

CHILD SUPPORT GUIDELINES - DEFINITION OF GROSS INCOME

INTRODUCTION

This memorandum reviews how state law, administrative rules, and the North Dakota Supreme Court define gross income in child support calculation matters, specifically, focusing on employer contributions to benefit plans.

NORTH DAKOTA LAW

North Dakota Century Code Section 14-09-09.7(1) provides that the child support guidelines adopted by the Department of Human Services must include consideration of gross income. State law does not define gross income as it applies to child support amount determinations. Section 14-09-09.7(1) provides:

The department of human services shall establish child support guidelines to assist courts in determining the amount that a parent should be expected to contribute toward the support of the child under this section. The guidelines must:

- a. Include consideration of gross income.
- b. Authorize an expense deduction for determining net income.
- c. Designate other available resources to be considered.
- d. Specify the circumstances which should be considered in reducing support contributions on the basis of hardship.

NORTH DAKOTA ADMINISTRATIVE RULES

North Dakota Administrative Code (NDAC) Chapter 75-02-04.1 addresses the child support guidelines adopted by the Department of Human Services. The child support guidelines consider gross income as part of the child support calculations and gross income is defined under NDAC Section 75-02-04.1-01(5), which provides:

"Gross income" means income **from any source, in any form**, but does not mean benefits received from means tested public assistance programs such as aid to families with dependent children, supplemental security income, and food stamps. Gross income includes salaries, wages, overtime wages, commissions, bonuses, deferred income, dividends, severance pay, pensions, interest, trust income, annuities

income, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, retirement benefits, veterans' benefits (including gratuitous benefits), gifts and prizes to the extent each exceeds one thousand dollars in value, spousal support payments received, cash 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. (emphasis added)

The North Dakota Administrative Code definition of gross income provides that "income from any source, in any form" is considered gross income. Gross income specifically includes salaries, wages, overtime wages, commissions, bonuses, deferred income, dividends, severance pay, and pensions.

NORTH DAKOTA SUPREME COURT DECISIONS

The North Dakota Supreme Court has decided numerous cases dealing with the issue of child support. The following three Supreme Court cases deal specifically with the issue of whether an obligor's employer's contributions to an employee benefit plan are included as part of gross income for child support calculations.

Shipley v. Shipley

In *Shipley v. Shipley*, 509 N.W.2d 49 (N.D. 1993), the North Dakota Supreme Court addressed the child support guidelines' treatment of an obligor's employer's contribution to a pension plan. Ms. Shipley appealed the trial court's order, arguing that the trial court erred in computing the amount of child support Mr. Shipley was ordered to pay. Specifically, Ms. Shipley argued that the trial court erred in not including in Mr. Shipley's gross income his employer's contributions to a pension plan. The Supreme Court decided that an employer's contribution to a pension plan is included as gross income under the child support guidelines.

Shaver v. Kopp

In *Shaver v. Kopp*, 545 N.W.2d 170 (N.D. 1996), the North Dakota Supreme Court addressed the child support guidelines' treatment of an obligor's employer's contributions to a

tax-deferred savings plan. Ms. Shaver appealed the trial court's order, arguing that the trial court erred in computing the amount of child support Mr. Kopp was ordered to pay. Specifically, Ms. Shaver argued that the trial court erred in not including in Mr. Kopp's gross income his employer's contributions to a tax-deferred savings plan. The Supreme Court decided that an employer's contribution to a tax-deferred savings plan is included as gross income under the child support guidelines.

In *Kopp*, Mr. Kopp's employer offered a voluntary tax-deferred savings plan in which the employer matched an employee's contribution on a dollar-for-dollar basis up to six percent of the employee's income. Mr. Kopp had access to his and his employer's contributions, but if he withdrew the funds all taxes would be due and a 10 percent penalty would be assessed.

The court applied the definition in NDAC Section 75-02-04.1-01, and decided that employer retirement contributions are included in "income from any source." Extending the court's decision in *Shiple*, the court stated that "[i]f . . . an employer's contribution to a pension plan is treated as gross income, there is no principled reason to treat the employer's contribution to Kopp's tax deferred savings plan any differently." Additionally, the court considered administrative rule drafting comments of Mr. Nordwall, Department of Human Services, that stated that because children cannot wait for support, obligors should not be allowed the option of deferring income until the child reaches adulthood and no support obligation remains.

Hendrickson v. Hendrickson

In *Hendrickson v. Hendrickson*, 553 N.W.2d 215 (N.D. 1996), the North Dakota Supreme Court addressed the child support guidelines' treatment of an obligor's employer's contributions to a pension plan and health insurance. Mr. Hendrickson appealed the trial court's treatment of his employer's contributions to his pension plan. The Supreme Court cited *Shaver* and *Shiple* and said "[a]n employer's contribution to an obligor's pension plan and health insurance must be included in the obligor's income for determining child support."

In *Hendrickson*, it appears the court did not have to decide the matter of the treatment of the employer's contributions, but decided the matter anyway. Specifically, directly following the analysis, the court stated that Mr. Hendrickson could not argue on appeal that the trial court's finding was in error, when his attorney suggested the finding was correct in a letter to the trial court before the trial court signed the child support order.

CONCLUSION

North Dakota Administrative Code Section 75-02-04.1-01(5) pertains to child support and defines gross income. Gross income includes "income from any source, in any form." The Supreme Court has decided that "income from any source" includes an employer's contribution to a pension plan, an employer's contribution to a tax-deferred savings plan, and an employer's contribution to an obligor's pension plan.