

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### JUDICIARY COMMITTEE

Monday, March 20, 2006  
Harvest Room, State Capitol  
Bismarck, North Dakota

Representative Lois Delmore, Chairman, called the meeting to order at 10:00 a.m.

**Members present:** Representatives Lois Delmore, Bill Amerman, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar; Senators Dick Dever, Stanley W. Lyson, Carolyn Nelson, Thomas L. Trenbeath

**Member absent:** Senator John T. Traynor

**Others present:** See attached appendix

**It was moved by Senator Nelson, seconded by Senator Lyson, and carried on a voice vote that the minutes of the November 14, 2005, meeting be approved as distributed.**

#### UNIFORM COMMERCIAL CODE ARTICLE 1 STUDY

Chairman Delmore called on Mr. Lowell Bottrell, Chairman, Uniform Commercial Code Task Force, Fargo, for testimony regarding the recommendations of the task force. Mr. Bottrell said meetings of the task force were conducted in November, January, and February. He said at those meetings, the task force members considered the suggested adoption of 2005 Senate Bill No. 2143, which dealt with the revised provisions of Article 1 of the Uniform Commercial Code (UCC). He said there was robust discussion about the changes to Revised Article 1, specifically dealing with the issue of the definition of good faith. He said the consensus of the task force was to adopt Revised Article 1 with certain changes.

The first recommended change, Mr. Bottrell said, is that instead of adopting Revised Section 1-301, the current version of North Dakota Century Code (NDCC) Section 41-01-05 should be retained. He said the task force felt it necessary to retain the current version of Section 41-01-05 because to date no state has adopted Revised Section 1-301. He said there does not seem to be a problem with jurisdiction under the current statute and the task force felt it is not necessary to cause any further confusion adopting Revised Section 1-301.

The second recommended change, Mr. Bottrell said, is 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." He said the reason this section was

suggested is to show that there was no independent claim for relief for a breach of this section. He said there is ample support for this change in the law. He said this language is supported by UCC comments to this section. He said the language was lifted, in part, from the comment to the UCC. He said UCC's Permanent Editorial Board Comment 10 indicates there should be no lawsuit solely based upon the provision of good faith. He said there may be courts and litigants that still may contend that there is a separate claim for relief based upon this section. He said because of this concern, the task force felt it necessary that North Dakota eliminate any chance that anyone would interpret this section as an independent basis for a lawsuit.

Mr. Bottrell said the third recommended change is 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. He said there is general agreement that no change to Article 5 was intended by the Article 1 change to the definition of good faith and that adding this language to Section 41-05-02 makes that clear. He said no other change to 2005 Senate Bill No. 2143 is recommended.

Mr. Bottrell said there was a robust discussion about the definition of good faith and whether the revised definition of good faith should be adopted. He said the recommendation of the task force is to accept the revised definition of good faith. Mr. Bottrell submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Koppelman, Mr. Bottrell said the claim for relief cannot be based solely upon a claim of bad faith. He said there must also be a contractual breach. He said bad faith may be an additional element to the contractual breach. He said there is a possibility that enhanced damages may be awarded for a claim of bad faith.

In response to a question from Representative Kretschmar, Mr. Bottrell said the task force was not unanimous on every provision but it was unanimous on the changes to Section 1-304.

In response to a question from Representative Delmore, Mr. Bottrell said North Dakota does not have any case law on challenges to Section 1-304. He said the section was never intended to create an independent claim for relief.

Representative Delmore requested that the Legislative Council staff prepare a bill draft

incorporating the changes suggested by the report of the task force.

Chairman Delmore called on Ms. Marilyn Foss, North Dakota Bankers Association, Bismarck, for testimony concerning the UCC Article 1 study. Ms. Foss said other states have asserted that it is permissible to sue for bad faith even if there is not a contractual breach. She said there was a lender case in South Dakota in which there was a claim of unreasonableness without a breach of contract. She said the court found that the separate obligation of fair dealing did not create a separate cause of action.

Representative Klemin said he was involved in a similar case that was not appealed to the North Dakota Supreme Court. He said bad faith was alleged as a counterclaim in this case. He said the district court held that the bad faith claim was frivolous.

### **UNIFORM TRUST CODE STUDY**

Chairman Delmore called on Mr. Bill Neumann, Executive Director, State Bar Association of North Dakota, Bismarck, for comments regarding the status of the Uniform Trust Code Task Force. Mr. Neumann said the task force was formed before Christmas and has been meeting on a monthly basis since its formation. He said the task force has been reviewing not only the entire Uniform Trust Code (UTC) as recommended by the National Conference of Commissioners on Uniform State Laws but also the modifications to each section of the UTC which have been enacted by other states. He said this is proving to be a substantial task but the task force has continued to move ahead with a section-by-section review. He said based upon this review, the task force is preparing draft suggestions for the Judiciary Committee. He said at this point, it is uncertain whether the task force will be able to complete its review of the UTC before the Judiciary Committee concludes its work for the interim. He said the task force will make every effort to submit a report in time for this committee's consideration in advance of the 2007 legislative session. He said the task force is committed to doing a complete and thorough job in order to present a report that will be useful to the Legislative Assembly. He said that may mean that legislative action on the UTC may be delayed until the 2009 legislative session. Mr. Neumann submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Delmore, Mr. Neumann said 15 states and the District of Columbia have adopted the UTC; however, all states that have adopted the UTC have done so with substantive changes. He said the task force will continue to move along with its review. He said the task force may seek an individual legislator to sponsor the bill if the task force cannot complete its work before the end of the interim.

Representative Klemin said it would be possible for the North Dakota Commission on Uniform State Laws to introduce the bill as well.

### **MARRIAGE LAWS STUDY**

Chairman Delmore called on Ms. Randi Roerick, North Dakota Council on Abused Women's Services, Bismarck, for testimony regarding marriage and domestic violence. Ms. Roerick said in 2004 there were 4,483 incidents of domestic violence reported to local programs. She said approximately 30 percent of those incidents involved victims who were assaulted by their spouse. She said 10 percent of the incidents involved a former spouse and 15 percent of the incidents involved abuse by a cohabitating partner. She said 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. She said these victims represent only a small percentage of those who are physically and sexually assaulted each year because most victims remain silent. She said 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 is not true.

Ms. Roerick said domestic violence advocates work hard to promote healthy relationships and provide education and awareness materials that promote the development of healthy relationships to communities, schools, and churches. She said funds from the domestic violence prevention fund are used consistently to directly support women and children in violent relationships. In 2004, she said, \$82,282 was disbursed from the fund to domestic violence agencies around the state. She said in 2005 the Legislative Assembly increased the portion of the marriage license fee that is deposited into this fund from \$29 to \$35. She said the increase has resulted in an additional \$5,000 over the last six months. She said the increase was deeply appreciated; however, it only represents about a \$1,000 increase per biennium for each program. She said 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. She said the fund is vital to direct service work and to help support services such as assistance in securing a protection order, shelter stays, children's services, 24-hour crisis hotline services, counseling and support groups, and batterer's treatment programs. She said her organization will continue to advocate for those who are unable to stay in a marriage due to violence. Ms. Roerick submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Koppelman, Ms. Roerick said she would provide to the committee information on the funding sources for domestic violence programs.

In response to a question from Representative Delmore, Ms. Roerick said the 2005 statistics are in the process of being compiled. She said she would provide that information to the committee when it is available.

In response to a question from Senator Dever, Ms. Roerick said advocates offer assistance to the victim whether it be leaving a relationship or staying in a relationship.

In response to a question from Representative Delmore, Ms. Roerick said it would be difficult to promote one alternative or another. She said the advocates support the victim's decision.

In response to a question from Representative Klemin, Ms. Roerick said if the marriage license fee is reduced, the amount that is deposited in the domestic violence prevention fund should not be reduced.

In response to a question from Representative Koppelman, Ms. Roerick said in cases in which there has been domestic violence, marriage counseling often is not very effective.

Chairman Delmore called on Dr. Sean Brotherson, Extension Family Science Specialist, North Dakota State University, Fargo, for testimony regarding the marriage laws study. Dr. Brotherson said in his position at North Dakota State University, he is responsible for conducting research on family life and developing and implementing educational programs to support children, families, and communities. He said he also serves as a resource specialist to state and local agencies and organizations in the state on issues of child and family well-being.

Dr. Brotherson said the government has traditionally taken an interest in creating an environment for healthy family relationships based upon the recognition that healthy families and strong marriages provide the seedbed for a good and virtuous society. He said there is a large body of social science research on marriage and its effects. He said overall the available research evidence persuasively demonstrates the advantages of marriage for children, adults, and society. He said 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, wealthier, and enjoy longer lives. He said divorce is a significant problem in our society. He said 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. He said healthy, stable marriages get the work of society done with minimal government involvement in personal lives. He said

recent research suggests that American citizens are generally supportive of efforts to strengthen marriage.

Dr. Brotherson said some governmental efforts to assist preparation for healthy marriage relationships include incentives to participate in education or counseling prior to marriage, modification of tax or economic assistance policies to benefit couples, and the delivery of educational programs on relationships to adolescents and youth. He said 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. He said 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. He said incentives appeal to the need for marital preparation while also preserving voluntary action for couples affected by state policies. He said since 1996 at least six states have attempted to require premarital counseling as a prerequisite to receiving a marriage license; however, none of those bills passed. He said the mandatory requirement approach is often seen as too heavy-handed and intrusive. He said a more successful policymaking approach occurred among states that invested in providing resources or educational opportunities to marrying couples. He said there is an increasing body of recent research that provides evidence that premarital education programs achieve their goal of helping couples form and sustain healthy marriages.

Dr. Brotherson said some important legislative changes regarding the provision of support to couples within marriage have also occurred in several states. He said one trend is to provide more benefits to married couples and strengthen commitment within marriages. He said the North Dakota State University Extension Service is a statewide educational system linked to higher education, not simply an agricultural research organization. He said parent and family education is an important emphasis in extension services across the country. He said the North Dakota State University Extension Service is required by law to design a program to educate and support individuals at all points in the family life cycle and it must provide support for families and youth with research-based information relating to personal, family, and community concerns.

Dr. Brotherson said while there is no legislative mandate for divorce-related education as in other states, there are clear efforts to provide such education. He said the North Dakota State University Extension Service has developed a four-hour educational program entitled "Children of Divorce." He said individuals who are separated or divorced are referred to this program by attorneys, local judges, social workers, teachers, or others who feel it is important for them to be exposed to education about the effects of divorce on children. Dr. Brotherson

submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Delmore, Dr. Brotherson said some of the information contained in his report is based upon research done in Oklahoma and Utah. He said he used the statistics contained in that research and converted the information using North Dakota marriage statistics.

In response to a question from Representative Klemin, Dr. Brotherson said the direct and indirect state, federal, and personal costs of divorce can range from \$35,000 to \$50,000 per divorce per year.

In response to a question from Representative Delmore, Dr. Brotherson said government involvement in marriage is a contentious issue. He said most states that have attempted to address the marriage issues have used a voluntary approach that offers incentives. He said about 30 to 40 percent of couples have had some type of premarital counseling. He said most of that premarital counseling is done through the couple's church. He said 75 to 80 percent of marriage ceremonies in the United States occur in a religious setting. He said that percentage is probably higher in North Dakota.

In response to a question from Representative Koppelman, Dr. Brotherson said he would welcome the opportunity to do North Dakota research that is similar to the marriage research done in Utah and Oklahoma. He said he would need funds to do such a study. He said the template is there so he would need just the funding. He said any incentives that encourage safe and stable relationships should be offered. He said to make the investment upfront is wise. He said research shows that the upfront programs do make a difference.

In response to a question from Representative Delmore, Dr. Brotherson said the premarital and marital counseling curricula that couples receive varies in both type and amount.

In response to a question from Senator Lyson, Dr. Brotherson said most of the research is based on couples who are in their 20s.

In response to a question from Representative Koppelman, Dr. Brotherson said there is excellent evidence to support the claim that counseling reduces conflict in a marriage.

In response to a question from Senator Nelson, Dr. Brotherson said studies conducted in Oklahoma, South Carolina, Louisiana, Utah, and Florida have all had similar results. He said Oklahoma began its efforts to strengthen marriages because research indicated that the state's high level of divorce was having a negative impact on the state's economy. He said regulating divorce is more difficult than offering incentives for premarital education.

In response to a question from Representative Klemin, Dr. Brotherson said the effects of an upfront investment may not be seen for years. He said research shows there is a significant decrease in divorces when there has been quality premarital and marital counseling.

In response to a question from Senator Dever, Dr. Brotherson said most of the innovative approaches in the area of alternatives to adversarial divorces have occurred in the judicial system. He said there have been some very promising approaches that target couples who are willing to work at their relationships.

In response to a question from Representative Delmore, Dr. Brotherson said Oklahoma used \$10 million in excess temporary assistance for needy families (TANF) funds to provide incentives. He said the federal TANF legislation encourages states to use TANF funds to encourage and strengthen marriage. He said the motivation behind this is that the investment upfront may prevent the need for public assistance at the end. He said there are also other federal funds available for marriage counseling programs.

Representative Koppelman said the North Dakota Supreme Court is working on a court rule to require parties to consider mediation in family law cases.

In response to a question from Senator Nelson, Dr. Brotherson said 50 percent of marriages are remarriages. He said remarriages are more likely to end in divorce than first-time marriages. He said the older a couple is at the time of marriage, the less likely they are to divorce.

Chairman Delmore called on Mr. Christopher Dodson, Executive Director, North Dakota Catholic Conference, Bismarck, for testimony regarding the marriage laws study. Mr. Dodson said marriage is a contractual agreement, an intimate relationship, and a religious covenant, but above all, marriage is a civic institution. He said the public commitment made between two persons results in benefits and duties that flow from the couple to the community and from the community to the couple. He said those benefits and duties extend to future generations. He said because the institution of marriage is rooted in the community and serves as the basis of the family, it is an essential component of the common good. Therefore, he said, the state has a legitimate and compelling interest in encouraging, preserving, and strengthening healthy marriages. He said increased government attention to the marriage and family structure has produced a wealth of social data that convincingly demonstrates the advantages of marriage for children, adults, and society. He said even after controlling for 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. He said men and women in marriages are significantly better off than their unmarried counterparts. He said married people tend to be healthier and save more money for retirement. He said marriage has benefits to society. He said marriage creates social bonds that would not happen in single or childless persons. He said marriage changes a person's lifestyle. He said married persons are more likely to vote and there is lower crime in

communities with higher percentages of married people.

Mr. Dodson said the government should ensure that state policies and practices do not deinstitutionalize marriage. He said government policies should treat the married couple as a distinct social, legal, and financial unit. He said treating married couples as if they were unmarried individuals or treating unmarried individuals as if they are married weakens marriage as a social institution. He said the government can ensure that public school curricula treats marriage as a civic institution; treats marriage as the ideal family form, especially for childbearing; does not equate marriage with all other types of relationships; educates about the proven personal, familial, and community benefits of marriage; and equips graduates with the skills needed to avoid bad relationships and build healthy ones. He said public school programs should emphasize marriage, not just maturity, in abstinence and pregnancy prevention programs. He said 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. He said the 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. He said other ideas include the establishment of a marriage commission charged with evaluating how state agencies treat marriage and developing specific initiatives and policies; hold conferences with faith-based and community organizations on marriage strengthening policies; invest in initiatives to promote fatherhood; incorporate marriage incentives in TANF; and discount marriage license fees for low-income couples who receive premarital counseling, using TANF funds to offset the cost. Mr. Dodson submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Delmore, Mr. Dodson said marriage education is a component in the curriculum of many Catholic schools. He said while it is difficult to mandate a program to those who are not interested, education can be used to emphasize marriage.

In response to a question from Representative Koppelman, Mr. Dodson said TANF funds could be used to subsidize the marriage license fee for low-income persons who receive premarital counseling.

In response to a question from Representative Delmore, Mr. Dodson said a voucher system could be set up whereby the counties would be reimbursed by the Department of Human Services for the amount of the reduced license fee.

In response to a question from Representative Klemin, Mr. Dodson said the Department of Human Services has the authority to implement such a program but it is likely that the department would want the approval of the Legislative Assembly before implementing it.

In response to a question from Representative Amerman, Mr. Dodson said the state's interest should be in protecting marriage as a civil institution, not as a religious institution. He said if it is a social good, it is a legitimate interest of the state.

Representative Klemin said he would like to have a bill draft prepared that reduces marriage license fees for low-income persons who complete premarital counseling. He said the bill draft should authorize the use of TANF funds and a voucher system through the Department of Human Services.

Representative Kretschmar said the committee may want to consider a resolution to encourage funding for a research project on marriage and divorce in North Dakota.

Senator Dever said a forum on marriage and fatherhood initiatives will be held at the National Conference of State Legislatures Spring Forum.

No additional business pending, Chairman Delmore adjourned the meeting at 2:00 p.m.

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Vonette J. Richter  
Committee Counsel

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