2021 HOUSE JUDICIARY

HB 1121

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1121
1/18/2021

Relating to division of marital property debts; and to provide for application

Chairman Klemin called the hearing to order at 10:50 AM.

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter.

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Discussion Topics:

- Exclusions to marital property
- Division of assets and debts
- Courts discretion to rule

Rep. D. Anderson: Introduced the bill. 10:50 Testimony #1109

Greg Grengs: Farmers from Sherwood, ND: Testimony #1085 10:55

Robert Schultz, Attorney in Fargo, ND: Testimony #1056 11:01

Deann Pladson, Attorney at law in ND and Minnesota: Testimony #980 11:05

Christina Sambor; Family law attorney in Western North Dakota: Testimony #1192 11:15

Additional written testimony: 1086, 1294, 1295

Chairman Klemin adjourned. 11:19

DeLores D. Shimek
Committee Clerk

AFTER DIVORCE

SUNDAY, JUNE 10, 2012

POSTED BY: ANDREW M. TATGE

Minnesota divorce lawyers are faced with unique and challenging issues when representing farmers in divorce proceedings, especially when dividing up the marital assets and debts.

Particularly important in light of today's farmland prices and other issues contributing to the value of the marital estate, a substantial award of cash or equity in a farm to the non-farming spouse can leave the farmer in a precarious position. Will he be able to cash flow the farming operations? What if prices of the farm output go down and he can't afford to keep the operation afloat? Are there non-farm assets that can be awarded to the non-farming spouse to allow suitable income for him or her to live on without invading the farm or requiring spousal maintenance? These are just a few of the difficult questions that must be analyzed in connection with a Minnesota farm divorce.

When negotiating a property division in a farm divorce matter, it is important to take into account the future impact of the property division on the farmer's income. If farm assets are reduced by a property division that fact should significantly impact the spouse's income for purposes of not only child support and spousal maintenance, but what is equitable as a division of the property.

One way to keep the family farm is for the previous generation to have gifted the farm or farm assets directly to the family member spouse, and not to the family member and his spouse jointly. In Minnesota, a gift to one spouse and not the other is non-marital property. This is the best way to keep a multi-generation family business or family farm out of the hands of the divorcing spouse. Antenuptial agreements can be utilized as well, as can tracing assets obtained by the farming spouse before the marriage to argue that those assets should not be divided.

If it is not possible to argue that the farm or farm assets are non-marital and there are not sufficient non-farm assets to divide, then it is vitally important to work with competent Minnesota divorce and business lawyers, financial advisors, accountants, and bankers to determine the best way to structure a "buy out" of the non-farming spouse so that the operation can continue on and support any new debt load it is required to undertake in order to buy out the spouse and ensure that the farm will be a viable business into the future.

There are numerous ways that creative attorneys can create asset and debt divisions which can provide significant advantages to the farm owner while also taking into account the risks inherent in

Testimony of Greg Grengs

Hello, my name is Greg Grengs. I appreciate the opportunity to testify amongst the representatives, and for my story to be heard.

I'm a fourth generation farmer from Sherwood, North Dakota and have recently been through a terrible divorce.

I took over the family farm when I was 14 years of age. My father was in an accident, became disabled and eventually lost both of his legs. At the age of 27 I married a beautiful young lady and took her elementary aged son under my wing. During our marriage we had my daughter.

Our marriage was full of adultery on my wife's part, but I stuck it out with her until the kids got old enough to be independent. During our marriage I tried to put a stop to the adultery and had my ex-wife sign a post-marital agreement to protect the farming entity. I wanted the farm to stay a viable unit to pass on to the kids and grandkids.

Three years later the adultery did not stop, so I filed for divorce. About six months into my divorce, my ex-wife's attorney went to my farmland landlords and defamed me libel per-se. She accused me of forging rental contracts and much more creating the first of many attempts to ruin my livelihood. I filed a defamation lawsuit against her, and my fate was sealed. You see, that attorney is from the same small town as the judge and works with him on a daily basis. She also worked for the judge's father years earlier. This same judge was assigned the case, but recused himself from the defamation suit due to their relationship. Things became personal, and it showed with the rulings. After that, the judge threw out my post-marital agreement, and everything went down-hill from there. My wife testified four different stories about the marital agreement, but finally settled on the fact she didn't have proper financial disclosure and that I wouldn't give her a copy to read. She testified she did the books, paid bills, sat in on income tax meetings with the accountant, and had access to all financial records. A balance sheet was even presented with her signature on it that was built very close to the same time. She told the judge, yes that was her signature on that financial document, but she didn't read it. The notary testified she and I had our own complete copies and she notarized both of them. The judge still threw it out.

Soon after the post-marital agreement was thrown out, it became a mission for her to destroy me through the courts. I was paying $4,000 a month spousal support, taking care of my daughter who was living with me, paying my ex-wife's car payment, health insurance and all of her attorney fees. She filed a motion with the court to include her own son's assets, under his name, into the divorce due to the fact that he used the family farms equipment to put his crop in. This attempt wouldn't have even been thought of if this bill was in place.

She filed an illegal lis pendens on my farming entity, which wasn't a party to the divorce either. My crops were hailed out in 2018 and I couldn't pay back my operating loan. The bank wouldn't loan me more money without restructuring and that was impossible with the Lis pendens filed. I

put a motion to the court in April begging him to release it so I could keep farming. The judge didn't rule until July, after planting was well over, and he ruled against it.

It was obvious that I was not going to survive his trial as it looked like he was planning to sell me out. In order to avoid seeing my family farm ripped apart and auctioned off to the public, I settled with my ex for a ridiculous sum of cash. The sum was about 70% of my net worth. A majority of my assets were bought before marriage, and some were bequeathed to me shortly before and during the divorce. My plan was to appeal the marital agreement after the judgment was signed and hope the Supreme Court would help me out. I filed the appeal but the SC wouldn't rule on the marital agreement due to the fact the judgement was now contract law.

I am now in bankruptcy and am desperately trying to hold onto my farm. A few years of marriage should not equal to half of what generations before us have built. Please pass this bill into law. My divorce would not have gone on for four years and cost me hundreds of thousands in attorney fees if there would have been a clear path for the judge to follow. My mental health would not have hit rock bottom and my farm would still be thriving. If this bill gets passed into law, most divorce cases won't even go to trial saving both the parties and the taxpayers money in court costs. It's too late for my farm and me, but if one generational family farm or business can be saved from me speaking to all of you today, then I can hold my head high and have something to be proud of after all of these years of treachery my kids and I have gone through.

I support HB1121.

Currently, in North Dakota, all assets and debts are subject to division by the court. There is no such thing as non-marital assets or debts.

The current statute directs the court to divide everything in a just and equitable manner. The source of the asset is a factor but not dispositive regarding of how the asset or debt will be allocated. Sometimes, the recipient of a gift or inheritance is awarded the asset. At other times, the gift or inheritance either is divided or even transferred to the other spouse.

HB1121 would create a non-marital category. The Court would lose authority to distribute non-marital assets. In other words, the receipt of the gift or inheritance would receive the gift or inheritance.

HB1121 promotes certainly and will likely promote settlement thereby reducing court time. HB1121 also preserves family businesses, such as family farms.

I support 1121.

#980

PLADSON
LAW OFFICE

January 16, 2021

North Dakota House of Representatives
The Honorable Lawrence Klemin
State Capitol Building
Bismarck, North Dakota 58505

RE: HB 1121

Dear Representative Klemin:

I am writing this letter in opposition to HB 1121. **Attachment 1**. I have practiced family law in North Dakota since 1992, and I am also licensed in Minnesota. House Bill 1121 seeks to specifically define marital property so as to exclude property acquired as a gift or inheritance, acquired before the marriage, addressed by a premarital agreement, or acquired in exchange for or is an increase in value of these types of assets. This is a concept which has been rejected by our legislature many times over the last few decades. Most recently it was rejected in 2007 after receiving a "do not pass" recommendation out of committee and failing to pass the House with 78 legislators rejecting the concept. **Attachment 2**. At first blush, it may seem like a fairly simple distinction between marital and nonmarital property, which may assist parties in facilitating settlement. However, other jurisdictions, such as Minnesota, show us that this distinction is nothing more than a hot bed for contested cases and appeals.

The current law in North Dakota requires the district court to look at certain factors, known as the "Ruff-Fisher" guidelines, when determining property division. Under those guidelines, the origin of the property must be considered by the court. The court is able to look at all of the circumstances between the parties and make an equitable distribution of the property. In 1999, the North Dakota Supreme Court upheld a trial court decision in which the husband received 86 percent of a $355,000 estate and the wife received 14 percent. The trial court found that because the husband's worth was greater at the time of the marriage and that the marriage was relatively short in duration, this distribution was equitable. Wetzel v. Wetzel, 1999 ND 29. **Attachment 3**. Over the last two decades, this case has been cited by the North Dakota

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Supreme Court 16 times justifying unequal distributions of a marital estate, and addressing passive or active increases in the value of assets. The trial courts are already using their discretion to achieve fair results for litigants, and HB 1121 would only serve to complicate property division.

Additionally, under current law, gifted and inherited property are considered marital property and the burden to prove that the property should not be marital property is on the party who wants to keep it out. Under HB 1121, the burden would be shifted to the party *least able to financially bear that burden*. Further, it could be argued that under HB 1121, the trial court would have *no discretion* to consider any other circumstances, because the legislature does not permit the trial court to award any property other than marital property. Given the rural and agricultural nature of North Dakota, this could lead to extremely unfair and oppressive results.

As practitioners, we deal with many cases involving family farms. A common tradition in North Dakota is to pass the farming operation to the next generation. Most often, that land is put in the name of one spouse only even if the land is acquired during the marriage. Under HB 1121, land transferred to one spouse could not be divided by the court. This is true even if the parties were married over 30 years, if the parties jointly worked the farming operation, or if the parties used the land as security and paid off one mortgage after the other during the course of the marriage. House Bill 1121 leaves no room for the court to consider all of the circumstances of the parties and make an equitable distribution of the assets. The results can leave a spouse completely unable to maintain a standard of living, dependent on the State for support, or completely uncompensated for the work and efforts made to increase the value of the asset.

If HB 1121 passed, the courts will be dealing with the issue of how to address appreciation of assets, and whether or not the appreciation was active or passive. The distinction between marital and non-marital property was codified in 1979 in Minnesota and its citizens are still litigating this very issue, four decades later. In Minnesota the courts have found that if the appreciation is active, the increase is marital property and if the appreciation is found to be passive, the increase is nonmarital. Active appreciation was defined as an increase attributable to the efforts of one or both spouses and passive appreciation was defined as an increase in value due to inflation or market forces. The Minnesota courts analogize a marriage to that of a partnership agreement and have held that increases during the marriage in the value of nonmarital property as a result of the efforts of one or both spouses are treated as a return on the investment made by the marital entity. Under HB 1121, litigants could not successfully raise this argument because N.D.C.C. §

14-05-24 (1)(5) requires that the increase in value be treated as nonmarital and the law does not give the court the authority to divide nonmarital assets.

Imagine a situation where a young couple, Sue and John, start dating five months after Sue opens up her own small corporation, a screen print t-shirt shop. John finds that he enjoys the work and he begins helping her with developing creative concepts and marketing strategies. They marry before the business is even one year old and work tirelessly on building their business and the brand. They each bring something to the business and grow it until it is worth over two million dollars. After 25 years of marriage and being partners in business, John decides he would like a divorce. The parties did not change the corporate structure of the business and it has always been in Sue's name only. It was clearly started before they started dating each other, let alone before the marriage. Under HB 1121 the court would not have any authority to divide this asset between the parties because it is only in Sue's name and it is not subject to distribution according to the proposed N.D.C.C. 14-05-24 (1)(a)(2).

North Dakota citizens already have the ability to exclude gifts, inheritances, separate property and premarital property through the use of properly drafted premarital agreement under N.D.C.C. Chapter 14-03.2. **Attachment 4**. If it is important to a soon to be husband or wife to keep certain assets separate, then they are free to enter into contracts which permit this and are enforceable under North Dakota law.

To impose a rigid definition of nonmarital property on parties without any meaningful discretion for a judge, will produce extremely unfair results and will result in increased litigation in family law. Most family law practitioners try to keep clients out of the courtroom. House Bill 1121 will have the opposite effect and will require parties to litigate this issue to uncover the true intent of the law and to prevent absolutely disparate results.

I thank you for your time and consideration of my thoughts and would invite you to call me should you have any further questions or concerns.

Very truly yours,

PLADSON LAW OFFICE, P.L.L.C.

DeAnn M. Pladson

CC: Anna Wischer, President SBAND Family Law Section

21.0086.01000

Sixty-seventh
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1121

Introduced by

Representative D. Anderson

Senator Kreun

A BILL for an Act to amend and reenact sections 14-05-24 and 14-05-27 and subsection 3 of section 29-15-21 of the North Dakota Century Code, relating to division of marital property debts; and to provide for application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 14-05-24 of the North Dakota Century Code is amended and reenacted as follows:

14-05-24. Division of marital property and debts.

1. As used in this section, "marital property" means all property held jointly or individually by the divorcing party. The term does not include:
   a. Real or personal property acquired by either spouse before, during, or after the existence of the marriage which is:
      (1) Acquired as a gift, bequest, devise, or inheritance made by a third party to one but not to the other spouse;
      (2) Acquired before the marriage;
      (3) Excluded by a valid premarital agreement;
      (4) Acquired by a spouse after the valuation date; or
      (5) Acquired in exchange for or is the increase in value of property described in paragraph 1, 2, 3, or 4; or
   b. Income from property described in subdivision a which is derived during the marriage unless the income was treated, used, or relied upon by the parties as marital property.
2. When a divorce is granted, the court shall make an equitable distribution of the marital property and debts of the parties. Except as may be required by federal law for specific property, and subject to the power of the court to determine a date that is just

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and equitable, the valuation date for marital property is the date mutually agreed upon between the parties. If the parties do not mutually agree upon a valuation date, the valuation date for marital property is the date of service of a summons in an action for divorce or separation or the date on which the parties last separated, whichever occurs first.

~~2.~~3. If one party to the divorce is covered by the civil service retirement system or other government pension system in lieu of social security and is not entitled to receive full social security benefits and the other party is a social security recipient, in making an equitable distribution award, the court shall compute what the present value of the social security benefits would have been to the party with the government pension during the covered period and subtract that amount from the value of the government pension in order to determine the government pension's marital portion.

~~3.~~4. The court may redistribute marital property and debts 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 marital property and debts.

SECTION 2. AMENDMENT. Section 14-05-27 of the North Dakota Century Code is amended and reenacted as follows:

14-05-27. Separation - Spousal support - Division of marital property.

Upon the granting of a separation, the court may include in the decree an order requiring a party to pay for spousal support and for the support of any minor children of the parties. Subject to section 14-05-24, the decree may also provide for the equitable division of the marital property and debts of the parties. As used in this section, the term "marital property" has the same meaning as provided under section 14-05-24.

SECTION 3. AMENDMENT. Subsection 3 of section 29-15-21 of the North Dakota Century Code is amended and reenacted as follows:

3. Any party who has been added, voluntarily or involuntarily, to the action or proceeding after the date of any occurrence in subsection 2 has the right to file a demand for change of judge within ten days after any remaining event occurs or, if all of those events have already occurred, within ten days after that party has been added. ~~In any event, no~~A demand for a change of judge may not be made after the judge sought to

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be disqualified has ruled upon any matter pertaining to the action or proceeding in which the demanding party was heard or had an opportunity to be heard. ~~Any~~A proceeding to modify an order for alimony, ~~property~~ division of marital property, or child support ~~pursuant to~~under section 14-05-24 or an order for child custody ~~pursuant to~~under section 14-05-22 must be considered a proceeding separate from the original action and the fact ~~that~~ the judge sought to be disqualified made any ruling in the original action does not bar a demand for a change of judge.

SECTION 4. APPLICATION. This Act applies to divorce and separation actions for which a summons has been served after July 31, 2021.

HB 1254 lost.

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SECOND READING OF HOUSE BILL

HB 1271: A BILL for an Act to amend and reenact sections 14-05-24 and 14-05-27 of the North Dakota Century Code, relating to property division in divorce and separation.

ROLL CALL

The question being on the final passage of the amended bill, which has been read, and has committee recommendation of DO NOT PASS, the roll was called and there were 12 YEAS, 78 NAYS, 0 EXCUSED, 4 ABSENT AND NOT VOTING.

YEAS: Boehning; DeKrey; Griffin; Hawken; Johnson, N.; Keiser; Kelsch, R.; Kretschmar; Onstad; Pinkerton; Porter; Speaker Delzer

NAYS: Aarsvold; Amerman; Bellew; Belter; Boe; Boucher; Brandenburg; Carlisle; Carlson; Charging; Clark; Conrad; Dahl; Damschen; Delmore; Dietrich; Dosch; Drovdal; Ekstrom; Froelich; Froseth; Glassheim; Grande; Gruchalla; Gulleson; Haas; Hanson; Hatlestad; Headland; Heller; Herbel; Hofstad; Hunskor; Johnson, D.; Kaldor; Karls; Kasper; Kelsh, S.; Kempenich; Kerzman; Kingsbury; Klein; Klemin; Koppelman; Kreidt; Kroeber; Martinson; Meier, L.; Metcalf; Meyer, S.; Monson; Mueller; Myxter; Nelson; Nottestad; Owens; Pietsch; Pollert; Potter; Price; Ruby; Schmidt; Skarphol; Sukut; Svedjan; Thoreson; Thorpe; Uglem; Vig; Vigesaa; Wald; Wall; Weiler; Weisz; Wieland; Williams; Wolf; Wrangham

ABSENT AND NOT VOTING: Berg; Schneider; Solberg; Zaiser

Engrossed HB 1271 lost.

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SECOND READING OF HOUSE BILL

HB 1364: A BILL for an Act to amend and reenact section 20.1-03-12.2 of the North Dakota Century Code, relating to antlered deer license application fees; and to declare an emergency.

ROLL CALL

The question being on the final passage of the amended bill, which has been read, and has committee recommendation of DO PASS, the roll was called and there were 40 YEAS, 52 NAYS, 0 EXCUSED, 2 ABSENT AND NOT VOTING.

YEAS: Berg; Boe; Boucher; Carlisle; Clark; Damschen; DeKrey; Delmore; Dosch; Ekstrom; Glassheim; Griffin; Gruchalla; Haas; Hanson; Hatlestad; Hofstad; Kaldor; Keiser; Kelsch, R.; Kelsh, S.; Klemin; Kretschmar; Kroeber; Martinson; Mueller; Nelson; Onstad; Pietsch; Pinkerton; Pollert; Porter; Potter; Price; Schmidt; Schneider; Thorpe; Weiler; Weisz; Wieland

NAYS: Aarsvold; Amerman; Bellew; Belter; Boehning; Brandenburg; Carlson; Charging; Conrad; Dahl; Dietrich; Drovdal; Froelich; Froseth; Grande; Gulleson; Hawken; Headland; Heller; Herbel; Hunskor; Johnson, D.; Johnson, N.; Karls; Kasper; Kempenich; Kerzman; Kingsbury; Klein; Koppelman; Kreidt; Meier, L.; Metcalf; Meyer, S.; Monson; Myxter; Nottestad; Owens; Ruby; Skarphol; Sukut; Svedjan; Thoreson; Uglem; Vig; Vigesaa; Wald; Wall; Williams; Wolf; Wrangham; Speaker Delzer

ABSENT AND NOT VOTING: Solberg; Zaiser

Engrossed HB 1364 lost.

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SECOND READING OF HOUSE BILL

HB 1388: A BILL for an Act to create and enact a new section to chapter 39-13 of the North Dakota Century Code, relating to a logo sign program.

ROLL CALL

The question being on the final passage of the bill, which has been read, and has committee recommendation of DO NOT PASS, the roll was called and there were 18 YEAS, 74 NAYS, 0 EXCUSED, 2 ABSENT AND NOT VOTING.

Filed 2/23/99 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

1999 ND 29

Clyde C. Wetzel, Plaintiff, Appellee and Cross-Appellant

v.

Patricia M. Wetzel, Defendant, Appellant and Cross-Appellee

Civil No. 980252

Appeal from the District Court for Burleigh County, South Central Judicial District, the Honorable Donald L. Jorgensen, Judge.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Opinion of the Court by Kapsner, Justice.

Thomas M. Tuntland, of Tuntland and Hoffman, P.O. Box 1315, Mandan, ND 58554, for plaintiff, appellee and cross-appellant.

William D. Schmidt, of Schmitz, Moench & Schmidt, P.O. Box 2076, Bismarck, ND 58502-2076, for defendant, appellant and cross-appellee.

Wetzel v. Wetzel

Civil No. 980252

Kapsner, Justice.

[¶1] Patricia Wetzel appealed from a divorce judgment, claiming the trial court erred in awarding child custody, setting the amount of child support, and dividing the marital property. Clyde Wetzel cross-appealed, claiming the trial court erred in dividing the marital property and awarding spousal support. We hold the trial court's award of child custody to Clyde Wetzel, division of the marital property, and award of spousal support are not clearly erroneous. We further hold the court's sixteen-month transition custody placement and award of child support during that transitional period are clearly erroneous. We affirm in part, reverse in part, and remand for a redetermination of the transitional custody placement and child support.

[¶2] The parties met in 1990 and began living together in 1991 at the farmstead of Clyde's parents north of Ashley. In 1994 the parties married and had a daughter, Carly. The marriage irretrievably broke down in September 1996, and Patricia moved to Bismarck with Carly.

[¶3] Clyde filed for divorce in September 1997. Patricia filed an answer and counterclaim for divorce. In an amended

judgment, dated June 19, 1998, the trial court awarded both parties a divorce on the grounds of irreconcilable differences. The court awarded custody of Carly to Clyde with liberal visitation for Patricia. The court also set a sixteen-month custody transition period in which each of the parties would have custody of Carly about one-half of the time in two-week intervals. The court ordered Patricia to pay child support of $168 per month, but reduced her child support obligation to $84 per month during the sixteen-month custody transition. The trial court awarded Patricia $50,358.80 of the net marital estate valued at $355,000, and awarded the balance to Clyde. The court also awarded Patricia rehabilitative spousal support of $350 per month for 24 months. Patricia appealed from the judgment and Clyde cross-appealed.

Motion to Dismiss

[¶4] Clyde moved to dismiss Patricia's appeal, asserting she accepted substantial benefits under the judgment and thereby waived her right to appeal from it. The trial court, in dividing the marital estate, awarded Patricia personal property and ordered Clyde to pay Patricia a lump sum of $36,000 in three annual installments. After the judgment was entered, Clyde paid the entire $36,000 to Patricia in one payment. We conclude Patricia's acceptance of the lump sum

payment did not, under the circumstances of this case, constitute a waiver of her right to appeal from the judgment.

[¶5] The general rule is that one who accepts a substantial benefit of a divorce judgment waives the right to appeal from the judgment. See, e.g., Davis v. Davis, 458 N.W.2d 309, 311 (N.D. 1990). This court has sharply limited the rule in domestic cases to promote a strong policy in favor of reaching the merits of an appeal. Spooner v. Spooner, 471 N.W.2d 487, 489 (N.D. 1991). Before a waiver of the right to appeal can be found, there must be an unconditional, voluntary, and conscious acceptance of a substantial benefit under the judgment. Grant v. Grant, 226 N.W.2d 358, 361 (N.D. 1975). The party objecting to the appeal has the burden of showing the benefit accepted by the appealing party is one which the party would not be entitled to without the decree. Hoge v. Hoge, 281 N.W.2d 557, 563 (N.D. 1979). There must be unusual circumstances, demonstrating prejudice to the movant, or a very clear intent on the part of the appealing party to accept the judgment and waive the right to appeal, to keep this court from reaching the merits of the appeal. Spooner, 471 N.W.2d at 490. We find no such circumstances in this case.

[¶6] Clyde voluntarily paid the entire $36,000 lump sum award to Patricia soon after the judgment was entered, even though the trial court had ordered it paid in three annual

installments. Under these circumstances, it is inconsistent for Clyde to argue he was prejudiced or Patricia accepted something to which she was not entitled. Generally, acceptance of a property award in a divorce case does not constitute waiver of the right to appeal from the divorce judgment where the accepting party is claiming a right to a larger share of the marital estate. Sanford v. Sanford, 295 N.W.2d 139, 142 (N.D. 1980). The trial court found the parties had a net worth of $355,000, but only awarded Patricia about $50,000 or 14 percent of the marital estate. Under these circumstances, we are not convinced her acceptance of that small percentage of the estate demonstrated an intent by her to be bound by the judgment. We hold Patricia did not waive her right to appeal from the judgment, and we deny the motion to dismiss.

Custody Award

[¶7] Patricia claims the trial court erred in awarding custody of their daughter, Carly, to Clyde. A trial court's determination of child custody is a finding of fact and will not be set aside on appeal under N.D.R.Civ.P. 52(a) unless it is clearly erroneous. Goter v. Goter, 1997 ND 28, ¶ 8, 559 N.W.2d 834. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no

evidence to support it, or if, although there is some evidence to support it, the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made. Severson v. Hansen, 529 N.W.2d 167, 168 (N.D. 1995).

[¶8] The trial court found both Clyde and Patricia are fit and able parents who genuinely love Carly and have strong emotional ties with her. The court found each parent is genuinely devoted to Carly's health and well-being and each is committed to providing the essentials of life for Carly. The trial court concluded the factor which tipped the scales in favor of placing custody with Clyde was Patricia's inability "to appropriately manage her anger towards other persons." The court was expressly bothered by Patricia's refusal "to recognize the need for anger management and seek professional help" in resolving the problem. The trial court has a difficult choice to make in deciding custody between two fit parents, and in such a case we will not substitute our judgment if the court's determination is supported by evidence. Hogue v. Hogue, 1998 ND 26, ¶ 9, 574 N.W.2d 579. The record evidence supports the trial court's custody award.

[¶9] Patricia argues the trial court gave inadequate consideration to the fact Carly has resided with her since the parties separated in 1996. The trial court found each parent

has provided daily care for Carly and each has "the support of extended family." Clyde lives on the family farmstead where the parties resided when Carly was born and where Clyde continues farming and ranching. The record evidence shows both parties are capable of providing continuity and stability in Carly's life, and we are not convinced the trial court gave inadequate consideration to this factor. We conclude the trial court's award of custody to Clyde with liberal visitation for Patricia is not clearly erroneous.

Custody Transition Period

[¶10] The trial court scheduled a sixteen-month custody transition in which each parent was essentially awarded custody of Carly for one-half of each month. Patricia's child support, which the court calculated to be $168 per month, was reduced to one-half, or $84 per month, during this sixteen-month transition period. Patricia asserts the trial court's child support award during the transition is clearly erroneous. She argues the trial court should have calculated her support during this sixteen-month period in the same manner support is calculated for split custody arrangements by the child support guidelines under N.D. Admin. Code § 75-02-04.1-03.

[¶11] Split custody under the guidelines is defined as a situation in which the parents have more than one child in common and each parent is awarded custody of at least one child. N.D. Admin. Code § 75-02-04.1-01(11). Under the split custody formula, a support amount is determined for the child or children in each parent's custody, and the lesser amount is subtracted from the greater, resulting in the difference being paid by the parent with the greater obligation. Shared custody of one child does not constitute split custody as defined by the child support guidelines, and, consequently, it is inappropriate to use the split formula in a shared custody situation. See Dalin v. Dalin, 545 N.W.2d 785, 789 n.5 (N.D. 1996). More importantly, however, we have clearly noted our disfavor with shared custody arrangements in which a child is bandied back and forth between parents. In Interest of Lukens, 1998 ND 224, ¶ 15, 587 N.W.2d 141. While a shared custody arrangement is not per se clearly erroneous, the trial court must make specific findings demonstrating shared custody is in the best interests of the child. Id.

[¶12] Here, the trial court made no explanation for the shared custody arrangement other than to indicate it was important the custody transition "be accomplished with a minimum of difficulty" and equally important Carly "have frequent contact with both parents due to the child's age."

We conclude this explanation is inadequate to support the trial court's shared custody arrangement for a sixteen-month transition period. The trial court can accomplish frequent contact between the child and both parents by awarding custody to one parent with frequent visitations to the other. Furthermore, the trial court could surely accomplish transition of custody from one parent to the other without forcing the child to be shuttled back and forth between the parent's homes once every two weeks for sixteen months.

[¶13] We conclude the trial court's award of shared custody for the sixteen-month transition is clearly erroneous. The trial court, having concluded it is in Carly's best interest to award custody to Clyde, can effect a proper transition by placing custody with Clyde and scheduling frequent liberal visitations for Patricia. Upon remand, the trial court must redetermine the transitional custody arrangement and recompute child support during the transitional period, in accordance with the child support guidelines.[1]

[1] "The guidelines contemplate one parent is the custodial parent, who is the primary caregiver for a proportionately greater time than the other parent, and the noncustodial parent pays child support. Dalin v. Dalin, 545 N.W.2d 785, 789 (N.D. 1996). Using the definitions in N.D.A.C. § 75-02-04.1-01, it is nearly impossible to determine whether Clyde or Patricia is the "custodial parent" for child support purposes during the sixteen-month transition, in which each parent has custody of Carly for basically an equal amount of time.

Property Division

[¶14] The trial court found Clyde entered the marriage with property valued at $330,000 and debt of between $15,000 and $20,000 for rent of real property from his father. The court found Patricia came into the marriage with property valued at about $4,500 and with indebtedness of $7,000. The court determined the net value of the marital estate at the time of the divorce was $355,000. The court awarded Patricia personal property valued at $14,367.80 and a lump sum cash award, payable in three annual installments, of $36,000, for a total award of $50,367.80, or about 14 percent of the total net marital estate. Clyde received the balance of the marital property. Patricia and Clyde have both appealed from the trial court's property division.

[¶15] Patricia asserts Clyde essentially acquired his assets over a 14-year period and she resided with him for about six years or 43 percent of that time. She argues the court should have awarded her 43 percent of the value of the marital estate. Clyde argues Patricia should have been entitled to only about one-half of the net increase in the value of the parties' assets during the marriage which, according to Clyde's figures, would have resulted in Patricia receiving a total property award of $23,400.

[¶16] Upon granting a divorce, the trial court is required under N.D.C.C. § 14-05-24 to make such equitable distribution of the real and personal property of the parties as may seem just and proper. The trial court's distribution of the marital property is a finding of fact and will not be reversed on appeal unless it is clearly erroneous. Young v. Young, 1998 ND 83, ¶ 11, 578 N.W.2d 111. When the parties have lived together and then married, it is appropriate for the court to consider all of the parties' time together in making an equitable distribution of the marital estate. Nelson v. Nelson, 1998 ND 176, ¶ 7, 584 N.W.2d 527. There is no rule the trial court must equally divide an increase in the net worth of the parties which occurred during the marriage, but all property, including separate property, is subject to distribution to either spouse when an equitable distribution requires it. Spooner v. Spooner, 471 N.W.2d 487, 491 (N.D. 1991). In distributing the property in an equitable manner the court should consider the Ruff-Fischer guidelines,[2] and

[2]In awarding spousal support or dividing marital property the court should "consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned at the time, its value at that time, its income-producing capacity, if any, and whether accumulated or acquired before or after the marriage; and from all such elements the court should determine the rights of the parties and all other matters pertaining to the case." Fischer v. Fischer, 139 N.W.2d 845, 852 (N.D. 1966); Ruff v. Ruff, 78 ND 755, 52 N.W.2d 107, 111 (N.D. 1952).

duration of the marriage and source of the property are two important considerations under those guidelines. See Routledge v. Routledge, 377 N.W.2d 542, 548 (N.D. 1985).

[¶17] The parties lived together for about six years and during that time both contributed to increasing their net worth. The trial court recognized this, but also recognized the marriage was of relatively short duration and Clyde brought considerable assets into the marriage, while Patricia began the marriage with a negative net worth. The court considered these factors in dividing the marital property and explained why it rejected both parties' views of how the property should be split:

> [Clyde] argues to the Court that [Clyde] should retain all property brought to this marriage, and that the Court should only be concerned with an equitable division of the assets acquired during marriage. [Patricia] argues to the Court that an equitable division of the assets of the parties is an equal division of the assets. To adopt the position of [Clyde] would be to impose a prenuptial agreement on the parties which does not exist. To adopt the position of [Patricia] would ignore the substantial estate brought to this marriage by [Clyde], and would ignore the brief term of said marriage.

[¶18] Although there is substantial disparity in the property split, the court's explanation and the underlying circumstances justify the unequal property division. The record evidence supports the trial court's distribution of the

marital estate, and we are not left with a definite and firm conviction the trial court made a mistake in dividing the property. We conclude, therefore, the trial court's property division is not clearly erroneous.

Spousal Support

[¶19] The trial court awarded Patricia rehabilitative spousal support of $350 per month for a period of 24 months. Clyde asserts the court's award of spousal support is clearly erroneous.

[¶20] Upon granting a divorce, the trial court may compel either of the parties to make such suitable allowances to the other for support as the court may deem just. N.D.C.C. § 14-05-24. A trial court's determination on spousal support is a finding of fact and will not be set aside on appeal unless it is clearly erroneous. Orgaard v. Orgaard, 1997 ND 34, ¶ 5, 559 N.W.2d 546. While the duration of a marriage is a relevant factor, spousal support may be appropriate regardless of the length of the marriage. Id. at ¶ 11. The purpose of rehabilitative spousal support is to provide a disadvantaged spouse the opportunity to become self-supporting through additional training, education, or experience. Wiege v. Wiege, 518 N.W.2d 708, 711 (N.D. 1994). A relevant factor in setting the amount of support for a disadvantaged spouse is

the distribution of marital property and the liquidity or income-producing nature of the property distributed to the disadvantaged spouse. Id.

[¶21] The trial court specifically found Patricia was disadvantaged by the divorce and in need of rehabilitative spousal support. While Clyde entered the marriage with a college degree in animal science, Patricia had only a high school diploma and one year of business college. Patricia did not receive additional education during the marriage. After Carly was born, Patricia spent a considerable period of time being a homemaker and caring for Carly rather than advancing her own career. At the time of trial, Patricia was employed as a cook earning approximately $825 per month. While Patricia received some personal property and a $36,000 cash settlement, Clyde received the entire farm and ranch operation, which was the parties' primary income-producing resource during the marriage. Under these circumstances, we are not convinced the trial court's finding Patricia was disadvantaged by the divorce and in need of rehabilitative spousal support was clearly erroneous. Nor are we left with a definite and firm conviction the trial court made a mistake in setting the amount of support at $350 per month for 24 months.

[¶22] The judgment is affirmed in part, reversed in part, and remanded for a redetermination of the transitional custody and child support. Clyde's request for attorney fees is denied.

[¶23] Carol Ronning Kapsner
Mary Muehlen Maring
William A. Neumann
Dale V. Sandstrom
Gerald W. VandeWalle, C.J.

CHAPTER 14-03.2
UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

14-03.2-01. Definitions.

In this chapter:

1. "Amendment" means a modification or revocation of a premarital agreement or marital agreement.
2. "Marital agreement" means an agreement between spouses who intend to remain married which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement.
3. "Marital dissolution" means the ending of a marriage by court decree. The term includes a divorce, dissolution, and annulment.
4. "Marital right or obligation" means any of the following rights or obligations arising between spouses because of their marital status:
   a. Spousal support;
   b. A right to property, including characterization, management, and ownership;
   c. Responsibility for a liability;
   d. A right to property and responsibility for liabilities at separation, marital dissolution, or death of a spouse; or
   e. Award and allocation of attorney's fees and costs.
5. "Premarital agreement" means an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed before the individuals marry, of a premarital agreement.
6. "Property" means anything that may be the subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein.
7. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
8. "Sign" means with present intent to authenticate or adopt a record:
   a. To execute or adopt a tangible symbol; or
   b. To attach to or logically associate with the record an electronic symbol, sound, or process.
9. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

14-03.2-02. Scope.

1. This chapter applies to a premarital agreement or marital agreement signed after July 31, 2013.
2. This chapter does not affect any right, obligation, or liability arising under a premarital agreement or marital agreement signed before August 1, 2013.
3. This chapter does not apply to:
   a. An agreement between spouses which affirms, modifies, or waives a marital right or obligation and requires court approval to become effective; or
   b. An agreement between spouses who intend to obtain a marital dissolution or court-decreed separation which resolves their marital rights or obligations and is signed when a proceeding for marital dissolution or court-decreed separation is commenced.
4. This chapter does not affect adversely the rights of a bona fide purchaser for value to the extent that this chapter applies to a waiver of a marital right or obligation in a transfer or conveyance of property by a spouse to a third party.

14-03.2-03. Governing law.

The validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement are determined:

1. By the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party and the designated law is not contrary to a fundamental public policy of this state; or
2. Absent an effective designation described in subsection 1, by the law of this state, including the choice-of-law rules of this state.

14-03.2-04. Principles of law and equity.

Principles of law and equity may not:

1. Supplement an agreement executed in accordance with this chapter; or
2. Be used to alter a material term in an agreement executed in accordance with this chapter.

14-03.2-05. Formation requirements.

A premarital agreement or marital agreement must be in a record and signed by both parties. The agreement is enforceable without consideration.

14-03.2-06. When agreement effective.

A premarital agreement is effective on marriage. A marital agreement is effective on signing by both parties.

14-03.2-07. Void marriage.

If a marriage is determined to be void, a premarital agreement or marital agreement is enforceable to the extent necessary to avoid an inequitable result.

14-03.2-08. Enforcement.

1. A premarital agreement or marital agreement is unenforceable if a party against whom enforcement is sought proves:
   a. The party's consent to the agreement was involuntary or the result of duress;
   b. The party did not have access to independent legal representation under subsection 2;
   c. Unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection 3 or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or
   d. Before signing the agreement, the party did not receive adequate financial disclosure under subsection 4.
2. A party has access to independent legal representation if:
   a. Before signing a premarital or marital agreement, the party has a reasonable time to:
      (1) Decide whether to retain a lawyer to provide independent legal representation; and
      (2) Locate a lawyer to provide independent legal representation, obtain the lawyer's advice, and consider the advice provided; and
   b. The other party is represented by a lawyer and the party has the financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.
3. A notice of waiver of rights under this section requires language, conspicuously displayed, substantially similar to the following, as applicable to the premarital agreement or marital agreement:

   "If you sign this agreement, you may be:

   Giving up your right to be supported by the person you are marrying or to whom you are married.

Giving up your right to ownership or control of money and property.

Agreeing to pay bills and debts of the person you are marrying or to whom you are married.

Giving up your right to money and property if your marriage ends or the person to whom you are married dies.

Giving up your right to have your legal fees paid."

4. A party has adequate financial disclosure under this section if the party:
   a. Receives a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party;
   b. Expressly waives, in a separate signed record, the right to financial disclosure beyond the disclosure provided; or
   c. Has adequate knowledge or a reasonable basis for having adequate knowledge of the information described in subdivision a.
5. If a premarital agreement or marital agreement modifies or eliminates spousal support and the modification or elimination causes a party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, on request of that party, may require the other party to provide support to the extent necessary to avoid that eligibility.
6. A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole:
   a. The term was unconscionable at the time of signing; or
   b. Enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed.
7. The court shall decide a question of unconscionability or substantial hardship under subsection 6 as a matter of law.

14-03.2-09. Unenforceable terms.

1. In this section, "parental rights and responsibilities" means all the rights and responsibilities a parent has concerning the parent's child.
2. A term in a premarital agreement or marital agreement is not enforceable to the extent that it:
   a. Adversely affects a child's right to support;
   b. Limits or restricts a remedy available to a victim of domestic violence under law of this state other than this chapter;
   c. Purports to modify the grounds for a court-decreed separation or marital dissolution available under law of this state other than this chapter; or
   d. Penalizes a party for initiating a legal proceeding leading to a court-decreed separation or marital dissolution.
3. A term in a premarital agreement or marital agreement which defines the rights or duties of the parties regarding parental rights and responsibilities is not binding on the court.

14-03.2-10. Limitation of action.

A statute of limitations applicable to an action asserting a claim for relief under a premarital agreement or marital agreement is tolled during the marriage of the parties to the agreement, but equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

14-03.2-11. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act [15 U.S.C. 7001 et seq.] but does not modify, limit, or supersede section 101(c) of that Act [15 U.S.C. 7001(c)] or authorize electronic delivery of any of the notices described in section 103(b) of that Act [15 U.S.C. 7003(b)].

Sandra Kuntz, Attorney and Owner, Legal Edge Solutions, PLLC
Christina Sambor, Attorney and Owner, Sambor Law & Consulting, P.C.
Testimony on HB 1121
House Judiciary Committee
January 18, 2021

Chairman Klemin and Members of the Committee:

We, Sandra Kuntz and Christina Sambor, both family law attorneys in central and western North Dakota, submit this testimony in opposition to HB 1121. While this new legislation attempts to bring uniformity in the division and distribution of divorce estates, this bill will bring about unintended consequences for spouses across the state. The testimony of Ms. Pladson does an excellent job of laying out how the division of marital property is presently treated in ND. As is appropriate for the thousands of families impacted by divorce, courts and counsel currently look to equitably divide martial property, based on the facts and circumstances of each case. In contrast, HB 1121 creates rigid categories of property that cannot take into account facts of a particular case that would make application of those categories wholly unfair. Simply put, the law as it currently stands allows parties due process and the opportunity to argue before the court regarding how their assets can be fairly divided. The standard proposed by HB 1121 removes any standard of discretion or fairness.

In HB 1121, discretion is removed from the Court to balance in factors that have long standing recognition as bringing "value" to a marriage and the financial partnership involved. By example, the Ruff-Fisher factors, which Courts currently use to divide the marital estate, list the following to be considered: the respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material.

This discretion traditionally held by the Court balances various scenarios of a North Dakota family, such as:

- The stay at home parent who provides daycare; home schooling; transportation of the family to school, medical appointments, shopping, etc;
- The stay at home spouse who provides household services such as cooking, cleaning, laundry, shopping for necessities, maintenance and repairs around the home;
- The spouse who contributes substantial labor and services to a business, farm, or ranch but was not the inheriting spouse.

Additionally, the significant change this new legislation will bring to the law will generate extensive litigation. For example, even the effective date of this law has potential to be challenged. A couple who may have married prior to the enactment of this new law may have relied upon the law in existence at the time of their marriage. If that law was a balancing of the factors under the Ruff-Fisher guidelines noted above, they may have a reliance claim as part of

the consideration for the marriage. Then does the law in effect at the time of entry into their marital contract become the binding law for their case and the new law applicable only to those who marry after the effective date of the new law? As another example of questions that could produce litigation: Does the language as written mean that there can be no "interim spousal support" ordered by the court because of the language of 1 b provides that income from all "excluded marital property" will no longer be available for distribution?

The language in HB 1121 will remove a Court's discretion to rule on property distribution through an examination of the facts and circumstances of the parties. This will undoubtedly result in grossly unfair outcomes for many divorcing parties, and those parties negatively effected will not even be given a chance to discuss their particular circumstances with the Court. The unfairness caused by the proposed changes would open up a Pandora's box of litigation challenging and clarifying the language in this bill. For those reasons, we respectfully ask that the Committee recommend a "do not pass" vote on HB 1121.

Ian Thomas Testimony

Members of the committee, my name is Ian Thomas, and I reside in Minot, North Dakota. I am in favor of Bill HB1121.

My parent's divorce began in 2017, and the after effects of it are still felt today.

For months I googled "how to protect your assets from someone else's divorce" and "can your assets be included in a divorce you are not a party of."

I invite you to do the same. I expect your results to be as futile as mine, as there are no clear laws or guidelines for what can or cannot be included in a divorce.

I researched these questions because my mother attempted to file a motion to include my own assets into my parents divorce because I rented the family farm equipment to farm my own land I owned or rented separately from the family farm. Everything I worked for, from childhood to adulthood, had now been in the hands of a single judge due to a dispute between two other adults and a lack of laws protecting my assets and me.

I have learned more about North Dakota laws, and spent more on attorneys then I ever cared to. This bill will not only protect family farms for generations to come, but protect the future generations! I would never wish what I've gone through for the past four years on anyone, and want to do everything in my power to prevent that. This bill allows me to do just that. I need to protect other young entrepreneurs, farmers, and children from the battles that come from divorce. It's unbelievable that a motion like that could have ever been dreamt to be filed, let alone officially filed in a court of law in North Dakota. I had no law, case law, or even a previous encounter of this ever happening to back me up. The courts need a clear path to follow rather than using their own discretion, which easily can be biased. I fought this blind and alone, and wish for this bill to pass to help prevent this from ever occurring in the future.

This bill will give both parties of a divorce their fair share of the marital estate while saving tax paying dollars in the courts, and heartache for the rest of the family involved.

Thank you to all members of the committee for hearing my story and considering the unfortunate events that can happen if this bill does not pass.

Respectfully,

Ian Thomas

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518.003 DEFINITIONS.

Subdivision 1. **Scope.** For the purposes of this chapter and chapter 518A, the following terms have the meanings provided in this section unless the context clearly requires otherwise.

Subd. 2. [Renumbered subd 9]

Subd. 3. **Custody.** Unless otherwise agreed by the parties:

(a) "Legal custody" means the right to determine the child's upbringing, including education, health care, and religious training.

(b) "Joint legal custody" means that both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training.

(c) "Physical custody and residence" means the routine daily care and control and the residence of the child.

(d) "Joint physical custody" means that the routine daily care and control and the residence of the child is structured between the parties.

(e) Wherever used in this chapter, the term "custodial parent" or "custodian" means the person who has the physical custody of the child at any particular time.

(f) "Custody determination" means a court decision and court orders and instructions providing for the custody of a child, including parenting time, but does not include a decision relating to child support or any other monetary obligation of any person.

(g) "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for dissolution, divorce, or separation, and includes proceedings involving children who are in need of protection or services, domestic abuse, and paternity.

Subd. 3a. **Maintenance.** "Maintenance" means an award made in a dissolution or legal separation proceeding of payments from the future income or earnings of one spouse for the support and maintenance of the other.

§ Subd. 3b. **Marital property; exceptions.** "Marital property" means property, real or personal, including vested public or private pension plan benefits or rights, acquired by the parties, or either of them, to a dissolution, legal separation, or annulment proceeding at any time during the existence of the marriage relation between them, or at any time during which the parties were living together as husband and wife under a purported marriage relationship which is annulled in an annulment proceeding, but prior to the date of valuation under section 518.58, subdivision 1. All property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses in a form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. Each spouse shall be deemed to have a common ownership in marital property that vests not later than the time of the entry of the decree in a proceeding for dissolution or annulment. The extent of the vested interest shall be determined and made final by the court pursuant to section 518.58. If a title interest in real property is held individually by only one spouse, the interest in the real property of the nontitled spouse is not subject to claims of creditors or judgment or tax liens until the time of entry of the decree awarding an interest to the nontitled spouse. The presumption of marital property is overcome by a showing that the property is nonmarital property.

"Nonmarital property" means property real or personal, acquired by either spouse before, during, or after the existence of their marriage, which

(a) is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse;

(b) is acquired before the marriage;

(c) is acquired in exchange for or is the increase in value of property which is described in clauses (a), (b), (d), and (e);

(d) is acquired by a spouse after the valuation date; or

(e) is excluded by a valid antenuptial contract.

Subd. 4. **Mediation.** "Mediation" means a process in which an impartial third party facilitates an agreement between two or more parties in a proceeding.

Subd. 5. **Parenting time.** "Parenting time" means the time a parent spends with a child regardless of the custodial designation regarding the child.

Subd. 6. **Pension plan benefits or rights.** "Pension plan benefits or rights" means a benefit or right from a public or private pension plan accrued to the end of the month in which marital assets are valued, as determined under the terms of the laws or other plan document provisions governing the plan, including section 356.30.

Subd. 7. **Private pension plan.** "Private pension plan" means a plan, fund, or program maintained by an employer or employee organization that provides retirement income to employees or results in a deferral of income by employees for a period extending to the termination of covered employment or beyond.

Subd. 8. **Public pension plan.** "Public pension plan" means a pension plan or fund specified in section 356.20, subdivision 2, or 356.30, subdivision 3, the deferred compensation plan specified in section 352.965, or any retirement or pension plan or fund, including a supplemental retirement plan or fund, established, maintained, or supported by a governmental subdivision or public body whose revenues are derived from taxation, fees, assessments, or from other public sources.

Subd. 9. **Residence.** "Residence" means the place where a party has established a permanent home from which the party has no present intention of moving.

History: *1951 c 551 s 1; 1969 c 1028 s 2,3; 1973 c 725 s 74; 1974 c 107 s 18; 1978 c 772 s 48; 1979 c 259 s 2,23,34; 1981 c 349 s 2; 1981 c 360 art 2 s 45; 1982 c 464 s 1; 1983 c 144 s 1; 1986 c 444; 1987 c 157 s 14-16; 1988 c 590 s 1; 1988 c 668 s 15,16; 1989 c 282 art 2 s 189; 1990 c 568 art 2 s 68,69; 1990 c 574 s 6,7; 1992 c 463 s 29; 1993 c 340 s 31; 1994 c 488 s 8; 1995 c 202 art 1 s 25; 1997 c 203 art 6 s 40,41; 1997 c 245 art 3 s 9; 1998 c 382 art 1 s 3-5; 1999 c 107 s 66; 1999 c 196 art 1 s 5; 2000 c 343 s 4; 2000 c 444 art 1 s 1; art 2 s 15; 2005 c 116 s 1-3; 2005 c 164 s 5,29,31; 1Sp2005 c 7 s 26,28; 2006 c 280 s 21,43; 2008 c 349 art 11 s 11*

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518.58 DIVISION OF MARITAL PROPERTY.

Subdivision 1. **General.** Upon a dissolution of a marriage, an annulment, or in a proceeding for disposition of property following a dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property and which has since acquired jurisdiction, the court shall make a just and equitable division of the marital property of the parties without regard to marital misconduct, after making findings regarding the division of the property. The court shall base its findings on all relevant factors including the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party. The court shall also consider the contribution of each in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker. It shall be conclusively presumed that each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife. The court may also award to either spouse the household goods and furniture of the parties, whether or not acquired during the marriage. The court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference, unless a different date is agreed upon by the parties, or unless the court makes specific findings that another date of valuation is fair and equitable. If there is a substantial change in value of an asset between the date of valuation and the final distribution, the court may adjust the valuation of that asset as necessary to effect an equitable distribution.

Subd. 1a. **Transfer, encumbrance, concealment, or disposition of marital assets.** During the pendency of a marriage dissolution, separation, or annulment proceeding, or in contemplation of commencing a marriage dissolution, separation, or annulment proceeding, each party owes a fiduciary duty to the other for any profit or loss derived by the party, without the consent of the other, from a transaction or from any use by the party of the marital assets. If the court finds that a party to a marriage, without consent of the other party, has in contemplation of commencing, or during the pendency of, the current dissolution, separation, or annulment proceeding, transferred, encumbered, concealed, or disposed of marital assets except in the usual course of business or for the necessities of life, the court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment, or disposal not occurred. The burden of proof under this subdivision is on the party claiming that the other party transferred, encumbered, concealed, or disposed of marital assets in contemplation of commencing or during the pendency of the current dissolution, separation, or annulment proceeding, without consent of the claiming party, and that the transfer, encumbrance, concealment, or disposal was not in the usual course of business or for the necessities of life. In compensating a party under this section, the court, in dividing the marital property, may impute the entire value of an asset and a fair return on the asset to the party who transferred, encumbered, concealed, or disposed of it. Use of a power of attorney, or the absence of a restraining order against the transfer, encumbrance, concealment, or disposal of marital property is not available as a defense under this subdivision.

§ Subd. 2. **Award of nonmarital property.** If the court finds that either spouse's resources or property, including the spouse's portion of the marital property as defined in section 518.003, subdivision 3b, are so inadequate as to work an unfair hardship, considering all relevant circumstances, the court may, in addition to the marital property, apportion up to one-half of the property otherwise excluded under section 518.003, subdivision 3b, clauses (a) to (d), to prevent the unfair hardship. If the court apportions property other than marital property, it shall make findings in support of the apportionment. The findings shall be based on all relevant factors including the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, and opportunity for future acquisition of capital assets and income of each party.

Subd. 3. **Sale or distribution while proceeding pending.** (a) If the court finds that it is necessary to preserve the marital assets of the parties, the court may order the sale of the homestead of the parties or the sale of other marital assets, as the individual circumstances may require, during the pendency of a proceeding for a dissolution of marriage or an annulment. If the court orders a sale, it may further provide for the disposition of the funds received from the sale during the pendency of the proceeding.

(b) The court may order a partial distribution of marital assets during the pendency of a proceeding for a dissolution of marriage or an annulment for good cause shown or upon the request of both parties, provided that the court shall fully protect the interests of the other party.

Subd. 4. **Pension plans.** (a) The division of marital property that represents pension plan benefits or rights in the form of future pension plan payments:

(1) is payable only to the extent of the amount of the pension plan benefit payable under the terms of the plan;

(2) is not payable for a period that exceeds the time that pension plan benefits are payable to the pension plan benefit recipient;

(3) is not payable in a lump-sum amount from defined benefit pension plan assets attributable in any fashion to a spouse with the status of an active member, deferred retiree, or benefit recipient of a pension plan;

(4) if the former spouse to whom the payments are to be made dies prior to the end of the specified payment period with the right to any remaining payments accruing to an estate or to more than one survivor, is payable only to a trustee on behalf of the estate or the group of survivors for subsequent apportionment by the trustee; and

(5) in the case of defined benefit public pension plan benefits or rights, may not commence until the public plan member submits a valid application for a public pension plan benefit and the benefit becomes payable.

(b) The individual retirement account plans established under chapter 354B may provide in its plan document, if published and made generally available, for an alternative marital property division or distribution of individual retirement account plan assets. If an alternative division or distribution procedure is provided, it applies in place of paragraph (a), clause (5).

(c) If liquid or readily liquidated marital property other than property representing vested pension benefits or rights is available, the court, so far as possible, shall divide the property representing vested pension benefits or rights by the disposition of an equivalent amount of the liquid or readily liquidated property.

(d) If sufficient liquid or readily liquidated marital property other than property representing vested pension benefits or rights is not available, the court may order the revocation of the designation of an optional annuity beneficiary in pension plans specified in section 356.48 or in any other pension plan in which plan-governing law or governing documents allow revocation of an optional annuity in marital dissolution or annulment situations.

History: *1951 c 551 s 5; 1974 c 107 s 22; 1978 c 772 s 53; 1979 c 259 s 27; 1979 c 289 s 8; 1981 c 349 s 7; 1982 c 464 s 2; 1986 c 444; 1987 c 157 s 17; 1988 c 590 s 2; 1988 c 668 s 20; 1989 c 248 s 8; 1991 c 266 s 4,5; 1992 c 548 s 6; 1993 c 239 art 4 s 1; 2005 c164 s 29; 1Sp2005 c 7 s 28; 2006 c 280 s 18; 2010 c 359 art 10 s 2,3*

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2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1121
1/19/2021

Relating to division of marital property debts; and to provide for application

Chairman Klemin called the meeting to order at 3:14 pm.

Present: Representatives Klemin, Karls, Becker, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter. Absent Rep. Buffalo

Discussion topics:

- Amendments

Motion made orally to amend on page 1 Section 1 B to strike lines 19-21 by **Rep. Vetter;** Seconded by **Rep. Christensen**

Voice vote carried.

Motion made orally to further amend on line 9 after the period before the word 'term" insert "except in the case of undue hardship," by **Rep. Vetter**; Seconded by **Rep. Satrom**

Voice vote carried.

Motion made orally to amend further to remove Subdivision A 2 on line 14 by **Rep. K. Hanson;** Seconded by **Rep. Paur**

Voice vote carried.

Do Not Pass as Amended 21.0086.01001 Motion Made by Rep. Vetter; Seconded by Rep. Paur

Roll Call Vote:

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Rick Becker	Y
Representative Ruth Buffalo	A
Representative Cole Christensen	Y
Representative Claire Cory	Y
Representative Karla Rose Hanson	Y
Representative Terry B. Jones	Y
Representative Jeffery J. Magrum	Y
Representative Bob Paulson	N

Representative Gary Paur	Y
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Steve Vetter	Y

Motion carried.12-1-1 Carrier: Rep. Satrom

Chairman Klemin closed the meeting at 3:36.

Delores Shimek
Committee Clerk

DP 1/19/21
1 of 1

21.0086.01001
Title.02000

Adopted by the Judiciary Committee

January 19, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1121

Page 1, line 9, replace "The" with "Except in the case of undue hardship, the"

Page 1, line 9, remove the underscored colon

Page 1, line 10, replace "a. Real" with "real"

Page 1, line 12, replace "(1)" with "a."

Page 1, line 14, replace "(2)" with "b."

Page 1, line 15, replace "(3)" with "c."

Page 1, line 16, replace "(4)" with "d."

Page 1, line 17, replace "(5)" with "e."

Page 1, remove lines 18 through 20

Page 1, line 21, replace "marital property" with "subdivision a, b, c, or d"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1121: Judiciary Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (12 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1121 was placed on the Sixth order on the calendar.

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