

## Full text of the shared parenting ballot initiative

This initiated measure would add a new section to Chapter 14-09 of the North Dakota Century Code relating to child custody and support and would provide that in the event of a divorce or separation, each parent would be entitled to joint legal and physical custody unless first declared unfit based on clear and convincing evidence. Parents would develop a joint parenting plan, with a court becoming involved only if the parents could not agree on a plan. Child support payments would be determined base on the parenting plan and could not be greater than the actual cost of providing for the basic needs of each child.

### FULL TEXT OF THE MEASURE:

IF MATERIAL IS UNDERSCORED, IT IS NEW MATERIAL WHICH IS BEING ADDED. IF MATERIAL IS OVERSTRUCK BY DASHES, THE MATERIAL IS BEING DELETED. IF NO MATERIAL IS UNDERSCORED OR OVERSTRUCK, THE MEASURE CONTAINS ALL NEW MATERIAL WHICH IS BEING ADDED.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF NORTH DAKOTA:

14-09-06.7. Shared Parenting – equal access to children. Notwithstanding any other state statute or common law, the following fundamental rights are hereby recognized for all adults and children of North Dakota, and this section shall be self activating upon voter approval.

1. Parents have a fundamental liberty interest in the care, custody and control of their children. Acknowledging the long established legal tenet that fit parents act in the best interest of their children, no parent shall be denied custody of a child without first having been declared unfit, utilizing the clear and convincing evidentiary standard. Absent a finding of parental unfitness parents retain joint legal and joint physical custody of their children. Joint physical custody of the children is defined as a rebuttable presumption of equal time sharing by the parents. In the event of a finding of unfitness of one parent, the best interests and welfare of the child is determined at the court's discretion utilizing current best interest standards as defined in existing state code.

2. Parents shall develop a joint parenting plan, or if they can not agree to such a plan, the court shall facilitate production of a parenting plan with them. These plans must take into account the fundamental liberty interest of the parents, encouraging parents to craft a plan based on their unique family circumstances. Parents may modify the parenting plan anytime without restriction by mutual agreement. Parenting plan changes as a result of court petition require the petitioner to demonstrate how the modification serves the child's best interest. Parents who have not previously had a fitness hearing my petition the court for a fitness hearing at any time. All decisions or actions under state law shall be gender and race neutral. Gender cannot be a determining factor in parenting plan formulation or modification decisions.

3. Child support payments and allocation of child support obligations will be determined according to the parenting plan, and will not be greater than the actual cost of providing for the basic needs of the child(ren).❖

## An analysis of the shared-parenting initiative: its relationship to child-support law & regulation

BY R. MARK ROGERS, CHILD SUPPORT ECONOMIST

There is no apparent federal legal or regulation problem with the three points in this initiative—as long as the initiative is implemented to conform to the requirements of 45 CFR 302.56.

Fundamentally, the initiative must be viewed as *establishing* a certain type of guideline formula, rather than causing guidelines not to be used.

Now I will explain how federal requirements can be squared with the initiative. My comments will focus only on Section 3 of the initiative since that is where there is public disagreement.

The three key requirements of 45 CFR 302.56 are:

- **The state must have a presumptive and fully rebuttable child support guideline formula.**
- **The guideline formula must be applied presumptively to all child support cases.**
- **The formula must include all of an obligor's income.**

Section 3 of the referendum creates two requirements for a guideline formula:

- **The award must be based on the parenting plan.**
- **The award must be based on actual costs of the basic needs of the children.**

These issues (parenting plan and actual costs) can be incorporated into child support guideline formulas, and thereby conform to federal regulations. First, parenting plans can become part of the application of the guideline, by requiring that the North Dakota guideline have a parenting-time financial adjustment. This adjustment would be based on a valid economic study and apply a standard of "equal duty of support." That means both parents share both parents' child costs.

The information from the parenting plan, including parenting-time adjustments, can and should be used as input into the guideline formula

The initiative does not define basic needs, but this is not a problem. There are many definitions. Basic needs can be defined very narrowly or broadly. Basic needs could be foster care amounts, or basic needs could rise with income but not include extravagances. Regardless of the definition, the basic needs could be allocated according to parenting time and shares of combined income. In this manner, the requirements of both the initiative and federal regulations would be met.

One of the key thrusts of this initiative is to move away from an income-sharing guideline formula to a cost-sharing formula. But a cost sharing formula clearly can include both parents' incomes as the mechanism for how to allocate the costs. Federal regulations *do not* prohibit a cost-sharing guideline. Most states have some sort of cost sharing guideline.

As noted in the Federal Register, when a question was raised regarding basing child support upon foster care guidelines, the federal agency published response was that such is allowable as a policy option. (From the Federal Register, 56 FR 22335 May 15, 1991.)

Basically, this initiative does not conflict with 45 CFR 302.56 if it is viewed as setting constraints for what North Dakota's child support guidelines should be based upon, instead of being viewed as eliminating guidelines. A guideline formula with a parenting time adjustment based on input from parenting plans and with basic costs shared, also according to shares of combined income, would not violate federal regulations. The guidelines could have either a narrow or broad definition of basic costs with an appropriate underlying economic study.

### Interesting example of Arizona

Arizona's current child support guidelines give an example of what North Dakota's referendum-based guidelines could look like. Arizona has a cost table that is "standard" costs. North Dakota could choose to use that same study or one similar for "needs" and choose to limit the amount of award presumptively. Many states have varying levels for the highest presumptive award. North Dakota could choose a ceiling presumptive award just as most states do. Additionally, Arizona has a built in parenting-time adjustment. North Dakota could adopt a parenting-time adjustment like Arizona's and base the input on the parenting plans of the parents. Thus Arizona gives a clear indication of how to conform to federal regulations.

Can the federal government truly claim that passage of the referendum will require the loss of federal funds? The answer to that is the answer to the question, "How much money has Arizona lost due to its guidelines, with a needs definition and parenting time adjustment?" The answer is "none." One could also ask, "How much money has the federal government withheld from any state with a ceiling on the presumptive child support award?" Again, the answer is "none." If these "none" answers are not accurate, then the headquarters and regional officials of the U.S. Department of Health and Human Services are invited to produce documents showing that they *have* withheld funds from states already implementing these features.

### Impact of Passage of Initiative on Receipt of Federal Monies

First, if the initiative involving 14-09-06.7 is implemented in terms of designing new guidelines based on basic costs, parenting time, and shares of combined income, there would be no conflict and no loss of federal monies.

Should there be conflict with federal regulations, there is time for the state to make corrections and not lose any federal monies. Before any penalty is imposed for non-compliance, there must be notice. At a minimum, the state would have a year for corrective action before losing federal funds. Additionally, should corrective action take somewhat longer, the penalties are *very small* and are only a fraction of federal monies received by the state.

These views are corroborated by the federal regulations I have checked.

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