# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

2384

# 2003 SENATE INDUSTRY, BUSINESS AND LABOR

## SB 2384

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2384

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 02-04-03

| Tape Number | Side A | Side B | Meter # |
|---|---|---|---|
| 1 | xxxx | | 200-2222 |
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| Committee Clerk Signature | | | |

Minutes:Chairman Mutch opened the hearing on SB 2384. All Senators were present.

SB 2384 relates to the effect on medical assistance eligibility of transfers involving annuities.

**Testimony in support of SB 2384**

**Senator Brown** introduced the bill.

**Gregory Larson,** an attorney in Bismarck, appeared on his own behalf. See attached testimony.

He states that he supports the bill because it provides an alternative to the practice of giving assets away to qualify for medical assistance when in a nursing home.

**Blaine Nordwall,** Department of Human Services, supported the bill and proposed amendments.

See attached.

**There was no opposing testimony. Hearing was closed, no action taken at this time.**

**The hearing was reopened in the afternoon.** Tape 2, side A, Meter no. 1228.

Gregory Larson presented a response to testimony of Blaine Nordwall. He explained that the proposed amendments would negate the bill all together. See attached. There was discussion from the committee.

**Senator Klein moved a DO PASS. Senator Espegard seconded.**

**Roll Call Vote: 7 yes. 0 no. 0 absent.**

**Carrier: Senator Espegard**

# FISCAL NOTE

**Requested by Legislative Council**
01/28/2003

Bill/Resolution No.: SB 2384

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

| | 2001-2003 Biennium | | 2003-2005 Biennium | | 2005-2007 Biennium | |
|---|---|---|---|---|---|---|
| | General Fund | Other Funds | General Fund | Other Funds | General Fund | Other Funds |
| Revenues | | | | | | |
| Expenditures | | | | | | |
| Appropriations | | | | | | |

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

| 2001-2003 Biennium | | | 2003-2005 Biennium | | | 2005-2007 Biennium | | |
|---|---|---|---|---|---|---|---|---|
| Counties | Cities | School Districts | Counties | Cities | School Districts | Counties | Cities | School Districts |
| | | | | | | | | |

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

This bill addresses when annuities paid for in a lump sum can be considered an uncompensated assignment or transfer of assets in determining a person's eligibility for medical assistance. The fiscal impact of this bill is undeterminable.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

| | | | |
|---|---|---|---|
| **Name:** | Debra A. McDermott | **Agency:** | Human Services |
| **Phone Number:** | 328-3695 | **Date Prepared:** | 01/31/2003 |

Date: 2-4-03
Roll Call Vote #: 1

**2003 SENATE STANDING COMMITTEE ROLL CALL VOTES**
**BILL/RESOLUTION NO. 2384**

Senate IBL Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken DO PASS

Motion Made By - Klein Seconded By Espegard

| Senators | Yes | No | Senators | Yes | No |
|---|---|---|---|---|---|
| 7- Sen. Duane Mutch, Chairman | X | | Sen. Michael Every 5 | X | |
| 1- Sen. Jerry Klein, Vice Chairman | X | | Sen. Joel Heitkamp 4 | X | |
| 6- Sen. Duaine Espegard | X | | | | |
| 2- Sen. Karen Krebsbach | X | | | | |
| 3- Sen. Dave Nething | X | | | | |
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Total (Yes) 7 No 0

Absent 0

Floor Assignment Espegard

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

**REPORT OF STANDING COMMITTEE (410)**
**February 5, 2003 1:48 p.m.**

**Module No: SR-22-1748**
**Carrier: Espegard**
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2384: Industry, Business and Labor Committee (Sen. Mutch, Chairman)** recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2384 was placed on the Eleventh order on the calendar.

Date: 3-12-03

Roll Call Vote #: 1

**2003 SENATE STANDING COMMITTEE ROLL CALL VOTES**
**BILL/RESOLUTION NO. 2384**

Senate ______________________ Committee

☑ Check here for Conference Committee

Legislative Council Amendment Number ______________________

Action Taken Do Not Concur

Motion Made By Klein Seconded By Espegard

| Senators | Yes | No | Senators | Yes | No |
|---|---|---|---|---|---|
| Sen. Mutch, Chairman | | | | | |
| Sen. Klein, Vice Chairman | | | | | |
| Sen. Krebsbach | | | | | |
| Sen. Nething | | | | | |
| Sen. Heitkamp | | | | | |
| Sen. Every | | | | | |
| Sen. Espegard | | | | | |
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Total (Yes) 7 No 0

Absent Voice Carry

Floor Assignment ______________________

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

**2003 HOUSE INDUSTRY, BUSINESS AND LABOR**

**SB 2384**

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2384

House Industry, Business and Labor Committee

❑ Conference Committee

Hearing Date February 26, 2003

| Tape Number | Side A | Side B | Meter # |
|---|---|---|---|
| 1 | | x | 36.4-end |
| 2 | x | | 0.0-20.0 |
| | | | |
| Committee Clerk Signature Judith Kramer | | | |

Minutes: **Chairman Keiser** opened the hearing on SB 2384.

**Gregory C. Larson,** attorney-at-law, Bismarck, appearing on his own behalf, testified in support of SB 2384. **(See attached)** He stated that he is not opposed to amendments proposed by the Department of Human Services.

**Rep. Klein:** What is the typical percentage on the front end of an annuity?

**Larson:** With these annuities, you ask for an income stream, it's mapped out like an amortization schedule, there's no loss, like a front end load does.

**Rep. Klein:** The insurance company bases a percentage, that's where the risk comes from, the pay off percentage? If someone dies right after taking this out, is that the end of it?

**Larson:** That's true, the annuity company basically determines what they can earn and what their interest rate is, from 1-5%. This is paid out over a certain number of months, it doesn't terminate at death, but would be paid out to a designated beneficiary.

**Rep. Kapser:** So it's paid out over a certain amount of payments? Can this only be purchased if one spouse is in the nursing home and one remains in their domicile? Can it be purchased when both are still living in their own home? Can it be purchased if they are both nursing home residents?

**Larson:** At any time. The problem is that most people don't think about this until they are in a crisis situation. Nursing home insurance is a good alternative, but that isn't available if someone is already in a nursing home. It's probably not as beneficial if both are living in a nursing home.

**Rep. Tieman:** What criteria is there for beneficiaries? Can a trust be named as beneficiary?

**Larson:** No restrictions, but typically beneficiaries are spouses or children. Certainly, trusts can be named as the beneficiary. That's a good idea for minor or disabled children.

**Rep. Klein:** How many other states have this type of law?

**Larson:** Probably 46 states allow for these type of annuities.

**Rep. Ruby:** Does this ostensibly protect assets while allowing people to receive medical assistance?

**Larson:** The main import of this bill is to prevent abuse of medical assistance programs and to avoid impoverishment for a surviving spouse. Purchasing these annuities provides for people's own care and retirement needs and it's geared for their life expectancy.

**Susan Johnson-Drenth,** attorney at law, Fargo, appearing on her own behalf, testified in support of SB 2384. **(See attached)** She urged a Do Pass.

**Donna Suckut,** private citizen, Fargo, appeared on her own behalf to testify in support of SB 2384. **See attached)**

**Curt Volesky, Director of Medicaid Eligibility Unit of Department of Human Services,** appeared to testify at the hearing for SB 2384. **(See attached)** He stated that, as currently written, certain aspects of this proposed legislation do not comply with Federal Medicaid requirements and noted an incorrect reference to a federal statute. He proposed amendments to correct these flaws. Final amendments will be sent through their legal counsel and delivered to the IBL Committee no later than Thursday, February 27.

**Rep. Kasper:** How would this benefit your agency, and how does it benefit our citizens?

**Volesky**: The intent is to prohibit loopholes and to avoid impoverishment for surviving spouses.

**Rep. Kasper:** So there is a potential long term positive effect for the state?

**Volesky**: Yes, that's correct.

**Chairman Keiser** closed the hearing on SB 2384.

**Rep. Klein** moved to adopt the amendments as proposed. **Rep. Severson** seconded the motion. A voice vote carried the motion to adopt.

**Rep. Severson** moved a **Do Pass As Amended.**

**Rep. Klein** seconded the motion.

**Rep. Thorpe** suggested that an emergency clause might be necessary for SB 2384.

**Volesky** stated that at present annuities are examined on a case by case basis to determine whether they are assignable or transferable. If there were no disqualifying transfers before this law goes into effect on August 1, 2003, the Department would not cut off Medicaid eligibility. It was therefore decided that an emergency clause is not necessary.

Results of the roll call vote were: **13-0-1.**

**Rep. Klein** will carry this bill on the floor.

**HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE**
**HEARING REGARDING SENATE BILL NO. 2384**
**February 26, 2003**

CHAIRMAN KEISER: We will now open the hearing on Senate Bill 2384. Thank you very much for your patience all of you that have been sitting through the process. We're just trying to move it along as quickly as we could but we appreciate your patience. So, is there anyone here to testify in support of Senate Bill 2384?

GREGORY LARSON: Chairman Keiser and committee members - My name is Gregory C. Larson. I'm an attorney in Bismarck here and I'm appearing on my own behalf in support of this bill. I do support this bill because it's an alternative to the practice of giving away all of your assets in order to qualify for medical assistance. This bill allows a person to take their excess assets and purchase an annuity that would provide an income stream so that they will not become impoverished when the spouse is in a nursing home. If this person purchases an annuity, in order to comply with the statutes, the annuity must be irrevocable and non-assignable, meaning they cannot sell the annuity - they cannot change the ownership on the annuity - they cannot give the annuity away. It will stay with the person that originally purchased it. The annuity must provide equal monthly payments of principal and interest. This is so that a continuous stream of income can go to the person purchasing it with the intention and the idea that this will provide for that person's retirement and stop them from becoming impoverished. Additionally the annuity must return all of the principal and interest during the purchaser's lifetime, and the idea there is that a person can't - who is ninety years old couldn't buy an annuity that will pay for twenty years . . . [inaudible - cough] they're not going to use up all of the annuity payments during their lifetime. This annuity will pay and be completely paid off in a time period that is in keeping with that person's life expectancy. And, finally, there is a cap on the amount of income that can be received from the purchase of this annuity, and that cap is such that it will not exceed the minimum monthly maintenance needs allowance that is set by the state each year, and for the year 2003, that minimum monthly maintenance needs allowance is $2,267.

This bill will provide the statutory authority for what has already been the law of the land. In 1994, the Health Care Financing Administration, which oversees the medical assistance program in the United States or oversaw, at that time - it's now changed, but - They issued a letter that's referred to as Transmittal Letter 64 - In that letter, they basically laid out these same provisions - that a person buying an annuity with these characteristics - that annuity will not disqualify that - or the purchase of that annuity will not disqualify that person for receiving medical assistance. The North Dakota Department of Human Services also recognized the ability to purchase these annuities and - and - as far as we could tell, were abiding by Transmittal Letter 64 but, this past year, we had a client that had purchased such an annuity and was disqualified by the department and, because of that, we felt that we needed to get statutory authority to allow these annuities to be purchased. As we probably wouldn't have too many clients that would purchase the annuity, knowing that they would have to go litigate in order for the annuity to be upheld. We - There's also - There is the letter attached to the testimony that was the department's position regarding an annuity that was - An attorney from Fargo had requested information as to whether it - an annuity that's in compliance with the characteristics

Transcribed by Dept of Human Services 7-2-03 from tapes -

we have here - if that would be a disqualifying transfer, and that letter outlines the department's response which was it would not be considered to be a disqualifying transfer.

The typical use of this annuity in this bill will be a situation where there is a husband and wife, and one of the parties is in a nursing home. They can have exempt assets of a house and a car and some personal property. In addition, if there's a husband and wife, the noninstitutionalized spouse has a community spouse resource allowance that's set at $90,660. If that couple would have, in addition to that another hundred thousand dollars, under this bill, they can take that hundred thousand dollars and purchase an annuity that would pay an income stream to the at-home spouse. If this was allowed to be done, you'd have three good things that would happen: (1) the at-home spouse would be fairly assured they would not become impoverished - in taking care of the one that's in the nursing home, they would be able to maintain their independence. And, if the institutionalized spouse passes away, there is a reduction in the income for the at-home spouse that occurs because the at-home spouse has probably had the use of both their social security and the social security of their spouse that's in a nursing home. If the one in the nursing home passes away, the total social security is now reduced for the at-home spouse to just whichever was the higher between the two. And, having this annuity in place will help to provide for that at-home spouse if their institutionalized spouse would pass away. And, finally, this sort of an annuity would be in place - it's irrevocable - non-assignable - so it's going to stay with that generation - with that annuitant, and if the annuitant was later going to a nursing home, the annuity payments would follow that annuitant and now help pay for their nursing home care, which would be a positive, fiscal affect of this bill.

When we make suggestions to clients in this area, we're forced to tell them that - that Medicaid laws allow them to give away their assets and qualify for medical assistance. With this bill, we can also tell them that - but you don't have to do that - you can buy an annuity - keep those assets and keep the - that - those assets at that parent's generation, rather than passing it down and losing the benefit of those moneys for that older generation.

The rest of my prepared testimony references the proposed amendments by the North Dakota Department of Human Services at the Senate hearing. I've met with the department recently before this hearing and they are now basically withdrawing all of the amendments that we were objecting to - Curtis Volesky who is the director of Medicaid Eligibility of the department is here today and he's going to be testifying, and he'll reference some amendment, but he still has in mind - we don't have a major problem with those amendments - one of them is to change the reference from lump sum - making a lump sum purchase - to allow someone to make a incremental purchase, I would guess, and we don't have a problem with that. I think most of the time it'll be a lump sum purchase but their concern was that it might eliminate the possibility - or someone could get around the statute somehow by not making a lump sum purchase, so - While we think it maybe isn't totally necessary to make that change, we wouldn't be in disagreement with that. Additionally, they want to change the definition of the annuity so that it doesn't apply to people who have a qualified retirement plan. I was a little bit concerned about that amendment because I - it's hard to tell with the - the understanding of somebody reading that might think that a person who - that you have to have a qualified retirement plan in order to comply with the statute, but my understanding is that the department just wants to be - make it clear that, if a person has a qualified retirement plan, may have annuities purchased under there, that - those annuities wouldn't necessarily have to comply with this statute. So, it sort of like exempts people because they have - in the past, they've never objected to people who have qualified retirement plans that were purchased annuities.

Another change that they want is regarding the reference to the life expectancy tables. Typically, in order to determine how long these payments should run, we look at the life expectancy tables. If you go in the Administrative Code where it references life expectancy tables, there's a paragraph after the tables that say - however - if a person has a medical condition that makes them terminal, obviously these life expectancy tables don't apply. They want to take out the reference to life expectancy tables so that they can make that determination at the time. We feel the statute probably already allows for that, but wouldn't object to that - that change. And then finally, they - there's a - we make a statutory reference in the bill to - the - 42 USC - they wanted to make a technical change on that - they read it a little different than us - Again, it's just a small, little change that doesn't affect the import of the statute, so we wouldn't necessarily be objecting to that. Again, we're happy with the way the statute reads now, but, if it'll make the department happy, then we're - we wouldn't necessarily object to those. And my understanding is with their amendments that they would be in agreement that the - a person that purchased an annuity under the provisions of this bill - that they would not be disqualified from receiving medical assistance because of that purchase.

I thank you for your time here, and I'd be glad to answer any questions.

CHAIRMAN KEISER: Thank you very much. Representative Klein?

REPRESENTATIVE KLEIN: Thank you Chairman Keiser. Two questions, Mr. Larson. The typical front-end load on an annuity is about what percentage?

MR. LARSON: Well, um -- [change tapes] -- such that would provide for front-end load, but with these annuities, basically what you do is you - you take maybe a hundred thousand dollars, and you go to an annuity company and say, okay, I'd like to get an income stream - what percentage are you paying me, and they'll - they'll just map out - it's just like a - a amortization schedule will be printed out, and so there's no - there'd be no loss - which a front-end load kinda does, you know, for purposes of a - of a - another type of annuity.

CHAIRMAN KEISER: Continue.

REPRESENTATIVE KLEIN: So, basically, the insurance company would, by basing the percentage, that's where their income would come from or their risk - by the payoff percentage.

MR. LARSON: Yes, Chairman Keiser - Representative Klein. That's true. If the - The annuity company, basically, they determine - if they take a hundred thousand, how much they can earn on it, and then what their interest rate is. And there's a - there's a market difference in interest rates. Right now we've seen companies that are paying one percent, and the companies we're using are paying five percent.

CHAIRMAN KEISER: Continue.

REPRESENTATIVE KLEIN: The second question I have is - you take out this annuity, and, a month later, you die. Is there a payment to the - to the - or is that the end of it? Is that the risk you take in the insurance --

MR. LARSON: Chairman Keiser and Representative Klein. If this type of annuity is - will be paid out over a certain number of months as it doesn't terminate when you pass away, so, there'll be a beneficiary designation, yes.

REPRESENTATIVE KLEIN: Thank you.

CHAIRMAN KEISER: Further questions for you - Representative Kasper.

REPRESENTATIVE KASPER: Thank you, Mr. Chairman. Two questions, Greg. If the annuity is paid out, let's say, over forty months, and the annuitant survives beyond forty months, is that the end of it? Forty months and it's gone?

MR. LARSON: Chairman Keiser and Representative Kasper. Yes, that's the case. It's - There's a certain number of payments, you know - it - or could be a hundred fifty payments - when - if you live past that , your payments are done.

CHAIRMAN KEISER: Continue.

REPRESENTATIVE KASPER: Thank you, Mr. Chairman. Um, just for clarification, is the only time this annuity can be purchased is when one spouse is in the nursing home and one is out of the nursing home or could it be purchased when both spouses are not in the nursing home yet and wish to enter into this type of a contract?

MR. LARSON: Chairman Keiser and Representative Kasper. Yes, it could be purchased, ah, at any time. Ah, it could - it's a - The problem with this is most people don't start thinking about this until somebody's had something, a stroke or heart attack or something, and now they start thinking about the planning. And, a lot of times, it's this crisis planning that we're forced to do. But, we certainly would suggest that . . . in the case you describe, that's when nursing home insurance is also a very good alternative, and we like to suggest that. But, if the person's already had the heart attack or stroke and going in the nursing home, then - then it's not available.

CHAIRMAN KEISER: Okay, thanks.

REPRESENTATIVE KASPER: Thank you, Mr. Chairman. And then the third question. Could it be purchased if both people are in the nursing home or, the fact that they're both in the nursing home, would that disqualify them from purchasing this annuity and having the benefits of this bill?

MR. LARSON: Chairman Keiser - Representative Kasper. It probably would not be as beneficial if both were in the nursing home. It certainly could be purchased, I would assume, but I don't - it doesn't have the benefit.

CHAIRMAN KEISER: Representative Tieman.

REPRESENTATIVE TIEMAN: Thank you, Mr. Chairman. Greg, in regards to the beneficiary designation, what did - now, there's many different kinds of beneficiary designations. Is there - Is this one just for, like the surviving spouse? It would receive the proceeds if, let's say, he or she passed away after a month or two, receiving the proceeds?

MR. LARSON: Chairman Keiser - Representative Tieman. Um, it's just a normal beneficiary designation - there's no restrictions. Typically beneficiary designations with either the spouse and-or children, and I'm assuming that's - that would be the case here.

CHAIRMAN KEISER: Continue.

REPRESENTATIVE TIEMAN: Is it - Would you be able to have a - a trust - or a - another entity like that?

MR. LARSON: Chairman Keiser - Representative Tieman. Certainly that gets a little more technical planning, more typically, probably, high percentage, would just be an individual, but you certainly could name a trust as - and sometimes that's what's done. In fact, that's actually a very good question, if you have minor children. But, usually, these people are going to be older. If you have a disabled child, that - a trust would be a very good alternative for a beneficiary - contingent beneficiary.

CHAIRMAN KEISER: Representative Klein.

REPRESENTATIVE KLEIN: Thank you, Mr. Chairman. Greg, how many other states have . . . ?

MR. LARSON: Chairman Keiser - Representative Klein. Ah, there are probably forty-six states that allow for these types of annuities.

REPRESENTATIVE KLEIN: Thank you.

CHAIRMAN KEISER: Further questions from the committee - Representative Ruby.

REPRESENTATIVE RUBY: Thank you, Mr. Chairman. Um, so we're doing - we're talking a lot about how the annuity works, but, basically, what this allows is you to protect your assets, and be in a nursing home and receive medical assistance and, basically, none of your assets are being used to pay for your care. Is that - Is that what this is trying to do?

MR. LARSON: Chairman Keiser - Representative Ruby. Ah, the main import of this - ah - the bill - and why the Health Care Financing Administration came out with their transmittal letter is that they wanted to say that if somebody is using their moneys to provide for their own care, their own retirement, and, that was kind of the idea that you buy an annuity that pays you a monthly income stream, that's kinda - and if it's geared just to your life expectancy, then that's kinda - you're taking care of yourself during your lifetime. You're not passing it on down to another generation, so they wanted to make that available because the abuse in this area is where people take large sums of money and pass it down to the next generation and it's never used for the care of the - of the older generation. In this case, that's - that's the goal and intent of this bill - to allow people to use their funds to provide for their retirement, and, in this case, yes, it - it certainly would be advantageous for the noninstitutionalized spouse to purchase this annuity and guarantee an income stream for themselves so they don't become impoverished and are able to live independently.

CHAIRMAN KEISER: Further questions from the committee? Thank you very much, Greg. Very complicated stuff, and I think you did a very good job.

MR. LARSON: Thank you.

CHAIRMAN KEISER: Is there anyone else here to testify in support of Senate Bill 2384?

SUSAN JOHNSON-DRENTH: Chairman Keiser, members of the committee, my name is Susan Johnson-Drenth, and I believe my testimony was handed out also. My testimony is in support of Senate Bill 2384. I am an attorney at the Gunhus Law Firm, which has offices in Fargo and Moorhead. As part of my estate planning practice, I frequently represent clients in planning ahead for Medicaid eligibility, and asset planning for long-term care. This bill addresses the use of annuities in asset planning. Due to the current uncertainty in North Dakota regarding the use of annuities in asset planning, many attorneys do not recommend immediate annuities to clients as a planning option. When clients wish to protect assets, the most common recommendation is to give assets away outright, as allowed under the Medicaid rules. With outright gifting such as this, there is no retention of an income stream, as one would have with an annuity. If this bill passes, the option of establishing an immediate annuity in which the community spouse, they're also called noninstitutionalized spouse, receives a lifetime income stream would likely be recommended by attorneys as a useful alternative to outright gifts because there would be no imposition of a period of ineligibility for Medicaid if the annuity purchased met the requirements of this proposed bill. An immediate annuity would provide an income stream for the community spouse, would need to be irrevocable and unassignable, would not be a countable asset towards Medicaid since it has no cash value, and is a wonderful option for allowing the community spouse more income, so he or she will be less likely to go on welfare themselves someday. If the community spouse needs nursing home care while the annuity is paying out, the annuity payments would go towards the nursing home care and would reduce the Medicaid ultimately used for that community spouse.

This bill will allow the purchase of an immediate annuity, which will provide the community spouse, during his or her expected lifetime, with at least the return of the premium paid for the annuity when it is purchased. Since these types of annuities are irrevocable, it is very important that the rules regarding annuities be interpreted with continuity and with certainty because they cannot be changed in the future. This bill will provide citizens with certainty of interpretation of the law regarding the use of these annuities. What community spouse would want to purchase an irrevocable annuity - an immediate annuity - unless they knew it was going to be allowable under the Medicaid rules and unless they knew it would not cause a period of ineligibility for Medicaid? Presently, this is why so many individuals choose instead to give assets away, as allowed under the Medicaid rules. Currently, there is not certainty in the interpretation of annuities by the Department of Human Services of North Dakota. On behalf of my clients, I cannot be assured that these annuities will be allowable or not under the Medicaid rules. It is very difficult to appropriately advise clients in this climate of uncertainty. This bill is a great step towards improving the current situation regarding annuities in the Medicaid program. And I respectfully request the committee give this bill a do pass. I'd be happy to answer any questions.

CHAIRMAN KEISER: Are there any questions from the committee? Susan, and I probably should have asked Greg, was there a fiscal note from the department on this?

MS. JOHNSON-DRENTH: I'm not certain, Chairman Keiser.

CHAIRMAN KEISER: Okay, thank you very much, Susan. Is there anyone else here to testify in support of Senate Bill 2384?

DONNA SUCKUT: Chairman Keiser and committee members, my name is Donna Suckut, and I'm a resident in Fargo, and I'm appearing today on my own behalf. I'm in favor of this bill because it will allow me to receive a guaranteed amount of income to provide for my retirement years. My husband, Vernon, is in a nursing home in Fargo. In addition to our home and automobile, which are exempt, we have assets of approximately a hundred and eighty thousand. Of the hundred eighty thousand, ninety thousand is exempt. And the other ninety thousand would allow me to buy an annuity which would produce about seven hundred a month. My social security is three hundred and forty-one dollars a month. And when you take Medicare payments out of fifty-eight dollars and Blue Cross/Blue Shield, I have a hundred and eighty-nine dollars left. Vernon's social security is eight hundred and seventeen dollars a month. And when you take the Medicaid - or Medicare - and Blue Cross/Blue Shield from that, you got six hundred and forty-three dollars a month, which equals eight hundred and thirty-two dollars, I would guess. And I have miscellaneous income of two hundred and forty dollars a month. So that, plus the eight hundred and thirty-two, and the seven hundred dollar annuity would equal one thousand seven hundred and seventy-two dollars to live on. If Vernon dies, I would lose the hundred and eighty-nine dollars, which would equal one thousand five hundred eighty-three dollars, that's with the annuity. Well, my husband is seventy-nine, and I am sixty-nine. So, my life expectancy is about sixteen years. So I need an additional income of seven hundred dollars so that I can live independently and not go on government assistance.

I'm afraid that if I spend the ninety thousand on my husband's care instead of purchasing the annuity, I would become impoverished at some point during the remainder of my life and would not be able to live independently. I would like to be able to provide for my husband's care in the nursing home, but I know this wouldn't leave me with enough income. So if I should go into the nursing home, the income that I would receive from the annuity, I would be able to pay for that care.

So I respectfully request that this bill be passed.

CHAIRMAN KEISER: Thank you very much, Donna. I want to tell you that you're one of the best testimonials we've ever had here --

MS. SUCKUT: Well, thank you.

CHAIRMAN KEISER: I know you're probably nervous, but --

MS. SUCKUT: I think I'm out of my territory.

CHAIRMAN KEISER: You did just great. Are there any questions? Representative Klein?

REPRESENTATIVE KLEIN: Again, let me just say, you put it all together for me, but I do have one question. Your social security is three hundred and forty-one and your husband's is eight hundred and seventeen?

MS. SUCKUT: That's right.

REPRESENTATIVE KLEIN: Don't you get half - or are you - are you operating on your own social security instead of half of his?

MS. SUCKUT: Well, this is half of his. The three hundred and forty-one is half of his because I never worked outside of the home in my life. So, the combination of the two, I guess, but then when you deduct everything, it equals the eight hundred and thirty-two.

REPRESENTATIVE KLEIN: Thank you.

CHAIRMAN KEISER: Is there any further questions for Donna? All right, thank you for coming in. As Representative Klein said, he did a better job than I did - you put it all together for us, so.

MS. SUCKUT: Thank you.

CHAIRMAN KEISER: Thanks a lot. Is there anyone else here to testify in support of Senate Bill 2384? Seeing none, is there anyone here to testify in opposition to Senate Bill 2384?

CURTIS VOLESKY: I'm not really in opposition, but neutral.

CHAIRMAN KEISER: Please - Come up to the podium. Now, let me explain something. This committee has a nice tradition that, after you're done, we're going to determine whether it's neutral or not. And if it's not neutral, you pay twenty bucks. Does that sound okay?

CURTIS VOLESKY: Sounds fair.

CHAIRMAN KEISER: Okay. Go ahead.

CURTIS VOLESKY: Good morning. Chairman Keiser and members of the House Industry, Business, and Labor Committee, my name is Curtis Volesky. I am director of the Medicaid Eligibility Unit of the Department of Human Services. We are responsible for implementing Medicaid eligibility policy.

There's an attachment to this testimony that Mr. Larson referred to. It identifies concerns about the way this bill doesn't comply with federal Medicaid requirements, it notes an incorrect reference to a federal statute, and offers possible solutions to those concerns.

The suggested solutions to these concerns would change the definition of annuity to remove the requirement that it be purchased in a lump sum of money. If the requirement for a lump sum purchase were to remain in the bill, anyone who pays for an annuity, other than in a lump sum, could defeat the law. The change of the definition would also exclude annuities that are part of an employee benefit plan or a retirement plan.

The next objection is to remove the requirement that life expectancy tables be used in all cases. This would allow a showing that a known medical condition affects the life of - the life expectancy of an applicant.

And lastly would be to correct the federal statutory reference from 42 USC 1396r to 42 USC 1396r-5. In this statute, subsection r-5 is not a subpart of subsection r. "R" deals with nursing homes and nursing home surveys. R-5 actually deals with the income levels for the community spouse. And if this committee wishes to consider any amendments, staff at the department are available to consult, and I will try and answer any questions that you have.

CHAIRMAN KEISER: Curtis, unfortunately, I think you passed the test. Are there any questions for Curtis? Representative Kasper.

REPRESENTATIVE KASPER: Thank you, Mr. Chairman. Curtis, if this bill passes as you suggest with your amendm nts, how does it benefit your department and the job that you have to do, and how does it b it the people who are - for their ability to be able to care for themselves until they have to us ate funds?

MR. VOLESKY: Chairm n Keiser - Representative Kasper. I guess the - the intent - we see a lot of people today that, um, in trying to do their planning, they realize that they may need nursing care services. Nursing care services are very expensive. So, they will transfer their property away to other people, and then come in and apply for Medicaid. If they're beyond the period of ineligibility, Medicaid picks up the full tab, and they could have had the resources available to help pay for that care. The spousal impoverishment prevention provision, um, the intent of those were to allow people to not become impoverished when one spouse needs nursing care. I guess we see this has allowed people to retain their assets, to meet their needs, without impoverishing themselves or giving it away, and, like was indicated earlier, if that person eventually then would need to go into the nursing home, they would have this source of income to help offset their cost of care.

CHAIRMAN KEISER: Further questions of Curtis?

REPRESENTATIVE KASPER: . . . Curtis, then, there is a potential long-term positive effect to the state of North Dakota? In less dollars having to be spent for the care of the people because they'll have an income stream which could help offset as opposed to them giving away the assets and the state has nothing with which to help cover costs, is that correct?

MR. VOLESKY: Yes.

CHAIRMAN KEISER: Further questions of Curtis? Thank you very much, Curtis. You did suggest that you would draft - your department's attorney would draft the amendments for - that would apply here? And, Greg, you have no problems with the amendments as proposed?

MR. LARSON: Ah, no, Chairman Keiser.

CHAIRMAN KEISER: Okay. What we would ask, Curtis, is if you could get those amendments drafted as - at your earliest convenience - by noon would be fine. But, what we would ask is that, um, run those amendments by Greg prior to submitting this to us. Greg, if you could let them know how to get in contact with you so that we could be sure. The committee is going to take action on the bill with the proposed amendments and not seeing the final form, but we're going to assume that they're going to come in okay for both parties. And we understand the concept, I think, so - I'm not uncomfortable as the committee with proceeding. Thank you very much, Curtis. Are there any other - Is anyone else here to testify on Senate Bill 2384? Seeing none, I'm going to close the hearing on Senate Bill 2384. What are the wishes of the committee? Representative Klein.

REPRESENTATIVE KLEIN: I move the amendments.

REPRESENTATIVE SEVERSON: Second.

CHAIRMAN KEISER: There's a motion to adopt the proposed amendments - motion made by Representative Klein, seconded by Representative Severson. Further discussion on the amendments? Seeing none, we'll take a voice vote for the adoption of the amendments for Senate Bill 2384. All those in favor, indicate by saying aye.

COMMITTEE: Aye.

CHAIRMAN KEISER: Opposed, nay. The amendments are adopted and are on the bill. What are the wishes of the committee?

REPRESENTATIVE SEVERSON: Do pass, as amended.

REPRESENTATIVE KLEIN: Second.

CHAIRMAN KEISER: We have a motion for a do pass, as amended. Motion made by Representative Severson, seconded by Representative Klein. Discussion from the committee. The committee members, I'll just say, of many of the bills we've seen, this is one of the best bills we've seen this session. Donna, it's all your fault. Don't think for a moment it's not. You know, people have worked really hard in our state to create some degree of resources that can support them. And, when we have a system that requires you to give away everything just so you can have coverage, it doesn't make a lot of sense, and this is a pretty terrific piece of legislation. Representative Thorpe.

REPRESENTATIVE THORPE: Thank you, Chairman Keiser, and the committee. I was just wondering if - is there any - would there be any need for emergency clause on it?

CHAIRMAN KEISER: Well, actually, that's a very good question. It had to go back to the Senate and get a two-thirds vote.

REPRESENTATIVE THORPE: It'd have to go back anyway, with the amendments, wouldn't it, Chairman Keiser?

CHAIRMAN KEISER: Well, no, the chairman - the chairman can - it will be going back, so. Is there an advantage? What's the department doing right now, Curtis? Are you imposing the rule or recognizing the intent of the legislature and you're going to allow these to proceed?

MR. VOLESKY: Chairman Keiser, right now what we are doing is we are looking at all annuities individually to see are they not assignable or transferable, um, depending on how they set them up were they - is it a disqualifying transfer. There's really no set rule on these kinds of annuities - are looked at in certain ways.

CHAIRMAN KEISER: I understand that, but if a client walks into someone today and says I want to do this, are you going to cut their Medicaid?

MR. VOLESKY: I guess what we would do today is - is we would to see - make a disqualifying transfer by giving away. They may not make a disqualifying transfer if they are going to receive all of it back within ~~their~~ lifetime of that person.

CHAIRMAN KEISER: I'm not sure I know how to answer that question, but I don't understand the answer, so let me try again. No disqualifying transfers - none of that goes on. Donna goes in today and wants to open one of these accounts today, before this law becomes effective on August 1st. What will you - What will the department do? There are no disqualifying transfers. She just wants to open this annuity and have a payment. She meets all the conditions.

MR. VOLESKY: If there's no disqualifying transfer, we would say it's not available as an asset. We would allow it, and we just count the income that's available from it.

CHAIRMAN KEISER: Okay. So, perhaps we don't need the emergency clause. If the department understands our intent, and that certainly is our intent, and it is part of this record, so, if you would communicate that as well. I think we can get it covered. Further discussion on the motion as amended? Seeing none, I will ask the clerk to take the roll for a do pass as amended on Senate Bill 2384.

CLERK: Chairman Keiser?

CHAIRMAN KEISER: Yes.

CLERK: Vice chair Severson?

VICE CHAIRMAN SEVERSON: Yes.

CLERK: Representative Dosch?

REPESENTATIVE DOSCH: Yes.

CLERK.: Representative Froseth?

REPRESENTATIVE FROSETH: Yes.

CLERK: Representative Johnson?

REPRESENTATIVE JOHNSON: Yes.

CLERK: Representative Kasper?

REPRESENTATIVE KASPER: Yes.

CLERK: Representative Klein?

REPRESENTATIVE KLEIN: Yes.

CLERK: Representative Nottestad?

REPRESENTATIVE NOTTESTAD: Yes.

CLERK: Representative Ruby?

REPRESENTATIVE RUBY: Yes.

CLERK: Representative Tieman?

REPRESENTATIVE TIEMAN: Yes.

CLERK: Representative Boe?

REPRESENTATIVE BOE: Yes.

CLERK: Representaive Ekstrom?

REPRESENTATIVE EKSTROM: Yes.

CLERK: Representative Thorpe?

REPRESENTATIVE THORPE: Yes.

CLERK: Representative Zaiser?

CHAIRMAN KEISER: The motion for a do pass as amended carries and um we'll be taking up - for - and with those amendments hopefully the Senate will actually not even have to take. . .

REPRESENTATIVE KLEIN: (inaudible)

CHAIRMAN KEISER: If you would like to, that would be great. Representative Klein will carry 2384. Committee members, we do have some time. Thank you very much for coming.

38363.0101
Title.0200

Adopted by the Industry, Business and Labor Committee
February 27, 2003

VK 2/27/03

HOUSE AMENDMENTS TO SENATE BILL NO. 2384 IBL 2-27-03

Page 1, line 8, replace "annuity" with ""annuity""

Page 1, line 9, remove "a lump sum of"

Page 1, line 11, after the period insert "The term does not mean an employee benefit that qualifies for favorable tax treatment under the Internal Revenue Code or a plan described in the Internal Revenue Code as a retirement plan under which contributions must end and withdrawals begin by age seventy and one-half."

HOUSE AMENDMENTS TO SB 2384 IBL 2-27-03

Page 2, line 2, remove "life expectancy tables published by"

Page 2, line 7, replace "1396r" with "1396r-5"

Renumber accordingly

Date: 2/26/03
Roll Call Vote #: 1

**2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES**
**BILL/RESOLUTION NO. 2384**

House **Industry, Business & Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass As Amended

Motion Made By Klein Seconded By Severson

| Representatives | Yes | No | Representatives | Yes | No |
|---|---|---|---|---|---|
| Chairman Keiser | ✓ | | Rep.Boe | ✓ | |
| Rep.Severson, Vice-Chair | ✓ | | Rep.Ekstrom | ✓ | |
| Rep.Dosch | ✓ | | Rep.Thorpe | ✓ | |
| Rep. Froseth | ✓ | | Rep. Zaiser | | |
| Rep. Johnson | ✓ | | | | |
| Rep.Kasper | ✓ | | | | |
| Rep. Klein | ✓ | | | | |
| Rep. Nottlestad | ✓ | | | | |
| Rep. Ruby | ✓ | | | | |
| Rep.Tieman | ✓ | | | | |
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Total (Yes) 13 No 0

Absent 1

Floor Assignment Klein

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

REPORT OF STANDING COMMITTEE (410)
February 27, 2003 4:12 p.m.

Module No: HR-35-3632
Carrier: M. Klein
Insert LC: 38383.0101 Title: .0200

**REPORT OF STANDING COMMITTEE**

**SB 2384: Industry, Business and Labor Committee (Rep. Keiser, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2384 was placed on the Sixth order on the calendar.

Page 1, line 8, replace "annuity" with ""annuity""

Page 1, line 9, remove "a lump sum of"

Page 1, line 11, after the period insert "The term does not mean an employee benefit that qualifies for favorable tax treatment under the Internal Revenue Code or a plan described in the Internal Revenue Code as a retirement plan under which contributions must end and withdrawals begin by age seventy and one-half."

Page 2, line 2, remove "life expectancy tables published by"

Page 2, line 7, replace "1396r" with "1396r-5"

Renumber accordingly

2003 SENATE INDUSTRY, BUSINESS AND LABOR

CONFERENCE COMMITTEE

SB 2384

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2384

**Senate Industry, Business and Labor Committee**

**☑ Conference Committee**

**Hearing Date 03-31-03**

| Tape Number | Side A | Side B | Meter # |
|---|---|---|---|
| 1 | xxx | | 0-738 |
| | | | |
| | | | |
| Committee Clerk Signature Lisa VanBerkom | | | |

Minutes:Chairman Espegard opened the conference committee on SB 2384. Conference committee is comprised of Sen. Espegard, Sen. Klein, and Sen. Every. Also Rep. M.Klein, Rep. Thorpe, and Rep. Johnson.

**Senator Espergard:** I don't have a problem with these amendments at all. I understood that the federal law says you have to have those expectancy tables in because that is what the amount of the annuity can be. What was the reason for taking that out?

**Rep. Klein:** I believe those amendments were from the attorneys.

**Senator Espegard:** The annuity must be purchased depending on how many years the spouse is expected to live. Therefore, the life expectancy table must be in there. If you have 20 years to live, you can buy a lot more annuity.

**Senator Klein:** The amendments were supposed to correct the flaws. Current legislation does not comply with federal requirements.

**Senator Espegard:** If Bolesky doesn't have a problem with it, I don't have a problem with it.

**Senator Klein moved that the Senate accede to the House amendments.**

**Rep. M. Klein seconded.**

**Roll Call Vote: 6 yes. 0 no. 0 absent.**

Date: 03-31-03
Roll Call Vote #: ~~Click here to type Roll Call Vote #~~ 1

**2003 SENATE STANDING COMMITTEE ROLL CALL VOTES**
**BILL/RESOLUTION NO. 2384**

Senate Industry Business and Labor Committee

[x] Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Ascede Senate

Motion Made By Sen. Klein Seconded By Rep. Klein

| Senators | Yes | No | Senators | Yes | No |
|---|---|---|---|---|---|
| Senator Espegard | X | | | | |
| Rep. Klein | X | | | | |
| Rep. Thorpe | X | | | | |
| Senator Klein | X | | | | |
| Senator Every | X | | | | |
| Rep. Johnson | X | | | | |
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Total (Yes) 6 No 0

Absent 0

Floor Assignment

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

Insert LC: .

## REPORT OF CONFERENCE COMMITTEE

**SB 2384:** Your conference committee (Sens. Espegard, Klein, Every and Reps. M. Klein, N. Johnson, Thorpe) recommends that the **SENATE ACCEDE** to the House amendments on SJ pages 659-660 and place SB 2384 on the Seventh order.

SB 2384 was placed on the Seventh order of business on the calendar.

2003 TESTIMONY

SB 2384

Support

February 4, 2003

SENATE INDUSTRY, BUSINESS AND LABOR COMMITTEE
SB #2384

CHAIRMAN MUTCH AND COMMITTEE MEMBERS:

My name is [redacted] am an attorney here in Bismarck appearing here today on my own behalf.

I support this bill because it provides an alternative to the practice of giving assets away to qualify for medical assistance when in a nursing home.

The bill provides that if a person purchases an annuity, it will not be a transfer that disqualifies a person from receiving medical assistance if the annuity:

1. is irrevocable and non-assignable;
2. provides equal monthly payments of principal and interest;
3. will return the full principal and interest within the purchaser's lifetime; and
4. has monthly payments that do not exceed the Minimum Monthly Maintenance Needs Allowance (MMMNA) which is $2,267 for 2003.

This bill would provide statutory authority for what has generally been the law of the land in the United States since 1994. In 1994, the Health Care Financing Administration (HCFA) issued transmittal letter 64 which stated that if an annuity was purchased that was consistent with the characteristics mentioned above, the purchase would not be considered to be a disqualifying transfer for purposes of qualifying for medical assistance. HCFA had oversight federally regarding medical assistance and most states follow the guidelines of transmittal letter 64. The North Dakota Department of Human Services (NDDHS) has also by letter to legal counsel approved the use of such an annuity in medical assistance planning that was consistent with transmittal letter 64. (See attached letter.)

However, recently DHS has denied eligibility for medical assistance when this type of annuity was involved. Thus, the need arises for statutory clarification of this area for the general public.

The typical use of this annuity purchase occurs where one spouse is in a nursing home and the other spouse lives at home but has assets in excess of the spousal resource allowance of $90,660. If, for example, that excess amount was $100,000, the at home spouse could purchase an annuity that complied with this bill that would pay her a monthly income for her life expectancy. This would do two very good things:

1. the at-home spouse would likely have enough income so that she would not become impoverished and go on welfare; and

2. If the at-home spouse went into a nursing home, the annuity income would be available to pay for the nursing home cost.

If the purchase of this $100,000 annuity was not allowed by NDDHS, then the only other planning available would be to give the $100,000 away. If this was done, the use of the $100,000 to pay expenses would be lost to this husband and wife and would likely pass to the next generation escaping any responsibility for the care of the parents.

Finally, it should be noted that this bill provides a cap on the amount of income that can be generated from the annuity at the level of the MMMNA established by the NDDHS in medical assistance cases, which is $2,267/month in 2003.

I respectfully request that the committee give this bill a do pass. I thank you for your time and consideration. I would be glad to answer any questions that you may have.

**NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES**

John Hoeven, Governor
Carol K. Olson, Executive Director

Economic Assistance Policy

(701) 328-2332
Fax (701) 328-1060
Toll Free 1-800-755-2716

March 14, 2002

Steven K. Aakre
Serkland Law Firm
P.O. Box 6017
Fargo, ND 58108-6017

I'm writing in response to your letter, dated February 27, 2002, with which you submitted a proposed single premium immediate annuity and asked whether it would be considered a disqualifying transfer.

The information submitted shows that the annuity would be purchased for approximately $140,700 and would immediately begin paying a monthly payment of $1100. The annuity is term certain for 15 years and would pay out all benefits within the annuitants anticipated life expectancy.

We would not ordinarily find the purchase of such an annuity to be a disqualifying transfer for Medicaid eligibility purposes. Rather, we regard such a transaction as an exchange of one type of asset (cash) for another (the annuity). If the value of the annuity is consistent with the amount paid, there is no disqualifying transfer.

Under current regulations, if this couple applied for Medicaid we would consider the annuity a contractual right to receive money payments per N.D.A.C. 75-02-02.1-30. The countable value of contractual rights to receive money payments is described in subsection 5 of N.D.A.C. 75-02-02.1-32.

I hope this information is helpful to you.

Sincerely,

Curtis Volesky
Director, Medicaid Eligibility

| Post-it® Fax Note 7671 | Date 3-14-02 pages 1 |
|---|---|
| To Steven Aakre | From Curtis Volesky |
| Co./Dept. Serkland Law Firm | Co. Medicaid |
| Phone # 232-8957 | Phone # 328-2110 |
| Fax # 237-4049 | Fax # 328-1544 |

TESTIMONY BEFORE THE
SENATE INDUSTRY, BUSINESS, AND LABOR COMMITTEE
REGARDING SENATE BILL NO. 2384
February 4, 2003

Blaine Nordwall

Support this bill

Chairman Mutch and members of the Senate Industry, Business, and Labor Committee, my name is [redacted] I am Director of Economic Assistance Policy for the Department of Human Services. That division is responsible for implementing Medicaid eligibility policy. I'm here to [redacted] and to suggest some amendments to conform the bill to federal requirements.

Senate Bill 2384 would discourage the purchase of so-called "Medicaid friendly" annuities as a means of attempting to qualify for Medicaid-paid long-term care.

Medicaid sets limits on the amount of assets and income an eligible individual can have.

- For a single individual, the asset limit is $3,000 in countable assets and $3,000 in a pre-need funeral set-aside. If the individual is in a nursing facility, all but $50 in monthly income must be contributed to the cost of care. An individual receiving home and community based care may retain income of $550 per month.

- For a married individual requiring long-term care, the spouse who lives in the community may have up to an additional $90,660 in assets, and all of the community spouse's income. In addition, the community spouse may have as much of the institutionalized spouse's income as is necessary to provide the community spouse with a total monthly income of $2,267.

Annuities have become the latest tool used by couples who want to avoid the asset limits. The technique is simple. Assets that exceed asset limits are used to purchase an annuity. With a "Medicaid friendly" annuity, the owner has no right to assign the annuity, or to otherwise act as the annuity's owner. The Medicaid application then claims that the couple has no available assets, and that any income from the annuity now belongs to the community spouse. If not prevented, this allows anyone, with any amount of funds, to become immediately eligible for long-term care coverage at the expense of the taxpayers.

Senate Bill 2384, as introduced, requires that annuities be treated as disqualifying transfers unless certain conditions are met. We can treat these annuities as disqualifying transfers without additional statutory authority. In addition, some of the conditions need to be tweaked to conform to federal Medicaid requirements. I have prepared suggested amendments, both in the usual form (attachment 1) and in a form that is easier to read (attachment 2).

The suggested amendments change the definition of "annuity" to remove the requirement that it be purchased in a "lump sum." If that were to remain in the bill, someone who pays for an annuity in other than a lump sum could defeat the law. Also, federal instructions say we must consider annuities purchased for retirement purposes as income and not as an asset. The suggested amendments exclude those retirement plans from the definition.

The suggested amendments create a definition of "community spouse." That term currently has no statutory definition in North Dakota.

The suggested amendments would void the "non-assignment" clause in the annuity. This would allow the annuity buyer to easily sell the annuity and realize funds to provide care. This should greatly reduce the number of "Medicaid friendly" policies sold by misleading marketing. Voiding the anti-assignment provision, rather than treating the transaction as a disqualifying transfer, provides annuity buyers with a way out.

I'd be happy to try and answer any questions the committee may have.

ATTACHMENT 1

Prepared by the North Dakota
Department of Human Services
February 4, 2003

**PROPOSED AMENDMENTS TO SENATE BILL NO. 2384**

Page 1, line 8, replace ", annuity" with ": a. 'Annuity'"

Page 1, line 9, remove "a lump sum of"

Page 1, line 11, after "future" insert ", but does not mean an employee benefit that qualifies for favorable tax treatment under the Internal Revenue Code or a plan described in the Internal Revenue Code as a retirement plan, provided contributions must end and withdrawals begin by age seventy and one-half; and"

Page 1, after line 11, insert:

"b. 'Community spouse' means the spouse of an individual described in 42 U.S.C. 1396a(a)(10)(A)(ii)(VI) or 42 U.S.C. 1396r-5 (h)(1)."

Page 1, line 12, replace "The purchase of an annuity, an instrument purporting to be an annuity, or any other" with "Any provision of an annuity contract that is intended to prevent an annuity purchaser who is an applicant or spouse of an applicant from assigning the purchaser's interest in the annuity, or from otherwise exercising the usual and customary rights of an annuity owner, is void as against public policy unless:"

Page 1, remove lines 13 through 16

Page 1, line 17, remove "The annuity is irrevocable and cannot be assigned to another person."

Page 1, line 18, remove "b."

Page 1, line 20, replace "c." with "b."

Page 2, line 1, replace "d." with "c."

Page 2, line 2, remove "life expectancy tables published by"

Page 2, line 4, replace "e." with "d.", after "The" insert "combined", and after "annuity" insert "and any other source of income available to a community spouse"

Page 2, line 7, replace "1396r" with "1396r-5"

Renumber accordingly

Prepared by the North Dakota
Department of Human Services
February 4, 2003

**PROPOSED AMENDMENTS TO SENATE BILL NO. 2384**

Page 1, replace lines 8 through 24 with:

"1. For purposes of this section:

a. 'Annuity' means a policy, certificate, contract, or other arrangement between two or more parties whereby one party pays money or other valuable consideration to the other party in return for the right to receive payments in the future, but does not mean an employee benefit that qualifies for favorable tax treatment under the Internal Revenue Code or a plan described in the Internal Revenue Code as a retirement plan, provided contributions must end and withdrawals begin by age seventy and one-half; and

b. 'Community spouse' means the spouse of an individual described in 42 U.S.C. 1396a(a)(10)(A)(ii)(VI) or 42 U.S.C. 1396r-5(h)(1).

2. Any provision of an annuity contract that is intended to prevent an annuity purchaser who is an applicant or spouse of an applicant from assigning the purchaser's interest in the annuity, or from otherwise exercising the usual and customary rights of an annuity owner, is void as against public policy unless:

a. The annuity is purchased from an insurance company or other commercial company that sells annuities as part of the normal course of business.

b. The annuity provides substantially equal monthly payments of principal and interest and does not have a balloon or deferred payment of principal or interest. Payments will be considered substantially equal if the total annual payment in any year varies by five percent or less from the payment in the previous year.

c. The annuity will return the full principal and interest within the purchaser's life expectancy as determined by the department of human services.

d. The combined monthly payments from the annuity and any other source of income available to a community spouse, unless specifically ordered otherwise by a court of competent jurisdiction, do not exceed the maximum monthly income amount allowed for a community spouse as determined by the department pursuant to 42 U.S.C. 1396r-5."

Page 2, removes lines 1 through 7

Renumber accordingly

RESPONSE TO TESTIMONY OF BLAINE NORDWALL
SENATE INDUSTRY – BUSINESS AND LABOR COMMITTEE
SB: 2384

CHAIRMAN MUTCH AND MEMBERS OF THE SENATE INDUSTRY – BUSINESS AND LABOR COMMITTEE:

My name is Gregory C. Larson. I testified regarding this bill at the hearing this morning on February 4, 2003.

I was not aware before the hearing of the amendments that were proposed by Blaine Nordwall regarding this bill. After the testimony, he handed me the proposed amendments to Senate Bill 2384. These amendments would have the affect of eliminating the benefit of this bill and completely negating its effect. I strongly oppose these amendments to the bill. The Amendments, as they were proposed, were clearly an attempt of subterfuge to confuse the committee and this bill's sponsors.

I would be glad to specifically address each of the amendments proposed before the committee votes on this bill. I continue to strongly urge the committee to pass the bill as originally proposed without the amendments.

Attachment # 1

February 26, 2003

HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE
SB #2384

CHAIRMAN KEISER AND COMMITTEE MEMBERS:

My name is Gregory C. Larson. I am an attorney here in Bismarck appearing here today on my own behalf.

I support this bill because it provides an alternative to the practice of giving assets away to qualify for medical assistance when in a nursing home.

The bill provides that if a person purchases an annuity, it will not be a transfer that disqualifies a person from receiving medical assistance if the annuity:

1. is irrevocable and non-assignable;
2. provides equal monthly payments of principal and interest;
3. will return the full principal and interest within the purchaser's lifetime; and
4. has monthly payments that do not exceed the Minimum Monthly Maintenance Needs Allowance (MMMNA) which is $2,267 for 2003.

This bill would provide statutory authority for what has generally been the law of the land in the United States since 1994. In 1994, the Health Care Financing Administration (HCFA) issued transmittal letter 64 which stated that if an annuity was purchased that was consistent with the characteristics mentioned above, the purchase would not be considered to be a disqualifying transfer for purposes of qualifying for medical assistance. HCFA had oversight federally regarding medical assistance and most states follow the guidelines of transmittal letter 64. The North Dakota Department of Human Services (NDDHS) has also by letter to legal counsel approved the use of such an annuity in medical assistance planning that was consistent with transmittal letter 64. (See attached letter.)

However, recently DHS has denied eligibility for medical assistance when this type of annuity was involved. Thus, the need arises for statutory clarification of this area for the general public.

The typical use of this annuity purchase occurs where one spouse is in a nursing home and the other spouse lives at home but has assets in excess of the spousal resource allowance of $90,660. If, for example, that excess amount was $100,000, the at home spouse could purchase an annuity that complied with this bill that would pay her a monthly income for her life expectancy. This would do three very good things:

1. the at-home spouse would likely have enough income so that she would not become impoverished and go on welfare while the institutionalized spouse is still living;

2. If the institutionalized spouse passes away, then the at-home spouse will lose the institutionalized spouse's social security, and thus, have additional need for this guaranteed annuity income; and

3. If the at-home spouse went into a nursing home, the annuity income would be available to pay for the nursing home cost.

If the purchase of this $100,000 annuity was not allowed by NDDHS, then the only other planning available would be to give the $100,000 away. If this was done, the use of the $100,000 to pay expenses would be lost to this husband and wife and would likely pass to the next generation escaping any responsibility for the care of the parents.

Finally, it should be noted that this bill provides a cap on the amount of income that can be generated from the annuity at the level of the MMMNA established by the NDDHS in medical assistance cases, which is $2,267/month in 2003.

Proposed Amendments by the North Dakota Department of Human Services.

At the Senate Industry, Business and Labor Committee hearing on this bill, the Department submitted testimony and amendments that would negate the intended purpose and benefit of this bill. Blaine Nordwall, Director of Economic Assistance policy for the Department of Human Services, testified that "annuities have become the latest tool used by couples who want to avoid the asset limits". As stated previously, this use of annuities has been the law of the land since 1994 and has been used nationwide since that time.

These suggested amendments by the Department are not needed. The bill, as it is, is very straight forward and clear in its intended application and use. Mr. Nordwall's testimony was that "Federal instructions say we must consider annuities purchased for retirement purposes as income and not as an asset". The very nature of the proposed bill satisfies this concern because transmittal letter 64 provided that if its guidelines were followed regarding a full return of principal and interest within the purchaser's life expectancy that the annuity would be considered to be for retirement purposes and not as a mechanism for transferring wealth to the next generation.

The suggested amendments voiding the "non-assignment" clause would completely eliminate the benefit and protection of this bill. If the annuity could be assigned, then it could be sold and produce cash that would cause the Medicaid applicant to exceed asset limits and be disqualified for medical assistance. Also, if the annuity was assignable, the annuitant could assign all of the benefits to the next generation and eliminate the guarantee that the money spent on the annuity would be used for the benefit of the parents' generation.

I respectfully request that the Committee give this bill a do pass. I thank you for your time and consideration. I would be glad to answer any questions that you may have.

Attachment # 2

TESTIMONY OF SUSAN JOHNSON-DRENTH

REGARDING SENATE BILL 2384

Chairperson and Members of the Committee: My name is Susan Johnson-Drenth. I am an attorney with the Gunhus Law Firm, which has offices in Fargo and Moorhead. As part of my estate planning practice, I frequently represent clients in planning ahead for Medicaid eligibility, and asset planning for long-term care.

This bill addresses the use of annuities in asset planning.

- Due to the current uncertainty in North Dakota regarding the use of annuities in asset planning, many attorneys do not recommend immediate annuities to clients as a planning option.
- When clients wish to protect assets, the most common recommendation is to give assets away outright, as allowed by Medicaid rules. With outright gifting such as this, there is no retention of an income stream, as one would have with an annuity.
- If this bill passes, the option of establishing an immediate annuity, in which the community spouse (or non-institutionalized spouse) receives a lifetime income stream, would likely be recommended by attorneys as a useful alternative to outright gifts, because there would be no imposition of a period of ineligibility for Medicaid if the annuity purchased met the requirements of this proposed bill.
- An immediate annuity:
    - would provide an income stream for the community spouse;
    - would need to be irrevocable and unassignable;
    - would not be a countable asset towards Medicaid, since it has no cash value; and,

- is a wonderful option for allowing the community spouse more income, so he or she will be less likely to go on welfare themselves someday.

- If the community spouse needs nursing home care while the annuity is paying out, the annuity payments will go towards his or her nursing home costs and would reduce the Medicaid ultimately used.
- This bill will allow the purchase of an immediate annuity, which will provide the community spouse, during his or her expected lifetime, with at least the return of the premium paid for the annuity when it is purchased.
- Since these types of annuities are irrevocable, it is very important that the rules regarding annuities be interpreted with continuity and certainty, because these annuities cannot be changed in the future. This bill will provide citizens with certainty of interpretation of the law regarding the use of these annuities.
- What community spouse would want to purchase an irrevocable immediate annuity unless they knew it was going to be allowable under the Medicaid rules and unless they knew that it would not cause a period of ineligibility for Medicaid? Presently, this is why so many individuals choose instead to give assets away, as allowed under the Medicaid rules.
- Currently, there is not certainty in interpretation of these annuities by the Department of Human Services. On behalf of my clients, I cannot be assured that these annuities will be allowable or not under the Medicaid rules. It is very difficult to appropriately advise clients in this atmosphere of uncertainty. This bill is a great step towards improving the current situation regarding annuities in the Medicaid program.

I respectfully request the committee give this bill a do pass.

Thank you for your time and consideration. If there are any questions, I would be happy to address them.

February 26, 2003

HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE
SB #2384

CHAIRMAN KEISER AND COMMITTEE MEMBERS:

My name is Donna Suckut. I am a resident of Fargo, North Dakota and am appearing here today on my own behalf.

I am in favor of this bill because it will allow me to receive a guaranteed amount of income to provide for my retirement years.

My husband, Vernon, is in a nursing home in Fargo. In addition to our home and automobile, which are exempt, we have assets of approximately $180,000.

I am allowed to exempt $90,660 of the $180,000. This leaves approximately $90,000. This bill would allow me to purchase an annuity for $90,000 that would pay me a monthly income of approximately $700. My social security is $341. My Medicare payment is $58, and my Blue Cross/Blue Shield is $93, leaving me a net amount of $189. My husband's social security is $817, less his Medicare and his Blue Cross/Blue Shield premiums, leaving him a net of $643, for a total of $832. We have other miscellaneous income of approximately $240 per month.

Therefore, if I was allowed to purchase an annuity that would provide $700 a month, my total monthly income while my husband is living would be $1,772. This is less than the minimum needs allowance of $2,267. If my husband was to pass away, I would receive the larger of the two social securities, and my total monthly income would then be $1,583 per month. My husband is 79 years old and I am 69 years old. My life expectancy is approximately 16 years. I will need the income of $700 per month from this annuity so that I can live independently without government assistance.

I am afraid that if I have to spend the $90,000 on my husband's care instead of purchase the annuity, then I will become impoverished at some point during the remainder of my life and will not be able to live independently.

I would like to be able to pay for all of my husband's care in the nursing home, but I know this will not leave me with enough income to live. If I should go into a nursing home, the income that I receive from an annuity would be available to help pay for my care.

I respectfully request that this bill be passed. I would be glad to answer any questions.

TESTIMONY BEFORE THE
HOUSE INDUSTRY, BUSINESS, AND LABOR COMMITTEE
REGARDING SENATE BILL NO. 2384
February 26, 2003

Chairman Keiser and members of the House Industry, Business, and Labor Committee, my name is Curtis Volesky. I am Director of the Medicaid Eligibility Unit of the Department of Human Services. We are responsible for implementing Medicaid eligibility policy.

An attachment to this testimony identifies concerns about ways this bill doesn't comply with Federal Medicaid requirements, notes an incorrect reference to a Federal statute, and offers possible solutions to the concerns.

The suggested solutions to these concerns would:

- Change the definition of "annuity" to remove the requirement that it be purchased in "a lump sum of" money. (If the requirement for a "lump sum" purchase were to remain in the bill, anyone who pays for an annuity in other than a lump sum could defeat the law.) The change to the definition would also exclude annuities that are part of an employee benefit plan or a retirement plan.
- Remove the requirement that life expectancy tables be used in all cases. This would allow a showing that a known medical condition affects life expectancy.
- Correct the Federal statutory reference from 42 U.S.C. 1396r to 42 U.S.C. 1396r-5. In this statute, subsection "r-5" is <u>not</u> a sub-part of subsection "r."

If this committee wishes to consider any amendments, staff of the department are available to consult.

I will try to answer any questions the committee may have.

| Federal Requirement | Bill Language Problem | Possible Solution |
|---|---|---|
| Per State Medicaid Manual sec. 3258.9(B), States are to "avoid penalizing annuities validly purchased as part of a retirement plan but to capture those annuities which abusively shelter assets." Annuities may be purchased by lump sum for valid retirement reasons, as when sums are available for roll-overs. | Page 1, lines 8 through 11. Bill applies to all annuities purchased by lump sum. | Page 1, line 9, remove "a lump sum of"<br>Page 1, line 11, after "future" insert ", but does not mean an employee benefit that qualifies for favorable tax treatment under the internal revenue Code or a plan described in the Internal Revenue Code as a retirement plan, provided contributions must end and withdrawals begin by age seventy and one-half" |
| Per State Medicaid Manual sec. 3258.9(B), States are to determine "[i]f the expected return on the annuity is commensurate with a reasonable expectation of life expectancey ..." | Page 2, line 2. Requires life expectancy to be determined with reference to life expectancy table published by DHS. Life expectancy tables do not describe "a reasonable expectation of life" for an individual with a known condition that affects life expectancy. | Page 2, line 2, remove "life expectancey tables published by" |
| 42 U.S.C. § 1396r-5 governs requirements for community spouse income allowance. | Page 2, line 7. Refers to 42 U.S.C.§ 1396r, which sets requirements for nursing facilities. | Page 2, line 7, replace "1396r" with "1396r-5" |

**NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES**

John Hoeven, Governor
Carol K. Olson, Executive Director

**Economic Assistance Policy**

(701) 328-2332
Fax (701) 328-1060
Toll Free 1-800-755-2716

February 26, 2003

The Honorable George Keiser, Chairman
House Industry, Business, and Labor Committee
North Dakota State Representative
State Capitol
Bismarck, ND 58505

RE: Senate Bill No. 2384

Dear Representative Keiser:

Enclosed are the proposed amendments to Senate Bill No. 2384 and a rendition of the bill as it would read with the proposed amendments. I appeared before you at the committee hearing conducted this morning. You asked that a copy be faxed to the Wheeler Wolf law firm for their review and approval. Wheeler Wolf law firm reviewed and has agreed to the proposed amendments.

If you have any questions or concerns, please call me.

Sincerely,

Curtis Volesky
Director, Medicaid Eligibility
328-2110
sovolc@state.nd.us

law
Enclosure

Hand delivered to
House Chambers

Prepared by the North Dakota
Department of Human Services
February 26, 2003

**PROPOSED AMENDMENTS TO SENATE BILL NO. 2384**

Page 1, line 9, remove "a lump sum of"

Page 1, line 11, after "future" insert ", but does not mean an employee benefit that qualifies for favorable tax treatment under the Internal Revenue Code or a plan described in the Internal Revenue Code as a retirement plan, provided contributions must end and withdrawals begin by age seventy and one-half"

Page 2, line 2, remove "life expectancy tables published by"

Page 2, line 7, replace "1396r" with "1396r-5"

Renumber accordingly

Prepared by the North Dakota
Department of Human Services
February 26, 2003

**SENATE BILL NO. 2384**
**WITH PROPOSED AMENDMENTS**

**SECTION 1.** A new section to chapter 50-24.1 of the North Dakota Century Code is created and enacted as follows:

**Transfers involving annuities.**

1. For purposes of this section, annuity means a policy, certificate, contract, or other arrangement between two or more parties whereby one party pays money or other valuable consideration to the other party in return for the right to receive payments in the future, but does not mean an employee benefit that qualifies for favorable tax treatment under the Internal Revenue Code or a plan described in the Internal Revenue Code as a retirement plan, provided contributions must end and withdrawals begin by age seventy and one-half.

2. The purchase of an annuity, an instrument purporting to be an annuity, or any other arrangement that meets the definition of annuity in subsection 1 is considered an uncompensated assignment or transfer of assets under section 50-24.1-02, resulting in a penalty under the applicable rules established by the department of human services unless the following criteria are met:

   a. The annuity is irrevocable and cannot be assigned to another person.

   b. The annuity is purchased from an insurance company or other commercial company that sells annuities as part of the normal course of business.

   c. The annuity provides substantially equal monthly payments of principal and interest and does not have a balloon or deferred payment of principal or interest. Payments will be considered substantially equal if the total annual payment in any year varies by five percent or less from the payment in the previous year.

   d. The annuity will return the full principal and interest within the purchaser's life expectancy as determined by the department of human services.

   e. The monthly payments from the annuity, unless specifically ordered otherwise by a court of competent jurisdiction, do not exceed the maximum monthly income amount allowed for a community spouse as determined by the department pursuant to 42 U.S.C. 1396r-5.