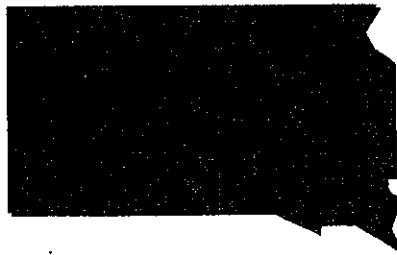


Report of the

SOUTH DAKOTA COMMISSION

ON CHILD SUPPORT



Presented to

Governor M. Michael Rounds

December 2008

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. 2007-26**

**Chairman
Senator Gene Abdallah**

Members

**Ms. Diana Broom
Referee Tim Dougherty
Representative Roger Hunt
Judge Pat Riepel
Ms. Linda Lea Viken
Mr. Richard Vincent
Mr. Terrance Walter**

Members of the South Dakota Commission on Child Support

Senator Gene Abdallah of Sioux Falls, represents the 10th District which includes Lincoln and Minnehaha Counties. He serves as Chairpèrson to the Senate Judiciary Committee and is a member of the Senate Commerce and State Affairs Committees. Senator Abdallah retired from the South Dakota Highway Patrol, where he was director.

Diana Broom of Rapid City, is a custodial parent.

Referee 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.

Representative Roger Hunt of Brandon, represents the 10th District which includes Lincoln and Minnehaha Counties. He serves as Vice Chairperson to the House Judiciary Committee and is a member of the House Commerce and Legislative Procedure Committees. Representative Hunt is an attorney and retired from the U.S. Navy where he was a Judge Advocate.

Judge Pat Riepel of Sioux Falls, is a Circuit Court Judge for the Second Judicial Circuit representing the Judiciary.

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.

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

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

INTRODUCTION

This report summarizes the findings and recommendation of the 2008 South Dakota Commission on Child Support. Governor M. Michael Rounds established the Commission by Executive Order to review the support obligation laws as required by Section 25-7-6.12 of the South Dakota Codified Laws. The laws are used to set child support order amounts among divorced, separated, and never-married parents and parents in other situations that otherwise involve a continued absence of the parent or child from the home. Throughout this report, we refer to obligation statutes as the “child support guidelines,” or “guidelines.”

The South Dakota child support guidelines were originally based on the findings and recommendations of the first Commission on Child Support, which was established in 1985, and approved by the 1986 Legislature. The original statute included a provision that the guidelines must be reviewed biennially; but beginning in 2000, the requirement was lengthened to quadrennial, which comports with the federal requirement.¹ Since 1985, five Commissions, including the 2008 Commission, have been established to review the guidelines. The Legislature approved the findings and recommendations of each of these Commission (i.e., the 1988, 1996, 2000, and 2004 Commissions).

The 2008 Commission consists of individuals familiar with the guidelines due to their profession (e.g., a judge, a referee, a family law attorney and a representative of the Department of Social Services, Division of Child Support) and other stakeholders including representatives of noncustodial and custodial parents and the Legislature. The Commission is administered by the Department of Social Services (DSS) pursuant to the Executive Order.

The Commission identified specific issues through public hearings and written comments; comments submitted by the DSS Division of Child Support; comments submitted from the judiciary, particularly those who frequently conduct hearings on child support; the Family Law Section of the State Bar Association; and individual Commission members; and, by reviewing recent Supreme Court decisions concerning the obligation laws.

¹ Title 45, Public Welfare, CFR 302.56.

In developing its recommendations, the Commission engaged in many activities and reviewed a considerable amount of information. It held three public hearings across the State (i.e., Pierre on August 11 with a Dakota Digital Network connection in Aberdeen, Sioux Falls on September 8 and Rapid City on September 22). Individual Commission members compiled information about recent Supreme Court decisions pertaining to guidelines and other information that was shared with the Commission. Individual Commission members also drafted proposed changes pertaining to a specific issue that were then reviewed by the Commission as a whole. The Commission invited child support referees to the Commission meetings to share their recommended changes based on their experiences applying the guidelines. The DSS Division of Child Support compiled relevant data from its automated system (e.g., number of orders based on guidelines deviations, number of parents with multiple child support orders, frequencies of the number of children covered by orders) for the Commission to consider in its recommendation-making. DSS Division of Child Support also retained an economist with expertise in child-rearing costs and child support guidelines to provide technical assistance with updating the support obligation schedule. She provided numerous briefing materials to the Commission on the costs of raising children, other relevant economic data and information about other state guidelines.

The Commission met seven times to discuss the findings from these activities and information presented and, then to formulate recommendations. The meetings occurred on May 6, July 9, August 11, September 8, September 22, October 31 and December 10. The procedure for making recommendations consisted of: (i) an individual Commission member making a motion to propose a recommendation; (ii) another individual seconding the motion; and (iii) a vote of the entire Commission. The Commission approved recommendations by a majority vote.

The Commission recommends ten legislative changes to the obligation laws including an updated schedule. A summary is first provided followed by a detailed discussion of individual recommendations. The final section of this report identifies other issues addressed by the Commission that did not result in a recommended legislative change.

SUMMARY OF RECOMMENDATIONS

Table 1 summarizes the Commission's ten recommendations. The summary is numbered to correspond to the sequence of the obligation statutes. Appendix A contains a mark-up of the recommended changes to statute.

1	Replace the reference to section numbers in SDCL 25-7-6.2 to "by this chapter" to refer to the entire child support guidelines provided in statute.
2	Amend the support obligation schedule in SDCL 25-7-6.2 to reflect current economic data on the costs of raising children in South Dakota, and expand it to \$20,000 combined net income.
3	Amend the low-income adjustment provided in SDCL 25-7-6.2 to reflect increases in minimum wage.
4	Amend the determinants of income in SDCL 25-7-6.3 to allow for the exclusion of income that is not regular and recurring when calculating the support obligation.
5	Codify the Supreme Court decisions in <u>Gisi v. Gisi</u> and <u>Hollinsworth v. Hollinsworth</u> concerning the presumption of income of incarcerated parents and unemployed and underemployed parents by amending SDCL 25-7.6.4 and SDCL 25-7-6.10. The amendments clarify that the existing rebuttable presumption that parents are at least capable of minimum-wage earnings in SDCL 25-7.6.4 applies to incarcerated parents as well; and, excludes incarceration as a basis for a guidelines deviation due to a voluntary act of either parent which reduces that parent's income under SDCL 25-7-6.10(6). The amendments also clarify that a deviation is allowable when a voluntary and unreasonable act results in unemployment or underemployment.

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| 6 | Amend the date in SDCL 25-7-6.13 to allow modification of child support orders so all parents can avail themselves of the guideline changes without having to show any change in circumstances. |
| 7 | Clarify and strengthen the criteria for applying a parenting-time adjustment and clearly distinguish between the abatement and the shared responsibility cross-credit adjustments such that they are applied to the case circumstances for which they are intended. This recommendation includes amendments to the abatement provisions in SDCL 25-7-6.14; and moving the shared responsibility cross-credit currently in SDCL 25-7-6.14 into its own section. |
| 8 | Clarify the criteria in SDCL 25-7-6.22 for rebutting the presumption that second job income is not to be considered. Namely, clarify that the presumption can be rebutted by evidence that the income source was available to the child when the parent initially became obligated to support the child. |
| 9 | Amend the provisions pertaining to the medical support order in SDCL 25-6-16, SDCL 25-7A-1, SDCL 25-7A-5, SDCL 25-7A-6, SDCL 25-7A-7, and SDCL 25-7A-22 to conform to new federal medical support requirements. |
| 10 | Create a new statute that allows for the imputation of income to a parent who fails to provide financial information at an amount based on the most recent annual pay standards reported by the South Dakota Department of Labor. |

DETAILED ANALYSIS OF RECOMMENDATIONS

Recommendation 1. Replace the reference to section numbers in SDCL 25-7-6.2 with “by this chapter” to refer to the entire child support guidelines provided in statute.

Issue. The current provision in SDCL 25-7-6.2 references chapters SDCL 25-7-6.2 to 25-7-6.18 as all of the provisions for determining support obligations while the 2004 legislated changes expanded the obligation statutes through 25-7-6.25.

Discussion. The purpose of the reference to the section numbers is to convey that guidelines users should consider all of the sections collectively when determining the support obligation. The current reference does not include all section numbers. The 2004 changes to the guidelines added new sections. Yet, the referenced section numbers were not changed to conform to the renumbering. To avoid this problem in the future, it would be practical to reference all statutes for determining support obligations without mentioning specific section numbers.

Recommendation Summary. The reference to section numbers is replaced with “in this chapter.”

Recommendation 2. Amend the support obligation schedule in SDCL 25-7-6.2 to reflect current economic data on the costs of raising children.

Issue. The existing schedule is based on economic data available in 2000. More current economic data is available to update the schedule to 2008 levels. Using the new data would also permit the highest amount of the schedule to be extended from \$10,000 to \$20,000 net per month.

Discussion. A major issue faced by the Commission was whether the support obligation schedule should be updated for more recent economic data and increases in the minimum wage; and, if so, how. Another impetus for this consideration is a federal requirement of states to consider economic data on the costs of child-rearing as part of their guidelines reviews. At the core of the calculation of the support obligation is a schedule that reflects child-rearing expenditures in intact families for a range of parents' combined net incomes and the number of children. The premise is that children of disrupted families, regardless of whether their parents separated, divorced or never married, are entitled to the same level of expenditures the children would have received had the parents lived together. Further, each parent is responsible for his or her pro rata share of the total support obligation schedule. In primary physical custody cases, the noncustodial parent's share forms the basis of the support obligation. South Dakota and 36 other states base their obligation schedule on these principles, which embody the "Income Shares Guidelines model."

The support obligation schedule in SDCL 25-7-6.2 was last updated in 2000. More current, credible economic data, including new evidence on the costs of raising children now exists. The new data were used to prepare an updated schedule that reflects the costs of raising children in 2008 in South Dakota. Specifically, the data included economic estimates of child-rearing expenditures developed by Professor David Betson, University of Notre Dame, from expenditures data collected from families surveyed in 1998 to 2004.² Older estimates prepared by Betson from families surveyed in 1980 to 1986 form the basis of the existing obligation schedule.³ (In all, Betson's estimates form the basis of about 25 state guidelines, more so than any other estimate.) Betson estimated child-rearing expenditures based on the new survey data using the same steps and assumptions as his estimates based on the old survey data.

Selecting an economic basis is just the first step to developing an obligation schedule. DSS retained Center for Policy Research (CPR) to conduct the other steps necessary to

² The State of Oregon commissioned Professor Betson to develop these estimates and graciously allows them to be shared with other states. The estimates are published in: Betson, David M. (2006). "Appendix I: New Estimates of Child-Rearing Costs in *State of Oregon Child Support Guidelines Review: Updated Obligation Scales and Other Considerations*, Report to State of Oregon, Prepared by Policy Studies Inc., Denver Colorado. Available at http://www.dcs.state.or.us/oregon_admin_rules/psi_guidelines_review_2007.pdf

develop an updated schedule. CPR converted the recent Betson estimates to 2008 price levels,⁴ realigned them to account for differences in South Dakota and national incomes,⁵ and removed most out-of-pocket medical expenses and all child care expenses from the estimates to develop an updated schedule.⁶ In all, CPR used the same assumptions and steps underlying the current South Dakota schedule but relied on the more recent economic data. The key assumptions are generally the same.

- The schedule reflects the economic cost of raising children in South Dakota in 2008.
- The schedule reflects average expenditures for children from ages 0 up to the age of 18.
- The schedule does not include child care expenses.
- The schedule does not include medical insurance for the children.
- The schedule includes \$250 per child per year to cover average out-of-pocket expenses such as band-aids, over-the-counter medicines, and other medical expenses incurred on behalf of most children. It does not include uninsured medical expenses above \$250 per child per year such as uninsured medical expenses for optometric, dental or orthodontic, counseling and other uncovered medical expenses.
- Parenting time is not factored into the schedule.

Recommendation Summary: Update the schedule to reflect the costs of raising children in South Dakota in 2008.

³ Betson, David M. (1990) *Alternative Estimates of the Cost of Children from the 1980-86 Consumer Expenditure Survey*, Report to U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, University of Wisconsin Institute for Research on Poverty, Madison, Wisconsin.

⁴ The Betson-Rothbarth estimates based on expenditures data from families surveyed in 1998-2004 was originally expressed in 2005 dollars. They were converted to August 2008 dollars using the changes in the Consumer Price Index published by the U.S. Bureau of Labor Statistics. Available at URL: <http://www.bls.gov>

⁵ The Betson-Rothbarth estimates were aligned to South Dakota incomes by using Census data to compare the distribution of national family income to that of South Dakota families and assuming families of the same percentile had similar expenditures patterns. The re-alignment to South Dakota incomes is necessary because the estimates are based on a nationally representative sample of families. South Dakota incomes and housing prices are considerably below national averages, and estimates of child-rearing expenditures and expenditures data do not exist at the State level

⁶ Out-of-pocket medical expenses incurred for a child average about \$250 per year. (McCormick, M. et al.,(2001) "Annual Report on Access to and Utilization of Health Care for Children and Youth in the United States—2000." *Ambulatory Pediatrics*, 1(1):January-February 2001. Agency for Healthcare Research and Quality 01-R036).

Recommendation 3. Amend the low-income adjustment in SDCL 25-7-6.2 to reflect increases in minimum wage.

Issue. The current low-income adjustment is based on the minimum wage rate in 2000. There have been substantial increases in the minimum wage since then.

Discussion. Most of the existing schedule is based on how much is spent to raise children. However, there are exceptions at the very low incomes (i.e., the emboldened areas) of the schedule, which also consider what a low-income obligor can reasonably pay while retaining a sufficient amount to live at least at a subsistence level. In part, the minimum order amounts, which form part of the low-income adjustment, were developed to be applied when the noncustodial parent cannot work full-time at minimum wage because he or she is disabled or incapacitated. The minimum order amounts are not applied when the parent purposely reduces his/her income to shirk his/her child support.⁷

When the low-income adjustment was recommended by the 2000 Commission, there was little difference between minimum-wage income and poverty income. Precisely, the difference was about \$100 per month; hence, this formed the basis for the minimum order for one child under the current schedule. The principle was that an obligor with minimum-wage earnings would be able to live at least at a subsistence level after payment of child support. The current minimum order increases for more children and applies to incomes up to \$800 net, which approximates after-tax income from working full-time at the minimum wage rate in 2000.

Since 2000, however, the gap between minimum wage income and poverty income grew, largely due to increases in the federal minimum wage. The changes to minimum wage were phased in beginning in 2007 and will be completely phased in by July 24, 2009. After the Commission extensively examined the impact of increased minimum wage on obligation amounts, the Commission recommended several changes.

⁷ In fact, this potential problem is avoided through another provision of the South Dakota guidelines. Section SDCL 25-7-6.3. provides a rebuttable presumption of employment at minimum wage. In effect, an incapacitated parent would have to provide evidence of their disability due to this provision.

- It recommended increasing the income range to which the minimum order applies to \$1,100 per month. This approximates after-tax income from full-time earnings at the 2009 minimum wage.
- The Commission also recommends increasing the minimum order. Similar to the basis of the minimum order for one child, the proposed minimum order also reflects the difference between after-tax income from minimum wage earnings (at the new 2009 minimum wage) and the federal poverty level for one person.
- Like the existing minimum order, it increases for more children. The percentage increase to the minimum order for more children reflects how much more families spend on children when they have two children instead of one child; three children instead of two children; and so forth.
- Like the existing minimum order amounts, they gradually phase out to amounts that reflect child-rearing costs. The minimum order amounts are gradually phased-out by taking the lower of: how much is spent on children at that income; and, assigning \$40 to the basic obligation for each \$50 in net income above \$1,100 per month.
- Like the existing schedule, the area with the low-income adjustment is emboldened. The low-income adjustment in SDCL 25-7-6.2 applies to the emboldened area.

Recommendation Summary. Update low-income adjustment incorporated into the schedule to reflect the minimum wage effective July 24, 2009.

Recommendation 4. Amend the determinants of income in SDCL 25-7-6.3 to allow for the exclusion of income that is not regular and recurring when setting the support obligation.

Issue. The current provision can be interpreted as requiring all income from overtime, commissions and bonuses to be considered even though that income may not be regular and recurring.

Discussion. The last phrase of SDCL 25-7-6.3, “such incomes shall be annualized to determine a monthly average income,” should not be interpreted to mean that irregular and non-recurring income should be annualized to a monthly average income. It is only reasonable to include income from overtime, commissions and bonuses if it is regular and recurring. If it is infrequent and non-recurring, the parent cannot count on it being available to support his/her child.

Recommendation Summary. The Commission recommends language that clarifies that when compensation is not a regular and recurring source of income for the parent, it may be excluded from income used to determine the support obligation.

Recommendation 5. Codify the Supreme Court decisions concerning the presumption of income to incarcerated, unemployed, and underemployed parents by amending SDCL 25-7.6.4 and SDCL 25-7-6.10. The decisions apply the presumption of minimum wage, and the minimum order amount, to incarcerated parents, and a reasonableness standard for unemployed and underemployed parents.

Issues. In Gisi v. Gisi, 2007 SD 39, 731 NW2d 223, the South Dakota Supreme Court essentially lays out that application of the guidelines would result in an incarcerated parent’s order being established at the minimum order amount. It also upheld the Circuit Court’s conclusion that incarceration is a voluntary act. The South Dakota Supreme Court’s decision in Hollinsworth v. Hollinsworth, 2008 SD 102, further points to the need for statutory clarification of deviations based on other voluntary acts that reduce a parent’s income, including underemployment.

Discussion. In Gisi v. Gisi, the South Dakota Supreme Court found that the Circuit Court erred by failing to follow the South Dakota guidelines. The Circuit Court had imputed an incarcerated parent’s income at his previous wage rather than at the minimum-wage income

as presumed in the guidelines. Presumption of minimum wage results in a guidelines amount of \$100 per month rather than the \$190 amount that was ordered. However, the Court upheld the Circuit Court's decision to not grant the request for a deviation from the guidelines due to incarceration of the obligated parent. The Circuit Court concluded that the incarceration was a voluntary act.

The Commission discussed the many implications of Gisi v. Gisi. By imputing an incarcerated parent's income at minimum wage, his/her income falls within the area of the schedule where the minimum support order applies. However, setting it at the minimum amount, rather than zero, establishes the principle that a parent still has a financial responsibility to his/her children no matter what his/her circumstance may be. Yet, by setting it at the minimum amount, rather than at a higher amount, it alleviates some of the arrears that would have likely accrued while the parent is incarcerated. This is important because research shows that high arrears are a deterrent to future payments.

The Commission also discussed whether reducing the support award was in the best interest of the child; and, essentially rewarded incarcerated parents for their criminal activity. Conversely, under the Income Shares guidelines model upon which the South Dakota guidelines are based, the child should receive the same level of expenditures the child would have received had the parents lived as an intact family. If a parent of an intact family becomes incarcerated, the income of that family is reduced as well as its child-rearing expenditures.

In addition, the Commission discussed the impact of both Gisi v. Gisi and Hollinsworth v. Hollinsworth on deviation criterion contained in SDCL 25-7-6.10(6), which allows for a deviation for "the voluntary act of either parent which reduces that parent's income." This provision has generally been used to impute income at an amount higher than actual income.

In Gisi v. Gisi, the South Dakota Supreme Court concluded that incarceration was a voluntary act. Hence, income can be imputed at minimum wage to an incarcerated parent even though his/her actual income is zero. The Court noted: "The Court's precedent suggests that a deviation or reduction of child support below the mandated minimum amount within SDCL 25-7-6.2 is not required because of incarceration...This result appears to be an equitable one, i.e., it recognizes the reduced income of the obligor as a result of incarceration

by imputing a minimum wage income instead of the obligor's prior income, but it does not totally relieve the obligor of child support payments as a result of that incarceration.”.

In Hollinsworth v. Hollinsworth, the Court noted that the statutes did not specifically address unemployment. The Commission agreed that both unemployment and underemployment may have a detrimental impact on the child and should be included as a deviation.

Recommendation Summary. The presumption of minimum wage income in SDCL 25-7-6.4 is expanded to clarify that the presumption applies to incarcerated parents. The current deviation criterion contained in SDCL 25-7-6.10 allows the referees and courts to deviate if a parent voluntarily reduces his/her income. The recommended amendment will exclude situations where the voluntary act of incarceration reduces a parent's income. The changes also specifically address reductions in income due to unemployment and underemployment. The recommended amendment also expands the provision from “a voluntary act” to “a voluntary and unreasonable act.”.

Recommendation 6. Amend the date in SDCL 25-7-6.13 to allow modification of child support orders so all parents can avail themselves to the guideline changes without having to show any change in circumstances.

Issue. The date referenced in SDCL 25-7-6.13 is the effective date of the last guidelines change and should be updated to the effective date of these guidelines changes if adopted.

Discussion. The Commission every four years has amended the date in this provision so parents can seek modifications based on the guidelines changes without having to show a change in circumstance in their particular case. Without this amendment, similarly situated cases with older orders would be treated differently than those based on the guidelines changes. There would have to be a change in circumstance (e.g., change in income) before the new guidelines could be applied to the older order.

Recommendation Summary. Update the date to reflect the effective date of guidelines changes approved by the Legislature.

Recommendation 7. Clarify, refine and strengthen the circumstances in which an abatement or shared responsibility cross-credit may be ordered and clearly distinguish between the two parenting-time adjustments.

Issue. There are several issues with the existing timesharing adjustments.

- “Day,” which is used to compute the amount of the adjustment, is not defined.
- Either provision can be applied to 120 days of parenting time per year or more.
- The obligation under the cross-credit formula is less than the abatement formula for the same number of days in some cases.
- In practice, the shared parenting provisions are being used in some cases to eliminate the payment of support from one parent to the other entirely, which is not its intent.
- To maintain the pro-rata sharing of the net incomes, the expenses shared by the parents need to be shared in proportion to income.

Discussion. The issue with a lack of a definition for “days” is obvious. Some interpret it to include an “overnight,” whereas, others consider a 24-hour period. Less obvious are the issues surrounding the two adjustments; and, how they differ and overlap. The two adjustments are intended to apply to different types of parenting time situations. The abatement is intended to apply to extended parenting time (i.e., when the child spends ten or more days a month with the noncustodial parent). In contrast, the cross-credit formula is intended to be applicable when the parents agree to a parenting plan encompassing significant sharing of parental responsibilities and child-rearing expenses. Although the premise of the cross-credit formula is sharing, it can be applied to timesharing arrangements that are significantly less than equal physical custody. The current cross-credit calculation can be applied to situations where one parent has parenting time for as little as 120 days in a year. In actuality, some parents use the cross-credit adjustment to reduce their obligation and, in

some cases that reduction is to a zero-dollar order while they do not truly share parenting responsibilities and expenses in proportion to their incomes, leaving the parent with the lower income less able to provide a similar environment for the child.

Recommendation Summary. The Commission recommended a multi-faceted solution to these issues.

- Replace “day” with “night” and adopt Internal Revenue Service regulations to define what constitutes a “night.”⁸
- Replace the term, “visitation,” with “parenting time” which is a more accurate description of the noncustodial parent’s time with the child, and consistent with changes in the Visitation Guidelines adopted by the South Dakota Supreme Court.
- Increase the threshold for applying the cross-credit formula to require more equal parenting time (i.e., 180 nights).
- Separate the abatement and cross-credit adjustment provisions into two separate statute sections to distinguish between the differing situations.

Recommendation 8. Clarify and refine the criteria in SDCL 25-7-6.22 for rebutting the presumption that second job income is not to be considered. Clarify that the presumption can only be rebutted by evidence that the income source was available to provide for the child when the parent initially became obligated to support the child pursuant to SDCL 25-7-6.1, regardless of whether the parents are married, divorced, separated, or had never lived together.

Issue. The current provision provides a rebuttable presumption that second job income is not to be considered. It also provides criteria for rebutting the presumption. Comments were received from at public hearings that the criteria lacks clarity.

Discussion. Based on the current provision, the exclusion of second job income can be rebutted if:

⁸ 26 CFR 1-152-4. Special rule for a child of divorced or separated parents or parents who live apart.

- (i) the income source was available to pay expenses related to the child when the family was intact or if the family had formed;
- (ii) the exclusion of the second job income would result in a financial hardship upon the other parent; or
- (iii) that exclusion of the second job income will have a substantial negative effect upon the child's standard of living.

There has been confusion with the phrase, "when the family was intact," in that it is sometimes misinterpreted to mean the parents had to have been married for this criterion to apply. Such was not the intent of the Commission. The Commission did not intend the guidelines to treat married, divorced or separated parents differently than never-married parents. The issues with the other two criteria are that they are not clearly defined. For example, the consideration of the child's standard of living in the third criterion favors including the noncustodial parent's second job income because its inclusion would always result in more child support; hence, increasing the "child's standard of living." Conversely, not including the noncustodial parent's second job income would always result in less child support; hence, decreasing the "child's standard of living."

The Commission reviewed the intent of the overall provision. If the second job income of either parent was available for the child's benefit when the support obligation arose under SDCL 25-7-6.1, regardless whether the parents lived together, the child should continue to benefit from that income. The Commission determined that subsequent second job income shall be excluded when establishing or modifying a support obligation because parents often take a second job to improve their financial circumstances. In those situations, a parent should not be penalized for taking a second job.

Recommendation Summary. Clarify the criteria for rebutting the exclusion of second job income such that second job income can only be included if it was available when the parent initially became obligated for support of the child.

Recommendation 9. Amend the provisions pertaining to the medical support order in SDCL 25-7-6.16, SDCL 25-7A-1, SDCL 25-7A-5, SDCL 25-7A-6, SDCL 25-7A-7, and SDCL 25-7A-22 to conform to new federal medical support requirements.

Issue. New federal regulations strengthen the medical support requirements in state guidelines and require states to develop definitions of accessible insurance and insurance reasonable in cost.

Discussion. Not only do state child support guidelines provide financial support for children but they also provide medical support for the children through ordering a parent(s) to provide health insurance coverage. Until the recent change, there was a longstanding presumption in federal regulation that the noncustodial parent would provide the child's health insurance through that parent's employer. The federal regulatory changes recognize that this is not realistic due to declining employer-sponsored insurance, escalating premiums, and health plans that serve a limited geographic area. They also recognize that the custodial parent's health insurance may be more appropriate coverage for the child.

To this end, the federal regulations requires states to consider what health insurance is available to each parent, whether it is reasonable in cost, and accessible to the child. Federal regulation also requires states guidelines to provide for how the child's uninsured medical expenses will be paid.

The existing South Dakota guidelines meet most of these requirements. It considers both parents' insurance and provides for uninsured medical expenses. Most of the proposed changes in SDCL 25-7-6.16, SDCL 25-7A-1, SDCL 25-7A-5, SDCL 25-7A-6, SDCL 25-7A-7, and SDCL 25-7A-22 are non-substantive changes to clarify that South Dakota is in compliance with the new federal regulations. The changes include adopting the federal terms, "medical support" and "cash medical support." "Medical support" encompasses all of the ways the child's medical needs are addressed in the guidelines (i.e., the child's insurance coverage, the child's unreimbursed medical expenses for orthodontia and other extraordinary medical expenses, the first \$250 per year per child in out-of-pocket medical expenses included in the schedule). "Cash medical support" refers to any type of medical support that

involves the obligated parent paying the custodial parent (e.g., the obligated parent pays his/her prorated share of unreimbursed medical expenses such as orthodontia).

The substantive changes recommended include defining the terms “accessible” and “reasonable cost”. The federal impetus for requiring states to define “accessible insurance” is some health plans serve a limited geographical area. For example, a noncustodial parent living in California may have employer-provided insurance that is not accessible to children living in South Dakota.

The federal impetus for requiring states to define reasonable cost in insurance is that the prior federal definition was unresponsive to escalating premium costs. Under that definition, the cost of insurance for the child was deemed reasonable if it was available through the parent’s employment or other group carrier. The new federal regulation specifies the child’s insurance is reasonable in cost if it is less than five percent of gross income; however, it also allows states to develop an alternative numeric standard that is reasonable for that particular state. The Commission considered tying the threshold to “net income” rather than “gross income” because net income forms the basis of South Dakota’s guideline schedule. A net-income based threshold also made sense to the Commission when discussing case examples (e.g., a farmer with substantial gross income but after-tax income is considerably less due to operating expenses and depreciation factors). An eight-percent of net income threshold was arrived at by converting the federal recommendation of five-percent of gross income to net income; and, South Dakota data that indicates many intact families spend more than five percent of one parent’s net income on the child’s health insurance. Setting the threshold at less than eight percent would prevent many children from being enrolled in their parent’s private health insurance plans.

Recommendation Summary. Amend SDCL 25-7-6.16, SDCL 25-7A-1, SDCL 25-7A-5, SDCL 25-7A-6, SDCL 25-7A-7, and SDCL 25-7A-22 to conform to the federal language pertaining to medical support. Adopt definitions of “accessible” insurance and insurance “reasonable in cost” appropriate for South Dakota.

Recommendation 10. Create a new statute that allows for the imputation of income to a parent who fails to provide financial information at an amount based on the most recent annual pay standard reported by the South Dakota Department of Labor.

Issue. In establishment and modification cases, some referees have been imputing income to a parent who fails to provide financial information at the average pay rates reported by the South Dakota Department of Labor.⁹ It is unclear whether referees have this authority.

Discussion. The Commission discussed when this circumstance would occur. For example, a referee may impute income at the DOL annual pay standard to a self-employed parent who did not provide tax records to document his or her income. Some referees find that imputing income at this level encourages parents to provide their financial information.

Although the Commission recognized the need for an income imputation standard, they had reservations about using the annual pay standard. They expressed concerns that it could be an incentive for a parent to provide no information unless it resulted in a lower obligation. There were two responses to this concern. First, it was noted that in most cases where this provision would be applied, few parents had actual incomes above the average pay standard. Secondly, it was noted that if a parent did indeed have income above the average pay standard it would be more appropriate to use other information such as the parents' financial abilities, which is permissible under current statute. It was decided that the average pay standard would be a floor; that is, income could be imputed at a higher amount when appropriate.

Recommendation Summary. Create a new statute that allows for the imputation of income to a parent who fails to provide financial information based at an amount not less than the most recent annual pay standards.

⁹ The average pay standard is available from the South Dakota website at URL: <http://www.state.sd.us/dol/lmic/quickanswers.htm>. The Division of Child Support periodically retrieves information from this site to compile a list of an average pay for various years. In turn, DCS shares this information with referees.

OTHER MATTERS ADDRESSED BY COMMISSION

The Commission was presented with and discussed many issues brought to their attention that did not result in recommendations. Some were outside the scope of the child support guidelines review (e.g., paternity dis-establishment). Some issues involved procedural functions of the Division of Child Support (DCS) and/or the Unified Judicial System (UJS).

Short summaries of these issues and the Commission considerations are provided below.

Adjustment for Multiple Orders. Public hearing testimony raised the issue of whether the guidelines should provide an adjustment for situations when a mother has children with multiple fathers and multiple child support orders that result in the total support payments to be more than if a mother has multiple children with one father. Data provided from the DCS indicates that few custodial parents (less than 10%) have multiple orders and even fewer (less than 1%) have more than two orders. The Commission decided the number of cases affected did not warrant a change in the guideline laws. However, it noted an adjustment could still be made through the existing guidelines deviations under SDCL 25-7-6.10. Some states have also included the payments under other support orders as income to the custodial parent.

Arrears Payments. An issue was raised about whether the State can accept a lesser amount to satisfy arrears owed to the State. (If a family receives public assistance, child support is assigned to the State to offset the public assistance.) DSS Division of Legal Services Special Assistant Attorney General clarified this is permissible in federal and State statute (SDCL 25-7A-17). DCS will file proposed stipulations requesting the court to approve these settlements for satisfying arrears for lump sum payments.

Access to Confidential Documents. The Commission discussed issues concerning access to and disclosure of financial information provided by the parties in connection with a child support proceeding. The parties' financial documents, including earnings statements and tax