

Child Support Commission on Child Support

Commission Meeting, Sioux Falls, SD

August 24, 2016

Judge Joni Cutler welcomed everyone to the meeting. Roll call was taken. Tom Lee, Cory Wipf, Jennifer Hanna, Judge Cutler, Gail Stoltenburg and Dan Tod were in attendance. Representative Gosch attended by phone. Senator Rusch joined the meeting in person at 12:47 pm.

Non-commission members in attendance include Suzanne Starr, UJS Director of Policy and Legal Services; David McVey, DSS Legal; and Shannon Abernathy, Program Specialist with DCS.

Judge Cutler asked for a motion to approve last meetings minutes. Tom Lee motioned to approve, Dan Todd seconded the motion and all approved. Judge Cutler advised the Commission Linda Lee Viken sent in changes to her testimony. Copies were provided to the Commission. Tom Lee made a motion to accept Linda Lea's comments. Dan Todd seconded the motion. All approved.

Judge Cutler discussed the public hearing notes Tom Lee motioned to approve, Dan Todd seconded and all approved.

Gail Stoltenburg shared copies of letters from constituents Mr. Jason Ellwein, Mr. Timothy Henderson, Mr. Kevin Carter, and Mr. Scott Daly. Mr. Daly testified at the public hearing held in Pierre on July 20th. Representative Gosch relayed he has not been able to open documents provided via email. Judge Cutler resent the emails to Representative Gosch for review. Documents resent were in .pdf and .word formats for use.

Letter from Mr. Jason Ellwein

Tom Lee commented that Mr. Jason Ellwein made two to three points in his letter. Mr. Ellwein would like information of the new spouse or parent considered in making the child support determination. Tom Lee advises the rule in South Dakota is that the parents are responsible for the support of their own children. They are also responsible for step or other children but Mr. Ellwein omitted some of the statute that talks about income of subsequent spouse can be considered and subsequent children may be a method of deviation.

Each case is different and where there are not two parents to support, they will consider other resources. However, statutes place primary responsibility on the parents. Subsequent children do not change the needs of the applicable children. Further it doesn't talk about splitting expenses of the child and is often overlooked.

There is a push for shared parenting but what the NCP doesn't understand is it reduces the support automatically. He also notes 25-7-6.10 and 25-7-6.17 but subsection 2 helps define financial hardship. And it says:

25-7-6.10. *Factors considered for deviation from schedule. Deviation from the schedule in § 25-7-6.2 shall be considered if raised by either party and made only upon the entry of specific findings based upon any of the following factors:*

- (1) *The income of a subsequent spouse or contribution of a third party to the income or expenses of that parent but only if the application of the schedule works a financial hardship on either parent;*
- (2) *Any financial condition of either parent which would make application of the schedule inequitable. If the total amount of the child support obligation, including any adjustments for health insurance and child care costs, exceeds fifty percent of the obligor's monthly net income, it is presumed that the amount of the obligation imposes a financial hardship on the obligor. This presumption may be rebutted based upon other factors set forth in this section;*
- (3) *Any necessary education or health care special needs of the child;*
- (4) *The effect of agreements between the parents regarding extra forms of support for the direct benefit of the child;*
- (5) *The obligation of either parent to provide for subsequent natural children, adopted children, or stepchildren. However, an existing support order may not be modified solely for this reason; or*
- (6) *The voluntary and unreasonable act of a parent which causes the parent to be unemployed or underemployed, unless the reduction of income is due to incarceration.*

Source: *SL 1989, ch 220, § 10; SL 1997, ch 154, § 3; SL 2001, ch 133, § 7; SL 2005, ch 134, § 10; SL 2007, ch 158, § 1; SL 2009, ch 130, § 4.*

25-7-6.17. *Large adjustment in support phased in. In cases resulting in an adjustment of more than twenty-five percent in the support award, the court may phase in the adjustment over time.*

Source: *SL 1989, ch 220, § 17.*

You can note financial hardship at any time and request for consideration. But the one defined in statute is the 50% factor. That rarely occurs unless there are multiple obligations. South Dakota law is being taken out of context and can occur when a lot of people read statutes.

Judge Cutler relays Mr. Ellwein was working with a mediator. The mediator is not to give legal advice and may have been missing some information as it is not the job of the mediator to inform them on legal background.

Tom Lee advised a lot of referee's are referred to as mediators as well.

Letter from Mr. Timothy Henderson

Judge Cutler states Mr. Henderson does a nice job laying out the points to consider and doing so makes it easier to work on.

Senator Rusch we have so many statutes in place that one more seems counterproductive.

Judge Cutler relayed modification can be retroactive back to the notice of hearing.

Suzanne Starr states there is an internal process with the Referee's, but the clerks processing the case and just in making a decision fall into this as well. Suzanne feels they have done rather well to get modifications through in the last six (6) months.

Judge Cutler advised if an individual has an attorney that fails to respond it is not something the Commission can solve.

Tom Lee states shared parenting plans were changed in the last Commission. Individuals feel it should cancel out the child support obligation which only happens when they make the same amount of money and have the children the same amount of time. Student loans were an issue – they were voluntary, front loaded, and are subject to deferment and offset. It was a policy decision made previously not to consider this type of debt. The Referees have to give notice at least 14 days prior to the hearing. It takes time to get the information from the Division of Child Support, to the Clerk of Courts, and out to the referee's. Lawyer performance and behavior issues cannot be addressed by the Commission. There is no visitation tied to support issues. Maybe a provisional item can be asked for during the modification process.

Gail Stoltenburg agrees with Tom Lee on the student loans. If you accept those loans it will open it up to other types of loans to be considered. The shared parenting law is specific; the expenses outlined include extracurricular activities.

Judge Cutler states it doesn't sound like there are any recommendations from this letter.

Letter from Mr. Kevin Carter

Gail Stoltenburg commented on Mr. Carter's portion of the letter that pertains to determining where the money is going. His daughter pays her own expenses. Unsure what 'own' expenses are, maybe the daughter wants a more expensive pair of jeans and she has to pay the difference between what the mother will pay and what she wants. The fake daycare should be brought up in the modification process.

Senator Rusch states Mr. Carter wants the referee to do the due diligence and it is not their responsibility to be the investigator.

Judge Cutler advised we have ways to address all complaints in Mr. Carter's letter in place, but it is a process that uses the courts if he is alleging fraud and other complaints. He may not know this is available.

Tom Lee is familiar with the phrase 'where is that money going.' It is a controlling issue with some and a consumer issue with others. Why is my daughter wearing a \$200 pair of sneakers? There is always going to be a conflict on that.

Gail Stoltenburg states as a department we are looking into ways to help them understand the process better. Our website provides good information but we are looking for ways to make it better. Such as

having an interactive site that may ask questions and provide information to them based on their answers.

Judge Cutler said it would be great for those pro-se litigants and she would like to see that. Judge Cutler asked if there was a timeframe on when this site would be done.

Gail Stoltenburg advised it is in the strategic plan and we may have it done in a year but it is uncertain.

Cory Wipf asked what the standard for subsequent children is. He has two daughters from a previous marriage, soon to have two from his current marriage, but there is no deviation for subsequent children. He can understand Mr. Carter's statements. Unless he is wrong, there is no deviation for this. It still cost money to raise children and there is only so much money in the pot. How is that looked at?

Tom Lee looks at individual facts. His rule is the natural parents undertook the obligation of the child and it is squarely on their shoulders. Yes, there are other times when there are disabled individuals that cannot earn an income. In that circumstance, Tom does look at the subsequent spouse's income. The current law does not place the responsibility to raise the children on subsequent individuals so we look for assets and circumstances. Tom states an individual should request the deviation and make it a part of the record. The referee may or may not deviate, but it will be considered if requested. If they deviate, they are required to explain why. If they don't deviate it may be a basis for an appeal. The referees' don't have a lot of guidance on this and it is determined on an individual basis. Tom Lee advised this is how he has evolved in his process.

Judge Cutler asks if the deviation is for his biological children.

Cory Wipf advised it was.

Senator Rusch states it's up to the trial court to determine what is fraudulent and what is not. The court apparently tried to correct the issue by giving Mr. Carter a judgment but not sure if it should have been discharged or not.

Judge Cutler asked Senator Rusch if he was referring back to Mr. Carter's letter and Senator Rusch confirmed he was.

Tom Lee states there will always be people that are bad. We are only able to use the evidence that was presented at the time of the hearing. He often gets calls from one of the parties stating the other was lying, but he has nothing on record. He advises the individual they need to provide the information at the time of the hearing.

Letter from Mr. Daly

Gail Stoltenburg reminded the Commission there is a summary on this letter in the July 20th notes and also that Mr. Daly testified at the July 20th public hearing in Pierre.

Tom Lee doesn't agree the Custodial Parent can decide the percentage they want. The percentage varies based on requirements for living and support of the child. You see the punishment principle come in where 'you are doing him wrong', but you can't fix everything. If we want to require proof of daycare or other expenses we can consider it. Tom usually tries to get written confirmation of such expenses, these come on different avenues including written on a napkin. We can only do the best we can.

Where is the support going? We have been careful to try and disestablish the link and the children's needs that need to be met; beyond that it isn't our business. It isn't necessary to make him happy and you can tell there is a lot of anger there. Legitimacy has been a long established standard; the 2012 Commission did create the disestablishment process. Is Mr. Daly not willing to hire an attorney? You shouldn't have to, but it seems the information out there is to utilize an attorney.

Senator Rusch states if Mr. Daly is in the military he probably has/had access to a JAG who could provide legal advice.

Judge Cutler relays we did spend time with Mr. Daly and some Commission members spoke with him off the record. Without giving legal advice, we have done the best at addressing his concerns. There is nothing the Commission needs to do at this time. Mr. Daly will need to do his own review of his needs.

Gail Stoltenburg stated there are comments in the minutes from the 7/20 public testimony of Swalve and Konda regarding the second job income being counted in situations in which the parent is a full time teacher during the school year but has summers off. Tom Lee previously stated he would come up with something written regarding full time employment and did not get that done. At what point do we want it to be considered a second job? A question was asked if this only pertained to teachers. Several Commission members stated there are others. Examples include nurses who only work thirty-six hours but get paid for forty, or oilfield workers that work two weeks on and two weeks off. It is felt the guidelines need to get away from the words 'full time' and mention two thousand eighty hours or equivalent. This is the amount of hours worked full time within a year. Dan Todd mentioned the two, three, and four weeks' vacation some companies provide.

David McVey expressed concern regarding referencing the annual hourly amount. Those working thirty hours per week do not work full time based on that hourly requirement. Tom Lee felt it could be used merely as a benchmark and state, if the parent wants second job income excluded, they must be working two thousand eighty hours multiplied by minimum wage or something equivalent.

Judge Cutler relayed the discussion sounds like the beginning of a proposal. She advised it will be helpful to have a written proposal in front of us for the next meeting. Tom Lee stated he would get a draft completed and sent to the Commission prior to the next meeting.

Guidelines

Representative Gosch was provided copies of the power point presentation.

Judge Cutler asked Gail Stoltenburg to guide the group through this discussion and advised the Commission will be speaking with Dr. Venohr later this afternoon.

Gail reviewed the differences between BR3 and BR4. She felt that the USDA scale was not an option for consideration. Only one state currently uses this method.

Judge Cutler agrees and feels it is not appropriate. BR3 and BR4 are the way of measuring child support based on assumptions from research.

Gail reminded the group BR3 looks at costs and BR4 looks at outlays. BR4 is less at the lower end and higher at the upper end. There are line graphs within the PowerPoint for both BR3 and BR4. BR4 discusses payments on second mortgages and loans; these are not something as a result of necessity. South Dakota currently uses BR3, current chart shows updated amount for BR3 2016. Page 20 of the PowerPoint also provides a comparison between the existing BR3 and BR4 for a single child. BR4 shows a little lower amount in the beginning and a bit higher in mid and upper bounds. BR3 2016 is a little higher as well in the middle and upper end, but is similar to what we have now. Gail relayed the Commission can also adjust the guidelines using the self-support reserve or incarceration.

Judge Cutler advised BR4 could be wrong and may not be the dramatic increase shown in the table for two children. During the last meeting, Senator Rusch asked if the data included Indian reservation areas. Dr. Venohr was going to check into this as she was unsure at the time.

Judge Cutler stated there is a good conclusion slide on page 23. The Commission needs to consider if SD changes from BR3 to BR4 would it reduce the support for lower income but may increase for middle, high, and higher incomes with two or more children.

Gail Stoltenburg reminded if you take the self-support reserve into account on BR3, you could reduce the lower income more than it currently shows. Judge Cutler asked Gail to discuss further.

Gail Stoltenburg advised setting the self-support reserve is allowing a financial amount it would cost an individual to support themselves. The reserve would ensure they have enough disposable income before we take other money so they are able to live on their own. We currently have a shaded within the guidelines a bit different than a reserve but it could be built into that area.

Tom Lee stated the shaded area was an alternative way of looking at the Non-custodial Parent's net income. It gave us another figure we could report, and we would be able to pick the lower of the two options. If it weren't for the shaded area, we would be a lot higher than we are now. But it appears there is need for relief for those individuals based on our neighboring states and inmates.

Dan Todd states when he looks at the tables on pages 20, 21, and 23 for one, two, and three children it doesn't seem to be a significant amount of difference. Maybe we are discussing something that doesn't make a lot of difference. It may be troublesome if B4 is considering principle payments. Dan advised he doesn't do taxes anymore, but their income looks like zero when it isn't. Tom Lee states he has seen that. The more things parties can identify as a legit deductible is going to affect those that have this type of deductible employment. Dan feel's we should stay with BR3.

Judge Cutler asked if Dr. Venohr wanted us to have a decision by the time we talk with her. Gail advised she didn't and it was more to ask questions. Judge Cutler asked about remedying the BR3 with a self-support reserve. Gail advised that it was something that Dr. Venohr may be able to explain better.

Gail reminded the Commission about a previous discussion that spoke about breaking out the monthly schedule net income between \$0 – 1,000 more. Gail referenced 25-7-6.2 which is located on page 4 of the Statues and Guidelines section of the member's binders. An example discussed, some states break it down lower and maybe it should be considered to include a \$0-200 or \$201-600, etc. For a long time minimum wage was \$1257, before that it was \$1100. If the earnings were less than minimum wage it would be imputed as such.

Dan Todd asked if Dr. Venohr told us the amount the majority of other states are working with. Gail advised we can ask Dr. Venohr for more information when she is on the phone.

Judge Cutler requested a list of questions be created so nothing is forgotten. The list should include information regarding self-support reserves, those states using BR3 and BR4, additional breakdown at the low end income, and if Dr. Venohr determined if the tables were off.

David McVey also said Dr. Venohr may help explain the different ways the self-support reserve can be accommodated. Tom asked if the tables could be raised at the top end. Gail said Dr. Venohr had economic data to raise the tables up to \$23,000 or \$24,000 and could extend them out. Cory Wipf advised she may be able to go out to \$35,000. Judge Cutler felt that was good. There is concern about the referee's determining those higher amounts and it would be good if we can provide guidance for it.

Currently the guidelines only go to six children. Do we want to ask Dr. Venohr to increase the number of children? Tom Lee said six children covers over 90% of the cases, but it wouldn't hurt to get a formula or something that can be used to calculate when there are more than six children.

Incarceration

Gail said a lot of states are moving to zero or very low orders for incarcerated NCP's. Proposed rules may require this, but we don't know when or even if this will occur. Many states are looking at a lot of these individuals having a huge arrears balance when they are released and are so overwhelmed they can't make the required payments. However, if the family would have been intact when the NCP was incarcerated, the income wouldn't be available to the family. Should it be considered the same? Gail advises she can see both sides.

Cory asked how many of these individuals actually pay. Gail stated she was not sure if there are studies out there. Dr. Venohr may have some information she can provide. Cory wondered if current circumstances are just creating runners. Suzanne advised if the support amount is more than 20% of the individual's income it is common to accrue arrears.

Gail relayed the Federal Office of Child Support Enforcement (OCSE) could possibly provide studies that show information on incarcerated individuals and could obtain that if needed.

Judge Cutler relayed she had a little heartburn with the public policy as there are no other situations where you wouldn't owe child support for your children. She feels the idea of non-accrual is not appropriate. She asked if child support affects an individual's parole. Gail advised that there are times we get calls from parole officers. Senator Rusch advised the parole officers try to set up a plan and that is why they are probably contacting DCS.

Judge Cutler asked if it affects the status of their parole if they are not paying support. Gail thought it did. Judge Cutler advised that most of the other criteria set are required to be followed.

Dan advised he would be in favor of considering adjustments on the repayment but not on the accumulation of arrears. If they are just coming out of jail, you have to give them time to get back on their feet. Representative Gosh agreed stating if they come into money later we can collect.

Gail asked about lowering the amount of support during incarceration. Gail also feels zero is too low but what about \$50? \$318 a month is pretty high.

David advised it should just be left to accrue, when they come out we can cut them a break or not have them pay for a few months or something until they get on their feet. Or lower the order when they go in and when they get out they would have to pay what is accrued.

Tom feels it is a practical matter. It is doubtful that the accrual of arrears is ever paid in full. As it is \$10 or \$20 per pay period is collected towards the balance. If you are collecting interest you get more behind. I think there is an opportunity to give the NCP an incentive to continue employment and support. If it is possible, adjust the arrears.

David felt there is a complexity to that logic and it could be messy.

Gail stated DCS would only be able to lower arrears balances on state owed arrears. If the balance is due to the CP we are not able to adjust the arrears. It could be provided to some, but not to most. David felt it becomes an issue of modification. Conceptually in terms of not coming out to large arrears would be to allow them to modify when they go into the prison system based on their ability to work. Gail felt you would still need to consider what that lower amount would be. They can still modify.

Judge Cutler asked if Dr. Venohr mentioned what other states are looking at. Maybe this is something she can help discuss. There is no obvious answer.

Suzanne Starr said she found it curious earlier when we said student loans are voluntary but if incarcerated the child support can be reduced. David stated those loan payments can be adjusted if the individual has a child. By allowing student loans to be considered the individual could receive a 'double dip' credit.

Senator Rusch would be reluctant to allow a zero or greatly reduced obligation for someone that is incarcerated. I have not seen this before, but I have seen every step taken while trying to get out of paying support. I have not seen them try to get incarcerated, but you never know.

Judge Cutler feels if you owe a higher amount it becomes a federal issue.

Dan asked what would come first, child support, or other expenses when an individual is released. He said he would think supporting children would be considered higher than court costs. Tom Lee states restitution is a requirement for probation, child support is not. Gail stated that parole officers do talk with DCS.

Judge Cutler advised Dr. Venohr can provide advice on what other states are doing and we may or may not do anything. As a public policy position, it doesn't appear there is huge support in reducing the support obligation. This may also be difficult within the legislature and general public.

Gail advised not reducing the amount may affect our incentive dollars. Other states will get more dollars due to lower arrears balances. But also stated it was not a reason to change it.

Tom said there is interest in getting the most money we can for the children. Tom attributes full income to prisoners; Supreme Court now says it was to be imputed at minimum wage. There was change against prisoners' interest as well. Maybe minimum wage is not appropriate either.

Judge Cutler called for a short break.

Judge Cutler called the Commission back in order. She asked if the Commission responded to the communications received in writing. Gail advised that we do not. We advise those individuals who provide communication we have received their concerns and will discuss them with the group. Does this Commission want to continue to proceed the same way? Tom said yes, we don't have the time or resources to respond to all communication received. It is agreed the Commission will use the same process previously utilized.

Judge Cutler advised Dr. Venohr will be available at 2:45. The next point of discussion is on referee concerns

Referee Concerns

Tom advised there are no developments since last meeting. During the referee's meeting it was discussed whether the low end of the guidelines is unattainable and causes unanticipated issue due to the minimum wage increase. People make an effort to meet their obligations, some don't. But, if there is some way we can make it doable, it is better to get a little than nothing at all.

There is a rebuttable presumption that a parent is capable of being employed at minimum wage, including while incarcerated. Tom hasn't seen one yet that can rebut minimum, but it isn't the way it is expected to work. The presumption means it goes from \$318 for one, to \$399 for 2, \$429 for 3 and so on. Anything that can be done to make it more realistic would help. However, just because Minnesota has a zero payment plan doesn't mean it is correct either. We are frustrated by NCP's who are at or above the top of the grid (guideline). Courts need to hold a hearing to determine the needs of the child. This process exceeds what the referee's are equipped to handle. Some of the cases get complicated and it takes a lot longer as there is a lot more evidence and there are games played with discovery. At the end of the day it would be nice if the charts or tables tracked the standard of living of the child, and it doesn't seem the tables take this into account. Maybe this is a conversation we can have with Dr. Venohr as well. Our guidelines are based on basic cost of living, with families of privileged there is a lot more to it. Without it, the expenses add to tension and make it more complex.

Tom relayed we are already addressing the presumption of primary employment and second jobs. We hope to have more on this by the next meeting. No other subjects were brought up for discussion.

Gail asked about a few items brought up during the July 20th meeting. She asked if the group would like to discuss the emancipation age of 18 or 19.

Tom agreed and feels it is a policy question. The needs do not stop at eighteen or upon graduation but rather they intensify. Do you want to continue to provide until your obligation ends or provide other options. Most other states, based on the information provided, are about the same. But we owe it to our constituents to discuss.

Judge Cutler relayed there is a summary of emancipation by age provided by Gail. It appears that South Dakota is with the majority of states who require eighteen (18) or nineteen (19) if still in secondary school, whichever occurs first. Are there any thoughts?

Gail is concerned that extending it could cause NCP's to try to talk children out of furthering their education. She has a few kids over 18 but they have to do some on their own.

Dan Todd asked if there were any statistics on this for single families, or child support families that show less of them going on to college. Is the statute going to mean anything?

Gail advised that we do not have those statistics and was unsure if the Federal OCSE would.

David asked if it's logical to continue support while in collect. You can go in the military at 18. I don't understand the necessity of this. What is the logic behind this?

Suzanne Starr advised she can see the need for health insurance, but you can't really require parents to 'do the right thing.'

Tom stated most parents continue the insurance, but some are going to discontinue out of spite. Maybe this is something we can talk about or add to the medical support statute to say it can be obtained while the child is still in school. If we do this we may or may not want to address the cost.

Judge Cutler asked if she understood correctly that one of the referee's intends to come this evening to testify. Tom advised that is correct. Judge Cutler asked if it was known what would be addressed. Tom did not know. Suzanne stated the referee coming to testify spoke about incarcerated individuals at the referee's meeting. Tom relayed this referee is a passionate individual but we don't all share the same passions.

Suzanne said one concern she has heard about referees and self-representing litigants is more information on how to determine income and self employed income.

Tom advised whenever we have a farm and ranch return where the individual showed negative twenty-five thousand (-\$25,000) in income, statutes direct us to start analysis on the income tax return. It is normal to add back depreciation to get a real number, but it isn't really accurate. If the Commission is willing to make clear guidelines so be it. Tom indicated he has a case in which a fellow inherited a lot of land and belongings from his mother. He was required to cash out a sibling. He is getting loans right now but has \$1.6 million in land value. After he applies the \$40,000 depreciation he is -\$25,000. What do you do?

David asked if you can impute the value and try to disassembled. Tom advised you could try but it is not clear. If the cash flow isn't adequate, you can go to assets. Tom advised when there are significant assets he feels he has to find there isn't enough cash. But if there is a negative tax return it isn't difficult. You do the best you can.

Gail relayed determining self-employment income is difficult. Even when she worked with food stamp eligibility those type of calculations were difficult.

Tom agreed and felt this was the reason for tax planning, trying to avoid taxes. The 1040 has nothing to do with the reality in the standard of living.

Judge Cutler asked Tom how he felt we were handling those situations. She asked if he felt the legislature should complete a study on this. She relayed Senator Rusch would like to form a committee. Senator Rusch wasn't sure if there was a solution for that. He doesn't know any better in figuring child support. Judge Cutler advised we can make a note for the record the discussion has been had, and there is no remedy in determining self-employment individuals and if there is any light that we can shine on it we can look at it.

Judge Cutler asked Gail if she was aware of any testimony this evening.

Gail advised an email addressed to the Commission was received this morning. We have not been able to print the email for the Commission at this time.

Dan discussed the tables and wage issues. If you look at the tables it still says \$216 as the minimum obligation, but minimum wage drives it to \$318. If you have a disability or have disparate incomes you can get lower but not often. So if we are going to have any viable way to get lower than the \$318, we are going to have to unlink it from the minimum wage.

David asked if Dan was talking actual income. Tom was not sure how to do that, but right now it is indexed on minimum wage.

Dan stated for those of us that have been in the system longer, we choose this index at one point; do we know where we were before this? Gail stated she has always known it as minimum wage. Tom advised when talking with those on the reservation, job opportunities are limited and minimum wage is not so.

David reminded the Commission it is not just minimum wage; it is full time at minimum wage. Tom stated it is possible to not impute minimum wage but put it at an index. Dan relays we need a standard or we are going to be all over the board. Maybe create a deviation; we need a standard that is used.

Judge Cutler advised this pertains to the BR3 and BR4 discussion and whether it is disparate on the lower end or not. Maybe Dr. Venohr may be able to alleviate it.

Email from Seth Eickholt and Michelle Vissia

Gail read the email received from Seth Eickholt and Michelle Vissia.

Judge Cutler advised it helps us to be a little prepared to set the stage on what their expectations are on the Child Support Commission. What we do and what we don't. What works and what doesn't. We will try to let them down gently and inform the parties a lot of the issues they have raised are not within the scope of this Commission. Sometimes this is a place people come and say things about their frustrations but we also have to make sure we understand we don't have any authority to act on some of the frustrations they have. This is always disappointing, they are expecting to be heard and our scope is much narrower.

Judge Cutler advised it was time to contact Dr. Venohr. The call with Representative Gosch ended so we could call him back on a cell phone. The poly-com was used to contact Dr. Venohr. A short break was called for while the calls were made.

Judge Cutler called the Commission back to order. She thanked Dr. Venohr for meeting with the Commission and appreciated her flexibility. We are ready to begin discussion

Dr. Venohr from the Center for Policy Research thanked the Commission for the opportunity to speak with them.

During the last meeting we spoke about the last page of the PowerPoint. The discussion is whether the guideline schedule should be updated. Economists are like weather forecasters. We don't always agree on how things should work.

The SD child support guidelines are based on a statistical technique known as Betson-Rothbarth (BR). South Dakota currently uses BR3. Mr. Benson has completed a new study (BR4) using more recent expenditures. He also changed the data consumption. They have imported a method of capturing low income expecting they are underreporting income. This shifted some households to a different category.

A switch to BR4 would reduce the low income and the high income, it was focusing on expenditures (purchase value) and now they are looking at outlays (what people do on a budget basis). The old method included interest payments not mortgage principle. The new way better captures how people think now. If they rent, if they make a purchased by payments, have orthodontics expenses, etc. The old thought was those expenses were made as a lump sum, now they are not. There is also the USDA version. The question is whether to update. Dr. Venohr states any would be appropriate. The BR3 is updated to the 2016 information. The USDA is a *big* increase. She doesn't recommend using the USDA and most states don't use this option.

Dr. Venohr spoke about change to low income and minimum orders. SD has some of the highest orders among many states.

Gail provided the questions from the Commission prior to the call with Dr. Venohr.

Dr. Venohr addressed the questions regarding the schedule. She confirmed there is an error at the \$18,000 income level on page 21. Looking at page 21 you see a notch on BR4 that looks like it is going up. There is an error there. That curve would continue at the same slope above \$18,000.

Do we have enough to extend the table to \$30,000? If the Commission chose BR3 it currently stops at \$26,000. She would be happy to extrapolate the data and take the curve into consideration. BR4 currently goes to \$21,000 and can be extended out to \$30,000 as well. There are several other states that Dr. Venohr has done this for including PA, IN, IA, and VA.

Judge Cutler asks if those states have gone to \$30,000 or if there is a different drop off point. Dr. Venohr advised it usually is at \$30,000. PA extended the income for an infinite amount. A formula was created but Dr. Venohr is not comfortable with that. She doesn't feel that a household with \$50,000 is similar to one with \$30,000. When she does an extrapolation, it is much more reliable when you get closer to the where the data is. Estimates further out is higher if you go 20 years down the road vs 5 year.

Those states using BR3 and BR4 are identified on page 12 of the PowerPoint.

BR4 is used by KY, CO, NC, RI, CA, WY, and possibly ME.

BR3 is used by AL, AR, AZ, IA, IN, LA, MO, MD, NM, OR, PA, SD

There are a few states remaining on BR1 and BR2 for a total of 29 states using a form of the BR.

Gail asked if any of those on BR3 have looked at their guidelines recently. Dr. Venohr stated AZ, IA, and PA have rejected BR4. They understand the estimator understates child rearing costs and is proven with formulas so why should we go even lower.

Judge Cutler asked if Dr. Venohr has an opinion on that.

Dr. Venohr stated she was fine with it. This is one of the things she is researching in the future. She is concerned there are more families on the low end spending their income and how does that affect child rearing costs. For example if one family earns \$1,000 and one has \$1,200, we say about 25% of income is

used on child rearing costs. If \$1,000 the 25% is \$250, if \$1,200 it is \$300. Dr. Venohr is going to be working on this in the next few years. She feels the low income (\$40,000 or less a year) seems to be the breaking point where they are spending more of their income on child rearing.

Dr. Venohr discussed the expansion of six or more children. She stated she can provide a formula for individuals in those rare instances that there are more than six children. She uses something provided by the National Academy of Science. Their information is only for one, two, or three children and we scale it to extend it up to seven or eight children. Dr. Venohr has provided information for up to twelve children for Guam. Roughly this is 8% going down to 6% for more children. Indiana takes the last column and says it is for 6 or more kids. When they look at the amounts it is pretty close to 50% at very low income and the Consumer Protection Act says you can only take 45 -55%. Dr. Venohr could get this to the Commission. The Commission should also consider if there are concerns about those amounts bumping up against the Consumer Protection Act. Dr. Venohr asked if the Commission wanted to add the percentages in the guidelines or do they want it extended in the schedule.

Gail was not sure if we should expand the guidelines to more than six children or just get the calculations.

Dr. Venohr asked if we were concerned about income.

Gail advised we didn't know. We would have to look at the case that sparked the question.

Dr. Venohr looked at the tables. At \$2,000 monthly net, the sixth (6th) child is \$1,099 if we assume the obligee has no income that is over 50% of the after tax income. I can give the calculations to you, but they probably won't be paid anyway. If you take 1.08% times the obligation for six children you can get the 7th child amount. If you take 1.08% time the obligation for the seventh child you will get the 8th child amount.

Judge Cutler advised there is no reaction from the Commission on what to do going forward. Perhaps leaving as is best at this time.

David asked about the high income and low income. If we are going against the Consumer Protection Act vs those making of \$100,000 it may want to be considered.

Judge Cutler advised we will consider this information and carry this over to the next meeting.

Dr. Venohr advised the rest of the questions pertain to low income or incarcerated.

Dr. Venohr is still updating the incarcerated information in a state by state guide. This seems to be a big issue on the federal level. There are lots of states who have case law that talks about how these cases are treated. One question the Commission asked was what state policies are in the guidelines. Twenty-one states mention incarceration in the state child support laws. Only two of those states have laws stating it cannot be considered voluntary.

Most states review incarcerated individuals and use actual income (present income), not impute. Colorado Child Support said the child support shall be calculated based on determination of potential income except for incarcerated parents sentenced to 1 year or more.

The second most common option is to apply the minimum order.

North Dakota uses an algorithm to reduce the obligation based on length. For example, the delinquent obligation of the parent for first 12 months shall be based on pre incarcerated income subject to limitations. The obligation of the parent be assessed an amount for those having 12-36 months of continuous confinement, and those with 37 months and more.

Other items to consider:

Is the incarceration for a crime against the child or spouse?

HI states when the payor has net income of zero, they may order no support.

If the individual is in prison for life with no chance of parole they are exempt from the minimum.

Gail asked if the state guide would be done soon. Dr. Venohr is hoping to get the brief done before the September 21st meeting. Gail stated she would like a copy when it is completed.

Dr. Venohr discussed low income adjustments. She liked the idea of how can we break down the low end by possibly breaking it down further into income increments. She explained, to keep it simple and clean we have \$50 increments now. Maybe the Commission should break it down by \$40 increments. If you were to keep the existing schedule and did same algorithm with \$40 as well as back-up the minimum; the new interval may be \$900-\$950, \$951-\$1000, etc. If you calculate at the \$900 amount it may calculate to \$97 for 1 child, \$119 for two children, \$153 for three children, \$175 for 4 children, \$197 for five children, and \$219 for six children. That would put SD in alignment with the other states. Self-reserve of \$281 ($\$900 - \$219 = \781) that is roughly 78% of the federal poverty level (FPL). You could argue that it is a self support reserve. This would help meet the federal requirement quickly if passed.

Other states have lower amounts. The current FPL is \$991/month. This would result in a lower obligation amount which is added in the schedule. At \$1,100 would calculate to about \$216 for one child. If you used the self-support reserve at \$990 a support amount would be set at \$110. Dr. Venohr stated it can be put in the schedule or in the worksheet.

Representative Gosch asked for a document to be put together that described what Dr. Venohr covered. Dr. Venohr relayed she could get that done rather easily.

Representative Gosch feels it would be helpful to see before the next meeting. Gail Stoltenburg and Judge Cutler agreed.

Dr. Venohr advised the most important thing is to ensure the low income adjustment blends in with the rest of the schedule. Dr. Venohr explained this could be done as soon as the South Dakota chooses which schedule will be used.

Dr. Venohr was not sure if the Commission has thought about whether to update to BR3 2016 or BR4 2016. If the Commission wants to see a side by side this can be provided. The PowerPoint was only graphed out. Case examples are on pages 18 and 19 to see the dollar difference it would make.

Judge Cutler states a side by side comparison would be helpful. It may assist the Commission to come to a consensus. If the Commission could get it soon, it is possible an answer could be provided between now and the next meeting.

Dr. Venohr asked if a meeting is scheduled for October. Judge Cutler advised no meeting has been scheduled. Dr. Venohr felt it may be needed. Gail Stoltenburg relayed a meeting can be done by phone. Dr. Venohr advised it takes 1-2 weeks after you decide which version you will use to determine what you are going to do to phase in the low income adjustments nicely. Based on this, Dr. Venohr asked for a meeting to be scheduled in October.

Judge Cutler confirmed all parties indicate they would be available. A date and time will need to be worked out.

Dr. Venohr asked if the Commission has received any public comment yet. Gail relayed a public hearing was held July 20th, a public hearing is scheduled for after the Commission meeting today, and one is scheduled in Rapid City on September 21st. Written comments are accepted until September 1st.

Dr. Venohr asked if there has been any feeling about whether the schedule should be updated.

Judge Cutler relayed what was received from public comment and one referee on the Commission. The public comments often deal with their own personal issues that go beyond the support table and child support statutes. A lot of participation is not directed towards the table. Senator Rusch states there have been no comments on the table. Gail Stoltenburg advertised the Commission will be reviewing the guidelines.

Judge Cutler feels the decisions will rely heavily on the Commission. We will rely a lot on the Custodial Parent and Non-Custodial Parent participation.

Dr. Venohr advised she will get analysis to the Commission on incarcerated individuals by state, she will provide calculations for seven or more children, provide a side by side analysis of BR3 versus BR4, and extend the schedules to \$30,000. Alternatives will be provided for the self-support reserve and she will provide a 'quick fix' on low income to extend the amounts below \$1,000 down to \$900. She will also extend the language that will fit the proposed OCSE rule changes currently pending.

Gail Stoltenburg asked about imputing at minimum wage and how that changes each year now. Dr. Venohr asked if we are considering alternatives to presuming minimum wage, or other ways to deal with the increase each year. Gail Stoltenburg advised we are looking for both.

Dr. Venohr doesn't have states that do not use minimum wage other than Arizona. They use minimum wage as the self-support reserve which would be a big change for South Dakota. SD minimum wage is \$8.55/hour which is a high minimum wage for a state that is not the wealthiest in the nation. It would be

a radical jump to adopt what Arizona does. Jane indicated she can give examples for a state moving away from full time minimum wage employment to more of a tiered system. She may be able to use available wage information from Non-Custodial Parents, new hire, quarterly wage, and other alternatives and testimonies. If Jane can get all the information in one package, she may have it done the week of September 9th. Otherwise the information will be sent in two pieces.

Judge Cutler felt it would make more sense to the Commission if it came in one package.

Dr. Venohr relayed she will get all requested information out to the Commission by September 9th.

Dr. Venohr advised good questions were asked and she appreciated them being emailed prior to the call. Judge Cutler stated any other questions will be sent to Gail Stoltenburg and forwarded onto Dr. Venohr and the group on September 9th.

Dr. Venohr thanked the Commission again for their hard work and public services. Judge Cutler thanked Dr. Venohr for her expertise. Call ended.

Dan Todd advised that it won't make a difference if alternatives are provided if the laws to impose minimum wage. Tom Lee agrees. David McVey asked about the verbiage of the statutes and reiterated the pecking order. Tom Lee advised the information could state minimum wage but provided additional criteria regarding full time employment.

Judge Cutler advised more information will be available for discussion once the Commission sees the impact the changes will be on the income tables. Any additional questions provided to Dr. Venohr will put the Commission in a better position to make the appropriate decision.

Judge Cutler asked Representative Gosch if he will be able to attend the public hearing tonight. Representative Gosch stated he was not able to attend. Judge Cutler thanked him for his time during the Commission meeting.

Judge Cutler called the meeting adjourned until 6:00 pm.

South Dakota Commission on Child Support

Public Hearing, Sioux Falls, SD

August 24, 2016

Judge Cutler welcomed everyone to the hearing. All parties introduced themselves and their role in the hearing.

Judge Cutler – Representative of the SD Judiciary & Commissioner of the Child Support Commission

Dan Todd – Practicing attorney in South Dakota

Gail Stoltenburg – Division Director for Division of Child Support

Corey Wipf – Non Custodial Parent

Tom Lee – one of twelve (12) Referees

Senator Rusch – representative of the Senate

Judge Cutler advised Representative Gosch is not with us but did join us earlier today by phone.

Jennifer Hanna – Custodial Parent

David McVey – Attorney for the Division of Child Support.

Suzanne Starr – UJS Director of Policy and Legal Services

Shannon Abernathy – note taker

Tom Keller is a child support referee. Chris McClure is also here that is practicing family law.

Judge Cutler asked if there were any public comments to be provided.

Tom Keller – Child Support Referee

Tom Keller thanked the Commission for their duties. He advised this is something that occurs every four years and it is very crucial. Tom relayed he is not here as a referee or a lawyer, but as someone that spends their life doing this every day. Tom does 300-400 modifications per year and has noticed a handful of things he would like to bring to the Commission for consideration. Copies of the items were provided to the Commission.

- 1) There is a difference between a Custodial Parent with three children and the same father and a Custodial Parent that has three children with three different Non-Custodial Parents. In 1989 the first Commission talked about how an obligation was broken down in the base child support. Health insurance and daycare is separate.

Tom feels the each parent is required to pay a share of the support equal to roughly $1/3^{\text{rd}}$ of the expense. Each NCP pays $1/3$ of that child's fixed cost. For example, if one person was paying \$1,000. \$333 of those dollars goes towards rent. If you have three different Non-Custodial Parents each one is paying their share or \$333. That seems inequitable. If there is only one Non-Custodial Parent he or she pays \$333. Three different Non-Custodial Parents end up paying a lot more than $1/3$ of the fixed shelter cost. If we had the ability to recognize the number of contributors, divide this by the number of children it would be better.

The need to put a roof over the child's head doesn't change if the CP has or does not have the child. That is why abatement is 38-66 %. Because these needs for the child are never reduced by 100%.

The second $1/3$ of the child support obligation is for regular necessary expenses including but not limited to school stuff, pictures, gaming systems, etc. This is divided by parents based on what they choose to spend. A fixed 34% if you have 3 different kids with 3 different parents.

Fixed cost is according to guidelines regardless of the number of individual paying into that figure. This would be a break to the Non-custodial parents and would split the cost between the number of payers.

The final 1/3 of the cost is fluid.

When we calculate child support in South Dakota we consider the amount paid on another child support case. So if you have support to another parent that comes off your income. When doing the calculations, why is it that we deduct the cost for the Non-Custodial Parent's income but we deduct zero from the Custodial Parent's income. It is presumed the Custodial Parent is contributing their share, but a dollar for dollar deduction is only provided for the Non-Custodial Parent. This is a deviation category, however I have advocated in court on this. Why is it presumed that those other children cost nothing? Both parents are paying to a child support obligation. And both should be recognized. The solution is an easy fix legislatively.

2) Calculations of overtime and other wages.

SDCL states if you are working full time 40 hours at minimum wage or higher, it is presumed that a second job is not to be included. Mr. Keller feels that is wise if a parent wants to take a second job and earn extra income. As a society, what we are saying is if you can work seven more hours at overtime we are going to include them in the child support calculation. But if you work the same seven hours in a second job it isn't included. If this is a job that was regularly held Mr. Keller indicated he has no problem including that for the calculations for raising the child. He doesn't think overtime should be treated so differently than a second job. There are a lot of individuals working a lot of hours in the summer and get unemployment during the winter. If you calculate that and it goes over 2080, Mr. Keller feels it should be given as a credit and not counted for child support. If a person was in the military for 15 years during their marriage, it should be counted in the calculations. (Grandfathering in revenue sources)

3) Inheritance

In our law when you look at sources of income, if someone gets \$500,000 in an inheritance and buys a house; none of those funds are calculated into the child support income. If you are receiving an inheritance of a sixth (1/6) share of an oil well in WY, every dime of it is counted in child support. It doesn't matter if it is a quarter of a section of land, it is looked at differently. If those monies were coming in when the parties were together Mr. Keller does not support taking that away, but doesn't want to add it if it comes from a source outside the relationship. If the individual got \$150,000 for a property settlement, that isn't calculated. You can't tell your parents to buy something so it shows you have nothing until the children are emancipated.

4) Minimum child support

In 2009 the minimum wage was \$5.85 and child support minimum was \$151/child. Now minimum wage is \$8.58 and the minimum support is \$309.00 which has more than doubled in seven years and most are incarcerated, students or under employed. They make nothing close to what we impute against them. Mr. Keller stressed he is not saying you can raise a child on \$309 but most of them receive DSS Services

and those services are there for a reason. Mr. Keller suggests looking at the minimum guidelines and be honest about those individuals we have to deal with on a day to day.

5) Guidelines

Every 4 years someone says we need to change the guidelines. Some amend the guidelines for a living, or there are advocates that should be raised across the board. Mr. Keller doesn't disagree, but as a percentage of an income the cost of raising a child does not change. If you look at the low part of the guidelines, at \$7.25 it was \$216. If you made \$7.50 you had to pay \$256. This is \$40 raise in child support for a \$50 jump in income. On the high end if you are \$18,500 – \$18,550 it is like \$1.00. You are not going to spend \$40 of the \$50 dollars at that level. Mr. Keller doesn't feel the guidelines need to be raised as it goes up as your income level increases.

6) Joint Physical Custody

Until 2009 Commission, there was consideration on who got the kids for taxes. There is a \$1,000/child tax credit and if you are in the lowest tax bracket you could get \$1,400/child. The reason it was phased out in 2009 is it was not being applied equally across the state. Mr. Keller believes the intent is to reward the Custodial Parent's as being parents. There has to be some way to calculate the amount of tax refund to the Non-custodial Parent's obligation. Mr. Keller thinks they should be able to consider the tax credits based on a percentage of the obligation or something similar. A 'bone' to those who pay a lot of money. If he doesn't address the tax information, the judge is not able to address who can claim the children. If it is added in the divorce decree a judge then has the ability to change it down the road.

Mr. Keller believes the Custodial Parent should receive the higher deviations as they are doing the majority of the work.

7) Abatements

SDCL states abatement can be granted if a Non-Custodial Parent has the children ten or more nights in a month. The statute actually says the number of days recognized can to be addressed by the referee. We shouldn't have to go to the courts each time they want an abatement credit.

If the parties are splitting week on week off with joint custody, SDCL says I cannot apply the cross credit formula unless there is already an order that has a cross credit formula. Mr. Keller feels he should be able to add a paragraph that discusses this as it isn't hard to put a paragraph in that the parties will provide irregular expenses necessary. Mr. Keller indicated he is in the minority of referees. He knows that he will put it in my referee's report and in two weeks nobody is going to contest the information.

If they are truly split, how do you decide who is to pay and who is to receive. Usually, the one that makes more money is the one that pays. The individual that makes less is the one that receives and they are responsible for the child. Referees should be able to recognize and change physical custody and have the ability to provide cross credits.

Gail Stoltenburg asked if Tom has run into any situations or cross credit issues where there are things one parent doesn't think the child should be in, for example hockey?

Tom Keller has had this situation but has never had any of those come back to undo the cross credits that was agreed upon. If the referee can recognize that the cross credit be abandoned, we should be able to recognize one that the parties have consented to.

Tom Lee advised the Commission did revisit this statute last Commission and ensured there was a court order among other things. Tom Lee asks what Tom Keller feels the statute says wrong.

Tom Keller advised the language of the statute hasn't changed. He is just saying in discussions amongst the referees, many of them say if Non-custodial Parent has the children all but three weeks of the summer, they are giving them ten weeks of the abatement. The referees are not making them go to the courts to get that done. It is two sentences that go back and forth in a dialog. The child support is not suppose to require an attorney to establish child support, then get cross credits, then get abatement credits after.

Senator Rusch responded to his second item stating he understands the point Tom Keller is making. In a practical matter where the parent has three children with one father, a third of that is going to what the three different fathers would pay. The figures work out.

Tom Keller feels the match is accurate. One parent paying for three children is not related as the fixed cost is the same. It is the variable costs that change. Yes there is more hot water, electricity, a bigger house, but the fixed cost that go into that are recognized in the first child and do not vary in child 2, 3. Mr. Keller believes is if you force 4 people to pay their share of that one number rather than 2 people sharing that amount it is different.

Senator Rusch advised he does not agree.

Tom Keller stated he would agree that any expense related in fixed cost should be divided equally.

Judge Cutler thanked Tom for being so thoughtful in future considerations. She advised the prior meeting held in Pierre and Aberdeen. She also noted an economist attends the meeting each year and reviews and advises on the changes to the guidelines. Although the Commission has not made a decision, there has been consideration of the lower end of the guidelines. The economist advised that we have a high lower amount and we haven't changed much since 2008. We have a lot of considerations in the problems that are of concern in different groups of different people.

Judge Cutler recognized Mary Byrd is also in attendance at the public hearing.

Judge Cutler also relayed that the Commission had Linda Lee Viken attend the last meeting and gave a lot of historical perspective that is taken into consideration. We are learning more in every meeting.

Chris McClure

Chris advised just this year, he has changed his opinion relating to the child support abatement. He doesn't believe the law is good. It is unfair and needs to be changed.

There was a time in the past where Custodial Parents were the only parents of children. Culturally it was the norm; today Chris doesn't feel it is the same anymore. Now both parents are involved and he thinks it is a change in the country in general. This is more for divorced parents and Chris doesn't believe it is fair that Non-Custodial Parents can only get a reduction for two-thirds (2/3) of their support. Chris understands the reason why it was put in place for the idea that the Custodial Parent still has to put a roof over the child's head, but so does the Non-Custodial Parent. Only allowing two-thirds (2/3) reduction is unfair and too small. Those times when there is ten or more day's visitation, the obligation should be set to zero. It is a step to say that when you have your children you won't be paying.

Chris feels there is a big shift in the county. He previously worked for the Division of Child Support and saw a lot of things and a lot of different scenarios. In that position, at that time, many areas in the state felt it was a façade and they said they were having visitation but they weren't. One parent was on state assistance and the other wasn't involved. In Sioux Falls it isn't that way, Chris indicated he has lots of clients that want shared parenting and more that fight for more time with their child. The rest of the state may not be there, but it is coming. This occurs mostly with father, wanting to be more of a part of their children's' lives.

Watch the trend

Consider the change

Try explaining to someone they have to pay when they have the children and all the expenses for the month. Chris agrees with Mr. Keller and it appears the Commission looks at it seriously. The obligation is a lot higher than we were; about \$100 more a month. The law is clear; if you go to prison you're paying the minimum. When people get behind \$10,000 and you make \$20,000 when you get out of prison, you are never going to pay that off. Statistically there are studies that show this.

The Non-Custodial Parent should be able to make a payment of current support reliably to Custodial Parent, not dodge the support or work under the table because they don't see an end. It isn't fair to the kids because it isn't working. On a justice scale, Chris gets it; you shouldn't have gotten in trouble. Parents should provide for their children, but statistically and mathematically they don't pan out. Those that come out with a big child support debt, they don't pay it off.

Tom Keller stated he ended up refusing a cross credit because it wasn't written in the order. Chris thought it was wrong then, and it is wrong today. How do you pick one that has to pay a full amount when they have the children the same amount of time? If they are fighting, don't allow it; but if they come in and totally agree, do it. Chris thinks it is an unfair system and feels the Referees should be able to do cross credits. Deviations are used in under 1% of cases, they don't happen so it is important to try to write the law as clearly as possible so you can map it out and get the same results everywhere.

Senator Rusch stated he was interested in the comments on summer abatements. Understanding what Chris McClure was saying about the Non-Custodial parent that is paying the household but it doesn't eliminate the parent that is caring for the child the other nine months. How do we deal with that and the same in reverse, should you get the abatement for those nine months?

Chris McClure agreed he is more in line with the Senator Rusch's second statement. He feels it is a step in the right direction, and it is easier for the parents to understand it. I have the kids I don't pay; I don't have the kids, I pay. But Chris agrees the Non-Custodial Parent is providing housing as well, and it seems unfair. When you split up, the guidelines work as if you still live together, but everyone's expenses go up. Chris relates he doesn't deal with the high end clients, and it is hard for both of them to maintain a household. It is important to be careful to make sure we set the amount paid fairly so they both can be involved in the child's life. And Chris thinks the Legislature would agree to have both parents involved.

Dan Todd asked if the logic on abatement would be required for the Custodial Parents as well.

Chris McClure felt that is fair. He doesn't think the reasoning is bad, but overall the fair thing to do is set to zero. It still provides the Custodial Parent child support for most of the months without a significant reduction. And truthfully they should have more money when not spending those funds when the children are not in the home.

Mary Burd

Mary relayed she is a family law practitioner in Sioux Falls.

The last time she did a case that was not family law was four years ago in a probate. This is all she does, all day every day. Child support is super important, children are our foundation. Ms. Burd commented on what Chris McClure and Tom Keller said. In terms of the fixed costs and whether we should have a deviation or a reduction if you have different fathers, Ms. Burd is not sure how fundamentally that will work. When we have more children we have to have a larger home. Ms. Burd thinks it creates a slippery slope if we say because you have this 'presumed' amount, you would pay as a Custodial Parent we would deduct that off your income to get to the bottom line. She thinks it would create too much uncertainty. The Supreme Court says if a child has to suffer in the problems of their parents why shouldn't the child get rewarded in the good times. The idea is the child support is not for the parent but for the child. The child has a right to visitation, the child has a right (from both parties) to be supported.

If the Commission is thinking about that, we should think about a special deviation category. Ms. Burd feels this is going to create too many problems. As it is, if the Non-custodial Parent does have other children, they are getting a benefit for that. That is spreading the poverty among all children. So again, if we have these types of situations, this is a common every day problem. Ms. Burd thinks it is being addressed and isn't a crisis.

In terms of personal contribution, because the Custodial Parent doesn't actually pay into the Division of Child Support, Ms. Burd thinks it creates a slippery slope. What if there isn't a calculation attached to the agreement? If it isn't, how do we know what the presumed contribution is? Tom Keller talked about overtime calculations. Mary's question; why is the child not rewarded for the parents hard and good work? We focus on the Custodial Parent getting the money but they are getting the money for the benefit of the child. They may be going to Spa 2000 to get a massage, but Ms. Burd bets most of those parents are pretty responsible. They are paying rent, putting gas in the car, buying fruit. Maybe today they have a steak dinner, maybe little Sara gets to go to dance class. That is what they need and want to do for their child.

Regarding inheritance, Ms. Burd thinks income is income. The Child Support Commission and statute is clear that we are including all forms of income. Separation pay, disability pay, etc. She understands what Tom Keller is saying regarding telling our clients to invest. But why wouldn't you want to? The child is still getting the benefit. Or if it is an investment in property it will show up in the calculations. There again, that child will see the benefit of the house one way or another. Ms. Burd thinks that parties, attorney's, referee's can navigate those waters if it is in an investment in their children.

Regarding Chris McClure's statement on whether the guidelines should change, Ms. Burd doesn't think a large overhaul is needed. Everyone recognizes a disparity of the lower area. She doesn't know how to change that nor if there is a good way around it, but ultimately everyone has difficulty in that.

On incarcerated individuals there is something else to think about. Ms. Burd indicates she has been guilty as it is a sword. When you get someone with a big arrears balance, if they start looking for visitation, she will hit them with both barrels and they know it. If we have a sense in what we are trying to do in the penal system with rehabilitation, we need to be mindful on how that can cut on the backend. Or even someone that has job loss or injury, she is standing there with a sharp sword. Visitation and child support are two different things but they are afraid to walk in the door because of the big cloud hanging over their head.

Regarding Tom Keller's comment on taxes; Ms. Burd indicates that can be a nice incentive if certain criterion is met. What Tom Keller discussed about history and how the credit was not being applied evenly across the state is correct. That is a problem

Ms. Burd feels we should take a look at a financial condition and having a deviation for that. But then we look at non-uniform application or maybe look at daycare credit. If you are entitled to the daycare credit it is an automatic 25% off. It doesn't matter how much you are paying, maybe that is something to consider looking at. Mary looked at a tax return the other day and Custodial Parent got \$7,400 back for three children. When they took that away, the Commission also increased the amount of the obligation.

Ms. Burd said cross credit is the bane of her existence, but it also creates a lot of headaches. She agrees that if both parties say yes I want the credit, maybe the referee should be able to do that. But most of them don't realize all the stuff that comes with it. She thinks we need to be cautious about that.

For abatements, Ms. Burd doesn't think it is appropriate to say, "No you don't have to pay if you have your child for six weeks." She agrees with Chris McClure that more fathers are involved now. Things are a lot better and different, but again, the Custodial Parent has all of these consistent things they have to pay for. Most of the time, we look at a week on week off schedule. So it is kind of like a summer camp. You can organize your bedroom a week at a time; maybe the kids get the living room one week or the bedroom the next week. They just don't have the caring costs. We need to figure out a way to figure out how to get more than 50%. There are other ways to deal with this.

Tom Lee asked what the 50% pertains to.

Mary relayed that is the 38-66% abatement.

Tom Lee advised he usually gives the 66% abatement.

Senator Rusch stated there are numerous comments on people who ask for the Custodial Parent to account for the support received and would like to know the feelings of the attorneys.

Mary Burd advised there is enough trouble requiring the accounting on paying medical bills. If we had to do that on all the dollars paid on a child that makes us an accountant. Unless, you have someone that is grossly spending someone's child support on something other than their child, we are going to know they are being neglected, or the Non-custodial Parent will get an attorney and go to court to identify their incorrect ways and ask for custody. That is the simple answer.

Gail Stoltenburg asked Tom Keller about his comments regarding the presumed fixed amount the custodial parent is paying towards the child. If the Custodial Parent gets benefits from the state (i.e. SNAP), these benefits aren't subtracted from the Custodial Parents share of expenses.

Tom relayed this is the benefits of a Custodial Parent and indicated he was asking; why does he not get credit for the amount the CP has to pay in a fixed share of a multi-family household. He generally doesn't make a huge deviation on that. He indicated he was talking only on a case where we always give the Non-Custodial Parent's credit for obligations they are actually paying.

Gail Stoltenburg understood, but asked about situations where the Custodial Parent is getting benefits for the children. Essentially they are getting benefits of the benefits.

Tom Keller wouldn't have a problem saying this would only apply to those non-assistance cases. It is a child support order and you are directed to spend this amount on your child. So he doesn't feel they should be allowed a deduction if they are their getting benefits for the child, but rather for those that are not getting benefits.

Tom Keller advised the only other thing he wanted to talk about is the Non-custodial parent's abatement. Right now the standard is ten or more nights in a month. A lot of Wednesday nights and every other weekend, and one out of every ten months is not going to meet the 10 days. Why can't we make it a different number than ten to qualify for any abatement. Mr. Keller indicated he has a lot of cases that have four nights out of fourteen and they get nothing. They get the same abatement as

another Non-custodial Parent that never sees their child. Mr. Keller would like to make it a different number; he doesn't care what it is.

Tom Keller asked; Why isn't there an opportunity for those that don't exercise their visitation to get an increase in support? Because under our guidelines it is exactly the same. Mr. Keller said he knows what he is saying is more work for him but he is trying hard to do the right thing. Trying to recognize the circumstances that may influence the decision based on the input. He thinks we should bump it up if you never see your child and lower it if you do for less than 10 days. A lot of time they may have the children a lot but never enough to meet the 10 days.

Judge Cutler thanked everyone for coming and appreciates the input provided. The meeting is called at ease at 7:30 but ask that the Commission be available to re-adjourn if needed.

At 8:00, Judge Cutler advised the Commission is adjourned.