plan are properly included as gross income. ***Shaver v. Kopp***, 545 N.W.2d 170 (N.D. 1996).

An employer's contribution to an obligor's pension plan and health insurance must be included in the obligor's income for determining child support. ***Hendrickson v. Hendrickson***, 553 N.W.2d 215 (N.D. 1996).

Gross income includes employer-paid benefits, including contribution to a 401(k) plan, medical insurance premiums, dental insurance premiums, life insurance premiums, accidental death and disability insurance premiums, long-term disability premiums, and pension fund contributions. ***Lawrence v. Delkamp***, 1998 ND 178, 584 N.W.2d 515.

Depreciation

Depreciation and other business expenses not requiring actual expenditures are part of an obligor's net income for purposes of computing child support obligations under the guidelines. ***Houmann v. Houmann***, 499 N.W.2d 593 (N.D. 1993).

In-Kind Income

In determining child support, the trial court must consider all sources of the obligor's income, including imputed earnings, in-kind income received on a regular basis, and gifts exceeding a value of $1,000. ***Cook v. Eggers***, 1999 ND 97, 593 N.W. 781.

75-02-04.1-02. Determination of support amount - General instructions.

1. Except as provided in section 75-02-04.1-08.2, calculations of child support obligations provided for under this chapter consider and assume that one parent acts as a primary caregiver and the other parent contributes a payment of child support to the child's care. Calculation of a child support obligation under section 75-02-04.1-08.2 does not preclude a court from apportioning specific expenses related to the care of the child, such as child care expenses and school activity fees, between the parents. An apportionment under this subsection is in addition to the child support amount determined by application of this chapter.

2. Calculations assume that the care given to the child during temporary periods when the child resides with the obligor or the obligor's relatives do not substitute for the child support obligation.

3. Net income received by an obligor from all sources must be considered in the determination of available money for child support.

4. The result of all calculations which determine a monetary amount ending in fifty cents or more must be rounded up to the nearest whole dollar, and must otherwise be rounded down to the nearest whole dollar.

5. In applying the child support guidelines, an obligor's monthly net income amount ending in fifty dollars or more must be rounded up to the nearest one hundred dollars, and must otherwise be rounded down to the nearest one hundred dollars.

6. The annual total of all income considered in determining a child support obligation must be determined and then divided by twelve in order to determine the obligor's monthly net income.

7. Income must be sufficiently documented through the use of tax returns, current wage statements, and other information to fully apprise the court of all gross income. Where gross income is subject to fluctuation, regardless of whether the obligor is employed or self-employed, information reflecting and covering a period of time sufficient to reveal the likely extent of fluctuations must be provided.

8. Calculations made under this chapter are ordinarily based upon recent past circumstances because past circumstances are typically a reliable indicator of future circumstances, particularly circumstances concerning

income. If circumstances that materially affect the child support obligation have changed in the recent past or are very likely to change in the near future, consideration may be given to the new or likely future circumstances.

9. Determination of a child support obligation is appropriate in any matter where the child and both of the child's parents do not reside together.

10. Each child support order must include a statement of the net income of the obligor used to determine the child support obligation, and how that net income was determined. If a child support order includes an adjustment for extended parenting time under section 75-02-04.1-08.1, the order must specify the number of parenting nights.

11. A payment of children's benefits made to or on behalf of a child who is not living with the obligor must be credited as a payment toward the obligor's child support obligation in the month (or other period) the payment is intended to cover, but may not be credited as a payment toward the child support obligation for any other month or period. The court may order the obligee to reimburse the obligor for any overpayment that results from the credit provided in this subsection.

12. No amount may be deducted to determine net income unless that amount is included in gross income.

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Duty of Trial Court

The task of the trial court in setting an amount for child support is to balance the needs of the children and the ability of the parent to pay. ***Montgomery v. Montgomery***, 481 N.W.2d 234 (N.D. 1992).

Findings and Standard of Review

Supreme Court will not upset an award of child support merely because the findings could have been more complete. ***Montgomery v. Montgomery***, 481 N.W.2d 234 (N.D. 1992).

A mere recitation that the guidelines have been considered in arriving at the amount of a child support obligation is insufficient to show compliance with the guidelines. ***Spilovoy v. Spilovoy***, 488 N.W.2d 873 (N.D. 1992).

Where it was unclear how the trial court arrived at the monthly child support obligation, a mere recitation that the guidelines had been considered in arriving at the amount of a child support obligation was insufficient to show compliance with the

guidelines, and the trial court erred in failing to follow the guidelines. ***Heley v. Heley***, 506 N.W.2d 715 (N.D. 1993).

A finding by the trial court of the obligor's net income is now essential because of the advent of the rebuttable presumption that the child support guidelines establish the correct amount of support; where the trial court's findings of fact shed no light on how it computed an obligor's child support obligation and did not indicate that the trial court applied the guidelines, the case was remanded for a specific finding of the obligor's net income, computation of child support under the child support guidelines, and health insurance premium payments. ***Foreng v. Foreng***, 509 N.W.2d 38 (N.D. 1993).

With no evidence or findings of an obligor's reasonable earning capacity, or whether obligor's continued unemployment was voluntary or intentional, it was inappropriate for the court to order child support based on previous monthly income. ***Schatke v. Schatke***, 520 N.W.2d 833 (N.D. 1994).

Where the court did not coherently assemble facts and figures from the evidence to determine net income but, instead, took at face value a figure from obligor's accountant that was not consistent with the guidelines, the trial court erred in adopting the expert's conclusion. ***Mahoney v. Mahoney***, 538 N.W.2d 189 (N.D. 1995).

Trial court erred in adopting obligor's calculations of his child support obligation, without question, because his calculations were not correct application of child support guidelines. Guidelines provide method for determining monthly net income for self-employed obligor, and they did not provide for standard deductions and personal exemptions taken by obligor from his five-year average annual self-employment income. ***Dalin v. Dalin***, 545 N.W.2d 785 (N.D. 1996).

Parents have a mutual duty to support children; however, child support guidelines contemplate child support payments be made by noncustodial parent to custodial parent. ***Richter v. Houser***, 1999 ND 147, 598 N.W.2d 193.

A trial court, in order to award the proper amount of child support, must determine the obligor's net monthly income under the child support guidelines, and make an adequate finding on the issue. ***Schleicher v. Schleicher***, 551 N.W.2d 766 (N.D. 1996); ***Wolf v. Wolf***, 557 N.W.2d 742 (N.D. 1996); ***Berg v. Ullman***, 1998 ND 74, 576 N.W.2d 218.

A court errs as a matter of law when it does not clearly state how an obligor's income is determined in applying the guidelines. ***Buchholz v. Buchholz***, 1999 ND 36, 590 N.W.2d 215. ***Richter v. Houser***, 1999 ND 147, 598 N.W.2d 193; ***Heinz v. Heinz***, 2001 ND 147, 632 N.W.2d 443; ***Sonnenberg v. Sonnenberg***, 2010 ND 94, 782 N.W.2d 654; ***Krueger v. Krueger***, 2011 ND 134, 800 N.W.2d 296.

Child support determinations involve questions of law which are subject to a de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and, in some limited areas, may involve matters of discretion subject to the abuse of discretion standard of review. ***Buchholz v. Buchholz***, 1999 ND 36, 590

N.W.2d 215; ***Simon v. Simon***, 2006 ND 29, 709 N.W.2d 4; ***Berge v. Berge***, 2006 ND 46, 710 N.W.2d 417; ***Marchus v. Marchus***, 2006 ND 81, 712 N.W.2d 636; ***Lautt v. Lautt***, 2006 ND 161, 718 N.W.2d 563; ***Clark v. Clark***, 2006 ND 182, 721 N.W.2d 6; ***Dunnuck v. Dunnuck***, 2006 ND 247, 724 N.W.2d 124; ***Cline v. Cline***, 2007 ND 85, 732 N.W.2d 385; ***Wagner v. Wagner***, 2007 ND 101, 733 N.W.2d 593; ***Evenson v. Evenson***, 2007 ND 194, 742 N.W.2d 829; ***Serr v. Serr***, 2008 ND 56, 746 N.W.2d 416; ***Serr v. Serr***, 2008 ND 229,758 N.W.2d 739; ***Doepke v. Doepke***, 2009 ND 10, 760 N.W.2d 131; ***Gunia v. Gunia***, 2009 ND 32, 763 N.W.2d 455; ***Verhey v. McKenzie***, 2009 ND 35, 763 N.W.2d 113; ***State ex rel. K.B. v. Bauer***, 2009 ND 45, 763 N.W.2d 462; ***Machart v. Machart***, 2009 ND 208, 776 N.W.2d 795; ***Heinle v. Heinle***, 2010 ND 5, 777 N.W.2d 590; ***Halberg v. Halberg***, 2010 ND 20, 777 N.W.2d 872; ***Fleck v. Fleck***, 2010 ND 24, 778 N.W.2d 572; ***Dupay v. Dupay***, 2010 ND 87, 782 N.W.2d 42; ***Sonnenberg v. Sonnenberg***, 2010 ND 94, 782 N.W.2d 654; ***Thornton v. Klose***, 2010 ND 141, 785 N.W.2d 891; ***Entzie v. Entzie***, 2010 ND 194, 789 N.W.2d 550; ***Becker v. Becker***, 2011 ND 107, 799 N.W.2d 53; ***Crandall v. Crandall***, 2011 ND 136, 799 N.W.2d 388; ***Keita v. Keita***, 2012 ND 234, ___N.W.2d ___.

Departure from Guidelines

In General

A child support award is clearly erroneous if it departs from the guidelines and the court does not expressly find that the support amount established under the guidelines has been rebutted by a preponderance of the evidence. ***Schatke v. Schatke***, 520 N.W.2d 833 (N.D. 1994).

Not Valid

Where there were no specific findings to rebut the presumptive child support obligation and thus justify a departure from the guidelines, the trial court's child support award was clearly erroneous and the case was remanded for a redetermination of the father's child support obligation. ***Bernhardt v. K.R.S.***, 503 N.W.2d 233 (N.D. 1993).

Custodial Parent Contribution

The guidelines recognize the obligee parent, as custodial parent, makes a substantial monetary and nonmonetary contribution to the child's basic care and needs by virtue of being a custodial parent. ***Perala v. Carlson***, 520 N.W.2d 839 (N.D. 1984); ***Richter v. Houser***, 1999 ND 147 598 N.W.2d 193.

Past Circumstances Reliably Indicate Future Income

Implied in the guidelines is the assumption that an obligor with a demonstrated ability to earn income and support his children at a certain level will continue to do so. ***Olson v. Olson***, 520 N.W.2d 572 (N.D. 1994); ***Schatke v. Schatke***, 520 N.W.2d 833 (N.D. 1994).

Courts, by necessity, must rely on past income information when calculating child support amounts because past income is generally the best predictor of future income. ***Shaver v. Kopp***, 545 N.W.2d 170 (N.D. 1996).

An obligor's ability to pay child support is not solely determinable from actual income, and income compatible with an obligor's prior earning history may be imputed in calculating the child support obligation. ***Edwards v. Edwards***, 1997 ND 94, 563 N.W.2d 394; ***Richter v. Houser***, 1999 ND 147 598 N.W.2d 193.

An obligor's support obligation is usually based on evidence of the obligor's past income which is used as a predictor of future income upon which the support amount is calculated. ***In the Interest of E.H.***, 1997 ND 101, 564 N.W.2d 281; ***Mahoney v. Mahoney***, 1997 ND 149, 567 N.W.2d 206.

Trial court did not err in refusing to consider obligor's past losses from out-of-state custom combining operation. Since obligor had discontinued that operation, those losses were not accurate predictors of future income. ***In the Interest of F.R.S.***, 2002 ND 191, 653 N.W.2d 659.

Where obligor, in addition to income from self-employment venture, had received wage income from a temporary position that had since been eliminated, trial court did not err in refusing to include the wage income for child support purposes. ***Evenson v. Evenson***, 2007 ND 194, 742 N.W.2d 829.

Because the guidelines do not and cannot envision every conceivable factual scenario that will arise, subsection 8 affords the district court some measure of discretion to consider the obligor's financial circumstances and fashion an appropriate level of support when prior circumstances are not a reliable indicator of the obligor's future financial circumstances. ***State ex rel. K.B. v. Bauer***, 2009 ND 45, 763 N.W.2d 462

Temporary Reduction in Income

It is appropriate to delay paying a portion of the support when the obligor's income is temporarily reduced. ***Schmidt v. Reamann***, 523 N.W.2d 70 (N.D. 1994); ***Henry v. Henry***, 1998 ND 141, 581 N.W.2d 921; ***Minar v. Minar***, 2001 ND 74, 625 N.W.2d 518, ***Orvedal v. Orvedal***, 2003 ND 145, 669 N.W.2d 89.

Effect of One-Time or Temporary Income

Nonrecurring income justifies an increase in child support obligation for one year to provide obligor's children with a benefit from that income. ***Longtine v. Yeado***, 1997 ND 166, 567 N.W.2d 818.

Trial court erred by not including obligor's compensation from temporary teaching position in determining gross income: not only is gross income calculated from income from any source, the guidelines specifically include wages and salary in the definition of gross income. ***Dufner v. Dufner***, 2002 ND 47, 640 N.W.2d 694.

Neither the child support guidelines nor precedents allow nonrecurrent payments to be simply ignored in determining an obligor's child support obligation. ***Berge v. Berge***, 2006 ND 46, 710 N.W.2d 417.

When obligor used proceeds from personal injury settlement to pay off debts, buy a home, and make investments, it was not clearly erroneous for trial court to find that the benefits of the obligor's windfall had not ceased. Adopting the obligor's argument that the windfall had ceased because the proceeds were no longer available to him in liquid form would encourage obligors to simply spend settlement proceeds in order to lower their child support obligations. ***Dupay v. Dupay***, 2010 ND 87, 782 N.W.2d 42.

Information to Document Income

Trial court properly relied on information other than obligor's tax return where obligor had notice of the use of that information. ***Reinecke v. Griffeth***, 533 N.W.2d 695 (N.D. 1995).

Generally, though not solely, the income of a self-employed obligor will be documented through tax returns. ***Dalin v. Dalin***, 545 N.W.2d 785 (N.D. 1996).

Where the trial court did not cite to specific evidence or consider specific deduction in determining the obligor's gross and monthly net incomes, and such evidence was admitted for the trial court to consider, the court's findings as to gross and monthly net income were not adequate under the child support guidelines. ***Wolf v. Wolf***, 557 N.W.2d 742 (N.D. 1996).

Failure of obligor to submit tax return or complete information on earnings led to trial court's mistaken finding that there was no basis to impute income. Each child support order must include a statement of net income of the obligor used to determine the child support obligation and how that net income was determined. ***Berg v. Ullman***, 1998 ND 74, 576 N.W.2d 218.

Where an obligor fails to present the information necessary to calculate income, the obligor is precluded from asserting the income calculation based on what little evidence was presented is clearly erroneous. ***Schumacher v. Schumacher***, 1999 ND 149, 598 N.W.2d 131.

The child support guidelines do not state that income tax returns prepared after a motion to modify child support cannot be used to determine a child support obligation. ***Doepke v. Doepke***, 2009 ND 10, 760 N.W.2d 131.

Trial court's finding that obligor made a reasonable decision to change employment was not sufficient to meet the requirement for a specific finding that the income reflected on the obligor's prior tax return was not a reliable indicator of future income. ***Sonnenberg v. Sonnenberg***, 2010 ND 94, 782 N.W.2d 654.

Trial court must make specific findings of fact that an obligor's tax returns do not adequately reflect the obligor's income or are not a reliable indicator of future income before the court can refuse to consider tax return information. ***Entzie v. Entzie***, 2010 ND 194, 789 N.W.2d 550.

Care Provided by Obligor

District court's refusal to abate father's child support obligation for the summer months when he was allowed visitation for the children, was not clearly erroneous where the district court made no written or specific finding of hardship. ***Beals v. Beals***, 517 N.W.2d 413 (N.D. 1994).

Care provided by the obligor when children are with him does not substitute for the child support obligation. ***Smith v. Smith***, 538 N.W.2d 222 (N.D. 1995).

Trial court erred in providing an abatement of the obligor's child support obligations for the child's temporary summer visits with him. ***Edwards v. Edwards***, 1997 ND 94, 563 N.W.2d 394; ***Schumacher v. Schumacher***, 1999 ND 10, 589 N.W.2d 185.

It was not an abuse of discretion for the trial court to deny obligor's request for retroactive modification of child support obligation where visitation was extended but there was no agreement between the parties to an actual change in custody for an extended period of time. ***Krizan v. Krizan***, 1998 ND 186, 585 N.W.2d 576.

It was clearly erroneous for the trial court to abate the obligor's support obligation for times the children were temporarily in his custody. ***Olson v. Olson***, 1998 ND 190, 585 N.W.2d 134.

It was not error for trial court to require obligor to pay the cost of child care when the child was in obligor's physical custody. There is to be no abatement of support obligation while the child is in the obligor's care. ***Harty v. Harty***, 1998 ND 99, 578 N.W.2d 519.

Child support guidelines expressly prohibit abatement of support obligations during temporary period in which the child resides with the noncustodial parent. ***Roberson v. Anderson***, 1999 ND 19, 592 N.W.2d 923; ***Schumacher v. Schumacher***, 1999 ND 10, 589 N.W.2d 185.

Trial court erred in giving the obligor a two-month credit against his annual child support obligation as a way to account for the obligor's extended visitation with the children and for travel costs. ***Cline v. Cline***, 2007 ND 85, 732 N.W.2d 385.

Annual Income to be Considered

It is error for trial court to rely on a partial year's income unless appropriate adjustments are made to reflect the proportionate annual effect of deductions occurring unevenly throughout the year. ***Mahoney v. Mahoney***, 538 N.W.2d 189 (N.D. 1995); ***Helbling v. Helbling***, 541 N.W.2d 443 (N.D. 1995).

Obligor's net annual income is divided by 12 months to get monthly net income from which his monthly child support obligation is determined under the guidelines schedule. ***Dalin v. Dalin***, 545 N.W.2d 785 (N.D. 1996); ***Edwards v. Edwards***, 1997 ND 94, 563 N.W.2d 394.

Extrapolation of Income

Unless the trial court makes a determination that evidence of an obligor's recent past circumstances is not a reliable indicator of his future circumstances, the trial court must not extrapolate an obligor's income. ***Korynta v. Korynta***, 2006 ND 17, 708 N.W.2d 895; ***Berge v. Berge***, 2006 ND 46, 710 N.W.2d 417; ***Heinle v. Heinle***, 2010 ND 5, 777 N.W.2d 590.

Trial court erred by extrapolating income to obligor, an independent contractor, based on based on hourly wage earned by her current spouse when there was no evidence to support the assumption that the obligor could find employment in a position identical to the spouse's position. ***Fleck v. Fleck***, 2010 ND 24, 778 N.W.2d 572.

Income Fluctuation

If an obligor's gross income fluctuates, information sufficient to reveal the likely extent of fluctuation must be provided. There is no deduction from gross income for nonrecurring payments. ***Helbling v. Helbling***, 541 N.W.2d 443 (N.D. 1995); ***Shaver v. Kopp***, 545 N.W.2d 170 (N.D. 1996).

Children should share in the obligor's good fortune. ***Helbling v. Helbling***, 541 N.W.2d 443 (N.D. 1995).

Trial court did not err in basing income calculations on the most recent evidence available. ***Shaver v. Kopp***, 545 N.W.2d 170 (N.D. 1996).

Trial court determined that obligor's initial support order was based on fluctuating income. It was not error for trial court to conclude that obligor's decrease in income for one year did not support a reduction in the support obligation. ***Withey v. Hager***, 1997 ND 225; 571 N.W.2d 142.

It was not clearly erroneous for trial court to average obligor's fluctuating income over five-year period instead of simply averaging the two years with the highest earnings. Averaging income over a five-year period provided a more accurate estimate of the obligor's income. ***Larson v. Larson***, 1998 ND 156, 582 N.W.2d 657.

Where obligor received "longevity bonus" every three years as compensation for overseas employment, trial court erred by not averaging the bonus over the three years it was intended to cover. ***Schiff v. Schiff***, 2000 ND 113, 611 N.W.2d 191.

Guideline Amount is for Current Need

Custodial parent has a representational right to collect support on behalf of the child. Child support under the guidelines assumes that support will be paid to the custodial parent to use for the child's current expenses. Guidelines contain no provision authorizing a portion of current support to be paid into an annuity for the child's future benefit. ***Schleicher v. Schleicher***, 551 N.W.2d 766 (N.D. 1996).

The child support guidelines contain no provision authorizing current support to be placed in a separate account when a custodial parent refuses to cooperate with

visitation. Rather, under the guidelines, child support is to be paid to the custodial parent to use for the child's current expenses. ***Hendrickson v. Hendrickson***, 1999 ND 37, 590 N.W.2d 220.

Interference with Visitation

It would be fundamentally unfair to allow an offset of child support, which belongs to and benefits the child, against amounts owed by the custodial parent for interfering with visitation. ***Sweeney v. Sweeney***, 2002 ND 206, 654 N.W.2d 407.

Cost per Child

Guidelines contemplate a greater cost of providing for the first child of the household and do not reflect a pro rata allocation of support for each child. ***Steffes v. Steffes***, 1997 ND 49, 560 N.W.2d 888.

Children's Benefits

Guidelines expressly provide that benefits, including social security disability dependency benefits, must be credited as a payment toward a child support obligation for the particular months or period the payment was intended to cover but may not be credited for any other month or period. ***Tibor v. Bendrick***, 1999 ND 92, 593 N.W.2d 395.

If and to the extent a child support obligation may survive the obligor's death, the Social Security survivors' death benefits must be credited as a payment toward the obligor's child support obligation in the month or other period the payment is intended to cover, but may not be credited as a payment toward the child support obligation for any other month or period. ***Nelson v. Nelson***, 2000 ND 118, 617 N.W.2d 131.

In an action brought by the obligor to recover an alleged overpayment of child support after Social Security dependency benefits were credited to his child support obligation, the Supreme Court held that the plain language of the guidelines leaves no room for the application of equitable principles and requires that the obligor be reimbursed for child support he had paid but which was subsequently supplanted by the children's receipt of lump sum Social Security dependency benefits. ***Davis v. Davis***, 2010 ND 67, 780 N.W.2d 707.

75-02-04.1-03. Determination of child support obligation - Split Custody or primary residential responsibility. A child support obligation must be determined and specifically ordered for the child or children for whom each parent has primary residential responsibility pursuant to a court order or, if there is no court order, for whom each parent has primary physical custody. The lesser obligation is then subtracted from the greater. The difference is the child support amount owed by the parent with the greater obligation. The offset of child support obligations in this section is for payment purposes only and must be discontinued for any month in which the rights to support of a child for whom the obligation was determined are assigned to a government agency as a condition of receiving public assistance.

History: Effective February 1, 1991; amended effective August 1, 2003; October 1, 2008; July 1, 2011.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(16); 42 USC 667

When custody of children is split between the parents, the income of each parent is computed and the lesser amount subtracted from the greater. ***Clutter v. McIntosh***, 484 N.W.2d 846 (N.D. 1992); ***Spilovoy v. Spilovoy***, 488 N.W.2d 873 (N.D. 1992).

The amount per month husband was ordered to pay for one child's support was not income to wife, and was not required to be considered in calculating wife's child support obligation for the couple's child in her custodial care; although a custodial parent may have a representational right to collect support on behalf of a child, the right to the support actually belongs to the child. ***Spilovoy v. Spilovoy***, 488 N.W.2d 873 (N.D. 1992).

Custody arrangement under which father had custody of child for three months each year, while mother had custody remainder of year, does not meet definition of split custody. Thus, order requiring mother to pay support to the father during that three-month period was remanded because child support guidelines only contemplate that support be paid by noncustodial parent, and mother is custodial parent. ***Dalin v. Dalin***, 545 N.W.2d 785 (N.D. 1996).

Decisions Under Prior Law

Shared custody of one child [where each parent was essentially awarded custody of child for one-half of each month] does not constitute split and, consequently, it is inappropriate to use the split formula in a shared custody situation. ***Wetzel v. Wetzel***, 1999 ND 29, 589 N.W.2d 889.

The offset provisions apply to all split custody and equal custody cases, even after one parent assigns the right to receive child support to the State. ***Simon v. Simon***, 2006 ND 29, 709 N.W.2d 4.

75-02-04.1-04. Minimum support level. A support obligation should be established in each case where the obligor has any income. Even though the obligor's payment is far from sufficient to meet the child's needs, considerations of policy require that all parents understand the parental duty to support children to the extent of the parent's ability. Equally important considerations of policy require the fostering of relationships between parents and children which may arise out of the recognition of parental duty.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(12); 42 USC 667

75-02-04.1-05. Determination of net income from self-employment.

1. Net income from self-employment means total income, for internal revenue service purposes, of the obligor:
   a. Reduced by that amount, if any, of:

      (1) That total income that is not the obligor's income or that is otherwise included in gross income; and

      (2) With respect to a partnership or a small business corporation for which an election under 26 U.S.C. section 1362(a) is in effect and over which the obligor is not able to exercise direct or indirect control to a significant extent, that income of the partnership or small business corporation which is not available, and has not yet been distributed, to the obligor; and

   b. Increased by that amount, if any, for:

      (1) Business expenses attributable to the obligor or a member of the obligor's household for employee's or proprietor's benefits, pensions, and profit-sharing plans;

      (2) Payments made from the obligor's self-employment activity to a member of the obligor's household, other than the obligor, to the extent the payment exceeds the fair market value of the service furnished by the household member; and

      (3) With respect to a corporation that pays its own tax over which the obligor is able to exercise direct or indirect control to a significant extent, the taxable income of the corporation, less the corporation's federal income tax, multiplied by seventy percent of the obligor's ownership interest in the corporation.

2. "Member of the obligor's household" includes any individual who shares the obligor's home a substantial part of the time, without regard to whether that individual maintains another home.

3. If the tax returns are not available or do not reasonably reflect the income from self-employment, profit and loss statements which more accurately reflect the current status must be used.

4. Self-employment activities may experience significant changes in production and income over time. To the extent that information is reasonably available, the average of the most recent five years of each self-employment activity, if undertaken on a substantially similar scale,

must be used to determine self-employment income. When self-employment activity has not been operated on a substantially similar scale for five years, a shorter period may be used.

5. When averaging self-employment income pursuant to subsection 4, no amount may be included in income for one year that was previously included in income for any other year during the period being averaged.

6. When less than three years were averaged under subsection 4, a loss resulting from the averaging may be used to reduce income that is not related to self-employment only if the loss is not related to a hobby activity and monthly gross income, reduced by one-twelfth of the average annual self-employment loss, equals or exceeds the greatest of:

   a. A monthly amount equal to one hundred sixty-seven times the hourly federal minimum wage;

   b. An amount equal to six-tenths of statewide average earnings for persons with similar work history and occupational qualifications; or

   c. An amount equal to eighty percent of the obligor's greatest average gross monthly earnings, calculated without using self-employment losses, in any twelve consecutive months beginning on or after twenty-four months before commencement of the proceeding before the court.

7. When three or more years were averaged under subsection 4, a loss resulting from the averaging may be used to reduce income that is not related to self-employment only if the loss is not related to a hobby activity, losses were calculated for no more than forty percent of the years averaged, and monthly gross income, reduced by one-twelfth of the average annual self-employment loss, equals or exceeds the greatest of:

   a. A monthly amount equal to one hundred sixty-seven times the hourly federal minimum wage;

   b. An amount equal to six-tenths of statewide average earnings for persons with similar work history and occupational qualifications; or

   c. An amount equal to ninety percent of the obligor's greatest average gross monthly earnings, calculated without using self-employment losses, in any twelve consecutive months beginning on or after twenty-four months before commencement of the proceeding before the court.

8. For purposes of subsections 6 and 7, an activity is presumed to be a hobby activity if the result from averaging is a loss. The presumption may be rebutted if the obligor shows that the activity is not done primarily for

enjoyment purposes, is a vocation and not an avocation and, in the context of the child support obligation, there is a reasonable expectation that the children will receive long-term benefits.

9. Net income from self-employment is an example of gross income and is subject to the deductions from gross income set forth in subsection 6 of section 75-02-04.1-01, to the extent not already deducted when calculating net income from self-employment.

History: Effective February 1, 1991; amended effective January 1, 1995; August 1, 1999; August 1, 2003; October 1, 2008; July 1, 2011.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(16); 42 USC 667

Income Fluctuation

When an obligor is self-employed with income subject to fluctuation, the information from several years must be used to arrive at income. ***Clutter v. McIntosh***, 484 N.W.2d 846 (N.D. 1992).

Fluctuating farm income is an explanation inadequate to justify departure from guidelines. ***Zacher v. Zacher***, 493 N.W.2d 704 (N.D. App. 1992).

The guidelines account for the typical fluctuation in the income of self-employed obligors by permitting the averaging of income over a five-year period. ***Schmidt v. Reamann***, 523 N.W.2d 70 (N.D. 1994).

Trial court must make specific findings on why a five-year average of self-employment income is not reflective of current income before the court can use a shorter period of time. ***Entzie v. Entzie***, 2010 ND 194, 789 N.W.2d 550.

Depreciation

Depreciation deductions may not be added back in when determining an obligor's net income from self-employment under the guidelines. ***Torgerson v. Torgerson***, 2003 ND 150, 669 N.W.2d 98; ***Kobs v. Jacobson***, 2005 ND 222, 707 N.W.2d 803; ***Clark v. Clark***, 2006 ND 182, 721 N.W.2d 6.

Business Costs

New spouse's contribution to the farming operation is not in-kind income to be used to reduce obligor's net income. ***Woolridge v. Schmid***, 495 N.W.2d 52 (N.D. 1993).

Mixed business and personal costs are deductible only to the extent that they reflect business costs. ***Heley v. Heley***, 506 N.W.2d 715 (N.D. 1993).

As a sanction for obligor's persistent and willful discovery misconduct, trial court did not abuse its discretion in disallowing obligor's farm expenses in calculating his

income to determine his child support obligation. ***Barth v. Barth***, 1999 ND 91, 593 N.W.2d 359.

Range of Inquiry to Determine Income

Generally, although not solely, the income of a self-employed obligor will be documented through tax returns. ***Dalin v. Dalin***, 545 N.W.2d 785 (N.D. 1996).

In determining income for child support purposes, the district court must consider the entire revenue of the business in self-employment situations, rather than what the obligor chooses his personal income to be. ***Quamme v. Bellino***, 540 N.W.2d 142 (N.D. 1995).

Trial court properly relied on information other than obligor's tax return where obligor had notice of the use of that information. ***Reinecke v. Griffeth***, 533 N.W.2d 695 (N.D. 1995).

Trial court improperly limited discovery to obligor's income tax returns as those returns do not necessarily reflect the degree of control an obligor has over his spouse's income. ***Smith v. Smith***, 538 N.W.2d 222 (N.D. 1995).

Where obligor owns 40.3% of corporation's shares but obligee failed to present evidence regarding obligor's control of distribution of corporation's retained earnings, trial court did not err in not attributing any of the corporation's retained earnings to obligor in calculating his child support obligation. ***Bleth v. Bleth***, 2000 ND 52, 607 N.W.2d 577.

Obligors are cautioned against practices which intentionally distort income in order to reduce child support obligations. Trial courts should not allow self-employed individuals to stray too far in accepting inaccurate tax returns as the basis for computing child support. ***Torgerson v. Torgerson***, 2003 ND 150, 669 N.W.2d 98.

The child support guidelines do not state that income tax returns prepared after a motion to modify child support cannot be used to determine a child support obligation. ***Doepke v. Doepke***, 2009 ND 10, 760 N.W.2d 131.

Hobby is not Self-Employment

An avocation or hobby is not self-employment when it is done primarily for enjoyment and there is not a reasonable expectation that the children of the obligor will receive a long-term benefit, and losses related to hobby activities may not be used to reduce or offset obligor's other income. ***Wilhelm v. Wilhelm***, 543 N.W.2d 488 (N.D. 1996).

Offset of Other Income by Self-Employment Losses

Trial court erred as a matter of law by offsetting employment income with self-employment losses from farming operation where obligor incurred self-employment losses in more than 40% of the years being averaged. ***Bladow v. Bladow***, 2005 ND 142, 701 N.W.2d 903.

Subchapter S Corporation

Trial court did not err by not accepting obligor's allegedly uncontroverted testimony about his monthly draw from his solely-owned Subchapter S corporation when he failed to provide documented evidence to show the current income and expenses of the corporation. ***Gunia v. Gunia***, 2009 ND 32, 763 N.W.2d 455.

Decisions Under Prior Law

For the purposes of calculating income from farm operations for a child support obligation, obligor's allowable deduction for payment on loans used to purchase depreciable machinery was the net reduction in the principle balance on the machinery loans. ***Edwards v. Edwards***, 1997 ND 94, 563 N.W.2d 394.

The trial court has discretion over whether and to what extent to allow or disallow the deduction of business costs paid, but not expensed for Internal Revenue Service purposes, in determining net income from self-employment. ***Christl v. Swanson***, 2000 ND 74, 609 N.W.2d 70.

75-02-04.1-06. Determining the cost of supporting a child living with the obligor. The cost of supporting a child living with the obligor, who is not also a child of the obligee, may be deducted from net income under subsection 4 of section 75-02-04.1-06.1 and is determined by applying the obligor's net income and the total number of children living with the obligor, who are not also children of the obligee, to whom the obligor owes a duty of support, to section 75-02-04.1-10.

History: Effective February 1, 1991; amended effective January 1, 1995; August 1, 1999; August 1, 2003.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(16); 42 USC 667

Decisions Under Prior Law

Hardship

Without specific findings of hardship to the noncustodial parent required by this section, a custodial parent's income is irrelevant to the noncustodial parent's obligation to pay child support. ***Reimer v. Reimer***, 502 N.W.2d 231 (N.D. 1993).

The presumptive obligation under the guidelines can only be rebutted if a preponderance of the evidence establishes the existence of factors not considered by the guidelines or the existence of a hardship. ***Bernhardt v. K.R.S.***, 503 N.W.2d 233 (N.D. 1993).

The district court's refusal to abate father's child support obligation for the summer months, when he was allowed visitation for the children, was not clearly erroneous where the district court made no written or specific finding of hardship. ***Beals v. Beals***, 517 N.W.2d 413 (N.D. 1994).

Remarriage and Additional Children

The additional living expenses assumed by an obligor who voluntarily had additional children did not constitute "factors not considered by the guidelines" to justify a finding of undue hardship. ***Guskjolen v. Guskjolen***, 499 N.W.2d 126 (N.D. 1993); ***Houmann v. Houmann***, 499 N.W.2d 593 (N.D. 1993); ***Rueckert v. Rueckert***, 499 N.W.2d 863 (N.D. 1993); ***Bernhardt v. K.R.S.***, 503 N.W.2d 233 (N.D. 1993).

Controllable Living Expenses

Controllable living expenses of the obligor and the obligor's household are not hardships. ***Gray v. Gray***, 527 N.W.2d 268 (N.D. 1995); ***Scherling v. Scherling***, 529 N.W.2d 879 (N.D. 1995).

75-02-04.1-06.1. Determination of support amount in multiple-family cases.

1. This section must be used to determine the child support amount presumed to be the correct amount of child support in all cases involving an obligor who:

   a. Owes duties of support payable to two or more obligees; or

   b. Owes a duty of support to at least one obligee and also owes a duty of support to a child living with the obligor who is not also the child of that obligee.

2. If a court consolidates proceedings involving an obligor and two or more obligees, the court must determine all obligations that may be determined in the consolidated proceeding without regard to whom the initial moving party may be.

3. A hypothetical amount that reflects the cost of supporting children living with the obligor, as determined under section 75-02-04.1-06, and a hypothetical amount due to each obligee under this chapter must first be determined for the children living with the obligor and each obligee, whether or not the obligee is a party to the proceeding, assuming for purposes of that determination:

   a. The obligor has no support obligations except to the obligee in question;

   b. The guidelines amount is not rebutted; and

   c. The obligor does not have extended parenting time.

4. A hypothetical amount due to each obligee under this chapter must next be determined for each obligee who is a party to the proceeding, assuming for purposes of that determination:

a. The obligor's net income is reduced by:

(1) The amount of child support due to all other obligees, as determined under subsection 3; and

(2) The cost of supporting a child living with the obligor, who is not also the child of that obligee, as determined under section 75-02-04.1-06;

b. The guidelines amount is not rebutted;

c. Any support amount otherwise determined to be less than one dollar is determined to be one dollar; and

d. The obligor does not have extended parenting time.

5. a. Except as provided in subdivision b, for each obligee before the court, the support obligation presumed to be the correct amount of child support is equal to one-half of the total of the two amounts determined, with respect to that obligee, under subsections 3 and 4.

b. Any necessary determination under this section must be made before an adjustment for extended parenting time appropriate under section 75-02-04.1-08.1. The "amount otherwise due under this chapter", for purposes of section 75-02-04.1-08.1, is equal to one-half of the total of the two amounts determined, with respect to that obligation, under subsections 3 and 4.

6. The fact, if it is a fact, that the obligor is required to pay, or pays, a different amount than the hypothetical amounts determined under subsections 3 and 4 is not a basis for deviation from the procedure described in this section.

7. When determining a support amount under paragraph 1 of subdivision a of subsection 4, consider only children to whom an obligor owes a current monthly support obligation pursuant to a support order and other children under the age of eighteen to whom an obligor owes a duty of support.

History: Effective January 1, 1995; amended effective August 1, 1999; August 1, 2003; July 1, 2011.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(16); 42 USC 667

Mandatory Application

The court committed error by not using the multiple-family calculation when the obligor had children from another relationship. ***Hanson v. Hanson***, 2005 ND 82, 695

N.W.2d 205, ***Machart v. Machart***, 2009 ND 208, 776 N.W.2d 795; ***Sonnenberg v. Sonnenberg***, 2010 ND 94, 782 N.W.2d 654.

Purpose

The formula in this section details the proper method of striking a balance between the needs of the children and the ability of the obligor to pay in cases where the obligor owes a duty of support to more than one obligee. ***Shaver v. Kopp***, 545 N.W.2d 170 (N.D. 1996).

This section allows for reductions when the obligor is responsible for the support of another child. ***In the Interest of L.D.C.***, 1997 ND 104, 564 N.W.2d 298.

A court must take into account the obligor's responsibility to support the child of a first marriage when computing the obligor's support obligation for children of the second marriage. ***Hogue v. Hogue***, 1998 ND 26, 574 N.W.2d 579.

Adult Children

Obligor's payment of graduate school expenses of adult children of prior marriage was child support, and child support obligation to minor children from a subsequent marriage must be calculated under § 75-02-04.1-06.1. ***Zarrett v. Zarrett***, 1998 ND 49, 574 N.W.2d 855.

Decisions Under Prior Law

Multiple Households

The guidelines do not provide adequate guidance when multiple families appear simultaneously before the court. ***Bergman v. Bergman***, 486 N.W.2d 243 (N.D. 1992).

The guidelines do not envision deductions from the obligor's income for unordered child support. ***State of Minnesota v. Snell***, 493 N.W.2d 656 (N.D. 1992).

Other Parent's Income

Court properly gave no consideration to the cost of supporting children living with the obligor where the obligor provided no information about the income of the other parent of those children, who also lived with the obligor. ***Hobus v. Hobus***, 540 N.W.2d 158 (N.D. 1995).

75-02-04.1-07. Imputing income based on earning capacity.

1. For purposes of this section:

   a. "Earnings" includes in-kind income and amounts received in lieu of actual earnings, such as social security benefits, workers' compensation wage replacement benefits, unemployment insurance benefits, veterans' benefits, and earned income tax credits; and

b. An obligor is "underemployed" if the obligor's gross income from earnings is significantly less than the statewide average earnings for persons with similar work history and occupational qualifications.

2. An obligor is presumed to be underemployed if the obligor's gross income from earnings is less than:

   a. Six-tenths of the statewide average earnings for persons with similar work history and occupational qualifications; or

   b. A monthly amount equal to one hundred sixty-seven times the federal hourly minimum wage.

3. Except as provided in subsections 4, 5, 6, 7, 8, and 11, gross income based on earning capacity equal to the greatest of subdivisions a through c, less actual gross earnings, must be imputed to an obligor who is unemployed or underemployed.

   a. A monthly amount equal to one hundred sixty-seven times the hourly federal minimum wage.

   b. An amount equal to six-tenths of the statewide average earnings for persons with similar work history and occupational qualifications.

   c. An amount equal to ninety percent of the obligor's greatest average gross monthly earnings, in any twelve consecutive months beginning on or after twenty-four months before commencement of the proceeding before the court, for which reliable evidence is provided.

4. Monthly gross income based on earning capacity may be imputed in an amount less than would be imputed under subsection 3 if the obligor shows:

   a. The reasonable cost of child care equals or exceeds seventy percent of the income which would otherwise be imputed where the care is for the obligor's child:

      (1) For whom the obligor has primary residential responsibility;

      (2) Who is under the age of fourteen; and

      (3) For whom there is no other adult caretaker in the parent's home available to meet the child's needs during absence due to employment.

b. The obligor suffers from a disability sufficient in severity to reasonably preclude the obligor from gainful employment that produces average monthly gross earnings equal to one hundred sixty-seven times the hourly federal minimum wage and subdivision b of subsection 7 does not apply.

c. The unusual emotional or physical needs of a minor child of the obligor require the obligor's presence in the home for a proportion of the time so great as to preclude the obligor from gainful employment that produces average monthly gross earnings equal to one hundred sixty-seven times the hourly federal minimum wage.

5. Gross income based on earning capacity may not be imputed if the obligor shows that the obligor has average monthly gross earnings equal to or greater than one hundred sixty-seven times the hourly federal minimum wage and is not underemployed.

6. If an unemployed or underemployed obligor shows that employment opportunities, which would provide earnings at least equal to the lesser of the amounts determined under subdivision b or c of subsection 3, are unavailable within one hundred miles [160.93 kilometers] of the obligor's actual place of residence, income must be imputed based on earning capacity equal to the amount determined under subdivision a of subsection 3, less actual gross earnings.

7. a. Monthly gross income based on earning capacity may not be imputed under subsection 3 in an amount greater than one-half of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor is under eighteen years of age or is under nineteen years of age and enrolled in and attending high school.

b. Monthly gross income based on earning capacity may not be imputed under subsection 3 if the obligor is receiving:

(1) Supplemental security income payments;

(2) Social security disability payments;

(3) Workers' compensation wage replacement benefits; or

(4) Total and permanent disability benefits paid by the railroad retirement board.

8. a. If an obligor is incarcerated, monthly gross income based on earning capacity may not be imputed under subsection 3:

(1) In an amount greater than one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for less than one year;

(2) In an amount greater than eighty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least one year but less than two years;

(3) In an amount greater than sixty percent of one hundred sixty- seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least two years but less than three years;

(4) In an amount greater than forty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least three years but less than four years;

(5) In an amount greater than twenty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least four years but less than five years; or

(6) In any amount if the obligor has been incarcerated for at least five years.

b. For purposes of this subsection, "incarcerated" means physically confined to a prison, jail, or other correctional facility.

c. In determining the length of time an obligor has been incarcerated for purposes of applying subdivision a, only continuous periods of actual confinement may be considered except that any periods representing work release may not be considered.

9. If the obligor fails, upon reasonable request made in any proceeding to establish a child support obligation, to furnish reliable information concerning the obligor's gross income from earnings, income based on earning capacity equal to the greatest of subdivisions a through c of subsection 3 must be imputed.

10. If the obligor fails, upon reasonable request made in any proceeding to review a child support obligation, to furnish reliable information concerning the obligor's gross income from earnings, and if that information cannot be reasonably obtained from sources other than the obligor, income must be imputed based on the greatest of:

a. Subdivisions a through c of subsection 3; or

b. The obligor's net income, at the time the child support order was entered or last modified, increased at the rate of ten percent per year.

11. Notwithstanding subsections 4, 5, 6, and 7, if an obligor makes a voluntary change in employment resulting in reduction of income, monthly gross income equal to one hundred percent of the obligor's greatest average monthly earnings, in any twelve consecutive months beginning on or after twenty-four months before commencement of the proceeding before the court, for which reliable evidence is provided, less actual monthly gross earnings, may be imputed without a showing that the obligor is unemployed or underemployed. For purposes of this subsection, a voluntary change in employment is a change made for the purpose of reducing the obligor's child support obligation and may include becoming unemployed, taking into consideration the obligor's work history, education, health, age, stated reason for change in employment, likely employment status if the family before the court were intact, and any other relevant factors. The burden of proof is on the obligor to show that the change in employment was not made for the purpose of reducing the obligor's child support obligation.

12. Imputed income based on earning capacity is an example of gross income and is subject to the deductions from gross income set forth in subsection 6 of section 75-02-04.1-01.

History: Effective February 1, 1991; amended effective January 1, 1995; August 1, 1999; August 1, 2003; October 1, 2008; July 1, 2011.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(16); 42 USC 667

Earning Capacity

Child support guideline remedy for underemployment was reasonable exercise of the rulemaking authority of the Department of Human Services. (Per Meschke, J., with one justice concurring and two justices concurring in the result.) ***Nelson v. Nelson***, 547 N.W.2d 741 (N.D. 1996).

Obligor's ability to pay child support is not solely determinable from actual income, and obligor's earning capacity also can be utilized. (Per Meschke, J., with one justice concurring and two justices concurring in the result.) ***Nelson v. Nelson***, 547 N.W.2d 741 (N.D. 1996); ***Minar v. Minar***, 2001 ND 74, 625 N.W.2d 518; ***T.E.J. v. T.S.***, 2004 ND 120, 681 N.W.2d 444.

Imputing income to underemployed obligor is not unjust, as parent has a duty to support his children to the best of his abilities, not simply to his inclinations. (Per

Meschke, J., with one justice concurring and two justices concurring in the result.) ***Nelson v. Nelson***, 547 N.W.2d 741 (N.D. 1996).

Child support guidelines definition of "underemployment" is tied to earning capacity, not to the amount of time that obligor works. (Per Meschke, J., with one justice concurring and two justices concurring in the result.) ***Id.***

Adoption of guidelines permitting imputation of income to unemployed or underemployed obligor based on earning capacity did not exceed rulemaking authority granted to Department of Human Services. ***Surerus v. Matuska***, 548 N.W.2d 384 (N.D. 1996).

An obligor's ability to pay child support is not solely determinable from actual income, and income compatible with an obligor's prior earning history may be imputed in calculating the child support obligation. ***Edwards v. Edwards***, 1997 ND 94, 563 N.W.2d 394.

The trial court's failure to impute the obligor's past earning capacity into calculations for determining the obligor's child support obligation was clearly erroneous. ***Richter v. Houser***, 1999 ND 147, 598 N.W.2d 193.

Guidelines recognize that a parent has the duty to support a child to the best of the parent's abilities, not simply to the parent's inclinations. ***Otterson v. Otterson***, 1997 ND 232, 571 N.W.2d 648.

Fact that obligor had been employed only part-time at a minimum wage job for two years is a circumstance that alone compelled a finding of underemployment of an able-bodied obligor. ***Berg v. Ullman***, 1998 ND 74, 576 N.W.2d 218.

Trial court erred by not clearly explaining how it calculated the income to be imputed to the obligor. ***Buchholz v. Buchholz***, 1999 ND 36, 590 N.W.2d 215.

Disability

An obligor who resists imputation of income based on earning capacity due to a disability has the burden of showing the disability is sufficient in severity to reasonably preclude the imputed employment earnings. ***Bernhardt v. Bernhardt***, 1997 ND 80, 561 N.W.2d 656; ***Otterson v. Otterson***, 1997 ND 232, 571 N.W.2d 648.

If obligor carries burden of showing a disability sufficient in severity to preclude imputing earnings at the minimum wage, trial court has discretion to impute income in a lesser amount. ***Otterson v. Otterson***, 1997 ND 232, 571 N.W.2d 648.

A trial court misapplies the guidelines and errs as a matter of law by determining that a disability automatically precludes a child support obligation without a hearing. ***Oien v. Oien***, 2005 ND 205, 706 N.W.2d 81.

Incarceration

Minimum wage should be imputed to an incarcerated obligor who has no other income, who is apparently ineligible for work release, and whose earnings in confinement are less than the minimum wage. ***Surerus v. Matuska***, 548 N.W.2d 384 (N.D. 1996); ***Ramsey County Social Service Board v. Kamara***, 2002 ND 192, 653 N.W.2d 693; ***St. Claire v. St. Claire***, 2004 ND 39, 675 N.W.2d 175; ***In the Interest of R.H.***, 2004 ND 170, 686 N.W.2d 107; ***In the Interest of A.M.S.***, 2005 ND 64, 694 N.W.2d 8.

Imputing minimum wages to an incarcerated obligor who has no other income appropriately promotes this state's strong public policy of protecting the best interests of children and preserving parents' legal and moral obligations to support their children, while recognizing, but not excusing, the obvious difficulty an incarcerated obligor faces in providing support for his or her children. ***Surerus v. Matuska***, 548 N.W.2d 384 (N.D. 1996).

As a matter of law, an incarcerated obligor whose obligation is based on imputing minimum wage cannot reduce the obligation by showing a lack of financial resources due to imprisonment. ***In the Interest of A.M.S.***, 2005 ND 64, 694 N.W.2d 8.

Lifestyle

Trial court erred by extrapolating unemployed obligor's income based on her "lifestyle" and on the use of her assets to maintain this lifestyle. ***Verhey v. McKenzie***, 2009 ND 35, 763 N.W.2d 113.

Minimum wage

The minimum wage is statutory, the guidelines fix 167 hours per month for imputed full-time employment, and the related tax rates and tables are judicially noticeable public records whenever the obligor fails to provide complete information to correctly calculate child support. ***Berg v. Ullman***, 1998 ND 74, 576 N.W.2d 218.

In an era when even a welfare parent with custody must work and earn minimum wages, the courts must expect no less from a noncustodial parent. ***Id.***

With federal minimum wage of $5.15 per hour, any obligor, self-employed or otherwise, is presumed to be underemployed if the obligor makes less than $860.05 per month. ***Kobs v. Jacobson***, 2005 ND 222, 707 N.W.2d 803.

Employment Available

While availability of employment opportunities may be relevant when seeking to impute income in an amount greater than minimum wage, the guidelines presume minimum wage jobs are available in any community. ***Otterson v. Otterson***, 1997 ND 232, 571 N.W.2d 648.

Where obligor's career as a cable lineman historically required him to relocate to places where cable needed to be laid, it would be unrealistic to compute prevailing earnings without looking at job sites beyond the 100-mile community radius. ***Richter v. Houser***, 1999 ND 147, 598 N.W.2d 193.

Where the obligor was underemployed and there was evidence in the record of available jobs in the city and surrounding areas where the obligor resided, it was not error for the trial court to impute income based on subsection 3, even though the obligor had been unable to secure a position in the area at the time of the hearing. ***Orvedal v. Orvedal***, 2003 ND 145, 669 N.W.2d 89.

Employment Unavailable

Imprisoned obligor must be considered as one for whom adequate employment opportunities were unavailable in the community, for purposes of applying child support guidelines permitting imputation of income to unemployed or underemployed obligors, where his earnings in confinement were less than minimum wage, he had no other income, and was apparently ineligible for work release. ***Surerus v. Matuska***, 548 N.W.2d 384 (N.D. 1996).

Underemployed

Trial court has considerable discretion in determining whether an obligor meets the guideline definition of underemployed. ***Henry v. Henry***, 1998 ND 141, 581 N.W.2d 921; ***Richter v. Houser***, 1999 ND 147, 598 N.W.2d 193.

Trial court misapplied the guidelines and erred as a matter of law by multiplying obligor's hourly wage from his part-time job by 167 hours to reflect a monthly salary as if the obligor were working full-time. ***McDowell v. McDowell***, 2001 ND 176, 635 N.W.2d 139.

Self-employed obligors may be underemployed as long as the obligor's income falls within the underemployment provisions in the guidelines. ***Entzie v. Entzie***, 2010 ND 194, 789 N.W.2d 550.

Homestead not to be Considered

Equity in an obligor's homestead up to $80,000 in value may not be considered when calculating an obligor's income. ***Reinecke v. Griffeth***, 533 N.W.2d 695 (N.D. 1995); ***Whitmire v. Whitmire***, 1999 ND 56, 591 N.W.2d 126.

Documentation of Earnings not Proffered

In proceeding to establish child support where obligor failed to make a reasonable effort to provide requested income information, income based on earning capacity equal to the greatest of subdivisions a through c of subsection 3 must be imputed. ***Boehm v. Boehm***, 2002 ND 144, 651 N.W.2d 672.

In proceeding to modify child support, even though parties' evidentiary presentation was inadequate, it was error for the trial court to use an "arbitrary number" as the basis for computing the obligation. Instead, the guidelines require that income be imputed in accordance with subsection 8. ***Knoll v. Kuleck***, 2004 ND 1999, 688 N.W.2d 370.

Voluntary Change in Employment

Subsection 9 unambiguously authorizes the trial court to impute income based on the obligor's prior earnings history, without a showing the obligor is unemployed or

underemployed, if the obligor has voluntarily changed employment resulting in a reduction in income. ***Logan v. Bush***, 2000 ND 203, 621 N.W.2d 314.

The trial court may consider the reasons for the obligor's change of employment when exercising its discretion in determining whether to impute income under subsection 9. ***Id.***

Where subsection 9 clearly requires the trial court to calculate imputed income based on an obligor's actual income in a prior 12-month period, it was error to pick the highest nine months and extrapolate that to a 12-month figure. ***Id.***

It is an error when a trial court extrapolates from less than a 12-month period to determine imputed income under subsection 9. ***Brandner v. Brandner***, 2005 ND 111, 698 N.W.2d 259; ***Christofferson v. Giese***, 2005 ND 17, 691 N.W.2d 195.

Imputation based on a voluntary change in employment is not appropriate when the obligor is concededly unemployed. ***Minar v. Minar***, 2001 ND 74, 625 N.W.2d 518; ***Interest of D.L.M.,*** 2004 ND 38, 675 N.W.2d 187; ***Verhey v. McKenzie***, 2009 ND 35, 763 N.W.2d 113.

Decisions Under Prior Law

Imputation of Minimum Wage

The guidelines do not provide that minimum wage income be imputed to a child support obligor who remains in the home to care for a child of the remarriage. ***Spilovoy v. Spilovoy***, 488 N.W.2d 873 (N.D. 1992).

Wages not Imputed

The North Dakota Child Support Guidelines do not provide for imputing wages to an obligor who remarries and chooses not to work outside the home. ***Spilovoy v. Spilovoy***, 488 N.W.2d 873 (N.D. 1992).

Rebuttable Presumption

Presumption that child support obligor is underemployed if he or she is earning less than 60% of the relevant prevailing wage in the community is rebuttable and may be overcome by contrary evidence weighed by the judge. (Per Meschke, J., with one justice concurring and two justices concurring in the result.) ***Nelson v. Nelson***, 547 N.W.2d 741 (N.D. 1996).

Community

Department of Human Services did not act arbitrarily or capriciously in adopting, for purposes of support guideline dealing with underemployment, definition of "community" as any place within 100 miles of obligor's residence. (Per Meschke, J., with one justice concurring and two justices concurring in the result.) ***Nelson v. Nelson***, 547 N.W.2d 741 (N.D. 1996).

Trial court's imputation of income to an underemployed obligor was not clearly erroneous when supported by evidence of earnings by others in the community with the

same skills and experience as the obligor. ***Henry v. Henry***, 1998 ND 141, 581 N.W.2d 921.

Prevailing Earnings

It was not clearly erroneous for court to find that father's 1992 wage and his estimates of what two companies were paying their top door installers in 1995, along with Job Services publication, were insufficient to prove the relevant prevailing wage for his work or that he was underemployed for purposes of support guidelines. (Per Meschke, J., with one justice concurring and two justices concurring in the result.) ***Nelson v. Nelson***, 547 N.W.2d 741 (N.D. 1996).

Child support guidelines present an objective standard – prevailing amounts earned in the community by persons with similar work history and occupational qualifications – against which to measure the obligor's gross income from earnings. ***Kjos v. Brandenburger***, 552 N.W.2d 63 (N.D. 1996).

Trial court can impute income to a self-employed obligor if the obligor's income is significantly less than prevailing amounts earned in the community by persons with similar work history and occupational qualifications. ***Torgerson v. Torgerson***, 2003 ND 150, 669 N.W.2d 98.

Employment Unavailable

The record did not support district court's determinations of underemployment and imputed income where there was no evidence of available work in the community and the referee did not impute income in accordance with the guidelines. ***Kjos v. Brandenburger***, 552 N.W.2d 63 (N.D. 1996).

Voluntary Changes of Employment

Absent a substantial showing of good faith or cause, a self-induced decline in income does not constitute an exceptional change in circumstances such as to afford the required basis for modifying a child support order. ***Mahoney v. Mahoney***, 51 N.W.2d 656 (N.D. App. 1994).

If the obligor's voluntary change in employment and earnings is reasonable under all of the circumstances, including the best interests of the children, then additional income cannot be imputed based on earning capacity, and child support should be computed upon actual net monthly income. If, however, an obligor with an established earnings history voluntarily, without good reason, places himself in a position where he is unable to meet his child support obligations, income compatible with his prior earnings history may be imputed in calculating child support under the guidelines. ***Olson v. Olson***, 520 N.W.2d 572 (N.D. 1994).

An obligor with a demonstrated ability to earn income may properly be treated as though he will continue to do so unless he can establish legitimate reasons for a change. ***Schatke v. Schatke***, 520 N.W.2d 833 (N.D. 1994).

An unrealistic expectation alone does not conclusively prove misconduct or bad faith in a voluntary change in employment. ***Mahoney v. Mahoney***, 538 N.W.2d 189 (N.D. 1995).

Voluntary change of employment resulting in reduction of income does not, by itself, foreclose an obligor from seeking modification of a child support obligation. (Per Meschke, J., with one justice concurring and two justices concurring in the result.) ***Nelson v. Nelson***, 547 N.W.2d 741 (N.D. 1996).

Because father was statutorily entitled to periodic review of his child support obligation, he was not absolutely precluded from seeking modification when, due to voluntary change of employment, application of the guidelines to present income would reduce his support obligation. ***Id.***

Child support obligation is subject to increase or decrease regardless of voluntariness or involuntariness of obligor's change of financial circumstances. ***Surerus v. Matuska***, 548 N.W.2d 384 (N.D. 1996).

Accumulation of child support arrears was appropriate where the obligor temporarily and voluntarily reduced his income while attending graduate school. ***Henry v. Henry***, 1998 ND 141, 581 N.W.2d 921.

Greater Prior Earnings

Trial court properly based obligation on amount in excess of obligor's current earnings based on evidence of greater recent prior earnings. ***Iverson v. Iverson***, 535 N.W.2d 739 (N.D. 1995).

75-02-04.1-08. Income of spouse. The income and financial circumstances of the spouse of an obligor should not be considered as income for child support purposes unless the spouse's income and financial circumstances are, to a significant extent, subject to control by the obligor as where the obligor is a principal in a business employing the spouse.

History: Effective February 1, 1991; amended effective January 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(12); 42 USC 667

Business Controlled by Obligor

Trial court improperly limited discovery to obligor's income tax return as those returns do no necessarily reflect the degree of control an obligor has over his spouse's income. ***Smith v. Smith***, 538 N.W.2d 222 (N.D. 1995).

The exclusion of the obligor's spouse's salary from gross income, when that salary is from a corporation controlled by the obligor, is clear error. ***Smith v. Smith***, 538 N.W.2d 222 (N.D. 1995); ***Quamme v. Bellino***, 540 N.W.2d 142 (N.D. 1995).

Where a spouse's income is subject to control to a significant extent by the obligor, the spouse's income must be included with the obligor's income. ***Clutter v. McIntosh***, 484 N.W.2d 846 (N.D. 1992).

Decisions Under Prior Law

Value of in-kind income contributed by the spouse of the obligor must be considered. ***Clutter v. McIntosh***, 484 N.W.2d 846 (N.D. 1992).

Trial court erred in subtracting the value of obligor's contribution to the marital enterprise from the in-kind income contributed to her by her spouse. ***Spilovoy v. Spilovoy***, 511 N.W.2d 230 (N.D. 1994).

In-kind income contributed by an obligor's spouse includes only basic living expenses, limited to food, shelter, utilities, clothing, health care, and transportation. ***Id.***

Unmarried Co-Resident

An obligor who resides with, but is not married to, a benefactor cannot avail herself of the exclusion of in-kind income of a spouse in calculating her child support obligation. ***Cook v. Eggers***, 1999 ND 97, 593 N.W.2d 781.

75-02-04.1-08.1. Adjustment for extended parenting time.

1. For purposes of this section, "extended parenting time" means parenting time between an obligor and a child living with an obligee scheduled by court order to exceed sixty of ninety consecutive nights or an annual total of one hundred sixty-four nights.

2. Notwithstanding any other provision of this chapter, if a court order provides for extended parenting time between an obligor and a child living with an obligee, the support obligation presumed to be the correct child support amount due on behalf of all children of the obligor living with the obligee must be determined under this subsection.

    a. Determine the amount otherwise due under this chapter from the obligor for those children.

    b. Divide the amount determined under subdivision a by the number of those children.

    c. For each child, multiply the number of that child's parenting time nights times .32 and subtract the resulting amount from three hundred sixty-five.

    d. Divide the result determined under subdivision c by three hundred sixty-five.

e. Multiply the amount determined under subdivision b times each decimal fraction determined under subdivision d.

f. Total all amounts determined under subdivision e.

History: Effective August 1, 1999; amended effective July 1, 2011.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(12); 42 USC 667

Court-Ordered Visitation

Extended visitation warranting an adjustment of child support is determined by the amount of visitation ordered, not the amount of visitation actually exercised. ***Logan v. Bush***, 2000 ND 203, 621 N.W.2d 314.

Trial court's general statement of "liberal and reasonable" visitation does not satisfy specific requirement of a court order providing for extended visitation. The guidelines contemplate visitation actually ordered, not hypothetical possibilities. ***Corbett v. Corbett***, 2001 ND 113, 628 N.W.2d 628.

If there is a custody order with extended visitation, the court must adjust the amount of the obligor's child support obligation to reflect the extended visitation. ***Gleich v. Gleich***, 2001 ND 185, 636 N.W.2d 418.

Trial court erred by giving the obligor a two-month credit against his annual child support obligation to account for the obligor's extended visitation with the children and for his travel costs. When an obligor has been awarded extended visitation as defined by the guidelines, the trial court must adjust the amount of child support to reflect that visitation in accordance with the guideline formula for extended visitation. ***Cline v. Cline***, 2007 ND 85, 732 N.W.2d 385.

Trial court erred by limiting the obligor's adjustment for extended visitation to the summer months when the visitation actually occurs. Nothing in the plain language of the guidelines restricts the adjustment for extended visitation to the months in which the visitation occurs. On the contrary, language used in the guidelines reflects that the entire year is to be considered. ***Pember v. Shapiro***, 2011 ND 31, 794 N.W.2d 435.

Extended visitation applies regardless of whether the divorce decree orders "visitation" or "custody" that exceeds 60 of 90 consecutive nights. ***Shaw v. Shaw***, 2002 ND 114, 646 N.W.2d 693.

75-02-04.1-08.2. Equal residential responsibility - Determination of child support obligation. A child support obligation must be determined as described in this section in all cases in which a court orders each parent to have equal residential responsibility for their child or children. Equal residential responsibility means each parent has residential responsibility for the child, or if there are multiple children, all of the children, for an equal amount of time as determined by the court. A child support obligation for each parent must be calculated under this chapter, and specifically

ordered, assuming the other parent has primary residential responsibility for the child or children subject to the equal residential responsibility order. The lesser obligation is then subtracted from the greater. The difference is the child support amount owed by the parent with the greater obligation. Each parent is an obligee to the extent of the other parent's calculated obligation. Each parent is an obligor to the extent of that parent's calculated obligation. The offset of child support obligations in this section is for payment purposes only and must be discontinued for any month in which the rights to support of a child for whom the obligation was determined are assigned to a government agency as a condition of receiving public assistance.

History: Effective August 1, 2003; amended effective October 1, 2008; July 1, 2011.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(16); 42 USC 667

In situations where the court order provides for equal physical custody, the court order controls the child support determination, regardless of the actual custodial arrangement exercised by the parties. ***Boumont v. Boumont***, 2005 ND 20, 691 N.W.2d 278.

Where the divorce judgment purported to award "joint custody" to the parents as "co-custodial parents" but on its face awarded more physical custody time to the father, the district court erred in applying the equal physical custody provision to determine the parties' child support obligations. ***Serr v. Serr***, 2008 ND 56, 746 N.W.2d 416.

Where actual language of the judgment does not give the parties equal physical custody, district court erred in applying the equal physical custody provision for establishing the parties' child support obligations. ***Serr v. Serr***, 2008 ND 229, 758 N.W.2d 739.

Judgment provision declaring that, for purposes of calculating child support, parties are considered to have equal physical custody, does not trump an expressly ordered custody schedule or convert an unequal division of custody into "equal physical custody" under the guidelines. ***Thornton v. Klose***, 2010 ND 141, 785 N.W.2d 891.

Decisions Under Prior Law

Shared custody of one child [where each parent was essentially awarded custody of child for one-half of each month] does not constitute split and, consequently, it is inappropriate to use the split formula in a shared custody situation. ***Wetzel v. Wetzel***, 1999 ND 29, 589 N.W.2d 889.

The guidelines do not address support when parents jointly share physical custody of their child for equal amounts of time. When the guidelines do not address a situation, the trial court must enter an order appropriate to the needs of the child and the parents' ability to pay. ***Knutson v. Knutson***, 2002 ND 29, 639 N.W.2d 495.

The offset provisions apply to all split custody and equal physical custody cases, even after one parent assigns the right to receive child support to the State. ***Simon v. Simon***, 2006 ND 29, 709 N.W.2d 4.

75-02-04.1-09. Criteria for rebuttal of guideline amount.

1. The child support amount provided for under this chapter, except for subsection 2, is presumed to be the correct amount of child support. No rebuttal of the guidelines may be based upon evidence of factors described or applied in this chapter, except in subsection 2, or upon:

    a. The subsistence needs, work expenses, and daily living expenses of the obligor; or

    b. Except as provided for in subdivision I of subsection 2, the income of the obligee, which is reflected in a substantial monetary and nonmonetary contribution to the child's basic care and needs by virtue of being a parent with primary residential responsibility.

2. The presumption that the amount of child support that would result from the application of this chapter, except for this subsection, is the correct amount of child support is rebutted only if a preponderance of the evidence establishes that a deviation from the guidelines is in the best interest of the supported children and:

    a. The increased need if support for more than six children is sought in the matter before the court;

    b. The increased ability of an obligor, with a monthly net income which exceeds twelve thousand five hundred dollars, to provide child support;

    c. The increased need if educational costs have been voluntarily incurred, at private schools, with the prior written concurrence of the obligor;

    d. The increased needs of children with disabling conditions or chronic illness;

    e. The increased needs of children age twelve and older;

    f. The increased needs of children related to the cost of child care, purchased by the obligee, for reasonable purposes related to employment, job search, education, or training;

    g. The increased ability of an obligor, whose net income has been substantially reduced as a result of depreciation and to whom

income has been imputed under section 75-02-04.1-07, to provide child support.

h. The increased ability of an obligor, who is able to secure additional income from assets, to provide child support;

i. The increased ability of an obligor, who has engaged in an asset transaction for the purpose of reducing the obligor's income available for payment of child support, to provide child support;

j. The reduced ability of an obligor who is responsible for all parenting time expenses to provide support due to travel expenses incurred predominantly for the purpose of visiting a child who is the subject of the order taking into consideration the amount of court-ordered parenting time and, when such history is available, actual expenses and practices of the parties;

k. The reduced ability of the obligor to pay child support due to a situation, over which the obligor has little or no control, which requires the obligor to incur a continued or fixed expense for other than subsistence needs, work expenses, or daily living expenses, and which is not otherwise described in this subsection;

l. The reduced ability of the obligor to provide support due to the obligor's health care needs, to the extent that the costs of meeting those health care needs:

(1) Exceed ten percent of the obligor's gross income;

(2) Have been incurred and are reasonably certain to continue to be incurred by the obligor;

(3) Are not subject to payment or reimbursement from any source except the obligor's income; and

(4) Are necessary to prevent or delay the death of the obligor or to avoid a significant loss of income to the obligor; or

m. The reduced needs of the child to support from the obligor in situations where the net income of the obligee is at least three times higher than the net income of the obligor.

3. Assets may not be considered under subdivisions h and i of subsection 2, to the extent they:

a. Are exempt under North Dakota Century Code section 47-18-01;

b. Consist of necessary household goods and furnishings; or

c. Include one motor vehicle in which the obligor owns an equity not in excess of twenty thousand dollars.

4. For purposes of subdivision i of subsection 2, a transaction is presumed to have been made for the purpose of reducing the obligor's income available for the payment of child support if:

   a. The transaction occurred after the birth of a child entitled to support;

   b. The transaction occurred no more than twenty-four months before the commencement of the proceeding that initially established the support order; and

   c. The obligor's income is less than it likely would have been if the transaction had not taken place.

5. For purposes of subdivision k of subsection 2, a situation over which the obligor has little or no control does not exist if the situation arises out of spousal support payments, discretionary purchases, or illegal activity.

6. For purposes of subdivisions a through f of subsection 2, any adjustment shall be made to the child support amount resulting from application of this chapter.

7. For purposes of subdivisions g through l of subsection 2, any adjustment shall be made to the obligor's net income.

8. For purposes of subdivision m of subsection 2, any adjustment shall be made to the child support amount resulting from application of this chapter after taking into consideration the proportion by which the obligee's net income exceeds the obligor's net income.

History: Effective February 1, 1991; amended effective January 1, 1995; August 1, 1999; August 1, 2003; July 1, 2008; April 1, 2010; July 1, 2011.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(16); 42 USC 667

Findings

Where trial court belatedly stated that it considered visitation in determining child support, it did not make written or specific findings sufficient to enable the court to review the court's deviation from child support guidelines of approximately 41%. ***McDonough v. McDonough***, 458 N.W.2d 344 (N.D. App. 1990).

A written finding or a specific finding on the record must be made if the court determines that the presumption has been rebutted. ***Spilovoy v. Spilovoy***, 488 N.W.2d 873 (N.D. 1992); ***Mahoney v. Mahoney***, 538 N.W.2d 189 (N.D. 1995).

Mere recitation that the guidelines have been considered in arriving at the amount of a child support obligation is insufficient to show compliance with the guidelines. ***Heley v. Heley***, 506 N.W.2d 715 (N.D. 1993).

A finding of net income is essential. ***Foreng v. Foreng***, 509 N.W.2d 38 (N.D. 1993).

Any deviation from the guidelines requires the court to make a written finding or a specific finding on the record. ***Beals v. Beals***, 517 N.W.2d 413 (N.D. 1994); ***In the Interest of L.D.C.***, 1997 ND 104, 564 N.W.2d 298; ***Schumacher v. Schumacher***, 1999 ND 10, 589 N.W.2d 185; ***State of Michigan ex rel., Schneider v. Schneider***, 2008 ND 35, 745 N.W.2d 368.

Daily Living Expenses

Trial court erred in deducting the entire monthly principal payment of a spouse's debt as a business cost in determining the child support obligation because the guidelines take into consideration the subsistence needs, work expenses, and daily living expenses of the obligor and to the extent that any of that payment was applied to construction of the spouse's house, rather than to farm land acquisition, that portion did not qualify as a deductible business cost. ***Heley v. Heley***, 506 N.W.2d 725 (N.D. 1993).

Medical bills, home mortgage payments, credit card bills and other household expenses were not hardships, but were subsistence needs, work expenses, and daily living expenses already considered by the guidelines and not deductible. ***Hallock v. Mickels***, 507 N.W.2d 541 (N.D. 1993).

Home mortgage payments and other household expenses are considered by the guidelines and cannot be further deducted from child support. ***Scherling v. Scherling***, 529 N.W.2d 879 (N.D. 1995).

Child support guidelines did not permit district court to consider obligor's increased cost-of-living expense in determining obligor's child support obligation. The guidelines plainly state that daily living expenses may not be used to rebut base amount of child support obligation under guidelines. ***Horner v. Horner***, 549 N.W.2d 669 (N.D. 1996).

Child support guidelines required deduction of business expenses, such as meal expenses according to IRS terminology, to determine adjusted gross income for self-employment. Meal expenses not allowed as a deduction for taxation purposes and not proven as actual business travel expenditures cannot be deducted from adjusted gross income to arrive at self-employment net income. ***Hieb v. Hieb***, 1997 ND 171, 568 N.W.2d 598.

Child support guidelines prohibit court from considering an obligor's daily living expenses when setting child support. ***Jarvis v. Jarvis***, 1998 ND 163, 584 N.W.2d 84.

Rebuttable Presumption

There is a rebuttable presumption that the amount of child support resulting from an application of the guidelines would be correct. ***Wenzel v. Wenzel***, 469 N.W.2d 156 (N.D. 1991); ***Zander v. Zander***, 470 N.W.2d 603 (N.D. 1991); ***Hallock v. Mickels***, 507 N.W. 541 (N.D. 1993).

After promulgation of child support guidelines, determinations of child support are made by applying the calculations required by the regulations, and these calculations result in an amount of child support which is presumptively correct. ***Montgomery v. Montgomery***, 481 N.W.2d 234 (N.D. 1992).

Evidence of increased needs of a supported child with a handicapping condition may be a basis for rebuttal of the presumption the guidelines amount is correct. ***Clutter v. McIntosh***, 484 N.W.2d 846 (N.D. 1992).

The presumption that the correct amount of child support is obtained by applying the child support guidelines may be rebutted by evidence establishing that factors not considered by the guidelines would result in undue hardship to the obligor or supported child. ***Spilovoy v. Spilovoy***, 488 N.W.2d 873 (N.D. 1992)

Assuming that plaintiff had correctly computed defendant's support obligation using the guideline formula, the monthly support payment would presumptively be a correct support award. The presumptive support obligation is rebuttable only with a specific written finding by the court that the preponderance of the evidence establishes that factors not considered by the guidelines would result in an undue hardship for defendant to pay that amount. ***Zacher v. Zacher***, 493 N.W.2d 704 (N.D. App. 1992).

There is a statutory rebuttable presumption that the amount of child support provided under the child support guidelines is the correct amount. Trial court may deviate from guideline amount only if it finds, by a preponderance of evidence and taking into consideration the best interests of the child, that the presumptive amount is not the correct amount of support required. ***Dalin v. Dalin***, 545 N.W.2d 785 (N.D. 1996); ***State of Michigan ex rel., Schneider v. Schneider***, 2008 ND 35, 745 N.W.2d 368.

Party urging deviation from presumptively correct child support guidelines amount carries burden of proof. ***Id.***

The party urging a deviation from the presumptively correct guideline amount bears the burden of proof. ***Schleicher v. Schleicher***, 551 N.W.2d 766 (N.D. 1996).

Trial court may deviate from presumptively correct amount of support only if preponderance of evidence shows the presumptive amount is not the amount required, taking into consideration the best interests of the child. ***Schleicher v. Schleicher***, 551 N.W.2d 766 (N.D. 1996); ***In the Interest of L.D.C.***, 1997 ND 104, 564 N.W.2d 298.

When a proper finding as to net income of the obligor is made, there is a rebuttable presumption that a child support order made under the guidelines is correct. ***Wolf v. Wolf***, 557 N.W.2d 742 (N.D. 1996).

Where the district court did not follow the guidelines in determining the amount of child support owed by the obligor, and did not provide written or specific findings on the record justifying deviation from the guidelines, the district court's award was clearly erroneous. ***In the Interest of L.D.C.***, 1997 ND 104, 564 N.W.2d 298.

Clear error exists where trial court recognized the support ordered was not in compliance with the guidelines, but did not make findings to justify the deviation. ***Peterson v. Peterson***, 555 N.W.2d 359 (N.D. 1996).

The amount prescribed by the guidelines enjoys a rebuttable presumption of correctness. ***Edwards v. Edwards***, 1997 ND 94, 563 N.W.2d 394; ***Hieb v. Hieb***, 1997 ND 171, 568 N.W.2d 598.

There is a rebuttable presumption that the amount calculated under the child support guidelines is the correct amount of support. ***Harty v. Harty***, 1998 ND 97, 578 N.W.2d 519.

If the court finds that the presumptively correct amount under the guidelines has been rebutted, it must make a specific finding on the record stating the presumptive amount, the criteria rebutting the presumptive correctness of that amount, and the correct amount of support warranted. ***Olson v. Olson***, 1998 ND 190, 585 N.W.2d 134.

Needs of Older Children

It was error for the trial court to refuse an upward modification because the child's increased needs exceeded a subsistence level of support. The increased needs of older children are not limited to subsistence needs. ***Bernhardt v. Bernhardt***, 1997 ND 80, 561 N.W.2d 656; ***Entzie v. Entzie***, 2010 ND 194, 789 N.W.2d 550.

High Income Obligor

The guidelines allow a district court to depart upward from the presumptively correct child support amount in cases that involve an obligor who earns more than $12,500 per month. ***Hanson v. Hanson***, 2005 ND 82, 695 N.W.2d 205.

Supreme Court rejected obligor's argument that the party seeking an upward deviation must justify that deviation by showing the child's appropriate needs in specific amounts, in a line-by-line accounting fashion. ***Nuveen v. Nuveen***, 2012 ND 260, ___ N.W.2d ___.

Needs of Children with Disabling Conditions or Chronic Illness

Trial court's finding that child's need for supplemental education programs to enhance reading skills and educational opportunities warranted a deviation from the guideline amount was not clearly erroneous. ***Entzie v. Entzie***, 2010 ND 194, 789 N.W.2d 550.

Child Care

The cost of day care may justify an upward deviation from the presumptively correct amount of support required by the guidelines. However, where obligee's mother

provided child care for children at rate of $1.50 per hour, trial court did not err by not granting an upward deviation. ***Corbett v. Corbett***, 2001 ND 113, 628 N.W.2d 312.

Travel Expenses for Visitation

No error in trial court's determination that obligor furnished insufficient facts to determine his visitation travel expenses. ***Hendrickson v. Hendrickson***, 553 N.W.2d 215 (N.D. 1996).

A child support obligation may be adjusted if the ability to provide support is reduced due to visitation-related travel expenses but the travel expenses must be subtracted from the obligor's net income before calculating the support obligation. ***State ex rel. K.B. v. Bauer***, 2009 ND 45, 763 N.W.2d 462.

A provision that contains no location limitation on travel for visitation does not affect obligor's stipulated obligation to pay one-half of these travel expenses. ***Cook v. Eggers***, 1999 ND 97, 593 N.W.2d 781.

Trial court erred in giving the obligor a two-month credit against his annual child support obligation to account for the obligor's extended visitation with the children and for his travel costs. The guidelines include explicit provisions governing deviations when an obligor has a reduced ability to pay due to visitation travel expenses. Under these provisions, travel expenses are subtracted from the obligor's net income before calculating the support obligation. ***Cline v. Cline***, 2007 ND 85, 732 N.W.2d 385.

Trial court did not err in denying the obligor a deviation for visitation travel expenses when, based on the obligor's own calculation of his income and travel expenses and on the fact that the obligee was responsible for costs of transporting the children to and from their visitation with the obligor, the trial court could reasonably conclude that the obligor's ability to provide support would not be hindered by his travel expenses. ***Pember v. Shapiro***, 2011 ND 31, 794 N.W.2d 435.

Trial court erred in denying the obligor a deviation for visitation travel expenses when, although history of actual expenses and visitation practices were not documented through receipts, there was testimony from the obligor that he had incurred costs for airfare, lodging, and car rental to exercise his parenting time. ***Keita v. Keita***, 2012 ND 234, ___ N.W.2d ___.

Continued or Fixed Expense

No evidence or finding supports claim that it was in best interests of children that obligor provide less support because of obligor's previous commitment to pay educational expenses of adult children from prior marriage. ***Zarrett v. Zarrett***, 1998 ND 49, 574 N.W.2d 855.

Consideration of costs of supporting children of prior marriage is properly governed by § 75-02-04.1-06.1, rather than by § 75-02-04.1-09(2)(j). ***Id.***

Hardship

Without the specific findings of hardship to the noncustodial parent required by this section, a custodial parent's income is irrelevant to the noncustodial parent's obligation to pay child support. ***Reimer v. Reimer***, 502 N.W.2d 231 (N.D. 1993).

The presumptive obligation under the guidelines can be rebutted only if a preponderance of the evidence establishes the existence of factors not considered by the guidelines or the existence of a hardship. ***Bernhardt v. Bernhardt***, 503 N.W.2d 233 (N.D. 1993).

The care and tuition of stepchildren living in a noncustodial parent's home did not qualify as a hardship. ***Hallock v. Mickels***, 507 N.W.2d 541 (N.D. 1993).

The district court's refusal to abate father's child support obligation for the summer months when he was allowed visitation with the children was not clearly erroneous where the district court made no written or specific finding of hardship. ***Beals v. Beals***, 517 N.W.2d 413 (N.D. 1994).

Even though obligor mother may have had difficulty maintaining her current standard of living and paying child support, this was not different from an ordinary family that must forego a comfortable lifestyle to raise children. Mother's budget, part of the record, contained items which could be reduced to pay for the house. Based on the guardian ad litem's testimony, she should make cuts in these other areas to maintain the marital home for the child. ***Scherling v. Scherling***, 529 N.W.2d 879 (N.D. 1995).

Additional Children

The additional living expenses assumed by an obligor who voluntarily remarried and had children from that marriage did not constitute factors not considered by the guidelines to justify a finding of undue hardship. ***Houmann v. Houmann***, 499 N.W.2d 593 (N.D. 1993).

The additional living expenses assumed by an obligor who voluntarily had additional children did not constitute factors not considered by the guidelines to justify a finding of undue hardship. ***Rueckert v. Rueckert***, 499 N.W.2d 863 (N.D. 1993).

Remarriage

Trial court's finding of undue hardship was clearly erroneous where child support obligor's financial burdens stemming from her voluntary remarriage and her having children of that marriage did not constitute factors not considered by the guidelines which could justify a finding of undue hardship. ***Guskjolen v. Guskjolen***, 499 N.W.2d 126 (N.D. 1993).

Work expenses of the obligor and the additional living expenses assumed by an obligor who voluntarily remarries and has children from that marriage did not constitute factors not considered by the guidelines to justify a finding of undue hardship. ***Bernhardt v. K.R.S.***, 503 N.W.2d 233 (N.D. 1993).

Controllable Living Expenses

Controllable living expenses of the obligor and his household are not hardships. ***Gray v. Gray***, 527 N.W.2d 268 (N.D. 1996); ***Scherling v. Scherling***, 529 N.W.2d 879 (N.D. 1995).

Illegal Activity

The child support guidelines have determined that, as a matter of law, financial hardship brought about by incarceration is not a situation in which an award of the presumptively correct amount of child support is "unjust or inappropriate." ***In the Interest of A.M.S.***, 2005 ND 64, 694 N.W.2d 8.

Net Income of Obligee at Least Three Times Higher than Net Income of Obligor

Trial court must make a specific finding of the obligee's net income under the guidelines and then determine whether the obligor is entitled to a downward deviation based on the obligee's net income being at least three times higher than the obligor's net income. ***Becker v. Becker***, 2011 ND 107, 799 N.W.2d 53.

Presumptively Correct Amount

The scheduled amounts under the child support guidelines promulgated by the Department of Human Services have been elevated from a scale of suggested minimum contribution to a presumptively correct amount which trial courts must follow unless that presumption of correctness was rebutted by criteria which took into consideration the best interests of the child. ***O'Callaghan v. O'Callaghan***, 515 N.W.2d 821 (N.D. App. 1994).

Parties' stipulation to a child support amount does not rebut the presumption that a correct child support amount results from the application of the guidelines. ***Smith v. Smith***, 538 N.W.2d 222 (N.D. 1995).

Trial court's determination that evidence did not support upward deviation from presumptively correct amount was not clearly erroneous. Although obligor bought pickup truck, obligee did not show that purchase was made for purpose of reducing income available for payment of child support. ***Dalin v. Dalin***, 545 N.W.2d 785 (N.D. 1996).

Presumptive Amount Rebutted

Even thought the court did not use the magic words, "the guidelines are hereby rebutted," the effect of its finding was the same: the increased child care expense resulting from child's preschool age and wife's full-time employment required an increase in husband's support obligation from the presumptive amount. ***Perala v. Carlson***, 520 N.W.2d 839 (N.D. 1994); ***Jarvis v. Jarvis***, 1998 ND 163, 584 N.W.2d 84.

Trial court's findings reflect balancing of children's best interests with obligor's ability to pay, and adequately support a determination that the presumptive guidelines amount is not the correct amount of support required and an upward deviation from the guidelines amount. ***Reinecke v. Griffeth***, 533 N.W.2d 695 (N.D. 1995).

The initial step in determining whether a deviation from the guidelines amount is appropriate is a finding by the court by a preponderance of the evidence that a deviation is in the best interest of the supported children. ***Zarrett v. Zarrett***, 1998 ND 49, 574 N.W.2d 855.

Parties stipulation to a child support obligation greater than that required by the guidelines rebutted the presumption the guidelines amount was correct. ***O'Callaghan v. O'Callaghan***, 515 N.W.2d 821 (N.D. App. 1994).

Where district court found that the presumptively correct amount in guidelines had been rebutted and deviation from guidelines was warranted, such findings were specific findings of fact which appellant had duty to challenge if he wanted the findings reviewed. ***Wagner v. Wagner***, 1998 ND 117, 579 N.W.2d 207.

Obligor's argument that the child support guidelines create an irrebuttable minimum payment fails since state law (N.D.C.C. § 14-09-09.7) and guidelines themselves provide that the amount resulting from application of the guidelines is rebuttably presumed to be the correct amount and, further, the guidelines provide criteria for rebuttal. ***In the Interest of R.H.***, 2004 ND 170, 686 N.W.2d 107.

Departure from Guidelines

A child support award is clearly erroneous if it departs from the guidelines and the court does not expressly find that the support amount established under the guidelines has been rebutted by a preponderance of the evidence. ***Schatke v. Schatke***, 520 N.W.2d 833 (N.D. 1994).

Where there were no specific findings to rebut the presumptive child support obligation and thus justify a departure from the guidelines, the trial court's child support award was clearly erroneous and the case was remanded for a redetermination of the father's child support obligation. ***Bernhardt v. K.R.S.***, 503 N.W.2d 233 (N.D. 1993).

Where the trial court did not indicate that it applied the guidelines in computing the obligor's income or child support obligation, and did not make findings to justify such a deviation from the guidelines, the trial court's award of child support was clearly erroneous. ***Peterson v. Peterson***, 555 N.W.2d 359 (N.D. 1996).

A change or modification of child support based on an erroneous application of the child support guidelines is clearly erroneous. ***Steffes v. Steffes***, 1997 ND 49, 560 N.W.2d 888.

Upward deviation to require obligor to pay for children's medical expenses not covered by insurance is not required where no evidence indicates any criteria for deviation is present. ***Dickson v. Dickson***, 1997 ND 167, 568 N.W.2d 284.

To the extent it may be understood to permit proof of uninsured medical expenses to support a deviation, Dickson v. Dickson is overruled. ***Jarvis v. Jarvis***, 1998 ND 163 584 N.W.2d 84.

Deviation from the guidelines requires the court to make a written finding or a specific finding on the record. ***Beals v. Beals***, 517 N.W.2d 413 (N.D. 1994); ***In the Interest of L.D.C.***, 1997 ND 104, 564 N.W.2d 298.

Trial court was not clearly erroneous in refusing to deviate from guidelines amount and allow obligor a credit on her child support obligation for travel expenses incurred solely for exercising visitation rights. ***Carver v. Miller***, 1998 ND App. 12, 585 N.W.2d 139.

Under the guidelines, the court can reduce the obligor's child support obligation if the court finds a reduced ability to pay because of travel expenses incurred by the obligor solely for the purpose of visitation. ***Schmaltz v. Schmaltz***, 1998 ND 212, 586 N.W.2d 852.

It was clearly erroneous to allow an abatement of obligor's support obligation during summer visitation period without issuing specific findings on the record as to the basis for allowing such a departure from the guidelines. ***Schumacher v. Schumacher***, 1999 ND 10, 589 N.W.2d 185.

Trial court order requiring obligor to obtain and maintain life insurance policy on himself as security for his future support obligations did not constitute an improper upward deviation from the guidelines. Statutes that authorize the trial court to make future provision for the child's care and support or require reasonable security for support payments do not create an extra level of child support. Instead, those statutes create a separate responsibility, over and above the initial duty to provide support in the amount required by the guidelines. ***Seay v. Seay***, 2012 ND 179, 820 N.W.2d 705.

In case involving split primary residential responsibility, Supreme Court rejected father's argument that it was an error to determine the deviation after offsetting the parent's presumptive support amounts for the reason that no law specifically requires the court to apply the deviation before the offset. ***Nuveen v. Nuveen***, 2012 ND 260, ___ N.W.2d ___.

Homestead not to be Considered

Equity in an obligor's homestead up to $80,000 in value may not be considered when calculating an obligor's income. ***Reinecke v. Griffeth***, 533 N.W.2d 695 (N.D. 1995); ***Whitmire v. Whitmire***, 1999 ND 56, 591 N.W.2d 126.

Asset Transactions

Trial court erred as matter of law in determining asset expenditures made by obligor before child was born were presumed to be asset transactions made for the purpose of reducing his income available for child support, warranting an upward deviation in child support. ***Christl v. Swanson***, 2000 ND 74, 609 N.W.2d 70.

Listed Factors are Exclusive

Department of Human Services amended this section, to list the exclusive factors available to rebut the presumptive amount, in response to 1993 amendment to N.D.C.C.

§ 14-09-09.7 to require the guidelines to establish the available criteria for rebutting the presumptive amount. ***Horner v. Horner***, 549 N.W.2d 669 (N.D. 1996).

This section limits the factors available for rebuttal of the presumptive amount to those listed in subsection 2. ***Id.***

The list of available criteria for deviation is exclusive. ***In the Interest of L.D.C.***, 1997 ND 104, 564 N.W.2d 298.

Medical insurance premiums and uninsured medical expenses (except for needs of children with disabling conditions or chronic illness) are not criteria for rebuttal of guidelines amount. ***Jarvis v. Jarvis***, 1998 ND 163, 584 N.W.2d 84.

Decisions Under Prior Law

The trial court shall use the guidelines as a starting point and then it must make its decision by considering the best interests of all the children and by balancing the needs of the children with the noncustodial parent's ability to pay. ***Bergman v. Bergman***, 486 N.W.2d 243 (N.D. 1992).

Child support deviations allowed for visitation travel expenses must be calculated on the basis of court-ordered visitation alone. Travel expense for discretionary visitation is not a valid criterion for rebuttal of the presumptively correct child support guidelines. ***Tibor v. Tibor***, 2001 ND 43, 623 N.W.2d 12.

Until the rule is amended to identify the method of deviation, the trial court may use its discretion to determine whether visitation travel expenses may be deducted directly from the child support obligation or from the noncustodial parent's gross monthly income to calculate net income. ***Id.***

Obligee's Income

The guidelines are premised on the obligor's income, not on the obligee's earnings or needs. ***Pozarnsky v. Pozarnsky***, 494 N.W.2d 148 (N.D. 1992).

When computing a noncustodial parent's child support obligation, the custodial parent's income is not a proper factor to be considered. ***Gabriel v. Gabriel***, 519 N.W.2d 293 (N.D. 1994).

A substantial disparity between the obligor's and the obligee's income is not material for setting child support. ***Scherling v. Scherling***, 529 N.W.2d 879 (N.D. 1995).

75-02-04.1-10. Child support amount. The amount of child support payable by the obligor is determined by the application of the following schedule to the obligor's monthly net income and the number of children for whom support is being sought in the matter before the court.

Obligor's Monthly Net Income	One Child	Two Children	Three Children	Four Children	Five Children	Six or More Children
100 or less	14	17	20	22	24	26
200	28	34	40	44	48	52
300	42	51	60	66	72	78
400	56	68	80	88	96	104
500	82	100	117	130	143	155
600	108	131	155	172	189	207
700	134	163	192	214	236	258
800	160	195	229	256	283	309
900	186	226	267	298	329	361
1000	212	258	304	340	376	412
1100	238	290	341	382	423	463
1200	264	321	379	424	469	515
1300	290	353	416	466	516	566
1400	316	385	453	508	563	617
1500	342	416	491	550	609	669
1600	368	448	528	592	656	720
1700	384	476	562	630	696	761
1800	400	505	596	668	736	803
1900	416	533	631	706	776	844
2000	431	562	665	744	816	885
2100	447	590	699	781	856	926
2200	463	619	733	819	896	968
2300	479	647	767	857	936	1009
2400	495	676	802	895	976	1050
2500	511	704	836	933	1017	1091
2600	527	733	870	971	1057	1133
2700	542	761	904	1009	1097	1174
2800	558	789	939	1047	1137	1215
2900	574	818	973	1084	1177	1257
3000	590	846	1007	1122	1217	1298
3100	606	875	1041	1160	1257	1339
3200	622	903	1075	1198	1297	1380
3300	637	932	1110	1236	1337	1422
3400	653	960	1144	1274	1377	1463
3500	669	989	1178	1312	1417	1504
3600	685	1017	1212	1350	1457	1545
3700	701	1045	1246	1387	1497	1587
3800	717	1074	1281	1425	1537	1628

3900	733	1102	1315	1463	1577	1669
4000	748	1131	1349	1501	1617	1710
4100	764	1159	1383	1539	1658	1752
4200	780	1188	1417	1577	1698	1793
4300	796	1216	1452	1615	1738	1834
4400	812	1245	1486	1653	1778	1876
4500	828	1273	1520	1691	1818	1917
4600	844	1302	1554	1728	1858	1958
4700	859	1330	1589	1766	1898	1999
4800	875	1358	1623	1804	1938	2041
4900	891	1387	1657	1842	1978	2082
5000	907	1415	1691	1880	2018	2123
5100	923	1444	1725	1918	2058	2164
5200	939	1472	1760	1956	2098	2206
5300	954	1501	1794	1994	2138	2247
5400	970	1529	1828	2031	2178	2288
5500	986	1558	1862	2069	2218	2330
5600	1002	1586	1896	2107	2258	2371
5700	1018	1614	1931	2145	2298	2412
5800	1034	1643	1965	2183	2339	2453
5900	1050	1671	1999	2221	2379	2495
6000	1065	1700	2033	2259	2419	2536
6100	1081	1728	2067	2297	2459	2577
6200	1097	1757	2102	2334	2499	2618
6300	1113	1785	2136	2372	2539	2660
6400	1129	1814	2170	2410	2579	2701
6500	1145	1842	2204	2448	2619	2742
6600	1161	1871	2239	2486	2659	2784
6700	1176	1899	2273	2524	2699	2825
6800	1192	1927	2307	2562	2739	2866
6900	1208	1956	2341	2600	2779	2907
7000	1224	1984	2375	2638	2819	2949
7100	1240	2013	2410	2675	2859	2990
7200	1256	2041	2444	2713	2899	3031
7300	1271	2070	2478	2751	2939	3072
7400	1287	2098	2512	2789	2979	3114
7500	1303	2127	2546	2827	3020	3155
7600	1319	2155	2581	2865	3060	3196
7700	1335	2183	2615	2903	3100	3237
7800	1351	2212	2649	2941	3140	3279
7900	1367	2240	2683	2978	3180	3320
8000	1382	2269	2717	3016	3220	3361
8100	1398	2297	2752	3054	3260	3403
8200	1414	2326	2786	3092	3300	3444
8300	1430	2354	2820	3130	3340	3485
8400	1446	2383	2854	3168	3380	3526
8500	1462	2411	2888	3206	3420	3568
8600	1478	2440	2923	3244	3460	3609

8700	1493	2468	2957	3281	3500	3650
8800	1509	2496	2991	3319	3540	3691
8900	1525	2525	3025	3357	3580	3733
9000	1541	2553	3060	3395	3620	3774
9100	1557	2582	3094	3433	3661	3815
9200	1573	2610	3128	3471	3701	3857
9300	1588	2639	3162	3509	3741	3898
9400	1604	2667	3196	3547	3781	3939
9500	1620	2696	3231	3585	3821	3980
9600	1636	2724	3265	3622	3861	4022
9700	1652	2752	3299	3660	3901	4063
9800	1668	2781	3333	3698	3941	4104
9900	1684	2809	3367	3736	3981	4145
10000	1699	2838	3402	3774	4021	4187
10100	1715	2866	3436	3812	4061	4228
10200	1731	2894	3470	3849	4101	4270
10300	1747	2923	3504	3887	4141	4311
10400	1763	2951	3538	3924	4181	4352
10500	1780	2979	3572	3962	4221	4394
10600	1796	3007	3605	4000	4260	4435
10700	1812	3035	3639	4037	4300	4476
10800	1828	3064	3673	4075	4340	4517
10900	1844	3092	3707	4112	4380	4559
11000	1860	3120	3741	4150	4420	4600
11100	1876	3148	3775	4188	4460	4641
11200	1892	3176	3809	4225	4500	4683
11300	1908	3205	3843	4263	4540	4724
11400	1924	3233	3877	4300	4580	4765
11500	1941	3261	3911	4338	4620	4807
11600	1957	3289	3945	4376	4659	4848
11700	1973	3317	3978	4413	4699	4889
11800	1989	3346	4012	4451	4739	4930
11900	2005	3374	4046	4488	4779	4972
12000	2021	3402	4080	4526	4819	5013
12100	2037	3430	4114	4564	4859	5054
12200	2053	3458	4148	4601	4899	5096
12300	2069	3487	4182	4639	4939	5137
12400	2085	3515	4216	4676	4979	5178
12500 or more	2102	3543	4250	4714	5019	5220

History: Effective February 1, 1991; amended effective January 1, 1995; August 1, 2003; July 1, 2011.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(16); 42 USC 667

Presumptive Amount

The presumptive amount of child support is a scheduled amount based on the obligor's monthly net income and the number of children for whom support is being sought. ***Shipley v. Shipley***, 509 N.W.2d 49 (N.D. 1993).

To apply the child support guidelines, a trial court must determine the obligor's net income. Where trial court determined that obligor's net income for child support purposes was between $2,000 and $3,000 per month, and evidence was not adequate for court to make a more precise determination, such determination was not clearly erroneous. ***Monson v. Monson***, 1998 ND App. 9, 583 N.W.2d 825.

Factors to be Considered

When there are sufficient resources, children of a divorce are entitled to enjoy a standard of living, post-divorce, comparable to that enjoyed while the family was intact. ***Bagan v. Bagan***, 382 N.W.2d 645 (N.D. 1986); ***Heggen v. Heggen***, 452 N.W.2d 96 (N.D. 1990); ***Bernhardt v. Bernhardt***, 1997 ND 80, 561 N.W.2d 656.

Children should be able to enjoy more than the subsistence level of support if the parents can afford greater amounts. ***Wolf v. Wolf***, 474 N.W.2d 257 (N.D. 1991).

The court should factor into its equation the principle that proportionally less funds are required for each succeeding child in a household. ***Bergman v. Bergman***, 486 N.W.2d 243 (N.D. 1992).

A child's appropriate needs are not limited to a subsistence level of support, but can also be based on the child's standard of living. ***Perala v. Carlson***, 520 N.W.2d 839 (N.D. 1994).

Decisions Under Prior Law

The guidelines do not establish a presumptively correct amount of child support due from a noncustodial parent with a monthly net income exceeding $10,000. ***Montgomery v. Montgomery***, 481 N.W.2d 234 (N.D. 1992).

In cases where the obligor's monthly net income exceeds $10,000, a trial court must make a further inquiry to determine an amount appropriate to the needs of the children and the ability of the parent to pay. ***Id***.

75-02-04.1-11. Parental responsibility for children in foster care or guardianship care. It is important that parents maintain a tie to and responsibility for their child when that child is in foster care. Financial responsibility for the support of that child is one component of the maintenance of the relationship of parent and child. Parents of a child subject to a guardianship order under North Dakota Century Code chapter 27-20 or 30.1-27 remain financially responsible for the support of that child.

1. In order to determine monthly net income, it is first necessary to identify the parent or parents who have financial responsibility for any child entering foster care or guardianship care, and to determine the net income

of those financially responsible parents. If the parents of a child in foster care or guardianship care reside together, and neither parent has a duty to support any child who is not also a child of the other parent, the income of the parents must be combined and treated as the income of the obligor. In all other cases, each parent is treated as an obligor, and each parent's support obligation must be separately determined.

2. Unless subsection 3 applies to the obligor, the net income and the total number of children are applied to section 75-02-04.1-10 to determine the child support amount. That child support amount is then divided by the total number of children to determine the child support obligation for each child in foster care or guardianship care. For purposes of this subsection, the "total number of children" means:

   a. If a child entering foster care or guardianship care resides in the obligor's home, the total number of children residing in the obligor's home to whom the obligor owes a duty of support, including the child or children entering foster care or guardianship care, plus any other full siblings of the child or children entering foster care or guardianship care to whom the obligor owes a duty of support who are not residing in the obligor's home; or

   b. If no child entering foster care or guardianship care resides in the obligor's home, the child or children entering foster care or guardianship care plus the full siblings of the child or children entering foster care or guardianship care to whom the obligor owes a duty of support.

3. If an obligor owes a duty of support to any child other than the child or children described in subdivision a or b of subsection 2, as applicable to that obligor, the support obligation must be determined through application of section 75-02-04.1-06.1 such that:

   a. The total number of children, as described in subdivision a or b of subsection 2, as applicable to that obligor, are treated as one obligee; and

   b. The amount resulting from the application of section 75-02-04.1-06.1 for the children described in subdivision a or b of subsection 2, as applicable to that obligor, is divided by the total number of such children to determine the child support obligation for each child in foster care or guardianship care.

4. For purposes of subsection 2, a full sibling of the child or children entering foster care or guardianship care is a brother or sister who has both parents in common with the child or children entering foster care or guardianship care.

History: Effective February 1, 1991; amended effective January 1, 1995; August 1, 1999; August 1, 2003; July 1, 2011.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(16); 42 USC 667

Authority to Establish Guidelines

State law provides ample authority for the Department to include children in foster care within the child support guidelines. ***In the Interest of K.G.***, 551 N.W.2d 554 (N.D. 1996).

Parental Support Responsibility

A parent remains financially responsible for support of a child in foster care. ***In the Interest of K.G.***, 551 N.W.2d 554 (N.D. 1996); ***In the Interest of L.D.C.***, 1997 ND 104, 564 N.W.2d 298; ***Berger v. Holt***, 2003 ND 34, 657 N.W.2d 273.

Obligor had no legal basis to protest paying support for his son while in foster care despite obligor's dissatisfaction with the services Social Services provided for the child. ***Berger v. Holt***, 2003 ND 34, 657 N.W.2d 273.

Foster Care Guideline Harmonized with Juvenile Court Act

The child support guidelines can be harmonized with Juvenile Court Act in cases involving foster care because the implementation of the child support guidelines contemplates a parent's financial ability to pay and permits an individualized examination of the presumption established by the guidelines as required by the latter. ***In the Interest of K.G.***, 551 N.W.2d 554 (N.D. 1996).

Uniformity in Child Support Amounts

Legislature encouraged uniformity in the calculation of child support amounts. By defining "obligee" to include a state or political subdivision to which a duty of support is owed, the legislature reflected its objective of uniformity. ***In the Interest of K.G.***, 551 N.W.2d 554 (N.D. 1996).

75-02-04.1-12. Uncontested proceedings. In a proceeding where the obligor appears, but does not resist the child support amount sought by the obligee, and in proceedings where the parties agree or stipulate to a child support amount, credible evidence describing the obligor's income and financial circumstances, which demonstrates that the uncontested or agreed amount of child support conforms to the requirements of this chapter, must be presented.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(12); 42 USC 667

Parties' Agreement to Greater Amount

Public policy does not preclude the parties from agreeing to an amount of child support greater than the minimum contributions required by the guidelines. ***O'Callaghan v. O'Callaghan***, 515 N.W.2d 821 (N.D. 1994).

Parties' Agreement to Lesser Amount

Stipulations by parents to pay an amount of child support less than that required by the guidelines violate public policy and will not be enforced. ***Heinz v. Heinz***, 2001 ND 147, 632 N.W.2d 443, ***Lee v. Lee***, 2005 ND 129, 699 N.W.2d 842.

75-02-04.1-13. Application. The child support guideline schedule amount is rebuttably presumed to be the correct amount of child support in all child support determinations, including both temporary and permanent determinations, and including determinations necessitated by actions for the support of children of married persons, actions seeking domestic violence protection orders, actions arising out of divorce, actions arising out of paternity determinations, actions based upon a claim for necessaries, actions arising out of juvenile court proceedings, interstate actions for the support of children in which a court of this state has the authority to establish or modify a support order, and actions to modify orders for the support of children. The fact that two or more such actions may be consolidated for trial or otherwise joined for convenient consideration of facts does not prevent the application of this chapter to those actions.

History: Effective February 1, 1991; amended effective January 1, 1995; October 1, 2008.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(12); 42 USC 667

Reason for Guidelines

Use of formal guidelines is designed to remedy the often inadequate, inconsistent, and ineffective results of random judicial action. ***Clutter v. McIntosh***, 484 N.W.2d 846 (N.D. 1992).

Legislature encouraged uniformity in the calculation of child support amounts. By defining "obligee" to include a state or political subdivision to whom a duty of support is owed, the Legislature reflected its objective of uniformity. ***In the Interest of K.G.***, 551 N.W.2d 554 (N.D. 1996).

Child support is presumed to benefit the children, not the custodial parent, and should not be used as a wedge or club to force compliance with the court's orders. ***Hendrickson v. Hendrickson***, 1999 ND 37, 590 N.W.2d 220.

Plain language of the guidelines does not authorize the court to order a custodial parent to pay child support to a noncustodial parent. ***Crandall v. Crandall***, 2011 ND 136, 799 N.W.2d 388.

Use of Guidelines in Effect at Time of Decision

Trial court properly applied the guidelines as they existed at time of decision. ***McDonough v. Murphy***, 539 N.W.2d 313 (N.D. 1995); ***Shaver v. Kopp***, 545 N.W.2d 170 (N.D. 1996).

Establishment of Guidelines

State law (N.D.C.C. § 14-09-09.7) provides clear statutory authority for Human Services to establish child support guidelines and it does not preclude child support guidelines based on the obligor model. ***Eklund v. Eklund***, 538 N.W.2d 182 (N.D. 1995).

State law provides ample authority for the Department to include children in foster care within the child support guidelines. ***In the Interest of K.G.***, 551 N.W.2d 554 (N.D. 1996).

Agreement of Parties

Parental stipulations regarding child support are legitimate incidents of parental authority and control and are entitled to serious consideration by a court; however, notwithstanding a parental agreement, a trial court has continuing jurisdiction to modify child support. ***Smith v. Smith***, 538 N.W.2d 222 (N.D. 1995).

To the extent the stipulation of the parents purports to mechanically restrict the father's child support obligation to half of the children's reasonable and necessary expenses, it violates public policy expressed in the child support guidelines by limiting the power of the court to modify future child support. ***Id.***

Parental agreements that prohibit or limit the power of a court to modify future child support are invalid. ***Rueckert v. Rueckert***, 499 N.W.2d 863 (N.D. 1993); ***Reimer v. Reimer***, 502 N.W.2d 231 (N.D. 1993); ***Zarrett v. Zarrett***, 1998 ND 49, 574 N.W.2d 855.

Stipulation to pay greater amount of child support than required by guidelines, unlike stipulation to pay lesser amount, does not violate public policy. ***O'Callaghan v. O'Callaghan***, 515 N.W.2d 821 (N.D. App. 1994).

Best interest of the children and public policy are satisfied by parental stipulations that require an obligor to pay more child support than required by the guidelines. ***Smith v. Smith***, 538 N.W.2d 222 (N.D. 1995).

Paternity Agreement

A court has continuing jurisdiction to modify an award based upon a stipulated agreement between the parents wherein the father has agreed to drop his contest of paternity in exchange for reduced child support payments. ***Bernhardt v. K.R.S.***, 503 N.W.2d 233 (N.D. 1993).

Modification

Even where the parties stipulate as to child support, public policy dictates that the noncustodial parent's obligation is subject to modification under the

continuing jurisdiction of the court and the guidelines. ***Steffes v. Steffes***, 1997 ND 49, 560 N.W.2d 888.

Material Change of Circumstances

It is unnecessary to show a material change of circumstances as a prerequisite to modification of an original decree that provides for no child support. ***Sullivan v. Quist***, 506 N.W.2d 394 (N.D. 1993).

Guidelines have not altered the substance of case law that a change in circumstances is one that is neither contemplated nor foreseen. ***Schmidt v. Reamann***, 523 N.W.2d 70 (N.D. 1994).

Where a material change in circumstances must be shown, a trial court's decision not to modify an obligor's support obligation because there has been no material change in circumstances is a finding of fact that will not be reversed unless it is clearly erroneous. ***Id.***

State law (N.D.C.C. § 14-09-08.4(3)) excuses a party from showing a material change of circumstances prior to obtaining an amendment to a child support amount, which is not consistent with the guidelines, when the order was entered at least one year before the motion to modify was filed. ***O'Callaghan v. O'Callaghan***, 515 N.W.2d 821 (N.D. App. 1994); ***Reinecke v. Griffeth***, 533 N.W.2d 695 (N.D. 1995).

Obligor only has to demonstrate material change in circumstances to seek modification of a child support order within one year after its entry. If obligor properly seeks to modify order after one year, trial court is required to modify the obligation to conform the amount of child support payment to that required under the child support guidelines. (Per Meschke, J., with one justice concurring and two justices concurring in the result.) ***Nelson v. Nelson***, 547 N.W.2d 741 (N.D. 1996).

A material change of circumstances is required for motions to modify child support filed within one year of entry of the order which the movant seeks to modify. ***O'Callaghan v. O'Callaghan***, 515 N.W.2d 821 (N.D. App. 1994); ***Withey v. Hager***, 1997 ND 225, 571 N.W.2d 142; ***Lauer v. Lauer***, 2000 ND 82, 609 N.W.2d 450; ***Harger v. Harger***, 2002 ND 76, 644 N.W.2d 182; ***Gunia v. Gunia***, 2009 ND 32, 763 N.W.2d 455.

The moving party has the burden of presenting sufficient evidence to justify modification under the child support guidelines. ***Harger v. Harger***, 2002 ND 76, 644 N.W.2d 182; ***Gunia v. Gunia***, 2009 ND 32, 763 N.W.2d 455.

Where order containing child support provisions had been amended, even though the child support provisions were left unchanged at that time, trial court did not err in finding that moving party had to show a material change of circumstances when pursuing a motion to amend the child support provision within one year of entry of the amended order: allowing party to parse various facets of a child support obligation through numerous challenges without regard to the one-year period under N.D.C.C. § 14-09-08.4 would defeat the limited finality feature of the law, which is intended to

restrain the frequency of changing child support orders. ***Dunnuck v. Dunnuck***, 2006 ND 47, 724 N.W.2d 124.

Where material change of circumstances must be shown, a change in financial circumstances by itself is not sufficient to modify child support without further inquiry about the cause of the change. ***Id.***

Where judgment contemplated how child support would be calculated as minor children reached majority and provided a mechanism for dealing with that event, that event does not satisfy the requirement for a material change of circumstances. ***Gunia v. Gunia***, 2009 ND 32, 763 N.W.2d 455.

Prior Period Support

Trial court did not err in considering guideline amount when determining reasonable reimbursement under N.D.C.C. § 14-08.1-01. ***Krug v. Carlson***, 2000 ND 157, 615 N.W.2d 564.

In determining prior period support for 1999 – 2001, trial court did not abuse its discretion by using "common sense approach" which included consideration of obligor's actual income from all sources without deducting self-employment losses for the reason that the losses did not accurately reflect the obligor's earning capability. ***T.E.J. v. T.S.***, 2004 ND 120, 681 N.W.2d 444.

Section 14-08.1-01, N.D.C.C., has been construed to authorize an award of past-due child support and to specifically authorize an award of past-due child support in a paternity action as reimbursement for governmental assistance provided to the child before the paternity action was commenced. ***Interest of S.L.W.***, 2010 ND 172, 788 N.W.2d 328.

Trial court's decision whether to award past child support is discretionary and will not be overturned on appeal unless the court has abused its discretion. ***Hagel v. Hagel***, 2006 ND 181, 721 N.W.2d 1; ***Deyle v. Deyle***, 2012 ND 248, ___ N.W.2d ___.

Effective Date of Modification

In order to effectuate the public policy underlying the guidelines, a modification of child support generally should be made effective from the date of the motion to modify, absent a good reason to set some other date. The trial court retains discretion to set some later effective date, but its reasons for doing so should be apparent or explained. ***Geinert v. Geinert***, 2002 ND 135, 649 N.W.2d 237; ***McDowell v. McDowell***, 2003 ND 174, 670 N.W.2d 876; ***Wigginton v. Wigginton***, 2005 ND 31, 692 N.W.2d 108; ***Marchus v. Marchus***, 2006 ND 81, 712 N.W.2d 636; ***Lautt v. Lautt***, 2006 ND 161, 718 N.W.2d 563.

Where modification resulted in a reduced child support obligation, the trial court did not err in setting a later effective date for the reasons that the obligor's failure to participate in the original proceeding resulted in an incorrect calculation and that retroactively imposing the reduced obligation or requiring reimbursement was not in the child's best interests. ***Wagner v. Wagner***, 2007 ND 101, 733 N.W.2d 593.

Where parents informally agreed to an actual change in primary residential responsibility for an extended period of time and obligor sought relief from the child support judgment by filing a 3.2 motion instead of a 60(b) motion, the trial court erred by ordering retroactive modification of child support. ***Sonnenberg v. Sonnenberg***, 2010 ND 94, 782 N.W.2d 654.

Case law addressing modification of an existing child support obligation does not apply in an original action brought to set an initial child support obligation. ***Interest of S.L.W.***, 2010 ND 172, 788 N.W.2d 328.

Termination of Parental Rights

Termination of parental rights is a change in circumstances that ends the obligation of the person whose parental rights were terminated to pay support for that child. ***Gabriel v. Gabriel***, 519 N.W.2d 293 (N.D. 1994).

Decisions Under Prior Law

Use of Guidelines

Scale of suggested minimum contributions established pursuant to this section is merely a set of guidelines and a trial court is required to consider guidelines but is not required to award child support within suggested scale. ***Burrell v. Burrell***, 359 N.W.2d 381 (N.D. 1985).

In its discretion, the trial court may award child support exceeding the published guideline amounts. ***Olson v. Olson***, 445 N.W.2d 1 (N.D. 1989).

Before N.D.C.C. § 14-09-09.7 was amended, the child support guidelines were not binding upon the trial court; however, the trial court was required to consider them. ***Heggen v. Heggen***, 452 N.W.2d 96 (N.D. 1990).

Trial court's use of invalid guidelines was harmless error. ***Wenzel v. Wenzel***, 469 N.W.2d 156 (N.D. 1991); ***Wolf v. Wolf***, 474 N.W.2d 257 (N.D. 1991).

Supreme Court will not automatically reverse decisions in which the trial court applied invalid guidelines. ***Zander v. Zander***, 470 N.W.2d 603 (N.D. 1991).

The court cannot rely on the guidelines in determining the support obligation, except as a preliminary starting point. ***Bergman v. Bergman***, 486 N.W.2d 243 (N.D. 1992).

When the guidelines do not establish the amount of child support, the trial court must decide the amount by striking a balance between the needs of the children and the ability of the noncustodial parent to pay, but the guidelines should still inform the court's inquiry. ***Id.***

1989 Amendment

Although the 1989 amendment to N.D.C.C. § 14-09-09.7 establishing presumptive child support obligations may not be retroactively applied to child support

accruing before the effective date (July 12, 1989), an obligor's child support obligation may be modified prospectively. ***McDonough v. McDonough***, 458 N.W.2d 344 (N.D. App. 1990).

Improper Considerations

The child support guidelines, which are a statutorily authorized schedule for court-awarded child support, constitute a substantive rule which must be promulgated in accordance with N.D.C.C. ch. 28-32 to have validity. Therefore, where mother failed to demonstrate that the child support guidelines were validly promulgated under chapter 28-32, or that they were otherwise binding upon the trial court, the trial court did not err in ordering child support which deviated from the guidelines. ***Huber v. Jahner***, 460 N.W.2d 717 (N.D. App. 1990).

The child support guidelines established by the Department of Human Services are invalid because the Department failed to promulgate them in compliance with N.D.C.C. ch. 28-32. ***Illies v. Illies***, 462 N.W.2d 878 (N.D. 1990).

Decision that child support guidelines were not properly promulgated is prospective only. ***Id.***

Court is not required to follow invalid guidelines upon remand. ***Puklich v. Puklich,*** 463 N.W.2d 651 (N.D. 1990).

In a child support case, it was error for the district court to consider the effect of the disparity of payments between the guidelines and the original order in determining whether or not there was a material change in circumstances. ***State ex rel. Younger v. Bryant***, 465 N.W.2d 155 (N.D. 1991).

Where child support guidelines were not adopted pursuant to N.D.C.C. ch. 28-32, it was improper to consider them as a material change in circumstances justifying a change in the child support payments. ***Id.***

Change of Circumstances

Trial court must find a material change of circumstances before it can apply the guidelines. Only after the trial court determines that a material change of circumstances has occurred, without reference to the guidelines, can it proceed to modify the child support. ***Garbe v. Garbe***, 467 N.W.2d 740 (N.D. 1991); ***State ex rel. Younger v. Bryant***, 465 N.W.2d 155 (N.D. 1991); ***Clutter v. McIntosh***, 484 N.W.2d 846 (N.D. 1992); ***Spilovoy v. Spilovoy***, 488 N.W.2d 873 (N.D. 1992); ***State of Minnesota v. Snell***, 493 N.W.2d 656 (N.D. 1992).

Not every cost of living increase or birthday of a child constitutes a material change of circumstances. ***Garbe v. Garbe***, 467 N.W.2d 740 (N.D. 1991).

A significant factor in a proceeding to modify child support is evidence of a change in the financial circumstances of either party to the divorce. ***Spilovoy v. Spilovoy***, 488 N.W.2d 873 (N.D. 1992).

Findings must enable reviewing court to understand the rationale behind the trial court's determination regarding a material change of circumstances. ***Garbe v. Garbe***, 467 N.W.2d 740 (N.D. 1991); ***Sweeney v. Hoff***, 478 N.W.2d 9 (N.D. 1991).

Increase in Income

Obligor's obtaining a job when she had virtually none at and after divorce was a change of circumstance significant enough to impose child support obligation. ***Reimer v. Reimer***, 502 N.W.2d 231 (N.D. 1993).

Where the obligor's income had more than doubled since the time he was first ordered to pay support, an increase in child support because a material change of circumstances had occurred was affirmed. ***Hallock v. Mickels***, 507 N.W.2d 541 (N.D. 1993).

Interim Orders

District court must award child support where an interim custody award is made. ***Ackerman v. Ackerman***, 1999 ND. 135, 596 N.W.2d 332; ***Johnson v. Johnson***, 2002 ND 151, 652 N.W.2d 315.

Effective Date of Modification

The effective date for modification of child support depends on the facts of each case. Trial court may make its order modifying child support effective on the date the motion was filed, any date the motion was pending, or some later date. ***Schleicher v. Schleicher***, 551 N.W.2d 766 (N.D. 1996).

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