

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION  
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2044

2001 SENATE JUDICIARY

SB 2044

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2044

Senate Judiciary Committee

Conference Committee

Hearing Date January 24th, 2001

Tape Number	Side A	Side B	Meter #
1	X		0-33.8
Committee Clerk Signature			

Minutes: Senator Traynor opened the hearing on SB 2044: A BILL FOR AN ACT TO AMEND AND REENACT SECTION 14-05-24 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO THE DIVISION OF PROPERTY IN A DIVORCE ACTION.

Yonette Richter, representing the legislative council, (presented a copy of the final report to the committee). The committee broke into a subcommittee and a task force with practicing attorneys and judges. There were four working groups; property division and spousal support, mediation, guardians, statutory revision. Bill relates to divorce action relating to division of property. Line 14 -21, page 1. "Except upon a finding that excluding the property is inequitable to the other party, property acquired by an individual spouse through inheritance or by gift, if titled and maintained in the sole name of the donee spouse, is the property of that party and is not subject to division under this section. Gifted and inherited property excluded from division is defined as property acquired by an individual spouse by gift or inheritance or property acquired in exchange for gifted or inherited property and includes the increase in value of the property acquired by the

individual spouse by gift or inheritance." 3rd subsection line 22, "Property acquired by gift from the other spouse is subject to property division under this section." 4th subsection line 1-4, page 2. The court may redistribute property in a postjudgment proceeding if a party has failed to disclose property and debts as required by rules adopted by the supreme court, or the party fails to comply with the terms of a court order distributing property and debts."

**Senator Traynor:** Apparently it makes no difference if property were acquired before or after a marriage.

**Vonette Richter:** That's my understanding.

**Richard Knutson,** testified in favor of SB 2044. (testimony attached)

**Senator Traynor:** Have you made any gifts for your daughter?

**Richard Knutson:** Yes I have. Under IRS law its limited to under \$10,000.

**Senator Lyson:** How many states have this law?

**Richard Knutson:** I was told approximately 27 states.

**Paul Bernabucci,** speaks in favor of SB 2044. (testimony attached)

**Leroy Triebold,** supports SB 2044. (Testimony attached)

**Sherry Mills Moore,** testifies for the Bar Association. First part of bill states there are two sides to every story. This bill will put current law upside down. New law gives special treatment to inheritance. Laws are intended to be fair. This bill is a policy decision which came out of committee with a split vote. Those who get married don't think of divorce. Prenuptial agreement will definitely cast a shadow on a marriage as Mr. Knuston states. Look at family the family farm situation, they need not incumber the land. Laws dealing with this will come into play. Courts always had power to divide divorce spouses inheritance. You will need to do a rule change with in this state. Paragraph 3 is a companion to paragraph 2 where everything is

equal. Paragraph 4 is less controversial, which protects a spouse from a sneaky spouse. Court can also do redistribution of property. Section 1 of this bill is directed to a cleanup bill, which which is 2046.

**Senator Traynor:** If this law becomes enacted could we open up old laws?

**Sherry Moore:** no.

**Senator Traynor:** There would be no retroactive effect?

**Sherry Moore:** yes.

**Senator Trenbeath:** What about the situation when their is an inheirance. This doesn't address the situation where the inheiriting spouse at one time has a CD in joint tendency, then because of joint tendency reverts to sole ownership. Is that then in the sole name or not? Once it's out of the sole name is it always out of that name, or can it come back to a sole name again.

**Sherry Moore:** This specifically directed to property in the sole title. It will not foreclose on some one from arguing that it came from my parents and I want it back.

**Senator Trenbeath:** Why is that in there? Making a financial decision that isn't good for the marriage, but is good for a divorce. You voiced this concern.

**Sherry Moore:** Those arguments will be continued to be made.

**Senator Trenbeath:** CD situation, inheiriting spouse puts th at in a CD for purposes other than a gift, an agency relationship. That presumption is that it is no longer inheirance. It's not protected anymore.

**Sherry Moore:** It would be and it would lose its protection.

**Senator Trenbeath:** What is the intent of the language that says "property aquired by the individual spouse by gift or inheritance." (line 20-21, page 2) Is the intent the inheritance is prior to marriage or during one.

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Senate Judiciary Committee

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**Sherry Moore:** Premarital property is not included in this provision. We are trying to make baby steps.

**Senator Trenbeath:** people will try to make a distinction.

**Senator Dever:** Except upon a finding that excluding the property is inequitable to the other party. Line 14, page 1. Could you give me an example?

**Sherry Moore:** Farmland inherited is inequitable. Wife says its not inequitable.

**Susan Beehle,** testifies against SB 2044. Represents R-Kids. A custodial parent not in favor of the bill as it is currently written. This doesn't give total protection of inheritance to a child. If you have been given a gift if shouldn't be given to another in a divorce. We wanted to know of the effect on the child.

**Bonnie Polleck,** represents CAW. Members of the coalition had discussion over this bill. With shifting of burden of proof with saying they are sole benefactors of the land. More detrimint to shift burden of proof.

**Senator Traynor** closed the hearing on SB 2046.

**Tape 2, side A meter # 35.5**

**There was discussion on the bill before a vote was taken.**

**MOTION TO DO PASS WAS MADE BY SENATOR TRENBEATH. SECONDED BY SENATOR LYSON. VOTE INDICATED 3 YEAS, 4 NAYS, AND 0 ABSENT AND NOT VOTING. SECOND MOTION TO DO NOT PASS WAS MADE BY SENATOR WATNE, SECONDED BY SENATOR NELSON. VOTE INDICATED 3 YEAS, 4 NAYS AND 0 ABSENT AND NOT VOTING. THIRD MOTION TO DO PASS WAS MADE BY SENATOR TRENBEATH, SECONDED BY SENATOR LYSON. VOTE INDICATED 3 YEAS, 4 NAYS AND 0 ABSENT AND NOT VOTING. FOURTH MOTION TO**

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Senate Judiciary Committee

Bill/Resolution Number SB 2044

Hearing Date January 24th, 2001

DELETE SUBSECTIONS 2 AND 3 WAS MADE BY SENATOR NELSON, SECONDED BY SENATOR BERCIER. VOTE INDICATED 3 YEAS, 4 NAYS AND 0 ABSENT AND NOT VOTING. FIFTH MOTION WAS MADE BY SENATOR WATNE TO AMEND SECTION 1, KEPP IN "AND DEPTS" REINSTATE LINES 8 - 13. SECONDED BY SENATOR NELSON. VOTE INDICATED 3 YEAS, 4 NAYS AND ZERO ABSENT AND NOT VOTING. SIXTH MOTION WAS MADE BY SENATOR DEVER TO SEND TO FLOOR WITHOUT RECOMMENDATION. SECONDED BY SENATOR TRENBEATH. VOTE INDICATED 5 YEAS, 2 NAYS AND 0 ABSENT AND NOT VOTING.



Date: 1/30/01  
Roll Call Vote #: 2

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 513 2014

Senate Judiciary Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Not Pass

Motion Made By Watne Seconded By Nelson

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman		X	Bercier, D.		X
Watne, D. Vice Chairman	X		Nelson, C.	X	
Dever, D.	X				
Lyson, S.		X			
Trenbeath, T.		X			

Total (Yes) 3 No 4

Absent 0

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:









**REPORT OF STANDING COMMITTEE (410)**  
January 30, 2001 1:50 p.m.

**Module No: SR-16-1932**  
**Carrier: Trenbeath**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2044: Judiciary Committee (Sen. Traynor, Chairman) recommends BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION (5 YEARS, 2 DAYS, 0 ABSENT AND NOT VOTING). SB 2044 was placed on the Eleventh order on the calendar.**

2001 HOUSE JUDICIARY

SB 2044

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2044

House Judiciary Committee

Conference Committee

Hearing Date 02-13-01

Tape Number	Side A	Side B	Meter #
TAPE I	x		2498 to 6256
TAPE I		x	01 to 1097
Committee Clerk Signature <i>Joan Diers</i>			

Minutes: Chairman DeKrey opened the hearing on SB 2044. Relating to the division of property in a divorce action.

Yonette Richter: Legislative Council, the Interim Committee conducted a family law study, here to explain SB 2044. One of the working divisions looked at property division in a divorce action and spousal support. This bill deals with property that is received by an individual spouse through inheritance or gift, provide that the titled and maintained in the sole name of the donee spouse, is the property of that party and is not subject to division under this section. Gifted and inherited property excluded from division is defines as property acquired by an individual spouse by gift or inheritance or property acquired in exchange for gifted or inherited property and includes the increase in value of the property acquired by the individual spouse by gift or inheritance. Subsection three provides that property acquired by gift from the other spouse is subject to property division under this section. Subsection four provides that the court may redistribute property in a postjudgement proceeding if a party has failed to disclose property and

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House Judiciary Committee  
Bill/Resolution Number SB 2044  
Hearing Date 02-13-01

debts as required by rules adopted by the supreme court, or the party, fails to comply with the terms of a court order distributing property and debts.

Rep Maragos: How does this change what is currently in law?

Yonette Richter: Currently everything is divided, regardless of the source. In this bill the same would apply except for the property that is received by gift or inheritance, with the exception that is on line 14.

Rep Onstad: Is there a time span here.

Yonette Richter: There isn't, the court is required to look at guidelines for distributing property.

Rep Onstad: But with this, it would not.

Yonette Richter: This it would not.

Rep Delmore: I have a question of the proof of the inheritance, would you have to prove that it was given to you by your father or whatever, then the judge would decide if it would go in?

Yonette Richter: It is required that the title is maintained.

Rep Wrangham: How does this effect property in another state?

Yonette Richter: I am not sure of the jurisdiction issues. The same could apply now, that doesn't change. What applies then applies now.

Vice Chr Kretschmar: In the first section of the bill, quite a bit of the statute is being removed, is there a provision in other statutes for maintenance of the children of the marriage?

Yonette Richter: Yes, what this section does now is to provide for equitable distribution of property and it also authorizes the court to provide for child support and spousal support.

Chairman DeKrey: If there are no further questions, thank you for appearing.

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House Judiciary Committee  
Bill/Resolution Number SB 2044  
Hearing Date 02-13-01

Paul Bernabucci: resident from Fargo (see attached testimony) also attached is a letter from J.R. Bernabucci.

Rep Delmore: Do you think that the time of the marriage should have any thing to do with land and those types of things? IS there a difference is you have lived together for two years or twenty?

Paul Bernabucci: I think that should play some roll in the decision, in the way the bill is drafter, the judge can decide if the parties are not capable of caring for themselves. In todays world, there are many inarrriages where the two parties involved are both working professionals and supporting themselves and maybe the children. If there are two professionals working, I do not understand, that give one person the right to take so much.

Chairman DeKrey: If there are no further questions, thank you for appearing.

Vic Knutson: (see attached testimony of two pages)

Chairman DeKrey: IF there are no further questions, thank you for appearing.

Sharon Mills Moore: attorney in Bismarck with a focus on family law (see attached testimony).

TAPE I SIDE B

Sharon Mills Moore (testimony continues)

Chairman DeKrey: When we passed this out of the Interim Committee, there was some talk that Minnesota had, defining property.

Sharon Mills Moore: Wwe did look at Minnesota, this does not copy that, it talks about land appreciation, most states do not include appreciated value.

Chairman DeKrey: Will this change amount of litigation?

Sharon Mills Moore: I don't think this will change anything. It will depend who has the burden.

Rep Maragos: Cannot most of this be avoided by estate trusts?

Sharon Mills Moore: It can, but not always.

Rep Maragos: The trust cannot be breached, but the benefits can.

Sharon Mills Moore: That is correct, you cannot undo a trust that is created by a third party. You can't undo a will.

Rep Eckre: A lot of other states have gone to this, have any states done away with and gone back to the old system?

Sharon Mills Moore: I don't know.

Vice Chr Kretschmar: What per cent of the divorce cases of parties reach an agreement?

Sharon Mills Moore: At least 85 to 90 per cent.

Vice Chr Kretschmar: There is just a small amount that the court has to decide.

Sharon Mills Moore: That is correct.

Rep Disrud: If the couple has a lot of bitterness, would it make a person want to hide the stuff.

Sharon Mills Moore: In the bitter state, the people become sneaky. Section four is directed at the sneaky spouse.

Chairman DeKrey: When people gift to a couple, or maybe they don't like the spouse, they make the gift to the son or daughter, if not kept separate, it will end up in the pot anyway.

Sharon Mills Moore: Yes, it will affect decisions in the marriage.

Rep Delmore: Is there any protection for someone investing a salary in the marriage, or contributing money from the salary to the land or a business.

Sharon Mills Moore: The protection that is there is unless it would be inequitable, but the professional working person would have the burden to convince the court.

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**House Judiciary Committee**

**Bill/Resolution Number SB 2044**

**Hearing Date 02-13-01**

**Chairman DeKrey: Are there any further questions, seeing none, thank you for appearing. Is there anyone else wishing to appear in support or opposition to SB 2044. Seeing none, we will close the hearing on SB 2044.**

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2044b

House Judiciary Committee

Conference Committee

Hearing Date 03-05-01

Tape Number	Side A	Side B	Meter #
TAPE 1		x	3265 to 5430
Committee Clerk Signature <i>Joan Diets</i>			

Minutes: Chairman DeKray: we will have some testimony on SB 2044 from a lady who is from Williston. We will take a look at SB 2044.

Luanna Peterson: homemaker, student, college instructor, business partner and mother from Williston. I am here to testify in opposition to SB 2044. Let me give you a little background. I was raised on a farm, the oldest of four children. I went to college, didn't finish, got married and moved to Montana. Where I became a full business partner with my children's father. We started a company related to the oil business. I was a full partner, working in the trenches etc. So I was a very full active partner in that business. Due to strain of being in partnership with my spouse, our marriage fell apart. I went back to college and got married and again got married to a man who had a business in the oil fields of Williston. I was reading the Bismarck Tribune and saw that this bill had passed the Senate. I think that there are some real problems with this bill. I don't know if this was taken a good enough look at. I think the premise is bent. If you take a closer look at the bill there is something very much wrong with it. Three issues I would like to talk

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House Judiciary Committee

Bill/Resolution Number SB 2044

Hearing Date 03-05-01

about. Family business, challenge of North Dakota and rural marriages of North Dakota. Family business, when I think about family business, I think of dad out on the tractor, mom and I picking rocks. That is a family business. Dad out branding cattle and giving shots and mom being in the house preparing the meal, that is family business. I think this bill is taking the family out of family business. There was a Forbes report that said a first generation really goes, you work hard, you are building them up, but when a family business goes to the second generation, almost 70% of the business goes into decline. North Dakota families and marriages. When she got married for the second time, his dream was to own the whole business that he owned in partnership with another person. He said I can't do this if I don't have your support. I gave him that support. My support was being there for the kids, meals were on the table. doctor appointments for the family. Business increased by 20% the first year we bought the business, I am his partner in every sense of the word. Another reason I have concerns of this bill, I have a friend who has a father who has alheimers, and they had a fairly large estate. If a couple is married and one partner had inherited property and has it documented. And that partner gets alheimers and they have two or three children, my friends mom after a time, when she could see the money going to nursing home care, made the decision to divorce to try and save half of the estate. She did that to save the business that he had worked hard for. If he would have inherited some part of that business, and she had went to divorce him, that business would have gone to his side anyway and he would have still lost it. You tell me who would have gained from that. Someone suggested that this bill would make it easler for lawyers and judges in the state of North Dakota. She gave an example of her mother and how her mother kept track of every dime that was spent on there farm because they received their money from FHA. If you would have told my mother that in order to guard

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House Judiciary Committee  
Bill/Resolution Number SB 2044  
Hearing Date 03-05-01

her partnership, she would have had to document everything. You would have had thousands of pages of documentation. This bill is not going to make things easier for judges and lawyers, you are going to have to look at everything that they have put in the record book for validity. Family is not based on a contract. Rural marriages are under so much pressure, I don't think that we should be so concerned about trying to protect the family business in a divorce. We should be trying to keep the family together. With this bill the judge makes the decision whether or not a partner has put in enough time to get some of the pot. I want to ask all of you, would you like to go before one person and see what you can get for the last twenty or thirty years of your life. To be told you have no worth, no right to this partnership. This should not be a partisan issue, this should be a North Dakota issue. Thank you.

Chairman DeKrey: Are there any questions for Ms Peterson.

Rep Delmore: I would like to assure you this will not be taken lightly.

Luanna Peterson: Tells why she is so interested in the bill.

Chairman DeKrey: Are there any further questions.

Rep Mahoney: A divorce is a miserable topic, it is a no win situation. But as to your comment that you have to put yourself in one persons hands, that happens now. What scares you about this bill.

Luanna Peterson: People thing that they have to document everything, I an not sure how to make this fair, but we cannot free everyone from consequences and can't protect all from a bad decision.

Rep Mahoney: Personally I would rather have a pre nup than a divorce.

Chairman DeKrey: Are there any more questions, seeing none, thank you for appearing.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2044c

House Judiciary Committee

Conference Committee

Hearing Date 03-12-01

Tape Number	Side A	Side B	Meter #
TAPE I		x	4602 to 5389
Committee Clerk Signature <i>Joan Diers</i>			

Minutes: Chairman DeKrey called the committee to order on SB 2044.

COMMITTEE ACTION

Chairman DeKrey: what are the wishes of the committee. Rep Grande moved a DO NOT PASS, seconded by Rep Delmore.

DISCUSSION

Chairman DeKrey: the clerk will call the roll on a DO NOT PASS motion on SB 2044. The motion passes with 10 YES, 3 NO and 2 ABSENT. Carrier Rep Wrangham.

Date: 03-12-01  
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB-2044

House JUDICIARY Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Not Pass

Motion Made By Rep Grande Seconded By Rep Delmore

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey		✓			
VICE CHR -- Wm E Kretschmar	✓				
Rep Curtis E Brekke					
Rep Lois Delmore	✓				
Rep Rachael Disrud	✓				
Rep Bruce Eckre		✓			
Rep April Fairfield					
Rep Bette Grande	✓				
Rep G. Jane Gunter	✓				
Rep Joyce Kingsbury	✓				
Rep Lawrence R. Klemin		✓			
Rep John Mahoney	✓				
Rep Andrew G Maragos	✓				
Rep Kenton Onstad	✓				
Rep Dwight Wrangham	✓				

Total (Yes) 10 No 3

Absent 2

Floor Assignment Rep Wrangham

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
March 12, 2001 12:28 p.m.

**Module No: HR-42-5331**  
**Carrier: Wrangham**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2044: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS (10 YEAS, 3 NAYS, 2 ABSENT AND NOT VOTING). SB 2044 was placed on the Fourteenth order on the calendar.**

2001 TESTIMONY

SB 2044

JOHN R. BERNABUCCI

P.O. BOX 2082 (701) 251-2007  
JAMESTOWN, NORTH DAKOTA 58402

January 22, 2001

VIA FEDERAL EXPRESS!  
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Honorable John T. Traynor  
North Dakota State Senate  
North Dakota Legislature  
600 East Boulevard Avenue  
Bismarck, N.D. 58505

Dear Senator Traynor:

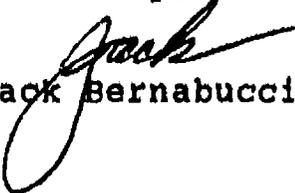
This letter is a request for your support for Senate Bill number 2044 relating to the division of property in divorce proceedings.

Some time ago I gifted substantial assets to my son with the clear intent and purpose that they be his; but recently a North Dakota Judge gave most of those assets to his former wife and I consider that to be a gross injustice to me and to my son.

Your support for Senate Bill 2044 will be deeply appreciated.

Thank you.

Sincerely,

  
Jack Bernabucci

January 22, 2001

Senate Judiciary Committee:

John T. Traynor  
Darlene Watne  
Dennis Bercier  
Dick Dever  
Stanley W. Lyson  
Carolyn Nelson  
Tom Trenbeath  
State Capital  
Bismarck, ND 58505

RE: Senate Bill No. 2044

Dear Senators:

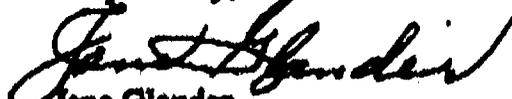
This letter is in support of Senate Bill No. 2044 which will change the way in which inherited or gifted property is distributed in divorces. I understand that the Bill provides that, in most cases, gifted or inherited property will be retained by the person to whom the gift was given. I believe that the Bill is a fair one and one that will honor the wishes of the person who has given the gift or provided the inheritance.

To demonstrate the unfairness of existing law, I would like to share my personal situation. I have been married for over twenty years. My husband makes a handsome salary. I am middle-aged and have minimal marketable skills. My employment history is limited. Contrary to my desires, there will be a divorce. During the marriage, I received an inheritance of farmland. The inheritance was specifically to me; it was not intended as a joint gift to me and my husband.

Because of the great disparity in our earning ability, the length of the marriage, and my age, my lawyer has told me that I should be entitled to spousal support to assist me in paying my necessary living expenses after the divorce. The income generated from the farmland is not sufficient to pay my necessary monthly or annual living expenses. Unfortunately, I am afraid that, if I assert a rightful claim for spousal support, my husband will then claim a portion of my inherited property. What makes the matter worse is that my husband will certainly receive a significant inheritance from his family after our divorce is complete. Thus, under existing law, there is a very real likelihood that I will not receive spousal support to which I am entitled or that my husband will share in my inheritance and also, in the end, he will retain 100% of his own inheritance. I personally believe that such an outcome would be unjust. I am told that it could be the result under existing law.

I urge your support for Senate Bill No. 2044.

Respectfully,

  
Jane Glander  
1513 Cottonwood Street  
Grand Forks, ND 58201

## **FAMILY LAW PROCESS STUDY**

### **Background**

North Dakota Century Code Title 14 contains the majority of the statutes dealing with domestic relations or family law in the state. Title 14 includes those chapters that deal with marriage, divorce, annulment, separation, custody and visitation, child support, adoption, alternative dispute resolution, and domestic violence. Another area of the code which includes statutes related to the family law process is Chapter 27-20, the Uniform Juvenile Court Act.

In 1999 11,151 of the 31,429 (or 35.5 percent) of the civil case filings in district court involved domestic relations cases. In addition, 2,313 juvenile cases were filed, representing about 3.7 percent of the total district court caseload. Within the domestic relations category, child support actions made up 53.4 percent of the cases; divorce, 24.8 percent; paternity, 8 percent; adult abuse, 10.1 percent; and custody and adoption, 3.4 percent. Adult abuse filings increased slightly in 1999 to 1,123, compared with 1,086 filings in 1998. Divorce filings decreased in 1999 with 2,774 filings compared to 3,044 in 1998, and child support actions decreased from 6,784 in 1998 to 5,952 in 1999.

### **Joint Family Law Task Force**

In 1995 the North Dakota Supreme Court, at the request of the State Bar Association of North Dakota, established a task force to study family law issues. The Joint Family Law Task Force consisted of members appointed by the State Bar Association of North Dakota and by the Supreme Court. The task force was assigned to review family law procedures and related matters presently used by the judicial system in North Dakota; evaluate the need for changes to ensure accessibility to the system and responsiveness of the system; assess the impact of court unification on the process; and evaluate the effectiveness of the process for clients, attorneys, and the courts.

The Joint Family Law Task Force was further directed to review dispute resolution alternatives for potential application in the family law system and the need for public education programs dealing with the impact of divorce and separation on the family unit. Finally, the task force was directed to consider two problematic areas raised by members of the bench and bar--domestic violence in custody cases and the use of guardian ad litem. The group completed its directives in April 1998 and made recommendations regarding parent education; postjudgment demand for change of judge; statutory review; domestic violence as a factor of custody; and alternative dispute resolution.

The Joint Family Law Task Force completed its work in April 1998 and concluded that the task force had completed as many of its goals as were practicable. The task force, in its final report, stated that the scope of what remains will require a cooperative effort among the judiciary, the State Bar Association of North Dakota, and the Legislative Assembly. The task force agreed to serve as an ad hoc group, ready to respond to issues raised by legislative interim committees and the Legislative Assembly.

### **Subcommittee and Working Groups**

Senate Concurrent Resolution No. 4032 called for a cooperative study of family law issues between the Legislative Council and the Joint Family Law Task Force of the State Bar Association of North Dakota. A subcommittee of 12 committee members and nine members of the Joint Family Law Task Force was formed to study the family law issues. The subcommittee identified four areas of study--property division and spousal support; mediation; guardians ad litem; and statutory review. The subcommittee was further divided into four working groups. Each of the family law subcommittee's four working groups held a series of meetings either in person or by conference call. In some instances, bill drafts were reviewed, in others, recommendations were considered. The following is a summary of the conclusions of each working group.

### **Property Division and Spousal Support**

The Property Division and Spousal Support Working Group identified three issues for study--disclosure of marital assets; establishment of guidelines, or other measures of certainty, for spousal support; and exclusion of premarital property, inherited property, and gifts from marital property. The study of the property division and spousal support issues included a survey of the respective laws in the other 49 states, while the disclosure discussion was based mainly on the California law.

The working group's concerns regarding the complete disclosure of marital assets were the premise for the discussions regarding the California disclosure law. Working group members questioned whether legislation similar to that passed in California would rectify problems associated with parties who conceal or decide not to candidly disclose information regarding marital assets.

California passed its disclosure law in 1993. The law was enacted to ensure fair and honest reporting of marital assets during the dissolution process. A party failing to comply with the disclosure requirements may be subject to a redistribution of the previous property division order as well as being required to pay the other side's attorney's fees and costs. The group discussed several issues concerning the implementation of a similar law in North Dakota, and noted in particular that disclosure laws would shift the burden from the victim to the perpetrator of nondisclosure.

The working group decided the disclosure requirements were largely procedural in nature and, therefore, should be considered as a potential rule. The working group concluded the number of cases involving disclosure issues was probably small while the impact of a disclosure rule on cost and the potential for delay would be great. The group also determined that Rule 60 of the North Dakota Rules of Civil Procedure, dealing with relief from a judgment or order when new information is obtained, provides relief similar to the disclosure law. Based on those findings, the working group decided to forego any further work on a disclosure law.

The working group also discussed possible guidelines for spousal support. The amount of spousal support awarded in a divorce is often unpredictable. As in most states, spousal support in North Dakota is governed by broad statutory language and case law. The working group's mission in this area was to determine if a more predictable and consistent solution could be discovered or developed. Based upon a review of information regarding statutes from other states, it was concluded that while some states included arbitrary time

limits for spousal support or establish a "years of marriage" demarcation for purposes of setting support, no state has adopted a comprehensive and fair set of guidelines.

One guideline identified and examined by the working group was that adopted by the Superior Court of Arizona in Maricopa County. The Maricopa County guidelines apply to marriages of at least five years and included some financial restrictions regarding the postdivorce income of the two parties. If the parties met the threshold, a mathematical formula for calculating spousal support is used. The guidelines, however, emphasize that the guidelines do not create a presumption but rather serve as a starting point for discussion, negotiation, or decisionmaking.

The working group expressed concern about the limited use of the Maricopa County guidelines and discussed the potential for using them on a limited basis in a pilot project-type setting to determine how well the guidelines would work. The judges on the working group suggested distribution of the guidelines to the Council of Presiding Judges for purposes of considering the development of a voluntary program allowing judges to use the guidelines. Under this program, judges could compare outcomes using the guidelines versus the outcomes under established case law. As data is collected regarding the outcomes, the working group believed the court system would be in a better position to determine whether spousal support guidelines provide a fair and reasonable alternative for the calculation of spousal support.

The most controversial topic discussed by the working group was that of excluding premarital property, inherited property, and gifts when dividing marital property. In North Dakota, all property owned by the parties, regardless of when obtained or how titled, is considered to be the marital property of the parties and is subject to property division. After reviewing how other states deal with property division, the group determined that changing the law to allow the exclusion of premarital property was too great a change. Consequently, the working group proposed a bill draft providing for the exclusion of inherited property and gifts as long as the property meets the definitions set forth in the draft.

The working group debated whether the present method of division should be changed because the exclusion of inherited property and gifts represents a dramatic shift from the present system and will eviscerate much of the existing case law dealing with property division. The working group concluded that the proposal would open the door for a new set of court interpretations regarding what constitutes inherited property and gifts and that the result may be a very steep learning curve for the court, the bar, and the public. In addition, concern was raised regarding the impact of the proposal on litigation costs. Proponents argued that the present practice creates unfair results to litigants, especially in situations involving segregated inheritance. While the group did not endorse the proposed language on property division, it did agree to forward the proposal to the full committee for its review and consideration.

As the working group discussed changes to the property division portions of NDCC Section 14-05-24, it was recognized that the present section included language regarding spousal support and a requirement that parents provide support to their children. The group believed the language was confusing and not germane to the section. Consequently, the group recommended removing the spousal support language from the section and creating a new section on spousal support and removing the sentence regarding child support from the section and inserting it into NDCC Section 14-09-08, dealing with the parents' mutual

duty to support children. The changes are included in a bill draft recommended by the Statutory Review Working Group.

The recommendations and findings of the Property Division and Spousal Support Working Group were:

- Encourage the Council of Presiding Judges to implement an informal procedure whereby the Maricopa County guidelines would be used to calculate spousal support and the results of that calculation should be compared to the actual spousal support awarded by the court.
- Forward to the full committee for its consideration the amendments to NDCC Section 14-05-24 regarding division of gifted and inherited property.
- Create a new section regarding spousal support that includes amended language from Section 14-05-24.
- Incorporate language dealing with child support from Section 14-05-24 into Section 14-09-08.

### **Mediation**

The history of developing a court-annexed alternative dispute resolution (ADR) program in North Dakota is complex. The Mediation Working Group identified two tasks--review statutes and rules from other states and analyze court-annexed ADR and funding issues--and two issues--the availability of mediation services to low-income families and the potential for creating qualifications for family law mediators.

As an initial step, the working group reviewed the final report of the Supreme Court and State Bar Association's Joint Dispute Resolution Committee. This report made several recommendations to the Supreme Court regarding the implementation of case settlement conferences similar to the procedure utilized by the federal court and requiring earlier judicial involvement in cases. The working group was informed the Supreme Court was in the process of developing new rules that provide for case settlement conferences using mediation techniques and using members of the judiciary, establish a court roster of trained neutral mediators, and establish training requirements. The working group recognized that any court-annexed mediation or ADR program involving private neutral mediators would require the Supreme Court to find a funding source. Thus, the working group concluded that the option of using judges to handle mediation may provide the most cost-effective system. Several members raised concerns, however, regarding the use of judges as neutral mediators, and emphasized that the Supreme Court should explore options for encouraging the use of private mediators.

With regard to the availability of mediation services to low-income families, the working group received information from the Conflict Resolution Center in Grand Forks. The center has implemented a sliding fee scale to accommodate the indigent population. As a result of this discussion, the State Bar Association of North Dakota also adopted a sliding fee scale for mediation services and incorporated the fee into its reduced fee program. The State Bar Association, in conjunction with Legal Assistance of North Dakota, also provided family law mediation training to 39 attorneys. Those attorneys have each agreed to provide either mediation services under the State Bar Association's volunteer lawyer program or the reduced fee program.

The working group also discussed several related issues, including a code of ethics for mediation in family law, the need for qualifications, and the maintenance of a roster of qualified mediators. The working group also addressed discipline issues. A draft of a code of ethics for mediation was developed with the intent that it be forwarded to the Supreme Court for its consideration.

The Mediation Working Group's recommendations were:

- Encourage the Supreme Court to explore options for establishing a court-annexed mediation program.
- Encourage the Supreme Court to consider adopting a code of ethics for mediators.

### **Guardian Ad Litem**

One mission of the Guardian Ad Litem Working Group was to discover whether other sources of funding were available to fund the training requirements contained in Rules 8.6 and 8.7 of the North Dakota Rules of Court, and to determine whether other resources were available to provide the services provided by child custody investigators and guardians ad litem. In certain family law cases, judges may order a child custody study to help the court determine the best interest of the children. Under the new rules, these investigations would be conducted by a child custody investigator. In instances in which the court is concerned about the child's best interest being adequately represented during a child custody case, the judge may order an attorney to serve as the child's guardian ad litem.

Under the new rules, both child custody investigators and guardians ad litem are required to attend an initial training session and to attend six hours of training each subsequent year. Since the services are of immeasurable value to the court system, the working group concluded the Supreme Court should consider ways in which to include the cost of training in its budget.

A secondary issue associated with sources of funding was the availability of qualified child custody investigators in the rural areas. Discussions on this issue were held with representatives from third-party providers and representatives from the Department of Human Services. Initially, the working group was seeking information regarding existing programs that could be tailored to meet the needs of the court program, or child custody investigation services that could be provided through regional human service centers. In response to the former, the third-party providers expressed concerns about training issues and administration of the services. The third-party providers also questioned the potential for liability for the services rendered. While there may be some interest in the future as the role of the investigators evolves, the third-party providers were hesitant to commit to providing resources.

The potential liability of a child custody investigator and guardian ad litem in conducting a study for the court or representing a child was also discussed. Concerns were raised about a recent lawsuit filed against a custody investigator. While there may be protection under current statutes for individuals conducting work on behalf of the court, the working group determined a bill draft adding immunity language to the section in the North Dakota Century Code enabling the court to appoint a guardian ad litem or child custody investigator was appropriate.

Discussions also were held with representatives of the Department of Human Services regarding the availability of support from regional human services centers. Several issues were raised by the representatives including present workloads of social workers at the regional centers. In light of the coordination required with child protection and other services, the department contended there may be a negative impact on the availability of staff and conflicts of interest would exist because the staff is often involved in working with the families on other issues. Consequently, the Department of Human Services was hesitant to suggest that their staff could provide child custody investigator services.

The working group concluded its study by noting that it seems as if several agencies are providing similar services to different, or sometimes the same, groups without any coordination. Several members of the working group speculated that the Supreme Court and the Department of Human Services should consider exploring the possibilities of coordinating services and resources in the area of child custody investigators. The working group believed a need exists to have a comprehensive study that would examine the common interests of the two entities, the conflicts, and the available resources as applied to the area of child custody investigations.

The recommendations of the Mediation Working Group were:

- Consider the inclusion of an immunity clause in NDCC Section 14-09-06.4.
- Encourage the Supreme Court and Department of Human Services to conduct a joint study exploring the possibilities of coordinating services and resources in the area of child custody investigators.

### **Statutory Review**

A survey mailed to the members of the family law section of the State Bar Association of North Dakota requesting suggestions for needed changes to NDCC Title 14 identified the following areas as being in need of change--consolidate Chapter 14-04 (Annulment), Chapter 14-05 (Divorce), and Chapter 14-06 (Separation); clarify that custody applies to separation and divorce; consider a new definition or some clarification to the definition of "habitual intemperance"; and reenact the penalty for removing a child from the state in violation of a custody order.

As the Statutory Review Working Group reviewed NDCC Chapter 14-04 dealing with annulments, there was consensus that Section 14-04-04, which deals with custody, should be amended to incorporate the best interest factors, as defined in the divorce chapter, into the annulment process. The present standard in the annulment chapter includes archaic language referring to fault. The working group discussed that the fault standard has not been recognized in custody for some time, and the group believed consistency dictated a change to the best interest factors.

The working group also recognized the need to make several amendments to NDCC Chapter 14-05 (Divorce) to incorporate provisions from the separation chapter. This was done in light of the working group's consensus that it is unnecessary to have separate chapters for separation and divorce because the protocols for the division of property, custody determination, and child support are the same for all three proceedings. Also within Chapter 14-05, the working group discussed updating the definition of "habitual

intemperance."

The Statutory Review Working Group noted the criminal penalty for intentionally removing a child from North Dakota in violation of a custody order had been inadvertently removed from the North Dakota Century Code when Chapter 14-14.1 (Uniform Child Custody Jurisdiction Act) was enacted in 1999. The working group agreed this was an oversight and recommended the addition of a new section to Chapter 12.1-18 (Kidnapping).

The recommendations of the Statutory Review Working Group were:

- Amend NDCC Section 14-04-04 to incorporate the best interest factors into the section.
- Consolidate the chapters dealing with divorce and separation into one chapter and remove archaic terms and language in the new chapter.
- Reenact the penalty for intentionally removing a child from the state in violation of a custody order into NDCC Chapter 12.1-18.

### Committee Considerations

Upon the conclusion of the working groups, the committee received information regarding the findings and recommendations of each group.

The Property Division and Spousal Support Working Group forwarded to the committee a bill draft regarding the division of gifted or inherited property. The committee received testimony that under this bill draft, the burden of proof should be shifted to the party who wants the gifted or inherited property to be divided. The testimony indicated that the burden may be shifted to the party least able to financially bear that burden. The testimony further indicated that the bill draft would result in more litigation at the appellate level. Several committee members expressed concerns that the goal of the bill draft was not necessarily to create less litigation but to provide for division of property that is fairer than under current law.

### Recommendations

The committee recommends Senate Bill No. 2044 to provide that property acquired by an individual spouse through inheritance or by gift, if titled and maintained in the sole name of the donee spouse, is the property of that party and is not subject to division.

The committee recommends Senate Bill No. 2045 to provide for the appointment of child custody investigators and provide immunity for child custody investigators and guardians ad litem.

The committee recommends Senate Bill No. 2046 to consolidate the chapters dealing with divorce and separation into one chapter, to reenact the penalty for intentionally removing a child from the state in violation of a child custody order, to apply the best interest standard to the annulment process, and to remove and update archaic language in the domestic relations statutes.

The committee also recommends the nonlegislative recommendations of the working groups

I am in support of house bill number 2044.

I feel with the number of increasing divorces. This bill would allow me more peace of mind when gifting property to my children.

I am third generation farmer in central North Dakota who does not want to chance losing our family farm.

I feel this legislation is far overdue and should be passed!

Kevin Lipetzky

Kevin Lipetzky

Box 125

Kensal, ND 58455

Dear Sir:

I would like to appear in support of bill 2044, as a second generation farmer who has known nothing but hard work and commitment to a family farm that was decimated by divorce. In these days of ready divorce because of irreconcilable differences it can be one small step toward saving so many FAMILY FARMS.

Thank you,

LeRoy Triebold

*LeRoy Triebold*

*1-23-2001*

Box 57  
Valley City, ND 58072

Phone: 701-840-0122

Today I would like to appear in support of Senate Bill 2044 both as a donor and a donee.

As a donor I would like to know that my intent to give my assets solely to my daughter upon my death will be protected under this revision of North Dakota law. It is my "intent" and "personal wishes" that are not currently protected under present North Dakota law. I do not wish that my daughter's inheritance must be shared with anyone else unless she chooses to do so. This would include any future spouse. To me it is unfair under current North Dakota law that a future spouse automatically is entitled to any inheritance that I have given to my daughter prior to or during her marriage. This bill if followed closely by any donee protects my "intent" and "personal wishes".

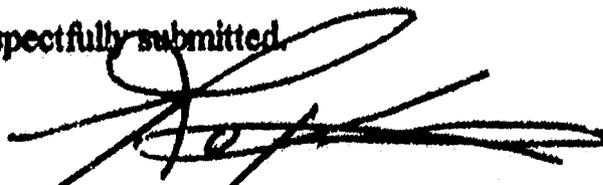
In today's world we have seen marriages crumble overnight. We have seen deliberate "gold digging" by unscrupulous individuals that has resulted in many people getting ripped off by professional con artists. Cult groups have also entered this arena conning susceptible people out of their inheritances by having die hard cult members marry susceptible newcomers in order to get at the newcomers inheritance. Some cults even have questionnaires asking the newcomers if they have any inheritances or any future inheritances. This law would help protect the people of North Dakota from these con artists. This law would also be gender neutral protecting both females and males.

As a donee I have also felt the sting of the current law. In Minnesota, where I lived prior to moving to North Dakota several years ago, my personal inheritance was protected under Minnesota law. I kept the inheritance and gifts given to me by my relatives separate under the guidelines of Minnesota law. Little did I know or think of checking into the laws of the State of North Dakota regarding the above issues when I moved to North Dakota. Nor did I receive any advise from my legal counsel at that time that the laws of the State of North Dakota were different than those of Minnesota regarding marital property. It turned out to be, in my opinion, a very unfair and costly situation in my own recent divorce.

My family had no intentions of leaving any of their assets to anyone but me. My family members were alive when I was married and they still did not mention my spouse's name in their wills nor did they ever intend to do so.

This bill's passage will bring North Dakota into uniformity with many of the states throughout the nation and particularly to some of those that are adjacent to the State of North Dakota who have laws with nearly identical language as that in Senate Bill 2044. It is my hope that this bill will receive a favorable recommendation for passage by this committee.

Respectfully submitted,



Richard D. Krutson  
2 Briarwood Place  
Briarwood, ND 58104

January 24, 2001

Today I am appearing before this committee to support the passage of Senate Bill 2044. I am appearing both as a donor and donee.

I have enjoyed some relative success in my business endeavors, as did my parents and grandparents. We have at this point two and one-half generations of risk, hard work, in the face of competitive pressures and regulatory pressures, and continue to face uncertainty as do all business. In the event that I may leave my assets to my children upon my death, I have grave concerns about the security of these assets.

Under current North Dakota law, in the event one or more of my three children were to find themselves locked in a marriage of great despair, leading to the tragedy of divorce, they are at great risk. Out of the carnage of divorce, those assets which I leave or gift to them will be forced from them, by powers unrelated to the generation of those assets, or unrelated to my children. This, regardless of my intentions as a donor.

In my most recent divorce, I was left with 100% of all obligations for my children's health care, as well as education. My former wife was free from these obligations. Now, she has been given other assets that were given to me, by my parents, and grandparents, and were not mixed with any marital property. She owns a home, I do not.

When I gift any assets to my children, it is my intention that those gifts remain my children's. I will not endorse any plan by which those assets can be extorted from my children, against their will. If they "choose" to share those gifts by their own volition, that should clearly be of their own free choice.

Today we see cults systematically separating vulnerable people from a legacy left for them by their families. We see "gold digging" brought to an ever-greater art form. In the state of North Dakota our citizens have no mechanism, no tools to employ in our defense. Neighboring states provide their citizens with the appropriate laws necessary to protect themselves from the carnage, from the destruction brought by opportunists.

My parents and grandparents intentions were to provide these gifts to me, and only to me. These gifts have now been taken away, by force of action. What is left, is to learn to live with the carnage, to accept that in someones perverse rationalization, I have been treated justly, even fairly.

Passing this bill will bring North Dakota into conformity with states all over the U.S. This bill is gender neutral, protecting the rights of both women and men, within the state of North Dakota. This bill is just plain good law. Please, give this law every consideration. A third generation farmer will not lose his or her farm land. Succeeding generations in a family business will not have to lose their share of a family business. Without this bill my children may be safer on the east side of the Red River, rather than here, in North Dakota.

This bill needs to protect all pending, and future cases that may arise. I hope this committee gives a favorable recommendation for Senate Bill 2044, and we can look forward to its passage.

Sincerely yours,

*Paul Bernabucci*

Paul Bernabucci  
P.O. Box 9377  
Fargo, ND 58106

# Proposed property legislation addresses family law concerns

## Treating Families Fairly

During the last legislative interim, a study of family law issues was conducted by a special committee consisting of legislators and members of the Joint Family Law Task Force. Several issues were reviewed including the distribution of property. A proposal suggesting changes to property division was debated at length, and ultimately the bill draft was recommended for introduction by the Interim Judiciary Committee. The amended text of Section 14-05-24 is included in the sidebar below. Pro and con analyses of the impact of the proposed change written by two seasoned family law practitioners follow.

By Sherry Mills Moore

*Better the Devil You Know* tends to be my general philosophy, but particularly with this proposed bill. The Property Division Bill turns our law on its head, flipping the burden from the person who wants to carve a piece of property out of the marital estate to the person who wants to include it. Often that person is the one least able to bear the burden. Let me explain.



Currently in a divorce all of the property goes into the marital estate, regardless of title, origin, or even sentiment. Then, the entire estate is divided. Often the division is equal, but it need not be. Factors which the court considers in making the division are the *Ruff-Fischer* guidelines, and include length of marriage, income producing capacity of the property, conduct, age of parties, health of parties, conduct, and source of accumulation, that is, where did it come from. The Property Division Bill would give this last factor different treatment, at least for gifts and inheritance. The bill does not cover premarital property acquired from sources other than gift and inheritance.

Simply stated, unless it would be inequitable, under the Property Division Bill, inherited and gifted property, which are titled and maintained separately, and the increased value of those assets, will remain the property of the heir or donee spouse. Let's parse this out a bit. If this bill passes, as a general rule, property inherited or given to one spouse and not the other, whether before or after the marriage, is eligible for nonmarital treatment. First, the asset has to be titled in the name of the spouse claiming it. This eliminates jointly held property, probably even pay-on-death accounts. Secondly, it has to have been separately maintained. If both parties managed the investment, worked the land, improved the house, or paid the property tax, it probably is ineligible. If both criteria are met, however, the burden to exclude the property from the marital estate shifts to the non-owner spouse to show that such treatment would be inequitable. This bill goes further than many states who distinguish between marital and nonmarital property, however, in that not only does it include the asset itself in the exclusion, but also any increase in value of the asset.

So how could this piece of legislation be viewed as anything but fair? To answer that you need to keep in mind that the laws of marital dissolution, as with laws of intestacy, seek to divide the property in the manner which gives the best solution to the most people leaving exceptions for the less common situation. In other words, the goal of the law should be to have its widest

### 14-05-24. Division of Property

1. When a divorce is granted, the court shall make ~~such an~~ equitable distribution of the ~~real and personal~~ property and debts of the parties.

Except upon a finding that excluding the property is inequitable to the other party, property acquired by an individual spouse through inheritance or by gift, if titled and maintained in the sole name of the donee spouse, is the property of that party and is not subject to division under this section. Gifted and inherited property excluded from division is defined as property acquired by an individual spouse by gift or inheritance or property acquired in exchange for gifted or inherited property and includes the increase in value of the property acquired by the individual spouse by gift or inheritance.

2. Property acquired by gift from the other spouse is subject to property division under this section.

4. The court may redistribute property in a post-judgment proceeding if a party has failed to disclose property and debts as required by rules adopted by the supreme court, or the party fails to comply with the terms of a court order distributing property and debts.

swath produce the best result for the most people. The question then is, will this kind of exclusion of property most frequently create a just result? I think the answer is, probably not.

Most people enter into a marriage hoping and presuming they will be a part of the 50 percent of the population for whom the marriage is forever. In their marriage they make countless decisions which do not contemplate divorce. They make purchases and expenditures based on what they need, what they want, where the funds are most currently available, and cost. They don't look at their marital choices as measured by asset protection from each other. This law would make the prudent spouse add to the decision-making mix, the question, *how will this affect me if we divorce?*

Let's look at some examples. Even if the tax and interest rates would dictate making a purchase with the wife's certificate of deposit from her father rather than the sale of marital stock, she needs to think through the divorce consequences. Or, should a couple trying to purchase a home make the payments manageable by using a gift to one spouse from his parents to increase the down payment, or increase the family's monthly cash flow by putting less into the wife's 401(k) (losing the tax benefit as well as the company match)? Or, whose certificate of deposit should be cashed in for the children's college, his or hers? The thinking of the typical farm family would need to be even more complicated. If there is off-farm income upon which the family lives, making it possible to farm without encumbering gifted land, is it really fair for the majority of the families, to presume the gifted land is separate property? Should the working spouse have to prove an exception to get a part of the farm? All of these questions, are made more difficult, and less clearly equitable, because the increased value of the asset would also be excluded from marital property. Because most families don't and won't put asset protection into their thinking caps, this proposed legislation is a poor fit for family needs.

If simplicity is what we are looking for, don't be fooled into thinking this offers the solution. Our neighbors in Minnesota enacted legislation introducing the concepts of marital and non-marital property in 1979 and have been defining, interpreting, refining, and battling over it ever since. For a measure of the complications see, *Family Law Forum*, Minn. State Bar Association Family Law Section, June 1997, Vol. 9, No. 2.

If, instead, we are trying to empower the courts to make divisions which are not equal but are equitable, they already have, and use that power. See, *Spooner v. Spooner*, 471 N.W.2d 487 (N.D.1991); *Weitzel v. Weitzel*, 1999 ND 29, 589 N.W.2d 889; *Dick v. Dick*, 414 N.W.2d 288 (N.D. 1987); *VanRosendale v. VanRosendale*, 342 N.W.2d 209 (N.D. 1983).

Given the parties' own ability to protect assets through a properly drafted prenuptial agreement, this legislation, though well-intended, not only would make old dogs learn new tricks, but fails to help most of the people it is intended to cover.

*Sherry Mills Moore is a partner in the Bismarck firm of Foss and Moors where she specializes in family law.*

## Treating Inheritances Fairly

By Maureen Holman

The Interim Judiciary Committee has proposed a bill which would change how a court divides property in a divorce. Among other things, the bill specifically excludes property acquired by an individual spouse through inheritance or by gift under certain circumstances. (For text of the bill see page 12).



In some respects, the statute does not change the way a court considers gifted or inherited property, in that the *Ruff-Fischer* guidelines have always allowed a court to consider the origin of the property. However, the effect of the new statute would be to shift the burden of proof so that, once property has been shown as inherited or gifted and titled and maintained solely in the name of the donee spouse, it will remain with the donee spouse unless it can be proven to be inequitable.

This change would modify how courts approach inherited property. Currently, inherited property is defined as marital property and, perhaps more importantly, the inherited property may be awarded to the non-donee spouse. *Glander v. Glander*, 1997 ND 192, ¶ 11, 569 N.W.2d 262; *VanOosting v. VanOosting*, 521 N.W.2d 93, 97 (N.D. 1994); *Young v. Young*, 1998 ND 83, ¶ 10, 578 N.W.2d 111. The North Dakota Supreme Court has held that when a trial court is dividing marital property the property should be equally divided, and that if it is not exactly equal, a trial court must explain any substantial disparity. *Kautzman v. Kautzman*, 1998 ND 192, ¶ 7, 585 N.W.2d 561. Thus, under the current law inherited property is included in the marital estate and a trial court will probably not be faulted for not only dividing all property equally, but giving inherited property to the spouse who did not inherit it. This is true even as to future interests, such as the division of a future right to receive trust income as occurred in *Zuger v. Zuger*, 1997 ND 97, ¶ 11-15, 563 N.W.2d 804.

A hypothetical case illustrates the effect the statute would have on inherited property. Assume a husband and wife are married ten years and one year before the divorce the wife inherits \$100,000 which she holds solely in her name in a certificate of deposit. Under the current case law, the court would have to consider the property as marital property and would probably divide all assets equally. Under the proposed statute, the certificate of deposit would not be subject to division, unless the husband could show that it would be inequitable not to divide the property. There are several ways in which a party could prove that it might be inequitable if the inherited property were not divided. For example, a party might contend that the property had been held for a significant length of time and the family relied upon the income from the property during the marriage. Additionally, a non-donee spouse might request the property if he or she were disabled and the property was necessary

**STATE BAR ASSOCIATION OF NORTH DAKOTA**

**TESTIMONY ON SENATE BILL 2044**

**SHERRY MILLS MOORE**

Good Morning, I am Sherry Mills Moore, an attorney in private practice here in Bismarck, with a focus on family law, and also a volunteer lobbyist for the State Bar Association of North Dakota. In addition, for the last eight years, I have served as the chair of the Family Law Task Force, a joint committee of the North Dakota Supreme Court and the State Bar Association of North Dakota. This is the committee that worked in conjunction with the Interim Judiciary Committee of this legislature over the last two years, and this bill is one of the products.

There are two parts to this bill, and two sides to every story. The first part of this bill, Paragraph 2, distinctly represents this principal. The bar association neither supports nor opposes this bill, but we do rise to offer you technical assistance on its effect. To ease you in that task and avoid repetition, I draw your attention to the articles copied for you and attached to this testimony. These articles come from the most recent edition of our association publication, The Gavel. One was authored by myself and the other by an attorney in Fargo, Maureen Holman. In that article I point out the problems with the proposal and Maureen points out its benefits.

Let me briefly summarize what this part of the bill would do and the concerns it raises. This bill flips our current law on its head by changing the burden of persuasion from the person who wants to carve out a piece of property from the marital estate, to the person who wants to include it.

Currently in a divorce all of the property goes into the marital estate regardless of title, origin or even sentiment. The court then makes a division of that property considering specific factors -- the length of the marriage, income producing ability of the parties, health of the parties, conduct, and where did the property come from. This last factor would get special treatment under the new law, call it a super priority. Inherited and gifted property, would stay with the recipient spouse, unless it would be inequitable to do so. For such treatment, the property needs to be titled and maintained separately, but if it is, the property and the growth to that property go to the recipient. For the other spouse to receive a share of the inheritance or gift, or get offsetting property, he or she needs

to prove that it would be inequitable to do so. The new law goes further than most jurisdictions by setting aside not only the asset, but also the growth to the asset.

How can this be anything but good? To answer this I need to have you step back to the basic purpose of this kind of statute. The laws of marital dissolution are intended to divide the property in the manner that gives the best solution to the most people, leaving exceptions for the less common situations, and flexibility in the court to address the individual needs of the parties. The goal of our law should be to have the widest swathe produce the best result for the most people. Will this bill do that? I don't think so, but others disagree.

Let me try to help you further. This bill is absolutely and without question, at least in my mind, a policy decision, and those are best made by you. This bill came out of the interim committee in a split vote, to get the input of the entire legislature on what our policy should be.

My concerns derive from whether this truly fits the way people live their lives in our state. Most people enter a marriage thinking it will be forever, and oh, but that it could be. They make countless decisions which do not contemplate divorce. They buy and spend based upon what they need, what they want, where the funds are most currently available, and cost. These choices are not made with an eye to asset protection from each other. This bill, however, would make the prudent spouse add to the decision making mix, the question of *how will this affect me if we divorce?*

Let's look at some examples. Suppose from a tax and interest perspective the best source for a purchase is the wife's inherited certificate of deposit rather than stock purchased during the marriage. Without this bill, the decision would be based on economics. With this bill, divorce protection would be a factor. Suppose the couple wants to contribute the maximum amount to the 401(k) and can do so if they reduce the monthly home mortgage payment by making a more substantial down payment from a gift to one of them. The 401(k) would be marital, the gift would not. Economics would say use the gift rather than lose the company match and the tax break. This bill would say, *protect the gift*. What happens to the farm family where because one spouse has off-farm income they are able to leave the inherited farmland unencumbered. Under the new law, the off-farm income producing spouse would have to prove it would be inequitable not to consider the farmland, but under the current law, the title-owner would have to prove

it inequitable to consider the land. Whose certificate of deposit should be cashed in for the children's college, the one with the lowest interest rate given to one spouse, or the certificate acquired during the marriage? Under the current law, it doesn't matter but, under the new law, it would. Because most married couples do not put asset protection into their thinking caps, this kind of legislation creates problems.

Let's look at the other side. One year before the end of a 10 year divorce, the wife inherits \$100,000. Under our current law the court must put it into the cooking pot for division and then may, or may not award it to the wife, with or without an offset. Upon divorce under current law, the wife has to prove it is not equitable to divide it. Under this legislation, the husband would have the burden.

Our courts already have the power to make divisions which allocate inherited and gifted property solely to the recipient spouse. Sometimes they do and sometimes they don't. What this bill does is to place the burden to prove the exception - inequity—on the non-recipient spouse. This is not just a function of the courtroom, however, but would also become a significant factor in settling cases. And, if you are looking for simplicity or cost savings in litigation, this bill does not do it. Our neighbors to the east implemented similar legislation in 1979 and have been monkeying with it ever since. This bill changes policy, not procedure.

If you discuss this case with lawyers who practice in the area of the law, or parties who have gone through it, both can regale you with (what was labeled in law school) the *parade of horrors*, worst case scenarios intended to persuade you. That is a function of perspective, usually tied to one particular set of facts. Because this will shift the law for all situations, it really does come back to you as a policy decision.

**Paragraph 3** is related in that it makes clear that gifts from one spouse to the other are not entitled to the same special treatment as those given from outside the marriage. Without this distinction, we would have a mess.

Now let's talk about **Paragraph 4**. This is far less controversial. This solution arises from the problem caused when one spouse hid assets from the other spouse. If the sneaky spouse was required to disclose those assets but did not, the property can be redistributed in a post judgment proceeding. Currently property distribution is final upon judgment, only to be opened in the case of fraud. The innocent spouse carries the burden,

and it is a heavy one, of proving the fraud. Here, if the innocent spouse shows an obligation to disclose and then failure to disclose an asset by the sneaky spouse, the property can be redistributed. The court is also empowered to redistribute property for enforcement. So, for example, in the latter situation, if the husband is awarded one car, but the wife intentionally destroys it, a piece of property previously distributed to her can be awarded the husband.

I thank you for the opportunity to speak to this bill, and, to give you this hot potato. If you have any questions, I would be happy to try to answer them. If any arise in the future you may contact our Executive Director, Christine Hogan, at 255-1404, or myself by telephone at 222-4777 or e-mail address of [esther@btigate.com](mailto:esther@btigate.com). Thank you.

February 12, 2001

Today I am appearing before this committee to support the passage of Senate Bill 2044. I am appearing as both a recipient of gifts from my family and as one who intends to gift my children in the future.

I have enjoyed some relative success in my business endeavors, as did my parents and grandparents. We have at this point two and one-half generations of risk, hard work, in the face of competitive and regulatory pressures, and continue to face uncertainty as do all businesses. In the event that I may gift and/or leave my assets to my children upon my death, I have grave concerns about the security of those assets.

Under current North Dakota law, in the event one or more of my three children were to find themselves locked in a marriage of great despair, leading to the tragedy of divorce, they are at great risk. Out of the carnage of divorce, those assets which I, or their grandparents, leave or gift to them may be forced from them, by powers unrelated to my children or my family. This, regardless of our intentions.

When I gift assets to my children, it is my intention that those gifts remain my childrens. I will not endorse any plan by which those assets can be taken from my children, against their will or mine. If they choose to share those gifts by their own volition, it should clearly be of their own free choice.

Today we see cults systematically separating vulnerable people from a legacy left for them by their families. We see 'gold-digging' brought to an ever-greater art form. In the state of North Dakota our citizens have no mechanism, no tools to employ in their defense. Neighboring states provide their citizens with the appropriate laws necessary to protect themselves from the carnage and destruction brought by opportunists.

When my parents and grandparents gifted me assets, born of the fruits of their labor, their intentions were for those gifts to be retained by me. Instead, a substantial portion of the gifts were taken in a divorce action. What is left is to learn to live with the carnage and to try to accept that in some way I have been treated justly or fairly; to try to accept that I now have no way to ensure that those assets are someday passed to my children, which is only right, instead of frittered away or given to others.

Passing this bill will bring North Dakota into conformity with states all over the U.S. This bill is gender neutral, protecting the rights of both women and men within the state of North Dakota. In short, this bill is just plain good law. Please, give this bill every consideration. A third generation farmer will not lose his or her farm land. Succeeding generations in a family business will not have to lose their share of a family business. Without this bill, my children would be safer on the east side of the Red River, rather than here in North Dakota.

I hope this committee gives a favorable recommendation for Senate Bill 2044 and that we can look forward to its passage.

Sincerely,



Paul Bernabucci  
P.O. Box 9377  
Fargo, ND 58106

JOHN R. BERNABUCCI  
P.O. BOX 2082 (701) 251-2087  
JAMESTOWN, NORTH DAKOTA 58402

February 12, 2001

North Dakota House of Representatives  
North Dakota State Capitol  
600 East Boulevard Avenue  
Bismarck, North Dakota 58505

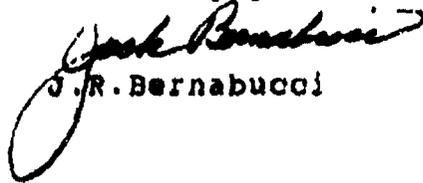
Dear Legislator:

This letter is a request for your support and vote for Senate Bill 2044 regarding the division of property in divorce actions.

In an effort to accomplish some estate planning I recently gifted significant assets to my son with the clear intent that those assets were to be his alone and not joint property. Taxes were paid and estate exemptions used up. However, about a year ago a North Dakota Judge awarded most of those assets to his former wife, and I consider that to be a gross injustice to me and to my son!

As a former member of the North Dakota House of Representatives and one who fully appreciates the dedication and fortitude that service in the legislature requires I would deeply appreciate your vote in favor of Senate Bill 2044.

Sincerely yours,

  
J.R. Bernabucci

From: Richard D Knutson <SONARS@juno.com>

To: dwrangha@state.nd.us, konstad@state.nd.us, amarag@state.nd.us,  
jmahoney@state.nd.us, tklein@state.nd.us,  
jkingsbu@state.nd.us, ggunter@state.nd.us,  
bgrande@state.nd.us, afaife@state.nd.us, beckre@state.nd.us,  
rdlarud@state.nd.us, ldelmores@state.nd.us,  
cbrekke@state.nd.us, wkretsch@state.nd.us, ddekrey@state.nd.us

HELLO! MY NAME IS DICK KNUTSON FROM BRIARWOOD N.D. I WOULD LIKE TO ENCOURAGE YOU TO VOTE YES ON SB2044. THIS BILL IS EXCELLENT LEGISLATION THAT WILL PROTECT FAMILY FARMS, BUSINESS AND OTHER ASSETS FROM BEING DEVASTED BY DIVORCE. IT PROTECTS THE DONARS INTENT TO WILL HIS OR HER ASSETS TO THEIR CHILDREN, GRANDCHILDREN, OR OTHER FAMILY MEMBERS. THOSE FAMILY MEMBERS UNDER SB2044 WILL HAVE A CHOICE AS TO WHAT THEY WANT TO DO WITH THEIR INHERITANCE AND WILL ALSO HAVE THE CHOICE AS TO WHOM THEY WANT TO SHARE IT WITH!!!! I RECENTLY TALKED WITH RICK CLAYBURG AND HE TOLD ME THAT 51% OF ALL MARRIAGES END UP IN DIVORCE. SHOULD A FUTURE SPOUSE OF YOUR CHILDREN BE GUARANTEED 50% OF YOUR FAMILY FARM OR BUSINESS THAT YOU HAVE PASSED ON TO YOUR CHILD IF THEY GET DIVORCED SHORTLY AFTER THE MARRIAGE? UNDER CURRENT NORTH DAKOTA LAW THATS WHAT HAPPENS!!!! I DON'T THINK THAT IS FAIR!!!! SB2044 CHANGES THAT AND AT LEAST GIVES THE DONEE THE CHOICE TO SHARE IT WITH THEIR SPOUSE IMMEDIATELY OR WAIT TO POSSIBLY SHARE IT LATER. THIS BILL IS GENDER NEUTRAL. IT ALSO BRINGS NORTH DAKOTA INTO UNIFORMITY, AND MIRRORS THE LANGUAGE, WITH A HUGE MAJORITY OF OTHER STATES THAT HAVE ENACTED SIMILIAR LEGISLATION. THIS BILL PASSED BY A HUGE MAJORITY IN THE SENATE 38-13 WITH STRONG SUPPORT FROM BOTH SIDES OF THE POLITICAL AISLE. I WOULD STRONGLY ENCOURAGE YOU TO VOTE YES ON SB2044!!! THANK YOU DICK KNUTSON

## MANY SIGNIFICANT REASONS TO SUPPORT SENATE BILL 2044

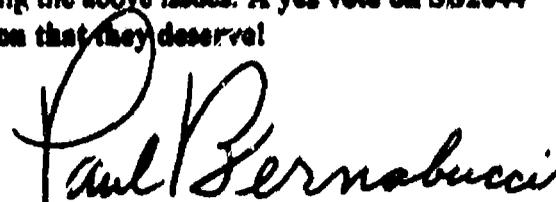
To fulfill the intent of the donor regarding gifts and inheritances to a donee and to protect that "intent" is the heart of SB2044.

1. Under current North Dakota law the intent of the donor is not protected. SB 2044 as it is written is gender neutral. Many women as well as men are gifted or inherit assets from grandparents, parents, aunts, uncles, etc. Under purposed Senate bill 2044 these gifts will be protected and remain intact.
2. Many citizens of the state of North Dakota who wish to pass on to their children their family farm, family business, real estate, savings, and as well as many other types of assets will now be protected if SB 2044 becomes law.
3. Under current North Dakota law any inheritance or gift received by one of the spouses automatically becomes part of the joint marital property. This is unfair. The spouse who is the beneficiary of an inheritance or gift should at least have a choice as to whether they want to share the gifts or inheritances with their spouse. Under current North Dakota law they have no choice or option. SB 2044 gives the donee that choice.
4. It is unfair that current state law mandates that a donee is forced to forfeit 50% of their inheritance to their spouse against their own wishes and ignores the intent of the donor. It is very important to remember that under SB 2044 the donee still has the option to share the inheritance or gift with the other spouse, and has the freedom to make such a choice.
5. Many other states already have laws on the books that mirror the language of SB 2044. SB 2044 would bring the state of North Dakota into uniformity with all of these states including some states that are adjacent to North Dakota.
6. Unfortunately in today's world, gold digging (men and women alike) has become an art form with some people. These unscrupulous individuals prey on other people's hard earned assets. These individuals will deliberately marry someone in order to gain 50% of a family farm, business, or other assets that would be guaranteed to them by current North Dakota law. Cult groups have also entered into this arena. SB 2044 would help protect our grandchildren, sons, and daughters from these con artists from getting half of the donee's gifts through a quickie marriage and divorce.
7. SB 2044 would eliminate the need for extensive prenuptial agreements which can in themselves be very costly but can also cast a shadow and dampen the mood of an impending marriage.

There are countless scenarios with horrible and tragic results that have happened to the hardworking people of NORTH DAKOTA regarding the above issues. A yes vote on SB2044 would give the donor and the donee the protection that they deserve!

Respectfully submitted

  
R.D. (DICK) KNUTSON  
BRIARWOOD N.D.

  
PAUL BERNABUCCI  
FARGO N.D.

# First Lutheran Church

Evangelical Lutheran Church In America



916 Main  
Williston, North Dakota 58801-5398

(701) 572-6363

February 28, 2001

Dear Legislators of North Dakota,

I am writing in opposition to Senate Bill #2044. It has consequences that are against the ideal and values of our state.

I am opposed because this bill would most often be used to remove legitimate value from a spouse in a divorce. Usually I have seen that it is the female and the children who are put into poverty in the event of a divorce. This bill has the ability to perpetuate this pattern.

Please use your abilities to defeat this bill.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dean E. Larson".

Dean E. Larson, Pastor