MICROFILM DIVIDER

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

ROLL NUMBER

DESCRIPTION

1271

2007 HOUSE JUDICIARY

HB 1271

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1271

House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 1/22/07

Recorder Job Number: 1572

Committee Clerk Signature

Minutes:

Chairman DeKrey: We will open the hearing on HB 1271.

Maureen Holman: Support (see attached testimony).

Rep. Meyer: On the face of it, it is true there are cases where a woman has inherited a CD or different things. In the vast majority of cases, I'm going to farm and ranch, it is usually the eldest son that is left the property, usually. Then the girls in the family our left with CD's because you understand if you have five or six more children, not all of them can make a living out of the family farm. If this law would be passed, I just feel like it would be so prohibitive to any spouse that goes into a farm or ranch situation for her husband who has inherited the property. You worked together, that is the only way that the farm and ranch property is going to go is if that wife puts in 24/7 like we all do in farming and ranching. However, when you get to court, that is never reflected. Those hours, the work, because the ACSC payments are usually in the husband's name, and the wife in those situations are considered non-property. All of that, when you get to a court of law they say you have not contributed to this at all. There is no way that I've seen that they say, well you have worked, without your contribution to that marital asset, you never would have had it to start with. Especially in your long term cases and if you would address that.

Maureen Holman: Clearly practicing in Fargo and going over to western MN I deal with a lot of farm cases exactly in the same type of situation you are talking about. Two ways that is deal with: 1) hardship and you certainly can provide all the information regarding the sweat equity that is put in. I think hardship becomes a way to get a portion of that non-marital property. The second way is most of those farm families, even though they may inherit some of the property, they end up either mortgaging it or doing improvements to it, or putting money into it. To the extent that you mortgage it, and you're using marital funds to pay down that mortgage, that turns it into marital property. Any time you are putting marital funds into it, it turns it into your property. So that's the way it is dealt with on the MN side, and I believe that other states that have that same kind of thing. You also have to remember that hardship. It's not impossible to have a finding of hardship and get a portion of that non-marital property. Because it is an issue.

Rep. Klemin: Just a couple of questions, on the MN law that you are referring to, does the MN also have this portion about the 1/2.

Maureen Holman: They do not limit it to a particular number. I take that back. Yes, they do. I think there is maybe 40% up to 1/2. Yes they do have that limitation.

Rep. Klemin: Secondly, this term, unfair hardship. I'm looking at this, that you can have a hardship, but it can't be an unfair hardship. You were talking hardship, what's the difference between a hardship and an unfair hardship.

Maureen Holman: To me, the quality of the person after the divorce and if somebody is going to be living on minimal income, with no assets, that's certainly an unfair hardship. I can only tell you what it feels like in MN, in my experience with the courts, whenever I have asked for it, I've gotten it. But you don't always have to ask for it.

Rep. Klemin: So we do have a term for the courts to work with, if this became law, I'm sure that you have cases that talk about that this was a hardship, but it wasn't an unfair hardship. Or yes, this is an unfair hardship, and what does unfair mean and that sort of thing. Are you able to give us any kind of definition.

Maureen Holman: I think because this is patterned very closely after MN's law and as Jean will indicate, off a Uniform Law, I think there are other states that would have guidance for us in terms of case law that would help. I think you are going to have to have some sort of discussion about that. We do that right now, too, with whether you should go other than equal. You're always going to have these factors.

Rep. Klemin: On marital property, what is included there. There is nothing mentioned about distributions from a trust or things like that. Are trusts included anywhere in here.

Maureen Holman: Trusts would be considered as non-marital if it were created before the marriage. If it were created during the marriage, then the presumption is going to be that it's marital. If it comes as an inheritance, that would be non-marital. If it's in the nature of an inheritance from a parent or aunt, it would be non-marital.

Rep. Klemin: Well, I think we all know what inheritance is. Somebody has to die first. You don't have to die to have a distribution from a trust.

Maureen Holman: But where is the corpus of the trust coming from. If it comes from outside your family, and it's in effect a gift to you, that would be non-marital.

Rep. Klemin: I think my point is that you don't mention anything about trusts in here.

Maureen Holman: It talked about gifts or inheritances. I believe the statute refers to gifts or inheritance. If I'm creating the trust myself, that's in my own property, so no, that wouldn't be. If it's a trust created by my parent or relative that is given to me, that's a gift, that would be private, non-marital in the statute.

Rep. Klemin: What if the trust was for education, maintenance, support and that sort of thing that was a parental responsibility, is that considered a gift or an obligation according to law.

Maureen Holman: Again, who created the trust. If I create it myself, that's marital, that's something that comes from the marriage relationship. If somebody else has created it, and given it to me or my spouse, that would be a gift and call it non-marital.

Rep. Klemin: Would it be better to have trust mentioned in here somewhere.

Maureen Holman: I don't think you have to, it could still either be a gift or an inheritance, one or the other. That is the way I've dealt with it in MN.

Rep. Onstad: Basically in 1271, if it passes, we are really separating out, if the divorce occurs, any future inheritance whatever it might be, would not be considered in the divorce.

Maureen Holman: Correct. Right now, there have been two cases decided in which parties anticipated an inheritance. They had a present interest, they knew there was some sort of trust established and they were going to get it some day, even though it might all disappear and the Supreme Court has said those future inheritances can be divided. Under this, it would not be able to be.

Rep. Klemin: On page 1, line 21 where you refer to tenancy by entirety or community property, we don't have those in ND, do we.

Maureen Holman: No, we do not. Some of that takes into consideration people who come here from other states.

Rep. Koppelman: Would you describe us as a community property state.

Maureen Holman: No, we are not a community property state. We are an equitable division state.

Rep. Koppelman: You talked about the one case in particular where one party had no interest in the wealth of the other party, and yet it was awarded by the court a 30% interest and

then that was appealed and they were awarded an equal interest. Why was it appealed if the first party had no interest.

Maureen Holman: In the case with the 30%, the wife who hadn't yet received any of that inheritance or premarital property and was forced to give up 30% when she got it, she appealed and did not want to have to give it up. The Supreme Court said you will have to give up that property.

Rep. Koppelman: I thought you said as a precursor to that that she had no interest in that.

Maureen Holman: That would be the other case, the Ulsaker case. I believe the wife in that case was one who did appeal because she must have decided at some point, she wanted some of that property.

Rep. Koppelman: Is there anything in ND, the way our current law is, that prevents people from entering into some sort of prenuptial agreement or other kind of agreement that sort of states what their intentions are in the event of a divorce.

Maureen Holman: No, we do permit premarital agreements and that can take care of this issue somewhat with people who are in second marriages, in particular. The difficulty that I find is people are so in love at the time they are getting married, they think this will always be perfect. My wife would never divorce me, my husband would never leave me for some other person and they don't take advantage of that option that does exist.

Rep. Koppelman: As you may be aware, in ND there is a movement afoot, to try and encourage, or put a mechanism to better provide for alternative dispute resolution in cases of divorces. Do you think that if that becomes a reality, that it will decrease the number of these kinds of problems, because it's often been said, if you don't hate each other when you come into a divorce, you certainly will by the time you are done.

Maureen Holman: No, I don't think it would make any difference. I do a lot of mediation myself. The reality is because the Supreme Court has said, we're going to divide all property whether inherited or premarital, and probably divide it equally. Somebody is going to use that as a bargaining chip somewhere in the mediation process. It's used right now, it's used in settlements. You get people fairly unhappy with their settlement.

Rep. Koppelman: I was looking in the bill to see where this was and maybe it isn't in the bill, but I thought I heard you refer to something earlier about a long standing marriage, or a lengthy marriage, is that a standard under current law, or would that change under the bill.

Maureen Holman: No, that would have no impact under the bill. Under current law, the Supreme Court has said, that there are various factors that you have to take into consideration on division of property. One of the factors can be whether the property was inherited or pre-marital, but in a long term marriage, which basically they say is anything over 8 to 10 years, there isn't a set cutoff point, you should divide all property equally. Even if there is inherited or premarital property.

Rep. Klemin: For purposes of terminology now, I call it the MN approach...

Maureen Holman: Perhaps the Uniform Laws might be a better description.

Rep. Klemin: But with respect to this approach, what is the prevailing view in the United States now, with case law.

Maureen Holman: Jean will address this. It is our understanding that most states make a distinction between marital and non-marital property. I believe 18 states don't make that distinction, we would be one of those 18 states.

Rep. Kretschmar: How long is a long term marriage.

Maureen Holman: There isn't a specific time, I think the Supreme Court would say probably 8-10 years.

Chairman DeKrey: Thank you. Further testimony in support.

Jean Hannig: (see attached testimony).

Rep. Delmore: How about people who hide assets. What provisions are there in the bill. Not everybody is squeaky clean. Why would this not encourage more people to have premarital agreements. No matter how much I love somebody under this law, it seems like one or the other of us is going to get the short end of the stick.

Jean Hannig: People who do not enter into premarital agreements before divorce, are really at a disadvantage at the time of divorce, if they have property that they owned at that time of the marriage, or even if they expect to inherit some property. Sometimes people are beneficiaries of a trust of their parent, and the property and the trust will come to them when their parent dies. Their right to inherit is established now, but the inheritance won't be realized for some time. This law, the proposed law would not make it necessary for people to enter into premarital agreements in order to have their non-marital property awarded to them. Current law, the only way a person can protect their premarital assets, is to enter into a premarital agreement. This law would not create more need for premarital agreements. This law would protect the people that did not enter into premarital agreements. I know you had another question.

Rep. Delmore: About hiding assets.

Jean Hannig: None of my clients hide assets, but other people have. This law does not address the hidden assets. However, the current law as it stands now, commits the court to redivide property when assets are discovered later. I don't know what you can do about keeping people from being sneaky at divorce. There is something about going through a divorce that creates sneakiness. I don't know what to do about that. The law does not, this amendment to our current statute, does not address that. But in our statute right now, we have

a provision that if assets are discovered after the divorce, that were hidden, then the court can rework that divorce, that is already in our statute. This would not change that. This would still be a part of that.

Rep. Koppelman: If a marriage worked in such a way that people kept everything in their own names and so on. If what you are proposing in this bill, were law, could a couple get married, keep everything in separate names throughout their marriage and maybe one owns a car, and the other one owns a car, and they didn't own a home together, let's say they rented property, at the end of the marriage, it would be like they were never married.

Jean Hannig: What did they acquire during the marriage.

Rep. Koppelman: Each had assets in their own name, could it get to the point where, from a financial standpoint, that the courts don't recognize marriage anymore, as long as people keep everything separate.

Jean Hannig: No, because the bill talks about all property being marital property. So everything they acquired, let's say they have car loan, and they paid off the car during the marriage, well it's no longer just a non-marital asset, because the money earned by the parties paid off the car during the marriage. So now, most courts in MN will treat that car as a marital asset; because the car was paid for during the marriage. I know Rep. Meyer asked a question earlier about farmland. The farm land is owned by the favored son in the family, and his wife is primarily taking care of the house and children, running parts out to the field, lunch, whatever the wife does to keep the operation going when they aren't sitting on the combine or the tractor. But, her contribution during the marriage, as the loans came in, no matter who's name they were in, as they were paid, as the operating loans were paid, the longer the marriage, the more this land is going to be characterized as marital property because as the land has increased in value, as operations have increased in value, so has the contribution of both

parties. Under this law, the contribution of both parties is recognized as equal after the marriage, no matter what each party does. If one party is the wage earner and the other party is the homemaker, it doesn't matter, because the contributions of both parties under this type of law, and under the Uniform Marital Property Act are considered equal contributions.

Rep. Koppelman: That would be true under current law as well.

Jean Hannig: Under current law, both of the contributions of the parties are considered equal, yes.

Rep. Koppelman: Would we be still considered an equitable state under this new law.

Jean Hannig: Yes, we would. There are 9 or 12 community property states. Wisconsin is one of those community property states. In Wisconsin it talks about property of the community. Their entire law structure is property of the community and property coming into the community. In the Wisconsin law structure, property owned prior to the marriage is not considered property of the community and so they even realize that even that community property that there is non-marital characters found on the property. This would not turn our state into a community property state. It would continue to be what is called dividing equitably. Dividing property equitably, what this would do is create a distinction between marital property and non-marital property that would provide certainty in people so that they know this property will be divided at divorce. Is this marital property.

Rep. Meyer: Going back to the sweat equity and the traceability. In cases I've seen like this, where a wife has chosen to be a stay-at-home mom and chosen to be an active farmer/rancher with that. In the court of law, it isn't recognized that I've seen. The sweat equity doesn't have a dollar amount on it. If she doesn't have the checks that she signed to pay for the property, it just doesn't seem to matter. There's no dollar figure on her contribution. We've seen what farm and ranch values have done. The counterargument to that, just

because you worked here for your whole life, you didn't contribute to the equity of that farm or ranch situation. That's not a traceable asset for the woman's contribution. In the vast majority of cases, even how our wages are in the state, I feel this law is going to be discriminatory against women.

Jean Hannig: I have to disagree with you; because I deal with this type of law in MN, actually the opposite happens. In cases where there is a farm, let's take a 35 year marriage, let's take a farm in western MN, let's put it in the Red River Valley and let's have beet acres on it. In the Red River Valley, farm land that has beet acres has increased tremendously. The value has increased. In your example, the husband has been the farmer, and the wife has been contributing to the farm through her care of the home and marriage. In MN, her contribution to that farm is going to be considered equal to his. Furthermore, in the 35 years that they've been married, to the extent that there's been increases in value because the farm has continued operation, there's been operating loans, in and out, by the time you have 35 years of marriage, it's my experience that all the farm assets are considered marital property and to the extent that there is a piece of land that was inherited or given to the husband before the marriage, this is the kind of case where the hardship provision is most often used to divide that property or to compensate the spouse with other assets to make the property division more equal. That's been my experience in MN. I would think that the same thing would happen in ND in these same types of cases.

Rep. Meyer: Say you're there and when you pay off the debt against that property. That's paid off before the equitable division then of the property.

Jean Hannig: I have trouble understanding your question.

Rep. Meyer: You gave the example of the operating loans in and out, and an operating loan holds the farm, as operating collateral. So when that is paid off, he inherited the farm, and

then you've got the money here, so the debt would be paid off before that would be allowed to be taken out of that marriage in the divorce settlement.

Jean Hannig: Not only would the debt be taken off, but in 35 years of operating loans, because farm land is pledged as security for those operating loans, the farm land is going to become joint marital property. Even though it is still held in the husband's name; 35 years of operating loans, there is no way that the property hasn't been paid over and over during the marriage by the operating loans. That's exactly the way the courts in MN treat that. The language of this bill would have the same effect. There is a case I just read out of Oregon, that was a cow-calf operation, 10 year marriage, cows and calves were owned at the time of marriage. What happens to cows and calves? They get sold, and more are purchased and sold, etc. The court in Oregon said all of these cows and calves are marital property. The non-marital cows and calves that were owned at the beginning of that 10 year marriage have disappeared. They no longer exist. They can't be traced through. The contribution of both parties to that cow-calf operation during the years of marriage and the cows and calves are all marital property.

Rep. Klemin: I've got a couple of questions. First of all, in the situation that you are talking about where one party inherits the land and they both work on it, and there's no debt, and there never has been any debt that happens sometimes. Are we getting into a situation where we have to look at the basis and depreciation of the value of the property in determining what's marital and what's non-marital?

Jean Hannig: In some of these marital/non-marital cases, that's exactly one of the issues: appreciation. I used in my example, shares of stock; they go up and down without regard to what you do. You hold them in your portfolio, they go up and down. They change daily in the New York stock exchange, so you don't do anything. But your stocks are dividends and so

that's received during the marriage. So they are treated differently. Depreciation is due to nothing you've done. If we have a piece of land that sat there idle for the whole time of the marriage, and appreciated in value, with no debt on it, then that appreciation for that land, would be without contribution by the parties. In a case like that, in MN, that land would be awarded to the party who owned it before the marriage of who inherited; because the parties did nothing to appreciate the value of that land.

Rep. Klemin: I'm having a little difficulty finding where sweat equity is taken into account.

Jean Hannig: It doesn't say sweat equity, but it does talk about marital property and marital debt, meaning how property was acquired during the marriage. So if you think about acquired during the marriage, that's where the sweat equity comes in. Acquired during the marriage equals what the parties did during the marriage. That's where your sweat equity comes in.

Rep. Klemin: On page 2, line 4, where it talks about tax liens. I have a question about creditor's rights. Can the court affect how the IRS treats the property for purposes of tax liens or how creditors view the ability to go after joint debtors.

Jean Hannig: In most IRS cases, the return has been signed jointly, a joint tax return. So it is a joint debt of the parties, that they owe taxes. A creditor who has a joint debt owing by parties, can go after the property of either party. If my husband and I owed taxes and I had some property in my name, and he has property in his name, the IRS can go against either one on those pieces of property because it is a joint debt. Tax liens on property, let's say it was a separate tax return; married filing separately, and he owed taxes. The IRS could not put a tax lien on my property originally to satisfy that debt. That is the thinking that we have in our statute right now for property being available for the debts of one spouse.

Rep. Klemin: Then claims of creditors, the same thing. Even though the court can allocate a debt to one party or the other, that doesn't mean that creditor can't still go after the other party on a joint debt.

Jean Hannig: That exists under current law and that's actually under contract law, and this does not change contract law.

Rep. Klemin: There's nothing in here that the parties can't enter into a property settlement agreement that's different from what is provided in here.

Jean Hannig: Absolutely nothing, the premarital agreement that we have in ND, allows parties to contract for things other than what is stated in the law.

Rep. Klemin: I'm talking about a property settlement agreement as part of a divorce.

Jean Hannig: Yes, parties can do anything in a property settlement agreement that they want, as long as the court can say it is a fair and equitable division.

Rep. Koppelman: You were talking about a case where the land was owned by one party prior to the marriage, and it appreciated in value and he didn't do anything to cause the appreciation, it was just the market. Any proceeds from that land can come off that land, instead of during the marriage, it would be part of marital property; but the land that was owned by the favored son in the example that we've talking about. There was a divorce; it would go back to that person owning the property, including the appreciation.

Jean Hannig: Yes.

Rep. Koppelman: People make financial decisions based upon their financial holdings. During the course of a marriage, that being the scenario, a family might decide that they have a choice here. We could take out a loan this year to operate our farm/ranch, and we can put up some land as equity for that land; therefore, there is an encumbrance, or we can sell some of our stock portfolio that we have together. It's something that we acquired during the

marriage, and want to keep the land free and clear; we're going to go and sell some stocks and put that money into the operation. It sounds to me like those decisions made during the marriage could affect the outcome at the end of the marriage. Can people advantage or disadvantage themselves if this kind of law becomes law, as to how the courts are going to look at it.

Jean Hannig: Yes, but they can do that today under existing law; they can make decisions that advantage or disadvantage themselves. I think in your scenario of a piece of land, and they decided to pay it off by using the stock portfolio, well there may be an argument that the other spouse can make that my non-marital stock portfolio paid off this land, so it should be part mine.

Rep. Koppelman: My example was that the land wasn't ever encumbered, it was given as a gift to the eldest son, the two people got married, they ran their finances together during the marriage and in the course of decision making during the marriage, this land that never had debt. They had an option, to sell some stock or take out a loan and use the land as collateral to be able to remain debt free. That decision would have an impact on how that land was divided in a divorce versus had they made a decision, well let's take out a loan here, and put the land up for collateral and at the time of the divorce, there is an encumbrance there and it's treated differently.

Jean Hannig: Yes, under your example the land would go to the person that owned it prior to the marriage, but this may be a good case for hardship, that the only thing they had left at the end of the marriage was that they had spent everything else. That's your hardship example. It's unfair that I end up with nothing and he ends up with the land. That's the hardship provision that would protect people from just those kinds of cases.

Rep. Koppelman: But the burden of proof is on the person making that claim, just like you said the burden of proof now is on the person making the claim that something is unfair.

Jean Hannig: Then the burden of proof would switch a little bit. It wouldn't switch entirely because the person who is arguing that it is non-marital, still has the burden of proof to provide that it's fair. So there is a little shift, but it doesn't the put the entire burden on the other party.

Rep. Charging: Without out this law, and we have at present an equitable and you're suggesting that many times premarital agreements will not hold up.

Jean Hannig: Right now in this state, parties can enter into a premarital agreement, they can make provisions in that premarital agreement to hold property separately, that the property never becomes the property of the other spouse and that the property would not be divided at divorce. When the divorce comes about, the spouse who believed that some of that property should be awarded to him/her can argue at that time that the application of this premarital agreement creates an unfair hardship and it's unfair to the party. The application of the premarital agreement is unfair at the time of divorce under our current law. This does not change anything in our existing law regarding premarital agreements that would still be the same.

Rep. Boehning: If the husband has a house here and the wife has a house in another state. They decide to live six months here and six months there. One has a loan on it, what happens in the divorce, how you divide that because the marital funds paid for the loan.

Jean Hannig: Well that was property acquired during the marriage, so in that kind of a division you are going to have mixed property, and you may have to determine what part of the property is non-marital or prior to the marriage, and what part of the property has been paid for during the marriage by the mortgage payments. In MN, the way that is treated, the value of

the house would be divided into percentages. A percentage would be non-marital, and a percentage would be marital and the marital portion would be divided.

Rep. Boehning: What if both houses are paid for, I will take my house and you take your house. One is worth considerably more than the other one, would you take your house back and I would take mine back. Would that still work that way?

Jean Hannig: If they are completely non-marital and there's no marital asset to those two properties, it would be awarded to the parties who owned them prior to the marriage. Now there may be some hardship provision if one house has tripled in value and the other house hasn't. Basically, if they were not paid during the marriage, non-marital, the parties did nothing, no improvements, during the marriage; it would be treated as non-marital property.

Rep. Boehning: If medical needs arise, and they move to the house down south, would that create a hardship for a party if they couldn't remain in that house.

Jean Hannig: You could, I don't know because the examples that you're giving have a lot of factors, we're talking about medical problems, about living in a certain climate, and then the hardship provision would make it more equitable or fair for the house to be awarded to the other party. In divorce cases, property division in divorce is always a puzzle. This isn't going to change it from being a puzzle, simply make the puzzle a little more identifiable and allow the parties to set aside the property that should be theirs because it's non-marital property. There are a lot of factors that can come into that. We have case today, where the factors are who should get the property.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Sherry Mills Moore, State Bar Association of ND: I am here to offer technical assistance (see attached testimony). Regarding the sneaky spouse, paragraph 2 does address it and does change what we have now. I think it may be looking like it's just cleaning up language, if

you go from marital to non-marital property distribution. I think that's a mistake even if you pass this bill, I think in paragraph 2, section 1, you need to be careful of only it's requiring a spouse to disclose marital property. There isn't going to be a good way to gauge whether there is hardship or a need to disclose it or an ability to divide it if it hasn't been disclosed and we put this in, this bill came in 2001 in order to avoid the sneaky spouse and it allowed the court to have jurisdiction to reduce it. If you leave the language in as it's drafted you will take the teeth out of that if you were to pass this bill. The other thing that the bill does in section 2 is to allow the court's to enforce things. For example, the husband was awarded a marital car and the wife destroyed it before it was delivered, the court would not be able to come back in and give him non-marital property as this was written. I doubt that was the intention of this bill, but that would be a consequence of it. The heart of the matter is what this would do to the law in ND on property division and flip this law on its head. It would change the presumption. Right now we presume that people get married, they live their lives, and if their marriage does not work out, then they get divorced, that what they have done during the course of the marriage isn't as significant as it would be under this bill. On page 2, line 15 and 16, non-marital property includes property acquired and exchanged for, or is the increase in value of, property or debt that is described in the first three paragraphs. I think that at the conclusion of the questions that were asked about marital and non-marital, you can see that even in MN they continue to have plenty of room for arguments, plenty of room for discussion, plenty of room for not settling. We settle approximately 85-95% of our cases and that's done in ND with equitable property distribution. It is not fair or accurate to say that we can't settle our cases because of the way that the law reads. We can settle our cases and we do so all the time. There are a lot of factors that we look at. This would make where the property came from a super priority kind of factor. That would be whether it is a gift or an inheritance, it won't be for

a person who bought it, that makes it hard for a case to have flexibility and to let the court have the flexibility that they need to look at medical factors and all kinds of factors when they are making those decision. Hard cases make hard law. Every case has two sides to it. You have to make laws that serve people the best and then give the court flexibility to do for the exceptions. I think economic is the thing we look to rather than to an eye towards divorce. Most couples think penults are romance killers, but when you go and buy a car most people aren't thinking about divorce and that this is mine. They make normal financial decisions as a couple. I think asset protection is not part of the thought process for people who are married and the court already has the power to make the kinds of divisions and decisions that have been talked to you. If you have off farm income that enables the family to leave the land unencumbered because that off farm income pays for some things that might ultimately have to be put into a loan otherwise. How is that fair for that property to remain in the name of the person who bought it 30 years ago, even if it has been left sacrosanct during this time. You may be able to argue that it's not fair, but if there is property to be divided it may not be a hardship. If there is income to be produced, it may not be a hardship, but it certainly seems to be unfair. This bill isn't as simple as it sounds. MN has a body of case law that we do not have. I would suggest that there are problems in making this kind of a policy decision. It isn't something that ought to be done lightly.

Rep. Delmore: Can this bill be saved if we put on some amendments, or do we have to assume that policy shift that you're talking about, that things will be done very differently in case law than what we're used to.

Sherry Mills Moore: I think you could clean up paragraph 2, take out marital and change the section numbers. I don't think there is any way to get around the fact that this bill is a policy change. If it's a policy you choose to make, of course that is your option. I also think, and I've

heard from some people, that are unhappy that the increase in value is included in here. If you were looking to do something to make it more palatable, getting rid of the increase in value or making an increase in value presumed to be marital property, probably would help. In the previous bill that came in, premarital property was not included because it gets to be co-mingled and so we've only dealt with inheritance as a gift. It seemed like the areas of deceit were the most bothersome to people. But it would be a policy change.

Chairman DeKrey: Thank you. Further testimony in opposition. We will close the hearing.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1271

House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 1/31/07

Recorder Job Number: 2461

Committee Clerk Signature DPenrose

Minutes:

Chairman DeKrey: We will take a look at HB 1271.

Rep. Griffin: Explained his amendments.

Rep. Delmore: This doesn't change anything about "unfair hardship" regarding the person who has to prove it.

Rep. Kretschmar: We should split the amendments between page 1 and page 2.

Rep. Koppelman: I think it was the intent of the sponsors to protect property that was not acquired during the marriage, such as property inherited before they were married.

Rep. Griffin: Right now, if someone gets married the first week, and inherits property during the marriage, and they get divorced the second week, the property would be considered marital property and have to be split between the parties. I would prefer that #4 stay in, but I think it is a little bit more moderate step. I move the amendments on page 1 per 70478.0201, and to change the spelling of "martial" on page 1, line 19 to "marital".

Rep. Wolf: Second.

Chairman DeKrey: We will take a voice vote on the amendments on page 1. Motion carried.

Rep. Kretschmar: I move the page 2 amendments.

Rep. Wolf: Second.

Chairman DeKrey: Hand vote on amendments on page 2. Motion failed (3 yes, 10 no).

Rep. Klemin: I have an amendment on page 2, line 18, remove "unfair" and again on line 21. I move the amendment.

Rep. Boehning: Second.

Chairman DeKrey: We will take a voice vote on the Klemin amendment. Motion carried. We now have the bill before as amended. What are the committee's wishes.

Rep. Delmore: I move a Do Not Pass as amended.

Rep. Charging: Second.

7 YES 6 NO 1 ABSENT DO NOT PASS AS AMENDED CARRIER: Rep. Charging

70478.0201
Title.

Prepared by the Legislative Council staff for
Representative Griffin
January 23, 2007

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1271

p9 l line 19
+ martial to marital
OK

Page 1, line 9, remove "marital"

Page 1, line 10, remove the first "marital" and remove the second "marital"

Page 1, line 12, remove the first "marital" and remove the second "marital"

Page 2, line 13, after the underscored semicolon insert "or"

Page 2, line 14, replace "; or" with an underscored period

Page 2, remove lines 15 and 16

Renumber accordingly

Adopted by the Judiciary Committee
January 23, 2007

House Amendments to HB 1271 (70478.0202) - Judiciary Committee 02/01/2007

Page 1, line 9, remove "marital"

Page 1, line 10, remove the first "marital" and remove the second "marital"

Page 1, line 12, remove the first "marital" and remove the second "marital"

Page 1, line 19, replace "martial" with "marital"

Renumber accordingly

Date: 1-31-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1271

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DNP as Amended

Motion Made By Rep. Delmore Seconded By Rep. Charging

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey		✓	Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin		✓
Rep. Boehning		✓	Rep. Meyer	✓	
Rep. Charging	✓		Rep. Onstad		✓
Rep. Dahl	✓		Rep. Wolf		✓
Rep. Heller					
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar		✓			

Total (Yes) 7 No 6

Absent 1

Floor Assignment Rep. Charging

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

REPORT OF STANDING COMMITTEE

HB 1271: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (7 YEAS, 6 NAYS, 1 ABSENT AND NOT VOTING). HB 1271 was placed on the Sixth order on the calendar.

Page 1, line 9, remove "marital"

Page 1, line 10, remove the first "marital" and remove the second "marital"

Page 1, line 12, remove the first "marital" and remove the second "marital"

Page 1, line 19, replace "martial" with "marital"

Renumber accordingly

2007 TESTIMONY

HB 1271

TESTIMONY OF MAUREEN HOLMAN
HOUSE BILL ~~1274~~ 1271

I am Maureen Holman, a family law lawyer with the Serkland Law Firm in Fargo. I am here to speak in favor of House Bill No. ~~1274.~~ 1271

This bill would change the way courts address the issue of division of property in a divorce. The bill would allow courts to categorize property as either marital or non-marital. Courts would be allowed to divide marital property, but non-marital property would be awarded to the person who owned it, unless that would create a hardship for the other party. Generally, the bill defines non-marital property as property that is owned before the marriage, or acquired as a gift or inheritance during the marriage.

Currently, all property is considered to be marital property. It doesn't matter if the property was owned before the marriage, or was acquired by gift or inheritance during the marriage. The trial court is free to divide all the marital property, and can award property inherited by one party to the other party as a part of the equitable division of property. Young v. Young, 1998 ND 83, 578 N.W.2d 111. Furthermore, if the marriage is considered to be a lengthy marriage, the trial court must start with an equal division of the parties' property and must explain any significant deviation from an equal division. Kautzman v. Kautzman, 1998 ND 192, 585 N.W.2d 561.

To show how this has been applied in North Dakota, it is instructive to review a couple of recent cases. The first is Hogan v. Hogan, 2003 ND 105, 665 N.W.2d 672. In Hogan,

the trial court divided all of the parties' then-existing property and debt equally, after an 11-year marriage. It then awarded the husband 30% of the wife's interest in a land trust established 7 years before the marriage, as well as 30% of the wife's interest in her mother's estate, who passed away the month before the divorce trial. The wife had not started to receive any of this premarital or inherited property. The wife appealed this decision, but the North Dakota Supreme Court ruled that this was a correct application of North Dakota law.

In Ulsaker v. White, 2006 ND 133, 717 N.W.2d 567, the parties had been married for about 16 years. During the marriage, the parties kept their property separate and lived "eclectic lifestyles." The wife testified that she never wanted the husband's family wealth to come to her. The parties had a total estate of about $5-6 million, with the wife owning about $1 million. The trial court ruled that each should have their own separate property. This ruling was overturned, with a reminder that a long-term marriage suggested support for an equal division of property, but also an indication that the court might be able to make a distribution that was disparate but equitable.

The Ulsaker case indicates why it is difficult to settle cases that involve premarital or inherited property: current law does give some options for unequal division of property, but the strong indication from the Supreme Court is that equal is better. Thus, parties are forced to go to trial if one of the parties thinks it is wrong to give up inherited property that has been kept separate during the marriage, or parties are forced into agreements that

divide premarital or inherited property, even though one of the spouses is bitter about that agreement.

Most of my clients are surprised to find that their inherited property can be awarded to their spouse. Most clients are upset when the antiques they received as an inheritance prior to the marriage are included in the value of the marital estate and must be "paid for" to the other spouse. To my clients, this does not feel fair or logical. Most of my clients do not understand the statement in van Oosting v. van Oosting, 521 N.W.2d 93, that "the express or implied wishes of the grantor are not barriers to equitable distribution."

A hypothetical case shows the effect this bill would have on the division of property. Assume a husband and wife have been married ten years and one year before the divorce the wife inherits $100,000, which she holds solely in her name in a CD. Under the current caselaw, the divorce court would consider the CD to be marital property and would probably divide the parties' property equally, as a ten-year marriage would be considered a long-term marriage. Under the proposed statute, the CD would not be subject to division, unless the husband could show that he would suffer a hardship if it were not divided.

There are several ways a party might be able to show a hardship under this statute. 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, the non-owner of the non-marital property might request the property if he

or she were disabled and the property was necessary for the support of that spouse. An argument might also be made that the parties decided to spend the assets of one party, on the assumption that the premarital or inherited property would be available for support in the future. Thus, the bill protects parties from an unfair categorization of property as marital or non-marital.

This bill requires the presumption that all property acquired during the marriage is marital. This will put the burden onto those who wish to have a property classified as non-marital to prove it to be such. My experience working in Minnesota, which uses this classification of marital and non-marital property, is that it is more difficult to prove that property is non-marital in long marriages, when the allegation is that there is premarital property. My experience practicing in Minnesota has also been that people are comfortable with the notion that inherited property should go to the person who inherited it, especially when it has been kept separate from other marital property. The definition of marital and non-marital makes it easier to resolve property disputes in Minnesota.

As with all changes, this change in the law will create stress for both the courts and practitioners. However, it has the benefit of feeling fairer to those who have to live with its effects: the divorcing parties. Thank you for allowing me to speak in favor of this bill. If you have any questions, I would be happy to respond. I am also available by telephone at 701-232-8957 and by e-mail at mholman@serklandlaw.com.

Uniform Law Commissioners

The National Conference of Commissioners on Uniform State Laws

SUMMARY

Uniform Marital Property Act

Elementary sociology tells us the self-evident fact that the nuclear family is the basic social unit upon which all other social and political institutions are based. Much has been said, as well, in those arenas in which public policy is debated and made, about the primacy of the family and the need to support and sustain it. But most of this discussion and concern has overlooked an inherent weakness in the family as an economic unit, at least in those states that are common law states. Although members of the family may have property and income, the family does not. As an economic unit, it is non-existent. And of all those factors that contribute to the problems of the family, perhaps its economic weakness is the most devastating.

After three years of consideration, the Uniform Law Commissioners promulgated the Uniform Marital Property Act (UMPA) in 1983. For the first time, the family can be made into a functioning economic unit. And, for the first time, there is an opportunity to give more than lip service to the family as an economic entity.

UMPA creates a class of property that is the property of the marriage, and not the property of individuals. That class of property is made up of all property of the spouses, except certain specific exceptions that remain individual property. If there is a question about specific property, whether it is marital or individual property, the Act raises the presumption that it is marital property. The presumption forces any party claiming property as individual property to bring sufficient evidence to overcome the presumption. Thus, UMPA explicitly favors the family and a finding of marital property.

Each spouse has an undivided present one-half interest in the marital property. Each spouse owns his or her own individual property. Further, marital property interests exist notwithstanding title as evidenced by title documents or otherwise. A spouse has his or her interest in marital property, even if that spouse's name appears nowhere on any title documents.

When does marital property come into being? There are three possible dates, one of which becomes the determination date. All property acquired by either spouse, with the given exceptions, is marital property for existing marriages after the effective date of the Act. Thereafter, marital property may come into being at the time of marriage or at the time marital domicile is established in the state.

Property of the spouses that is not marital property is individual property. Any property acquired by a spouse before the effective date of UMPA or before marriage is individual property. The bulk of property classified as individual property will fall into this category. Property acquired before marital domicile is established in a state or jurisdiction adopting UMPA remains as classified under the law of the prior domicile.

During marriage, certain other property of spouses is also individual property. For example, an inheritance does not become marital property. A gift to a particular spouse from a third person is that spouse's individual property. Recovery of damages for personal injury is individual property, unless subrogated to prior compensation drawn from marital property. UMPA specifically identifies the kinds of property that are individual property. But it should be remembered that UMPA presumes marital property in the absence of evidence to the contrary.

Certain, specific kinds of property are specially considered in UMPA. Income from individual property earned after the determination date is marital property. Appreciation of individual property remains individual property, unless the appreciation is attributable to the efforts of the other spouse. That appreciation is marital property. Insurance policies and proceeds become marital property insofar as acquired or paid for after the determination date. Any program entitling a spouse to deferred employment benefits is marital property insofar as acquired or paid into following the determination date. Commingled or mixed property is marital property except for that individual property that can be specifically traced. UMPA sets specific rules in each of these categories to solve significant, known problems in the establishment of marital property.

Although marital property exists no matter what the title documents say, the power to transfer or consume

marital property does follow title. A third person acquiring property from a spouse may rely upon the title document whatever it may be, or appropriate affirmations of title, even if the other spouse is not included on the documents or does not consent to the transfer. The numerous and complex systems for the transfer of all types of property, as they have evolved in this country, are not disturbed by the establishment of marital property. UMPA does not impose extraordinary burdens on third parties because of the existence of marital property. Marital property must be managed within the marriage, and any inappropriate act of transfer must also be remedied within the context of the marriage.

Between spouses, UMPA imposes responsibilities and inhibits the mishandling of marital property. All marital property must be managed in good faith for the marriage. If it is not, the injured spouse may recover from the spouse responsible for the injury. UMPA restricts gifts to third parties from marital property by one spouse not acting jointly with the other to a small amount (suggested $500.00). Property cannot easily be shifted by gift to avoid the responsibilities of family. Also, any third party must be a bona fide purchaser for value to be free from an injured spouse's capacity to trace and recover an asset improperly or fraudulently sold to that third party. Such provisions inhibit and restrain collusion and other practices designed to avoid legal family responsibilities.

UMPA, in addition, establishes creditors' rights, an issue of great importance if the family is to have credit as a family. Any obligation for the family may be settled out of marital property and the individual property of the spouse incurring the obligation. Indeed, UMPA presumes that obligations arising after the determination date, incurred by a spouse, are for the family.

However, individual obligations may arise as well. All individual obligations may be satisfied out of the incurring spouse's individual property. If the obligations precede the determination date, in time, the creditor may, also, be satisfied from marital property that would have been individual property but for the marriage. If the obligations arise after the determination date, they may be satisfied out of the incurring spouse's share of the marital property, as well as his or her individual property. These rules clearly designate that property which a creditor may use to satisfy a debt.

UMPA merely establishes marital property and makes only those adjustments in the general incidents of property ownership to do so. It does not affect the actual distribution of marital property at divorce or death. These matters are covered in the divorce and probate statutes of a state. There are a number of other topics related to distribution for which UMPA does provide, however. Spouses can use the survivorship rules provided in UMPA to pass their shares in specific marital property to each other at death without probate. UMPA also empowers spouses to determine what is marital property and individual property by agreement, and to agree on distribution even at separation or divorce. These features permit spouses considerable flexibility in ordering their own affairs.

UMPA provides the means to overcome a share of the economic inequities inherent in the current family structure. The concept of marital property requires careful consideration everywhere for that reason.

211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

tel: (312) 915-0195 | fax: (312) 915-0187 | e-mail: nccusl@nccusl.org

TESTIMONY ON HOUSE BILL 1271
House Judiciary Committee

Jean P. Hannig, J.D.
January 22, 2007

Good Morning Chairman DeKrey and members of the Committee. I am Jean Hannig, an attorney in private practice. One of my primary practice areas is family law. I have been practicing in the area of family law for more than twenty years. I am licensed to practice law in the State of North Dakota and in the State of Minnesota. My law office is in Fargo. I am a member of the State Bar Association of North Dakota(SBAND) and currently serve as the chair of the SBAND Family Law Section. I am here as an individual and not on behalf of any organization.

My family law practice is a litigation practice that includes the areas of divorce, custody, child support, and adoption. I understand the divorce law in North Dakota as it is now. This is why I am appearing to urge your support of HB 1271 which will change the way that property is divided in divorce cases. I believe that if HB 1271 becomes law, it will establish a method of property and debt division that will be more fair for people who are divorcing.

As Maureen Holman has explained so well, the current law in North Dakota directs the court to divide all of the property owned by the spouses. We have a policy in this state to divide property and debt at divorce in an equitable way. But dividing all of the property owned by the spouses between the spouses is not always fair and equitable. HB 1271 will change the law so that the property and debt divided at divorce is only the marital property owned by the spouses and the marital debts owed by the spouses. Today when I use the word "property", I am including both property and debt and the characterization of that property and debt as marital or non-marital.

HB 1271 directs the court to divide marital property and marital debt at divorce. It begins with a definition of marital property and debt that presumes that all of the property and debt acquired during the marriage is marital property. The bill contains a definition of non-marital property and debt. If a spouse is the owner of non-marital property or if some property is a replacement for non-marital property, then the spouse owning that property can present evidence to overcome the presumption of marital property by proving that the property is non-marital property. Once property is co-mingled or jointly owned by the spouses, then the non-marital nature of the property can disappear.

The bill defines non-marital property and debt. If the property or debt is non-marital, then it will be set aside for the owner spouse. If the resulting property division creates a hardship for the other spouse, then the non-marital property can be divided between the spouses. The bill has a list of factors that a court will consider to determine if a hardship exists. This bill will make property division at divorce fair for the parties. It will also allow the parties to identify that property that is not marital without the need to litigate the issue before a court. Right now, the only way that a party can keep property that he or she owned before the marriage or inherited during marriage is to convince the court that the property should be awarded to the person who inherited it or owned it before marriage.

Opponents of this bill will argue that making a distinction between property and debt by labeling it "marital" or "non-marital" will completely change the law in this state. I do not agree.

The North Dakota Constitution contains a provision at Article XI Section 23 that provides as follows:

> "Property Rights of Married Women. . The real and personal property of any woman in this state, acquired before marriage, and all property to which she may, after marriage become in any manner rightfully entitled, shall be her separate property, and shall not be liable for the debts of her husband."

This section of the ND Constitution was enacted in 1889. This was our state's response to the law that existed in other states that would not permit a woman to own her own property after marriage. This constitutional provision recognizes the separate nature of pre-marital property and inheritance.

The North Dakota Century Code contains a provision that recognizes that both the husband and the wife may own separate property during marriage. Section 14-07-08, subdivision 4, provides that property owned separately by one spouse may not be taken to satisfy debts owing only by the other spouse. That subdivision also states that each spouse is separately liable for their own debts contracted before the marriage date.

Subdivision 2 of Section 14-07-08 recognizes that earnings of one spouse will be the separate property of that spouse if the parties are separated when the money is earned. That statute refers to the "separate property of each spouse."

The passage of HB 1271 will extend this recognition of separate property of spouses to the division of property upon divorce.

This bill will also bring North Dakota in line with the majority of states which recognize a distinction between marital property and non-marital property and which provide for the division of marital property upon divorce. The Family Law Section of the American Bar Association publishes a survey of divorce law in the 50 states each year in its publication, Family Law Quarterly. The 2006 survey published for winter 2006 (See Family Law Quarterly, Vol. 39 No. 4, at pg. 909, Chart 5)shows that there are 18 states that do not have laws to divide only marital property at divorce.

North Dakota is one of these 18 states. This review shows how various states address non-marital property issues at divorce.

The Uniform Law Commissioners recognized that uniformity among the states in the division of marital property at divorce would be desirable. The Commissioners promulgated a Uniform Marital Property Act in 1983. A summary of this act printed from the National Conference of Commissioners on Uniform State Laws is attached to my written remarks.

The definitions of "marital" and "non-marital property" contained in the Uniform Marital Property Act is similar to the definition of marital and non-marital property in House Bill 1271. While North Dakota has not adopted the Uniform Marital Property Act, there are three important aspects contained in the Uniform Marital Property Act that make good sense.

1. The Uniform Marital Property Act presumes that all property acquired during marriage is marital property regardless of how the property is titled;

2. The Uniform Marital Property Act recognizes that some property is not marital property: property owned prior to marriage by one of the spouses; and property acquired by inheritance or gift by one of the spouses from a third party during the marriage.

3. The burden of proof to claim non-marital property is on the spouse making the claim.

House Bill 1271 contains a definition of marital property and non-marital property that is similar to the Uniform Marital Property Act. This similarity is important for litigants and courts if this bill is passed and becomes the law of this state. Other states that have these provisions can provide guidance on issues of characterization of property as marital and non-marital and division of property that is both marital and non-marital - which is called "mixed" in family law terms.

Let me give you an example of how this type of law works:

Two people marry. They are both widowed and retired. Both have adult children. The wife owns her own home that was paid for, some Certificates of Deposit, and has retirement income from a pension . Husband owns his home with mortgage debt, a stock portfolio, and receives retirement from a pension. Both parties sell their homes and purchase a home together that they hold jointly. Wife pays 75% of the purchase price from her home sale and husband pays 25% of the purchase price with his home equity. There is no mortgage on the new home. Wife keeps her CDs in her separate name and Husband keeps his stock portfolio in his separate name. Husband's mother dies and leaves him a quarter of farmland. Husband rents out the farmland and keeps the rent in a separate account in his name. The parties have joint checking and savings accounts. Retirement benefits and social security benefits go into the joint accounts. One of the wife's certificates of deposit mature and she puts that money in the joint account. The marriage fails and the parties divorce. Under current law all of the assets will be divided between the parties.

How is property divided if HB 1271 becomes law?

The home is split so that wife gets 75 % and husband gets 25% of the home (purchase price can be traced to non-marital assets).

Wife keeps her CDs but the interest earned during marriage is divided between the parties (interest is acquired during marriage)

Husband keeps his farmland but the rent account is divided between the parties (rent is received during marriage)

Husband keeps his stocks but the dividends received during marriage are divided (dividends are earned during marriage)

Both parties keep their respective pension plans

All funds in joint bank accounts are divided between the parties

As you can see, the provisions in House Bill 1271 will make property division in North Dakota more fair for the parties who own property before marriage and who inherit property or receive gifts from third parties during marriage.

Some opponents of this law will tell you that this law will create more litigation. I disagree. In the example that I just gave to you, the parties can go to court and argue that what they owned before the marriage should be returned to them. But the only way that this can happen is if the case is tried to a judge who agrees to return property to the person who owned it before marriage or who agrees that inherited property should be awarded to the one who inherited it.

With a law that provides for division of marital property, litigation can be reduced. I see this in my own practice. If I represent a party in a Minnesota divorce, I can advise the party what property will be treated as marital property or debt and what will be treated as non-marital property and debt. This creates more certainty and leads to more settlements. When I represent a party in a North Dakota divorce, that party is often surprised to discover that property or debt owned before the marriage or inherited during the marriage will be divided at divorce. Most people consider this unfair.

I believe that House Bill 1271 recognizes that in North Dakota many marriages are second marriages and a number of marriages happen after people have begun to acquire property in their own names before marriage. This law will be more in line with what is happening in the world of marriage and divorce. It won't force people to enter into agreements before marriage to decide how property will be divided at divorce. The law won't eliminate the need for premarital agreements

which will still be required to change the inheritance rules between a husband and wife. Instead the law will award property to the people who own it prior to marriage or who inherit the property after marriage. Finally the law will still protect people from experiencing great hardship at divorce and being left with nothing. I respectfully urge you to recommend passage of House Bill 1271.

I thank you for the opportunity to speak about this bill. If you have questions, I would be happy to answer them. If any questions arise in the future, please contact me at 701-232-5051 or by e-mail at Jean@Hanniglaw.net. Thank you.

STATE BAR ASSOCIATION OF NORTH DAKOTA

TESTIMONY ON HOUSE BILL 1271

SHERRY MILLS MOORE

Good Morning, I am Sherry Mills Moore, a volunteer lobbyist for the State Bar Association of North Dakota, here today to offer technical assistance on this bill. I am attorney in private practice here in Bismarck, with a focus on family law. In addition, I have served as the co-chair of the Family Law Interim Task Force with the legislature, the chair of the Family Law Task Force, a joint committee of the North Dakota Supreme Court and the State Bar Association of North Dakota. This is the committee that worked in conjunction with the Interim Judiciary Committee of this legislature back in 2000 and 2001 on property issues. The Task Force, did not endorse it, however.

There are three parts to this bill, and two sides to every story. The heart of this bill, Paragraph 3, distinctly represents this principle. The bar association neither supports nor opposes this bill, but we do rise to offer you technical assistance on its effect. To ease you in that task and avoid repetition, I draw your attention to the articles copied for you and attached to this testimony. These articles come from a 2001 edition of our association publication, The Gavel. One was authored by myself and the other by an attorney in Fargo, Maureen Holman. In that article I point out the problems with the proposal and Maureen points out its benefits.

Let me briefly summarize what Paragraph 3 of the bill would do and the concerns it raises. This bill flips our current law on its head by changing the burden of persuasion from the person who wants to carve out a piece of property from the martial estate, to the person who wants to include it.

Currently in a divorce all of the property goes into the marital estate regardless of title, origin or even sentiment. The court then makes a division of that property considering specific factors -- the length of the marriage, income producing ability of the parties, health of the parties, conduct, and where did the property come from.

This last factor would get special treatment under the new law, call it a super priority. Inherited and gifted property and property owned before the marriage would stay with the recipient spouse, unless it would be inequitable to do so. This property, and the increase in value of that property, go to the spouse who received the gift or inheritance or owned

it before the marriage. The property dances with the one that brung it, so to speak. For the other spouse to receive a share of the inheritance or gift or premarital property, or to get other property to balance that nonmarital property, he or she needs to prove that it would be work an unfair hardship to do so. The new law goes further than many jurisdictions by setting aside not only the asset, but also the growth to the asset.

How can this be anything but good? To answer this I need to have you step back to the basic purpose of this kind of statute. The laws of divorce are intended to divide the property in the manner that gives the best solution to the most people, leaving exceptions for the less common situations, and flexibility in the court to address the individual needs of the parties. The goal of our law should be to have the widest swathe produce the best result for the most people. Will this bill do that? I don't think so, but others disagree.

Let me try to help you further. This bill is absolutely and without question, at least in my mind, a policy decision, and those are best made by you. But I know that in making a policy decision you do not want unintended consequences.

My concerns derive from whether this truly fits the way people live their lives in our state. Most people enter a marriage thinking it will be forever, and oh, but that it could be. They make countless decisions which do not contemplate divorce. They buy and spend based upon what they need, what they want, where the funds are most currently available, and cost. These choices are not made with an eye to asset protection from each other. This bill, however, would make the prudent spouse add to the decision making mix, the question of *how will this affect me if we divorce*?

Let's look at some examples.

Suppose from a tax and interest perspective the best source for a purchase is the wife's inherited certificate of deposit rather than stock purchased during the marriage. Without this bill, the decision would be based on economics. With this bill, divorce protection would be a factor. Economics would say use the certificate of deposit rather.

What happens to the farm family where because one spouse has off-farm income they are able to leave the inherited farmland unencumbered. Under the new law, the off-farm income producing spouse would have to prove it would be an unfair hardship to consider the farmland. Under the

current law, the title-owner would have to prove it inequitable to consider the land.

Whose certificate of deposit should be cashed in for the children's college, the one with the lowest interest rate given to one spouse, or the certificate acquired during the marriage? Under the current law, it doesn't matter but, under the new law, it would.

Because most married couples do not put asset protection into their thinking caps, this kind of legislation creates problems.

Our courts already have the power to make divisions which allocate inherited and gifted property solely to the recipient spouse. Sometimes they do and sometimes they don't. What this bill does is to place the burden to prove the exception – unfair hardship—on the non-recipient spouse. This is not just a function of the courtroom, however, but would also become a significant factor in settling cases. And, if you are looking for simplicity or cost savings in litigation, this bill does not do it. Our neighbors to the east implemented similar legislation in 1979 and have been monkeying with it ever since. This bill changes policy, not procedure, but marriage has enough hurdles without adding to the mix an ongoing financial eye towards divorce at every economic juncture.

If you discuss this case with lawyers who practice in the area of the law, or parties who have gone through it, both can regale you with (what was labeled in-law school) the *parade of horribles*, worst case scenarios intended to persuade you. That is a function of perspective, usually tied to one particular set of facts. Because this will shift the law for all situations, it really does come back to you as a policy decision. You should know, however, that if this bill passes, we will have very little case law to back us up. It will take many years for us to know how this is to work here, even if it is the same kind of legislation as in Minnesota. We can look to Minnesota for answers, but as you know, just because it is true in Minnesota, does not mean it is binding on us.

Now let's talk about **Paragraph 2.** This statute arose to address the problem of the sneaky spouse. Even if you pass this bill and flip the way our law has worked, this paragraph should not be changed. This solution arises from the problem caused when one spouse hid assets from the other spouse. If the sneaky spouse was required to disclose those assets but did not, the property can be redistributed in a post judgment proceeding.

Surely there should be teeth behind paragraph two of this statute to require disclosure of both marital and nonmarital property. If a spouse is able to circumvent the equities of our laws by not telling the other party about the property preventing the court a full examination, then the court should have some power to pull that spouse back in and redistribute all of the property, not just that deemed, "marital".

The court is also empowered to redistribute property for enforcement. So, for example, in the latter situation, if the husband is awarded a marital car, but the wife intentionally destroys it, a piece of property previously distributed to her, even if nonmarital, can be awarded the husband.

I thank you for the opportunity to speak to this bill, and, to give you this hot potato. If you have any questions, I would be happy to try to answer them. If any arise in the future you may contact our Executive Director, Bill Neumann, at 255-1404, or myself by telephone at 222-4777 or e-mail address of esther@btinet.net. Thank you.

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.

14-05-24. Division of Property.

1. When a divorce is granted, the court shall make a just and equitable distribution of the couple's 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, 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 dispose 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.

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

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 nonmarital 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.

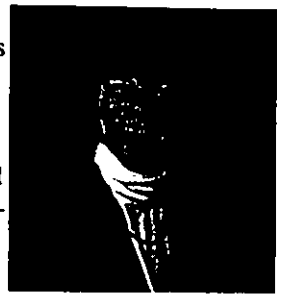
If, instead, we are trying to empower the courts to make divisions which are not equal but are equitable, they already have, and use that power. *See, Spooner v. Spooner*, 471 N.W.2d 487 (N.D.1991); *Wetzel v. Wetzel*, 1999 ND 29, 589 N.W.2d 889; *Dick v. Dick*, 414 N.W.2d 288 (N.D. 1987); *VanRosendale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

Sherry Mills Moore is a partner in the Bismarck firm of Foss and Moore where she specializes in family law.

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.

DeKrey

The first suggested amendment will be on page 1 lines 9 through 12. I recommend that the bill be amended to make no change to the current section 2. This will allow the court to redistribute any property if a party has failed to disclose any property or if the party has failed to comply with the terms of a court order distributing property. The rationale for this change is the fact that section 2 is meant to be a way for the court to redistribute property when one party has done something wrong - think "sneaky spouse" or "obstinate spouse" who refuses to play by the rules or fails to give up what the court had ordered to be distributed. So page 1, lines 9 through 12 would just have the section as it exists now

2. The court may redistribute property in a postjudgment proceeding of 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.

The next amendment is to change the words "martial debt" on page 1 line 19 to "marital debt" This is a typographical error that needs to be corrected.

The next amendment is to change the section number on page 2, line 28 to Section 2. Right now this reads Section 3 but should be section 2 since there are only two sections in this bill.