

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIAL PROCESS COMMITTEE

Wednesday, January 9, 2008
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Shirley Meyer, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Shirley Meyer, Dawn Marie Charging, Chris Griffin, Dennis Johnson, Nancy Johnson, Joyce Kingsbury, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar, Lee Myxter, Lisa Wolf; Senators Tom Fiebiger, Curtis Olafson, Constance Triplett

Member absent: Senator JoNell A. Bakke

Others present: See attached [appendix](#)

Senator David O'Connell, member of the Legislative Council, was also in attendance.

It was moved by Senator Triplett, seconded by Representative Wolf, and carried on a voice vote that the minutes of the September 19, 2007, meeting be approved.

DOMESTIC VIOLENCE PROTECTION ORDER PROCESS STUDY

Chairman Meyer called on Justice Mary Muehlen Maring, North Dakota Supreme Court, for testimony regarding the domestic violence protection order process study. Justice Maring said she chaired the Gender Fairness Implementation Committee from 1997 to 2006. She said the principal mission of this committee is to "oversee the development of a detailed course of action to implement recommendations of the Final Report of the North Dakota Commission on Gender Fairness in the Courts" and to "monitor the progress of the Judicial Branch toward eradicating gender bias in the courts." She said regional focus group discussions were conducted with lawyers, child support personnel, domestic violence advocates, victim and witness assistants, and judicial system employees. She said questionnaires were distributed to solicit background information and to provide a base of information for the assessment process. She said domestic violence was one of the four areas addressed in the committee's assessment. She said the responses concerning domestic violence indicated that education and awareness efforts have positively affected how these cases are handled and that professional conduct in the proceedings has improved. She said the survey question that generated a general concern was whether the current domestic violence protection order process within the court system serves both parties equally in terms of resources, review of petitions, and dispositions. She said about half of the

responses reflected a general sentiment that the process serves both parties equally. She said judicial officers raised a general concern that there are unequal resources in these proceedings. She said a review of some of these responses suggested that unequal resources meant the unavailability of a domestic violence advocate for both parties when dual protection petitions are filed and the unavailability of an attorney to represent a respondent who cannot afford one. She said the responses are not a criticism of the job done by the North Dakota Council on Abused Women's Services or the job done by any of the local agencies. She said it is a matter of funding for more advocates.

Justice Maring said because the domestic violence protection order process is a civil proceeding, the respondent must hire an attorney to represent the respondent in the proceeding. If the respondent is unable to afford an attorney, the respondent must look for legal services at no cost or a reduced cost. She said North Dakota has very limited resources for these parties. She said these are funding matters that are appropriate for the Legislative Assembly.

In 2005 Justice Maring said North Dakota Supreme Court Administrative Rule 34, which authorizes the use of advocates for domestic violence cases, was amended to allow entities other than the North Dakota Council on Abused Women's Services to be a certifying entity qualified to train and certify domestic violence advocates. She said the Court Services Administration Committee is considering the development of an informational brochure for respondents who wish to petition for domestic violence protection orders. She said all of these steps have been taken to ensure the elimination of any perceived or actual gender bias in the process.

Justice Maring said a second area of concern reflected in the responses was that the protection order process is being used to gain an advantage in custody disputes. She said North Dakota Century Code (NDCC) Section 14-07.1-02.1 provides a penalty for domestic violence protection order petitions that are false and not made in good faith. She said a lot of progress has been made in eliminating gender bias in the adjudication and disposition of domestic violence protection orders. She said the findings do not indicate the process is broken. She said a motivating sentiment behind the study resolution was to review whether more resources should be considered so that more services

are available for those respondents who cannot afford an attorney or who do not have access to advocates. Justice Maring submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Triplett, Justice Maring said there are no statistics available on the number of false allegation cases in the state.

In response to a question from Representative N. Johnson, Justice Maring said a pilot project focused on settling custody disputes in divorce cases without litigation is being planned for two sites. She said an administrator will be hired. She said there will be a concerted effort to resolve the custody issues without an adversarial proceeding. She said although mediation usually is not used to resolve custody in cases in which domestic violence is alleged, there will be an attempt to resolve some of these cases in the pilot project.

In response to a question from Representative Meyer, Justice Maring said the definition of domestic violence contained in NDCC Section 14-09-06.2 is used only for raising a rebuttable presumption against custody. She said that definition is different from the definition of domestic violence in Section 14-07.1-01. She said the definition in the domestic violence protection order statute is much broader.

In response to a question from Senator Fiebiger, Justice Maring said additional funding for respondents would help balance the resources available to each party. She said in some instances, the respondent also may be a victim of domestic violence but does not have access to an advocate. She said in cases in which there is no dual petition, the petitioner may have an advocate but the respondent does not have any assistance because of the inability to afford an attorney.

In response to a question from Representative Klemin, Justice Maring said there is no constitutional requirement for legal counsel in civil matters. She said, therefore, it is necessary to look to the state for funding.

In response to a question from Senator Triplett, Justice Maring said while the domestic violence protection order process is a civil case, the penalty for violating an order is a criminal offense. She said upon the filing of a verified petition, the judge issues an order for the respondent to appear to show cause why a protection order should not be issued. She said the respondent is allowed to cross-examine those individuals who signed affidavits. She said if the respondent is unable to show cause, the protection order is issued and served on the respondent. She said if the respondent violates the order, it becomes a criminal matter. She said at this point the respondent becomes the defendant and has a legal right to counsel. She said if the defendant cannot afford an attorney, the defendant may be entitled to receive legal services from an indigent defense attorney.

Chairman Meyer called on Judge Gail Hagerty, South Central Judicial District, for testimony regarding the domestic violence protection order process.

Judge Hagerty said the language used in protection orders is not easily understood by respondents. She said the language in the orders seems more directed at law enforcement. She said following the issuance of a temporary protection order, a hearing is scheduled within 14 days. She said to issue a domestic violence protection order there must be specific findings of domestic violence. She said the petitioner is usually accompanied by an advocate. She said the respondents usually do not have an advocate or an attorney. She said respondents often do not understand the proceeding or how to represent themselves. She said it would be helpful if informational materials regarding the process were available to both the petitioner and respondent. She said the materials should be in plain English and in a format similar to those done for small claims court parties. She said there also should be more information made available to respondents regarding the possession of firearms if a domestic violence protection order is issued. Judge Hagerty provided examples of a temporary domestic violence protection order and a domestic violence protection order, copies of which are on file in the Legislative Council office.

In response to a question from Representative Griffin, Judge Hagerty said she did not have information regarding the percentage of protection orders that are granted. She said a petitioner must go through a screening process with the advocacy organization to determine if the petitioner has a case.

In response to a question from Representative Charging, Judge Hagerty said respondents often do not know how to appear or how to respond to the order.

In response to a question from Representative Klemin, Judge Hagerty said it would be a good idea if the State Bar Association of North Dakota would form a task force to develop informational materials for petitioners and respondents regarding the domestic violence protection order process.

In response to a question from Representative Wolf, Judge Hagerty said a domestic violence protection order also can address custody, child support, and visitation. She said when both parties allege domestic violence, the party who goes to the advocate first is the one who will receive assistance.

Chairman Meyer called on Mr. William Neumann, Executive Director, State Bar Association of North Dakota, for testimony regarding the study. Mr. Neumann said because of the restrictions from the funding sources, Legal Services of North Dakota is not able to represent respondents in domestic violence protection order cases. He said because the volunteer lawyer program follows the same guidelines as Legal Services of North Dakota, this program also does not represent respondents. He said some cases may be referred to the State Bar Association. He said the State Bar Association may attempt to find an attorney who is willing to take the case.

Chairman Meyer called on Mr. John V. Emter for testimony regarding the study. Mr. Emter said the

state's legal system is broken. He said there are many constitutional violations in the courts.

Committee Discussion

Senator Triplett said the amount of resources available to petitioners and respondents is uneven. She said the funding for civil legal services has been reduced over the years.

Representative Klemin said it is not the Legislative Assembly's position to provide funding for legal services in civil cases. He said there is no constitutional requirement to provide legal services in civil cases. He said if the protection orders issued by the court are unclear or difficult to understand, the court can change the language. He said the responsibility for clearer orders or for providing informational packets belongs in the judicial branch.

Senator Triplett said judges could be directed to give specific instructions to the respondents.

Senator Fiebiger said the committee could encourage the courts to include clearer information in the protection orders. He said the committee could make a recommendation to the judicial branch and the State Bar Association to evaluate the language used in the orders and to include information regarding the respondent's rights and responsibilities.

CHILD CUSTODY - BEST STATE PRACTICES STUDY

Chairman Meyer called on Ms. Sherry Mills Moore, State Bar Association of North Dakota, regarding the child custody study. Ms. Mills Moore said she would provide to the committee a list of the members of the task force formed by the State Bar Association to study custody and visitation. She said the task force has met numerous times and will continue to meet monthly until summer. She said in November the task force met in Fargo with the North Dakota Coalition of Families and Children. She said the task force received public testimony and there was a good discussion of the issues. She said the issues revolve around balancing the best interests of the children with the rights of the parents. She said the task force is studying the concept of using parenting coordinators and parenting plans. She said the task force is also looking at the use of terms other than "custody" and "visitation."

Ms. Mills Moore said parenting coordinators, also known as visitation expeditors, could be used in high-conflict cases. She said parenting coordinators could be used to settle issues between the parties. She said a parenting coordinator could save time and money for the parties and the courts. She said the task force is looking at how other states use parenting coordinators. She said the task force is also looking at the use of parenting plans. She said some states require a parenting plan before a divorce is granted. She said some states, e.g., Montana, require a very detailed parenting plan. She said parenting plans are used in North Dakota but are not required. She said

the task force is not looking at the cost of these concepts. She said it is not the function of the task force to determine the costs. She said the task force is also looking at the presumption of joint legal custody and an early neutral intervention process.

In response to a question from Representative Meyer, Ms. Mills Moore said a parenting plan is done before the divorce is finalized. She said many parenting plans contain a process to be followed for the resolution of a conflict not covered in the parenting plan.

In response to a question from Representative Griffin, Ms. Mills Moore said the task force is not looking at how to speed up the divorce process but that is a part of the problem. She said because of a court's busy schedule, it would be difficult to speed up the process. She said the lengthy process actually can help the parties heal.

Chairman Meyer requested that information provided by the North Dakota Coalition for Families and Children be distributed to the committee. Copies of the information are on file in the Legislative Council office.

Committee Discussion

Chairman Meyer said the committee should continue to receive updates from the task force.

MISSING PERSONS STUDY

Chairman Meyer called on Ms. Jeannine Willie, Missing Persons DNA Program, Attorney General's office, Sacramento, California, for testimony regarding the missing persons study. Ms. Willie testified via telephone conference. Ms. Willie said California passed its missing persons legislation in 1989. She said the model missing persons legislation under consideration by the committee is based primarily on California's law. She said there are as many as 50,000 unidentified remains in the United States. She said several concerns about California's missing persons legislation have not materialized. She said there were concerns about domestic violence issues. She said there are some persons who may appear to be missing when they actually do not wish to be found. She said this may occur in domestic violence situations. She said in these cases law enforcement may confirm that the person is safe but do not reveal the person's location. She said concerns about jurisdiction have been addressed and have not been a problem.

In response to a question from Representative N. Johnson, Ms. Willie said California law provides that a risk assessment is to be done immediately upon receiving the missing persons report. She said when law enforcement takes the report, an assessment is done. She said the assessment may vary depending on the individual who is missing.

In response to a question from Representative Kingsbury, Ms. Willie said the amount of time and resources that law enforcement expends on a case depends on the situation.

In response to a question from Representative Klemin, Ms. Willie said in California the Attorney General's office is the central state agency for missing persons cases. She said for interstate cases, the local law enforcement agency usually works with the Federal Bureau of Investigation (FBI) and the law enforcement in the other state or states.

In response to a question from Senator Fiebiger, Ms. Willie said there are as many as 15 other states that have passed similar missing persons legislation. She said the legislation has led to an increase in the number of bodies identified. She said there are about 2,600 unidentified bodies in California. She said it is likely that a large number of those are persons who were from out of state or out of country. She said it also is likely that a missing persons report was not made on these persons. She said most states do not mandate that coroners report unidentified remains to a central repository.

In response to a question from Senator O'Connell, Ms. Willie said federal legislation known as the Adam Walsh Act of 2006 has led to an increased number of missing persons who are under 21 years of age being reported to a central repository. She said because of increases in the number of missing college students, the age for mandatory reporting to a central repository was increased from 17 to 21.

In response to a question from Representative Koppelman, Ms. Willie said most of the states that have passed missing persons legislation have used at least portions of the model Act. She said states have "tweaked" the legislation to work better for each individual state. In 2005, she said, the United States Department of Justice established a task force of representatives from local, state, and federal law enforcement, forensic medicine, and victim advocacy organizations to study ways to improve the use of federal DNA data bases. With the assistance of the task force, the National Institute of Justice developed this model state legislation to provide guidance to states on the entire process surrounding missing persons.

In response to a question from Representative Wolf, Ms. Willie said the University of North Texas has received funding from the National Institute of Justice to process DNA samples free of charge for law enforcement from all states. She said California funds its missing persons DNA program from the fee charged for the issuance of copies of death certificates. She said of the \$2 cost per death certificate, 10 cents is designated for the missing persons DNA program. She said federal law provides that the DNA analysis may be used only for the purpose of identifying or locating missing persons and any other use is prohibited. She said California law provides that a body of an unidentified person may not be cremated until the jawbone is removed and retained. She said it is not possible to get DNA from cremated remains. She said California's missing persons DNA program has been very successful. She

said every unidentified person deserves to be identified and the remains returned to the family.

Representative N. Johnson said the model legislation began as part of President George Bush's DNA initiative. She said she was a legislative participant on the task force that developed the model legislation. She said the model legislation was needed because there is no uniform procedure in all states to deal with missing persons. She said there are about 35 unidentified or missing persons in North Dakota.

Chairman Meyer called on Mr. LaMonte Jacobson, State Crime Laboratory, for testimony regarding the use of DNA for identifying missing persons. Mr. Jacobson said the State Crime Laboratory has two sections. He said the forensic section deals with analysis of evidence involving arson, drugs, DNA, firearms, and trace. He said the toxicology section deals with drug screening, blood alcohol, breath instruments, and officer training for the use of intoxilyzers. He said the DNA unit works with the screening of biological evidence. He said there is DNA in every nucleated cell in the body. He said there are two copies of nuclear DNA present in each cell with the biological mother and father each contributing one copy. He said DNA can be found in blood, muscle, bone marrow, tooth pulp, hair roots, saliva, sweat, semen, and tissue. He said it is possible to obtain DNA from a number of sources with which there has been human contact, including chewing gum, stamps and envelopes, stains, doorknobs, toothbrushes, hairbrushes, sanitary pads, and bite marks. He said the federal DNA Identification Act of 1994 formalized the FBI's authority to establish a National DNA Index System (NDIS). He said over 170 public law enforcement agencies across the country participate in NDIS. He said the Combined DNA Index System (CODIS) merges aspects of forensic science and computer technology to create an effective tool for providing investigative leads and solving violent crimes. In 2000, he said, the FBI laboratory began developing the national missing persons data base program for the identification of missing and unidentified missing persons. He said CODIS contains the following indexes--convicted offender, forensic, arrestees, missing persons, unidentified human remains, and biological relatives of missing persons. He said the missing persons data base program uses three indexes in NDIS, including unidentified human remains, missing persons, and biological relatives of missing persons. He said DNA profiles in these three indexes are searched against each other. He said the index totals at the State Crime Laboratory are:

- Offender index - 2,709 profiles; 2,079 samples waiting to be processed.
- Forensic index - 226 profiles; 187 cases waiting to be processed.
- Arrestee index - No profiles; law becomes effective August 1, 2009.

- Unidentified human remains index - No profiles; one case awaiting analysis at University of North Texas.
- Biological relatives of missing persons index - 7 profiles entered; 4 cases.

Mr. Jacobson said as part of the President's DNA initiative, DNA collection kits are available to law enforcement free of charge. Mr. Jacobson provided written testimony and a sample DNA collection kit, both of which are on file in the Legislative Council office.

In response to a question from Representative Griffin, Mr. Jacobson said to send a DNA case to a private laboratory for testing would cost approximately \$6,675, which includes the cost of screening and DNA testing for five samples. He said the cost for the State Crime Laboratory to process the same case is \$2,870.

In response to a question from Representative Koppelman, Mr. Jacobson said state's attorneys often demand 10 to 20 DNA samples from a crime scene. He said in recent years there has been an increased demand for DNA testing.

In response to a question from Senator Triplett, Mr. Jacobson said he was not aware that there were 35 unidentified bodies in North Dakota. He said those may be in the coroner system.

In response to a question from Representative Meyer, Mr. Jacobson said each county has its own procedures regarding how to preserve or dispose of human remains.

Chairman Meyer called on Chief Keith Witt, Bismarck Police Department, for testimony regarding the study and the model missing persons legislation. Chief Witt said it is important for law enforcement to investigate legitimate reports of missing persons when evidence or other information exists to show the person is not simply delayed or otherwise voluntarily missing and to do everything possible to locate missing persons. He said DNA plays an important role in the investigation of missing person cases and the identification of unidentified persons and remains and should be gathered and used to the fullest extent possible. He said he is opposed to the adoption of the model missing persons legislation in its current form. He said it is not advisable to codify extensive procedures. As the chief of a police department, he said, he is aware of the ever-developing nature of procedures and the need for revisions. He said procedures need to be updated when the need arises and having a procedure in law which cannot be revised until the next legislative session could create significant issues for law enforcement.

Chief Witt said law enforcement agencies often receive calls from concerned friends or relatives who want to report someone missing if the person has failed to come home on time from work, an appointment, or a social gathering. He said occasionally, perpetrators of domestic violence also attempt to make a missing person report concerning their domestic partner in order to have law enforcement locate their domestic partner who may

be seeking safe shelter. He said basic information is gathered in these situations, but supervisors are given discretion in how these calls are handled in the initial stages. He said the model legislation does not allow for any discretion in the handling of missing persons reports. He said the model legislation states that a law enforcement agency may not refuse to accept a missing persons report for any reason. He said this would include those cases in which the law enforcement agency has no jurisdictional link to the missing person. He said this would be impractical and unworkable. He said an example would be someone who lives in Minot comes to Bismarck to report someone missing in St. Louis, Missouri. He said the Bismarck officers would be required to take the report and begin gathering information and attempting to do an investigation. He said the department would be severely limited in what it could do to investigate the case. He said it would not be fair to expect taxpayers in Bismarck to pay for an officer's time in investigating a case that does not have some link to the department's jurisdiction. He said the model legislation also states that all missing persons reports accepted by a law enforcement agency must be entered without delay into the National Crime Information Center (NCIC) missing persons file. He said the NCIC has specific qualifying conditions that must be met before a missing person may be entered into the system, including that the missing person must have a proven physical or mental disability; must be missing under circumstances indicating the disappearance was not voluntary; or must be missing under circumstances indicating that the person's physical safety may be in danger. He said in this respect there appears to be a conflict between the model legislation and NCIC regulations. He said the model legislation makes reference to a central state agency responsible for handling missing persons cases. He said it is not clear if this state agency or the local agency is then responsible for the investigation concerning the missing person.

Chief Witt said the model legislation contains excellent procedural guidelines that should generally be followed. He said it would be best for a statute to require that law enforcement agencies are required to have a written policy concerning missing persons reports. He said the model legislation could be provided as a model policy for departments to use as a guide in developing their own policies. Chief Witt submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Klemin, Chief Witt said the Bismarck Police Department has a missing persons policy. He said his review of the model legislation generated ideas for some changes that could be made to his department's policy. He said the policy allows for some determinations to be made before a missing report is generated. He said most of the law enforcement agencies in the state have missing persons policies in place. He said there is good coordination with other

agencies in the state. He said the Division of State Radio is used to assist in the coordination of efforts. He said other than a requirement that a law enforcement agency have a missing persons policy in place, there is no need for anything else in statute.

In response to a question from Representative Wolf, Chief Witt said the Bismarck Police Department receives about 10 to 12 missing persons reports each year. He said most are short-term missing persons. He said the department only has two unsolved missing persons cases. He said all agencies could use the model legislation as a guide and adapt it to meet their own needs.

In response to a question from Representative Koppelman, Chief Witt said it would be helpful if the person making the report was a resident of the jurisdiction or at least had some jurisdictional link to the law enforcement agency that takes the report.

In response to a question from Senator Triplett, Chief Witt said the model legislation prohibits the cremation of unidentified remains. He said it makes sense to not destroy evidence. He said the procedure in the model legislation for high-risk cases is good. He said that procedure is being used in North Dakota.

In response to a question from Representative N. Johnson, Chief Witt said other jurisdictional issues arise when dealing with travelers. He said if a person traveling through Bismarck reported a person missing, the department would take the report.

In response to a question from Representative Klemin, Chief Witt said he would provide a copy of the Bismarck missing persons policy to the committee.

In response to a question from Representative Griffin, Chief Witt said the two unsolved missing persons cases have been forwarded to the national missing persons data base.

Chairman Meyer called on Sheriff Pat Heinert, Burleigh County Sheriff's Department, for testimony regarding the study and the model missing persons legislation. Sheriff Heinert said he agrees with the intent of the model legislation. He said the legislation would be good for the state and would be easy to adopt. He said there are, however, several areas of the model legislation to which he would recommend changes. He said the model legislation requires any agency in the state to take the missing persons report. He said additional language needs to be added to identify the party that is responsible to follow up on the report. He said the report, once taken, should be forwarded to the law enforcement agency that would have proper jurisdiction. He also said that the model legislation requires an absolute timeframe for completing the risk assessment. He said most agencies have a limited number of staff working these cases. He said there also is a concern about the section that requires the prompt transfer of unidentified remains. He said there may be an issue with this when dealing with unearthened remains at historic sites. Sheriff Heinert submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Koppelman, Sheriff Heinert said he would support the idea of having the Attorney General, as the chief law enforcement officer, develop the details of a missing persons policy. He said the Legislative Assembly could include those features that would be essential in the policy and the Attorney General could work out the details.

Committee Discussion

Representative Meyer said the committee should receive a copy of the missing persons policy of the Bismarck Police Department.

Senator Triplett requested that a bill draft of the model legislation be prepared. She said the bill draft should include the reporting requirements of the model legislation.

Representative N. Johnson said the bill draft should include a uniform procedure for preserving an unidentified body. She said the bill draft should require the local law enforcement agency to take the report and then investigate or refer the case to another jurisdiction.

Representative Koppelman said it is important that law enforcement agencies have flexibility.

EXEMPTIONS FROM JUDICIAL PROCESS STUDY

Chairman Meyer called on Mr. John S. Foster, Adjunct Professor, University of North Dakota School of Law, for testimony regarding the exemptions from judicial process study. Mr. Foster said when attorneys need guidance in interpreting the exemptions contained in NDCC Chapter 28-22, it is often necessary to look to bankruptcy court decisions. He said he would recommend a number of changes be made to the exemptions contained in that chapter. He said there is an exemption for the family Bible. He said that should be changed to provide for an exemption for "one family Bible or other family primary religious text." He said there also is a need for a clarification of what is included in the term "wearing apparel." He said garnishment has been a more effective way for creditors to get property from a debtor than bankruptcy. He said North Dakota's homestead exemption is fairly liberal. He said the homestead exemption law in North Dakota limits the homestead to \$80,000 equity over liens and encumbrances. He said the Bankruptcy Code of 2005 was amended to limit homestead exemptions to \$125,000. He said he does not recommend an increase to North Dakota's homestead exemption. He said the exemptions in North Dakota seem to allow most debtors to stay in their homes.

Mr. Foster said North Dakota law exempts insurance benefits resulting from insurance covering any or all of the absolute exemptions. He said he recommends language that provides "if the insurance benefits are in cash or have been invested in other property capable of exemption under this chapter."

He said this would prevent a debtor from claiming his Jet-Ski is traceable to insurance proceeds from a fire at his exempt mobile home.

Mr. Foster said North Dakota law exempts a housetrailer or mobile home occupied as a residence by the debtor or the debtor's family. He said it is possible that a housetrailer or mobile home may exceed \$80,000 in retail or market value. He said because this statute has no dollar limit, it may be possible for someone living in a mobile home to get more of a "homestead" bang for his buck than someone living in a stick-built home using the \$80,000 homestead exemption. He said perhaps the housetrailer or mobile home value should be limited to the \$80,000 like the regular stick-built homestead exemption. He said NDCC Section 28-22-03 allows for an additional exemption of \$5,000 in personal property. He said despite the fact that this statute is fairly clear about being limited to personal property, there have been numerous attempts by debtors to try to spread this wild card exemption onto real estate. He said it may be appropriate to add language that clarifies that the exemption cannot be used to exempt a real estate interest of any kind.

Mr. Foster said NDCC Section 28-22-03.1 raises the issue of whether the term "resident" is different from the term "head of family." He said this section allows a resident to take, in lieu of the homestead exemption, an additional exemption of up to \$7,500. He said the North Dakota Supreme Court has not dealt with this but the bankruptcy court has refused to allow this exemption to a North Dakota resident if that resident's spouse has already chosen the homestead exemption under Section 28-22-02. He said the bankruptcy court approach to this makes sense and it is probably what the Legislative Assembly intended. He said, however, an argument by a debtor could be made that if one person in a married couple makes himself or herself the head of family, that leaves the other person still a resident. He said the head of family could choose the homestead while the other person, who is a resident, could choose the "in lieu of homestead" exemption. He said the statute could be clarified to provide that the exemption is not available if the resident exemption claimant, the spouse of the resident exemption claimant, or other head of the family of the resident exemption claimant has chosen the homestead exemption.

Mr. Foster said motor vehicle exemption is limited to \$1,200. He said this has been interpreted to mean \$1,200 in equity over and above liens and encumbrances. He said this statute could be amended to clarify that point. Regarding pensions, annuities, and life insurance policies, he said, there is a \$100,000 per account or \$200,000 maximum exemption. He said individual retirement accounts (IRAs), such as the Roth IRA and 401K accounts are totally exempt. He said there is a danger that a debtor might try to convert nonexempt property into exempt property in the face of a threatened judgment execution by, for example, selling a nonhomestead

lake cabin for \$100,000 and putting the money into an exempt IRA. He said perhaps limiting language could be added which provides that any contributions to any of the plans made within one year before the issuance of the execution and which contributions are more than the amounts allowed by the governmental regulation to be tax-exempt for the year of contribution are not exempt from process. Mr. Foster submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative D. Johnson, Mr. Foster said NDCC Section 28-22-02(6) allows for an exemption of fuel necessary for one year. He said the fuel must be "in kind" and actually on the debtor's property. He said the debtor cannot have money in an account that is designated as money for fuel. He said it is also not clear if the fuel exemption applies to fuel to heat a home or fuel to propel a vehicle or both. He said clarification is necessary.

In response to a question from Representative Klemin, Mr. Foster said there is some confusion in the exemption for pensions, annuities, and life insurance as to whether the requirement that the account must be in effect for at least one year applies only to the pensions, annuities, and life insurance policies or whether it also applies to the IRAs as well.

Chairman Meyer called on Mr. Lowell P. Bottrell for testimony regarding the exemptions study. Mr. Bottrell said he has worked extensively in the area of exemptions for the last 24 years. He said he has represented debtors, creditors, and bankruptcy trustees dealing with bankruptcy and other financial issues, including collections and foreclosures. He said he wrote a *North Dakota Law Review* article concerning exemptions. He said he has accumulated a summary of exemptions in North Dakota and Minnesota. Copies of the article and the exemptions summary are on file in the Legislative Council office.

Mr. Bottrell said the Constitution of North Dakota provides that debtors filing bankruptcy must be provided with certain exemptions. He said the constitution indicates that certain exemptions are a right and are necessary to provide for the comforts and necessities of life. He said the constitution does not specify what the exact exemptions should be but indicates that "all heads of families" should be entitled to a homestead the value of which is to be limited and defined by law. He said the constitution also provides that a reasonable amount of personal property must be exempt. He said the kind and value of both the homestead and personal property exemptions are to be fixed by law. He said his interpretation of that provision is that there is no requirement that the Legislative Assembly provide real estate as an exemption. He said this is further evidenced by the in lieu of homestead exemption that has been codified at NDCC Section 28-22-03.1(1).

Mr. Bottrell said the federal government can preempt state law when it so chooses. He said, for example, under the Employee Retirement Income

Security Act (ERISA), Congress has chosen to completely control the areas of ERISA qualified plans and has determined that such plans are completely exempt. He said ERISA qualified plans are not even considered the property of a bankruptcy estate and, subsequently, a debtor does not need to use an exemption to claim a qualified plan.

Mr. Bottrell said North Dakota has many exemptions that are out of date and never utilized in today's society. He said an example is in NDCC Section 28-22-02(2), which provides for an exemption for "a pew or other sitting in any house of worship." He said he has never seen this exemption utilized. He said some of the exemptions do not have economic reality. He said an example is the motor vehicle exemption of \$1,200. He said in today's society it would be very difficult to find a motor vehicle worth \$1,200 that would actually provide for the comforts and necessities of life.

Mr. Bottrell said he recommends that the Legislative Assembly establish one exemption of a fixed dollar amount. He said providing one exemption of a fixed dollar amount would eliminate the need for the Legislative Assembly to pigeonhole exemptions into specific areas. He said, for example, if the fixed dollar amount was \$80,000, the debtor could choose to use the entire sum toward the exemption of a homestead, or instead could choose to exempt personal property, whether it is cash, farm machinery, motor vehicles, or retirement plans. He said providing one exemption would also eliminate the need for debtors to move assets from one form to another just to claim the assets as exempt. He said a single claim exemption would eliminate disputes, such as the items that constitute "wearing apparel." He said the big issue would be how much the exemption dollar amount should be.

Mr. Bottrell said the Legislative Assembly has altered NDCC Section 28-22-03.1(4), which exempts certain amounts of the payments individuals have received from a wrongful death or bodily injury claim. He said the exemption was changed from \$7,500 to \$15,000 in 2007. He said these amounts are trivial in regard to someone who has suffered a wrongful death or bodily injury and is no longer able to generate future income. He said this money has not been obtained to provide for the individual now, but rather to provide for the individual's future needs. He said if payments received from a wrongful death or bodily injury claim are not completely exempt, individuals will eventually end up relying on public assistance. He said society should not be forced to pay for an individual's future needs if the individual rightfully had obtained a wrongful death or bodily injury claim. He said the claim should remain with the debtor so that the debtor can maintain oneself and not look to society to pay the debtor's way.

Mr. Bottrell said NDCC Section 28-22-17 provides that North Dakota has chosen to opt out of the federal exemptions, which allow for a broader range of exemptions. He said in the area of bankruptcy, he is

not certain that opting out of the federal exemptions is the right answer. He said in his experience the Minnesota system functions more efficiently because Minnesota has allowed debtors to claim either the federal exemptions or the state exemptions. Mr. Bottrell submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Fiebiger, Mr. Bottrell said going to a single exemption concept would reduce litigation. He said there would be no need to move assets around to fit into a scheme of exemptions. He said it would prevent hiding assets.

Mr. Foster said the valuation of property would be a problem if a single exemption concept was used. He said there would be a question as to which valuation tools to use.

In response to a question from Representative Koppelman, Mr. Bottrell said because more people own a computer than a church pew, a single exemption amount would allow a family to determine what is important to them.

In response to a question from Representative Griffin, Mr. Bottrell said irresponsible spending is the most typical cause of bankruptcy. He said preapproved credit cards are a problem. He said he also sees a considerable number of bankruptcies as a result of catastrophic medical bills.

In response to a question from Representative Koppelman, Mr. Bottrell said there was a spike in the number of bankruptcy filings before the new federal law changes on October 17, 2005. He said that spike was followed by a decline in filings. He said the spike in filings is occurring again.

Chairman Meyer called on Mr. Michael Wagner for testimony regarding the exemptions study. Mr. Wagner said if the state adopted a single exemption concept, the exemption should be limited to necessities. He said luxury items should not be permitted as exempted property. He said the purpose of exemptions is to give relief and provide necessities. Mr. Wagner provided to the committee suggested changes to the exemptions. A copy of the list of suggested changes is on file in the Legislative Council office.

In response to a question from Representative Meyer, Mr. Wagner said a debtor may be denied discharge of debt in bankruptcy if it can be proven that the debtor attempted to defraud creditors. He said it is very difficult to prove intent.

Chairman Meyer called on Mr. Ross Espeseth for testimony regarding the exemptions study. Mr. Espeseth said in his law practice he often represents debtors. He said whether the homestead exemption is used or a single exemption amount, there will still be ongoing litigation. He said he has not seen many bankruptcies that are strictly because of an abuse of credit cards. He said the current exemptions provide that the only real estate that can be protected is the homestead. He said there are situations in which other real estate should be exempt.

In response to a question from Representative Koppelman, Mr. Espeseth said his clients are usually in dire straits when they come to him. He said it is usually more expensive for the client to try to work things out with the creditors than to go through bankruptcy. He said most creditors are following the fair debt collection practices. He said the credit counseling requirement is not as valuable as the post-bankruptcy counseling.

In response to a question from Senator Fiebiger, Mr. Espeseth said the exemption levels are not keeping up with the amount of property people have. He said valuation of property is always a problem.

Committee Discussion

Representative Klemin requested that four bill drafts be prepared. He said the first bill draft should include the recommendations made by Mr. Foster. He said a second bill draft should provide for a single exemption of \$40,000 for personal property but should keep the current homestead exemption and garnishment provisions. He said a third bill draft should include the recommendations made by Mr. Wagner. He said a fourth bill draft should allow an option of the federal exemptions.

Senator Triplett said the North Dakota exemptions cannot affect the ERISA plans.

Representative Charging said there should be a study of the reasons for bankruptcies.

Representative Griffin said the committee may want to consider whether the debtor's assets should be kept in state as exemptions or whether the assets should flow to out-of-state credit card companies.

PATERNITY REGISTRY STUDY

At the request of Chairman Meyer, committee counsel presented a [chart](#) that provided information regarding the paternity registry laws of other states. Committee counsel said the chart provides information regarding the requirements of each state registry as well as the agency responsible for maintaining the registry. She also provided a copy of the legislative history for 2003 Senate Bill No. 2035. This bill would have provided for a paternity registry in North Dakota. The bill failed to pass the Senate. She also provided information and a copy of 2006 federal legislation that would have provided for a national paternity registry. She said the bill was not enacted. A copy of the information regarding the federal bill is on file in the Legislative Council office.

Chairman Meyer called on Ms. Julie Hoffman, Department of Human Services, regarding the establishment of a paternity registry study. Ms. Hoffman said 2003 Senate Bill No. 2035 would have provided for a paternity registry facilitated through the Division of Vital Records of the State Department of Health. She said the purpose of the bill was to protect the rights of fathers who wished to assume responsibility for the children they may have fathered and to expedite adoptions of children whose biological fathers are unwilling to assume

responsibility for their children. She said the bill allowed for a potential father to register at any time before the birth of the child and up to three days after the birth of the child. Under the bill, she said, an agency facilitating the adoption of a child would be required to request a search of the registry before a hearing for the termination or relinquishment of parental rights. She said the search of the registry would have required to be conducted no sooner than four business days after the birth of a child and the Division of Vital Records was required to issue a certificate of the results of the search within three business days of the receipt of the request. She said the timeframes would have potentially allowed for a hearing on a relinquishment of parental rights within 7 to 10 business days of the child's birth, a timeframe that would have been consistent with current timeframes for relinquishment hearings for infant adoptions in some court jurisdictions within the state. She said the bill provided that a mother would have 30 days from the receipt of notice of a paternity registry submitted to deny the registrant's claim of paternity.

Ms. Hoffman said she contacted her counterparts in states in the region to inquire as to how they view the efficacy of paternity registries in their states. She said comments regarding the efficacy of the registries varied. She said the response from her counterpart in Montana indicated that the Montana registry was "better than not having one," but felt it was not publicized adequately and wondered whether young men were aware of this option to protect their rights to a child. She said her counterpart in Wisconsin noted that Wisconsin has not had any particular issues with its registry and that it is an effective tool. She said both Montana and Wisconsin believe that their adoption agencies continue to make efforts to search for birth fathers to involve them in adoption planning and to gather their information when possible. She said the individual from Iowa commented that the registry is an effective tool for public agencies in making diligent efforts to identify fathers of children in foster care. She said the individual from Minnesota said that although its public agency has not regularly used the registry, they are now looking at changes that would make the registry more accessible to the public agency. She said Minnesota has had several precedent-setting cases related to their registry. She said Minnesota indicated that private agencies in the state are unhappy with the length of time after birth that a father has to register (30 days) and have tried several times to have that time shortened. She said South Dakota and Colorado do not have paternity registries. She said there have been unsuccessful attempts in both states to pass such legislation. Ms. Hoffman submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Wolf, Ms. Hoffman said a paternity test is not a requirement for termination of parental rights. She

said paternity testing could delay the permanency of the placement.

Committee Discussion

Representative Klemin said the committee may want to consider whether to proceed any further with this study. He said it is not likely that a paternity registry bill would pass. He said the bill considered in 2003 failed in the Senate by a vote of 1 to 46.

OTHER BUSINESS

Chairman Meyer said the meeting of the committee initially scheduled for July 16, 2008, will be rescheduled for June 26, 2008.

No further business appearing, Chairman Meyer adjourned the meeting at 3:30 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1