**Testimony**
**Engrossed House Bill 1175 – Department Of Human Services**
**Senate Human Services Committee**
**Senator Judy Lee, Chairman**
**March 4, 2009**

Chairman Lee, members of the Senate Human Services Committee, I am James Fleming, Deputy Director and Chief Legal Counsel of the Child Support Enforcement Division of the Department of Human Services. I am here to ask for your favorable consideration of Engrossed House Bill 1175, with the amendments attached to my testimony.

Madame Chairman and members of the committee, based on the work on the bill in the House of Representatives, we anticipate that two areas of the bill will receive the most attention – insurance matching and data matching. As a result, I will quickly go through each section of the bill, and conclude my testimony with comments and proposed amendments in those two areas.

It has been a successful biennium for the Department of Human Services and the child support enforcement program. In 2008, the National Child Support Enforcement Association named North Dakota as program of the year, and our director as the manager of the year. This is in addition to several awards from our federal Office of Child Support Enforcement. Our program performance ranked third in the country, based in part on collecting 75.85% of support in the month in which it is due, and making a collection toward delinquent support in 72.67% of the cases in which there is an arrearage. These collection rates have allowed, for the first time, for the unpaid principal balance of arrears in IV-D cases to decline. Total collections for Calendar Year 2008 were an all-time record of $122,734,000, of which about 90% is paid to families.

However, there is still more work to do to achieve our goal of having a world-class program that produces reliable collections for families. At the end of December 2008, we had 4,888 cases in our caseload in which we were actively trying to locate an obligor's address, employer, or assets. Obtaining these pieces of information is critical to requesting a court order for child support at an appropriate level and to enforcing g the order.

For comparison, at the end of the federal fiscal year, we had only 89 children in our caseload needing paternity to be established (out of 24,269 children in the IV-D caseload who were born out of wedlock); 4,746 court orders to establish (out of a total IV-D caseload of 36,918); and 7,862 cases with arrears in which there was no payment in the last year (out of a total IV-D arrears caseload of 28,772).

Given the work yet to do and the large number of obligors we are trying to locate, several provisions in House Bill 1175 would improve our program's access to information, in addition to internal efficiencies.

**Section One:** This is a technical change to remove language that is moot based on legislation enacted during the 2007 Legislative Session.

**Section Two:** This section is proposed to revise and clarify terminology. Technically, a contempt proceeding is not a method of punishing a person. Rather, the goal of such a proceeding is to compel a person to do something that he or she already has a duty to do.

In the last few years, we have increased our actions against employers who either do not withhold money as required in an income withholding order, or who withhold the money from the obligor but illegally keep the money without paying it to the State Disbursement Unit (SDU). In applying the provisions in current law that are proposed to be amended in the bill, it was determined that some clarification would be helpful to indicate that the same penalties and remedies apply in both contexts – failure to withhold income and failure to deliver income that has been withheld.

**Section Three:** A recent North Dakota Supreme Court decision held that a person could be prosecuted for willfully failing to pay child support that is past due, but noted that the statute was not as clear as it could be. State v. Nastrom, 2008 ND 110, 750 N.W.2d 432. This section of the bill is proposed to clarify that a person can be prosecuted for willfully failing to pay child support arrears (which is not a debt that is subject to any statute of limitations).

**Section Four:** This section of the bill recognizes that since the Department has taken over issuing income withholding orders in all child support cases, there is no longer a need for the clerks of court to receive this information. The court administrator's office is aware of this proposed amendment.

**Section Five:** In 2003, the Legislature passed a law to address the following scenario:

> Dad owes Mom several thousand dollars of past-due child support. A few months ago, custody of the minor children was changed from

> Mom to Dad. Mom now owes Dad child support on behalf of the children but also has accumulated arrears. In other words, Dad owes arrears to Mom and Mom owes arrears to Dad.

The legislative history of the 2003 legislation indicates that an offset of the arrears in the example is a convenient and efficient way of reducing both parents' arrears to each other (assuming none of the arrears are assigned to the State).

However, as applied to the current and future support that is owed to the children, the legislative history also indicates:

> An offset should not deprive children of the current support they need for food, clothes, shelter, and other essentials . . . . Therefore, except as provided in subsection 4 of this section, an offset of child support arrears against child support that is due in the current month, or that will be due in a future month, is not permitted.

After balancing the interests involved of providing support for the children's current needs with the impact of enforcing an arrearage that is owed by a parent who currently has custody of the children, the 2003 Legislature enacted the following language:

> An obligor's child support obligation for the current month or for a future month may not be offset by past-due child support or other debts owed to the obligor by an obligee unless the court orders the offset as a method of satisfying an overpayment of child support

that results from the establishment or reduction of a child support obligation.

N.D.C.C. § 14-09-09.33(5).

Recently, the North Dakota Supreme Court upheld an offset of current support with arrears, despite the language above, based on language in N.D.C.C. § 14-09-09.24 authorizing parents to enter into a written agreement for assuring the regular payment of child support in lieu of income withholding, and language in N.D.C.C. § 14-09-09.30 regarding the monthly amount due for purposes of income withholding. Walberg v. Walberg, 2008 ND 92, 748 N.W.2d 702.

We believe that the court's decision, in attempting to harmonize the multiple statutes involved, reached a conclusion that is inconsistent with the intent of the Legislature and jeopardizes the right of children to obtain current support from an obligor. Thus, this section of the bill would clarify the interaction of these statutes and fulfill the intent of the provision enacted in 2003.

**Section Six:** The change in the first part of this section is to give courts and the SDU the authority to stop collecting support from an obligor and refund any collections if the obligee is deceased and heirs or next of kin cannot be found. Currently, our program would continue to attempt to collect the support from the obligor, make best efforts to find an heir or next of kin. If after 3 years we are unable to find an heir or next of kin, we turn over the collections to the Unclaimed Property Division.

The second part of this section updates a duplicative reference to the clerks of court and the child support program, consistent with the proposed change in **Section Four**.

**Section Seven:** Currently, a person who illegally hunts, traps, or fishes when the person's privileges have been suspended by a court is guilty of a Class A misdemeanor, but a person who illegally hunts, traps, or fishes when the person's privileges have been suspended by the child support enforcement program is guilty of only a Class B misdemeanor (the penalty that applies to general game violations). The amendment to existing law is proposed for the sake of consistency.

**Section Eight:** As mentioned earlier, we have increased our enforcement activities regarding employers who do not honor their legal duties in the child support area. One common area is reporting of new hires, where we are authorized to assess a civil penalty of $20 per failure to report an employee. The current process of collecting this penalty has proven slightly confusing and cumbersome in application because it involves a third party (the employer) in a contempt proceeding in a court case between the two parents. We believe it would be simpler for all if we simply brought a separate legal action against the employer to collect any civil penalty that is imposed for failing to report new hires.

**Section Nine:** Through our High Intensity Enforcement Unit, we are pursuing more liens against property in the hands of third parties. Currently, the law only requires that the lien be filed with the Secretary of State or the county recorder of the county where the property is located and provided to the obligor. However, as a practical matter, we need to send the third party a copy of the lien for them to know about it. The

new language would reduce the paperwork in this process and authorize the filing of our liens directly with the third party who possesses the property. This issue arises quite often when placing liens on capital distributions from utility cooperatives, which can often be for small amounts that are not subject to other claims.

**Section Ten:** This section relates to the same issue in **Section Six** when an obligee is deceased and no heirs or next of kin can be found. This section authorizes the records of the debt to be removed from the state's official payment records so future collection actions can be avoided.

**Section Eleven:** The law proposed to be amended in this section was enacted in response to numerous mandates contained in the federal welfare reform act of 1996. These mandates included mandatory data sharing agreements with financial institutions, authority to issue administrative subpoenas, and the right to access (including automated access) records of government entities and public utilities. In large part, the language in this section follows the language in federal law, to ensure compliance with the federal mandates and preserve funding for the Temporary Assistance to Needy Families and Child Support Enforcement programs.

The parts of the original law that are not proposed to be amended in House Bill 1175, and will remain in effect, provide strong immunity protection for entities that cooperate with child support and require that any confidentiality be preserved. We have a long history of accessing and protecting personal information. We take our access to information very seriously, and only use the information we obtain for program purposes or as otherwise required by law. The IRS, which has a most intensive

ongoing security oversight process, has long accepted the safeguards that the Department and the Information Technology Department have had in place, as evidenced by their program review last summer.

As we shift more attention to locating obligors and their employers or assets, this law is becoming more important to our operations and to improving our collection efforts. Our experience in applying this law has also taught us ways in which we feel the law can be improved.

This section of the bill was significantly amended in the House of Representatives, and I will discuss those changes later in this testimony.

**Section Twelve:** This section is proposed to account for the fact that federally-funded child support programs are now operated by some Indian tribes as well as states.

**Section Thirteen:** This section provides for a protest period for any collections received under **Section Fourteen** of the bill.

**Section Fourteen:** Common child support enforcement tools for North Dakota and other states today include intercepting federal and state tax refunds, insurance claims, and lottery winnings. Other states, particularly Colorado, have had similar success in intercepting other gambling winnings. Under this section, a gaming operator who is subject to North Dakota law (which excludes tribal casinos) would be required to report all winnings for which an IRS W-2G form is required prior to making a payment.

This connection to the IRS form is important; a W-2G is only required for bingo winnings in excess of $1,200 and other winnings, such as pari-mutuel winnings, of $600. Based on the experience of other states and a contact we have had with the charitable gaming industry in North Dakota, we believe this allows for the number of reported winnings to be very manageable for the gaming operator. We believe we can provide a web-based tool for the gaming operator that will allow it to obtain the needed information at whatever time of the day or night the operator may be making a payment to the winner. The fiscal note on the bill identifies the cost of computer programming to implement the web-based interface.

Under **Section Seventeen**, the effective date of this section and the protest period in **Section Thirteen** would be delayed until July 1, 2010, to give the Department the opportunity to work with the gaming industry on the details of the match process.

**Section Fifteen:** This section of the bill clarifies that the Department's authority to write off uncollectible child support arrears includes medical support arrears that stem from a Medicaid assignment.

**Section Sixteen:** The 2005 Session Law that is proposed to be amended in this section is the Uniform Parentage Act. The Department supported the enactment of the uniform law because it provided greater guidance in many areas. However, the transition clause that is proposed to be amended was recently interpreted by the North Dakota Supreme Court in an unexpected way, which results in the prior, more ambiguous law being applied to more cases. Gerhardt v. C.K., 2008 ND 136, 751 N.W.2d 702. The "old" paternity act is no longer widely available. As amended, the

date of a complaint or motion to disestablish paternity would govern which law applies, even if the paternity action occurred earlier.

**Section Seventeen:** As discussed earlier in my testimony, this section delays the effective date of the reporting of gaming winnings (**Sections Thirteen and Fourteen**) until July 1, 2010, to give the Department the opportunity to work with the affected industries on the details of the new processes.

**Amendments:** Attached to my testimony is a set of amendments that the Department would request be added to the bill. These amendments pertain to issues that were raised in the House of Representatives during its consideration of the bill, and led to the removal of some provisions from the original bill that the Department feels continue to have merit. The amendments cover two subjects: insurance matching and data matching.

**Insurance Matching:** As indicated at the beginning of my testimony, improving our access to information for locating parents and their income or assets is a key to improving the collection of support for children. Nationally, the Child Support Lien Network (a multi-state partnership hosted by Rhode Island) and the federal Office of Child Support Enforcement each conduct a match between insurance claims and delinquent obligors.

In North Dakota, participation by insurance companies is currently voluntary, and we appreciate the cooperation of the insurance companies who are choosing to participate. Just last week, we learned that the State Farm insurance group is now participating in the federal match, and

we have already received our first match. However, one of the concerns expressed by some companies at a national level is that they would feel more protected from lawsuits if the process was mandated. For this reason, some will not participate unless it is mandated, which has led to the proposed language in the original bill and the attached proposed amendments.

At the present time, we would plan to implement the match process through the existing match processes that are in place with the Child Support Lien Network or the Office of Child Support Enforcement. Many insurers today are participating in these networks through a centralized claims processor called ISO, and the amendments confirm that this existing service will suffice under the proposed match process.

Under the amendments, the effective date of the insurance match would be delayed until July 1, 2010, to give the Department the opportunity to continue working with the insurance industry on the details of the match process. The current voluntary process would remain in effect until that time. In addition, the sanctions against an insurer for failing to report a claim are delayed until July 1, 2011, to give insurers and their staff an opportunity to become familiar with the match process.

Since the original bill was introduced, the Department has worked hard with representatives of the insurance industry on agreeable amendments to address industry concerns. Unfortunately, consensus could not be reached on all points before the House was required to act on the bill, and the match provisions were removed. However, we believe that the remaining disagreements between the Department and the insurance

industry are relatively minor, and that the proposed amendments are a workable solution that should be added to the bill.

**Data Matching:** Under current law, the Department has authority to access information from government agencies, financial institutions, and public utilities, and can also issue administrative subpoenas for information to any person who is believed to possess information regarding obligors or their income or assets. The parts of the law regarding information exchange with government agencies and financial institutions have been used since the law was first passed in 1997. However, the provisions regarding public utility matches have only begun being implemented in the last biennium. In implementing this new area of data matching, some shortcomings and ambiguities in current law have been identified.

For example, in terms of obtaining information, a lot has changed in the 12 years since the law was first passed. Instead of a subpoena in a specific case on a one-time basis, a far more efficient way to obtain and compare information today is a data sharing agreement where an entire list of individuals is compared to our list of child support obligors on an ongoing, periodic basis using a computerized process. One entity receiving a request from our program to enter into a data sharing agreement responded by claiming that an administrative subpoena was the exclusive way that we could obtain the access to information provided in subdivision 1(g) of the law. We disagree under current law, but feel a clarification would be helpful.

Another recent example is a data match with a utility cooperative. The company was very willing to work with us, but current law expressly

authorizes only that the name and address of the customer and the customer's employer be provided (page 8, line 1 of the bill); what is not as clear is the authority to share the customer's social security number or asset information. However, the law allows us to obtain name and address information regarding obligors, which we can only do with a reasonable degree of certainty if we match based on social security numbers. Rather than imply the authority to exchange all relevant information with utilities, we propose the clarification in the bill.

In the original bill, and in the Department's proposed amendments, we propose similar authority to obtain records of any person that we become aware of who possesses information about obligors. Except for administrative subpoenas, the authority in current law to obtain access to information is limited to government agencies, financial institutions, and public utilities. In reality, there are other sources of information regarding multiple obligors. A recent example would be the class action lawsuit from the train derailment in Minot. If this provision had been in place, we may have been able to match the potential claimants under the lawsuit to determine who was obtaining a settlement, and apply some of those funds to the care of their children.

Finally, identity theft can be a concern for our data sharing partners. Current law gives Child Support Enforcement the ability to obtain information from many entities. But some would prefer to receive the information from us and conduct their own match. As long as the entity agrees to honor state law requiring it to keep the information confidential and not use it for purposes other than our program, we would like the flexibility of accommodating such a request and allow the entity to do the match and report the outcome to us (Page 9, lines 5 through 9).

In the House, the Department supported amendments to this section. One amendment clarified that our automated access to records of a public utility is "subject to safeguards on privacy and information security." We would not seek to obtain automated access to the computer system of a public utility if the access could not be secure and limited to only the records authorized by law to be shared with Child Support Enforcement. Instead, we would work with the entity to form an agreement to exchange data files without the automated access. Another amendment expressly limited the reach of the statute to the portion of public utility records containing the information that would be useful to the Department.

However, an amendment in the House that does pose a concern is the provision that not only requires an administrative subpoena for information in public utility records, even if the utility is willing to cooperate, but also significantly limits the pieces of information that can be obtained through the subpoena (page 8, lines 1 through 6). Instead of authority to conduct certain data matches and the general power to obtain information through administrative subpoena, these amendments actually would narrow the information that the Department currently can obtain.

In conclusion, on this issue current law since 1997 has authorized the Department to obtain information through specific data exchanges and general authority to issue administrative subpoenas. The goal of the original bill and the attached amendments is to clarify the existing subpoena power, expand the ability to use data exchanges in lieu of a subpoena, and create a third alternative under which the person in

possession of the information can conduct its own data match using information supplied by the Department. We believe that a one-size fits all method is not required; instead, we propose that either the Department or the third party can conduct the data match, with an administrative subpoena being reserved for times when the person is not willing to use either option but the information is needed.

Madame Chairman, this gives an overview of the engrossed bill and the amendments requested by the Department. I would be glad to respond to any questions the committee may have.