

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIAL PROCESS COMMITTEE

Tuesday, June 24, 2008
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Shirley Meyer, Chairman, called the meeting to order at 1:00 p.m.

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

Members absent: Representatives Kim Koppelman, Lee Myxter, Lisa Wolf

Others present: See attached [appendix](#)

It was moved by Senator Triplett, seconded by Representative Klemin, and carried on a voice vote that the minutes of the April 16, 2008, meeting be approved.

CHILD CUSTODY - BEST STATE PRACTICES STUDY

Chairman Meyer called on Ms. Sherry Mills Moore, State Bar Association of North Dakota, Custody and Visitation Task Force, for testimony regarding the findings and recommendations of the task force. Ms. Mills Moore said the Custody and Visitation Task Force was formed because the State Bar Association of North Dakota made a commitment in the last legislative session to study custody and visitation in this state and to consider what could be improved. She said the task force reviewed practices in other states with an eye toward what does and does not seem to work well in our state. She said the task force met with proponents of the failed initiated measure as well as those who are circulating a new proposed custody measure. She said the proposals developed by the task force were approved by the State Bar Association of North Dakota Board of Governors. She said the task force would like the interim Judicial Process Committee to submit the legislation proposed by the task force to the Legislative Assembly in 2009.

Ms. Mills Moore said the proposed legislation provides for a change in the terminology currently used in family law. She said the proposed legislation would change the term "custody" to "primary residential responsibility" and would change the term "visitation" to "parenting time." She said the proposed legislation would provide for definitions of the terms used to delineate the rights and responsibilities of parents to their children, including the terms decisionmaking responsibility, parental rights and responsibilities, parenting plan, parenting schedule,

residential responsibility, and primary residential responsibility. The proposed legislation would provide that in any proceeding to establish or modify a judgment providing for parenting time with a child, she said, the parents would be required to develop and file with the court a parenting plan. She said the proposed legislation lists those provisions that must be included in the parenting plan, including decisionmaking responsibilities, information sharing and access, transportation and exchange of the child, a procedure for review and adjustment of the plan, and methods for resolving disputes. Regarding the best interest factors used by a court in determining custody, she said, the proposed legislation maintains the general structure of the best interest analysis; however, several factors were clarified and new factors were added. She said the proposed legislation also provides for the establishment of a parenting coordinator program. She said a parenting coordinator is a neutral person who helps to resolve parenting time disputes. She said the proposed legislation sets out the duties of a parenting coordinator and outlines the procedure for allocating the fees of the parenting coordinator between the parties. Under the proposed legislation, she said, the Supreme Court would be responsible for establishing the qualification of parent coordinators. She submitted [written testimony](#), a copy of the [proposed legislation](#), and a [sample parenting plan form](#) used by the state of Oregon, all of which are on file in the Legislative Council office.

In response to a question from Representative Meyer, Ms. Mills Moore said there is no certain age that the court uses as a baseline for determining whether the child is of sufficient maturity for the court to give substantial weight to the child's preference.

In response to a question from Representative Klemin, Ms. Mills Moore said the preference of the child may be part of the child custody investigator's report. She said the report may also indicate whether there is a lack of maturity on the part of the child to make that decision or whether the child's stated preference may be due to undue influence. She said when a child custody investigator is not used, the parties may bring the child to court. She said she will be working with the North Dakota Association of Counties to draft language regarding which county is responsible for the costs of the child custody investigator or guardian ad litem.

In response to a question from Representative Meyer, Ms. Mills Moore said under the proposed legislation, there would be only one parenting coordinator per family.

In response to a question from Senator Olafson, Ms. Mills Moore said a parenting coordinator is a dispute resolution tool. She said a parenting coordinator could make a significant difference in some high-conflict cases.

In response to a question from Representative Klemin, Ms. Mills Moore said the proposed legislation does not propose a presumption of equal or "50/50" custody or residential responsibility. She said the proposed legislation provides that a court may not approve a parenting plan unless the plan contains a method of resolving disputes. She said the purpose of the parenting coordinator is to address more immediate issues that may arise regarding visitation or parenting time. She said the parenting coordinator would not have the authority to modify a judgment but would have the authority to interpret how the judgment is to be applied. She said the proposed legislation makes the fees for the parenting coordinator the responsibility of the parties. Under current law, she said, the court can order the parties to pay the costs of the child custody investigator or guardian ad litem. She said most of the states with parenting coordinator programs only appoint a parenting coordinator if the parties are able to pay for the cost of the service.

In response to a question from Senator Bakke, Ms. Mills Moore said the parenting plan is done at the front end of the process while the parenting coordinator is used after the judgment has been issued. She said a parenting coordinator is like a "mediator with teeth." She said the proposed legislation provides for a procedure for the modification or termination of a parenting coordinator.

In response to a question from Senator Olafson, Ms. Mills Moore said the requirement that a party may not change the residence of the child to another state without the consent of the other parent or an order of the court allowing the move is done to protect the parent who is left behind. She said most of these cases are resolved without going to court.

In response to a question from Representative Kretschmar, Ms. Mills Moore said there will always be difficult domestic relations cases but with the use of parenting plans, the additional best interest factor of considering which parent will best foster the relationship with the other parent, and the use of parenting coordinators should help with some of those concerns.

In response to a question from Representative Klemin, Ms. Mills Moore said the proposed legislation, if passed, would apply to those cases pending on the effective date of the legislation and any cases that have not procedurally completed the process.

In response to a question from Representative Meyer, Ms. Mills Moore said if the proposed legislation passes, it is likely that a parenting plan form would be developed by the State Bar Association of North

Dakota and the courts. She said a similar form is available now in the family law manual. She said a preferred form would likely be developed with some variations by judicial district.

Chairman Meyer called on Ms. Sally Holewa, State Court Administrator, Supreme Court, for testimony regarding the court's pilot project on family law mediation. She said during the 2007 legislative session, the court requested and received funding to provide mediation services to litigants involved in custody and visitation disputes. She said mediation is one tool that has been found to be effective in reducing the acrimony of divorce and assisting parties in reaching agreements on what should happen with their case. She said mediation can be successful because its focus is on the strengths each person has as a parent and on the joint goals and aspirations that parents have for their children. She said before this project, the court has encouraged mediation by requiring attorneys to discuss the option of alternative dispute resolution with their clients. She said the court created a rule that allowed parties to ask for judge-mediated dispute resolution. She said this practice does not have a mechanism for informing self-represented litigants about the option of alternative dispute resolution. She said the practice also can be cost-prohibitive to some parties. She said the use of a district judge to mediate cases for other judges turned out to be an unpopular and rarely used option. She said many judges are not comfortable in the role of mediator. She said it was these issues that led the court to request a pilot project of court-sponsored mediation in which mediation would be mandated for all cases involving custody or visitation disputes. She said the goal of the mediation project is to assist parties in reaching a settlement, to get parties thinking beyond the immediacy of the divorce to thinking about the challenges of parenting children from separate homes, to teach parents new ways to resolve disputes that they can use now and in the future, and to increase compliance with court orders by basing them as much as possible on the wishes of the parents. She submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Bakke, Ms. Holewa said the use of a mediator and a parenting coordinator in custody and visitation cases are similar. However, she said, the mediator is used at the beginning of the process and the parenting coordinator is used postdivorce for disputes arising on short notice. She said it is likely that there are people who would do both types of work.

In response to a question from Representative Klemin, Ms. Holewa said the mediation project will be reviewed to make sure the services are not duplicative with the ideas being proposed by the task force.

In response to a question from Senator Bakke, Ms. Holewa said the pilot project is being funded by a \$1 million general fund appropriation. She said the court has hired a coordinator for the project and is contracting with mediators for the mediation services.

Chairman Meyer called on Ms. Cathy Ferderer, Family Mediation Program Administrator, Supreme Court, for testimony regarding the mediation pilot project. Ms. Ferderer said the administrative order and protocol for the family mediation pilot project were approved by the Supreme Court in February 2008. Since that time, she said, the project has advertised for, selected, and contracted with mediators to provide mediation services; provided training for the contracted mediators; developed a mediator mentoring program for new mediators; requested and received proposals for an independent evaluation of the program; selected and contracted with an independent evaluator to conduct the evaluation; collected preimplementation data; and developed and implemented an evaluation plan. She said there are 11 mediators providing mediation services for the program--6 in the Grand Forks area and 5 in the Bismarck area. She said eight of the mediators are attorneys and three hold social science degrees. On March 1, 2008, she said, the pilot project went into effect and clerks began referring any civil proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. She said 66 cases from the two pilot districts--the South Central and Northeast Central Judicial Districts--have been referred to the program. She said of those 66 referrals, 42 have been accepted into the program. She said those cases not accepted were screened out due to settlements, domestic violence issues, or one party was living out of state. She said the paperwork has been completed on five cases. In four of the five completed cases, she said, all issues were resolved through the mediation process. She said the cases averaged 4.2 hours of combined mediation orientation and mediation with an average cost of \$714. Ms. Ferderer's testimony also included statistics for a 12-month period ending March 31, 2008, regarding divorce cases that involved physical custody issues. She submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Meyer, Ms. Ferderer said the costs of the mediation services for the pilot project are paid by the project.

In response to a question from Representative Klemin, Ms. Holewa said the court plans to include in its budget funding to continue the pilot project for at least one year into the next biennium. She said the court would like to expand the project to the remainder of the units in the state. She said if the project proves to be sufficiently effective, a sliding fee scale may be implemented.

In response to a question from Representative N. Johnson, Ms. Ferderer said the Supreme Court has developed mediator qualifications for the project. She said four years of mediation experience is required. She said all mediators have had 40 hours of mediation training.

Chairman Meyer called on Mr. Mike Schwindt, Director, Child Support Enforcement, Department of Human Services, for information on accounting for

child support paid and received and on the suspension of a driver's license for the nonpayment of child support. Mr. Schwindt said as a result of the federal Welfare Reform Act of 1996, the Legislative Assembly required that all child support payments would flow through a centralized state disbursement unit. He said this reassignment of responsibilities resulted in the child support enforcement program and clerks becoming more efficient because there was a single set of records and customers who had one place in the state to call for an account status. He said there are outstanding balances that could be updated for a number of reasons. He said a common problem source is the court order was misinterpreted when originally ordered. He said this can result in all subsequent accruals being incorrect. He said other reasons for incorrect accounts may be that payments were made to another jurisdiction and the child support enforcement program was not informed; payments were withheld from an obligor's paycheck but was not forwarded for disbursement; a parent paid the other parent directly instead of sending the money to the state disbursement unit; or the state or the employer may have made a mistake when distributing the funds. He said all reasonable steps to correct and maintain accurate data have been taken. He said more staff has been hired to handle customer calls. He said in 2002 thousands of letters were mailed to parents to confirm balances. He said the program received very few questions and even fewer showed the program's data to be incorrect. He said each month the program sends notices to people with arrears informing them that the records indicate an overdue balance and that the program will be filing one-time tax refund offset and credit reporting notices. He said this gives those parents an opportunity to identify differences and reconcile the accounts. He said the program also sends over 4,000 monthly billing statements to obligors in certain situations. He said the three primary criteria for billing notices are that the case is open to IV-D services; there is no active income withholding order or automatic withdrawal on file; and there is a court-ordered support obligation. He said the billing notice lists the toll-free number to the state disbursement unit so the obligor can contact the unit with any questions or disagreements with the information in the notice. He said the program offers a number of portals to parents to ensure their data is accurate and to learn their current status. He said when parents feel their account information is not accurate, a comparison can be done to identify the reason for the discrepancy. He said this includes a month-by-month comparison of debts and receipts to determine the specific months that are unpaid in an effort to pinpoint the discrepancy. He said if this preliminary review does not resolve the discrepancy, a copy of the payment history is sent to the person alleging the discrepancy. He said the program can provide an account in many ways for amounts owed and paid by obligors. He said it is not something they hide. He said the program

encourages parents to periodically obtain and review their account information to ensure the data is accurate.

Regarding driver's license suspensions, Mr. Schwindt said driver's licenses can be suspended for nonpayment of child support by the courts as part of the contempt proceedings and by the child support enforcement program as part of the enforcement process. He said the Legislative Assembly in 2003 authorized administrative license suspension, including driver's licenses, as part of the simplification of enforcement activities and to better work with obligors before arrearages reached the point of being unmanageable. He said this legislation led to an increase in the number of suspended licenses as well as an increase in child support payments. He said many obligors are unable to immediately satisfy their arrears. As a result, he said, the tool of driver's license suspension helps in efforts to negotiate a payment plan that will enable the obligor to pay the outstanding balances over a 10-year period. He said the flexibility the child support enforcement program was given has allowed the program to reinstate suspended licenses for cooperative obligors. He said there may be a limited need for work permits. As of June 2, 2008, he said, there have been 955 administratively and 63 judicially suspended driver's licenses. He said the program has payment plans with 688 obligors who know their licenses will be suspended if they do not follow through on their payment plans. He said the child support enforcement program does not want licenses but they do want parents to take care of their children. He said for some, license suspension is the right tool; for others, it is meaningless. He submitted written testimony, a copy of which is on file in the Legislative Council office.

Chairman Meyer requested that a copy of the testimony of Mr. Terrell Epps from the April 16, 2008, meeting be included in the record of the committee. A copy of Mr. Epps' testimony is on file in the Legislative Council office.

In response to a question from Representative Meyer, Mr. Schwindt said he is unable to discuss Mr. Epps' case without a release of information from Mr. Epps.

In response to a question from Representative Klemin, Mr. Schwindt said license suspension often gets the attention of the obligor. He said while it is unclear whether the child support enforcement program has the authority to issue work permits, explicit language authorizing that authority could be given to the program.

At the request of Chairman Meyer, committee council reviewed a bill draft [\[90157.0100\]](#) regarding joint custody of children. Committee counsel said the bill draft would provide that unless there is evidence of domestic violence, upon the request of either party for joint custody, the court would be required to use a rebuttable presumption that joint custody is in the best interests of the child.

Representative Klemin said the bill draft would be compatible with the legislation proposed by the task force. He said the bill draft does not infringe on the court's ability to make determinations based upon the best interests standard.

In response to a question from Senator Fiebiger, Representative Klemin said the legislation proposed by the task force does not address joint custody. He said joint custody could be defined to mean joint legal and physical custody.

Senator Triplett said if joint custody means equal or "50/50" custody, such arrangements can be difficult for the child, especially if the parents do not live in the same school district. She said it does not make sense to presume that equal time with each parent is in the best interests of the child.

Representative Klemin said the bill draft provides that the presumption of joint custody is rebuttable.

Representative Griffin said the presumption of joint custody may not be compatible with the other best interests factors.

Senator Fiebiger said the bill draft does not solve the custody problem. He said the legislation proposed by the task force is more useful and comprehensive.

Senator Triplett said in light of the statistics quoted by Ms. Ferderer, the issue of presumed joint custody appears to be a "nonproblem" looking for a solution. She said the statistics indicate that joint custody is being stipulated in about 25 percent of cases and is being ordered by the court in about 25 percent of cases. She said the problem may not be as significant as she has been led to believe.

It was moved by Representative Klemin, seconded by Senator Olafson, and failed on a roll call vote that the bill draft relating to the rebuttable presumption of joint custody be approved and recommended to the Legislative Council. Representatives Klemin and Kretschmar and Senator Olafson voted "aye." Representatives Meyer, Griffin, D. Johnson, N. Johnson, and Kingsbury and Senators Bakke, Fiebiger, and Triplett voted "nay."

COMMITTEE DISCUSSION

Representative Klemin requested that the Legislative Council staff prepare a bill draft to give the Department of Human Services the specific authority to issue work permits for those obligors whose driver's licenses have been suspended due to nonpayment of child support. He said the work permit could be issued on request for good cause to issue a work permit. He said the department should also have the authority to revoke the work permit.

Senator Triplett requested that the legislation proposed by the task force be prepared as a bill draft for consideration by the committee at the next meeting.

MISSING PERSONS STUDY

At the request of Chairman Meyer, committee counsel presented a bill draft [\[90122.0200\]](#) regarding

a procedure for locating and identifying missing persons. She said the bill draft is a revision of the bill draft presented to the committee at the April 16, 2008, meeting. She said the bill draft includes the committee's recommendations regarding the referral of missing persons cases to a law enforcement agency in another jurisdiction.

Senator Fiebiger said the bill draft does not include a penalty for noncompliance with the procedures.

Representative N. Johnson said law enforcement agencies are aware of the bill draft under consideration.

It was moved by Representative N. Johnson, seconded by Representative Kingsbury, and carried on a roll call vote that the bill draft relating to a procedure for locating and identifying missing persons be approved and recommended to the Legislative Council. Representatives Meyer, Griffin, D. Johnson, N. Johnson, Kingsbury, Klemin, and Kretschmar and Senators Bakke, Fiebiger, Olafson, and Triplett voted "aye." No negative votes were cast.

EXEMPTIONS FROM JUDICIAL PROCESS STUDY

Chairman Meyer requested that a letter regarding exemptions from Mr. Edward J. Tarnavsky be included in the record of the committee. A copy of [Mr. Tarnavsky's letter](#) is on file in the Legislative Council office.

At the request of Chairman Meyer, committee counsel presented a bill draft [90155.0100] regarding exemptions from judicial process. She said the bill draft is the result of the merger of two of the bill drafts presented to the committee at the April 16, 2008, meeting. She said the bill draft is based upon the recommendations of Mr. John Foster and Mr. Michael Wagner. She said the bill draft also retains the "in lieu of homestead exemption" as requested by the committee.

Chairman Meyer called on Mr. Wagner for comments regarding the bill draft. Mr. Wagner said the changes proposed in this bill draft will go a long way to address many concerns and uncertainties that have arisen in bankruptcy cases over the years. He said one issue that may need to be addressed is whether both spouses may claim an exemption as head of household. He said the bankruptcy court has raised this issue. He said there may need to be a clarification that only one spouse can be the head of household and therefore entitled to the exemption.

In response to a question from Representative Griffin, Mr. Wagner said the United States Supreme Court has held that Employee Retirement Income Security Act (ERISA)-qualified plans are not property that is subject to claims in bankruptcy.

In response to a question from Senator Olafson, Mr. Wagner said although the bill draft provides that the retirement funds must have been in effect for at

least one year, there may need to be more clarification that the funds have been on deposit for at least one year.

In response to a question from Representative Griffin, Mr. Wagner said in light of the United States Supreme Court case, the limits on the amounts in the retirement accounts are likely to be preempted by the decision, but the timing of the fund may not be preempted.

In response to a question from Representative Klemin, Mr. Wagner said the confusion on the definition of head of household is based upon North Dakota Century Code Section 28-22-01.1(2). He said while subsection 1 of that section appears to be clear that the head of household can be only one spouse, the bankruptcy court has requested briefs on the issue.

Chairman Meyer called on Mr. Jack McDonald for testimony regarding the exemptions bill draft. Mr. McDonald said he has concerns that the property of the judgment debtor and the debtor's family must be claimed as exempt, as provided on page 6, lines 8 and 9, of the bill draft. He said this requirement may allow property of family members and not just the judgment debtor to be levied upon.

Following committee discussion, Chairman Meyer requested that the bill draft be amended to remove the underscored language on page 6, lines 8 and 9.

Chairman Meyer called on Ms. Marilyn Foss for testimony regarding the bill draft. Ms. Foss said there are nonqualified, non-ERISA plans that are retirement plans.

Senator Triplett said bankruptcy planning has been around for a long time.

It was moved by Senator Bakke, seconded by Senator Fiebiger, and carried on a roll call vote that the bill draft relating to exemptions from bankruptcy and other judicial process be approved and recommended to the Legislative Council. Representatives Meyer, Griffin, D. Johnson, N. Johnson, Kingsbury, Klemin, and Kretschmar and Senators Bakke, Fiebiger, Olafson, and Triplett voted "aye." No negative votes were cast.

COMPREHENSIVE STATUS AND TRENDS REPORT

At the request of Chairman Meyer, committee counsel distributed to the committee the 2008 *Comprehensive Status and Trends Report* regarding unlawful controlled substances use and abuse treatment and enforcement efforts. Committee counsel said because of scheduling conflicts, the Attorney General was unable to present the report in person but that he would be happy to appear at the next meeting of the committee to discuss the report. A copy of the report is on file in the Legislative Council office.

No further business appearing, Chairman Meyer adjourned the meeting at 4:15 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1