

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 93-F-22

Date issued: December 17, 1993

Requested by: Henry C. "Bud" Wessman, Executive Director,  
North Dakota Department of Human Services

- QUESTION PRESENTED -

Whether the factors identified in North Dakota Administrative Code (N.D. Admin. Code) ? 75-02-04.1-09(2) as not having been considered in calculating the child support guidelines schedule are criteria established by the Department of Human Services (hereafter "Department") which may be applied in any judicial determination that the child support guidelines do not establish the correct amount of child support under North Dakota Century Code (N.D.C.C.) ? 14-09-09.7(3).

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the factors identified in N.D. Admin. Code ? 75-02-04.1-09(2) as not having been considered in calculating the child support guidelines schedule are criteria established by the Department which may be applied in any judicial determination that the child support guidelines do not establish the correct amount of child support under N.D.C.C. ? 14-09-09.7(3).

- ANALYSIS -

The child support guidelines contained in N.D. Admin. Code ch. 75-02-04.1 are presumed to provide the correct amount of child support, but that presumption may be rebutted upon a proper showing.

There is a rebuttable presumption that the amount of child support that would result from the application of the child support guidelines is the correct amount of child support. The presumption may be rebutted if a preponderance of the evidence in a contested matter establishes, applying criteria established by the public authority<sup>[1]</sup> which take into

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<sup>1</sup>The public authority is the Department of Human Services. N.D.C.C. ? 14-09-09.10(10).

ATTORNEY GENERAL'S OPINION 93-22  
December 17, 1993

consideration the best interests of the child, that a child support amount established under the guidelines is not the correct amount of child support. A written finding or a specific finding on the record must be made if the court determines that the presumption has been rebutted. The finding must:

- a. State the child support amount determined through application of the guidelines;
- b. Identify the criteria that rebut the presumption of correctness of that amount; and
- c. State the child support amount determined after application of the criteria that rebut the presumption.

N.D.C.C. ? 14-09-09.7(3). N.D.C.C. ? 14-09-09.7(3) formerly read, in part, that "[t]he presumption may be rebutted if a preponderance of the evidence in a contested matter establishes that factors not considered by the guidelines will result in an undue hardship to the obligor or a child for whom support is sought." See, 1993 N.D. Sess. Laws ch. 152, ? 12. Under that statute, the definitions and application of factors found in N.D. Admin. Code ch. 75-02-04.1 were used to determine whether factors not considered by the child support guidelines were present in a given case. Zacher v. Zacher, 493 N.W.2d 704, 706-707 (N.D. Ct. App. 1992). The present administrative rules were developed under the prior law and accordingly track the language used in the prior law. Under the present law evidence will only rebut the presumption that the amount of child support established under the guidelines is correct if it applies criteria established by the Department which take into consideration the best interests of the child and shows that the guideline amount is incorrect.

The Legislature's intent initially must be sought from the statutory language. County of Stutsman v. State Historical Society, 371 N.W.2d 321, 325 (N.D. 1985). When interpreting statutory language, the words used are to be understood in their ordinary sense unless there is a plain intention to the contrary or the words are otherwise defined in the code. N.D.C.C. ? 1-02-02. Words and phrases used in a statute are construed according to their context and the rules of grammar, but technical words and phrases which have acquired a particular meaning in the law or are defined by statute will

ATTORNEY GENERAL'S OPINION 93-22  
December 17, 1993

be construed according to that meaning. N.D.C.C. ? 1-02-03. The Century Code is to be construed liberally with a view to effecting its objects. N.D.C.C. ? 1-02-01. The Code should also be construed to provide a result capable of being executed. N.D.C.C. ? 1-02-38(4).

Although the Department has established an advisory committee to make recommendations for an amendment to the rules regarding the child support guidelines which will list criteria which take into consideration the best interests of the child for purposes of rebutting the presumption that the child support guidelines provide the correct amount of child support in any specific case, the committee has not done so at the present time. A comprehensive listing of the criteria which would be relevant to such a showing would be convenient, but there is no requirement that such criteria be part of a specific listing.<sup>2</sup>

The criteria established by the Department which would be relevant for the purpose of rebutting the presumption that the child support guidelines provide the correct amount of child

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<sup>2</sup>The amendment of N.D.C.C. ? 14-09-09.7(3) requiring that evidence rebutting the presumption that the child support guidelines schedule shall apply criteria established by the Department was enacted to comply with federal regulations. Hearing on H. 1181 Before the Senate Human Services Comm., 53d N.D. Leg. (March 2, 1993) (Statement of Asst. A.G. Blaine L. Nordwall). The federal regulation requires a court to find that the application of the guidelines would be unjust or inappropriate in a particular case to rebut the presumption, "as determined under criteria established by the State." 45 C.F.R. 302.56(g). The federal regulations do not state whether these criteria are the criteria used to calculate the guidelines schedule or whether these criteria are to be in a specific regulation addressing the rebuttal of the presumption. The expected outcome of the Department's advisory committee is a specific rule addressing the finding required to rebut the presumption which will comply with both federal requirements and federal expectations. However, a construction of N.D.C.C. ? 14-09-09.7(3) to require such a specific listing of "criteria" would be inconsistent with the requirements to liberally construe statutes with the intent to provide a result capable of execution because there is no such specific list and the statute does not direct the Department to develop such a list.

support includes any criteria showing how the guidelines were calculated. The administrative code defines several factors which were considered and not considered in determining the guidelines schedule:

**75-02-04.1-09. Factors considered - Not considered.**

1. The child support amount and the calculations provided for under this chapter consider all factors described or applied in this chapter, except those described in subsection 2 and, in addition, consider:
  - a. The subsistence needs, work expenses, and daily living expenses of the obligor; and
  - b. 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 custodial parent.
  
2. The child support guidelines schedule and the calculations provided for under this chapter do not consider:
  - a. The increased need in cases where 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 ten thousand dollars, to provide child support;
  - c. The increased educational costs voluntarily incurred at private schools;
  - d. The increased needs of children with handicapping conditions or chronic illness;
  - e. The increased needs of children age twelve and older;
  - f. The full cost of child care purchased by the obligee;
  - g. The value of the income tax exemption for

supported children; and

- h. The reduced ability of the obligor to provide support due to travel expenses incurred solely for the purpose of visiting a child who is the subject of the order.

Of the eight factors specifically listed as not considered in developing the child support guidelines schedule, the first six relate to the need for increased child support based on identified factual situations. The seventh factor considers the benefit the obligor obtains by being able to claim the child as an income tax exemption. The eighth factor considers the cost incurred in visiting the child. Consideration of all of these factors, therefore, relate to the best interest of the child - either increased child support or considering the specific visitation costs in calculating the amount of support the obligor can afford.

Evidence showing that the guidelines do not establish the correct amount of child support might demonstrate that the particular fact situation before the court was not considered when the guidelines schedule was calculated. Thus, evidence concerning the eight items which the Department has identified in N.D. Admin. Code ? 75-02-04.1-09(2) as not having been considered in calculating the child support guidelines schedule is relevant in determining whether the guidelines schedule shows the correct amount of child support in a specific situation.

The calculations regarding the amounts shown in the child support guidelines consider all factors described or applied in N.D. Admin. Code ch. 75-02-04.1 except for those described in N.D. Admin. Code ? 75-02-04.1-09(2). N.D. Admin. Code ? 75-02-04.1-09(1). The 1993 amendment to N.D.C.C. ? 14-09-09.7(3) alters the analysis used in rebutting the guideline amount from requiring a showing that factors not considered by the guidelines will produce undue hardship in a particular case to requiring a showing that, when applying criteria established by the Department which take into consideration the best interests of the child, the child support amount set by the guidelines is not correct. Therefore, any factors described or applied in N.D. Admin. Code ch. 75-02-04.1, both those considered and those not considered in developing the guidelines, are relevant criteria to apply when establishing that the child support guidelines do not present the correct amount of child support in a

ATTORNEY GENERAL'S OPINION 93-22  
December 17, 1993

specific case. For example, facts which indicate the subsistence needs of the obligor are substantially higher than average due to the obligor's medical condition, a factor under ? 75-02-04.1-09(1), might be used as evidence the child support guidelines do not provide a correct amount in a specific case.

Consequently, it is my opinion that the factors identified as not having been considered in developing the child support guidelines schedule under N.D. Admin. Code ? 75-02-04.1-09(2) may be included as criteria established by the Department which take into consideration the best interests of the child for purposes of being applied in a judicial determination that a child support amount established under the guidelines is not the correct amount of child support.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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