



1968

## Family Courts in North Dakota

Dale Evavold

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Evavold, Dale (1968) "Family Courts in North Dakota," *North Dakota Law Review*: Vol. 45 : No. 2 , Article 6.  
Available at: <https://commons.und.edu/ndlr/vol45/iss2/6>

This Note is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact [und.common@library.und.edu](mailto:und.common@library.und.edu).

# FAMILY COURTS IN NORTH DAKOTA

## I. BACKGROUND

On March 15, 1965, Governor William L. Guy signed into law House Bill 903 which established the institution of the family court in North Dakota.<sup>1</sup> The purpose of the act is to protect the rights of children and promote family life and the marriage relationship.<sup>2</sup> This note will examine the act in its present form, compare it with family court legislation elsewhere, and offer some suggestions for furthering its stated objectives.

A review of some statistics will be helpful in defining the problems that the legislators faced and explaining why they attempted to resolve those problems by establishing family courts. In 1960, the last year for which comparative figures are available, there were 1,523,381 marriages and 393,000 divorces, including annulments, in the United States.<sup>3</sup> This means that about one marriage in four ends in divorce. The statistics for North Dakota, for the same period, indicate that almost one marriage in six ends in divorce.<sup>4</sup> This is certainly lower than the national average but the social and economic problems raised by family dissolution are still considerable in North Dakota, and the divorce rate has been increasing, both within the state and on the national level.<sup>5</sup>

Broken homes are costly, not only to the immediate parties involved but also to society as a whole. In fiscal year 1965, \$4,195,784 was provided in aid to families with dependent children in North Dakota.<sup>6</sup> It is clear that in many of these cases support was necessitated by unresolved marital difficulties. In the same fiscal year the Public Welfare Board reported that 721 children received attention from the board because of parental neglect, abuse or exploitation.<sup>7</sup> Furthermore, 987 children were in need of substitute paren-

---

1. N.D. CENT. CODE ch. 27-05.1 (Supp. 1967). The origination of the bill is credited to the Honorable W. C. Lynch, District Judge at Bismarck, North Dakota. The bill was sponsored in the House by Representatives Carl Boustead, John Coles and George Unruh. It was originally enacted in 1965 and revised in 1967 to clarify and expand the jurisdiction to include counties with smaller populations.

2. N.D. CENT. CODE § 27-05.1-01 (Supp. 1967).

3. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 63 (1967).

4. *Id.*

5. *Id.*

6. [1965-1966] N.D. PUB. WELFARE Bd. BIENNIAL REP., at 32.

7. *Id.* at 68.

tal care. The inevitable conclusion is that there is a serious and expensive problem.<sup>8</sup>

## II. HISTORY OF FAMILY COURTS

Attempts to reconcile marital difficulties date back to ancient religious organizations that had exclusive control over contracts of marriage.<sup>9</sup> France was one of the first countries to give marital reconciliation efforts civil recognition by enacting a law in 1886 requiring any couple seeking a divorce to go before a judge who would attempt to reconcile them.<sup>10</sup> Michigan in 1919, and Wisconsin in 1933 were among the earliest jurisdictions to provide judicial reconciliation proceedings in the United States.<sup>11</sup> The first court to take jurisdiction over both divorce and children's cases was established in 1914 as a division of the Hamilton County Court of Common Pleas in Cincinnati, Ohio.<sup>12</sup> Today, family courts and reconciliation procedures or counseling services are available in several states.<sup>13</sup>

## III. COMPARATIVE FEATURES OF VARIOUS FAMILY COURT ACTS

The most significant features of family courts in divorce, annulment and separation cases are the provisions for court sponsored marriage counseling with a waiting period between the filing of the petition and the hearing. North Dakota permits, but does not require, the court to be established in any county having 10,000 or more inhabitants.<sup>14</sup> Parties wishing to obtain a divorce in such counties must file a petition for family court proceedings (unless family court jurisdiction has been waived by court order)<sup>15</sup> whereupon the institution of the divorce or separation action is automatically stayed for ninety days.<sup>16</sup>

### *Procedures and Extent of Jurisdiction*

The jurisdiction of North Dakota's family court is invoked by the filing of a petition rather than service of a summons. This is

8. *Id.* at 97. In North Dakota direct payments totaling over \$36,000,000 were made to welfare recipients for the period July 1, 1964 — June 30, 1966. (Source of funds were: 58.1 per cent Federal; 32.9 per cent State; 9.0 per cent County). The administrative expenses were additional.

9. Burke, *The Role of Conciliation in Divorce Cases*, 1 J. FAMILY L. 209 (1961).

10. *Id.*

11. *Id.*

12. *The Standard Family Court Act*, 5 NPPA J. 100 (1959).

13. *E.g.* WIS. STAT. ANN. § 247.01 (Supp. 1968); OHIO REV. CODE ANN. § § 2301.03, 3105.08 (Baldwin 1964); PA. STAT. ANN. tit. 23 § 19 (Supp. 1967); N.C. GEN. STAT. § 7-101 (Supp. 1967); CAL. CIV. PROC. CODE § 1760 (West Supp. 1967).

14. N.D. CENT. CODE § 27-05.1-02 (Supp. 1967).

15. N.D. CENT. CODE § 27-05.1-06 (Supp. 1967). Jurisdiction is often waived, for example, when one party is out of the state, in prison or in a mental institution.

16. N.D. CENT. CODE § 27-05.1-18 (Supp. 1967).

also the procedure in California,<sup>17</sup> and in New York,<sup>18</sup> but in some states the jurisdiction is invoked by the conventional method of service of a summons.<sup>19</sup>

Questions arise as to why the action is begun by a petition rather than a summons and as to what jurisdiction the family court has upon submission of the petition. The North Dakota act states that its purpose is to protect the rights of children and promote the public welfare by preserving and promoting family life.<sup>20</sup> Toward this end the legislature has apparently heeded the experience of some family courts which indicates that the sooner a couple can be routed to counseling the greater the possibility of reconciliation.<sup>21</sup> Having the spouses file a petition for family court jurisdiction before a divorce action can be commenced is one method of insuring that the persons involved will not seek a divorce on a sudden impulse but will have sufficient time to reflect on their actions. Then, after the stay of proceedings has passed, if the spouses still want a divorce, the action may be filed and heard without further delay.<sup>22</sup> The use of a petition with private hearings rather than service of a summons has the advantage of keeping the proceedings on a more informal basis and yet invoking the jurisdiction of the court to insure taking advantage of the counseling facilities made available by this act.

In North Dakota, after the petition is filed, the court has authority to issue such orders as it believes necessary concerning the care and custody of the children of the marriage,<sup>23</sup> and refer the parties to a counselor for counseling sessions.<sup>24</sup> The counselor may issue citations to spouses and witnesses requiring them to attend.<sup>25</sup>

California has similar proceedings. The jurisdiction of the court is invoked by a petition,<sup>26</sup> although it is intended to be primarily for couples with children.<sup>27</sup> The parties may be required to attend hearings by issuance of citations.<sup>28</sup> The court, however, may only issue orders concerning the family after there has been a hearing and not before,<sup>29</sup> as in North Dakota. The stay of proceedings in

---

17. CAL. CIV. PROC. CODE § 1761 (West 1955).

18. N.Y. FAMILY CT. ACT § 921 (McKinney 1963).

19. OHIO REV. CODE ANN. § 3105.08 (Baldwin 1964); WIS. STAT. ANN. § 262.10 (Supp. 1968).

20. N.D. CENT. CODE § 27-05.1-01 (Supp. 1967).

21. *Supra* note 9.

22. N.D. CENT. CODE § 27-05.1-18 (Supp. 1967).

23. N.D. CENT. CODE § 27-05.1-09 (Supp. 1967).

24. N.D. CENT. CODE § 27-05.1-10 (Supp. 1967).

25. *Id.*; See also N.D. CENT. CODE § 27-05.1-12 (Supp. 1967). The counselor may hold conferences with each party while the other is excluded and shall make no record of the conference unless ordered by the family court judge.

26. CAL. CIV. PROC. CODE § 1761 (West 1955).

27. CAL. CIV. PROC. CODE §§ 1761, 1772 (West 1955, Supp. 1967).

28. CAL. CIV. PROC. CODE § 1766 (West 1955).

29. CAL. CIV. PROC. CODE § 1769 (West Supp. 1967).

California is for thirty days,<sup>30</sup> as compared with ninety in North Dakota. The stay in California, however, may be extended by consent of both parties.<sup>31</sup>

Ohio's proceedings are instituted by filing an action for divorce, separation or alimony.<sup>32</sup> When there are children under fourteen years of age involved in the marital dispute the court must conduct an investigation of the character, family relations, past conduct, and financial condition of the parties. This is the section of the code that has permitted the establishment of extensive counseling procedures in some Ohio courts.<sup>33</sup> The Ohio family courts (called Domestic Relations Courts) have jurisdiction over juvenile cases, bastardy cases, divorce cases and annulment cases.<sup>34</sup> Therefore, they have some rather extensive powers compared to North Dakota courts, which have jurisdiction only over marital difficulties.

New York family courts are unique in that they concern themselves with virtually all aspects of family life except divorce, annulment and separation,<sup>35</sup> and are notable in that the family court has jurisdiction over some actions normally thought of as criminal. These include family offenses such as disorderly conduct not in a public place or assault between spouses or parent and child or members of same household.<sup>36</sup> The conciliation proceedings are commenced by the submission of a petition stating that the spouses are having marital difficulties.<sup>37</sup> The court may order spouses to attend meetings with the probation service<sup>38</sup> and the court's jurisdiction terminates ninety days after filing unless both parties consent to a continuance.<sup>39</sup>

Wisconsin's family court, which exists only in Milwaukee County, is brought into action by the service of a summons without a complaint.<sup>40</sup> Sixty days must then pass before the complaint can be served,<sup>41</sup> followed by another sixty days before the trial.<sup>42</sup> The family court in Wisconsin is notable primarily because a reconciliation attempt by the counselors is mandatory.<sup>43</sup> The jurisdiction

30. CAL. CIV. PROC. CODE § 1770 (West Supp. 1967).

31. CAL. CIV. PROC. CODE § 1769 (West Supp. 1967).

32. OHIO REV. CODE ANN. § 3105.08 (Baldwin 1964).

33. See Alexander, *The Lawyer in the Family Court*, 5 NPPA J. 172 (1969); Alexander, *The Family Court—An Obstacle Race?*, 19 U. PITT. L. J. 602 (1968).

34. OHIO REV. CODE ANN. § 2301.03 (Baldwin 1964).

35. N.Y. FAMILY CT. ACT § § 115, 243, 252, 253, 641, 812, 912 (McKinney 1963, Supp. 1967). The New York Family Court has jurisdiction over neglect, support, probation, paternity, custody of children, juvenile delinquency, family offenses, conciliation, adoption — in fact, over all aspects of family life except separation, annulment and divorce.

36. N.Y. FAMILY CT. ACT § 812 (McKinney Supp. 1967).

37. N.Y. FAMILY CT. ACT § 921 (McKinney 1963).

38. N.Y. FAMILY CT. ACT § § 922, 923, 924, 925 (McKinney 1963, Supp. 1967).

39. N.Y. FAMILY CT. ACT § 926 (McKinney 1963).

40. WIS. STAT. ANN. § 247.081 (Supp. 1968).

41. WIS. STAT. ANN. § 247.061 (Supp. 1968).

42. WIS. STAT. ANN. § 247.081 (2) (a) (Supp. 1968).

43. WIS. STAT. ANN. § 247.081 (2) (Supp. 1968). The family court commissioner must

of the family court parallels that of North Dakota's in that it has jurisdiction over marital difficulties.<sup>44</sup> Wisconsin also gives the family court jurisdiction over the Uniform Reciprocal Enforcement of Support Act.<sup>45</sup>

### *Hearings and Reconciliation Agreements*

One interesting feature of the family court in North Dakota is that conferences with the family court counselor are informal.<sup>46</sup> The hearings before the family court must be in private and no persons except court officers, the parties and their counsel are admitted.<sup>47</sup> Anything said by either party in the conferences with the counselor is privileged and may not be used in court without that party's permission.<sup>48</sup> Any reconciliation agreement entered into by the parties may be reduced to writing and at the judge's discretion a court order may be issued to insure compliance with it.<sup>49</sup>

California similarly provides for confirmation of reconciliation agreements by court order.<sup>50</sup> One California judge believes that the agreement should definitely be reduced to writing.<sup>51</sup> He also recommends that a clause titled "Trial Reconciliation" be inserted in the reconciliation agreements stating that the parties have not forgiven the past offenses so the parties will not appear to condone past offenses and lose their grounds for divorce.<sup>52</sup> This would appear to be an added inducement to encourage couples to try the conciliation proceedings. It should be noted that the court has jurisdiction to enforce the order because willful non-compliance by either party to the order would place him in contempt of court which is a misdemeanor.<sup>53</sup>

### *Cost-Free Services*

North Dakota provides that there shall be no charge for any of the services under the family court.<sup>54</sup> In California there is a similar provision.<sup>55</sup> In New York there is no statutory provision covering costs in the reconciliation proceedings. In Ohio and Wis-

---

certify that a reconciliation attempt has been made and this must be entered on the court record.

44. WIS. STAT. ANN. § 247.01 (Supp. 1968) ; N.D. CENT. CODE § 27-05.1-06 (Supp. 1967).

45. WIS. STAT. ANN. § § 247.01 and 52.10 (Supp. 1968).

46. N.D. CENT. CODE § 27-05.1-11 (Supp. 1967).

47. N.D. CENT. CODE § 27-05.1-12 (Supp. 1967).

48. N.D. CENT. CODE § 27-05.1-14 (Supp. 1967).

49. N.D. CENT. CODE § 27-05.1-17 (Supp. 1967).

50. CAL. CIV. PROC. CODE § 1769 (West Supp. 1967).

51. Burke, *The Role of Conciliation in Divorce Cases*, 1 J. OF FAM. L. 209, 216, 217 (1961). Judge Burke feels that reducing the agreement to writing will help prevent people from forgetting their promises and will make the reconciliation agreement more formal and hopefully more effective.

52. *Id.* at 222, 223.

53. CAL. PEN. CODE § 166 (4) (West 1955).

54. N.D. CENT. CODE § 27-05.1-08 (Supp. 1967).

55. CAL. CIV. PROC. CODE § 1765 (West 1955).

consin the actions must be initiated in the same manner as any other civil action, which apparently means that the ordinary fees will be charged for the summons or petitions.

One problem of any service is to induce poor people to take advantage of it. When family court proceedings are offered without cost anyone can take advantage of them, but there remains the hurdle of informing the poor about the free service. People on welfare need as much or more help and counseling than people who are self-supporting.<sup>56</sup> By providing a cost-free family court, a large step forward has been taken.

The cost of counsel, however, still remains as a barrier for the indigents who are in need of a divorce. Without a divorce, these families have no choice but to resort to the "poor man's divorce" (desertion), or alternately, to stay together as a family unit with a resulting expansion of the unit and a corresponding increase in the welfare payments needed to support the additional children. The legislature, therefore, should now explore the feasibility of providing court appointed counsel for these indigents. It should be noted, however, that the right to counsel in a civil case is in derogation of the common law and any statutes granting such a right will be strictly construed,<sup>57</sup> and will not be mandatory unless specifically required in the statute. For example, in Texas a statute which granted the court the right to appoint counsel for indigents was held by the Texas Court of Appeals not to be mandatory.<sup>58</sup> Without such legislation the only other alternatives to those stated above would be for the indigent family court litigant to act as his own counsel or seek representation through a legal aid society, assuming he can locate one which is available and willing to take the case.

### *Standard Family Court Act*

There is one other source that should be examined when comparing family courts and that is the Standard Family Court Act.<sup>59</sup> This is intended only to be a model or a guide and is not expected

---

56. See M. HOADLEY and O. GARDEBRING, *IMPERILED YOUTH* 86 (1960): This study of North Dakota juvenile delinquency reports that lower income group children have a significantly higher emotional deprivation than children from higher income groups; R. CAVAN, *THE AMERICAN FAMILY* 181 (1955): In a report on broken homes, thirty-three percent of upper lower class, and fifty-six percent of lower class homes were broken in one city.

57. *People v. McNeill*, 30 Misc.2d 566, 219 N.Y.S.2d 118 (Sup. Ct. 1961), *cert. denied*, 370 U.S. 932 (1962); *La Barbera v. Hart & Crouse Co., Inc.*, 248 App. Div. 261, 289 N.Y.S. 567 (Sup. Ct. 1936).

58. *Sandoval v. Rattikin*, 395 S.W.2d 889 (Tex. Civ. App. 1965).

59. *Standard Family Court Act*, 5 NPPA J. 99-160 (1959). This was compiled by the committee on the Standard Family Court Act of the National Probation and Parole Association in cooperation with the National Council of Juvenile Court Judges and the United States Children's Bureau.

to be enacted by any jurisdiction. Included in the jurisdiction of the standard court are:

1. Juvenile delinquency cases;
2. Adult offenses against children;
3. Desertion;
4. Failure of support;
5. Offenses other than felonies against a member of the immediate family;
6. Proceedings for support;
7. Alimony;
8. Divorce;
9. Separation;
10. Paternity; and
11. Commitment of an adult alleged to be mentally ill or defective.<sup>60</sup>

The procedure of the court is not included in the act. It provides for some marital counseling,<sup>61</sup> but does not provide free services for the spouses. Apparently, it requires the parties to invoke the jurisdiction of the court in the conventional manner of service of a summons for divorce, annulment or separation. In this respect it seems inferior to the North Dakota law, with its provisions for free access to the court's services. The standard act also does not grant a stay of proceedings after service of the summons, but this could be included in the divorce procedure which would be dealt with elsewhere in the particular jurisdiction's code.

#### IV. COUNSELING EFFECTS AND GOALS

The effectiveness of the family courts will necessarily depend on the quality and objectives of the counselors.<sup>62</sup> It is recognized by family court judges that there must be social workers or counselors available for the spouses. One judge states that:

Somehow we wonder if trying to keep social work out of the court isn't like trying to keep the Salvation Army out of the Bowery or keeping Traveler's Aid out of all the passenger stations. Why not take the needed service where the people are who need it?<sup>63</sup>

A good summary of the goals of the marital counselors is found

---

60. *Id.* at 116-120.

61. *Id.* at 113-114.

62. N.D. CENT. CODE § 27-05.1-15 (Supp. 1967). The counselors are given the same powers as masters and section 10 gives them authority to issue citations for attendance at counseling sessions.

63. Alexander, *The Family Court—An Obstacle Race?*, 19 U. PITTS. L. REV. 602, 611 (1958).



in the report of the progress of the marital counseling program in Grand Forks County.<sup>64</sup> The marriage counselor writes that "[w]e must face the fact that there are a good many marriages that are very destructive to one or both spouses as well as the children involved."<sup>65</sup> Moreover, "[a]n unsound reconciliation that is only temporary in nature can also lead to an ever greater number of children on public assistance roles."<sup>66</sup> It would appear that this report recognizes a need for divorces, but also indicates that much of the pain of divorce can be eased through proper counseling.<sup>67</sup>

---

64. O. Omlid, Marital Counseling Program Report, 1966 (unpublished report to district judges). On pages 20-21, Mr. Omlid writes: It is my own opinion that the scope of counseling should be broadened.

Most of the marital cases that come to our attention have been in the process of conflict and disintegration for long periods of time. Feelings of anger and guilt have left their scars on the couple, on the children, and sometimes even on the in-laws. By the time they reach the counselor they have usually become involved with their attorneys and have taken on the roles of adversaries. Too often the children, as well as property, are seen as something to be "won or lost" in a legal struggle. Even the matter of visiting rights becomes a means of threat and counterthreat. Because they see themselves as having entered into a process where one must accuse and the other be accused, where one must be right and the other wrong, and where one must win and the other must lose, the chances are greatly increased that their feelings have been brought to the point where they have spoken or acted in a manner that has severely hurt the other emotionally and will later cause great feelings of guilt in themselves. These feelings will affect the kind of relationship they will have with each other and with the children, whether they reach a reconciliation or secure a divorce.

If a reconciliation takes place it does not necessarily mean that the problems have all been solved, or even that the reconciliation will long endure. Thus, counseling should be available on a continued basis to help with the realistic and emotional problems that still exist, and [sic] as these may involve the children as well as the parents.

Even when a divorce takes place, the fact remains that the couple still remain the parents of the children and it is very likely they will have to communicate with, and possibly relate to, each other and the children in some manner in the future. In most instances one of the parents, usually the mother, will continue to live with the children for many years to come. In some instances the emotional maturity and adjustment of the mother will permit her to function extremely well as the only parent in the home. In other instances, the mother's lack of emotional maturity and her own personality problems, now aggravated by the divorce and the stress that brought it about, is in greater need of help at this time than she has been at any time in the past. Her emotional adjustment and feelings about the divorce will have a vital effect upon the future emotional adjustment of her children. The children will also be affected, most likely adversely, by the absence of a father in the home (but this is not meant to imply that there are not instances in which their situation is not improved by this absence). This is often demonstrated by the couples who are referred for counseling and whose present marital problems are rooted in the personalities and problems associated with the divorce of their own parents. Counseling and other services continued after the divorce could do much to improve the mother's own general emotional adjustment and to handle the residue of unhealthy feelings left by the divorce, with the result that the mother-child relationships would be improved, the adverse effects of the absent father reduced, and the chances of another ill-advised marriage made less likely.

65. *Id.* at 23.

66. *Id.* at 24.

67. Judge W. C. Lynch, District Court Judge at Bismarck, North Dakota, in an interview on July 15, 1968, expressed the same thought concerning an easing of tensions and ill feelings through counseling, and that it is noticeable in court.

## V. PROBLEMS IN NORTH DAKOTA'S ACT

*Creation of Family Court—Discretionary*

North Dakota has a workable conciliation court under the present act, although it calls for a maximum of local cooperation. The judge, first of all, must create the court, the lawyer must send his clients to the family court rather than take them out of the county or ask for counseling to be waived, and the social center must supply qualified marital counselors. What are the consequences when a judge does not create a family court? This is the situation in Cass County at the present time. The local district judges have not seen fit to establish a family court with the result that court regulated conciliation proceedings are not available to persons who are seeking divorces. Court enforced counseling may encourage couples to present themselves for counseling even before filing a family court petition,<sup>68</sup> but this is less likely to happen where the court does not advocate counseling as part of the procedure prior to obtaining a divorce. It seems a tragedy that the district court in North Dakota's largest city is not giving its residents all the advantages that are available and provided by the statute. It is even more remarkable when it is reported that the family courts will lower the judges' workload rather than increase it by reducing the number of contested divorces.<sup>69</sup>

*Waiver of Counseling*

Another problem arises when a judge waives counseling in a particular case. The district judges have waived counseling in eighty-two per cent of the cases in Grand Forks County since the family court was created.<sup>70</sup> There are many reasons for waiving counseling in particular cases, for example: one spouse may be out of the state, in prison or in a mental hospital; the couple may be older or have no children; they may have separated years ago and now one wants to get a divorce in order to remarry; also, counseling may be waived after it has begun. However, it would seem that more than eighteen per cent of the cases would warrant counseling. Perhaps at least one session with the counselor should be mandatory where there are children involved, for there are convincing statistics showing that marital difficulties are a major cause of juvenile delinquency.<sup>71</sup>

---

68. *Supra* note 6, at 43.

69. *Infra* note 99.

70. From Clerk of District Court records, Grand Forks, North Dakota. Counseling was waived in 317 of 388 petitions for family court in Grand Forks County between July 1, 1965, and July 15, 1968.

71. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME at 198 (1967).

### *Limitation of Family Court by County Population*

A major shortcoming of the North Dakota law is that more than one third of the population is denied the facilities of the family court because the current act *permits (but does not require)* its establishment only in counties of over 10,000 people.<sup>72</sup> That leaves thirty-three counties in North Dakota with a total population of nearly 200,000 without these facilities. This would be understandable if there were no counseling facilities available in these areas. There are, however, eight Area Social Service Centers in North Dakota covering the whole state and it would seem reasonable that these centers could provide counseling for the family courts in every county rather than in only three. There has recently been a suggestion that the program for delinquent children be placed under the Welfare Department in North Dakota.<sup>73</sup> This would necessitate the Area Centers and Welfare Department covering the entire state to perform another function other than marriage counseling. A result of the enlarged staff could be increased specialization and additional marital counseling in the counties where counseling does not presently exist.

### *Possible Constitutional Problem*

A more serious question is brought to light when the family court is limited in its application on the basis of population. North Dakota has a constitutional prohibition against special legislation concerning divorce.<sup>74</sup> It is permissible to classify objects or places but the classification must be natural, not artificial.<sup>75</sup> "There must be a substantial distinction, having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded."<sup>76</sup> The constitutional provision requiring all laws to have a uniform operation and prohibiting the granting of privileges or immunities upon one class of citizens does not prohibit or prevent classification, "provided such classification is reasonable for the purpose of legislation, is based on proper and justifiable distinctions considering the purpose of the law, is not clearly arbitrary, and it not a subterfuge to shield one class or to burden another or to oppress unlawfully in its administration."<sup>77</sup> Thus it appears there would have to be some reason why the population figure of 10,000 was chosen for making the act effective.

72. N.D. CENT. CODE § 27-05.1-02 (Supp. 1967).

73. *Infra* note 99, at II-3, II-9.

74. N.D. CONST. § 69 (1).

75. *Ex parte Connolly*, 17 N.D. 546, 117 N.W. 946 (1908).

76. *Id.* at 948. *See also* *Fradet v. City of Southwest Fargo*, 59 N.W.2d 871, 875 (N.D. 1953); *State v. E. W. Wylie Co.*, 58 N.W.2d 76, 84 (N.D. 1953).

77. *F. W. Woolworth Co. v. Gray*, 77 N.D. 757, 46 N.W.2d 295, 309 (1951).

There is another side to the coin in that the legislature has a wide discretion in determining classifications to which its acts shall apply.<sup>78</sup> A Kansas court has stated:

The mere fact that under circumstances existing at the time a statute is enacted it applies to only one city, one county or one school district, does not mean the act is a special law . . . if it is reasonable that in the ordinary course of things, other governmental units may come within the operation of the act.<sup>79</sup>

Thus there is some dispute as to what is a special or general law and North Dakota's family court may possibly be questioned on this point when Cavalier County with 10,064 inhabitants<sup>80</sup> may have a family court and Benson County, with 9,435 population<sup>81</sup> is not permitted to have such a court.

### *Jurisdiction Over Children*

In connection with section nine of the North Dakota Family Court Act,<sup>82</sup> there would seem to be a question as to when the court gains jurisdiction over children. For example, could the family court, without giving notice to the husband, issue an injunction prohibiting the husband from seeing the children upon a petition signed by the wife and her plea that the husband is a disturbing influence upon them? The normal procedure makes a judgment void unless reasonable notice is given to the persons affected.<sup>83</sup> The North Dakota juvenile court has broad powers<sup>84</sup> and may take jurisdiction over children to terminate parental rights.<sup>85</sup> Also the district court may issue ex parte injunctions.<sup>86</sup>

Notwithstanding the lack of notice provisions, it would seem that the family court division of the district court would have sufficient statutory basis for issuing any orders it deemed necessary for preserving order in the family.<sup>87</sup> Any order requiring a spouse to attend a meeting with the court or counselor would, however, be notice to him of the action being taken by the court.<sup>88</sup>

78. *Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d 66 (1948), *appeal dismissed*, 338 U.S. 843 (1949).

79. *Common School District No. 6 v. Robb*, 179 Kan. 162, 293 P.2d 230, 233 (1956).

80. *THE WORLD ALMANAC* 311 (L. Long ed. 1968).

81. *Id.*

82. N.D. CENT. CODE § 27-05.1-09 (Supp. 1967).

83. *RESTATEMENT OF JUDGEMENTS*, § 6 (1942).

84. N.D. CENT. CODE § 27-16-08 (Supp. 1967).

85. N.D. CENT. CODE § 27-16-34 (1960).

86. N.D. CENT. CODE § 32-06-06 (1960).

87. N.D. CENT. CODE § 27-05.1-02 (Supp. 1967). The family court in North Dakota shall have all the same powers as the district court.

88. N.D. CENT. CODE § 27-05.1-10 (Supp. 1967).

## VI. STATUTORY RECOMMENDATIONS FOR NORTH DAKOTA

*Required Waiting Period Prior to Divorce*

Some problems are inherent in the act as it now stands. It is working reasonably well, in the counties where it has been instituted.<sup>89</sup> However, the problems of shifting the situs of the divorce action to a county without a family court,<sup>90</sup> the failure of some counties to establish a family court even though they are eligible,<sup>91</sup> and the lack of uniformity throughout the state would be reduced by a waiting period before hearing the divorce action. If the parties know they may be ordered to see a counselor, this may encourage them to seek counseling on their own during the stay of proceedings or possibly even prior to filing a petition. The Bismarck Area Social Service Center reports that some couples are presenting themselves to the Center for marriage counseling before filing family court petitions since the family courts have been established, and credit the courts with making the service known.<sup>92</sup> Therefore, it is recommended that North Dakota amend its divorce law to state that a divorce, separation or annulment case may not be heard by a court until (a) ninety days after the action was filed, or (b) after the family court proceedings had been complied with and the ninety day family court jurisdiction expired or the family court has waived jurisdiction. By enacting a statute of this type, the North Dakota divorce procedure will be more uniform throughout the state, and counseling services could be offered as fast as the Area Social Service Centers can organize to cover the state with marital counselors. This would also encourage the establishment of family courts because the quickest way to get a divorce would be through the family court's waiving its jurisdiction.

To further promote the purpose of the family court in North Dakota it would be beneficial to amend the act to enable counties having less than 10,000 inhabitants to create a family court. But even more effective would be a plan whereby one district judge would be appointed to handle the family court cases for the whole district. The population of each county then would have no bearing on whether or not a family court could be established.

---

89. Judges and counselors of the present family courts in North Dakota have expressed general satisfaction with the chapter so far, though some changes are urged. (from personal interviews with judges and counselors).

90. The trend in the Grand Forks area shows that the number of divorces granted in Traill County has increased as Grand Forks County decrees have decreased. Since Grand Forks County instituted a family court in 1965 the number of divorces granted in Grand Forks County has decreased from 138 in 1964 to 82 in 1967 and 32 in the first six months of 1968. Traill County meanwhile has seen its number of divorces climb from 7 in 1964 to 44 in 1967 and 17 in the first three months of 1968 (Figures are from Clerk of District Court records in Grand Forks and Traill Counties).

91. Most notably Cass County which has the largest population in the state with 66,947 inhabitants according to the 1960 census report.

92. [1965-1966] REPORT OF PUBLIC WELFARE BOARD, at 43.

### *Combined Family and Juvenile Courts*

It should be noted that the Standard Family Court Act,<sup>93</sup> the New York family court,<sup>94</sup> and the Ohio family court,<sup>95</sup> all include more than a marital conciliation service. In addition to marriage counseling,<sup>96</sup> Wisconsin vests its family courts with jurisdiction over custody of children and any other family matter not specifically vested in some other tribunal.<sup>97</sup> This expansion of jurisdiction to cover various aspects of family problems seems more consistent with the title of a family court. If North Dakota would combine its present family court with the present juvenile court<sup>98</sup> or the proposed new court<sup>99</sup> and call the new court and its services a family court, there would be, in reality, a family court<sup>100</sup> in North Dakota. The use of a petition, counseling and informal hearings are common to both courts now and the present family court is basically a court with a similar philosophy to that of the juvenile court.<sup>101</sup> At present, the family court is misnamed and should be called a conciliation court because this is all it attempts to do.

If the juvenile court in North Dakota were combined with the present family court it would be feasible to appoint one judge in each district as a family court judge. The records of the Clerk of the District Court in Grand Forks County reveal that approximately twenty-five per cent of the judgments rendered are for divorces. This, together with the juvenile delinquency proceedings, would seem to be a full-time job for one of the district judges in each district. Even if the load of cases under the family court and juvenile delinquency proceedings are insufficient to keep one judge fully occupied, there could be one judge appointed to hear all of the domestic relations cases which arise. This would enable that judge to specialize in family court proceedings and provide a more uniform administration of justice throughout the district and the state.

### VII. CONCLUSION

Members of the North Dakota bench and bar are to be commended for the steps that have been taken thus far to provide a

---

93. *Standard Family Court Act*, 5 NPPA J. 99-160 (1959).

94. N.Y. FAMILY CT. ACT § § 115, 243, 252, 253, 641, 812 (McKinney Supp. 1967).

95. OHIO REV. CODE ANN. § 2301.03 (Baldwin 1964).

96. WIS. STAT. ANN. § 252.016 (2) (b) (Supp. 1968).

97. WIS. STAT. ANN. § 252.016 (2) (c) (1957).

98. N.D. CENT. CODE § 27-16 (Supp. 1967).

99. U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL AND REHABILITATION SERVICES, A STUDY OF SERVICES FOR THE CONTROL AND TREATMENT OF JUVENILE DELINQUENCY IN THE STATE OF NORTH DAKOTA (1968).

100. Arthur, *A Family Court-Why Not?* 51 MINN. L. REV. 223 (1966). This article contains a good review of reasons for consolidating all litigation concerning the family into one court, a family court.

101. McVeety, *The Family Court: A Bane or A Blessing*, 12 ARK. L. REV. 273 (1958).

family court for North Dakota. However, the statistics showing rising rates of juvenile delinquency and divorce indicate that much more needs to be done.

DALE EVAVOLD