

1999 HOUSE HUMAN SERVICES

HB 1028

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1028

House Human Services Committee

Conference Committee

Hearing Date 01-13-99

Tape Number	Side A	Side B	Meter #
1	x		6.9
Committee Clerk Signature <i>Anna A. Quinn</i>			

Minutes:

SUMMARY OF BILL: Relating to the child support guidelines' definition of gross income.

Ms. Jennifer Clark, Legislative Council, is neutral on the bill, she was committee council on the Interim Child care Committee. This bill will amend sections of existing ND Century Code provisions relating to child care. The provision addresses gross income of the obligor. It does not address employee benefits as it relates to child care requirements. She responded to questions relating to 401k that would be included as calculated payments to be made. As the law stands now, everything will be considered.

Daniel Biesheuvel, lobbyist for the interim committee to the case that initiated this bill. They support this bill.

(see attached written testimony)

Representative Eliot Glassheim, spoke in support of HB 1028, he served on the Interim Committee that drafted legislation on the bill.

Ms. Barb Siegel, Depart. of Human Services, spoke in support of the bill. She is representing Blaine Nordwall, who can not attend the hearing. The department is in process of amending child care guidelines. They have included language that would address the same provisions as the HB 1028. They are recommending an amendment to the bill. It should be clear which of the items that are liquid.

Mr. Arnie Fleck, attorney representing people affected by this bill are not in support of the bill. This bill will cause unfairness to people making child care benefits. By adding benefit amounts while considering child care payments to be made is unfair. People who have courage to start a business will be held to making greater payments the same as people that have a greater earning job. People with different incomes will be paying the same amount of child care benefits.

Mr. Kenneth Hendrickson, representing self, was in support of HB 1028.

Chairwoman Price closed the hearing on HB 1028 at 11:00 a.m.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1028

House Human Services Committee

Conference Committee

Hearing Date January 25, 1999

Tape Number	Side A	Side B	Meter #
2	X		30.1 - End
2		X	0.0 - 1.3
Committee Clerk Signature <i>Susann Lindteigen</i>			

Minutes:

Amendment No. 90098.0301 was reviewed by the committee.

Committee Discussion.

Rep. CLARA SUE PRICE and Rep. ROBIN WEISZ discussed the exemption for employed individuals that doesn't go to self-employed persons.

Rep. BRUCE ECKRE stated that Mr. Fleck testified he wanted amendment because Human Services will do it anyway.

Rep. AMY KLINISKE moved to ADOPT AMENDMENT.

Rep. TODD PORTER second the motion

VOICE VOTE: 15 yeas, 0 nays. Unanimous

Rep. ROBIN WEISZ moved DO PASS As AMENDED.

Rep. AMY KLINISKE second the motion.

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House Human Services Committee

Bill/Resolution Number 1028Jan25

Hearing Date January 25, 1999

Further Committee Discussion.

ROLL CALL VOTE #4: 15 yeas, 0 nays, 0 absent

Motion Carried.

CARRIER: Rep. CHET POLLERT

MARK HAFNER submitted written testimony (attached).

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1028

Page 1, line 7, replace "For purposes of the guidelines, gross" with "For purposes of the guidelines, gross income does not include an employee benefit over which the employee does not have significant influence or control over the nature or amount unless:

- (1) That benefit may be liquidated; and
- (2) Liquidation of that benefit does not result in the employee incurring an income tax penalty."

Page 1, remove lines 8 through 11

Re-number accordingly

VR
1/26/99

HOUSE AMENDMENTS TO HOUSE BILL NO. 1028 HUMSER 1-26-99

Page 1, line 8, replace "any" with "an", replace "if" with "over which", and replace "may" with "does"

Page 1, replace lines 9 through 11 with "have significant influence or control over the nature or amount unless:

- (1) That benefit may be liquidated; and
- (2) Liquidation of that benefit does not result in the employee incurring an income tax penalty."

Renumber accordingly

Date: 1-25-99
Roll Call Vote #: 4

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1028

House Human Services Committee

Subcommittee on _____
or

Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass As Amended

Motion Made By Robin Weisz Seconded By Amy Kliniske

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	X		Bruce A. Eckre	X	
Robin Weisz - Vice Chairwoman	X		Ralph Metcalf	X	
William R. Devlin	X		Carol A. Niemeier	X	
Pat Galvin	X		Wanda Rose	X	
Dale L. Henegar	X		Sally M. Sandvig	X	
Roxanne Jensen	X				
Amy N. Kliniske	X				
Chet Pollert	X				
Todd Porter	X				
Blair Thoreson	X				

Total (Yes) 15 No 0

Absent 0

Floor Assignment Pollert

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1028: Human Services Committee (Rep. Price, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (15 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1028 was placed on the Sixth order on the calendar.

Page 1, line 8, replace "any" with "an", replace "if" with "over which", and replace "may" with "does"

Page 1, replace lines 9 through 11 with "have significant influence or control over the nature or amount unless:

- (1) That benefit may be liquidated; and
- (2) Liquidation of that benefit does not result in the employee incurring an income tax penalty."

Renumber accordingly

1999 SENATE HUMAN SERVICES

HB 1028

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1028

Senate Human Services Committee

Conference Committee

Hearing Date FEBRUARY 24, 1999

	1	X		1,240
	1		X	
3/3/99	1		X	1,900
3/3/99	2	X		205
Committee Clerk Signature <i>Barol Klodejchuk</i>				

Minutes:

The hearing was opened on HB1028.

REPRESENTATIVE GLASSHEIM, sponsor, explained the bill. The problem is the question of what gross income would be for child support. Are benefits treated as income. The system we now use is unfair. We do not want loopholes to hide income but not penalize because of employer paid benefits that he has no control over. SENATOR DEMERS asked if the amendment the House put on was all right with you? REP GLASSHEIM stated that it was; it was probably clearer than it was.

JENNIFER CLARK, Legislative Council, explained bill. The amendments made to clarify the bill. This bill amends the section of code that addresses specifics of child support guidelines adopted by Human Services Dept. Under current law the guidelines consider gross income which include income from all sources; employee-employer benefits. This bill attempts to

exclude a certain type of benefits from gross income; the benefits the employee does have control over; the benefits the employee does not have control over. It looks at the employee non-controlled benefits and if they can be liquidated without incurring a tax penalty, that in that instance they will be considered those benefits. If they are benefits that employee has no control and cannot be liquidated they are not considered in gross income; if they are benefits the employee has no control over and can be liquidated with a tax penalty they would not be considered gross income. There was a court case in which the court labeled benefits as part of income and the Supreme Court affirmed the district court's decision.

DAN BIESHEUVEL, R-KIDS of ND, supports bill with written testimony. SENATOR LEE asked if his proposed bill was considered in the interim committee. MR. BIESHEUVEL replied that the actual draft was not pursued but is attached to the testimony.

BLAINE NORDWALL, Dept of Human Services, supports bill. (written testimony). SENATOR DEMERS asked for comments on Mr. Nordwall's last statement. MR. NORDWALL: The word penalty in this sense means for IRS purposes and not simply that paying tax is a penalty. There is a difference in tax liability and tax penalty. SENATOR KILZER: Would there be any law suits coming from previous benefits were treated? MR. NORDWALL: I can't guarantee that it would not happen; however, this bill would not have a retroactive provision and I see no language that would do anything but look forward. SENATOR DEMERS asked about an emergency clause to better coordinate what you are doing. MR. NORDWALL stated that the Dept was delaying the final rules until all bills came due and an emergency would actually disrupt the procedure. SENATOR THANE asked about health insurance being carried strictly for the child he is paying child support for. MR. NORDWALL: Under the current law or the

recent lawsuit it could be termed gross income; but there is an existing provision in child-support guidelines with arriving at net income that says you can deduct cost of providing insurance coverage for your children. Medical support should go along with financial support.

DAN LAWRENCE supports the bill. He is part of the Lawrence v Delkamp law suit. The state department was behind the case; it went to the Supreme Court and they upheld the district court decision. If a person doesn't have control it should not be income. In the case of the man that does not have custody and marries the entire income of the household is included as gross income. If the woman gets married, her husband's income is not included. My base salary is \$48,000. The Supreme Court has \$75,000 as salary. If you get a parking space that has to be paid for or an office furnished by company, it is included as gross salary. It needs to look at both incomes - man and woman's. This is the fair way; South Dakota has been doing this for some time.

GREGG BOYER, Mandan, explained his personal situation in written testimony, supports bill.

Opposition to the bill was called.

ARNIE FLECK, attorney representing Delkamp in lawsuit, opposes bill in written testimony.

SENATOR DEMERS asked who determines the percentage? MR. FLECK answered the Department of Human Services has guidelines to determine support payments. SENATOR LEE asked about situations working for relatives. MR. FLECK stated that there was a provision that the income of the spouse was not included unless they set up a system where they funnel the money to the spouse. SENATOR DEMERS asked about the how the money used as insurance in a group plan. MR. FLECK answered that it was the actual amount of individual coverage in a group plan.

GREGG BOYER was given the chance to be heard. SENATOR LEE stated that he had asked if he could have the chance to be heard. SENATOR DEMERS asked if he brought this to the interim committee. It was not brought to the committee; it was submitted to Blaine Nordwall.

SENATOR KILZER asked about the one million dollars left in child support. What are the figures if this were enacted? MIKE SCHWINDT, Dept, explained that the million dollar issue is part of a fiscal note. We took an estimate of how much time and effort was involved in reviewing and accumulating the information of staff at the county level. Basically you are looking at about 5000 cases each year, at 3 hours per case, \$26 a hour for people doing the work.

SENATOR DEMERS asked if this was all administrative costs in conversion, its not lost money to the system through lost child support collect or offsets to that. MR. SCHWINDT: That is the actual cost of people at regional offices; simply staff time.

The hearing was closed on HB1028.

Discussion resumed on 3/3/99. SENATOR LEE explained amendments. BLAINE NORDWALL, Dept of Human Services, explained that it would be simply using income tax returns, which would not be good. Now they add back any deductions that do not take money and subtract principle. SENATOR DEMERS asked if this was discussed in interim. MR. NORDWALL replied yes. SENATOR DEMERS asked what this new rule is going to do. MR. NORDWALL replied that this change will remove code that currently provides that in calculating net income you add any depreciation that has been taken; any non deduction that does not require any cash outlay and subtract the principle. We would look at the IRS income. With this bill we have addressed the idea and think it will adjust this to take care of it. SENATOR

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Senate Human Services Committee

Bill/Resolution Number HB1028

Hearing Date FEBRUARY 24, 1999

LEE explained it came from Senator Cook involving a farm family with Social Services and assessment of child support payment.

SHERRY MILLS-MOORE, an attorney, has concerns with amendments. Just take the IRS.

Guidelines will take care of depreciation. With the amendments, the self-employed person can deduct more than employed; I don't think it is appropriate.

Discussion continued on HB1028.

SENATOR LEE: Because of the explanation Mr. Schwindt and Mr. Nordwall provided about the depreciation, I am not uncomfortable with being able to answer the gentlemen that came here before. SENATOR LEE moved a DO PASS. SENATOR FISCHER seconded it. No further discussion. The amendments were not adopted. Roll call vote carried 6-0-0. SENATOR FISCHER will carry the bill.

Date: 3/3/99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1028

Senate HUMAN SERVICES COMMITTEE Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken No Pass

Motion Made By Sen Lee Seconded By Sen Fischer

Senators	Yes	No	Senators	Yes	No
Senator Thane	✓				
Senator Kilzer	✓				
Senator Fischer	✓				
Senator Lee	✓				
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 6 (yes) 0 (no)

Absent 0

Floor Assignment Sen Fischer

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 4, 1999 8:45 a.m.

Module No: SR-39-3989
Carrier: Fischer
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1028, as engrossed: Human Services Committee (Sen. Thane, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1028 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

HB 1028

Fact Sheet: Child Support Enforcement Division

What is it? Child Support Enforcement is a joint state, county, and federal partnership to collect child support to ensure that children have the financial support of both their parents, to foster responsible behavior toward children, and to reduce welfare costs.

Who does the division serve? Our primary customers are the children for whom we collect funds for their support and medical care. We also serve custodial and non-custodial parents.

What services are provided? Working with the Regional Child Support Enforcement Units, we locate non-custodial parents, establish paternities, establish court ordered child support and medical support, and periodically review and adjust support obligations.

Who can apply for services? Either parent can apply for services. Applicants for TANF, Medi-caid, or Foster Care are referred to us for service.

Are there fees? We do not charge a fee for services.

How is the division funded? The federal government provides 66% of our budget; the state is responsible for the rest. The Regional Child Support Enforcement Units are responsible for their costs, generally relying on local property taxes.

How much is collected? Through the combined efforts of the regional units, the state office, and the federal government, our collections continue to increase at double digit rates each year. In calendar year 1998, we collected \$40.8 million, an 11.65% increase over 1997. In contrast, we collected \$12.1 million in 1990.

Where does the money go? Most of the amounts collected are sent to the families. A portion is retained to repay the federal, state, and county governments for TANF, Foster Care, and Medicaid payments made on behalf of families.

What about the penalty? The division is currently under federal penalty because we did not get FACSES, our Fully Automated Child Support Enforcement System, sufficiently developed to meet federal certification standards. The penalty, a percentage of the federal administrative funds available to us, was \$125,000 for 1998 and \$250,000 for 1999. We expect to become certified during 1999 and recover 90% of the penalty for the year, resulting in a total net penalty of \$150,000.

What does it cost to operate the Child Support Enforcement program statewide? The regional offices and state office spent a combined \$7.6 million in federal fiscal year 1998. Our appropriation request for the state office in the upcoming biennium, as approved in the Governor's budget, is \$6.3 million of which \$106,981 would be general funds.

How many cases are handled? We have about 35,000 cases, each of which involves at least three people — a child, the mother, and the father. These are primarily in-state cases, but by working with other states and other countries, we also serve people across the United States and internationally.

What does the future hold? We expect change in the future. With the continued emphasis at the federal and state level for people to be more self-sufficient, and the TANF imposed 60-month time limit, all levels of government and society will need to collect the amounts due for the support of children. The change in the immediate future involves bringing all case information into FACSES so that it can be certified. The guidelines, which are in the process of amendment, need to be finalized once the Legislature completes its work. The enforcement tool chest will also be revisited to ensure we are using all the appropriate tools to collect what is due. We will continue to work with our customers to ensure that we are providing prompt, courteous and accurate services.

Prepared January 1999 for the North Dakota Department of Human Services. For information call (701) 328-3582.

House Bill 1028
January 13, 1999
10:00 am
Ft Union Room

- Cafeteria
- Self employed exempt
- Minimum requirement for employment
- No influence
- Court tax and assess C.S.

Chairman Price, members of the House Human Services Committee, my name is Daniel Biesheuvel, lobbyist for R-KIDS of North Dakota.

R-KIDS were influential in introducing the interim committee to the case that initiated this bill. Dan Lawrence took this case all the way to the Supreme Court (Lawrence v Delkamp), with a "friend of the court" brief provided by Bill Strate of the DHS.

Mr. Lawrence's workers benefits that were included in gross income, but not deducted from net income raised his child support another \$400.00 a month. Included was his parking space, company Christmas party, and job required employee benefits.

R-KIDS and DHS contention was that if the employee cannot influence the benefit without penalty, it should not be considered as income. Once in the control of the employee, it will be assessed the appropriate tax liability, and then appropriate support obligations.

Thank you, and I will attempt to answer any questions.

**TESTIMONY BEFORE THE
HOUSE HUMAN SERVICES COMMITTEE
REGARDING HOUSE BILL NO. 1028**

January 13, 1999

Chairman Price and members of the House Human Services Committee, my name is Blaine Nordwall, and I appear on behalf of the Department of Human Services. The department supports this bill. We are concerned that several recent court cases have firmly established that, under current law, employee benefits that have not and cannot be liquidated must be considered as income in setting child support.

Under N.D.C.C. § 14-09-09.7, the department is responsible for adopting child support guidelines consistent with requirements of the statute. The North Dakota Supreme Court has required that those guidelines be adopted as administrative rules.

The department has begun the process of amending Child Support Guidelines and expects to include language with the same practical effect as House Bill 1028. The current practice of considering employee benefits as gross income is unfair to employees who have no practical means of liquidating the benefits and whose employer decides the nature or amount of benefits. If House Bill No. 1028 becomes law, we will incorporate its provisions in the guidelines.

We have also drafted, and recommend, an amendment to clarify that employee benefits that are liquidated can be counted as income, and that payment of income tax is not a penalty. It should be clear in the bill that liquidated benefits are counted and benefits that cannot be liquidated without an income tax penalty should not be counted. It also should be clear that payment of income tax is not the "penalty" referred to in the bill.

Presented by:

**Blaine L. Nordwall
Director, Legal Advisory Unit
ND Department of Human Services**

Prepared by the North Dakota
Department of Human Services
1/6/99

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1028

Page 1, line 8, after "any" insert "unliquidated"

Page 1, line 11, after the period insert "For purposes of this subsection, income tax due or paid is not an income tax penalty."

Renumber accordingly

Brief Prepared for Testimony for the 56th Legislature
Child Support Guidelines
Human Services Committee

Mark Hafner

My name is Mark Hafner and I am from Beulah ND where I have lived all my life. I am married to Denise and we have a 6 month old son, Josten. I work for the Coteau Properties Company and Denise works as a transcriptionist at Missouri Slope Clinic in Beulah

I was divorced from my first wife in 1991. Her name is Brenda and we have two daughters Kara now 13 and Deanna now 11. They moved to Tehachapi, CA shortly after our Divorce to live with her parents there. Brenda was originally from Hazen, ND and had lived in ND all her life but her parents had moved to CA shortly after we were married.

I will try to show in this brief, different parts of my divorce story and will tie them into different aspects of how legislation being looked at affects these situations.

HB 1346 Mandatory Mediation.

When we, meaning Brenda and myself first got divorced it was agreed that we did not want a big fight in court that would in turn hurt the kids and cause more problems between the two of us. Although we both had attorneys, almost all aspects of our divorce were agreed to between us. This aspect of our divorce went fine and seemed to be working fine until, and this is the problem with this idea, the spring of 1998 after she found out Denise was pregnant she decided she needed more money for Child Support and filed for such. I had assumed when our Divorce was settled and everything had been agreed to that this stipulation was binding and would be for the term of the children's eligibility. This was as I found out later not to be true. Child support as I found out can be changed later even though she knew what the guidelines required at the time of our Divorce and she admitted to knowing in court in October, under oath. My recommendation for this bill is that it would pass with the addition that this is a legal obligation by both parties and cannot be broken in a court of law or by the Child support Enforcement Unit at a later date for either persons purposes.

HB 1280 Child Support Income Shares Guidelines.

I recently went to Court for a raise in Child Support brought on by Brenda by the Child support Enforcement Unit. A few things should be mentioned here about incomes for the benefit of this bill. I work for the Coteau Properties Company and work a 40 hour week Guaranteed with a base salary of \$50386 a year. Denise works 30 hours a week at her job and will have a base salary of \$10875. As noted before we have a child from the two of us. In our case Denises salary is now figured into the basis of my support for my two Daughters. By the guidelines now in place I am paying Brenda \$991 a month in support for two children I see once a year. Brenda currently works a 40 hour a week job and is paid about \$7.50 an hour for a base pay of \$15600. Brenda is remarried and her husband works as a civilian aircraft mechanic at Edwards Airforce Base making over \$50000 a year. They are also still living with Brenda's parents who are both claiming disability and don't work. Add their incomes up and they make about \$65000 a year plus the \$12000 I send them a year. Living with Brendas parents, she only pays half the expense of the household and does not require any day care expenses. For the purpose of my case and all other cases I strongly believe that Shared Guidelines should be in place no matter how large the cost to the state, even though it would not be as large a cost as previously testified, because it is the right thing to do to fix a very unfair practice to the obligor of the children.

HB 1028 & 1029 Employee Benefits, Overtime and Second Job Exclusions.

Up until July of 1998 overtime at Coteau was very easy to come by for those that wanted to go outside their own departments to work it. Up to that point I was working overtime in my own department as well as picking up overtime in other departments. The day I am writing this is January 31, and from this day back to July 17, 1998 I have not worked any overtime, in any department. Although I am willing to work overtime it is not available anymore. Why is this important to know? When I went to Court in October I entered evidence that my income for 1998 would fall far short of what I made in 1997 and would even be less in 1999. The attorney for the Child Support Enforcement Unit turned my numbers around and added and subtracted and probably multiplied to come up with her own figures to suit their own needs. She came up with numbers showing that I would earn \$57853 in 1998 and 1999 and claimed that my figures were and I quote [Speculative and self serving to better my own interest] un-quoted. Recently I just received my W-2 for 1998. During court I testified under oath that I would make \$55000 in 1998. Guess what. My total wages for 1998 were \$54892.17. I also testified that in 1999 my wages because of the lack of overtime would continue to drop and with a possible raise in March of that year I would probably make \$52000, with again the same response from the Child Support Enforcement Unit. This figure will be what I will make this year and I will more than likely be back in court to have my case refigured in July. I leave this issue with these two thoughts, with my wage set at \$52000 which is a true and accurate figure I would not have to waste the courts time to reassess my support and the children would have been fine. And second who is being speculative and self serving to better their own interest. Please pass this bill on.

SB 2039 Child Support Guidelines and Extended Visits

My two children, Kara and Deanna live in CA with their mother, new dad and Grandma and Grandpa. I have visitation rights to see them for 6 weeks in the summer in 1999 and 2000 and 8 weeks from then on. I am required from the before mentioned agreement to pay all travel expenses to and from Ca to ND. These travel expense add up to more than \$1500 and are figured into my Child Support, but only amount to a deduction in support of \$15 a month. Being my children live in CA, when they step of that plane what they bring with them in their one small suitcase apiece is what they will have for the time they are with us. We can't just drive back to moms later and pick something up. We will have to by whatever they need to get by with, and in most cases their mother does this on purpose just so the girls will get new things. Also now that my girls are here we now have to pay daycare, which as noted she doesn't have to pay anyway, we now have to run all over to keep them entertained, feed them, etc. Which are all things she no longer has to do. I strongly urge the passage of this bill.

Required Benefits

As mentioned above I am required to pay almost \$1500 in travel expenses to get my girls back to CA. Although \$1200 of this is deducted in my Child Support it only comes of my net monthly income and gets me a \$15 break on my support. Spend \$1500 get a break of \$180. I am also required By my divorce to provide Life Insurance policies on both Kara and Deanna for \$25000 apiece that would also accrue interest and be made available to them when they go to college. I am also required to have \$100000 life insurance policy with the same effect that lists Kara and Deanna as beneficiaries. These three policies are required by divorce and cost me \$100 a month with no consideration on my Child Support. In reality then I am paying \$991 for support plus \$225 for travel expenses and insurance with a total of \$1216. Someone else whose children lived nearby and was not required to have Life Insurance policies which by the way is not a requirement would then only be paying \$991. This is a good bill and should definitely be passed

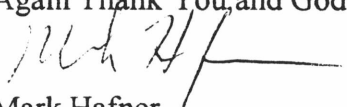
SR 2197 False allegation of Domestic Violence

As noted before I just finished going through courts on Child Support and myself going for more visitation. On the issue of more visitation the judge did rule in our favor for more visitation. My X- wife did not like this. After everything was completed and I thought over for now I received in the mail a copy of a letter sent to the judge from her attorney disagreeing with his finding for longer visitation and claiming Domestic Violence In our previous marriage and my current marriage. No mention of Domestic Violence was ever mentioned in our first divorce or in the courtroom while arguing case points for longer visitation. The reason being that it could never be proven by her because it didn't exist and was only made as a allegation in a desperate measure for a change that I could now not defend myself against. This Bill will not keep people that are involved in a domestic situation from reporting it but it will deter false accusations from being made or at least give the accused the protection that they need.

In closing I would like to say that I know these are only a few of the bills being looked at but I think they are all a good start to Make the Child Support System more fair than it is. It would eliminate most of the complaints, problems and injustices brought on by a system that is totally for the well being of the custodial parent with no rights at all to the non-custodial parent regardless of how good a parent they are. I also firmly believe that this system of Child Support Enforcement that is in place only affects those people who are as good of parents as they can be by continually going after these people for more and more things while those people who could care less about their kids, continue to not support their children and never see their children continue to be looked over, pampered to and basically don't have any thing happen to them. I also believe the Department of Human services and especially the Child Support Enforcement Units need to learn to be more fair and understanding in their methods and should not be speculative and self serving just to fit their needs.

I Thank You for taking the time to read this description of my case, how these bills affect me and how I feel about them and this system in North Dakota. I have tried to keep as much of my negativity about this system as it is now, out of this description and in no way mean to offend anyone if it did. I believe North Dakota is an excellent place to live and raise children and I know that you people are doing your best to make it a fair and equal place for all people to live.

Again Thank You, and God bless you and your work here,


Mark Hafner
5840 4th St NW
Beulah ND 58523

file

Gregg & Wendy Boyer
4360 Hwy. 1806 B.Y.P.
Mandan, ND 58554-7901

October 12, 1998
Blaine L. Nordwall

We are responding to the proposed amendments to N.D. Administrative Code ch. 75-02-04.1, **Child Support Guidelines**.

In 1996 we became involved with the social services system in North Dakota due to the unruly behavior of our daughter. During the process of social services determining our obligation as self-employed persons to pay for their help in this matter of child support, the topic of capital gains and depreciation came up in their calculations. The position that social services took was that all capital gains and all depreciation gains should be used to determine our overall income. My wife, Wendy, and I both testified that neither of these sources were viable income in providing for our family's needs. *The revenue from these sources went right back into our farm operation in the form of debt retirement or purchase of equipment to change our farm operation to cash crop alfalfa from raw crop productions. The value of these two sources were not used to buy groceries or provide personal needs for our five children.*

Initially Judicial Referee Robert Fried ruled in our favor and we received what we considered a fair monthly child support obligation. At this time the attorney representing Burleigh county, Rhonda Pierce, appealed the Judicial Referee's decision stating that all capital gains and depreciation must be included to determine child support payments, quoting the sections from the Century Code that you are now considering - 75-02-04.1-01. Eventually the Referee changed his decision and our monthly payment was raised to a level that is unbearable for us as a family.

I have been communicating with former state Senator Evan Lips of Bismarck on this issue. Sen. Lips served for 38 years in the Senate of North Dakota and spent many of these years on the Senate Human Services Committee. When I asked Sen. Lips about this issue he told me with no hesitation that it was his understanding that the Human Services Committee and the State Legislature never intended these two items, capital gains and depreciation, to be used against families in North Dakota the way they have been used in this case. He is suggesting a legislative solution to the problem and is advising me about implementing that process. I am responding to you in the hope that this will not be necessary.

In my initial investigation concerning this process I was told by Mike Schwindt that you were conducting oral hearings and taking written testimony on these very Century Code sections and that in his opinion I should submit my concerns to you.

We believe there is a lack of understanding on the part of some of those included in the process of determining child support payments in regard to self-employed parents as opposed to parents employed by another. The cost of maintaining the operations of a business is something you simply cannot fully understand until you have been in the position of making those decisions and determining where available capital should go to ensure a reasonable chance of future profit.

We are asking that these two items, **capital gains and depreciation**, be dropped in computing child support payments for those who are self employed and possibly for others as well! **It is unfair to the families of North Dakota to have these items included in their income calculations when they do not go into the actual household income.** We are also asking that all child support decisions in the last 5 years which were influenced by these two items be reviewed and adjusted to show a child support payment that does not include capital gains and depreciation.

We thank you for your consideration in this matter. Please feel free to contact us for any further information on this matter.

Sincerely,
Gregg & Wendy Boyer

**TESTIMONY BEFORE THE
SENATE HUMAN SERVICES COMMITTEE
REGARDING ENGROSSED HOUSE BILL NO. 1028
February 24, 1999**

Chairman Thane and members of the Senate Human Services Committee, my name is Blaine Nordwall. I appear on behalf of the Department of Human Services. The department supports this bill. We are concerned that recent court cases have firmly established that, under current law, employee benefits that have not and cannot be liquidated must be considered as income in setting child support.

Under N.D.C.C. § 14-09-09.7, the department is responsible for adopting child support guidelines consistent with the requirements of the statute. The North Dakota Supreme Court has required those guidelines be adopted as administrative rules.

The department has begun the process of amending Child Support Guidelines and expects to include language with the same practical effect as Engrossed House Bill 1028. The current practice of considering employee benefits as gross income is unfair to employees who have no practical means of liquidating the benefits and whose employer decides the nature and amount of benefits. If Engrossed House Bill 1028 becomes law, we will incorporate its provisions in the guidelines. We understand that it is not the intention of this legislation to regard payment of taxes as a penalty.

If the committee has any questions, I'd be happy to answer them.

Presented by:

**Blaine L. Nordwall
Director, Legal Advisory Unit
ND Department of Human Services**

House Bill 1028
February 24, 1999
9:30 am
Red River Room

Chairman Thane, members of the Senate Human Services Committee, my name is Daniel Biesheuvel, lobbyist for R-KIDS of North Dakota.

R-KIDS was influential in introducing the interim committee to the case that initiated this bill. Dan Lawrence eventually took this case all the way to the Supreme Court (Lawrence v. Delkamp), with a "friend of the court" brief provided by former Director of the Child Support Enforcement Unit, Bill Strate. R-KIDS and the DHS contention was that if the employee cannot influence the benefit without penalty and taxation, it should not be considered as income. Once in the control of the employee, it will be assessed the appropriate tax liability, and then appropriate support obligations. The Supreme Court instead decided that worker's benefits could be included. That's why we need this legislation.

This cannot be sidestepped by an obligor that is self-employed, or an employee who requests his employer to "stash" income away in retirement funds.

The issue of the self-employed having the freedom to invest without that being considered assessable income has been raised. I drafted a bill that would allow a certain percentage of self-employed income to be invested in retirement and for health insurance. This bill was not pursued.

Mr. Lawrence's workers benefits that were included in gross income, but not deducted from net income raised his child support substantially every month.

Rule of thumb: If you can't tax it, you can't assess child support to it. Simple.

Thank you, and I will attempt to answer any questions.

PROPOSED SELF-EMPLOYED RETIREMENT/HEALTH BENEFITS BILL

00000.0000

FIRST DRAFT:

Prepared for the Legislative Council staff for the
Child Support Committee

December 1998

Fifty-sixth
Legislative Assembly
of North Dakota

Introduced by

1 A BILL for an Act to amend and reenact subdivision ___ of subsection ___ of section 14-00-00.7
2 of the North Dakota Century Code, relating to allowing the self employed to provide for their
3 retirement and health needs without penalty.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION __. AMENDMENT.** Subdivision ___ of subsection ___ of section 14-00-00.0 of
6 North Dakota Century Code is amended and reenacted as follows:

7 ___ Seeing it a right and duty for everyone to provide for themselves in a lawful and
8 efficient manner, any self-employed person must be allowed to set aside funds
9 for their retirement.

10 These self employed persons should be able to set aside a maximum of 10% of
11 their gross income for retirement in an account not to be withdrawn from without
12 penalty (as with any other retirement fund).

13 These self employed persons should also be able to set aside a maximum of
14 10% of their gross income for health insurance.

15 Once these amounts are set aside, they will be considered as a deduction from
16 from gross income to determine net income, and will not be included in the
17 assessment of any payments determined by net income.

18 This will be implemented as an emergency.

March 1, 1999

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1028

Page 1, line 7, after the second period insert "(1)"

Page 1, line 10, replace "(1)" with "(a)"

Page 1, line 11, replace "(2)" with "(b)"

Page 1, after line 12, insert:

"(2) For purposes of the guidelines, adjusted gross income from self-employment is equal to adjusted gross income as calculated under the Internal Revenue Code and depreciation may not be added to determine net income from self-employment."

Renumber accordingly

not adopted



NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES

STATE CAPITOL - JUDICIAL WING
600 E BOULEVARD AVE DEPT 325
BISMARCK, NORTH DAKOTA 58505-0250



K. Olson, Executive Director

March 1, 1999

Edward T. Schafer, Governor

The Honorable Judy Lee
North Dakota State Senator
State Capitol
600 E. Blvd. Ave.
Bismarck, ND 58505

RE: Proposed Amendments to Engrossed House Bill No. 1028

Dear Senator Lee:

On March 1, 1999, the department received from an unknown source a copy of Proposed Amendments to Engrossed House Bill No. 1028 bearing a notation that they were prepared for you by Legislative Council staff. The department has concerns with respect to these proposed amendments and could not support Engrossed House Bill 1028 should these amendments be included.

The amendments require child support calculations for self-employed individuals to be based upon the IRS adjusted gross income. That would allow self-employed individuals, who have absolute control over their own employee benefits, to effectively deduct the full cost of those employee benefits. As a consequence, the original "employee benefit" provisions of the bill would not apply to self-employed persons. We are concerned that these amendments could disadvantage the children of self-employed obligors.

For your information, the department proposed amendments to the child support guidelines to eliminate the practice of adding depreciation amounts in determining an obligor's income. While we have not finalized those rules, we have examined all public comments and have no basis not to adopt a final rule that eliminates the depreciation add-back.

We would welcome an opportunity to visit with you or the Senate Human Services Committee regarding these concerns.

Proposed rule would remove sec. 2 code & eliminate adding back depreciation - any deduction not requiring a cash outlay. eliminate subtracting principal payments.

Sincerely,

Michael R. Schwindt
Director, Child Support

law
cc: The Honorable Russell T. Thane, Chairman
Senate Human Services Committee

GENERAL INFORMATION	(701) 328-2310	ECONOMIC ASSISTANCE	(701) 328-2332
FAX	(701) 328-2359	EXECUTIVE OFFICE	(701) 328-2538
TDD	1-800-366-6888	FIELD SERVICES	(701) 328-2310
		PROGRAM & POLICY	(701) 328-2310

HB 1028

Lee

1. Agree that it may jeopardize the original Bill w/ Amendment - Especially with Mike S. Comment in letter.
2. Concern is with the flexibility that Department has with rules.
3. Concern with Rule that addresses the depreciation in the calculation. excepts Sec. 179 depreciation, but there is no indication that a recalculation will be forthcoming on assets that had Sec 179 for tax purposes. (Attached illustration)
(Possibly a little more clarification in the rule)
4. IF we do not propose Amendment, is there a way to get legislative support in getting Rule to meet our expectations?

Allowance for depreciation in calculating child support

Rule as written, does not allow the use of IRS code section 179 depreciation in the calculation.

Section 179 depreciation is a special election made to take an added amount of deduction in the year of purchase... The maximum in 1998 was 18,500.

If section 179 depreciation is not allowed in the calculation, then the calculation should allow for the add back of that amount to the net income from self-employment and a recalculation of what the normal depreciation would be on the asset(s) that had the section 179 depreciation claimed.

Illustration:

Tractor acquired for cost of \$35,000

Section 179 depreciation allowable for IRS is \$18,500

Balance available for other depreciation is \$16,500

In the first year the total depreciation allowed for tax purposes would be \$20,268

With the mere deduction of the \$18,500 for section 179, the total allowed would be \$1,982.

If there is a recalculation of depreciation based on no section 179, the depreciation for the year would be \$3,750.

Without the additional step in the calculation of self employment income, depreciation of $(3,750 - 1,982)$ \$1,768 would be lost.

February 24, 1999

SENATE HUMAN SERVICES COMMITTEE

HB 1028

CHAIRMAN THANE AND COMMITTEE MEMBERS:

My name is Arnie Fleck, I am an attorney who is licensed to practice law in the State of North Dakota. I am employed by the Wheeler Wolf Law Firm of Bismarck, North Dakota, and have been practicing law in the private sector for the past 12 years. My practice primarily consists of civil litigation, wherein I am involved in a lot of domestic relation cases, involving divorce, child custody, child support and visitation. I am opposed to HB 1028 and appear in my capacity as a concerned citizen who believes in equal justice for all.

HB 1028 is an attempt to overturn the decision of the North Dakota Supreme Court in Lawrence v. Delkamp, 1998 ND 178, 584 N.W.2d 515. In Lawrence v. Delkamp the Supreme Court held that it was proper to include employer-paid benefits as gross income in determining the proper child support obligation under the child support guidelines. Including the \$11,008 worth of annual tax free employer-paid benefits in the calculation of the obligor's child support obligation resulted in \$1,740 more in child support payments annually, less than 16% of the value of the benefits. I represented Tina Delkamp, the appellee in that case. We successfully defended the father's appeal of the trial court's decision to include the benefits.

The House Human Services Committee was given inaccurate information about the facts in Lawrence v. Delkamp when the committee took testimony on HB 1028. Though I informed the committee of the inaccuracy of the information in my testimony, I'm not certain who the committee believed. To prevent such inaccurate information being given any credence by you, I've attached a copy of the decision in Lawrence v. Delkamp.

HB 1028, as approved by the House, will as a practical matter exclude employer-paid benefits from the determination of an obligor's child support obligation in the vast majority of the cases. I believe employer-paid benefits should only be excluded if doing so creates a hardship for the obligor.

Excluding employer-paid benefits from the calculation of child support in virtually every case, would undermine the public policy favoring adequate support and maintenance of minor children.

If employer-paid benefits are not included in determination of an obligor's child support obligation, one can foresee companies, most likely those operated by family members of an obligor or a former obligor, revamping their compensation systems to provide low pay with substantial benefits to attract obligors who are looking to undermine their support obligations. Though such companies would probably be the exception to the rule, one such company would be one to many, as at least one child would be victimized as a result.

It is not uncommon for an obligor to work for a family owned business. To place the burden on the custodial parent to prove some form of conspiracy to evade child support on the part of the employer and employee would not be fair. Conspiracies are hard to prove and cost prohibitive. Most custodial parents live from paycheck to paycheck and could not afford to pursue such litigation. As a result, such claims would not likely be pursued.

Because of the cost, it's not likely that many custodial parents will be in a position to litigate issues arising from the provisions of HB 1028 which suggest that employer-paid benefits are to be included in the calculation of child support, if the obligor has "significant influence and control over the nature and amount" of the benefit or if the benefit "may be liquidated [without] incurring an income tax penalty." As a result, enactment of HB 1028, as approved by the House, will result in the exclusion of employer-paid benefits from the vast majority of the cases, regardless of whether or not the benefits should be included under the wording of HB 1028.

Including employer-paid benefits in the calculation of child support in all cases, with the exception of cases where it would cause a hardship, is also fair. Under the provisions of HB 1028, as passed by the House, the stage is set for some very unfair results.

As drafted HB 1028 would require that the employer-paid benefit be included in the calculation of the child support, if the obligor has "significant influence or control over the nature or amount" of the benefit. This would result in people who are paid the same amount in wages and receive the same benefits paying different amounts of child support, and people who are paid the same amount in wages and receive drastically different benefits paying the same child support.

Such results are possible, because an obligor who is self-employed or owns a controlling interest in a business that employs the obligor should be found to have a "significant influence or control over the nature or amount" of the benefit, which would result in the inclusion of the benefits in the determination of his child support obligation. Whereas, the calculation of the support obligation for an obligor, who is paid the same wages and receives the same benefits who is employed by a business over which he has no control, would not include the benefits. Such a situation is not fair, particularly since it is the person who takes the risk of running his own business who will always have his benefits included in the determination of his support obligation.

Many employers provide cafeteria plans which allow their employees to elect to have an employer contribution paid to them as wages, applied to costs of providing insurance coverage to the employee and/or invested in a tax-deferred savings plan. Under a cafeteria plan, the employees can elect to have some of his salary withheld and pooled with the employers contribution to be used to purchase insurance or invested under the plan. Any amount of the employer contribution paid to the employee as wages is treated as taxable income. Any amount applied to insurance coverage is not taxable income, and no tax is paid on any amount invested in a tax-deferred savings plan until the money is withdrawn. Typically, smaller companies,

who pay their employees less, are more inclined to provide cafeteria plans, because a cafeteria plan allows the employer to control the cost of providing the benefits to the employees. Unless the employer elects to increase the employer contribution for each employee, the employer's costs remain relatively the same from year to year. Whereas, for an employer, who provides insurance coverage and a pension plan as benefits to its employees without an option to receive the costs of the benefits as wages, the costs of the benefits increase as the premiums for the insurance increase and salaries of the employees increase.

Since, under a cafeteria plan, the employee has the option of receiving the employer's contribution as wages, the employee should be found to have a "significant influence or control over the nature or amount" of the benefit, which would result in the inclusion of the benefits in the determination of his child support obligation. Whereas, that would not be true for employees who receive benefits without such an option. If HB 1028 is enacted, obligors who receive benefits under a cafeteria plan, regardless of how they elect to use the employer contribution, will find themselves paying child support based on a determination of gross income which includes their employer's contributions. Under such a system, the employees of large corporations that pay substantially more than the average wage will not only receive better pay and benefits, but will also pay less child support proportionately speaking, than those who receive benefits under a cafeteria plan or no benefits at all.

Including employer-paid benefits in the determination of child support provides a much more fair means of determining child support, while at the same assuring that children receive adequate support.

Most employer-paid benefits, such as dental, health, life and disability insurance and retirement funds, are considered in our society as necessities. Since the employer pays for these necessities without any tax consequences to the employee, the employee is free to spend or save more of his wages on non-necessities, than an obligor who receives no such benefits but a similar amount in wages. Since the employee doesn't have to expend his wages on such expenditures, he has more money "available" for child support, than an obligor who doesn't receive such benefits. Furthermore, since premiums paid for insurance coverage under an employer funded group insurance plan are discounted and the amount paid for the insurance by the employer is not taxable income to the employee, the cost to the employee, if he had to purchase similar coverage on his own, would be substantially higher. Thus, an employee who receives such benefits really does have more money available, than one who doesn't.

In cases where including employer-paid benefits may cause hardship to the obligor, the child support guidelines already provide a means of avoiding any hardship that may result. N.D. Admin. Code § 75-02-04.1-09(2)(j) allows a reduction in the amount of child support presumed to be correct under the guidelines in the following situations:

... if a preponderance of the evidence establishes that a deviation from the guidelines is in the best interest of the supported children and ... [t]he reduced

ability of the obligor to pay child support due to a situation, over which the obligor has little or no control, which requires the obligor to incur a continued and fixed expense for other than subsistence needs, work expenses, or daily living expenses ...

This provision allows a trial court to reduce an obligor's monthly child support payment, if the court determines it is in the children's best interest to do so and it is established that the obligor had little or no control over the determination of the benefits provided to him by his employer. The need to reduce an obligor's support obligation due to hardship is not likely to arise too often. It is my experience that the cost of employer-paid benefits is most often proportionate to the wages paid to the employee (i.e. the more an employee is paid in wages, the more he receives in benefits). The facts in Lawrence v. Delkamp offer a perfect example. The amounts contributed by the employer to the obligor's 401(k) and pension plan, as well as the amount of life insurance coverage provided as a benefit, are based on formulas which include the obligor's annual salary. Thus, the value of the benefit package provided to each employee is directly related to the employee's salary. The value increases as the employee's salary increases.

The Department of Human Services has completed hearings on amendments to the child support guidelines, which, if promulgated, would implement the provisions of HB 1028, even if HB 1028 is not enacted into law. Therefore, if you agree that employer-paid benefits should be taken into consideration in determination of child support, either HB 1028 needs to be amended to require that the guidelines include such benefits or the legislative history of HB 1028 needs to clearly indicate that HB 1028 did not pass because the legislature approved of the holding in Lawrence v. Delkamp. Since the House has already passed HB 1028, enacting amendments to HB 1028 which require that employer-paid benefits be included in the determination of child support would provide the clearest message of the legislative intent, which in turn should prevent the Department from promulgating guidelines contrary to the holding in Lawrence v. Delkamp. Guidelines promulgated by the Department may not exceed or contradict the legislative grant of authority.

Attached are proposed amendments which, if enacted, should prevent the Department of Human Services from promulgating amendments to the child support guidelines which would overturn the holding in Lawrence v. Delkamp. The attached amendments would amend N.D.C.C. § 14-09-09.7 to read as follows:

- a. Include consideration of gross income. For the purpose of the guidelines, gross income includes the cost of an employer-paid benefit, unless to do so creates a hardship for the employee.

I, therefore, respectfully request that HB 1028 be amended as set forth in the attached proposed amendments or, at a minimum, that your committee recommend a DO NOT PASS of HB 1028, with the minutes of the committee reflecting that the reason for the committee's do not pass vote is that it agreed with the ruling in Lawrence v. Delkamp.

*515 584 N.W.2d 515

1998 ND 178

John Daniel LAWRENCE, aka, Dan Lawrence, Plaintiff and Appellant,
v.
Tina Lucille DELKAMP, Defendant and Appellee.

Civil No. 980015.
Supreme Court of North Dakota.
Sept. 29, 1998.

Mother moved to invalidate father's prior child support obligation and to set new obligation under child support guidelines. The District Court, Burleigh County, South Central Judicial District, Benny A. Graff, J., calculated father's child support obligation at \$942 per month, and father appealed. The Supreme Court, Neumann, J., held that (1) premium payments made by father's employer on his behalf for dental insurance, health insurance, life insurance, long-term disability insurance, and accidental death and disability insurance constituted "income from any source" which district court was statutorily required to consider in calculating father's child support obligation under guidelines, and (2) contributions by father's employer to father's pension fund and tax deferred savings plan were "deferred income" which district court was statutorily required to consider in calculating father's child support obligation under guidelines.

Affirmed.

VandeWalle, C.J., filed an opinion concurring in the result in which Sandstrom, J., joined.

1. PARENT AND CHILD ↪ 3.3(10)
285 ----
285k3 Support and Education of Child
285k3.3 Actions to Compel Support or Payment for Necessaries
285k3.3(10) Review.

N.D. 1998.

District court's determination of child support is a finding of fact which will not be reversed on appeal unless it is found to be clearly erroneous.

2. APPEAL AND ERROR ↪ 1008.1(5)
30 ----
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(5) Clearly erroneous findings.

N.D. 1998.

Finding of fact is "clearly erroneous" when it has been induced by an erroneous view of the law, if there is no evidence supporting the finding, or if, after review of all the evidence, the court is left with a definite and firm conviction that a mistake has been made.

See publication Words and Phrases for other judicial constructions and definitions.

3. PARENT AND CHILD ↪ 3.3(7)
285 ----
285k3 Support and Education of Child

285k3.3 Actions to Compel Support or Payment for Necessaries
285k3.3(7) Amount of award.

N.D. 1998.

Child support guidelines are mandatory "presumptively correct" guidelines. NDCC 14-09-09.7, subd. 3.

4. PARENT AND CHILD ⚡ 3.3(7)

285 ----

285k3 Support and Education of Child

285k3.3 Actions to Compel Support or Payment for Necessaries

285k3.3(7) Amount of award.

N.D. 1998.

Accurate finding of a parent's income is necessary to determining the proper amount of that parent's child support obligation under the guidelines. NDCC 14-09-09.10, subd. 8.

5. PARENT AND CHILD ⚡ 3.3(7)

285 ----

285k3 Support and Education of Child

285k3.3 Actions to Compel Support or Payment for Necessaries

285k3.3(7) Amount of award.

N.D. 1998.

Child support guidelines use the "net income" approach; this does not mean the net income used to determine an obligor's child support obligation will coincide with the net income from a paycheck, but rather, net income under the guidelines refers to the remaining balance once specified deductions are subtracted from the obligor's gross income. N.D.Admin. Code § 75-02-04.1-01(7)(a-h).

See publication Words and Phrases for other judicial constructions and definitions.

6. STATUTES ⚡ 188

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 In general.

N.D. 1998.

Supreme Court must use the words of a statute as they are used in their ordinary sense, absent a contrary intent. NDCC 1-02-02.

7. CHILDREN OUT-OF-WEDLOCK ⚡ 67

76H ----

76HV Paternity Proceedings

76Hk63 Judgment or Order

76Hk67 Award for support and expenses.

N.D. 1998.

Premium payments made by father's employer on his behalf for dental insurance, health insurance, life insurance, long-term disability insurance, and accidental death and disability insurance constituted "income from any source" which district court was statutorily required to consider in calculating father's child support obligation under guidelines. NDCC 14-09-09.10, subd. 8; N.D.Admin. Code § 75-02-04.1-01(5).

8. CHILDREN OUT-OF-WEDLOCK ⚡ 67

76H ----


76HV Paternity Proceedings

76Hk63 Judgment or Order

76Hk67 Award for support and expenses.

N.D. 1998.

Contributions by father's employer to father's pension fund and tax deferred savings plan were "deferred income" which district court was statutorily required to consider in calculating father's child support obligation under guidelines. NDCC 14-09-09.10, subd. 8; N.D.Admin. Code § 75-02-04.1-01(5).

9. PARENT AND CHILD  3.3(7)
 285 ----
 285k3 Support and Education of Child
 285k3.3 Actions to Compel Support or Payment for Necessaries
 285k3.3(7) Amount of award.

N.D. 1998.

Child support obligee is not required, as part of his or her burden of discovering all suitable income of obligor for purposes of calculating obligor's child support obligation, to determine whether rights have vested in portions of obligor's income, such as contributions by obligor's employer to pension fund and/or tax deferred savings plan.

*516 James J. Coles of Snyder Coles Lawyers, Bismarck, for plaintiff and appellant.

Arnold V. Fleck of Wheeler Wolf, Bismarck, for defendant and appellee.

Candace A. Prigge Assistant Attorney General, Bismarck, amicus curiae.

NEUMANN, Justice.

[¶ 1] John Daniel Lawrence appeals from the district court's judgment increasing the child support payment and affirming the original judgment as amended. We affirm the judgment of the district court.

I

[¶ 2] A child was born in August of 1992 to John Lawrence and Tina Delkamp. Lawrence and Delkamp were never married to each other. On October 9, 1992, the district court entered a stipulated judgment giving custody and care of the child to Lawrence. The judgment also directed no child support be paid to or by either party.

[¶ 3] On May 22, 1995, the district court entered an amended judgment incorporating a child and visitation agreement entered into by the parties subsequent to the first stipulated judgment. The amended judgment gave Delkamp custody of the child, and directed Lawrence to pay \$540 per month in child support.

[¶ 4] On June 6, 1996, by stipulation of the parties, the district court entered another judgment amending the May 22, 1995, judgment. This second amended judgment among other things decreased Lawrence's child support obligation to \$200 per month.

[¶ 5] On June 30, 1997, Delkamp moved to invalidate Lawrence's child support obligation of \$200 per month and set a new obligation consistent with the North Dakota Child Support Guidelines.

[¶ 6] On November 6, 1997, the district court entered judgment amending Lawrence's child support obligation to \$942 per month. The district court found Lawrence would earn \$59,134 in taxable wages in the following twelve months from his employer Dakota Gasification Company (DGC). In addition, Lawrence would receive \$1,106 in interest and dividend income. The district court also found Lawrence would receive other tax-exempt income and benefits: Lawrence's contribution to his 401k plan (\$2,347), Lawrence's employer's contribution to the 401k plan (\$2,347), medical insurance *517 premiums paid by DGC (\$2,605), dental insurance paid by DGC (\$280), life insurance premiums paid by DGC (\$50), accidental death and disability insurance premiums paid by DGC (\$56), long-term disability insurance premiums paid by DGC (\$207), pension fund contribution paid by DGC (\$5,535), and Lawrence's contribution to a cafeteria plan offered by DGC to reimburse for medical

expenses not covered by insurance (\$180). These income deferrals and benefits totaled \$13,627.

[¶ 7] The district court found Lawrence was entitled to \$16,305 in deductions under the North Dakota Child Support Guidelines. *See* N.D. Admin. Code § 75-02-04.1-01(7). The district court found Lawrence's total gross income to be \$73,867. Applying the deductions, the district court calculated Lawrence's net annual income to be \$57,562 and his monthly net income to be \$4,797. Applying the North Dakota Child Support Guidelines, the district court determined the proper support obligation to be \$862 per month *See* N.D. Admin. Code § 75-02-04.1-10. The district court added one-half of the parties' monthly child care expenses (\$80) for a total support obligation of \$942 per month *See* N.D. Admin. Code § 75-02-04.1-09(2)(f).

[¶ 8] Lawrence appeals from the second amended judgment, arguing the district court erred in determining a child support obligation of \$942 per month. The Department of Human Services filed an amicus brief in support of Lawrence, arguing the employer benefits were improperly included as gross income, and also arguing that to include them in gross income is inconsistent with the intent of the Department of Human Services. (FN1)

II

[1] [2] [¶ 9] A district court's determination of child support is a finding of fact which will not be reversed on appeal unless it is found to be clearly erroneous. *See Hart v. Hart*, 1998 ND 99 ¶ 14, 578 N.W.2d 519. A finding of fact is clearly erroneous when it has been induced by an erroneous view of the law, if there is no evidence supporting the finding, or if, after review of all the evidence, the court is left with a definite and firm conviction that a mistake has been made. *Steffes v. Steffes*, 1997 ND 49 ¶ 8, 560 N.W.2d 888.

[¶ 10] Lawrence argues the district court erred in including employer-paid benefits in its calculation of gross income because the North Dakota Child Support Guidelines do not provide for the inclusion of those benefits.

[3] [4] [¶ 11] The child support guidelines are mandatory "presumptively correct" guidelines *See* N.D.C.C. § 14-09-09.7(3). Therefore, an accurate finding of income is necessary to determining the proper amount of child support under the guidelines. *See e.g., Shaver v. Kopp*, 545 N.W.2d 170, 174-75 (N.D.1996).

[¶ 12] At a minimum, the federal government requires a definition of income, for child support determination, to take into account "all earnings and income of the absent parent." 45 C.F.R. § 302.56(c)(1). "Income" is broadly defined under N.D.C.C. § 14-09-09.10(8) as:

[A]ny form of payment, regardless of source, owed to an obligor, including any earned, unearned, taxable or nontaxable income, workers' compensation, disability benefits, unemployment compensation benefits, annuity and retirement benefits, but *518 excluding public assistance benefits administered under state law.

[5] [¶ 13] The North Dakota Child Support Guidelines use the "net income" approach. This does not mean the net income used to determine an obligor's child support obligation will coincide with the net income from a paycheck. Rather, net income under the guidelines refers to the remaining balance once specified deductions are subtracted from the obligor's gross income. Lynne Gold-Bikin & Linda Ann Hammond *Determination of Income*, in *Child Support Guidelines: The next generation* 29, 32 (U.S. Dept. Human Serv.1994) *see* N.D. Admin. Code § 75-02-04.1-01(7)(a-h).

[¶ 14] The guidelines define gross income under N.D. Admin. Code § 75-02-04.1-01(5), providing:

5. "Gross income" means *income from any source, in any form*, but does not mean benefits received from means tested public assistance programs such as aid to families with dependent children, supplemental security income, and food stamps. *Gross income includes:* salaries, wages, overtime wages, commissions, bonuses, *deferred income*, dividends, severance pay, pensions, interest, trust income, annuities income, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, retirement benefits,

veterans' benefits (including gratuitous benefits), gifts and prizes to the extent each exceeds one thousand dollars in value, spousal support payments received, cash value of in-kind income received on a regular basis, children's benefits, income imputed based upon earning capacity, military subsistence payments, and net income from self-employment.

(Emphasis added.)

[6] [¶ 15] We must use words as they are used in their ordinary sense, absent a contrary intent. See N.D.C.C. § 1-02-02. The statutory definition of income includes "any form of payment regardless of source." N.D.C.C. § 14-09-09.10(8). The administrative code defines gross income as "income from any source" and provides a nonexclusive listing of items properly included in gross income. See N.D. Admin. Code § 75-02-04.1-01(5).

[¶ 16] Currently, DGC makes premium payments on behalf of Lawrence for dental insurance, life insurance, long-term disability insurance, and accidental death and disability insurance. During the trial, a representative from DGC was asked, "[d]oes ... John pay any of these premiums," referring to the medical insurance and dental insurance. The witness responded, "No." Similarly, the witness was asked whether Lawrence paid any portion of the long-term disability insurance or the accidental death insurance. Again, the witness responded, "No." Regarding the life insurance premiums, the witness stated, "[t]he company [DGC] pays for two times the employees' annual salary and that premium comes out of the company's pocket to the extent that the premium is paid."

[7] [¶ 17] Clearly, DGC was making those payments for Lawrence. As a result, he did not have to spend his own disposable income on them. Under the broad statutory and administrative definition of income and gross income, those payments constitute income properly considered in determining child support. N.D.C.C. § 14-09-09.10(8); N.D. Admin. Code § 75-02-04.1-01(5) cf. *Shaver* 545 N.W.2d at 175 (holding an employer's contribution to a tax-deferred plan also constitutes income) *Shipley* 509 N.W.2d at 53 (holding employer contributions to health insurance and pension plans are income under the broad definition of gross income in N.D. Admin. Code § 75-02-04.1-01). Therefore, we find the district court was not clearly erroneous in including these employer-paid benefits in gross income.

[¶ 18] We have previously interpreted gross income under the North Dakota Century Code and the N.D. Admin. Code. In *Shipley*, we determined that under the broad definition of income in N.D. Admin. Code § 75-02-04.1-01(2) an employer's contributions to the obligor's pension fund and employer-paid health insurance premiums both constitute "income from any source." *Shipley*, 509 N.W.2d at 53. Similarly, in *Shaver* we found an employer's contributions to a § 515 tax-deferred savings plan also constitute "income from any source," under N.D. Admin. Code § 75-02-04.1-01(2). *Shaver*, 545 N.W.2d at 175. We decided there was no principled reason to treat employer contributions to a pension plan differently than employer contributions to a tax-deferred savings plan. (FN2) *Id.*

[8] [¶ 19] In this case, we have similar employer benefits that were included in the gross income. Under our previous holdings employer contributions to a pension plan, a tax-deferred savings plan, and employer-paid health insurance are all found to be income. See *Shaver*, 545 N.W.2d at 175 *Shipley* 509 N.W.2d at 53. Here, DGC contributes to Lawrence's pension plan, and to his tax-deferred savings plan (401k), and pays his medical insurance premiums. We hold these employer-paid benefits are the specified "deferred income" and all "income from any source," based on the broad definition of income. See N.D.C.C. § 14-09-09.10(8); N.D. Admin. Code § 75-02-04.1-01(5); *Shaver*, at 175; *Shipley*, at 53. Therefore, we find the trial court was not clearly erroneous in including these in gross income. (FN3)

[9] [¶ 20] Lawrence argues if payments to retirement and pension plans are included in his income now, when they are paid in, they will also be included in his income once again when they are paid out following his retirement. While the possibility seems akin to double taxation, and arguably is unfair, the issue is not presented by the facts in this case, and therefore is not before us.

[¶ 21] The record is silent as to whether Lawrence is vested as to any of his employer's contributions. In child support cases the obligee has the arduous task of discovering all suitable income of the obligor to be used for a child support determination. At the very least the obligee will scrutinize the obligor's income disclosures to ascertain full disclosure under the guidelines. We believe it would be unjust to add to this burden the task of determining whether rights have vested in portions of the obligor's income, especially when one considers the information is readily available to the obligor.

III

[¶ 22] We hold the district court properly included employer-paid benefits as gross income under N.D.C.C. § 14-09-09.10(8) and N.D. Admin. Code § 75-02-04.1-01(5) in determining the proper child support obligation. We affirm the district court's judgment.

[¶ 23] MARING and MESCHKE, JJ., concur.

VANDE WALLE, Chief Justice, concurring in the result.

[¶ 24] I concur in the result reached by the majority opinion. I write separately to emphasize we do not decide the issue of whether or not an employer's contributions under a retirement plan which the employee has no choice to join and from which the employee cannot withdraw, at least without leaving employment, is income for purposes of the guidelines. In *Shaver v. Kopp*, 545 N.W.2d 170 (N.D.1996), the income was deferred income which was deferred at the will of the employee and subject to withdrawal at the will of the employee, although with a penalty for early withdrawal. *Id.* at 175 (noting "record shows Kopp is allowed to withdraw his employer's contributions, as well as his own, at any time, subject to taxes and penalties"). Nor do: *Shipley v. Shipley*, 509 N.W.2d 49 (N.D.1993), determine whether payments to a compulsory pension plan to which the employee has no access are income for the purposes of the guidelines. Rather, the contributions were not included by the trial *520. court as income because no information was presented but "we decline[d] to visit that failure on [the] children" and we reversed and remanded to supplement the record because accurate information about the employee's pension plan "was necessary to correctly determine [the employee's] gross income and net income" and "to determine the exact amount of the [employer's] contribution to [the employee's] pension and whether it qualified for deduction from his gross income" under the guidelines *Id.* at 53. On this record we do not know the status of the retirement fund, and I agree with the majority that this was information readily available to Lawrence but which he did not introduce.

[¶ 25] As to the discussion in ¶ 20 concerning whether retirement and pension payments are to be included within income going into the plan as well as coming out of the plan, that issue was of concern to me when this court's opinion in *Shaver* was issued in March of 1996 *Shaver v. Kopp* 545 N.W.2d 170, 177-178 (N.D.1996) (Vande Walle, C.J., concurring specially) (questioning "[w]hat will happen in those possibly rare circumstances in which the deferred income is withdrawn while the support obligation is still in effect? Will it be considered income going in *ana* coming out?").

[¶ 26] As the majority notes these issues were suggested by opinions some time ago. I agree the record before us in this case is not adequate to decide the issues contrary to the trial court decision.

[¶ 27] Finally, I believe vesting in a pension or retirement plan is significant only to the extent it means the funds--employer or employee contributions--are accessible to the obligor. If the funds are vested but not accessible short of leaving employment, I question whether they should be included as income for purposes of the guidelines. It would be self-defeating to encourage an employee/obligor to leave employment in order to access funds to pay child support.

[¶ 28] SANDSTROM, J., concurs.

FN1. We note *Shipley v. Shipley*, 509 N.W.2d 49, 53 (N.D.1993), which first included certain employer benefits

in gross income under N.D. Admin. Code § 75-02-04.1-01(2) was decided more than a year before the 1995 Legislative Assembly and three years before the 1997 Legislative Assembly. *Shaver v. Kopp* 545 N.W.2d 170, 175 (N.D.1996), which also included employer benefits in gross income was issued more than 9 months before the 1997 Legislative Assembly. See *Hassan v. Brooks*, 1997 ND 150 ¶ 7, 566 N.W.2d 822 (holding that the court assumes the legislature acquiesced in our interpretation of the language because the legislature had not amended the language). We also note the Department of Human Services has drafted proposed guidelines which are currently in the rule-making process. This proposed draft contains a provision which seems to allow an obligor to deduct certain employer-paid benefits from gross income. See Proposed Amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines, July 31, 1998.

FN2. In *Shaver*, the record clearly showed the obligor could have, at any time, withdrawn his employer's contributions to the tax-deferred savings plan. *Shaver*, 545 N.W.2d at 175.

FN3. The issue of whether a deduction to gross income should apply, based on the portion of health insurance covering Rylan, was not raised on appeal. Therefore, we do not determine whether employer-paid health insurance premiums, which provide insurance to the child for whom support is being determined, constitute a "portion of premium payments, made by the person whose income is being determined, for health insurance policies or health service contracts" under N.D. Admin. Code § 75-02-04.1-01(7)(d).

Prepared by
Arnie Fleck

02/24/99

FIRST ENGROSSMENT

PROPOSED AMENDMENT TO HOUSE BILL NO. 1028

Page 1, line 8, overstrike "does not include an employee" and insert immediately thereafter "includes the cost of an employer-paid"

Page 1, line 8, overstrike "over which the employee does" and insert immediately thereafter ", unless to do so creates a hardship for the employee"

Page 1, overstrike lines 9, 10 and 11

Page 1, line 12 overstrike "income tax penalty"

Renumber accordingly

*Info only
Jennifer Clark*

584 N.W.2d 515

Filed 9/29/98 by Clerk of Supreme Court

[Download as WordPerfect]
Concurrence filed.

NB 1028

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

1998 ND 178

John Daniel Lawrence, aka, Dan Lawrence, Plaintiff and Appellant

v.

Tina Lucille Delkamp, Defendant and Appellee

Civil No. 980015

Appeal from the District Court for Burleigh County, South Central Judicial District, the Honorable Benny A. Graff, Judge.

AFFIRMED.

Opinion of the Court by Neumann, Justice.

James J. Coles of Snyder Coles Lawyers, P.O. Box 1321, Bismarck, N.D. 58502-1321; for plaintiff and appellant.

Arnold V. Fleck of Wheeler Wolf, P.O. Box 2056, Bismarck, N.D. 58502-2056; for defendant and appellee.

Candace A. Prigge Assistant Attorney General, 900 East Boulevard Avenue, Bismarck, N.D. 58505-0041; amicus curiae.

Lawrence v. Delkamp

Civil No. 980015

Neumann, Justice.

[¶1] John Daniel Lawrence appeals from the district court's judgment increasing the child support payment and affirming the original judgment as amended. We affirm the judgment of the district court.

I

[¶2] A child was born in August of 1992 to John Lawrence and Tina Delkamp. Lawrence and Delkamp were never married to each other. On October 9, 1992, the district court entered a stipulated judgment giving custody and care of the child to Lawrence. The judgment also directed no child support be paid to or by either party.

[¶3] On May 22, 1995, the district court entered an amended judgment incorporating a child and visitation agreement entered into by the parties subsequent to the first stipulated judgment. The amended judgment gave Delkamp custody of the child, and directed Lawrence to pay \$540 per month in child support.

[¶4] On June 6, 1996, by stipulation of the parties, the district court entered another judgment amending the May 22, 1995, judgment. This second amended judgment among other things decreased Lawrence's child support obligation to \$200 per month.

[¶5] On June 30, 1997, Delkamp moved to invalidate Lawrence's child support obligation of \$200 per month and set a new obligation consistent with the North Dakota Child Support Guidelines.

[¶6] On November 6, 1997, the district court entered judgment amending Lawrence's child support obligation to \$942 per month. The district court found Lawrence would earn \$59,134 in taxable wages in the following twelve months from his employer Dakota Gasification Company (DGC). In addition, Lawrence would receive \$1,106 in interest and dividend income. The district court also found Lawrence would receive other tax-exempt income and benefits: Lawrence's contribution to his 401k plan (\$2,347), Lawrence's employer's contribution to the 401k plan (\$2,347), medical insurance premiums paid by DGC (\$2,605), dental insurance paid by DGC (\$280), life insurance premiums paid by DGC (\$50), accidental death and disability insurance premiums paid by DGC (\$56), long-term disability insurance premiums paid by DGC (\$207), pension fund contribution paid by DGC (\$5,535), and Lawrence's contribution to a cafeteria plan offered by DGC to reimburse for medical expenses not covered by insurance (\$180). These income deferrals and benefits totaled \$13,627.

[¶7] The district court found Lawrence was entitled to \$16,305 in deductions under the North Dakota Child Support Guidelines. See N.D. Admin. Code § 75-02-04.1-01(7). The district court found Lawrence's total gross income to be \$73,867. Applying the deductions, the district court calculated Lawrence's net annual income to be \$57,562 and his monthly net income to be \$4,797. Applying the North Dakota Child Support Guidelines, the district court determined the proper support obligation to be \$862 per month. See N.D. Admin. Code § 75-02-04.1-10. The district court added one-half of the parties' monthly child care expenses (\$80) for a total support obligation of \$942 per month. See N.D. Admin. Code § 75-02-04.1-09(2)(f).

[¶8] Lawrence appeals from the second amended judgment, arguing the district court erred in determining a child support obligation of \$942 per month. The Department of Human Services filed an amicus brief in support of Lawrence, arguing the employer benefits were improperly included as gross income, and also arguing that to include them in gross income is inconsistent with the intent of the Department of Human Services.⁽¹⁾

II

[¶9] A district court's determination of child support is a finding of fact which will not be reversed on appeal unless it is found to be clearly erroneous. See *Harty v. Hart*, 1998 ND 99, ¶ 14, 578 N.W.2d 519. A finding of fact is clearly erroneous when it has been induced by an erroneous view of the law, if there is no evidence supporting the finding, or if, after review of all the evidence, the court is left with a definite and firm conviction that a mistake has been made. *Steffes v. Steffes*, 1997 ND 49, ¶ 8, 560 N.W.2d 888.

[¶10] Lawrence argues the district court erred in including employer-paid benefits in its calculation of gross income because the North Dakota Child Support Guidelines do not provide for the inclusion of those benefits.

[¶11] The child support guidelines are mandatory "presumptively correct" guidelines. See N.D.C.C. §

14-09-09.7(3). Therefore, an accurate finding of income is necessary to determining the proper amount of child support under the guidelines. See e.g., *Shaver v. Kopp*, 545 N.W.2d 170, 174-75 (N.D. 1996).

[¶12] At a minimum, the federal government requires a definition of income, for child support determination, to take into account "all earnings and income of the absent parent." 45 C.F.R. § 302.56 (c)(1). "Income" is broadly defined under N.D.C.C. § 14-09-09.10(8) as:

[A]ny form of payment, regardless of source, owed to an obligor, including any earned, unearned, taxable or nontaxable income, workers' compensation, disability benefits, unemployment compensation benefits, annuity and retirement benefits, but excluding public assistance benefits administered under state law.

[¶13] The North Dakota Child Support Guidelines use the "net income" approach. This does not mean the net income used to determine an obligor's child support obligation will coincide with the net income from a paycheck. Rather, net income under the guidelines refers to the remaining balance once specified deductions are subtracted from the obligor's gross income. Lynne Gold-Bikin & Linda Ann Hammond, *Determination of Income*, in *Child Support Guidelines: The next generation* 29, 32 (U.S. Dept. Human Serv. 1994); see N.D. Admin. Code § 75-02-04.1-01(7)(a-h).

[¶14] The guidelines define gross income under N.D. Admin. Code § 75-02-04.1-01(5), providing:

5. "Gross income" means income from any source, in any form, but does not mean benefits received from means tested public assistance programs such as aid to families with dependent children, supplemental security income, and food stamps. Gross income includes salaries, wages, overtime wages, commissions, bonuses, deferred income, dividends, severance pay, pensions, interest, trust income, annuities income, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, retirement benefits, veterans' benefits (including gratuitous benefits), gifts and prizes to the extent each exceeds one thousand dollars in value, spousal support payments received, cash value of in-kind income received on a regular basis, children's benefits, income imputed based upon earning capacity, military subsistence payments, and net income from self-employment.

(Emphasis added.)

[¶15] We must use words as they are used in their ordinary sense, absent a contrary intent. See N.D.C.C. § 1-02-02. The statutory definition of income includes "any form of payment regardless of source." N.D.C.C. § 14-09-09.10(8). The administrative code defines gross income as "income from any source" and provides a nonexclusive listing of items properly included in gross income. See N.D. Admin. Code § 75-02-04.1-01(5).

[¶16] Currently, DGC makes premium payments on behalf of Lawrence for dental insurance, life insurance, long-term disability insurance, and accidental death and disability insurance. During the trial, a representative from DGC was asked, "[d]oes . . . John pay any of these premiums," referring to the medical insurance and dental insurance. The witness responded, "No." Similarly, the witness was asked whether Lawrence paid any portion of the long-term disability insurance or the accidental death insurance. Again, the witness responded, "No." Regarding the life insurance premiums, the witness stated, "[t]he company [DGC] pays for two times the employees' annual salary and that premium

comes out of the company's pocket to the extent that the premium is paid."

[¶17] Clearly, DGC was making those payments for Lawrence. As a result, he did not have to spend his own disposable income on them. Under the broad statutory and administrative definition of income and gross income, those payments constitute income properly considered in determining child support. N.D.C.C. § 14-09-09.10(8); N.D. Admin. Code § 75-02-04.1-01(5); cf. Shaver, 545 N.W.2d at 175 (holding an employer's contribution to a tax-deferred plan also constitutes income); Shipley, 509 N.W.2d at 53 (holding employer contributions to health insurance and pension plans are income under the broad definition of gross income in N.D. Admin. Code § 75-02-04.1-01). Therefore, we find the district court was not clearly erroneous in including these employer-paid benefits in gross income.

[¶18] We have previously interpreted gross income under the North Dakota Century Code and the N.D. Admin. Code. In Shipley, we determined that under the broad definition of income in N.D. Admin. Code § 75-02-04.1-01(2) an employer's contributions to the obligor's pension fund and employer-paid health insurance premiums both constitute "income from any source." Shipley, 509 N.W.2d at 53. Similarly, in Shaver, we found an employer's contributions to a tax-deferred savings plan also constitute "income from any source," under N.D. Admin. Code § 75-02-04.1-01(2). Shaver, 545 N.W.2d at 175. We decided there was no principled reason to treat employer contributions to a pension plan differently than employer contributions to a tax-deferred savings plan.⁽²⁾ Id.

[¶19] In this case, we have similar employer benefits that were included in the gross income. Under our previous holdings employer contributions to a pension plan, a tax-deferred savings plan, and employer-paid health insurance are all found to be income. See Shaver, 545 N.W.2d at 175; Shipley, 509 N.W.2d at 53. Here, DGC contributes to Lawrence's pension plan, and to his tax-deferred savings plan (401k), and pays his medical insurance premiums. We hold these employer-paid benefits are the specified "deferred income" and all "income from any source," based on the broad definition of income. See N.D.C.C. § 14-09-09.10(8); N.D. Admin. Code § 75-02-04.1-01(5); Shaver, at 175; Shipley, at 53. Therefore, we find the trial court was not clearly erroneous in including these in gross income.⁽³⁾

[¶20] Lawrence argues if payments to retirement and pension plans are included in his income now, when they are paid in, they will also be included in his income once again when they are paid out following his retirement. While the possibility seems akin to double taxation, and arguably is unfair, the issue is not presented by the facts in this case, and therefore is not before us.

[¶21] The record is silent as to whether Lawrence is vested as to any of his employer's contributions. In child support cases the obligee has the arduous task of discovering all suitable income of the obligor to be used for a child support determination. At the very least the obligee will scrutinize the obligor's income disclosures to ascertain full disclosure under the guidelines. We believe it would be unjust to add to this burden the task of determining whether rights have vested in portions of the obligor's income, especially when one considers the information is readily available to the obligor.

III

[¶22] We hold the district court properly included employer-paid benefits as gross income under N.D.C.C. § 14-09-09.10(8) and N.D. Admin. Code § 75-02-04.1-01(5) in determining the proper child support obligation. We affirm the district court's judgment.

[¶23]

William A. Neumann
Mary Muehlen Maring
Herbert L. Meschke

VandeWalle, Chief Justice, concurring in the result.

[¶24] I concur in the result reached by the majority opinion. I write separately to emphasize we do not decide the issue of whether or not an employer's contributions under a retirement plan which the employee has no choice to join and from which the employee cannot withdraw, at least without leaving employment, is income for purposes of the guidelines. In *Shaver v. Kopp*, 545 N.W.2d 170 (N.D. 1996), the income was deferred income which was deferred at the will of the employee and subject to withdrawal at the will of the employee, although with a penalty for early withdrawal. *Id.* at 175 (noting "record shows Kopp is allowed to withdraw his employer's contributions, as well as his own, at any time, subject to taxes and penalties"). Nor does *Shipley v. Shipley*, 509 N.W.2d 49 (N.D. 1993), determine whether payments to a compulsory pension plan to which the employee has no access are income for the purposes of the guidelines. Rather, the contributions were not included by the trial court as income because no information was presented but "we decline[d] to visit that failure on [the] children" and we reversed and remanded to supplement the record because accurate information about the employee's pension plan "was necessary to correctly determine [the employee's] gross income and net income" and "to determine the exact amount of the [employer's] contribution to [the employee's] pension and whether it qualified for deduction from his gross income" under the guidelines. *Id.* at 53. On this record we do not know the status of the retirement fund, and I agree with the majority that this was information readily available to Lawrence but which he did not introduce.

[¶25] As to the discussion in ¶ 20 concerning whether retirement and pension payments are to be included within income going into the plan as well as coming out of the plan, that issue was of concern to me when this court's opinion in *Shaver* was issued in March of 1996. *Shaver v. Kopp*, 545 N.W.2d 170, 177-178 (N.D. 1996) (VandeWalle, C.J., concurring specially) (questioning "[w]hat will happen in those possibly rare circumstances in which the deferred income is withdrawn while the support obligation is still in effect? Will it be considered income going in and coming out?").

[¶26] As the majority notes these issues were suggested by opinions some time ago. I agree the record before us in this case is not adequate to decide the issues contrary to the trial court decision.

[¶27] Finally, I believe vesting in a pension or retirement plan is significant only to the extent it means the funds - employer or employee contributions - are accessible to the obligor. If the funds are vested but not accessible short of leaving employment, I question whether they should be included as income for purposes of the guidelines. It would be self-defeating to encourage an employee/obligor to leave employment in order to access funds to pay child support.

[¶28]

Gerald W. VandeWalle, C.J.
Dale V. Sandstrom

Footnotes:

1. We note *Shipley v. Shipley*, 509 N.W.2d 49, 53 (N.D. 1993), which first included certain employer benefits in gross income under N. D. Admin. Code § 75-02-04.1-01(2) was decided more than a year before the 1995 Legislative Assembly and three years before the 1997 Legislative Assembly. *Shaver*

v. Kopp, 545 N.W.2d 170, 175 (N.D. 1996), which also included employer benefits in gross income was issued more than 9 months before the 1997 Legislative Assembly. See Hassan v. Brooks, 1997 ND 150, ¶7, 566 N.W.2d 822 (holding that the court assumes the legislature acquiesced in our interpretation of the language because the legislature had not amended the language). We also note the Department of Human Services has drafted proposed guidelines which are currently in the rule-making process. This proposed draft contains a provision which seems to allow an obligor to deduct certain employer-paid benefits from gross income. See Proposed Amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines, July 31, 1998.

2. In Shaver, the record clearly showed the obligor could have, at any time, withdrawn his employer's contributions to the tax-deferred savings plan. Shaver, 545 N.W.2d at 175.

3. The issue of whether a deduction to gross income should apply, based on the portion of health insurance covering Rylan, was not raised on appeal. Therefore, we do not determine whether employer-paid health insurance premiums, which provide insurance to the child for whom support is being determined, constitute a "portion of premium payments, made by the person whose income is being determined, for health insurance policies or health service contracts" under N.D. Admin. Code § 75-02-04.1-01(7)(d).

For Dan

info only
Jennifer Clark Lawrence.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

JOHN DANIEL LAWRENCE, ET AL,)

Plaintiff,)

-v-)

TINA LUCILLE DELKAMP,)

Defendant.)

File No. 92-R-1316

MEMORANDUM OPINION

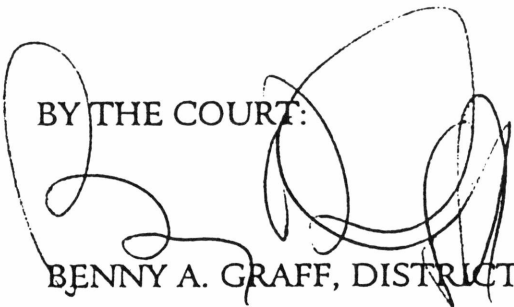
This motion becomes before the Court on an application for child support increase. I am satisfied after a review of the testimony that the post-hearing brief submitted by the defendant arrives at the appropriate figure for gross income. This results in a child support obligation of \$862.00 per month. The Court further approves an upward deviation of \$80/month for child care expenses which equal one-half of said expenses for a total payment of \$942.00 per month for child support.

The Court further orders a contribution from the plaintiff to the defendant of \$500 for attorney's fees for bringing the motion.

The adjusted figure of \$942.00 per month shall be effective as of August 1, 1997. The attorney fees and delinquency in child support are ordered to be paid within 30 days of the date of this order.

Counsel for the defendant may prepare the appropriate order for my signature.

Dated: October 7, 1997

BY THE COURT:

BENNY A. GRAFF, DISTRICT JUDGE

RECEIVED
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STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 92-R-1316

John Daniel Lawrence, aka)
Dan Lawrence,)
)
Plaintiff,)
)
vs.)
)
Tina Lucille Delkamp,)
)
Defendant.)

**ORDER FOR SECOND
AMENDED JUDGMENT**

The defendant filed and served a post-judgment Motion To Increase Child Support, dated June 30, 1997, and the matter was heard before this Court, with the Honorable Benny A. Graff presiding, on September 8, 1997; and the Court, after considering all the evidence and arguments submitted by the parties, makes the following:

FINDINGS OF FACT

1. In the 12 months following the hearing the plaintiff, John D. Lawrence, will earn \$59,134 in taxable wages from his employment with Dakota Gasification Company and an additional \$1,106 in taxable interest and dividend income.

2. In addition to the taxable income referenced above, the plaintiff will also receive the following tax exempt income and benefits in the 12 months following the hearing:

a. His contribution to the 401(K) Plan offered by his employer in the amount of \$2,347;

b. His employer's contribution to the 401(K) Plan in the amount of \$2,347;

- c. Medical Insurance premiums paid by his employer in the amount of \$2,605;
- d. Dental Insurance premiums paid by his employer in the amount of \$280;
- e. Life Insurance premiums paid by his employer in the amount of \$50;
- f. Accidental Death and Disability Insurance premiums paid by his employer in the amount of \$56;
- g. Long Term Disability Insurance premiums paid by his employer in the amount of \$207;
- h. Pension fund contributions paid by his employer and fund in the amount of \$5,535; and
- i. His contributions to the Cafeteria Plan offered by his employer for reimbursement of his medical expenses not covered by insurance in the amount of \$180.

That this additional income and benefits totals \$13,627 in additional annual gross income attributable to the plaintiff under the Child Support Guidelines.

3. As reflected in the Child Support Worksheet attached to Defendant's Post-Hearing Brief dated September 12, 1997, the plaintiff is entitled to the following deductions to arrive at his net annual income under the Child Support Guidelines:

- a. Medicare and social security premium tax in the amount of \$4,703;
- b. Federal income tax in the amount of \$10,177; and
- c. State income tax in the amount of \$1,425.

These deductions total \$16,305 annually.

4. The plaintiff, John D. Lawrence, is projected to gross annually \$73,867 in income, as defined under the Child Support Guidelines, and net therefrom, after the deductions set forth above, the amount of \$57,562, which averages to a monthly net

income of \$4,797.

5. The defendant, Tina L. Delkamp, is attending as a full-time student the Power Plant Process Training Program at Bismarck State College, maintaining a 3.67 grade point average, and is expected to graduate in May of 1998.

6. The defendant, Tina Delkamp, as a full-time student has a limited income and is supporting four children with that income. The expenses she incurs includes \$160 in child care expenses each month for the time Rylan, the minor child for whom the plaintiff pays support, is at daycare while the defendant and her other children are at school.

CONCLUSIONS OF LAW

Applying the findings to the law, the Court arrives at the following conclusions:

1. Pursuant to NDAdminC §75-02-04.1-10, the plaintiff, John D. Lawrence, with an average net monthly income of \$4,800 should pay \$862 per month in child support for one child. However, pursuant to NDAdminC §75-02-04.1-09(2)(f), an upward deviation in the amount of child support may be awarded if the evidence establishes that it is in the best interest of the supported child and arises from the increased needs of the child related to the cost of child care purchased to allow the custodial parent to pursue employment, job search, education or other training. This Court concludes that it is in the minor child's best interest to deviate upward from the Guidelines in the amount of \$80 per month, one-half of the defendant's monthly child care expenses for the

minor child for whom plaintiff pays support.

2. Based on the disparity in the income of the plaintiff, John D. Lawrence, and the defendant, Tina L. Delkamp, and the numerous proceedings that have been filed in this action, the plaintiff shall pay to the defendant \$500 to partially reimburse her for her attorney's fees and costs in bringing the Motion to Increase Child Support.

ORDER FOR ENTRY OF SECOND AMENDED JUDGMENT

On the foregoing findings of fact and conclusions of law,
IT IS HEREBY ORDERED THAT:

1. The Clerk of District Court shall enter a second amended judgment increasing the monthly child support payment of the plaintiff, John D. Lawrence, to \$942 per month effective August 1, 1997, and awarding the defendant an additional sum of \$500 in child support arrears to compensate the defendant for the attorney's fees and costs awarded to her;

2. The plaintiff, John D. Lawrence, shall pay the attorney fees and delinquency in child support arising as a result of the amended judgment within ten days from service of the notice of entry of the second amended judgment; and

3. All other provisions of the Judgment of May 22, 1995, as amended by the Order of August 18, 1995, and the Amended Judgment of June 7, 1996, which do not conflict with the provisions of this Judgment, shall remain in full force and effect.

Dated this _____ day of November, 1997.

BY THE COURT:

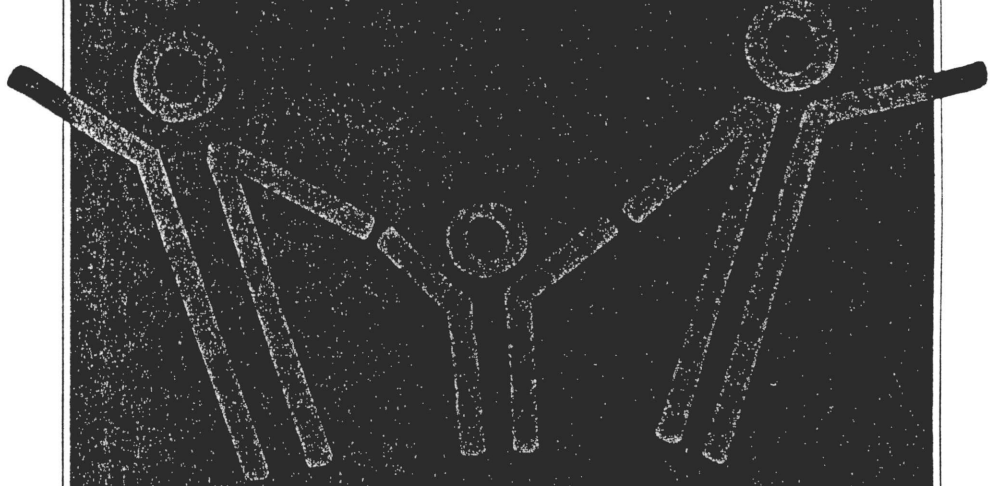
Benny A. Graff, District Judge

OFFICE OF CHILD SUPPORT ENFORCEMENT

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America's Children*



Handbook on Child Support Enforcement



U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Administration for Children and Families
Office of Child Support Enforcement