Legislative Assembly

North Dakota
House of Representatives

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March 14, 2023

Madam Chair and Members of the Senate Judiciary Committee:

For the record, I am Rep. Zac Ista from District 43 in Grand Forks. HB 1492 addresses an omission in North Dakota's existing laws protecting children from abuse by defining the currently undefined term "mental injury." In doing so, the Legislature would better protect victims of child abuse and more clearly put citizens on notice as to what exactly constitutes the criminal offense of child abuse by mental injury.

At the outset, let me be clear that this bill does not expand existing criminal child abuse law in North Dakota. Rather, our state's definition of child abuse already includes conduct that causes either "mental injury or bodily injury" to a child—and it has since at least 1999 (and will continue to even if this bill were not adopted). While the law provides clear definitions of various types of bodily injuries, we have never separately defined what the term "mental injury" means. Thus, law enforcement officers are left unsure what conduct might give rise to a child abuse by mental injury charge, prosecutors are left not knowing how to prove a case with this allegation, and defendants and their counsel likewise are left not knowing how to defend against such allegations.

This omission in law reached the North Dakota Supreme Court in the 2022 case of State v. Castleman. There, a defendant was convicted of child abuse after evidence at trial showed that the defendant entered his daughter's bedroom, screamed at the child's mother, held her by the neck, pushed her face into a pillow, and threatened to kill her in a graphic manner. The child was present for all of this domestic violence, and trial testimony showed that the girl felt scared, was shaking, and cried. There was no evidence, however, that the defendant physically harmed his child during this incident. Under these facts, the State charged the defendant with child abuse, alleging that he caused mental injury to his daughter. During deliberations, the jury asked the court to provide a definition of "mental injury," but the court was unable to elaborate on the term. Ultimately, the jury returned a guilty verdict on the offense of child abuse by mental injury.

On appeal, the North Dakota Supreme Court overturned the conviction. In doing so, the Court conducted an extensive analysis of what the term "mental injury" means in § 14-09-22(1) after observing that the term is neither defined nor explained in Century Code. Applying various conventions of statutory construction, the Court ultimately held that the term means "mental suffering that has some lasting, non-transitory effect," which "may be shown by evidence of a medical diagnosis, behavioral changes, or other lasting effect of psychological, emotional, or mental trauma." The Court rejected what it characterized as a more sweeping definition that could include only "temporary mental discomfort." Applying this newly adopted definition to the record before it, the Court concluded that the evidence at trial was insufficient to support a conviction.

HB 1492 seeks to fill the statutory gap the Court highlighted in Castleman. In doing so, the bill better asserts our legislative prerogative to write the laws, leaving our courts to interpret and apply them rather than having to create their own definitions where we provide none. Notably, without adopting a legislatively drafted definition, the court-created one from Castleman would remain binding legal precedent.

In preparing this legislation, I learned that including mental injuries as one type of child abuse certainly is not unique to North Dakota, and many other states—including Florida, Alaska, Idaho, Minnesota, Iowa, Maryland, Missouri, Nevada, and Pennsylvania—already define what constitutes "mental injury" in their state codes. While none of those definitions is exactly the same, they do have some common elements. First, like the Court held in Castleman, they require some sort of sustained adverse impact on the child's mental well-being. Second, they generally require the mental injury to have a substantial or serious impact on the child (rather than the more amorphous "mental suffering" applied in Castleman). Third, they require evidence that the mental injury has caused the child to function at a level below that which would otherwise be expected in terms of the child's emotional, behavioral, or psychological performance, *i.e.* a measurable impact. The combination of these elements—a substantial impact of sustained duration and measurable impact—creates a high bar for prosecution under a mental injury theory of child abuse.

As passed by the House, HB 1492 contains a definition including each of these three components by requiring the mental injury to be 1) "observable and substantial," 2) "nontransitory," and 3) measurable against the "child's mental or psychological ability to function within a normal range of performance or behavior." This definition is the result of careful work by a House subcommittee after defense attorneys and I worked together to address concerns they had with the original language of the bill. I believe the definition in the engrossed bill now before you satisfies their concerns while maintaining my original intent in bringing this legislation.

To that end, I do want to briefly touch on one aspect of the original bill that is no longer included in the engrossed version: a specific reference to exposing child to domestic violence as one basis that could give rise to the mental injury prong of child abuse. The reason I specifically included exposure to domestic violence in my

initial bill draft is because of the devastating effects it can have on children. In her concurrence in Castleman, Justice McEvers, joined by then-Justice VandeWalle, noted that children's exposure to domestic violence can often lead to long-term detrimental mental health effects. "It is not uncommon for children who are raised in violent homes to experience long-term negative emotional, mental or behavioral impacts of domestic violence, even when they are not the target of the abuse," Justice McEvers wrote, adding that "[c]hildren who witness domestic violence may also demonstrate aggressive behavior, depression, or have cognitive deficiencies, and are at greater risk to develop serious health problems." Others behind me planning to offer supportive testimony of HB 1490 will echo Justice McEvers's sentiments and further describe the harmful impact that exposing a child to domestic violence can have.

Addressing this particular concern was a primary motivation of mine in bringing the bill, and I continue to believe strongly that the mental injuries a child can experience from being exposed to domestic violence are among the most serious examples of this form of child abuse. That's why, in the limited but appropriate circumstances proposed in this bill, exposure to domestic violence that causes "an observable and substantial, nontransitory impairment to a child's mental or psychological ability to function within a normal range of performance or behavior" could still form the basis of a "mental injury" charge of child abuse if the State can so prove beyond a reasonable doubt. This will give law enforcement and courts an additional tool to protect children from the long-term damage that can arise following exposure to domestic violence.

So why, then, not specifically include reference to exposure to DV in this section of Century Code? As Mr. Travis Finck of the North Dakota Commission on Legal Counsel for Indigents noted during subcommittee work on the bill, there is no functional legal reason to list all possible types of conduct that could give rise to a mental injury charge. While exposure to domestic violence is one important possible basis, there surely are others that also could meet the strictures of the proposed definition. Setting forth a definition like the one proposed gives law enforcement and prosecutors a standard by which to view the facts of any particular case to determine if the evidence supports bringing a charge. Just as importantly, it gives prospective defendants and their counsel a clear definition by which to assess the availability of potential defenses against criminal liability. Ultimately, it will be up to judges to apply the facts of each case to the proposed law in this bill to determine whether a crime has been committed—a task that our judges already do on a daily basis.

For these reasons, members of the Committee, I urge a **do pass** recommendation for HB 1492. It does not expand existing criminal law or create any new crime, but rather clarifies a law we have had on the books for over two decades. We should assert our legislative prerogative now and clearly define the language we already put into statute. Thank you for your consideration, and I stand for any questions.