

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIAL PROCESS COMMITTEE

Tuesday, April 16, 2008
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Shirley Meyer, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Shirley Meyer, Chris Griffin, Nancy Johnson, Joyce Kingsbury, Lawrence R. Klemin, William E. Kretschmar, Lee Myxter, Lisa Wolf; Senators JoNell A. Bakke, Tom Fiebiger, Curtis Olafson, Constance Triplett

Members absent: Representatives Dennis Johnson and Kim Koppelman

Others present: See attached [appendix](#)

It was moved by Representative Wolf, seconded by Representative Klemin, and carried on a voice vote that the minutes of the January 9, 2008, meeting be approved.

COMMISSION ON LEGAL COUNSEL FOR INDIGENTS ANNUAL REPORT

Chairman Meyer called on Ms. Robin Huseby, Executive Director, Commission on Legal Counsel for Indigents, for the presentation of the annual report of the commission. Ms. Huseby said North Dakota Century Code Section 54-61-03 mandates that the director of the commission submit an annual report containing pertinent data on the operation, needs, and cost of the indigent defense contract system; any established public defender offices; and any other information as the commission may require. She said the commission has been in existence for about two years. She said public defender offices are operational in Williston, Dickinson, Grand Forks, and Minot. She said the Minot office, for example, is handling about 280 cases per calendar year. She said the assignments are a mixture of felonies, misdemeanors, and juvenile cases. She said in Minot, as in the other public defender cities, the commission hires conflict counsel to handle those cases in which the public defender may have a conflict of interest. She said there will be public defender offices in Bismarck and Fargo by the end of 2008. She said about two-thirds of indigent defense cases are being handled by contract attorneys and about one-third by public defender offices. She submitted a written copy of the annual report, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Fiebiger, Ms. Huseby said one of the most challenging issues has been finding attorneys to do indigent defense work, especially in the western part of the state. She

said indigent defense is a niche. She said it takes a special person to be able to do this kind of work.

In response to a question from Representative Meyer, Ms. Huseby said in the case of conflicts, there is a need to hire outside counsel. She said hiring outside counsel is often more expensive.

In response to a question from Senator Triplett, Ms. Huseby said many of the complaints received about the indigent defense program are about the lack of contact with the person's attorney. She said her office has implemented a system for having attorneys respond to complaints. She said as a result of this new system, the number of complaints has decreased.

In response to a question from Representative Griffin, Ms. Huseby said those persons with income of less than 125 percent of the federal poverty level can qualify for indigent defense services. She said this income level requirement should not be increased.

CHILD CUSTODY - BEST STATE PRACTICES STUDY

Chairman Meyer called on Ms. Sherry Mills Moore, State Bar Association Custody and Visitation Task Force, for testimony regarding the activities of the task force. Ms. Mills Moore said the task force has been reviewing New Hampshire's custody statutes. She said the task force has discussed the requirement of parenting plans for every custody case. She said in North Dakota, the best interest factors are statutory. She said the task force is working on the revision of several of these factors, including the length of time in a stable environment and the permanence of the home. She said the task force is looking at combining these factors. She said the task force is also looking at an additional factor of which parent is most likely to foster a relationship with the other parent. She said the task force is also discussing the use of the terms "parenting time" and "residential parenting" instead of visitation and custody. She said the task force is studying the concept of the use of a parenting coordinator. She said a parenting coordinator is a person appointed by the court to work with the parties over disputes.

In response to a question from Senator Bakke, Ms. Mills Moore said a parenting coordinator works independently but is appointed by the court. She said a parenting coordinator would be required to have certain qualifications and training. She said a

parenting coordinator would be employed in a way that would be similar to a guardian ad litem or child custody investigator. She said these positions tend to set their own rates with some court oversight.

In response to a question from Representative Klemin, Ms. Mills Moore said the court would pay for the services of the parenting coordinator if the parents are unable to pay. She said hopefully the use of a parenting coordinator would save money by not using as much of the court's time. She said the use of a parenting coordinator would have a fiscal impact but the intention is that in the long run, resources are saved and conflicts reduced.

In response to a question from Representative Wolf, Ms. Mills Moore said mediation can be used in disputes to reach resolution. She said the Legislative Assembly approved two pilot projects for family mediators in the Northeast and South Central Judicial Districts. She said the goal of mediation is to reach a resolution before going to court.

In response to a question from Representative Meyer, Ms. Mills Moore said when parenting plans are used, each party may submit a parenting plan and the court may reconcile the two plans. She said in some instances one plan that has been agreed upon by the parties is submitted to the court for approval based upon the best interests of the child.

Chairman Meyer called on Ms. Susan Beehler, Mandan, for testimony regarding the child custody study. Ms. Beehler said she spoke at legislative hearings more than 10 years ago as a lobbyist for "RKids" or "Remembering Kids in Divorce Settlements." She said the system needs lots of improvement in the area of child custody. She said the system in which there is an obligor and obligee tends to create more conflict and is not in the best interests of the children. She said both parents are best for the children and money should be only one thing in a long list to be considered. She said the system is not designed for families. She said the system is designed for legal and criminal matters that really have little to do with love. She said the laws do not address the diversity there is within families and fail to ensure both parents can be in the child's life. She said the system is easily manipulated by the physical custodial parent even when the term "joint" custody is used. She submitted written testimony, a copy of which is on file in the Legislative Council office.

Chairman Meyer called on Mr. Mitchell Sanderson, Chairman, North Dakota Coalition for Families and Children, for testimony regarding the child custody study. Mr. Sanderson said judges often deny custody changes based upon procedural technicalities. He said the judiciary in the state is corrupt. He said an adversarial system is not good for families because it creates conflict and hurts children. He said attorneys often do not follow their own ethical rules. He said there are no checks and balances in the system. He said shared parenting would stop these problems. He said the Department of Human Services causes more

harm to children and is in need of legislative oversight. He said a parent's right is a fundamental constitution right. He said the 2006 shared parenting initiated measure failed by 6 percent. He said North Dakota should use the shared income model for determining child support. He said there is gender discrimination in the current system. He submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Bakke, Mr. Sanderson said North Dakota is one of seven states that have not moved away from the obligor model. He said the state does not use the shared income model because of the money.

Chairman Meyer called on Mr. Rock Tweten, Grafton, for testimony regarding the child custody study. Mr. Tweten read to the committee the testimony of Mr. Phil Manning from Crystal, North Dakota. In this testimony, Mr. Manning discussed his efforts to gain custody of his children. Mr. Manning said too many of the citizens of North Dakota have seen their families destroyed by arrogant or incompetent judges who refuse to follow the laws. He said there is an abuse of power by the courts. He said this abuse of power and the disgraceful lack of accountability by state officials cannot be tolerated. He said he loves his children very much and intends to bring them back to the home from which they should have never been taken. He said what happened to his family and to his children goes to the heart of the constitution and justice in America. A copy of Mr. Manning's testimony is on file in the Legislative Council office.

In response to a question from Senator Triplett, Mr. Tweten said Mr. Manning's case was appealed to the North Dakota Supreme Court; however, the court refused to hear the case.

In response to a question from Representative Meyer, Mr. Tweten said complaints to the judicial conduct and disciplinary process yielded no response.

Chairman Meyer called on Mr. Gary Dietz, Bismarck, for testimony regarding the child custody study. Mr. Dietz said parents of children in foster care are treated better than fathers in custody cases. He said visitation is a problem. He said the police do not want to get involved in custody disputes. He said good fathers should not be punished. He said in his son's custody matter, the case was appealed to the North Dakota Supreme Court. He said the Supreme Court remanded the case to the district court for further action; however, the judge in the district court refused to follow the Supreme Court's directive. He said the child custody system in the state is not fair. He said the judges do not follow the law. He submitted a copy of an e-mail message sent from his granddaughter to his son, a copy of which is on file in the Legislative Council office.

Chairman Meyer called on Mr. Terrell Epps, Mandan, for testimony regarding the child custody study. Mr. Epps said he has written letters to Governor Hoeven and the Child Support Enforcement

Unit regarding his child support situation. He said there are discrepancies regarding the amount that he has been told that he owes and the amount he believes is accurate. He said it does not make sense to incarcerate a person for the nonpayment of child support. He said incarceration takes away a person's livelihood and ability to work to make the child support payments.

In response to a question from Senator Olafson, Mr. Epps said his ex-wife agreed that there was a discrepancy in the amount he was ordered to pay.

In response to a question from Representative Meyer, Mr. Epps said he has received accountings from the Child Support Enforcement Unit; however, the accountings are never the same amounts.

COMMITTEE DISCUSSION

Representative Klemin said the directive of the Legislative Council for the Judicial Process Committee is to look at best state practices as they relate to child custody laws. He said 23 states have a preference for joint custody. He said the Legislative Council staff should prepare a bill draft for consideration by the committee at its next meeting that would provide for a rebuttable presumption of joint custody. He said the bill draft should be based upon the Minnesota and New Hampshire statutes.

In response to a question from Senator Bakke, Senator Fiebiger said the task force is working on proposed legislation. He said custody and visitation go hand in hand. He said there is a relational tie between custody and visitation.

Chairman Meyer said the task force would present its ideas for legislation at the next meeting of the Judicial Process Committee.

Chairman Meyer said the committee should receive information from the Child Support Enforcement Unit or the Child Support Division of the Department of Human Services regarding the process for obtaining an accounting of the amount of child support which has been paid and to whom it has been paid.

Senator Triplett said child support collections and distribution were centralized by federal law. She said the federal law mandates that each state have a central disbursement unit for child support payments. She said these are duties formerly handled by the counties.

MISSING PERSONS STUDY

At the request of Chairman Meyer, committee counsel presented a bill draft [\[90122.0100\]](#) regarding a procedure for locating and identifying missing persons. She said the bill draft is based upon model missing person legislation that has been adopted in a number of other states. She said the bill draft provides that a report of a missing person may be made to any law enforcement agency in the state. She said the bill draft allows the law enforcement agency to refer the missing person report to a more

appropriate law enforcement agency when appropriate. She said the bill draft sets forth the information to be gathered regarding the missing person. She said the bill draft also provides for the entry of certain information regarding the missing person into state and national databases. She said the bill draft establishes a procedure for the identification and preservation of unidentified human remains.

Representative Klemin said the bill draft should be amended to remove the requirement that the missing person report may not be referred to another law enforcement agency if the person is a high-risk missing person. He said the portion of the bill draft regarding the acceptance of the missing person report by the other law enforcement agency should be changed to provide that the referred jurisdiction must be a reasonable jurisdiction.

At the request of Chairman Meyer, committee counsel distributed a copy of the missing person procedure of the Bismarck Police Department. A copy of the policy is on file in the Legislative Council office.

EXEMPTIONS FROM JUDICIAL PROCESS STUDY

At the request of Chairman Meyer, committee counsel presented four bill drafts regarding exemptions from judicial process.

The first bill draft [\[90094.0100\]](#), committee counsel said, was based upon the suggestion of Mr. Lowell Bottrell at the committee's January 9, 2008, meeting. This bill draft, she said, would give North Dakota residents, when filing a petition for bankruptcy, the option of claiming either the federal exemptions or the applicable exemptions allowable by state law. The committee referred to this bill draft as "Bottrell A."

The second bill draft [\[90117.0100\]](#), committee counsel said, was also based upon the suggestions of Mr. Bottrell. She said this bill draft would provide for a lump sum exemption of \$40,000. She said this exemption would replace many of the separate exemptions that are now available. She said in addition to the lump sum exemption, a debtor could still claim the homestead exemption; professionally prescribed health aids; an unmaturing life insurance contract owned by the debtor; the debtor's interest in certain retirement plans; and certain benefits, including Social Security benefits, veterans' disability pension benefits, disability, illness, or unemployment benefits, alimony, support, or separate maintenance. She said the bill draft would also exempt payments received on account of the wrongful death of an individual of whom the debtor was a dependent. The committee referred to this bill draft as "Bottrell B."

The third bill draft [\[90095.0100\]](#), committee counsel said, was based upon the recommendations of Mr. John Foster. She said this bill draft makes changes that are intended to clarify some exemption provisions that have been the subject of bankruptcy

decisions and uncertainty. The committee referred to this bill draft as "Foster."

The fourth bill draft [90110.0100], committee counsel said, was based upon the recommendations made by Mr. Michael Wagner at the January 9, 2008, meeting. She said most of the changes included in this bill draft deal with the additional exemptions, including the exemptions for certain retirement plans. She said the bill draft also increases the value of the motor vehicle that can be exempted from \$1,200 to \$2,950. The committee referred to this bill draft as "Wagner."

Chairman Meyer called on Mr. Ross Espeseth, Bismarck, for testimony regarding the bill drafts. Mr. Espeseth said the "foster" bill draft provides for cleanup and clarification. He said he did not have any objections to the changes in that bill draft. He said the "Bottrell A" bill draft, which adds the option of claiming the federal exemptions, adds complications to the current system. He said this bill draft would also allow the federal government to dictate the state's exemptions. He said bankruptcy under this bill draft would be more expensive and more complex. He said the "Bottrell B" bill draft is more radical. He said a number of states have gone to the lump sum exemption method. He said the question to be decided is how to determine the appropriate amount for the lump sum. He said the "Wagner" bill draft provides for some "tweaking" of the current exemptions. He said he does not agree that the in lieu of the homestead exemption should be repealed. He said he agrees with the proposed change that allows the debtor to claim a mobile home as a dwelling house as part of the homestead.

In response to a question from Representative Kretschmar, Mr. Espeseth said the federal exemptions may be more liberal than the state exemptions.

In response to a question from Representative Meyer, Mr. Espeseth said state exemptions are exempted by federal laws in certain areas, such as certain retirement plans. He said the state's current limits on retirement accounts may be preempted by federal law.

Representative Kretschmar said for historical reasons, he would like to see some of the state's exemptions retained.

Senator Olafson said he agreed with Mr. Espeseth's recommendations regarding the bill drafts. Following more committee discussion, the committee decided to take no further action on the "Bottrell A" and "Bottrell B" bill drafts. Representative Klemin said it would be very difficult to determine an appropriate amount for the lump sum exemption in the "Bottrell B" bill draft.

Chairman Meyer said the "Foster" and "Wagner" bill drafts should be merged into one bill draft and that the merged bill draft should include the recommendations made by Mr. Espeseth regarding the "in lieu of homestead exemption." Chairman Meyer said the committee would review the merged bill draft at the next meeting.

DOMESTIC VIOLENCE PROTECTION ORDER PROCESS STUDY

It was moved by Representative Griffin, seconded by Senator Bakke, and carried on a roll call vote that the Legislative Council interim Judiciary Committee encourages the courts to include clearer information in domestic violence protection orders, recommends that the judicial branch and the State Bar Association of North Dakota evaluate the language used in domestic violence protection orders, and recommends that information regarding the respondent's rights and responsibilities should be included in those orders. Representatives Meyer, Griffin, Johnson, Kingsbury, Klemin, Kretschmar, and Myxter and Senators Bakke, Fiebiger, Olafson, and Triplett voted "aye." No negative votes were cast.

No further business pending, Chairman Meyer adjourned the meeting at 3.35 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1