

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIARY COMMITTEE

Monday, September 27, 1999
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Wayne Stenehjem, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Wayne Stenehjem, Dennis Bercier, Joel C. Heitkamp, Stanley W. Lyson, John T. Traynor, Darlene Watne; Representatives Duane DeKrey, Lois Delmore, G. Jane Gunter, Kathy Hawken, Dennis E. Johnson, Scot Kelsh, Lawrence R. Klemin, Kim Koppelman, Shirley Meyer, Phillip Mueller

Members absent: Senators Judy Lee, Carolyn Nelson; Representatives Amy N. Kliniske, John Mahoney

Others present: See attached appendix

The committee considered the minutes of the previous meeting. Chairman Stenehjem requested that the name of Mr. John Emter be changed in the minutes of the August 24, 1999, meeting to include Mr. Emter's middle name "Val". **It was moved by Senator Watne and seconded by Representative DeKrey that the minutes of the August 24 meeting be approved as corrected.** The motion was carried on a voice vote.

COURT UNIFICATION AND CLERK OF COURT IMPLEMENTATION STUDY

Chairman Stenehjem called on Chief Justice Gerald W. VandeWalle, North Dakota Supreme Court, for comments concerning the implementation of the 1999 legislation regarding clerks of court. Chief Justice VandeWalle said the first newsletter regarding the implementation of the legislation has been sent to the counties, the committee members, and other interested persons. He said the primary concerns among the counties are that there will not be a sufficient number of FTEs for the volume of work to be done and there is a concern over what the clerks' duties will be.

In response to a question from Representative Delmore, Chief Justice VandeWalle said there is a fear of the unknown among the counties. He said most of those fears will be addressed as policies and plans are developed over the next several months. He said only Cass County has officially completed the necessary paperwork for the state assumption of its clerk of court services.

In response to a question from Senator Stenehjem, Chief Justice VandeWalle said the

personnel committee is working on how to transfer vacation and sick leave between the counties and the state. He said because there are 53 counties with 53 different vacation and sick leave policies, it will be difficult to work out a uniform policy that will be equitable to all counties. He said in some cases the state will be assuming an unfunded liability because the policy adopted may allow vacation or sick time to persons who are new to a position.

In response to a question from Senator Lyson, Chief Justice VandeWalle said for those counties that choose the state employment option, the clerk of court as well as other clerk of court employees will become state employees.

In response to a question from Senator Traynor, Chief Justice VandeWalle said under the state employment option, the Supreme Court will be considered the employer and the person who was clerk of court before becoming a state employee will be the supervising person in the clerk of court office. For counties that choose the contract option or to provide the services at the county's expense, he said, the county will make the decision as to who is the supervising person in the clerk's office. For those counties that choose the contract option or that opt to fund their own clerk's offices, the Supreme Court is authorized to step in if adequate clerk of court services are not being provided.

In response to a question from Senator Stenehjem, Chief Justice VandeWalle said the Supreme Court completed the judgeship position elimination hearings on September 23. He said the court has not yet reviewed all the data presented at those hearings and the court may be requesting more data. He said it is very likely that the five justices will have five different views on which position should be eliminated.

In response to a question from Senator Lyson, Chief Justice VandeWalle said the final judgeship position is scheduled to be eliminated on January 1, 2001. He said the 1999 Legislative Assembly rejected a proposal to keep the number of judgeships at 43.

Senator Stenehjem said the idea of a two-year moratorium on further judgeship reductions was considered by a conference committee during the 1999 Legislative Assembly. However, the idea was rejected by the House conferees.

In response to a question from Representative Delmore, Chief Justice VandeWalle said there is a concern that the \$1 million appropriation for the first three months of the clerk of court implementation will not be adequate. He said the large counties are expected to opt for state funding of clerk of court services, which will consume the majority of the appropriated funds. He said there is even greater concern over how to prepare the budget for the following biennium.

VOTER REGISTRATION AND RESIDENCY STUDY

Chairman Stenehjem called on Mr. Alvin A. Jaeger, Secretary of State, to present information regarding residency requirements of voters in other states. He said his office conducted a survey of the residency requirements of voters in other states. He said voter residency requirements also raise issues related to the residency of elected officials.

Chairman Stenehjem called on Mr. Cory Fong, Elections Director, Secretary of State's office, to present information on the residency requirements of voters in other states. Mr. Fong said the data was gathered with the help of the Election Center, a national clearinghouse for election-related questions and topics. He said many states have a definition of residency that is unique to voting, and in some cases, for holding public office. He said the residency definition does not necessarily carry over for determining residency for other purposes, such as taxes, tuition, and licensing. He said many states specifically address military and college students in their definition of residency. Many states, he said, specifically address those persons who are temporarily out of their election jurisdictions for work and government service or those persons whose businesses and homes are in different election jurisdictions. He said some states assign residency based upon where a person's family is located. Many states, he said, tie residency to a "domicile," "fixed" permanent habitation or abode, or "principal" home. Some states, he said, do not define "residence" and leave residency determination up to the courts. He said Michigan ties residency to where people "habitually sleep" and Connecticut ties residency to the person's federal tax obligation. He said Tennessee provides factors for determining a person's residence. Mr. Fong submitted written testimony and a summary of state residency provisions, copies of which are on file in the Legislative Council office.

In response to a question from Senator Stenehjem, Mr. Fong said all states seem to be addressing residency concerns. He said Georgia, Tennessee, and Minnesota appear to have very thorough residency statutes. He said a common thread throughout residency statutes is that residency is a union of act and intent.

In response to a question from Representative Mueller, Mr. Fong said county auditors have the

primary responsibility for enforcing residency and voting laws.

In response to a question from Representative Delmore, Mr. Fong said residency requirements that are too restrictive may eliminate some people from voting, such as military personnel and college students. He said residency requirements need to be clarified without being too restrictive.

In response to a question from Representative Hawken, Mr. Fong said it is important to clarify residency issues before implementing a voter registration system. Mr. Jaeger said his office receives many calls about where to vote, especially for local level elections, such as township and school board elections. He said clarifying residency could resolve some of the problems that would be addressed by registration.

In response to a question from Senator Stenehjem, Mr. Jaeger said the place where people vote is often rooted in the ownership of property.

In response to a question from Representative Koppelman, Mr. Fong said it would be illegal for a person to vote in two states, even if the person is voting on local election issues in one state and for federal candidates in another. He said a person can only have one residence. He said without voter registration, it is not possible to cross-check voters with other states. He said he will provide the committee with more information on the possibility of using a unique identifier number, such as a driver's license number, for voting purposes.

In response to a question from Senator Traynor, Mr. Fong said although the law only allows for one residence, a person may have multiple dwellings. He said some states tie voting to where a person pays taxes.

In response to a question from Senator Watne, Mr. Fong said short of using a voter registration system, a unique identifier for voting purposes would provide a data base that could be cross-checked.

In response to a question from Senator Stenehjem, Mr. Jaeger said the Federal Voting Assistance Program encourages military voting and that it is important to preserve the right of military personnel to vote.

Chairman Stenehjem called on Mr. John Val Emter for comments concerning voter residency and registration. Mr. Emter said only people who live in North Dakota should be able to vote on issues that affect North Dakota.

Representative Klemin requested the Legislative Council staff to prepare a bill draft authorizing poll workers to ask a voter for identification.

FAMILY LAW STUDY

Chairman Stenehjem said the committee would be conducting joint meetings with the Family Law Task Force for the portion of the meetings that deal with the family law study. Introductions were made between the committee members and the task force members.

Task force members who were present at the meeting were Ms. Sherry Mills Moore, Judge Bruce Bohlman, Judge Lee Christofferson, Judge Ralph Erickson, Ms. Maureen Holman, Justice Mary Maring, Mr. Larry Spain, and Ms. Sandra Tabor.

Task Force Activities

Chairman Stenehjem called on Ms. Moore for an update on the issues considered by the task force. Ms. Moore said the task force, which began as an ad hoc committee in 1995, concluded its work in 1998. She said the accomplishments of the task force included rule changes and statutory changes. She also said the task force participated in the development of parenting programs and mediation pilot programs. She said the rule changes made as a result of the recommendations of the task force included changes to Rules 8.2 through 8.7 of the North Dakota Rules of Court. She said the rule changes affect interim orders, divorce actions, the exchange of information, mediation, guardians ad litem, and custody investigations. She said the statutory changes proposed by the task force which were enacted by the Legislative Assembly included legislation to address the concerns raised by the attorneys and judges regarding repeated custody disputes with or without the same judge. She said legislation restricts a party's ability to modify a custody order for two years after the date of entry with certain exceptions. She said the task force also drafted legislation to address problems associated with the domestic violence presumption in North Dakota Century Code (NDCC) Sections 14-05-22 and 14-09-06.2. The legislation, she said, provides guidance to the courts by refining when domestic violence triggers the presumption against a parent. She said the task force also reviewed the idea of a family court in North Dakota but concluded that the establishment of such a court would be too costly. She also said the task force conducted a statutory review of family law statutes but was forced to abandon the project because of a lack of staff and because it was concluded that a joint effort with the legislature would be more effective.

Domestic Relations Summary Proceeding Pilot Project

Chairman Stenehjem called on Judge Bohlman for information on the domestic relations summary proceeding pilot project in Mountrail County which is provided for by Rule 8.5 of the North Dakota Rules of Court. Judge Bohlman said the summary proceeding allows persons seeking a divorce to have easy access to the courts without the necessity of counsel in most cases and it eliminates the adversarial nature of the proceeding. He said the proceeding allows the parties to resolve a case within a short time, usually 30 days. He said only three cases have required more than the preliminary hearing to resolve all the issues. He said the option is available to anyone with

less than \$10,000 in assets. He said the option is being used by low-income persons with few assets and with few issues in dispute between the parties. He said since the pilot project began three years ago, about 60 cases have been handled using Rule 8.5. He said the asset limitation has limited the number of persons who can exercise the option. He said when it fits within the property restrictions, the summary proceeding is a much quicker and more cost-effective way of handling a divorce. He said the project has been operating at zero cost to the parties. He said the first contested child custody case using the summary proceeding is now being heard. He said he was unsure as to what extent the procedure would be workable in a custody proceeding, but the procedure would lend itself to that problem, and it would be less destructive than the adversarial proceedings currently used for that purpose. He said he hopes the Supreme Court will extend the rule for another year, and he would recommend it be optional for those districts that want to adopt it. Judge Bohlman submitted three documents related to the pilot project, all of which are on file in the Legislative Council office.

In response to a question from Justice Maring, Judge Bohlman said the only additional judge time required as a result of the proceeding is the preparation of the final judgment, which is normally prepared by the attorneys.

In response to a question from Senator Heitkamp, Judge Bohlman said the \$10,000 limit is one of the reasons for the low number of cases eligible to use the procedure. He said this type of procedure may not be appropriate for larger property situations.

In response to a question from Ms. Tabor, Judge Bohlman said Judge Holte and he are the only judges who have participated in the pilot project.

Use of Mediation and Family Courts in Other States

Chairman Stenehjem called on Ms. Tabor for testimony regarding the use of mediation by other states. Ms. Tabor said 33 states have some type of mandated mediation, but states vary on the level of required participation in that mediation. She said states with mandated mediation allow the mediation to be terminated by either party. Another common element in states with mandated mediation, she said, is the use of tax revenues to fund the mediation. She said a 1994 study indicated a 50 to 75 percent settlement rate for parties who participated in mediation. She said despite the impressive settlement rates, mediation tends to have little impact on court workload and time because less than 10 percent of the cases heard by a court involve issues addressed in mediation. She said the study also indicates that mediation may increase postdivorce hearings. She said 70 to 90 percent of the persons surveyed in the study were very satisfied with the mediation outcome. She said the reasons cited for the satisfaction were the ability to express their point of view without

interruption, the understanding of the process, and the focus on the children. She said another study indicated that 50 percent of the participants reported the mediation to be tension-filled and that they were rushed because of the time limits placed on the mediation. She said states with mandated mediation show compliance with mediation orders in the short run, but after four to five years, there is little difference as to the frequency of postjudgment hearings. She said the research indicates the parties fall back into their old patterns within two years after the mediation, which is about the same as is reported for adversarial proceedings.

In response to a question from Senator Heitkamp, Ms. Tabor said the studies are based on states or cities with mandated mediation, and none of the results were based on mediation outcomes in North Dakota. She said it is possible that North Dakota may be distinct in that North Dakotans may take more pride in their agreement and are more likely to abide by the outcome of the mediation.

In response to a question from Ms. Holman, Ms. Tabor said Minnesota requires mediation in family law cases. She said many people are not aware that mediation is an option for resolving family law issues.

In response to a question from Representative Delmore, Ms. Tabor said it would be worthwhile to involve the Department of Human Services in the mediation process and the committee's study of mediation for family law issues.

In response to a question from Senator Traynor, Justice Maring said family law cases are in the top three as far as the number of cases heard by the Supreme Court.

In response to a question from Representative Mueller, Ms. Tabor said there is concern over whether there are a sufficient number of qualified mediators in the state. However, she said, any person willing to take the necessary coursework can become a mediator.

At the request of Chairman Stenehjem, committee counsel presented a memorandum entitled *Family Courts in Other States*.

Task Force Study Suggestions

Ms. Holman said the committee should consider studying the classification of property as marital and nonmarital. She said Minnesota uses these classifications. She said nonmarital property is the property of a person before the marriage or inherited by a party during the marriage. She said in Minnesota, nonmarital property is not considered for division during the divorce proceeding. In North Dakota, she said, premarital property may be subject to division. She said a lack of distinction between marital and nonmarital property increases litigation. Ms. Holman also said the committee should consider statutory definitions of custody. She said other states statutorily define custody terms, such as legal custody, joint legal custody, and physical custody.

Justice Maring said she would also recommend that the committee review the marital and nonmarital property distinctions as well as the custody definitions. She said the committee should also consider reviewing the grandparent visitation statute that was declared unconstitutional and the court decision regarding the removal of children from the state.

Mr. Spain said an area of concern is the lack of access to the courts for many persons due to lack of money. He said the summary proceeding project is one way to help assist persons with their legal concerns, but there are many more persons who are financially unable to have their legal issues heard by a court.

Judge Erickson said the state's domestic relations laws are based on the territorial law of the 1800s and are fault-based. He said under a fault-based system, divorce is disfavored and is seen as a last resort. He said the committee should consider moving to a nonadversarial system in which the courts do as little damage as possible to the parties involved.

Judge Christofferson said a divorce concludes a legal contract between adults. He said divorce settlements need to be reviewed from time to time after the settlements. He said certain issues, such as visitation, may need adjusting and the adjusting should be done in a nonadversarial setting.

Judge Bohlman said a family court system with a coordinated case management system is an effective way to address family law issues in a nonadversarial setting. He said he would suggest changing NDCC Chapter 27-20 from the Juvenile Court Act to the Family Court Act and incorporating Title 14 into that chapter. He said a family court system would look at all of a family's problems, both legal and nonlegal, in the same setting.

In response to a question from Representative Koppelman, Judge Bohlman said mediation and counseling could both be part of the equation in a family court setting.

In response to a question from Senator Heitkamp, Judge Bohlman said mediation is not a counseling tool to help couples stay married.

In response to a question from Senator Traynor, Ms. Holman said Minnesota law does not allow a court to consider fault in family law matters. She said in this regard, Minnesota law is more equitable than North Dakota law. She said assigning fault is not good for the client or for the family. Justice Maring said she preferred practicing family law in Minnesota because it was easier to resolve the issues and less trial time was required.

Ms. Moore said the committee should consider adopting better factors for determining spousal support. She said there are a number of archaic concepts in North Dakota domestic relations law which could be repealed. She also said the committee should consider state-funded mediation. She said the committee should consider factors for determining the best interests of the child that are

more definable, measurable, and more scientifically tracked.

In response to a question from Senator Heitkamp, Ms. Moore said mediation is a great nonadversarial way to resolve some family law issues. Judge Erickson said although mediation does not save significant court time and money, it does save money for the families involved.

OTHER BUSINESS

Chairman Stenehjem said a subcommittee will be appointed to work on some of the issues raised in the family law study. He said a subcommittee would

identify issues, develop options, and then present those options to the full committee.

It was moved by Representative DeKrey, seconded by Representative Delmore, and carried on a voice vote that the meeting be adjourned. Chairman Stenehjem adjourned the meeting at 3:00 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1