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HB 1271

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1271

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/22/07

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Committee Clerk Signature



Minutes:

Chairman DeKrey: We will open the hearing on HB 1271.

Maureen Holman: Support (see attached testimony).

Rep. Meyer: On the face of it, it is true there are cases where a woman has inherited a CD or different things. In the vast majority of cases, I'm going to farm and ranch, it is usually the eldest son that is left the property, usually. Then the girls in the family our left with CD's because you understand if you have five or six more children, not all of them can make a living out of the family farm. If this law would be passed, I just feel like it would be so prohibitive to any spouse that goes into a farm or ranch situation for her husband who has inherited the property. You worked together, that is the only way that the farm and ranch property is going to go is if that wife puts in 24/7 like we all do in farming and ranching. However, when you get to court, that is never reflected. Those hours, the work, because the ACSC payments are usually in the husband's name, and the wife in those situations are considered non-property. All of that, when you get to a court of law they say you have not contributed to this at all. There is no way that I've seen that they say, well you have worked, without your contribution to that marital asset, you never would have had it to start with. Especially in your long term cases and if you would address that.

Maureen Holman: Clearly practicing in Fargo and going over to western MN I deal with a lot of farm cases exactly in the same type of situation you are talking about. Two ways that is deal with: 1) hardship and you certainly can provide all the information regarding the sweat equity that is put in. I think hardship becomes a way to get a portion of that non-marital property. The second way is most of those farm families, even though they may inherit some of the property, they end up either mortgaging it or doing improvements to it, or putting money into it. To the extent that you mortgage it, and you're using marital funds to pay down that mortgage, that turns it into marital property. Any time you are putting marital funds into it, it turns it into your property. So that's the way it is dealt with on the MN side, and I believe that other states that have that same kind of thing. You also have to remember that hardship. It's not impossible to have a finding of hardship and get a portion of that non-marital property.

Because it is an issue.

Rep. Klemin: Just a couple of questions, on the MN law that you are referring to, does the MN also have this portion about the 1/2.

Maureen Holman: They do not limit it to a particular number. I take that back. Yes, they do. I think there is maybe 40% up to 1/2. Yes they do have that limitation.

Rep. Klemin: Secondly, this term, unfair hardship. I'm looking at this, that you can have a hardship, but it can't be an unfair hardship. You were talking hardship, what's the difference between a hardship and an unfair hardship.

Maureen Holman: To me, the quality of the person after the divorce and if somebody is going to be living on minimal income, with no assets, that's certainly an unfair hardship. I can only tell you what it feels like in MN, in my experience with the courts, whenever I have asked for it, I've gotten it. But you don't always have to ask for it.

Rep. Klemin: So we do have a term for the courts to work with, if this became law, I'm sure that you have cases that talk about that this was a hardship, but it wasn't an unfair hardship. Or yes, this is an unfair hardship, and what does unfair mean and that sort of thing. Are you able to give us any kind of definition.

Maureen Holman: I think because this is patterned very closely after MN's law and as Jean will indicate, off a Uniform Law, I think there are other states that would have guidance for us in terms of case law that would help. I think you are going to have to have some sort of discussion about that. We do that right now, too, with whether you should go other than equal. You're always going to have these factors.

Rep. Klemin: On marital property, what is included there. There is nothing mentioned about distributions from a trust or things like that. Are trusts included anywhere in here.

Maureen Holman: Trusts would be considered as non-marital if it were created before the marriage. If it were created during the marriage, then the presumption is going to be that it's marital. If it comes as an inheritance, that would be non-marital. If it's in the nature of an inheritance from a parent or aunt, it would be non-marital.

Rep. Klemin: Well, I think we all know what inheritance is. Somebody has to die first. You don't have to die to have a distribution from a trust.

Maureen Holman: But where is the corpus of the trust coming from. If it comes from outside your family, and it's in effect a gift to you, that would be non-marital.

Rep. Klemin: I think my point is that you don't mention anything about trusts in here.

Maureen Holman: It talked about gifts or inheritances. I believe the statute refers to gifts or inheritance. If I'm creating the trust myself, that's in my own property, so no, that wouldn't be.

If it's a trust created by my parent or relative that is given to me, that's a gift, that would be private, non-marital in the statute.

Rep. Klemin: What if the trust was for education, maintenance, support and that sort of thing that was a parental responsibility, is that considered a gift or an obligation according to law.

Maureen Holman: Again, who created the trust. If I create it myself, that's marital, that's something that comes from the marriage relationship. If somebody else has created it, and given it to me or my spouse, that would be a gift and call it non-marital.

Rep. Klemin: Would it be better to have trust mentioned in here somewhere.

Maureen Holman: I don't think you have to, it could still either be a gift or an inheritance, one or the other. That is the way I've dealt with it in MN.

Rep. Onstad: Basically in 1271, if it passes, we are really separating out, if the divorce occurs, any future inheritance whatever it might be, would not be considered in the divorce.

Maureen Holman: Correct. Right now, there have been two cases decided in which parties anticipated an inheritance. They had a present interest, they knew there was some sort of trust established and they were going to get it some day, even though it might all disappear and the Supreme Court has said those future inheritances can be divided. Under this, it would not be able to be.

Rep. Klemin: On page 1, line 21 where you refer to tenancy by entirety or community property, we don't have those in ND, do we.

Maureen Holman: No, we do not. Some of that takes into consideration people who come here from other states.

Rep. Koppelman: Would you describe us as a community property state.

Maureen Holman: No, we are not a community property state. We are an equitable division state.

Rep. Koppelman: You talked about the one case in particular where one party had no interest in the wealth of the other party, and yet it was awarded by the court a 30% interest and

then that was appealed and they were awarded an equal interest. Why was it appealed if the first party had no interest.

Maureen Holman: In the case with the 30%, the wife who hadn't yet received any of that inheritance or premarital property and was forced to give up 30% when she got it, she appealed and did not want to have to give it up. The Supreme Court said you will have to give up that property.

Rep. Koppelman: I thought you said as a precursor to that that she had no interest in that.

Maureen Holman: That would be the other case, the Ulsaker case. I believe the wife in that case was one who did appeal because she must have decided at some point, she wanted some of that property.

Rep. Koppelman: Is there anything in ND, the way our current law is, that prevents people from entering into some sort of prenuptial agreement or other kind of agreement that sort of states what their intentions are in the event of a divorce.

Maureen Holman: No, we do permit premarital agreements and that can take care of this issue somewhat with people who are in second marriages, in particular. The difficulty that I find is people are so in love at the time they are getting married, they think this will always be perfect. My wife would never divorce me, my husband would never leave me for some other person and they don't take advantage of that option that does exist.

Rep. Koppelman: As you may be aware, in ND there is a movement afoot, to try and encourage, or put a mechanism to better provide for alternative dispute resolution in cases of divorces. Do you think that if that becomes a reality, that it will decrease the number of these kinds of problems, because it's often been said, if you don't hate each other when you come into a divorce, you certainly will by the time you are done.

Maureen Holman: No, I don't think it would make any difference. I do a lot of mediation myself. The reality is because the Supreme Court has said, we're going to divide all property whether inherited or premarital, and probably divide it equally. Somebody is going to use that as a bargaining chip somewhere in the mediation process. It's used right now, it's used in settlements. You get people fairly unhappy with their settlement.

Rep. Koppelman: I was looking in the bill to see where this was and maybe it isn't in the bill, but I thought I heard you refer to something earlier about a long standing marriage, or a lengthy marriage, is that a standard under current law, or would that change under the bill.

Maureen Holman: No, that would have no impact under the bill. Under current law, the Supreme Court has said, that there are various factors that you have to take into consideration on division of property. One of the factors can be whether the property was inherited or premarital, but in a long term marriage, which basically they say is anything over 8 to 10 years, there isn't a set cutoff point, you should divide all property equally. Even if there is inherited or premarital property.

Rep. Klemin: For purposes of terminology now, I call it the MN approach...

Maureen Holman: Perhaps the Uniform Laws might be a better description.

Rep. Klemin: But with respect to this approach, what is the prevailing view in the United States now, with case law.

Maureen Holman: Jean will address this. It is our understanding that most states make a distinction between marital and non-marital property. I believe 18 states don't make that distinction, we would be one of those 18 states.

Rep. Kretschmar: How long is a long term marriage.

Maureen Holman: There isn't a specific time, I think the Supreme Court would say probably 8-10 years.

Chairman DeKrey: Thank you. Further testimony in support.

Jean Hannig: (see attached testimony).

Rep. Delmore: How about people who hide assets. What provisions are there in the bill. Not everybody is squeaky clean. Why would this not encourage more people to have premarital agreements. No matter how much I love somebody under this law, it seems like one or the other of us is going to get the short end of the stick.

Jean Hannig: People who do not enter into premarital agreements before divorce, are really at a disadvantage at the time of divorce, if they have property that they owned at that time of the marriage, or even if they expect to inherit some property. Sometimes people are beneficiaries of a trust of their parent, and the property and the trust will come to them when their parent dies. Their right to inherit is established now, but the inheritance won't be realized for some time. This law, the proposed law would not make it necessary for people to enter into premarital agreements in order to have their non-marital property awarded to them. Current law, the only way a person can protect their premarital assets, is to enter into a premarital agreement. This law would not create more need for premarital agreements. This law would protect the people that did not enter into premarital agreements. I know you had another question.

Rep. Delmore: About hiding assets.

Jean Hannig: None of my clients hide assets, but other people have. This law does not address the hidden assets. However, the current law as it stands now, commits the court to redivide property when assets are discovered later. I don't know what you can do about keeping people from being sneaky at divorce. There is something about going through a divorce that creates sneakiness. I don't know what to do about that. The law does not, this amendment to our current statute, does not address that. But in our statute right now, we have

a provision that if assets are discovered after the divorce, that were hidden, then the court can rework that divorce, that is already in our statute. This would not change that. This would still be a part of that.

Rep. Koppelman: If a marriage worked in such a way that people kept everything in their own names and so on. If what you are proposing in this bill, were law, could a couple get married, keep everything in separate names throughout their marriage and maybe one owns a car, and the other one owns a car, and they didn't own a home together, let's say they rented property, at the end of the marriage, it would be like they were never married.

Jean Hannig: What did they acquire during the marriage.

Rep. Koppelman: Each had assets in their own name, could it get to the point where, from a financial standpoint, that the courts don't recognize marriage anymore, as long as people keep everything separate.

Jean Hannig: No, because the bill talks about all property being marital property. So everything they acquired, let's say they have car loan, and they paid off the car during the marriage, well it's no longer just a non-marital asset, because the money earned by the parties paid off the car during the marriage. So now, most courts in MN will treat that car as a marital asset; because the car was paid for during the marriage. I know Rep. Meyer asked a question earlier about farmland. The farm land is owned by the favored son in the family, and his wife is primarily taking care of the house and children, running parts out to the field, lunch, whatever the wife does to keep the operation going when they aren't sitting on the combine or the tractor. But, her contribution during the marriage, as the loans came in, no matter who's name they were in, as they were paid, as the operating loans were paid, the longer the marriage, the more this land is going to be characterized as marital property because as the land has increased in value, as operations have increased in value, so has the contribution of both

parties. Under this law, the contribution of both parties is recognized as equal after the marriage, no matter what each party does. If one party is the wage earner and the other party is the homemaker, it doesn't matter, because the contributions of both parties under this type of law, and under the Uniform Marital Property Act are considered equal contributions.

Rep. Koppelman: That would be true under current law as well.

Jean Hannig: Under current law, both of the contributions of the parties are considered equal, yes.

Rep. Koppelman: Would we be still considered an equitable state under this new law.

Jean Hannig: Yes, we would. There are 9 or 12 community property states. Wisconsin is one of those community property states. In Wisconsin it talks about property of the community. Their entire law structure is property of the community and property coming into the community. In the Wisconsin law structure, property owned prior to the marriage is not considered property of the community and so they even realize that even that community property that there is non-marital characters found on the property. This would not turn our state into a community property state. It would continue to be what is called dividing equitably. Dividing property equitably, what this would do is create a distinction between marital property and non-marital property that would provide certainty in people so that they know this property will be divided at divorce. Is this marital property.

Rep. Meyer: Going back to the sweat equity and the traceability. In cases I've seen like this, where a wife has chosen to be a stay-at-home mom and chosen to be an active farmer/rancher with that. In the court of law, it isn't recognized that I've seen. The sweat equity doesn't have a dollar amount on it. If she doesn't have the checks that she signed to pay for the property, it just doesn't seem to matter. There's no dollar figure on her contribution. We've seen what farm and ranch values have done. The counterargument to that, just

because you worked here for your whole life, you didn't contribute to the equity of that farm or ranch situation. That's not a traceable asset for the woman's contribution. In the vast majority of cases, even how our wages are in the state, I feel this law is going to be discriminatory against women.

Jean Hannig: I have to disagree with you; because I deal with this type of law in MN, actually the opposite happens. In cases where there is a farm, let's take a 35 year marriage, let's take a farm in western MN, let's put it in the Red River Valley and let's have beet acres on it. In the Red River Valley, farm land that has beet acres has increased tremendously. The value has increased. In your example, the husband has been the farmer, and the wife has been contributing to the farm through her care of the home and marriage. In MN, her contribution to that farm is going to be considered equal to his. Furthermore, in the 35 years that they've been married, to the extent that there's been increases in value because the farm has continued operation, there's been operating loans, in and out, by the time you have 35 years of marriage, it's my experience that all the farm assets are considered marital property and to the extent that there is a piece of land that was inherited or given to the husband before the marriage, this is the kind of case where the hardship provision is most often used to divide that property or to compensate the spouse with other assets to make the property division more equal. That's been my experience in MN. I would think that the same thing would happen in ND in these same types of cases.

Rep. Meyer: Say you're there and when you pay off the debt against that property. That's paid off before the equitable division then of the property.

Jean Hannig: I have trouble understanding your question.

Rep. Meyer: You gave the example of the operating loans in and out, and an operating loan holds the farm, as operating collateral. So when that is paid off, he inherited the farm, and

then you've got the money here, so the debt would be paid off before that would be allowed to be taken out of that marriage in the divorce settlement.

Jean Hannig: Not only would the debt be taken off, but in 35 years of operating loans, because farm land is pledged as security for those operating loans, the farm land is going to become joint marital property. Even though it is still held in the husband's name; 35 years of operating loans, there is no way that the property hasn't been paid over and over during the marriage by the operating loans. That's exactly the way the courts in MN treat that. The language of this bill would have the same effect. There is a case I just read out of Oregon, that was a cow-calf operation, 10 year marriage, cows and calves were owned at the time of marriage. What happens to cows and calves? They get sold, and more are purchased and sold, etc. The court in Oregon said all of these cows and calves are marital property. The non-marital cows and calves that were owned at the beginning of that 10 year marriage have disappeared. They no longer exist. They can't be traced through. The contribution of both parties to that cow-calf operation during the years of marriage and the cows and calves are all marital property.

Rep. Klemin: I've got a couple of questions. First of all, in the situation that you are talking about where one party inherits the land and they both work on it, and there's no debt, and there never has been any debt that happens sometimes. Are we getting into a situation where we have to look at the basis and depreciation of the value of the property in determining what's marital and what's non-marital?

Jean Hannig: In some of these marital/non-marital cases, that's exactly one of the issues: appreciation. I used in my example, shares of stock; they go up and down without regard to what you do. You hold them in your portfolio, they go up and down. They change daily in the New York stock exchange, so you don't do anything. But your stocks are dividends and so

that's received during the marriage. So they are treated differently. Depreciation is due to nothing you've done. If we have a piece of land that sat there idle for the whole time of the marriage, and appreciated in value, with no debt on it, then that appreciation for that land, would be without contribution by the parties. In a case like that, in MN, that land would be awarded to the party who owned it before the marriage or who inherited; because the parties did nothing to appreciate the value of that land.

Rep. Klemin: I'm having a little difficulty finding where sweat equity is taken into account.

Jean Hannig: It doesn't say sweat equity, but it does talk about marital property and marital debt, meaning how property was acquired during the marriage. So if you think about acquired during the marriage, that's where the sweat equity comes in. Acquired during the marriage equals what the parties did during the marriage. That's where your sweat equity comes in.

Rep. Klemin: On page 2, line 4, where it talks about tax liens. I have a question about creditor's rights. Can the court affect how the IRS treats the property for purposes of tax liens or how creditors view the ability to go after joint debtors.

Jean Hannig: In most IRS cases, the return has been signed jointly, a joint tax return. So it is a joint debt of the parties, that they owe taxes. A creditor who has a joint debt owing by parties, can go after the property of either party. If my husband and I owed taxes and I had some property in my name, and he has property in his name, the IRS can go against either one on those pieces of property because it is a joint debt. Tax liens on property, let's say it was a separate tax return; married filing separately, and he owed taxes. The IRS could not put a tax lien on my property originally to satisfy that debt. That is the thinking that we have in our statute right now for property being available for the debts of one spouse.

Rep. Klemin: Then claims of creditors, the same thing. Even though the court can allocate a debt to one party or the other, that doesn't mean that creditor can't still go after the other party on a joint debt.

Jean Hannig: That exists under current law and that's actually under contract law, and this does not change contract law.

Rep. Klemin: There's nothing in here that the parties can't enter into a property settlement agreement that's different from what is provided in here.

Jean Hannig: Absolutely nothing, the premarital agreement that we have in ND, allows parties to contract for things other than what is stated in the law.

Rep. Klemin: I'm talking about a property settlement agreement as part of a divorce.

Jean Hannig: Yes, parties can do anything in a property settlement agreement that they want, as long as the court can say it is a fair and equitable division.

Rep. Koppelman: You were talking about a case where the land was owned by one party prior to the marriage, and it appreciated in value and he didn't do anything to cause the appreciation, it was just the market. Any proceeds from that land can come off that land, instead of during the marriage, it would be part of marital property; but the land that was owned by the favored son in the example that we've talking about. There was a divorce; it would go back to that person owning the property, including the appreciation.

Jean Hannig: Yes.

Rep. Koppelman: People make financial decisions based upon their financial holdings. During the course of a marriage, that being the scenario, a family might decide that they have a choice here. We could take out a loan this year to operate our farm/ranch, and we can put up some land as equity for that land; therefore, there is an encumbrance, or we can sell some of our stock portfolio that we have together. It's something that we acquired during the

marriage, and want to keep the land free and clear; we're going to go and sell some stocks and put that money into the operation. It sounds to me like those decisions made during the marriage could affect the outcome at the end of the marriage. Can people advantage or disadvantage themselves if this kind of law becomes law, as to how the courts are going to look at it.

Jean Hannig: Yes, but they can do that today under existing law; they can make decisions that advantage or disadvantage themselves. I think in your scenario of a piece of land, and they decided to pay it off by using the stock portfolio, well there may be an argument that the other spouse can make that my non-marital stock portfolio paid off this land, so it should be part mine.

Rep. Koppelman: My example was that the land wasn't ever encumbered, it was given as a gift to the eldest son, the two people got married, they ran their finances together during the marriage and in the course of decision making during the marriage, this land that never had debt. They had an option, to sell some stock or take out a loan and use the land as collateral to be able to remain debt free. That decision would have an impact on how that land was divided in a divorce versus had they made a decision, well let's take out a loan here, and put the land up for collateral and at the time of the divorce, there is an encumbrance there and it's treated differently.

Jean Hannig: Yes, under your example the land would go to the person that owned it prior to the marriage, but this may be a good case for hardship, that the only thing they had left at the end of the marriage was that they had spent everything else. That's your hardship example. It's unfair that I end up with nothing and he ends up with the land. That's the

hardship provision that would protect people from just those kinds of cases.

Rep. Koppelman: But the burden of proof is on the person making that claim, just like you said the burden of proof now is on the person making the claim that something is unfair.

Jean Hannig: Then the burden of proof would switch a little bit. It wouldn't switch entirely because the person who is arguing that it is non-marital, still has the burden of proof to provide that it's fair. So there is a little shift, but it doesn't put the entire burden on the other party.

Rep. Charging: Without out this law, and we have at present an equitable and you're suggesting that many times premarital agreements will not hold up.

Jean Hannig: Right now in this state, parties can enter into a premarital agreement, they can make provisions in that premarital agreement to hold property separately, that the property never becomes the property of the other spouse and that the property would not be divided at divorce. When the divorce comes about, the spouse who believed that some of that property should be awarded to him/her can argue at that time that the application of this premarital agreement creates an unfair hardship and it's unfair to the party. The application of the premarital agreement is unfair at the time of divorce under our current law. This does not change anything in our existing law regarding premarital agreements that would still be the same.

Rep. Boehning: If the husband has a house here and the wife has a house in another state. They decide to live six months here and six months there. One has a loan on it, what happens in the divorce, how you divide that because the marital funds paid for the loan.

Jean Hannig: Well that was property acquired during the marriage, so in that kind of a division you are going to have mixed property, and you may have to determine what part of the property is non-marital or prior to the marriage, and what part of the property has been paid for during the marriage by the mortgage payments. In MN, the way that is treated, the value of

the house would be divided into percentages. A percentage would be non-marital, and a percentage would be marital and the marital portion would be divided.

Rep. Boehning: What if both houses are paid for, I will take my house and you take your house. One is worth considerably more than the other one, would you take your house back and I would take mine back. Would that still work that way?

Jean Hannig: If they are completely non-marital and there's no marital asset to those two properties, it would be awarded to the parties who owned them prior to the marriage. Now there may be some hardship provision if one house has tripled in value and the other house hasn't. Basically, if they were not paid during the marriage, non-marital, the parties did nothing, no improvements, during the marriage; it would be treated as non-marital property.

Rep. Boehning: If medical needs arise, and they move to the house down south, would that create a hardship for a party if they couldn't remain in that house.

Jean Hannig: You could, I don't know because the examples that you're giving have a lot of factors, we're talking about medical problems, about living in a certain climate, and then the hardship provision would make it more equitable or fair for the house to be awarded to the other party. In divorce cases, property division in divorce is always a puzzle. This isn't going to change it from being a puzzle, simply make the puzzle a little more identifiable and allow the parties to set aside the property that should be theirs because it's non-marital property. There are a lot of factors that can come into that. We have case today, where the factors are who should get the property.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Sherry Mills Moore, State Bar Association of ND: I am here to offer technical assistance (see attached testimony). Regarding the sneaky spouse, paragraph 2 does address it and does change what we have now. I think it may be looking like it's just cleaning up language, if

you go from marital to non-marital property distribution. I think that's a mistake even if you pass this bill, I think in paragraph 2, section 1, you need to be careful of only it's requiring a spouse to disclose marital property. There isn't going to be a good way to gauge whether there is hardship or a need to disclose it or an ability to divide it if it hasn't been disclosed and we put this in, this bill came in 2001 in order to avoid the sneaky spouse and it allowed the court to have jurisdiction to reduce it. If you leave the language in as it's drafted you will take the teeth out of that if you were to pass this bill. The other thing that the bill does in section 2 is to allow the court's to enforce things. For example, the husband was awarded a marital car and the wife destroyed it before it was delivered, the court would not be able to come back in and give him non-marital property as this was written. I doubt that was the intention of this bill, but that would be a consequence of it. The heart of the matter is what this would do to the law in ND on property division and flip this law on its head. It would change the presumption. Right now we presume that people get married, they live their lives, and if their marriage does not work out, then they get divorced, that what they have done during the course of the marriage isn't as significant as it would be under this bill. On page 2, line 15 and 16, non-marital property includes property acquired and exchanged for, or is the increase in value of, property or debt that is described in the first three paragraphs. I think that at the conclusion of the questions that were asked about marital and non-marital, you can see that even in MN they continue to have plenty of room for arguments, plenty of room for discussion, plenty of room for not settling. We settle approximately 85-95% of our cases and that's done in ND with equitable property distribution. It is not fair or accurate to say that we can't settle our cases because of the way that the law reads. We can settle our cases and we do so all the time.

There are a lot of factors that we look at. This would make where the property came from a super priority kind of factor. That would be whether it is a gift or an inheritance, it won't be for

