North Dakota Law Review

Volume 73 | Number 4 Article 7

1997

Divorce - Parent and Child: Imputing Income to an Obligor Based on Earning Capacity - The Recent Guideline Approach

Gretchen Dee Thilmony

DIVORCE—PARENT AND CHILD: IMPUTING INCOME TO AN OBLIGOR BASED ON EARNING CAPACITY—THE RECENT GUIDELINE APPROACH

Nelson v. Nelson, 547 N.W.2d 741 (N.D. 1996)

I. FACTS

Plaintiff, Jody Lynn Nelson (Jody), appealed from a decree decreasing her ex-husband's child support obligation for their two children.[1] Before the parties' divorce, the defendant, Keith Nelson (Keith), worked for the Overhead Door Company as an installer making $10.50 per hour.[2] Shortly after the divorce however, he left that company to work for Red River Overhead Door Company, where he earned less income.[3] In 1993, Keith left that job and started his own overhead door business,[4] where he made an hourly income of $4.99 per hour.[5]

In 1995, Keith moved to reduce his child support obligation due to a "dramatic reduction in income."[6] Jody argued that Keith should not be allowed to subsidize his business venture at the expense of his children's welfare.[7] However, Keith maintained that the reason he decided to change employment was the "ambitious goal of operating his own business."[8] Furthermore, Keith asserted that the court should not place artificial barriers on divorced parents' employment opportunities by declaring that they cannot start their own business and pursue economic freedom because of their child support obligation.[9]

Jody resisted Keith's motion for reduction in child support, claiming that his reduction in income was voluntary and only temporary.[10] In the alternative, Jody urged that if the court found that a modification was

---

1. Nelson v. Nelson, 547 N.W.2d 741, 743 (N.D. 1996). When the parties were divorced in January of 1992, the divorce decree placed custody of the two children with Jody and ordered Keith to pay $526 monthly child support. *Id.* The decree was amended in December of 1992 and Keith was ordered to pay $568 per month. *Id.* As of the most recent judgment at the trial court level, Keith was ordered to pay $252 per month. Brief for Appellant at 3, *Nelson* (No. 950299).

2. *Nelson*, 547 N.W.2d at 743.

3. *Id.* Keith earned $27,130 at Overhead Door Company in 1991, and $17,361 at the Red River Overhead Door Company in 1992. *Id.*

4. *Id.* at 743, 747. Keith earned $8,292 in 1993 and $10,005 in 1994. *Id.* at 743. In June of 1994, he filed for bankruptcy. *Id.* Keith contended that he should be applauded, not chastised, for handling his debts and obligations through bankruptcy proceedings. Brief for Appellee at 8-9, *Nelson* (No. 950299).

5. *Nelson*, 547 N.W.2d at 747.

6. *Id.* at 743.

7. Brief for Appellant at 6, *Nelson* (No. 950299).

8. Brief for Appellee at 8, *Nelson* (No. 950299).

9. *Id.* at 9. Keith claimed that he would literally be an "economic hostage" to the his ex-wife if he was not able to make his own decisions regarding employment and starting his own business. *Id.*

10. *Nelson*, 547 N.W.2d at 743.

warranted, it should also find that Keith was underemployed as defined by the North Dakota Child Support Guidelines.[11] If Keith was found to be underemployed, the court could impute more income to him so that the support award would not be as drastically reduced.[12] The imputation would consider Keith's prior earnings and experience in the door installation business to increase the child support obligation computed from his present income.[13]

After the hearing on Keith's motion, the trial court issued its memorandum decision where it concluded that the North Dakota Department of Human Services had exceeded its rule-making authority when it drafted the imputation remedy for underemployment, and therefore the imputation remedy was unlawful.[14] The trial court instead applied a "rule of reason" and concluded that Keith was entitled to a reduction in his child support obligation.[15] Jody then appealed, arguing that the underemployment guideline remedy was not unreasonable and that Keith's child support obligation should not have been reduced because his reduction in income was voluntary and only temporary.[16]

The Supreme Court of North Dakota first stated that because obligors are entitled to periodic review of their child support obligation, they are not precluded from seeking a modification when application of the guidelines to their present income will reduce the support obligation, even if it is due to a voluntary change in employment.[17] The North Dakota Supreme Court *held* that the North Dakota Department of Human Services reasonably exercised their rule-making authority when drafting the child support guideline remedy for underemployment and allowing for the imputation of income to an obligor.[18] The court further *held* that it was not clearly erroneous for the trial court to find that Jody had failed to prove that Keith was underemployed so as to apply the guideline remedy and impute income to him.[19]

II. LEGAL BACKGROUND

In order to better understand the recent child support guideline remedy allowing for the imputation of income, it is useful to trace the early development of the child support guidelines. Next, the current

11. *Id.*
12. *Id.*
13. Brief for Appellant at 17, *Nelson* (No. 950299).
14. *Id.* at 3.
15. *Id.*
16. *Nelson*, 547 N.W.2d at 743.
17. *Id.*
18. *Id.* at 748.
19. *Id.*

analysis of modification proceedings will demonstrate how today child support obligations may be altered to accommodate the needs of the children and the ability of the parent to pay. Finally, a new consideration of the guidelines will be explored—how earning capacity is now utilized to impute income to an underemployed obligor as a mechanism of enforcing a parent's duty to support his or her children.

A. DEVELOPMENT OF THE GUIDELINES

The North Dakota child support guidelines were enacted in accordance with federal law.[20] Beginning in the mid-seventies with the amendments to the Social Security Act, child support laws became increasingly federally mandated.[21] Throughout the next decade, the laws concerning child support were incrementally enhanced, and eventually led to the adoption and use of discretionary guidelines.[22] These guidelines were to be a tool to efficiently and mathematically calculate child support orders, which would in turn expedite the process of setting support orders and forego formal judicial proceedings in every case.[23] Furthermore, the use of formula guidelines was meant to remedy the inconsistent and sometimes inadequate results of random judicial action.[24]

With the Family Support Act of 1988,[25] Congress mandated that state child support guidelines become binding rather than discretionary.[26] This Act was part of welfare reform intended to strengthen the enforcement of child support obligations so that innocent children receive the proper care that they deserve and so that parents recognize their responsibility to support their children.[27] Federal law allows guidelines to be established by legislative, judicial, or administrative action.[28] In addition, federal law requires: 1) that the guidelines be reviewed at

---

20. 42 U.S.C.A. §§ 651-65 (1988 & Supp. 1996) (codifying Title IV-D of the Social Securities Act, Pub. L. No. 93-647, 88 Stat. 2348).

21. *See id.* §§ 651-62 (codifying 1974 Social Service Amendments to the Social Securities Act).

22. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified as amended in scattered sections of 42 U.S.C. (1988)). *See* Burrell v. Burrell, 359 N.W.2d 381, 384 (N.D. 1985) (stating that the court is only required to *consider* the guidelines as a suggested scale, and is not bound by them).

23. Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AM. ACAD. MATRIMONIAL L. 103, 116 (1990).

24. Clutter v. McIntosh, 484 N.W.2d 846, 848 (N.D. 1992).

25. 42 U.S.C.A. § 687 (Supp. 1996).

26. *Id.*

27. Shipley v. Shipley, 509 N.W.2d 49, 54 (N.D. 1993) (citing 134 CONG. REC. 14895 (daily ed. June 16, 1988) (statement of Bill Bradley) (supporting mandatory immediate income withholding for all child support orders)).

28. 42 U.S.C. § 667 (1994). Nineteen states have adopted statutory child support guidelines, 22 states have adopted guideline by court rule, and 10 states use administrative rule; when changes need to be made, administrative or court rules prove to be more easily modified. Elrod, *supra* note 23, at 117-18.

least once every four years; and 2) that there be a presumption that the amount of child support reflected in the guidelines be correct.[29]

North Dakota adopted guidelines by administrative rule; essentially reiterating the requirements of federal law.[30] In 1989, the North Dakota legislature provided statutory authority for the Department of Human Services to establish child support guidelines to aid courts in determining the proper amount that a parent should be expected to contribute toward the support of a child.[31] The statutory authority also created a presumption that the guideline amount would be correct.[32] Finally, the statutory authority provided for the periodic review of all child support orders.[33]

In 1991, the Department of Human Services effectuated these legislative directives and established child support guidelines by adopting an obligor model.[34] The obligor model authorizes a percentage of the obligor's income to be used for child support based on reliable and contemporary economic evidence of the cost of raising children.[35] Because the North Dakota Department of Human Services is a state

---

29. 42 U.S.C. § 667(b)(2) (1994).

30. *Compare* N.D. ADMIN. CODE § 75-02-04.1 (1995), *with* 42 U.S.C. § 667 (demonstrating that state and federal law have similar requirements with respect to child support guideline review and the presumption of guideline correctness).

31. N.D. CENT. CODE § 14-09-09.7(1) (Supp. 1995. The statute requires that the guidelines "(a) include consideration of gross income, (b) authorize an expense deduction for determining net income, (c) designate other available resources to be considered, and (d) specify the circumstances which should be considered in reducing support considerations on the basis of hardship." *Id.*

32. N.D. CENT. CODE § 14-09-09.7(3) (1991). The original section read:

> There is a rebuttable presumption that the amount of child support which 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 that factors not considered by the guidelines will result in an undue hardship to the obligor or a child for whom support is sought. A written finding or a specific finding on the record must be made if the court determines that the presumption has been rebutted.

Id.

33. N.D. CENT. CODE § 14-09-08.4 (Supp. 1995). Initially, the 1989 legislation directing statutory authority for periodic review applied only to child support orders being enforced by child support agencies. Garbe v. Garbe, 467 N.W.2d 740, 742 (N.D. 1991) (citing N.D. CENT. CODE § 14-09-08.4). However, this temporary section was replaced by a permanent section that provided for periodic review of all child support orders, effective October 1, 1993. *Id.*

34. N.D. ADMIN. CODE § 75-02-04.1 (1995); *see also* Ecklund v. Ecklund, 538 N.W.2d 182, 187 (N.D. 1995) (clarifying the decision to choose the "obligor model" because the alternative "income shares model" would lead to increased litigation costs, was more complex, and because ultimately there was little or no difference in award amounts between the "obligor model" and the "income shares model"); Olson v. Olson, 520 N.W.2d 572, 573 (N.D. 1994) (explaining that North Dakota's "obligor model" guidelines are based on the obligor's net monthly income and the number of children for whom the support is sought).

35. REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL, 53RD LEGISLATIVE ASSEMBLY 19 (1993). The study, done by the National Center for State Courts, reported that states using the obligor model include Alaska, Arkansas, California, Georgia, Illinois, Massachusetts, Minnesota, Mississippi, Nevada, North Dakota, Tennessee, Texas, Wisconsin, and Wyoming. *Id.* "Obligor" is defined as any person owing a duty of support. N.D. CENT. CODE § 14-09-09.10 (Supp. 1995).

agency[36] it must act in accordance with the prescribed procedures found in the Administrative Agencies Practice Act[37] in order for the guidelines it promulgates to be valid.[38]

The 1988 version of the guidelines administered by the Department of Human Services was not properly promulgated, and therefore was found invalid by the North Dakota Court of Appeals—which meant the guidelines were not binding upon the trial courts.[39] However, section 14-09-09.7 of the North Dakota Century Code was amended to codify a substantive rule requiring identified and written findings by the trial court in order to depart from the guidelines, effective July 12, 1989,[40] and consequently the guidelines became binding in prospective cases.[41] The most recent version of the guidelines became effective February 1, 1995.[42] Current law states that trial courts are bound by the guideline amounts when determining an initial support obligation and during the modification of any support order over one year old.[43]

---

36. N.D. CENT. CODE § 28-32-01 (Supp. 1995). "'Administrative agency' or 'agency' means each board, bureau, commission, department or other administrative unit of the executive branch of state government . . . or other persons directly or indirectly purporting to act on behalf or under authority of the agency." *Id.*

37. N.D. CENT. CODE § 28-32-02 (Supp. 1995).

38. *Id.* Administrative rules that are properly promulgated have the force and effect of law. Hecker v. Stark County Soc. Serv. Bd., 527 N.W.2d 226, 232 (N.D. 1994).

39. Illies v. Illies 462 N.W.2d 878, 883 (N.D. 1990); Huber v. Jahner, 460 N.W.2d 717, 720 (N.D. Ct. App. 1990).

40. N.D. CENT. CODE § 14-09-09.7(3) (Supp. 1995). The amended section states:

> 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 by the public authority which take into consideration the best interests of the child, that the 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.

Id.

41. Heggen v. Heggen, 452 N.W.2d 96, 102 (N.D. 1990).

42. N.D. ADMIN. CODE § 75-02-04.1 (1995). The successive versions of the guidelines are: Version I, effective November 3, 1980; Version II, effective February 8, 1984; Version III, effective October 18, 1988; Version IV, effective February 1, 1991; and the current Version V, effective February 1, 1995. Kirk Smith, *Child Support Enforcement: A Case for Balance—The Rational Limitations of Child Support Enforcement Guidelines*, 72 N.D. L. REV. 73, 79 n.22 (1996).

43. N.D. CENT. CODE §§ 14-09-09.7(3), 14-09-08.4(3) (Supp. 1995).

B. CURRENT ANALYSIS OF MODIFICATION PROCEEDINGS

The prevailing view, that child support obligations may be modified throughout a child's minority years based upon a material change in circumstances, was based on tradition.[44] Prior North Dakota law mandated that only upon a showing of a material change of circumstances would a child support order be modified.[45] This material change was determined through a fact-finding inquiry by the trial court.[46]

The question then became whether adoption of the guidelines amounted to a material change in circumstances in order to modify existing child support obligations.[47] North Dakota courts did not find that the adoption of the guidelines was a sufficient change in circumstances to warrant modification.[48] It was not until a material change of circumstances was found, without reference to the guidelines, that the trial court could modify the child support.[49]

However, with the legislature's adoption of periodic review of all support orders, the standards and procedures for modifying child support obligations became more refined.[50] Current law mandates that an obligor is only required to show a material change in circumstances if the obligor is seeking to modify a support order within a year of a prior order.[51] When an obligor seeks to modify a support obligation that is more than one year old, statutory authority requires that the trial court modify the obligation so as to conform to the current guideline amounts.[52]

The obligor's burden of proof in demonstrating a change in circumstances is satisfied by a showing of a change in the financial

---

44. Elrod, *supra* note 23, at 123.

45. *See* Ecklund v. Ecklund, 538 N.W.2d 182, 185 (N.D. 1995) (stating that the doctrine of changed circumstances gives a limited finality effect to a child support order and yet leaves room for subsequent revisions for the best interests of the child); Skoglund v. Skoglund, 333 N.W.2d 795, 796 (N.D. 1983) (stating that courts have the power to modify the amount of child support to be paid whenever the circumstances of the parties have materially changed).

46. Sweeney v. Hoff, 478 N.W.2d 9, 10 (N.D. 1991).

47. Elrod, *supra* note 23, at 123. South Dakota was one of the states that decided that adoption of the guidelines was a sufficient change in circumstances so as to allow for a modification of a parent's support award. *Id.* at 123 n.111. However, Minnesota remained constant with the requirement that a change in circumstances must come from analysis of the statutory factors. *Id.*

48. Garbe v. Garbe, 467 N.W.2d 740, 743 (N.D. 1991) (holding that "[t]he disparity between the obligor's current payments and the payments suggested by the guidelines cannot serve as a basis for finding a change in circumstances").

49. *Id.* (citing State *ex rel.* Younger v. Bryant, 465 N.W.2d 155 (N.D. 1991)).

50. *See Ecklund*, 538 N.W.2d at 185-86 (discussing the change in procedures for modifying child support obligations).

51. N.D. CENT. CODE § 14-09-08.4(3) (Supp. 1995); *see also* Schmidt v. Reamann, 523 N.W.2d 70, 72-73 (N.D. 1994) (finding that there was no material change in circumstances within the one year period because the obligor had failed to present sufficient evidence of a change).

52. N.D. CENT. CODE § 14-09-08.4(3).

circumstances of either party.[53] This change is also analyzed as to whether it was foreseen or contemplated at the time of the initial decree.[54] If changed circumstances are based upon a financial change, then the needs of the children and the ability of the obligor to pay must be taken into account in determining whether the modification should be granted.[55] In addition, the inquiry is taken beyond the mere financial change to the cause of the change, and whether it was permanent or temporary, or due to a voluntary act or neglect on the part of the obligor.[56] This scrutiny leads to trial courts examining not only the obligor's actual income, but also the obligor's earning capacity.[57]

C. NEW CONSIDERATIONS: HOW EARNING CAPACITY AND THE IMPUTATION OF INCOME ARE USED

1. *The Judicial Approach*

An obligor's earning capacity was considered by trial courts in child support modification proceedings long before it was officially incorporated into the North Dakota child support guidelines.[58] The North Dakota Supreme Court recognized that an obligor's ability to pay is not based solely on actual income, but rather on the obligor's net worth.[59] In many pre-guideline cases, the court examined the reason for the obligor's inability to meet his or her child support obligations before reducing the amounts.[60] Included in this analysis was whether the obligors had voluntarily put themselves in a position where they were unable to make their child support payments and whether this situation was temporary.[61]

Though the early guidelines did not specifically allow for the imputation of income,[62] the court recognized the parental duty to

---

53. Cook v. Cook, 364 N.W.2d 74, 76 (N.D. 1985).

54. Sweeney v. Hoff, 478 N.W.2d 9, 10 (N.D. 1991).

55. Skoglund v. Skoglund, 333 N.W.2d 795, 796 (N.D. 1983).

56. *Sweeney*, 478 N.W.2d at 10 (citing Gabel v. Gabel, 434 N.W.2d 722, 723 (N.D. 1989); Bloom v. Fyllesvold, 420 N.W.2d 327, 331 (N.D. 1988); Cook v. Cook, 364 N.W.2d 74, 76 (N.D. 1985)).

57. *Skoglund*, 333 N.W.2d at 796 (citing Schnell v. Schnell, 252 N.W.2d 14 (N.D. 1977)).

58. *See id.*

59. Burrell v. Burrell, 359 N.W.2d 381, 383 (N.D. 1985). The extent of the obligor's net worth includes physical assets and earning ability as demonstrated by past income. *Id.*

60. *See, e.g.*, Perry v. Perry, 382 N.W.2d 628, 630 (N.D. 1986); Hoster v. Hoster, 216 N.W.2d 698, 701 (N.D. 1974).

61. *See, e.g.*, Gabel v. Gabel, 434 N.W.2d 722, 724 (N.D. 1989) (finding that the obligor's unemployment was only temporary and consequently refusing to reduce his child support obligation); *Perry*, 382 N.W.2d at 630 (concluding that the obligor had voluntarily placed himself in a position where he was unable to make his support payments, and consequently refusing to reduce the obligation).

62. *See* Heley v. Heley, 506 N.W.2d 715, 722 (N.D. 1993) (citing Guskjolen v. Guskjolen, 499 N.W.2d 126, 128 (N.D. 1993); Spilovoy v. Spilovoy, 488 N.W.2d 873, 878 (N.D. 1992)).

support one's children.[63] Furthermore, the court emphasized in certain situations that the best remedy for an obligor who is experiencing a temporary inability to make support payments is not a permanent reduction in the support award, but rather a request for a delay in making the support payments.[64]

As case law developed in the early nineties, issues concerning child support obligations sparked interesting public policy concerns such as the imputation of income.[65] In a 1994 case, the North Dakota Supreme Court looked at a study of child support guidelines in various states and noted that in thirty states, courts are imputing income to an obligor who is voluntarily underemployed or unemployed.[66] In that same year, the supreme court implemented a "rule of reason," whereby an obligor with an established earnings history was not allowed to drastically reduce his or her income without good reason.[67] When obligors with an established earning history voluntarily, without good reason, place themselves in a position where they cannot meet their child support obligation, income compatible with their prior earnings history may be imputed.[68] This judicially-adopted measure of imputing income to a voluntarily underemployed obligor continued to be used in subsequent cases.[69] However, this judicial rule preceded the current version of the administrative rule found in the child support guidelines.[70]

2. *The Guideline Approach*

Prior to the current version, the 1991 guidelines promulgated by the Department of Human Services did allow for the imputation of income based on assets,[71] not on earning capacity, but the provision failed in

---

63. *Perry*, 382 N.W.2d at 630. The court stated, "A parents duty to support his or her children is continuous and does not depend on his or her prosperity . . . it is both a legal and moral obligation." *Id.* (citation omitted).

64. Schmidt v. Reamann, 523 N.W.2d 70, 73 (N.D. 1994).

65. *See* Spilovoy v. Spilovoy, 488 N.W.2d 873, 878 (1992) (discussing the Appellant's argument that minimum wage should be imputed to his former wife for computation of her child support obligation because she did not work outside the home, and recommending that this argument be made to the Department of Human Services—the agency responsible for promulgating the child support guidelines).

66. Spilovoy v. Spilovoy, 511 N.W.2d 230, 233 (N.D. 1994).

67. Olson v. Olson, 520 N.W.2d 572, 574 (N.D. 1994).

68. *Id.*

69. *See* Mahoney v. Mahoney, 538 N.W.2d 189, 193 (N.D. 1995) (concluding that the husband had not voluntarily changed his employment in bad faith and that he had stated legitimate reasons for the change); Schatke v. Schatke, 520 N.W.2d 833, 837 (N.D. 1994) (finding that the trial court had erred in imputing income because they had made no findings of fact as to the husband's earning capacity and whether his continued unemployment was voluntary).

70. *See Schatke*, 520 N.W.2d at 837 n.2 (citing to the proposed provision of the administrative code that would allow for the imputation of income based on earning capacity and stating that the problems arising with these cases would probably end with the passing of these proposed rules).

71. N.D. ADMIN. CODE § 75-02-04.1-07 (1991) (amended in 1995). The provision stated, in part:

practice.[72] Consequently, the Guidelines Advisory Task Force for the Department of Human Services (Task Force) conducted research aimed at developing a more functional process of imputing income.[73] The primary obstacles facing the task force were first, how to determine an obligor's actual earning capacity and second, how to overcome practical constraints with regard to proving this earning capacity.[74]

The new section proposed by the Task Force provided a basis for imputing income based on earning capacity, rather than on assets, to an obligor who is unemployed or underemployed.[75] An obligor is "'underemployed' if the obligor's gross income earnings is significantly less than prevailing amounts earned in the community by persons with similar work history and occupational qualifications."[76]

The key characteristics of this new section were: "1) a presumption of underemployed, 2) exceptions to the presumption, 3) articulation of how the presumption may be rebutted, and 4) what level of income should be used if the presumption is not rebutted."[77] Furthermore, income must be imputed if an obligor fails to present necessary information to rebut or avoid the presumption.[78]

Practical constraints with proof problems were also addressed by the Task Force.[79] Potential difficulties were determining the "prevailing amounts earned in the community by persons with similar work history and occupational qualifications," and how to prove them.[80] The main concern was that expert testimony would be needed to show the prevailing amounts earned in the community, which would lead to a longer, more expensive, and more drawn out process.[81]

However, the Task Force addressed this concern by stating that prevailing wages could be shown by the North Dakota Labor Market

---

> All assets, other than property claimable as a homestead . . . necessary household goods and furnishings, and one motor vehicle which the parent owns an equity not in excess of fifteen thousand dollars must be considered for the purpose of imputing income. Annual net property income equal to six percent of the parent's equity interest in all such property which does not produce at least six percent return on equity, reduced by the actual net property income, must be imputed.

Id.

72. Telephone Interview with Blaine Nordwall, Member of the Guidelines Advisory Task Force in 1993 (Sept. 18, 1996). This provision failed in part because its language was too general, it did not base the imputation on earning capacity, and it didn't properly impute assets. *Id.*

73. *Id.*

74. *Id.*

75. Blaine Nordwall, *Summary of Comments Received in Regard to Proposed Amendments to N.D. ADMIN. CODE § 75-02-04.1*, at 17 (Nov. 14, 1994) (on file with the North Dakota Department of Human Services).

76. N.D. ADMIN. CODE § 75-02-04.1-07(1)(6) (1995).

77. Tina M. Heinrich, *The Guidelines, They Are A Changin'*, GAVEL, June-July 1994, at 8, 9.

78. *Id.*

79. Nordwall, *supra* note 75, at 17-8.

80. *Id.*

81. *Id.*

Advisor, a publication by Job Service of North Dakota.[82] The Task Force noted that the information contained in this publication, which lists common types of occupations by county, would be a reliable, judicially noticeable indicator of the prevailing amounts earned in the community.[83] When an obligor is determined to be unemployed or underemployed so as to require application of the guideline remedy, income may be imputed in three ways: minimum wage, relevant prevailing wage, or past earnings.[84] The greatest of the three variations is the amount imputed to the obligor.[85] After public hearings, the Task Force's recommendations for imputing income were adopted as part of the final version of the child support guidelines and thus became controlling law.[86]

III. CASE ANALYSIS

In *Nelson v. Nelson*,[87] the North Dakota Supreme Court affirmed the trial court's modification of Keith's child support obligation, but disagreed with most of the trial court's reasoning for not imputing income to him.[88] Nevertheless, the court stated that it agreed with one valid reason and the ultimate result.[89] After discussing the current procedure for modification of Keith's child support obligation, the supreme court examined two issues: first, whether the child support guideline remedy for underemployment was an unreasonable exercise of the rule-making authority of the North Dakota Department of Human Services; and second, whether the trial court had properly concluded that Jody had failed to present sufficient evidence of her ex-husband's underemployment for application of the guideline remedy.[90]

A. THE PROCEDURE FOR MODIFICATION OF OBLIGATION

The North Dakota Supreme Court began by explaining that the voluntary nature of Keith's change in financial circumstances would have been a relevant factor to consider under prior law.[91] The cited former child support modification cases that required a material change

82. *Id.*
83. *Id.* This information would be judicially noticeable under Rule 201 of the North Dakota Rules of Evidence. *Id.*
84. N.D. ADMIN. CODE § 75-02-04.1-07(3)(a)(b)(c) (1995).
85. N.D. ADMIN. CODE § 75-02-04.1-07(8)(a)(b) (1995).
86. § 75-02-04.1-07.
87. 547 N.W.2d 741 (N.D. 1996).
88. Nelson v. Nelson, 547 N.W.2d 741, 743 (N.D. 1996).
89. *Id.*
90. *Id.* at 744-46.
91. *Id.* at 743-44.

in circumstances as a prerequisite for modification.[92] In these prior cases, the material change was predominantly a financial one; therefore the courts had to also consider the voluntariness of the obligor's financial change before determining whether modification of the support award was warranted.[93]

However, because of new legislation directing periodic review of all child support orders, the court concluded that this analysis was no longer applicable to an obligor who sought modification of his obligation after one year of entry of the prior support order.[94] Now, if the obligor correctly seeks to modify an obligation after one year of prior decree, section 14-09-08.4(3) *requires* the court to conform to the amount specified in the guidelines.[95] Yet it was recognized that the prerequisite for a material change in circumstances was not eliminated from cases in which an obligor sought to modify the support order *within* one year of the prior order.[96] In *Nelson*, Keith, the obligor, did not have to demonstrate a material change in circumstances because his support order was over one year old.[97] Therefore, the court stated that he was not precluded from seeking a modification when application of the guidelines to his current income would reduce his child support obligation.[98]

The court then examined Jody's argument that the appropriate remedy for Keith's temporary reduction in income would be to delay the making of a portion of the support payments rather than permanently reduce them.[99] The court reflected on previous opinions where such a delay was ordered as an alternative to reducing the obligation, and agreed that this was a viable and preferred method of relief.[100] However, in the present situation the court determined that due to the extent and duration of Keith's reduction in income, the trial court had properly granted modification of his support obligation.[101] In conclusion, the

92. *Id.* at 743 (citing Sweeney v. Hoff, 478 N.W.2d 9, 10 (N.D. 1991)).
93. *Id.*
94. *Id.* at 744 (citing N.D. CENT. CODE § 14-09-08.4 (Supp. 1995)).
95. *Id.* at 744 (citing N.D. CENT. CODE § 14-09-08.4(3)).
96. *Id.* (emphasis added).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* (citing Schmidt v. Reamann, 523 N.W.2d 70, 73 (N.D. 1994) (suggesting that the best relief when an obligor is experiencing difficulty in meeting his child support payments is to delay them rather than permanently reducing them in order to balance the needs of the children with the obligor's ability to pay); Hartman v. Hartman, 466 N.W.2d 155, 157 (N.D. 1991) (finding that a delay in making payments serves to temporarily relieve the obligor when the children's need for the support has not changed)).
101. *Id.* The defendant had gone from making $17,361 to $10,005 over a two year period. *Id.* at 743.

court reminded Jody that if and when Keith's business earns more, she would be entitled to have the support increased.[102]

B. THE DEPARTMENT'S AUTHORITY TO ENACT AN UNDEREMPLOYMENT GUIDELINE THAT ALLOWS FOR THE IMPUTATION OF INCOME

The court then turned to Jody's argument that the trial court erred when it declared the underemployment guideline remedy unreasonable.[103] The court agreed with Jody that the remedy was a reasonable action on the part of the Department of Human Services.[104] The court's analysis began with examining whether the guideline comported with precedent.[105] The court emphasized that prior case law had already established that an obligor's earning capacity was an available factor to consider when determining an obligor's ability to pay, and therefore the guideline was merely an "expansion" of precedent.[106]

The court reasoned that in 1994 they had specifically adopted a standard by which to impute income, even before the recent guideline remedy for imputing income was realized.[107] In *Olson v. Olson*,[108] the judicially created standard was that an obligor with an established earnings history could not, without good reason, place himself in a position where the obligor was unable to make his child support payments.[109] If an obligor did so, the court concluded that income could be imputed to him.[110] Thus, the court adopted a "rule of reason" with which to analyze an obligor's reduction in income for purposes of modifying a child support obligation.[111]

After noting the rationale behind *Olson*, the court pointed out that this rule preceded the adoption of the guideline specifically allowing for the imputation of income based on earning capacity.[112] The court began by articulating the definitions of the new section of the administrative code, specifically the sections defining

---

102. *Id.*

103. *Id.* (citing N.D. ADMIN. CODE § 75-02-04.1-07 (1995)).

104. *Id.* at 744.

105. *Id.*

106. *Id.* (citing Gabel v. Gabel, 434 N.W.2d 722, 724 (N.D. 1989); Cook v. Cook, 364 N.W.2d 74, 76 (N.D. 1985); Burrell v. Burrell, 359 N.W.2d 381, 383 (N.D. 1985); Skogland v. Skogland, 333 N.W.2d 795, 796 (N.D. 1983)).

107. *Id.*

108. 520 N.W.2d 572 (N.D. 1994).

109. *Nelson*, 547 N.W.2d at 744 (citing Olson v. Olson, 520 N.W.2d 572, 574 (N.D. 1994)).

110. *Id.* (citing *Olson*, 520 N.W.2d at 574). In *Olson*, the North Dakota Supreme Court found that the obligor had left a higher-paying teaching job to take a substantially lower-paying job, with little legitimate reason for doing so. *Olson*, 520 N.W.2d at 574. The court concluded that even though his purpose may not have been to evade his support obligations, the guidelines would never have intended to allow such a drastic reduction in income, and consequently an inability to pay "upon a whim." *Id.*

111. *Id.*

112. *Nelson*, 547 N.W.2d at 744.

underemployment,[113] the presumption of underemployment,[114] and the guideline definition of community.[115] The trial court had concluded that these definitions were unreasonable and left no room for judicial discretion.[116] Specifically, the trial court interpreted the guideline definition of "community" as extremely broad and not having a rational relationship to the actual availability of jobs in those areas.[117] Therefore, instead of applying the guidelines, the trial court used the previous "rule of reason," to find Keith's decision to start his own business reasonable, and failed to impute income to him.[118]

The Supreme Court of North Dakota examined the statutory authority of the Department of Human Services that allows it to create such definitions in their guidelines and whether it was a reasonable exercise of their rule-making capacity.[119] The applicable statutory authority specifically gave the Department of Human Services the ability to "designate other available resources to be considered" when establishing child support guidelines.[120] The court determined that the amended guideline authorizing the imputation of income did not conflict with prior case law allowing the imputation of income and therefore did not exceed the Department's scope of authority.[121] Consequently, the supreme court ruled that the trial court had erroneously concluded that the underemployment guideline was inappropriate and unreasonable.[122]

The supreme court went on to disagree with the trial court's conclusion by stating that the court cannot substitute its view for that of

---

113. *Id.* at 745 (citing N.D. ADMIN. CODE § 75-02-04.1-07(1)(b) (1995)).

114. N.D. ADMIN. CODE § 75-02-04.1-07(2). "An obligor is presumed to be underemployed if the obligor's gross income from earnings is less than six-tenths of prevailing amounts earned in the community by persons with similar work history and occupational qualifications." *Id.*

115. § 75-02-04.1-07(1)(a). "Community includes any place within one hundred miles [160.93 kilometers] of the obligor's actual place of residence." *Id.*

116. *Nelson*, 547 N.W.2d at 745; *see also* Smith, *supra* note 42, at 79 (discussing how meaningful judicial discretion and review is being eliminated with the use of increasingly enhanced administrative guidelines).

117. *Nelson*, 547 N.W.2d at 745.

118. *Id.*

119. *Id.* at 745-46.

120. *Id.* at 745 (citing N.D. CENT. CODE § 14-09-09.7(1) (Supp. 1995)).

121. *Id.* (citing Hecker v. Stark County Soc. Serv. Bd., 527 N.W.2d 226, 232 (N.D. 1994) (noting that an administrative agency does not have the power to ignore or overrule judicial precedent); Little v. Tracy, 497 N.W.2d 700, 704 (N.D. 1993) (stating that a regulation is beyond an agency's authority to adopt if it conflicts with the statute it implements)); *see also* Spilovoy v. Spilovoy, 488 N.W.2d 873, 878 (N.D. 1992) (guiding arguments for imputing income to an obligor to the Department or the legislature).

122. *Nelson*, 547 N.W.2d at 748. A trial court's modification is a finding of fact that will not be reversed unless clearly erroneous. *Id.* at 743. "[A] finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it or if, on the entire record, we are left with a definite and firm conviction that a mistake has been made." *Id.*

the Department of Human Services.[123] Furthermore, the court reasoned that if doubts materialize as to the use of these definitions, the argument for improving them is better directed to the Department of Human Services or the legislature.[124]

The supreme court ended its analysis of this issue by negating the trial court's ruling that the new guideline improperly intruded upon judicial discretion.[125] The court emphasized that trial courts still have plenty of leeway when determining whether an obligor meets the definition of underemployed.[126] Finally, the court disagreed with the trial court's interpretation that the new guideline was somehow "unjust," and reiterated the duty that parents have to support their children to the best of their abilities, not merely to their propensities.[127]

C. EVIDENCE NEEDED TO PROVE UNDEREMPLOYMENT

After determining that the underemployment guideline was a reasonable exercise of the Department of Human Services, the court examined whether the trial court erred in finding that even if the guideline applied, that Jody had failed to prove that Keith was underemployed.[128] The court disagreed with Keith's argument that he could not be considered unemployed because he is a self-employed obligor who is continually looking for work.[129] However, because of the deference a trial court is awarded with respect to weighing the evidence and the credibility of witnesses, the supreme court deferred to the trial court's conclusion that the modification should be awarded and income should not be imputed in this case.[130]

The supreme court analyzed how the trial court had discounted the reliability of Jody's use of the North Dakota Labor Market Advisor to prove the prevailing wage in the community because it provided manufacturing wages that were not necessarily the same as the installation business of the Defendant.[131] Jody had also elicited testimony from Keith to show that the present prevailing wage in the community was at

123. *Id.* at 745-46 (citing Scherling v. Scherling, 529 N.W.2d 879, 882 (N.D. 1995)).

124. *Id.* at 746.

125. *Id.*

126. *Id.* The court stressed that the ambiguity of the words "significantly," "prevailing," and "similar" allows for continued judicial discretion and that even if there is a presumption in the guideline, it may be rebutted. *Id.*

127. *Id.* The court articulated that the Department's objective in adopting the underemployment guideline was to balance the obligor's freedom to make employment decisions with his duty to support his children using diligent efforts. *Id.*

128. *Id.* at 746-48.

129. *Id.* at 746.

130. *Id.* at 746-48.

131. *Id.* at 747.

least the wage he earned in 1992.[132] However, the trial court had disregarded the reliability of Keith's testimony and therefore found that he was not underemployed.[133]

Ultimately, although the supreme court was not willing to hold that an obligor's own testimony would never be enough to show the prevailing wage in the community, the court did defer to the lower court's finding of insufficient evidence.[134] The supreme court held that the trial court's finding that Jody had not presented sufficient evidence to prove Keith's underemployment, and therefore the trial court's refusal to impute income to him, was not clearly erroneous.[135]

In a separate opinion concurring with the result, Chief Justice VandeWalle voiced concern over the apparent elimination of the judicially-created "rule of reason."[136] He indicated skepticism regarding an obligor's apparent ability under the guidelines to leave a "plum" job for a lower-paying job, as long as it is not less than six-tenths the prevailing wage in the community, with no consequences at all, except at the expense of the child.[137] Before the new guidelines, the judicially created "rule of reason" would have made the obligor responsible for showing that he left a good paying job for legitimate reasons.[138] Though Chief Justice VandeWalle reserved concern for the now obscure state of "reasonableness" with regard to an obligor's employment decisions, he stated that as the guidelines are now promulgated, he could not dissent from the majority opinion.[139]

IV. IMPACT

The adoption of the new child support guidelines allowing for the imputation of income to an underemployed obligor has significantly altered the North Dakota Supreme Court's analysis in determining whether modification of a support order is warranted in cases where the obligor has undergone a reduction in income.[140] Because of the Department of Human Service's recently established criteria for imputing income, the judicially created "rule of reason" for imputing income has effectively been limited to cases where the obligation sought

132. *Id.*

133. *Id.* Jody argued that if the prevailing wage was $10.50 per hour, which is what Keith was making in 1992, his present wage of $4.99 per hour was less than six-tenths of that amount, and therefore he should presumptively be underemployed. *Id.*

134. *Id.*

135. *Id.* at 748.

136. *Id.* (VandeWalle, C. J., concurring).

137. *Id.*

138. *Id.* (citing *Olson*, 520 N.W.2d at 572).

139. *Id.*

140. *See id.* at 743-48.

to be modified is within one year of a previous order.[141] The current emphasis is that now the obligor need only meet the definition of underemployed for income to be imputed.[142] Consequently, Chief Justice VandeWalle's concern in *Nelson* as to the state of limbo of reasonableness has become realized.[143]

Not only has *Nelson* reformulated the reasonableness standard, but it has also redefined the structure of reliable evidence. *Nelson* developed the threshold inquiry as to what was reliable evidence needed to prove the prevailing wage in the community in order to impute income to an underemployed obligor.[144] In sum, *Nelson* has demonstrated that the evidence needed to prove underemployment must be a sufficiently particular and objective indicator of the obligor's work.

Ultimately, the impression that the new guideline for imputing income based on earning capacity has left is that it is not an easily established practical remedy.[145] One aspect that is clear, however, is child support obligations are subject to increase or decrease regardless of the voluntariness or involuntariness of the obligor's reduction of income after one year of a previous decree.[146]

When the specific provision for imputing income was instituted in the guidelines, it may have at first seemed easier for the plaintiff to establish that income should be imputed to the obligor because the plaintiff no longer had to demonstrate that that the obligor was "unreasonable" in deciding to change jobs.[147] The trigger for

---

141. *Id.* at 748 (VandeWalle, C.J., concurring); *see also* Surerus v. Matuska, 548 N.W.2d 384, 387 (N.D. 1996) (stating that reasonableness in a change of jobs, after one year of the initial decree, is no longer a factor in the court's decision-making process in modification proceedings).

142. *See* Kjos v. Brandenburg, 552 N.W.2d 63, 66 (N.D. 1996) (considering the nature of the evidence needed to prove underemployment so as to impute income); *Surerus*, 548 N.W.2d at 387-89 (discussing how to impute income to an incarcerated obligor). The *Surerus* court applied the guideline remedy to an incarcerated obligor and imputed income to him. *Id.* at 387. Though the court stated that the application of this remedy to an incarcerated obligor may not have been expressly provided for by the Department, it was nevertheless necessary to apply it. *Id.* Furthermore, the court reasoned that though a finding of underemployment or unemployment was a prerequisite to imputing income, to find either in this case would serve no purpose since the obligor's imprisonment made the finding a distinction without a difference. *Id.* at 388.

143. *See Nelson*, 547 N.W.2d at 748 (VandeWalle, C.J., concurring) (expressing reservations about the freedom of an obligor to voluntarily leave a high paying job that would subsequently lower his child support obligation).

144. *Id.* at 747-48. The supreme court has further qualified this standard by emphasizing that the guidelines use an *objective* standard to measure the prevailing amounts earned in the community by persons with similar work history and job qualifications in order to satisfy the definition of underemployment. *Kjos*, 552 N.W.2d at 65. In *Kjos*, the court rejected proof of work aside from the obligor's regular occupation, due to its subjective nature, and reversed the lower court's finding of underemployment. *Id.* at 65-6.

145. *See Kjos*, 552 N.W.2d at 63-66; *Nelson*, 547 N.W.2d 741 at 748.

146. *Surerus*, 548 N.W.2d at 387.

147. *See Olson* 520 N.W.2d at 573 n.1 (N.D. 1994) (anticipating the arrival of the new guideline approach and predicting that problems revolving around the imputation of income would probably not arise again); Schatke v. Schatke, 520 N.W.2d 833, 837 & n.2 (N.D. 1994) (discussing the analysis for

imputing income is no longer an intuitive judicial interpretation as to an obligor's reasonableness in employment decisions, but rather is a more standardized application of whether the obligor meets the definition of underemployed. However, as in the *Nelson* case, proving that the obligor is actually underemployed seems to be an obstacle in itself.[148] The proof problems that were underscored by the Task Force have ultimately proven to be a more difficult constraint in practice.[149] Though the supreme court has approved of the new method for imputing income due to its promotion of North Dakota's strong public policy of protecting children's best interests, it remains to be seen how practical a remedy it will prove to be.[150]

Gretchen Dee Thilmony

---

determining reasonableness in text and again referring to the arrival of the new guidelines as a potential problem-solver in a footnote).

148. *See Nelson*, 547 N.W.2d at 743-48; *see also Kjos*, 552 N.W.2d at 66 (concluding that the evidence was not strong enough for a finding of underemployment).

149. Nordwall, *supra* note 75, at 18.

150. For additional information regarding the practical limitations of this aspect of the North Dakota Child Support Guidelines, see Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 CONN. L. REV. 647, 725 (1997).