

Testimony
House Bill 1343 – Department Of Human Services
House Human Services Committee
Representative Clara Sue Price, Chairman
February 5, 2007

Chairman Price, members of the House Human Services Committee, I am James Fleming, Deputy Director and General Counsel of the Child Support Enforcement Division of the Department of Human Services. I am here to suggest a "Do Not Pass" recommendation on House Bill 1343.

As part of the federal child support enforcement program, the State is required to adopt child support guidelines. Under federal and state law, there is a rebuttable presumption that the amount of child support determined under the guidelines is the correct amount of child support that an obligor should pay. The North Dakota child support guidelines are based on the number of children supported by an obligor and the obligors' income. If an obligor is underemployed or unemployed, income is generally imputed based on the obligor's earning capacity.

When calculating the child support obligation of an unemployed or underemployed person, income is to be imputed in one of the following three ways:

- a. An amount equal to one hundred sixty-seven times the hourly federal minimum wage.
- b. An amount equal to six-tenths of prevailing gross earnings in the community of persons with similar work history and occupational qualifications.

- c. An amount equal to ninety percent of the obligor's greatest average gross monthly earnings, in any twelve consecutive months beginning on or after thirty-six months before commencement of the proceeding before the court, for which reliable evidence is provided.

N.D. Admin. Code § 75-02-04.1-07(3).

Usually, the subsection above which will result in the greatest income is applied. However, there is an exception to this rule:

If an unemployed or underemployed obligor shows that employment opportunities, which would provide earnings at least equal to the lesser of the amounts determined under subdivision b or c . . . are unavailable in the community, income must be imputed based on earning capacity equal to the amount determined under subdivision a . . . less actual gross earnings.

N.D. Admin. Code § 75-02-04.1-07(6). The North Dakota Supreme Court has held in several cases that an incarcerated obligor's "community" is the jail, which has limited employment opportunities, and therefore imputation at minimum wage is appropriate.

For the committee's information, a minimum wage obligation for one child under the child support guidelines would be \$168 per month, and for two children the obligation would be \$200. By contrast, the median order for one child in North Dakota as of June 30, 2005, was \$266 per month.

States vary widely in how they handle the child support obligations of inmates. Some relieve incarcerated obligors of all child support obligations while incarcerated. The North Dakota Supreme Court has often discussed this issue:

[W]e believe application of subsection (6) of the imputed income guideline to an incarcerated obligor who has no other income appropriately promotes this state's strong public policy of protecting the best interests of children and preserving parents' legal and moral obligations to support their children, while recognizing, but not excusing, the obvious difficulty an incarcerated obligor faces in providing for his or her children.

Surerus v. Matuska, 548 N.W.2d 384 (N.D. 1996).

Chief Justice Vandewalle concurred in the result reached by the majority of the court in Surerus, but further observed:

I do not believe it is wise to release obligors from prison with an arrearage in child support so large that it is inconceivable the obligor will be able to earn enough to pay it.

Surerus, 548 N.W.2d at 389.

More recently, in 2005, the court again visited this issue:

Matuska does not provide incarcerated obligors with a complete reprieve from their child support obligations due to the financial hardships associated with imprisonment. Matuska repeatedly

emphasized the defendant's lack of financial resources capable of satisfying a minimum-wage-based obligation. In this regard, Matuska necessarily stands for the proposition that incarceration, even if it results in a complete lack of financial resources, is alone no justification for a reduction in child support payments below what a minimum-wage earner, or a person without employment, would owe.

Interest of A.M.S., 2005 ND 64 ¶ 7, 694 N.W.2d 8.

Child support obligations must be reviewed by the child support enforcement program at least once every three years upon request of either parent. In May 2006, we adopted a new policy creating exceptions to this general rule for cases in which the obligor is or has been incarcerated.

- An obligor who has at least one year remaining on his or her sentence (with no possibility of earlier release) can request a review.
- If the existing child support order was based on the obligor's incarceration (most often imputed at minimum wage) and it has been at least 12 months since the obligor was released, an obligee can request a review.

In either case, if the guidelines lead to a different support obligation being appropriate, the child support enforcement program will file a motion in court to change the obligation.

I recently served as the chairman of the Child Support Guidelines Advisory Committee, which is convened at least every four years by statute to review the guidelines and make recommendations to the Department. This committee included a district court judge, a tribal court judge, a judicial referee, a state senator (Senator Tom Fischer), a state representative (former Representative Bill Devlin), an attorney in private practice, an obligor, an obligee, and representatives of the Department of Human Services (including the TANF and Medical Assistance divisions).

The committee offered a number of changes to the guidelines regarding the rules for imputation based on earning capacity. However, the committee specifically decided NOT to change the current rule regarding incarcerated obligors.

The Department believes that the decision of the advisory committee on this issue and the existing caselaw reflects a balanced approach between the needs of the children and the ability of an incarcerated obligor to pay child support. For that reason, we suggest that the current rule remain in place to provide for a minimum wage obligation while the obligor is incarcerated and that the committee give a "Do Not Pass" recommendation on House Bill 1343.

Madame Chairman, that concludes my testimony and I would be glad to answer any questions the committee may have.