# OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 30286

#### CHARLES JOSEPH BURKARD,

PLAINTIFF AND APPELLEE,

V.

#### TAMI JO BURKARD,

DEFENDANT AND APPELLANT.

## APPEAL FROM THE SECOND JUDICIAL CIRCUIT LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN PEKAS CIRCUIT COURT JUDGE

#### BRIEF OF APPELLANT TAMI JO BURKARD

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#### PRELIMINARY STATEMENT

Citations to the settled record in 41DIV12-524 as reflected by the Clerk's Index are designated with "R." and the page number. Citations to the Appendix are designated as "App." and the page number. There are two hearing transcripts in this consolidated action. Citations to the transcript from the October 19, 2022 hearing before the Child Support Referee on the Petition for Modification of Child Support are designated as "HT1" followed by the page number. Citations to the transcript from the February 6, 2023 hearing on the Objections to the Referee's Report are designated as "HT2" followed by the page number.

#### JURISDICTIONAL STATEMENT

This is an appeal arising from the Circuit Court's child support order. Appellant Tami Burkard respectfully appeals from: (1) the February 14, 2023 Child Support Order and (2) the February 14, 2023 Order Following Hearing on Objections to Referee's Report and Recommendation. R. 402-13, App. 5-16. Notice of Entry of Order was served on Charles Burkard on March 8, 2023. R. 414. Tami timely filed her Notice of Appeal on March 8, 2023. R. 430-31. This Court has jurisdiction under SDCL 15-26A-3(1) and (2).

#### REQUEST FOR ORAL ARGUMENT

Appellant Tami Burkard respectfully requests the privilege of appearing for oral argument before this Honorable Court.

#### STATEMENT OF THE ISSUES

I. THE CIRCUIT COURT ERRED BY CONSIDERING NEW EVIDENCE, IN VIOLATION OF SDCL 25-7A-22, DURING THE HEARING ON THE OBJECTIONS TO THE REFEREE'S REPORT.

At the Circuit Court's hearing on the objections to the Referee's Report, Charles offered the testimony of an attorney, Tom Keller, to provide opinions on the formula that was to apply to the Parties' unique child custody arrangement. HT2 \*6, App. 22. Tami objected to Keller providing written and oral testimony at the hearing. *Id.* \*7-8, \*10, \*13. The Circuit Court noted Tami's objections but allowed the admission of Keller's testimony and report. *Id.* \*8. The Circuit Court's *Order Following Hearing on Objections to Referee's Report and Recommendation* integrates Keller's opinions. R. 402-10, App. 8-16.

- SDCL 25-7A-22
- II. THE CIRCUIT COURT COMMITTED LEGAL ERROR BY APPLYING THE FORMULA CREATED BY THE REFEREE TO THE PARTIES' UNIQUE CHILD CUSTODY ARRANGEMENT.

The Referee created a child support formula to determine the Parties' child support obligation. The Referee elected to (1) calculate the standard two-child calculation and divide it by two children. R. 249, App. 1. Then, (2) it calculated the two-child shared parenting calculation/cross-credit calculation and divided it by two children. Id. Finally, (3) the two calculations' results were added together, which resulted in Charles's child support obligation. Id. The Referee determined that Charles's monthly child support obligation is \$1,465.58. After a hearing on the matter, the Circuit Court adopted the Referee's formula in its Child Support Order. R. 411-13, App. 5.

- SDCL 25-7-6.23
- SDCL 25-7-6.2
- SDCL 25-7-6.27

#### STATEMENT OF THE CASE

The Parties had a pre-existing child custody and support order from

April of 2014, which provided that they would have joint physical custody of

their Son and Daughter. R. 113-28, 131. In 2021, the Parties' custody arrangement changed for their Daughter. R. 138-41. In August of 2022, the Parties agreed that Tami would have primary physical custody of their Daughter, and the Parties would continue having joint physical custody of their Son. R. 231-40.

As a result, a motion was brought to modify Charles's child support obligation. The child support matter was transferred to a Child Support Referee ("Referee"). R. 241. A hearing to determine child support was held before the Referee on October 19, 2022. Following the hearing, the Referee issued its Findings of Fact and Conclusions of Law and Proposed Order. R. 248-51, App. 1. Tami objected to the Referee's Report on October 28, 2022, which included an objection to the child support formula created by the Referee. R. 353-57.

A hearing was held before the Circuit Court on February 6, 2023. R. 402-03. During the hearing, Charles offered new evidence into the record through the oral and written testimony of an attorney/child support referee, Tom Keller. HT2 \*7, App. 23. Keller provided his opinion on the formula that he believed should apply to the Parties' custody arrangement. HT2 \*7-19, App. 23-35. Tami repeatedly objected to Keller's testimony, but the Circuit Court allowed its admission. HT2 \*7-9, App. 23-25.

The Circuit Court entered its Child Support Order and Order
Following Hearing on Objections to Referee's Report and Recommendation on

February 14, 2023. R. 402-13, App. 5-16. In its Order, the Circuit Court adopted the Referee's formula. *Id*. This appeal timely follows.

#### STATEMENT OF THE FACTS

Tami Jo Burkard ("Tami") and Charles Joseph Burkard ("Charles") have two children together, a Daughter and a Son. R. 131. The Parties entered into a Stipulation and Agreement regarding their divorce and child custody arrangement in April of 2014. R. 113-28. This Stipulation and Agreement was incorporated into the Judgment and Decree of Divorce which was filed on April 25, 2014. R. 130-32. In their initial child custody agreement, the Parties had joint physical custody of both their children. R. 113-28. As a result, the Parties applied the two-child cross-credit formula to determine that Charles's child support obligation was \$1,000 per month. R. 119-20.

A. Modification of Child Custody and Support Regarding Daughter.

This Parties abided by this custody and child support order until February of 2022. R. 140-41. In February of 2022, Daughter decided to live solely with Tami and to stop living with Charles. *Id.* After Daughter moved in with Tami full time, Tami filed a Motion to Change Child Custody and Child Support Pursuant to SDCL 25-4-45. R. 138-39. Tami asked the Circuit Court to modify the Parties' child support and custody arrangement to correspond with this change. *Id.* After this motion was filed, the Parties entered into a Stipulation and Agreement to Modify Custody, Parenting

Time, and Other Issues on August 5, 2022. R. 231-40. In the Stipulation, the Parties agreed that Tami would have primary physical custody of Daughter, and they would continue to have joint physical custody of Son. R. 232. Due to the new arrangement, the Parties' child support obligation needed to be modified. R. 237. The Parties were unable to reach an agreement regarding the amount of child support Charles was to provide. As a result, the matter was brought before the Circuit Court. R. 241. The Circuit Court transferred the matter to a Child Support Referee, Tom Weerheim. *Id*.

#### B. Child Support Hearing and Parties' Arguments.

The child support hearing was held before the Referee on October 19, 2022. R. 362. At the hearing, the Parties agreed that Tami provides health insurance for both children at a rate of \$213.66 per month, and they agreed upon the amount stated for each parent's salary. R. 369, HT1 \*8; R. 372, HT1 \*11. The key dispute was the proper child support formula that was to apply to the Parties' unique situation where the Parties have two children together but have joint physical custody of one child and one parent has primary physical custody of the other child. R. 371.

The Referee noted that this matter involves a unique custody arrangement, and the Parties agreed that no statute provides a perfect formula for this matter. R. 371, HT1 \*10. During the hearing, Tami argued that SDCL 25-7-6.23 provides the best guidance, as it involves parents who

have two children with different custody arrangements. R. 380, HT1 \*19. Accordingly, Tami argued that the one-child cross-credit calculation should be applied to Son's situation and the standard one-child calculation should be applied to Daughter's situation, as each of these calculations reflect the child's individual custody arrangement. R. 351. Then, Daughter's calculated amount and Son's calculated amount should be added together to arrive at Charles's child support obligation. *Id.* Applying this formula, Tami argued that Charles's monthly child support obligation should be \$2,075.20.1

Charles argued the applicable statutes were SDCL 25-7-6.23 and 25-7-6.27. R. 381, HT1 \*20. He advanced that the Referee should take the standard calculation for two children and subtract it from the standard calculation for one child. R. 350. Then, that number was to be added to the cross-credit calculation for one child. Id. Charles arrived at a child support obligation of \$1,254. Id.

C. Referee's Findings of Fact and Conclusions of Law.

Following the hearing, the Referee issued its Report of Referee with Findings of Fact and Conclusions of Law and Recommended Order. R. 248-51, App. 1-4. In its Findings of Fact and Conclusions of Law, the Referee rejected both Charles's and Tami's formulas and created its own "hybrid".

<sup>1.</sup> Since the hearing before the Referee, Tami adopted the amount the Referee withheld for Charles's social security, which affected the Parties' base support obligation. Tami's previous social security withholding for Charles was based on the online DSS calculator, which provided a different amount for Charles's social security withholding. Following the hearing before the Referee, Tami adopted a modified monthly child support obligation of \$2,014.

calculation[.]" R. 249. The Referee elected to (1) calculate the standard two-child calculation and divide it by two children. *Id.* Then, (2) it calculated the two-child shared parenting calculation/cross-credit calculation and divided it by two children. *Id.* Finally, (3) the two calculations were added together, resulting in Charles's monthly child support obligation of \$1,465.58. R. 250. Tami objected to the *Referee's Report and Recommended Order* arguing, among other things, that the Referee applied a legally incorrect formula. R. 353-56.<sup>2</sup>

#### D. Circuit Court Hearing.

Tami's objections to the Referee's Report came before the Circuit Court on February 6, 2023. HT2 \*1, App. 17. Tami argued that SDCL 25-7-6.23 should govern the Parties' child custody arrangement, as the Legislature intended two distinct child custody arrangements to be calculated separately. *Id.* \*4, App. 20. She noted that the Referee's formula, which divides the cross-credit and standard calculations by two, dilutes the base amount of support that the Legislature determined was necessary to raise a child in South Dakota. *Id.* \*5-6, App. 21-22.

Charles, during his argument, called a new witness, Tom Keller ("Keller"). *Id.* \*6, App. 22. Tami objected to Keller providing new testimony at the appeal hearing. *Id.* \*7-8, \*10, \*13. The Circuit Court noted Tami's objections but allowed the testimony. *Id.* \*8, App. 24. In the process, the

The only issues now before this Court are (1) the legally inaccurate formula and
 the new evidence that was introduced by Charles at the Circuit Court hearing.

Circuit Court agreed that Charles was seeking to supplement the record. *Id.*\*8-9, App. 24-25. However, over the objections of Tami, Charles was allowed to supplement the record with the written and oral opinions of Keller. *Id.*\*11-12, App. 27-28. During cross-examination, Keller affirmed that he was not the referee in the underlying matter. *Id.* \*19, App. 35. He was not Charles's counsel. *Id.* He was not a judge nor a legislator. *Id.* \*20, App. 36. And therefore, his opinions held no more binding effect upon the matter than any other family law practitioner in the State of South Dakota. *Id.* Keller ultimately agreed that the issue regarding the applicable formula was a question of law for the Circuit Court to decide. *Id.* 

#### E. Circuit Court's Order

The Circuit Court issued its Order Following Hearing on Objections to Referee's Report and Recommendation on February 14, 2023.<sup>3</sup> R. 402, App. 8-16. In its Order, the Circuit Court overruled Tami's objections and adopted the Referee's Report and Recommendation. Id. The Circuit Court then integrated Keller's opinions and calculations by literally attaching them to the Order. R. 404-10. The Circuit Court issued its Child Support Order the same day, which ordered, among other things, that Charles was to pay \$1,465.58 in monthly child support. R. 411-13, App. 5-7.

<sup>3.</sup> The Circuit Court's Order includes factual errors: (1) the Petitioner did not appear personally at the hearing but rather through counsel, and (2) new evidence was received at the hearing.

#### STANDARD OF REVIEW

The Court's standard of review in child support modification cases is well settled:

The Court reviews a child support referee's findings of fact under the clearly erroneous standard and questions of law are fully reviewable. Mixed questions of law and fact are classified as questions of law and are reviewable de novo. In addition, when the circuit court has adopted a child support referee's findings and conclusions, [the Court] appl[ies] the clearly erroneous standard of review to the findings and give[s] no deference to conclusions of law. Further, in applying this standard, [the Court] will not reverse findings of fact unless [it] [is] left with a definite and firm conviction a mistake has been made.

Gisi v. Gisi, 2007 S.D. 39, ¶ 6, 731 N.W.2d 223, 226. Both issues before the Court are legal issues, requiring de novo review.

#### ARGUMENT

I. THE CIRCUIT COURT ERRED BY CONSIDERING NEW EVIDENCE, IN VIOLATION OF SDCL 25-7A-22, DURING THE HEARING ON THE OBJECTIONS TO THE REFEREE'S REPORT.

During the hearing on the objections to the Referee's Report, the Circuit Court permitted Charles to admit the oral and written testimony of an attorney, Tom Keller. HT2 \*6, App. 22. Tami objected to the introduction of this evidence as it was prohibited by SDCL 25-7A-22. The Court admitted the evidence, and then attached the opinions and calculation of Keller to its Order Following Hearing on Objections to Referee's Report and Recommendation. R. 404-10, App. 8-16. Tami contends that this was a prejudicial legal error requiring remand.

SDCL 25-7A-22 sets forth the procedure that a circuit court and parties are to follow when modifying a child support order. The process provides that after the circuit court refers the matter to a referee, and the referee issues its report, a party may object to the referee's report. "If any objection is filed, the circuit court shall fix a date for hearing on the report, the hearing is to be solely on the record established before the referee."

SDCL 25-7A-22 (emphasis added). It is important to note that Keller did not testify during the hearing before the Referee nor was he involved in this case prior to Tami filing objections to the Referee's Report.

Yet, during the hearing before the Circuit Court, Charles was permitted, over the objections of Tami, to present both the oral and written testimony of Keller. The Circuit Court acknowledged that Charles was seeking to "supplement[] the record" with Keller's testimony and opinions and that Keller was "adding information into the record[.]" HT2 \*8-9, App. 24-25. However, the Circuit Court allowed the testimony and permitted Charles's counsel to submit the written and oral opinions of Keller into the record. *Id.* \*11-12, App. 27-28. SDCL 25-7A-22 provides, without exception, that a hearing on objections to a referee's report is to be "solely" based upon the record that was established before the referee. The admission of Keller's oral and written testimony was a clear violation of SDCL 25-7A-22.

Further, the admission of Keller's testimony was prejudicial to Tami, as it affected the outcome of the proceeding. Keller testified that he has been

a child support referee for fifteen to twenty years. HT2 \*10-19, App. 26-35. He then proceeded to provide a summarized history of our State's child support statutes and his opinions on the various formulas that are to apply to different child custody arrangements. *Id.* By providing what was akin to expert testimony on the law, Keller invaded the province of the Circuit Court. It was for Charles's counsel to make legal arguments on his behalf, not a witness. The introduction of testimony from an individual who vouched to be an expert in the field, who is a long-time referee, and who expounded upon the history of our State's child support system inserted a secondary referee's opinion into the hearing. Without question, Keller's opinions affected the Circuit Court's decision, as the Circuit Court overruled Tami's objections and attached the opinions and calculation of Keller to its Order. R. 404-10, App. 8-16. As a result, Tami was prejudiced by the introduction of Keller's opinions.

Charles supplementing the record with a witness who provided legal testimony was a violation of SDCL 25-7A-22. As a result, Tami respectfully requests that this matter be reversed and remanded to the Circuit Court.

# II. THE CIRCUIT COURT COMMITTED LEGAL ERROR BY APPLYING THE FORMULA CREATED BY THE REFEREE TO THE PARTIES' UNIQUE CHILD CUSTODY ARRANGEMENT.

When reviewing a child support obligation, courts are to start "with the proposition that parents have a statutory duty to support their children." Dahl v. Dahl, 2007 S.D. 64, ¶ 15, 736 N.W.2d 803, 806. "The parents'

obligation to provide support for their children is a matter of public policy, as well as a statutory duty." Thomas v. Hague, 2002 S.D. 12, ¶ 7, 639 N.W.2d 520, 521 (citation omitted). In making any child custody or support decision, a court must always be guided by the "best interests" of the child. *Id.* Tami contends that her formula—which considers each child's unique custody arrangement and ensures that the Children receive the support the Legislature intended—is in the Children's best interests.

A. South Dakota has no controlling statute for the Parties' unique custody arrangement.

South Dakota law provides two formulas for calculating child support. If the parents share physical custody of their children, then the circuit court is to apply the shared-parenting/cross-credit child support formula found in SDCL 25-7-6.27. If one parent has primary physical custody of the couple's children, then the circuit court applies the standard child support formula found in SDCL 25-7-6.2. Thus, neither of South Dakota's statutory formulas (shared-parenting/cross-credit nor the standard child support formulas) are a perfect fit for the situation at-hand in which the parents have two children together and each child has a different custody arrangement.

SDCL 25-7-6.23 provides the best guidance for the case at-bar. It provides:

If the parents have two or more children between them and each parent has primary physical custody of at least one child, the child support obligation shall be determined by computing the amount of each parent's respective support obligation for the children in the other parent's physical custody, and the support obligations shall be offset in determining a monthly support obligation. . . .

SDCL 25-7-6.23. Although Tami is the only parent with primary physical custody, the statute's method for calculating child support is the most applicable. Tami has primary physical custody of Daughter, and Son's physical custody is shared between the Parties. Therefore, two separate child custody arrangements exist. SDCL 25-7-6.23 supports the legal conclusion that when two separate custody arrangements are present, the arrangements must be computed separately and then offset from one another or added together.

B. The Referee's formula deprives the Children of a substantial amount of support guaranteed by the Legislature.

The Referee elected to reject both Tami's and Charles's proposed formulas and opted to create its own. The formula created by the Referee: (1) calculated a standard two-child arrangement and divided it by two; (2) calculated a two-child cross-credit arrangement and divided it by two; and then (3) added the two results together. This formula has no footing in our State's statutes.

The key issue with the Referee's formula is that it assumes that our statutory scheme provides a set expenditure amount for each child and that this "set expenditure" incrementally increases with the addition of each child. Accordingly, the Referee believed it was appropriate to simply divide each formula by two to arrive at the cost of raising one child in South Dakota. The

Referee's premise that a set expenditure amount is allocated to each child is legally incorrect. If this were the case, our laws would have a "set support obligation" for each child, and then all a circuit court/referee would have to do to calculate child support would be to take that "set support obligation" and multiply it by the number of children ("set obligation" x "number of children") to arrive at the monthly child support obligation. As is discussed above, this is not how our statutory scheme is arranged and treating it this way deprives children of a substantial amount of child support.

Our scheme is set up so that the amount of child support a parent provides for his/her children decreases with the addition of each child. The best way to illustrate the error with the Referee's formula is to examine the Support Obligation Schedule found in SDCL 25-7-6.2. In this case, the Referee calculated the Parties' monthly income to be within the \$13,401-\$13,450 category. This category provides:

Monthly Net	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
Income						
\$13,401- \$13,450	\$1903	\$2703	\$3185	\$3558	\$3974	\$4439

The Referee's calculation assumes that when a child is added to the formula the amount of child support doubles. Based upon this rationale, the Referee concluded that it could then divide the amount of computed child support by the number of children to arrive at the child support obligation for each individual child.

However, as is seen above, that is not how our statutory scheme operates. Instead, the amount of child support allocated to each child decreases as an additional child is added. From the first to the second child, the child support obligation increases by \$800 (\$2703 (-) \$1903); for the third child, the support obligation increases by \$482 (\$3185 (-) \$2703); for the fourth child, the support obligation increases by \$373 (\$3558 (-) \$3185), and so on. During the hearing, this was referred to as the "cheaper by the dozen" theory. See also South Dakota Commission on Child Support 2021 Report \*10 (discussing concept), App. 71.

As a result, by calculating each formula (standard and cross credit) based upon the parents having two children, and then dividing each formula's result by two, the Referee deprived the Children and Tami of a portion of the "base amount" of child support that the Legislature deemed was necessary to raise a child in South Dakota. The Legislature set up the schedule in SDCL 25-7-6.2 this way because it determined that there are set expenditures that are required to raise a child in South Dakota. See South Dakota Commission on Child Support 2016 Report, \*6, App. 60; South Dakota Commission on Child Support 2021 Report \*6-7, App. 71.4 These

<sup>4.</sup> The relevant portions of the Reports are included in the Appendix. In addition, the Commission's 2016 report can be accessed at:

<a href="https://boardsandcommissions.sd.gov/bcuploads/PublicDocs/2016%20Report.pdf">https://boardsandcommissions.sd.gov/bcuploads/PublicDocs/2016%20Report.pdf</a>
The Commission's 2021 report can be accessed at:

<a href="https://dss.sd.gov/docs/childsupport/child-support-commission-report.pdf">https://dss.sd.gov/docs/childsupport/child-support-commission-report.pdf</a>

expenditures decrease with the addition of each child. As a result, the Referee's formula withheld from the Children and Tami a portion of these "base expenditures" by dividing the support obligations by two, as the second child's share is less than the first child's share. Essentially, the Referee took \$2,703 (obligation for two children at the \$13,401-\$13,450 monthly income level) and divided it by two, saying that each child's share is worth \$1,351.50. The Court will notice that this amount is less than the amount the Legislature allocated for parents with one child at the \$13,401-\$13,450 category—which is \$1,903. The Referee's formula is legally incorrect and simply does not work.

Our Legislature set forth two separate formulas—one for a shared custody arrangement and one for a primary custody arrangement. The two distinct formulas consider the expenses that accrue under each unique custody arrangement. Both formulas provide a "base amount" of expenditures for one child which increases in smaller increments with the addition of each child. Tami's formula treats each child's distinct arrangement separately and applies the formula that the Legislature enacted for each child's custody arrangement.

C. Tami's formula is the only proposed formula guided by our State's statutes.

Tami respectfully requests that this Court adopt her formula, as it honors the two distinct formulas and is guided by our State's statutes.

Tami's formula takes the Daughter's standard one-child calculation's result of

\$1,387 and adds it to Son's one-child cross-credit calculation's result of \$627. The result is a monthly support obligation of \$2,014. As was discussed at the hearing, this calculation is fully supported by SDCL 25-7-6.23.

SDCL 25-7-6.23 is the only statute that implicates parents with two or more children together who agree to a different custody arrangement for each child. While the statute refers to each parent having primary physical custody of at least one child, the statute's calculation method still applies to the matter before the Court. In SDCL 25-7-6.23's split custody situation, the Legislature determined that it was in the best interests of the children for each child's support obligation to be calculated separately, and then, the children's support obligations to be offset from one another. Here, Tami has sole physical custody of Daughter and Charles and Tami have joint physical custody of Son. Under the guidelines of SDCL 25-7-6.23, Son's one-child shared parenting cross credit formula must be calculated and Daughter's one-child standard support obligation must be calculated, and the two calculations' results must be offset or added together. This is the exact formula that Tami advanced.

Tami's proposal was the *only* formula presented in the underlying proceeding that is consistent with our State's statutes. Neither the Referee nor Charles presented any statute that supported or guided their *created* formulas. Rather, both the Referee and Charles manufactured formulas that they believed would reach an "equitable" result. As this Court has stated,

however, "the court's broad equitable power to set child support has long been replaced by the mandatory child support statutes, the goal of which is to establish uniformity." *Kauth v. Bartlett*, 2008 S.D. 20, ¶ 19, 746 N.W.2d 747, 753. Our statutes and case law do not allow parties to improvise or create a formula.

It has been repeatedly established that the provisions of South Dakota's child support scheme are not discretionary, but rather are "mandatory" and must be followed. *Midzak v. Midzak*, 2005 S.D. 58, ¶ 31, 697 N.W.2d 733, 741; *Kauth*, 2008 S.D. 20, ¶¶ 18-21, 746 N.W.2d at 754. Our Legislature has gone so far as enacting SDCL 25-7-6.10, which sets forth a certain set of circumstances which *must be present* in order for a court to deviate from our State's mandatory child support calculations. If the circumstances set forth in SDCL 25-7-6.10 are not present, the court cannot deviate. The Legislature has made it clear that any child support obligation must be rooted in our State's statutes to ensure consistency. The Legislature provided no room for a party or a referee to "equitably" construct a party's child support obligation.

This Court is confined to the language set forth in our statutes and, if the language is unclear, the Legislature's intent in enacting them. See Martinmaas v. Engelmann, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (setting forth rules of statutory interpretation). Here, Tami's formula follows both the language of SDCL 25-7-6.23 and the legislative intent behind our State's

child support scheme. Accordingly, both the Referee's and Charles's created formulas cannot be adopted.

Ultimately, child support does not belong to the parents. It belongs to the children. Tami's formula ensures that both parents fulfill their statutory duty to provide for their Children as required by the law.

#### CONCLUSION

The formula adopted by the Circuit Court deprives the Parties' children of a substantial amount of child support. Tami's formula is the only presented formula consistent with and grounded in our State's statutes and guided by the intent of the Legislature.

WHEREFORE, Appellant Tami Burkard respectfully requests that this Honorable Court reverse the judgment below, vacate the order adopting the Referee's formula, and remand with instructions to adopt the formula advanced by Tami Burkard.

Respectfully submitted this 5th day of June, 2023.

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#### CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4,491 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Erin Schoenbeck Byre
Erin Schoenbeck Byre

#### CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT and APPENDIX were served via email upon the following:

Nichole A. Carper, <u>nichole@burdandcarper.com</u> on this 5th day of June, 2023.

Erin Schoenbeck Byre
Erin Schoenbeck Byre

# IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 30286

CHARLES JOSEPH BURKARD,

PLAINTIFF AND APPELLEE,

V.

TAMI JO BURKARD,

DEFENDANT AND APPELLANT.

## APPEAL FROM THE SECOND JUDICIAL CIRCUIT LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN PEKAS CIRCUIT COURT JUDGE

#### APPENDIX OF APPELLANT TAMI JO BURKARD

ATTORNEYS FOR APPELLANT Tami Jo Burkard:

A. Russell Janklow Erin Schoenbeck Byre 101 S. Main Avenue, Suite 100 Sioux Falls, SD 57104 (605) 338-4304 russ@janklowabdallah.com erin@janklowabdallah.com ATTORNEY FOR APPELLEE Charles Joseph Burkard:

Nichole A. Carper Burd and Carper Law Office 4900 East 57th Street, Suite A Sioux Falls, SD 57108

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STATE OF SOUTH DAKOTA COUNTY OF LINCOLN

IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT File No: 41DIV12000524 DCS IV-D #

CHARLES JOSEPH BURKARD
Plaintiff/Respondent

vs.

REPORT OF REFEREE WITH
FINDINGS OF FACT AND
CONCLUSION OF LAW AND
RECOMMENDED ORDER

Defendant/Petitioner

This matter came before Child Support Referee Tom C. Weerheim on October 19, 2022, at Sioux Falls, SD pursuant to SDCL Chs. 25-7 and 25-7A. Petitioner Mother appeared telephonically, and with her attorneys, Russ Janklow and Erin Schoenbeck Byre; Respondent Father appeared telephonically, and with his attorney, Nichole Carper, and evidence was presented regarding their current financial situations, and based upon that evidence, and that the parties have two minor children, born in 2006 and 2008, who reside with the parties; and upon the files and records herein, the Referee recommends that the Court adopt the following:

#### FINDINGS OF FACT

- 1. Father and Mother were both properly served with a Notice of Hearing at their last known addresses. A previous Order dated April 25, 2014, requires Father to pay \$1,000.00 per month as support.
- 2. No change in circumstances needs to be shown pursuant to SDCL §25-7-6.13, as the previous Order was entered and in effect prior to July 1, 2022. There has also been a change in custody/visitation since the prior order in that Mother is now the primary physical custodian of Arabella Burkard, rather than there being a shared-parenting arrangement.
  - 3. The parties have two minor children:

Arabella Florianne Burkard, born May 7, 2006, where Mother is the primary physical custodian; and

Anton Charles Burkard, born May 29, 2008, with whom the parties share physical custody.

4. Referee acknowledges that this is an unorthodox physical custody situation and that it warrants an unorthodox calculation. So far, there is no guidance within the South Dakota Codified Laws or respective caselaw as to how a calculation shall be made in this type of case. The parties share physical custody of one child, and Mother is primary physical custodian of the other.

Mother argues that Referee shall apply a standard one-child calculation in addition to a one-child cross-credit calculation, and add the two together. Father argues that Referee shall apply a one-child cross-credit calculation, and then use the difference between a one-child and a

two-child support amount within the tables of SDCL §25-7-6.2 and add that to the cross-credit amount to get the support amount for the second child.

Referee rejects Mother's argument in that a calculation in that particular arrangement would result in Father paying more in child support than he would in a standard two-child calculation. This would not be in the best interest of the children as in some cases, a non-custodial parent would then be deterred from pursuing any future shared parenting arrangement for one of the children in a multiple child situation.

Referee also rejects Father's argument as it does not consider which child would be the "first" or "dominate" position in any calculation. If Referee calculated a cross-credit one-child support amount and then used the difference between a one-child and two child support amount within the tables to calculate the second child; this would yield a different result than if Referee utilized the standard calculation for the first child, and then used the difference between a cross-credit one-child and two-child support amount within the tables to calculate the second child.

Therefore, Referee will utilize the following hybrid calculations: 1) a standard two child calculation and divide it by two children, and 2) a two-child 50-50 shared parenting calculation and divide it by two children; and 3) add the two calculations together.

- 5. The parties stipulated to Mother's income of \$63,204.00 annually. She saves 4% of her gross monthly income in a qualifying retirement plan. Therefore, Mother's current gross monthly income is \$5,267.00.
- 6. The parties stipulated to Father's income of \$187,693 annually. They further stipulated that Father has \$2,121.00 in business expenses deductions. Therefore, Father's gross monthly income before the expenses is \$15,641.08.
- 7. The combined monthly net income is \$13,428.61. The combined monthly support for two children is \$2,703.00 per month. Father's pro rata share is 69% which equates to \$1,865.00 per month and Mother's pro rata share is 31% which equates to \$838.00 per month. When divided by two, Father's base support amount is \$932.50 for Arabella Burkard.

When applying the cross-credit calculation in a two-child calculation, Father's pro rata share is 69% which equates to \$1,399.00 per month and Mother's pro rata share is 31% which equates to \$628.50 per month Following application of the cross-credit, Father's base share responsibility obligation is \$770.50. When divided by two, Father's base support amount is \$385.25 for Anton Burkard.

When combined, after factoring the cost of insurance, Father's recommended support amount is \$1,465.58 (\$1,006.50+\$459.08=\$1,465.58).

- 8. Mother provides medical, dental, and vision insurance at \$107.00 per month per child.
- 9. All possible deviations and adjustments allowed by law were individually reviewed during the hearing, and the referee finds no deviations apply.

- 10. There are no child care expenses in this matter.
- 11. The parties had a previous agreement for additional expenses for the children. Since Arabella Burkard is no longer in a shared-parenting situation, that agreement is severed.

However, in regard to Anton Burkard, the parties agree that the agreement still applies. Therefore, the parties agreement remains for Anton, albeit at the new pro-rata shares of their incomes. Father shall pay 69% of all expenses and Mother shall pay 31% of all expenses in regard to Anton Burkard; including, but not limited to sports equipment, uniforms, shoes, entry fees, registration fees, camps, clinics, private lessons, hotel costs, respectively until he reaches majority age. All expenses will be agreed to in writing, in advance.

Based upon the foregoing Findings of Fact the Referee now enters the following:

#### CONCLUSIONS OF LAW AND RECOMMENDED ORDER

A. The Court has jurisdiction of the parties and the subject matter herein. The Referee concludes that Mother's average gross monthly income is \$5,267.00 and Father's is \$15,641.08, and that calculations pursuant to SDCL Ch. 25-7 and 25-7A are applicable in this case as shown on the attached worksheet, which worksheet is by this reference incorporated herein.

- B. All deviations are denied.
- C. That the Referee determines that Father has the ability to pay to Mother as support for their minor children the sum of \$1,465.58 per month, commencing June 1, 2022 and each month thereafter. Said support shall continue until each child reaches the age of eighteen, or until each child attains the age of nineteen if a full-time student in a secondary school as provided in SDCL 25-5-18.1, or until further Order of the Court.
- D. Mother currently provides health, dental, and vision insurance coverage for the minor children at a cost of \$107.00 per child per month, and shall continue to do so. Pursuant to SDCL 25-7-6.16, the cost of insurance attributable to the children, after proportionate medical support credit is applied shall not exceed \$329.61 per month.

Father is required to pay a pro rata share of the cost of this health insurance coverage. Therefore, 69% of the cost, or \$107.00 per child per month, has been added to the basic child support obligation, and is reflected in Father's \$ 1,465.58 monthly child support obligation as stated above

If the cost of the health insurance premium changes, or if the insurance is no longer available; and proof of such cost or change is provided to the Division of Child Support, the Division of Child Support may adjust the monthly child support obligation accordingly without requiring a petition to modify the child support.

The parties shall share all uncovered expenses for medical, dental, orthodontic, optical, and counseling care provided for the children in the same pro rata shares as their incomes: 69 percent paid by Father and 31 percent paid by Mother, except that Mother as custodial parent for Arabella Burkard shall pay the first \$250.00 in uncovered expenses for the Arabella Burkard, each year.

E. That unless otherwise notified by the Division of Child Support, all child support payments shall be made by cashier's check, money order, or personal check made payable to Division of Child Support and delivered or mailed to:

Child Support Payment Center 700 Governor's Drive, Suite 84 Pierre, SD 57501-2291.

- F. Upon notification, Father shall make the child support payments in accordance with any notice Father may receive from the Division of Child Support, or upon further Order of the Court. If any child support obligation under this Order becomes delinquent, the sum in arrearage shall bear interest as provided by South Dakota law. Father's current or subsequent payers of income shall be immediately directed to withhold amounts for current support and arrearages as specified herein, and as provided by SDCL §25-7A-23. The division of Child Support may immediately proceed to collect the entire judgment or any amounts due under this Order by submittal for federal income tax refund offset or any other legal remedy available.
- G. Both parties shall keep the Division of Child Support informed of his or her current address, the name and address of his or her current employer, and shall give the Department written notice of any change of address or employment within seven days of the change. Each party shall pay their own attorney fees and costs, if any. This Order shall amend and modify only the amount of the child support obligation and shall not modify, amend, or otherwise affect any other provision of any prior judgment or Order entered by any court of administrative agency.

H. Father shall pay 69% of all expenses and Mother shall pay 31% of all expenses in regard to Anton Burkard; including, but not limited to sports equipment, uniforms, shoes, entry fees, registration fees, camps, clinics, private lessons, hotel costs, respectively until he reaches majority age. All expenses will be agreed to in writing, in advance.

Dated October 26, 2022, at Sioux Falls, South Dakota.

/s/Tom Weerheim
Tom Weerheim, Child Support Referee

STATE OF SOUTH DAKOTA COUNTY OF LINCOLN

IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT File No: #41DIV12000524 DCS IV-D #

CHARLES JOSEPH BURKARD Plaintiff/Respondent

DIV 12-524

VS.

CHILD SUPPORT ORDER

TAMI JO BURKARD Defendant/Petitioner

This Court having been presented with a Petition for Modification of Child Support filed by the Petitioner and this matter having been submitted pursuant to an Order of Reference to a referee and the referee having conducted a hearing on the Petition and having made a report to this Court pursuant to SDCL §25-7A-22 and copies of the report of the referee having been served upon the parties and the secretary by first class mail and no party having filed any objections to the report, the Court does hereby adopt the report of the referee and does find that the filing requirements of SDCL §25-7A-56.7 have been satisfied by the following information and also specifically finds that where indicated such information was unavailable:

Custodial Parent's Name: Tami Jo Burkard

Non-Custodial Parent's Name: Charles Joseph Burkard and does hereby

ORDERED, that the Obligor, Charles Joseph Burkard's child support obligation for the following children of the parties:

Arabella Florianne Burkard, born May 7, 2006, where Tami Jo Burkard is the primary physical custodian; and

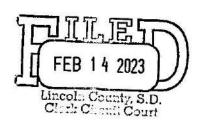
Anton Charles Burkard, born May 29, 2008, with whom the parties share physical custody,

is hereby set in the amount of \$1,465.58 per month due commencing June 1, 2022. Included in this amount is the amount of reimbursement or credit for medical insurance, any allocation of child care costs as set forth in the report and any abatement for periods of visitation; and it is further

ORDERED, that all deviations are denied; and it is further

ORDERED, that pursuant to SDCL §25-5-18.1, the support obligation shall continue until a child attains the age of eighteen, or until the child attains the age of nineteen if the child is a full-time student in a secondary school; and it is further

ORDERED, that the Obligor, Charles Joseph Burkard's current or subsequent payor(s) of income shall be immediately directed to withhold amounts for current support and arrearages as specified herein, and as provided in SDCL §25-7A-23, et.seq.; and it is further



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ORDERED, that if any child support obligation under this Order becomes delinquent that any sum unpaid shall bear interest as provided by South Dakota law; and it is further

ORDERED, that in accordance with SDCL §25-7-7.3 the effective date of this Order is June 1, 2022; and it is further

ORDERED, that the parties shall keep the Department of Social Services informed of his/her current address; the name and address of his/her current employer; and shall give written notice to the department of any change of address or employment within seven days of the change; and it is further

ORDERED, that Tami Jo Burkard currently provides health, dental, and vision insurance coverage for the minor children at a cost of \$107.00 per child per month, and shall continue to do so. Pursuant to SDCL 25-7-6.16, the cost of insurance attributable to the children, after proportionate medical support credit is applied shall not exceed \$329.61 per month,; and it is further

ORDERED, that Charles Joseph Burkard is required to pay a pro rata share of the cost of this health insurance coverage. Therefore, 69% of the cost, or \$107.00 per child per month, has been added to the basic child support obligation, and is reflected in Charles Joseph Burkard's \$ 1,465.58 monthly child support obligation as stated above,; and it is further

ORDERED, that if the cost of the health insurance premium changes, or if the insurance is no longer available; and proof of such cost or change is provided to the Division of Child Support, the Division of Child Support may adjust the monthly child support obligation accordingly without requiring a petition to modify the child support; and it is further

ORDERED, that the parties shall share all uncovered expenses for medical, dental, orthodontic, optical, and counseling care provided for the children in the same pro rata shares as their incomes: 69 percent paid by Charles Joseph Burkard and 31 percent paid by Tami Jo Burkard, except that Tami Jo Burkard as custodial parent for Arabella Burkard shall pay the first \$250.00 in uncovered expenses for the Arabella Burkard, each year, and it is further

ORDERED, that Tami Jo Burkard shall notify the Department of Social Services of the insurance company name, policy number and names of persons covered within ten (10) days of obtaining coverage; and Tami Jo Burkard shall furnish the Department insurance cards, a description of the coverage available and the effective date of coverage, including, if not already provided, a summary plan description and any forms, documents, or information necessary to effectuate such coverage, as well as information necessary to submit claims for benefits and shall also notify the Department of any changes in coverage, and it is further

ORDERED, that this Order shall amend and modify only the amount of the current child support obligation and those matters addressed specifically herein and shall not modify, amend or otherwise affect any other provision or any other prior Judgment or Order entered by the Court or any other administrative agency in this case; and it is further

ORDERED, that the Department may immediately proceed to collect the entire judgment or any amounts that become due under this order by submittal for federal income tax refund offset or any other legal remedy available; and it is further

ORDERED, until otherwise notified by the Division of Child Support, all payments shall be made payable to "Division of Child Support Enforcement" and mailed to:

Child Support Payment Center 700 Governors Drive, Suite 84 Pierre, South Dakota 57501-2291

Upon notification, the Obligor, Charles Joseph Burkard shall make the payments in accordance with the notice from the Division of Child Support Enforcement, or upon further order of the Court; and it is further

ORDERED, that the Department of Social Services may garnish wages, salary, earnings or other employment income of the Obligor, Charles Joseph Burkard pursuant to the provisions of chapter SDCL 21-18 or applicable provisions of SDCL 25-7A, to reimburse the state for any expenditures made on behalf of a dependent child under the medical assistance program as provided under Title XIX of the Social Security Act as amended to January 1, 1994 in order to recover any money received by the obligor from third-party liability sources which are necessary to reimburse either the custodial parent or the provider of the medical services for expenditures made or services rendered on behalf of a dependent child for covered medical services under the Obligor's group or private family health insurance plan; and it is further

ORDERED, that Charles Joseph Burkard shall pay 69% of all expenses and Tami Jo Burkard shall pay 31% of all expenses in regard to Anton Burkard; including, but not limited to sports equipment, uniforms, shoes, entry fees, registration fees, camps, clinics, private lessons, hotel costs, respectively until he reaches majority age. All expenses will be agreed to in writing, in advance.

Dated this the 14 day of Telonon, 2023.

BY THE COURT

ATTEST:

BRITTAN ANDERSON

By: Sy

Deputy Clerk

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STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA )

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

Charles Joseph Burkard
Plaintiff Respondent,

Div 12-524

VS.

ORDER FOLLOWING HEARING ON OBJECTIONS TO REFEREE'S REPORT AND RECOMMENDATION

Jani Jo Burkard,
Defendant/ Petitrue.

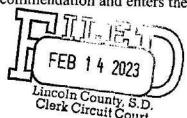
This matter having come before the Court on the day of Fibrus, 20 23, at 9:00 o'clock A. M. upon the written objection(s) to Referee's Report and Recommendation filed by the Petitioner Respondent and the Petitioner, appearing not appearing personally and represented not represented by counsel of record; and the Respondent, appearing not appearing personally and represented by counsel of record; and good cause appearing therefore it is hereby determined that:

- a. The written objection(s) to the Referee's Report and Recommendation were were not timely filed within ten (10) days as required by statute (SDCL 25-7A-22);
- b. The objecting party did/aid not request a transcript of the hearing held before the Referee;
- c. The hearing on the Objections to the Referee's Report and Recommendation was based upon the record established before the Referee and no new evidence or testimony was received (SDCL 25-7A-22);

NOW THEREFORE, based upon the governing law, as well as the statements of the parties and/or their counsel at the hearing, the Court:

Sustains the Objection(s) of the Petitioner/Respondent to the Referee's Report and Recommendations;

Overrules the Objection(s) of the Petitioner/Respondent to the Referee's Report and Recommendation, adopts the Referee's Report and Recommendation and enters the proposed Order;



Modifies the Referee's proposed Orde	r as follows:
Remands the matter to the Referee for the following issues:	a determination or clarification of
Dated this 14 day of Feberry	20 <u>23</u> .
<b>f</b>	BY THE COURT:
BRITTAN ANDERSON, Clerk of Court  By Synchronic Deputy	Circuit Court Judge

#### November 18, 2022

Nichole A. Carper Attorney at Law 4900 E. 57th St., Suite A Sioux Falls, SD 57104

Re: Opinion on child support in Lincoln County DIV 12-504; Burkard

Dear Ms. Carper,

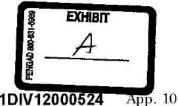
This letter is written as to my opinion as to child support in the above. A calculation as undertaken by referee Thomas Weerheim. I have not altered, in any way, the numbers used in the calculation of support as they relate to income, retirement, insurance or daycare costs.

This case represents a situation, increasingly common, but not addressed formally through any Supreme Court opinion, and not covered by the child support statutes at this time. It is ripe for judicial review so that a consistent philosophy can be maintained, and ultimately may be due for a statutory update.

This is what I call a "hybrid" custody situation, where the parties have more than one child, and at least one of the children lives in a joint physical custody/cross-credit situation.

There are, fundamentally, four methods of calculating child support in these situations. I will discuss each and the relative merits and detriments I find in each.

- Begin with a 1-child calculation, with the child in primary custody, and calculate support. Then, take the difference between the 1-child and 2-child calculations, and apply the cross-credit formula solely to that difference, and add the two together.
- 2. Begin with a 1-child calculation, with the child or children in cross-credit joint custody being calculated first and calculate support. Then, take the difference between the 1-child and 2-child calculations, and apply the pro-rata formula solely to that difference, and add the two together.



Filed: 3/8/2023 5:14 PM CST Lincoln County, South Dakota 41DIV12000524

- 3. Do as the referee did here do a 2-child calculation utilizing cross-credit, and do a 2-child calculation using the traditional formula, and take 1/2 of the first and 1/2 of the second and add the two together.
- 4. Do as opposing counsel suggests, and treat the children as being wholly separate from one another, and do two separate 1-child calculations, one using the traditional formula, and 1 using the cross-credit and add them together.

As the referee has already performed calculation 3, I am enclosing calculations 1, 2, and 4, so that they may also be utilized in the discussion of the pro's and con's of each.

#### Analysis

Scenario 1 - calculate 1 child, then apply cross-credit to 2nd child only. That (see attached) would mean a \$1,313 order for child 1 (Dad's 69% of \$1,903), plus Dad's prorata share of the difference between a 1-child and 2-child calculation (the difference between them is \$800). Dad's pro-rata cross-credit share of \$800 is \$228. Thus, Dad's ultimate support would be \$1,313 + \$228 = \$1,541 (plus his share of health insurance, which is \$74 under all these scenarios). Total \$1,615

Scenario 2 - calculate 1 child cross-credit, then apply pro-rata to 2nd child only. That (see attached) would mean a \$543 order for child 1 (Dad's pro-rata share of the cross-credit for one child), plus \$552 (Dad's pro-rata 69% share of difference between 1-child and 2-child calculation, which is \$800). Thus, Dad's ultimate support would be \$543 + \$552 = \$1,095 + \$74 = \$1,169.

Scenario 3 - 1/2 of 2-child cross credit plus 1/2 of 2-child traditional calculation. As shown by the referee, this is  $1,865 + 771 = 2,636 \times 1/2 + 1,318$  plus 74 = 1,392.

Scenario 4 - All of 1-child traditional plus all of 1-child cross-credit, added. This is \$1,313 plus \$543 = \$1,866, plus \$74 = \$1,940.

The advantages of Scenario 1 and Scenario 2 are that only the "difference between 1-child and 2-child" is subject to either cross-credit or traditional calculation, not the entirety. The disadvantage is deciding whether cross-credit should predominate, only subjecting the difference to a pro-rata calculation, or whether traditional calculations should predominate, only subjecting the difference to a cross-credit calculation.

It strikes me that there are flaws to both of these, but that of the two, the second calculation is preferable. This recognizes, fundamentally, that when both parents have at least 50/50 custody of at least one child, that both are required to have housing sufficient to take care of those parenting responsibilities. As each parent has these cross-credit responsibilities, that calculation should be the dominant one. And, as the guidelines recognize, the marginal cost of a second child is far less than the first - and the third far less than the second, and so on. The old movie "Cheaper By The Dozen" comes to mind,

App. 11

as subsequent children often receive hand-me-downs, do not require substantial separate financing, and do, as a perfectly practical matter, cost less than the first child.

This also recognizes South Dakota's preference - statutorily and otherwise - to shared parenting and cross-credit calculations. In scenario two, the Court would be recognizing that both parents are doing the regular and daily things that are necessary to maintaining homes for children - not just one of them. It would recognize that a second child is less expensive, and only apportion the cost of the second child, rather than the entire 2-child calculation.

It would also avoid further problems, that may occur if there are multiple children. For instance, if a family had 4 children, and 3 of them were in joint physical custody subject to a cross-credit calculation, and 1 was not (which often occurs due to a child reaching his or her senior year, wanting to participate in sports in the location where only one parent is now located, or for a variety of other reasons) that a parent would have less ability to manipulate the child support system by convincing one child to relocate from home A to home B. And we must face the fact that this happens often, and most people cannot afford litigation to address this each time there is a change, however slight. The law, SDCL 25-7-6.24 (modified in 2018) recognizes this family fluidity by allowing a child support referee to acknowledge a voluntary change in custody, without having to have a full-blown custody order in place prior to any modification.

This would, further, allow for continuity of calculation. The cross-credit would be first applied, then the remaining proportionate cost of additional children subject to the traditional pro-rata division. Then, if there were 4 children, and one went from joint custody cross-credit into the sole custody of one parent, the referee or Court could easily perform a 3-child cross-credit, and then apportion solely the costs of the 4th child and add or subtract that number.

There are problems here, however. For instance, if a parent had 3 children in his or her sole care, but one child was in joint physical custody, there is an argument that the majority of children should rule, and that solely the 4th child should be subject to a cross-credit calculation, rather than a 1 child cross-credit followed by a 3-child pro-rata of the difference between the guidelines at 1 and 4 children.

Scenario 3 (the one adopted by Referee Weerheim) accomplishes all this, and in a method that is repeatable and simple to apply. In this case, you take one-half of the 2-child traditional formula, and one-half of the 2-child cross-credit formula, and add the two together. One will also note that this calculation comes pretty close to the "middle" of the range of possible outcomes, and while I'm not saying that the very center of the range of possibilities is the correct answer, it does have the advantage of splitting the difference between the advocates of Scenario 1 and Scenario 2.

Note, too, that this would be applicable to all situations under every degree of fluidity. This reporter recently had a case in which the parties had 3 children, 2 of whom were in joint physical custody and 1 of whom was not. The Court directed that the parties

use 2/3 of a 3-child cross-credit calculation and 1/3 of a 3-child traditional calculation. The Mother in this case was pregnant, and during the separation of the parties had another child. Thus, the Court directed that as of the date of birth of the baby, that 2 of 4 children were in cross-credit, and 2 of 4 were in a traditional calculation, so the parties were directed to take 2/4 of a 4-child cross-credit and 2/4 of a 4-child traditional calculation, and add the two together. Anyone can see the applicability of this, and how amenable to change it would be, all while recognizing the hybrid nature of custody and applying only cross-credit to that proportion of children who are in joint custody, and only traditional pro-rata apportionment of child support to those children who are not in joint custody.

Scenario 4 suggests that we apply a 1-child traditional pro-rata formula, and a 1-child cross-credit formula, and add the two together. They suggest that, as foundation for this, SDCL 25-7-6.23, which directs that if each parent has primary physical custody of at least one child, that we do two separate calculations and offset one against the other.

This is an absolutely correct analysis in a situation where each parent has primary custody of at least one child. However, it is inappropriately applied to hybrid situations. There is both a theoretical and a practical reason for this - the theoretical reason is that the children are not in two separate homes, streams whose paths never cross. They are half (and, truth be told, often way more than half) of the time in one home together, and occasionally separated when the child in cross-credit is in the home of the non-custodial parent to the other child. In many instances, the child not going back and forth 50/50 is actually going 6 or more overnights in any one month on alternating weekends, so the children are together for 15 overnights in one home, and at least 6 more in the other - and often more. This "amount of time the child in traditional custody spends in the home of the non-custodial parent" can be accounted for as well - with a deviation granted to the NCP for the number of overnights the child in traditional custody spends. This would apply, it would seem, to any of the scenarios presented.

As a practical matter, it is plainly wrong. SDCL 25-7-6.23 clearly only applies to offsetting child support calculations of split custody. It recognizes that each parent needs to provide a primary home for the child or children in his or her primary care, and is paying the lion's share of those costs. The only method the other parent has of contributing to those costs is through the application of the traditional formula.

Historically, if one looks at the initial determination of child support in 1989, the Commission at that time recognized that child support is made up of three fundamental "portions" - roughly 1/3 of the costs of raising a child are related to "fixed" costs for housing and utilities, which do not change radically whether the child is present or not (that is why the maximum abatement is 66% because the Commission recognized that 34% of the costs of raising a child don't go away when the child goes to the other parent).

Roughly 1/3 of the costs of raising a child are related to "variable" costs, such as food and entertainment. Again, the child support commission recognized in 1989 that an abatement must be at least 38% of a monthly child support amount because 38% of the

costs of raising a child go directly along with that child and into the hands of the other parent.

There is a middle third as well - these are considered the "regular and recurring" expenses for the child unrelated to housing and food and entertainment. They include clothing, school lunches, and the variety of other expenses that occur. They also overlap with the set of costs that are separately divided by parents when utilizing a cross-credit calculation - irregular but necessary costs for clothing, school, extra-curricular activities, phones, vehicles, and the like. They do not automatically flow from parent A to parent B when a child goes back and forth, so they must be divided separately from a child support formula which does recognize those automatic back-and-forth charges for housing and food and entertainment.

There is a practical answer as well - if you look at this case, in particular, and the attached calculations, you will note that Father's child support for 2 children in a traditional calculation is \$1,865, with Mother being responsible for 31% and Father 69% of medical costs over \$250.

Under Scenario 4, in which the two children are treated as separate entities, Father's 1-child cross-credit (\$543) and his 1-child traditional formula (\$1,313) totals \$1,856, which is \$9 less than if he didn't have either child at all! Plus, under Scenario 4, he would be responsible for 69% of the out of pocket costs for the one child in cross-credit plus 69% of the medical costs for that child, (and all of the costs attendant with being a coparent) without Mother paying the first \$250.

The reason for this is plain - the first child costs more than the second, or third. By only paying attention to the 1-child formula and then replicating that formula, we are overweighing (truly doubling) the housing and utility costs as though those separately occur for the two children, when in fact they do not. It also recognizes, quite clearly, that "Father owes Mother" his share of HER housing costs, but does not recognize that she is contributing toward his for the child in joint custody.

In forming this opinion, I recognize that my calculations do not perfectly correspond to those of the referee. I do not know for certain, but it appears that Mr. Weerheim took one-half of the 2-child traditional and cross-credit formulae, but added Father's share of health insurance costs to both calculations. I am uncertain whether the "total cost" for both children's health insurance is the \$107 that Father is paying \$74 (69%) of, or whether that is the cost per child, in which case Father should be paying \$74 for each child. Mr. Weeheim's calculation has Father paying \$74 twice.

Thank you for the opportunity to address this matter. I have attached the calculations, and can also submit the original 1989 Child Support Commission Report in support of the 1/3, 1/3, 1/3 arguments, above.

If you have any questions or concerns regarding this matter, please feel free to contact my office.

Sincerely yours,

Thomas M. Keller

### EXHIBIT "A"

File Name:	Burki	910		
Ct File:	Non-australia! Parent: Charles 15,641	Parent: 79,	- mi 267	
Income:				
Retirement Social Security Federal Income Tax Other Deductions				_
Net Incomes	9308	4120	13428 Combined Net Incom	
Parent's Shares (%)	69%	, <u>318</u>	1-ch, 6/1,903	3-1 chldcross 2854 3 2 childcross 4054
Number of Children	I chied 2/	1+1	2-ch.101,1370	3 2 childress 4054
Parent's Sharees	(\$1313)	s 590	Combined Support A	Above Jehren 1,2
Bold Face Amt.	2 chita 1865	\$ 838		\$800]
Parent's shared time	1 cross-creditional	70	Cross-credit x 1.5	
Cross-Credit Shares	2 childross. Cras	who are	(543)	
Insurance:	(+74)	399 - 628 :(	\$771) Cross-crod Diffeence	4 = 1,200x.69 x { 1.5 - 1,200x.31 x } . 192
Deviations:			fro 1999 N. Herace	\$800x.69= 552 \$800x.69= 552
•				- 1803.31=248
		82		
Total \$	per month			_



STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS

)

COUNTY OF LINCOLN

SECOND JUDICIAL CIRCUIT

\*

CHARLES JOSEPH BURKARD, Plaintiff,

-VS-

OTHER HEARING

TAMI JO BURKARD,

Defendant.

41DIV.12-000524

\*

The Honorable Douglas E. Hoffman

Circuit Court Judge Canton, South Dakota.

APPEARANCES: Ms. Nichole A. Carper

Attorney at Law

4900 East 57th Street Suite A Sioux Falls, South Dakota 57108

For the Plaintiff;

Mr. Russ Janklow

Ms. Erin Schoenbeck Byre

Attorneys at Law P.O. Box 2348

Sioux Falls, South Dakota 57101

For the Defendant.

PROCEEDINGS:

The above-entitled proceedings commenced at 9:00 a.m., on the 6th day of February, 2023,

in Commissioner's Room, at the Lincoln County Courthouse, Canton, South Dakota.

> Roxane R. Osborn 605-782-3032 Sioux Falls, South Dakota

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WITNESSES: Direct Cross Re-D Re-C

For the Plaintiff:

Thomas Keller

By Ms. Carper

By Ms. Schoenbeck Byre 19

For the Defendant:

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MOTIONS & STIPULATIONS MADE ON RULED ON

End of Proceedings......24

THE COURT: Let's go ahead then and, ah, go on the record. This DIV.12-524. It's Charles Burkard versus Tami Burkard, and we're here on an objection to a referee's report. I do want to thank the parties for the briefing that was done. I had a chance to review the briefing and it is an interesting issue, and so I want to have it further developed. I, I do agree that this is one of those rare areas where I do think it's appropriate that we develop an adequate record because it may be something that the parties may want to go ahead and take further.

And so with that being said may I note appearances, please.

MR. JANKLOW: Ah, ah, go ahead, I guess we're the defendant, but on behalf of the defendant, Russ Janklow, and Erin Schoenbeck Byre, Your Honor.

THE COURT: Thank you.

MS. CARPER: And Nichole Carper appearing on behalf of father who is personally present with me here at counsel table, Your Honor.

THE COURT: Thank you. And we're here on the objection and I did have a chance as I indicated to review what was submitted, and with that being said why don't we go ahead, and you can go ahead and make your record on the objection.

MS. SCHOENBECK: Thank you, Your Honor. Ah, so I think it's key to remember today that the focus is on the best

interests of Arabella and Anton here. The formula that should be your calculation that should be chosen shouldn't necessarily be the easiest, the fastest, or what's in the best interests of the parent or to be frank really what's going to be best applied across all situations. The focus must be what's best for Anton and Arabella.

And with that there's not really a lot in dispute, and I don't think opposing counsel disagrees with this, um, the salaries of the parents aren't in dispute. Um, the healthcare was kind of, ah, I guess it was disputed a little bit, but I think both parties agree it was a \$107 for each, each child which would be 214 total for both children per month.

Um, and beyond that nothing's in dispute. The only disputed factor is the actual calculation here. Um, as the court noted there's no statute or case law that provides exact guidance on this issue, however, mother is advancing, and as we did before the referee that SDCL. 25-7-6.23 provides the best guidance in this situation.

What that statue, what the policy behind that statute is is that when you have two children that have distinct child custody arrangements, um, that they should be calculated separately, and then either deducted or added together accordingly depending upon what they are.

Now, that statute does apply when they're -- each

parent has sole custody, um, but we contend that that statute provides guidance for what the legislature wanted us to do in this particular situation, and that's exactly what mother's formula does.

Mother's formula takes Arabella, one primary child custody, calculates that, takes Anton, which is a cross credit, calculates that, and then adds the two together.

The purpose for this is that this formula is one of the only formulas, actually the only formula that has both bases in statute and also ensures that mother's base amount of child support is not taken away, and that's the biggest issue with the referee's calculation.

What the referee did was he calculated, um, a two child primary custody divided it by two, and then took a two child cross credit and divided it by two, and added those two together.

The problem with this and opposing counsel actually notes this in their brief, too, and calls it the cheaper by the dozen which I kind of like is that with each additional child it's, it's a smaller amount that's allocated for each child. So, when you divide it by two what happens is you take away mom's base amount that the legislator deemed is necessary to raise one child in South Dakota.

The best illustration of this, as we discussed in our brief-brief, is seen in SDCL 25-7-6.2. Um, if you look at,

which is the support obligation schedule. For example, the 13 401 to 13 450 monthly net income for one child, um, the amount that the legislature-legislature deemed necessary was 1903, two children 2703, three children 2185. What the court will note is that with each additional child the amount that's allocated becomes smaller. 800 for two. 42 for-for three, and 373 for four. That exemplifies the key error with the referee's formula. By simply dividing it by two, he took away that base amount and essentially took away the amount that robbed Tami of a substantial amount of child support.

Now, mother's formula best ensures that the, that the base amount is not taken away from Tami. It's rooted in the statute, and more importantly it gives homage to what the legislature intended and can be seen in SDCL 25-7-6.23.

At the end of the day, mother's formula insures both Anton and Arabella are add -- adequately taken care of, and that the amount that each parent is supposed to provide to ensure that they're cared for is allocated. Thank you.

THE COURT: Thank you. And, ah, Ms. Carper, I'm assuming you're going to want to call a witness?

MS. CARPER: I am.

THE COURT: And take your time, folks.

MS. CARPER: And, Judge, just for purposes of our record, we would ask the court to incorporate in to its review the pleadings, the record before the child support referee,

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    including the transcript herein. And the, the, ah,
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    submissions that have been provided to the court in
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    anticipation of today's hearing.
       THE COURT: Thank you. And I'm assuming there's no
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    objection, counsel.
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       MR. JANKLOW: No objection.
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       THE COURT: All right. Thank you.
       MS. CARPER: And I would do the same as well for-for
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    their, for their side of things, Your Honor.
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       At this point, I'm going to call Tom Keller to the stand,
    Your Honor.
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       THE COURT: Mr. Keller, why don't you come right over here
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    and, make yourself comfortable, Sir. Could you, ah, raise
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    your right hand.
15
                         THOMAS KELLER,
    being called as a witness, being first duly sworn, testified
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    as follows:
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       THE COURT:
                  Thank you and make yourself comfortable, Mr.
    Keller. You can begin whenever you're ready, Ma'am.
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       MR. JANKLOW: Your Honor, before we begin with, ah, Mr.
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    Keller's testimony.
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       THE COURT: Oh, yes.
       MR. JANKLOW: I guess I'd make a record I guess I had not
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    (sic) the statute in front of me, but my recollection is that
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the review of the Circuit Court is de novo review with

respect to the law, but that the record before the referee is the sole record, and no additional testimony is taken on an appeal on a child support referee's matter.

THE COURT: You're absolutely right and thank you for your objection. It's noted for the record. I did have a chance to review the briefing that was done, as well as the approach that counsel wants to go ahead and supplement the record. Your objection's noted. I'm going to let the supplementing of the record take place, ah, and your objection's noted though.

So, with that being said, please, begin.

MS. CARPER: Thank you. And, Judge, I would say that we're not seeking to really supplement the record as I think counsels acknowledges both parties pretty much agree on the factual record as far as what's been presented. This is a unique situation where we're simply offering what we think is some guidance for the court or some things for the court to consider in dealing with kind of a novel situation. So, I'm not intending to try to really do much with respect to the underlying record. It's just to offer guidance as to the applicability of the law.

THE COURT: You know that's an interesting question though. I do think that he's supplementing the record though, and so your objection's noted as well.

MS. CARPER: Right.

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1 THE COURT: Um, that you don't feel as though it's supplementing the record, but I disagree with you. 2 3 MS. CARPER: Okay. 4 THE COURT: I do believe that it's adding information into 5 the record that I think is necessary not only for this court, 6 but also for any review that should take place at a higher 7 level, and so it's noted. I'm overruling your objection. 8 do think that we're supplementing the record. 9 MS. CARPER: Thank you. 10 THE COURT: So, with that said, please, begin. 11 DIRECT EXAMINATION 12 (BY MS. CARPER) Mr. Keller, could you, please, state your name for the record? 13 14 My name's Tom Keller. 15 And, Mr. Keller, how are you currently employed? I'm a private practice attorney. I'm also a child 16 support referee for the State of South Dakota. 17 18 And how long have you been licensed to practice law in 19 South Dakota? 20 1988, so 35 years old. 21 God you're old. 22 Α Ah, yes. 23 Q And how long have you been --

Noted for the record, Ms. Carper, I am old.

And how long have you been a child support referee?

- 1 A I think 15 or 20 years.
- 2 Q Okay. So, um, did we ask you to take a look at this
- 3 | factual scenario and give us some advice as far as how you
- 4 | would understand the child support statutes to apply?
- 5 A You did.
- 6 Q Okay. And as part of that did you prepare, I guess,
- 7 | what I would call a written statement as to your analysis and
- 8 | how you felt that, um, it would be best to look at this
- 9 situation?
- 10 A I did.
- 11 MR. JANKLOW: Your Honor, I want to make sure for
- 12 appellate review that we have a solid record on this. Mr.
- 13 | Keller didn't testify before the referee in the underlying
- 14 matter, and this would be totally inappropriate testimony in
- 15 this matter.
- 16 THE COURT: Thank you, it's noted for the record.
- 17 Overruled.
- 18 Q You can answer the question.
- 19 A And what was the question?
- 20 Q Did you prepare a written legal memorandum? I think you
- 21 | answered, but I just think it got covered up by Mr. Janklow,
- 22 at our request as far as your analysis of the scenario?
- 23 A I did.
- 24 Q Thank you. And as far as you know was that provided to
- 25 the counsel present today and the court?

A I know I provided it to you, Ms. Carper. I guess I don't know what happened after that. I guess I looked at it as you'd hired me, so I sent it to you.

MS. CARPER: Judge, I would ask that the court take judicial notice of the fact that this submission was provided to counsel and the court prior to today's hearing. And prior to today I don't think any objection was posited by counsel with respect to the court taking that in to consideration.

THE COURT: Okay. It's noted, but I'm going to let them make their record.

MS. CARPER: I --

THE COURT: Mr. Janklow.

MS. CARPER: Yet, Your Honor, this is something that, ah, should have been, Mr. Keller should have been testifying before the underlying referee for cross-examination development of the record. Ah, from what I can tell, that Mr. Keller is going to be because there's no question regarding the facts. He's really being called to testify in front of you regarding a legal conclusion that the court should be taking in to consideration so it would be akin to us calling the underlying referee and cross-examining him as to what his rationale was. This is totally inappropriate testimony on an appeal.

THE COURT: I agree. It's noted for the record, um, but I'm going to overrule it and let them generate their

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1 record so you can begin.
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- MS. CARPER: Thank you.
- Q Mr. Keller, could you walk us through, um, your analysis that you provided?
- A So, as everyone's aware there is not a direct statutory guideline for situations in which parties have more than one child and they live in situations other than both or all children living in one home or children living in distinct homes, ah, essentially the reference that Ms. Schoenbeck made. Ah, there -- I call it hybrid. There are children who are in joint physical custody, and children who are in sole physical custody, and they have the same parents, ah, it seems as though there is no guidance for that. So, that's what I attempted to do was analyze the possibilities and to
- Q And I, ah, when I was reviewing the proposal that you submitted it looked like you presented some different scenarios for analysis; is that correct?

put forth a proposal for how it might be considered.

- 19 A Yes.
  - Q So, um, if you could summarize sort of the position taken by opposing counsel in reference to the statute that they rely on, which of your scenarios does that most apply to?
- 24 A Well, I might have numbered them. I don't recall 25 particularly. Is it alright if I look at my, ah, my

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submission?
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        MS. CARPER: Is that agreeable with the court?
         THE COURT: That's fine. In fact, we should probably
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   have one marked. Why don't we go ahead and mark one. Do you
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   have it in front of you, Mr. Keller?
         THE WITNESS: I have my letter opinion of November 18th,
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    2022, Your Honor. It is, it consists of six pages, and what
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    I believe are -- is one calculation sheet. So, a total of
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    seven pages is what I have.
         THE COURT: Thank you.
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        MS. CARPER: And I'll for the record, Judge, state to
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    the court that we just took that and incorporated that in to
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    the memorandum that we submitted. I don't have a ---
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         THE COURT: I know, I read it.
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         MS. CARPER: -- supplement --
         THE COURT: -- I read it.
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        MS. CARPER: -- okay.
         THE COURT: But I'm going to mark it as Exhibit A.
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         (Exhibit A was marked for identification.)
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         THE COURT: And you can go ahead and note your objection
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    at this time, Counsel.
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         MR. JANKLOW: For the same grounds have been stated for
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    objecting to this witness, Your Honor.
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         THE COURT: Thank you. And it's noted, but overruled.
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So, in -- that was number four of my four

recommendations is the, the position that was taken by mom's counsel.

Q Okay. And so, um, if you, as you heard them testify to or, excuse me, argue to the court, um, their position is that that analysis is most in line with the statutes. Did you hear that?

7 A Yes.

- 8 Q Do you agree with that position?
- 9 A No.
- 10 Q Tell me why or tell the court why.
  - A Well, this is going to be more global perhaps that I just think it leads to absurd results which are not fair and it underlines, it suggests the contrary public policy to what I think is in the best interests of children in the State of South Dakota. This is my opinion, okay. I think there are three public policy issues here. I think there are a handful of ways to go about resolving this, that's one of them. You know everybody can have their advocacy. The, the public policy for a hybrid which we don't have is that it, it needs to be simple to apply. I think most all of these are simple to apply. Ah, number two, I think it, it has to discourage people from trying to lure a child over from a hybrid situation to a sole situation, or from a sole situation to a hybrid situation for economic purposes.
  - Q And if I could jump in. When you say sole, are you

using that, ah, just like we would think of as a primary?

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Q Okay.

Ah, when I say sole I just mean that to be distinct from joint physical custody. I don't mean the child doesn't have any parenting time with the other parent, but a traditional calculation of child support. Ah, the, the other public policy is that I think the State of South Dakota is implicitly or explicitly encouraging joint physical custody of minor children by the statutory changes that have occurred within my career since I became an attorney. I think it's clear that they are advocating for joint physical custody coparenting and the joint raising of children in situations where it's appropriate. Not situations where it's not appropriate, but we have a whole new statute on joint physical custody that never existed before. We have a set of guidelines for joint physical custody and the cross credit that never existed before there are efforts made in the legislature each year to almost mandate joint physical custody for minor children or to say you must have an extraordinary reason not to have joint physical custody. So, I think it is the public policy of the State of South

Dakota to encourage joint physical custody of children. All

that being said, Ms. Carper, there are to me five different

ways of going about doing this calculation. I know I

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mentioned four, but essentially the fifth incorporates all the four. So, I don't like the idea of treating two children as though they're not related if they have the same parents. The fault that I find with the position of mom in this case is if you do a two-child calculation as Ms. Schoenbeck pointed out the numbers, and you apply the percentage formula that dad is of the income, his child support under a two child, if the children were living solely with mom at no deviations for visitation, parenting time, or whatsoever, it is \$1.00 less than the calculation that's being advocated by Essentially, he'd be paying a dollar more than he would otherwise for having one child fifty percent of the time and being responsible for a percentage of that child's expenses every month. So, his percentage applied to the two child -child support calculation results in a number that's \$1,00 less than what is being advocated by mom. So, I don't like It seems to me wrong that someone would absurd results. benefit from, or you know my child support goes up because now I have a child half the time and I didn't before. the, the possibilities that remain are the one the referee did. Basically, you acknowledge there are two children, or three, or four, or five, but that they have the same parents. They are a family unit. You do the five child child support calculation both as a cross credit and as a traditional calculation, and then the percentage of children in each of

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those two situations is multiplied by their percentage of the total. So, if there's three kids in joint custody and two who live with parent A you do sixty percent of a five child cross credit and forty percent of a traditional calculation, and then that number would provide the solution. The other two that I advocated were you start with and, again, if anybody wants to reference the code, you start with the one child child support calculation. Um, you do a cross credit of that for instance for the child that's in joint physical custody, and then you simply prorate the difference because the second child is the second child. For each parent they already have housing for at least one extra child above and beyond their own needs, and in most of these cases they have housing for all their children. So, it recognizes that both parents have a responsibility for housing rather than just the primary parent. That's one of the greatest criticisms of the current system is that, ah, and why they just reduced the number of overnights to qualify for an abatement is it never recognized unless you had the children ten or more overnights or almost half the time that you even had any housing costs, ah, that you were just contributing to the other parent's housing costs as though they were sheltering the children all the time.

Q And let me jump in there just so we have a point of reference. Are you referring to the recent modification of

the statutes that said that whereas before the -- to be entitled to an abatement you had to have ten or more overnights now at six or more overnights?

- A That's correct. That's exactly what I'm referencing.
- 5 Q Thank you.

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- 6 A That's part of the omnibus child support bill that was
  7 passed and went in to effect on July 1st, 2022.
- 8 Q Thank you.
  - So, so you could take a one child cross credit and then prorate the second child. You could do a one child traditional calculation and prorate the cross credit of the difference between the one child, as they said \$800 was the difference in this case between the one child and the twochild calculation. You could simply just cross credit the two child. So, again, there is the percentage of each. There is the do both and add them together. There is the start with cross and prorate the second child. There's the start with traditional and pro and cross credit the second child, or you could do all those calculations and then come up with a number somewhere in there that feels right to everybody. Well, that's the fifth way to do it, and I've had judges say, Tom, run them all over the map for me and give me a range and I'm going to pick something that seems reasonable I like that and I trust judges to do a good in the middle. job of it. It's just there's no certainty to it, and it sort

of guarantees that every single one of these is going to get appealed to at least the circuit court until we have some finality, and I think there does need to be a legislative or judicial determination ultimately of what the policy ought to be. But the concerns being both the public policy aspects, and the various ways of doing it. My advocacy is perhaps different than other peoples might be, and it's not related to this case to me at all. Ah, it's, it's more I -- we need guidance, and I think I'd love to be part of whatever impetus it takes to get this done, so all the referees and judges and everyone know how to do these.

Q Thank you.

MS. CARPER: Ah, thank you. I have nothing further on direct for this witness, Your Honor.

THE COURT: Thank you, cross.

MS. SCHOENBECK: Thank you, Your Honor.

#### CROSS-EXAMINATION

Q (BY MS. SCHOENEECK) Just a few points of clarity here, ah, you're not the ref -- you were not the referee in the underlying matter, correct?

- A That is correct.
- Q You're not counsel for the father in this matter, correct?
- 24 A That is correct.
- 25 | Q You're not a judge, correct?

- 1 A No, I'm not.
- 2 Q And you're not a legislator are you, correct?
- 3 A No, I've never been in the legislature.
- 4 Q So, your opinion then in this matter has no binding on
- 5 any family law practitioner in this state providing their
- 6 opinion, correct?
- 7 A Ah, no, it's, it's my opinion, and I guess you'd have to
- 8 consider me well versed in it in order to give it any
- 9 | gravitas whatsoever.
- 10 | Q And you agree that no case law controls in this matter?
- 11 A I agree.
- 12 Q And you agree that no statute controls in this matter?
- 13 A I agree that there is no statute on point.
- 14 Q So, as a practicing attorney you would have to agree
- 15 that this is a legal matter for a judge to decide, correct?
- 16 A Absolutely.
- 17 Q Okay.
- 18 MS. SCHOENBECK: No further questions, Your Honor.
- 19 THE COURT: Thank you. Anything else?
- 20 MS. CARPER: I just have argument for the court.
- 21 THE COURT: All right.
- 22 MS. CARPER: One, one --
- 23 THE COURT: You may step down, Mr. Keller.
- 24 MS. CARPER: Thank you, Tom.
- 25 THE WITNESS: Thank you.

MS. CARPER: I think the last thing I'd like --

THE COURT: And I'll take the Exhibit.

THE WITNESS: Oh, yeah, I'll give it to you.

MS. CARPER: My only concern with that Exhibit, Judge, is it's not actually what I submitted and, but as long as everyone agrees that that's what I incorporated, I'm fine with it. I just don't want it to seem like you're getting two different things.

THE COURT: I understand. Well, it's noted.

MS. CARPER: Thank you.

THE COURT: Thank you.

MS. CARPER: So, I guess the final thing I would ask the court to consider is the record. Oftentimes in child support cases, and I think the statutes actually direct that one of the things that a referee can consider and by extension of court is if the actual needs of the child are not being met, or the children are not being met by the support that's been ordered by the court. And I think you know on the other end of things we have the case out of this jurisdiction Schieffer versus Schieffer, where in that particular case we had two parties that had I guess what I'd consider extraordinarily monthly income and an argument was made that the Child Support that was ordered for the father was not fair in the sense that it didn't reflect the extraordinary monthly income that was generated by father's business interests. And so I

think you know if we were faced in this case with a situation where the best interest of the child in part premised upon me that was not being met by a function of either the child support referee's recommended order in this case, or the suggestion that we put forth in our pleadings that perhaps would be a different situation, but there's nothing in the record that would ever support a conclusion or even suggest that the child support that was recommended by the referee would result in a situation where either child in this case their needs, general or-or special weren't being met.

And so while I can appreciate that this is a novel situation, I do think that it's one that as attorneys that work in family law we come up against more and more. I think that the idea that through application of the position taken by mother in this case would mean that my child support for my client would simply be the difference of a dollar even though he has shared custody of one of those children is an inequitable, ah, and improper result in light of the general statements and policy statements that are included in the child support statutes. This would be, as Mr. Keller suggested, an absurd result and cannot be what the legislature intended when we developed a-a prism, if you will, for figuring out a fair way to provide for children's needs when they're living in both households.

I, I, not to be glib, but I, I, I loved the reference

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    for, ah, that Mr. Keller used in terms of sort of an -- sort
2
    of suggesting that the first child costs X, but every child
3
    after that doesn't replicate the cost of the first child, um,
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    and I think that that's an appropriate way to look at this.
5
    It's a percentage. And I think the statutes themselves
6
    reflect this when you look at the, ah, the grid, if you will,
7
    setting out what the obligations are. You don't see a
8
    doubling for every child that's added to the mix. It's a
9
    percentage increase. I think premised upon the recognition
10
    that you don't have to replicate each of those costs for
11
    every child that's added to the mix. And so we suggest to
12
    the court that the, at a minimum the referee's decision is
    valid. We obviously didn't appeal from it, and we asked the
13
14
    court to uphold the proposed order in this case, or
15
    alternatively to take in to consideration the testimony that
    we provided here today and included in our memorandum to the
16
17
    court.
            Thank you.
       THE COURT: Thank you, Ms. Carper. And is it going to be
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19
    Mr. Janklow or is it going to be Ms. Schoenbeck?
       MS. SCHOENBECK: Ms. Schoenbeck, sir.
20
21
       THE COURT: All right. Yeah, go ahead, whenever you're
22
    ready, Ma'am.
23
      MS. SCHOENBECK: Your Honor, the only thing I bring you
24
    back to is the best interests of the children.
                                                   Equity of the
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parents plays no bearing in this matter. It's what's best

1 for Anton and Arabella. We contend that SDCL 25-7-6.23 is 2 frankly one of the only statutes that provides guidance in 3 this matter, and for that it ensures that mother and father 4 provide the necessary amount of support for each of their 5 children in their unique custody situations. Thank you. 6 THE COURT: All right. Thank you. And I do appreciate 7 the argument, as well as the objections that were put on the 8 As you know, I did have a chance to review the 9 reports, however, I'm also interested in the arguments of 10 counsel, and as well as the testimony that was provided, and I'm going to go ahead and review that, and I'll give you guys 11 12 a decision when I have a chance to get something put down. 13 All right. MS. CARPER: Thank you, Judge. 14 15 MS. BYRE: Thank you, Your Honor. THE COURT: All right. Thank you. So, I'll take it under 16 advisement. 17 (Proceedings concluded at 9:31 a.m.) 18 19 20 21 22 23 24 25

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA )

CERTIFICATE

This is to certify that I, Roxane Osborn, Court

Recorder and Notary Public, do hereby certify and affirm that

I transcribed the proceedings of the foregoing case, and

the foregoing pages 1 - 24, inclusive, are a true and correct

transcription from CourtSmart.

Dated at Sioux Falls, South Dakota, this 25th day of April, 2023.

Roxane R. Osborn

Court Recorder
Notary Public - South Dakota
My commission expires: May 9, 2024

# <u>25-7A-22</u>. Petition for modification of child support--Hearing--Referee's report--Objections--Service--Objection to modification of report.

If the support order was entered in this state and this state maintains continuing exclusive jurisdiction over the support order pursuant to chapter <u>25-9C</u>, or if the support order was registered in this state and the requirements of § <u>25-9C-611</u> or <u>25-9C-613</u> are satisfied, an obligor, an obligee, or the assignee may file a petition, on forms prescribed by the department, to increase or decrease child support. For any support order entered or modified after July 1, 1997:

- (1) The order may be modified upon showing a substantial change in circumstances if the petition is filed within three years of the date of the order; or
- (2) The order may be modified without showing any change in circumstances if the petition is filed after three years of the date of the order.

If a petition is filed, the secretary of social services shall file the petition in the office of the clerk of the circuit court where the original order for support is filed. Any response shall also be provided to the petitioning party. The matter shall be set for hearing before a referee who is a member in good standing of the State Bar Association and is appointed by the court, pursuant to statute, and after due notice to all parties by first class mail. The referee shall make a report to the court, recommending the amount of the monthly support obligation of the parent and for medical support.

The referee shall file the report with the court and cause copies thereof to be served by mailing to the parties and the secretary. Any party shall have ten days from the date of service of the report in which to file objections to the report. If a party files an objection, the other party shall have an additional five days from the date of service of the objections to file additional objections. If no objection is filed, the circuit court may thereafter, and without further notice, enter its order. If any objection is filed, the circuit court shall fix a date for hearing on the report, the hearing to be solely on the record established before the referee. The circuit court may thereafter adopt the referee's report, or may modify it, or may reject and remand it with instructions or for further hearing. The secretary shall serve the parent the court's order by certified mail, return receipt requested, at the parent's last known address, and shall file proof of service.

If the circuit court's order modifies the referee's report and no hearing was held before the circuit court before entry of its order, any party has ten days from the date of service of the order in which to file an objection to that modification. If an objection is filed, the circuit court shall fix a date for hearing on the objection and after the hearing shall enter its order. The secretary shall serve the order by certified mail, return receipt requested, at the parent's last known address, and shall file proof of service.

**Source:** SL 1986, ch 218, § 21; SL 1987, ch 194; SL 1989, ch 175, § 8; SL 1991, ch 213, § 2; SL 1995, ch 144, § 4; SL 1997, ch 155, § 7; SL 2005, ch 134, § 8; SL 2009, ch 130, § 16; SL 2015, ch 148, § 80.

# <u>25-7-6.23</u>. Offset of support obligation when each parent has primary physical custody of at least one child--Computation--Assistance from department.

If the parents have two or more children between them and each parent has primary physical custody of at least one child, the child support obligation shall be determined by computing the amount of each parent's respective support obligation for the children in the other parent's physical custody, and the support obligations shall be offset in determining a monthly support obligation. If one or more of the children are receiving assistance from the department as provided in § 28-7A-7, and in lieu of the offset, each parent shall be obligated to pay the respective support obligation amount to the other parent.

Source: SL 2005, ch 134, § 6.

#### 25-7-6.2. Support obligation schedule.

The child support obligation must be established in accordance with the following schedule subject to the revisions or deviations as permitted by this chapter. Except as provided in this chapter, the combined monthly net incomes of both parents must be used in determining the obligation to be divided proportionately between the parents based upon their respective net incomes. The noncustodial parent's proportionate share establishes the amount of the child support order.

The emboldened areas of the schedule include a self-support reserve of eight hundred seventy-one dollars per month that accounts for the subsistence needs of the obligated parent with a limited ability to pay. If the obligation using only the noncustodial parent's monthly net income is an obligation within the emboldened areas of the schedule, that amount must be compared to the noncustodial parent's proportionate share using both parents' monthly net incomes. The lesser amount establishes the noncustodial parent's child support order.

P	arents monthly het in						
	Monthly Net Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
	0-950	79	79	79	79	79	79
	951-1,000	129	129	129	129	129	129
	1,001-1,050	179	179	179	179	179	179
	1,051-1,100	225	229	229	229	229	229
	1,101-1,150	266	279	279	279	279	279
	1,151-1,200	308	329	329	329	329	329
	1,201-1,250	320	379	379	379	379	379
	1,251-1,300	333	429	429	429	429	429
	1,301-1,350	345	479	479	479	479	479
	1,351-1,400	357	523	529	529	529	529
	1,401-1,450	370	541	579	579	579	579
	1,451-1,500	382	559	629	629	629	629
	1,501-1,550	395	577	679	679	679	679
	1,551-1,600	407	595	706	729	729	729
	1,601-1,650	419	613	727	779	779	779
	1,651-1,700	431	629	747	829	829	829
	1,701-1,750	443	646	766	855	879	879
	1,751-1,800	455	663	785	877	929	929
	1,801-1,850	466	679	804	899	979	979
	1,851-1,900	478	696	824	920	1012	1029
	1,901-1,950	490	713	843	942	1039	1079
	1,951-2,000	501	729	862	963	1063	1129
	2,001-2,050	513	746	882	985	1086	1177
	2,051-2,100	525	763	901	1006	1110	1219
	2,101-2,150	536	779	920	1028	1134	1245
	2,151-2,200	548	796	939	1049	1157	1271
	2,201-2,250	560	813	959	1071	1181	1297
	2,251-2,300	572	829	978	1092	1205	1322
	2,301-2,350	583	846	998	1115	1246	1348
	2,351-2,400	595	862	1020	1139	1272	1374
	2,401-2,450	607	879	1041	1163	1299	1400
	2,451-2,500	618	896	1062	1186	1325	1425

2,501-2,550	630	912	1083	1210	1352	1477
2,551-2,600	642	929	1105	1234	1378	1527
2,601-2,650	653	946	1126	1258	1405	1569
2,651-2,700	665	962	1147	1281	1431	1599
2,701-2,750	677	979	1168	1305	1458	1628
2,751-2,800	688	996	1190	1329	1484	1658
2,801-2,850	700	1012	1211	1353	1511	1688
2,851-2,900	712	1029	1232	1376	1537	1717
2,901-2,950	723	1046	1253	1400	1564	1747
2,951-3,000	735	1062	1275	1424	1590	1776
3,001-3,050	746	1079	1296	1447	1617	1806
3,051-3,100	758	1096	1317	1471	1643	1836
3,101-3,150	770	1114	1338	1495	1670	1865
3,151-3,200	781	1129	1356	1515	1692	1890
3,201-3,250	793	1146	1373	1533	1713	1913
3,251-3,300	805	1162	1389	1551	1733	1935
3,301-3,350	816	1179	1405	1569	1753	1958
3,351-3,400	821	1185	1421	1587	1773	1981
3,401-3,450	824	1198	1437	1605	1793	2003
3,451-3,500	828	1212	1453	1624	1813	2026
3,501-3,550	831	1226	1470	1642	1834	2048
3,551-3,600	834	1240	1485	1659	1853	2070
3,601-3,650	842	1251	1499	1675	1871	2089
3,651-3,700	852	1263	1513	1690	1888	2109
3,701-3,750	861	1274	1527	1705	1905	2128
3,751-3,800	869	1286	1540	1721	1922	2147
3,801-3,850	876	1297	1554	1736	1939	2166
3,851-3,900	880	1309	1568	1751	1956	2185
3,901-3,950	883	1320	1582	1767	1974	2205
3,951-4,000	889	1332	1596	1782	1991	2224
4,001-4,050	897	1340	1605	1792	2002	2236
4,051-4,100	906	1347	1612	1800	2011	2246
4,101-4,150	915	1353	1619	1808	2019	2256
4,151-4,200	924	1360	1626	1816	2028	2265
4,201-4,250	929	1366	1633	1824	2037	2275
4,251-4,300	932	1373	1640	1831	2046	2285
4,301-4,350	936	1379	1647	1839	2054	2295
4,351-4,400	939	1386	1654	1847	2063	2304
4,401-4,450	943	1392	1660	1854	2071	2313
4,451-4,500	946	1397	1665	1859	2077	2320
4,501-4,550	951	1402	1669	1865	2083	2326
4,551-4,600	954	1407	1674	1870	2089	2333

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4,601-4,650	958	1411	1679	1875	2094	2339
4,651-4,700	961	1416	1683	1880	2100	2346
4,701-4,750	965	1421	1688	1885	2106	2352
4,751-4,800	969	1426	1693	1891	2112	2359
4,801-4,850	973	1430	1697	1896	2118	2366
4,851-4,900	978	1437	1704	1904	2126	2375
4,901-4,950	981	1443	1712	1912	2136	2385
4,951-5,000	985	1449	1719	1920	2145	2396
5,001-5,050	989	1456	1726	1928	2154	2406
5,051-5,100	993	1462	1734	1937	2163	2416
5,101-5,150	996	1469	1741	1945	2172	2426
5,151-5,200	1000	1475	1748	1953	2182	2437
5,201-5,250	1005	1481	1756	1961	2191	2447
5,251-5,300	1009	1488	1763	1969	2200	2457
5,301-5,350	1012	1495	1770	1978	2209	2467
5,351-5,400	1016	1502	1778	1986	2218	2478
5,401-5,450	1020	1509	1785	1994	2227	2488
5,451-5,500	1024	1516	1792	2002	2236	2498
5,501-5,550	1028	1523	1800	2010	2245	2508
5,551-5,600	1032	1530	1807	2018	2254	2518
5,601-5,650	1036	1537	1814	2026	2263	2528
5,651-5,700	1040	1544	1821	2035	2273	2538
5,701-5,750	1045	1552	1829	2043	2282	2549
5,751-5,800	1051	1560	1837	2052	2292	2561
5,801-5,850	1058	1568	1845	2061	2302	2572
5,851-5,900	1064	1577	1853	2070	2312	2583
5,901-5,950	1071	1585	1861	2079	2322	2594
5,951-6,000	1077	1593	1869	2088	2332	2605
6,001-6,050	1084	1601	1877	2097	2342	2616
6,051-6,100	1090	1610	1885	2106	2352	2627
6,101-6,150	1097	1619	1896	2118	2366	2642
6,151-6,200	1104	1631	1910	2134	2383	2662
6,201-6,250	1112	1642	1924	2149	2401	2681
6,251-6,300	1119	1654	1938	2165	2418	2701
6,301-6,350	1126	1665	1952	2180	2436	2720
6,351-6,400	1134	1676	1966	2196	2453	2740
6,401-6,450	1141	1688	1980	2212	2470	2759
6,451-6,500	1149	1699	1994	2227	2488	2779
6,501-6,550	1156	1711	2008	2243	2505	2798
6,551-6,600	1156	1711	2010	2245	2507	2801
6,601-6,650	1156	1712	2011	2247	2510	2803
6,651-6,700	1156	1713	2013	2249	2512	2806

6,701-6,750	1156	1714	2015	2251	2514	2808
6,751-6,800	1157	1715	2017	2253	2516	2811
6,801-6,850	1157	1715	2018	2255	2518	2813
6,851-6,900	1162	1716	2020	2257	2521	2816
6,901-6,950	1167	1717	2022	2259	2523	2818
6,951-7,000	1172	1722	2027	2264	2529	2825
7,001-7,050	1177	1729	2034	2272	2538	2835
7,051-7,100	1182	1737	2041	2280	2547	2845
7,101-7,150	1187	1745	2049	2288	2556	2855
7,151-7,200	1192	1753	2056	2297	2565	2865
7,201-7,250	1197	1761	2063	2305	2574	2876
7,251-7,300	1202	1768	2071	2313	2583	2886
7,301-7,350	1207	1776	2078	2321	2593	2896
7,351-7,400	1212	1784	2085	2329	2602	2906
7,401-7,450	1216	1791	2093	2337	2611	2916
7,451-7,500	1221	1798	2100	2346	2620	2927
7,501-7,550	1226	1805	2107	2354	2629	2937
7,551-7,600	1231	1812	2115	2362	2639	2947
7,601-7,650	1237	1819	2122	2370	2648	2958
7,651-7,700	1242	1826	2130	2379	2657	2968
7,701-7,750	1247	1834	2137	2387	2666	2978
7,751-7,800	1253	1841	2144	2395	2675	2988
7,801-7,850	1258	1848	2152	2403	2685	2999
7,851-7,900	1263	1855	2159	2412	2694	3009
7,901-7,950	1268	1862	2166	2420	2703	3019
7,951-8,000	1274	1869	2174	2428	2712	3030
8,001-8,050	1279	1876	2182	2437	2722	3041
8,051-8,100	1285	1884	2191	2447	2733	3053
8,101-8,150	1290	1892	2200	2457	2745	3066
8,151-8,200	1296	1900	2209	2467	2756	3078
8,201-8,250	1302	1908	2218	2477	2767	3090
8,251-8,300	1307	1916	2226	2487	2778	3103
8,301-8,350	1313	1924	2235	2497	2789	3115
8,351-8,400	1319	1932	2244	2507	2800	3128
8,401-8,450	1324	1940	2253	2517	2811	3140
8,451-8,500	1330	1948	2262	2527	2822	3153
8,501-8,550	1336	1956	2271	2537	2833	3165
8,551-8,600	1341	1964	2280	2547	2845	3177
8,601-8,650	1347	1972	2289	2557	2856	3190
8,651-8,700	1352	1980	2298	2566	2867	3202
8,701-8,750	1358	1988	2307	2576	2878	3215
8,751-8,800	1364	1996	2315	2586	2889	3227

8,801-8,850	1369	2004	2324	2596	2900	3239
8,851-8,900	1375	2012	2333	2606	2911	3252
8,901-8,950	1381	2020	2342	2616	2922	3264
8,951-9,000	1386	2028	2351	2626	2933	3277
9,001-9,050	1392	2036	2360	2636	2944	3289
9,051-9,100	1397	2044	2369	2646	2956	3301
9,101-9,150	1403	2052	2378	2656	2967	3314
9,151-9,200	1409	2060	2387	2666	2978	3326
9,201-9,250	1414	2068	2396	2676	2989	3339
9,251-9,300	1420	2076	2404	2686	3000	3351
9,301-9,350	1426	2084	2413	2696	3011	3363
9,351-9,400	1431	2092	2422	2706	3022	3376
9,401-9,450	1437	2100	2431	2716	3033	3388
9,451-9,500	1443	2107	2440	2726	3044	3401
9,501-9,550	1447	2115	2449	2736	3056	3414
9,551-9,600	1452	2123	2459	2747	3068	3427
9,601-9,650	1457	2130	2468	2757	3080	3440
9,651-9,700	1462	2138	2478	2768	3092	3453
9,701-9,750	1466	2145	2487	2778	3103	3466
9,751-9,800	1471	2153	2497	2789	3115	3480
9,801-9,850	1476	2160	2506	2799	3127	3493
9,851-9,900	1481	2168	2516	2810	3139	3506
9,901-9,950	1485	2175	2525	2821	3151	3519
9,951-10,000	1490	2183	2535	2831	3162	3532
10,001-10,050	1495	2190	2544	2842	3174	3546
10,051-10,100	1500	2198	2554	2852	3186	3559
10,101-10,150	1505	2205	2563	2863	3198	3572
10,151-10,200	1509	2213	2572	2873	3210	3585
10,201-10,250	1514	2221	2582	2884	3221	3598
10,251-10,300	1519	2228	2591	2895	3233	3612
10,301-10,350	1524	2236	2601	2905	3245	3625
10,351-10,400	1528	2243	2610	2916	3257	3638
10,401-10,450	1533	2251	2620	2926	3269	3651
10,451-10,500	1538	2258	2629	2937	3281	3664
10,501-10,550	1543	2266	2639	2947	3292	3678
10,551-10,600	1547	2273	2648	2958	3304	3691
10,601-10,650	1552	2281	2658	2969	3316	3704
10,651-10,700	1557	2288	2667	2979	3328	3717
10,701-10,750	1562	2296	2677	2990	3340	3730
10,751-10,800	1566	2303	2686	3000	3351	3743
10,801-10,850	1571	2311	2696	3011	3363	3757
10,851-10,900	1576	2318	2705	3021	3375	3770

10,901-10,950	1581	2326	2714	3032	3387	3783
10,951-11,000	1585	2333	2724	3043	3399	3796
11,001-11,050	1590	2341	2733	3053	3410	3809
11,051-11,100	1595	2349	2743	3064	3422	3823
11,101-11,150	1600	2356	2752	3074	3434	3836
11,151-11,200	1604	2364	2762	3085	3446	3849
11,201-11,250	1609	2371	2771	3095	3458	3862
11,251-11,300	1614	2379	2781	3106	3469	3875
11,301-11,350	1619	2386	2790	3117	3481	3889
11,351-11,400	1623	2394	2800	3127	3493	3902
11,401-11,450	1628	2401	2809	3138	3505	3915
11,451-11,500	1633	2409	2819	3148	3517	3928
11,501-11,550	1638	2416	2828	3159	3528	3941
11,551-11,600	1642	2424	2837	3169	3540	3954
11,601-11,650	1649	2431	2847	3180	3552	3968
11,651-11,700	1656	2439	2856	3190	3564	3981
11,701-11,750	1663	2446	2866	3201	3576	3994
11,751-11,800	1670	2454	2875	3211	3587	4007
11,801-11,850	1677	2462	2885	3222	3599	4020
11,851-11,900	1684	2469	2894	3232	3611	4033
11,901-11,950	1691	2477	2903	3243	3622	4046
11,951-12,000	1698	2484	2913	3254	3634	4059
12,001-12,050	1705	2492	2922	3264	3646	4072
12,051-12,100	1712	2499	2932	3275	3658	4086
12,101-12,150	1719	2507	2941	3285	3669	4099
12,151-12,200	1726	2514	2950	3296	3681	4112
12,201-12,250	1733	2522	2960	3306	3693	4125
12,251-12,300	1741	2529	2969	3317	3705	4138
12,301-12,350	1748	2537	2979	3327	3716	4151
12,351-12,400	1755	2544	2988	3338	3728	4164
12,401-12,450	1762	2552	2997	3348	3740	4177
12,451-12,500	1769	2559	3007	3359	3751	4190
12,501-12,550	1776	2567	3016	3369	3763	4204
12,551-12,600	1783	2574	3026	3380	3775	4217
12,601-12,650	1790	2582	3035	3390	3787	4230
12,651-12,700	1797	2590	3044	3401	3798	4243
12,701-12,750	1804	2597	3054	3411	3810	4256
12,751-12,800	1811	2605	3063	3422	3822	4269
12,801-12,850	1818	2612	3073	3432	3834	4282
12,851-12,900	1825	2620	3082	3443	3845	4295
12,901-12,950	1833	2627	3091	3453	3857	4308
12,951-13,000	1840	2635	3101	3464	3869	4321

13,001-13,050	1847	2642	3110	3474	3881	4335
13,051-13,100	1854	2650	3120	3485	3892	4348
13,101-13,150	1861	2657	3129	3495	3904	4361
13,151-13,200	1868	2665	3138	3506	3916	4374
13,201-13,250	1875	2672	3148	3516	3927	4387
13,251-13,300	1882	2680	3157	3527	3939	4400
13,301-13,350	1889	2687	3167	3537	3951	4413
13,351-13,400	1896	2695	3176	3548	3963	4426
13,401-13,450	1903	2703	3185	3558	3974	4439
13,451-13,500	1910	2710	3195	3569	3986	4452
13,501-13,550	1917	2718	3204	3579	3998	4466
13,551-13,600	1925	2725	3214	3590	4010	4479
13,601-13,650	1932	2733	3223	3600	4021	4492
13,651-13,700	1939	2740	3232	3611	4033	4505
13,701-13,750	1945	2748	3241	3621	4044	4517
13,751-13,800	1950	2755	3250	3630	4055	4529
13,801-13,850	1955	2763	3258	3639	4065	4541
13,851-13,900	1960	2770	3266	3649	4076	4552
13,901-13,950	1965	2778	3275	3658	4086	4564
13,951-14,000	1970	2786	3283	3667	4096	4576
14,001-14,050	1975	2793	3291	3677	4107	4587
14,051-14,100	1980	2801	3300	3686	4117	4599
14,101-14,150	1985	2808	3308	3695	4128	4610
14,151-14,200	1990	2816	3316	3704	4138	4622
14,201-14,250	1996	2823	3325	3714	4148	4634
14,251-14,300	2001	2831	3333	3723	4159	4645
14,301-14,350	2006	2839	3341	3732	4169	4657
14,351-14,400	2011	2846	3350	3742	4180	4669
14,401-14,450	2016	2854	3358	3751	4190	4680
14,451-14,500	2021	2861	3366	3760	4200	4692
14,501-14,550	2026	2869	3375	3770	4211	4703
14,551-14,600	2031	2876	3383	3779	4221	4715
14,601-14,650	2036	2884	3392	3788	4232	4727
14,651-14,700	2041	2892	3400	3798	4242	4738
14,701-14,750	2046	2899	3408	3807	4252	4750
14,751-14,800	2051	2907	3417	3816	4263	4761
14,801-14,850	2056	2914	3425	3826	4273	4773
14,851-14,900	2061	2922	3433	3835	4284	4785
14,901-14,950	2066	2929	3442	3844	4294	4796
14,951-15,000	2071	2937	3450	3853	4304	4808
15,001-15,050	2076	2945	3458	3863	4315	4820
15,051-15,100	2081	2952	3467	3872	4325	4831

15,101-15,150	2086	2960	3475	3881	4336	4843
15,151-15,200	2091	2967	3483	3891	4346	4854
15,201-15,250	2097	2975	3492	3900	4356	4866
15,251-15,300	2102	2982	3500	3909	4367	4878
15,301-15,350	2107	2990	3508	3919	4377	4889
15,351-15,400	2112	2998	3517	3928	4388	4901
15,401-15,450	2117	3005	3525	3937	4398	4913
15,451-15,500	2122	3013	3533	3947	4408	4924
15,501-15,550	2127	3020	3542	3956	4419	4936
15,551-15,600	2132	3028	3550	3965	4429	4947
15,601-15,650	2137	3035	3558	3975	4440	4959
15,651-15,700	2142	3043	3567	3984	4450	4971
15,701-15,750	2147	3051	3575	3993	4460	4982
15,751-15,800	2152	3058	3583	4002	4471	4994
15,801-15,850	2157	3066	3592	4012	4481	5005
15,851-15,900	2162	3073	3600	4021	4492	5017
15,901-15,950	2167	3081	3608	4030	4502	5029
15,951-16,000	2172	3088	3617	4040	4512	5040
16,001-16,050	2177	3096	3625	4049	4523	5052
16,051-16,100	2182	3104	3633	4058	4533	5064
16,101-16,150	2187	3111	3642	4068	4544	5075
16,151-16,200	2192	3119	3650	4077	4554	5087
16,201-16,250	2197	3126	3658	4086	4564	5098
16,251-16,300	2203	3134	3667	4096	4575	5110
16,301-16,350	2208	3141	3675	4105	4585	5122
16,351-16,400	2213	3149	3683	4114	4596	5133
16,401-16,450	2218	3157	3692	4124	4606	5145
16,451-16,500	2223	3164	3700	4133	4616	5157
16,501-16,550	2228	3172	3708	4142	4627	5168
16,551-16,600	2233	3179	3717	4151	4637	5180
16,601-16,650	2238	3187	3725	4161	4648	5191
16,651-16,700	2243	3194	3733	4170	4658	5203
16,701-16,750	2248	3202	3742	4179	4668	5215
16,751-16,800	2253	3210	3750	4189	4679	5226
16,801-16,850	2258	3217	3758	4198	4689	5238
16,851-16,900	2263	3225	3767	4207	4700	5249
16,901-16,950	2268	3232	3775	4217	4710	5261
16,951-17,000	2273	3240	3783	4226	4720	5273
17,001-17,050	2278	3247	3792	4235	4731	5284
17,051-17,100	2283	3255	3800	4245	4741	5296
17,101-17,150	2288	3262	3808	4254	4752	5308
17,151-17,200	2293	3270	3817	4263	4762	5319

17,201-17,250	2298	3278	3825	4273	4772	5331
17,251-17,300	2303	3285	3833	4282	4783	5342
17,301-17,350	2309	3293	3842	4291	4793	5354
17,351-17,400	2314	3300	3850	4300	4804	5366
17,401-17,450	2319	3308	3858	4310	4814	5377
17,451-17,500	2324	3315	3867	4319	4824	5389
17,501-17,550	2329	3323	3875	4328	4835	5400
17,551-17,600	2334	3331	3883	4338	4845	5412
17,601-17,650	2339	3338	3892	4347	4856	5424
17,651-17,700	2344	3346	3900	4356	4866	5435
17,701-17,750	2349	3353	3908	4366	4876	5447
17,751-17,800	2354	3361	3917	4375	4887	5459
17,801-17,850	2359	3368	3925	4384	4897	5470
17,851-17,900	2364	3376	3933	4394	4908	5482
17,901-17,950	2369	3384	3942	4403	4918	5493
17,951-18,000	2374	3391	3950	4412	4928	5505
18,001-18,050	2379	3399	3958	4422	4939	5517
18,051-18,100	2384	3406	3967	4431	4949	5528
18,101-18,150	2389	3414	3975	4440	4960	5540
18,151-18,200	2394	3421	3983	4449	4970	5552
18,201-18,250	2399	3429	3992	4459	4980	5563
18,251-18,300	2404	3437	4000	4468	4991	5575
18,301-18,350	2410	3444	4008	4477	5001	5586
18,351-18,400	2415	3452	4017	4487	5012	5598
18,401-18,450	2420	3459	4025	4496	5022	5610
18,451-18,500	2425	3467	4033	4505	5032	5621
18,501-18,550	2430	3474	4042	4515	5043	5633
18,551-18,600	2435	3482	4050	4524	5053	5644
18,601-18,650	2440	3490	4058	4533	5064	5656
18,651-18,700	2445	3497	4067	4543	5074	5668
18,701-18,750	2450	3505	4075	4552	5084	5679
18,751-18,800	2455	3512	4083	4561	5095	5691
18,801-18,850	2460	3520	4092	4571	5105	5703
18,851-18,900	2465	3527	4100	4580	5116	5714
18,901-18,950	2470	3535	4108	4589	5126	5726
18,951-19,000	2475	3543	4117	4598	5136	5737
19,001-19,050	2480	3550	4125	4608	5147	5749
19,051-19,100	2485	3558	4133	4617	5157	5761
19,101-19,150	2490	3565	4142	4626	5168	5772
19,151-19,200	2495	3573	4150	4636	5178	5784
19,201-19,250	2500	3580	4158	4645	5188	5796
19,251-19,300	2505	3588	4167	4654	5199	5807

19,301-19,350	2510	3596	4175	4664	5209	5819
19,351-19,400	2516	3603	4183	4673	5220	5830
19,401-19,450	2521	3611	4192	4682	5230	5842
19,451-19,500	2526	3618	4200	4692	5240	5854
19,501-19,550	2531	3626	4208	4701	5251	5865
19,551-19,600	2536	3633	4217	4710	5261	5877
19,601-19,650	2541	3641	4225	4719	5272	5888
19,651-19,700	2546	3649	4233	4729	5282	5900
19,701-19,750	2551	3656	4242	4738	5292	5912
19,751-19,800	2556	3664	4250	4747	5303	5923
19,801-19,850	2561	3671	4259	4757	5313	5935
19,851-19,900	2566	3679	4267	4766	5324	5947
19,901-19,950	2571	3686	4275	4775	5334	5958
19,951-20,000	2576	3694	4284	4785	5344	5970
20,001-20,050	2581	3702	4292	4794	5355	5981
20,051-20,100	2586	3709	4300	4803	5365	5993
20,101-20,150	2591	3717	4309	4813	5376	6005
20,151-20,200	2596	3724	4317	4822	5386	6016
20,201-20,250	2601	3732	4325	4831	5396	6028
20,251-20,300	2606	3739	4334	4841	5407	6040
20,301-20,350	2611	3747	4342	4850	5417	6051
20,351-20,400	2617	3755	4350	4859	5428	6063
20,401-20,450	2622	3762	4359	4868	5438	6074
20,451-20,500	2627	3770	4367	4878	5449	6086
20,501-20,550	2632	3777	4375	4887	5459	6098
20,551-20,600	2637	3785	4384	4896	5469	6109
20,601-20,650	2642	3792	4392	4906	5480	6121
20,651-20,700	2647	3800	4400	4915	5490	6132
20,701-20,750	2652	3808	4409	4924	5501	6144
20,751-20,800	2657	3815	4417	4934	5511	6156
20,801-20,850	2662	3823	4425	4943	5521	6167
20,851-20,900	2667	3830	4434	4952	5532	6179
20,901-20,950	2672	3838	4442	4962	5542	6191
20,951-21,000	2677	3845	4450	4971	5553	6202
21,001-21,050	2682	3853	4459	4980	5563	6214
21,051-21,100	2687	3861	4467	4990	5573	6225
21,101-21,150	2692	3868	4475	4999	5584	6237
21,151-21,200	2697	3876	4484	5008	5594	6249
21,201-21,250	2702	3883	4492	5017	5605	6260
21,251-21,300	2707	3891	4500	5027	5615	6272
21,301-21,350	2712	3898	4509	5036	5625	6283
21,351-21,400	2717	3906	4517	5045	5636	6295

21,401-21,450	2723	3914	4525	5055	5646	6307
21,451-21,500	2728	3921	4534	5064	5657	6318
21,501-21,550	2733	3929	4542	5073	5667	6330
21,551-21,600	2738	3936	4550	5083	5677	6342
21,601-21,650	2743	3944	4559	5092	5688	6353
21,651-21,700	2748	3951	4567	5101	5698	6365
21,701-21,750	2753	3959	4575	5111	5709	6376
21,751-21,800	2758	3967	4584	5120	5719	6388
21,801-21,850	2763	3974	4592	5129	5729	6400
21,851-21,900	2768	3982	4600	5139	5740	6411
21,901-21,950	2773	3989	4609	5148	5750	6423
21,951-22,000	2778	3997	4617	5157	5761	6435
22,001-22,050	2783	4004	4625	5166	5771	6446
22,051-22,100	2788	4012	4634	5176	5781	6458
22,101-22,150	2793	4020	4642	5185	5792	6469
22,151-22,200	2798	4027	4650	5194	5802	6481
22,201-22,250	2803	4035	4659	5204	5813	6493
22,251-22,300	2808	4042	4667	5213	5823	6504
22,301-22,350	2813	4050	4675	5222	5833	6516
22,351-22,400	2818	4057	4684	5232	5844	6527
22,401-22,450	2823	4065	4692	5241	5854	6539
22,451-22,500	2829	4072	4700	5250	5865	6551
22,501-22,550	2834	4080	4709	5260	5875	6562
22,551-22,600	2839	4088	4717	5269	5885	6574
22,601-22,650	2844	4095	4725	5278	5896	6586
22,651-22,700	2849	4103	4734	5288	5906	6597
22,701-22,750	2854	4110	4742	5297	5917	6609
22,751-22,800	2859	4118	4750	5306	5927	6620
22,801-22,850	2864	4125	4759	5315	5937	6632
22,851-22,900	2869	4133	4767	5325	5948	6644
22,901-22,950	2874	4141	4775	5334	5958	6655
22,951-23,000	2879	4148	4784	5343	5969	6667
23,001-23,050	2884	4156	4792	5353	5979	6679
23,051-23,100	2889	4163	4800	5362	5989	6690
23,101-23,150	2894	4171	4809	5371	6000	6702
23,151-23,200	2899	4178	4817	5381	6010	6713
23,201-23,250	2904	4186	4825	5390	6021	6725
23,251-23,300	2909	4194	4834	5399	6031	6737
23,301-23,350	2914	4201	4842	5409	6041	6748
23,351-23,400	2919	4209	4850	5418	6052	6760
23,401-23,450	2924	4216	4859	5427	6062	6771
23,451-23,500	2930	4224	4867	5437	6073	6783

23,501-23,550	2935	4231	4875	5446	6083	6795
23,551-23,600	2940	4239	4884	5455	6093	6806
23,601-23,650	2945	4247	4892	5464	6104	6818
23,651-23,700	2950	4254	4900	5474	6114	6830
23,701-23,750	2955	4262	4909	5483	6125	6841
23,751-23,800	2960	4269	4917	5492	6135	6853
23,801-23,850	2965	4277	4925	5502	6145	6864
23,851-23,900	2970	4284	4934	5511	6156	6876
23,901-23,950	2975	4292	4942	5520	6166	6888
23,951-24,000	2980	4300	4950	5530	6177	6899
24,001-24,050	2985	4307	4959	5539	6187	6911
24,051-24,100	2990	4315	4967	5548	6197	6923
24,101-24,150	2995	4322	4975	5558	6208	6934
24,151-24,200	3000	4330	4984	5567	6218	6946
24,201-24,250	3005	4337	4992	5576	6229	6957
24,251-24,300	3010	4345	5000	5586	6239	6969
24,301-24,350	3015	4353	5009	5595	6249	6981
24,351-24,400	3020	4360	5017	5604	6260	6992
24,401-24,450	3025	4368	5025	5613	6270	7004
24,451-24,500	3030	4375	5034	5623	6281	7015
24,501-24,550	3036	4383	5042	5632	6291	7027
24,551-24,600	3041	4390	5050	5641	6301	7039
24,601-24,650	3046	4398	5059	5651	6312	7050
24,651-24,700	3051	4406	5067	5660	6322	7062
24,701-24,750	3056	4413	5075	5669	6333	7074
24,751-24,800	3061	4421	5084	5679	6343	7085
24,801-24,850	3066	4428	5092	5688	6353	7097
24,851-24,900	3071	4436	5100	5697	6364	7108
24,901-24,950	3076	4443	5109	5707	6374	7120
24,951-25,000	3081	4451	5117	5716	6385	7132
25,001-25,050	3086	4459	5126	5725	6395	7143
25,051-25,100	3091	4466	5134	5734	6405	7155
25,101-25,150	3096	4474	5142	5744	6416	7166
25,151-25,200	3101	4481	5151	5753	6426	7178
25,201-25,250	3106	4489	5159	5762	6437	7190
25,251-25,300	3111	4496	5167	5772	6447	7201
25,301-25,350	3116	4504	5176	5781	6457	7213
25,351-25,400	3121	4512	5184	5790	6468	7225
25,401-25,450	3126	4519	5192	5800	6478	7236
25,451-25,500	3131	4527	5201	5809	6489	7248
25,501-25,550	3136	4534	5209	5818	6499	7259
25,551-25,600	3142	4542	5217	5828	6509	7271

25,601-25,650	3147	4549	5226	5837	6520	7283
25,651-25,700	3152	4557	5234	5846	6530	7294
25,701-25,750	3157	4565	5242	5856	6541	7306
25,751-25,800	3162	4572	5251	5865	6551	7318
25,801-25,850	3167	4580	5259	5874	6561	7329
25,851-25,900	3172	4587	5267	5883	6572	7341
25,901-25,950	3177	4595	5276	5893	6582	7352
25,951-26,000	3182	4602	5284	5902	6593	7364
26,001-26,050	3187	4610	5292	5911	6603	7376
26,051-26,100	3192	4618	5301	5921	6613	7387
26,101-26,150	3197	4625	5309	5930	6624	7399
26,151-26,200	3202	4633	5317	5939	6634	7410
26,201-26,250	3207	4640	5326	5949	6645	7422
26,251-26,300	3212	4648	5334	5958	6655	7434
26,301-26,350	3217	4655	5342	5967	6665	7445
26,351-26,400	3222	4663	5351	5977	6676	7457
26,401-26,450	3227	4671	5359	5986	6686	7469
26,451-26,500	3232	4678	5367	5995	6697	7480
26,501-26,550	3237	4686	5376	6005	6707	7492
26,551-26,600	3243	4693	5384	6014	6717	7503
26,601-26,650	3248	4701	5392	6023	6728	7515
26,651-26,700	3253	4708	5401	6032	6738	7527
26,701-26,750	3258	4716	5409	6042	6749	7538
26,751-26,800	3263	4724	5417	6051	6759	7550
26,801-26,850	3268	4731	5426	6061	6770	7562
26,851-26,900	3274	4740	5436	6072	6782	7576
26,901-26,950	3280	4749	5446	6083	6795	7590
26,951-27,000	3286	4758	5456	6095	6808	7604
27,001-27,050	3292	4767	5466	6106	6820	7618
27,051-27,100	3298	4775	5476	6117	6833	7632
27,101-27,150	3304	4784	5487	6128	6846	7646
27,151-27,200	3311	4793	5497	6140	6858	7661
27,201-27,250	3317	4802	5507	6151	6871	7675
27,251-27,300	3323	4811	5517	6162	6883	7689
27,301-27,350	3329	4819	5527	6174	6896	7703
27,351-27,400	3335	4828	5537	6185	6909	7717
27,401-27,450	3341	4837	5547	6196	6921	7731
27,451-27,500	3347	4846	5557	6207	6934	7745
27,501-27,550	3353	4855	5567	6219	6946	7759
27,551-27,600	3359	4863	5577	6230	6959	7773
27,601-27,650	3365	4872	5588	6241	6972	7787
27,651-27,700	3371	4881	5598	6253	6984	7801

27,701-27,750	3377	4890	5608	6264	6997	7815
27,751-27,800	3384	4899	5618	6275	7009	7829
27,801-27,850	3390	4908	5628	6286	7022	7844
27,851-27,900	3396	4916	5638	6298	7035	7858
27,901-27,950	3402	4925	5648	6309	7047	7872
27,951-28,000	3408	4934	5658	6320	7060	7886
28,001-28,050	3414	4943	5668	6332	7072	7900
28,051-28,100	3420	4952	5679	6343	7085	7914
28,101-28,150	3426	4960	5689	6354	7098	7928
28,151-28,200	3432	4969	5699	6365	7110	7942
28,201-28,250	3438	4978	5709	6377	7123	7956
28,251-28,300	3444	4987	5719	6388	7135	7970
28,301-28,350	3451	4996	5729	6399	7148	7984
28,351-28,400	3457	5004	5739	6411	7161	7998
28,401-28,450	3463	5013	5749	6422	7173	8013
28,451-28,500	3469	5022	5759	6433	7186	8027
28,501-28,550	3475	5031	5769	6444	7198	8041
28,551-28,600	3481	5040	5780	6456	7211	8055
28,601-28,650	3487	5048	5790	6467	7224	8069
28,651-28,700	3493	5057	5800	6478	7236	8083
28,701-28,750	3499	5066	5810	6490	7249	8097
28,751-28,800	3505	5075	5820	6501	7262	8111
28,801-28,850	3511	5084	5830	6512	7274	8125
28,851-28,900	3517	5093	5840	6523	7287	8139
28,901-28,950	3524	5101	5850	6535	7299	8153
28,951-29,000	3530	5110	5860	6546	7312	8167
29,001-29,050	3536	5119	5871	6557	7325	8182
29,051-29,100	3542	5128	5881	6569	7337	8196
29,101-29,150	3548	5137	5891	6580	7350	8210
29,151-29,200	3554	5145	5901	6591	7362	8224
29,201-29,250	3560	5154	5911	6602	7375	8238
29,251-29,300	3566	5163	5921	6614	7388	8252
29,301-29,350	3572	5172	5931	6625	7400	8266
29,351-29,400	3578	5181	5941	6636	7413	8280
29,401-29,450	3584	5189	5951	6648	7425	8294
29,451-29,500	3590	5198	5961	6659	7438	8308
29,501-29,550	3597	5207	5972	6670	7451	8322
29,551-29,600	3603	5216	5982	6681	7463	8336
29,601-29,650	3609	5225	5992	6693	7476	8351
29,651-29,700	3615	5234	6002	6704	7488	8365
29,701-29,750	3621	5242	6012	6715	7501	8379
29,751-29,800	3627	5251	6022	6727	7514	8393

29,801-29,850	3633	5260	6032	6738	7526	8407
29,851-29,900	3639	5269	6042	6749	7539	8421
29,901-29,950	3645	5278	6052	6761	7551	8435
29,951-30,000	3651	5286	6062	6772	7564	8449

The share of the custodial parent is presumed to be spent directly for the benefit of the child.

**Source:** SL 1989, ch 220, § 2; SL 1997, ch 154, § 1; SL 2001, ch 133, § 1; SL 2009, ch 130, § 1; SL 2017, ch 111, § 1; SL 2022, ch 80, § 1.

#### 25-7-6.27. Shared parenting child support cross credit.

If a custody order by the court, contains a detailed shared parenting plan which provides that the child will reside no less than one hundred eighty nights per calendar year in each parent's home, and that the parents will share the duties and responsibilities of parenting the child and the expenses of the child in proportion to their incomes, the court may, if deemed appropriate under the circumstances, grant a cross credit on the amount of the child support obligation based on the number of nights the child resides with each parent. The shared parenting child support cross credit shall be calculated as follows:

- (1) Multiply the parents' combined child support obligation under the schedule by 1.5 to establish the parents' combined shared parenting child support obligation;
- (2) Multiply the combined shared parenting child support obligation by each parent's percentage share of the parents' combined net incomes to establish each parent's shared parenting child support obligation;
- (3) Multiply each parent's shared parenting child support obligation by the percentage of nights the child resides with each parent based on a three hundred sixty-five day calendar year to establish each parent's prorated shared parenting child support obligation;
- (4) Offset the parents' prorated shared parenting child support obligations; and
- (5) The parent with the larger prorated shared parenting child support obligation shall pay the difference between these amounts.

In deciding whether a shared parenting child support cross credit is appropriate, the court shall consider whether it would have a substantial negative effect on the child's standard of living.

It is presumed that the parenting time is exercised. If the parenting time exercised substantially deviates from the parenting time ordered, either party may petition the court for a modification of the support order without showing any other change in circumstances.

**Source:** SL 2009, ch 130, § 10; SL 2015, ch 147, § 1.

# Report of the

# 2016 South Dakota Commission on Child Support



# Presented to Governor Dennis Daugaard

December 2016

# Report of the

# **South Dakota Commission on Child Support**

This report is respectfully submitted to
Governor Dennis Daugaard by the
South Dakota Commission on Child Support
Established by Executive Order No. 2016-01

# Chair

Judge Joni Cutler

#### Members

Representative Brian Gosch
Ms. Jennifer Hanna
Referee Thomas Lee
Senator Arthur Rusch
Ms. Gail Stoltenburg
Mr. Daniel Todd
Mr. Cory Wipf

# MEMBERS OF THE SOUTH DAKOTA COMMISSION ON CHILD SUPPORT

**Judge Joni Cutler**, Sioux Falls, is a Circuit Court Judge for the Second Judicial Circuit representing the Judiciary.

**Representative Brian Gosch**, Rapid City, represents the 32<sup>nd</sup> District, which includes Pennington County. He is the House Majority Leader, and has served as a member of the Legislative Procedure and State Affairs Committees.

Ms. Jennifer Hanna, Pierre, is a custodial parent.

**Referee Thomas Lee**, Pierre, is an attorney in private practice and also serves as a child support referee on behalf of the Unified Judicial System.

**Senator Arthur Rusch**, Vermillion, represents the 17<sup>th</sup> District, which includes Clay and Turner County. He is a member of the Health and Human Services Committee, Judiciary Committee, and Agriculture and Natural Resources Committee. He is also a retired Circuit Judge for the First Judicial Circuit with eighteen years of service.

**Ms. Gail Stoltenburg**, Pierre, is the Division Director for the Division of Child Support within the Department of Social Services.

**Mr. Daniel Todd**, Pierre, is an attorney in private practice.

Mr. Cory Wipf, Aberdeen, is a noncustodial parent.

#### STATE OF SOUTH DAKOTA OFFICE OF THE GOVERNOR EXECUTIVE ORDER 2016-01

WHEREAS, Section 667 of Title IV-D of the Social Security Act and Section 25-7-6.12 of the South Dakota Codified Laws requires the state to establish a State Commission on Child Support every four years to review the child support guidelines; and,

WHEREAS, Section 1-32-4.1 of the South Dakota Codified Laws provides that the Governor "May create such advisory councils, committees, boards or commissions as may be deemed necessary and in the best interest of the state of South Dakota"; and,

WHEREAS, It is deemed necessary and in the best interest of the state of South Dakota to establish a commission to conduct a review of the provisions of Chapter 25-7 of the South Dakota Codified Laws:

IT IS, THEREFORE, BY EXECUTIVE ORDER, Directed that the South Dakota Commission on Child Support is established and authorized to function in compliance with the following sections of this order.

#### General Provisions

Section 1. The name of the commission is the South Dakota Commission on Child Support.

Section 2. The Governor of South Dakota shall appoint as many mombers as he deems necessary to fulfill the goals of the commission. Members shall serve at the pleasure of the Governor. The commission membership shall include, but not be limited to, one or more representatives of the following:

- 1) noncustodial parent:
- 4) the South Dakota Department of Social Services; and
- 2) custodial parent;
- a member in good standing of the South Dakota State Bar.
- 3) the South Dakota Judiciary;

Section 3. The Speaker of the South Dakota House of Representatives and the President Pro Tempore of the Senate shall meet and designate a member from each chamber of the South Dakota State Legislature to participate on the commission.

Section 4. The South Dakota Commission on Child Support shall conduct a review of the support obligation laws as required by Section 25-7-6.12 of the South Dakota Codified Laws and related sections of South Dakota Codified Laws and submit a report to the Governor and the legislature no later than December 31, 2016.

Section 5. The South Dakota Commission on Child Support shall be administered by the Department of Social Services. Expenses of the members to attend meetings shall be paid by the Department of Social Services.

Section 6. The South Dakota Commission on Child Support shall dissolve and cease to exist upon completion of its report to the Governor and the legislature.

Section 7. This Executive Order shall expire and is hereby rescinded upon submission of the report but no later than December 31, 2016.

Dated in Pierre, South Dakota, this 25th day of Jebrury , 2016.

Dennis Daugaard, Govern

/

Shantel Krebs, Secretary of State

#### INTRODUCTION AND BACKGROUND

This report is issued in response to Governor Dennis Daugaard's Executive Order 2016-01.

#### HISTORY

The South Dakota child support guidelines were originally based on the findings and recommendations of the first Commission of Child Support, which was established in 1985. Among those recommendations approved by the 1986 Legislature, SDCL 25-7-6.12 requires that a commission on child support review the guidelines every four years. Seven commissions have convened since that time. The Legislature has approved the findings and recommendations of the 1988, 1996, 2000, 2004, 2008, and 2012 Commissions. The federal government currently requires states to review their guidelines at least once every four years.<sup>1</sup>

#### 2016 COMMISSION ON CHILD SUPPORT

The 2016 Commission consists of several members that bring a variety of perspectives and personal and professional experiences to the Commission. The composition of the Commission fulfills the Executive Order requirement for two State legislators, one member from the House of Representatives and one member from the Senate; a noncustodial parent; a custodial parent; a representative of the South Dakota Judiciary; a representative of the South Dakota Department of Social Services; and a member in good standing of the South Dakota State Bar. The Commission is staffed and administered by the Department of Social Service (DSS) Division of Child Support (DCS).

#### **PROCEEDINGS**

The Commission first met on June 29 via teleconference to introduce Commission members and supporting staff, develop a shared understanding of their responsibilities and plan their schedule. The Commission planned and held public hearings on three separate occasions: July 20 in Pierre, August 24 in Sioux Falls, and September 21 in Rapid City. The first public hearing was also linked by video-conferencing to a public hearing location in Aberdeen. The hearing locations and times were publicized by paid advertisements in local newspapers, public service announcements on the radio, the DSS website, and the State Bar Association newsletter. Oral testimony was taken at the public hearings. The Commission also considered written testimony submitted from other sources.

In addition to the information gathered through oral testimonies and written comments, the Commission received and reviewed other information. Commissioner member, Mr. Tom Lee, who is a child support referee, reported on issues raised by the child support referees. DCS extracted and summarized guidelines deviation data from its automated system and presented it to the Commission. The summary identified the number of child support orders established since the last guidelines review in which deviations from the guidelines were noted and the reasons for those deviations. The Commission also received several briefing reports relevant to the updating of the child support schedule,

<sup>&</sup>lt;sup>1</sup>Title 45, Public Welfare, CFR 302.56.

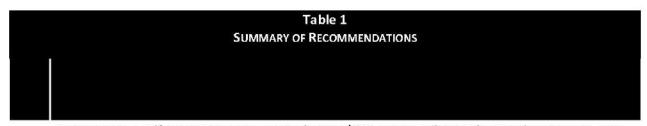
including current economic data on the cost of raising children. The briefings were developed by Dr. Jane Venohr, an economist and nationally-recognized expert on child support guidelines, who was retained by DCS to provide technical assistance. DSS also made its Legal Counsel available to the Commission to provide legal expertise about the child support services provided through its division. Similarly, the Director of Policy and Legal Services of the Unified Judicial System (UJS) attended each of the Commission's meetings to lend her expertise on the child support process from the court perspective.

In addition, the Commission met via teleconference on November 9. All Commission meetings were open and in compliance with State open-meeting requirements.

The Commission dissolves and ceases to exist upon completion of its report to the Governor and legislature.

#### RECOMMENDATIONS

Table 1 summarizes the Commission's recommendations. Appendix A contains a mark-up of the recommended changes to statute.



- Incorporate a self-support reserve equivalent to \$871 per month into the very low-income area of the schedule in SDCL 25-7-6.2 and provide a minimum order of \$79 per month.
- 3. Amend SDCL 25-7-6.22 to provide a clear definition of full-time employment.

#### DETAILED ANALYSIS OF RECOMMENDATIONS

RECOMMENDATION 1: AMEND THE CHILD 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 THE SCHEDULE TO A MONTHLY NET INCOME OF \$30,000.

#### Issue

Federal regulation requires states review economic data on the cost of child rearing as part of a state's guidelines review; and, if appropriate, update the schedule.

The existing child support schedule is based on economic data available in 2008. More current economic data is available to update the schedule to 2016 price levels. Using the updated data would

also permit the highest amount of the schedule to be extended from \$20,000 to \$30,000 monthly net income.

#### Discussion

A major issue faced by the Commission was whether the support obligation schedule should be updated to more recent economic data.

The schedule is used for calculation of child support obligations and reflects child-rearing expenditures for intact families for a range of parents' combined net incomes in relationship to the number of children. Children of disrupted families, regardless of whether their parents are 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.

The support obligation schedule in SDCL 25-7-6.2 was last updated in 2008. The 2012 Commission did not recommend a change to the schedule as economic data available in 2012 showed the economic impact of the 2008-09 economic recessions was lingering, and there was not clear evidence that the economy was improving or prices and expenditures would stabilize or increase soon or before the next guidelines review.

Acknowledging that the economy has since improved, the 2016 Commission reviewed current economic data on the cost of raising children and recommends updating the schedule to the current price levels. The existing schedule is based on an economic study conducted by Professor David Betson using the "Rothbarth" methodology to separate the child's share of expenditures from total expenditures in expenditure data collected from families surveyed from 1998 to 2004.<sup>2</sup> The Commission considered an updated Betson-Rothbarth (BR) study using expenditures data collected from families surveyed in 2004 to 2009, which is the most current BR study available.<sup>3</sup> The updated BR study contains methodological differences from the study underlying the current schedule. Those methodological differences produced anomalous differences between the existing schedule and the updated BR study. As a result, the Commission recommends staying with the current BR study and updating to 2016 price levels.

Price levels have increased since the existing schedule was developed. Some of that increase is offset by increases in income, so the actual increase to the schedule amounts is generally less than a two-percentage point increase in the percentage of income assigned to child support. Increasing the schedule now would likely prevent the need for larger increases in the future when price levels increase.

The Commission heard public testimony, including testimony from private attorneys and child support referees, that the schedule needs to be extended to higher incomes. They believe extending the

<sup>&</sup>lt;sup>2</sup> 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 <a href="http://www.oregonchildsupport.gov/laws/guidelines-archive/docs/psi-guidelines-review-2006.pdf">http://www.oregonchildsupport.gov/laws/guidelines-archive/docs/psi-guidelines-review-2006.pdf</a>.

<sup>&</sup>lt;sup>3</sup> Betson, David M. (2010). "Appendix A: Parental Expenditures on Children." in Judicial Council of California, *Review of Statewide Uniform Child Support Guideline*. San Francisco, California. Available at <a href="http://www.courts.ca.gov/documents/review-sucsg-0611.pdf">http://www.courts.ca.gov/documents/review-sucsg-0611.pdf</a>.

schedule to higher incomes would improve the consistency of the support award determinations in cases where the parents' combined income exceeds \$20,000 per month, as well as provide more predictable support award amounts for parents with combined incomes above \$20,000 per month. In short, extending the schedule to higher incomes would improve the consistency and predictability of support awards.

# Recommendation Summary

Retain the existing study as the basis of the schedule and update to 2016 price levels to reflect current costs of raising children in South Dakota. Additionally, the Commission recommends extending the schedule in SDCL 25-7-6.2 to net incomes of \$30,000 per month as shown in Appendix A.

RECOMMENDATION 2: INCORPORATE A SELF-SUPPORT RESERVE EQUIVALENT TO \$871 PER MONTH INTO THE VERY LOW-INCOME AREA OF THE SCHEDULE IN SDCL 25-7-6.2 AND PROVIDE A MINIMUM ORDER OF \$79 PER MONTH.

#### Issues

There are several issues with the low-income area of the schedule in SDCL 25-7-6.2, particularly the emboldened area, which is intended to provide a low-income adjustment for obligated parents with poverty or near poverty income. In general, the current adjustment yields amounts above what an obligated parent can pay while retaining sufficient income to live at least at a subsistence level. In other words, the current adjustment can further impoverish obligated parents with poverty incomes.

#### Discussion

The current definition of poverty— the 2016 federal poverty level (FPL) for one person— is \$990 per month. The existing schedule in SDCL 25-7-6.2 provides the order amount for an obligated parent with an income of \$990 per month is \$216 for one child, \$279 for two children, \$312 for three children, \$335 for four children, \$357 for five children, and \$379 or six children because these are the amounts for any income within the range of \$0 to \$1,100. For an obligated parent with a net income of \$1,100 per month, the maximum amount of support that would leave him or her with sufficient income to at least live at the 2016 FPL (i.e., \$990 per month) is \$110 per month. For incomes below \$1,100, the amount would be less.

The Commission heard comments from referees and others that these minimum amounts were too high and the low-income adjustment, and the emboldened area of the schedule above the \$0 to \$1,100 income range were also too high. Specifically, the amounts are beyond what very low-income parents (i.e. disabled) can reasonably pay. The sentiment is consistent with national trends emphasizing the importance of setting appropriate award amounts that a low-income parent can reasonably pay based on his or her actual income.<sup>4</sup> Most states provide a self-support reserve (SSR) in their guidelines that

<sup>&</sup>lt;sup>4</sup> The trends included proposed evidence-based federal rule changes that would require states to consider the subsistence needs of the obligated parent in their guidelines and make other evidence-based changed aimed at improving the treatment of low-income parents. The rules are available from the U.S. Department of Health and Human Services. (Nov. 17, 2014). "Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs." Federal Register, Vol. 79, No. 221, p. 68580.

relates to the FPL for one person. Some low-income states set it lower than the FPL, while other high income states set it higher to reflect that state's above average cost of living. At one time, the South Dakota schedule incorporated a SSR in its schedule, but the SSR was engulfed by other changes in 2008 to accommodate increases in the federal minimum wage that were legislated in 2007.

The Commission believes it is important to incorporate an SSR into the schedule and break down the existing income interval of \$0 to \$1,100 into several income intervals that also include a SSR. The Commission proposes a SSR adjusted for South Dakota's income, specifically a SSR of \$871 per month, which is equivalent to South Dakota's price parity (88.0%)<sup>5</sup> multiplied by the current FPL (\$990). The SSR is incorporated into the proposed schedule by taking the lower of the two amounts: the schedule amount adjusted to 2016 price levels, and the difference between the income and the proposed SSR.<sup>6</sup> The Commission also proposes changes to the emboldened area that comport with the proposed SSR; that is, the areas adjusted for the proposed SSR are emboldened.

The Commission recognizes the need for a minimum order when income is below or near the self-support reserve. For example, at an income of \$850 per month, the obligated parent would not even have sufficient income to meet the proposed self-support reserve of \$871 per month. A minimum order, even a token amount, establishes a precedent of financial responsibility to the children and when paid and distributed to the family, makes a difference in the financial lives of children. The most common minimum order amount used by states is \$50 per month. This has been the common amount for decades, but recently states are adopting or considering higher amounts. For simplicity and consistency, the Commission favored a minimum order of \$79, and applying it to incomes of \$0 to \$950 per month. The \$79 is the difference between \$950, which is the top of the proposed income range and \$871 per month, the proposed self-support reserve.

#### Recommendation Summary

Adopt the changes in the low-income area of the schedule in SDCL 25-7-6.2 as shown in Appendix A and set a minimum order amount.

Retrieved from <a href="http://www.acf.hhs.gov/programs/css/resource/nprm-flexibility-efficiency-and-modernization-in-child-support-enforcement-programs">http://www.acf.hhs.gov/programs/css/resource/nprm-flexibility-efficiency-and-modernization-in-child-support-enforcement-programs</a>

<sup>5</sup> The U.S. Bureau of Economic Analysis (BEA) developed and calculates the price parity to measure the differences in the price levels of goods and services across states for a given year. Price parities are expressed as a percentage of the overall national price level for each year, which is equal to 100%. If a state has a price parity of less than 100%, its price levels are below average; if a state has a price parity of more than 100%, its price levels are above average. The most recent data is from 2014. It shows South Dakota's price parity is 88.0%. [U.S. Bureau of Economic Analysis, *Real Personal Income for States and Metropolitan Areas*, 2014. <a href="http://www.bea.gov/newsreleases/regional/rpp/rpp\_newsrelease.htm">http://www.bea.gov/newsreleases/regional/rpp/rpp\_newsrelease.htm</a> ]

<sup>6</sup>For example, at a net income of \$1,100 per month, the average amount expended on one child in 2016 dollars is \$282 per month while the difference between \$1,100 and a SSR of \$871 is \$229, so \$229 is the amount provided in the proposed schedule changes.

RECOMMENDATION 3: AMEND SDCL 25-7-6.22 TO PROVIDE A CLEAR DEFINITION OF FULL TIME EMPLOYMENT.

#### Issues

The underlying issue is there is a not clear definition of full time employment in the guidelines, although the guidelines mention "full time" several times. Not all referees and judges consistently define full time. Some assume full time means 40 hours per week, 52 weeks per year. Others are less concerned with hours, and more concerned with the primary occupation. Exacerbating the issue is that a growing number of occupations do not offer a 40-hour workweek, 52 weeks per year. In turn, this has indirect consequences for guidelines provisions pertaining to income imputation and income from second jobs that mention "full-time" employment, but do not define it. SDCL 25-7-6.22 provides a rebuttable presumption that second job income is not to be considered in establishing support obligation if a parent is employed *full-time* at a rate of pay that equals or exceeds the state's minimum wage. SDCL 25-7-6.4 provides that the parent's child support obligation shall be computed at a rate not less than *full-time* employment at the state minimum wage.

#### Discussion

The Commission recognizes and heard comments that there are several occupations that do not offer a 40-hour workweek, 52 weeks per year; and, this indirectly affects the guidelines calculation. The definition of full-time work by the U.S. Bureau of Labor Statistics is 35 hours per week. The Commission also identified several examples: retailers often schedule workers for less than 40 hours per week and school teachers do not usually work 40 hours per week, 52 weeks per year. The former example is relevant to the presumption that a parent, at a minimum is capable of full-time employment at minimum wage. It is common for service sector employers to offer less than 40-hour work weeks. The latter example of the school teacher is relevant to whether a school teacher's income from summer employment should be included as income in the calculation of support, as at least one referee did, because the teacher's primary occupation did not require 40 hours per week for 52 weeks.

The Commission believes it is important to establish a quantitative threshold that is realistic, reflective of typical employment hours, and could easily be applied. To this end, the Commission settled on relating the recommended threshold to a 35-hour workweek, 52 hours per year. This amounts to 1,820 hours per year.

#### Recommendation Summary

Amend SDCL 25-7-6.22 to read "if a parent has annual primary employment earnings equaling or exceeding the current state minimum hourly wage multiplied by 1,820 hours, it is presumed that a parent's second job income is not to be considered in establishing a support obligation. This presumption may be rebutted by evidence that the income source was available to pay expenses related to the child when the parent initially became obligated for the support of the child pursuant to § 25-7-6.1

# OTHER MATTERS ADDRESSED BY COMMISSION

Several other issues where identified through the public hearings and written comments submitted to the Commission, but did not result in recommendations for a variety of reasons. One reason for no recommendation was the issue was not identified as a common concern; instead, it was often unique to the individual submitting the comment. Other reasons include the issue being outside the scope of the executive order or lack of public awareness. In response to some of the lack of awareness issues, DCS may be able to address some of them through its website because DCS is continuously improving its website to better inform parents of child support processes.

The Commission discussed pending proposed federal rule changes pertaining to state child support guidelines review requirements; however, no finalized rule changes were released prior to the Commission's November 9<sup>th</sup> meeting. The Federal Office of Child Support Enforcement (OCSE) had revised the 2014 proposed federal rules after receiving public comment, but cannot release information about how the finalized rules would be similar or different from the proposed rules. Without knowing what the finalized rules will be, it makes no sense for the Commission to take further actions on them. The Commission, however, recognizes the proposed rule changes, and is not making any recommendations that would be inconsistent with them. In fact, the Commission's self-support reserve recommendation is likely to make the South Dakota guidelines compliant or more compliant with the proposed federal rule change requiring that a state's guidelines take in consideration the subsistence needs of the obligated parent.



# Report of th

# 2021 South Dakota Commission on Child Support

This report is respectfully submitted to
Governor Kristi Noem and the 2022 Legislature by the
South Dakota Commission on Child Support
Established by Executive Order No. 2020-3 and
Extended by Executive Order No. 2020-29 and No. 2021-16

#### Chair

Justice Scott Myren

# **Members**

Senator Arthur Rusch
Representative Mike Steven
Ms. Lindsey Riter-Rapp
Ms. Terri Willia
Ms. Virgena Wieseler
Ms. Amber Kinney
Mr. Robert Simmermon

# MEMBERS OF THE SOUTH DAKOTA COMMISSION ON CHILD SUPPORT

**Justice Scott Myren, Chair,** Pierre, became the 54<sup>th</sup> Justice of the South Dakota Supreme Court in January 2021. Before joining the Supreme Court, Justice Myren served 22 years as a trial judge.

**Senator Arthur Rusch**, Vermillion, represents the 17<sup>th</sup> District, which includes Clay and Turner counties. Senator Rusch serves as chair to the Senat Judiciary Committee and is a member of the Senate Health and Human Services Committee. His prior experience includes practicing law and serving as a circuit judge for the First Judicial Circuit.

**Representative Mike Stevens**, Yankton, represents the 1 <sup>th</sup> District, which encompasses Yankton County. Representative Stevens serves as Vice-Chair to the House Judiciary Committee and is a member of the House Education Committee. He is an attorney.

**Ms. Lindsey Riter-Rapp**, Pierre, is the representative of the South Dakota State Bar. Ms. Riter-Rapp joined the Riter Rogers Law firm in 2008. Her prior experience includes working as an attorney at the Public Defender's Office in Rapid City and serving as a law clerk for the Seventh Judicial Ci

**Ms. Terri Williams**, Rapid City, is a child support ref Ms. Williams has practiced law in South Dakota for more than 25 years. She specializes in family and criminal law

**Ms. Virgena Wieseler**, Pierre, is the Chief of Children and Family Services for the South Dakota Department of Social Services (DSS). As Ch Ms. Wieseler oversees the Division of Child Support, Child Protection Services and Economic Assistance. She is the DSS representative on the Commissi

Ms. Amber Kinney, Sturgis, is the custodial parent representative.

Mr. Robert Simmermon, Sioux Falls, is the noncustodial parent representative.

# STATE OF SOUTH DAKOTA OFFICE OF THE GOVERNOR EXECUTIVE ORDER 2020-03

Whereas, Section 667 of Title IV-D of the Social Security Act and South Dakota Codified Law 25-7-6.12 requires the State to establish a state Commission on Child Support every four years to review the child support guidelines; and,

Whereas, South Dekota Codified Law 1-32-4.1 provides that the governor "may create such advisory councils, committees, boards, or commissions as may be deemed necessary and in the best interest of the State of South Dakota"; and,

Whereas, It is deemed necessary and in the best interest of the State of South Dakota to establish a commission to conduct a review of the provisions of Chapter 25-7 of the South Dakota Codified Laws;

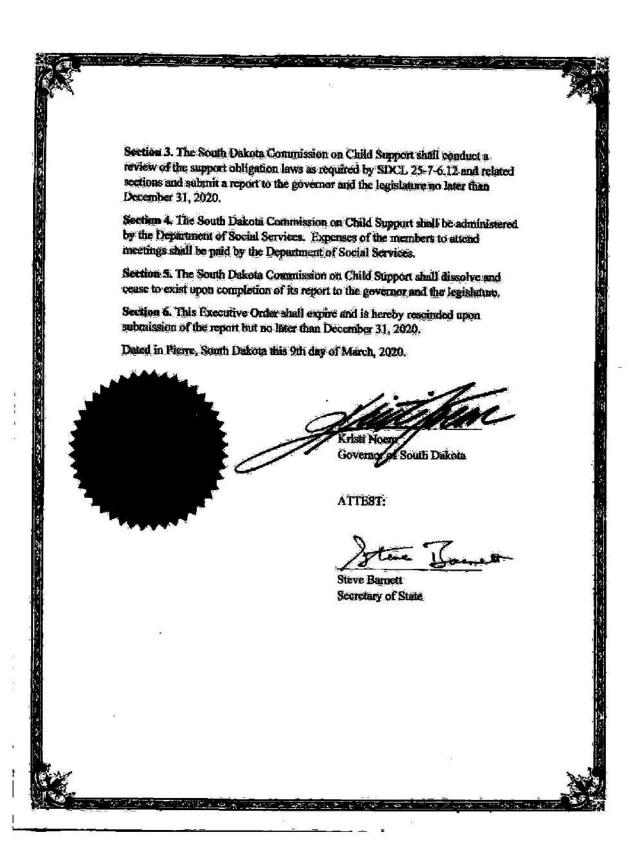
It Is, Therefore By Executive Order, Directed that the South Dakota Commission on Child Support is established and authorized to function in compliance with the following sections of this Order.

#### General Provisions

Section 1. The name of the commission is the South Dakota Commission on Child Support.

Section 2. The Governor of South Dakots shall appoint as many members as she deems necessary to fulfill the goals of the Commission. Members shall serve at the pleasure of the governor. The Commission membership shall include; but not be limited to, one or more representatives of the following:

- 1) noncostedial perent;
- 2) custodial parent;
- 3) the South Daketa Judiciary:
- the South Dakota Department of Social Services;
- 5) a member in good standing of the South Dekota State Bar:
- 6) a member of the South Dakota Senate: and
- 7) a member of the South Dakots House of Representatives.



#### STATE OF SOUTH DAKOTA OFFICE OF THE GOVERNOR EXECUTIVE ORDER 2020-29

Whereas, Section 667 of Title IV-D of the Social Security Act and South Dakota. Codified Law 25-7-6.12 requires the State to establish a state Commission on Child Support every four years to review the child support guidelines;

Whereas, South Dakota Codified Law 1-32-4.1 provides that the governor "may create such advisory councils, committees, boards, or commissions as may be deemed necessary and in the best interest of the State of South Dakota";

Whereas, it is deemed necessary and in the best interest of the State of South Dakota to establish a commission to conduct a review of the provisions of Chapter 25-7 of the South Dakota Codified Laws:

Whereas, On March 9, 2020, Executive Order 2020-03 was executed establishing the commission and ordering certain deadlines for review and reporting on child support guidelines; and,

Whereas, Due to delays and obstacles caused by the coronavirus pandemic and the spread of COVID-19, it is necessary to extend those deadlines by one year.

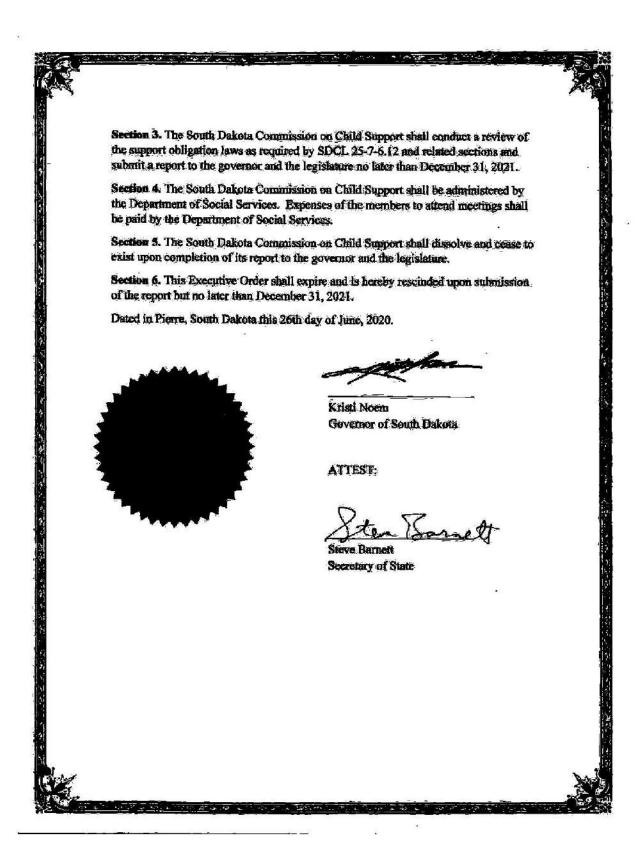
It Is, Therefore By Executive Order, Directed that the South Dakota Commission on Child Support is established and authorized to function in compliance with the following sections of this Order.

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- 2) custodial parent;
- 3) the South Dakota Judiciary;
- the South Dakota Department of Social Services;
- 6) a member of the South Dakota Senate: and
- a member of the South Dakota House of Representatives.
- 5) a member in good standing of the South Dakota State Bar;



#### STATE OF SOUTH DAKOTA OFFICE OF THE GOVERNOR EXECUTIVE ORDER 2021-16

Whereas, Past executive orders, by the virtue of their own terms may fail to expire on a date certain and remain in effect and in full force until modified, amended, rescinded, or superseded by the Governor; and,

Whereas, Past executive orders may no longer be relevant or applicable for the organization or operation of state government; and,

Whereas, Past executive orders have established task forces, committees, councils, commissions, or other groups or entities that are no longer active; and,

Whereas, It is in the best interest of the State and its citizens to review and modify, update, or eliminate unnecessary or outdated government regulations:

NOW, THEREFORE, I, KRISTI NOEM, Governor of the State of South Dakota, by the authority vested in me by the Constitution and the Laws of the State, do hereby Order and Direct the following:

- That Executive Order 2012-01 be rescinded as no longer applicable to the Department of Corrections as the agency no longer runs a state juvenile correctional facility to which the Performance Based Standards apply.
- That references to the Department of Agriculture now refer to Department of Agriculture and Natural Resources and that Wildland Fire be recognized as a division within the Department of Public Safety in Executive Order 2018-07.
- That references to the Department of Agriculture now refer to Department of Agriculture and Natural Resources in Executive Order 2019-29.
- That Executive Order 2020-29 remains in effect until March 31, 2022 and the Commission not dissolve or cease until March 31, 2022.
- That the following executive orders be rescinded in their entirety as the
  emergencies which those Orders declared no longer exist and have resolved;
  2013-05; 2013-08; 2013-13; 2014-05; 2014-08; 2015-08; 2016-10; 2018-06;
  2019-04; 2019-05; 2019-07; 2019-13; 2019-19; 2019-23; 2019-28; and 2020-27.

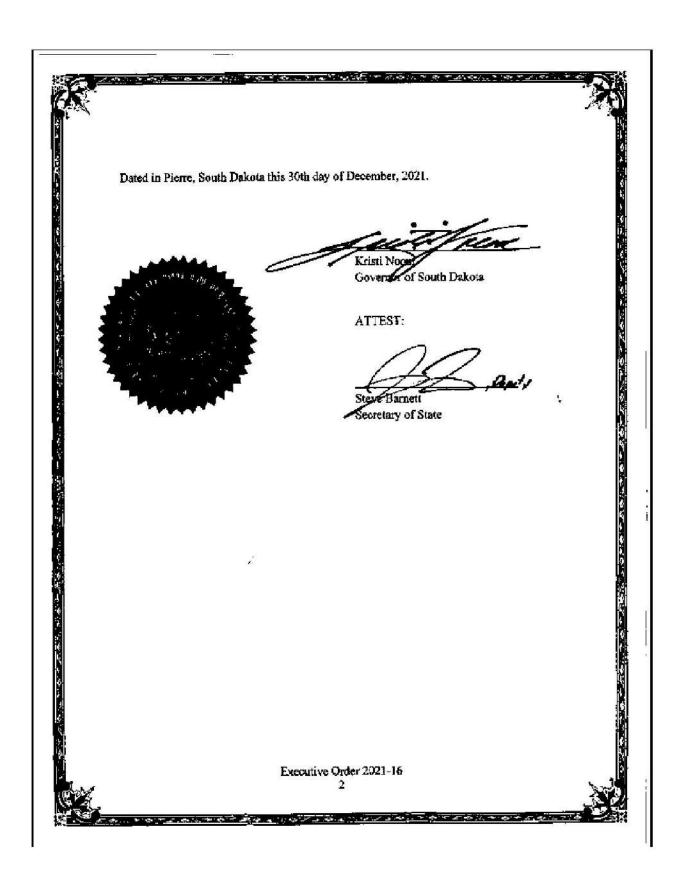


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# INTRODUCTION AND BACKGROUND

This report is issued in response to Governor Kristi Noem's Executive Orders 2020-03, 2020-29, and 2021-16. The report fulfills state and federal requirements to quadrennially review the child support guidelines. The review would have normally occurred in 2020, but due to the COVID-19 pandemic, an extension was requested and received.

#### **HISTORY**

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. Among those recommendations approved by the 1989 Legislature, SDCL § 25-7-6.12 required that a commission on child support revie the guidelines every four years. Seven commissions have convened since that time: 1996, 2000, 2004, 2008, 2012, 2016, and 2021 Commissions Generally, the Legislature has approved the findings and recommendations of each Commission. A notable exception was the updated schedule recommended by the 2016 Commission. The 2017 Legislature limited some of the proposed increases to the schedule. Some of the increases were more substantial than those of previous reviews because the schedule had not been updated since 2008. (Unlike most of the previous Commissions, the 2012 Commission did not recommend a schedule update because the economy was suffering from the 2008–2009 recession and there was not overwhelming and definitive data at the time to indicate that there was a substantial change in the cost of raising children.)

# 2021 COMMISSION ON CHILD SUPPORT

The 2021 Commission consists of several members who bring various perspectives and personal and professional experiences to the Commission. Its membership fulfills the requirements in the Executive Order for at least one noncustodial parent, one custodial parent, one representative of the South Dakota Judiciary, a representative of the South Dakota Department of Social Services, a member in good standing of the South Dakota State Bar, a member of the South Dakota Senate, and a member of the South Dakota House of Representatives. The Commission is staffed and administered by the Department of Social Services (DSS) Division of Child Support (DCS) with added staff support by the Unified Judicial System.

#### PROCEEDINGS OF 2021 COMMISSION

The 2021 Commission aimed to maximize participation in Commission meetings and ensure ample opportunity for public comment. To meet these objectives, individuals could attend meetings and public hearings in person or virtually through videoconference. In addition, written public comments were accepted through mail and email. The Commission met five times in 2021: July 29 in Pierre, August 26 in Pierre, September 30 in Sioux Falls, October 27 in Rapid City, and November 18 in Pierre. The Commission also met January 7, 2022 in Pierre. The January meeting was held due to concerns about proposed decreases at lower incomes when there has been significant and ongoing inflation. Each of these si commission meetings reserved time for public comments. There were also three dedicated public

<sup>&</sup>lt;sup>1</sup> See SDCL § 25-7-6.12 and 45 C.F.R. § 302.56.

hearings held the evenings of August 26 in Pierre, September 30 in Sioux Falls, and October 27 in Rapid City.

Meeting and public hearing notifications were provided in advance and adhered to state requirements, including open meeting requirements. (Attachment 1 provides a copy of the meeting notices.) The opportunity for public comment was broadcast by published advertisements paid by DSS, public service announcements on the radio, press releases and a banner on the DSS website, published information in the September and October State Bar Newsletter, and notices published on the Boards and Commissions portal on OpenSD.gov where information and actions of the Commission are posted.

The first meeting was dedicated to introductions and reviewing the premises and economic data underlying the existing schedule provided in <u>SDCL § 25-7-6</u>, which is the core of the guideline calculation. (See Attachment 2.) DCS retained Dr. Jane Venohr, an economist with Center for Policy Research, to assist with the economic analysis. Her analysis also identified alternative assumptions and more current economic data that the Commission could consider when deliberating whether to update the schedule and, if so, how. The agenda items of subsequent meetings were set according to the issues identified through public comment and issues brought up by Commission members or support staff a to meet state and federal requirements for state guidelines and guidelines reviews.

Appendix A provides a draft bill of the Commission's recommendations. In accordance with Executive Order 2021-16, the Commission will dissolve on March 31, 2022.

# FEDERAL REQUIREMENTS

In 1989, the federal government enacted rules requiring states to review their guidelines at least once every four years. As part of a state's guideline review, a state must consider economic evidence on the cost of raising children and analyze case file data on the application of and deviation from the guidelines. The intent is to use the information to update the guidelines if appropriate and to develop provisions that keep deviations at a minimum. In December 2016, federal requirements were expanded. (Exhibit 1 provides an excerpt of the current federal rules.) The deadline for meeting the expanded requirements varies depending on a state's review cycle. South Dakota has until 2025 to meet the expanded data analysis requirements. Besides measuring guidelines deviations, the case file data analysis must also measure the rates that orders are entered by default, income is imputed to the obligor, and a state's low income adjustment is applied as well as analyze payment data by these factors. (See (45 C.F.R. 302.56(h)(2)). Attachment 3 shows that South Dakota collected case file data and was able to meet most of these data analysis requirements for this review. In addition, states are now required to analyze labor market data (45 C.F.R. 302.56(h)(1)). Attachment 4 shows that South Dakota was able to meet this requirement for this review

<sup>&</sup>lt;sup>2</sup> 81 Fed. Reg. 244 (Dec. 20, 2016.) Department of Health and Human Services Centers for Medicaid Services. *Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs*. Retrieved from <a href="https://www.govinfo.gov/content/pkg/FR-2016-12-20/pdf/2016-29598.pdf">https://www.govinfo.gov/content/pkg/FR-2016-12-20/pdf/2016-29598.pdf</a>.

The expanded federal requirements also require states to consider the basic subsistence needs of the obligated parent (which South Dakota child support guidelines already fulfills), consider the individual circumstances of parent when income imputation is authorized 45 C.F.R. 302.56(c)(1)(iii)), and provide that incarceration is not voluntary unemployment (45 C.F.R. 302.56(c)(3)). These requirements must be met in this review. In addition, the Commission considered an expanded federal requirement aimed to ease the modification of child support orders among incarcerated parents. (This requirement is shown at the end of Exhibit 1.)

#### **Exhibit 1: Federal Requirements**

#### 45 C.F.R. § 302.56 Guidelines for setting child support orders

- (a) Within 1 year after completion of the State's next quadrennial review of its child support guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan, the State must establish one set of child support guidelines by law or by judicial or administrative action for setting and modifying child support order amounts within the State that meet the requirements in this section.
- (b) The State must have procedures for making the guidelines available to all persons in the State
- (c) The child support guidelines established under paragraph (a) of this section must at a minimum:
- (1) Provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay that:
- (i) Takes into consideration all earnings and income of the noncustodial parent (and at the State's discretion, the custodial parent):
- (ii) Takes into consideration the basic subsistence needs of the noncustodial parent (and at the State's discretion, the custodial parent and children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self- support reserve or some other method determined by the State; and
- (iii) If imputation of income is authorized, takes into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the ca
- (2) Address how the parents will provide for the child's health care needs through private or public health care cover and/or through cash medical support;
- (3) Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders; and
- (4) Be based on specific descriptive and numeric criteria and result in a computation of the child support obligatio
- (d) The State must include a copy of the child support guidelines in its State plan.
- (e) The State must review, and revise, if appropriate, the child support guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support order amounts. The State shall publish on the internet and make accessible to the public all reports of the guidelines reviewing body, the membership of the reviewing body, the effective date of the guidelines, and the date of the next quadrennial review.
- (f) The State must provide that there will be a rebuttable presumption, in any judicial or administrative proceeding for the establishment and modification of a child support order, that the amount of the order which would result from the application of the child support guidelines established under paragraph (a) of this section is the correct amount of child support to be ordered.
- (g) A written finding or specific finding on the record of a judicial or administrative proceeding for the establishment o modification of a child support order that the application of the child support guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case will be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the child support guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines
- (h) As part of the review of a State's child support guidelines required under paragraph (e) of this section, a State must:
- (1) Consider economic data on the cost of raising children, labor market data (such as unemployment rates, employment rates, hours worked, and earnings) by occupation and skill-level for the State and local job markets, the impact guidelines policies and amounts on custodial and noncustodial parents who have family incomes below 200 percent of the Federal poverty level, and factors that influence employment rates among noncustodial parents and compliance with child support orders;

- (2) Analyze case data, gathered through sampling or other methods, on the application of and deviations from the child support guidelines, as well as the rates of default and imputed child support orders and orders determined using the low-income adjustment required under paragraph (c)(1)(ii) of this section. The analysis must also include a comparison of payments on child support orders by case characteristics, including whether the order was entered by default, based on imputed income, or determined using the low-income adjustment required under paragraph (c)(1) The analysis of the data must be used in the State's review of the child support guidelines to ensure that deviations from the guidelines are limited and guideline amounts are appropriate based on criteria established by the State under paragraph (g);
- (3) Provide a meaningful opportunity for public input, including input from low-income custodial and noncustodial parent their representatives. The State must also obtain the views and advice of the State child support agency funded under Title IV—D of the Act.

## § 303.8 Review and adjustment of child support orders

\*\*\*\*\*(b)

\* \* \* (2) The State may elect in its State plan to initiate review of an order, after learning that a noncustodial parent will be incarcerated for more than 180 calendar days, without the need for a specific request and, upon notice to both parents, review, and if appropriate, adjust the order, in accordance with paragraph (b)(1)(i) of this section. \* \* \* \* \* \* (7) The State must provide notice— (i) Not less than once every 3 years to both parents subject to an order informing the parents of their right to request the State to review and, if appropriate, adjust the order consistent with this section. The notice must specify the place and manner in which the request should be made. The initial notice may be included in the order. (ii) If the State has not elected paragraph (b)(2) of this section, within 15 business days of when the IV-D agency learns that a noncustodial parent will be incarcerated for more than 180 calendar days, to both parents informing them of the right to request the State to review and, if appropriate, adjust the order, consistent with this section. The notice must specify, at a minimum, the place and manner in which the request should be made. Neither the notice nor a review is required under this paragraph if the State has a comparable law or rule that modifies a child support obligation upon incarceration by operation of State law. (c) \* \* \* Such reasonable quantitative standard must not exclude incarceration as a basis for determining whether an inconsistency between the existing child support order amount and the amount of support determined as a result of a review is adequate grounds for petitioning for adjustment of the order.

# **NEXT STEPS AND TIMELINES**

Federal regulation requires the publication of timelines concerning the review process. This report, which includes the Commission's recommended changes, will be submitted to the Governor in January 2022. Ultimately, any changes must be made by the Legislature. If changes are made, the timeline for making the changes is also at the Legislature's discretion. Historically, the Legislature considers the Commission recommendations in the legislative session immediately following the completion of the Commission report and promulgates changes midyear.

South Dakota's next quadrennial review will be in 2025.

# RECOMMENDATIONS

Exhibit 2 summarizes the Commission's recommendations. Appendix A contains a mark-up of the recommended changes to statute.

# **Exhibit 2: Summary of Recommendations**

1.	Amend the support obligation schedule in <u>SDCL § 25-7-6.2</u> to reflect current economic data on the costs of raising children in South Dakota.
2.	State the amount of the self-support reserve (SSR) contained in the low-income adjustment provided in SDCL § 25-7-6.2 so it is transparent.
3.	Update the allowable deductions from monthly gross income in <u>SDCL § 25-7-6.7</u> to reflect 2017 federal income tax reform.
4.	Amend the abatement provision for when the child resides with the obligor ten or more nights per month in <u>SDCL § 25-7-6.14</u> to provide for more consistent application of the provision, better consideration of the appropriate and relevant cost of the child to each parent, and documentation of the abatement in the order and to address when parenting time is not exercised at the number of nights considered in the abatement.
5.	Simplify how the amount of the cost of the insurance attributable to the child(ren) for whom support is determined in <u>SDCL § 25-7-6.16</u> and insurance covers others besides the child(ren) for whom support is being determined.
6.	Provide for the consideration of the actual income of an incarcerated parent (and fulfill a new federal requirement concerning the treatment of income of incarcerated parents) by:  a. Expanding the list of exclusions from the rebuttable presumption of employment at minimum wage in SDCL § 25-7-6.4 to also include incarceration for at least one hundred eighty days;  b. Striking the exclusion that references "incarceration" in the deviation criterion that provides for the consideration of the voluntary and unreasonable act of a parent which causes the parent to be unemployed or underemployed in SDCL § 25-7-6.10(6);  c. Specifying that incarceration is an exception to the presumption that a parent is capable of being employed at minimum wage when ap SDCL § 25-7-6.26 which addresses how to determine income available for child support when a parent fails to furnish income or other financial information and the parent is in default.
7.	Provide more specification on the factors to be considered when imputing income in <u>SDCL § 25-7-6.26</u> which addresses how to determine income available for child support (and meet new federal requirements that require the consideration of the specific circumstances of the obligor when income imputation is authorized).
8.	Add a new provision that provides for a written finding for the establishment or modification of a child support order when application of the child support schedule would be unjust or inappropriate in a particular case where the deviation from the child support schedule considers the best interest of the child.
9.	Strike <u>SDCL § 25-4-43</u> that provides for support payments through the clerk of courts because it is obsolete considering <u>SDCL § 25-7A-</u> and <u>25-7A-3.2</u> that has designated the Department of S Services state child support case registry and state disbursement unit since October 1, 1998, and any child born before 1998 would now be over the emancipation age.

#### **DETAILED ANALYSIS OF RECOMMENDATIONS**

#### RECOMMENDATION 1: UPDATE THE SCHEDULE TO CONSIDER CURRENT ECONOMIC DATA

#### Issue

The existing schedule in <u>SDCL § 25-7-6.2</u> is based on measurements of child-rearing expenditures from expenditure data collected from families in 1998–2004. The measurements were updated to 2016 price levels for most incomes when adopted by the 2017 South Dakota Legislature. There are more current measurements of child-rearing expenditures available now. The most current study considers expenditures data collected from families in 2013–2019 Price levels have increased by 14.6 percent from September 2016 through October 2021. Federal regulation (45 C.F.R. § 302.56(h)) requires that states consider the economic data on the cost of raising children as part of their state guidelines review an make changes, if appropriate.

#### Discussion

The key points to understanding the premises underlying the proposed updated schedule are:

- both the existing and proposed schedules relate to economic data on how much South Dakota families spend on children, but the existing schedule is based on old data;
- more current economic studies of child-rearing expenditures and the methodologies us measure expenditures and income have improved over
- the existing schedule is based on 2016 prices with some exception
- prices have increased significantly since the last review was conducted;
- updating the schedule for more current economic data and price levels does not produce uniform changes across all income levels and number of children;
- the Commission considered limiting increases (which would only affect higher incomes, particularly those with more children) but decided against it because it would shortchange families, and of additional concern to the Commission was that the gap between the schedule amount and what families spend would widen over time if the Legislature limits increases or continues to impose a previous limit; and
- whenever the proposed updated schedule indicated decreases the Commission opted to retain
  the existing amounts to recognize current inflationary trends and so families receiving the full
  guidelines amount currently would not receive less.

#### Underlying Premise of the Existing Schedule

The schedule reflects how much South Dakota families of a particular income and family size spend on their children. The schedule considers the parents' combined income and the parents' combined contribution to their children. Each parent is responsible for their prorated share of the schedule amount. The obligor's share of the schedule amount forms the basis of the child support order amount. The schedule amounts increase for more children and more income. More children cost more to raise. The schedule amounts increase with more income so the children can share in the lifestyle afforded by a parent with more income. If the obligor has more income, the schedule amount will increase and the

obligor's prorated share of the schedule amount will increase. However, if the obligee's income increases and the obligor's income does not increase, the obligor's prorated share of the schedule amount will decrease as well as the order amount. These outcomes are consistent with the income shares guidelines model that forms the basis of the South Dakota guidelines and 40 other state guidelines.<sup>3</sup>

Besides presuming each parent is responsible for their prorated share, the income shares model also presumes that the child is entitled to the same amount of expenditures the child would have received had the child lived with the parents and the parents shared financial resources. The underlying principle of the income shares model is that the guidelines should apply equally to children of divorced parents and children of unmarried parents, regardless of whether the parents ever lived together. The children should not be the economic victims of their parents' decisions to live apa <sup>4</sup> This is why the South Dakota schedule (and the schedules of most states relying on the income shares guidelines) relate to measurements of child-rearing expenditures.

#### Economic Study Underlying the Current Schedule

For various reasons, South Dakota has relied on the same study of child-rearing expenditures as the basis of its schedule for over a decade. The study was conducted by Professor David Betson, University of Notre Dame, using the Rothbarth methodology to separate the child's share of expenditures from total expenditures.<sup>5</sup> (An economic methodology is necessary because most household items, such as housing expenses, are consumed by both children and adults living in the same household.) Betson estimated child-rearing expenditures from data collected from families participating in the 1998–200 U.S. Bureau of Labor Statistics (BLS) Consumer Expenditure Survey (CE). Betson first studied child-rearing expenditures in 1990 for the U.S. Department of Health and Human Services to assist states in developing and reviewin their child support guidelines.<sup>6</sup> After assessing five different methodologies, including the Rothbarth methodology, Betson concluded that the Rothbarth approach was the best approach to measure child rearing expenditures and recommended it for state guidelines use. Since then, Betson has updated his Rothbarth measurement of child-rearing expenditures four times for more current CE data and improved CE measures. Most states rely on one of the (Betson-Rothbarth) BR studies as the basis of their child support guidelines schedule or formula.

Since Betson measures child-rearing expenditures from a national data set (i.e., the CE), an adjustment was made to account for the fact that both incomes and the cost of living in South Dakota are lower than the national averages. The CE is the largest and most comprehensive study of expenditures in the nation <sup>7</sup>

<sup>&</sup>lt;sup>3</sup> National Conference, of State Legislatures., Child Support Guideline Models. (Jul. 2020). Retrieved from <a href="https://www.ncsl.org/research/human-services/guideline-models-by-state.a">https://www.ncsl.org/research/human-services/guideline-models-by-state.a</a>.

<sup>&</sup>lt;sup>4</sup> More information about the underlying premises, application and impact of different guideline models can be found in Venohr, J. (Apr. 2017). "Differences in State Child Support Guidelines Amounts: Guidelines Models, Economic Basis, and Other Issues." *Journal of the American Academy of Matrimonial Lawyers*.

<sup>&</sup>lt;sup>5</sup> 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, CO. Retrieved from <a href="https://justice.oregon.gov/child-support/pdf/psi\_guidelines\_review\_2006.">https://justice.oregon.gov/child-support/pdf/psi\_guidelines\_review\_2006.</a>.

<sup>&</sup>lt;sup>6</sup> 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, WI).

More information about the CE can be found at <a href="https://www.bls.gov/cex/">https://www.bls.gov/cex/</a>.

Its sampling is not sufficient to produce state-specific measurements and no state replicates it. The existing South Dakota schedule was realigned for South Dakota incomes by comparing income distributions of South Dakota families to all families across the U.S. The source of the income data was the 2007 U.S. Census. Other states with below average income use a similar methodology.

#### Recommendations of Previous Reviews

The third Betson-Rothbarth study (BR3) was the study recommended for the basis of an updated schedul by the 2008 Commission and subsequently adopted by the 2009 Legislature. (At the time, the schedule was based on an earlier BR study.) When the Commission was formed earlier in 2008, the economy was experiencing inflation due to a spike in oil prices. The Commission completed most of its recommendations before the financial market collapsed in the Fall of 2008 and precipitated ma devasting effects. The ramifications of the 2008–2009 Great Recession included a drop in prices and wages, home foreclosures, high unemployment, and lingering wage stagnat

The 2012 Commission did not recommend a change to the schedule as economic data available at the time showed the economic impact of the 2008–2009 economic recessions lingere. There was no clear evidence that the economy was improving or prices and expenditures were stabilized or increasing.

Acknowledging that the economy had improved, the 2016 Commission recommended updating the current schedule (i.e., the one that was adopted in 2009 and was based on expenditures data from families in 1998–2004 and 2007 Census data) to 2016 price levels. The Commission considered a more current economic study (i.e., the fourth Betso Rothbarth study, which is also called BR4). The BR4 study contained methodological changes to the underlying CE data including improvements to how the BLS measures incomes and switching from a measure of "expenditures" to "outlays." Expenditures mirror how gross domestic product (GDP) is calculated: payment of housing principal is an investment under GDP and thus is not included in child-rearing expenditures (but mortgage interest, utilities, and other housing expenses are included as well as rent for renters.) Outlays capture these expenses and payments on second mortgages and home equity loans and other installment payments. The change produced unexpected differences between th R3-based and R4-based schedules. Those differences contain decreases at lower incomes and larger increases at high incomes. The decreases at low incomes appeared to reflect BLS' improved measure of income. (One reason the BLS embarked on the improvement was because of the observation that lower income families spend more than their income.) The increases at higher incomes appeared to reflect the switch from expenditures to outlays which better captures installment payments and payments toward mortgage principal, second mortgages, and home equity loans. Higher income families are more likely to have installment payments and mortgages than lower income families

At the time, there were few studies substantiating these changes, so the 2016 Commission recommended retaining the BR3 measurements as the basis of the South Dakota schedule and updating them to 2016 price levels. The 2016 Commission also recommended extending the schedule to combined incomes of \$30,000 net per month.

#### Current Studies on Child-Rearing Expenditures

The most current Betson-Rothbarth study is the fifth study (BR5).<sup>8</sup> It is based on expenditures data from families surveyed in 2013–2019 It relies on the improved definition of income and outlays as described above. When used to prepare an updated schedule for South Dakota it also suggests some decreases at low incomes and larger increases at high incomes. The decreases occur at very low incomes. The decreases are never more than \$35 per month. This is the amount owed by both parents, so the obligor's share would be less. The increases at high income exceed 10 percent when the parents' combined income is more than \$10,250 net per month for one child and \$9,900 net per month for two children and lower incomes for three or more children. An analysis of recently established and modified orders in the DCS caseload found that 89 percent of orders are for one and two children. Only one case among the 1,533 DCS orders analyzed for the guideline review had a combined income and number of children in the area of the schedule where there was at least a 10 percent increase. In other words, based on the DCS caseload data, few orders are likely to be in the area with double-digit increase

In addition to the BR4 and BR5 studies suggesting that substantial increases are warranted at higher incomes, the 2017 USDA study of child-rearing expenditures suggests that the South Dakota sc should be increased at higher incomes.<sup>9</sup>

The proposed schedule is also adjusted for differences in South Dakota and U.S. average income. The current schedule uses income data from the 2007 U.S. Census. The proposed schedule uses income data from the 2019 U.S. Census.

#### Increases in Prices

The proposed schedule is updated to July 2021 price levels. This was the most current price level data available when the 2021 Commission began deliberating the schedule update. Price levels had increased 12.5 percent from September 2016, which is the basis of the existing schedule, to July 2021. In 2021, inflation was of national concern. Price levels at the national level have increased by 15.1 percent from September 2016 through November 2021. The increase for the Midwest region, which includes South Dakota, is about the same. As of November2021, prices had increased 6.8 percent in the last yea. The percentage increase was not consistent across all items. For example, the price of new and used motor vehicles increased by 16.2 percent over the same time period and the price of food and beverages increased by 5.1 percent.

The Proposed Changes Are Not Uniform Across All Incomes and for All Numbers of Chi

There are at least four reasons the updated schedule does not produce consistent changes at all income levels and for all numbers of childre 
The first reason is the composition of what families purchase has

<sup>&</sup>lt;sup>8</sup> Betson, Dav M. (2021). "Appendix A: Parental Expenditures on Children: Rothbarth Estimates." Venohr, Jane & Matyasic, Savahanna. (Feb. 23, 2021). Review of the Arizona Child Support Guidelines: Findings from the Analysis of Case File Data and Updating the Child Support Schedule. Report to the Arizona Supreme Court Administrative Office of the Courts. Retrieved from <a href="https://www.azcourts.gov/Portals/74/FCIC-CSGR/SupplementalPacket-030121-FCIC-CSGRS.pdf?ver=2021-02-26-161844-187">https://www.azcourts.gov/Portals/74/FCIC-CSGR/SupplementalPacket-030121-FCIC-CSGRS.pdf?ver=2021-02-26-161844-187</a>.

<sup>&</sup>lt;sup>9</sup> Lino, Mark. (2017). Expenditures on Children by Families: 2015 Annual Report. U.S. Department of Agriculture, Center for Nutrition and Policy Promotion. Miscellaneous Publication No. 1528-2015, Washington, D.C. Retrieved from <a href="https://fns-prod.azureedge.net/sites/default/files/crc2015">https://fns-prod.azureedge.net/sites/default/files/crc2015</a> March2017 0.pdf.

changed since the expenditures data that forms the basis of the existing schedule was collected in 199 2004, and those changes are not consistent across income range and family size. For example, although cell phones are now common among most households, the total amount expended varies by income because of the cost of more generous plans and updated phones. A second reason is that lower-income families, on average, devote a larger budget share to food, which have not incurred the same level of price increases as other items that are more likely to be purchased by higher-income families (e.g., new an used vehicles). A third reason is the BLS improvements to their measurements of income and expenditures/outlays that were described earlier. The fourth reason concerns larger increases for children. The economic evidence suggests "economies of scale" are being lost for three children. In turn, this would increase the schedule amounts for three children more so than it does for one and two children. The concept of economies of scale is that the second child costs less than the first child due to clothes being handed down, shared bedrooms, etc. The same is true for the third child and so forth.

More information about changes in price level over time is provided in Attachment 5 that responds to a question asked by Representative Stevens about calculating the present value, which is another way to analyze change in price levels. Child support calculations for a range of income scenarios, including more common ones, under the existing and proposed schedule are compared in Attachment 6.

#### Capping How Much the Schedule Can Increase

The 2017 Legislature did not adopt the 2016 Commission's proposed schedule verbatim. Instead, the Legislature adopted schedule amounts that never exceeded more than 104 percent of the 2008 schedule amounts; that is, there was never more than a 4 percent increase between the schedule in effect a time and the schedule adopted by the 2017 Legislature. The cap affected combined incomes of about \$4,150 to \$12,500 net per month. Above and below these combined incomes, the Legislature adopted the schedule recommended by the 2016 Commission.

The 2021 Commission debated whether to recommend a similar cap or a cap at another amount. The Commission considered public testimony; some favoring schedule increases, while others did not favor schedule increases, and some even favored schedule decreases. The major reason for not imposing a cap was that the cost of raising of a child had increased. Overall, prices have increased substantially since the existing schedule was developed. A cap would tacitly place the burden on the custodial family. The arguments for the cap centered around families already receiving a sufficient level of support and not requiring obligors to pay more.

The Commission also discussed whether the proposed increases would produce a surge in requests for modifications and, if modified, whether the obligor would be able to afford the increase. The data and facts do not support this. DCS data and U.S. Census data do not suggest there are a lot of South Dakota families with incomes in the range that would be affected. Instead, family income data suggests most South Dakota families would fall in the range of the schedule where the changes would be modest. Another safeguard against a surge in modification requests is there must be at least a 10 percent change and at least a \$25 change in an order amount for a DCS modification. Regarding affordability, one Commission member reminded others that the guidelines can be rebutted and that there is a statute

(SDCL § 25-7-6.1) that authorizes a phase in of a child support order over a period of time if the order increased by more than 25 percent.

#### No Decreases to Schedule Amounts

Although the economic data generally suggests increased schedule amounts, the updated economic data indicated some anomalous decreases of \$1 to \$42 to the basic obligation amounts, which is the combined amount owed by both parents, below combined incomes of \$5,250 net per month for one child and less for more children. The Commission received public comments and heard DSS concerns about the proposed decreases, particularly in light of recent inflation. If inflation persists, those decreases may not be warranted and it could be harmful to families in that income range that currently received the full amount of support. To this end, the Commission favored retention of the current schedule amounts wherever the updated economic data indicated decreases. There is a small exception at combined adjusted net incomes of \$1,901 to \$2,350 for five children, and combined adjusted net incomes of \$2,05 to \$2,500 for six children. These exceptions were made to smooth the transition between income ranges.

#### **Recommendation Summary**

The recommendation is to update the schedule using the most current Betson Rothbarth study (*i.e.*, the study based on expenditures data from families surveyed in 2013–2019), updating it for 2021 price levels, and realigning it to account for South Dakota's below average income using 2019 U.S. Census data. An exception is made where the updated economic data indicated decrea — These anomalous decrease would have reduced the schedule amount \$1 to \$42 per month below combined incomes of \$5,250 net per month for one child and less for more children. These decreases may not be appropriate in the near future as unprecedently high levels of inflation continue to rise. To this end, the existing schedule amounts were substituted in this area of the proposed schedule.

Overall, this recommendation is in the best interest of South Dakota children. The Commission does not recommend any decreases and does not recommend a cap on the increase because it would shortchange families. With regard to the larger increases at very high incomes, there are mechanisms already in to address an extraordinary increase in the order amount if an order modification was pursued and granted. The evidence, however, suggests that most families have incomes and number of children in the areas of the schedule with modest changes, and there will not be a surge of modification requests due to updating the schedule for more current economic evidence on the cost of raising children

# RECOMMENDATION 2: EXPLICITLY STATE THE AMOUNT OF THE SEL -SUPPORT RESERVE SO IT IS TRANSPARENT

#### Issue

The self-support reserv R) represents an amount to address the basic subsistence needs of the obligated parent. The consideration of basic subsistence needs of the noncustodial parent who has a limited ability to pay is a federal requirement (45 C.F.R. 302.56(c)(1)(ii)). The existing schedule in SDCL § 25-7-6.2 includes a self-support reserve of \$871 per month but it is not explicitly stated in the guidelines.

#### Discussio

Historically, South Dakota guidelines have always provided some sort of safeguard for low-income obligors to have sufficient income to at least live at a basic subsistence level. Federal regulation now requires states to do so. In its final rulemaking the federal Office of Child Support Enforcement (OCSE) makes it clear that "basic subsistence needs" is to be defined by the state at a level appropriate for their state; and recognizing the needs of custodial families (particularly, low-income families), the state may also consider the basic subsistence needs of the custodial fami <sup>10</sup> In defining "subsistence," OCSE referred to a dictionary definition meaning that it is the minimum necessary to support life and used food and shelter as examples of necessary items. <sup>11</sup> Still, OCSE made it clear the purpose of the low-income adjustment is to ensure that a low-income, obligor could meet their basic subsistence need, pay the full amount of child support owed, and continue employment. <sup>12</sup>

The intent of the federal regulation is to ensure that parents meet their child support obligations and to help states comply with the U.S. Supreme Court decision in *Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507 (2011), which essentially requires the determination of ability to pay prior to incarceration f nonpayment of child support. Addressing order amounts at the front-end by setting an accurate order based upon the ability to pay can avoid the need for enforcement actions and improves the chances that the obligor will, over time, continue to pay. This can avoid other enforcement actions such as driver's license suspension that are triggered automatically and required by federal regulation. (Attachment 7 details DCS policy and procedures on license restriction and revocation as well as identifies pertinent federal regulation, state laws and administrative rule. Attachment 8 provides similar information for income withholding/garnishment.)

There are two components to achieving this federal objective: using the actual income of the parent (rather than an imputed or presumed income, particularly when that imputed/presumed amount exceeds the actual income of the parent) and providing a low-income adjustment. The rule changes are based on research findings that suggest setting more reasonable orders for low-income obligors will increas regular, on-time payment to families, increase the number of obligors working and supporting their children, and reduce the accumulation of unpaid arrears. <sup>13</sup> The rule changes also recognize research finds the importance of healthy parent—child relationships in the development of children and how unpaid child support in some situations can inadvertently create barriers to the healthy interaction between the child and the parent obligated to pay support (e.g., driver's license suspension may also impede parent-child contact).

<sup>&</sup>lt;sup>10</sup> Federal Register/Vol. 81, No. 244. (Dec. 20, 2016.) Department of Health and Human Services Centers for Medicaid Services. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs. Vol. 81, No. 244. P. 68,555. Retrieved fr https://www.govinfo.gov/content/pkg/FR-2016-12-20/pdf/2016-29598.pdf.

<sup>&</sup>lt;sup>11</sup> U.S. Department of Health and Human Services (Nov. 17, 2014). "Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs." 79 Fed. Reg. 68,555. Retrieved from <a href="https://www.govinfo.gov/content/pkg/FR-2014-11-17/pdf/2014-26822.pdf">https://www.govinfo.gov/content/pkg/FR-2014-11-17/pdf/2014-26822.pdf</a>.

<sup>&</sup>lt;sup>12</sup> U.S. Dept. o Health and Human Services (2016), Supra Note 10.

<sup>&</sup>lt;sup>13</sup> U.S. Department of Health and Human Services. (Nov. 17, 2014). "Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs." 79 Fed. Reg. 68,548. Retrieved from <a href="https://www.govinfo.gov/content/pkg/FR-2014-11-17/pdf/2014-26822.pdf">https://www.govinfo.gov/content/pkg/FR-2014-11-17/pdf/2014-26822.pdf</a>.

#### Mechanics of the Existing Low Income Adjustment

The South Dakota low-income adjustment is incorporated into the child support schedule. The emboldened amounts at the low-income end of the schedule are less than what families spend on their children at that income range and for that number of children. The emboldened amounts aim to provide an obligor with at least \$871 per month in remaining income after payment of the guidelines-determine amount. Suppose the obligor's income and number of children fall into the emboldened areas of the schedule. In that case the emboldened amount, assuming the obligee has no income, is compared to the guidelines-calculated amount. The order is set at the lower of the two calculations.

The first line of the existing schedule, as shown below, provides for a minimum order of \$79 per month. The amount is the difference between \$950, which is the highest income of the first income range and the existing self-support reserve of \$871 per month, which is based on the 2016 federal poverty guideline for one person multiplied by South Dakota's 2014 price parity. The income ranges of the schedule are at \$50 intervals, so the next income range after \$871 per month would end at \$900 net per month and the income range after that would end at \$950 net per month. The \$950 is used at the end point for the first income range because ending at \$900 net per month would suggest a minimum order of \$29 per month. Most states with a minimum order typically set it at least \$50 per month.

Exhibit 3: First Row of Current Schedule

Monthly Net Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
0 – 950	79	79	79	79	79	79

The Commission initially favored increasing the self-support reserve to the 2021 federal poverty guidelines (\$1,073) and reducing the minimum order to \$50 per month. After DSS's careful review of this recommendation and the realization that an update of the self-support reserve could reduce the order amounts of some families that currently receive the full amount, DSS asked the Commission to reconsider the recommendation. There was concern about harming these families, particularly since these families are the most economically vulnerable and are also facing a rising cost of living. The Commission recognizes the cost of living also increased for obligated parents. In all, the Commission recognizes there is a delicate balance when both parents are low-income and decided to err on doing no harm to children currently receiving more than what the order amount would be if the self-support reserve was increased. DSS showed that increasing the self-support reserve could have a \$200 decrease in some order amounts for two or more children, particularly in the range of minimum wage earners, which is a common income among DCS cases. The Commission's final recommendation with regard to the amounts of the self-support reserve and minimum order was not to make any changes.

#### Self-Support Reserves and Higher Income

The Commission also heard public comment about recognizing the cost of living for obligated parents with high incomes and possibly providing a self-support reserve at all income levels. As the obligor's income increases, the obligor has sufficient income to cover the guidelines-determined amount and the self-support reserve. Consequently, there is no need for further adjustment at higher incomes. The schedule

amounts are no longer emboldened if they are not adjusted for the self-support reserve. This occurs at combined incomes above \$1,200 net per month for one child; \$1,350 net per month for two children; \$1,550 net per month for three children; \$1,700 net per month for four children; \$1,850 net per month for five children; and \$2,000 net per month for six children.

#### **Recommendation Summary**

Explicitly stating the amount of the self-support reserve will make it clear that South Dakota complies wi the federal regulation to consider the basic subsistence needs of the obligated parent with limited ability to pay. Moreover, the amount of the self-support reserve will be transparent to guidelines users a parents. This is important to determining when the application of and deviation from the guidelines is appropriate. The decision not to update the self-support reserve and minimum order at this time was made in respect to balancing the needs of low-income, noncustodial parents and custodial parents. Low-income, custodial parents also face a higher cost of living due to recent inflation. They cannot afford to receive les

#### RECOMMENDATION 3: UPDATE THE ALLOWABLE INCOME DEDUCTIONS IN SDCL § 25-7-6.7

#### Issue

<u>SDCL § 25-7-6</u> specifies allowable deductions from monthly gross income. <u>SDCL § 25-7-6.7(1)</u> provides for the deduction of income taxes payable based on the applicable tax rate for a single taxpayer with one withholding allowance and a monthly payroll period rather than the actual tax rate. The phrase "one withholding allowance" is not consistent with the IRS W-4 form. It no longer provides a withholding allowance for self. The IRS modified the W-4 form to reflect the Tax Cuts and Jobs Act of 2017 (Pub. L. 115-97), which increased the standard deduction and repealed personal exemptions. Due to this IRS change, retaining the phrase "with one withholding allowance" is confusing to guideline users.

#### Discussion

SDCL § 25-7-6.7 provides the consistent calculation of income available for child support from gross income by specifying how the allowable deduction for federal income tax be calculated. Without it, two parents with identical gross incomes would have different levels of income available for child support due to differences in the federal income tax. For example, although two parents had identical gross incomes, they would be treated differently if one parent rented and did not itemize deductions when filing federal income taxes and the other parent itemized mortgage interest and other deductions. To ensure equitable treatment for similarly situated parents, SDCL § 25-7- provides that the amount of federal income tax deducted should be calculated assuming a parent is a single taxpayer and using a monthly payroll period. It can be calculated using the IRS withholding formula for a single taxpayer with a monthly payroll period using the IRS publication for employer withholding.<sup>14</sup>

In December 2017, the U.S. Congress passed the Tax Cuts and Jobs Act (Pub. L. 115-97). It became effective on January 1, 2018. The IRS phased in changes to the W-4 form gradually. The Act increased

<sup>&</sup>lt;sup>14</sup> U.S. Department of Treasury Internal Revenue Service. (Dec. 8, 2020.) *IRS Publication 15-T: Federal Income Tax Withholding Methods: 2021.* Retrieved from 2021 Publication 15-T (irs.gov).

the standard deduction from \$6,500 to \$12,000 for individual filers and made similar increases for other filing statuses. It also eliminated or restricted many itemized deductions. More information about the impact of the changes to individual tax filers can be found in an IRS publication on the topic: https://www.irs.gov/pub/irs-pdf/p5307.pdf.

Retaining the current language confuses guideline users because it is inconsistent with the instructions of IRS W-4 <sup>15</sup>

#### **Recommendation Summary**

Exhibit 5 shows the recommendation is to simply strike the phrase "with one withholding allowance" in order to reflect current federal income tax code and the instructions for the IRS W-4 withholding allowance certificate that employers use to determine monthly payroll taxes.

#### Exhibit 4: Eliminate th Phrase "with one withholding allowance"

25-7-6.7. Allowable deductions from monthly gross income.

Deductions from monthly gross income shall be allowed as fol

(1) Income taxes payable based on the applicable tax rate for a single taxpayer with one withholding allowance and a monthly payroll period rather than the actual tax rate;

#### RECOMMENDATION 4: AMEND THE ABATEMENT PROVISION IN SDCL § 25-7-6.14

#### Issue

SDCL § 25-7-6.14 provides for an abatement of 38 to 66 percent when the child resides with the obligor 10 or more nights in a month. The Commission received many public comments about the abatement provision. One of the most common public comments concerned inconsistent application of the abatement. In addition, DCS surveyed referees on their use of the abatement. It revealed that some referees do not believe they have the statutory authority to grant an abatement and among those who apply it, it is applied inconsistently. Some public comments suggested the abatement was insufficient to meeting the obligor's cost of having the children and the overnight threshold should be lowered, but this sentiment was not unanimous. In general, public comment suggested the abatement should consider the actual cost of the child to each parent when the child resides with that parent and the offset of those costs when the child resides more with the obligor.

#### Discussion

The abatement is one of two adjustments for parenting time. The other is the cross-credit adjustment provided in <u>SDCL § 25-7-6</u> when the child resides at least 180 nights with each parent and other criteria are met. In other words, the South Dakota guidelines provide for two different adjustments for parenting time. There was a strong sentiment that the abatement should reduce the order amount more than the cross-credit formula does. The Commission received some public comment suggesting that abatement

<sup>&</sup>lt;sup>15</sup> U.S. Department of Treasury Internal Revenue Service. *IRS Form W-4: Employee's Withholding Certificate: 2021*. Retrieved from 2021 Form W-4 (irs.go\_\_.

produced a larger adjustment, but upon investigation, DCS learned that this occurred when the abatement was calculated incorrectly. Users often confuse the time period of the adjustment; it is a monthly, rather than daily, adjustment

The Commission formed a subcommittee to address the numerous abatement issues. Results of the DCS survey of referees revealed that not all referees believe they can grant an abatement based on the wording of the current statute, referees would like to have the authority to recommend an abatement, and referees would like clarity of the intent of the abatement. Other questions identified from Commission members or public comment were whether there should be a change in the 10 or more overnights per month criterion for granting the abatement and whether the range of the abatement percentage was appropriate. The South Dakota abatement is unusual compared to other states. Unlike the few other states with an abatement, South Dakota does not require consecutive overnights to apply its abatement, provides a range for its abatement, and will advance the abatement. The monthly order may reflect the advanced abatement because the number of overnights is consistent from month to month. In contrast, most other states with abatements issue the abatement afterwards. Further, most other states roll their timesharing adjustments together.

After a careful review, the subcommittee did not recommend changes to the overall structure of the abatement, the overnight threshold, or the range of the abatement. They recommended adding clarifying language about how the abatement should be calculated. They also recommended to clearly state in statute that a referee can grant an abatement. This would allow the abatement to be realized in more cases, not just those before the courts. It would be equitable treatment.

The Commission heard public comments on the types of child-rearing expenses that would justify an abatement. The phrase "non-duplicated, fixed expenditures" was used to describe some expenses that the obligor would incur when the child resides with the obligor. Examples included routine clothing costs and school supplies. The subcommittee agreed that an abatement should occur if the obligor incurred these expenses and the burden of proving the expense should be on the obligor.

Another expressed concern was addressing the circumstances when the abatement is advanced and the child does not spend the number of overnights in the obligor's residence as calculated. The subcommittee drafted language to address this issue. The Commission discussed how the obligee could be reimbursed in this situation and the process could be like the process for reimbursement of the child's uncovered medical expenses.

The Commission also recommended eliminating the criterion requiring a custody order before applying the abatement. Both the abatement and cross-credit currently require a custody order. There were many comments that the criterion was too restrictive for the abatement. It would not apply to parents who agree to an informal change, such as the children living with the obligor during an extended spring break. Another reason is that never-married parents face a different on-ramp to obtaining a custody order than divorcing or separating parents. The only issue before the court among never-married parents is typically child support. A separate court action must be filed to obtain a custody order. To this end, unmarried

parents often do not have a custody order. In contrast, the issues before the court in a divorce or separation typically include child support, child custody or timesharing, and division of marital property

Attachment 9 provides a history of South Dakota's abatemen

#### Recommendation Summary

There are several changes to improve the consistency in the application of the abatements and its equitable treatment. The term "order" was struck as a criterion for applying the abatement to accommodate parents who agree to the custody but did not obtain a court order. The proposed provision states explicitly that the court or child support referee can apply the abatemen. The proposed provision clarifies how the abatement is to be calculated. In deciding whether an abatement is appropriate, the proposed revision provides for the consideration of the obligor's direct costs of expenses associated with the child's time (such as school supplies and called "non-duplicated fixed expenditures" in the proposed statute) and places the burden of providing evidence of the expense on the obligor. The proposed language specifically states that the abatement should not exceed the reduction in support due to the cross-credit. The proposed revision also requires the obligor to reimburse the abatement amount to the obligee if the number of overnights considered in the abatement are not exercised.

The recommendation does not change the overnight threshold for applying the abatement or the abatement percentage range. The proposed language retains the requirement that the order specify the number of nights for which the abatement is allowed and the amount of the abatement, but moved that requirement in another paragraph of the proposed provision.

#### RECOMMENDATION 5: SIMPLIFY HOW THE COST OF INSURANCE IS ATTRIBUTABLE TO THE CHILD

#### Issue

Until recently, federal regulation required the consideration of the cost of insurance attributable to the child(ren) for whom support is being determined when calculating the child support order and determining child medical support. This can be complicated because a family plan may cover the parent, the parent's new spouse or domestic partner, adult children, and other children who are not the subject of the child support order. Federal regulation now provides more flexibility in how states consider the cost of insurance.

#### Discussion

SDCL § 25-7-6.16 provides that the cost of the insurance attributable to the child is the cost of adding t child to the existing coverage, the difference between self-only coverage and family coverage, or the cost of private medical insurance for the child. When family coverage included others besides the child(ren) for whom support was being determined, the difference between self-only coverage and f was to be divided by the number of individuals, excluding the parent, enrolled in the family coverage. Obviously, this is a complicated calculation. The Commissioners also heard public comments expressing frustration with how the cost of insurance for the child was determine

Recent changes in federal regulation now allow states to consider the full cost of the insurance plan (see <u>45 C.F.R. § 303.3</u>). Prior regulation limited it to only the child's portion. This allows South Dakota considerable flexibility in how to simplify its provision.

Attachment 10 describes DCS policy and procedures on medical child support as well as identifies pertinent federal regulation, state laws and administrative rule.

#### **Recommendation Summary**

The Commission favors simplifying the calculation by dividing the parent's cost of obtaining fa coverage by the number of individuals covered by the family coverage to determine a per person/child amount. This simplification strikes the phrase "excluding the parents."

#### RECOMMENDATION 6: CONSIDER THE ACTUAL INCOME OF AN INCARCERATED PARENT

#### Issue

<u>SDCL § 25-7-6</u> provides for the presumption of employment at minimum wage to incarcerated parents when the reality is that most prisoners do not earn minimum wage or even could earn minimum wage i prison. Recent federal regulation changes encourage the use of the actual income of the parent when setting child support. To this end, federal regulation now provides that incarceration cannot be treated as voluntary unemployment. Therefore, both <u>SDCL § 25-7-</u> and the deviation criterion referencing incarceration in <u>SDCL § 25-7-6.10(6)</u> conflict with the federal requirement.

#### Discussion

The Commission heard from Commission members and public testimony that incarcerated parents do not earn minimum wage while in prison. Prison jobs, when available, typically pay far less. Federal regulations (45 C.F.R. § 302.56(c) \_\_\_\_) now require states to provide that incarceration cannot be considered voluntary unemployment when establishing or modifying a child support order. The federal intent is to provide for the actual income of the incarcerated parent to be used when setting a child support order. The overarching federal goal is to set child support orders at levels that low-income parents can and will pay. The provision specifically targets low-income parents because their ability to pay is the limiting factor and can trigger punitive enforcement actions that spiral into other issues (e.g., work in the undergroun economy and recidivism). In contrast, obligors with higher income can pay but may not want to pay for other reasons. Incarceration was a particular area targeted for federal rule change because of several studies finding that unpayable arrears often accumulate while an obligor is incarcerated. The arrears exceed what can ever be paid realistically and can be a barrier to employment and re-integration amo obligors once released from prison.

In complying with this requirement to not treat incarceration as voluntary unemployment, several states specify incarceration of over 180 days to be congruent with the provision in <u>45 C.F.R. § 303.8</u> that is al shown in Exhibit 1. In September 2020, the federal Office of Child Support Enforcement (OCSE) proposed modifying the requirement to allow exceptions for incarceration due to nonpayment or if the parent was incarcerated due to an offense to the child or custodial person. Almost a year later, OCSE withdrew the proposed modification citing that it received numerous public comments that many states were already

in compliance with the requirement. <sup>16</sup> Since OCSE withdrew its proposed rule, South Dakota must strike "unless the reduction of income is due to incarceration" from its deviation criterion in <u>SDCL § 25-7-6.10(6)</u> concerning voluntary and unreasonable act of a parent which causes the parent to be unemployed or underemployed.

#### **Recommendation Summary**

There are two components to the recommendation: provide that incarceration of more than 180 days as a reason for not applying the rebuttal presumption of minimum wage earnings as referenced in <u>SDCL § 25-7-6.4</u> and <u>SDCL § 25-7-6</u>; strike "unless the reduction of income is due to incarceration" from its deviation criterion in § 25-7-6.10(6 concerning voluntary and unreasonable act of a parent which causes the parent to be unemployed or underemployed. These three changes will allow for the consideration of the incarcerated parent's actual income when setting a child support order. They will also bring South Dakota into compliance with the recent federal regulation change.

#### RECOMMENDATION 7: PROVIDE MORE SPECIFICATION ON IMPUTED INCOME

#### Issue

The issue concerns what income is to be used for the calculation of support when there is no evidence of actual income, the evidence shows little history of employment and earnings, or the parent is voluntarily unemployed or underemployed. The issue concerns <u>SDCL § 25-7-6</u> that addresses how to determine available income for support and <u>SDCL § 25-7-6</u> that provides for the rebuttal presumption of employment at minimum wag. The Commission heard many public comments concerning evidence of income and how income available for child support was determined and whether the income use reflected the full earning potential of that parent. A recent change in federal regulation that requires the consideration of the individual circumstances of the obligor when income imputation is authorized was also addressed as part of this issue

#### Discussion

The Commission heard public comments and from Commission members that it is not uncommon that income is presumed at minimum wage earnings for the calculation of the support although the parent could earn more income (e.g., the parent could work as a data coder but decides not to). The consensus was that this was not a fair outcome. The Commission also identified other circumstances where income imputation to a parent may be appropriate: the parent failed to produce sufficient proof of income, the

<sup>&</sup>lt;sup>16</sup> U.S. Department of Health and Human Services, Office of Child Support Enforcement. (Nov. 10, 2021.) "NPRM Withdrawal-Optional Exceptions to Child Support Guidelines." *Dear Colleague Letter* 21-15 <a href="https://www.acf.hhs.gov/css/policyguidance/nprm-withdrawal-optional-exceptions-child-support-guid">https://www.acf.hhs.gov/css/policyguidance/nprm-withdrawal-optional-exceptions-child-support-guid</a>.

parent has an unknown employment status, or the parent is a student whose education or training wou essentially increase earnings.

Another consideration was the change in federal regulation (45 C.F.R. § 302.56(c)(1)(iii)). It is shown below. The Commission understands that most states are simply inserting the federal language into their guidelines. In discussing this option, the Commission identified when income imputation is not appropriate. These circumstances include when the parent has physical or mental disabilities that affect the parent's earning ability, the parent is incarcerated for more than 180 days, or the parent made diligent efforts to find and accept suitable work or to return to customary self-employment, to no avail.

# Exhibit 5: Federal Requirement to Consid Individual Circumstances when Imputing Income \$302.56 (c)(1)

(iii) If imputation of income is authorized, takes into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.

#### **Recommendation Summary**

The recommendation addresses all of the issues mentioned above by expandin <u>SDCL § 25-7-6.26</u>, which currently addresses the failure to furnish financial information, to consider imputed income. The proposed modifications identify circumstances where income imputation is appropriate (e.g., the parent is voluntarily underemployed) and circumstances where income imputation is not appropriate (e.g., the parent has physical or mental disabilities that prevent the parent from earning income). It also lists all of the federally identified considerations and factors to be considered when income imputation is appropriate.

#### RECOMMENDATION 8: ADD A NEW PROVISION TO REQUIRE A WRITTEN FINDING WHEN DEVIATING

#### Issu

Federal regulation requires states to have rebuttable presumption guidelines. Each state is to determ its own deviation criteria. South Dakota provides for six deviation criteria in <u>SDCL § 25-7-6.10</u>, but it does not specify a written finding when the guidelines-determined amount is unjust or inappropriate.

#### Discussion

The federal requirement is shown below. The intent is to provide documentation of the basis of the order. It can be used to inform the appropriate order amount if a party requests that the order amount be reviewed.

#### Exhibit 6: Federal Provision Requiring a Written Finding in Deviations

#### § 302.56

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the establishment or modification of a child support order that the application of the child support guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case will be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child.

Findings that rebut the child support guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

#### **Recommendation Summary**

The Commission recommends adding a provision that mirrors the federal provision by requiring a written finding when there is a guidelines deviation.

# RECOMMENDATION 9: STRIKE SDCL § 25-4-43 THAT PROVIDES FOR PAYMENTS THROUGH CLERK OF COURTS

#### Issue

The provision is obsolete. Support payments are no longer being paid through clerk of courts.

#### Discussion

Prior to the federal requirement for a state child support case registry and state disbursement unit, South Dakota provided for payments on DCS cases through the clerk of courts. Not later than October 1, 1998, each state was required to set up its own system to track child support cases (or cases under wh the state's child support program administered through Title IV-D of the Social Security Act was called). South Dakota met the federal requirement and timeline. However, not all cases paid through the clerk of courts were transferred to the new system. Some continued paying through the clerk of courts. DCS knows of no DCS cases that are currently being paid through the clerk of courts. It is highly likely that any children of such a case are now emancipated and the case is now closed.

#### **Recommendation Summary**

The Commission recommends deleting <u>SDCL § 24-4-43</u> because it is no longer relevant. No cases pay through the clerk of courts.

# OTHER MATTERS ADDRESSED BY THE 202 COMMISSION

Several other issues were identified by Commission members and DCS, and through the public hearin and written comments submitted to the Commission. Some did not result in recommendations for a variety of reasons. Some of the public comments were not specific to a particular guidelines provision, and often the comment intertwined several issues that were not guidelines issues, and some comments expressed broad dissatisfaction with the entire guidelines and child support and custody policies in general. It was not always clear whether the issue was the guidelines or a particular policy or procedure or general dissatisfaction. Some of the other issues concerned a specific circumstance of the case, the determination of custody, lack of enforcement, too strict enforcement, case processes and procedures or another non-guidelines issue (e.g., driver's license suspension). Still, there were many public commen concerning shared parenting, but the issues varied and were also often bundled with other issues. Some concerned the amount of the adjustment, the underlying premises of the adjustment or the guideline and others concerned custody determination. Some of the intertwined issues considered the level of parental involvement with the child and the determination of income of a self-employed parent. Several parents shared their stories about custody determination, and identified specific expenses (e.g., the cost of the child's hobbies) that they believe are not considered in the guidelines calculation or should be

considered when adjusting for any timesharing arrangement. A few parents specifically identified issues with how the cost of the child's health insurance was determined or with the provision for extraordinary medical support. A few parents also advocated for accountability of child support payments and setting child support obligations so that they relate to the basic expenses of the child. Still, other comments suggested that the level of support was inadequate. The Commission also heard public comments expressing concerns with the Commission's recommendations because most of them would lower the amount of child support to be paid to a family.

There were only two issues that are explicitly in the guidelines that were discussed in length that did not result in a recommendation:

- The treatment of overtime income and income from second jobs as income available for child support;
   and
- Addressing how to meet the federal requirement that provides for three different methods to ease order modification among incarcerated parents

Although the Commission received public comment about overtime income and second jobs, one Commission member reminded the 2021 Commission that previous Commissions or the Legislature had carefully addressed these issues and it did not seem sensible to re-hash the issues. The Commission also received one or two comments on other narrow guidelines issues that they did not address (e.g., credits for arrears and transportation expenses).

The Commission explored the pros and cons of automatically suspending the child support order for an incarcerated parent. Federal regulation now provides for this option (see 45 C.F.R. § 303.8, which is shown at the bottom of Exhibit 1). Their interest spanned policy issues, operational issues, and implementation issues. One particular concern is the impact automatic suspension would have on the courts and whether there was sufficient automation to support automatic suspension. For example, one common concern among most states is whether incarceration can be identified from automated sources particularly due to nuanced differences in names and other personal identifiers, and the lack of automated links to county jails and prisons outside the state system. DCS clarified many policies surrounding incarcerated parents. For example, some states suspend their orders when the obligor is incarcerated for more than 180 days. The Commission also considered how incarcerated parents are periodically notified of their right to review and steps to take to initiate a modification. DCS representatives explained that DCS sends a notice of a right to request a review to an incarcerated parent once DCS learns that the parent is incarcerated for more than 180 days. DCS is collaborating with the Department of Corrections (DOC) to better address child support issues among incarcerated parents. For example, DCS and DOC are discussing the impact of South Dakota meeting the federal requirement to not consider incarceration to be voluntary unemployment and re-notifying. Attachment 11 provides more information about automatic suspension compared to notification of the right to request a modification.

# IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

#### APPEAL NO. 30286

CHARLES JOSEPH BURKARD
Defendant and Appellant,
vs.
TAMI JO BURKARD
Plaintiff and Appellee.

Appeal from the Circuit Court, Second Judicial Circuit
Lincoln County, South Dakota
The Honorable John Pekas
Circuit Court Judge

#### APPELLEE'S BRIEF

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## **Preliminary Statement**

References to the settled record

All references to the Settled Record are cited as "S.R." followed by the page number.

References to the hearing transcript on Mother's objections to the Referee's report are cited "H.T." with page and line numbers separated by a colon. References to the Referee's report are "R.R." with a page number.

## **Jurisdictional Statement**

Tami Burkard ("Mother") brought a petition to modify child support on April 20, 2022. (S.R. 162). Her petition was heard before South Dakota Child Support Referee Tom Weerheim on October 19, 2022. The Referee modified child support and issued a report on October 26, 2022. (S.R. 248). Mother filed objections to the report and hearing was held before the Honorable Circuit Court Judge John Pekas in the Second Circuit Court, Lincoln County. (S.R. 353). Judge Pekas issued an order adopting the Referee's recommendations on February 14, 2023. (S.R. 402). Mother filed notice of appeal to this Honorable Court on March 8, 2023. (S.R. 430).

#### States of Legal Issues

I. Whether the Circuit Court Erred in Considering Testimony During the Hearing on Mother's Objections to the Referee's Report

#### Relevant Case Law:

Hauck v. Clay Cnty. Comm'n, 2023 SD 43, \*\*\*N.W.2d\*\*\*
Kelley v. Kirk, 391 N.W.2d 652 (S.D. 1986)
Linge v Meyerink, 2011 SD 78, 806 N.W.2d 245
Tovsland v. Reub, 2004 S.D. 93, 686 N.W.2d 39

II. Whether the Circuit Court Committed Legal Error in Adopting the Referee's Recommendation

#### Relevant Case Law:

Crawford v. Schulte, 2013 S.D. 28, 829 N.W.2d 155
Kauth v Bartlett, 2008 S.D.20, 746 N.W.2d 747
MGA Ins. Co. v. Goodsell, 2005 S.D. 118, 707 N.W.2d 483
Schieffer v. Schieffer, 2013 S.D. 11, 826 N.W.2d 627

# Statement of Facts

Tami ("Mother") and Charles ("Father") Burkard have two children, Daughter who is 17 years old, and Son, who is 15 years old. The parents initially had a shared parenting agreement that included both children. Daughter is now in Mother's primary custody. The parties retain the shared parenting agreement for Son. The change in Daughter's custody arrangement prompted Mother to file a petition for child support modification.

# Proceedings Before the Referee

Both parties appeared before the Referee with counsel. (R.R.1). There were no significant factual disputes; rather, the parties sought to ascertain the method for calculating child support in a circumstance where one child is under a shared parenting agreement and the other is in one parent's primary custody. (H.T. 4:14-15). The Referee considered and rejected all possible deviations and adjustments to support. (R.R. 2).

Mother argued support should be calculated by adding the standard one-child calculation to a one-child cross credit calculation. (R.R. 1). This calculation worked as follows

Standard 1 child calculation	\$1313
1 child cross credit	\$543

Health insurance	\$74	
Total	\$1940	

The Referee found Mother's formula created a support obligation for Father that was greater than he would pay if Mother had primary custody of both children. *Id.* The Referee found, "this would not be in the best interest of the children as in some cases, a non-custodial parent would then be deterred from pursuing any future shared parenting arrangement for one of the children in a multiple child situation." *Id.* 

Father argued the Referee should apply a one-child cross credit calculation and add the result to the difference between the standard one-child and two-child support obligations. (R.R. 1-2). Father's proposed calculation worked as follows:

\$543
\$552
\$74
\$1169

The weakness of Father's claim, according to the Referee, was that it did not account for which child should be considered first in the calculation. "If Referee calculated a cross-credit one child support amount and then used the difference between a one child and two child support amount within the tables to calculate the second child, this would yield a different result than if Referee utilized the standard calculation for the first child and then used the difference between a cross credit one-child and two-child support amount within the tables to calculate the second child." (R.R. 2).

The Referee noted there was no statutory or case law directly governing the parties' situation (R.R.1) and chose a "hybrid" formula for calculating the support amount. (R.R. 2).

The Referee's calculation (R.R.3):

\$932.50
\$459.08
\$74
\$1465.58

## Proceedings Before the Circuit Court

Mother objected to the Referee's recommendation, and a hearing on her objection was held on February 6, 2023, before Judge Pekas. Both parties appeared with counsel. (H.T. 1). Mother continued to assert that proper resolution required considering each child's custody situation separately and then stacking the resulting obligations. (H.T. 4:17-24). Father did not file objections to the Referee's recommendation and argued in support of the Referee's resolution. (H.T. 23:13-17). Neither party testified before the circuit court.

Over Mother's objection, the circuit court permitted Father to call Thomas Keller to testify. (H.T. 7:23-8:11). Mr. Keller has been a child support referee for at least 15 years but was not the referee in this case. (H.T. 10:1). He testified to the various methods for calculating the support in parents' situation and opined that the Referee's calculation was most aligned with the policy and intention undergirding South Dakota's child support statutory scheme. (H.T. 8-19). His testimony and written submission also

demonstrated the various options for calculating the obligation. (S.R. 402, Ex. A). The trial court required Mr. Keller's written assessment of the issue to be marked as evidence, took the memoranda, and appended it to the court's child support order. *Id.* (H.T. 21:2). The circuit court affirmed the Referee's recommendation, adopting its findings and conclusions. (S.R. 402).

# Appellee's Argument

#### Standard of Review

When the circuit court adopts the child support referee's recommendation, findings of fact are reviewed for clear error, conclusions of law are reviewed *de novo*, and this Court gives no deference to the referee or circuit court's statutory interpretation. *Crawford v. Schulte*, 2013 S.D. 28, ¶8, 829 N.W.2d 155, 157 (quoting *Dahl v. Dahl*, 2007 S.D. 64, ¶9, 736 N.W.2d 803, 805; *Arneson v. Arneson*, 2003 S.D. 125, ¶ 27, 670 N.W.2d 904, 914.) Father respectfully asserts that, in the event this Court finds the award was not in derogation of the statutes on child support, then the circuit court should be overturned only if the Court finds the circuit court abused its discretion in adopting the Referee's recommendation. *Roberts v Roberts*, 2003 S.D. 75, ¶11, 666 N.W.2d 477, 480.

The only question in this case is one of statutory interpretation. Thus, "the language expressed in the statute is the paramount consideration." *In re Appeal by an Implicated Individual*, 2023 S.D. 16, ¶ 11, 989 N.W.2d 517, 521-522. The rules of

attached to the court's order.

5

When the court had the memoranda marked as evidence, counsel for Father advised the court that Mr. Keller's discussion in the memoranda had already been incorporated into Father's written argument prior to the hearing. (H.T. 13). (Brief is located at S.R. 394). The circuit court said he was aware of this and then heard Mother's objection to the memoranda, overruling it. After Mr. Keller testified, the court told Father's counsel he would "take" the memoranda. (H.T. 21:2.) The exhibit appears in the record index

statutory construction require the Court to read the child support scheme as a whole and give words their plain meaning and effect. *Id.* "When the language of a statute is clear, certain and unambiguous, there is no occasion for construction, and the court's only function is to declare the meaning of the statute as clearly expressed in the statute." *Id.* (internal citations and quotations omitted). As this Court has noted however,

There are instances when it is necessary to look beyond the express language of a statute in determining legislative intent. Most notably, when the language is ambiguous, unclear, or if confining ourselves to the express language would produce an absurd result.

MGA Ins. Co. v. Goodsell, 2005 S.D. 118, ¶ 17, 707 N.W.2d 483, 485 (citing Myrl & Roy's Paving, Inc., 2004 S.D. 98, ¶ 6, 686 N.W.2d at 654; Moeller v. Weber, 2004 S.D. 110, ¶ 46, 689 N.W.2d 1, 16 ("we must fall back on the rule of statutory construction that requires us to give a sensible reading to statutes"). The Court has also gone beyond the plain language of a statute when it found that to do otherwise would "subvert[] the manifest purpose of [a] legislative amendment." Id. at ¶ 18. Thus, "[i]n cases where a literal approach would functionally annul the law, the cardinal purpose of statutory construction--ascertaining legislative intent--ought not be limited to simply reading a statute's bare language; we must also reflect upon the purpose of the enactment, the matter sought to be corrected and the goal to be attained." Id. at ¶19. Ultimately, "[t]he purpose of statutory construction is to discover the true intention of the law" (Id. at ¶9) and "[e]nactments relating to the same subject are ... relevant in determining legislative intent." Id. at ¶16 (citing Gloe v. Union Ins. Co., 2005 SD 29, ¶11, 694 N.W.2d 238, 242).

I. Whether the Circuit Court Erred in Considering Testimony During the
Hearing on Mother's Objections to the Referee's Report

Mother argues the circuit court committed reversible error by considering the testimony and written memorandum of Thomas Keller at the hearing on Mother's objections. Mother bases her argument on SDCL 25-7A-22, which provides in relevant part:

If any objection is filed [to the referee's report], the circuit court shall fix a date for hearing on the report, the hearing to be <u>solely on the record established before</u> the referee. The circuit court may thereafter adopt the referee's report, or may modify it, or may reject and remand it with instructions or for further hearing.

and

If the circuit court's order modifies the referee's report and no hearing was held before the circuit court before entry of its order, any party has ten days from the date of service of the order in which to file an objection to that modification. If an objection is filed, the circuit court shall fix a date for hearing on the objection and after the hearing shall enter its order.

# Id. (emphasis supplied).

Consideration of this issue is somewhat complicated by the fact that the testimony and memoranda provided by Mr. Keller were, in sum and substance, made by counsel in her written submissions and oral arguments about how to read and apply the child support guidelines. Additionally, the substance of Mr. Keller's testimony was found in written submissions that were received by the court without objection. (H.T. 6:23-7:7). The questions of how to interpret the child support statutes and the implications of the various options for calculating the award were, of course, questions on which the court was able to hear argument. Otherwise, there would be no point in the circuit court's power to hear objections to the referee's support recommendation. See *Janke v Janke*, 467 N.W.2d 494, 497 (S.D. 1991) (holding that the referee's conclusions of law, are freely reviewable by the circuit court and may be overturned whenever they are thought to be incorrect). In short, if Mr. Keller's testimony had not been permitted, the same arguments could have

been (and were) properly made directly by counsel and heard by the court. Indeed, the arguments made by counsel and the testimony of Mr. Keller were a direct response to the legal and policy arguments Mother advanced.

Mr. Keller gave no testimony involving new factual claims related to the parties' relative income, the children's needs, or any other factual issues relevant to the question whether the Referee properly modified the child support award. Mother conceded that there were no factual issues in dispute. (H.T. 4:14-15). Father's counsel argued to the circuit court that it was not her intent to supplement the record but rather to clarify the calculation options and discuss their implications. (H.T. 8:12-21). To the extent that nothing new was introduced at the hearing on Mother's objections, hearing from Mr. Keller did not violate the statute by going beyond the record of the hearing before the Referee. But even if it was a violation of the statute, Mother was not prejudiced.

The circuit court was clear that he had read and understood the parties' written submissions and was aware that arguments in Mr. Keller's memorandum were incorporated into Father's written argument. (H.T. 13:6-17). Mother was well-aware of those arguments prior to the hearing, having received them in advance without objection. (H.T. 11:4-10). Having the memorandum in hand, Mother also had a full opportunity to cross examine Mr. Keller. (H.T. 19-20).

The burden is on Mother to show the court's error and that the error was prejudicial. *Tovsland v. Reub*, 2004 S.D. 93, ¶15 686 N.W.2d 392, 398. Here, the court had the power and indeed the obligation to consider the legal claims made by Father's counsel in support of the Referee's recommendation. SDCL 25-7A-22. The court made it clear that he did not abandon his own discretion or reading of the law in upholding the

referee's decision and he carefully considered the arguments of the parties. See e.g. H.T. 3:3-6; H.T. 8:4-10 (court noting he'd read parties' submissions); H.T. 9:4-6 (court noting he believed the testimony was necessary for resolution of the issue); H.T. 13:11-17 (the court noting that he'd read Mr. Keller's analysis as incorporated into Father's hearing brief prior to the hearing). For Mother's argument regarding prejudice to withstand scrutiny, this Court would have to accept the proposition that the circuit court abandoned the judicial role and ceded it to a witness. The record simply does not support that conclusion. See e.g. *Linge v Meyerink*, 2011 SD 78, ¶15, 806 N.W.2d 245, 248; *Dahl v Dahl*, 2007 SD 64, ¶12, 736 N.W.2d 803, 806 ("Clearly, SDCL 25-7A-22 permits a court to adopt a referee's report after holding a hearing on and reviewing a party's objection to the report.") If the Court determines that the circuit court reached the right result in this case, it should not overturn the decision on this issue.

Prior to the hearing on Mother's objection, both parties and the court knew this factual situation had not been directly addressed by statute or case law. It is clear the circuit court expected the parties would appeal the issue, (H.T. 3:1-10; 9:4-8) not only for their own sake but for purposes of clarifying the law to address a situation that is occurring with increasing frequency across the state. (S.R. 402, Ex. A). Although permitting Mr. Keller to testify as to the differing calculations was an unusual manner of proceeding, even if it was a violation of 25-7A-22, it was harmless error. *Tovsland*, 2004 S.D. 93 at ¶15 686 N.W.2d at 398.

Father respectfully asserts that overturning the circuit court's child support order on these grounds is unnecessary and counterproductive. As Father develops below, the legal issue raised by the parties' custody situation requires resolution to ensure uniformity

in child support awards. Lacking explicit legislative guidance, that uniformity can come only through a decision by this Court.<sup>2</sup>

# II. Whether the Circuit Court Committed Legal Error in Adopting the Referee's Recommendation

Father agrees with Mother that no statute in the child support regime explicitly addresses the parties' custody situation. But the child support statute is mandatory.

Unless an exception applies, the court must calculate the award per the schedule, which requires finding the parties' support obligation on a chart that has the parents' income on one axis and the number of children in the family on the other axis. So, the court must start with the proposition that this is a two child family and proceed from there. The custody situation is a secondary consideration and herein lies the fundamental error in Mother's proposed calculation. There is, however, ambiguity in precisely how to proceed in the calculation. Thus, interpretation of the statutes requires consideration of legislative intent. Father respectfully asserts that the legislative intent, combined with the plain language of the child support schedule supports the referee's determination.

The Child Support Statutory Scheme

In the late 1980s, Congress required states to create child support guidelines to qualify for receipt of federal funds for public welfare programs. 1985 South Dakota

10.00

<sup>&</sup>lt;sup>2</sup> Mother did not make or provide support for an argument that the testimony was inadmissible based on any grounds other than SDCL 25-7A-22. Failure to do so waives such arguments on appeal. *Hauck v. Clay Cnty. Comm'n*, 2023 SD 43, ¶ 4\*\*\*N.W.2d\*\*\* (Arguments not raised at the trial level are deemed waived on appeal) (additional citations and quotations omitted); *Kelley v. Kirk*, 391 N.W.2d 652, 654-655 (S.D. 1986)(issue is waived when party fails to cite authority on appeal).

Commission on Child Support at 3. As can be intuited, the federal government was interested in encouraging states to adopt child support policies that would diminish reliance on federal welfare assistance by ensuring that child support obligations were paid. Id. Thus, there was a focus on enforcement. But the federal government was also interested in achieving "a uniform standard of adequacy and equity in the establishment of child support orders." Robert G. Williams, Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report, Part I, 23-24 (U.S. Department of Health & Human Services, Office of Child Support Enforcement 1987)). To meet these goals, the states were required to create a set of presumptive guidelines that provided descriptive and numerical criteria, permitted deviation based only on specific statutory conditions, and required the Legislature to consider both the cost of raising children and the regularity of deviations in creating and adjusting the standards. See e.g.45 C.F.R. 302.56; Report of the 2021 South Dakota Commission on Child Support at 2 ("2021 Commission Report"); Beld, Michelle, & Biernat, Len, Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting, 37 Fam. L.Q. 165, 170 (citing Pub. L. No. 100-485, § 103, 102 STAT. 2343 (1988); 42 U.S.C. § 667(b)(2) (1991); 45 C.F.R. § 302.56(c-h) (2003)).

In response to the federal mandate, the South Dakota Commission on Child Support was created. 1985 Commission Report at 3. It produced its first report in 1985.

Id. Since then, the Commission has met regularly, and with a few exceptions, its recommendations have been accepted and adopted by the Legislature. 2021 Commission Report at 1. The first Commission observed that federal law required the state to

"examine, investigate and study the operation of the State's child support system for the primary purpose of determining the extent to which said system has been successful in securing support and parental involvement...for children....giving particular attention to such specific problems as visitation, the establishment of appropriate objective standards for support, enforcement of interstate obligations, the availability, cost and effectiveness of services...to children and the need for additional state or federal legislation to obtain support for all children."

1985 Commission Report at 3 (citing PL 98-378). The Commission noted that the state's lack of uniform guidelines led to "substantial variations" in support orders based on varying calculation methods. *Id.* at 13. That first Commission report led to significant and lasting changes in the state's child support law. The primary change was imposition of a child support schedule and a rebuttable presumption that application of the schedule led the court to an appropriate child support obligation. This focus on uniformity continues to be an important value in the statutory scheme. SDCL 25-7-6.1 provides foundational concepts for South Dakota's law on child support. Parents are "jointly and severally obligated for the necessary maintenance, education and support of the child in accordance with their means." To determine the amount of support owed by each parent, the Legislature adopted the support obligation schedule. SDCL 25-7-6.2. Use of the schedule is mandatory, with deviations governed by statute. *Id*; *Midzak v. Midzak*, 2005 S.D. 58, ¶ 30-31, 697 N.W.2d 733, 740 (abuse of discretion to fail to follow mandatory language of child support schedule).

The schedule adopts an "income shares" model, which requires courts to use the combined monthly income of the parents in determining the entire support obligation for all the children in the family. *Id.* The parties' combined obligation is divided proportionally between the parents according to their incomes. *Id.* The support schedule itself does not explicitly describe how the Legislature arrived at the support amounts in

the schedule, but it is clear the Legislature was attempting to achieve the stated federal goals of uniformity, adequacy, and equity.

The State's adoption of the "income shares" model of child support sheds a some light on the issue raised by this case. This model was not the first one utilized when South Dakota moved to a child support schedule. We began with an obligor only model, which simply assumed the custodial parent was paying their fair share of the child support obligation and did not consider their income or identify a separate support obligation. 1985 Commission Report at 15. Within 3 years, the Commission was recommending the Legislature abandon the obligor only model in favor of the income shares model, arguing that both the perception of fairness and actual fairness required consideration of the custodial parent's income in setting the support obligation. South Dakota 1989 Commission on Child Support at 7. The following year, the Legislature adopted the recommendation, and the state has used this model since. SDCL 25-7-6.2. The insistence on shared parental obligations can also be seen in the Commission's 1988 discussion of shared parenting situations, where it noted, "the commission did not believe the mere existence of a joint custody arrangement, even with 50/50 sharing, should necessarily result in a total lack of support being paid from one parent to the other, except in those cases where the income of both parties was equal." 1998 Commission Report at 11. The requirement that the obligation of both parents be calculated and considered and the value of fairness are still embraced by the child support statutes.

Although the custodial parent is still presumed rather than ordered to use their share of the obligation for the benefit of the children, the Legislature's switch to an income shares model takes the custodial parent's income into account and explicitly

assigns both parents a proportionate share of the support obligation. Thus, even in a case where one parent has a much higher income, both parents' obligation for each child is separately identified and respected.

Mother argues that the circuit court committed legal error in adopting the Referee's formula because the court was bound to consider the best interests of the children in its determination of child support. (H.T. 4:1-6; 23:25-24:1). Mother misconstrues the standard in child support cases. In *Kauth v Bartlett*, the child support referee raised deviations from the schedule *sua sponte* on the theory that doing so was supported by the "broad equitable theory of best interest of the child." *Kauth v Bartlett*, 2008 S.D.20, ¶ 19, 746 N.W.2d 747. This Court responded that "the best interest of the child is not a standard articulated in the child support statutes. The guiding standard for child support is the child's standard of living pre-divorce." *Id.* (citing SDCL 25-7-6.2; *Laird v Laird*, 2002 S.D. 99, ¶30, 650 N.W.2d 296, 301.)<sup>3</sup>

The South Dakota Commission on Child Support, the Legislature, and this Court have been clear that children should not pay the price for the parent's decision to live separately. See e.g. SDCL 25-7-6.27; Sigler v Sigler, 2017 S.D. 85, ¶16, 905 N.W.2d 308, 312 (discussing Evans v. Evans, 1997 S.D. 16, ¶19, 559 N.W.2d 240, 245). Thus, to at least some degree, the child support scheme operates under the fiction that parents maintain the same ability to provide for their children even though they are now supporting two homes. But the regime also accounts for another important aspect of

<sup>&</sup>lt;sup>3</sup> In 2022, upon the recommendation of the Commission on Child Support and at the behest of federal regulations, the Legislature added SDCL 25-7-6.29. This statute does use the phrase "best interest of the child," but the context is related to a requirement of written findings to support a referee or court's holding that application of the guidelines would be inappropriate or unjust. If the referee is refusing to apply the guidelines, they must consider the best interest of the child.

family finances; in a situation where more than one child lives in the same home, it is an economic fact and an assumption of the child support regime that there are economies of scale. In other words, the family expends more money and resources on the first child than subsequent. From the very first iteration, the South Dakota child support guidelines have been based on this understanding. As the first Commission noted in 1985,

"the schedule reflects that the cost per child decreases as the number of children in the household increases. Recent studies of net income expenditures on children reflect that each additional child costs approximately one half of the incremental increase in costs of the previous child. For example, if the support for one child is \$200, two children is \$300, three children is \$350 four children is \$375."

1985 Commission Report at 14.

One can see how the Legislature took these economies of scale into account by review of the schedule. SDCL 25-7-6.2. First, the referee is required to consider the number of children in setting the obligation. *Id.* Second, the incremental increase in the amount owed with each subsequent child reflects the idea that costs are not simply doubled by addition of another child. *Id.* The schedule therefore treats the children of the family as one unit and attempts to ensure that each child in the family is receiving the same amount of support as they would have had if the parents remained together in the same home. *2021 Commission Report* at 4; S.D. Commission on Child Support, 2004 (noting, the income shares 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.")

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<sup>&</sup>lt;sup>4</sup> But see 1988 Commission Report, at 10 (noting, "the commission was advised that it is not economies of scale which result in the diminishing dollar increase in costs for raising each additional child, but rather the realities of life—that is, that there is only so much of the pie which can be allocated to the costs of raising children at any given income level"). Regardless of the reasoning, the child support schedule assumes a subsequent child does not double the custodial parent's costs.

The legislative intent to take economies of scale into consideration is evident in every scenario that the Legislature has explicitly addressed. As discussed *supra* and *infra*, the assumption is written into the support schedule, it is implicit in the split custody statute, and it is written into the shared custody cross-credit legislation.

Split Custody

The fiction that parents can provide the exact level of support that the children would enjoy if the family remained intact became less sustainable as an increasing number of families entered into "non-traditional" parenting arrangements that required creation and maintenance of two custodial homes. The child support schedule is premised on the assumption that one parent has primary physical custody of all the children. The gap in the child support regime first became apparent in cases of "split custody," where each parent had custody of at least one of the children. The child support statutes simply did not account for such arrangements, so this Court took up the issue in *Steffens v Peterson*, 503 N.W.2d 254, 258 (S.D. 1993).

In Steffens, the parties had three children. The father had primary custody of two children, the mother had primary custody of one. This Court approved a support obligation reached by calculating the mother's obligation for the children in father's custody and subtracting it from the father's obligation for the child in mother's custody. The resulting amount was the father's obligation. In 2004, the South Dakota Commission on Child Support recommended that the Legislature codify the formula approved in Steffens. 2004 Commission Report at 17. The Commission believed the Court's formula would encourage uniformity and predictability of child support obligations. Id. The resulting statute was SDCL 25-7-6.23.

It is perhaps helpful to review how SDCL 25-7-6.23 works in practice, because here, Mother argues that SDCL 25-7-6.23 should guide the Court's calculation of child support. The highlighted portion is the formula for assessing split custody obligations:

Mother's obligation for two children residing with Father (Pro-rata	\$201.35
share of standard 2 child calculation)	
Father's obligation for one child residing with Mother (Pro-rata	\$952.95
share of standard 1 child calculation)	
Father's obligation offset by Mother's obligation	\$751.60

One can see the logic in the calculation. Each parent is both a custodial and a non-custodial parent, owing a support obligation to the child(ren) in their custody and the child(ren) in the other parent's custody. The formula ensures that each parent retains responsibility for their share of support for all the children by offsetting the two obligations. The formula accounts for the necessary doubling of certain expenses by calculating the parents' obligations separately. Finally, by using the support guidelines to calculate each individual parent's award, the formula will automatically account for the economies of scale enjoyed by the parent who is the primary custodian of more than one child. As one Kentucky court noted:

"With split custody, each parent supports only a portion of the original family offspring because neither household will be supporting all the children. Once custody of the children is divided between the parents, each child will have one primary home and one custodial parent and will only visit the other parent's abode. Economically speaking, the visit will not increase the noncustodial parent's expenses to any greater degree than would a visit by any guest. As insensitive as it may sound, that is how sole custody works and split custody is sole custody."

Serrano v. Serrano, 2020 Ky. App. Unpub. LEXIS 178 (Court of Appeals of Kentucky March 13, 2020, Rendered)(quoting Marygold S. Melli & Patricia R. Brown, The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence, 31 HOUS. L. REV. 543, 554-55 (1994) (footnote omitted)).

Shared Custody

Economies of scale were also considered in the second exception to the support schedule: true shared custody cases. SDCL 25-7-6.27. The Court can perhaps home in on a resolution to the case at hand by looking to how the Legislature has dealt with situations of shared parenting. SDCL 25-7-6.27 applies to situations in which the parents entered "a detailed parenting plan" that includes an agreement that the child will spend at least 180 nights in each parent's home and the parents share duties, responsibilities, and expenses for the child in proportion to their incomes. In a shared parenting arrangement, both parents' houses will be home to the children. By necessity then, there is greater cost because of the necessity of duplicating certain costs, such as housing, utilities and furnishings. See e.g. Linda Lea M. Viken, Child Support in South Dakota From Obligor Only To Shared Responsibility, an Overview, 48 S.D. L. Rev. 443, 448 (2003)(discussing fixed and duplicated costs).

South Dakota dealt with shared parenting by permitting a discretionary cross credit whenever the parenting agreement meets the statutory criteria. SDCL 25-7-6.27. The court determines appropriateness of the cross credit by inquiring whether "it would have a substantial negative effect on the child's standard of living." *Id.* If the court does

deem the cross credit appropriate, the method of its calculation is mandatory, the statute providing detailed criteria for how the calculation is performed.<sup>5</sup>

This exception to the support schedule remains true to the basic principles supporting the child support regime. First, subsection (1) adopts a 1.5 multiplier for the parents' support obligation. The multiplier "recognizes the duplicative child rearing costs resulting from shared custody arrangements." 2000 Commission, at 13 fn 10. As the Commission observed "studies suggest that the costs of rearing children in a shared custody situation may increase by as much as 50%." Id. Second, the statute mandates use of the schedule to determine the parents' combined obligation. Mandatory application of the schedule implicitly forces resolution of the economies of scale issue by basing the support obligation on the number of children being provided for. By utilizing the proportional share analysis, the statute embraces the ideal that parents should support the children according to their respective means. Finally, it acknowledges that each parent is both a non-custodial parent and a custodial parent who owes a share of support for all the children by requiring that their obligations be offset and that the parent with the larger

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<sup>&</sup>lt;sup>5</sup> (1) Multiply the parents' combined child support obligation under the schedule by 1.5 to establish the parents' combined shared parenting child support obligation;

<sup>(2)</sup> Multiply the combined shared parenting child support obligation by each parent's percentage share of the parents' combined net incomes to establish each parent's shared parenting child support obligation;

<sup>(3)</sup> Multiply each parent's shared parenting child support obligation by the percentage of nights the child resides with each parent based on a three hundred sixty-five day calendar year to establish each parent's prorated shared parenting child support obligation;

<sup>(4)</sup> Offset the parents' prorated shared parenting child support obligations; and

<sup>(5)</sup> The parent with the larger prorated shared parenting child support obligation shall pay the difference between these amounts."

share of the obligation pay the difference between the two awards. SDCL 25-7-6.27 (5) and (6).

Application of the Statutory Regime to Mother and Father's Case

As Mother acknowledges, no existing statute explicitly addresses the parents' situation. She nevertheless argues that since SDCL 25-7-6.23, (the statute dealing with split custody) comes the closest to the parties' situation, the referee and circuit court erred and abused their discretion by failing to utilize her recommended formula, which is similar to that in the statute. There are significant problems with Mother's argument. As our review of the child support statutes reveals, the Legislature has focused on ensuring support obligations are paid, requiring uniformity in support obligations, ensuring that both parents pay their proportionate share of support, maintaining the children's predivorce standard of living, and accounting for the economies of scale realized in multiple child homes. Mother's proposed formula violates all these principles.

## SDCL 25-7-6.23 provides:

If the parents have two or more children between them and each parent has primary physical custody of at least one child, the child support obligation shall be determined by computing the amount of each parent's respective support obligation for the children in the other parent's physical custody, and the support obligations shall be offset in determining a monthly support obligation. If one or more of the children are receiving assistance from the department as provided in § 28-7A-7, and in lieu of the offset, each parent shall be obligated to pay the respective support obligation amount to the other parent.

Statutory interpretation requires the Court to abide first by the plain language of the law. Both standing on its own and read *in pari materia*, this formula simply cannot control. First, use of the schedule is mandatory unless there is a statutory exception or a permissible deviation. SDCL 25-7-6.2; *Kauth v Bartlett*, 2008 S.D.20, ¶ 21, 746 N.W.2d 747("the 1986 statutory scheme and all subsequent amendments to the child support

guidelines demonstrate a clear legislative intent to make the statutory procedures mandatory.") Mother's formula ignores the schedule, which requires that, in determining the parents' support obligation, all the children in the family are considered together, as one family unit. Since neither the schedule nor the split custody statutes are discretionary, application of Mother's formula requires that the Court ignore the plain language of both. But even if Mother's argument did not violate basic principles of statutory construction, it leads to an absurd result that is antithetical to the policies of both child custody and child support.

The schedule's requirement that the child be considered together as part of a family unit advances the principle that the children should enjoy the same level of support that they would have enjoyed had the parent's not chosen to live apart. SDCL 25-7-6.23 provides an exception to the requirement of considering the children together by requiring consideration of each custody arrangement separately. This exception recognizes both the duplicated costs of creating two full time homes and the fact that there is no actual savings in having two children when each parent has at least one child in their primary custody. As soon as each parent has one child in their primary custody, the economies of scale are either lost (if the family has only 2 children) or diminished (if the family has more than 2 children). Here, Mother has primary physical custody of one child and a shared parenting agreement regarding the second child. She thus benefits from the economies of scale in providing the home for the second child. Her formula, which requires considering each child separately and then adding to the two support obligations together, fails to account for this.

Mother's formula inflates Father's obligation in a way that is unnecessary to meet the children's standard of living in her home while simultaneously threatening Son's standard of living in Father's home. Her formula fails account for Mother's full support obligation for the children when both are in her home. By refusing to recognize that she enjoys economies of scale, she is asking the court to have Father to pay her twice for obligations she only incurs once.

Mother's assertion that the two separate awards should be "offset or added together" adds further confusion to the child support calculation. App. Br. 17. She asserts that this is the "exact formula" provided by SDCL 25-7-6.23. But the statute requires the parents' obligations to be *offset*, rather than added. Unless defined or explained, words used in statutes "are to be understood in their ordinary sense[.]" SDCL 2-14-1. The statute itself does not define the term "offset." The term is used as a verb in SDCL 25-7-6.23 and is defined by Black's Law Dictionary as "[t]o balance or calculate against; to compensate for [as in] the gains offset the losses." Black's Law Dictionary (11th ed. 2019). The first definition aligns with the context of the statute, common sense, and the intent of the statute. Furthermore, stacking the obligations ignores her obligations to the child in the shared custody arrangement.

Mother's interpretation is completely unmoored from the statute, the case the statute is based upon, the Commission's recommendations, and the purposes of the law on child support. The interpretation also leads to an absurd result. Stacking the two child support obligations ignores that Father's resources are also necessary for providing for the child who resides with him 50% of the time. Yet adopting Mother's calculation means that Father would pay approximately \$10 less per month in child support than he

would if both children were in Mother's primary custody. Mother's solution risks creating a perverse incentive for the parent who is willing to use parenting agreements to affect the child support owed or received.

The problem with Mother's formula stands out in even starker relief if one considers a family with more children. Assume all the facts in this case remain the same but add one more child. If Mother had primary custody of 2 children and the third was in a shared parenting agreement, under Mother's formula, Father's obligation would be as follows:

Father's obligation for 2 children in Mother's custody (pro-rata share of	\$1865
standard 2 child calculation)	
Father's obligation for 1 child in 50/50 shared parenting	\$542
Two sums added for total obligation under Mother's formula	\$2407
Father's obligation if Mother had primary custody of all 3 children	\$2197
Father's obligation if Mother had primary custody of 4 children	\$2455
And the second s	

The fact that Father would only pay \$48 more in child support for *four* children in Mother's primary custody than he would pay for 2 in her custody and one in a shared parenting agreement clearly highlights the problems with adopting Mother's formula as the standard for referees and courts across the state. Mother's formula would create a situation in which simply sending one child into a shared parenting agreement could simultaneously increase the parent's child support while reducing the monthly expenditures on the children.

Taking the same hypothetical through the Referee's formula yields the following result:

Standard calculation for 3 children: (2197 x 66.66%)	\$1468
Cross credit calculation for 3 children: (1761 x33.33%)	\$587
Total obligation	\$2055

While there is only a reduction of approximately \$140 by virtue of the third child going into a shared parenting plan, this is consistent with the schedule. In 2021, the Commission on Child support found that economies of scale were being lost for families with three children. 2021 Commission at 10. Hence, the jump in obligation between 2 and 3 children relative to that between 1 and 2 children is (and ought to be) greater. The Referee's formula accounts for this while maintaining an outcome that is both fair and less likely to encourage parents to manipulate parenting time for purposes of adjusting child support.

There is no question that due to the abatement and cross credit statutes, child support is to some degree tied to parenting time. For purposes of fairness in child support orders, this is a necessary reality. See e.g. Linda Lea M. Viken, *Child Support in South Dakota From Obligor Only To Shared Responsibility, an Overview*, 48 S.D. L. Rev. 443, 451-52 (2003). But aside from abatement and cross credit calculations, support and parenting time ought to be separate considerations; for example a parent may not deny parenting time for failure to pay support and vice versa. See e.g. *Stach v. Stach*, 369 N.W.2d 132, 133 (S.D. 1985). Reading the child custody and support statutes together, it is clear the Legislature does not intend to create child support rules that encourage parents to adjust parenting times and custody arrangements for the purpose of adjusting

support obligations. Certainly, the Legislature would not have intended to discourage obligors from entering into a shared parenting agreement. See e.g. SDCL 25-4A-Appx ("parents should agree on a parenting arrangement that is most conducive to the children having frequent and meaningful contact with both parents, with as little conflict as possible"), Yet if the obligor is responsible for providing all the necessaries for the child in shared custody, doubly compensating the obligee's set expenses, and paying the same basic support as if the obligee had primary custody of both children, that incentive is created. This is particularly so for those at lower income levels, for whom a smaller variation in support may be sufficient to heavily influence their ability to provide a home for the child or pay their support obligation. Under Mother's proposal, a noncustodial parent would be financially foolish to move to a shared parenting agreement with one or more of the children as long as at least one child remained in the other parent's custody.

Pulling the lens out to look at the entire child support scheme further accentuates the failure of Mother's proposed formula. In determining an obligor's gross income for purposes of assessing the parents' support obligation, the referee and court are required to deduct for pre-existing support orders. SDCL 25-7-6.7. On the other hand, while a court may consider subsequent support obligations as a potential deviation for an existing support order, the subsequent obligation, standing alone, is insufficient to warrant a deviation. 25-7-6.10(5). These statutes reaffirm the Legislature's commitment that children should not suffer for their parents' choices and gives the first child primacy regarding the obligor's resources. Thus, if a parent takes on a new parenting obligation, their support of the existing children should not be diminished. By calculating the two child support situations separately and stacking them, Mother's formulation treats Father

and the child in shared custody worse than if the child in shared custody was born to Father after the marriage. It treats Father worse because stacking the separate obligations neither accounts for the diminishment of Father's gross income because of the first obligation nor the benefit Mother's household enjoys based on economies of scale. The child in shared custody is equally entitled to both parents' full proportion of the support obligation when the child is in Father's home, a benefit he is denied when his support obligation is considered separately and stacked.

Children's Best Interest and Standard of Living

Although it would be preferable to adopt the referee's calculation, even if the Court rejects that calculation, it does not lead to the automatic conclusion that Mother's formulation should control. In fact, a review of the statutory scheme does not support such a conclusion. Consider, for example the Legislature's method of addressing the cross credit. Application of the cross credit is discretionary and depends on whether the circuit court deems it "appropriate." SDCL 25-7-6.27. Appropriateness is measured by whether application of the cross credit will have a "substantial negative effect" on the child's standard of living. Similarly, SDCL 25-7-6.9 which addresses cases where the combined income exceeds the schedule, requires consideration of the actual needs and standard of living of the children. Imposition of a support obligation, on the other hand, is mandatory, even if the obligor has minimal income and the obligation is nominal (SDCL 25-7-6.2) or if the obligee has independent means. *Dahl v. Dahl*, 2007 S.D. 64, ¶ 17, 736 N.W.2d 803, 807.

If the Court agrees with Mother that the Referee is permitted to ignore the schedule and that it must create a new formula based on the exception statutes, then it

should thus be more inclined to look at SDCL 25-7-6.9 or SDCL 25-7-6.27. Both statutes address custody or income situations that are not explicitly covered by the schedule.

Accepting Mother's argument requires the Court to ignore fundamental assumptions and plain language requirements of the schedule. Thus, the burden should be on her to show that the actual needs of the children will not be met and their standard of living will be diminished by application of the referee's formula. This, she failed to do. Indeed, her own formula reduces the amount available to the child in shared custody during the time the child lives with Father. This approach would also be consistent with the Court's reasoning in Schieffer v. Schieffer, where the parties' income was well beyond the statutory maximum income. Schieffer v. Schieffer, 2013 S.D. 11, 826 N.W.2d 627, There, the Court held that Mother's child support request was properly denied when she failed to establish that the award was not justified and clearly against reason and evidence. Id. at ¶ 48. Father acknowledges the distinguishing factors in Schieffer, where the circuit court found that Mother's expenses were inflated, and she tended to excess. But there is a principle underlying the Court's reasoning that is equally applicable here: Mother is asking for a child support formulation that ignores the mandates of the schedule by failing to account for both children in assessing the total obligation. The burden should thus be on Mother to demonstrate that the award was unjustified and against reason and evidence.

This resolution of the case would be less than ideal, as it would leave open the question of how to address this custody situation and would not alleviate the problem of variation in the calculation of support orders around the state. Children ought to be treated equally regardless of where in the state they reside and the referee chosen to hear

their case.

Equity and Fairness

Mother argued before the circuit court that the question of equity was not relevant to consideration of the support award. (H.T. 23:23-25). Father respectfully disagrees. This situation requires interpretation of ambiguous statutes and thus should lead the Court to a consideration of the underlying purposes of the child support regime. One of those purposes is fairness and equity. This is seen regularly in the Commission's discussions about the schedule and its exceptions. Both actual fairness and the appearance of fairness are important in ensuring that obligors pay their share of support and minimizing familial strife after a divorce. Regardless of the custodial situation, both parents must be held accountable for their full support obligation. Mother's preferred solution is not equitable, cannot be supported by reference to the schedule, and would not advance the purposes of the South Dakota's law on child support. See also *Gisi v. Gisi*, 2007 S.D. 39, ¶ 22, 731 N.W.2d 223, 229 (considering equity in determining when incarceration should allow for a deviation).

#### Conclusion

Father respectfully urges the Court to accept the referee's calculation, as it would lead to fairness, uniformity, and certainty in support orders across the state. In the alternative, the Court should adopt the reasoning utilized in other cases that are outside the support schedule and inquire into the children's needs and standard of living. In either case, the record supports affirming the referee's calculation.

# Respectfully submitted this 21st day of August, 2023.

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#### CERTIFICATE OF COMPLIANCE

- I certify that the Appellee's Brief is within the limitation provided in SDCL 15-26A-66(b) using Times New Roman typeface in 12 point type. Appellee's Brief contains 8227 words.
- I certify that the word and character count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, certificate of counsel or any addendum materials.

Dated this 21st day of August, 2023.

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#### CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellee's Brief was efiled and served upon the following person pursuant to SDCL 15-26A-79, by placing the same in the service indicated, addressed as follows:

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# OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 30286

# CHARLES JOSEPH BURKARD,

PLAINTIFF AND APPELLEE,

V.

# TAMI JO BURKARD,

DEFENDANT AND APPELLANT.

# APPEAL FROM THE SECOND JUDICIAL CIRCUIT LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN PEKAS CIRCUIT COURT JUDGE

# REPLY BRIEF OF APPELLANT TAMI JO BURKARD

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## REPLY ARGUMENT

# I. THE VIOLATION OF SDCL 25-7A-22 WAS NOT HARMLESS.

Sometimes it is difficult to determine exactly what the Legislature meant when it enacted a statute. But SDCL 25-7A-22 is as clear and direct as it gets. Where, as here, a parent has filed an objection to a referee's report regarding a child support modification petition, "the circuit court shall fix a date for hearing on the report, the hearing to be <u>solely</u> on the record established before the referee." *Id.* (emphasis supplied). That means no new testimony, no new witnesses, no new reports, no new anything in terms of the record may be considered. The Legislature has provided as a matter of law that the hearing before the circuit court is to be resolved on the record made at the hearing before the referee alone.

The impropriety of permitting a party to actually call another family law attorney and child support referee as a new witness at the circuit court hearing to testify and submit an expert report into evidence on how he thinks the statutes should be construed and what the governing law ought to be is not really in question. In his brief, Charles seeks to downplay the spectacle, stating that: "Although permitting Mr. Keller to testify as to the differing calculations was an unusual manner of proceeding, even if it was a violation of 25-7A-22, it was harmless error." Appellee Brief at 9.

True enough, violating the plain language of SDCL 25-7A-22 was "an unusual manner of proceeding," but the legal error resulting from that clear

violation of the governing statute was far from harmless. Certainly, the inquiry into whether error was harmless "cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence."

Mendenhall v. Swanson, 2017 S.D. 2, ¶ 13, 889 N.W.2d 416, 421 (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)).

Thus, "[i]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Id.*; *see also* SDCL 15-6-61; *Hein v. Zoss*, 2016 S.D. 73, ¶ 7, 887 N.W.2d 62, 65 ("Error is prejudicial when, in all probability it produced some effect upon the final result and affected rights of the party assigning it"); *Matter of Ehlebracht*, 2022 S.D. 46, ¶ 26, 978 N.W.2d 741, 750 n.11 (quoting *In re Neb. Pub. Power Dist.*, 354 N.W.2d 713, 718 (S.D. 1984) ("Use of the wrong standard of review is not merely harmless error")).

As in *Mendenhall*, it is clear that Keller's statutorily prohibited testimony and new expert report were "designed to ensure" that his inadmissible opinions about how the law should be applied "had a substantial influence on the [circuit court's] decision." 2017 S.D. 2, ¶ 14, 889 N.W.2d at 421. At the hearing, Tami's counsel objected to Keller's testimony and expert report based upon SDCL 25-7A-22, advising the court that "the record before

the referee is the sole record, and no additional testimony is taken on an appeal on a child support referee's matter." HT2 \*8. The court responded:

You're absolutely right and thank you for your objection. It's noted for the record. I did have a chance to review the briefing that was done, as well as the approach that counsel wants to go ahead and supplement the record. Your objection's noted. I'm going to let the supplementing of the record take place, ah, and your objection's noted.

HT2 \* 8 (emphasis supplied). And when counsel for Charles then interposed her own objection attempting to deny that presenting this new testimony and new expert report constituted new evidence, the circuit court flatly rejected that characterization, stating:

I do think that he's supplementing the record though, so your objection's noted as well... that you don't feel as though it's supplementing the record, but I disagree with you.

... I do believe that it's adding information into the record that I think is necessary not only for this court but also for any review that should take place at a higher level, and so it's noted. I'm overruling your objection. I do think that we're supplementing the record.

HT2 \*8-9 (emphasis supplied). When Keller began to testify regarding his opinion on what the law should be, the court basically agreed that even though this new evidence was "totally inappropriate," it was just too important to disallow:

[Tami's counsel]: Your Honor, I want to make sure for appellate review that we have a solid record on this. Mr. Keller didn't testify before the referee in the underlying matter, and this would be totally inappropriate testimony in this matter.

... He's really being called to testify in front of you regarding a legal conclusion that the court should be taking into consideration so it would be akin to us calling the underlying referee and cross-examining him as to what his rationale was. This is totally inappropriate testimony on appeal.

THE COURT:

<u>I agree</u>. It's noted for the record, um, but I'm going to overrule it and let them generate their record so you can begin.

HT2 \*10-11 (emphasis supplied). Clearly, both Charles and the circuit court believed that the new evidence sought to be submitted by Charles was critically important to consider in addressing Tami's objections to the Referee's report.<sup>1</sup>

To bolster his opinions, Keller started his testimony by identifying himself as a "private practice attorney" with 35 years of experience and a "child support referee for the State of South Dakota" for "15 or 20 years." HT2 \*9-10. He then proceeded to act as a living treatise and explain in laborious detail his view of how the circuit court should resolve the legal questions in this case. He went on to critique Tami's legal position, explain why he did

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¹ Charles appears to claim Tami waived her right to object to Keller's testimony, as she did not object to Keller's report prior to the hearing. However, unlike normal motion practice, SDCL 25-7A-22 does not provide the moving party an opportunity to respond to the nonmoving party prior to the hearing. SDCL 25-7A-22 provides, "Any party shall have ten days from the date of service of the report in which to file objections to the report. If a party files an objection, the other party shall have an additional five days from the date of service of the objections to file additional objections. . . . If any objection is filed, the circuit court shall fix a date for hearing on the report, the hearing to be solely on the record established before the referee." The first opportunity the moving party has to object to the nonmoving party's arguments is at the hearing on the objections. This is exactly when Tami's counsel repeatedly objected to Keller's testimony and expert report. The objection was preserved.

not agree with it, and finally offered his support of the legal position adopted by the Referee and why he liked it. HT2 \*12-19. Keller's expert report, which contained even more of his legal conclusions, was marked as "Exhibit A" and entered into the record. HT2 \*13, 21.

The strategy adopted by Charles thus worked. The circuit court not only allowed the prohibited testimony and report, but it also adopted the new evidence verbatim into its decision by incorporating and attaching Keller's expert "report" to the order. R. 4. Indeed, the circuit court's order contains no legal analysis—as in zero—other than Keller's expert report on what the law should be. R. 402-09. Truly, the only window into the circuit court's legal analysis and rationale for its decision to overrule Tami's objections to the Referee's report is Keller's five-page, single-spaced legal analysis stapled to the template used by the circuit court to issue its decision. R. 402-09. Keller's inadmissible opinions and conclusions quite literally became the circuit court's decision.

In this day and age, it is difficult to envision a more clearly demonstrated case of legal error that "had substantial influence," which in all probability "produced some effect upon the final result," and affected the substantial rights of the party assigning the error. *Mendenhall*, 2017 S.D. 2, ¶ 13, 889 N.W.2d at 421; *see also Hein*, 2016 S.D. 73, ¶ 7, 887 N.W.2d at 65; SDCL 15-6-61. This Court should reverse on this issue.

II. THE CIRCUIT COURT COMMITTED LEGAL ERROR
BY APPLYING THE FORMULA CREATED BY THE
REFEREE RATHER THAN THE METHOD IDENTIFIED
BY THE LEGISLATURE FOR SIMILAR SPLIT-CUSTODY
ARRANGEMENTS.

In his brief, Charles argues that when determining appropriate child support, "[t]he custody situation is a secondary consideration and herein lies the fundamental error in Mother's proposed calculation." Appellee Brief at 10. If the "custody situation" truly is a "secondary consideration" when calculating child support, the Appellee Brief neglects to tell us expressly what the primary consideration should be. However, one can glean from the remainder of the brief, which consists of various policy arguments, hypotheticals, and economic theory, that it involves enforcing the concepts of fairness and equity to the parent charged with the less burdensome child-rearing obligation as a result of the parties' custody arrangement.

Tami respectfully suggests that a proper construction and application of our State's child support statutes best demonstrate the Legislature's intent on how the child support calculation should be made in the circumstance at hand. This is a situation involving split custody between two parents.

Although SDCL 25-7-6.23 assumes that each parent has primary physical custody of at least one child, it is the *only* statute that provides guidance on how the Legislature intends the child support obligation to be calculated in split-custody situations.

The statute's method is straightforward. The obligation should be determined "by computing the amount of each parent's respective support obligation for the children in the other parent's physical custody, and the support obligations shall be offset in determining a monthly support obligation." SDCL 25-7-6.23. Tami and Charles's situation is slightly different, of course, because Charles does not have primary physical custody of either child. Instead, Tami has primary physical custody of their daughter and the parents share joint physical custody of their son, resulting in Tami bearing the greatest child rearing responsibilities. Unless and until the Legislature enacts a statute providing otherwise, the method of computation for split-custody situations should remain consistent with our State's currently enacted statutes.

Unfortunately, the Referee opted to forgo consistency and ignore the method identified by the Legislature for equivalent split-custody situations. Rather, the Referee elected to improvise his own method. As set forth in detail in the opening brief, this was a legal error. The circuit court should have declined to adopt the Referee's recommendation which included a novel method for computing child support that was untethered from our State's statutory scheme for computing child support.

In short, in the absence of concrete legislative guidance, Tami
respectfully suggests that a method modeled after the statutes enacted by the
Legislature is preferable to one manufactured to satisfy policy arguments

rooted in an advocate's supposition that children are "cheaper by the dozen" and indefinite notions of parental "equity" with no basis in the governing statutory framework. Tami's formula abides by the Legislature's intent to ensure that parents provide adequate support to raise their children.

#### CONCLUSION

WHEREFORE, Appellant Tami Burkard respectfully requests that this Honorable Court reverse the judgment below, vacate the order adopting the Referee's formula, and remand with instructions to adopt the formula advanced by Tami Burkard.

Respectfully submitted this 13th day of September, 2023.

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# CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 1,949 words, excluding the table of contents, table of cases, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Erin Schoenbeck Byre
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## CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was served via email upon the following:

Nichole A. Carper, <u>nichole@burdandcarper.com</u>

on this 13th day of September, 2023.

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