

# South Dakota Commission on Child Support

## Commission Recommendation Options

### 1. Child Support Guidelines

**Consideration:** Amend guideline schedule in SDCL 25-7-6.2 to adjust for inflation.

1. Utilizing inflationary changes in prices for the Midwest Region from July 2021 to March 2025; or
2. Utilizing those inflationary increases as well as adjusting for income changes in South Dakota (as determined by realigning national data to South Dakota incomes using 2023 Census data).

### 2. Prior Period Support

**Consideration:**

1. Amend SDCL 25-7A-21.1 and SDCL 25-8-5 to one year and indicate prior period support would be calculated at the current minimum wage amount; or
2. Amend SDCL 25-7A-21.1 and SDCL 25-8-5 to not allow for prior period support, rather the date of application begins the calculation; or
3. Amend SDCL 25-7A-21.1 and SDCL 25-8-5 to indicate prior period support would be calculated at the current minimum wage amount.

#### **Option 1**

##### **25-7A-21.1. Order establishment case--Limitation on prior-period support obligations or arrearages.**

In any order establishment case, the custodian is limited to a prior-period support obligation or arrearage not exceeding ~~three years~~one year before either the date of application with any Title IV-D agency, the date of filing with a court of competent jurisdiction, or the date of a written demand served personally or by registered or certified mail, return receipt requested, upon the noncustodial parent at the noncustodial parent's last known address, whichever occurs earlier. Prior-period support shall be calculated at the state's current minimum wage amount.

##### **25-8-5. Custodian's recovery of support from noncustodian--Period support recoverable.**

The custodian may recover support for a period of ~~three years~~one year before the date of application with any Title IV-D agency, the date of filing with a court of competent jurisdiction, or the date of a written demand served personally or by registered or certified mail, return receipt requested, upon the noncustodial parent at the noncustodial parent's last known address, whichever occurs earlier. Prior-period support shall be calculated at the state's current minimum wage amount.

#### **Option 2**

##### **25-7A-21.1. Order establishment case--Limitation on prior-period support obligations or arrearages.**

In any order establishment case, the custodian is ~~limited~~ not entitled to a prior-period support obligation or arrearage ~~not exceeding three years~~ before either the date of application with any Title IV-D agency, the date of filing with a court of competent jurisdiction, or the date of a written demand served personally or by registered or

certified mail, return receipt requested, upon the noncustodial parent at the noncustodial parent's last known address, whichever occurs earlier.

**25-8-5. Custodian's recovery of support from noncustodian--Period support recoverable.**

The custodian may recover support ~~for a period of three years before~~ after the date of application with any Title IV-D agency, the date of filing with a court of competent jurisdiction, or the date of a written demand served personally or by registered or certified mail, return receipt requested, upon the noncustodial parent at the noncustodial parent's last known address, whichever occurs earlier.

***Option 3***

**25-7A-21.1. Order establishment case--Limitation on prior-period support obligations or arrearages.**

In any order establishment case, the custodian is limited to a prior-period support obligation or arrearage not exceeding three years before either the date of application with any Title IV-D agency, the date of filing with a court of competent jurisdiction, or the date of a written demand served personally or by registered or certified mail, return receipt requested, upon the noncustodial parent at the noncustodial parent's last known address, whichever occurs earlier. Prior-period support shall be calculated at the state's current minimum wage amount.

**25-8-5. Custodian's recovery of support from noncustodian--Period support recoverable.**

The custodian may recover support for a period of three years before the date of application with any Title IV-D agency, the date of filing with a court of competent jurisdiction, or the date of a written demand served personally or by registered or certified mail, return receipt requested, upon the noncustodial parent at the noncustodial parent's last known address, whichever occurs earlier. Prior-period support shall be calculated at the state's current minimum wage amount.

**3. Emancipation**

**Considerations:**

1. Amend SDCL 25-5-18.1 to identify one specific age without reference to education; or
2. Amend statute to clarify or include alternative education; or
3. Amend statute to remove the words "full-time."

***Option 1 - amend statute to one specific age:***

**25-5-18.1. Parental duty to support child.**

The parents of any child are under a legal duty to support their child in accordance with the provisions of § 25-7-6.1, until the child attains the age of eighteen, ~~or until the child attains the age of nineteen if the child is a full time student in a secondary school~~. If it is determined by the court that the child support obligation survives the death of the parent, the amount due may be modified, revoked, or commuted to a lump sum payment by the court, taking into consideration all factors deemed relevant, including the financial resources of the child and the other parent and the needs of the decedent's

family.

... or...

#### **25-5-18.1. Parental duty to support child.**

The parents of any child are under a legal duty to support their child in accordance with the provisions of § 25-7-6.1, until the child attains the age of ~~nineteen eighteen, or until the child attains the age of nineteen if the child is a full-time student in a secondary school~~. If it is determined by the court that the child support obligation survives the death of the parent, the amount due may be modified, revoked, or commuted to a lump sum payment by the court, taking into consideration all factors deemed relevant, including the financial resources of the child and the other parent and the needs of the decedent's family.

#### ***Option 2 - amend statute to clarify/include alternative instruction:***

#### **25-5-18.1. Parental duty to support child.**

The parents of any child are under a legal duty to support their child in accordance with the provisions of § 25-7-6.1, until the child attains the age of eighteen, or until the child attains the age of nineteen if the child is a full-time student in a secondary school or is receiving alternative instruction pursuant to Chapter 13-27. If it is determined by the court that the child support obligation survives the death of the parent, the amount due may be modified, revoked, or commuted to a lump sum payment by the court, taking into consideration all factors deemed relevant, including the financial resources of the child and the other parent and the needs of the decedent's family.

#### ***Option 3 - amend statute to remove full-time:***

#### **25-5-18.1. Parental duty to support child.**

The parents of any child are under a legal duty to support their child in accordance with the provisions of § 25-7-6.1, until the child attains the age of eighteen, or until the child attains the age of nineteen if the child is a ~~full-time~~ student in a secondary school. If it is determined by the court that the child support obligation survives the death of the parent, the amount due may be modified, revoked, or commuted to a lump sum payment by the court, taking into consideration all factors deemed relevant, including the financial resources of the child and the other parent and the needs of the decedent's family.

#### **4. Adjudication of Paternity**

**Consideration:** Amend SDCL 25-7A-6 to allow for adjudication of paternity when DNA testing has been done which shows at least 99% probability the individual is the biological father of the child.

#### **25-7A-6. Hearing requested by parent--Referee's report--Objections--Order of court--Service--Objection to court's modification.**

If a parent served with a notice of support debt under § 25-7A-5 makes a timely request for a hearing, the secretary of social services shall file the notice of support debt, proof of service thereof, and response thereto in the office of the clerk of the circuit court in

the county of residence of that parent. The matter shall be set for hearing before a referee who is a member in good standing of the State Bar Association and is appointed by the court, pursuant to statute, and after due notice to all parties by first class mail. The referee shall make a report to the court, recommending the amount of the debt due to the state, if any, and the monthly support obligation of the parent and the arrearage debt due to the obligee or another state who has applied for support enforcement services, the provision of medical support, or genetic testing costs. If genetic testing showing a 99% or higher likelihood of paternity, or a Voluntary Acknowledgment of Paternity, are presented as evidence during the hearing, the referee shall make a finding of adjudication of paternity and include such finding in the report to the court.

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

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

#### 5. Minimum Order for Incarcerated Payors of Support

**Consideration:** Amend SDCL 25-7-6.2 to clarify the method for calculating support obligations for incarcerated individuals with no income:

1. If a parent's actual income during incarceration is \$0, the resulting obligation shall be set at the minimum obligation amount established in the schedule.
2. All obligations shall be set at the minimum obligation amount established in the schedule

#### **Option 1**

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

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

The emboldened areas of the schedule include a self-support reserve of eight hundred seventy-one dollars per month that accounts for the subsistence needs of the obligated parent with a limited ability to pay. If the obligation using only the noncustodial parent's monthly net income is an obligation within the emboldened areas of the schedule, that amount must be compared to the noncustodial parent's proportionate share using both parents' monthly net incomes. The lesser amount establishes the noncustodial parent's child support order, except that a noncustodial parent who is incarcerated for more than 180 days shall be obligated to no less than the base obligation amount of \$79.

### **Option 2**

... The lesser amount establishes the noncustodial parent's child support order, but in no case shall a noncustodial parent be obligated to less than the base obligation amount of \$79.

## **6. Obligations of Incarcerated Payors of Support upon Release**

**Consideration:** Amend SDCL 25-7-6.13 to codify that child support obligations do not revert to the pre-incarceration amount upon release and that a Petition for Modification must be filed to adjust the obligation post-release.

### **25-7-6.13. Modification of prior orders of support.**

All orders for support entered and in effect prior to July 1, ~~2022~~ 2026, may be modified in accordance with this chapter without requiring a showing of a change in circumstances from the entry of the order. If an individual incarcerated for more than 180 days is released from incarceration, the child support obligation in effect at the time of release shall continue in effect until either parent files a petition for modification.

## Child Support Referee Recommendation Options

### **7. Presumption of employment/income**

**Consideration:** Amend SDCL 25-7-6.4 to set the rebuttable presumption of income at the current state minimum wage.

### **25-7-6.4. Rebuttable presumption of employment at minimum wage.**

~~Except as provided in § 25-7-6.26 it~~ It is presumed for the purposes of ~~determination of determining~~ child support that a parent is capable of being employed ~~a minimum of one thousand eight hundred twenty hours per year, and the parent's child support obligation must be calculated at a rate~~ and earning an annual gross income of not less than one thousand eight hundred twenty hours ~~at~~ multiplied by the current state minimum wage.

### **8. Factors for imputation of income**

**Consideration:** Amend SDCL 25-7-6.26 to clarify factors used when imputing income.

### **25-7-6.26. Effect of failure to furnish financial information--Imputation of income.**

~~If a parent in a child support establishment or modification proceeding fails to furnish income or other financial information, the parent is in default. Income not actually~~

~~earned by a parent may be imputed to the parent pursuant to this section. Except in cases of physical or mental disability or incarceration for one hundred eighty days or more, it is presumed for the purpose of determining child support in an establishment or modification proceeding that a parent is capable of being employed a minimum of one thousand eight hundred twenty hours per year at the state minimum wage, absent evidence to the contrary. Evidence to rebut this presumption may be presented by either parent.~~

~~Income may be imputed to a parent when the parent is unemployed, underemployed, fails to produce sufficient proof of income, has an unknown employment status, or is a full-time or part-time student, whose education or retraining will result, within a reasonable time, in an economic benefit to the child for whom the support obligation is determined, unless the actual income is greater.~~

~~In all cases where imputed income is appropriate, the amount imputed must be based upon the following:~~

- ~~(1) The parent's residence;~~
- ~~(2) The parent's recent work and earnings history;~~
- ~~(3) The parent's occupational, educational, and professional qualifications;~~
- ~~(4) Existing job opportunities and associated earning levels in the community or the local trade area;~~
- ~~(5) The parent's age, literacy, health, criminal record, record of seeking work, and other employment barriers;~~
- ~~(6) The availability of employers willing to hire the parent; and~~
- ~~(7) Other relevant background factors.~~

~~Income is not imputed to a parent who is physically or mentally disabled to the extent that the parent cannot earn income; who is incarcerated for more than one hundred eighty days; who has made diligent efforts to find and accept suitable work or to return to customary self-employment, to no avail; or when the court makes a finding that other circumstances exist that make the imputation inequitable, in which case the imputed income may only be decreased to the extent required to remove such inequity.~~

~~Imputed income may be in addition to actual income and is not required to reflect the same rate of pay as actual income.~~

A parent's income may be imputed if the parent fails to produce sufficient proof of income, or the parent's employment status is unknown, or the parent is unemployed or underemployed. In determining the amount of income to impute to a parent, the court

may consider any factor relevant to the parent's ability to earn income including the parent's education, occupational skills, experience, age, health, criminal record and employment opportunities in the geographical area where the parent resides.

The amount imputed may be based on the parent's past income or data on wage rates for various occupations and locations published by the United States Bureau of Labor Statistics or any other federal or state government agency, or job advertisements.

No income may be imputed to a parent who has been sentenced to serve a term of incarceration or confinement of one hundred eighty days or more. Otherwise, unless a parent is disabled, the amount imputed may not be less than the current state minimum wage multiplied by one thousand eight hundred twenty hours.

#### 9. Credit during times of physical custody

**Consideration:** Amend 25-7-6.19 to allow credit against accumulated arrears for times when the obligor has physical custody including when the court orders physical custody to the obligor.

#### **25-7-6.19. Credit for child support arrearages for parent with primary physical custody during period of custody.**

Notwithstanding the provisions of § 25-7A-17 or 25-7-7.3, if, by agreement of the parties or court order, the obligor had primary physical custody of the child for more than four consecutive months, the court may credit the obligor for child support arrearages which accumulated during the period the obligor had actual physical custody of the child.

#### 10. Abatement

**Consideration:** Amend 25-7-6.14 to simplify the considerations for an abatement.

#### **25-7-6.14. Abatement of portion of child support--Modification.**

If the child resides with the obligor six or more nights in a month pursuant to a custody order, the court may, if deemed appropriate under the circumstances, grant an abatement of not less than thirty-eight percent nor more than sixty-six percent of the basic child support obligation for the nights the child resides with the obligor. It shall be presumed that the parenting time is exercised.

In deciding whether an abatement is appropriate, the court or child support referee shall consider ~~the fixed obligations of the custodial parent that are attributable to the child and to~~ the increased ~~non-duplicated~~ costs of the noncustodial parent that are associated with the child's time with the noncustodial parent. ~~The burden is on the noncustodial parent to demonstrate the increased costs that the noncustodial parent incurs for non-duplicated fixed expenditures, including routine clothing costs, costs for extra-curricular activities, school supplies, and other similar non-duplicated fixed expenditures.~~

The order granting the abatement must specify the number of nights that the abatement is allowed and the amount of the abatement. To calculate an abatement, the court or child support referee shall:



- (1) Determine the basic child support calculation, excluding additional costs including health insurance or child care, and annualize the same;
- (2) Divide the annual amount in subdivision (1) by three hundred sixty-five days to calculate the daily child support amount;
- (3) Multiply the daily child support amount in subdivision (2) by the number of overnights the child spends with the noncustodial parent on a monthly basis; and
- (4) Multiply the amount in subdivision (3) by the abatement percentage utilized. The figure must be annualized and subtracted from the monthly child support obligation.

No abatement may exceed the child support cross credit allowed under § 25-7-6.27.

If the noncustodial parent does not exercise the extended parenting time during a particular year, the noncustodial parent is required to repay the abated amount of child support to the custodial parent.

### 11. Service by email

**Consideration:** Adding a section to SDCL 25-7A to allow referees to serve parties by email.

### NEW SECTION

If a party agrees, the referee may send copies of any notice or report required to be served on the party under § 25-7A-5 or 25-7A-22 by electronic mail, using the email address provided by the party.

### 12. Filing of records upon objection

**Consideration:** Adding a section to SDCL 25-7A to allow referees to only file all records upon objection to the referee's report.

### NEW SECTION

If a party files an objection to the referee's report, the referee shall file with the court all exhibits entered into the record in the hearing before the referee. The referee shall file the exhibits within ten days after receiving notice of the objection. The referee shall maintain exhibits for thirty days following a signed order.

## Public Comment Recommendation Options

### 13. Abatement

**Consideration:** Amend SDCL 25-7-6.14 to change the threshold for an abatement from nights the child resides with the obligor to hours spent with the obligor.

### 25-7-6.14. Abatement of portion of child support--Modification.

~~If the child resides with the obligor six or more nights in a month pursuant to a custody order, the court may, if~~ If deemed appropriate under the circumstances, ~~the court may~~ grant an abatement of ~~not less than thirty-eight percent nor more than sixty-six percent of the~~ obligor's basic child support obligation for ~~the nights~~ time spent with



the child ~~resides with the obligor~~, pursuant to a custody order, based on the following schedule:

- (1) For each day per month the child spends less than two hours at the residence of or in the company of the obligor, at least twenty-five percent of the obligor's basic child support obligation;
- (2) For each day per month the child spends two to six hours at the residence of or in the company of the obligor, at least fifty percent of the obligor's basic child support obligation;
- (3) For each day per month the child spends more than six hours at the residence of or in the company of the obligor, one hundred percent of the obligor's basic child support obligation; and
- (4) For each night per month the child resides with the obligor, as set forth in § 25-7-6.28, one hundred percent of the obligor's basic child support obligation.

~~It shall be~~ is presumed that the parenting time is exercised.

In deciding whether an abatement is appropriate, the court or child support referee shall consider the fixed obligations of the custodial parent that are attributable to the child and to the increased non-duplicated costs of the noncustodial parent that are associated with the child's time with the noncustodial parent. The burden is on the noncustodial parent to demonstrate the increased costs that the noncustodial parent incurs for non-duplicated fixed expenditures, including routine clothing costs, costs for extra-curricular activities, school supplies, and other similar non-duplicated fixed expenditures.

The order granting the abatement must specify the number of days and nights that the abatement is allowed and the amount of the abatement. To calculate an abatement, the court or child support referee shall:

- (1) Determine the basic child support calculation, excluding additional costs including health insurance or child care, and annualize the same;
- (2) Divide the annual amount in subdivision (1) by three hundred sixty-five days to calculate the daily child support amount;
- (3) Multiply the daily child support amount in subdivision (2) by the number of ~~overnights~~ days and nights the child spends with the noncustodial parent on a monthly basis; and
- (4) Multiply the amount in subdivision (3) by the abatement percentage utilized. The figure must be annualized and subtracted from the monthly child support obligation.

No abatement may exceed the child support cross credit allowed under § 25-7-6.27.

If the noncustodial parent does not exercise the extended parenting time during a particular year, the noncustodial parent is required to repay the abated amount of child support to the custodial parent.

#### 14. Shared parenting cross credit

**Consideration:** Repeal SDCL 25-7-6.27 allowing for a shared parenting cross credit and associated mentions in 25-7-6.14 and 25-7-6.28.

#### **25-7-6.14. Abatement of portion of child support--Modification.**

If the child resides with the obligor six or more nights in a month pursuant to a custody order, the court may, if deemed appropriate under the circumstances, grant an abatement of not less than thirty-eight percent nor more than sixty-six percent of the basic child support obligation for the nights the child resides with the obligor. It shall be presumed that the parenting time is exercised.

In deciding whether an abatement is appropriate, the court or child support referee shall consider the fixed obligations of the custodial parent that are attributable to the child and to the increased non-duplicated costs of the noncustodial parent that are associated with the child's time with the noncustodial parent. The burden is on the noncustodial parent to demonstrate the increased costs that the noncustodial parent incurs for non-duplicated fixed expenditures, including routine clothing costs, costs for extra-curricular activities, school supplies, and other similar non-duplicated fixed expenditures.

The order granting the abatement must specify the number of nights that the abatement is allowed and the amount of the abatement. To calculate an abatement, the court or child support referee shall:

- (1) Determine the basic child support calculation, excluding additional costs including health insurance or child care, and annualize the same;
- (2) Divide the annual amount in subdivision (1) by three hundred sixty-five days to calculate the daily child support amount;
- (3) Multiply the daily child support amount in subdivision (2) by the number of overnights the child spends with the noncustodial parent on a monthly basis; and
- (4) Multiply the amount in subdivision (3) by the abatement percentage utilized. The figure must be annualized and subtracted from the monthly child support obligation.

~~No abatement may exceed the child support cross credit allowed under § 25-7-6.27.~~

If the noncustodial parent does not exercise the extended parenting time during a particular year, the noncustodial parent is required to repay the abated amount of child support to the custodial parent.

#### **25-7-6.28. Child residence with parent for a night--Residence for days.**

For the purposes of §§ 25-7-6.14 ~~and 25-7-6.27~~, a child resides with a parent for a night if the child sleeps:

- (1) At the residence of that parent at night, whether or not the parent is present; or
- (2) In the company of the parent, if the child does not sleep at a parent's residence.

If, in a calendar year, due to a parent's nighttime work schedule, a child resides with a parent for days, but not nights, the court may condition the abatement on the required days rather than nights. In those instances, on a school day, the child is treated as residing at the primary residence registered with the school.

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

~~If a custody order by the court, contains a detailed shared parenting plan which provides that the child will reside no less than one hundred eighty nights per calendar~~

~~year in each parent's home, and that the parents will share the duties and responsibilities of parenting the child and the expenses of the child in proportion to their incomes, the court may, if deemed appropriate under the circumstances, grant a cross credit on the amount of the child support obligation based on the number of nights the child resides with each parent. The shared parenting child support cross credit shall be calculated as follows:~~

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

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

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

## 15. Deviations

**Consideration:** Amend SDCL 25-7-6.10 to allow the federal tax consequences of claiming the child as a dependent as a factor for deviation.

### **25-7-6.10. Factors considered for deviation from schedule.**

Deviation from the schedule in § 25-7-6.2 must 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 that 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 that causes the parent to be unemployed or underemployed, consistent with the provisions of § 25-7-6.26.
- (7) The federal income tax consequences arising from claiming the child as a dependent.