

## FAMILY LAW PROCESS - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4032 (copy attached as an appendix) directs the Legislative Council to study the family law process in North Dakota with a focus on a review of existing statutes, the coordination of procedures, and the further implementation of alternative dispute resolution methods. The resolution further provides that in conducting the study, the Legislative Council consider conducting meetings with the Joint Family Law Task Force of the State Bar Association.

The testimony received during the hearings on Senate Concurrent Resolution No. 4032 indicated that the state's domestic relations statutes are in need of updating and coordination. The testimony further indicated that the implementation of more alternative dispute resolution methods could help to relieve some of the heavy civil caseload the state's courts are facing.

### BACKGROUND

North Dakota Century Code (NDCC) Title 14 contains the majority of the statutes dealing with the domestic relations or family law in the state. Title 14 includes those chapters that deal with marriage, divorce, annulment, separation, custody and visitation, child support, adoption, alternative dispute resolution, and domestic violence. Another area of the code which includes statutes related to the family law process is Chapter 27-20--the Uniform Juvenile Court Act.

In 1998, 12,501 of the 33,692 (or 37 percent) of the civil case filings in district court involved domestic relations cases. In addition, 2,821 juvenile cases were filed, representing about 2.3 percent of the total district court caseload. Within the domestic relations category, child support actions made up 54.5 percent of the cases; divorce, 24.4 percent; paternity, 9.2 percent; adult abuse, 8.7 percent; and custody and adoption, 3.2 percent. Adult abuse filings decreased slightly in 1998 to 1,086 cases, compared with 1,160 filings in 1997. Divorce filings increased in 1998 with 3,044 filings compared to 2,911 in 1997, while child support actions decreased from 7,610 in 1997 to the 1998 level of 6,788.

### PREVIOUS STUDIES

#### 1991-92 Interim

The 1991-92 Administrative Rules Committee, pursuant to Section 24 of Senate Bill No. 2002, studied the impact of various child support guideline models on family units, on the quality of the relationships among the persons in the families, and on children who receive child support. The committee recommended guidelines that incorporate a modified income shares model.

Also during the 1991-92 interim, the Budget Committee on Human Services, pursuant to Senate Concurrent Resolution No. 4050, studied the distribution of child support enforcement incentive payments made by the federal government. The committee recommended a child support incentives account funded with money from the federal child support incentives, with distributions made to child support education programs.

#### 1993-94 Interim

During the 1993-94 interim, the Judiciary Committee, pursuant to Senate Concurrent Resolution No. 4057, studied the Uniform Interstate Family Support Act and its relationship to existing North Dakota law and the desirability of adopting the Act. The committee recommended adoption of the Act, which was passed during the 1995 legislative session.

Also during the 1993-94 interim, the Court Services Committee, pursuant to Senate Concurrent Resolution No. 4043, studied the feasibility and desirability of establishing a family court for the resolution of domestic relations cases for low-income persons. The committee made no recommendation with respect to the establishment of a family court.

#### 1997-98 Interim

The 1997-98 interim Child Support Committee, pursuant to House Concurrent Resolution No. 3031 and Section 14 of 1997 House Bill No. 1041, studied the issues of fairness and equity as they relate to child support guidelines, the issuance and enforcement of child custody and visitation orders, and the provision of child support services and child care licensing in the state. The committee made no recommendation with respect to child care licensing. The committee recommended several bills relating to the enforcement of child support obligations and the criteria used for determining child support obligations. The committee also recommended a bill that provided parents with specific rights and duties and provided that courts must include these rights and duties in child visitation orders.

### SUMMARY OF NORTH DAKOTA DOMESTIC RELATIONS LAWS

#### Annulment or Dissolution of Marriage

North Dakota Century Code Section 14-03-01 provides that marriage is a personal relation arising out of a civil contract between a male and a female to which the consent of the parties is essential. That section provides that the marriage relation may be annulled or dissolved only as provided by law.

Section 14-04-01 provides that a marriage may be annulled by an action in the district court based upon certain causes existing at the time of the marriage. Section 14-04-04 provides that a court shall award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent and may also provide for the education and maintenance of the children out of the property of the guilty party.

Section 14-05-01 provides that a marriage may be dissolved only by the death of one of the parties or by a judgment of a court of competent jurisdiction decreeing a divorce of the parties.

Section 14-05-22 provides that in an action for divorce, the court, before or after judgment, may give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper. The court is permitted to vacate or modify the judgment at any time. That section also provides limitations on custody and visitation between a child and parent when it has been determined that domestic violence or sexual abuse has occurred.

Section 14-05-23 provides that during any time in which an action for divorce is pending, the court, upon application of a party, may issue an order requiring a party to pay such support as may be necessary for the support of a party and any minor children of the parties and attorney fees and awarding custody of any minor children to any party.

Section 14-05-24 provides that when a divorce is granted, the court is required to make such equitable distribution of the real and personal property 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. In addition, the court may make suitable allowances to the other party for support during life or for a shorter period as the court deems just. The court may modify its orders from time to time.

Section 14-06-01 provides that a decree of separation from bed and board may be decreed by a district court on complaint of a married woman or man for any cause for which a divorce may be decreed.

Section 14-06-02 provides that during any time in which an action for separation is pending, the court, upon application of a party, may issue an order requiring a party to pay such support as may be necessary for the support of a party and any minor children of the parties and attorney fees and awarding custody of any minor children to any party.

Section 14-06-03 provides that upon decreeing a separation, the court may make an order for the suitable support and maintenance of the wife or husband and children out of the separate or joint property of the husband or wife or may make such division of the joint or separate property of the husband and wife as may appear just and proper.

### **Protection Orders**

Section 14-07.1-02 provides that an action for a protection order commenced by a verified application

alleging the existence of domestic violence may be brought in district court.

Section 14-07.1-03 allows for the issuance of a temporary protection order upon an application that alleges an immediate and present danger of domestic violence to the applicant.

Section 14-07.1-05.1 provides that the court, upon the request of either party or upon its own motion, may appoint a guardian ad litem in an action for a protection order to represent a minor concerning custody, support, or visitation.

### **Child Support Enforcement**

Section 14-08.1-02 provides that an obligation for the support of a child may be asserted by a civil action commenced in the district court of the county where the child or defendant resides or where the defendant has assets subject to attachment, garnishment, or execution. Chapter 14-08.1 provides civil remedies for child support.

### **Parent-Child Relationship**

Section 14-09-05.1 provides that the grandparents of an unmarried minor must be granted reasonable visitation rights and the great-grandparents may be granted reasonable visitation rights to the minor by the district court, upon application by the grandparents or great-grandparents, unless a finding is made that visitation is not in the best interest of the minor. The North Dakota Supreme Court, in *Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999), held the section to be unconstitutional to the extent that the 1993 statutory amendment to that section created a presumption and required grandparental visitation unless the visitation is not in the best interest of the child.

Section 14-09-06 provides that when a husband and wife live separate without being divorced, the district court, upon application of either, may grant a writ of habeas corpus to inquire into the custody of any minor unmarried child of the marriage and may award the custody of the child to either parent for such time and under such regulations as the case may require.

Section 14-09-06.2 sets forth the factors to be considered by the court when making custody determinations.

Section 14-09-06.4 provides that in any action for an annulment, divorce, legal separation, or other action affecting marriage, when either party has reason for special concern as to the future of the minor children, and in actions affecting the marriage relationship when the custody of the children is contested, either party to the action may petition the court for the appointment of a guardian ad litem to represent the children concerning custody, support, and visitation. In addition, the court, in its discretion, may appoint a guardian ad litem on its own motion.

Section 14-09-19 provides that the abuse of parental authority is the subject of judicial cognizance in a civil action in the district court brought by the

child, or by its relatives within the third degree, or by the county social service board of a county where the child resides.

Chapter 14-09.1 provides that in any proceeding involving an order, modification of an order, or enforcement of an order for the custody, support, or visitation of a child in which the custody or visitation issue is contested, the court may order mediation at the parties' own expense. The mediator must be appointed by the court from a list of qualified mediators approved by the court and the mediator is required to conduct the mediation proceedings in private. The mediator is required to reduce to writing any agreement of the parties and the agreement is not binding until the agreement is approved by order of the court. If the parties fail to agree, the mediator may report to the court at any time that the parties are unable to reach an agreement and the mediator may recommend to the court that a full hearing on the custody, support, or visitation issue be held within 30 days.

### **Child Support**

Chapter 14-12.2 is the codification of the Uniform Interstate Family Support Act. Under that chapter, the district court is vested with jurisdiction under the Act. The purpose of the Act is to improve and extend by reciprocal legislation between states the enforcement of duties of support imposed by law or order, decree, or judgment of any court in an action for divorce, separation, or separate maintenance.

### **Child Custody**

Chapter 14-14, which codified the Uniform Child Custody Jurisdiction Act, was repealed by 1999 Session Laws Chapter 147. Chapter 14-14 was replaced by Chapter 14-14.1, which codifies the Uniform Child Custody Jurisdiction and Enforcement Act. The Act became effective August 1, 1999. The general purpose of the Act is to prioritize the home state as a ground for taking jurisdiction and clarify the emergency jurisdictional grounds and to add interstate enforcement procedures and powers to improve interstate enforcement of child custody orders.

### **Adoption**

Chapter 14-15 codified the Revised Uniform Adoption Act. Under the Act, the district court is vested with jurisdiction over adoption and termination proceedings.

Chapter 14-15.1 provides that a petition to relinquish parental rights with respect to a minor child to an identified adoptive parent must be filed with the district court.

### **Paternity**

Chapter 14-17 provides that the district court has jurisdiction over civil actions brought under the Uniform Parentage Act.

## **Juvenile Matters**

Chapter 27-20 codified the Uniform Juvenile Court Act. Under that chapter, the district court is designated as the juvenile court and has exclusive jurisdiction over proceedings in which a child is alleged to be delinquent, unruly, or deprived and proceedings for the termination of parental rights except when a part of an adoption proceeding.

## **1999 LEGISLATION Passed**

The legislation relating to family law which was passed during the 1999 legislative session may be classified in these subject areas: marriage and divorce, child support, parent and child, and domestic violence.

### **Marriage and Divorce**

**House Bill No. 1044** removes references to the 20th century in the marriage license and certificate form.

**House Bill No. 1275** removes references to the clerk of court as the person authorized to perform certain duties, including solemnizing marriages and issuing marriage licenses, and replaces the clerk of court references with the register of deeds or another official designated by the board of county commissioners.

### **Child Support**

**House Bill No. 1028** provides that for the purpose of the child support guidelines, gross income does not include an employee benefit over which the employee does not have significant influence or control over the nature or amount unless the benefit may be liquidated and the liquidation of that benefit does not result in the employee incurring an income tax penalty.

**Senate Bill No. 2039** requires the Department of Human Services, when developing the child support guidelines, to include consideration of extended periods of time a minor child spends with the child's obligor parent.

**Senate Bill No. 2073** clarifies the procedure for continuing child support after a child becomes 18 and provides that a child is treated as being in school during summer vacation if the child was enrolled in and attending school and did not graduate from high school at the end of the school period immediately preceding the summer vacation.

**Senate Bill No. 2170** provides a procedure for the certification of child support records. The bill provides that the court has continuing jurisdiction to modify a judgment or order for future custody and visitation, provides for voluntary paternity establishment service entities, makes technical and conforming amendments to child support laws and the state disbursement unit, and repeals a section dealing with reimbursement of voluntary support of a child.

**Senate Bill No. 2287** provides that interest accrued on unpaid judgments for child support is considered child support and payments received on judgments for child support must first be applied to accrued interest and then to the principal.

**Senate Bill No. 2288** provides that due and unpaid child support is not subject to statutes of limitations and may not be discharged in bankruptcy proceedings. This bill became effective April 2, 1999.

#### Parent and Child

**Senate Bill No. 2040** provides parents with specific rights and duties and provides that the court must include these rights and duties in child visitation orders. The bill also allows courts, as a part of child visitation enforcement proceedings, to use any appropriate remedy that is available to enforce a child support order.

**Senate Bill No. 2152** provides for the repeal of the Uniform Child Custody Jurisdiction Act and creates the Uniform Child Custody Jurisdiction and Enforcement Act. The bill provides procedures and the jurisdictional grounds for the interstate enforcement of child custody orders.

**Senate Bill No. 2171** amends the adoption procedures statute to require that the reports and assessments of adoptive parents include a criminal history record investigation.

**Senate Bill No. 2223** changes the penalty from a Class C felony to a Class B felony for the infliction of bodily injury, substantial bodily injury, or serious bodily injury upon a child if the child is under the age of six years.

**Senate Bill No. 2388** exempts certain relatives from the adoption investigation and report requirement if the child to be adopted has lived with the relative for at least nine months and no allegations of abuse or neglect have been filed against the relative or any member of the relative's household.

#### Domestic Violence

**House Bill No. 1077** provides that foreign domestic violence protection orders are enforceable in the state if certain factors are satisfied. The bill also provides that a violation of a foreign protection order that is entitled to full faith and credit is a Class A misdemeanor and a second or subsequent violation is a Class C felony.

**House Bill No. 1473** allows domestic violence funding to be spent on sexual assault prevention.

**Senate Bill No. 2197** allows the court to order a party who falsely alleges domestic violence to pay court costs and reasonable attorney fees incurred by the other party in responding to the allegation.

**Senate Bill No. 2306** changes from 4 to 12 the number of hours within which a warrantless arrest of a domestic violence offender may be made following the time the officer determines probable cause exists.

#### Failed

The following bills, which relate to family law, failed during the 1999 legislative session:

**House Bill No. 1062** would have created a disputable presumption or a conclusive presumption that there must be supervised visitation in situations where the court finds evidence that the parent seeking visitation physically abused a child. The bill failed to pass the House.

**House Bill No. 1213** would have authorized a court to order joint legal custody of a child. The bill failed to pass the House.

**House Bill No. 1346** would have required mediation in divorce cases. The bill failed to pass the House.

**House Bill No. 1407** would have required the child support guidelines to take into consideration spousal support paid by the obligor to the obligee. The bill failed to pass the House.

#### JOINT FAMILY LAW TASK FORCE

In 1995 the North Dakota Supreme Court, at the request of the State Bar Association of North Dakota, established a task force to study family law issues. The task force consisted of members appointed by the Bar Association and by the Supreme Court. The task force was assigned to:

- Review family law procedures and related matters presently used by the judicial system in North Dakota;
- Evaluate the need for changes to ensure accessibility to the system and responsiveness of the system;
- Assess the impact of court unification on the process; and
- Evaluate the effectiveness of the process for clients, attorneys, and the courts.

The task force was further directed to review dispute resolution alternatives for potential application in the family law system and the need for public education programs dealing with the impact of divorce and separation on the family unit. Finally, the task force was directed to consider two problematic areas raised by members of the bench and bar--domestic violence in custody cases and the use of guardians ad litem. The group completed its directives in April 1998. The following is a summary of the final status of each area studied:

1. **Parent Education** - The task force concluded that during the two years before the study the courts and the bar had done a good job of encouraging parents to attend parent education programs and made no further recommendation for action in this area.
2. **Postjudgment Demand for Change of Judge** - To address the concerns raised by the attorneys and judges regarding repeated custody disputes with or without the same

judge, the task force drafted proposed legislation to restrict a party's ability to modify a custody order for two years after the date of entry with certain exceptions. The legislation, which was introduced as Senate Bill No. 2167, was passed by the 1997 Legislative Assembly.

3. **Statutory Review** - The task force drafted proposed legislation granting immunity from prosecution to individuals testifying in a divorce, annulment, or separation proceeding regarding sexual acts with another person under NDCC Section 12.1-20-09. The proposed legislation was introduced as Senate Bill No. 2168 and was passed by the 1997 Legislative Assembly. The task force also began to conduct a comprehensive review of all family law statutes but concluded that it was politically inadvisable at the time. The task force recommended that a complete review of the family law statutes should include the involvement of legislators in the process.
4. **Domestic Violence as Factor of Custody** - To address problems associated with the domestic violence presumption in Sections 14-05-22 and 14-09-06.2, the task force drafted proposed legislation that would provide guidance to the courts by refining when domestic violence triggers the presumption against a parent. The legislation, which was introduced as Senate Bill No. 2235, was passed by the 1997 Legislative Assembly.
5. **Alternative Dispute Resolution** - In conjunction with the Bar Association's Alternative Dispute Resolution (ADR) Committee, the task force reviewed the status of alternative dispute resolution in family law cases in the state. A local rule of mediation in family law which was drafted by the ADR Committee and revised by the Joint Dispute

Resolution Committee was recommended by the task force.

The task force completed its work in April 1998 and concluded that the task force had completed as many of its goals as were practicable. The task force, in its final report, stated that the scope of what remains will require a cooperative effort among the judiciary, the Bar Association, and the Legislative Assembly. The task force agreed to serve as an ad hoc group, ready to respond to issues raised by legislative interim committees and the 1999 Legislative Assembly.

### **SUGGESTED STUDY APPROACH**

A possible approach to the study of the family law process in the state would be to:

1. Review the domestic relations categories of NDCC Title 14, select those categories most in need of review, and prioritize the order in which the selected categories should be reviewed.
2. Seek recommendations from the State Bar Association, the task force, members of the judiciary, and other interested parties regarding recommended revisions of existing statutes and suggestions for new statutes.
3. Prepare bill drafts based on the recommendations and conduct public hearings on those drafts to receive testimony from those individuals and agencies who would be impacted by the changes.
4. Receive testimony from representatives of the State Bar Association, the judiciary, and other interested persons regarding the implementation of alternative dispute resolution methods to address domestic relations issues.
5. Develop final recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1

**Fifty-sixth Legislative Assembly, State of North Dakota, begun in the Capitol in the City of Bismarck, on Tuesday, the fifth day of January, one thousand nine hundred and ninety-nine**

**SENATE CONCURRENT RESOLUTION NO. 4032  
(Senators W. Stenehjem, T. Mathern, G. Nelson)  
(Representatives Boucher, Dorso)**

A concurrent resolution directing the Legislative Council to study the family law process in North Dakota with a focus on a review of existing statutes, the coordination of procedures, and the further implementation of alternative dispute resolution methods.

**WHEREAS**, more than half of all civil actions filed in district courts involve domestic relations cases, including divorce, separation, adult abuse, custody proceedings, support actions, adoptions, and paternity proceedings; and

**WHEREAS**, the existing judicial system provides for an adversarial proceeding for domestic relations cases which often compounds the negative impact of family dissolutions; and

**WHEREAS**, constituents have expressed broad-based concerns regarding the existing family law system; and

**WHEREAS**, the statutes governing domestic relations are in need of updating and coordination; and

**WHEREAS**, the Joint Family Law Task Force of the State Bar Association has considerable expertise and knowledge of court procedures and alternative systems in North Dakota and in other jurisdictions; and

**WHEREAS**, the Joint Family Law Task Force of the State Bar Association has offered its assistance in conducting the study;

**NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF NORTH DAKOTA, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN:**

That the Legislative Council study the family law process in North Dakota with a focus on a review of existing statutes, the coordination of procedures, and the further implementation of alternative dispute resolution methods; and

**BE IT FURTHER RESOLVED**, that in conducting the study, the Legislative Council consider conducting meetings with the Joint Family Law Task Force of the State Bar Association; and

**BE IT FURTHER RESOLVED**, that the Legislative Council report its findings and recommendations, together with any legislation required to implement the recommendations, to the Fifty-seventh Legislative Assembly.