

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### JUDICIAL PROCESS COMMITTEE

Wednesday, September 19, 2007  
Roughrider 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, Kim Koppelman, William E. Kretschmar, Lee Myxter, Lisa Wolf; Senators JoNell A. Bakke, Tom Fiebiger, Curtis Olafson, Constance Triplett

**Members absent:** Representatives Dawn Marie Charging, Dennis Johnson

**Others present:** See attached [appendix](#)

#### CHILD CUSTODY - BEST STATE PRACTICES STUDY

At the request of Chairman Meyer, committee counsel presented a memorandum entitled [Best State Practices - Child Custody - Background Memorandum](#).

Chairman Meyer called on Ms. Sheri Mills-Moore, State Bar Association of North Dakota (SBAND), regarding the child custody study. Ms. Mills-Moore said SBAND has formed a task force to study custody and visitation. She said the 15-member task force includes judges, legislators, laypersons, custody investigators, private practice attorneys, a custodial father, and a minister. At the first meeting of the task force, she said, various members of the task force were designated to work on particular topics. She said some of those topics include the use of visitation expeditors, the family court concept, the early intervention process, the primary caretaker presumption, and states that mandate parenting plans. She said the task force will meet every four to six weeks. At its November meeting, she said, the task force will receive public comments.

In response to a question from Representative Koppelman, Ms. Mills-Moore said mediation and other forms of alternative dispute resolution continue to be studied by the family law section of SBAND. She said mediation is not being excluded from the issues under consideration by the task force; however, she said, the task force does not want to duplicate the efforts of other groups. She said the best interests of the child will always be the paramount concern. She said the task force is not studying child support. She said, however, it is difficult to completely separate child custody and visitation from child support. She said it is important to look at the motives behind a particular

custody arrangement and whether the arrangement is being done for the children or for the money.

In response to a question from Representative Klemin, Ms. Mills-Moore said the best practices for child custody in North Dakota would be a process in which both the children and the parents are happy. She said when looking at best state practices, both the procedure and the resources that would be necessary to implement those procedures must be considered. She said it is important to look at why a particular procedure works in another state and whether it would work here. She said the availability of resources must be considered as well as the procedure itself.

In response to a question from Senator Bakke, Ms. Mills-Moore said those custody matters that occur within tribal jurisdiction are governed by tribal law.

In response to a question from Senator Fiebiger, Ms. Mills-Moore said best practices should include a process that works for all parties.

In response to a question from Representative Meyer, Ms. Mills-Moore said the Supreme Court has held that the rights of parents are paramount to those of grandparents.

Chairman Meyer called on Mr. John Val Emter for testimony regarding the best practices study. Mr. Emter said there should be laws against adultery and lying. He said it is the children that suffer in custody matters.

#### COMMITTEE DISCUSSION

Representative Klemin said the committee should receive information regarding the definition of best practices.

Senator Triplett said the committee should receive articles on custody and visitation best practices and a list of the members of the SBAND task force.

Senator Fiebiger said the committee should continue to receive updates from the SBAND task force. He also said the committee should receive more information on the child custody and visitation laws of Minnesota, South Dakota, and Montana.

#### PATERNITY REGISTRY STUDY

At the request of Chairman Meyer, committee counsel presented a memorandum entitled [Establishing a Paternity Registry - Background Memorandum](#).

Chairman Meyer said the committee should receive a copy of the paternity registry forms used in other states.

Chairman Meyer called on Ms. Julie Hoffman, Department of Human Services, regarding the establishment of a paternity registry study. Ms. Hoffman said a bill was considered by the Legislative Assembly in 2003 which would have provided for a paternity registry. She said the bill, 2003 Senate Bill No. 2035, was developed by an informal working group of child-placing agency staff and supervisors in consultation with the Department of Human Services. She said the bill failed in the Senate. The committee received a copy of 2003 Senate Bill No. 2035 and the accompanying fiscal note.

Ms. Hoffman said when a birth mother is seeking to make an adoption plan for her child, the child-placing agency makes every effort to contact the putative father and involve him in the planning. She said when a birth father is unavailable or is not cooperative, the birth mother and agency may proceed with the adoption planning and a hearing to terminate parental rights. She said if the birth father is known, he is given notice of the hearing, either personally or by publication. She said if he does not appear at the hearing, his rights may be terminated by default. She said the difficulty in this process may occur when the birth mother is either not aware of or is not truthful with the agency as to the identity of the birth father. She said the effect of a paternity registry is that notice of an action to terminate a man's parental rights is provided to a registered father. She said a paternity registry may protect the rights of a birth father who has an interest in a child he has fathered who may be placed for adoption without the father's knowledge. She said a registry puts the burden on the birth father to establish his interest in a child he may have fathered. She said a registry allows a birth mother to proceed with an adoption plan when the birth father is not cooperative in the planning process and is not willing to take parental responsibility. She said the paternity registry may also assist a birth parent or adoption counselor in locating an alleged father who has registered his interest in a child he may have fathered. She said a paternity registry would not relieve a birth mother of an obligation to identify a known father of her child or of the agency to contact a known birth father to obtain his cooperation and other information for the benefit of the child and the prospective adoptive family. Ms. Hoffman submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative N. Johnson, Ms. Hoffman said it is possible that more than one man may be registered for the same child.

In response to a question from Senator Triplett, Ms. Hoffman said the burden is on the man to keep the registry updated with a current address and other contact information.

In response to a question from Representative Wolf, Ms. Hoffman said the 2003 bill designated the Division of Vital Statistics as the entity responsible for the establishment of a paternity registry. She said the fiscal note for the bill indicated a fiscal effect of \$1,000. She said it was determined that the costs involved would be mainly for publication materials. She said as the bill was drafted, no additional full-time equivalent positions were necessary.

In response to a question from Senator Bakke, Ms. Hoffman said the registration period in the paternity registry laws in other states varies. She said most laws allow for a registration period before and after the birth.

In response to a question from Senator Triplett, Ms. Hoffman said strict confidentiality provisions in paternity registry laws have resulted in limited problems with the abuse of the information contained in the registries. She said both Montana and Minnesota have actively provided public information on the existence of the paternity registries in their states. She said, however, few people have used the Montana registry.

In response to a question from Senator Bakke, Ms. Hoffman said the adoptive parents usually bear the cost of DNA testing, if such testing is necessary. She said requiring a mother to name the father of a child may not be an effective way of determining paternity. She said a mother may not know the name of the father or may give an incorrect name.

In response to a question from Representative Meyer, Ms. Hoffman said she was not sure if the information contained in a paternity registry could be used by child support agencies to locate a father. She said registering on a paternity registry will not change the name listed on a birth certificate as the father. She said if multiple men would register claiming to be the putative father of a child, additional testing would be necessary.

Chairman Meyer called on Ms. Susan Grundysen, The Village Family Service Center, for testimony regarding the paternity registry study. Ms. Grundysen said she would support legislation for the establishment of a paternity registry in North Dakota. She said a paternity registry can protect a child's right to a smooth adoption. She said a paternity registry also aids a father in asserting his rights in a timely manner. She said a paternity registry does not relieve a mother of the obligation to name any possible fathers. She said a paternity registry does not squelch men's rights but rather it gives men rights. She said a Louisiana senator has proposed the idea of a national paternity registry.

In response to a question from Representative N. Johnson, Ms. Grundysen said everyone registered regarding a particular woman is given notice of the pending adoption.

In response to a question from Representative Wolf, Ms. Grundysen said minors could register on a paternity registry. She said she was unsure if the

registry could be used against a man if the mother is a minor.

Chairman Meyer called on Mr. Robert J. Eckerdt, Grand Forks, for testimony regarding the paternity registry study. Mr. Eckerdt said he and his wife had an adoption experience in which a man came forward when their adoptive son was six months old, claiming to be the father of the child. He said the challenges and difficulties he and his wife experienced could have been avoided if they had lived in Minnesota, a state with a paternity registry. He said the outcome of their experience was that the parental rights of the birth father were eventually terminated because the court found that the birth father could not properly parent the child. He said this outcome was finally achieved after more than a year of legal matters, added legal costs, and a great deal of emotional anguish. He said a paternity registry would have prevented those problems. He said a paternity registry is not about taking away rights but rather it is about establishing timelines.

In response to a question from Senator Olafson, Mr. Eckerdt said there is no statutory timeline in North Dakota within which a father may be precluded from asserting his objection to an adoption. Ms. Hoffman said North Dakota adoption law provides for two proceedings--a hearing termination of parental rights and a proceeding to finalize the adoption conducted six months later.

In response to a question from Representative Koppelman, Ms. Hoffman said if the hearing to terminate parental rights was also used to terminate the rights of any potential father, it would solve some of the adoption issues.

In response to a question from Senator Fiebiger, Ms. Hoffman said a paternity registry provides a vehicle for a man to assert his parental rights.

Senator Triplett said for a paternity registry to provide a right to a man, it would require widespread publication. She said the paternity registry would need to be fully funded, including the funding necessary to promote the registry.

In response to a question from Senator Olafson, Ms. Hoffman said mandatory DNA testing for all adoptions would cause delays. She said there also would be problems with persons willing to comply with the testing.

In response to a question from Representative Meyer, Ms. Hoffman said the child must be in the home for six months before the adoption may be finalized.

In response to a question from Senator Bakke, Ms. Hoffman said foster care payments may be available during that six-month period for some situations. She said in the case of a newborn, the family does not receive foster care compensation for the six-month period preceding the finalization of the adoption.

In response to a question from Representative Koppelman, Ms. Hoffman said there is supervision and home visits during the six-month period. She said

the waiting period before finalization of an adoption varies by state.

In response to a question from Representative Klemin, Ms. Hoffman said paternity registry legislation may need more timelines than were in the 2003 bill. She said she would provide more information on timelines.

Chairman Meyer called on Mr. Emter for testimony regarding the paternity registry study. Mr. Emter said a DNA test of all babies should be required. He said you cannot put a price tag on the needs of a child.

## COMMITTEE DISCUSSION

Representative Klemin said the committee should receive a copy of the final report of the 2001-02 interim Family Law Committee. He said the committee should also receive a copy of the legislative history for 2003 Senate Bill No. 2035.

Senator Bakke said the committee should receive a copy of the proposed federal legislation regarding a national paternity registry.

Senator Olafson said the committee should receive information and statistics regarding paternity registries in other states and how well they are working. He said the information should include the agency in those states which is responsible for the registry. He also said the committee should receive information as to whether any state requires a father's name on the birth certificate.

## MISSING PERSONS STUDY

At the request of Chairman Meyer, committee counsel presented a memorandum entitled [Search for and Identification of Missing Persons Study - Background Memorandum](#).

Chairman Meyer called on Representative N. Johnson for testimony regarding the missing persons study. Representative N. Johnson said there is no national legislation or any procedures in place for the sharing of information about the search for and identification of missing persons. In 2005, she said, the United States Department of Justice established a task force to study ways to improve the use of federal DNA data bases. She said with the help of the task force, the National Institute of Justice developed model state legislation that is intended to provide guidance to states on the entire process surrounding missing persons. She said the model legislation would require certain information to be gathered. She said the model legislation also requires the first person to receive the information to take ownership of the case. She said in some domestic violence cases, the missing person may not want to be found. She said the model legislation involves the family in the process. She said there are currently about 40 missing persons cases in North Dakota.

In response to a question from Representative Meyer, Representative N. Johnson said there is a misconception that there is a waiting period before a person may be considered missing. She said North

Dakota law does not contain a procedure for law enforcement for dealing with missing persons.

Chairman Meyer called on Mr. Emter for testimony regarding the missing persons study. Mr. Emter expressed concerns about the need for a procedure for locating missing persons.

### **COMMITTEE DISCUSSION**

Representative Klemin said the committee should invite Ms. Hope Olson, Director, State Crime Laboratory, to the next meeting to discuss the use of DNA for locating and identifying missing persons.

Representative Kretschmar said the committee should receive information as to whether any states have adopted the model legislation in some form.

In response to a question from Senator Triplett, Representative Kretschmar said he was not aware of any plans of the National Conference of Commissioners on Uniform State Laws to draft a uniform law regarding missing persons.

Senator Fiebiger said the committee may wish to hear about the experience of the Trenton family whose son went missing.

### **EXEMPTIONS FROM JUDICIAL PROCESS STUDY**

At the request of Chairman Meyer, committee counsel presented a memorandum entitled [Exemptions From Judicial Process Study - Background Memorandum](#).

Chairman Meyer called on Mr. Mike Wagner for testimony regarding the exemptions from judicial process study. Mr. Wagner said he is an attorney and is one of three bankruptcy trustees in North Dakota. He said the role of a bankruptcy trustee is to examine debtors and to ensure that the proper exemptions are being taken. He said some of the exemptions contained in North Dakota law are archaic and others need to be updated. He said according to statute and case law, retirement benefits are exempt. He said some of the mobile home exemption is vague and needs clarification. He said the mobile home exemption is often added to the homestead exemption. He said there is also a need for clarification of the annuities exemption.

In response to a question from Representative Koppelman, Mr. Wagner said pensions are exempt in bankruptcy. He said the North Dakota exemptions should provide protection that is equal to the federal exemptions.

In response to a question from Representative Klemin, Mr. Wagner said there should be a limit on the amount of annuity exemption.

In response to a question from Senator Fiebiger, Mr. Wagner said other states' exemptions are similar to North Dakota's. He said many states have a "wild card" exemption. He said in North Dakota the "wild card" exemption amount is \$5,000.

In response to a question from Representative N. Johnson, Mr. Wagner said he would provide

information to the committee on the amounts and types of federal exemptions.

In response to a question from Representative Klemin, Mr. Wagner said in order to claim that a debtor made a fraudulent transfer, it must be proven that the debtor planned to defraud creditors. He said that is difficult to do.

In response to a question from Representative Griffin, Mr. Wagner said settlements from wrongful death or personal injury cases are usually paid in the form of an annuity. He said the annuity, up to a certain amount, is exempt from bankruptcy.

In response to a question from Representative Kretschmar, Mr. Wagner said in about 70 percent to 80 percent of bankruptcy cases, excessive credit card debt is the primary reason for filing for bankruptcy. He said about 10 percent of the bankruptcy cases are the result of debt from unpaid medical bills. He said these figures take into consideration the possibility that credit cards may have been used to pay medical bills.

In response to a question from Representative N. Johnson, Representative Kretschmar said the look-back period for medical assistance eligibility is five years.

### **COMMITTEE DISCUSSION**

Representative Klemin said the committee should receive a copy of the North Dakota exemptions and the fraudulent transfers statute.

Senator Olafson said the committee should receive recommendations from Mr. Wagner and the other bankruptcy trustees in the state on changes to bankruptcy exemptions.

Chairman Meyer said the committee will invite Mr. Lowell Bottrell and Mr. John Foster to the next meeting to provide testimony and suggestions regarding this study.

### **DOMESTIC VIOLENCE PROTECTION ORDER PROCESS STUDY**

At the request of Chairman Meyer, committee counsel presented a memorandum entitled [Domestic Violence Protection Order Process - Background Memorandum](#).

Committee counsel distributed a copy of testimony presented by Justice Mary Muehlen Maring on House Concurrent Resolution No. 3013 during the 2007 legislative session, as requested by Justice Maring.

Chairman Meyer called on Ms. Bonnie Palecek, North Dakota Council on Abused Women's Services, for testimony regarding the domestic violence protection order process study. Ms. Palecek said the process for applying for a temporary protection order begins with an individual obtaining an application in which the individual outlines the history of abuse and describing the most recent, specific incident of abuse. The petition is presented to the district court pro se, with an attorney, or with the assistance of an advocate certified under North Dakota Court Rule 34. She said

a hearing is scheduled within 5 to 14 days at which time the judge will decide if the order is granted. She said if the temporary order is granted, it is served on the respondent who may appear at a full hearing within 14 days. At that hearing, she said, the court hears from each party and determines whether to continue the order. She said this hybrid civil and criminal process was first enacted in 1979. She said each Legislative Assembly since 1979 has made changes to the law. She said the process is unique because it is basically a civil process which, if violated, invokes a criminal penalty. She said all 50 states have a protection order process. She said the federal government has enacted full faith and credit recognition of this process among all states and tribes, which means that every state and tribe must honor orders from every other jurisdiction. She said the North Dakota Supreme Court sanctioned the role of domestic violence advocates in this process in 1992 by outlining specific activities that advocates can engage in relating to the process, including sitting at counsel table, giving written or oral statements to the court, and assisting the petitioner with printed forms. She said there are codified training requirements for advocates for an initial training and 10 hours of continuing education each year. She said all certified advocates must be affiliated with a domestic violence agency. She said the North Dakota Council on Abused Women's Services provides a list of certified advocates to the Supreme Court every six months for distribution. She said there are currently 65 certified advocates. She said some relevant statistics for 2006 are:

- 4,319 new victims sought assistance from 19 centers;
- Of those seeking assistance, 95 percent were female;
- 734 temporary protection orders were granted with the assistance of domestic violence advocates;
- 34 temporary order petitions were denied;
- 30 orders were denied at the full hearing;
- It was alleged that 101 respondents violated the orders;
- 32 respondents were arrested for violations;
- Seven respondents were arrested for subsequent violations;
- 21 respondents were prosecuted for violations; and
- Another six were prosecuted for subsequent violations, which is a felony offense.

Ms. Palecek said the advocacy network is very aware of the allegations that protection orders are handed out "like candy" and that the process is sometimes abused out of spite or in order to gain the upper hand in custody disputes. She said nearly every center has had experience with receiving referrals from attorneys who want free assistance for their clients in getting protection orders. She said two safeguards to maintaining the integrity of the process

include a separate definition of domestic violence when custody is involved, which was accomplished in a 1997 change to North Dakota Century Code Section 14-05-22, and a sanction for false allegations of domestic violence, which was accomplished in a 1999 change to Section 14-07.1-02.1. She said she is not aware of an instance in which Section 14-07.1-02.1 has been used. She said considerable effort has been exerted to maintain, clarify, and enhance the laws relating to domestic violence. She said the intent 30 years ago was to level the playing field by providing assistance to the most vulnerable, battered women and their children. She said in the course of doing that, advocacy groups have sought policy changes, new laws, money, and adequate training in many arenas. In 2006, she said, at an estimated four hours per protection order at \$85 per hour, advocacy agencies provided services for 734 orders amounting to \$249,560 for the year. She said there are concerns about accusations of lopsided resources when the victim advocates have raised the resources themselves. She said the talk of equal resources for respondents is puzzling. She said respondents are eligible for indigent defense if they violate an order. She said she continues to hear complaints from respondents and from defense attorneys representing respondents, but there has been no effort to organize to get services as an oppressed group. She said the integrity of the protection order process has been valued and guarded since 1979. Ms. Palecek provided written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Meyer, Ms. Palecek said it is up to the court to determine if the level of imminent harm is there. She said the 34 petitions for protection orders which were denied in 2006 were not denied because the allegations were false, but rather because the harm did not rise to the level required.

In response to a question from Representative Klemin, Ms. Palecek said the victim advocacy groups do not represent respondents. She said their purpose is to provide assistance to victims. She said victim advocacy groups receive public money.

In response to a question from Senator Fiebiger, Ms. Palecek said because her data collection is victim-based, there are no statistics on the number of respondents who have legal counsel. She said she could keep that statistic anecdotally over the course of the committee's study. She said she is concerned about the responses about unfairness in the protection order process in the report on gender fairness in North Dakota courts report.

In response to a question from Representative Meyer, Ms. Palecek said law enforcement is being trained on how to determine the predominant aggressor in domestic violence situations. She said the predominant aggressor law change has been very important in helping to clarify victims from aggressors. She said domestic violence is a gender-based crime. She said as long as people resist seeing domestic

violence as a gender-based crime, there will be gender-based issues.

### **COMMITTEE DISCUSSION**

Chairman Meyer said Justice Maring has indicated that she will be available to testify at the next meeting regarding gender fairness in North Dakota courts report.

Senator Fiebiger said the committee should receive information from Legal Assistance of North Dakota and SBAND regarding respondent complaints.

Chairman Meyer said the committee should invite some district judges to discuss the protection order process issues.

Representative Klemin said Judge Gail Hagerty would be able to provide some helpful information for the committee and requested that she be invited.

### **OTHER BUSINESS**

The committee discussed future meeting dates of the committee. Chairman Meyer said the next meeting of the committee would be on January 9, 2008.

No additional business pending, Chairman Meyer adjourned the meeting at 3:00 p.m.

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Vonette J. Richter  
Committee Counsel

ATTACH:1