JUDICIARY COMMITTEE

The Judiciary Committee was assigned four studies. Section 4 of House Bill No. 1002 directed a study of the impact of court unification on the judicial system and on the effective provision of judicial services to state residents. House Concurrent Resolution No. 3067 directed the Legislative Council to review and monitor the implementation of legislation enacted by the 56th Legislative Assembly which provided for the delivery of clerk of district court services through state funding and alternative methods. Senate Concurrent Resolution No. 4032 directed a study of 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 directed that in conducting the study, the Legislative Council consider conducting meetings with the Joint Family Law Task Force of the State Bar Association. Senate Concurrent Resolution No. 4043 directed a study of voter registration. The Legislative Council chairman authorized expansion of that study to include a study of voter residency requirements. The Legislative Council delegated to the committee the responsibility to review uniform laws recommended to the Legislative Council by the Commission on Uniform State Laws under North Dakota Century Code (NDCC) Section 54-35-02. The Legislative Council chairman directed the committee to conduct public hearings on statewide primary and general election ballot measures. The Legislative Council also assigned to the committee the responsibility for statutory and constitutional revision.

Committee members were Senators Wayne Stenehjem (Chairman), Dennis Bercier, Joel C. Heitkamp, Judy Lee, Stanley W. Lyson, Carolyn Nelson, John T. Traynor, and Darlene Watne and Representatives Duane DeKrey, Lois Delmore, G. Jane Gunter, Kathy Hawken, Dennis E. Johnson, Scot Kelsh, Lawrence R. Klemin, Amy N. Kliniske, Kim Koppelman, John Mahoney, Shirley Meyer, and Phillip Mueller.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2000. The Council accepted the report for submission to the 57th Legislative Assembly.

COURT UNIFICATION STUDY - FUNDING OF THE CLERK OF DISTRICT COURT OFFICE

The committee was assigned Section 4 of House Bill No. 1002, which directed a study of the impact of court unification on the judicial system and on the effective provision of judicial services to state residents, and House Concurrent Resolution No. 3067, which directed the Legislative Council to review and monitor the implementation of legislation enacted by the 56th Legislative Assembly regarding the delivery of clerk of district court services through state funding and alternative methods. Because of the similarity in the studies directed by this bill and this resolution, the committee combined the two studies into one comprehensive study.

Background District Courts

The Constitution of North Dakota Article VI, Section 1, provides:

> The judicial power of the state is vested in a unified judicial system consisting of a supreme court, a district court, and such other courts as may be provided by law.

Article VI, Section 9, provides that the state is to be divided into judicial districts by order of the Supreme Court. In 1979 the Supreme Court divided the state into seven judicial districts. In each judicial district there is a presiding judge who supervises court services in the district. The duties of the presiding judge, as established by the Supreme Court, include convening regular meetings of the judges within the district to discuss issues of common concern, assigning cases among the judges of the district, and assigning judges within the district in cases of demand for a change of judge.

County Courts

In 1981 the Legislative Assembly enacted legislation providing for one county court in each county instead of the multilevel system of county courts, county justice courts, and county courts of increased jurisdiction as existed at that time. The legislation also provided that county judges had to be law-trained and full time and provided for the assumption by the state of many district court expenses.

County courts had jurisdiction over civil cases involving $10,000 or less; criminal misdemeanors, infractions, and traffic cases; small claims cases involving $3,000 or less; probate; testamentary, guardianship, and mental health commitment proceedings; appeals from municipal court; and any other cases as were assigned by the presiding district judge of the judicial district in which the county was located.

Court Unification

In 1991 the Legislative Assembly unified the court system through elimination of county courts and the creation of additional

district court judgeships from county court judgeships. In 1991 there were 53 district and county judges. Under unification, the law provided that the total number of district court judgeships must be reduced to 42 before January 1, 2001. The Supreme Court began eliminating judgeships, and by January 2, 1995, the primary implementation date for consolidation of trial courts, the number of judgeships was reduced to 47. As of November 2000, the number of judgeships has been reduced to 43, with one additional judgeship to be eliminated at the end of 2000.

Office of Clerk of District Court

Historically, the clerks of court have been elected county officials whose salaries are set by state law but are paid by the county. The duties of the clerk are prescribed by state law, and the duties of the clerk are essentially performed for the district court. In 1989 the Legislative Assembly enacted legislation that provided counties the option of seeking state funding for the clerk of district court. The legislation, codified as NDCC Section 11-17-11, provides that "[t]he board of county commissioners of any county may initiate the option to transfer responsibility for funding for the clerk of district court to the state by the filing of written notice to the state court administrator . . . ."

In 1997 the Legislative Assembly expressed its intent to provide for the state funding of clerks of court by stating in Section 6 of 1997 Senate Bill No. 2002 that "the judicial branch budget for the 1999-2001 biennium and future bienniums include funding necessary to efficiently fund administration of the district courts."

In 1999 the Legislative Assembly enacted legislation to provide for the state funding of clerk of district court services. The legislation, codified as NDCC Chapter 27-05.2, provides for the transfer of the funding for clerk of district court services to the state effective April 1, 2001. The legislation defined clerk of district court services as "those duties and services, as provided by statute or rule of the supreme court, that directly serve the judicial system and the provision of effective and efficient judicial services to the public." The legislation provided that the options available to a county regarding state funding of clerk of district court services depended upon the number of full-time equivalent (FTE) positions the Supreme Court determined to be necessary to provide adequate clerk of district court services. Under the legislation, a county in which the Supreme Court determined that at least five FTE employees are necessary would have the option of state-funded clerk of court services or clerk of district court services provided at the county's own expense; a county in which the Supreme Court determined that one or more, but fewer than five, employees are necessary may opt for state-funded clerk of district court services, contract with the Supreme Court for clerk of district court services, or provide the services at the county's own expense; and a county in which the Supreme Court determines that less than one FTE is necessary may either contract with the Supreme Court for clerk of district court services or provide the services at its own expense. The legislation further required each board of county commissioners to notify the Supreme Court of its election to provide clerk of district court services, of its consent to the elected clerk of court and designated staff to become state employees, or of its election to enter an agreement with the Supreme Court to provide funding for clerk of district court services by April 1, 2000.

Testimony and Committee Considerations

The committee received testimony and reviewed extensive information submitted by the Supreme Court with regard to the implementation of the 1999 legislation regarding the delivery of clerk of district court services through state funding. The committee also received testimony on impact of court unification on the judicial system and on the effective provision of judicial services to state residents. The committee's considerations centered on five issues--implementation of the 1999 clerk of district court services legislation; reduction of judgeships; judicial salaries; juvenile drug courts; and the central legal research program.

Implementation of 1999 Clerk of District Court Services Legislation

The committee received testimony from the Supreme Court regarding implementation of the 1999 legislation that provided for state funding of clerk of district court services. Eleven counties have requested the state to fund and operate clerk of district court services; three counties have elected to pay for clerk of district court services without funding agreements with the state for reimbursement; and one county did not make an election within the time set by statute. As a result, that county will operate the clerk of district court office at its own expense. The remaining 38 counties agreed to provide clerk of district court services in exchange for reimbursement from the state in accordance with an agreed formula.

The committee also received testimony regarding the number of FTE positions authorized using a 600 filings per FTE formula, adjusted to include administrative traffic cases. The testimony indicated that the funds appropriated by the 56th Legislative Assembly are not sufficient to operate the state clerk of district court office and meet funding agreement obligations from April 1, 2001, through June 30, 2001.

The Supreme Court contracted with the National Center for State Courts to conduct a workload assessment study. A broad-based committee consisting of 18 clerks and deputy clerks representing all sizes of offices participated in the study. Every task in clerk of district court offices was analyzed, weighed, and discussed. The results of the study will be used in the budget request to the Legislative Assembly for FTE positions in the next biennium in state-operated offices and as a basis for funding

agreements for counties that have selected that option.

The committee received testimony that many questions have been raised concerning who will handle restitution and the preparation of criminal judgments. Current practice varies from county to county. In some counties, the collection of restitution and the preparation of criminal judgments are performed by clerks of district court, and in other counties these duties are performed by state's attorneys. According to the testimony, the Supreme Court will address that issue in the form of a rule that proposes both functions become clerk of district court functions.

The testimony also included a review of the hiring procedures being implemented in the state-funded offices. The law provides that elected clerks of district court in state-funded offices will automatically become state employees on April 1, 2001. The remainder of clerk of district court staff will be selected from county-paid staff in offices being funded by the state. Eligible deputy clerks will receive application forms and instructions. A series of briefings were scheduled in the state-funded offices to explain pay issues and available state benefits and to answer questions. Anyone who was interested in a position with a state-funded office was required to submit an application to the presiding judge of the judicial district. The presiding judge will make the decision concerning who will be hired after consultation with the clerk of district court and others as appropriate. The decisions are to be based on job performance and on a best-qualified basis. Staffing is expected to be finalized by February 2001, with employment starting on April 1, 2001. According to the testimony, the clerks and their staffs have been very cooperative and willing to work with the Supreme Court on implementation of the 1999 legislation.

The committee makes no recommendations with respect to implementation of the 1999 clerk of district court services legislation.

Reduction of Judgeships

The Supreme Court reported that the reduction in the number of judgeships is on schedule. Before 2000, the reductions in district court judgeships were made by either the resignation or death of a judge. With the number of judgeships reduced to 43, a sitting judgeship had to be eliminated to make the final reduction to 42 by January 1, 2001. The judge whose position is to be eliminated was required to be notified of the decision by January 1, 2000, and the position to be eliminated was required to be one that would be up for election in November 2000. There are 11 positions up for election in 2000, and all were considered for elimination with the exception of one position in the Southeast Judicial District. The Supreme Court conducted a series of judgeship position elimination hearings and reported that the judgeship to be eliminated was one located in the Southwest Judicial District.

Judicial Salaries

The committee received testimony from a district judge concerning the salaries of judges and justices in North Dakota and how those salaries compared to similar judicial positions in other states. In the late 1970s, North Dakota judges ranked above the national average and the national median for salaries. As of July 1, 1999, the national average for trial court judges was about $101,000, and for court of last resort judges the national average was about $112,000. North Dakota district judges were paid approximately $77,000 and North Dakota Supreme Court justices were paid approximately $83,000. In 1999 North Dakota district judges ranked 50th in salary, and North Dakota Supreme Court justices ranked 49th in salary. In addition, the average district judge salary for the three states bordering North Dakota was $87,200. The average salary of district court judges among states of less than one million in population was $93,500. In states with a population of less than that of North Dakota, the salaries ranged from a high in Alaska with a salary of $103,000 to a low in Wyoming of $83,700. South Dakota's equivalent of North Dakota's district judges were paid $88,600 and South Dakota Supreme Court justices were paid about $93,000. If North Dakota judicial salaries had kept pace with inflation, the salary for a district judge would be approximately $98,000.

The testimony indicated that adequate salaries are important for attracting the most qualified candidates for the job, and that an ambitious, competent, and qualified judiciary is essential to economic development. The testimony indicated that lawyers do not seek judgeships for the money but rather do so for the ability to perform public service. The testimony further indicated that judges believe that in reducing the size of a branch of government and in continuing to deliver services in a timely manner, the judiciary has demonstrated that government can be both leaner and more responsive. Consequently, judges and justices should be fairly compensated for the work they do. The committee was urged to either recommend legislation or to endorse the idea of a fair and equitable wage for North Dakota judges and justices.

Several members of the committee raised concerns about the committee's endorsement or recommendation of judicial pay equity legislation and stated that while the judicial salary issue is an important one, the entire state budget must be considered before judicial pay equity legislation can be addressed.

The committee makes no recommendation regarding the judicial salaries issue.

Juvenile Drug Courts

The committee received testimony regarding implementation of the juvenile drug court pilot projects in the state. The testimony indicated a need has arisen for juvenile drug courts in the state because the traditional drug offense process for dealing with juvenile drug offenders has been unsuccessful. From 1995 to 1998, the number of juvenile controlled substance violations in the state had doubled. Alcohol violations during that same time period increased from 1,700 to 2,700. A survey of North Dakota high school students indicated that 61 percent had experimented with alcohol. The national percentage is 51 percent.

In 1989 the first drug court system for adults was developed in Miami, Florida. In 1995 the idea was expanded to include juveniles. As of February 2000, there were 81 juvenile drug courts across the country and 65 more are being planned. The juvenile drug courts have been successful in reducing recidivism rates and have had an increased rate of retention in treatment and in the success of that treatment. In 1998 the Juvenile Policy Board, an advisory board to the North Dakota Supreme Court, organized a study committee to determine whether the resources were available in North Dakota to operate a pilot juvenile drug court and to determine whether a need existed for a juvenile drug court in the state. The advisory committee concluded that the resources were available and that a need existed for a juvenile drug court in the state.

In May 2000 juvenile drug court pilot projects were established in Grand Forks and Fargo. By September 2000, about 30 juveniles were participating in the program at the two sites. The criteria used to determine whether a juvenile drug offender is eligible for the program includes that the juvenile be between 14 and 18 years of age; have no prior felony level adjudication; have no previous dangerous antisocial behavior; have no previous referral to the drug court; have no prior or pending charges of selling or manufacturing controlled substances; and the juvenile must admit to the offense and complete a drug or alcohol assessment. The juvenile drug court team is composed of a judge, a juvenile court supervisor, a state's attorney, a defense counsel, a school representative, and a treatment coordinator. The team decides who is eligible for the program, designs the program, and makes weekly reports to the judge. The juvenile remains in the program for 6 to 12 months. The program, which includes weekly drug court hearings before the juvenile drug court judge, provides sanctions for noncompliance and incentives for compliance. Parental involvement and community service are requirements of the program.

The committee received testimony that the two district judges who are operating the drug court programs in Grand Forks and Fargo have added the drug court responsibilities to their schedules without taking any reduction in their caseloads. The first year of the program is being funded by a planning grant, and additional grants will be sought to fund the drug court for an additional two years. It was reported that there may be a need to seek a legislative appropriation if the grant requests are unsuccessful.

The committee makes no recommendation regarding the juvenile drug court program.

Central Legal Research

The committee received testimony regarding the funding of Central Legal Research at the University of North Dakota School of Law in Grand Forks. Central Legal Research's mission is to answer the research needs of judges, prosecutors, and court-appointed defense attorneys in an essentially rural state in which legal resources are at a premium. Each year the Central Legal Research staff researches and writes about 80 to 100 legal memoranda and responds to numerous other requests for less complex research assistance. The Central Legal Research staff includes six second- and third-year law students, a program director, and a certified legal assistant. The testimony indicated that the memoranda give lawyers and judges foundational assistance for the writing of legal briefs and the making of judicial decisions. For most of the program's 22-year history, the program was funded as part of the School of Law budget. During the 1999 legislative session, however, no funds were earmarked in the higher education budget for Central Legal Research. The Legislative Assembly approved an $80,000 appropriation for Central Legal Research in the 1999-2001 biennial district court budget. It was reported that although this level was less than half of the appropriation Central Legal Research received in the previous biennium, it meant the branch of government that benefits the most directly from the program's services, the court system, had assumed a share of the funding responsibility. It was noted by several committee members that the services provided by Central Legal Research are valuable, especially for those attorneys and state's attorneys in remote areas of the state.

The committee makes no recommendation regarding the funding of Central Legal Research.

FAMILY LAW PROCESS STUDY

Background

North Dakota Century Code Title 14 contains the majority of the statutes dealing with 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 1999 11,151 of the 31,429 (or 35.5 percent) of the civil case filings in district court involved domestic relations cases. In addition, 2,313 juvenile cases were filed, representing about 3.7 percent of the total district court caseload. Within the domestic

relations category, child support actions made up 53.4 percent of the cases; divorce, 24.8 percent; paternity, 8 percent; adult abuse, 10.1 percent; and custody and adoption, 3.4 percent. Adult abuse filings increased slightly in 1999 to 1,123, compared with 1,086 filings in 1998. Divorce filings decreased in 1999 with 2,774 filings compared to 3,044 in 1998, and child support actions decreased from 6,784 in 1998 to 5,952 in 1999.

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 Joint Family Law Task Force consisted of members appointed by the State Bar Association of North Dakota 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 Joint Family Law 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 guardian ad litems. The group completed its directives in April 1998 and made recommendations regarding parent education; postjudgment demand for change of judge; statutory review; domestic violence as a factor of custody; and alternative dispute resolution.

The Joint Family Law 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 State Bar Association of North Dakota, 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 Legislative Assembly.

Subcommittee and Working Groups

Senate Concurrent Resolution No. 4032 called for a cooperative study of family law issues between the Legislative Council and the Joint Family Law Task Force of the State Bar Association of North Dakota. A subcommittee of 12 committee members and nine members of the Joint Family Law Task Force was formed to study the family law issues. The subcommittee identified four areas of study--property division and spousal support; mediation; guardians ad litem; and statutory review. The subcommittee was further divided into four working groups. Each of the family law subcommittee's four working groups held a series of meetings either in person or by conference call. In some instances, bill drafts were reviewed, in others, recommendations were considered. The following is a summary of the conclusions of each working group.

Property Division and Spousal Support

The Property Division and Spousal Support Working Group identified three issues for study--disclosure of marital assets; establishment of guidelines, or other measures of certainty, for spousal support; and exclusion of premarital property, inherited property, and gifts from marital property. The study of the property division and spousal support issues included a survey of the respective laws in the other 49 states, while the disclosure discussion was based mainly on the California law.

The working group's concerns regarding the complete disclosure of marital assets were the premise for the discussions regarding the California disclosure law. Working group members questioned whether legislation similar to that passed in California would rectify problems associated with parties who conceal or decide not to candidly disclose information regarding marital assets.

California passed its disclosure law in 1993. The law was enacted to ensure fair and honest reporting of marital assets during the dissolution process. A party failing to comply with the disclosure requirements may be subject to a redistribution of the previous property division order as well as being required to pay the other side's attorney's fees and costs. The group discussed several issues concerning the implementation of a similar law in North Dakota, and noted in particular that disclosure laws would shift the burden from the victim to the perpetrator of nondisclosure.

The working group decided the disclosure requirements were largely procedural in nature and, therefore, should be considered as a potential rule. The working group concluded the number of cases involving disclosure issues was probably small while the impact of a disclosure rule on cost and the potential for delay would be great. The group also determined that Rule 60 of the North Dakota Rules of Civil Procedure, dealing with relief from a judgment or order when new information is obtained, provides relief similar to the disclosure law. Based on those findings, the working group decided to forego any further work on a disclosure law.

The working group also discussed possible guidelines for spousal support. The amount of spousal support awarded in a divorce is often unpredictable. As in most states, spousal support in North Dakota is governed by broad statutory language and case law.

The working group's mission in this area was to determine if a more predictable and consistent solution could be discovered or developed. Based upon a review of information regarding statutes from other states, it was concluded that while some states included arbitrary time limits for spousal support or establish a "years of marriage" demarcation for purposes of setting support, no state has adopted a comprehensive and fair set of guidelines.

One guideline identified and examined by the working group was that adopted by the Superior Court of Arizona in Maricopa County. The Maricopa County guidelines apply to marriages of at least five years and included some financial restrictions regarding the postdivorce income of the two parties. If the parties met the threshold, a mathematical formula for calculating spousal support is used. The guidelines, however, emphasize that the guidelines do not create a presumption but rather serve as a starting point for discussion, negotiation, or decisionmaking.

The working group expressed concern about the limited use of the Maricopa County guidelines and discussed the potential for using them on a limited basis in a pilot project-type setting to determine how well the guidelines would work. The judges on the working group suggested distribution of the guidelines to the Council of Presiding Judges for purposes of considering the development of a voluntary program allowing judges to use the guidelines. Under this program, judges could compare outcomes using the guidelines versus the outcomes under established case law. As data is collected regarding the outcomes, the working group believed the court system would be in a better position to determine whether spousal support guidelines provide a fair and reasonable alternative for the calculation of spousal support.

The most controversial topic discussed by the working group was that of excluding premarital property, inherited property, and gifts when dividing marital property. In North Dakota, all property owned by the parties, regardless of when obtained or how titled, is considered to be the marital property of the parties and is subject to property division. After reviewing how other states deal with property division, the group determined that changing the law to allow the exclusion of premarital property was too great a change. Consequently, the working group proposed a bill draft providing for the exclusion of inherited property and gifts as long as the property meets the definitions set forth in the draft.

The working group debated whether the present method of division should be changed because the exclusion of inherited property and gifts represents a dramatic shift from the present system and will eviscerate much of the existing case law dealing with property division. The working group concluded that the proposal would open the door for a new set of court interpretations regarding what constitutes inherited property and gifts and that the result may be a very steep learning curve for the court, the bar, and the public. In addition, concern was raised regarding the impact of the proposal on litigation costs. Proponents argued that the present practice creates unfair results to litigants, especially in situations involving segregated inheritance. While the group did not endorse the proposed language on property division, it did agree to forward the proposal to the full committee for its review and consideration.

As the working group discussed changes to the property division portions of NDCC Section 14-05-24, it was recognized that the present section included language regarding spousal support and a requirement that parents provide support to their children. The group believed the language was confusing and not germane to the section. Consequently, the group recommended removing the spousal support language from the section and creating a new section on spousal support and removing the sentence regarding child support from the section and inserting it into NDCC Section 14-09-08, dealing with the parents' mutual duty to support children. The changes are included in a bill draft recommended by the Statutory Review Working Group.

The recommendations and findings of the Property Division and Spousal Support Working Group were:

- Encourage the Council of Presiding Judges to implement an informal procedure whereby the Maricopa County guidelines would be used to calculate spousal support and the results of that calculation should be compared to the actual spousal support awarded by the court.
- Forward to the full committee for its consideration the amendments to NDCC Section 14-05-24 regarding division of gifted and inherited property.
- Create a new section regarding spousal support that includes amended language from Section 14-05-24.
- Incorporate language dealing with child support from Section 14-05-24 into Section 14-09-08.

Mediation

The history of developing a court-annexed alternative dispute resolution (ADR) program in North Dakota is complex. The Mediation Working Group identified two tasks--review statutes and rules from other states and analyze court-annexed ADR and funding issues--and two issues--the availability of mediation services to low-income families and the potential for creating qualifications for family law mediators.

As an initial step, the working group reviewed the final report of the Supreme Court and State Bar Association's Joint Dispute Resolution Committee. This report made several recommendations to the Supreme Court regarding the implementation of case settlement conferences similar to the procedure utilized by the federal court and requiring earlier judicial involvement in cases.

The working group was informed the Supreme Court was in the process of developing new rules that provide for case settlement conferences using mediation techniques and using members of the judiciary, establish a court roster of trained neutral mediators, and establish training requirements. The working group recognized that any court-annexed mediation or ADR program involving private neutral mediators would require the Supreme Court to find a funding source. Thus, the working group concluded that the option of using judges to handle mediation may provide the most cost-effective system. Several members raised concerns, however, regarding the use of judges as neutral mediators, and emphasized that the Supreme Court should explore options for encouraging the use of private mediators.

With regard to the availability of mediation services to low-income families, the working group received information from the Conflict Resolution Center in Grand Forks. The center has implemented a sliding fee scale to accommodate the indigent population. As a result of this discussion, the State Bar Association of North Dakota also adopted a sliding fee scale for mediation services and incorporated the fee into its reduced fee program. The State Bar Association, in conjunction with Legal Assistance of North Dakota, also provided family law mediation training to 39 attorneys. Those attorneys have each agreed to provide either mediation services under the State Bar Association's volunteer lawyer program or the reduced fee program.

The working group also discussed several related issues, including a code of ethics for mediation in family law, the need for qualifications, and the maintenance of a roster of qualified mediators. The working group also addressed discipline issues. A draft of a code of ethics for mediation was developed with the intent that it be forwarded to the Supreme Court for its consideration.

The Mediation Working Group's recommendations were:

- Encourage the Supreme Court to explore options for establishing a court-annexed mediation program.
- Encourage the Supreme Court to consider adopting a code of ethics for mediators.

Guardian Ad Litem

One mission of the Guardian Ad Litem Working Group was to discover whether other sources of funding were available to fund the training requirements contained in Rules 8.6 and 8.7 of the North Dakota Rules of Court, and to determine whether other resources were available to provide the services provided by child custody investigators and guardians ad litem. In certain family law cases, judges may order a child custody study to help the court determine the best interest of the children. Under the new rules, these investigations would be conducted by a child custody investigator. In instances in which the court is concerned about the child's best interest being adequately represented during a child custody case, the judge may order an attorney to serve as the child's guardian ad litem.

Under the new rules, both child custody investigators and guardians ad litem are required to attend an initial training session and to attend six hours of training each subsequent year. Since the services are of immeasurable value to the court system, the working group concluded the Supreme Court should consider ways in which to include the cost of training in its budget.

A secondary issue associated with sources of funding was the availability of qualified child custody investigators in the rural areas. Discussions on this issue were held with representatives from third-party providers and representatives from the Department of Human Services. Initially, the working group was seeking information regarding existing programs that could be tailored to meet the needs of the court program, or child custody investigation services that could be provided through regional human service centers. In response to the former, the third-party providers expressed concerns about training issues and administration of the services. The third-party providers also questioned the potential for liability for the services rendered. While there may be some interest in the future as the role of the investigators evolves, the third-party providers were hesitant to commit to providing resources.

The potential liability of a child custody investigator and guardian ad litem in conducting a study for the court or representing a child was also discussed. Concerns were raised about a recent lawsuit filed against a custody investigator. While there may be protection under current statutes for individuals conducting work on behalf of the court, the working group determined a bill draft adding immunity language to the section in the North Dakota Century Code enabling the court to appoint a guardian ad litem or child custody investigator was appropriate.

Discussions also were held with representatives of the Department of Human Services regarding the availability of support from regional human services centers. Several issues were raised by the representatives including present workloads of social workers at the regional centers. In light of the coordination required with child protection and other services, the department contended there may be a negative impact on the availability of staff and conflicts of interest would exist because the staff is often involved in working with the families on other issues. Consequently, the Department of Human Services was hesitant to suggest that their staff could provide child custody investigator services.

The working group concluded its study by noting that it seems as if several agencies are providing similar services to different, or

sometimes the same, groups without any coordination. Several members of the working group speculated that the Supreme Court and the Department of Human Services should consider exploring the possibilities of coordinating services and resources in the area of child custody investigators. The working group believed a need exists to have a comprehensive study that would examine the common interests of the two entities, the conflicts, and the available resources as applied to the area of child custody investigations.

The recommendations of the Mediation Working Group were:

- Consider the inclusion of an immunity clause in NDCC Section 14-09-06.4.
- Encourage the Supreme Court and Department of Human Services to conduct a joint study exploring the possibilities of coordinating services and resources in the area of child custody investigators.

Statutory Review

A survey mailed to the members of the family law section of the State Bar Association of North Dakota requesting suggestions for needed changes to NDCC Title 14 identified the following areas as being in need of change--consolidate Chapter 14-04 (Annulment), Chapter 14-05 (Divorce), and Chapter 14-06 (Separation); clarify that custody applies to separation and divorce; consider a new definition or some clarification to the definition of "habitual intemperance"; and reenact the penalty for removing a child from the state in violation of a custody order.

As the Statutory Review Working Group reviewed NDCC Chapter 14-04 dealing with annulments, there was consensus that Section 14-04-04, which deals with custody, should be amended to incorporate the best interest factors, as defined in the divorce chapter, into the annulment process. The present standard in the annulment chapter includes archaic language referring to fault. The working group discussed that the fault standard has not been recognized in custody for some time, and the group believed consistency dictated a change to the best interest factors.

The working group also recognized the need to make several amendments to NDCC Chapter 14-05 (Divorce) to incorporate provisions from the separation chapter. This was done in light of the working group's consensus that it is unnecessary to have separate chapters for separation and divorce because the protocols for the division of property, custody determination, and child support are the same for all three proceedings. Also within Chapter 14-05, the working group discussed updating the definition of "habitual intemperance."

The Statutory Review Working Group noted the criminal penalty for intentionally removing a child from North Dakota in violation of a custody order had been inadvertently removed from the North Dakota Century Code when Chapter 14-14.1 (Uniform Child Custody Jurisdiction Act) was enacted in 1999. The working group agreed this was an oversight and recommended the addition of a new section to Chapter 12.1-18 (Kidnapping).

The recommendations of the Statutory Review Working Group were:

- Amend NDCC Section 14-04-04 to incorporate the best interest factors into the section.
- Consolidate the chapters dealing with divorce and separation into one chapter and remove archaic terms and language in the new chapter.
- Reenact the penalty for intentionally removing a child from the state in violation of a custody order into NDCC Chapter 12.1-18.

Committee Considerations

Upon the conclusion of the working groups, the committee received information regarding the findings and recommendations of each group.

The Property Division and Spousal Support Working Group forwarded to the committee a bill draft regarding the division of gifted or inherited property. The committee received testimony that under this bill draft, the burden of proof should be shifted to the party who wants the gifted or inherited property to be divided. The testimony indicated that the burden may be shifted to the party least able to financially bear that burden. The testimony further indicated that the bill draft would result in more litigation at the appellate level. Several committee members expressed concerns that the goal of the bill draft was not necessarily to create less litigation but to provide for division of property that is fairer than under current law.

Recommendations

The committee recommends Senate Bill No. 2044 to provide that property acquired by an individual spouse through inheritance or by gift, if titled and maintained in the sole name of the donee spouse, is the property of that party and is not subject to

division.

The committee recommends Senate Bill No. 2045 to provide for the appointment of child custody investigators and provide immunity for child custody investigators and guardians ad litem.

The committee recommends Senate Bill No. 2046 to consolidate the chapters dealing with divorce and separation into one chapter, to reenact the penalty for intentionally removing a child from the state in violation of a child custody order, to apply the best interest standard to the annulment process, and to remove and update archaic language in the domestic relations statutes.

The committee also recommends the nonlegislative recommendations of the working groups.

VOTER REGISTRATION AND RESIDENCY STUDY

Senate Concurrent Resolution No. 4043 directed a study of voter registration. The Legislative Council chairman authorized expansion of the study to include a study of residency requirements.

Background

North Dakota is the only state in the United States which does not require some form of voter registration. A number of states, however, do provide for same day registration.

The North Dakota Legislative Assembly enacted a bill requiring voter registration in 1895. The bill provided for voter registration two weeks before every general or municipal election in all cities and villages exceeding 1,000 in population. Voters who failed to have their names properly registered on the first day were permitted to have their names added by the local election board, which also served as the registration board, one week before the election. Even then, an unregistered voter could still appear at the polls and vote by filing an affidavit supported by the oath of a householder or registered voter attesting that the prospective voter was in fact a resident entitled to vote.

The North Dakota Legislative Research Committee, predecessor of the Legislative Council, studied the state's voter registration laws during the 1949-50 interim. As a result of the study, Senate Bill No. 61 was introduced during the 1951 legislative session. The bill repealed mandatory voter registration and left registration optional with the governing boards of the municipalities. The 1951 Legislative Research Committee report stated "[t]he present system is cumbersome and of limited effect since it does not apply to primary elections, usually the most important elections in the state." A report issued in 1974 by the Bureau of Governmental Affairs entitled Fraud-Free Elections Are Possible Without Voter Registration explained:

> At that time, North Dakota was a 1-party Republican state in which major electoral contests occurred in the June party primaries between two major factions of the Republican party. Typical of 1-party states, the final decisions were really being made in the primaries. Apparently, the study committee felt there was so little merit to continuing registration that no serious consideration was given the idea of including the primary elections in the registration system.

Senate Bill No. 61 passed unanimously in the Senate and passed in the House with a vote of 95 to 5. Since that time, NDCC Section 40-21-10 has provided for optional registration of voters within municipalities.

In the majority of the legislative sessions between 1957 and 1975, unsuccessful attempts were made to pass legislation again requiring mandatory statewide registration. In 1975 a bill requiring registration passed by a vote of 56 to 41 in the House and 27 to 19 in the Senate. The Governor vetoed the bill and in the communiqué to the Secretary of State said:

> House Bill 1101 requires the registration of voters in North Dakota. Initial registration would be conducted at both the primary and general elections in 1976. Subsequently, registration would be open until five days prior to any statewide primary, general, or special election. The bill provides that the registration would be permanent, although names would be purged from the registration lists if a person did not vote in two consecutive general elections. Such registration lists would be available to the public, but only for political and not for commercial purposes.
>
> This legislation offers no improvement in our election law. Rather, it appears to be a significant movement away from securing more active participation of the electorate. The low percentage of eligible voters who actually vote clearly indicates we do not need complicated registration legislation which will tend to reduce even further the number of citizens who vote.
>
> A need for voter registration could exist if there were irregularities or fraud in North Dakota elections. There has

been no indication or evidence of such election problems to justify this legislation.

We need legislation to make the ballot more accessible to the citizen. We do not need additional roadblocks to keep voters from the polls. Therefore, I veto House Bill 1101.

North Dakota Voter Registration Laws

North Dakota Century Code Section 40-21-10, which allows a city to institute voter registration, provides:

> The governing body of any city may require the registration of voters in any election held or conducted within the municipality at such time and place or places as the governing body may designate.

North Dakota's election laws are contained in NDCC Title 16.1, and one of the 18 chapters in that title, Chapter 16.1-02, is reserved for elector registration.

Testimony and Committee Considerations

The committee received testimony and reviewed extensive information provided by the Secretary of State's office with regard to voter registration and residency requirements. The committee's consideration centered on three issues--voter registration and the National Voter Registration Act; residency requirements; and challenged voters.

Voter Registration and the National Voter Registration Act

Representatives of the Secretary of State's office and of other interested organizations provided the committee with information regarding the National Voter Registration Act and on implementation of voter registration in North Dakota.

The National Voter Registration Act of 1993 [42 U.S.C. § 1973gg] requires that individuals be given an opportunity to register to vote in elections for federal office when applying for or renewing a driver's license or other personal identification document issued by a state motor vehicle authority; when applying for or receiving certain types of public assistance and other services; by mail, using either an appropriate state form or a national form, and at a military recruiting office. The Act prohibits the purging of voters' names from voter registration lists solely for failure to vote and requires a program for positively confirming the accuracy and currency of the registration lists. The Act sets out very specific and detailed requirements for the maintenance of voter lists that require multiple confirmation mailings in most cases. The Act provides for certain "fail-safe" voting mechanisms to ensure that the right to vote prevails when a voter's name is eliminated or not included on a voter registration list. According to the testimony, these fail-safe voting procedures were incorporated under the principle that once registered, a voter should remain on the voter registration list as long as the individual remains eligible to vote in that jurisdiction. The Act requires states to report to the Federal Election Commission the impact of administering elections according to the requirements of the Act. In addition to the requirements of the Act, federal legislation passed in 1998 requires all institutions of higher learning to make a good-faith effort to offer voter registration to students enrolled in a degree or certificate program. According to a preliminary listing provided by the Federal Election Commission, there are 27 North Dakota institutions that would be impacted.

In addition, the committee received testimony that North Dakota, which does not have voter registration, is one of six states that is exempt from complying with the Act. Only those states that had "same-day" registration in place at the time of the enactment of the Act were permitted to continue with that type of registration. It was reported that if North Dakota implemented voter registration, it would immediately fall under the requirements of the Act.

The committee received testimony in support of implementing voter registration in North Dakota. According to the testimony, voter registration would protect the integrity of the voting process before the votes are cast. The testimony further indicated that voter registration would keep people voting in the proper district, would eliminate multiple voting by one person, would provide a list of eligible voters for election boards, and would help eliminate voter fraud. It was argued that a voter registration system would not have to be complicated, and with an adequate publicity campaign, the citizens of the state would be able to adjust to the change. It was suggested that a simple and easy registration system like the one used in Minnesota could be implemented. While it was acknowledged that voter registration would not cure all voting problems, it would help resolve some voter fraud concerns.

Other testimony indicated that the estimated cost of implementing a voter registration system is approximately $800,000, and the continued maintenance of the system would be costly to both the state and the counties. According to the testimony, if North Dakota implemented a voter registration system, the simplified registration procedures used by Minnesota could not be used in North Dakota. Minnesota is not subject to the Act because the state is one of the six states exempted from complying with the Act. If North Dakota would institute voter registration, it would be subject to the Act. Regarding incidents of voter fraud, the testimony indicated that few, if any, cases of voter fraud have been brought to the attention of a state's attorney and that there is more concern over whether people are voting in the proper precinct than over voter fraud.

The committee considered a bill draft that would have established a county-based voter registration system. The bill draft provided that electors would have to be registered at least 30 days before an election to be entitled to vote. The bill draft included procedures for registering electors and provided that the elector may register when applying for or renewing a driver's license or when applying for public assistance and the bill draft included the registration provisions required by the National Voter Registration Act. Several committee members indicated that there has not been a public outcry for voter registration, that it would be costly to the state, and that it would make the state subject to the federal voter registration laws. Other committee members believed the issue was important and should receive full legislative consideration.

Residency Requirements

The committee received testimony from representatives of the Secretary of State's office on the residency requirements of voters in North Dakota. Residency is determined based on the rules provided in NDCC Section 54-01-26. Under that section, a residence is the place where a person returns when not called elsewhere for work and other temporary purposes, and it is the place where a person returns in times of rest; a person can only have one residence, and a residence cannot be lost until another is gained; and a person's residence can be changed only by the union of act and intent. According to Section 16.1-01-04, a person may establish a new voting residence by residing in a new precinct for at least 30 days and by intending it to be the person's residence. According to the testimony, sometimes a person's actions and intent clearly coincide, making the place of voting residence much more evident. Oftentimes, however, a person's actions and intent do not appear to clearly coincide, making the place of the person's voting residence unclear and questionable.

The testimony indicated that election officials and members of election boards are not authorized by law to determine whether a person's actions and intent clearly coincide when determining whether a person is a resident of a precinct, and thus qualified to vote at the precinct. Election officials, members of election boards, and challengers are authorized, however, to challenge a voter when they know or have reason to believe a voter is not a qualified elector or resident of the precinct. Determining a person's voting residence generally requires findings of fact that may only be determined through an investigative process and potentially through court proceedings.

The committee also received testimony regarding the voter residency of other states. It was reported that many states have a definition for residency that is unique to voting, and in some cases, for holding public office. This residency definition does not necessarily carry over for determining residency for other purposes such as taxes, tuition, and licenses. Many states, it was reported, specifically address military and college students in their definitions of residency and also specifically address those who are temporarily out of their election jurisdictions for work and government service or those whose businesses and homes are in different election jurisdictions. A number of states assign residency based upon where a person's family is located and other states tie residency to a "domicile," "fixed" permanent habitation or abode, or "principal" home. The testimony also indicated some states do not define residence and leave residency determinations up to the courts. One state, it was reported, ties residency to where a person "habitually sleeps." A common thread throughout residency statutes of other states is that residency is a union of act and intent.

Challenged Voters

The committee received testimony regarding the procedures used by election officials when a person's eligibility to vote in a particular precinct or election is in question. Under NDCC Section 16.1-05-06, members of an election board and poll challengers may challenge the right of anyone to vote who they know or have reason to believe is not a qualified elector. The section provides that the election board member or poll challenger may request that the challenged voter execute an affidavit that the challenged person is a legally qualified voter of the precinct. Several members of the committee inquired as to whether a person's Social Security number could be used as a means of identifying voters. Although federal law prohibits the Social Security number from being used as an identifier for election purposes, another unique identifier number could be used. It was reported that a unique identifier number would provide a data base of voters which could be cross-checked to detect voter fraud.

The committee considered a bill draft to permit election board members and poll challengers to request identification from challenged voters to address voting eligibility concerns. Because of the variety of reasons for which a voter's eligibility may be questioned, the testimony on the bill draft indicated it would be difficult to include in the bill draft the acceptable forms of identification.

The committee also considered a bill draft to provide a provisional ballot procedure for the ballots of challenged voters. Under the bill draft, following the execution of an affidavit and the marking of a ballot by a challenged voter, the ballot would be marked "provisional" and would not be counted until the reason for the challenge is reviewed by the county canvassing board. Testimony in support of the bill draft indicated the procedure would be an improvement over the current procedure because the bill draft would set forth a procedure by which the ballot would be set aside until the voter's eligibility is reviewed. Under current law, the ballot of a challenged voter, regardless of the voter's eligibility, is not kept separate and is included and counted with all the nonchallenged ballots. Opponents of the bill draft indicated that unless there is evidence that a large voter fraud problem exists, the state should not impose any procedures that would empower poll workers to make people uncomfortable when they

come to polls.

Recommendations

The committee recommends House Bill No. 1047 to permit election board members and poll challengers to request identification from challenged voters in order to address voting eligibility concerns. The bill provides that if the requested identification does not adequately address the eligibility concerns, the election board member or poll challenger may request that the person execute an affidavit before being permitted to mark a ballot.

The committee recommends House Bill No. 1048 to provide a provisional ballot procedure for the ballots of challenged voters. Under the bill, following the completion of the affidavit and the marking of the ballot by the challenged voter, the poll challenger or election board member is required to insert the marked ballot in an envelope, seal the envelope, and write the word "provisional" on the envelope and a statement of the reason for the challenge. Following the election, the county auditor is required to review the reason for the challenge and is required to make a recommendation to the county canvassing board as to whether the challenged voter is a qualified voter.

The committee makes no recommendation regarding voter registration.

UNIFORM LAWS REVIEW

The North Dakota Commission on Uniform State Laws consists of 11 members. The primary function of the commission is to represent North Dakota in the National Conference of Commissioners on Uniform State Laws. The national conference consists of representatives of all states and its purpose is to promote uniformity in state law on all subjects in which uniformity is desirable and practicable and to serve state government by improving state laws for better interstate relationships. Under NDCC Sections 54-35-02 and 54-55-04, the state commission may submit its recommendations for enactment of uniform laws or proposed amendments to existing uniform laws to the Legislative Council for its review and recommendation during the interim between legislative sessions.

The state commission recommended five uniform Acts to the Legislative Council for its review and recommendation. These Acts range from replacements of existing uniform Acts adopted in North Dakota to comprehensive legislation on subjects not covered by existing state law. The five Acts were the Revised Uniform Commercial Code Article 9 (1999); the Uniform Foreign Money-Judgments Recognition Act; the Uniform Disclaimer of Property Interests Act (1999); the Uniform Electronic Transactions Act and the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.

Revised Uniform Commercial Code Article 9 (1999)

The national conference recommended the Revised Uniform Commercial Code Article 9 in 1999. The Act is a revision of the Uniform Commercial Code Article 9, and the Act provides a statutory framework that governs secured transactions. As of November 2000, the Act has been adopted in 27 states and has been introduced in 12 other states.

The committee reviewed information comparing NDCC Chapter 41-09 with the provisions of Revised Article 9. Testimony in explanation of the Act indicated that Article 9 operates using two key concepts: "attachment" and "perfection." These terms describe the two key events in the creation of a "security interest." Attachment generally occurs when the security interest is effective between the creditor and the debtor, and that usually happens when their agreement provides that it take place. Perfection occurs when the creditor establishes "priority" in relation to other creditors of the debtor in the same collateral. The creditor with "priority" may use the collateral to satisfy the debtor's obligation when the debtor defaults before other creditors subsequent in priority may do so. Perfection occurs usually when a "financing statement" is filed in the appropriate public record. Generally, the first to file has the first priority, and so on.

Article 9 relies on the public record because the public record provides the means for creditors to determine if there is any security interest that precedes theirs--a notice function. A subsequent secured creditor cannot complain that the grant of credit was made in ignorance of the prior security interests easily found in the public record, and cannot complain of the priority of the prior interests as a result. Every secured creditor has a priority over any unsecured creditor.

There are substantial exceptions to the above-stated perfection rule. Filing is not the only method for perfection. Much depends upon the kind of property that is collateral. Possession of collateral by the secured party is an alternative method of perfection for many kinds of collateral. For some kinds of property, control either perfects the interest or provides a better priority than filing does. There are kinds of transactions for which attachment is perfection. Priority is also, but not always, a matter of perfecting a security interest first in time.

The committee received extensive testimony regarding the Act from persons in the banking industry, the agricultural processing

industry, municipal bond attorneys, and from the Secretary of State's office. Testimony on the Act indicated there were a number of concerns with the Act, particularly regarding the priority of agricultural liens and how the priority of those liens under the Act would conflict with current practice. A number of issues were also raised regarding the incompatibility of the procedures in the Act with the state's computerized central indexing system.

Because of the complexity of the concerns raised by the testimony, the committee urged the interested parties to work together to discuss and resolve any concerns regarding the Act before the Legislative Assembly convenes in January.

The committee makes no recommendation regarding the Revised Uniform Commercial Code Article 9.

Uniform Foreign Money-Judgments Recognition Act

The Uniform Foreign Money-Judgments Recognition Act, which was completed by the national conference in 1962, has been adopted in 29 states. North Dakota adopted the Enforcement of Foreign Judgments Act in 1969 and the Foreign Money Claims Act in 1991.

Testimony in explanation of the Act indicated that the purpose of the Act is to simplify international business by recognizing money judgments obtained in other countries.

The committee received no testimony in support or in opposition to the Act. The committee makes no recommendation regarding the Uniform Foreign Money-Judgments Recognition Act.

Uniform Disclaimer of Property Interests Act (1999)

The national conference recommended the Uniform Disclaimer of Property Interests Act in 1999. Testimony in explanation of this Act indicated that the Act updates and replaces the earlier Uniform Disclaimer of Property Interests Act; the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act; and the Uniform Disclaimer of Transfers under Nontestamentary Instruments Act. It allows beneficiaries of intestate, testamentary, and nontestamentary interests to execute a disclaimer of those interests. A disclaimer extinguishes the interest as if that interest had never been granted. Disclaimers are used to reallocate interests in estates, trusts, and other kinds of property holdings in which benefits may be allocated at death. This Act makes it clearer that trustees and other fiduciaries may use disclaimers, that powers of appointment may be disclaimed, and that unfair distributions of interests are avoided when disclaimers are used. As of November 2000, Hawaii is the only state to have adopted the Act.

The committee received no testimony in support or in opposition to the Act. The committee makes no recommendation regarding the Uniform Disclaimer of Property Interests Act.

Uniform Electronic Transactions Act

The national conference recommended the Uniform Electronic Transactions Act in 1999. The Act is designed to support the use of electronic commerce. The primary objective of the Act is to establish the legal equivalence of electronic records and signatures with paper writings and manually signed signatures, removing barriers to electronic commerce. Testimony in explanation of the Act indicated that the Act is the first comprehensive effort to prepare state law for the electronic commerce era. The Act contains several sections that affect state government records. The Act provides for the authority of the state records administrator to develop rules for electronic records.

Other testimony received regarding the Act indicated that the Act would give state agencies the authority to accept signatures electronically. It was noted that the Act refers to government agencies, which includes political subdivisions and other nonstate governmental agencies and the definition should be more specific to apply to only state agencies. The committee also received testimony regarding a concern about the lack of procedural clarity in the relationship to the state's existing notary laws. Further testimony indicated that the Act is a matter which interests and is generally supported by the state's financial institutions.

The committee received testimony that both houses of Congress have approved S. 761, titled the Electronic Signatures in Global and National Commerce Act or "E-Sign," and that it was signed by the President on June 30, 2000. The uniform Act and the "E-Sign" legislation overlap significantly. In some cases the federal legislation uses the language of the uniform Act without change. The federal legislation does not preempt state enactments of the uniform Act, and it permits additional states to enact the uniform version of the Act without fear of preemption. It is unclear, however, whether the states must adopt the uniform Act without amendment to avoid federal preemption. As of November 2000, the Act has been adopted by 23 states and has been introduced in five other states.

The committee makes no recommendation regarding the Uniform Electronic Transactions Act.

Uniform Interstate Enforcement of Domestic Violence Protection Orders Act

The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was recommended by the national conference in 2000 and has not yet been enacted by any state.

Testimony in explanation of the Act indicated that the Act provides for the interstate enforcement of protection orders issued by another state's tribunal. The Act only provides for the enforcement of protection orders and does not provide for the enforcement of support orders. The Act would repeal a similar North Dakota law, NDCC Section 14-07.1-22, which was enacted in 1999. The uniform Act is different from Section 14-07.1-22 in that the uniform Act defines a protection order; the uniform Act allows for the presentation of the protection order to a law enforcement officer by electronic or other medium if it is retrievable in perceivable form; and the uniform Act provides for immunity for officials acting in good faith who are enforcing a valid protection order.

Other testimony regarding the Act indicated that while there is support of the concept of uniform laws as they relate to protection orders and full faith and credit, there are concerns over the possibility of losing provisions in the current law and that the lack of clarity in some areas of the uniform law may impede training and enforcement. Several areas of concern included the notice on ex parte order, certification, and the transmittal process.

The committee makes no recommendation regarding the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.

PUBLIC HEARINGS ON BALLOT MEASURES

By directive of the chairman of the Legislative Council, the committee conducted public hearings on the constitutional measures scheduled to appear on the primary and general election ballots. The purpose of the hearing was to promote public discussion and debate on the measures and to create a public history. Four measures appeared on the primary election ballot and one measure appeared on the general election ballot.

Measure No. 1 - Primary Election

Measure No. 1 on the June 2000 primary election ballot related to the membership of the State Board of Higher Education. The measure, which amended subsection 2 of Section 6 of Article VIII of the Constitution of North Dakota, changed from one to two the number of persons holding a bachelor's degree from the same institution of higher education which is under the jurisdiction of the North Dakota State Board of Higher Education who are eligible to serve on the eight-member board at the same time.

Testimony in support of measure No. 1 indicated that the passage of the measure would provide the flexibility necessary to attract a broader pool of candidates for the State Board of Higher Education. The measure keeps the principle that a majority of the board could not be a graduate of any one campus in the state. The measure only limits the number of board members who receive bachelor's degrees from the same institution; however, it is possible that there may be more than two members of the board who had received an associate's, master's, or doctorate degree from the same institution. Other testimony in support of measure No. 1 indicated that the recent change in the length of board members' terms from seven years to four years gave the board selection committee the opportunity to review candidates more frequently. That change, in addition to the change proposed in measure No. 1, would help to "raise the bar" on the quantity and quality of candidates for board positions.

There was no testimony in opposition to primary election measure No. 1.

This measure was approved at the June 13, 2000, primary election.

Measure No. 2 - Primary Election

Measure No. 2 on the primary election ballot amended Section 5 of Article V of the Constitution of North Dakota to provide that at the November 2004 general election, the Agriculture Commissioner, Attorney General, Secretary of State, and Tax Commissioner would be elected to terms of two years. Beginning with the November 2006 general election, these offices would again be elected to terms of four years. The measure would change the rotation so that, beginning with the November 2006 general election, approximately half of the statewide officials would be on the ballot every two years and still be elected for terms of four years.

Testimony in support of measure No. 2 indicated that because the Labor Commissioner is no longer an elected position, the only statewide official elected in nonpresidential year elections is one Public Service Commissioner. Because state representatives are now elected to four-year terms, one Public Service Commissioner position would be the only position on the ballot in half the districts in the state in nonpresidential years. Under measure No. 2, there would be six statewide officials elected in a

presidential election year and six elected in the nonpresidential election year. The testimony further indicated that there are not enough campaign volunteers or campaign contributions to go around when all statewide officers are elected in one election. About 30 states elect their governors in the nonpresidential year election. The passage of measure No. 2 would better serve the citizens of the state. It was noted the only drawback of measure No. 2 would be that eight candidates for office in 2004 would have to run for a two-year term rather than a four-year term. Other testimony in support of the measure indicated that the measure would place more focus on the nonpresidential year election.

Further testimony in support of measure No. 2 indicated that moving the election of these four constitutional officers to the nonpresidential year election cycle would allow the voters to become more knowledgeable about each individual candidate and about each candidate's qualifications to hold public office. Because of the large number of positions listed on the present statewide ballot, it is challenging for the voters to adequately learn about all the candidates' qualifications. The resources of the media are spread too thinly among the many different races, and it becomes a challenge for the media to adequately provide coverage of the elections. The passage of measure No. 2 would benefit and enhance the state's system of government, would enhance interest in nonpresidential elections, and more persons may want to consider running for a statewide elected office. The passage of measure No. 2 would also strengthen the political party structure.

The committee received no testimony in opposition to measure No. 2.

This measure was approved at the June 13, 2000, primary election.

Measure No. 3 - Primary Election

Measure No. 3 on the primary election ballot related to the elimination of the State Treasurer position. This measure would have amended Section 2 of Article V, Section 3 of Article IX, and Section 12 of Article X of the Constitution of North Dakota, and would have repealed Section 15 of Article XII of the Constitution of North Dakota.

Effective January 1, 2003, this measure would have eliminated the State Treasurer as an elected officer of the state and would have provided that upon approval of this measure, the State Treasurer would be elected to a final term of two years at the November 2000 general election. This measure also provided that the Agriculture Commissioner would replace the State Treasurer on the Board of University and School Lands and would repeal those duties of the State Treasurer related to the issuance of legal tender by banks in this state.

Testimony in support of measure No. 3 indicated that the passage of the measure would provide for a more effective and efficient government. The testimony indicated that of the seven positions in the State Treasurer's office, only two would need to be retained, and those two positions could be a part of the Office of Management and Budget. The Bank of North Dakota and the Office of Management and Budget perform some of the same functions as the State Treasurer's office. It was argued that, regardless of the amount of money that can be saved or the number of FTE positions involved, there is a responsibility to the citizens of the state to create good public policy and good cost-efficient government. The duties performed by the State Treasurer's office could be performed by the Office of Management and Budget, the Bank of North Dakota, and the Attorney General's office. The responsibility for the veterans' postwar trust fund could be transferred to the State Retirement and Investment Office. According to the testimony, the people of the state want an efficient government.

Other testimony in support of measure No. 3 indicated that advancements in technology, including the use of electronic payments and deposits, have taken away many of the manual duties of the State Treasurer's office. With the use of technology and other existing state agencies, the State Treasurer's office is virtually obsolete and unnecessary. Other states are recognizing the changing business environment and are voting to eliminate their State Treasurers. It was stated that the passage of measure No. 3 would result in a net savings to the taxpayers of over $500,000 per biennium.

Additional testimony in support of measure No. 3 suggested it is time that North Dakota government move out of the 19th century. The testimony further indicated that if the measure were approved, the Legislative Assembly would be responsible for deciding which agency should be assigned the duties of the State Treasurer's office. Other testimony indicated that the private business community supports further consolidation and reorganization of government entities at all levels when it provides for a more efficient, effective, and economical government. Finally, testimony in support of measure No. 3 indicated that significant advancements in information technology will have a dramatic impact on the state and on state government. The state needs to reengineer how the state does its business, and it will be necessary to look at ways of reducing the costs of state government. The State Treasurer's office is a victim of these advances in technology.

Testimony in opposition to measure No. 3 indicated that the State Treasurer deals with the licensing and regulation of alcoholic beverage wholesalers and distributors and helps with the regulation of suppliers. The argument was made that the alcoholic beverage industry is vulnerable to abuse, and the State Treasurer is doing a good job of regulating the industry. Reassigning the State Treasurer's duties does not eliminate the costs of performing those duties. The State Treasurer's office is very streamlined. If the alcoholic beverage regulation duties were assigned to the Attorney General's office, eventually an alcohol control

commission would need to be developed and that would result in an additional level of government. It was noted the recordkeeping done by the State Treasurer's office is very detailed, and if the position is eliminated, there will still be a need for someone to maintain those records.

Additional testimony in opposition to measure No. 3 indicated the framers of the constitution believed it was important for officials to be elected, because an elected official is accountable to the people. Appointed officials do not always perform in the most exemplary way because appointed officials are only accountable to the person who makes the appointment and are not subject to recall. It was stated that the people of the state do not want the control of the government in the hands of just a few elected officials.

Other testimony in opposition to measure No. 3 indicated that the elimination of the State Treasurer's office would strip the people of their right to elect their own state officials and that the removal of the office would weaken accountability, increase bureaucratic cost, move the people further away from the process, and would add more power to agencies that report to the Governor, not to the people. It was noted that North Dakotans spoke to this issue in 1984, and it was defeated by a 60 percent vote. The voters have soundly rejected abolishing a constitutional office and giving up their right to say who will serve them. With a biennial budget of only $695,265, it was argued that the office is one of the most frugal in state government and at the same time provides a necessary check and balance in the distribution of state moneys. With a staff of seven, proponents of the office believe the office provides cost-effective, efficient government. The breaking apart of the State Treasurer's office and moving it to four state agencies would eliminate the ability to track how those dollars are spent and the bureaucracy would grow.

Neutral testimony on measure No. 3 indicated that there is a concern about how the passage of measure No. 3 would affect the alcoholic beverage industry. The viewpoint was expressed that the Attorney General's office is not as experienced and is not as familiar with federal alcohol regulations as the State Treasurer's office has been, and the office has been stable and helpful. Presently, the industry is required to report to just one agency. If the duties are spread among several agencies and those functions do not get the necessary attention, it is likely that an alcohol control board or commission would have to be created. While other states may have eliminated their treasurer's office, those offices were not responsible for regulating their state's alcoholic beverage industry.

This measure was defeated at the June 13, 2000, primary election.

Measure No. 4 - Primary Election

Measure No. 4 on the primary election ballot amended Section 11 of Article IV of the Constitution of North Dakota to allow the Legislative Assembly to provide, by law, a procedure for filling vacancies occurring in the Legislative Assembly and to replace the requirement that the Governor call an election to fill such vacancies.

Testimony received by the committee in opposition to measure No. 4 indicated that because representatives now serve four-year terms, it is likely there will be more legislative vacancies than ever. The measure would allow the Legislative Assembly to determine how a vacant legislative seat is to be filled. The measure would give a nonelected legislator an undue advantage in the next election because the selected or appointed legislator could potentially serve four years before being required to face an election. The measure would allow the majority party at the time to adopt a procedure that would benefit that party.

Measure No. 4 was approved at the June 13, 2000, primary election.

Measure No. 1 - General Election

The only constitutional measure on the November 2000 general election ballot related to hunting, fishing, and trapping. The measure, which created a new section to Article XI of the Constitution of North Dakota, provided that hunting, trapping, and fishing are a valued part of the state's heritage and will be preserved for the people and managed by law and regulation for the public good.

Testimony received by the committee in support of the measure indicated that in some parts of the country, there are groups who are trying to rid citizens of the ability to hunt, fish, and trap. It was said the people of the state need to make a statement that they value hunting, fishing, and trapping as a part of their heritage and that the people want to preserve that heritage. The testimony indicated during the drafting of the language in the measure, there was a concern over whether the language should be placed in the state's bill of rights in Article I of the Constitution or whether it should be placed in the general provisions in Article XI of the Constitution. It was decided it was more appropriate for the language to be placed in Article XI rather than in Article I because some persons might view the language as creating a right and might believe that their hunting, fishing, and trapping activities should not be subject to regulation and limitations. Further testimony in support of the measure indicated that hunting, fishing, and trapping were and are an important part of the heritage of the Indian tribes as well as the pioneers. Concerns were expressed regarding future access to land and lake shores and to the possibility of commercial fishing becoming

an issue in the state. The testimony indicated that the measure provides that the Legislative Assembly is in direct control of the laws that regulate hunting, fishing, and trapping.

The committee received no testimony in opposition to measure No. 1.

Measure No. 1 was approved at the November 7, 2000, general election.

CONSTITUTIONAL AND STATUTORY REVISION

Grandparent Visitation - Recommendation

The committee received testimony regarding a North Dakota Supreme Court decision, *Hoff v. Berg*, 595 N.W.2d 285 (1999) in which the court declared a portion of NDCC Section 14-09-05.1 unconstitutional.

In 1983 the Legislative Assembly enacted a statute regarding grandparental visitation rights. That statute provided the test that the court was to apply was whether visitation was in the best interests of the minor and would not interfere with the parent-child relationship. Further, the court was to consider the amount of personal contact between the grandparents or great-grandparents and the minor and the minor's parents. In 1993 the statute was amended to require that visitation must be granted to grandparents unless the court found that visitation was not in the best interests of the minor. The 1993 amendment shifted the burden to the nonconsenting parent to prove that visitation was not in the best interests of the child by providing that visitation rights of grandparents to an unmarried minor were presumed to be in the minor's best interest. In Hoff v. Berg, the North Dakota Supreme Court found unconstitutional the 1993 amendment providing the presumption that grandparent visitation was in the best interests of the child and shifting the burden to the parent to prove that it was not.

The committee also received testimony regarding a recent United States Supreme Court opinion, Troxel v. Granville, ____U.S. ____, 120 S. Ct. 2054 (2000), in which the Court declared a Washington grandparent visitation statute unconstitutional. In that case, the Washington statute, which was declared to be very broad, permitted "any person" to petition a court for visitation rights "at any time," and authorized the court to grant such visitation rights whenever "visitation may serve the best interest of the child." The Court, in finding the statute unconstitutional as applied, reiterated its prior holdings that "there is a presumption that fit parents act in the best interests of their children." The Court also found that the statute's application of a presumption in favor of the grandparents was a fatal flaw in the application of the statute. According to the testimony received by the committee, the 1993 amendments to the North Dakota grandparent visitation statute would not have withstood constitutional scrutiny under Troxel; however, the now applicable 1983 statute appears to be constitutional under the Court's analysis in Troxel.

The committee recommends Senate Bill No. 2047 to amend NDCC Section 14-09-05.1, the grandparent visitation statute, to comply with *Hoff v. Berg*.

Technical Corrections - Recommendation

The committee continued the practice of reviewing the Century Code to determine if there are inaccurate or obsolete name and statutory references or superfluous language. The committee recommends House Bill No. 1049 to make technical corrections throughout the Century Code. The following table lists the North Dakota Century Code sections affected and describes the reasons for the change:

4-30-03.9	The change corrects a reference to the Milk Stabilization Board, which was changed to the Milk Marketing Board by 1997 S.L., ch. 69
10-19.1-05	Section 10-19.1-03, which is cross-referenced in Section 10-19.1-05, was repealed by 1999 S.L., ch. 50, § 79
15-18-06	Section 15-10-01.1, which is cross-referenced in Section 15-18-06, was repealed by 1999 S.L., ch. 154, § 2
26.1-26-11	The change corrects a typographical error contained in 1999 S.L., ch. 254, § 9
27-20-02(6)	The definitions in this section were extensively revised by 1999 S.L., ch. 282, § 3. That amendment also incorrectly changed the internal references.
38-18.2	This chapter is repealed because the chapter established the Tenneco Plant Impact Assistance Interstate Compact, which is now obsolete
38-03-09.4(1)	The change corrects an error in 1965 S.L., ch. 269, § 4
40-47-01.1(5)	1999 S.L., ch. 367, § 1, added a new subsection 3 to this section but did not correct the internal reference
40-63-01(1)	The change corrects a reference to the Office of Intergovernmental Assistance, which was changed to the

(7)	Division of Community Services by 1999 S.L., ch. 475
40-63-02	The change corrects a reference to the Office of Intergovernmental Assistance, which was changed to the Division of Community Services by 1999 S.L., ch. 475
40-63-03	The change corrects a reference to the Office of Intergovernmental Assistance, which was changed to the Division of Community Services by 1999 S.L., ch. 475
40-63-09	The change corrects a reference to the Office of Intergovernmental Assistance, which was changed to the Division of Community Services by 1999 S.L., ch. 475
49-21-01(13)	1999 S.L., ch. 411, § 2, created five new definitions to this section. The change corrects the references in this subsection.
52-06-06.1(2)(c)	42 U.S.C. 662 was repealed in 1996 Public Law 104-193, which revised and moved the definition to 42 U.S.C. 659(i)(5), which is Section 459 of the Social Security Act
57-39.3-02	This change corrects an error contained when this section was created by 1989 S.L., ch. 714, § 4
57-40.3-11	As amended by 1989 S.L., ch. 723, § 1, Section 57-40.3-10 no longer contains a subsection 3
62.1-02-01	This change corrects an internal cross-reference that resulted from the removal of a subsection by 1995 S.L., ch. 120