

Report of the

SOUTH DAKOTA COMMISSION

ON CHILD SUPPORT

Presented to

Governor M. Michael Rounds

December 2004

Report of the

South Dakota Commission on Child Support

**This report is respectfully submitted to
Governor M. Michael Rounds by the
South Dakota Commission on Child Support
Established by Executive Order No. 2003-10**

Chairman

Circuit Judge Max A. Gors

Members

**Linda Lea Viken
Terrance A. Walter
Richard Vincent
Nicole Nordbye
Tim Dougherty
Senator Gene Abdallah
Representative Thomas Deadrick**

Members of the South Dakota Commission on Child Support

Max A. Gors, Chairman, of Pierre, is a circuit court judge for the South Dakota Unified Judicial System.

Linda Lea M. Viken, of Rapid City, is an attorney in private practice specializing in family law. She formerly served as a state legislator for Minnehaha and Pennington Counties. She is a Fellow of the American Academy of Matrimonial Lawyers and is board certified as a Family Law Trial Advocate by the National Board of Trial Advocacy.

Terrance A. Walter, of Pierre, is the Division Director for the Division of Child Support within the Department of Social Services.

Nicole Nordbye, of Pierre, is a custodial parent.

Richard Vincent, of Aberdeen, is a non-custodial parent.

Gene Abdallah, of Sioux Falls, is retired and the former director of the South Dakota Highway Patrol. He is also a State Senator serving Minnehaha County.

Tim Dougherty, of Sioux Falls, is an attorney in private practice and also serves as a child support referee on behalf of the Unified Judicial System.

Thomas Deadrick, of Platte, is an attorney and also is a State House Representative from District 21 comprised of Brule, Buffalo, Charles Mix, and Gregory Counties.

David L. Braun, South Dakota Special Assistant Attorney General and Legal Counsel with the Division of Child Support provided drafting, technical, and legal assistance to the Commission.

I N T R O D U C T I O N

In 1985, the first South Dakota Commission on Child Support made its report to the Honorable William J. Janklow, Governor of South Dakota. In 1986, the Legislature approved the findings and recommendations of that report.

In 1988, Governor George S. Mickelson re-established the South Dakota Commission on Child Support to conduct the biennial review required by SDCL 25-7-6.12. The Commission reported to the Governor in December of 1988. In 1989, the Legislature approved the findings and recommendations of the Commission.

In 1996, Governor William J. Janklow re-established the Commission to conduct the review required by SDCL 25-7-6.12. The Commission reported to the Governor in January of 1997. In 1997, the Legislature approved the findings and recommendations of that report.

In 2000, William J. Janklow again re-established the South Dakota Commission on Child Support to conduct the review of the child support guidelines as required every four years by SDCL 25-7-6.12. The Commission reported to the Governor in December of 2000. In 2001, the Legislature approved the findings and recommendations of the Commission.

By Executive Order No. 2003, Governor M. Michael Rounds, the Speaker of the South Dakota House of Representatives, and President Pro Tem of the South Dakota Senate appointed the present Commission to conduct the required review of South Dakota's child support guidelines and related statutes. This Commission, like previous Commissions, was comprised of a cross-section of individuals who have direct knowledge of child support issues. Members included a custodial parent who receives child support, a noncustodial parent who pays child support, a circuit court judge, a representative of the Department of Social Services, a child support referee, family law attorneys, a State Senator and a State Representative. The Governor requested that the Commission make recommendations and propose changes to South Dakota's child support guidelines and related statutes. The primary charge of the Commission was to review new economic data and determine whether changes in existing guidelines were

needed. The Commission also reviewed the South Dakota Supreme Court's interpretations of the guidelines, and received recommendations and comments from the state's child support referees, the general public, and the Family Law Section of the State Bar Association.

The Commission met in August, September, October, November, and December of 2004.¹ The Commission also conducted public hearings, and listened to public concerns and suggestions in Pierre on September 28th; in Rapid City on October 27th; in Sioux Falls on November 22nd; and, in Aberdeen on December 8th, 2004. The Commission also solicited, received, and reviewed various written comments and suggestions from the general public.

The Commission concluded that revisions to South Dakota's child support guidelines were not needed at this time. The Commission is recommending legislative changes to other child support related statutes, however, in view of the factors and considerations outlined within this report.

S U M M A R Y O F P R O P O S A L S

The Commission's proposed legislative changes to South Dakota's child support statutes are found in Appendix A of this report. A detailed explanation of each of the Commission's proposals follows within this report. The 2004 South Dakota Commission on Child Support as appointed by Governor Rounds recommends the following:

I. SDCL 25-7-6.2 – THE COMMISSION RECOMMENDS NO AMENDMENTS OR REVISIONS TO SOUTH DAKOTA'S CURRENT CHILD SUPPORT GUIDELINES.

II. SDCL 25-7A-6 and 25-7A-22 – AMEND CURRENT STATUTES TO ALLOW PARTIES AN ADDITIONAL FIVE DAYS TO FILE OBJECTIONS TO A CHILD SUPPORT REFEREE'S RECOMMENDED DECISION AND ORDER.

¹ Copies of the Commission's minutes and working documents from the public hearings and Commission's meetings are maintained in the Department of Social Services, Division of Child Support, Pierre, SD 57501.

III. SDCL CHAPTER 25-7 – ENACT A NEW STATUTE WHICH ALLOWS A CHILD SUPPORT CREDIT FOR THE OBLIGOR IF THE CHILD RECEIVES SOCIAL SECURITY DISABILITY, SOCIAL SECURITY RETIREMENT, OR VETERAN'S DISABILITY PAYMENTS.

IV. SDCL CHAPTER 25-7A AND SDCL 25-8-5 – ENACT STATUTES WHICH WILL LIMIT THE AMOUNT OF RETROACTIVE SUPPORT AN OBLIGEE MAY RECEIVE FROM THE OBLIGOR IN PATERNITY AND ORDER ESTABLISHMENT CASES.

V. SDCL 25-7-6.16 AND SDCL CHAPTER 15-39 – ENACT STATUTES WHICH WILL SIMPLIFY HOW PARENTS CAN RECOVER UNPAID MEDICAL EXPENSES FROM THE OTHER PARENT, AND SPECIFY THAT SOUTH DAKOTA'S SMALL CLAIMS PROCEDURES MAY BE USED FOR THIS PURPOSE.

VI. SDCL CHAPTER 25-7A – ENACT A NEW STATUTE WHICH ALLOWS PARENTS TO SEEK MODIFICATION OF CHILD SUPPORT ORDERS IF THERE HAS BEEN A VOLUNTARY BUT INFORMAL CHANGE OF PHYSICAL CUSTODY OF THE CHILD(REN).

VII. SDCL 25-7-6.10(5) – ELIMINATE THIS STATUTORY PROVISION AS A CHILD SUPPORT DEVIATION BECAUSE IT IS NO LONGER NEEDED IN VIEW OF THE PASSAGE OF TIME SINCE ITS ORIGINAL ENACTMENT.

VIII. SDCL 25-7-6.10 (4) – AMEND THIS STATUTORY DEVIATION TO CLARIFY THAT THE DEVIATION ONLY APPLIES TO CHILDREN WITH EDUCATION OR HEALTH CARE SPECIAL NEEDS.

IX. SDCL 27-7-6.7 AND 25-7-6.10 – AMEND THESE STATUTES TO CLARIFY AND AMEND HOW INCOME TAX CONSEQUENCES ARE CONSIDERED IN THE CALCULATION OF CHILD SUPPORT OBLIGATIONS.

X. SDCL CHAPTER. 25-7 – ENACT A NEW STATUTE WHICH SPECIFIES HOW TO CALCULATE CHILD SUPPORT OBLIGATIONS IN SPLIT CUSTODY SITUATIONS

XI. SDCL CHAPTER. 25-7 – ENACT A NEW STATUTE WHICH CREATES A PRESUMPTIVE LIMIT OF 50% OF THE OBLIGORS' NET INCOME FOR CHILD SUPPORT OBLIGATIONS INCLUDING HEALTH INSURANCE AND DAY CARE COSTS.

XII. SDCL CHAPTER 25-7 – ENACT A STATUTE WHICH ESTABLISHES A PRESUMPTION THAT SECOND JOB INCOME IS

NOT CONSIDERED IN CALCULATING CHILD SUPPORT OBLIGATIONS IN CERTAIN SITUATIONS.

XIII. SDCL 25-7-6.14 – CLARIFY THE REQUIREMENT IN SHARED PARENTING CASES TO REQUIRE A WRITTEN AGREEMENT ADDRESSING THE SHARING OF DUTIES, RESPONSIBILITIES, AND EXPENSES IN RAISING THE CHILD(REN).

XIV. SDCL 25-7-6.13 – AMEND EXISTING LAW TO ALLOW MODIFICATION OF CHILD SUPPORT ORDERS WITHOUT A CHANGE IN CIRCUMSTANCES IF THE EXISTING ORDER IS IMPACTED BY THESE CHANGES IN LAW.

DETAILED ANALYSIS OF RECOMMENDATIONS

I. THE COMMISSION RECOMMENDS NO AMENDMENTS OR REVISIONS TO SOUTH DAKOTA'S CHILD SUPPORT GUIDELINE SCHEDULE AT THIS TIME.

Discussion: To assist in its review of South Dakota's child support guidelines and related statutes, the Department of Social Services once again contracted with Policy Studies, Inc., of Denver, Colorado. Policy Studies is a national consulting firm that assisted the previous Commissions in development and modification of South Dakota's guidelines. Policy Studies also works with a significant number of other states in development of their respective guidelines, and is a recognized expert in this field of family law.

South Dakota utilizes the Income Shares Model as an integral basis for its guidelines. This model seeks to allocate the costs of raising a child based upon the proportional amount of each parent's income at the same level as if the household remained intact. Based upon recommendations by Policy Studies, Inc., the 1996 Child Support Commission used the Rothbarth Model to review and revise South Dakota's guidelines. At that time, this model, as developed by Dr. David Betson of the University of Notre Dame in 1990, had the most economic validity, and constituted the best available evidence on the costs of raising children in the development of child support guidelines.

The explicit purpose of the study was to provide information that could be used by states to develop and update child support guidelines. The 1990 study contains measurements of child-rearing costs developed from a methodology that separates the child's share of household expenses from the parents' share of joint consumption items such as home electricity, a loaf of bread, etc... This is known as the Rothbarth methodology. Dr. Betson recommends use of the Rothbarth methodology in the development of state child support guidelines. The Betson-Rothbarth measurements form the basis of South Dakota's existing guideline schedule. The Betson-Rothbarth measurements are also the most commonly used measurements of child-rearing costs underlying most other states' guidelines.

The existing South Dakota Schedule was last updated in 2000. After review, Policy Studies recommended that South Dakota's guidelines be amended to reflect new studies recently completed by Dr. Betson related to the costs of raising children. In summary, the recommended changes considered, and ultimately rejected, by the Commission would result in child support increases for the lower and middle income levels, and a decrease in child support obligations for upper income levels. Specifically, for combined joint income levels from \$1200 to \$6100 per month, the proposed revised schedule increased child support obligations from a low of .2% increase for one child at the \$6100 income level, to a 17.9% increase at the \$3000 combined income level. Conversely, at combined income levels commencing at \$6200 per month and above, the proposed revisions decreased support obligations for one child in a range from .1% to a decrease of 8.2% at the \$10,000 combined income levels. The proposed increases and decreases in support obligations were even more dramatic when establishing support for multiple children. For example, at the \$10,000 combined income levels, the proposed revisions would reduce child support obligations by 20.7%.

After careful consideration the Commission decided not to adopt the recommended changes of Policy Studies Inc. The Commission decided not to adopt these recommendations for a number of reasons, including, but not limited to:

- In making its recommendations to the Commission, Policy Studies, Inc., relied upon a new study completed in 2001 by Dr. Betson related to the costs of raising children. This study, however, is based upon new data related to the costs of

raising children within the United States, and neither the study nor the underlying data has been tested or studied by a sufficient number of economists to establish its validity.

- As specifically recognized by Policy Studies in its recommendations to the Commission, the new measurements for the costs of raising children, and the resulting guideline changes, are not statistically different from the old measurements. As a result, and since there is not statistical difference, the actual differences may have resulted from differences in the sampled families, as opposed to changes in the actual costs in child rearing expenditure patterns over time.
- A significant number of other states and state legislators are hesitant, or have refused, to revise their child support guidelines based upon Dr. Betson's most recent study because of the resulting changes to the guideline levels, that is, a significant increase in support obligations at the middle income levels, and an even larger reduction in child support obligations at the higher income levels.
- The Commission specifically recognized that South Dakota's wage and income levels are lower than national levels. In considering South Dakota's income and wage levels, and in reviewing existing guidelines, the majority of the Commission members could not justify or support up to a 17% increase in child support obligations for certain middle income payors, and at the same time up to a 20.7% decrease in support obligations at the higher income levels.
- As discussed *infra* within this report, the Commission is recommending that the legislature adopt a statute which creates a presumptive limit or cap of 50% of a person's net income for child support, when combined with health insurance and day care costs. Some Commissioners were of the opinion that it would be inconsistent to recommend such a cap or limit on child support, health care, and day care expenses for children, and at the same time recommend a significant increase in child support obligations at middle income levels.
- During the public hearings, many obligors expressed significant concerns about the current level of child support obligations, when combined with health care and day care costs for children which are not included within the actual guideline

schedule amounts. The majority of the Commission was of the opinion that increases at any levels would only exacerbate these complaints and problems for many child support payors, thereby causing them to give up in their efforts to pay any amounts for child support.

For these and other reasons, the Commission, by a 5-2 vote, decided not to recommend any changes to South Dakota's guidelines. Instead, the Commission decided to leave the current guidelines intact and provide more time for economists to further review and study the data and report recently completed by Dr. Betson.

Recommendation: The Commission recommends no changes or amendments to South Dakota's existing child support guideline schedule as found in SDCL 25-7-6.2.

II. AMEND SDCL 25-7A-6 AND 25-7A-22 TO ALLOW PARTIES AN ADDITIONAL FIVE DAYS TO FILE OBJECTIONS TO A CHILD SUPPORT REFEREE'S RECOMMENDED DECISION AND ORDER.

The vast majority of child support orders established or modified in South Dakota are handled through the current child support referee process. Under existing law, either party has ten days to file written objections with the circuit court to a child support referee's recommended decision and order establishing or modifying child support. If either party files written objections, the circuit court conducts a hearing to determine if the referee's decision should be affirmed, modified, reversed or remanded.

Oftentimes, one party may not totally agree with the findings, conclusions, and recommended decision of the child support referee, but decides not to file written objections with the circuit court. The other party subsequently files written objections to the referee's report thereby prompting a circuit court hearing. Since the first party did not file written objections within the required ten day period, the issues that concerned that party cannot now be heard or considered by the circuit court.

The Commission recommends that the applicable statutes be amended so that if one party files written objections within the current ten day period, the other party will be afforded an additional five days to file their objections, if any. This change will result in a full and complete hearing by the circuit court judge regarding all issues of concern to

both parties. This change is also consistent with other appellate statutes and procedures within South Dakota.

Recommendation: Amend SDCL 25-7A-6 and 25-7A-22 to afford either party an additional five days to file objections to a child support referee's recommended decision and order.

III. SDCL CHAPTER 25-7 – ENACT A NEW STATUTE WHICH ALLOWS AN OBLIGOR A CHILD SUPPORT CREDIT IF THE CHILD RECEIVES SOCIAL SECURITY DISABILITY, SOCIAL SECURITY RETIREMENT, OR VETERAN'S DISABILITY PAYMENTS.

In Hawkins v. Peterson, 474 NW2d 90 (S.D. 1990), the South Dakota Supreme Court held that a child support obligor is entitled to a credit on his child support obligation if the child receives social security benefits as a result of the obligor's disability. The Supreme Court has reaffirmed this holding in a number of subsequent appeals. The Commission is of the opinion that this same analysis should apply if a child receives veteran's benefits or payments as a result of the obligor's disability. The majority of states and/or courts who have addressed this issue allow the obligor a child support credit in both situations. Additionally, under federal law, the majority of jurisdictions also allow the obligor a child support credit if the child receives social security benefits as a result of the obligor's receipt of social security retirement benefits. Therefore, the Commission recommends enactment of a statute that will codify the prior holdings of the South Dakota Supreme Court related to the receipt of social security disability benefits, and also expands these holdings to include veteran's disability benefits and social security retirement benefits received by the child, thereby bringing South Dakota in line with the majority of other states and jurisdictions within the country.

Recommendation: The Commission recommends that the legislature enact a statute that codifies the Supreme Court's holding in Hawkins v. Peterson, and also allows the same child support credit in situations involving veteran's disability payments or social security retirement benefits received by the child.

IV. ENACT STATUTES TO LIMIT THE AMOUNT OF RETROACTIVE CHILD SUPPORT AN OBLIGEE MAY RECEIVE FROM THE OBLIGOR IN PATERNITY AND ORDER ESTABLISHMENT CASES.

Current law allows a child support obligee to receive six years of retroactive child support in paternity establishment cases. See, SDCL 25-8-5. During the 2004 legislative

session, the Department proposed a statute to limit retroactive support awards to a maximum of two years.² The Department did so because of a disturbing number of cases wherein a mother conceived a child and failed to advise the putative father of either her pregnancy or the subsequent birth of the child. After the passage of many years, the mother then seeks not only paternity establishment services, and establishment of a current monthly support obligation against the obligor, she also requests a judgment for six years of retroactive child support arrearages. In some of these cases, the father has since married and is raising his own family when notified that he was the father of a teenage child.

This passage of time, and an award of 6 years of past-due support, creates a significant financial hardship upon the father and his current family set in situations where the mother "slept on her rights." The mother's actions also deprived the father of any opportunity to establish a meaningful relationship with his child. In some of these cases, the South Dakota Supreme Court upheld the award of six years of arrearages to the mother, while in others the Court denied or limited the request for child support arrears.³

The bill proposed by the Department in the 2004 legislative session was killed in the House Judiciary Committee by a 10-4 vote. The primary concerns raised by committee members included a disparity in the handling of paternity cases pursued by the Department as opposed to actions handled by private attorneys and the court system.⁴ The Committee also expressed concerns that a mother's right to recover arrears would be limited in situations where she did not "sleep on her rights," but rather the delay was caused because of her inability to locate the alleged father for a long period of time.

² See, House Bill 1011 ~ 2004 Legislative Session

³ See e.g., Loomis v. Loomis, 1998 SD 113, 587 NW2d 427 (SD) [mother did not advise father of either her pregnancy or childbirth. After passage of 14 years, mother sought paternity establishment, current child support, and, six years of child support arrears amounting to \$21,343. Supreme Court disallowed arrears because of delayed actions to the mother and prejudice to father. See also, State ex. rel. Bennett v. Petersen, 23 SD 16 (Feb. 12, 2003) & Bonde v. Boland, 2001 SD 98 (July 7, 2001) [Supreme Court upholds mothers right to recover 6 years arrears].

⁴ House Bill 1011 as proposed by the Department last year would have applied only to actions pursued by the Department and not actions by private parties or attorneys.

The Commission unanimously agrees that a mother who does nothing to establish paternity or support for her child for many years should not be allowed an economic windfall in child support arrearages. The mother's delay in taking action seriously prejudices the father and also deprives him of his opportunity to establish a meaningful relationship with his child. South Dakota current statute allowing six years of child support arrears is one of the longest in the nation. To resolve the House Judiciary Committee's concerns of last legislative session, the Commission recommends the following:

- Establish a maximum recovery of three years of allowable arrearages as opposed to the Department's proposal of two years;
- Apply the three year limitation in all paternity cases, whether pursued by the Department or brought by private parties or private attorneys.
- Finally, to address legislative concerns that the mother should not be penalized in situations wherein the mother could not locate the alleged father, the Commission recommends that the arrearage computation begins from either the date of application for services with any Title IV-D Support Enforcement Agency; the date the action is initially filed within a court; or, the date the mother actually notifies the father by registered or certified mail or personal service, whichever occurs earlier.

Recommendation: The Commission recommends enactment of statutes that limit the amount of retroactive child support arrears a mother may receive in paternity and order establishment cases to a period of three years.

V. SDCL 25-7-6.16 AND SDCL CHAPTER 15-39 – ENACT STATUTES WHICH WILL SIMPLIFY HOW PARENTS CAN RECOVER UNPAID MEDICAL EXPENSES FROM THE OTHER PARENT, AND SPECIFY THAT SOUTH DAKOTA'S SMALL CLAIMS PROCEDURES MAY BE USED FOR THIS PURPOSE.

When establishing or modifying child support obligations, SDCL 25-7-7.16 currently allows the referee or the circuit court to also enter an order requiring payment of a child's uninsured medical expenses between parents in proportion to their respective incomes.

In many cases, a child's uninsured medical costs can be significant. Under existing law there is no easy or cheap method for a parent to recover these costs from the other parent. The Department pursues collection of unpaid medical expenses if court ordered, but only if these costs and expenses are reduced to judgment. Once the unpaid medical expenses are reduced to judgment, the Department then has a sum certain for a specific period of time which the Department attempts to collect from the responsible parent.

Many circuit courts within South Dakota allow parents to obtain medical expense judgments in small claims court. A few circuit courts do not, however, ruling that the parties must proceed back to the circuit court which entered the original divorce decree or support order to obtain this medical expense judgment. This procedure is very costly for the parties since the services of an attorney are generally required. Additionally, most circuit court judges have full calendars and would prefer to have these issues resolved in the more informal setting of small claims court.

To resolve these concerns, the Commission recommends enactment of statutes authorizing parents to obtain medical expense judgments in small claims courts throughout South Dakota. This will create consistency within the state and allow the parents to obtain the judgments following a small claims hearing. The Department will then be in a position to pursue collection of the judgment amounts. To facilitate this process, the Commission also recommends that the Department create and distribute a standardized form wherein parents can request payment of unpaid medical expenses from the responsible parent in lieu of commencing legal action in small claims court.

Recommendation: Enact statutes which will simplify how parents can recover a child's uninsured medical expenses from the other parent and direct that South Dakota's small claims procedure may be used for this purpose.

VI. ALLOW PARENTS TO SEEK MODIFICATION OF CHILD SUPPORT ORDERS IF THERE HAS BEEN A VOLUNTARY BUT INFORMAL CHANGE OF PHYSICAL CUSTODY OF THE CHILD(REN).

Oftentimes, parents voluntarily agree to change the physical custody of their child(ren) from one parent to another without first obtaining a formal order from the circuit court approving the change of custody. This occurs for a vast number of reasons such as health concerns of one parent, the desires of the child (ren) involved, unexpected military service, etc. Most referees and circuit court judges allow the parents in these

situations to seek a modification of their existing child support order before the child support referee without showing any other change in circumstances. At least one circuit court judge has determined, however, that in these circumstances the parties must first retain an attorney and proceed into circuit court to obtain an order approving the change of custody before modification of any existing child support orders.

Many times the parents do not have the financial resources to hire an attorney for this purpose. Additionally, the timeframes for resolving these matters are very limited, as in situations wherein the primary physical custodian becomes activated for overseas military duty, or is unexpectedly hospitalized for a lengthy period of time. The Commission is of the opinion that if both parents agree to an informal change of physical custody of the child(ren), the child support referees are capable of hearing the matter and proposing a modification of the existing child support order. On the other hand, if the parties are not agreeable to such a change of custody, one parent would be required to request a change of custody before a circuit court judge, who would hear and decide the issue based upon the "best interests of the child".

This change will simplify the process for all and not take up valuable circuit court time to hear and decide uncontested custody issues. It will also be cheaper and timelier for the parents involved since the referee process does not require the assistance of an attorney, and in most circumstances, result in the establishment of a timelier child support order which the parents must then follow. The proposed statute will also create consistency throughout the state in terms of both referees and circuit court judges in addressing this issue.

Recommendation: Enact a statute which allows parents to seek a modification of their existing child support order if they have voluntarily agreed to an informal change of custody of the child(ren) without showing any other changed circumstances.

VII. ELIMINATE A STATUTORY CHILD SUPPORT DEVIATION BECAUSE IT IS NO LONGER NEEDED IN VIEW OF THE PASSAGE OF TIME SINCE ITS ORIGINAL ENACTMENT.

In 1989, the Child Support Commission recommended the legislative approval of a child support deviation which allowed an adjustment in child support obligations "if it

is established by clear and convincing evidence, that debts or property were exchanged for child support and it appears equitable to continue such arrangement.” This deviation was specifically limited to agreements entered into prior to July 1, 1986. Children who may have been impacted by this deviation turned 18 years of age effective July 1, 2004. Accordingly the Commission is of the opinion that this deviation is no longer necessary within South Dakota’s child support statutes. Additionally, this deviation is seldom used by child support referees and judges in establishing child support obligations.

Recommendation: Amend the deviation statute thereby eliminating section 5 of SDCL 25-7-6.10 since this particular deviation is no longer needed within the South Dakota child support statutes.

VIII. SDCL 25-7-6.10 (4) – AMEND THIS STATUTORY DEVIATION TO CLARIFY THAT THE DEVIATION APPLIES TO CHILDREN WITH EDUCATION OR HEALTH CARE SPECIAL NEEDS.

A child support deviation currently exists wherein a court or child support referee may adjust support obligations based upon “any special needs of the child.” There is misunderstanding by the general public, and some attorneys and judges, regarding the meaning of this particular deviation and the original intent behind the deviation. When originally adopted, this deviation was intended to cover a child’s special medical or education needs. Some parents construe this deviation to include such things as automobiles, computers, piano lessons, etc. This was not the intent behind this deviation and it should not be used in this manner.

Recommendation: Amend SDCL 25-7-6.10 to clarify that this statutory deviation only applies to medical or educational special needs children.

IX. AMEND EXISTING STATUTES TO AMEND HOW INCOME TAX CONSEQUENCES ARE CONSIDERED IN THE CALCULATION OF CHILD SUPPORT OBLIGATIONS.

Existing statutes take into consideration the various income tax consequences in calculating a child support obligation. For example, SDCL 25-7-6.10(3) currently allows a deviation in a parent’s child support obligation based upon “the federal income tax consequences arising from claiming the child as a dependent.” This deviation

encompasses consideration of numerous factors such as the actual dependency exemption and which parent is entitled to claim the exemption from year to year, and the various child tax credits, which continually change at the federal level. Similarly, SDCL 25-7-6.7 (1) currently allows a deduction from monthly gross income for "income taxes withheld on the basis of two dependent exemptions for a single taxpayer paid monthly rather than the actual amount withheld." Current law also allows a deduction for IRS retirement fund contributions. See, SDCL 25-7-6.7(4).

During the course of its meetings, the Commission recognized that there is significant inconsistency among circuit court judges and child support referees in considering the various income tax consequences when calculating a parent's respective child support obligation. Some judges and referees do so in virtually every case, while others do not consider the tax consequences at all because of the complexity and time consuming nature of doing so. The Division of Child Support does not consider the deviation for federal income tax consequences (SDCL 25-7-6.10(3) in any of its numerous recommended orders.

The Commission believes that child support obligations must be calculated consistently throughout the state to the greatest extent possible. Only in this manner will South Dakota's children be treated equally, no matter where they may reside or which judge or referee hears their case. By continuing to allow the broad federal income tax deviation, the Commission is of the opinion that inconsistency in this area of law will continue. Eliminating this deviation will have a minimal impact upon the parents' actual child support obligations and also result in a much simpler, uniform, and consistent child support calculation.

In addition to the recommended repeal of the income tax deviation, the Commission also recommends amending SDCL 25-7-6.7 to allow a deduction from gross income for income taxes for a single taxpayer with one withholding allowance, as opposed to the existing two withholding exemptions. This change more readily reflects the reality of a

non-custodial parent's family set, i.e., no additional dependents. This change also minimizes the impact of repealing the current deviation for income tax consequences.⁵

Finally, the Commission recommends a retirement fund contribution cap of ten percent (10%) of a person's gross income to avoid situations wherein a parent can create a large tax shelter to minimize his or her child support obligation.

Recommendation: The Commission recommends repealing the statutory deviation for income tax consequences, changing the withholding allowance from two dependency exemptions to one, and limiting the amount a person can contribute to a retirement fund to 10% of gross income.

X. ENACT A NEW STATUTE WHICH SPECIFIES HOW TO CALCULATE CHILD SUPPORT OBLIGATIONS IN SPLIT CUSTODY SITUATIONS.

In numerous situations the parents of two or more minor children agree or the court orders a split custody arrangement where one parent will be the primary physical custodian of one or more children, and the other parent will be the primary custodial parent of the other child(ren). Inconsistency exists throughout the state amongst child support referees, family law attorneys, and judges in setting the respective child support obligations between the parents in these situations. The Division of Child Support calculates each parent's respective obligation utilizing the guidelines and their incomes, and offsets the two obligations. This method is also consistent with the South Dakota Supreme Court's decision in Steffens v. Peterson, 503 NW2d 254 (SD 1993). To create consistency and uniformity throughout the State in calculating these types of child support obligations, and except in situations where the rights to child support are assigned to the State, the Commission recommends that this formula be codified so all parents and children in split custody situations are treated equally.

Recommendation: The Commission recommends codification of the Supreme Court's decision in Steffens v. Peterson to require calculation and offsetting of each parents' respective child support obligation in split custody situations.

⁵ Examples of the actual differences in child support calculations based upon the proposed dependency exemption change are found in Appendix B of this report.

XI. ENACT A NEW STATUTE WHICH CREATES A PRESUMPTIVE LIMIT OF 50% OF THE OBLIGORS' NET INCOME FOR CHILD SUPPORT OBLIGATIONS INCLUDING HEALTH INSURANCE AND DAY CARE COSTS.

During public hearings, the Commission heard significant testimony from parents related not only to the levels of child support which they must pay, but also the respective costs of health insurance premiums and day care expenses that they also must pay in proportion to their respective incomes. The costs of the health insurance and the costs of day care for the child(ren) are a significant portion of the obligor's total monthly obligation. The Commission and the legislature have some control in setting the base child support obligations by review of the guidelines and the respective incomes of South Dakota families. The Commission and legislature have little control over the spiraling costs of health insurance premiums or the continually rising costs of children's day care.

In many situations, when all of these amounts are combined and paid by the non-custodial parent, that parent is left with limited income to maintain an appropriate standard of living. Additionally, in many of these cases, the non-custodial parent has a second family to support, and these combined financial burdens create a significant hardship upon his or her subsequent family and children. In these situations, the obligor either cannot pay the full monthly amount and accumulates significant past-due arrearages, or simply gives up and pays no support whatsoever.

The Commission is cognizant of these concerns, and especially the financial effect upon parents. To address this issue, the Commission recommends that the Legislature enact a statute which creates a presumptive limit of 50% of the obligor's net income as his or her total child support obligation, that is, the guideline schedule amount combined with his or her respective share of health insurance and day care costs. This is the same statutory limit which the Division of Child Support can legally withhold from an obligor's net income for payment of child support in order to leave the obligor with sufficient financial resources to maintain an appropriate standard of living. This statutory cap provides obligors an incentive to continue in their efforts to pay their respective obligations, instead of forcing the obligor into quitting entirely or accumulating significant child support arrears which can never be paid. This presumptive limit can be

rebutted in appropriate cases based upon evaluation of the facts of each particular case and most importantly, the best interests of the children.⁶

Recommendation: The Commission recommends that the Legislature enact a new statute that creates a presumptive limit of 50% of the obligor's income as the appropriate level of child support, when monthly child support is combined with the obligor's proportionate share of day care and health insurance costs.

XII. SDCL CHAPTER 25-7 – ENACT A STATUTE WHICH ESTABLISHES A PRESUMPTION THAT SECOND JOB INCOME IS NOT CONSIDERED IN CALCULATING CHILD SUPPORT OBLIGATIONS IN CERTAIN SITUATIONS.

During the public hearings, the Commission heard concerns of many parents regarding the effect of second jobs on child support. Many parents take second jobs to earn extra money to pay bills, improve their standard of living, and sometimes to pay support obligations. Non-custodial parents expressed valid concerns that it is counterproductive to attempt to increase their standard of living through second job income because of the resulting increase in child support obligations and taxes, which eliminates any incentive for them to do so. Additionally, many non-custodial parents expressed concerns that they would like to find a second job, or increase their incomes, but under the current guideline structure, any increased income ends up being paid to the custodial parent for child support and other needs of the children. Conversely, many custodial parents stated that they must find second or third jobs to adequately support their children and consideration of this income may decrease their child support.

The Commission carefully considered this testimony and reviewed the current guideline structure. The Commission is of the opinion that children should benefit from their parents' increased standard of living established over time. On the other hand, the Commission does not believe the guidelines and child support statutes should penalize parents who are trying to earn extra income, and should not eliminate incentives to do so. The Commission reviewed the manner in which other states address this issue and after considerable discussion and debate decided upon a compromise approach wherein it

⁶ The 50% cap as proposed by the Commission only applies to child support calculations for the same family set, and does not apply in cases where the obligor has multiple family sets.

would recommend enactment of a statute that creates a rebuttable presumption that second job income of either the custodial or non-custodial parent would not be considered in calculating support obligations. This presumption can be overcome if there is evidence that the additional income was available for the benefit of the child had the family remained intact or the family had initially formed; if exclusion of the income creates a financial hardship upon the custodial parent; or, if exclusion of second job income will have a substantial negative effect upon the child's standard of living. The Commission believes that this is a reasonable compromise for both the custodial and non-custodial parent.⁷

Recommendation: The Commission recommends that the legislature enact a statute which establishes a presumption that overtime or second job income should not be considered in calculating support obligations in certain instances.

XIII. CLARIFY THE CALCULATION FOR PAYMENT OF A CHILD REARING EXPENSES IN SHARED PARENTING SITUATIONS.

The 2000 Child Support Commission recommended, and the Legislature adopted, the shared parenting and responsibility section found within in SDCL 25-7-6.14. This provision allows a cross credit when establishing child support obligations in cases where both parents have a "parenting plan whereby each parent provides a suitable home for the child of the parties, the court order allows the child to spend at least one hundred twenty days in a calendar year in each home, and the parents share the duties, responsibilities, and expenses of parenting. See, SDCL 25-7-6.14.

Since enactment of the shared responsibility section, questions have arisen regarding what "expenses of parenting" are to be shared by the parents and in what manner. The Commission discussed various alternatives and requested information from Policy Studies, Inc., including examples of how other states address these issues.

States differ significantly in how they define extra-ordinary expenses, and also how they address payment of the same within their respective child support statutes. Policy

⁷ The Commission also considered the creation of a similar presumption for overtime income earned by either the custodial or non-custodial parent, but after discussion and debate, decided to limit this change to second job income only.

Studies, Inc. advised the Commission that South Dakota's current guidelines already includes the average amount spent for a child's extra-curricular activities.

After review of various proposals and after considerable discussion, the Commission decided to recommend that the shared responsibility statute be amended to clarify that parents seeking a shared parenting arrangement and the accompanying support cross credit shall agree in writing to the sharing of a child's education, recreation, and entertainment activities. This amendment will assist in eliminating the uncertainty regarding this issue and allow the parents to agree in writing in how to address payment of these expenses.

XIV. MODIFY CHILD SUPPORT ORDERS WITHOUT A CHANGE IN CIRCUMSTANCES IF THE ORDER IS IMPACTED BY THESE CHANGES IN LAW.

Discussion: Previous Commissions have recommended that changes in the child support guidelines be immediately available to parents and children upon enactment of the new guidelines. Otherwise, children of parents similarly situated will be treated differently.

Recommendation: The Commission recommends that all orders for support in effect prior to July 1, 2004, may be modified utilizing the revised guidelines without establishing any other change in circumstances.

ADDITIONAL RECOMMENDATIONS

In addition to the foregoing, the Commission also makes the following non-legislative recommendations to benefit South Dakota's child support system and process:

1. Child Support Calculation Worksheet -- The Commission recommends that child support referees include with their recommended decision and order, a copy of the child support calculation worksheet which they used in reaching the monthly support obligation. Most referees do so now, but it is of great benefit to the parties and also to the circuit court reviewing the matter if the actual worksheet is part of the referees

recommended decision and recommended orders. The Department will work with the Unified Judicial System to implement this recommendation.

2. Visitation Issues Faced by Non-Custodial Parents – During the public hearings, the Commission once again heard many complaints and testimonials from non-custodial parents regarding the numerous and varied problems faced when exercising their court-ordered visitation rights with their children. Many believe it is unfair that the Department is very aggressive in collecting child support from them, but cannot do anything when the custodial parent denies court-ordered visitation rights. Federal regulations prohibit the Division of Child Support from any involvement in either custody or visitation issues. If pursued by the Department, the State stands to lose in excess of \$27.5 million in federal money used to fund the State's child support enforcement and TANF programs.

The Commission is deeply concerned about parents who deny other parents their court-ordered right to see and spend time with their children. National studies establish that a parent is more willing to pay his or her court-ordered child support obligations, and assist in the welfare of their child(ren), if they are allowed to spend time and bond with the child during all ages of minority. The Commission is also aware that this has been an on-going issue and problem in South Dakota for a great number of years, and continues to be a reoccurring concern. The legislature, prior Commissions, and the Department are very cognizant of this issue and have taken some remedial steps, including among other things:

- (1) requiring the custodial parent to provide advance notice to the non-custodial parent before moving with the child(ren), and allowing the non-custodial parent the opportunity to object to the re-location of the children;
- (2) adopting standard visitation guidelines by the Supreme Court and used on a statewide basis to establish specific visitation rights for all parents;
- (3) Revision by the Department of all of its recommended child support orders to incorporate the standard visitation guidelines except in cases of domestic violence or child abuse;
- (4) the creation of visitation centers in various areas of the state with the assistance of federal grant money;