

February 1, 2025

MEMORANDUM FOR NORTH DAKOTA SENATE JUDICIARY COMMITTEE

FROM DERRICK R. SHERWOOD

Subject: Testimony in Support of Senate Bill 2383

1. Madam Chair and Senators of the Judiciary Committee, my name is Derrick Sherwood, and I submit this testimony of my own free will, that it was not influenced by any person and everything that I am stating is true based upon my personal knowledge and beliefs **IN SUPPORT OF SB2383**.
2. I would like to discuss family law. I am here today in support of this bill as this is a much-needed change for the State of North Dakota. This bill is needed because our current laws force parents into a competition for custody of minor children by simply utilizing one word “best.” People may say that the courts of North Dakota cannot do this...but they can, and they do. For example, say we are here to determine who is the best senator and I am the only person who can decide who is best. Senator A may believe they are the best because they have vast experience in the legislature. Senator B may believe they are the best because they have new fresh ideas. Now prove to me who is the best. What happened here is we created an unnecessary competition. The fact is that while this hypothetical situation is not real, this is what happens in our family courts every day across the State of North Dakota. As Senators you all come into session on equal grounds simply by holding the title of Senator and being duly elected to your position, no voice is less powerful than the other and all votes are the same. In family court you are required to prove to a judge in a child custody case that you are better than the other parent. We need a standard in this state to place every individual, to include the children, on equal ground under the law. While the Constitution of the United States grants equal protection under the law, this standard is widely ignored in divorce cases simply because it is a civil not a criminal action. *Troxel v. Granville* 530 U.S. 57 (2000) and other United States Supreme Court decisions have made it clear that parenting is a fundamental right under the 14th Amendment—*i.e. to exercise care, custody and control* of their children (see also *Meyers v. Nebraska*, 262 U.S. 390 (1923)¹, *Stanley v. Illinois*, 405 U.S. 645 (1972)², *Washington v. Glucksburg* 521 U.S. 702 (1997)³, and *Santosky v.*

¹ *Meyer v. Nebraska*: The law was arbitrary and did not meet any state end.

² *Stanley v. Illinois*: fathers of children born out of wedlock had a fundamental right to their children

³ *Washington v. Glucksburg*: Established that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to direct their children's education, care, and upbringing

*Kramer*⁴) and also the 1st Amendment “right to familiar association”—*i.e.* **private speech** (*e.g.* to do homework together, pray together and lead by an example on a regular basis). This also means that this right is further protected under Article I of the North Dakota Constitution. Now it begs the question: how is a parent able to be a parent when a court allows the children to move 1500 miles away from Parent A and only granting Parent A 15% of the year to have time with the children while Parent B being the custodial parent is granted 85% of the year and has the authority to determine when Parent A can exercise parenting time. With those numbers Parent A is nothing more than a visitor. This is exactly what happened in my divorce case, simply due to my job, that required me to move here, a District Judge determined there is no community support and therefore the children will be allowed to move to a place where they have never lived. SB 2383 corrects all these issues by establishing the rights of all parties involved (to include the children) and mandating that each parent is fit unless a parent has been deemed unfit (see *Troxel, id*). This determination of fitness and equal protection aligns North Dakota with current court guidance.

3. Additionally, this bill corrects vague language within the best interest factors. Specifically, this eliminates the “moral fitness clause,” commonly referred to as factor “f.” *State of North Dakota v. Holbach*, 2009 ND 37, ¶ 22-26, 763 N.W.2d 761 states, “*Vague laws may trap the innocent because they fail to provide adequate warning of what conduct is prohibited, and they may result in arbitrary and discriminatory application because a vague law delegates basic policy matters to those who apply the law allowing the law to be applied on an ad hoc and subjective basis*” (emphasis added). The vagueness of this factor is morality, what is defined as moral. As a Senator from this state said “it is not the job of the government to regulate morality” yet this regulation of morality is codified in our law. This codification allows a judge who may not agree with a person’s beliefs to be determined immoral and not be awarded custody of their children when that person’s morals and ethics have no effect on that parent’s ability to raise a child, simply because a judge has a different opinion.
4. Furthermore, this action reigns in the unchecked power of the courts that have been legislating from the bench. In 2021, the North Dakota Supreme Court explained the word “necessary” in *Slappy v. Slappy*, 2021 ND 186. **The court** (*emphasis added*) “expanded the requirement (for a modification of custody) to demonstrate the change in circumstances adversely affected the child’s best interest, that a change is required to include circumstances, where there has been a general decline in the condition of the child.” Therefore, **the court** (*emphasis added*) made it clear that simply improving your

⁴ *Santosky v. Kramer*- established that clear and convincing evidence is required to permanently terminate a parent's rights.

circumstances as a party is not sufficient to modify custody or parenting time. Neither will a general decline in the primary parent's circumstances. None of this is written into the law. By doing this the court has usurped the power of the legislative body. SB 2383 will ensure that the courts are bound to an equality standard not an equitable one. Equality and equitability are completely different things.

5. Also, if passed this bill will update our standards in North Dakota to a modern-day standard that takes into consideration the elevated divorce and children born out of wedlock statistics. While it is understood and agreed that the family unit is the cornerstone of our great country and state, we must face a fact that 50% of all marriages will end in divorce⁵ and most divorces occur within the first five (5) years and the fifteenth (15th) to twentieth (20th) years of marriage. According to these statistics sixty-five (65) percent of children are born within the first five (5) years of marriage. These statistics do not include forty (40) percent of children who are born out of wedlock and half of these occur within cohabitating.⁶ These dynamics show that most children are more than likely to be involved with a divorce type custody arrangement at some point in their life. By ensuring that parents are presumed fit unless deemed unfit we can place the children in a more dynamic home life situation where they can be raised by both parents equally under the law.
6. Lastly, this bill protects our military members across the state. The provisions listed in Section 5 number 3 allow a military member who is deployed to make up lost time especially if they are inherently unable to execute parenting time due to military service. We must consider that eighty (80) percent of all military marriages end in divorce with only .04% of the military members retaining primary custody.⁷ By guaranteeing equal division of the time or at minimum one hundred (100) days a year or approximately 30%, it will ensure proper parenting time is guaranteed for our service members unless they are deemed unfit.
7. In conclusion, for the above-listed reasons, now is the time to pass this bill. This will only make the State of North Dakota better by aligning us with current guidance, update us to modern day standards, and protect our military members. Not only will it make it better for parents but the future of the State of North Dakota which is the children.

⁵ Source: Center For Disease Control (CDC)/National Center for Health Statistics (NCHS) National Vital System

⁶ Source: www.childtrends.org- Among women, roughly 40% of first births occurred before marriage and one-half of all premarital first births occurred within cohabiting.

⁷ Source: University of Maryland School of Law: Approximately 142,000 of active duty, national guard, and reserve members have primary custody out of a total of approximately a total of 2.86 million members who currently serve.

8. I thank you all for reading this testimony and respectfully request that you vote a **DO PASS** recommendation for this bill.

Derrick R. Sherwood

DERRICK R. SHERWOOD

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