



Clearinghouse Rule 08-066

State of Wisconsin
Department of Workforce Development
Division of Family Supports

Establishment of Birth Cost Orders
Based on Child Support Guidelines

DWD 40

The Wisconsin Department of Workforce Development proposes to amend ss. DWD 40.03(3) and 40.04(4)(b) and to create ss. DWD 40.02 (12m), 40.05, and DWD 40 Appendix D, relating to establishment of birth cost orders based on child support guidelines.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 49.22 (9) and 227.11 (2) (a), Stats.

Statutes interpreted: Section 767.89 (3) (e), Stats.

Related statutes or rules: 45 CFR 302.33, 302.56, 303.31, 303.72(a)

Explanation of agency authority. Section 49.22 (9), Stats., provides that the department shall promulgate rules that provide a standard for courts to use in determining a child support obligation based upon a percentage of the gross income and assets of either or both parents. According to the federal Office of Child Support Enforcement (OCSE), medical support is a subset of child support.

Summary of the proposed rule. Under s. 767.89 (3) (e), Stats., the content of a paternity judgment shall include an order establishing the amount of the father's obligation to pay or contribute to the reasonable expenses of the mother's pregnancy and the child's birth. The amount established may not exceed one-half of the total actual and reasonable pregnancy and birth expenses. The order shall specify the court's findings as to whether the father's income is at or below the federal poverty line and specify whether periodic payments are due on the obligation, based on the father's ability to pay or contribute to those expenses. If the father has no present ability to pay, the court may modify the judgment or order at a later date to require the periodic payments if the father has the ability to pay at that time.

If the birth costs were paid by the Medicaid program, the order for payment of birth costs under s. 767.89 (3) (e), Stats., will be to the State of Wisconsin. An unmarried

mother who applies for or receives Medicaid is required to cooperate with the local child support agency in establishing paternity (if necessary), obtaining medical support, and assigning the rights to payment of medical support to the state. There are exceptions to the child support cooperation requirement for good cause and for women during pregnancy and 60 days post-partum.

Federal and state income tax refund offset is one of the primary tools for collection of birth cost orders owed to the state. OCSE recently notified Wisconsin that it will not certify the state's request for federal income tax refund offset for birth cost orders that have been determined using the methodology in s. 767.89 (3) (e), Stats. This provision requires the court to make a finding based on the father's ability to pay before *setting a periodic payment* on birth costs. OCSE's interpretation of federal regulations as issued in Policy Interpretation Question PIQ-07-01 provides that the *judgment amount* must be set according to guidelines that take into consideration the father's ability to pay.

This rule creates a procedure in the child support guidelines in Chapter DWD 40 that allows a court to take into consideration the father's ability to pay in determining the birth cost judgment amount. The court may order a judgment that is the lowest of the following:

- An amount that does not exceed one-half of the actual and reasonable cost of the pregnancy and child's birth as provided under s. 767.89 (3) (e), Stats.
- An amount that does not exceed 5% of the father's income over 36 months.
- If a father's child support obligation was determined under s. DWD 40.04 (4) and the father's monthly income available for child support is between 75% and 125% of the federal poverty guidelines, the court may use the maximum birth cost judgment amount provided in the schedule in Appendix D.
- If a father's child support obligation was determined under s. DWD 40.04 (4) and the father's monthly income available for child support is less than 75% of the federal poverty guidelines, the court may order a birth cost judgment at an amount appropriate for the father's total economic circumstances.

Although the primary impetus for this rule is to comply with federal child support regulations to ensure that OCSE will certify birth cost orders owed to the State of Wisconsin in cases under Section IV-D of the Social Security Act, the birth cost provision will also apply to other parties, such as a private insurance company seeking recovery of birth costs under s. 767.89 (3) (e), Stats.

The department will revise the schedule of the maximum birth cost judgment amounts for low-income payers in Appendix D every year based on changes in the federal poverty guidelines and publish notice of the revisions to the schedule in the *Wisconsin Administrative Register*. Currently the schedule in Appendix C on determining the child support obligation of low-income payers is revised at least once every 4 years based on changes in the federal poverty guidelines since the schedule was last revised. The proposed rule will provide that both Appendix C and Appendix D will be revised every year based on changes in the federal poverty guidelines.

The proposed rule will also create a cross-reference to the medical support provision in s. 767.513, Stats., in the newly-created section on medical support in s. DWD 40.05.

OCSE has notified Wisconsin that the medical support provision in s. 767.513, Stats., must be within the child support guidelines in Chapter DWD 40.

In addition, the proposed rule amends the section on determining income imputed based on earning capacity when information on the parent's actual income or ability to earn is unavailable. The current rule provides that the court may impute to the parent the income that a person would earn by working 35 hours per week for the federal minimum wage. This provision was created effective January 1, 2004, when the federal and state minimum wage were the same rate.

The state minimum wage has been higher than the federal minimum wage since June 1, 2005, and the provision on imputing income when information is unavailable has been inconsistently applied by counties since the increase. Some counties have been using the state minimum wage in determining earning capacity since it is the applicable minimum wage rate, while others have been using the federal minimum wage as the current rule provides.

The proposed rule will allow courts to impute income to the parent at the higher of the state or federal minimum wage. This change will have no effect in the near future since the federal minimum wage will soon be equal to or higher than the state minimum wage, but it will ensure consistency among counties if the state rate is again higher than the federal rate. Effective 7/24/08, the federal minimum wage rate will be \$6.55 and the state minimum wage rate will be \$6.50. Effective 7/24/09, the federal minimum wage rate will be \$7.25, and the state minimum wage is proposed to also increase to \$7.25.

Summary of related federal requirements. In PIQ-07-01, OCSE states that medical support is a subset of child support, and child support orders must be set under state guidelines that comply with 45 CFR 302.56. State guidelines must:

- Take into consideration all earnings and income of the noncustodial parent.
- Be based on specific descriptive and numeric criteria and result in a computation of the support obligation.
- Provide for the child's health care needs through health insurance coverage or other means.
- Provide a rebuttable presumption that the amount determined using the guidelines is the correct child support to be awarded.

The circumstances in which past-due support qualifies for federal income tax refund offset are listed in 45 CFR 303.72(a). The list includes cases where the child support agency is providing services to a Medicaid recipient.

Comparison with rules in adjacent states. All states are required to comply with the OCSE interpretation that birth cost judgment amounts must be set under the state's child support guidelines.

Summary of factual data and analytical methodologies. OCSE has notified states that birth cost judgment amounts must be set according to child support guidelines that take into consideration the father's ability to pay.

This rule provides that the amount of a birth cost judgment may not exceed 5% of the father's income over 3 years, with a graduated scale of lower amounts for fathers with income below 125% of the federal poverty guidelines. The 5% limit is based on a proposed federal rule on medical support in child support cases. The proposed federal rule provides that cash medical support or private health insurance is considered reasonable in cost to the obligated parent if it does not exceed 5% of his or her gross income. *Child Support Enforcement Program; Medical Support*, 71 Fed. Reg. 549965, (proposed September 20, 2006)

Effect on small businesses. The rule may affect small businesses but will not have a significant economic impact on a substantial number of small businesses.

Analysis used to determine effect on small businesses. The rule could affect a private insurance company seeking recovery of birth costs under s. 767.89 (3) (e), Stats., but the effect would be *de minimus*.

Department of Children and Families. As of the date of filing, authority to promulgate this rule is within the Department of Workforce Development. Effective July 1, 2008, authority to promulgate the rule and contact individuals will be within the Department of Children and Families.

Agency contact person. Attorney Connie Chesnik, Office of Legal Counsel, Department of Children and Families, (608) 267-7295, connie.chesnik@wisconsin.gov.

Place where comments are to be submitted and deadline for submission. Comments may be submitted to Elaine Pridgen, Office of Legal Counsel, Department of Children and Families, 201 E. Washington Avenue, Madison, WI, 53707 or elaine.pridgen@wisconsin.gov. The comment deadline is July 30, 2008.

SECTION 1. DWD 40.02 (12m) is created to read:

DWD 40.02 (12m) “Federal poverty guidelines” means the poverty guidelines updated periodically in the Federal Register by the U.S. department of health and human services under the authority of 42 USC 9902 (2).

SECTION 2. DWD 40.03 (3) is amended to read:

DWD 40. 03 (3) DETERMINING INCOME IMPUTED BASED ON EARNING CAPACITY. In situations where the income of a parent is less than the parent’s earning capacity or is unknown, the court may impute income to the parent at an amount that represents the parent’s ability to earn, based on the parent’s education, training and recent work experience, earnings during previous periods, current physical and mental health, history of child care responsibilities as the parent with primary physical placement, and the availability of work in or near the parent’s community. If evidence is presented that due diligence has been exercised to ascertain information on the parent’s actual income or ability to earn and that information is unavailable, the court may impute to the parent the income that a person would earn by working 35 hours per week for the higher of the federal minimum hourly wage under 29 USC 206 (a)(1) or the state minimum wage under Chapter DWD 272. If a parent has gross income or income modified for business expenses below his or her earning capacity, the income imputed based on earning capacity shall be the difference between the parent’s earning capacity and the parent’s gross income or income modified for business expenses.

SECTION 3. DWD 40.04 (4) (b) is amended to read:

DWD 40.04 (4) (b) The department shall revise the schedule in Appendix C ~~at least once every 4 years. The revision shall be~~ year based on changes in the federal poverty guidelines since the schedule was last revised. The department shall publish revisions to the schedule in the Wisconsin Administrative Register.

SECTION 4. DWD 40.05 is created to read:

DWD 40.05 Medical support. (1) In addition to ordering child support for a child under this chapter, the court shall specifically assign responsibility for and direct the manner of payment for the child's health expenses under s. 767.513, Stats.

(2) BIRTH COST JUDGMENT. (a) In this subsection, "birth cost judgment" means an order establishing the amount of the father's obligation to pay or contribute to the reasonable expenses of the mother's pregnancy and the child's birth under s. 767.89 (3) (e), Stats.

(b) The court may order a birth cost judgment amount that is the lowest of the following:

1. An amount that does not exceed one-half of the actual and reasonable cost of the pregnancy and child's birth as provided under s. 767.89 (3) (e), Stats.

2. An amount that does not exceed the sum of 5% of a father's monthly income available for child support for 36 months.

3. If a father's child support obligation was determined under s. DWD 40.04 (4) and the father's monthly income available for child support is between 75% and 125% of the federal poverty guidelines, the court may use the maximum birth cost judgment amount provided in the schedule in Appendix D.

4. If a father's child support obligation was determined under s. DWD 40.04 (4) and the father's monthly income available for child support is less than 75% of the federal poverty guidelines, the court may order a birth cost judgment at an amount appropriate for the father's total economic circumstances.

(c) The department shall revise the schedule in Appendix D every year based on changes in the federal poverty guidelines. The department shall publish revisions to the schedule in the Wisconsin Administrative Register.

SECTION 5. DWD 40, Appendix D is created to read:

Chapter DWD 40

APPENDIX D

2008 Maximum Birth Cost Judgment Amounts for Low-Income Payers at 75% to 125% of the Federal Poverty Guidelines

| Monthly Income Up To: | Percent | Number of Months | Maximum Birth Cost Judgment Amount* |
|-----------------------|---------|------------------|-------------------------------------|
| \$650 | 3.28% | 36 | \$768 |
| \$675 | 3.38% | 36 | \$821 |
| \$700 | 3.49% | 36 | \$879 |
| \$725 | 3.60% | 36 | \$940 |
| \$750 | 3.71% | 36 | \$1,002 |
| \$775 | 3.81% | 36 | \$1,063 |
| \$800 | 3.92% | 36 | \$1,129 |
| \$825 | 4.03% | 36 | \$1,197 |
| \$850 | 4.14% | 36 | \$1,267 |
| \$875 | 4.25% | 36 | \$1,339 |
| \$900 | 4.35% | 36 | \$1,409 |
| \$925 | 4.46% | 36 | \$1,485 |
| \$950 | 4.57% | 36 | \$1,563 |
| \$975 | 4.68% | 36 | \$1,643 |
| \$1,000 | 4.78% | 36 | \$1,721 |
| \$1,025 | 4.89% | 36 | \$1,804 |
| \$1,050 | 5.00% | 36 | \$1,890 |

*The maximum birth cost judgment amount may not exceed the identified percentage of the father's monthly income available for child support over 36 months.

SECTION 6. EFFECTIVE DATE. This rule shall take effect the first day of the month following publication in the Administrative Register as provided in s. 227.22 (2) (intro.), Stats.