

***Family Law Section of the State Bar of North Dakota  
Legislative Subcommittee  
Christina Sambor, Chair***

The Honorable Diane Larson  
State Capitol Building  
600 E. Boulevard Ave.  
Bismarck, ND 58505

RE: House Bill 1190

Dear Ms. Larson:

We are writing to you today in support of House Bill 1190. This bill was originally introduced by representatives M. Johnson, Klemin, O'Brien and Schneider, at the urging of a concerned family law attorney regarding the status of our current law. The current law, N.D.C.C. § 14-05-24(1) has been interpreted by the Supreme Court to limit the court's discretion to determine a valuation date, when the parties cannot agree. In the case of *Messmer v. Messmer*, 2020 ND 62, the Court held at paragraphs 15 through 17:

The statute is unambiguous. It does not provide the district court with discretion when the parties do not agree upon a valuation date. In the absence of an agreement, the statute requires valuation of the marital estate as of the date of service of a summons or the date on which the parties last separated, whichever occurs first.

The second sentence of N.D.C.C. § 14-05-24(1) reads: '[e]xcept as may be required by federal law for specific property, and subject to the power of the court to determine a date that is just and equitable, the valuation date for marital property is the date mutually agreed upon between the parties.' That sentence requires the district court to use the valuation date agreed upon by the parties unless the court determines the agreement would not be just and equitable.

The third sentence of N.D.C.C. § 14-05-24(1) reads: '[i]f the parties do not mutually agree upon a valuation date, the valuation date for marital property is the date of service of a summons in an action for divorce or separation or the date on which the parties last separated, whichever occurs first.' That sentence does not include any directive to the district court to exercise its discretion, but instructs the court, in the absence of an agreement between the parties, to value the marital property on the date of service of a summons or the date the parties last separated, whichever occurs first.

Reading district court discretion into the third sentence and allowing the court to exercise its discretion in the absence of an agreement would render the legislature's directives meaningless. There would be no circumstances under which the court would not have discretion. Regardless of this Court's preference regarding district court discretion in selecting an equitable date for valuing a marital estate, "the letter of it [the law] is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05.

The smallest amount of research revealed that the North Dakota legislature never intended to take away the power of the court to decide the valuation dates, even when the parties could not agree. It is preferred that the parties agreement control for the valuation date. However, when

proposing this change to the law, all legislators testified that the court would have the authority to consider special circumstances and “maintain the ability to change the valuation date if there is an unfairness.” (Rep. M. Nelson, February 3, 2017, House Session 12:49:44 PM.) The court was to “retain its ability to determine if [the valuation date] is unfair.” (Rep. Klemin, February 3, 2017, House Session 12:58:30 PM.) The new law adopted in 2017 intended to “reserve the power of the court to determine what is equitable and fair.” (Rep. K. Koppleman, February 3, 2017, House Session 12:55:40 PM.) These sentiments were echoed in the Senate by Senator Armstrong, March 15, 2017, Senate Session 1:30:49. <https://www.legis.nd.gov/assembly/65-2017/bill-video/bv1325.html>

House Bill 1190 will correct this situation. The current law has created significant problems for valuation when the parties have lived in separate households for several years, but intended to remain married, at least for a period of time. Perhaps it was a situation where the parties agreed to work on their marriage, but they needed to live separately to attempt reconciliation. At the time of the separation, neither party is intending to divorce. Using a retroactive date for the valuation back to the date of separation can create an unfair surprise to one or both of the spouses.

Additionally, the current retroactive valuation date makes appraisals extremely difficult. Appraisers are being asked to put a value on property years before the appraisal is actually being prepared, and oftentimes after significant improvements or changes are made to the property. Additionally, the date of separation increases conflict between the parties to show whether or not the parties were, in fact, separated.

HB 1190 amends N.D.C.C. Sec 14-05-24(1) to restore the power of the court to make valuation determinations which are fair and equitable under the unique circumstances of the case. It also identifies a specific date, which is unambiguous, on which the parties can rely for a valuation date. It does not incentivize delay of the proceedings and allows for meaningful preparation and maximum resolution of issues prior to trial.

Valuation issues involve moving targets. The value of assets and debts can change daily and often do. Identifying the valuation date as “sixty days before the initially scheduled trial date” creates a date certain for the parties and counsel on which to value the assets. This is two months before the trial, meaning that there is a greater opportunity for the parties to agree on the values well in advance of trial. It also creates certainty for parties in terms of the present value of assets needing an appraisal rather than speculative appraisals based upon the condition or use of the property several years prior.

The sixty-day deadline was reached after several discussions between the members of the legislative committee, members of the House, and practitioners as a fair and equitable timeframe. Having the date be subject to the trial date set by the Court limits the ability of the parties to manipulate the valuation dates, as can occur now. Moreover, it prevents the creation of “non-marital property,” which does not exist in our law. This law seeks to provide certainty for parties, while still allowing some level of discretion for the Courts.

These changes will allow parties to choose their own date of valuation, but if they do not agree, then a date certain will apply—sixty days before the initially scheduled trial date. This makes agreements on valuation easier and will likely produce more pre-trial agreements on the values on assets and debts. It also allows the court to use an alternative date, so long as its reasons are fair and equitable and spelled out in the court order. This protects both parties from the conduct of the other, market forces over which neither party has control, and simplifies appraisals and information gathering.

Thank you for considering our thoughts on this very important family law issue.

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