NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

CHILD SUPPORT COMMITTEE

Monday, June 22, 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, William R. Devlin, April Fairfield, George Keiser, Amy N. Kliniske, Sally Sandvig; Senators Dwight C. Cook, Joel C. Heitkamp, Donna L. Nalewaja, John T. Traynor

Members absent: Representatives Linda Christenson, Dale L. Henegar, Jim Torgerson

Others present: Daniel Biesheuvel, R-KIDS, Bismarck
Bill Kerzmann, Bismarck
Arnie Fleck, Wheeler Wolf Law Firm, Bismarck
Susan Beehler, R-KIDS, Mandan
Bonnie Palecek, Bismarck
Sherry Moore, Bismarck
Bill Strate, Department of Human Services, Bismarck
Philip Papineau, R-KIDS, Fargo

It was moved by Senator Heitkamp, seconded by Representative Fairfield, and carried on a voice vote that the minutes of the April 22, 1998, meeting be approved as distributed.

STUDY OF THE PROVISION OF CHILD SUPPORT ENFORCEMENT

Chairman Glassheim called on Mr. Bill Strate, Director, Child Support Enforcement, Department of Human Services, for comments regarding the status of the implementation of the child support state disbursement unit and the proposed content of child support annual summaries.

Mr. Strate said in order to take full advantage of economies of scale and to ensure a timely turnaround of payments, automation is the key to child support. He said conversion of IV-D child support cases to the fully automated child support enforcement system (FACSES) has been under way since January 1998 and is over 90 percent complete. The child support distribution changes and the design and planning necessary for implementation of the state disbursement unit, he said, have been under way since 1997 and are projected to be completed and tested by late summer 1998, at which time the conversion from the clerks of court to the state disbursement unit can begin.

Mr. Strate said the authorizing legislation for the state disbursement unit requires the Department of Human Services to consult with county officials and the Supreme Court on the plans and process for converting to the new system. He said this group has begun the planning process, and the next meeting is scheduled for June 24, 1998. Mr. Strate said the conversion will occur on a county-by-county basis beginning with Divide, Williams, and McKenzie Counties.

Mr. Strate said the annual report an obligee receives from the state disbursement unit will differ from the annual report an obligor receives. He said a child support obligee will receive a monthly report anytime a child support payment is retained by the state. This report, he said, will provide a breakdown of collections for the month and show how the collections were distributed, and this report will serve as the basis for the annual report each obligee will receive.

Mr. Strate said child support obligors who are not under income withholding will receive a monthly billing statement. He said the information from this statement will serve as a basis for the annual report each obligor will receive.

Mr. Strate said in addition to an obligee report and an obligor report, there will be a ledger of each case which could serve as an additional attachment to annual reports. He said he anticipates changes will be made as more is learned about the readability of the reports produced and feedback is received from the customers of the state disbursement unit; therefore, he urges that the committee not mandate certain data elements until there is an opportunity for the state disbursement unit to learn from experience. Mr. Strate provided written testimony that includes the member names and addresses of the state disbursement unit work group, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Keiser, Mr. Strate said the 20 percent of the conversion costs not covered by federal funds will be covered by state and county funds.

In response to a question from Senator Traynor, Mr. Strate said new hire reporting went into effect October 1, 1997. He said although specific statistics are not yet available regarding the effectiveness of the employer new hire reporting, child support

enforcement collections indicate a 17 percent increase since the new hire requirements went into effect. Employers have been very cooperative, and new hire reporting outreach is being performed, he said, in the form of fliers included in state agency mailings to employers. He said approximately 55 percent of the employers report via facsimile, 20 percent via on-line communication, and 25 percent via the United States mail. Mr. Strate said he is not certain whether federal money will be available for future maintenance of the state disbursement unit system.

In response to questions from Senator Nalewaja, Mr. Strate said child support collection from obligors who are self-employed or underemployed raises unique problems that are difficult to address; the Department of Human Services is staying abreast of how other states are implementing central disbursement units; and outreach is being developed to notify obligors of the transition to the state disbursement unit. He said although state and county child support enforcement services cannot provide services on the reservations until federally approved child support guidelines are established, the University of North Dakota Law School received a grant to help draft child support guidelines for the reservations. Because the state disbursement unit is not fully implemented, he said, the state is in a penalty phase; however, pending federal legislation may decrease the penalty.

In response to a question from Representative Glassheim, Mr. Strate said the Department of Human Services is in the process of reconciling child support cases in an attempt to minimize problems during the conversion. He said a statewide federal child support registry will be implemented in 1999.

Chairman Glassheim accepted the report on the status of the state disbursement unit and said the committee will not take any action at this time.

STUDY OF THE EQUITY AND FAIRNESS OF THE CHILD SUPPORT GUIDELINES

Income Shares and Obligor Child Support Guidelines Models

Chairman Glassheim called on Mr. Strate to present an actual child support case using the North Dakota child support guidelines and using the Washington child support guidelines. Mr. Strate said under Washington's guidelines, which are based on an income shares model, the obligor is being ordered to pay $283 per month. In calculating the estimated child support obligation under North Dakota's guidelines, which are based on an obligor model, Mr. Strate said, the child support order would be $282 per month. Mr. Strate provided written testimony that includes a worksheet illustrating the calculations used to determine the North Dakota child support amount, a copy of which is on file in the Legislative Council office.

Chairman Glassheim called on Mr. Strate for comments regarding the costs associated with changing to an income shares child support guidelines model. Mr. Strate reviewed the written testimony he provided to the committee on February 10, 1998, and said the cost to the child support enforcement program of a change to an income shares model would be between $168,750 and $187,500 per year. He said the majority of this amount would be incurred by the counties due to an increase in the work associated with establishing and reviewing orders. He said it is difficult to estimate the cost upon the judiciary and private litigants, although the short-term impact would likely be significant because the transition would result in an increase in child support litigation because one party would perceive an advantage under the new model. Mr. Strate provided written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Belter, Mr. Strate said only one case comparison was prepared for this meeting; however, at previous meetings multiple hypotheticals were presented using the Utah child support guidelines which illustrate a variety of income situations.

In response to a question from Senator Heitkamp, Mr. Strate said both the obligor model and the income shares model may have problems in dealing equitably with exceptional cases. He said deviations are intended to address cases with exceptional circumstances, but it is difficult to define what circumstances constitute an exceptional case. The child support guidelines are reviewed every four years, he said, and this review is intended to deal with problems with the guidelines. He said the lists of deviations have grown over the years as a result of the reviews.

In response to a question from Senator Traynor, Mr. Strate said although the obligor model is equitable, it is possible the expense of changing models may be worthwhile due to the alleviation of the perception of unfairness. He said although the four-year guideline review allows for public comment, the best way to educate the public regarding child support guidelines would be to hire a full-time public relations person.

Chairman Glassheim called on Mr. Philip Papineau, President, Fargo Chapter, R-KIDS, for comments regarding the income shares model. Mr. Papineau said the drafting of the child support guidelines should not be the responsibility of the Department of Human Services but should be the responsibility of the legislative branch. The North Dakota child support guidelines, he said, should address the unique population of this state, and for that reason it may not be appropriate to copy a child support guideline structure from another state. Mr. Papineau provided written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Glassheim, Mr. Papineau said it is possible to create a fair child support system using the income shares model or the obligor model, but the problem with the obligor model is the appearance of unfairness. He said the bottom line is whether the amount ordered is fair.

In response to a question from Senator Nalewaja, Mr. Papineau said Minnesota is an example of a state that creates child support guidelines statutorily. Mr. Strate said the federal requirements do not dictate who makes the guidelines; therefore, some guidelines are created administratively, some statutorily, and some judicially.

In response to a question from Senator Traynor regarding whether the Fargo chapter of R-KIDS was actively involved in the last review of the child support guidelines, Mr. Papineau said R-KIDS was not active at the last review but will be active in the current review.

In response to a question from Senator Heitkamp, Mr. Papineau said although it is true that women usually get custody of children, both men's and women's standards of living go down after a divorce.

In response to a question from Senator Nalewaja, Mr. Terry Traynor, Assistant Director, North Dakota Association of Counties, said changing to an income shares model would have a great impact on counties because the regional child support enforcement units are staffed by county personnel. He said any costs associated with a change in models would be funded through property tax increases.

It was moved by Representative Devlin and seconded by Representative Keiser that the committee no longer pursue changing from an obligor child support model to an income shares child support model.

Senator Nalewaja said problems arise when an obligor's income is much lower than a custodial parent's income. Representative Keiser said he seconded the motion, not because he supports the obligor model, but because the committee has not received information that creates a basis to change models. He said the income shares model appears more fair, and this appearance may result in cost savings; however, changing models is not consistent with the current movement to decrease the size of the court system. Representative Belter said he resists the motion because a problem under the obligor model is the perception that only one parent is responsible for a child. He said change in the system should have started with the interim committee instead of during the legislative session.

After this discussion, **the motion passed on a roll call vote.** Representatives Glassheim, Devlin, Fairfield, and Keiser and Senators Cook, Heitkamp, Nalewaja, and Traynor voted "aye." Representatives Belter, Kliniske, and Sandvig voted "nay."

Bill Drafts

Chairman Glassheim called on committee counsel to present a new version of a bill draft relating to the child support guidelines definition of gross income. She said the new version of the bill draft is in response to a committee request at the previous meeting. The bill draft contains language, she said, that is relatively specific and addresses how to define an employee benefit that is to be excluded from gross income. She said under the bill draft, gross income does not include any employee benefit the employee cannot lawfully liquidate, and the employee has no significant influence or significant control over the nature or the amount. She said this bill draft leaves some discretion to the department or the courts to define "employee benefit," "significant influence," and "significant control."

In response to a question from Representative Glassheim, committee counsel said under the bill draft, the value of a liquidated benefit would likely be determined posttax.

In response to a question from Representative Keiser regarding the availability of benefits under a 401k emergency clause, committee counsel said under the bill draft, the benefits available under an emergency clause would probably be speculative until an emergency occurred that resulted in receipt of money, at which time the money received would likely be considered.

In response to a question from Representative Belter, committee counsel said under the bill draft if an obligor could lawfully liquidate a benefit by incurring a penalty, it is probable the benefit would be considered at the penalized amount.

Chairman Glassheim called on Mr. Strate for comments regarding the bill draft. Mr. Strate said the Department of Human Services neither supports nor opposes the basic intent of the bill draft; however, there are concerns over the language of the bill. He suggested the bill draft provide that the department "limit the inclusion of employee benefits provided by the employer as part of an established employee benefit plan in the calculation of the income used in establishing a child support contribution." Mr. Strate provided written testimony, a copy of which is on file in the Legislative Council office.

Chairman Glassheim called on Mr. Arnie Fleck, Attorney, Wheeler Wolf Law Firm, for comments regarding gross income for determinations of child support. Mr. Fleck said he is testifying because he is not aware of any obligee organizations in the state. He said child support determinations should include consideration of employee benefits unless an obligor proves hardship. This approach would give the courts discretion. Mr. Fleck said an employee who earns $100,000 per year plus benefits is different from an employee who earns $100,000 a year without benefits.

Representative Keiser said a representative from the Tax Department should be asked to testify regarding the bill draft at the next meeting.

Representative Glassheim said perhaps income for child support purposes should be tied to the income considered for federal income taxes. Representative Keiser said using the federal income tax tables would be easy but would also allow obligors to hide up to 20 percent of their income. Senator Heitkamp said the determining factor is the amount of income taxed. Senator Cook said he wants to avoid a system under which an obligor can manipulate the amount of income considered for child support purposes.

It was moved by Senator Traynor, seconded by Senator Heitkamp, and carried on a voice vote that the Legislative Council staff be requested to draft a new version of the bill draft which considers whether an employee may liquidate a benefit without incurring tax liability penalties.

Representative Glassheim suggested the bill draft be changed to address "noncash" benefits and benefit "plans." Senator Heitkamp said if an employee is offered a true cafeteria plan under which the employee has discretion how to spend benefit money, if the employee chooses to buy insurance, that portion of the benefit should not be considered income in determining child support, but if the employee takes a cash payment, that cash payment should be considered income in determining child support. Representative Belter said there is a possible inequity between employees who receive benefits and employees who do not receive benefits.

In response to a question from Senator Nalewaja, Mr. Strate said the theory behind the guidelines is that income is money to which a person has access. He said a problem arises with cost avoidance; therefore, it is best to look at disposable income.

It was moved by Senator Cook, seconded by Senator Heitkamp, and carried on a voice vote that the Legislative Council staff be requested to draft a new version of the bill draft which refers to noncash benefits and benefit plans in accordance with Representative Glassheim's suggestion.

It was moved by Senator Heitkamp, seconded by Representative Kliniske, and carried on a voice vote that the committee take no further action on the bill draft until the next meeting.

Chairman Glassheim called on committee counsel to present a bill draft relating to the effective dates of modified child support orders. Committee counsel said the bill draft adopts the amended bill draft Representative Sandvig presented to the committee at the previous meeting. Committee counsel said the bill draft includes amendments that affect the form and style of the statute and creates new language on lines 9 through 12 which provides that most child support order modifications are effective the first day of the month following the date the motion is filed, but in some instances are effective the first day of the month following some event upon which the modification is based. The provision regarding the occurrence of an event addresses anticipatory motions to modify.

In response to a question from Representative Keiser, Mr. Strate said a notice may be served on a respondent before the notice is filed with the court. He said practitioners may have problems finding this law in the North Dakota Century Code, and perhaps a new section should be created instead of amending existing law.

In response to a question from Senator Traynor, Mr. Strate said one effect the bill draft may have is to discourage parties from footdragging.

Mr. Daniel Biesheuvel, President, Bismarck Chapter, R-KIDS, said it is conceivable a modification case could take two years between filing and issuing an order, and this delay may result in problems with reimbursement. Ms. Susan Beehler, Member, Bismarck Chapter, R-KIDS, said oftentimes a modification results in a lump sum payment that is essentially a windfall to the custodial parent which is not always used for the child's needs. She said arrearages can be very harmful to an obligor's credit rating.

Representative Keiser said the effect of this bill draft would be no different from planning for a child to go to college in that it requires a party to plan ahead.

In response to a question from Senator Traynor, Mr. Strate said the effective date of a child support order is currently left to the discretion of the trial court.

It was moved by Representative Keiser and seconded by Senator Nalewaja that the committee adopt the bill draft. The motion failed on a roll call vote. Representatives Glassheim, Keiser, and Sandvig and Senators Cook and Nalewaja voted "aye." Representatives Belter, Devlin, Fairfield, and Kliniske and Senators Heitkamp and Traynor voted "nay."

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

Mediation

Representative Glassheim presented a House concurrent resolution draft expressing legislative approval of the actions taken by the North Dakota Supreme Court Joint Task Force on Family Law to facilitate and promote mediation as a method of addressing family law matters.

It was moved by Senator Heitkamp, seconded by Representative Fairfield, and carried on a voice vote that the committee adopt as a committee draft Representative Glassheim's mediation concurrent resolution draft.

Pro Se Representation

Representative Glassheim presented a study resolution draft relating to pro se representation. He said the concurrent resolution draft directs the Legislative Council to study the feasibility and desirability of facilitating pro se representation in domestic relations matters.

It was moved by Senator Traynor, seconded by Senator Nalewaja, and carried on a voice vote that the committee adopt as a committee draft Representative Glassheim's concurrent study resolution draft.

Bill Drafts

Chairman Glassheim called on committee counsel to present a new version of a bill draft relating to parental access to records and visitation enforcement. Committee counsel said this version of the bill draft combines bill drafts the committee reviewed at earlier meetings regarding parental rights and duties and visitation and enforcement remedies.

Ms. Sherry Moore, President, Joint Task Force on Family Law, said she is concerned Section 2 of the bill draft regarding enforcement remedies for visitation does not apply to enforcement of the parental rights provided for under Section 1. She said it may be helpful to clarify under Section 1 of the bill draft that all visitation orders must include the listed parental rights and duties.

In response to a question from Senator Traynor, committee counsel said at least one other state has enacted a law similar to Section 2 of the bill draft relating to visitation enforcement remedies.

It was moved by Senator Heitkamp, seconded by Representative Kliniske, and carried on a voice vote that the Legislative Council staff be requested to draft a new version of the bill draft which implements the changes suggested by Ms. Moore.

Chairman Glassheim called on committee counsel to present a bill draft relating to false claims of domestic abuse. She said the bill draft is identical to the version of the bill draft Senator Cook introduced at the last meeting except this bill draft reflects that it is now a committee bill draft.

In response to a question from Senator Nalewaja, committee counsel said the title of the bill draft could be changed to refer to domestic violence instead of domestic abuse.

In response to a question from Senator Heitkamp, Ms. Bonnie Palecek, Abused Adult Resource Center, said the language of the bill draft is based on a statute regarding false claims of child abuse. She said she is not aware of a large number of cases in which there are false claims of domestic violence. One major difference between domestic violence and child abuse, she said, is that unlike child abuse there is no formal investigation in cases of domestic violence. She said she is concerned this bill draft may have a chilling effect on victims pursuing protection orders.

Ms. Beehler said victims of domestic violence are ruled by fear of violence and are not ruled by fear of losing money in a court of law; therefore, this bill draft will not affect behavior of victims of domestic violence.

Mr. Strate said North Dakota Century Code Section 28-26-31, regarding pleadings not made in good faith, may already address the problems addressed by this bill draft.

It was moved by Senator Cook, seconded by Representative Kliniske, and failed on a roll call vote that the committee continue to consider this bill draft. Representatives Glassheim, Belter, Devlin, and Kliniske and Senator Cook voted "aye." Representatives Fairfield, Keiser, and Sandvig and Senators Heitkamp, Nalewaja, and Traynor voted "nay."

Representative Glassheim presented a bill draft that authorizes judges to create child support contribution trusts.

Representative Keiser said courts already create trusts as a result of negotiations between parents.

In response to a question from Senator Nalewaja, Mr. Strate said this bill draft pertains to child support moneys, not property settlements.

It was moved by Senator Cook that the committee review the bill draft at the next meeting. Chairman Glassheim ruled the motion failed for the lack of a second.

Chairman Glassheim announced the next meeting of the Child Support Committee is scheduled for Monday, September 28, 1998. No further business appearing, Chairman Glassheim adjourned the meeting at 3:00 p.m.

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Jennifer S. N. Clark
Committee Counsel