

**Testimony of Timothy G. Richard, JD, AEP
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And
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Chairperson Larson and members of the Senate Judiciary Committee, we, Timothy Richard and Mary Locken, submit the following testimony in opposition to House Bill 1364. Timothy Richard is a shareholder with the Serkland Law Firm who practices primarily in the area of trusts and estates. He is an Accredited Estate Planner (AEP) certified by the National Association of Estate Planners & Councils and a Fellow in the American College of Trust & Estate Counsel, a peer-nominated professional association of trust and estate attorneys. Mary Locken is the Manager of Bell Bank's Wealth & Fiduciary Division, one of the largest providers of professional fiduciary services in North Dakota.

Based on our combined 50+ years of working with probate and estate matters in North Dakota, we believe HB 1364 will have significant, unintended consequences and unnecessarily increase probate costs for families in North Dakota. Although the amendments proposed in HB 1364 may appear minor on their face, taking away control from the Personal Representative/executor over all real estate that is part of an estate will complicate the probate process and unnecessarily increase expenses, even if there is no dispute. Some of these issues are outlined below:

- First and foremost, North Dakota has adopted the Uniform Probate Code to keep its estate laws consistent with the vast majority of other states in the country and because it was developed after extensive research and input from trust and estate professionals to create a set of rules to ensure the most efficient and fair process to handle decedents' estates. Any changes to the North Dakota Uniform Probate Code should come from the proper sources so such changes are properly vetted and do not conflict with this overall intent and other specific Probate Code provisions. Specifically, with respect to the purpose and intent of N.D.C.C. § 30.1-18-09, which HB 1364 seeks to amend, the official Comments state as follows:

This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for possession that he may need to institute against an heir or devisee. It may be possible for an heir or devisee to question

the judgment of the personal representative in later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.

Thus, § 30.1-18-09 as currently written, already tries to balance the right of the heirs and the control needed by the Personal Representative to properly manage an estate. HB 1364 will remove this balance and effectively take control away from North Dakota citizens in determining how a person's estate is managed.

Consistent with the above official Comment, one of the primary purposes for doing a Last Will and Testament is to designate the person that the testator believes is the most qualified and able to properly administer his/her estate. With respect to real property, it is very common for testators to intend to leave their land equally to their children or heirs, but at the same time make sure that their designated Personal Representative has control over their estate. Often families have certain heirs who are qualified to administer the estate, and other heirs who the testator definitely does not wish to have in control, even though he/she still wants such heirs to be included in the ultimate inheritance. This may be simply because certain heirs do not have the requisite knowledge or skills to properly administer an estate, or because there is a potential family conflict. Under the current language of N.D.C.C. § 30.1-18-09, which states "[e]xcept as otherwise provided by a testator's will," a testator already has the power to do what HB 1364 is seeking to accomplish, i.e., direct that specific real property be left under the control of the presumptive heirs rather than the Personal Representative. However, if the testator intends to have his/her designated Personal Representative in control of the estate, HB 1364 completely contradicts and overrides such specific directive by mandating that the Personal Representative does not have control, regardless of the terms of the Will, unless a court order is obtained. The overarching intent of the North Dakota Uniform Probate Code is to enforce the testator's stated wishes with court involvement, not contradict them and force a Personal Representative to go to court to enforce them.

- Related to the above point, when there is already a potential family conflict, testators will often designate a neutral third-party to control his/her estate to minimize and avoid conflict between the heirs, usually a bank or trust company. HB 1364 contradicts that choice by the testator and actually invites conflict among the heirs in those family situations by putting those heirs in direct control of any real estate initially. Furthermore, when a person names a bank or other neutral third-party as their Personal Representative to avoid family conflict, that professional Personal Representative will generally only accept that role if it has control over the assets. If HB 1364 is enacted, it will force such professional Personal Representatives to immediately file a petition with the court to get control of any real estate that is part of the estate, unnecessarily increasing the cost of the probate by a minimum of \$500-\$1,000 and delaying the probate by 30 – 60 days, even if there is no conflict. Or worst case is that such professional Personal Representatives will not be willing to take on the appointment in the first place, making it more likely there will be a dispute among the heirs as to who should be appointed as Personal Representative and be in control of the land. Even individual Personal Representatives may be reluctant to take on this role if it means they will need to file a petition against their family members to get control over the real estate. Again,

HB 1364 would have the effect of contradicting a testator's stated wishes regarding his/her estate and likely causing more conflict among heirs, not less.

- HB 1364 also is in direct conflict with N.D.C.C. § 30.1-18-11, which provides that:

[A] personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. **This power may be exercised without notice, hearing, or order of court.** (emphasis added)

HB 1364 is also in conflict with N.D.C.C. § 30.1-18-15, which authorizes the Personal Representative to "execute or deliver a deed," "dispose of an asset, including land," make repairs to buildings or to even demolish buildings, and "sell, mortgage, or lease any real or personal property of the estate." Consistent with its overall intent, there are numerous provisions in the Probate Code that give the Personal Representative control over the property of the estate, and thus there are likely numerous additional conflicts with HB 1364. This further illustrates why any changes to the North Dakota Uniform Probate Code need to be properly reviewed and vetted against the other provisions of the Probate Code and its overall intent before being enacted.

- Additionally, HB 1364 potentially creates conflict with the management and control of personal property that is part of the estate. If the real property is left under the control of the presumptive heirs, how is the Personal Representative to protect and administer personal property that may be distributed to different heirs? If the heirs controlling the real property do not give the Personal Representative permission to enter the real property to take possession of the personal property that is part of the estate, the Personal Representative will be forced to either commit trespass to recover the personal property or go to court and incur additional cost simply to get permission to enter the real property.
- If HB 1364 is enacted, it will create issues as to who has management control over any rental real property, whether farmland, commercial or residential rental property. If the Personal Representative does not have possession or control of such property, who is to execute or renew any leases on that property while the estate is being settled? Further, does the tenant pay rent directly to the "presumptive heirs" of that property, and is the income to be reported directly to the heirs receiving the rent checks? Under the Tax Code, such rental income would still need to be reported to the estate on the estate's income tax return (Form 1041) until such property is actually deeded to the heirs. If the rent is paid directly to the presumptive heirs, is that to be reported as a distribution from the estate on Schedule K-1 to Form 1041, or is the estate potentially obligated to pay the income tax liability on such rental income without having control of the actual payment itself? Again, the Personal Representative will likely be forced to file a petition with the court in order to address these issues, causing unnecessary delay and additional expense, even if there is no dispute among the heirs.
- The most obvious issue created by HB 1364 is when the estate needs to sell real property in order to pay estate expenses. Often real estate is the primary asset available to pay expenses. For example, it is very common for the decedent's house, which the adult children generally

have no interest in keeping, to be sold by the estate in order to pay necessary expenses. The heirs simply wish to sell it in the most efficient way, which is generally by the Personal Representative through the estate, rather than getting all the heirs to agree and sign off on the sale documents. Under HB 1364, even if all of the heirs agree that the property should be sold by the estate to pay expenses, the Personal Representative would be required to petition the court, again causing unnecessary delay and expense to the heirs.

- HB 1364 will also create title issues and confusion. The North Dakota Title Standards currently require a Personal Representative's Deed in order to document the chain of title from the decedent to the heirs. If the Personal Representative does not have legal possession and control over estate real property, can the PR even sign a PR's Deed to have a good chain of title? If there is no PR Deed recorded, how are any third parties that are reviewing the chain of title going to determine who are the current title owners? Can the heirs take out a mortgage or encumber this real property even though his/her name does not appear in the real estate records? And if they can, what are the consequences if that land needs to be sold to pay estate expenses or if it is ultimately determined that the land should be distributed to a different heir? Does a North Dakota bank who took such a mortgage from an heir end up with a void mortgage under such circumstances? There are a number of title issues that HB 1364 creates that need to be further considered.
- Lastly, based on the very limited testimony before the House Judiciary Committee, HB 1364 apparently arises out of a very contentious estate dispute that involved multiple appeals over many years. See Matter of Curtiss A. Hogan Trust B, created under the Last Will and Testament of Curtiss A. Hogan, 2020 ND 71; Estate of Hogan, 2019 ND 141; Hogan v. Hogan, 2019 ND 17; Matter of Hogan Trust B, 2018 ND 117; Estate of Hogan, 2015 ND 125. However, based on a review of the issues raised in this case, HB 1364 would not change the result, and thus would not rectify any perceived shortcoming in the North Dakota Uniform Probate Code. First, a number of the disputed issues involved a trust and the trustee's actions in administering the trust assets. Obviously, the Probate Code and the powers granted to a Personal Representative are inapplicable to trust matters, which are governed by the North Dakota Uniform Trust Code. The issues that did involve the probate estate were related to the estate's right to a "retainer" or offset against one heir's share of the estate, which primarily consisted of land, under N.D.C.C. § 30.1-20-03 for amounts that the Personal Representative claimed were owed by one heir to the estate. Based on the facts of the case, the heir that was ultimately determined to owe money to the estate was leasing and farming the land, and therefore was already in possession and control of the land during the probate, which is what HB 1364 purports to accomplish. Thus, even if HB 1364 had been in effect, the result would have been exactly the same – the Personal Representative would have been entitled to offset what was owed against the debtor/heir's share of the land in the estate. If the real intent of HB 1364 is to make an heir essentially immune from allowing the Personal Representative to offset a valid debt against that heir's share of any real estate, HB 1364 does not accomplish that. More importantly, if that is the real intent behind HB 1364, such a result would be patently unfair to the estate and other heirs that would be harmed.

The above issues are only a partial list of the problems that we feel would be caused by House Bill 1364. Based on our discussions with other trusts and estates professionals, we believe there will

likely be other testimony in opposition to House Bill 1364 that raise additional issues. Therefore, we urge the Committee to give HB 1364 a "Do Not Pass" recommendation.

Thank you for your consideration of this testimony.