NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

CHILD SUPPORT COMMITTEE

Monday and Tuesday, February 9-10, 1998
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Eliot Glassheim, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Eliot Glassheim, Wesley R. Belter, Linda Christenson, William R. Devlin, April Fairfield, Dale L. Henegar, George Keiser, Amy N. Kliniske, Sally Sandvig, Jim Torgerson; Senators Dwight C. Cook, Joel C. Heitkamp

Members absent: Senators Donna L. Nalewaja, John T. Traynor

Others present: See Appendix A

It was moved by Senator Heitkamp, seconded by Representative Torgerson, and carried on a voice vote that the minutes of the November 17-18, 1997, meeting be approved as mailed.

STUDY OF THE EQUITY AND FAIRNESS OF THE DETERMINATION AND ENFORCEMENT OF CHILD CUSTODY AND VISITATION ORDERS

Family Law Mediation

Conflict Resolution Center

Chairman Glassheim called on Mr. James Antes, Director, Conflict Resolution Center, Grand Forks, for comments regarding mediation. He said mediation can be defined as "the process in which trained neutral mediators assist conflicting individuals in making their own decisions about the issues over which there is conflict and in developing a better understanding of those issues and the prospective of other participants."

Mr. Antes said a survey of Indiana judges indicates advantages of mediation include the amount of time necessary to conclude civil cases is reduced, participants are encouraged to take more responsibility in dealing with conflicts, agreements are more likely to be maintained, participants have a greater opportunity to express concerns, and mediation helps attorneys and participants better understand the strengths and weaknesses of a case. He said the Indiana survey reported that mediation concerns include problems associated with mandated mediation and the variable quality of available mediators.

Mr. Antes said comparisons of settlements reached by mediation and adversarial proceedings indicate mediation participants save money, participants are more satisfied with the outcome, greater participant compliance with agreements, agreements are more comprehensive, participants believe the agreements are more fair and sensitive to the participants' needs, and mediation takes less time. He said an advantage of mediation which is especially helpful in domestic law mediation is that many participants learn new methods of handling conflict and are able to resolve future differences informally rather than relying on the courts.

Mr. Antes said people approach conflict in a variety of ways. He said the three ways dispute outcomes are determined are who has the power, who is right, and what interest is involved. He provided written information regarding mediation, information about the Conflict Resolution Center, and information about workshops and seminars provided by the Conflict Resolution Center, copies of which are on file in the Legislative Council office.

In response to a question from Representative Glassheim, Mr. Antes said although there is not a professional mediator association in North Dakota, many North Dakota mediators are associated with the Conflict Resolution Center. He said the center conducts three or four 40-hour mediation training sessions per year, but is not directly responsible for family mediation training. For family mediation training, he said, the center brings in an out-of-state trainer.

In response to a question from Representative Keiser, Mr. Antes said approximately 40 to 60 percent of mediation cases settle on all issues and the other 40 to 60 percent of mediation cases go to court to settle all or some of the issues.

In response to a question from Senator Heitkamp, Mr. Antes said mediators are often

attorneys, human service workers, and occasionally clergy.

In response to a question from Representative Glassheim, Mr. Antes said the Conflict Resolution Center has a billing schedule based on a sliding fee scale, with a maximum hourly charge of $45 and a minimum hourly charge of $4.50. He said typically a session does not exceed two hours and a case does not exceed a total of five sessions. Within the field of mediation, he said, there is controversy regarding how to deal with power differentials between mediating parties. He said mediators should be able to ensure that parties make informed decisions, although disadvantages may exist if one party has historically exerted power in the relationship.

Joint Dispute Resolution Study Committee

Chairman Glassheim called on Ms. Janet Demarais Seaworth, member of the Joint Dispute Resolution Study Committee, for comments regarding the study committee's purpose and progress. She said the Joint Dispute Resolution Study Committee was created by Supreme Court Administrative Order 6 dated October 11, 1995. The committee consists of five attorneys and five trial judges, she said, and the charge of the study committee is to review existing procedures to resolve legal disputes other than by court trial, evaluate the need for developing further court-annexed options to resolve legal disputes, develop suggested court-annexed options to meet various needs, and make appropriate recommendations. She said the study committee's initial report to the Supreme Court, president of the State Bar Association, and the Board of Governors is dated November 1, 1996. A copy of this report is on file in the Legislative Council office.

Ms. Demarais Seaworth said the study committee is not specifically studying family law alternative dispute resolution options, but the Joint Task Force on Family Law is studying alternative dispute resolution for family law matters. She said alternative dispute resolution techniques such as settlement conferences are used in the federal courts and alternative dispute resolution techniques are commonly used outside courtrooms in larger communities. In North Dakota, she said, alternative dispute resolution is not widely mandated nor widely used. She said experience is the best indicator of a neutral's skill.

Ms. Demarais Seaworth said alternative dispute resolution can be a substitute for negotiations. She said most legal cases settle before court and alternative dispute resolution is not always intended to be an alternative to going to court; therefore, mandatory mediation does not necessarily decrease the costs incurred by the courts but might increase participants' satisfaction. She said there is some concern that mediation may not decrease the expenses participants incur.

Ms. Demarais Seaworth said she opposes mandatory mediation because of the lack of available funding, the lack of qualified mediators, and because participants have to be committed to mediation for mediation to work. She said mediation is more effective when it is used sooner rather than later. She said courts and attorneys should be responsible for providing parties with information regarding mediation, and it should be the parties who select the mediators.

Ms. Demarais Seaworth said the study committee's final report is due June 1998. She said some of the areas that will be addressed in the final report include implementing case management rules, scheduling orders that mention alternative dispute resolution, amending the North Dakota Rules of Court, requiring parties to file information documents with the court, creating a court roster of neutrals, and establishing basic training standards for neutrals.

In response to a question from Senator Heitkamp, Ms. Demarais Seaworth said in North Dakota there are no professional training requirements that apply to all mediators.

In response to a question from Representative Keiser, Ms. Demarais Seaworth said the recommendations made by the study committee will not address the specifics of mediation procedure, but will instead allow mediation professionals to establish the details.

In response to a question from Representative Glassheim regarding whether legislative action is needed to move mediation forward, Ms. Demarais Seaworth said mediation is being adequately addressed through the judicial branch, and her impression is that funding is not available to set up a complete alternative dispute resolution system in North Dakota. She said North Dakota's case backlog is not significant compared to backlogs of other states and using mediation as a type of alternative dispute resolution does not necessarily result in decreasing court backlog.

In response to a question from Representative Devlin, Ms. Demarais Seaworth said most judges in North Dakota do not have backgrounds in the area of alternative dispute resolution; therefore, most judges do not use alternative dispute resolution methods as often as judges could.

In response to a question from Senator Heitkamp, Ms. Demarais Seaworth said there are some situations in which it is appropriate to use a judge as a neutral, for example, federal

magistrates use alternative dispute resolution techniques and settlement conferences.

Joint Task Force on Family Law

Chairman Glassheim called on Ms. Sandi Tabor, member of the Joint Task Force on Family Law, for comments regarding the task force's study of mediation. She said the task force is studying how to make family law less acrimonious. She said North Dakota Rule of Court Rule 8.3 addresses case management in divorce cases and the district courts already implement alternative dispute resolution techniques in family law cases. She said one problem with the court rules is that judges do not have time to fully implement the rules because of court unification.

Ms. Tabor said the task force will recommend court rules that include a provision for mandatory mediation orientation. She said the hope is that mandatory orientation will encourage mediators to practice in western North Dakota, and a video orientation might be effective in getting mediation off the ground in rural areas.

In response to a question from Senator Cook regarding the possibility that attorneys have a vested interest in not encouraging parties to mediate, Ms. Tabor said most attorneys understand that the current family law system is not working and not meeting the needs of clients. She said because divorce cases are hard on the attorneys as well as the parties, many attorneys no longer practice family law.

In response to a question from Senator Heitkamp, Ms. Tabor said competent mediators should be able to recognize situations in which there is a power struggle and deal with the situation accordingly. She said judges should not be in the business of mediating, especially if the judge-mediator is the same judge who will sit on the case if the case goes to court.

In response to a question from Representative Glassheim regarding whether legislation is needed to encourage mediation, Ms. Tabor said the task force chose to address mediation through court rules because court rules can be established and modified quicker than statutes.

Chairman Glassheim called on Ms. Joanne Ottmar, attorney-mediator, for comments regarding family law mediation. Ms. Ottmar said she attended mediation training because of the dissatisfaction she saw her family law clients experiencing with the traditional court system. She said one goal of mediation is to level the playing field, and this may require caucusing each party individually. When she begins mediation with parties, she said, she lays out some ground rules that include parties are only allowed to move forward, the parties are not allowed to blame each other, and the parties need to think of solutions and not just the problems the parties are experiencing.

Ms. Ottmar said there is a need to train individuals as mediators in western and rural North Dakota. She said within the mediation community there are varying opinions regarding how to deal with domestic violence cases. Although mediation procedures are occasionally more financially costly than traditional court cases, she said, mediation is usually less emotionally costly on the participants. She said North Dakota Rules of Court Rule 28 provides the training requirements for mediators who are on court mediator rosters. She said Rule 28 does not apply to nonroster mediators, but is applied to mediators under the court system because of liability issues and conflict of interest issues. She said everything done in mediation is confidential and as a mediator she shreds all mediation documents except the final agreement. The best mediators, she said, are those mediators with experience and a real interest in mediation.

In response to a question from Representative Glassheim, Ms. Tabor said the proposed mediation court rules are in the editing phase and the task force hopes to finish these rules by April 1998.

In response to a question from Representative Sandvig, Ms. Ottmar said she has performed mediation over the telephone, and this is one way to bring mediators to rural areas; however, the better approach is to provide mediator education and promote mediators to travel to rural communities. She said it is important that the state not cut any more judicial positions.

Family Court Pilot Project

Chairman Glassheim called on District Judge Bruce Bohlman, Northeast Central Judicial District, for comments regarding mediation and family law courts. Judge Bohlman addressed the committee over a speaker phone.

Judge Bohlman said although family law mediation is not the answer to all the problems related to family law, mediation is a step in the right direction. He said 70 percent of North Dakota court time is spent on family law matters, and 40 to 45 percent of all cases filed in district court are family law cases. He said he established a pilot project under North Dakota Rules of Court Rule 8.5, which allows for the establishment of a small-claims-type court for family law matters. Due to the flooding in Grand Forks, he

said, he will be asking the Supreme Court to extend the project for an additional year.

Judge Bohlman said one of the problems with the adversarial family law systems is that the adversarial system does not promote solution-making and this is a problem because often the parties need to cooperate after the divorce in order to raise children. He said the adversarial system does not promote communication between parties, the adversarial system is very expensive, the adversarial system does not necessarily lead to finding the truth, and the North Dakota Rules of Civil Procedure are not designed for family law matters. He said the North Dakota Rules of Civil Procedure are based on the Federal Rules of Civil Procedure and federal courts do not deal with family law cases.

Judge Bohlman said generally judges do not act as mediators in cases in which the judge will be responsible for trying. He said some women may not want to participate in mediation because of the fear that mediation may take away some of the rights and protections built into the traditional court system.

Judge Bohlman said his pilot project for a small-claims-type family court is his solution to the problems with the existing court system. He said North Dakota once had a family court system, but this system did not work. He said under the old family court system the only real difference between district and family courts was that family court required mandatory counseling. A true family court, he said, should be designed to deal with all of the family law issues a family unit may encounter, including juvenile court cases. He said in all likelihood the state will not be able to create an entirely new family court system, but North Dakota may be able to combine the juvenile court system with other family law cases so that there is one judge per family. Under the current system, he said, district courts do not communicate with the juvenile courts and this results in a fragmented approach to dealing with family problems. He said although court rules can address a large portion of mediation in the courts, legislation would have benefits in the area of mediation qualification standards.

Judge Bohlman said one legislative need is to change family law terminology. He said "child custody" is a bad term and should be replaced with a term such as "child parenting," which removes the emphasis of one parent having custody and the other parent having visitation. Judge Bohlman said a change in terminology could distinguish between the custodial parent and the noncustodial parent by instead referring to "placement" of the child.

Judge Bohlman said the personality and skills of a mediator are more indicative of a mediator's qualifications than a mediator's formal training. He said some judges are more power oriented and, therefore, even with mediation training some judges may not be successful mediators.

Judge Bohlman said one of the negatives of the current legal system is that attorneys are hired to represent a client and advocate for a client even if this means starting a legal war. Parties do not know about the options to the traditional system, he said, and if court rules are implemented which require attorneys and judges to educate parties about mediation, it is important that the attorneys and judges understand what mediation is.

Judge Bohlman said a mediator does not have to be an expert on all matters because experts are available as consultants. He said the end result of mediation is happier participants, use of less court time, and commitment to the end result. He said in mediation the participants should agree to address future issues through mediation before going to court.

Judge Bohlman said although mediation is not always appropriate, mediation can be used as an empowering tool that helps parties learn to make decisions. He said mediators need to be trained in the areas of domestic violence, gender issues, and ethics in order to appropriately deal with situations in which there is disparity of power between the participants. He said the divorce with dignity program run by Judge Davidson in Hennepin County, Minnesota, is not a mediation model because Judge Davidson imposes her decisions on the participants.

Chairman Glassheim called on Mr. Dominic Volesky, Mediator, Mediation Services, for comments regarding mediation. Mr. Volesky said the issue of mediator qualification is very important. Classroom training by itself is not adequate because, he said, life experience is necessary to be successful as a mediator. He provided a brochure of his mediation program, Mediation Services, a copy of which is on file in the Legislative Council office.

Chairman Glassheim called on Mr. Dan Lawrence, Bismarck, for comments regarding mediation. Mr. Lawrence said 50 percent of all married couples get divorced, and in divorce both parties want to win. Winning, he said, means having full custody of the children and being awarded all of the marital property; therefore, courts should award parties equal custody and equal assets. He said the law should provide that each parent get 50 percent of everything.

Pro Se Representation

Chairman Glassheim called on District Judge Benny A. Graff, South Central Judicial District, for comments regarding family law pro se representation--when a party does not retain an attorney and instead the party is self-represented in court. Judge Graff said a pro se litigant is not a good attorney and for that reason does not do well in court.

Judge Graff said a pro se litigant is required to follow the same procedural rules as a licensed attorney. He said a pro se litigant tends to consume large amounts of court time and this places quite a burden on the judge, and instead of getting a story across, the pro se litigant gets very antagonistic with the opposing party. Most attorneys do a majority of the legal work before the actual litigation in the courtroom, he said, and pro se litigants do not realize this.

Judge Graff said encouraging pro se litigation is inconsistent with decreasing the number of district judges to 42. He said the local rules in his district provide that when parties stipulate to the provisions of a divorce neither party is required to enter the courtroom.

In response to a question from Representative Glassheim, Judge Graff said child support enforcement services reviews IV-D cases every three years. He said pro se representation in child support modification typically is easier than pro se representation in child visitation enforcement cases, because visitation enforcement tends to be antagonistic. Although court-created forms may help pro se litigants, he said, parties still need to establish the validity or invalidity of the evidence. Although there are enough visitation enforcement tools, he said, the nature of visitation enforcement creates problems that enforcement tools cannot address.

In response to a question from Senator Heitkamp, Judge Graff said visitation enforcement can be improved by increasing funding to Legal Aid of North Dakota and encouraging mediation.

In response to a question from Senator Cook, Judge Graff said the term "gross income" is defined in the child support guidelines, and North Dakota Supreme Court decisions further clarify the definition.

Chairman Glassheim called on Ms. Penny Miller, Clerk of the Supreme Court, for comments regarding pro se litigation in family law matters. Ms. Miller said although the Supreme Court typically deals with pro se representation in criminal cases, the number of pro se litigators in domestic posttrial cases is growing. She said pro se litigation puts an enormous strain on the court system, and the clerks of court are impacted the most because the clerks deal with most of the pro se litigant's questions. She said it takes approximately 20 to 30 minutes of staff time to deal with each pro se issue.

CHILD SUPPORT GUIDELINES STUDY

Pro Se Representation

Chairman Glassheim called on Mr. Brad Davis, Administrator, Southwest Area Child Support Enforcement Unit, for comments regarding child support pro se representation. Mr. Davis said as part of the ongoing child support enforcement strategic planning, he gathered information regarding child support administrative processes and pro se litigation for child support. He said states that have set up a pro se process for child support have also set up an administrative process for child support. North Dakota does not have an administrative process for child support and the number of district judges is being reduced, he said, therefore, the child support enforcement units are not pursuing further study of pro se representation. He provided written testimony, a copy of which is attached as Appendix B.

Income Shares and Obligor Child Support Guidelines Models

Model Comparison

Chairman Glassheim called on Mr. William Strate, Director, Child Support Enforcement Agency, Department of Human Services, regarding a comparison of the income shares child support guidelines model and the obligor child support guidelines model. Mr. Strate presented various scenarios in which he reviewed the child support determinations under the North Dakota obligor model child support guidelines and the Utah income shares model child support guidelines. He provided written testimony, a copy of which is attached as Appendix C.

In response to a question from Senator Cook, Mr. Strate said "gross income" is defined in the child support guidelines. He said in *Shipley v. Shipley*, *Shaver v. Kopp*, and *Hendrickson v. Hendrickson*, the Supreme Court has expanded the class of types of income included in gross income. He said there is a case filed with the Supreme Court, which is an appeal based on how the trial court interpreted the definition of gross income in a child support order. He said the Child Support Enforcement Agency is filing an amicus brief in this appeal.

In response to a question from Representative Devlin, Mr. Strate said occasionally a

noncustodial parent is ordered to pay for a child's health insurance premium in addition to the child support ordered, even if there was not a health insurance policy in effect. When this happens, he said, the health insurance expense is deducted from the obligor's gross income and is not deducted dollar for dollar from the amount of the child support order.

In response to a question from Representative Keiser, Mr. Strate said the Utah guidelines do not consider the income of a new spouse, and North Dakota does not consider the income of an obligor's new spouse unless the obligor controls the obligor's spouse's income.

In response to a question from Senator Heitkamp, Mr. Strate said child support enforcement units typically receive complaints from parties during the six months immediately following a new child support order. Mr. Davis said complaints are also common when circumstances change and when a deviation is merited.

Representative Belter asked whether it is possible that both the income shares model and the obligor model are fundamentally flawed. Committee counsel said testimony was received at an earlier meeting indicating that technical assistance money is being sought by the Department of Human Services to study the base amounts used in establishing child support orders.

Chairman Glassheim asked what additional information is needed regarding the income shares model.

Representative Belter said the amount of money child support obligors are ordered to pay is too high and it is not fair.

Representative Keiser said the child support system is built on the assumption that the custodial parent needs to keep a home for the children, but the system does not take into account that the noncustodial parent is trying to keep a home for visitation. He said the system provides that the obligor must work, but the obligee is not required to work.

Senator Heitkamp said the committee is focusing on the needs of the obligor and obligee, but should instead focus on the needs of the children. He said he does not believe a custodial mother would want to stay home and live on $500 a month child support and public benefits, and studies indicate that after divorce the custodial parent's standard of living goes down dramatically.

Representative Sandvig suggested the child support guidelines be based on the figures used for aid to families with dependent children. Senator Heitkamp said children are born into certain homes, for example, children of doctors versus children of minimum wage workers.

Representative Keiser said the low child support order payment rate is bad for children and if the income shares model helps to improve payment rates, income shares results in helping children. He said the state cannot afford to police all existing nonpayment cases.

Mr. Strate said a recent performance audit of IV-D cases indicates obligors in 50 to 60 percent of the cases pay. He said there have been a variety of studies regarding why obligors do not pay, and the study conclusions are all over the place. Ultimately, he said, you cannot legislate maturity, and there will be nonpaying cases regardless of what legislators do. He said he does not think the North Dakota payment compliance rate will increase under an income shares model.

Representative Belter said the obligor model sends the message that the custodial parent does not have to be financially responsible for the parties' children. Mr. Strate said North Dakota's obligor model assumes the custodial parent cares for the child.

Financial Impact of Changing Models

Chairman Glassheim called on Mr. Strate for comments regarding the impact on the Department of Human Services of changing from an obligor child support guidelines model to an income shares child support guidelines model. Mr. Strate said the income shares model requires twice as much work as the obligor model, and calculations under an income shares model are typically more complex than those under North Dakota's current obligor guidelines. He said another impact of changing models is an increase in child support order reviews due to a perceived benefit by one of the parties. He provided written testimony, a copy of which is attached as Appendix D.

In response to a question from Representative Keiser, Mr. Strate said the income shares model has been considered by the North Dakota Legislative Assembly several times, and it is difficult to anticipate the impact the change would have. He said Montana and South Dakota changed child support models and South Dakota is currently in the process of evaluating the impact of the South Dakota change. He said his counterpart in South Dakota reported that although there was an initial rush to the courthouse after South Dakota changed models; this phenomena occurs every time child support guidelines change. He said one difference to keep in mind is that South Dakota uses an administrative system, whereas North Dakota uses a judicial system.

Chairman Glassheim called on Mr. Keithe Nelson, State Court Administrator, for comments regarding the impact on the judicial system of changing from an obligor child support guidelines model to an income shares child support guidelines model. Mr. Nelson said his attempts to gather information from Montana were not very successful, but his counterpart in South Dakota reported that the number of complaints made by parties decreased after South Dakota changed to the income share model.

In response to a question from Representative Keiser, Mr. Nelson said he is aware of the divorce with dignity program used in Hennepin County, Minnesota, and North Dakota is experimenting with alternatives to the current family law court process.

BILL DRAFTS

Extended Visitation

Chairman Glassheim called on committee counsel to review two bill drafts relating to child support credit for periods of extended visitation. Committee counsel said in response to committee directives, the first bill draft directs the Department of Human Services to include in the child support guidelines a monthly deduction equal to one-twelfth of the amount of child support ordered, for each 50-day period of extended visitation exclusive of periodic visitation with the custodial parent. She said the second bill draft is more general in scope and directs the Department of Human Services to include in the guidelines consideration of extended visitation a child spends with a noncustodial parent.

In response to a question from Representative Devlin, committee counsel said the bill draft that specifies the 50-day period of extended visitation is based on the committee's request and is not based on only other states' statutes.

In response to a question from Representative Keiser, committee counsel said the North Dakota Century Code does not define "extended visitation."

Chairman Glassheim called on Mr. Strate for comments regarding the two bill drafts. Mr. Strate said the Department of Human Services opposes both drafts. He said one problem with the more specific of the two bill drafts is that the bill draft would result in yearly modifications of child support, thereby increasing judicial caseloads. He provided written testimony, a copy of which is attached as Appendix E.

In response to a question from Representative Glassheim, Mr. Strate said consideration of extended visitation cannot be built into an initial child support order because a noncustodial parent might not exercise visitation.

Mr. Strate said Utah uses the term "nights" instead of the term "days" in referring to visitation.

In response to a question from Representative Keiser, Mr. Strate said the definition of "extended visitation" is problematic, and, therefore, might need to be defined.

In response to a question from Representative Christenson regarding enforcement of visitation, Mr. Strate said courts are not able to force parties to be responsible, and it usually is not a viable alternative to send the police to grab a child to enforce visitation. He said he is not aware of any completed studies that address visitation enforcement.

It was moved by Representative Keiser and seconded by Representative Torgerson that the Legislative Council staff be requested to revise the less specific extended visitation bill draft to read "the department shall consider the length of time a minor child spends with a noncustodial parent."

Representative Glassheim said if the committee pursued mediation, the bill drafts relating to extended visitation may not be necessary. Senator Heitkamp said the committee needs to consider mandated mediation versus voluntary mediation. Senator Cook said one way to encourage parties to partake in mediation is to make mediation more appealing than the alternative. Ms. Tabor said mediation and the traditional court system can coexist. She said parent education may be a good idea, and the bill draft regarding parent education which Representative Sandvig introduced last session might be helpful.

Mr. Daniel Biesheuvel, President, Bismarck Chapter of R-KIDS, said it is possible that the two bill drafts regarding extended visitation will needlessly complicate visitation and child support.

Ms. Tabor said it is impossible to legislatively define every visitation circumstance that might arise. She said the more specific bill draft regarding extended visitation does not allow for true joint physical custody.

Representative Keiser said the extended visitation bill draft that is less specific is the better of the two bill drafts, and instead of legislatively defining "extended visitation," it is better to allow the Department of Human Services to finesse the definition of "extended visitation" in the guidelines.

In response to a question from Senator Cook, Mr. Strate said the child support guidelines do not address situations of true joint physical custody.

Mr. Volesky said one problem with the extended visitation legislation is that it could turn into an accounting nightmare, and for that reason the less specific bill draft is better.

Senator Heitkamp suggested using the term "nights" instead of "length of time." Representative Keiser said it is better not to distinguish between length of time, days, or nights, but instead the Department of Human Services should work this out in the guidelines.

After this discussion, **the motion carried on a voice vote.**

It was moved by Representative Keiser, seconded by Representative Torgerson, and carried on a roll call vote that the committee consider the revised bill draft at the next committee meeting. Representatives Glassheim, Devlin, Keiser, Kliniske, and Torgerson and Senator Cook voted "aye." Representatives Christenson, Fairfield, Henegar, and Sandvig and Senator Heitkamp voted "nay."

It was moved by Representative Keiser, seconded by Senator Heitkamp, and carried on a voice vote that the committee give no further consideration to the more specific bill draft.

Senator Heitkamp said he is worried about creating negative visitation incentives by having the guidelines consider extended visitations.

Representative Devlin said he is lukewarm on the idea of extended visitation, but supports keeping the issue of extended visitation alive and letting the Department of Human Services work with the guidelines.

Senator Cook said allowing for consideration of extended visitations will allow more flexibility in joint physical custody situations.

Phasing In Child Support Order Modifications

Chairman Glassheim called on committee counsel to present a bill draft relating to large modifications of child support orders. Committee counsel said the bill draft is in response to committee directive and creates new law that would allow a court to modify a child support order in stages if the amount of the total increase or decrease in the child support order exceeds 25 percent of the order modified. She said this bill draft is based on South Dakota law. Although judges may already have the authority to phase in child support orders, she said, the nature of the child support guidelines is such that the guidelines discourage judges from phasing in modifications and if challenged on appeal, judges may be prohibited from phasing in modifications.

Mr. Strate said the Department of Human Services neither supports nor opposes the phasein bill draft; however, it might be appropriate to consider establishing a period of time in which modifications may be phased in. He said the committee may want to consider a trigger level greater than 25 percent because adjustments of child support orders greater than 25 percent are common. He provided written testimony, a copy of which is attached as Appendix F.

Representative Glassheim said he supports having a monetary threshold instead of a percentage threshold. Representative Christenson said using a dollar amount threshold may not be appropriate because the amount of money is relative to the amount of money a person earns.

Senator Cook said there is a problem with the system because it allows an obligor to be in arrears from the date of modification. He said arrears occur when a child support order modification goes back to the filing date of the motion to modify.

Mr. Biesheuvel said a dollar amount threshold set by statute may be more than the amount ordered by the child support order; therefore, using a percentage threshold would be better. He said judges should be able to implement child support orders on a case-by-case basis for obligors who are seasonal workers.

In response to a question from Representative Keiser, Mr. Strate said a seasonal worker obligor is expected to budget over a 12-month period.

Representative Keiser said he does not like this bill draft because if the child support guidelines are correct they should be implemented right away. He said this bill draft may be opening a can of worms, and the fact that changes in the amount of a child support order have an impact is the nature of modifications.

In response to a question from Senator Heitkamp, Mr. Strate said the IV-D program reviews IV-D cases every three years, and if a party wants more frequent reviews the party may initiate proceedings using a private attorney.

Representative Sandvig said the bill draft regarding phasing in child support modifications should use the word "shall" and thereby require judges to phase in modifications.

It was moved by Representative Henegar, seconded by Representative Keiser, and carried on a voice vote that the committee give no further consideration to the bill draft.

Accounting for Child Support Payments Received and Distributed

Chairman Glassheim called on committee counsel to present a bill draft relating to accounting for child support payments received and distributed. Committee counsel said the bill draft is in response to committee directive and amends a North Dakota Century Code section that becomes effective July 1, 1999. She said the bill draft would require the Department of Human Services state disbursement unit to mail all parties an annual summary of information regarding child support collected and distributed, and would require the unit to provide a quarterly summary of information upon the request of the party.

In response to a question from Senator Heitkamp, Mr. Biesheuvel said this bill draft is needed because parties should have access to child support payment and distribution information just like an individual has access to bank account information.

Mr. Strate said the department neither supports nor opposes this bill draft; however, the costs associated with complying with the new requirements are not included in the Governor's budget. He said in addition to the postage and paper costs associated with providing parties with this information, there would be costs associated with redesigning the automated system. He provided written testimony, a copy of which is attached as Appendix G.

In response to a question from Senator Heitkamp, Mr. Strate said there is a disbursement unit plan to implement a voice response telephone system that would provide child support information to the parties.

It was moved by Senator Heitkamp, seconded by Representative Keiser, and carried on a voice vote that the Legislative Council staff be requested to revise the bill draft to provide that the state disbursement unit is required to provide an annual activity report once a year upon a party's request.

It was moved by Senator Heitkamp, seconded by Representative Christenson, and carried on a voice vote that the committee consider the revised bill draft at a future meeting.

Parental Access to Child's Records

Chairman Glassheim called on committee counsel to present a bill draft relating to parental access to a child's records. Committee counsel said this bill draft is in response to committee directive and is based on language and ideas submitted by the Joint Task Force on Family Law. She said areas of possible improvement in the bill draft include defining "accident or serious illness" and defining "reasonable access."

Senator Heitkamp said although he has concerns regarding the definitions of some of the terms in this bill draft, there is a need for this bill draft.

Ms. Tabor said a court does not have authority to waive any right or duty; therefore, a different term should be used. She said the bill draft does not address juvenile court records, and appears to put a burden on schools to provide records. She said the joint task force will work with committee counsel in revising the bill draft.

Mr. Biesheuvel said noncustodial parents need to have access to the types of information listed in the bill draft.

Mr. Strate said the Department of Human Services neither supports nor opposes the bill draft. He provided written testimony, a copy of which is attached as Appendix H.

It was moved by Representative Devlin, seconded by Representative Christenson, and carried on a voice vote that the Legislative Council staff be requested to work with the Joint Task Force on Family Law to revise the bill draft.

Visitation Enforcement

Chairman Glassheim called on committee counsel to present a bill draft relating to visitation enforcement remedies. Committee counsel said the bill draft is in response to committee directive and provides courts with visitation enforcement remedies equal to the remedies available to enforce child support orders. She said the remedies available for visitation enforcement would be limited to those child support order enforcement remedies that are appropriate. She said the only additional visitation enforcement tool this bill draft would provide to courts is the authority to revoke or suspend professional licenses, recreational licenses, or drivers licenses. She said the bill draft also would expand visitation enforcement tools if child support enforcement tools were expanded in the future.

In response to a question from Representative Kliniske, committee counsel said it is within a court's discretion to determine when to implement a visitation enforcement remedy, and in that respect the law would not change.

Mr. Dan Bertsch, Assistant State's Attorney, Cass County, said this bill draft would not change the court's ability to hold a party in contempt; the only thing this bill draft addresses is the court's ability to revoke or suspend licenses.

In response to a question from Representative Glassheim, Mr. Bertsch said the child support enforcement remedies currently available do not include mediation.

In response to a question from Representative Keiser, Mr. Bertsch said although there is a reluctance by judges to revoke or suspend licenses, the bill draft would provide an appearance of fairness by giving noncustodial parents the same tools obligees have.

Mr. Biesheuvel said the bill draft is a step towards creating an appearance of fairness.

Mr. Strate said the Department of Human Services neither supports nor opposes the bill draft. He provided written testimony, a copy of which is attached as Appendix I.

It was moved by Senator Cook and seconded by Representative Christenson that the committee approve the visitation enforcement bill draft and that the committee consider the bill draft at a future meeting. Representative Devlin said this bill draft may be creating another tool for parties to use to hurt each other. After this discussion, **the motion carried on a voice vote.**

Visitation Orders

Chairman Glassheim called on committee counsel to present a bill draft relating to visitation guidelines. Committee counsel said the bill draft is in response to committee directive and is based on Utah law. She said the bill draft requires judges to consider a variety of provisions when creating a visitation schedule. The bill draft does not specify the repercussions of a judge not considering these elements, she said, and the bill draft does not require the court to make specific findings when the court does not incorporate the elements into a visitation order. She said terms in the newly created language of the bill draft that might need clarification include "significant functions," "immediately" as it refers to notifying a custodial parent of a medical emergency, and "travels" as it pertains to providing information to the other parent.

Ms. Tabor said her concerns with the bill draft include putting legislative intent into statute, there is no enforcement mechanism for these guidelines and questionable substantive soundness of some of the provisions. If the provisions were made into mandates, she said, the mandates may be problematic when applied to situations of domestic violence.

Mr. Strate said the Department of Human Services neither supports nor opposes the bill draft. He provided written testimony, a copy of which is attached as Appendix J.

In response to a question from Representative Glassheim, committee counsel said state law provides that visitation is presumed to be in the best interest of the child.

Representative Keiser said although the elements in the bill draft would be helpful for mediation, it is not appropriate to include these guidelines in the North Dakota Century Code.

Ms. Tabor said the mediation pilot project will include a list of visitation considerations for parents to consider.

Mr. Biesheuvel said there are associated problems with imposing a parent's religious beliefs on children.

It was moved by Senator Heitkamp and seconded by Representative Keiser that the committee give no further consideration to the bill draft. Representative Christenson said there is force and power behind statute, and the issues addressed in the bill draft are important; therefore, the committee should continue considering the bill draft. Representative Keiser said the Supreme Court already decides a lot of visitation cases and this statute might result in even more appeals and litigation. Ms. Tabor said most domestic law cases do not go to court because the parents are usually able to settle, and in reaching settlements the attorneys already consider the elements contained in the bill draft. After this discussion, **the motion carried on a voice vote.**

Uninsured Medical Expenses

Chairman Glassheim called on committee counsel to present a bill draft relating to parental responsibility for uninsured medical expenses. Committee counsel said this bill draft is in response to committee directive. She said North Dakota law provides that an obligor must provide health insurance coverage whenever the coverage is available at reasonable cost, and an obligee must provide health insurance whenever the coverage is available at no or nominal cost. She said the bill draft provides that child support orders must require the obligor and obligee to share financial responsibility for uncovered medical and dental expenses. Under the bill draft, she said, the parties would be required to share financial responsibility according to the party's ability to pay. She said this bill draft essentially puts into law the practice that is occurring in the legal community.

In response to a question from Representative Kliniske, Ms. Tabor said the bill draft does not

specifically address eye care expenses or orthodontic expenses, and these expenses would not be covered unless the bill draft specifically addressed these expenses.

In response to a question from Representative Kliniske, Mr. Biesheuvel said some parents resist paying for medical expenses, but the parties should be left with some discretion regarding how to pay for uncovered medical expenses.

Representative Keiser said he does not have problems with codifying current practice, and codification might make court orders more consistent.

Mr. Strate said the Department of Human Services neither supports nor opposes the bill draft. He provided written testimony, a copy of which is attached as Appendix K.

It was moved by Representative Keiser and seconded by Senator Cook that the committee consider the bill draft at a future meeting. Representative Kliniske said she is concerned about uncovered orthodontic expenses and eye care expenses. Senator Heitkamp said he does not want to codify the existing practice because he is concerned it will create a weapon for the parties. After this discussion, **the motion failed on a roll call vote.** Representatives Glassheim, Christenson, Henegar, and Keiser and Senator Cook voted "aye." Representatives Devlin, Fairfield, Kliniske, and Sandvig and Senator Heitkamp voted "nay."

Study of Family Courts

Chairman Glassheim called on committee counsel to present a study resolution draft relating to a study of family courts. Committee counsel said the draft of the study resolution is identical to Senate Concurrent Resolution No. 4043 (1993).

Ms. Tabor said the 1993 study resolution resulted in creation of the committee currently known as the Joint Task Force on Family Law, and Judge Bohlman's family court pilot project is in response to the 1993 study resolution. The pilot program is being implemented, she said, and the project is being evaluated. She said the task force concluded that a family court system would be too expensive to implement.

In response to a question from Representative Glassheim, Ms. Tabor said one of the advantages of a family court is that one judge is assigned to a family and this results in more continuity.

Mr. Bertsch said under the current system judicial referees deal with family law matters, and separation order and child support order services are available through the IV-D system.

Senator Heitkamp questioned whether the issue of a family court is a Child Support Committee issue or whether it would more appropriately be addressed by the Judiciary Committee. He said the current climate includes cutting the number of judges to 42.

Mr. Strate said the Department of Human Services neither supports nor opposes this draft. He provided written testimony, a copy of which is attached as Appendix L.

It was moved by Senator Heitkamp, seconded by Representative Kliniske, and carried on a voice vote that the committee give no further consideration to the study resolution draft.

Child Support - Gross Income

Chairman Glassheim called on Senator Cook to present a bill draft Senator Cook would like the committee to consider recommending to the Legislative Council.

Senator Cook said the bill draft relates to the child support guidelines' definition of "gross income." He said the bill draft would require that the guidelines not include in gross income any income or benefit that is received by an employee as part of an employee benefit package if the income or benefit is out of the immediate control of the employee.

Senator Heitkamp asked whether parties might use this definition of gross income to avoid child support by hiding money in employee benefits.

Representative Devlin said Mr. Strate already informed the committee that child support enforcement is dealing with this gross income definition issue; therefore, the committee should not be addressing this issue.

Mr. Blaine Nordwall, Attorney, Legal Services, Department of Human Services, said the department is filing an amicus brief with the Supreme Court because the interpretation of the definition of gross income has been expanded further than the Department of Human Services intended. He said the definition problems of gross income can be fixed through the rulemaking process, and these problems might be resolved before the 1999 session. Fixing the definition of gross income is quite touchy, he said, and the definition needs to be studied very carefully.

It was moved by Representative Devlin, seconded by Representative Christenson, and carried on a voice vote that the committee give further consideration to Senator Cook's bill draft as a committee bill draft.

DISCUSSION TOPICS

The committee reviewed the status of the child support survey question topics the committee had decided to study.

Chairman Glassheim said that at a later date the committee will address possible statutory definitions of joint legal custody, joint physical custody, and extended visitation.

Survey question No. 4--The custodial parent should be required to account for expenditure of child support. Representative Kliniske said accounting for expenditures of child support would be an administrative nightmare. Representative Glassheim agreed with Representative Kliniske on this matter. Representative Sandvig said Social Security requires an accounting, so why not require accounting for child support. The committee decided to keep this topic for consideration, although no additional information is requested at this time.

Survey question No. 10--We should have statutory advisory visitation guidelines. The committee decided to terminate further consideration of this topic.

Survey question No. 12--Because North Dakota cannot do much to affect federal taxes, the state should allow an obligor who regularly pays court-ordered child support to deduct that amount from the obligor's taxable income. Representative Keiser said this may be a good idea, but it will result in death by fiscal note. Representative Sandvig said it might be possible to split the deduction between parties. The committee decided to terminate further consideration of this topic.

Survey question No. 15--We should legislatively define family law mediators to include attorneys with certain specific additional training and licensed counselors, social workers, and psychologists with specific additional training. Senator Cook asked whether court rules already define mediators. Ms. Tabor said court rules only apply to court-mandated mediation, and do not apply to mediation that parties enter into on their own. The committee decided to address this topic at a future meeting.

Survey question No. 20--There should be a presumption that, absent abuse or other strong reason, joint physical or legal custody is in the best interest of the child. Committee counsel said if a presumption is created, the burden shifts to the parties to establish that the best interests of the child are served by something other than joint physical or legal custody. Representative Kliniske said creating this presumption would encourage parents to disagree. She said it is not always in the best interest of the child for the parents to have joint custody, so the best interests need to be determined on a case-by-case determination.

In response to a question from Representative Keiser, committee counsel said under current law there is not a presumption that joint custody is in the child's best interest, but there is a presumption that visitation is in the best interest of the child. The committee decided to address this topic at a future meeting.

Survey question No. 23--There should be minimums and maximums of amounts of income used in calculating child support. Senator Heitkamp said this is an issue that will result in extensive debate. The committee decided to terminate future consideration of this topic.

Survey question No. 24--We should recommend creation of a Joint Family Law Legislative Committee or Senate and House standing family law committees in the legislative session. The committee decided to terminate future consideration of this topic.

Survey question No. 25--We should recommend the creation of a system of family law courts with practitioners having specific training in family law. The committee decided to terminate future consideration of this topic.

Survey question No. 29--The obligor child support guidelines model should be changed to an income shares child support model. Senator Heitkamp said Representative Belter seems to have some real questions regarding the basic foundation of all child support guidelines models.

Representative Devlin said although the income shares model sounds fairer than the obligor model and his constituents report that child care expenses are frequently added on top of the amount of child support ordered, a bill draft that implements an income shares child support guidelines model will die by fiscal note. He said counties would be required to fund the guideline change by increasing property taxes.

Mr. Strate said his experience with IV-D cases is that it is not common practice to add child care expenses on top of ordered child support ordered amounts, although one reason for this may be that IV-D cases often deal with lower income parties than non-IV-D cases.

Ms. Tabor said when parties stipulate in family law cases, it is common practice to negotiate child care expenses. Mr. Strate said child care expenses are often used as the payoff for one party taking on other types of marital debt.

Representative Keiser agreed that a bill draft to change the child support model to an income shares model will die by fiscal note; but, he

requested that child support enforcement draft a child support scenario that favors the income shares model and a scenario that favors the obligor model. He said he would like to receive additional information regarding the statistics South Dakota gathers regarding the transition to the income shares child support model.

Mr. Strate said the scenarios will be subject to attack if child support enforcement chooses the scenario facts as requested by Representative Keiser. Mr. Biesheuvel provided written testimony in support of mediation and the obligor model, a copy of which is attached as Appendix M. He said R-KIDS will provide committee counsel with scenario facts.

The committee decided to continue discussing the income shares guidelines model at the next committee meeting.

Survey question No. 30--The child support guidelines should continue to be created by rulemaking. The committee decided to terminate future consideration of this topic.

Survey question No. 32--Overtime or second jobs should be excluded from a noncustodial parent's income. The committee requested that the Legislative Council staff be requested to prepare a bill draft addressing income from overtime or second jobs.

Chairman Glassheim announced the next meeting of the Child Support Committee is scheduled for April 27-28, 1998. No further business appearing, Chairman Glassheim adjourned the meeting at 3:30 p.m.

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Jennifer S. N. Clark
Committee Counsel

ATTACH:13