

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2045

2001 SENATE JUDICIARY

SB 2045

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2045

Senate Judiciary Committee

Conference Committee

Hearing Date January 29, 2001

| Tape Number | Side A | Side B | Meter # |
|---------------------------|--------|--------|---------|
| | X | | 0-21.1 |
| | | | |
| | | | |
| Committee Clerk Signature | | | |

Minutes: Senator Traynor opened the hearing on SB 2045: A BILL FOR AN ACT TO AMEND AND REENACT SECTION 14-09-06.4 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO IMMUNITY FOR GUARDIANS AD LITEM AND CHILD CUSTODY INVESTIGATORS.

Vonette Richter, staff attorney for the legislative council, testifies neither against or for SB 2045. (Testimony Attached of the interim committee's final report)

Senator Traynor, could you distinguish for the committee the difference between guardian ad litem and a child custody investigator.

Vonette Richter, a guardian ad litem is now required to be an attorney and they are looking out for the legal interest of the child. A child custody investigator is probably someone who was known as a guardian ad litem. The court appoints this person to do investigations, interviews and too make a report to the court.

Page 2

**Senate Judiciary Committee
Bill/Resolution Number SB 2045
Hearing Date January 29th, 2001**

Senator Traynor the guardian ad litem is used to protect the child? Does the guardian ad litem have an attorney as well?

Sherry Moore a guardian ad litem is the attorney, I can't see why he would need one?

Senator Trenbeath, term "disputable presumption," is that a new term?

Vonette Richter in a court that is the term that is used. It means the same thing as rebuttable.

Senator Devour is it rebuttable or disputable?

Vonette Richter there would be a presumption there that the person is acting in good faith. If it is a disputable there would have to be rebuttable evidence that they didn't act in good faith.

Sherry Moore, representing the bar association, supports the bill. Guardian ad litem need protection from court. Which can be overcome by evidence of a lack of good faith. If there is no protection for them, they will not get involved. It helps the process.

Senator Traynor, these are contentious matters and that is why immunity is important.

Sherry Moore they are, and they are very heart felt matters. There is a need to protect these persons. They are subject to cross examination and impeachment on how they behave and the judge does not rubber stamp them. This bill will not give them license to do as they will and they have a reputation to hold.

Susan Beehler, represents R-Kids, opposed to SB 2045. Couldn't find the training requirements for guardian ad litem or child custody investigators in the bill. Did go to the supreme court rule, didn't find much regarding either. Went to the library to find out about them. The concern is what are the requirements to become either an ad litem or a child custody investigator. Is that person knowledgeable enough to qualify for these positions. I found ad litem to be very negative. Should not give ad litem immunity.

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**Senate Judiciary Committee
Bill/Resolution Number SB 2045
Hearing Date January 29th, 2001**

Senator Lyson do you realize there was no such thing as a custody investigator until this bill is passed. We're all guardian ad litem. Do you realize that?

Susan Beelher, no and that is why I tried to do research on it to find the definition.

Senator Lyson another question regards the janitor who was an investigator. There was no investigator, that could not happen.

Susan Beelher, in Hendrikson v. Hendrikson they went to the supreme court and that is what he said, unless he is lying to us. We believe our membership.

Senator Lyson, that is exactly why the committee decided to separate the two. The ad litem is there to protect the child. The investigator is supposed to be neutral. There are a lot of regulations which states that ad litem need to be an attorney and the court is very specific on what kind of attorney that should be. This is a win win for the children.

Susan Beelher, I agree with you, but as a lay person I found no qualifications for an ad litem. What is the criteria for a child investigator.

Senator Lyson I agree that not everything can be put in law, and that some of the rules must be established by the courts.

Sherry Moore in North Dakota rule of court 8.6 to 8.7 it was adopted by the North Dakota supreme court which makes the rules for court appointed people and in there it has rules for education criteria. Listed is the hours of training that is required.

Senator Traynor, this bill doesn't require the guardian ad litem to be an attorney, do the rules provide that?

Sherry Moore, yes. Rules do now provide that the guardian ad litem be an attorney. Problem with nomenclature. Separated functions: Guardian ad litem = attorney. Custody investigator could be a lay person. They both still need training.

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**Senate Judiciary Committee
Bill/Resolution Number SB 2045
Hearing Date January 29th, 2001**

Senator Traynor, if a minor got a claim for a car accident. The guardian ad litem would be an attorney.

Sherry Moore those are different issues.

Senator Watne, I've served as a guardian ad litem. We knew more was needed to protect the child. Your group (R-Kids) should be enthused about this bill.

Susan Beehler, we didn't know about any clarifications. Our experience hasn't been positive. I have caution about immunity. I could support this bill if it is well intended.

Senator Lyson when I sat on this as a parol officer. I think this investigator is exactly what is needed here so the judge can see what is going on in black and white. We want to do the right thing for the child.

Susan Beehler, I agree with you. I wasn't clear for us. And the immunity thing still bothers us.

Senator Traynor, we hope this will be an improvement and the things you have told us will not happen.

Dan Beeshold, former president of R-Kids, still has reservations with the term immunity and good faith.

Senator Traynor closed the hearing on SB 2045.

SENATOR WATNE MOTIONED TO DO PASS, SECONDED BY SENATOR LYSON.

VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND NOT VOTING. SENATOR

LYSON VOLUNTEERED TO CARRY THE BILL.

Date: 1/29/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2045

Senate Judiciary Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken D. Pass

Motion Made By Watne Seconded By Lyson

| Senators | Yes | No | Senators | Yes | No |
|-------------------------|-----|----|-------------|-----|----|
| Traynor, J. Chairman | X | | Bercier, D. | X | |
| Watne, D. Vice Chairman | X | | Nelson, C. | X | |
| Dever, D. | X | | | | |
| Lyson, S. | X | | | | |
| Trenbeath, T. | X | | | | |
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Total (Yes) 7 No 0

Absent 0

Floor Assignment Lyson

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

REPORT OF STANDING COMMITTEE (410)
January 30, 2001 11:20 a.m.

Module No: SR-16-1902
Carrier: Lyson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2045: Judiciary Committee (Sen. Traynor, Chairman) recommends DO PASS
(7 YEARS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2045 was placed on the
Eleventh order on the calendar.

2001 HOUSE JUDICIARY

SB 2045

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2045

House Judiciary Committee

Conference Committee

Hearing Date 02-14-01

| Tape Number | Side A | Side B | Meter # |
|---|--------|--------|------------|
| TAPE I | | x | 01 to 3562 |
| | | | |
| | | | |
| Committee Clerk Signature <i>Joan Diers</i> | | | |

Minutes: Chairman DeKrey opened the hearing on SB 2045. Relating to immunity for guardians ad litem and child custody investigators.

Yonette Richter: Attorney for Legislative Council, Interim Judiciary Committee. This bill was introduced by the Legislative council. It would allow the court to appoint a guardian ad litem or an investigator. The second thing this bill does is beginning with line 19, would provide immunity from civil liability, anyone of those that acts in good faith.

Rep Fairfield: What is good faith?

Yonette Richter: Whatever is done is not done maliciously or negligent

Rep Fairfield: I understand, I thought that you might give an example.

Chairman DeKrey: Your investigation may show one is a lousy person, that person ; may not like the result of the report, and that may lead to civil action against you the investigator.

Rep Klemin: That might be a case for slander.

Chairman DeKrey: Any more questions for Yonette, if not thank you for appearing.

Page 2

House Judiciary Committee
Bill/Resolution Number SB 2045
Hearing Date 02-14-01

Sharon Mills Moore: lawyer for Family Law appeared in support of SB 2045.

Chairman DeKrey: Anyone else wishing to testify in support or opposition of SB 2045.

Margaret Kottre: R-KIDS lobbyist (see attached testimony)

Chairman DeKrey: Are there any questions, seeing none, thank you for appearing.

Susan Beehler: R-KIDS, volunteer lobbyist. Spoke in opposition to the bill. She thought that the investigator needs to be accountable for their actions. They are a paid investigator and should be acting in good faith. She questioned the qualifications of the investigator (associate degree in child care). Investigators need more training. We should demand more from these people not granting them immunity. She gave examples of her concerns.

Rep Delmore: Our intent was to protect children.

Susan Beehler: The Supreme Court Rules states the instances for a guardian ad litem. The criteria for a guardian ad litem is stated there. There needs to be training and it needs to be required and the Supreme Court could require that or you as the Legislature could require that training.

Rep Delmore: I would be interested in seeing the information on training, salary and qualifications.

Susan Beehler: I only know what the Supreme Court Rules are. As far as what has been done in the past, I don't know. You need to look at qualifications before granting a blanket immunity.

Rep Klemin: The case you are talking about, the guardian ad litem is an attorney.

Susan Beehler: Yes.

Rep Klemin: Most guardian ad litem are attorneys.

Susan Beehler: They are required to be an attorney by law.

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House Judiciary Committee

Bill/Resolution Number SB 2045

Hearing Date 02-14-01

Rep Klemin: She (mother of the step daughter) would have had to have hired an attorney to be in court.

Susan Beehler: NO, when it is a social service case, in a custody proceeding, her attorney was paid for.

Rep Klemin: There was an attorney present.

Susan Beehler: She (the attorney) did not even get the sex of the child straight.

Rep Klemin: You talked about adequate training, isn't this a matter that is set out by Supreme Court Rules?

Susan Beehler: Yes. I haven't worked with the Supreme Court Rules.

Rep Klemin: My point is, the appropriate place to increase the requirements of the child custody investigator would be in the Supreme Court.

Susan Beehler: The Legislature would have the authority.

Rep Eckre: We are straying from the bill.

Rep Delmore: I would have a question from Sharon Mills Moore, who has worked with family law.

Sharon Mills Moore: The rules about a custody investigator came about from lots of input from guardian ad litem, custody investigators, general public attorneys. The requirements of training have not been in place very long. Those people who have had problems were not working under the rules that we have now. This statute deals with custody, if they do a poor job, they will not be appointed again. This bill clarifies both the guardian ad litem and custody investigators.

Rep Fairfield: Can you tell us what happens now without the immunity?

Sharon Mills Moore: Yes, there is discretion of the judge, but it may not happen until the issue is settled and costs are incurred.

Rep Fairfield: What happens, I am a parent and I believe that they are not acting in good faith? What do I have to do to prove this?

Sharon Mills Moore: The first thing is at the custody hearing, you would be provided with evidence of bad faith. That would be the first time you would have the evidence and the proof of that, the court if they believe that it would come out in court. The second place you would go would be the professional board. You would have the burden of proof.

Rep Wrangham: I am confused, isn't the investigator innocent until found guilty, without this immunity?

Sharon Mills Moore: It wouldn't be a criminal charge, it would be a civil suit.

Rep Wrangham: If they acted in bad faith, without this immunity, they could be sued.

Susan Mil's Moore: With immunity they can still be sued.

Rep Wrangham: Bad faith would have to be determined. Do you have statics?

Susan Mills Moore: No, I do not.

Vice Chr Kretschmar: Is the standard of acting in good faith higher, then all of the standards that we are under?

Sharon Mills Moore: Acting in bad faith, it isn't just being sloppy, it would be I have a motive, bad faith is a bad act, it is just a different standard.

Vice Chr Kretschmar: Is bad faith more serious than ordinary negligence?

Sharon Mills Moore: Yes.

Susan Beehler: I am not an attorney, and I don't know how those things work, my fear is that with the good faith, we don't prosecute perjury, and it happens a lot in custody cases. It is because of the burden of proof that is required.

Chairman DeKrey: Are there any questions, seeing none, thank you for appearing.

Rep Disrud: Do you believe that the outcome of the child custody has any relationship to the amount of money you can afford.

Susan Beehler: Absolutely.

Rep Disrud: I am wondering if the qualifications should be directly related to the number of degrees or the amount of in service training?

Susan Beehler: I know what you are talking about. She goes on to tell of her experiences with this matter.

Chairman DeKrey: If there are no further questions, thank you for appearing. If there is no further testimony, we will close the hearing on SB 2045.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2045b

House Judiciary Committee

Conference Committee

Hearing Date 03-13-01

| Tape Number | Side A | Side B | Meter # |
|---|--------|--------|------------|
| TAPE I | | x | 580 to 850 |
| | | | |
| | | | |
| Committee Clerk Signature <i>Joan Diers</i> | | | |

Minutes: Chairman DeKrey called the committee to order on SB 2045.

DISCUSSION

COMMITTEE ACTION

Chairman DeKrey: What are the wishes of the committee. Rep Klemin moved a DO PASS, seconded by Rep Delmore. The clerk will call the roll on a DO PASS motion. The motion passes with a vote of 11 YES, 2 NO and 2 ABSENT. Carrier Rep Klemin.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2045c

House Judiciary Committee

Conference Committee

Hearing Date 03-14-01

| Tape Number | Side A | Side B | Meter # |
|---|--------|--------|--------------|
| TAPE I | | x | 1070 to 2036 |
| | | | |
| | | | |
| Committee Clerk Signature <i>Joan Diets</i> | | | |

Minutes: Chairman DeKrey: this bill was re-referred to our committee to amend. The State Bar Association wanted the amendments. There was two pieces of that divorce bill that were ok, had nothing to do with property division. They would like to add the amendments to this bill.

Sandi Tabor: State Bar Association, I bring you amendments to this bill, language from SB 2044 to be put into SB 2045. She explains in detail why the amendments of paragraph one and four of SB 2044.

DISCUSSION

Rep. Delmore: moved the State Bar Association amendments.

Rep. Kingsbury: Seconded the motion.

Chairman DeKrey: We will take a voice vote on the amendments. Motion carries.

Rep. Mahoney: Moved a DO PASS as amend.

Rep. Grande: Second to the motion.

Page 203-14-01

House Judiciary Committee

Bill/Resolution Number SB 2045

Hearing Date 03-14-01

Chairman DeKrey: The clerk will call the roll on a DO PASS as amend motion on SB 2045. The motion passes with a vote of 12 YES, 1 NO and 2 ABSENT. Carrier Rep Klemin.

Date: 03-13-01

Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB-2045

House JUDICIARY Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Rep Klemen Seconded By Rep Delmore

| Representatives | Yes | No | Representatives | Yes | No |
|-----------------------------|-----|----|-----------------|-----|----|
| CHR - Duane DeKrey | ✓ | | | | |
| VICE CHR -- Wm E Kretschmar | ✓ | | | | |
| Rep Curtis E Brekke | | | | | |
| Rep Lois Delmore | ✓ | | | | |
| Rep Rachael Disrud | ✓ | | | | |
| Rep Bruce Eckre | ✓ | | | | |
| Rep April Fairfield | | | | | |
| Rep Bette Grande | ✓ | | | | |
| Rep G. Jane Gunter | ✓ | | | | |
| Rep Joyce Kingsbury | ✓ | | | | |
| Rep Lawrence R. Klemen | ✓ | | | | |
| Rep John Mahoney | | ✓ | | | |
| Rep Andrew G Maragos | ✓ | | | | |
| Rep Kenton Onstad | ✓ | | | | |
| Rep Dwight Wrangham | | ✓ | | | |

Total (Yes) 11 No 2

Absent 2

Floor Assignment Rep Klemen

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

REPORT OF STANDING COMMITTEE (410)
March 13, 2001 12:45 p.m.

Module No: HR-43-5452
Carrier: Klemin
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2045: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS
(11 YEAS, 2 NAYS, 2 ABSENT AND NOT VOTING). SB 2045 was placed on the
Fourteenth order on the calendar.

VR
3/14/01

HOUSE AMENDMENTS TO SENATE BILL 2045 HOUSE JUDICIARY 03-15-01
Page 1, line 1, replace "section" with "sections 14-05-24 and"

Page 1, line 2, after "to" Insert "the division of property in divorce proceedings and"

Page 1, after line 3, insert:

"SECTION 1. AMENDMENT. Section 14-05-24 of the North Dakota Century Code is amended and reenacted as follows:

14-05-24. ~~Permanent alimony~~— Division of property.

1. ~~When a divorce is granted, the court shall make such an equitable distribution of the real and personal property and debts of the parties as may seem just and proper, and may compel either of the parties to provide for the maintenance of the children of the marriage, and to make such suitable allowances to the other party for support during life or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively. The court from time to time may modify its orders in these respects.~~
2. The court may redistribute property in a postjudgment proceeding if a party has failed to disclose property and debts as required by rules adopted by the supreme court, or the party fails to comply with the terms of a court order distributing property and debts."

Renumber accordingly

Date: 03-14-01
Roll Call Vote #: 2

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB-2045

House JUDICIARY Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number 10090, 0301 .0400

Action Taken Do Pass as amend

Motion Made By Rep Mahoney Seconded By Rep Grande

| Representatives | Yes | No | Representatives | Yes | No |
|----------------------------|-----|----|-----------------|-----|----|
| CHR - Duane DeKrey | ✓ | | | | |
| VICE CHR --Wm E Kretschmar | ✓ | | | | |
| Rep Curtis E Brekke | | | | | |
| Rep Lois Delmore | ✓ | | | | |
| Rep Rachael Disrud | ✓ | | | | |
| Rep Bruce Eckre | ✓ | | | | |
| Rep April Fairfield | | | | | |
| Rep Bette Grande | ✓ | | | | |
| Rep G. Jane Gunter | ✓ | | | | |
| Rep Joyce Kingsbury | ✓ | | | | |
| Rep Lawrence R. Klemin | ✓ | | | | |
| Rep John Mahoney | ✓ | | | | |
| Rep Andrew G Maragos | ✓ | | | | |
| Rep Kenton Onstad | ✓ | | | | |
| Rep Dwight Wrangham | | ✓ | | | |

Total (Yes) 12 No 1

Absent 2

Floor Assignment Rep Klemin

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

REPORT OF STANDING COMMITTEE

SB 2045: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (12 YEAS, 1 NAY, 2 ABSENT AND NOT VOTING). SB 2045 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "section" with "sections 14-05-24 and"

Page 1, line 2, after "to" insert "the division of property in divorce proceedings and"

Page 1, after line 3, insert:

"SECTION 1. AMENDMENT. Section 14-05-24 of the North Dakota Century Code is amended and reenacted as follows:

14-05-24. ~~Permanent alimony~~— Division of property.

1. ~~When a divorce is granted, the court shall make such an equitable distribution of the real and personal property and debts of the parties as may seem just and proper, and may compel either of the parties to provide for the maintenance of the children of the marriage, and to make such suitable allowances to the other party for support during life or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively. The court from time to time may modify its orders in these respects.~~
2. The court may redistribute property in a postjudgment proceeding if a party has failed to disclose property and debts as required by rules adopted by the supreme court, or the party fails to comply with the terms of a court order distributing property and debts."

Renumber accordingly

2001 TESTIMONY

SB 2045

Testimony SB 2045**Wednesday January 29, 2001 Human Service Committee
Fort Lincoln Room 9 AM**

Good morning Chairman Senator Traynor and members of the Judiciary Committee,

My name is Susan Beehler, an unpaid lobbyist for R-KIDS, Remembering Kids in Divorce Settlements, a working mom with 5 children, a custodial parent and a wife to a non-custodial parent, a girl scout leader to two troops in Mandan, and training to become an advocate for AARC.

R-Kids is opposed to SB2045.

We believe that any investigator needs to be accountable for their actions or inaction that may effect our children's lives.

In researching for this bill I could not find much on guardian ad litem or child custody investigators.

What is their education? What criteria are used to determine their qualifications? If a custody case involves abuse is this person knowledgeable in the effects of that abuse and signs of abuse, or is the only qualification for a guardian ad litem, to be attorney with or without a little family law background.

These positions can play a major part in a custody proceeding. A decision can be based on very little time the investigator or guardian ad litem spends with the child. Our children need someone who is knowledgeable and will look out for their best interests.

Our members have good stories and horror stories of having worked with a guardian ad litem. One member told of his investigator was a janitor; he didn't know how he had become qualified to be used as a "child custody investigator."

My personal experience with a guardian ad litem was very negative. My stepdaughter was removed from her mother's home by social services. The guardian ad litem visited with her for less than 10 minutes in recommending where she live. She did come to live with us. But he did nothing to insure she was legally protected through the court system. The guardian ad litem and the court had to be repeatedly reminded our daughter was a "girl". She has a unisex name; the court continually referred to her as a boy even after we asked the court to stop

referring to her as a boy. Someone that does not even bother getting the "sex" of the child correct in my opinion does not deserve immunity.

Recently the human service committee heard a bill requiring a marriage counselor or therapist to be licensed. What about a child investigator?

Children are the most precious treasures in the world we should be demanding more from people who represent them, not granting immunity.

On line 21 & 22 "not acting in good faith" leaves the burden of proof on the injured party. This bill could produce another expensive legal battle for the parties involved, if your child was harmed; you would have to prove that that the "investigator" was not acting in good faith.

R-KIDS urges you to vote DO NOT PASS.

Susan Beehler 663-4728
susieqbee@prodigy.net

SB 2045 Fort Lincoln room

9am

Sen Chairman Traynor and Judiciary Committee members
my name is Margaret Kottre I am an active volunteer
member of R-KIDS remembering kids in divorce settlements
I am the spouse of a non-custodial parent, a step mother of
one & a mother of three. I am here today to ask you ~~not~~
to vote for 2045 when it comes to the welfare of our
children I do not feel that anybody especially a
guardian ad litem or child custody investigator should
be granted immunity. I feel that they should be held
accountable. The children's lives may suffer from
inaccurate reports by child custody investigators, and
now they want to be granted immunity which to me
means they do not have to be held accountable for
their actions. I feel that this is a major reason why
our society is the way it is - nobody is held
accountable for their actions. So again I am asking
you to recommend a Do Not pass on SB 2045

Margaret Kottre

258-08437

rmkottre@btigate.com

Senator Chairman DeYoung and Judiciary Committee members
my name is Margaret Kettie. I am a lobbyist for the
PKIDS organization - Remembering Kids in Greater Communities

R-KIDS is against SB015 and we ask you to recommend
a Do Not Pass. Our members do not feel that the guardian

ad them or child custody investigators should be immune
from any civil liability. It seems now days nobody

has to be accountable for their actions. A guardian ad
litem or child custody investigator can say they were

acting in good faith even though the information they
released was not accurate and not in the best interest

of the child, and not have to be accountable for their
actions. Who defines acting in good faith? What

good faith means to one person may not mean the
same thing to somebody else. If the guardian ad

litem or child custody investigator are truly acting in
good faith, honestly supply the most accurate information

that is in the best interest of the children then they
should not need immunity. How much longer of a search

are we going to make parents take to protect their
children. Giving this immunity will make it seem as

if somebody's goal, maybe instead of immunity
there should be more hours of training to provide

the best protection for our children. Again R-KIDS
is asking for a Do Not Pass on SB015.

Margaret Kettie
R-KIDS lobbyist
license # 587

Proposed property legislation addresses family law concerns

Treating Families Fairly

During the last legislative Interim, a study of family law issues was conducted by a special committee consisting of legislators and members of the Joint Family Law Task Force. Several issues were reviewed including the distribution of property. A proposal suggesting changes to property division was debated at length, and ultimately the bill draft was recommended for introduction by the Interim Judiciary Committee. The amended text of Section 14-05-24 is included in the sidebar below. Pro and con analyses of the impact of the proposed change written by two seasoned family law practitioners follow.

By Sherry Mills Moore

Better the Devil You Know tends to be my general philosophy, but particularly with this proposed bill. The Property Division Bill turns our law on its head, flipping the burden from the person who wants to carve a piece of property out of the marital estate to the person who wants to include it. Often that person is the one least able to bear the burden. Let me explain.



Currently in a divorce all of the property goes into the marital estate, regardless of title, origin, or even sentiment. Then, the entire estate is divided. Often the division is equal, but it need not be. Factors which the court considers in making the division are the *Ruff-Fischer* guidelines, and include length of marriage, income producing capacity of the property, conduct, age of parties, health of parties, conduct, and source of accumulation, that is, where did it come from. The Property Division Bill would give this last factor different treatment, at least for gifts and inheritance. The bill does not cover premarital property acquired from sources other than gift and inheritance.

Simply stated, unless it would be inequitable, under the Property Division Bill, inherited and gifted property, which are titled and maintained separately, and the increased value of those assets, will remain the property of the heir or donee spouse. Let's parse this out a bit. If this bill passes, as a general rule, property inherited or given to one spouse and not the other, whether before or after the marriage, is eligible for nonmarital treatment. First, the asset has to be titled in the name of the spouse claiming it. This eliminates jointly held property, probably even pay-on-death accounts. Secondly, it has to have been separately maintained. If both parties managed the investment, worked the land, improved the house, or paid the property tax, it probably is ineligible. If both criteria are met, however, the burden to exclude the property from the marital estate shifts to the non-owner spouse to show that such treatment would be inequitable. This bill goes further than many states who distinguish between marital and nonmarital property, however, in that not only does it include the asset itself in the exclusion, but also any increase in value of the asset.

So how could this piece of legislation be viewed as anything but fair? To answer that you need to keep in mind that the laws of marital dissolution, as with laws of intestacy, seek to divide the property in the manner which gives the best solution to the most people leaving exceptions for the less common situation. In other words, the goal of the law should be to have its widest

14-05-24. Division of Property

1. When a divorce is granted, the court shall make such an equitable distribution of the real and personal property and debts of the parties.
2. Except upon a finding that excluding the property is inequitable to the other party, property acquired by an individual spouse through inheritance or by gift, if titled and maintained in the sole name of the donee spouse, is the property of that party and is not subject to division under this section. Gifted and inherited property excluded from division is defined as property acquired by an individual spouse by gift or inheritance or property acquired in exchange for gifted or inherited property and includes the increase in value of the property acquired by the individual spouse by gift or inheritance.
3. Property acquired by gift from the other spouse is subject to property division under this section.
4. The court may redistribute property in a post-judgment proceeding if a party has failed to disclose property and assets as required by rules adopted by the supreme court, or the party fails to comply with the terms of a court order distributing property and debts.

swath produce the best result for the most people. The question then is, will this kind of exclusion of property most frequently create a just result? I think the answer is, probably not.

Most people enter into a marriage hoping and presuming they will be a part of the 50 percent of the population for whom the marriage is forever. In their marriage they make countless decisions which do not contemplate divorce. They make purchases and expenditures based on what they need, what they want, where the funds are most currently available, and cost. They don't look at their marital choices as measured by asset protection from each other. This law would make the prudent spouse add to the decision-making mix, the question, *how will this affect me if we divorce?*

Let's look at some examples. Even if the tax and interest rates would dictate making a purchase with the wife's certificate of deposit from her father rather than the sale of marital stock, she needs to think through the divorce consequences. Or, should a couple trying to purchase a home make the payments manageable by using a gift to one spouse from his parents to increase the down payment, or increase the family's monthly cash flow by putting less into the wife's 401(k) (losing the tax benefit as well as the company match)? Or, whose certificate of deposit should be cashed in for the children's college, his or hers? The thinking of the typical farm family would need to be even more complicated. If there is off-farm income upon which the family lives, making it possible to farm without encumbering gifted land, is it really fair for the majority of the families, to presume the gifted land is separate property? Should the working spouse have to prove an exception to get a part of the farm? All of these questions, are made more difficult, and less clearly equitable, because the increased value of the asset would also be excluded from marital property. Because most families don't and won't put asset protection into their thinking caps, this proposed legislation is a poor fit for family needs.

If simplicity is what we are looking for, don't be fooled into thinking this offers the solution. Our neighbors in Minnesota enacted legislation introducing the concepts of marital and non-marital property in 1979 and have been defining, interpreting, refining, and battling over it ever since. For a measure of the complications see, *Family Law Forum*, Minn. State Bar Association Family Law Section, June 1997, Vol. 9, No. 2.

If, instead, we are trying to empower the courts to make divisions which are not equal but are equitable, they already have, and use that power. See, *Spooner v. Spooner*, 471 N.W.2d 487 (N.D.1991); *Wetzel v. Wetzel*, 1999 ND 29, 589 N.W.2d 889; *Dick v. Dick*, 414 N.W.2d 288 (N.D. 1987); *VanRosendale v. VanRosendale*, 342 N.W.2d 209 (N.D. 1983).

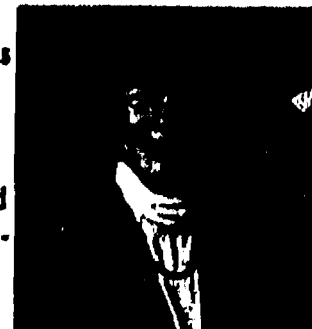
Given the parties' own ability to protect assets through a properly drafted prenuptial agreement, this legislation, though well-intended, not only would make old dogs learn new tricks, but fails to help most of the people it is intended to cover.

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Treating Inheritances Fairly

By Maureen Holman

The Interim Judiciary Committee has proposed a bill which would change how a court divides property in a divorce. Among other things, the bill specifically excludes property acquired by an individual spouse through inheritance or by gift under certain circumstances. (For text of the bill see page 12).



In some respects, the statute does not change the way a court considers gifted or inherited property, in that the *Ruff-Fischer* guidelines have always allowed a court to consider the origin of the property. However, the effect of the new statute would be to shift the burden of proof so that, once property has been shown as inherited or gifted and titled and maintained solely in the name of the donee spouse, it will remain with the donee spouse unless it can be proven to be inequitable.

This change would modify how courts approach inherited property. Currently, inherited property is defined as marital property and, perhaps more importantly, the inherited property may be awarded to the non-donee spouse. *Glander v. Glander*, 1997 ND 192, ¶ 11, 569 N.W.2d 262; *VanOosting v. VanOosting*, 521 N.W.2d 93, 97 (N.D. 1994); *Young v. Young*, 1998 ND 83, ¶ 10, 578 N.W.2d 111. The North Dakota Supreme Court has held that when a trial court is dividing marital property the property should be equally divided, and that if it is not exactly equal, a trial court must explain any substantial disparity. *Kautzman v. Kautzman*, 1998 ND 192, ¶ 7, 585 N.W.2d 561. Thus, under the current law inherited property is included in the marital estate and a trial court will probably not be faulted for not only dividing all property equally, but giving inherited property to the spouse who did not inherit it. This is true even as to future interests, such as the division of a future right to receive trust income as occurred in *Zuger v. Zuger*, 1997 ND 97, ¶ 11-15, 563 N.W.2d 804.

A hypothetical case illustrates the effect the statute would have on inherited property. Assume a husband and wife are married ten years and one year before the divorce the wife inherits \$100,000 which she holds solely in her name in a certificate of deposit. Under the current case law, the court would have to consider the property as marital property and would probably divide all assets equally. Under the proposed statute, the certificate of deposit would not be subject to division, unless the husband could show that it would be inequitable not to divide the property. There are several ways in which a party could prove that it might be inequitable if the inherited property were not divided. For example, a party might contend that the property had been held for a significant length of time and the family relied upon the income from the property during the marriage. Additionally, a non-donee spouse might request the property if he or she were disabled and the property was necessary

"... the effect of the new statute would be to shift the burden of proof so that, once property has been shown as inherited or gifted and titled and maintained solely in the name of the donee spouse, it will remain with the donee spouse unless it can be proven to be inequitable."

for the support of that spouse. An argument might also be made that parties had jointly decided to spend the assets of one party, on the assumption that the inherited assets would be available for support in the future.

Numerous states treat inherited property as separate or non-marital property. *See e.g.*, Arkansas: § 9-12-315; Colorado: § 14-10-113; Delaware: § 1513(b); Iowa: § 598.21 (2); Minnesota: Minn. Stat. § 518.54, Subd. 5. In the Winter 2000 Family Law Quarterly Review of the Year in Family Law, 31 states were listed as dividing only marital property in a divorce. Thus, North Dakota would be inching towards the majority view that some property should be kept separate and not subject to division in a divorce.

The proposed North Dakota statute would limit the ability to keep inherited and gifted property separate, by requiring that the property be titled and maintained in the sole name of the donee spouse. If the property has already been transferred to a joint

account or is held in joint tenancy, the burden of proof would not shift.

As with all changes in the law, this change will create stress for both the courts and practitioners. However, the proposed statute has the benefit of being more fair, in that if inherited property has always been held separately in a marriage, it should be the non-donee spouse's burden to show why it is not fair to leave the situation as is. The statute gives courts the opportunity to invade the inheritance if equity so requires and, so, should not be viewed as an unfair change in the law.

Maureen Holman is a shareholder in the Serkland Law Firm in Fargo. She practices solely in the area of family law.