

Testimony
Senate Bill 2277 – Department Of Human Services
House Judiciary Committee
Representative Kim Koppelman, Chairman
March 8, 2017

Chairman Koppelman, members of the House Judiciary Committee, I am Jim Fleming, Director of the Child Support Division of the Department of Human Services (Child Support). I am here to support Senate Bill 2277.

" Well I got a job and tried to put my money away
But I got debts that no honest man can pay"

"Atlantic City", Bruce Springsteen, Nebraska 1982

It may seem strange that the state agency in charge of collecting child support would support a bill to reduce child support obligations, but we consider the purpose of Senate Bill 2277 to be addressing uncollectible child support arrears rather than reducing the amount of money that is actually collected and distributed to families.

As a general rule, able-bodied obligors in North Dakota are expected to work at least 40 hours per week for minimum wage (higher if warranted by the person's occupation or job history). If necessary, income is imputed to a parent at that level for purposes of determining the parent's child support obligation. Until 2011, this rule applied to incarcerated parents, even though they could not earn that income. Starting in 2011, the amount of income that may be imputed to the obligor decreases as the length of the sentence increases (80 percent of minimum wage for the second year of incarceration, 60 percent for year three, 40 percent for year four, and 20 percent for year five). After a parent has been incarcerated for five years, income may not be imputed in any amount.

Even under this phase-down formula, a parent who is incarcerated accrues child support that he or she cannot pay while incarcerated. A child support obligation for one child based on minimum wage for 40 hours a week is \$238. After being incarcerated for 180 days (and thus, in most cases, unable to pay support) the parent would owe \$1,428 in child support arrears plus interest, along with any court costs, restitution, and legal fees from the criminal conviction.

After the bill was drafted with an initial proposed timeframe of one year of incarceration or longer, a new final federal rule was adopted on December 20, 2016. Under the final rule, a state must choose one of the following three options for any parent incarcerated for 180 days or more:

1. Proactively review and seek appropriate modification of the obligation;
2. Notify both parents of the right to request such a review and modification; or
3. Have a "comparable law or rule that modifies a child support obligation upon incarceration by operation of State law." 45 Code of Federal Regulations Section 303.8(c).

Of the three mandated options for parents who are incarcerated under a sentence of more than 180 days, the third option is the approach taken in Senate Bill 2277, and is the most efficient and economical. It avoids the need to consume valuable time of the court, the parents, and the child support program when the outcome is pre-determined because the incarcerated parent has no outside income.

Senate Bill 2277 does not prohibit establishment of a child support

obligation for an incarcerated parent based on actual income. As recommended by the federal Office of Child Support Enforcement:

If an incarcerated parent has income or assets, these can be taken into consideration in reviewing the order. However, States should not assume an ability to earn based on pre-imprisonment wages, particularly since incarceration typically results in a dramatic drop in income and ability to get a job upon release.

Federal Register Volume 81, No. 244, page 93527 (December 20, 2016)

Not only are these arrears uncollectible during incarceration, the arrears are detrimental to the child because they actually reduce the amount of child support collected from the parent after the parent is released:

[O]nce released, noncustodial parents tend to view the methods employed to collect support and arrearages as a disincentive to seek legitimate gainful employment. Research suggests that using maximum-level income withholding rates and other enforcement mechanisms tend to discourage employment, particularly among individuals in low socioeconomic communities. When combined with the difficulty faced by formerly incarcerated parents in obtaining employment, there is a strong incentive to seek work in the “underground economy” where it is difficult for authorities and custodial parents to track earnings and collect payments. Research demonstrates that when high support orders continue through a period of incarceration and thus build arrearages, the response by the released obligor is to find more methods of avoiding payment, including a return to crime. It is unrealistic to expect that most formerly incarcerated parents will be able to repay high arrearages upon release. To the extent that an order fails to take into account

the real financial capacity of a jailed parent, the system fails the child by making it more likely that the child will be deprived of adequate support over the long term.

Federal Register at page 93527.

In discussing the bill with private attorneys, a question was asked why an incarcerated parent's obligation simply didn't revert back to the amount due prior to the incarceration. Our division had a similar internal discussion when developing the bill. This was addressed in the preamble to the federal rule:

We strongly encourage States to review child support orders after the noncustodial parent is released to determine whether the parent has been able to obtain employment and to set the orders based on the noncustodial parent's ability to pay. States should not automatically reinstate the order established prior to incarceration because it may no longer be based on the noncustodial parent's ability to pay, especially if the noncustodial parent is not able to find a job or find a job similar to pre-incarceration employment. A recent study found that incarceration results in 40 percent lower earnings upon release [footnote omitted]. Instead, the order should be reviewed and adjusted according to the State's guidelines under § 302.56.

Federal Register at page 93539.

In the experience of the Child Support Division, we are fortunate if we can collect current support and prevent further arrears after a parent is released from prison. The arrears that accrue during incarceration are

seldom collected, and often make it harder for the parent to re-join society and earn sufficient income to pay child support.

Mr. Chairman and members of the committee, this concludes my testimony in support of Senate Bill 2277, and I would be glad to answer any questions the committee may have.