

JUDICIARY COMMITTEE

The Judiciary Committee was assigned three studies. Section 2 of Senate Bill No. 2361 directed the Legislative Council to study the state's marriage laws and methods for strengthening the institution of marriage in the state, including premarital requirements, such as marital education and counseling, waiting periods, and marital blood tests; the availability of marriage counseling and parenting education in the state; and the implementation of predivorice requirements, such as divorce-effects education. Senate Concurrent Resolution No. 4031 directed the Legislative Council to study the Uniform Trust Code to determine the feasibility and desirability of adopting the Uniform Trust Code in North Dakota. Senate Concurrent Resolution No. 4032 directed the Legislative Council to study Revised Article 1 of the Uniform Commercial Code - General Provisions (2001) to determine the feasibility and desirability of adopting Revised Article 1. 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 also delegated to the committee the responsibility to receive periodic reports from the Department of Human Services regarding the status of the alternatives-to-abortion funding.

Committee members were Representatives Lois Delmore (Chairman), Bill Amerman, Lawrence R. Klemin, Kim Koppelman, and William E. Kretschmar and Senators Dick Dever, Stanley W. Lyson, Carolyn Nelson, John T. Traynor, and Thomas L. Trenbeath.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2006. The Council accepted the report for submission to the 60th Legislative Assembly.

MARRIAGE LAWS STUDY

Section 2 of Senate Bill No. 2361 directed a study of the state's marriage laws and methods for strengthening the institution of marriage in the state, including premarital requirements, such as marital education and counseling, waiting periods, and marital blood tests; the availability of marriage counseling and parenting education in the state; and the implementation of predivorice requirements, such as divorce-effects education. The bill, as introduced, would have provided for a reduced marriage license fee for a couple that completed 12 hours of premarital education. As passed, the bill provided for an increase in the amount of the marriage license fee and did not include a premarital education requirement. Section 2 of the bill, which provided for this study, was added by the conference committee on Senate Bill No. 2361.

Background

In the English common-law tradition, from which American legal doctrines and concepts have developed, a marriage was a contract based upon a voluntary private agreement by a man and a woman to become

husband and wife. Marriage was viewed as the basis of the family unit and vital to the preservation of morals and civilization. Traditionally, the husband had a duty to provide a safe house, pay for necessities such as food and clothing, and live in the house. The wife's obligations were maintaining a home, living in the home, having sexual relations with her husband, and rearing the couple's children. Today, the underlying concept that marriage is a legal contract still remains, but due to changes in society the legal obligations are not the same.

Marriage is chiefly regulated by the states. The United States Supreme Court has held that states are permitted to reasonably regulate the institution of marriage by prescribing who is allowed to marry and how the marriage can be dissolved. Entering into a marriage changes the legal status of both parties and gives both husband and wife new rights and obligations. One power that the states do not have, however, is that of prohibiting marriage in the absence of a valid reason. For example, prohibiting interracial marriage is not allowed for lack of a valid reason and because the prohibition was deemed to be unconstitutional.

All states limit individuals to one living husband or wife at a time and will not issue marriage licenses to anyone with a living spouse. Once an individual is married, the individual must be legally released from the relationship by either death, divorce, or annulment before the individual may remarry. Other limitations on individuals include age and close relationship. Limitations that some but not all states prescribe are the requirements of blood tests, good mental capacity, and being of opposite sex.

North Dakota Domestic Relations Law and Caseloads

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 that includes statutes related to the family law process is Chapter 27-20, which contains the Uniform Juvenile Court Act.

In 2005, 9,510 of the 32,431 or 29.3 percent of the civil case filings in district court involved domestic relations cases. The domestic relations case filings decreased 7.2 percent over 2004. In addition, 2,448 juvenile cases were filed, representing a 1.73 percent decrease over the 2004 filings. Within the domestic relations category, child and spousal support proceedings made up 47.2 percent of the cases; divorce, 23.2 percent; paternity, 7.4 percent; protection and restraining orders, 17.7 percent; custody filings, 1.2 percent; and adoption, 3.2 percent. Protection and restraining order filings increased 9.2 percent to 1,680. Divorce filings decreased 6.25 percent in 2005 with 2,202 filings compared to 2,349 in 2004. The number of

divorce filings was 2,774 in 1999, 3,044 in 1998, and 2,911 in 1997.

Paternity case filings were up 6.9 percent with 705 cases filed in 2005, while support proceedings decreased 5.5 percent with 4,487 cases filed, compared to 4,750 cases in 2004.

North Dakota Marriage Laws

The state's laws concerning the marriage contract are contained in NDCC Chapter 14-03. Section 14-03-01 defines marriage as "a personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential. . . . A spouse refers only to a person of the opposite sex who is a husband or a wife." Following are some of the requirements for a valid marriage in North Dakota:

- Identification requirement. North Dakota Century Code Section 14-03-17 requires each applicant to provide a birth certificate or other satisfactory evidence of age.
- Residency requirement. Individuals are not required to be residents of the state in order to be married in the state.
- Previous marriage. North Dakota Century Code Section 14-03-17 provides that if a divorce has been granted to either or both of the parties, a certified copy of each decree must be filed with the marriage license application.
- Under 18 years of age. Under NDCC Section 14-03-02, if an individual is between 16 and 18 years of age, a marriage license cannot be issued without the written consent of the parents or guardian. A marriage license may not be issued to any person below age 16.
- Marriage license fees. North Dakota Century Code Section 14-03-22 provides for a marriage license fee of up to \$30 and a supplemental fee of \$35, which is to be deposited in the domestic violence prevention fund to provide aid to victims of domestic violence.
- Waiting period. North Dakota law does not require a waiting period between the issuance of a license and the marriage.
- Blood tests. No blood tests are required in this state. North Dakota Century Code Section 14-03-12, which was repealed in 1983, provided that a serological test for syphilis was required before individuals could apply for a marriage license.
- Common-law marriage. A common-law marriage is not recognized as valid in this state *Schumacher v. Great Northern Railway*, 23 N.D. 231, 136 N.W. 85 (1912).
- Void marriages. North Dakota Century Code Section 14-03-03 provides that certain marriages are incestuous and void. These include marriages between parents and children, brothers and sisters, uncles and nieces, aunts and nephews, and between first cousins.
- Same sex marriage. North Dakota Century Code Sections 14-03-01 and 14-03-08 as well as a constitutional amendment passed in November

2004 provide that same sex marriages are prohibited in the state.

- Officiants. North Dakota Century Code Section 14-03-09 provides that a marriage may be solemnized by a judge of a court of record; a municipal judge; a recorder or another official designated by the board of county commissioners; an ordained minister of the gospel; a priest; clergy licensed by recognized denominations; and by any individual authorized by the rituals and practices of any religious persuasion. Under Section 14-03-21, the officiant must return the original copy of the marriage certificate and license to the official who issued the license within five days after the solemnization of the marriage. A duplicate copy must also be given to the individuals married.
- License valid. According to NDCC Section 14-03-10, a marriage license is valid for 60 days. The license may only be used within the state.

Other North Dakota laws regarding the marriage and divorce process are also contained in NDCC Title 14. Chapter 14-03.1 provides for the Uniform Premarital Agreement Act; Chapter 14-05 addresses issues relating to divorce; and Chapter 14-07 addresses issues relating to the rights and liabilities of the husband and wife.

Testimony and Committee Considerations

The committee received testimony and information from the North Dakota Association of Counties, the Department of Human Services, representatives of religious organizations, representatives of domestic violence prevention organizations, and a family science expert regarding the issues raised in this study. The committee's deliberations centered on four issues--the importance of marriage to society, government efforts to encourage healthy marriages, the domestic violence prevention fund, and marriage license fees.

Importance of Marriage to Society

The committee received testimony that the state has a legitimate and compelling interest in encouraging, preserving, and strengthening healthy marriages. According to the testimony, increased government attention to the marriage and family structure has produced social data that convincingly demonstrates the advantages of marriage for children, adults, and society. It was noted that even after controlling other social and economic factors, children raised outside intact marriages are at higher risk of experiencing a variety of negative economic, social, psychological, educational, and physical outcomes; men and women in marriages are significantly better off than their unmarried counterparts; married people tend to be healthier; and married people save more money for retirement. The testimony also noted the benefits of marriage to society. According to the testimony, marriage creates social bonds that would not happen in single or childless persons, marriage changes a person's lifestyle, married persons are more likely to vote, and there is a lower crime rate in communities with higher percentages of married people.

The committee also received testimony that government policies should treat the married couple as a distinct social, legal, and financial unit. It was suggested that government should ensure that public school curricula treat marriage as a civic institution; treats marriage as the ideal family form, especially for childbearing; do not equate marriage with all other types of relationships; educate about the proven personal, familial, and community benefits of marriage; and equip graduates with the skills needed to avoid bad relationships and build healthy ones. According to the testimony, government can ensure that all state policies and practices respect rather than burden or discourage marriage; give preference in state-funded job creation and location incentive programs to those proposals that provide not only good wages and benefits, but also traditional hours and predictable work schedules; and continue and increase funding for centers that provide positive help for women facing unexpected pregnancies. The testimony indicated that government should explore divorce education or mediation pilot projects designed to reduce unnecessary divorce; fund voluntary marriage preparation and education services for cohabiting and unmarried new parents; and fund voluntary marriage education and other intervention services to reduce conflict, violence, and unnecessary divorce in high-risk couples. Other suggested ideas included establishing a marriage commission charged with evaluating how state agencies treat marriage and developing specific initiatives and policies; holding conferences with faith-based and community organizations on marriage-strengthening policies; investing in initiatives to promote fatherhood; incorporating marriage incentives in the temporary assistance for needy families (TANF) program; and discounting marriage license fees for low-income couples who receive premarital counseling, using TANF funds to offset the cost.

Government Efforts to Encourage Healthy Marriages

The committee received testimony regarding premarital counseling requirements and incentives and other governmental efforts to encourage healthy marriages. According to the testimony, the available research evidence persuasively demonstrates the advantages of marriage for children, adults, and society. According to the testimony, a few of the key findings are that marriage, especially if it is low-conflict and long-lasting, is a source of economic, educational, and social advantage for most children; children from intact families are far less likely to be poor or to experience persistent economic insecurity; children from intact married parent families are most likely to stay in school; warm, responsive, firm, and fair parenting helps to promote healthy emotional development and to foster emotional resilience in children; and married people, on average, are happier, healthier, and wealthier and enjoy longer lives.

The committee received testimony that divorce is a significant problem in our society. According to the testimony, divorce intrusively inserts government control into people's personal lives in the form of divorce settlements, child support enforcement, visitation rights,

and many other family decisionmaking issues. The testimony indicated that American citizens are generally supportive of efforts to strengthen marriage and to reduce the number of divorces. According to the testimony, the direct and indirect state, federal, and personal costs of divorce can range from \$35,000 to \$50,000 per divorce per year.

The committee received testimony that some of the governmental efforts to assist preparation for healthy marriage relationships include incentives to participate in education or counseling before marriage, modification of tax or economic assistance policies to benefit couples, and the delivery of educational programs on relationships to adolescents and youth. The testimony indicated that an emerging pattern in governmental attempts to influence family relationships before marriage involves providing incentives to couples or creating requirements to encourage them to pursue premarital education or counseling. By 2002 five states had implemented policies to reduce marriage license fees or decrease waiting periods to couples who participate in premarital education or counseling. Since 1996 at least six states have introduced legislation to require premarital counseling as a prerequisite to receiving a marriage license; however, none of those bills has passed. According to the testimony, the mandatory requirement approach is often seen as too heavy-handed and intrusive. The testimony indicated that a more successful policymaking approach has occurred among states that invested in providing resources or educational opportunities to marrying couples. According to the testimony, there is an increasing body of recent research that provides evidence that premarital education programs achieve the goal of helping couples form and sustain healthy marriages. The testimony indicated that some important legislative changes regarding the provision of support to couples within marriage also have occurred in several states. One trend is to provide more benefits to married couples. According to the testimony, Oklahoma used \$10 million in excess TANF funds to implement programs that provide marriage incentives. The federal TANF legislation encourages states to use TANF funds to encourage and strengthen marriage.

Domestic Violence Prevention Fund

The committee received information and testimony regarding the portion of the marriage license fee which is deposited in the domestic violence prevention fund. According to the testimony, in 2004 there were 4,483 incidents of domestic violence reported to local programs. Thirty percent of those incidents involved victims who were assaulted by their spouses, 10 percent of the incidents involved a former spouse, and 15 percent of the incidents involved abuse by a cohabitating partner. The testimony indicated that of the 825 new victims of sexual assault that were reported in 2004, 14 percent of the victims were either married to or cohabitating with their assailant. According to the testimony, the victims represent only a small percentage of those who are physically and sexually assaulted each year because most victims remain silent. It was noted

that it is often said that marriage is the institution that most strongly protects mothers and children from domestic violence and violent crimes; however, for roughly 1,800 victims in 2004, that was not true.

The committee received testimony that domestic violence advocates work hard to promote healthy relationships as well as to provide education and awareness materials that promote the development of healthy relationships to communities, schools, and churches. It was noted that funds from the domestic violence prevention fund are used consistently to directly support women and children in violent relationships. In 2004, \$82,282 was disbursed from the fund to domestic violence agencies around the state. In 2005 the Legislative Assembly increased the portion of the marriage license fee which is deposited into this fund from \$29 to \$35. It was noted that in the face of federal and state budget cuts, there is a concern that the amount deposited in this fund will be decreased if the marriage license fee is reduced in an effort to encourage and promote marriage. According to the testimony, the fund is vital to direct service work and to help support services such as assistance in securing protection orders, shelter stays, children's services, 24-hour crisis hotline services, counseling and support groups, and batterer's treatment programs. The testimony indicated that advocates offer assistance to the victims, whether it be for leaving relationships or staying in relationships. It was noted that the advocate's role is to support the victim's decision. It was also noted that in cases in which there has been domestic violence, marriage counseling often is not very effective.

Marriage License Fees

The committee, in its discussion of the marriage laws of the state and methods for strengthening marriage, received testimony regarding the fees charged for a marriage license in North Dakota and other states. The committee discussed 2005 Senate Bill No. 2361, which increased the fee for a marriage license from \$6 to \$30 and increased the supplemental fee deposited in the domestic violence prevention fund from \$29 to \$35. The committee received testimony from a representative of the counties that all counties in the state are charging \$65 for a marriage license. According to the testimony, the County Recorder's Association passed a resolution urging county recorders to ask their county commissioners to raise the marriage license fee to \$30. It was noted that the reason for the request for uniformity in the amount of the marriage license fee among the counties was due, in part, to a computer issue. The computer program used by the State Department of Health for the issuance of marriage licenses only allows for a single amount for a marriage license. According to the testimony, the uniform fee eliminates the need for a major computer programming change to allow for different fees for different counties. It was also noted that a single fee prevents couples from shopping around from county to county for a lower fee. The 2005 increase in the state's marriage license fee was the first increase in 36 years. The marriage license fee is deposited in the county general fund. According to the

testimony, the \$24 increase in the marriage license fee is used to fund the operation of the county office that issues the licenses.

The committee received information regarding marriage license fees of other states. The fees range from a low of \$21 in Mississippi to a high of up to \$100 in Wisconsin and Minnesota. The information indicated that several states, including Minnesota, Tennessee, and Florida, offered a reduced marriage license fee for those couples who had completed premarital counseling. In Minnesota the fee is reduced from \$100 to \$30 if the couple completes 12 hours of premarital counseling. The committee noted that North Dakota's fee is among the highest for mandated marriage license fees.

To address the issues raised in the testimony regarding marriage license fees and the benefits of premarital counseling, the committee considered a bill draft that provided for a \$25 reduction in the marriage license fee for low-income persons who complete four hours of premarital counseling. The bill draft provided that the premarital counseling should include a discussion of the rights, expectations, needs, obligations, and other commitments incident to the marriage contract, including discussion about children, finances, relationships with new family members and friends, time management, goalsetting, and communication and conflict resolution skills. The bill draft also provided premarital counseling may be provided by a member of the clergy; the staff of a church, including a church volunteer sponsoring couple, or other religious organization with training in premarital counseling or a trained or certified counselor. The bill draft provided for a voucher system that would be administered by the Department of Human Services. The bill draft contained an appropriation of \$35,000 from TANF funds for the program.

Testimony regarding the bill draft indicated that TANF regulations permit the use of TANF funds for programs that encourage the maintenance of two-parent families. It was noted that it is not required that eligibility for these programs be based upon income. According to the testimony, for such a program to be utilized, it is important to limit the number of agencies a couple must go to in order to receive the discount. The testimony indicated that program would require staff time to establish and implement.

Committee members expressed concern about whether the program in the bill draft should apply only to low-income persons and whether \$25 is enough incentive.

Testimony from a representative of county marriage license officials indicated that the 53 officials in the state who issue marriage licenses are strong supporters of measures that encourage a knowledgeable approach to the decision of marriage. It was noted that the bill draft adds only a small administrative responsibility of receiving and submitting the vouchers to the Department of Human Services. According to the testimony, the bill draft would be easy to implement because it does not require marriage license officials to determine if individual couples are eligible for the discounted fee. It was noted that the most significant impact of the bill draft

would be the necessary changes to the marriage license software. According to the testimony, the change would require a programming change to accept the variation in the fee and for additional reporting if the Legislative Assembly decided to evaluate the use of the discount. It was estimated that the programming changes to implement the program proposed in the bill draft would cost \$3,000 to \$5,000.

Testimony in opposition to the bill draft indicated that the process in the bill draft seemed cumbersome for the amount of the fee reduction. It was also noted that the bill draft sends a mixed message in that it encourages people to get married but imposes a waiting period. A concern was expressed about the appropriateness of using TANF funds for marriage promotion. According to the testimony, there has not been a reduction in domestic violence in those states that have lowered marriage license fees for couples who complete premarital counseling. The testimony also indicated it is not the goal of the abused adult services programs to save a couple's relationship but rather to provide safety and to give choices to abused adults. It was noted that about 75 percent of people in relationships in which there is domestic violence will leave that relationship.

One committee member expressed concerns that if the purpose of the bill draft was to encourage premarital counseling by reducing the marriage license fee, then this bill draft is essentially the same as the bills considered in the last session. According to the committee member, premarital counseling is available to those couples who want it and the state should not be involved in that process.

Another committee member expressed concern that because marriage is a contract based upon a private agreement between two people, the state should limit its interference with the marriage contract. It was noted that if the state gets involved in mandating or providing incentives for premarital counseling, it is important to realize that not everyone is a Christian, that there are cultural differences, that not everyone speaks the same language, and that not every culture has the same customs.

It was the consensus that the bill draft should be amended to provide that eligibility for a voucher should not be income-based but should be available to any couple willing to participate in premarital counseling.

Recommendation

The committee recommends Senate Bill No. 2041 to provide for a \$25 reduction in the marriage license fee for persons who complete four hours premarital counseling. The bill provides for a voucher system that would be administered by the Department of Human Services. The bill, which does not limit eligibility for the voucher to low-income persons, contains an appropriation of \$110,000 from TANF funds for the program.

UNIFORM TRUST CODE

Senate Concurrent Resolution No. 4031 directed a study of the Uniform Trust Code to determine the feasibility and desirability of adopting the Uniform Trust

Code in North Dakota. The 2005 Legislative Assembly considered Senate Bill No. 2122, which would have provided for the adoption of the Uniform Trust Code. The bill was opposed by the North Dakota Bankers Association, the North Dakota Credit Union League, and the State Bar Association of North Dakota. Senate Bill No. 2122 failed to pass the Senate. This resolution was passed to provide the opponents of the Uniform Trust Code the opportunity to identify the specific provisions that would be detrimental to settlors, beneficiaries, and trustees and those provisions that should be modified to make North Dakota unique in the area of laws governing trusts.

Background

North Dakota Statutory Provisions

North Dakota law regarding trusts is contained in NDCC Chapters 59-01 through 59-05. Chapter 59-01 provides for the general provisions with regard to trusts; Chapter 59-02 provides for trusts for the benefit of third persons; Chapter 59-03 provides for trusts in relation to real property; Chapter 59-04 provides for procedures for the administration of trusts; Chapter 59-04.2 is the codification of the Uniform Principal and Income Act; and Chapter 59-05 addresses powers in relation to real property. With the exception of Chapter 59-04.2, which was enacted in 1999, the majority of the statutes contained in these chapters are based upon the California Civil Code and have remained unchanged since their enactment in 1877.

Uniform Trust Code (2000)

According to the National Conference of Commissioners on Uniform State Laws (national conference), the purpose of the Uniform Trust Code is to provide a comprehensive model for codifying the law on trusts. According to the national conference, while there are numerous uniform Acts related to trusts, such as the Uniform Prudent Investor Act, the Uniform Principal and Income Act, the Uniform Trustees' Powers Act, the Uniform Custodial Trust Act, and parts of the Uniform Probate Code, none is comprehensive. The Uniform Trust Code is intended to enable states that enact it to specify their rules on trusts with precision and to provide individuals with a readily available source for determining their state's law on trusts. The Uniform Trust Code was completed by the national conference in 2000. The Uniform Trust Code has been enacted in Alabama, Arkansas, the District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Utah, Virginia, and Wyoming.

A trust is a fiduciary relationship with respect to property in which one person--the trustee--holds the legal title to the trust property, subject to enforceable equitable rights in another--the beneficiary. It is basically a device, whereby one or more persons manage the property for the benefit of others. The trustee ordinarily has legal title to the property and the beneficiaries have equitable title. The testator or grantor who creates an express trust is the trustor or settlor. Most trusts have identifiable beneficiaries. There are, however, charitable

and honorary trusts, which do not have actual beneficiaries. These trusts have a beneficial purpose that substitutes for named or identifiable beneficiaries. Trusts are recognized in the law for many purposes. Trusts are commonly used as part of an individual's estate plan, to avoid probate, and to obtain favorable tax consequences.

A trustee is a fiduciary, sometimes described as the utmost fiduciary. A fiduciary has enforceable obligations to the settlor, beneficiaries, or beneficial purpose. There are many kinds of fiduciary relationships in the law. The vulnerability of the beneficiaries or the beneficial interest is the reason that the law imposes special obligations on the trustee as a fiduciary.

The prior law governing the trust relationship is fundamentally American common law, best represented in the Restatement (Second) of Law of Trusts, and the Restatement (Third) of Law of Trusts. The restatements come from the American Law Institute. There are also statutes in most states that govern aspects of the trust relationship. A handful of states have attempted a codification of the law of trusts. California is an example.

In 2000 the national conference adopted the first national codification of the law of trusts with the Uniform Trust Code. The Uniform Trust Code has its basis in common-law sources, including the Restatements. Existing statutory law is also a source. The objective of the Uniform Trust Code is a codification of existing law, but with elements of law reform. According to the national conference, the reforms are intended to conform trust law to modern needs. The Uniform Trust Code provides fundamental rules that apply to all voluntary trusts.

According to the national conference, the Uniform Trust Code "does not try to incorporate detailed rules for every conceivable kind of trust, nor does it incorporate all of the kinds of trusts there are. It does not contain statutory rules that are already governing trusts in many jurisdictions, and that are working just fine. It does not displace, for example, the Uniform Prudent Investor Act or the Uniform Custodial Trust Act. What the Uniform Trust Code contains is a set of basic default rules that fairly, consistently, and clearly govern voluntary trusts. It is a default statute for the most part, because the terms of a trust instrument will govern even if inconsistent with the statutory rules."

The Uniform Trust Code is divided into 11 articles. The 1st and 11th articles do not address substantive topics but deal with general provisions, such as definitions and rules of statutory interpretation. Article 9 has no content but may be used to include the Uniform Prudent Investor Act within the Uniform Trust Code if a state wishes to include it there. The eight substantive articles are Article 2 - Judicial Proceedings; Article 3 - Representation; Article 4 - Creation, Validity, Modification, and Termination of a Trust; Article 5 - Creditor's Claims, Spendthrift and Discretionary Trusts; Article 6 - Revocable Trusts; Article 7 - Office of Trustee; Article 8 - Duties and Powers of a Trustee; and Article 10 - Liability of Trustees and Rights of Persons Dealing With Trustee.

Testimony and Committee Considerations

The committee received extensive testimony and information from the national conference, the State Bar Association of North Dakota, and the North Dakota Bankers Association regarding the Uniform Trust Code and the feasibility and desirability of adopting the Uniform Trust Code in North Dakota. The committee also received extensive information and recommendations from the Uniform Trust Code Task Force, a group formed by the State Bar Association of North Dakota to conduct an in-depth review of the Uniform Trust Code. The task force provided information and recommendations regarding proposed changes to the Uniform Trust Code.

National Conference of Commissioners on Uniform State Laws

The committee received extensive testimony from a representative of the national conference regarding the Uniform Trust Code. It was noted that often the impetus for a new uniform Act is to avoid federal preemption. According to the testimony, the national conference works with the Council of State Governments and other national legislative organizations to find the most effective solution to an issue. The testimony indicated that the goal of the national conference is to get all 50 states involved and to draft a product that is fair and balanced for all states.

According to the testimony, 18 states and the District of Columbia have passed the Uniform Trust Code and at least 8 states are considering the Uniform Trust Code in current or upcoming legislative sessions. The testimony indicated that the Uniform Trust Code is a default law that applies only when the trust instrument is silent. The Uniform Trust Code was completed in 2000 and was amended in 2001, 2003, 2004, and 2005. The committee received a section-by-section comparison of the changes made by the states that have enacted the Uniform Trust Code. It was noted several area states, including South Dakota, Iowa, and Montana, are studying the Uniform Trust Code or have plans to introduce the Uniform Trust Code. It was also noted that the Uniform Trust Code is intended to be a model and that a state may want to tailor the Uniform Trust Code to meet that state's needs.

According to the testimony, the Uniform Trust Code was drafted in close coordination with the revision of the Restatement (Third) of Law of Trusts. It was noted that once a state adopts a statute, the Restatement is no longer considered to be the authority on the subject. The majority of North Dakota's statutes on trusts were passed in 1943 with periodic updates. The testimony indicated that North Dakota's laws on trusts are not as comprehensive as the Uniform Trust Code.

The committee also viewed a videotape on the Uniform Trust Code, which was provided to the committee by the national conference. The videotape discussed the provisions of the Uniform Trust Code, including the advantages of having coordinated provisions in multistate trust instances. The presentation on the videotape also provided information on trustee reporting requirements, spendthrift clauses, trustee

powers and duties, and retroactivity. The presentation concluded that the Uniform Trust Code promotes and retains uniformity, simplifies the law, and provides an updated approach to trust law.

Uniform Trust Code Task Force

The Uniform Trust Code Task Force, a group formed by the State Bar Association of North Dakota to conduct an indepth review of the Uniform Trust Code, also provided information and recommendations regarding the Uniform Trust Code, the feasibility and desirability of adopting the Uniform Trust Code in North Dakota, and proposed changes to the Uniform Trust Code.

Throughout the course of the committee's study of the Uniform Trust Code, the committee received extensive information and frequent updates from representatives of the task force regarding its review of the Code. The task force conducted a thorough section-by-section review of the Uniform Trust Code. In addition to reviewing each section of the Uniform Trust Code, the task force reviewed the modifications to each section which have been enacted by other states. It was noted that although 18 states and the District of Columbia have adopted the Uniform Trust Code, each has made extensive modifications to the Code. It was also noted that a 19th state--Arizona--adopted the Uniform Trust Code and then repealed it before its effective date. In 2003 Minnesota considered the Uniform Trust Code and elected to adopt some of its provisions for inclusion in the Minnesota trust statutes. According to the testimony, the interests of North Dakota would be best served if the state could begin to utilize the Uniform Trust Code in a modified form.

Testimony from the task force indicated that within certain parameters, an individual is free to make the decisions on how a trust is set up. It was noted that the Uniform Trust Code provides for retroactive application and thus it will affect existing trusts. For this reason, the testimony indicated that the spendthrift provision was carefully reviewed. It was also noted that the task force carefully reviewed the special needs trusts provisions of the Uniform Trust Code. According to the testimony, in reviewing the Uniform Trust Code, every attempt was made to preserve the intent of currently existing trusts. The task force also emphasized that the Uniform Trust Code is not a revision of an existing uniform law. There are certain trust topics on which the North Dakota Century Code is silent. The Uniform Trust Code addresses those topics.

At the final meeting of the committee, the task force reported that it completed a review of the first six articles of the Uniform Trust Code. According to the testimony, the task force planned to continue to meet to review and recommend proposed changes to the remaining articles.

The committee considered a bill draft relating to the Uniform Trust Code. Testimony in explanation of the bill draft indicated that the bill draft is substantially similar to the version considered by the 2005 Legislative Assembly; however, the bill draft included those changes recommended by the task force to date.

Recommendation

The committee recommends House Bill No. 1034 to adopt the Uniform Trust Code. The bill includes those changes recommended by the Uniform Trust Code Task Force as of the date the committee completed its work for the interim. The committee also recommends that further changes to the Uniform Trust Code as recommended by the task force be presented to the Legislative Assembly as amendments. The task force was requested to forward the additional changes to the Legislative Council to be prepared as amendments.

UNIFORM COMMERCIAL CODE REVISED ARTICLE 1 - GENERAL PROVISIONS STUDY

Senate Concurrent Resolution No. 4032 directed a study of the Uniform Commercial Code Revised Article 1 - General Provisions (2001). The purpose of the study was to determine the feasibility and desirability of adopting Revised Article 1. In 2005 the Legislative Assembly considered Senate Bill No. 2143, which would have provided for the adoption of Revised Article 1. Senate Bill No. 2143 failed to pass the Senate. Supporters of Senate Concurrent Resolution No. 4032 testified that an interim study of Revised Article 1 would provide opponents of harmonization of the various articles of the Uniform Commercial Code an opportunity to identify those provisions that should be unique to North Dakota.

Background

North Dakota Statutory Provisions

North Dakota's current version of the Uniform Commercial Code Article 1 - General Provisions is contained in NDCC Chapter 41-01. Article 1 was adopted by the Legislative Assembly in 1965. This chapter provides definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code.

Revised Article 1 of the Uniform Commercial Code

According to the national conference, the purpose of Revised Article 1 is to update the General Provisions section of the Uniform Commercial Code and to harmonize Article 1 with ongoing Uniform Commercial Code projects and recent revisions. Revised Article 1 was completed by the national conference and the American Law Institute in 2001. Revised Article 1 has been approved by the American Bar Association. Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Texas, United States Virgin Islands, Virginia, and West Virginia have adopted Revised Article 1.

Uniform Commercial Code Article 1 provides definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code.

According to the national conference, as other parts of the Uniform Commercial Code have been revised and amended to accommodate changing business practices and development in the law, these modifications need to be reflected in an updated Article 1. In addition, over the years it has been in place, the national conference reports that certain provisions of Article 1 have been identified as confusing or imprecise. Several changes reflect an effort to add greater clarity in light of this experience. According to the national conference, developments in the law have led to the conclusion that certain changes of a substantive nature needed to be made.

The first substantive change is intended to clarify the scope of Article 1. Section 1-102 now expressly states that the substantive rules of Article 1 apply only to transactions within the scope of other articles of the Uniform Commercial Code. The statute of frauds requirement aimed at transactions beyond the coverage of the Uniform Commercial Code has been deleted. Second, amended Section 1-103 clarifies the application of supplemental principles of law, with clearer distinctions about where the Uniform Commercial Code is preemptive. Third, the definition of "good faith" found in 1-201 is revised to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing." This change conforms to the definition of good faith that applies in all of the recently revised Uniform Commercial Code articles, except Revised Article 5. Finally, evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of trade.

Another change in Revised Article 1 deals with default choice of law provisions found in Section 1-301, which replaces previous Section 1-105. Under Article 1, before the 2001 amendments, parties to a transaction could agree to be governed by the law of any jurisdiction that bears a reasonable relation to that transaction. Revised Article 1 provides a different basic rule that applies except for consumer transactions in certain circumstances.

With respect to all transactions, an agreement by the parties to use the law of any state or country is effective, regardless of whether the transaction bears a reasonable relation to that state. However, if one of the parties to a transaction is a consumer, such a choice of law provision in a contract may not deprive the consumer of legal protections afforded by the law of the state or country in which the consumer resides, or of the state or country where the consumer contracts and takes delivery of goods. Also, with respect to all transactions, an agreement to use the law of a designated state or country is ineffective to the extent that application would violate a fundamental public policy of the state or country that has jurisdiction to adjudicate a dispute arising out of the transaction. The forum state's law will govern the transaction if the contract is silent on the issue of choice of law.

Previous Studies and Legislation

The 2001-02 interim Judiciary A Committee, pursuant to NDCC Section 54-35-02, studied the Uniform

Commercial Code Article 1 - General Provisions (2001). The committee made no recommendation regarding Revised Article 1. During the 2003 legislative session, the Legislative Assembly considered House Bill No. 1069, which would have codified the changes proposed in Revised Article 1. The bill was withdrawn from consideration.

In addition to the 2001-02 study of Revised Article 1, a number of other articles of the Uniform Commercial Code have been studied in recent years. The 2001-02 interim Judiciary A Committee and the 2003-04 interim Judicial Process Committee studied Uniform Commercial Code Article 2 - Sales, Article 2A - Leases, Article 3 - Negotiable Instruments, and Article 4 - Bank Deposits and Collections. The 2003-04 interim Judicial Process Committee also studied Uniform Commercial Code Article 7 - Documents of Title, which was adopted by the Legislative Assembly in 2005. The 1999-2000 interim Judiciary Committee studied Uniform Commercial Code Article 9 - Secured Transactions, which was adopted by the Legislative Assembly in 2001.

Testimony and Committee Considerations

The committee received extensive testimony and information from the national conference, the State Bar Association of North Dakota, and the North Dakota Bankers Association regarding Uniform Commercial Code Revised Article 1 and the feasibility and desirability of adopting Revised Article 1 in North Dakota. The committee also received extensive information and recommendations from the Uniform Commercial Code Revised Article 1 Task Force, a group formed by the State Bar Association of North Dakota to conduct an indepth review of Revised Article 1. The task force provided to the committee information and recommendations regarding Revised Article 1.

The committee received testimony that the primary objections to the adoption of Revised Article 1 during the 2003 and 2005 legislative sessions were the choice of law provisions of Revised Article 1 and how the definition of "good faith" and "fair dealings" would apply. It was noted that every state that has adopted Revised Article 1 has removed the choice of law provision. It was also noted that those states that have adopted Revised Article 1 have done so with substantive changes. According to the testimony, the choice of law provision in Revised Article 1 creates uncertainty in the choice of law issue.

National Conference of Commissioners on Uniform State Laws

The committee received information and testimony from a representative of the national conference regarding Revised Article 1. Article 1 of the Uniform Commercial Code provides definitions and general provisions that, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code. According to the testimony, Revised Article 1 contains technical nonsubstantive modifications, such as reordering and renumbering sections, and adding gender-neutral terminology. It was

noted that because of developments in the law, certain substantive changes in Article 1 have been made as well. According to the testimony, Revised Article 1 contains a number of necessary changes that every state should adopt, including a change in the scope of Article 1. This section provides that the substantive rules of Article 1 apply only to transactions governed by other articles of the Uniform Commercial Code. Revised Section 1-103 clarifies the application of supplemental principles of law and provides clearer distinctions about where the Uniform Commercial Code is preemptive. Section 1-201 of Revised Article 1 adopts the objective standard of "good faith" which applies in all of the recently revised Uniform Commercial Code articles, except Revised Article 5. The default choice of law provisions have been revised and are now found in Section 1-301 to replace former Section 1-105. With respect to all transactions, an agreement by the parties to use the law of any state or country is generally effective regardless of whether the transaction bears a reasonable relation to that state. According to the testimony, it appears that most states want to keep their current choice of law provisions.

Uniform Commercial Code Revised Article 1 Task Force

The Uniform Commercial Code Revised Article 1 Task Force, a group formed by the State Bar Association of North Dakota to conduct an indepth review of Revised Article 1, provided to the committee information and recommendations regarding Revised Article 1, the feasibility and desirability of adopting Revised Article 1 in North Dakota, and proposed changes to Revised Article 1. Several committee members served on the task force.

Throughout the course of the committee's study of Revised Article 1, the committee received extensive information and frequent updates from representatives of the task force regarding its review of Revised Article 1. According to a representative of the task force, there was robust discussion about the changes to Revised Article 1, specifically dealing with the issue of the definition of good faith. According to the testimony, the consensus of the task force was to adopt Revised Article 1 with certain changes. It was noted that 2005 Senate Bill No. 2143 was used as the base document for the task force review of Revised Article 1.

The first recommended change of the task force was that instead of adopting Revised Section 1-301, the current version of NDCC Section 41-01-05 should be retained. It was noted that the task force determined it necessary to retain the current version of Section 41-01-05 because to date no state has adopted Revised Section 1-301. It also was noted that there does not seem to be a problem with jurisdiction under the current statute and it is not necessary to cause any further confusion adopting Revised Section 1-301.

The second recommended change was that Revised Section 1-304, codified as NDCC Section 41-01-18 should be modified to provide that "[t]his section does not support an independent claim for relief for failure to perform or enforce in good faith, and does not create a

separate duty of fairness and reasonableness which can be independently breached." According to the testimony, the reason this section was suggested is to show that there is no independent claim for relief for a breach of this section. It was noted that there is ample support for this change in the law. It was also noted that this language is supported by the Uniform Commercial Code comments to this section and that the language was lifted, in part, from the comment to the Uniform Commercial Code. According to the testimony, the Uniform Commercial Code's Permanent Editorial Board Comment 10 indicates that there should be no lawsuit solely based upon the provision of good faith. According to the testimony, there may be courts and litigants that still may contend that there is a separate claim for relief based upon this section. Because of this concern, it was noted that North Dakota should eliminate any chance that anyone would interpret this section as an independent basis for a lawsuit.

The third recommended change was that NDCC Section 41-05-02(1)(g) be amended to clarify that the definition of good faith contained in Article 1 does not apply to Article 5. The testimony indicated that there is general agreement that no change to Article 5 was intended by the Revised Article 1 change to the definition of good faith and that adding this language to Section 41-05-02 makes that clear. According to the testimony, there was extensive discussion about the definition of good faith and whether the revised definition of good faith should be adopted. It was noted that the recommendation of the task force is to accept the revised definition of good faith.

Based upon the recommendations of the task force, the committee considered a bill draft relating to the Uniform Commercial Code Revised Article 1 - General Provisions. Testimony in explanation of the bill draft indicated that the bill draft is substantially similar to the version considered by the Legislative Assembly in 2005; however, the bill draft includes the changes recommended by the task force. Those changes included retaining NDCC Section 41-01-05 instead of adopting Revised Section 1-301; modifying Revised Section 1-304, codified as Section 41-01-18 to provide that "[t]his section does not support an independent claim for relief for failure to perform or enforce in good faith, and does not create a separate duty of fairness and reasonableness which can be independently breached; and amending the definition of good faith to clarify that the definition of good faith contained in Article 1 does not apply to Article 5.

Recommendation

The committee recommends House Bill No. 1035 to adopt the Uniform Commercial Code Revised Article 1 - General Provisions. The bill provides definitions and general provisions that, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code. The bill also includes changes recommended by the Uniform Commercial Code Revised Article 1 Task Force.

UNIFORM LAWS REVIEW

The North Dakota Commission on Uniform State Laws consists of nine 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 on which uniformity is desirable and practicable and to serve state governments 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.

According to testimony from a representative of the North Dakota Commission on Uniform State Laws, the national conference has recommended the Uniform Anatomical Gift Act; Uniform Child Abduction Prevention Act; Uniform Prudent Management of Institutional Funds Act; Uniform Power of Attorney Act; Uniform Limited Liability Compact Act; Uniform Representation of Children in Abuse and Neglect and Custody Proceedings Act; and the Model Registered Agents Act. The state commission indicated that the uniform Acts that are possibilities for recommendation in North Dakota are the Uniform Commercial Code Revised Article 1 and the Uniform Trust Code, both of which were studied by the interim Judiciary Committee, the Uniform Anatomical Gift Act, the Uniform Environmental Covenants Act, and amendments to the Uniform Disclaimer of Property Interests Act. According to the testimony, the 1987 version of the Uniform Anatomical Gift Act was adopted in North Dakota in 1989. The testimony indicated that the revised Act has added people, in priority order, who can authorize the anatomical gift and the Act clarifies that those same people do not have the authority to revoke a gift.

The committee makes no recommendation regarding these uniform Acts.

REPORTS OF THE DEPARTMENT OF HUMAN SERVICES

The committee received two reports from the Department of Human Services regarding the status of the alternatives-to-abortion services funding program. The department was assigned the responsibility of establishing an alternatives-to-abortion services program in North Dakota. According to the report from the department, it was the intention of the Legislative Assembly that the department seek funds from the federal Office of Faith-Based and Community Initiatives

for this project. The report indicated, however, that funds from this office were available only for abstinence programs or grants to agencies that would provide technical assistance to faith-based or community-based programs interested in applying for federal funds. The report indicated that with no funds available from this source, TANF funds are being used to fund the alternatives-to-abortion services program. It was noted that the Charitable Choice provisions in TANF govern the administration of this program.

According to the report, the department provides alternatives-to-abortion services by making vouchers available to individuals needing the service. Those individuals use the vouchers to access the services and the service providers use the vouchers to bill the department. This method allows the department to pay all interested providers for these services. The department contacted all agencies that had been providing alternatives-to-abortion services before the implementation of the program. According to the report, these agencies became partners in developing this program and are receiving payment through the program for their services. The eight agencies currently providing these services are Catholic Charities of North Dakota, Christian Family Life Services, First Choice Clinic, the Perry Center, the St. Gianna's Maternity Home, The Village Family Service Center, the Women's Pregnancy Center, and the YFC Teem Moms. According to the report, the Mental Health Association in North Dakota is also a partner by allowing use of the 211 hotline to direct referrals to the alternatives-to-abortion program. The department has developed a script for the Mental Health Association staff to use when they get a 211 call regarding an unplanned pregnancy.

According to the report, the program became operational shortly before the beginning of 2006. At the time of the report, the eight service providers had submitted claims and all had been paid or approved for payment. That amount, as of July 31, 2006, was \$43,555. The total of all clients served and billed for all months since the program began was 556 as of July 31, 2006. The report indicated that the voucher process is an effective way to deliver this service and the current rate of spending suggested that the \$500,000 appropriated in Senate Bill No. 2409 was sufficient for the intended purpose. According to the report, program funds cannot be used to provide medical service. All funding must be used for offering alternatives-to-abortion services. The report also noted that the department will have more data on the results and effectiveness of the program for the Legislative Assembly during the upcoming session.