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March 17, 2021

The Honorable Judy Lee
State Capital Building
600 E. Boulevard Ave.
Bismarck, ND 58505

***RE: House Bill 1254***

Dear Senator Lee:

My name is Jason McLean. I am a family law attorney in Fargo, North Dakota. I have practiced exclusively in the area of family law since becoming licensed in this state in 2004. Prior to that time, I clerked for a family law attorney in Grand Forks. I have also practiced family law in Minnesota since 2003. It is with that background that I provide this testimony opposing House Bill 1254.

Throughout the many years of practice in family law, nothing has proved more vexing to courts, parties, and even attorneys, than our spousal support laws. The sparseness of the statutory language, and our reliance on case law for parameters, provides little clarity for families as they try to navigate the issues. Unfortunately, HB 1254 does not address these issues. Rather, it provides arbitrary periods of time and prevents the discretion of the courts to increase an award if there may be reason to do so. It does not address the underlying problems in our spousal support system, as I will explain here.

Initially, to understand the problems with our current system, the Committee needs to know that there are no statutory provisions as to the why or how spousal support is awarded. Nothing in the current Century Code provisions explains what circumstances are required to be used by the courts, only that circumstances are to be considered. Over the years, the courts have used the *Ruff-Fisher* guidelines, first developed as it related to spousal support (alimony) in *Ruff v. Ruff*, for nearly 70 years. These factors address the intertwined issues of spousal support and property division. These factors are well known to courts and practitioners, but have never been codified. Moreover, they have not changed with the times. The factors are attached as a separate PDF for your convenience.

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Over time, our district courts have been left to address each spousal support case individually, with only these factors. The factors do not speak about duration of the award or the amount. Our Supreme Court has developed case law to help with the unknowns. For example, the need of a party and the ability to pay are taken into account. However, recent decisions have muddied the waters as to what type of spousal support should be awarded and what the purpose (need) of that award may be.

Recently, the decision in *O'Keeffe v. O'Keeffe*, 2020 ND 201, 948 N.W.2d 848, highlighted the problem with termination of support. In *O'Keeffe*, the question related, in part, to co-habitation, the nature of support, and what constituted temporary support versus rehabilitative support. In that discussion, the Court was forced to look at and apply different factors depending on if the support award was to rehabilitate a party or not. These are judicial creations, not within the statute. Instead, the Court, because it was forced to do so, has now created three forms of spousal support: permanent, temporary, and rehabilitative. If a party wants to see which one he or she will get, litigation is the only avenue.

In addition to the questions of need and ability to pay, the Court developed a maxim that a spouse need not dissipate his or her marital estate award to live. That is often seen as a purpose behind spousal support. Because property divisions and spousal support are intertwined, the district courts are supposed to ensure that a spouse can live without having to liquidate the only award he or she may get. Until recently, this was generally applied to the spouse in need, and not the spouse with the alleged ability to pay. That arguably changed in *Willprecht v. Willprecht*, 2021 ND 17. In this decision, the Court expanded the dissipation of asset provisions to the payors as well. In doing so, there is a valid question of whether ***any*** spousal support award could be justified under the current law.

Additionally, spousal support awards can be dependent on the vocation of the payor. For example, if there are two payors, who each earn $200,000 a year, but one is a farmer, the judicial protection for family farms could mean that person is treated differently than a wage earner. The reason for difference is the farmer has he ability to control his or her own income, has the ability to reduce that income, and our courts are extremely reluctant to do anything that could break up a family farm. The reluctance is there, even if it means providing no aide to the spouse that helped build the farm.

I bring up these issues—hardly an exhaustive list—as examples of the problems that lie within our current system. HB 1254 does not address these issues. It will not fix a broken system. If spousal support in North Dakota were a home, it would be referred to as a tear-down. That is the best course of action here.

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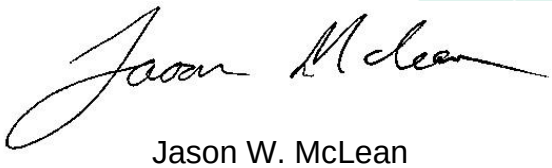
This Committee should vote Do Not Pass on HB 1254. In its place, a legislative study should be convened over the course of the next two yeas to study spousal support/maintenance/alimony throughout the 50 states so that we may bring our system into the 21st century. It may be that a use of guidelines, similar to child support, is the most equitable solution. There may be mathematical formulas in other jurisdictions that help to determine temporary and permanent awards that can be used here. What I can say with certainty is that there is a better system out there than what we have here.

Lastly, in his dissent in *Stock v. Stock*, 2016 ND 1, 873 N.W.2d 38, former Justice Dale Sandstrom issued a quote that has become a bit famous, or infamous, depending on your view: "It is time to end the spousal support lottery." While Justice Sandstrom was describing what he viewed as a party getting rich off another, in reality the idea of the spousal support lottery isn't that farfetched. Like the regular lottery, the chances of "hitting the big one" are astronomical. Like the actual lottery, you have no idea what you are going to get until someone tells you the number. Like the actual lottery, most folks don't play. But, for those that do, it is important that we have rules and guidelines that are fair to all. HB 1254 does not address those issues, and it should not become law.

I thank the Committee for its time and consideration.

Sincerely,



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