Jason McLean's Testimony on HB 1190

Good Morning, my name is Jason McLean. I am a family law attorney in Fargo, North Dakota. I have practiced exclusively in the area of family law since becoming licensed in this state in 2004. Prior to that time, I clerked for a family law attorney in Grand Forks. I have also practiced family law in Minnesota since 2003. With that background, I am offering this testimony in support of HB 1190 today.

Prior to the revisions to N.D.C.C. § 14-05-24 in 2017, the date of the valuation of property in a divorce, absent an agreement, was the date of trial. This created problems that were likely discussed in 2017, including what occurs when a matter is continued for long periods of time, or trial dates occur after long periods of separation. Often times, the trials themselves were used as an extension of discovery, even if the parties had completed extensive investigations during the interim. Such an arrangement also created situations where a spouse may benefit or be harmed by the increases and decreases in values as the case languished on the Court's docket. That was the impetus for a change four years ago.

However, in making that change, the pendulum swung too far in the other direction. Now, parties are required to value their property as of the date of the commencement of the action (when the summons was served) or the date of separation, ***whichever occurs first***. This change has had several consequences over the past four years:

1) It inadvertently creates a designation of "non-marital property" that does not exist in our law. It does so because any gains that are experienced during the period after separation are not subject to division. Instead, the party that takes the property profits from these uncounted increases in value.

2) It creates a penalty for spouses who wish to have a "trial separation" in the hopes of saving the marriage. If that trial separation is unsuccessful, the date of valuation may be months, over years, in the past.

3) It increases the ability of a party to manipulate valuations in divorce. A spouse who knows that a windfall is approaching, or that a debt is on the horizon, can now move out and set the valuation date through his or her own actions, leaving the other spouse harmed in the process.

4) It creates separate dates of valuation for separate items of property. A spouse may agree on the value of a vehicle or other personal property, but not agree on the value of a retirement account, thus making that value revert to the date of separation or commencement. This lack of uniformity provides a breeding ground for mischief in the divorce setting.

5) It creates confusion as to what the level of authority the courts have in setting valuations. Does the court have the ability to use its equitable power in all cases of valuations, or just those where a federal law may be at issue? Does the court have the inherent ability to dictate just inequitable values to make the required equitable division of property or not?

These are just a few of the problems that arose with the application of N.D.C.C. § 14-05-24. I do not believe they are all of the problems that have occurred. While the goal in 2017 may have been to provide certainty at the beginning of the process, the problems with that approach has become apparent. A change is necessary.

The changes that are submitted in HB 1190 will help to address the mentioned problems. By setting a valuation date as of the date of an initially scheduled pretrial conference, the date for valuation is not subject to the manipulation of the parties. Rather, the Courts will set that date. If there are counties or districts that do not usually hold pretrial conferences, the Court would still the opportunity to set the date for valuation versus allowing one party to manipulate the date. This creates equity and puts the parties on the equal playing field.

Likewise, HB 1191 clarifies the ability of the courts to review substantial changes to the property values and adjust them, as necessary. This provision is in keeping with the courts' powers to do what is equitable in divorce matters. It also addresses the question as to what the courts may and may not do with regard to changes in values. For example, if a farmer has a bad season and incurs several thousands of dollars' worth of debt after the date of the pretrial conference, the court could arguably determine it is necessary to include that debt in its analysis. Under the current law, those losses would not be included, and the property could be divided as though the losses do not exist. This problem, and those like it, has reared its head during the last four years.

Parties that are going through a divorce are faced with uncertainty. They are faced with major changes to lifestyles and economics. In some cases, parties made the decision to live separately, only to find that divorce was the only option. Our current law does not encourage parties to separate in hopes of saving a marriage. Instead, it punishes those who try that route. If we wish to encourage parties to try to save the marriage, we cannot place them in the position to risk their futures by doing so.

The changes made in 2017 to N.D.C.C § 14-05-24 were an over-correction. Now that we can see how the pre-divorce and commencement valuation language causes greater problems and confusion, we can correct the statute to a balance. HB 1190 provides that balance. I encourage each of you to consider this bill and give it a DO PASS recommendation from the Committee.
Thank you,

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