

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

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ROLL NUMBER

DESCRIPTION

2187

2001 SENATE HUMAN SERVICES

SB 2187

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2187

Senate Human Services Committee

Conference Committee

Hearing Date January 23, 2001

Tape Number	Side A	Side B	Meter #
1	X		
1		X	23.5
January 24, 2001 1	X		37.6
Committee Clerk Signature	<i>Paul Klodechuk</i>		

Minutes:

The Senate Human Services Committee was called to order by Senator Lee with all members present.

The hearing was opened on SB 2187.

SENATOR MATHERN introduced the bill on behalf of the well-being of family members in the case of disability. Government programs are often not adequate to meet the needs of the person or the family believe there should be a greater level of support than the Government provides.

There is a wish to put money aside to help that person meet the needs of the future. A supplemental needs trust is set up, an asset on the side, for times of need. The technical and legal side will be discussed by others.

WILLIAM GUY III, Attorney with Gunhus Law Firm, Fargo, Moorhead, supports bill. (Written testimony). Presented proposed amendments. SENATOR LEE: Has there ever been a limit of dollars on the trust? MR. GUY: There is no limit. An estate plan for a family would be the trust

getting equal share of the estate. SENATOR KILZER: When did the Federal Statute come into

being? MR. GUY: With the overact of 1993, 7 years. SENATOR KILZER: Occasionally

there is an accident in which a settlement which goes to the disabled. Is this a place for this

money? MR. GUY: If the disabled person receives a settlement, these funds would go into a

special need trust authorized by Federal law. After the death of the individual the proceeds

would go to the Human Services Department for money advanced to them during the lifetime of

the disability. This is already a matter of Federal. This bill will only make it clear that the state

has authority to create trust. SENATOR MATHERN: Would you review the amendments?

MR. GUY: An attorney from the Human Services department went through it and even though

they do not basically agree with it, it alleviated many of their concerns. SENATOR FISCHER:

Do these amendments destroy or alter the general intent of the original bill? MR. GUY: No they

operate well without them. SENATOR MATHERN: Two questions - Where is the expertise to

make this work? Where would the money be held? MR. GUY: The expertise to prepare these

trusts lies primarily with the attorneys who do estate planning. The trustee could be a family

member, trustee, or someone appointed.

ROGER SCHWINGHAMMER, father of disabled child, supports bill. What happens to child

when parents are gone. We rely on help from citizens. Assets need to be used before

Government income kicks in. (written testimony).

BILL CHAUSSEE, President of the Guardianship Assoc. Of ND, supports bill. (Written

testimony)

COURTNEY KOEBELE, ARC, supports bill.. SENATOR KILZER: What are tax effects for

income, Federal and State?

MEL WEBSTER, Lawyer, supports bill. This law tracks the Federal law and ND Human Services Department. Make legal community aware of trusts for individuals.

BLAINE NORDWALL, Director of Economic Assistance Policy for ND Dept. Of Human Services, is neutral from the Department. The amendments should take care of most of our reservations with bill. This is an expansion. (Written testimony). We don't know what is might cost and we don't think it does much. SENATOR MATHERN: Would you like us to add something so it does more? MR. NORDWALL: A bill itself won't inform families. They will go to lawyers, friends, family and that's how they continue to find out. SENATOR MATHERN: Does the Dept make people aware of supplemental needs trust availability? MR. NORDWALL: The department does not have such a brochure, but I believe that in practice the people who deal with developmental disabilities know that trusts are possible. SENATOR LEE: Can you comment on amendments? MR. NORDWALL: The amendments would take care of concerns. The special needs trust is no a concern. The supplemental needs trust is the concern because of Federal law.

SOL WEZELMAN, father, was not aware that this was new? What effect will this bill have on my trust. This bill raises questions. It implies 3 different trusts. We don't seem to fall into any of those. If we are going to grandfather trusts created before those dates, it would clarify the bill. MR. NORDWALL: 1993 was the effective date of language you see. Trusts established before that date would be outside of the trust regulations.. MR. GUY: If his trust is in his will he does not know what will happen. If the trust is approved by department it will continue to be approved.

The hearing was closed on SB 2187.

Discussion resumed on 2187, Tape 1, Side B, Meter 23.5

Page 4
Senate Human Services Committee
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SENATOR FISCHER moved to accept the amendment. SENATOR KILZER seconded it.

Roll call vote carried 6-0. SENATOR FISCHER moved DO PASS AS AMENDED.

SENATOR MATHERN seconded it. Roll Call Vote carried 6-0. SENATOR MATHERN will carry the bill.

January 24, 2001, Tape 1 Side A, Meter 37.6.

SENATOR MATHERN moved to reconsider the action taken previously. SENATOR FISCHER seconded it. Voice vote carried. SENATOR MATHERN explained the concern of prior trusts to be accepted. Suggested wording - on Page 2, line 24 we would insert the wording

"notwithstanding any other provisions, this chapter shall not be construed to disqualify any supplemental needs trust that qualifies under previously existing law." We are simply

grandfathering in all existing trusts to the extent that they were already qualified. Discussion.

SENATOR MATHERN moved to further amend SB 2187. SENATOR ERBELE seconded it.

Roll call vote carried 6-0. SENATOR MATHERN moved a DO PASS AS AMENDED.

SENATOR ERBELE seconded the motion. Roll call vote carried 6-0. SENATOR MATHERN will carry the bill.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2187

Page 1, line 9, replace "under the" with ":",

Page 1, after line 9, insert:

"a. Under the"

Page 1, line 11, after "Income" insert ";" and remove "has a physical or mental illness or condition that,"

Page 1, after line 11, insert:

"b. Under the regulations of the Department of Human Services."

Page 1, remove lines 12 through 15

Page 1, line 19, after the second "trust" insert "that is otherwise qualified pursuant to section 2 of this chapter"

Page 1, line 21, after "spouse," insert "a parent of a minor beneficiary,"

Page 2, overstrike lines 1 through 4

Page 2, line 11, replace "disabled individuals" with "an individual with a disability"

Page 2, remove lines 15 through 21

Page 2, line 22, replace "3" with "2"

Page 3, remove lines 6 through 8

Page 3, line 9, replace "4" with "3" and after "law" insert "if the court determines the reformation to be necessary"

Renumber accordingly

Roll Call Vote #: /

Date: 11/23/01

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2187

Senate HUMAN SERVICES Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken Amendment

Motion Made By Sen Fischer Seconded By Sen Kilzer

Senators	Yes	No	Senators	Yes	No
Senator Lee, Chairperson	✓		Senator Polovitz	✓	
Senator Kilzer, Vice-Chairperson	✓		Senator Mathern	✓	
Senator Erbele	✓				
Senator Fischer	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Roll Call Vote #: 2 Date: 1/23/01

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2187

Senate HUMAN SERVICES Committee

Subcommittee on _____
 or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass As Amended

Motion Made By Sen Fischer Seconded By Sen Mathern

Senators	Yes	No	Senators	Yes	No
Senator Lee, Chairperson	✓		Senator Polovitz	✓	
Senator Kilzer, Vice-Chairperson	✓		Senator Mathern	✓	
Senator Erbele	✓				
Senator Fischer	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen Mathern

If the vote is on an amendment, briefly indicate intent:

PROPOSED AMENDMENTS TO SENATE BILL NO. 2187

Page 1, line 9, insert :

Page 1, line 9, insert a.

Page 1, line 15, insert or.

Page 1, line 16, insert b.

Page 1, line 11, remove ~~or has a physical or mental illness or condition that, in the expected natural course of the illness or condition either before or after the creation of the trust, to a reasonable degree of medical certainty, is expected to last for a continuous period of twelve months or more and substantially impairs that individual's ability to provide for that individual's care or custody~~ and replace with or under the regulations of the Department of Human Services.

Page 1, line 19, insert which is otherwise qualified pursuant to section 2 of this chapter

Page 1, line 21, insert a parent of a minor beneficiary.

Page 2, line 1, remove ~~Establishment of disability. For purposes of this chapter, disability may be established conclusively by the written opinion of a licensed professional who is qualified to diagnose the illness or condition, confirmed by the written opinion of a second licensed professional who is qualified to diagnose the illness or condition.~~

Page 2, line 5, title as SECTION 2.

Page 2, line 6, remove ~~must~~ and replace with may

Page 2, line 11, replace ~~disabled individuals~~ with an individual with a disability.

Page 2, line 15, remove ~~The trust income and assets of a supplemental needs trust are considered available to the beneficiary for medical assistance purposes to the extent they are considered available to the beneficiary under medical assistance or supplemental security income, whichever is used to determine the beneficiary's eligibility for medical assistance. For other public assistance programs established or administered under state law, assets and income will be considered available to the beneficiary in accordance with the methodology applicable to the program.~~

Page 2, line 22, remove ~~3:~~

Page 2, line 25, title as SECTION 3.

Page 2, line 27, title as SECTION 4.

Page 3, line 6, remove ~~The trustee or the grantor of any trust may amend the trust to conform with state or federal law to accomplish the purpose of a supplemental needs trust or special needs trust without the need for court approval.~~

Page 3, line 9, remove ~~4:~~

Page 3, line 9, insert if the court determines the reformation to be necessary.

Roll Call Vote #:

Date: 1/24/01
3

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2187

Senate HUMAN SERVICES Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken Amended amendments

Motion Made By Sen Mathern Seconded By Sen Erbele

Senators	Yes	No	Senators	Yes	No
Senator Lee, Chairperson	✓		Senator Polovitz	✓	
Senator Kilzer, Vice-Chairperson	✓		Senator Mathern	✓	
Senator Erbele	✓				
Senator Fischer	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Roll Call Vote #: 4

Date: 1/24/01

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2187

Senate HUMAN SERVICES Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken Be pass as amended

Motion Made By Sen Mathern Seconded By Sen Erbele

Senators	Yes	No	Senators	Yes	No
Senator Lee, Chairperson	✓		Senator Polovitz	✓	
Senator Kilzer, Vice-Chairperson	✓		Senator Mathern	✓	
Senator Erbele	✓				
Senator Fischer	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen Mathern

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2187: Human Services Committee (Sen. Lee, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2187 was placed on the Sixth order on the calendar.

Page 1, line 9, replace "under the" with ":

a. Under the"

Page 1, line 11, after "income" insert a semicolon and replace "has a physical or mental illness or condition that," with:

"b. Under the rules of the department of human services."

Page 1, remove lines 12 through 15

Page 1, line 19, after the second "trust" insert "that is otherwise qualified under this chapter"

Page 1, line 21, after the comma insert "a parent of a minor beneficiary,"

Page 2, remove lines 1 through 4

Page 2, line 11, replace "disabled individuals" with "an individual with a disability"

Page 2, remove lines 15 through 21

Page 2, line 22, replace "3" with "2"

Page 2, line 24, after the period insert "Notwithstanding any other provision of law, this chapter does not disqualify any supplemental needs trust that qualified under previous law."

Page 3, remove lines 6 through 8

Page 3, line 9, replace "4" with "3" and after "law" insert "if the court determines the reformation to be necessary"

Renumber accordingly

2001 HOUSE HUMAN SERVICES

SB 2187

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2187

House Human Services Committee

Conference Committee

Hearing Date March 5, 2001

Tape Number	Side A	Side B	Meter #
2	x		930 to 4038
Committee Clerk Signature <i>Corinne Easton</i>			

Minutes:

Chairman Price, Vice Chairman Devlin, Rep. Dosch, Rep. Galvin, Rep. Klein, Rep. Pollert, Rep. Porter, Rep. Tieman, Rep. Weiler, Rep. Weisz, Rep. Cleary, Rep. Metcalf, Rep. Niemeier, Rep. Sandvig

Chairman Price: We will open the hearing on SB 2187. The clerk will read the title.

Sen. Mathern - District 11: I am here to introduce SB 2187. It is a bill that may create some possibilities to make sure people with disabilities have some assets to address their needs. In some cases the bills we put together in Human Services activities are not sufficient to meet the needs of disabled persons. The programs that the Federal Government puts together to support the needs of disabled individuals are sometimes not sufficient. So what can be done? One thing, is we can encourage families and other people to put assets aside in form of a trust so that those assets can be used for that individual. The bill before you is just such a vehicle. It is trying to encourage ND families and individuals to reserve some assets, even though a disabled person

would be eligible for a government program. What happens in real life, I think is a family member is concerned about someone in their family being disabled and they feel if they put some assets aside for that disabled member, those assets will be taken or assigned a person not eligible for government programs. So a caring parent might take that asset and give it to another family member and say, please when this disabled person needs this and I gone, please use those assets for the care of that person. Sometimes it happens, sometimes it doesn't. What we are trying to do with this bill is to be very direct about that and encourage and permit a family to create a trust with that money and it go to supplement whatever is already available through the government to support this person with a disability. Much of the activity in this area of special needs is within the context of Federal law, and there are some experts in the state that help families develop trusts that are quite specific to the Federal law. The bill creates a section in the Century Code regarding these kinds of trust. The goal is to encourage more and more people to consider this kind of vehicle to address the needs of a disabled family member in the future. Again, much of this is within Federal law. I believe it is important to have this in state law that promotes the concept. I want to ask for your support of this to keep families involved in the care of their disabled family member. The vehicle of a trust is one of those ways.

Rep. Weisz: The trust would only come into play from your perspective as a parent, when the child is an adult. Because it is prohibited for a minor. Is that correct?

Sen. Mathern: As I see it, when the child is a minor, it is the parent's resources that are really an issue and so yes, I would see this more going into effect when this person is no longer a minor. It is at that point when the parent's resources are not part of the eligibility determination.

Rep. Weisz: So in other words, (inaudible) wouldn't be able to take some of their resources and put them a separate trust for the child while he is still a minor to avoid their resources being used. This would only come into play when their resources are no longer being considered.

Sen. Mathern: I believe a family could put those resources in a trust, however who ever is providing for the child's care, like the state, would have to see that trust as one of the assets. So they couldn't hide it, it would be one of the assets. Just like if they would have kept the money in a savings account. I don't believe this would permit anybody to hide that asset with a trust, this basically says, let's create a trust that is in the open and it becomes workable once the child is an adult. It is only workable if it also doesn't make the child ineligible for Federal programs. So it is kind of working that narrow ground between total eligibility and not being eligible.

Chairman Price: Let's say that the parents establish that trust the age of 25. For whatever reason the child dies at age 30, the parents are still living, how is the trust handled at that time?

Sen. Mathern: I understand that there would be a beneficiary named to the trust. Somebody would have already made a decision who was the beneficiary of that trust. I assume no one would establish it without saying okay, if John doesn't need it, this is where it goes. Part of this might go to a government agency.

Chairman Price: Is there any thing like that? Any other questions?

Rep. Devlin: Specifically, what does this bill allow that isn't already allowed by Federal law?

Sen. Mathern: To me, this clarifies under state statute some of the things that are important for moving ahead in this area, just in the definition area for example. I think with very fine expert legal advice where somebody knows the Federal law very well I think you could do most of what you can do under this bill. I am not sure what further provisions it provides. Most people need help, legal help to establish such a vehicle to help a disabled member in the future. I think we

need to send a signal that we as a state believe this is an acceptable form of planning for the future. I think that is what this bill does, gives directions to the attorneys, the courts, and Department of Human Services that we believe as a state that this is appropriate. Putting it in the ND Century Code makes it clear that this is the policy of our state and more people will begin using it in the interest of those disabled persons. Right now there are assets being put aside that aren't always getting to that disabled person. Or in the future they get used in another way.

Courtney Koebele - The ARC of ND: (See written testimony).

Sen. Mathern: I want the committee to know I support the amendments made by the ARC.

Chairman Price: Anyone else wishing to testify for SB 2187. Any opposition to SB 2187?

Blaine Nordwall - Director of Economic Assistance Policy for the ND Department of Human

Services: (See written testimony).

Rep. Devlin: What is in the bill, or the intent of the bill that isn't already in Federal law?

Nordwall: The Federal law only deals with special needs trusts. It helps settle trusts. The Federal law was addressing the law and the problem was the people with means creating trusts and causing themselves to be eligible. The supplemental needs trust concept is not described anywhere in Federal law. But it is described thoroughly in a series of cases that the ND Supreme Court has handed down that essentially serve to distinguish between support trusts and trusts that are supplemental. They are different in that they are not intended to have any of the support be used to prevent the individual from realizing full assistance levels. The Supreme Court has handed down four cases over the last decade that draw a pretty clear line between what our Supreme Court has said and Federal law. The subject is clear in ND. I don't see this as doing much except for one thing, if you look at the end of the bill, page 2 line 25 - 27 (reads). It doesn't say that that is the purpose intended by the creator of the trust. What I believe this language does

and I am not sure that the sponsors intended this - what I believe this language may do is create in courts the authority to take a trust that was never intended as a supplemental needs trust or a special needs trust and cause it to be such. That isn't provided for anywhere.

Chairman Price: Under current case law and that type of thing - my daughter is 27. Let's say I wanted to establish a trust should she have a disability. I could currently under this law establish a trust and designate how I wanted this money to be used and it would not affect her eligibility for services?

Nordwall: Yes, that is actually done fairly commonly, primarily with respect to disabled people.

Chairman Price: I could say it could be for supplemental medical, or to pay here x amount of dollars a month, it could be for whatever I wanted.

Nordwall: The nature of a trust is that it is sort of a law unto itself. The words in the trust, say what would happen with the trust. Unless it says to do something illegal with it.

Chairman Price: So unless she used that to take her asset level above what would make her Medicaid eligible, it would not affect her benefits.

Nordwall: If you had a provision in the trust that said she couldn't access it except in certain circumstances, as long as those circumstances were such that they didn't affect her eligibility it wouldn't happen. The problems we have seen always work out to this, someone has created a trust. The trust doesn't have language that is clearly intended, it looks like it might be a support trust and the person might have a very substantial need and what happens then is they apply for assistance. We might say, do you have a trust that provides for this? The effect of having a very substantial need and perhaps a modest amount in a trust, is that the trust will run out of money. The people who usually come in and are unhappy about that are the contingent beneficiaries, who as a consequence will not have any contingency, or the people who are administering the

trust and want it to last a long, long time. It is easy to draft around those things if you do it ahead of time. You say to your lawyer, I want this to happen and it happens. You fail to say that and there could be a problem. There has really only been two cases where we really said, I am sorry and the court said that is not right.

Chairman Price: In your opinion is this in front of us because in some cases the attorneys have not done their job?

Nordwall: It is dangerous for me to look at the motives of people. I can't assume that is why they do it. Generally speaking the lawyers in ND do a very good job of writing trusts. The problem I think is when they started out with one set of directions and circumstances have caused people to wish they had started out with a different set of instructions. We are still following the original instructions.

Rep. Weisz: I think you kinda answered by question.

Nordwall: Yes, it is very simple. Lawyers are familiar with doing that. I think it would be malpractice if someone came in and asked someone to do a supplemental needs trust, not to do enough research to know how to do that.

Chairman Price: Any further questions? Anyone else in opposition to SB 2187? I will close the hearing on SB 2187.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2187A

House Human Services Committee

Conference Committee

Hearing Date March 6, 2001

Tape Number	Side A	Side B	Meter #
Tape 2		X	900 to 2050
Committee Clerk Signature <i>Cornie Easton</i>			

Minutes:

Chairman Price, Vice Chairman Devlin, Rep. Dosch, Rep. Galvin, Rep. Klein, Rep. Pollert, Rep. Porter, Rep. Tieman, Rep. Weiler, Rep. Weisz, Rep. Cleary, Rep. Metcalf, Rep. Niemeier, Rep. Sandvig

Chairman Price: We will hear testimony from William Guy, III on SB 2187.

William Guy, III: Thank you for holding this open Madam Chairman. (See written testimony.)

I am here today in support of SB 2187 which pertains to trusts for people with disabilities.

Basically this law pertains to two categories of trust: There is a Special Needs Trust - it is authorized under federal law. These trusts arise when persons with disabilities who is on medication and other programs receives some money - whether it is a gift, inheritance, proceeds from a law suit - this money can then be placed in a trust for the benefit of this person and the proceeds are used to supplement the benefits they receive under the various programs they are a participant in. At the time of the participants death the proceeds of this trust, as required by

federal law, will be used to repay the Medicaid Program. The legislation here today just acknowledges those trusts and specifically authorizes the state district courts to establish such a trust as they are allowed to do under federal law. The other portion of the bill pertains to Supplemental Needs Trust. They are quite similar except that a Supplemental Needs Trust is money that never comes into the hands of the participant. Very often it is a parent or grandparent who wants to provide for someone with a disability, in their will, and they realize that if they do so directly that it may disqualify the person from receiving benefits. They are then faced with leaving this child out and hope the other children will provide for them. Then upon the death of the participant the proceeds would pass onto the parents other children or grandchildren. There are also provisions set forth that pertain to the administration of the trust. This is a bill that will have absolutely fiscal impact on the state.

Rep. Weisz: Is there anything in this bill that we can't already do? Is there a reason why we should pass this? Is there an advantage to this?

William Guy: This bill puts the legislative stamp of approval on it. It makes it easier for citizens to define - they would have a very difficult time understanding Supplemental Needs Trusts. This would be like every other legislative action - it sets for public policy.

Rep. Weisz: On page 2, lines 25 to 27 - you authorize the court to reform, but there has been some discussion that this could open it up - that a court could reform any kind of trust. Are you concerned that this language might be too broad?

William Guy: Courts would typically be very circumspect in reforming a trust. In my experience you don't see reformations very often. It really is just to correct a technical problem.

Chairman Price: Mr. Guy, will you be available when we are ready to work on this bill?

William Guy: Certainly.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2187 B

House Human Services Committee

Conference Committee

Hearing Date March 13, 2001

Tape Number	Side A	Side B	Meter #
Tape 2	X		3780 to 4975
Tape 3	X		0 to 370
Committee Clerk Signature <i>Corinne Easton</i>			

Minutes:

COMMITTEE WORK:

CHAIRMAN PRICE: Let's go to SB 2187.

REP. PORTER: It was an interesting discussion between the department and then some of the lawyers that came in and presented conflicting sides of the story. I certainly would be very hesitant to pass this bill as a law. If it is that big of a deal that they think it is something necessary, I think it would definitely require further study. Currently right now, my understanding is that most of the trust situations can be handled through competent attorneys. They are looking for a big loop hole on page 2 that the court can change someone's total intentions of their trust after that person is deceased. The court can come back in and change the total intent of the trust is something the person that set the trust didn't intend it to be. I have a problem with empowering the court with that much ability to change the intentions and the wishes of someone who isn't around to defend themselves.

REP. KLEIN: I agree with Rep. Porter. We just had a major case out in Dickinson that took about three years. This person died and someone tried to go back and go through the will. I think that is a valid point.

REP. DOSCH: Couldn't we just amend out lines 25, 6, and 7?

CHAIRMAN PRICE: I think this is the biggest bulk of what they want. I think there is some real confusion out there among the legal profession as to how they put some of these together. We also have amendments from Courtney Koebele on page 2, lines 10, 11, and 12. You may want to consider these.

REP. WEISZ: Page 2 and those lines - I don't really have a problem with that, because in testimony that came out - if anything that would be a tweaking to make sure that the trust complies with the law and statute. Do we know what we're getting in to. It appears there is a dispute whether attorneys can always do them properly.

CHAIRMAN PRICE: This is a complicated issue. Maybe they aren't doing the research in to case law the way they should be. The second thing is that you may go in and direct the trust to be set up some way, and then five years down the road circumstances have changed and you say "oh, I shouldn't have done it that way". That is why I think they are asking for the reforming of the trust.

REP. PORTER: I think that the reforming of the trust has to do also with border line legal malpractice where they didn't know what they were doing, and now they need a way to change some of the wrong doings.

CHAIRMAN PRICE: Does anyone wish to make amendments to the bill? Anyone want information, such as from Blaine Nordwall, before we take any action?

VICE CHAIRMAN DEVLIN: I don't know if I want to question Blaine - he has given us three pages of testimony already. I am in Rep. Porter's camp on this one. I think there are a lot of things that somebody has to study further before they lock this into statute.

CHAIRMAN PRICE: Let's have a show of hand from the committee to make this into a study.

REP. CLEARY: I think it is an issue that should be studied.

REP. WEISZ: Either that or kill it.

CHAIRMAN PRICE: Show of hands for making this a study.

VICE CHAIRMAN PRICE: I don't know if I want to open up a Pandora's box because we didn't fully understand the ramifications of the bill.

CHAIRMAN PRICE: I think what I will do is have the intern get the language drafted, and when we take up the bill, you still have the option to vote No on that amendment.

COMMITTEE RECONVENED:

VICE CHAIRMAN DEVLIN: Committee, 2187 you have the amendments before you that would essentially turn 2187 into a study. Does anyone have anything additional to put into the language? Madam Chairman, we have explained the amendments to 2187, we opened it up to questions and that is where we're at.

CHAIRMAN PRICE: Discussion? What are your wishes?

REP. PORTER: I would move the amendment.

REP. METCALF: Second.

CHAIRMAN PRICE: Any other discussion? All those in favor signify by saying Aye (13 Yes, 1 Absent). We have an amended bill, what are your wishes?

REP. POLLERT: I move a DO PASS as amended.

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House Human Services Committee

Bill/Resolution Number SB 2187

Hearing Date March 13, 2001

REP. KLEIN: Second.

CHAIRMAN PRICE: Discussion? The clerk will call the roll on a **DO PASS** as amended.

12 YES 0 NO 2 ABSENT CARRIED BY REP. DOSCH

PROPOSED AMENDMENTS TO SB 2187

Page 1, line 1, after A BILL, replace the remainder of the bill with "for an Act to provide for a legislative council study of trusts for individuals with disabilities.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Trusts for individuals with disabilities - Legislative council study. During the 2001-02 interim, the legislative council shall consider studying trusts for individuals with disabilities. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the fifty-eighth legislative assembly."

Renumber accordingly.

10380.0201
Title.0300

Adopted by the Human Services Committee
March 13, 2001

VR
3/13/01

HOUSE AMENDMENTS TO SB 2187

HOUSE HUMAN SERVICES

03/14/01

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of trusts for individuals with disabilities."

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. TRUSTS FOR INDIVIDUALS WITH DISABILITIES -
LEGISLATIVE COUNCIL STUDY.** During the 2001-02 interim, the legislative council shall consider studying trusts for individuals with disabilities. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the fifty-eighth legislative assembly."

Renumber accordingly

Date: 3-13-01
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2187

House Human Services Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken move amendment

Motion Made By Porter Seconded By Metcalf

Representatives	Yes	No	Representatives	Yes	No
Rep. Clara Sue Price, Chairman	✓		Rep. Audrey Cleary		
Rep. William Devlin, V, Chairman	✓		Rep. Ralph Metcalf	✓	
Rep. Mark Dosch	✓		Rep. Carol Niemeier	✓	
Rep. Pat Galvin	✓		Rep. Sally Sandvig		
Rep. Frank Klein	✓				
Rep. Chet Pollert	✓				
Rep. Todd Porter	✓				
Rep. Wayne Tieman	✓				
Rep. Dave Weiler	✓				
Rep. Robin Weisz	✓				

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 3-13-01
Roll Call Vote #: 2

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2187

House Human Services Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS as amended

Motion Made By Rep. Pollert Seconded By Rep. Klein

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairman	✓		Audrey Cleary		
William Devlin - V. Chairman	✓		Ralph Metcalf	✓	
Mark Dosch	✓		Carol Niemeier	✓	
Pat Galvin	✓		Sally Sandvig		
Frank Klein	✓				
Chet Pollert	✓				
Todd Porter	✓				
Wayne Tieman	✓				
Dave Weiler	✓				
Robin Weisz	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Dosch

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2187, as engrossed: Human Services Committee (Rep. Price, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2187 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of trusts for individuals with disabilities.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. TRUSTS FOR INDIVIDUALS WITH DISABILITIES - LEGISLATIVE COUNCIL STUDY. During the 2001-02 interim, the legislative council shall consider studying trusts for individuals with disabilities. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the fifty-eighth legislative assembly."

Renumber accordingly

2001 SENATE HUMAN SERVICES
CONFERENCE COMMITTEE

SB 2187

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2187

Senate Human Services Committee

Conference Committee

Hearing Date March 28, 2001

Tape Number	Side A	Side B	Meter #
1	X		
Committee Clerk Signature <i>Carol Klodejchuk</i>			

Minutes:

The conference committee was called to order by SENATOR KILZER with SENATOR LEE, SENATOR MATHERN, REPRESENTATIVE PORTER, REPRESENTATIVE DOSCH, and REPRESENTATIVE SANDVIG present.

REPRESENTATIVE PORTER explained the House amendments and why they were adopted.

We decided to turn it into a study to iron out anything that is already in law. SENATOR

MATHERN: Why does this bill keep coming around if we don't need this law. REP PORTER:

The education and complexity of trusts in the law needs understanding among the lawyers.

Lawyers are not going to research Federal law. SENATOR LEE asked MR. NORDWALL to

speak to concerns of the department. MR. NORDWALL: technical concerns. Reform is only to

meet trustees needs and intent. Discussion. SENATOR MATHERN moved to ACCEDE to the

HOUSE AMENDMENTS. SENATOR LEE seconded the motion. Discussion. Roll call vote

Page 2

Senate Human Services Committee

Bill/Resolution Number SB 2187

Hearing Date March 28, 2001

carried 6-0. SENATOR MATHERN will carry the bill to the Senate. REPRESENTATIVE

PORTER will carry the bill to the House floor.

Date: 3/28/01

Roll Call Vote #:

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2187

Senate Human Services Committee

Subcommittee on _____

or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Accede to House Amendments

Motion Made By Sen Mathem Seconded By Sen Lee

Senators	Yes	No	Rep Senators	Yes	No
Senator Kilgus	✓		Rep Porter	✓	
Senator Lee	✓		Rep Daschle	✓	
Senator Mathem	✓		Rep Sandberg	✓	

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen ~~Mr~~ Kilgus Mathem / Rep Porter

If the vote is on an amendment, briefly indicate intent:

REPORT OF CONFERENCE COMMITTEE (420)
March 28, 2001 4:22 p.m.

Module No: SR-54-7057

Insert LC: .

REPORT OF CONFERENCE COMMITTEE

SB 2187, as engrossed: Your conference committee (Sens. Kilzer, Lee, T. Mathern and Reps. Porter, Dosch, Sandvig) recommends that the **SENATE ACCEDE** to the House amendments on SJ page 853 and place SB 2187 on the Seventh order.

Engrossed SB 2187 was placed on the Seventh order of business on the calendar.

2001 TESTIMONY

SB 2187

TESTIMONY OF WILLIAM L. GUY III

IN SUPPORT OF
SENATE BILL 2187

Mr. Chairman and Members of the Committee, my name is Bill Guy. I am an attorney with the Gunhus Law Firm which has offices in Fargo and Moorhead. I am here today to speak on behalf of Senate Bill 2187 which proposes legislation to authorize **Supplemental Needs Trusts** and **Special Needs Trusts**. Also in attendance this morning is Attorney Sue Johnson-Drenth who is the elder law specialist in our office.

- **Supplemental Needs Trusts** and **Special Needs Trusts** allow for the enrichment of the lives of mentally or physically disabled individuals by allowing for the extras which public support benefits, such as Medicaid, cannot provide.
- First, I believe that some definitions are in order.
 - A "**Supplemental Needs Trust**":
 - is a trust created by a third party (typically a parent or grandparent) for the benefit of a physically or mentally disabled individual; and,
 - is funded with assets provided by the third party (which never become directly owned by the disabled individual); and,
 - A "**Special Needs Trust**" is specifically authorized by Title 42 of the U. S. Code (frequently referred to as OBRA 93) and is funded with the assets of the disabled individual.
- With respect to both **Supplemental Needs Trusts** and **Special Needs**

Trusts:

- Neither of these trusts add to or diminish the government benefits available to disabled individuals.
 - Instead, they coordinate with government programs and benefits to provide for extras that a disabled individual cannot afford and that are not provided by government programs.
 - These items can include clothing, transportation, personal items, recreation, travel, handicap accessible vehicles, and extra medical and dental care not provided by government programs (such as Medicaid).
 - These trusts are intended to supplement or compliment government benefits for the disabled. They are not intended to replace, reduce or substitute for any government program.
- With respect to **Supplemental Needs Trusts** only:
 - A **Supplemental Needs Trust** is created for the benefit of a disabled individual by a third party (again, typically by a parent or grandparent for the benefit of a child/grandchild).
 - A **Supplemental Needs Trust** may be established by the parent or grandparent during their lifetime or upon death.
 - Frequently, parents of a disabled adult child believe that they must disinherit that child in order to maintain the disabled child's eligibility for government benefits. The parents then hope that their other adult children will use some of their inheritance for the benefit of their disabled sibling.
 - The proposed legislation would:
 - enable parents to include their disabled adult child as a part of

the parents' estate plan and coordinate the provisions made for the disabled child with available government programs; and,

- does not pertain to trusts established by parents for the benefit of minor children (to whom the parents owe an obligation of support).

Parents of minor children would use a special needs trust during the minority of the child.

- Upon termination of a **Supplemental Needs Trust**, the remaining trust estate is distributed as directed by the creator of the trust.
- Authorization of a **Supplemental Needs Trust** will have no revenue impact on the State Treasury.
 - If **Supplemental Needs Trusts** are not clearly authorized by statute, then, in my experience, many parents who would have otherwise used one for their disabled child will instead elect to disinherit the child with the hope that other family members will "look after" the disabled child.
 - Thus, the funds that go into a **Supplemental Needs Trust** would probably not have been allocated to the disabled individual anyway and would thus have not been considered to be available assets for the support of the disabled individual.
- With respect to a **Special Needs Trust**:
 - A **Special Needs Trust** is established by a parent, grandparent, legal guardian or the Court using the disabled individual's income and/or assets.
 - **Special Needs Trusts** were specifically authorized by Title 42 of the

U. S. Code.

- This statute will authorize state district courts to create and fund **Special Needs Trusts**.
- Since a **Special Needs Trust** is funded with property belonging to the disabled individual, federal law requires that upon the death of the disabled individual that the remaining trust estate is used to reimburse the State Department of Human Services for the Medicaid benefits provided to the disabled individual. Any assets left in the trust estate will then be distributed pursuant to the terms of the trust.
- Thus, a **Special Needs Trust** is really just a deferral during the lifetime of the disabled individual.
 - While the State Department of Human Services does continue to pay Medicaid benefits that would have been otherwise lost without the trust (until the disabled individual's assets had been consumed), the Department does receive reimbursement for those Medicaid benefits upon the death of the disabled individual.
 - Thus, the only loss to the Department is the time value of money during the term of the trust.
- In any event, this trust is authorized pursuant to federal law. This legislation will simply facilitate the creation of such a trust by a State District Court.

For all of the reasons stated above, Senate Bill 2187 would be of immense benefit to the disabled citizens of North Dakota without causing any fiscal impact to the state. If you have any questions, Sue and I would be happy to answer them.

SENATE BILL NO. 2187
SENATE HUMAN SERVICES COMMITTEE
RED RIVER ROOM
JANUARY 23, 2001
TESTIMONY BY BILL CHAUSSEE, PRESIDENT
GUARDIANSHIP ASSOCIATION OF NORTH DAKOTA

Madam Chairman and Committee Members:

My name is Bill Chaussee. I am the President of the Guardianship Association of North Dakota, a non-profit corporation, whose mission is to establish training, standards, and a code of ethics for guardians and other fiduciaries.

I am, also, the Administrator of Guardian and Protective Services, Inc., a non-profit corporation that provides guardianship and protective arrangements for vulnerable adults.

This "disabled needs trust" bill will allow low income disabled citizens to set aside modest amounts to provide needs that are not available to the individual through medical assistance or other publicly funded benefit programs.

Some examples that these funds can provide are:

- Dental, vision, and auditory care for which there are no funds available.
- Private rehabilitative training and physical therapy.
- Supplemental nursing and personal attendant care.
- Special equipment such as an electric wheelchair or other supportive devices.
- Funds for emergency situations.
- Programs for training, education, and social enhancements.
- Professional services such as legal or guardian services.

The Guardianship Association of North Dakota supports Bill No. 2187 and requests the Senate Human Services Committee to support this Bill.

To: Human Services Committee
From: Roger E. Schwinghammer
Subject: SB 2187

Madam Chairperson and members of the Committee. I come to you today as the father of a child with a developmental disability bringing with me 38 years of experience in the field of social services. I come with a certain excitement for other parents who like me have asked the question what happens to my child after my wife and I are gone.

Like most parents of children with disabilities we will never have sufficient resources to provide for all our child's needs after we are gone and have to rely on our fellow citizens for help. Government help is available but only at a basic level of subsistence. If I were to leave my meager estate to Jay, my son, most of his government support would cease until all of my assets had been consumed and then he might resume getting the assistance he needed to supplement the income he makes as a dishwasher. If I left my estate with his sister to provide for Jay I might still be jeopardizing the government support he needs to survive. Further the recipient of an estate has no obligation to use the resources to care for the person with the disability. That was my problem and the problem of all persons with a child with a disability who could not afford to take care of all the child's needs.

And then along came the supplemental needs trust. This federally approved trust allows me to establish a trust obligated to improving my sons economic well-being without putting his government entitlements in jeopardy. The bill before you, modeled after the Minnesota statute provides parents and their attorneys with a model for establishing a supplemental needs trust. It also informs judges that they have jurisdiction in ^{reforming} transforming existing trusts to supplemental needs trust so that the well being of persons with disabilities might be improve beyond the limited resources provided by government agencies.

I have found a way of answering in part the question that haunts parents on their deathbeds what will happen to my child after I am gone. I have found an answer to the implied financial question and I encourage a yea vote on this bill so that others may enjoy the same peace of mind.

**TESTIMONY BEFORE THE
SENATE HUMAN SERVICES COMMITTEE
REGARDING
SENATE BILL NO. 2187
January 23, 2001**

Chairman Lee, members of the Senate Human Services Committee, my name is Blaine Nordwall. I am Director of Economic Assistance Policy for the North Dakota Department of Human Services. I am here to express the department's strong concern and reservations with respect to Senate Bill 2187.

First, with respect to determinations of disability, we have two major concerns.

- The second clause of the definition of "individual with a disability" is different in several respects than the existing federal definition of disability at 42 U.S.C. § 416(i). We believe this clause would substantially liberalize the definition of disability, and have found no basis under which the department could claim federal funds for providing Medicaid benefits to individuals determined disabled under that criteria.**
- The provisions for establishment of disability, at the top of page 2, completely remove the department from a determination of whether or not an individual has a disability. Federal law requires that determinations of disability, for Medicaid purposes, be accomplished either by a state Medicaid agency or by the Social Security Administration.**

Second, the provisions relating to special needs trusts would essentially be without effect. The requirements for any trust created out of the assets

belonging to a medical assistance applicant, or the spouse of that applicant, are governed by 42 U.S.C. § 1396p(d). 42 U.S.C. § 1396p(d)(4)(A) and (C) already create exceptions for special needs trusts respectively created by individuals and by non-profit organizations. (A copy of 42 U.S.C. § 1396p(d) is attached.) The Supremacy Clause of the United States Constitution would require that the federal law pre-empt a North Dakota law on this subject.

Third, the provisions found on page 3, lines 6 through 8, effectively authorize either the trustee or the grantor of any trust to amend that trust without court approval.

- This approach effectively deprives special needs trusts of the Medicaid treatment otherwise provided under 42 U.S.C. § 1396p(d)(4)(A) and (C), because it would require the department, under applicable federal law, to treat the trust assets and income as available for medical assistance eligibility purposes.
- Because of the language on page 2, lines 22 through 24, this bill would apply to existing supplemental needs trusts. The bill may have the effect of ending medical assistance eligibility of recipients already benefiting from supplemental needs trusts.

Fourth, the law governing supplemental needs trusts is already well established in North Dakota. Over the past several years, the North Dakota Supreme Court has decided three cases that bear on the requirements of supplemental needs trusts. Yesterday, I went to the North Dakota Supreme Court's website and typed "Medicaid and trust" into the search engine that is a part of that website. Immediately I had all the relevant cases before me. In my experience, lawyers who develop trusts are a cautious lot, and closely follow the decisions of the court that already established the expectations.

I'll try to answer any questions the Committee may have.

Presented by:

**Blaine L. Nordwall
Director, Economic Assistance Policy
ND Department of Human Services**

(d) Treatment of trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to—

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

(3)(A) In the case of a revocable trust—

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.

(B) In the case of an irrevocable trust—

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed of by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

(B) A trust established in a State for the benefit of an individual if—

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter, and

(iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title.

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:

(i) The trust is established and managed by a nonprofit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

(5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

(6) The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

January 24, 2001

SENATE HUMAN SERVICES COMMITTEE
SB 2187

CHAIRMAN LEE AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of The ARC of North Dakota. The Arc is an open membership organization made up of people with mental retardation and other related developmental disabilities, their families, friends, interested citizens, and professionals in the disability field.

It is organized on three levels: local chapters, state chapters and the national organization. All three levels provide opportunities to engage policy-makers in efforts to improve public policy affecting people with mental retardation and related developmental disabilities and their families.

The Arc of North Dakota has over 1,200 committed members and friends...your neighbors and constituents...in chapters in Grand Forks, Fargo, Valley City, Jamestown, Bismarck, Dickinson and Bowman.

Our **Mission Statement** is to improve the quality of life for children and adults with mental, retardation and related developmental disabilities and their families through advocacy, education and family support services.

Public policy advocacy is an essential component of the Arc movement, and that's why we're here today. Arc members have worked together over the past 50 years to secure family support services, special education, health care, leisure opportunities, vocational training, community housing and other community support services.

We support the concepts of SB 2187, but believe one amendment is needed to insure that supplemental needs trusts already in place and serving so many persons, including Sol Wezelman, from whom you heard earlier, are not put at risk.

Therefore, we respectfully request that you adopt the amendment below, which has been reviewed by William Guy, who addressed you earlier, and then give the bill a do pass.

If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

Jack McDonald

PROPOSED AMENDMENTS TO SB 2187

On page 2, line 24, after the word "created." insert "Notwithstanding any other provisions, this chapter shall not be construed to disqualify any supplemental needs trust that qualified under previously existing law."

Renumber accordingly

1 **Establishment of disability.** For purposes of this chapter, disability may be
2 established conclusively by the written opinion of a licensed professional who is qualified to
3 diagnose the illness or condition, confirmed by the written opinion of a second licensed
4 professional who is qualified to diagnose the illness or condition.

5 **Supplemental needs trusts under state law.**

- 6 1. A supplemental needs trust must provide for the living expenses and other needs
7 of an individual with a disability when benefits from publicly funded benefit
8 programs are not sufficient to provide adequately for those needs. A supplemental
9 needs trust must limit distributions in a manner and for purposes that supplement
10 or complement the benefits available under medical assistance and other publicly
11 funded benefit programs for disabled individuals. A supplemental needs trust may
12 not have the effect of replacing, reducing, or substituting for publicly funded
13 benefits otherwise available to the beneficiary or rendering the beneficiary ineligible
14 for publicly funded benefits.
- 15 2. The trust income and assets of a supplemental needs trust are considered
16 available to the beneficiary for medical assistance purposes to the extent they are
17 considered available to the beneficiary under medical assistance or supplemental
18 security income, whichever is used to determine the beneficiary's eligibility for
19 medical assistance. For other public assistance programs established or
20 administered under state law, assets and income will be considered available to
21 the beneficiary in accordance with the methodology applicable to the program.
- 22 3. This section applies to any supplemental needs trust that complies with the
23 requirements of this chapter, regardless of the date on which the supplemental
24 needs trust was created. *

25 **Special needs trusts under federal law.** The courts of this state may authorize the
26 creation and funding of special needs trusts.

27 **Provisions for supplemental needs trusts and special needs trusts.**

- 28 1. This chapter does not require the submission of a supplemental needs trust or a
29 special needs trust to a state agency or to a court for interpretation or enforcement.
- 30 2. Except as allowed by sections 2 and 3 of this chapter, a provision in a trust that
31 provides for the suspension, termination, limitation, or diversion of the principal,

March 5, 2001

HOUSE HUMAN SERVICES COMMITTEE
SB 2187

CHAIRWOMAN PRICE AND COMMITTEE MEMBERS:

My name is Courtney Koebele. I'm appearing here today on behalf of The Arc of North Dakota. The Arc is an open membership organization made up of people with mental retardation and other related developmental disabilities, their families, friends, interested citizens, and professionals in the disability field.

It is organized on three levels: local chapters, state chapters and the national organization. All three levels provide opportunities to engage policy-makers in efforts to improve public policy affecting people with mental retardation and related developmental disabilities and their families.

The Arc of North Dakota has over 1,200 committed members and friends...your neighbors and constituents...in chapters in Grand Forks, Fargo, Valley City, Jamestown, Bismarck, Dickinson and Bowman.

Our **Mission Statement** is to improve the quality of life for children and adults with mental, retardation and related developmental disabilities and their families through advocacy, education and family support services.

Public policy advocacy is an essential component of the Arc movement, and that's why we're here today. Arc members have worked together over the past 50 years to secure family support services, special education, health care, leisure opportunities, vocational training, community housing and other community support services.

We support the concepts of SB 2187. The bill is needed to make sure that these very vital trusts are allowed to continue to meet the needs of the developmentally disabled and their families.

We supported the amendment which was added in the Senate to clarify the effect this new law will have on existing special needs trusts. Since this bill passed the Senate, we've checked with experts in this area and we believe that the Senate amendment needs to be further clarified as we've indicated below to make sure that existing trusts are fully protected. This proposed amendment does not change the effect of the new law, but merely clarifies the standing of existing trusts.

Therefore, we respectfully request that you adopt the amendment below, and then give the bill a do pass. If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

PROPOSED AMENDMENTS TO ENGROSSED SB 2187

On page 2, line 10, after the word "law," delete the remainder of the line and insert "this chapter will not require that assets in a special needs trust be considered available to the beneficiary of the trust for medical assistance purposes if those assets would not have been, or were not, considered available to the beneficiary for medical assistance purposes under prior law."

On page 2, delete lines 11 and 12.
Renumber accordingly

**TESTIMONY BEFORE THE
HOUSE HUMAN SERVICES COMMITTEE
REGARDING
ENGROSSED SENATE BILL NO. 2187
March 5, 2001**

Chairman Price, members of the House Human Services Committee, my name is Blaine Nordwall. I am Director of Economic Assistance Policy for the North Dakota Department of Human Services.

Engrossed Senate Bill No. 2187 includes no language that reveals if it is intended to expand Medicaid eligibility or only encourage and make more obvious the possibility of establishing supplemental needs trusts. The bill nowhere provides any direction to the department or expresses any requirement with respect to the administration of the Medicaid program. The only mention of the department is an apparent grant of rulemaking authority on page 1, line 12. That line is problematical for another reason.

Trusts for disabled persons are legal documents, sometimes complicated, that are prepared by lawyers. Lawyers preparing such trusts are held to standards that include gaining knowledge about the effect of trusts on Medicaid. Currently, a combination of easily accessed North Dakota Supreme Court decisions and federal law describes the relationship between trusts and Medicaid eligibility. There is no need for a statute to alert lawyers of these factors, but if there was, this bill is likely to add confusion. Just as the bill provides no direction to the department, it provides none to the lawyers drafting trusts.

Engrossed Senate Bill No. 2187 has a number of technical problems. In order, they are:

- Page 1, line 12, would grant rulemaking authority for the department to set disability criteria. With respect to the Medicaid program, the department cannot, under federal law, expand the definition of disability. It could establish a more restrictive definition of disability only if it had used a more restrictive definition in its January 1, 1972 Medicaid State Plan. The 1972 Medicaid State Plan did not use a more restrictive definition of disability. The department could never use this rulemaking authority to any real effect.
- Page 1, lines 13 through 15, the definition of special needs trust, refers to a trust which "qualifies under federal law as a trust that does not make an individual with a disability ineligible for medical assistance while maintaining assets in that trust." The federal law that allows establishment of special needs trusts is 42 U.S.C. § 1396p(d)(4)(A). A copy of that federal law is attached to this testimony. But the definition of special needs trust on lines 13 through 15 is so broad as to include all "supplemental needs trusts," created after August 10, 1993, and would also include any other trust that named a disabled person as a beneficiary and did not cause that person to be ineligible for Medicaid.
- Page 1, lines 16 and 17, include within the definition of supplemental needs trust one that is "otherwise qualified under this chapter" The chapter does not indicate what the trust is qualified for.
- Page 2, lines 10 through 12, include the sentence "Notwithstanding any other provision of law, this chapter does not disqualify any supplemental needs trust the qualified under previous law." The underscored "the" probably was intended to be "that." Moreover, the sentence does not indicate what a trust would have qualified or failed to qualify for, or what "previous" means.

- **Page 2, line 18, refers to "sections 2 and 3 of this chapter" The sections of the proposed new chapter are not numbered. This language appeared in the bill as introduced, but the Senate removed the material that was then in the second unnumbered section of the proposed new chapter. Though I suspect the intent is to refer to the material that begins on page 1, line 22, and concludes on page 2, line 12, it is not possible to discern what was intended.**

Finally, to the extent this bill would cause additional individuals to become eligible for Medicaid, there will be a cost for those services that is not in the budget. The department supports Governor Hoeven's budget as submitted.

I'll try to answer any questions the Committee may have.

Presented by:

**Blaine L. Nordwall
Director, Economic Assistance Policy
ND Department of Human Services**



Roger
Schwinghammer
<rschwinghammer2@
yahoo.com>

03/08/2001 09:09 AM

To: cprice@state.nd.us, wdevelin@state.nd.us, pgalvin@state.nd.us,
lporter@state.nd.us, cpollert@state.nd.us, mdosch@state.nd.us,
dweiler@state.nd.us, whie@state.nd.us, fklein@state.nd.us,
rweist@state.nd.us, acleary@state.nd.us, cnlemeir@state.nd.us,
rmetcalf@state.nd.us, ssandvig@state.nd.us
cc:
Subject: SR2187

I understand that the House Human Services committee reviewed the above bill and had questions regarding the authority give to the judge to "reform" trust to comply with federal law relative to the supplemental needs trust which is now available to parents, grandparents, etc to help respond to the burdensome question they ask themselves often, what happens to my child after I am gone. The provision which caused some of you to hesitate voting in favor of the bill is a mechanism to carry out the will of the person contributing to a trust. We have heard of numerous cases where trusts were not set up properly and the will of the donor was not carried through . this provision simply gives the judge the authority to amend the trust language so that the person can receive a few extra dollars without jeopardizing the persons entitlements. The trust by federal law must be accurately stated and as attorneys become familiar with the federal law this provision should not be as necessary, but as it is persons with mental retardation are being hurt.

we have worked hard to get this bill to where it is so far and we pray you as a member of the Human Services Committee will recommend a yes vote to the House floor.

Roger Schwinghammer, Executive Director
The Arc of Cass County
and father of a child with mental retardation.

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