

## South Dakota Family Law – Jurisdiction and Service of Process

By Morgan, Lewis & Bockius LLP – March 31, 2021

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### Custody Determination – Jurisdiction

#### *Initial Custody Determination*

##### **S.D. Codified Laws § 26-5B-201**

(a) Except as otherwise provided in § 26-5B-204, a court of this state has jurisdiction to make an initial child-custody determination only if:

(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(2) A court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under § 26-5B-207 or 26-5B-208, and:

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under § 26-5B-207 or 26-5B-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

#### *Temporary Emergency Jurisdiction*

##### **S.D. Codified Laws § 26-5B-204**

(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(b) If there is no previous child-custody determination that is entitled to be enforced under this chapter and a child-custody proceeding has not been commenced in a court of a state having jurisdiction under §§ 26-5B-201 to 26-5B-203, inclusive, a child-custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under §§ 26-5B-201 to 26-5B-203, inclusive. If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under §§ 26-5B-201 to 26-5B-203, inclusive, a child-custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

(c) If there is a previous child-custody determination that is entitled to be enforced under this chapter, or a child-custody proceeding has been commenced in a court of a state having jurisdiction under §§ 26-5B-201 to 26-5B-203, inclusive, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under §§ 26-5B-201 to 26-5B-203, inclusive. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) A court of this state which has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a state having jurisdiction under §§ 26-5B-201 to 26-5B-203, inclusive, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to §§ 26-5B-201 to 26-5B-203, inclusive, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

#### **Authority Interpreting § 26-5B-204**

It appears that there is only one decision on Westlaw citing or discussion this provision, and it does not appear particularly salient.

In *Langdeau v. Langdeau*, 2008 S.D. 44, ¶ 30, 751 N.W.2d 722, 732, the court merely held that the trial court may decline to exercise jurisdiction under § 26-5B-204 when there is a more appropriate forum.

#### **Custody Determination – Service/Notification Requirements**

##### **S.D. Codified Laws § 26-5B-108**

(a) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(b) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

(c) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

#### **Paternity and Child Support Proceeding – Jurisdiction**

##### **S.D. Codified Laws § 25-9C-201**

[Bases for jurisdiction over non-resident]

(a) In a proceeding to establish or enforce a support order or to determine parentage of a child, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(1) The individual is personally served with notice within this state;

(2) The individual submits to the jurisdiction of this state by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

(3) The individual resided with the child in this state;

- (4) The individual resided in this state and provided prenatal expenses or support for the child;
  - (5) The child resides in this state as a result of the acts or directives of the individual;
  - (6) The individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
  - (7) The individual asserted parentage of a child in the child support case registry maintained in this state by the Department of Social Services; or
  - (8) There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.
- (b) The bases of personal jurisdiction set forth in subsection (a) or in any other law of this state may not be used to acquire personal jurisdiction for a tribunal of this state to modify a child support order of another state unless the requirements of § 25-9C-611 are met, or, in the case of a foreign support order, unless the requirements of § 25-9C-615 are met.

## **S.D. Codified Laws § 25-9C-401**

[Establishment of Support Order]

- (a) If a support order entitled to recognition pursuant to this chapter has not been issued, a responding tribunal of this state with personal jurisdiction over the parties may issue a support order if:
- (1) The individual seeking the order resides outside this state; or
  - (2) The support enforcement agency seeking the order is located outside this state.
- (b) The tribunal may issue a temporary child support order if the tribunal determines that such an order is appropriate and the individual ordered to pay is:
- (1) A presumed father of the child;
  - (2) Petitioning to have his paternity adjudicated;
  - (3) Identified as the father of the child through genetic testing;
  - (4) An alleged father who has declined to submit to genetic testing;
  - (5) Shown by clear and convincing evidence to be the father of the child;
  - (6) An acknowledged father as provided by applicable state law;
  - (7) The mother of the child; or
  - (8) An individual who has been ordered to pay child support in a previous proceeding and the order has not been reversed or vacated.
- (c) Upon finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders pursuant to § 25-9C-305.

## **S.D. Codified Laws § 25-9C-205**

[Continuing jurisdiction to modify support order]

- (a) A tribunal of this state that has issued a child support order consistent with the law of this state has and shall exercise continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order and:
- (1) At the time of the filing of a request for modification this state is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or
  - (2) Even if this state is not the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify its order.
- (b) A tribunal of this state that has issued a child support order consistent with the law of this state may not exercise continuing, exclusive jurisdiction to modify the order if:
- (1) All of the parties who are individuals file consent in a record with the tribunal of this state that a tribunal of another state that has jurisdiction over at least one of the parties who is an individual or that is located in the state of residence of the child may modify the order and assume continuing, exclusive jurisdiction; or

(2) Its order is not the controlling order.

(c) If a tribunal of another state has issued a child support order pursuant to the Uniform Interstate Family Support Act or a law substantially similar to that Act which modifies a child support order of a tribunal of this state, tribunals of this state shall recognize the continuing, exclusive jurisdiction of the tribunal of the other state.

(d) A tribunal of this state that lacks continuing, exclusive jurisdiction to modify a child support order may serve as an initiating tribunal to request a tribunal of another state to modify a support order issued in that state.

(e) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

## **Paternity and Child Support Proceeding – Service/Notification Requirements**

### **S.D. Codified Laws § 25-9C-401**

As explained above, upon finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders pursuant to § 25-9C-305.

### **S.D. Codified Laws § 25-9C-316**

The physical presence of a nonresident party who is an individual in a tribunal of this state is not required for the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage of a child.

## **Child Abuse/Neglect Proceeding – Jurisdiction**

There does not appear to be a specific jurisdiction or venue provision in Chapter 16-8A of the South Dakota Codified Laws titled “Protection of Children from Abuse or Neglect.” There also does not appear to be an applicable cross reference in another provision that might specifically govern venue or jurisdiction under Chapter 16-8A.

### **S.D. Codified Laws § 26-8A-29**

In any action involving the termination of parental rights of both parents or any surviving parent, the court has continuing jurisdiction of the action and of the abused or neglected child for purposes of review of status of the child until the adoption of the child is fully completed. The Department of Social Services or any other party having custody and guardianship of the child pending adoption may petition the court to review the status of the child at any time before the adoption of the child is completed. The court may issue any orders or decrees necessary to protect the child, to preserve the child's welfare and to facilitate adoption of the child by the court or another court of competent jurisdiction without delay. The continuing jurisdiction of the court according to this section does not prevent the acquisition of jurisdiction of the child by another court for adoption proceedings according to law.

## **Child Abuse/Neglect Proceeding – Service/Notification Requirements**

### **S.D. Codified Laws § 26-8A-10.1**

If an investigation by the Department of Social Services determines that abuse or neglect has occurred, the department shall make reasonable efforts to inform each of the child's parents of the determination with due regard given to the rights of the subject of the report pursuant to § 26-8A-11. The information shall only include identification of the provisions of § 26-8A-2 which constituted the basis for the determination that abuse or neglect occurred. This provision does not limit the department in providing

services to a parent who is the subject of the report. A notice of the report shall be sent, by certified mail, to any parent who is not the subject of the report at the parent's last known address. The information shall be maintained confidential by the parent pursuant to § 26-8A-13.

### **S.D. Codified Laws § 26-8A-28**

Notice of entry of order of adjudication or final decree of disposition issued by the court in any action involving an abused or neglected child shall be served on the child's attorney and the child's guardian ad litem or special advocate, if any, and on all respondent parents and other respondent parties in any manner authorized by the rules of civil procedure. The notice of entry may be served by publication in the same manner as service of the summons in the action as provided in § 26-7A-48. If the notice of entry is served by publication, the service is completed five days after the date of publication. The time for appeal commences on the day following the date of completed service of the notice of entry regardless of the manner in which the notice of entry is served.

### **Divorce and Legal Separation – Jurisdiction**

There does not appear to be any statutory provision specifically governing jurisdiction over non-resident defendants in divorce proceedings under Chapter 254 of the South Dakota Codified Laws titled “Divorce and Separate Maintenance.” A review of the applicable case law indicates that a plaintiff in a divorce proceeding must effect service pursuant to the general service rules set forth in the South Dakota Rules of Civil Procedure, which are detailed above.

### **S.D. Codified Laws § 25-4-30.1**

An action for divorce or separate maintenance may be commenced in the county of residence of either party, subject to the right of the defendant to have the place of trial changed to the county where the defendant resides.

### **S.D. Codified Laws § 25-4-30**

The plaintiff in an action for divorce or separate maintenance must, at the time the action is commenced, be a resident of this state, or be stationed in this state while a member of the armed services. Subsequently, the plaintiff need not maintain that residence or military presence to be entitled to the entry of a decree or judgment of divorce or separate maintenance.

### **Divorce and Legal Separation – Service/Notification Requirements**

There do not appear to be any statutory provision specifically governing service and notice under Chapter 25-4 of the South Dakota Codified Laws titled “Divorce and Separate Maintenance.” A review of the applicable case law indicates that a plaintiff in a divorce proceeding must effect service pursuant to the general service rules set forth in the South Dakota Rules of Civil Procedure, which are detailed above.

### **Adoption Proceeding – Jurisdiction**

### **S.D. Codified Laws § 25-6-7**

The circuit court for the county of the child's legal residence or of the adopting parent's legal residence according to where petition is first filed shall have the original jurisdiction.

## Adoption Proceeding – Service/Notification Requirements

### S.D. Codified Laws § 25-6-1.1

Father of illegitimate child not entitled to notice unless acknowledged. Notwithstanding any other provision of law or court rule the father of an illegitimate child shall, as a requirement of due process, have no rights to the service of process in adoption, dependency, delinquency, or termination of parental rights proceedings unless he is known and identified by the mother or unless he, prior to the entry of a final order, in any of the three proceedings, shall have acknowledged the child as his own by affirmatively asserting paternity, within sixty days after the birth of the child:

- (1) As outlined in § 25-6-1; or
- (2) By causing his name to be affixed to the birth certificate as provided by § 34-25-13.2; or
- (3) Otherwise by commencing a judicial proceeding claiming a parental right.

### S.D. Codified Laws § 25-6-11

Upon the filing of a petition for the adoption of a minor child the petitioner therein shall notify the Department of Social Services, by mailing to the department a copy of the petition. The petitioner also shall notify the department of the date fixed for hearing the petition, or mail to the department a copy of the order fixing the date of the hearing. The department shall make a recommendation as to the desirability of the adoption. The department may appear in any procedure the same as the party in interest, and may request a postponement of hearing on the petition in the event more time is needed for its investigation. This section only applies to a child in the custody of the department.

### S.D. Codified Laws § 25-6-4

No child may be adopted without the consent of the child's parents. However, if it is in the best interest of the child, the court may waive consent from a parent or putative father who:

- (1) Has been convicted of any crime punishable by imprisonment in the penitentiary for a period that, in the opinion of the court, will deprive the child of the parent's companionship for a critical period of time;
- (2) Has, by clear and convincing evidence, abandoned the child for six months or more immediately prior to the filing of the petition;
- (3) Has substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection;
- (4) Being financially able, has willfully neglected to provide the child with the necessary subsistence, education, or other care necessary for the child's health, morals, or welfare or has neglected to pay for such subsistence, education, or other care if legal custody of the child is lodged with others and such payment ordered by the court;
- (5) Is unfit by reason of habitual abuse of intoxicating liquor or narcotic drugs;
- (6) Has been judicially deprived of the custody of the child, if the adjudication is final on appeal To the court of last resort or the time for an appeal has expired;
- (6A) Has caused the child to be conceived as a result of rape or incest; or
- (7) Does not appear personally or by counsel at the hearing to terminate parental rights after notice pursuant to §§ 25-5A-11 and 25-5A-12 which was received at least fifteen days prior to the hearing.

## Domestic Violence – Jurisdiction

### S.D. Codified Laws § 25-10-2

An application for relief seeking protection from domestic abuse may be filed in circuit court or in a magistrate

court with a magistrate judge presiding. Venue lies where any party to the proceedings resides.

## **Domestic Violence– Service/Notification Requirements**

### **S.D. Codified Laws § 25-10-4**

Upon receipt of the petition seeking protection from domestic abuse, if sufficient grounds are alleged for relief, the court shall order a hearing which shall be held not later than thirty days from the date of the order unless for good cause the court grants a continuance. Personal service of the petition, affidavit, and notice for hearing shall be made on the respondent not less than five days prior to the hearing.

### **S.D. Codified Laws § 25-10-7**

An ex parte temporary protection order is effective for a period of thirty days except as provided in § 25-10-7.1 unless for good cause the court grants a continuance. No continuance may exceed thirty days unless the court finds good cause for the additional continuance and:

- (1) The parties stipulate to an additional continuance; or
- (2) The court finds that law enforcement is unable to locate the respondent for purposes of service of the ex parte protection order.

If a continuance is granted, the court by order shall extend the ex parte temporary protection order until the rescheduled hearing date. The respondent shall be personally served without delay with a copy of the ex parte order along with a copy of the petition, affidavit, and notice of the date set for the hearing. The ex parte order shall be served without delay under the circumstances of the case including service of the ex parte order on a Sunday or holiday. The law enforcement agency serving the order shall notify the petitioner by telephone or written correspondence when the order is served if the petitioner has provided to the law enforcement agency either a telephone number or address, or both, where the petitioner may be contacted. The law enforcement agency and any officer of the law enforcement agency is immune from civil and criminal liability if the agency or the officer makes a good faith attempt to notify the petitioner in a manner consistent with the provisions of this section.

### **S.D. Codified Laws § 25-10-7.1**

If an ex parte temporary protection order is in effect and a judge issues a protection order pursuant to § 25-10-5, the ex parte temporary protection order remains effective until the order issued pursuant to § 25-10-5 is served on the respondent.

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