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A Family Court for North Dakota

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A FAMILY COURT FOR NORTH DAKOTA

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In 1989, 54.9% of all actions filed in district court involved domestic relations, including divorce, separation, adult abuse, custody proceedings, support actions, adoptions, and paternity proceedings.[1] The number of cases alone would indicate that it is time for specialized procedures in order to provide judicial services expeditiously, with preprinted forms available for use by pro se litigants, recognizing that the procedures will primarily be used by persons with low income and property levels.

The former family court structure under Chapter 27-05.1 of the North Dakota Century Code was designed to require counseling for divorcing couples.[2] The Family Court Act actually impeded access to the courts by not allowing a divorce to be filed until the family court jurisdiction had either been waived or until ninety days had expired since the date of filing the petition.[3]

There are basically two needs that should be addressed through any family court structure: 1) a readily accessible court; and 2) procedures which are simplified and provide expedited handling of cases.

All too often, when a divorce is filed, the parties must wait for many months before the case comes on for trial. In the meantime, there may be various other proceedings, including adult abuse protection orders, and interim, or temporary, orders under the divorce code. It is not unusual to have a case tried three times, if a litigant uses all potential proceedings available, including the divorce court interim order, adult abuse protection order, and the final divorce hearing. Needless to say, the litigation only becomes worse with age, and it cannot be said that trying the matter over and over again and delaying the ultimate resolution of the case is in the best interest of the litigants—especially the children of the litigants.

Divorce is a bitter process at best. At worst, long delays and adversarial proceedings, with all of the usual posturing, result in acrimony that can last a lifetime and ruin any chance of effective

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1. 1989 N.D. Judicial Sys. Ann. Rep. 9.

2. *See* N.D. CENT. CODE § 27-05.1 (1974) (sets out purposes and procedures of family courts). Chapter 27-05.1 was repealed in the 1991 Legislative Session. *See* Senate Bill 2268.

3. N.D. CENT. CODE § 27-05.1-18 (1974).

communication between parents caught up in the seamless web of pre-divorce, divorce, and post-divorce hearings.

Divorce does not limit itself to any particular economic strata. Most low income clients must either rely on the relatively overworked legal aid offices in the State of North Dakota or obtain counsel through the North Dakota State Bar Association Lawyer Referral Program. Even with such innovations in recent years as the Medd Plan,[4] which called for mandatory pro bono services, the poor are still under-served. As a group, the poor constitute the greatest service need for the judiciary to meet. It is tragic to think of the cases that cannot even be filed because the plaintiff has no funds. The only alternative for people unable to file is to stay in an abusive relationship, separate informally without the benefit of court ordered support, or use other self-help measures to find relief. To avoid domestic violence as one of those self-help measures, it is imperative that the judiciary provide access to the courts to those who are least able to afford the luxury of litigation.

The solution calls for innovative approaches. Many states have enacted legislation that improves the speed with which divorces can be handled, by allowing parties who have no children and few assets to obtain a divorce by stipulation and no subsequent court appearance, other than the filing of an affidavit.[5] The affidavit procedure is also used in North Dakota,[6] but there is currently no rule of court that provides for the procedure.

Arguably, a default divorce can be granted by affidavit under Rule 55 of the North Dakota Rules of Civil Procedure, which allows the court to "require such proof as may be necessary to enable it to determine and grant the relief . . . to which the plaintiff may be entitled."[7] Hence, there is nothing inherently innovative about the process of granting divorces by way of stipulation and affidavit. Indeed, in most collection cases, default judgments are customarily issued on the basis of an affidavit of proof, which merely recites the amount due. When the parties in a divorce

4. The *Medd* Plan was devised in 1988 by District Court Judge Joel Medd of the Northeast Central Judicial District and called for mandatory pro bono legal services (with certain exemptions). In 1989, the North Dakota State Bar Association adopted, by plebiscite, the so-called "opt-out" plan, which is a completely voluntary program designed to increase the number of lawyers on the State Bar Association Pro Bono Panel. In February of 1991, 48 requests for legal services in divorce matters were referred to the Panel. Only six were filled. This, according to the State Bar Association Office, is beginning to be a trend.

5. *See, e.g.*, CAL. CIV. CODE § 4550 (West 1983 & Supp. 1991) and COLO. REV. STAT. § 14-10-120.3 (1987).

6. 1989 N.D. Judicial Sys. Ann. Rep. 19 (report of the South Central Judicial District).

7. N.D.R. CIV. P. 55(a)(2).

action have already agreed upon the terms of the divorce, it is not a procedural quantum leap to allow the plaintiff to appear by affidavit.

A family court for North Dakota which addresses the problems and concerns listed above must be a court where *all* family problems can be resolved by the court, using the full range of services available in the community, including guardian ad litem services for minor children, counseling, addiction and substance abuse treatment programs, mediation, domestic violence protection orders (including criminal misdemeanor actions for violations thereof), enforcement proceedings for child custody, support and visitation, and modification proceedings. The goal of the family court should be to *treat* the total legal ills of the family, and to do so in a timely manner with the least possible trauma to all parties (especially children). Juvenile court matters should also be handled in the family court, since those cases impact significantly on other family proceedings.

North Dakota presently has a small claims court.[8] The procedures used in small claims court are effective and result in a speedy resolution of disputes, even without the intervention of attorneys. A family court for North Dakota, while certainly not handling "small" claims, could well utilize many of the procedures found in such a court:

> (a) divorce, separation, child support proceedings and child custody matters (either original or modifications) could be started by the use of preprinted forms provided by the court. The plaintiff would receive instructions developed by the court on the use of the forms, and a hearing would be scheduled within thirty days or less. If the needs of children or the parties required an immediate hearing to determine interim support and custody, an order for hearing could be issued and the matter brought before the court in a very short time. This procedure would obviate the issuance of ex parte interim orders now used (and also abused) as a matter of course in divorce litigation.
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> (b) No attorney would be necessary, and the proceedings would be informal. The judge would be required to ask questions of the litigants and to take a

8. N.D. CENT. CODE § 27-08.1 (1974 & Supp. 1989).

more active role in the proceedings where either one or both of the parties was not represented by counsel.

(c) The proceedings of the family court would be a matter of record, just as any other proceeding in district court.

(d) The final hearing could be scheduled in thirty days, or as soon as the court is satisfied that all necessary information has been gathered and the parties have had a fair opportunity to prepare their respective cases.

(e) Order and judgment forms (also preprinted) could be used by the court to lessen the administrative burden, especially since uniformity in judgment terms and conditions could easily be placed on the preprinted form and sufficient space reserved for stating additional terms and conditions as circumstances required. The additional terms and conditions could be called up on word processors and documents speedily completed.

It may be argued that the informal proceedings are not adequate to deal with some of the complex issues involved in child custody disputes. However, the court still has all of the tools available and can use guardian ad litem services, home studies, psychological evaluations, and alcohol and other substance abuse evaluations. There would be little, if any, information presently available through the more formal litigation milieu involving a more passive judiciary that could not be obtained through the informal proceedings. In essence, the informal proceedings would require judges to be more active in the proceedings. This can be done without taking sides, and most judges now are faced with many cases where at least one of the litigants is acting pro se. Pro se litigation requires a court to exercise more of its prerogatives without the usual involvement of legal counsel.

The proposed family court procedures would be available in those cases where the parties qualify for legal services, a standard that allows eligibility at income levels of 125% of poverty guidelines.[9] For example, a family of four could qualify with a gross annual income of $16,750.00.[10] Property ownership is limited to

9. 45 C.F.R. § 1611.3 (1990). Congress established the Federal Legal Service Corporation in order to allow low income people equal access to the judicial system. 42 U.S.C. § 2996 (1988).

10. 56 Fed. Reg. 9,634 (1991) (to be codified at 45 C.F.R. § 1611 appendix A).

$10,000, not including equity in a homestead.[11] Juvenile court cases would not be subject to such a limitation and would continue to be processed under applicable law.[12]

There is good reason for limiting the informal proceedings to cases where the income and property levels meet eligibility standards for legal services. In those cases where income and property exceed the qualification levels, there may be a need for more formal discovery techniques, and attorneys would customarily be involved in proceedings where the parties had significant assets and could afford to pay attorney's fees.

Even though there might be a need to have formal and prolonged proceedings in order to determine the full extent of marital assets and to divide those assets between the parties in an equitable manner, the expedited proceedings outlined herein could be used for child custody, visitation, and support. It is important to resolve these issues as quickly as possible, regardless of the parties' economic circumstances. The expedited proceedings would also be useful in eliminating ex parte orders, a goal that is certainly consistent with due process. The strength of the expedited procedure is not only speed, but involvement of both parties from the very beginning, since the court would have the ability to schedule a hearing with both parties present within a matter of hours, if necessary.

Where property division requires a more extended time period to resolve the problems, the family court could enter the divorce itself and resolve all other issues except for property division and spousal support, reserving those matters for a later hearing. There is no reason to delay the divorce itself if the marriage is no longer viable. The parties should be allowed to reconstruct their separate lives as soon as possible in order to gain the necessary independence and life structure that will be needed in the post-divorce period.

As a possible adjunct to the expedited and informal procedures of the family court, discovery methods should also be simplified to shorten this phase of the case. For example, at the time of filing a petition for divorce in the family court, the plaintiff could be required to file a complete financial statement (again on a preprinted form), and the defendant would be required to file a similar form within ten days of being served with the petition.

11. Legal Assistance of North Dakota, in its discretion, has established the $10,000 property ownership ceiling. This ceiling is approved by the Legal Services Corporation.

12. *See* N.D. CENT. CODE § 27-20 (1974 & Supp. 1989).

CONCLUSION

Domestic relations cases do not get better as they get older. To the contrary, everyone suffers by reason of delay and procedural complications that do nothing to alleviate the traumatic effect of family disintegration. If the proposal for a family court is to be seriously considered, there must undoubtedly be statutes enacted and rules of court provided. However, the concept is one that deserves discussion. If the legal system is to be responsive to the needs of those it serves, it must take into account the fact that family law matters are not the same as contract or tort actions. The present Rules of Civil Procedure may provide an adequate framework around which to resolve disputes concerning a breach of contract or a tort action, but the same procedures may be wholly inadequate to deal with the special needs of a family going through the pain of divorce. With over fifty percent of the actions in district court now involving the family, is it not time to recognize the special needs involved in allowing the parties to find their way out of the legal entanglement and emerge as intact as possible for the benefit of themselves and their children?