1999 HOUSE JUDICIARY

HB 1346

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1346

House Judiciary Committee

❑ Conference Committee

Hearing Date : January 27, 1999

Tape Number	Side A	Side B	Meter #
1	X		3
Committee Clerk Signature			

Minutes:

REP KLINISKE: This bill came out of the Child Support Interim Committee. It is identical to Vermont's mediation statute which works very well. It is costly but the social costs are much greater. This statute would not prevent parties from going to court. The procedure called for here is just a first step in divorce. Keep in mind that this is mediation, not arbitration. Both Colorado and Minnesota have mediation statutes. All mediation statutes require divorcing couples to try mediation but do not require that mediation reaches a final solution.

DANIEL BIESHEUVEL (R-KIDS) Submitted written testimony, a copy of which is attached.

ANDREA MARTIN (Abused Women) Submitted written testimony, a copy of which is attached.

KELLY SCHMIDT Submitted written testimony, a copy of which is attached.

DOMINIC VOLENSKY (Mediation Services) Submitted written testimony, a copy of which is attached.

SHERRY MILLS MOORE (SBAND) The State Bar Association opposes this bill. Mediation can be very helpful, but it is not for everyone and should not be mandatory. There is presently a pilot test project going on in two districts in North Dakota on mediation. We believe that we must orient people to the fact that mediation is available and what it can do. Mandating mediating is contrary to the principle that mediation must be entered into willingly. Currently there aren't enough mediators to make the system work. HCR 3006 calls for more study of this subject and we should wait for that.

COMMITTEE ACTION: February 2, 1999

REP DELMORE move that the committee recommend that the bill DO NOT PASS. Rep. Sveen seconded and the motion was passed on a roll call vote with 13 ayes, 2 nays and 0 absent. Rep. Cleary was assigned to carry the bill.

FISCAL NOTE

REVISED

Bill/Resolution No.: 1346 Amendment to: _____

Requested by Legislative Council Date of Request: 1-14-99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, and cities.

Narrative: This bill mandates mediation in all divorces, unless waived by the court for one of the reasons specified in the bill. Each party is required to pay a $50 mediation fee at the time of filing. In 1998, 3031 divorce cases were filed in North Dakota. Our best estimate is that 40% of these cases would meet the waiver criteria in the bill and mediation would be waived by the court. The remaining 1819 cases would require mediation. The average qualified mediator charges $100 per hour. Divorce mediation takes approximately seven hours per case or $700. 1819 cases at $700 per case would cost $1,273,600 each year. ($2,546,600 per biennium). If the mediation were to be accomplished by trained state employees, the cost would be as follows. One mediator can handle 225 cases per year. Fourteen mediation trained employees would be required. The cost per mediator is $62,650 for salary, fringe benefits, employer overhead, office space, operating and equipment expenses. Fourteen employees times $62,500 is $875,000 per year. The biennium cost is $1,750,000 using state employees. Concerning revenue, it is assumed the $50 mediation fee would be waived in 20% of the cases. The mediation fee would be collected in 2425 cases. The $50 mediation fee ($100 per case) would generate $242,500 per year or $485,000 per biennium assuming the bill is interpreted to require all divorce parties to pay the fee. If refunds are given to those not requiring mediation, the bill would generate $181,900 or $363,800 per biennium. Although the cost for both contract mediators and state employee mediators are reflected above, the amounts shown below are for contract mediators because this is the best way to start the program if it is implemented.

2. **State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Special Funds	General Fund	Special Funds	General Fund	Special Funds
Revenues:	0	0	$363,800		$363,800	
Expenditures:	0	0	$2,546,600		$2,546,600	

3. What, if any, is the effect of this measure on the appropriation for your agency or department:

   a. For rest of 1997-99 biennium: 0

   b. For the 1999-2001 biennium: $2,546,600

   c. For the 2001-2003 biennium: $2,546,600

4. **County, City, and School District** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
0	0	0	0	0	0	0	0	0

If additional space is needed, attach a supplemental sheet.

Signed Keithe E. Nelson

Typed Name Keithe E. Nelson

Date Revised: 1/26/99

Department Judicial Branch

Phone Number 328-4216

FISCAL NOTE

Bill/Resolution No.: 1346 Amendment to: _____

Requested by Legislative Council Date of Request: 1-14-99

Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, and cities.

Narrative: This bill mandates mediation in all divorces, unless waived by the court for one of the reasons specified in the bill. Each party is required to pay a $50 mediation fee at the time of filing. In 1998, 2296 divorce cases were filed in North Dakota. Our best estimate is that 40% of these cases would meet the waiver criteria in the bill and mediation would be waived by the court. The remaining 1378 cases would require mediation. The average qualified mediator charges $100 per hour. Divorce mediation takes approximately seven hours per case or $700. 1378 cases at $700 per case would cost $964,600 each year. ($1,929,200 per biennium). If the mediation were to be accomplished by trained state employees, the cost would be as follows. One mediator can handle 225 cases per year. Seven mediation trained employees would be required. The cost per mediator is $62,650 for salary, fringe benefits, employer overhead, office space, operating and equipment expenses. Seven employees times $62,500 is $438,550 per year. The biennium cost is $877,100 using state employees. Concerning revenue, it is assumed the $50 mediation fee would be waived in 20% of the cases. The mediation fee would be collected in 1836 cases. The $50 mediation fee ($100 per case) would generate $183,600 per year or $367,200 per biennium assuming the bill is interpreted to require all divorce parties to pay the fee. If refunds are given to those not requiring mediation, the bill would generate $110,200 or $220,400 per biennium. Although the cost for both contract mediators and state employee mediators are reflected above, the amounts shown below are for contract mediators because this is the best way to start the program if it is implemented.

2. **State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Special Funds	General Fund	Special Funds	General Fund	Special Funds
Revenues:	0	0	$220,400		$220,400	
Expenditures:	0	0	$1,929,200		$1,929,200	

3. What, if any, is the effect of this measure on the appropriation for your agency or department:

   a. For rest of 1997-99 biennium: 0

   b. For the 1999-2001 biennium: $1,929,200

   c. For the 2001-2003 biennium: $1,929,200

4. **County, City, and School District** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
0	0	0	0	0	0	0	0	0

If additional space is needed, attach a supplemental sheet.

Signed Keith E. Nelson

Typed Name Keithe E. Nelson

Date Prepared: 1/20/99

Department Judicial Branch

Phone Number 328-4216

Fifty-sixth
Legislative Assembly
of North Dakota

Proposed Amendment to House Bill No. 1346

Page 1, line 15, remove "A record of adjudication of abuse or a factual basis of abuse exists", and insert "A finding of domestic violence as defined in chapter 14-07.1".

suggested by
ND Council on
Abused Women's
Services

Date: 4-3
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1346

House JUDICIARY Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do NOT Pass

Motion Made By Delmore Seconded By Sveen

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY	✓		REP. KELSH	✓	
REP. CLEARY	✓		REP. KLEMIN	✓	
REP. DELMORE	✓		REP. KOPPELMAN		✓
REP. DISRUD	✓		REP. MAHONEY		✓
REP. FAIRFIELD	✓		REP. MARAGOS	✓	
REP. GORDER	✓		REP. MEYER	✓	
REP. GUNTER	✓		REP. SVEEN	✓	
REP. HAWKEN	✓				

Total Yes 13 No 2

Absent 0

Floor Assignment Cleary

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1346: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO NOT PASS** (13 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1346 was placed on the Eleventh order on the calendar.

1999 TESTIMONY

HB 1346

House Judiciary Committee
House Bill 1346
January 27, 1999 10:00 am
Prairie Room

Chairman DeKrey, members of the Judiciary Committee. My name is Daniel Biesheuvel, lobbyist for R-KIDS of North Dakota.

Divorce is painful enough without inflicting the added pain of mistrust. R-KIDS lobbied hard for mediation as a recognized option in divorce. Mediation is proven to be more cost effective, and less alienating than litigation.

I was also happy with the Subsection 2 waivers. Mediation is not for everyone, but in a vast majority of cases, it will open the lines of communications, which will come in handy when decision about the children need to be made later on. I hope you vote a 'do-pass' and help give the children their parents back.

Thank you.

BISMARCK
Abused Adult Resource Center
222-8370
BOTTINEAU
Family Crisis Center
228-2028
[redacted]LAKE
[redacted]ternatives for
Abused Families
1-888-662-7378
DICKINSON
Domestic Violence and
Rape Crisis Center
225-4506
ELLENDALE
Kedish House
349-4729
FARGO
Rape and Abuse Crisis Center
800-344-7273
FORT BERTHOLD RESERVATION
Coalition Against
Domestic Violence
627-4171
FORT YATES
Tender Heart Against
Domestic Violence
854-3402
GRAFTON
Tri-County Crisis
Intervention Center
352-4242
GRAND FORKS
Community Violence
[redacted]tion Center
[redacted]5
JAMESTOWN
S.A.F.E. Shelter
888-353-7233
McLEAN COUNTY
McLean Family
Resource Center
800-657-8643
MERCER COUNTY
Women's Action and
Resource Center
873-2274
MINOT
Domestic Violence Crisis
Center
852-2258
RANSOM COUNTY
Abuse Resource Network
683-5061
STANLEY
Domestic Violence Program,
NW, ND
628-3233
VALLEY CITY
Abused Persons Outreach
Center
[redacted]8
[redacted]N
Th[redacted]vers Crisis Center
642-2115
WILLISTON
Family Crisis Shelter
572-0757

Testimony on HB 1346
House Judiciary Committee
January 27, 1999

Chair DeKrey and Members of the Committee,

My name is Andrea Martin. I am the Assistant Director of the ND Council on Abused Women's Services. I am here on behalf of the Council to offer our support of HB1346. As a matter of clarification, we would also like to offer an amendment to HB1346. The amendment would eliminate line 15 on page 1 that currently states that mediation may be waived in cases where there is a record of adjudicated abuse or a factual basis that abuse exists between the divorcing parties.

The proposed amendment attached to my testimony states that mediation may be waived in cases where there has been a finding of domestic violence as defined in Chapter 14-07.1. The term "abuse" that is currently used in this bill is not defined in our domestic violence chapter of the NDCC.

Also, using the definition currently provided in statute would broaden the scope of cases that may not be mediated as a result of family violence. I have attached a hand out that talks about the dangers of mediation in cases of domestic violence.

Thank you.

Andrea J. Martin, L.P.C.C.
Assistant Director
NDCAWS/CASAND

• 20 Years of Advocacy •
for victims of violence

North Dakota Council on Abused Women's Services • Coalition Against Sexual Assault in North Dakota
418 East Rosser #320 • Bismarck, ND 58501 • Phone: (701) 255-6240 • Toll Free 1-800-472-2911 • Fax: 255-1904

SHOULD THE PROPOSED MANDATORY MEDIATION MODEL APPLY TO FAMILY CASES?

This article was originally published in the Lawyer's Weekly on Jan. 16, 1998 in the "Special Focus on ADR".

Barbara Landau Ph.D., LL.M., C. MED. President, Cooperative Solutions, is a psychologist, lawyer and mediator offering training programs and dispute resolution services for family and workplace conflicts. She is an executive member of the CBAO - ADR section, Vice-President of AMIO and co-author of the Family Mediation Handbook, 1997, published by Butterworths.

By June 1, 1998, the Ontario Attorney General wants virtually all non family cases to attempt mediation before litigation. Should this policy be extended to family cases? If the answer is "yes", should it apply to all cases?

Arguments For and Against

For many in the mediation field it was at best ironic that the government's principal initiative should be in non-family fields. This is the reverse of most programs in the United States, Australia, England and Scotland where mediation was first encouraged for family matters. The primary value of a mediated approach to conflict resolution is its power to repair, or at least to do a minimum of damage, to relationships that have to continue with some degree of cooperation and mutual respect. This fits the objective of most family cases far more closely than the adversarial model. When parents decide to end their marital (or common law) relationship they discover, often to their dismay, that continuing a relationship with their children and grandchildren requires an ongoing relationship with their ex. Since the adversarial process by its very nature heightens tensions, turns private hurts into public humiliation, undermines trust and discourages constructive communication between the parties, it is clearly not a process of first choice. Sadly, the damaging effects spread beyond the parties to engulf the children, extended family members, new partners and friends.

Perhaps the strongest argument in favour of mandatory mediation in family cases is that separation and divorce are not primarily legal events - at least not to the participants. For the parties it is about lost self-esteem, broken trust, emotional loss, changing social roles, and economic fears. For the children its about loss of security, stability, and closeness, fears for the future and loss of the "Leave it to Beaver" dream. While a legal structure and remedies are needed, the best outcome for the long-term adjustment of all family members is an agreement that both parents think is fair and workable, that meets the emotional, social and economic needs of the children (and the parents) and that both parents are prepared to carry out.

The primary interest of the State is in ensuring that these arrangements do not fall below a reasonable standard in terms of financial support and parental care. This can be done through clear policies that can act as guidelines for families going through a mediation process and by efficient remedies for unilateral breach of the agreements reached. Ideally lawyers and financial advisers would ensure that parties were well-informed as to their rights and responsibilities, would help prepare the necessary financial disclosure for use in the mediation and review the Memorandum of Understanding before it was signed. Because parties are able to fashion agreements to meet their unique needs, the agreements are more likely to be followed and require less State enforcement. This model changes lawyers from adversaries or gladiators to advisors or part of a team of resources helping the families in crisis. Since families who enter mediation, even under a mandate, would be free to leave after one session, I could argue that there is less harm in requiring one mediation session, than there is in proceeding to litigation as a first step.

However, as much as I philosophically favour a mediated approach in family cases, there are at least two important reasons to avoid the policy that has been proposed for other civil cases; namely 1) Domestic Violence 2) The specific process proposed for other civil cases.

1) Domestic Violence

In the first place, domestic violence is often a factor, particularly at the time of separation. Mediation requires that participants be able to raise concerns and present proposals that meet their needs or the children's needs without fear of reprisal. They need to be informed as to their rights and responsibilities and reach a voluntary settlement, that is without duress. Both parties need to be able to appreciate that the other has legitimate interests and be able to establish trust that the other is participating in good faith. Where there has been violence, these criteria may not be met by one or both parties. Therefore, in cases of violence or fear of violence, the Report of the Toronto Forum on Woman Abuse, 1993 and the Domestic Violence policies of the Ontario Association for Family Mediation, the Academy of Family Mediators and the National Council of Juvenile and Family Court Judges all agree that there should be a rebuttable presumption against mediation. This presumption can be rebutted if, the victim/survivor of abuse requests mediation and the mediation is offered in a specialized manner that protects the victim's/survivor's safety, by a mediator trained in domestic violence.

To determine who is appropriate and who may be at risk, it is essential to screen both parties for their capacity to participate and in doubtful cases, alternatives need to be discussed and available. This means that all those offering mediation, especially in the context of a mandatory model, need to have specialized training in screening for domestic violence, specialized procedures and safe termination when mediation is not appropriate. Many mediators have not had such training and most family law lawyers either have not been trained to screen or minimize the effect of violence on the capacity to negotiate.

2) Process Proposed for Non Family Cases

The Attorney General is proposing that parties participate in a mandatory 3 hour session. Additional sessions can be arranged voluntarily. One hour is allocated for preparation and the mediations are to be arranged, offered and paid for privately. The most serious objection is that the time frame contemplated for non family cases creates a norm that is not adequate and possibly dangerous. It would not allow the time needed to screen, canvas options and then carry out a specially designed process, if this is needed.

Even where violence is not a concern, family cases require additional time because of the strong emotional feelings and need to rebuild trust, and the number of individuals who may be involved in the process (eg children, new partners, extended family members). Also, family cases require a good and lasting solution be achieved for the children; one that has the commitment of both parties. Often this means allowing time for participants to tell their stories, feel understood, offer acknowledgements and apologies, where warranted, and then, when some measure of confidence has been restored, move to problem solving, financial disclosure (where support and property are involved) and finally the drafting of an agreement. Depending on the degree of distrust, the emotional state of the parties, the number and complexity of the issues, the mediation will often take between 15 and 30 hours.

Note: This article was originally published in the Lawyers Weekly, January 23, 1998, "Special Focus on Family Law".

Mr Chairman / members of committee

My name is Kelly Schmidt. I am here to speak in favor of House Bill 1346. I am a married mother of 4. My two oldest sons are from my first marriage. My ex-husband and I separated in June of 1990, and have been divorced since 1992. As not to create confusion I should mention my ex-husbands name is also Kelly.

Kelly and I have a exceptional relationship as parents. I attribute this accomplishment partly to mediation. Kelly and I chose to participate in mediation even before we had decided to divorce and then again when our decision became final.

We participated in the mediation process in hopes of continuing our relationship as parents. When separation takes place rules and roles change. We needed help in defining those rules and roles **before** we met with attorneys, especially with children involved. Our experience proved to us that lawyers have a tendency to forget about us as "people" and "parents" and focus more on the "his" and "mine".

Establishing definitions is extremely important in the divorce and parenting process, this eliminates assumptions. Assuming breeds conflict. Through mediation we were able to define and focus on several issues which included:

1. Parenting...We agreed it is necessary to support each other in our respective roles as parents.
2. Visitation.....Who gets the kids when, the definition of a weekend, holiday time, summer vacations.
3. Review and Evaluate: agreements every 6 months or based on need.
4. Information: We both have access to complete information regarding Justin and Michael ex. doctors, teachers, counselors.
5. Financial Matters: Financial responsibilities of each of us during separation until a divorce is final. The division of debts and assets. Insurance.
6. Payment of Special Lessons: Ex. Music, Sports, Camps etc.
7. Post High-School Education: Payment, room, board etc.
8. Tax-Exemptions:

*** 9. Savings Accounts: The establishment of saving accounts For Justin and Michael which is contributed to on a monthly basis, minimum of $5.00/mo. To be used for education/training.

*** 10. Gifts: Limited to $50.00 gifts of greater value will be joint unless agreed upon

***These items were personalized to our case.

The issues which we discussed and agreed upon back then have been changed and changed again. As our circumstances change and the needs or our children change so does our agreement. The tools we were given through mediation have given us a point of reference and helped us to accommodate and support one another while always keeping the best interests of our children in the fore front.

I am very proud of the relationship my husband and I have with Kelly. I would be kidding you to say it's easy...it's hard work. But, with the tools of mediation and a mutual respect for each other as people and parents we've managed to make a very difficult process into a manageable lifestyle.

Divorce is a hard, and it should be...but you could make it a little easier for the children of our state. By supporting this bill you can help salvage what's left of a broken relationship.

Thank you....Questions?

HB 1346 - Testimony **HOUSE JUDICIARY COMMITTEE**

January 27, 1999

Chairman DeKrey and Committee Members,

My name is Dominic Volesky. I am the owner of Mediation Services here in Bismarck.

As a professional mediator who deals in divorce mediation on a daily basis, I cannot support making mediation mandatory as proposed in this bill. I believe this bill is lacking in too many issues, is premature and would, if passed, lead to a series of problems. Mediation is a voluntary, non-adversarial alternative to the adversarial litigation process. Making divorce mediation mandatory at this stage of development would defeat the entire concept of mediation. It is difficult to obtain fair and equitable settlements in an environment of adversity brought on by Court orders. There is an alternative, which has been proposed and established in numerous states, wherein the Court mandates a process ordering the divorcing couples to attend an orientation and consultation session where they can learn about the benefits of mediation.

I want to make myself very clear. I am a strong proponent of divorce mediation. I believe divorce mediation is the answer to peaceful solutions for separating couples. Most couples who have experienced mediation are now living more harmoniously and are communicating better than when they were married.
Mediation is relatively new and is in its infancy in this state. As an infant, mediation must go through its growing pains. However, we must attempt to raise this infant in an atmosphere conducive to the non-adversarial goals of the mediation process. Let us develop a well-thought out mediation program based on the experiences of mediation professionals and not a hastily, ill-prepared program which might be filled with numerous problems negatively affecting the lives of many people.

The Supreme Court may not be the appropriate entity to establish the training and the experience qualifications for divorce mediators as proposed in lines 7 through 9, page 1 of the bill. The innate tradition of the Supreme Court typifies the adversarial nature of dispute resolution which contradicts the goals of the mediation process. Rather, the Court could propose a divorce mediation program based on the recommendations of an interdisciplinary board which includes mediation professionals. Certainly we do not use educators, not trained in law or medicine, establishing the training and qualifications to teach or practice law and medicine! So let us not have non-mediators unilaterally dictating what training and experience is necessary for mediation. An association of family mediators should be the driving force to establish what training and qualifications are necessary for divorce mediation. There is a national Academy of Family Mediators and numerous states have associations of family mediators who have or are working on qualifications for mediators. Although North Dakota has not yet established such an association, one may be in the making. Also, there is a move to have mediators in North Dakota join in with an association already established in South Dakota which is working on mediation issues.

As an alternative to mandatory mediation, the first sentence of paragraph 2 (lines 10 and 11, page 1 of the bill) could read "Before any litigation is commenced in court, the parties to the action shall attend an initial consultation and orientation session by a family mediator who is on a List of Court Appointed Mediators pursuant to Section 2, North Dakota Supreme Court Administrative Rule 28."

In regard to paragraph 3 of this proposed bill, why should each of the parties to the divorce be required to pay a mediation fee of fifty dollars in addition to any other fee required by law? Is this fee in addition to the $80 filing fee already being imposed on persons filing for a divorce? Certainly, they would not be obtaining any mediation services from the Court! Simply adding another fee makes this process lend to a system where more people become disadvantaged to use such a process for separations and belittles the advantage of the mediation process.

Are there any questions?

(Mediation Services - Tele. No. 222-0727)