

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2122

2005 SENATE JUDICIARY

SB 2122

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2122

Senate Judiciary Committee

☐ Conference Committee

Hearing Date January 12, 2005

Tape Number	Side A	Side B	Meter #
1	x		5834 - End
1		x	0.0 - 3340
Committee Clerk Signature <i>Mina L. Solberg</i>			

Minutes: Relating to Trusts; and to provide for retractive application.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Rep. Kretschmar, Dist 28 Introduced the bill (meter 5834) and discussed hand outs - Att. #1 and Att #2. This is a "new" law and sometimes change is difficult (tape 1, side b)

Sen. Nelson questioned why if we have something in place we change? Do we not have a complete set of rules? Discussion of the goal to have consistencies across the United States.

Senator Triplett asked what other states have adopted these changes (attachment #1). **Sen.**

Trenbeath questioned pg 17 of bill (meter 492)

Testimony in Opposition of the Bill:

Marilyn Foss - Bankers Assoc. Gave testimony (meter 950) Attachment #3.

Sen. Traynor asked if **Ms. Foss** if she knew what amendments other states have adopted. She did not have any but was aware of what 2 banks (Wells Fargo and US Bank) who have interstate trust operations, have given her amendments they would propose. They do not even agree with each other about the amendments they would propose. This is generating quite a bit of controversy in the industry. **Sen. Traynor** asked if this has been adopted in MN? I do not know.

Senator Triplett asked why the banks would not see the advantage of the uniformity across state lines some day. She responded the industry supports uniformity but no one approves of this ruling. **Senator Triplett** asked her what her top three objections are? I can not. I do not want to be a mediator in the industry (meter 1170).

Malcom Brown, Attorney (meter 1190) Representing Real Property, Probate and Trust Section of State Bar Assoc. ND. Gave testimony Att. #4.

Sen. Trenbeath stated that the idea that "we do not need to fix a law that is not broken" is not the preview of "Uniform Law Commissions" uniformity is. (meter 1820) **Senator Triplett** questioned **Mr. Brown** on retroactive application (meter 1881) Pg. 46 middle of page.

Sen. Nelson discussed her interim committee experience (meter 1960). Discussion on pg 47 (meter 2020) Internal Revenues code is current law already.

Greg Tschiner, Attorney (meter 2106) Representing ND Credit Union League. While we do not have trusts we will be impacted by this as a business. Att #5. 40 states have rejected this or is going to reject it. If ND passes this it will not be in the majority. (meter 2160) We should wait and see what other states do.

Senator Triplett Asked again if any one was aware of any of the amendments? **Ms. Foss** stated no.

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Senate Judiciary Committee

Bill/Resolution Number SB 2122

Hearing Date January 12, 2005

Neutral Position

Perrell Grossman, Director of Consumer Protection and Antitrust Division Att. Generals office.

(meter 2383) Gave testimony. **Sen. Traynor** asked about the appeal **Mr. Grossman** was referring to in his testimony. (meter 3039). Discussion of a nonprofit law suit. **Mr. Grossman** did not consult with any other states.

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2122

Senate Judiciary Committee

☐ Conference Committee

Hearing Date January 25, 2005

Tape Number	Side A	Side B	Meter #
1		X	3200 - End
Committee Clerk Signature <i>Maria L Solberg</i>			

Minutes: Relating to Uniform Law Bill

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All

Senators were present. Discussion:

Sen. Traynor stated that in the past when two parties will not communicate, in the past they have passed a bill with a delayed start date until 1997 - Att #1b

Sen. Nelson sited that if we give this a do pass we need to read the entire bill and even the bankers have not read the whole thing. **Sen. Trenbeath** responded that "ooh yes they know what they say they just don't agree with it".

Sen. Traynor stated: My thought was if we wanted to consider a delayed effective date on the bill as a "do pass" it would force the parties to come to the table. Read Att #1 showing the history of this being done. I do not have strong feelings about either of these bills but it is important for them to thoroughly review these documents it seem to me the bar association in opposing the bill has taken the position that they have not had a chance to educate its members.

If they wanted us to do what they are asking we could use the delayed effective date as a device to do that. **Sen. Trenbeath** responded that is first response would be to adopted this suggestion however, while I am disturbed that this bill didn't "appear out of thin air" and they are the results of years of work from some of the top legal minds of the country and myself. To generate this doctorate and the Uniform Laws Commission, puts this forth for consideration and the bar association, who always has a representative on the drafting committees and uniform laws committee when it if finally completed. Our seven people have decided that this is one of the bills/acts that we would promote. There are many bills we do not think would work in North Dakota. This is done by a vote. The bills have been available to these entities since that time and have come to these committees today. What greatly disappoints me is the fact that these two entities; the Bar Association and Bankers Assoc., literally five minutes before we are set to here the bill, come to me and say they can not support it due to the fact that they did not have time to look them over thoroughly. I find this implicitice, frankly. This is an embarrassment to the ND Uniform Law Organization as well as the National Organization. We are being put into the position of going back to the organization and telling them that we introduced four bills and two were defeated in committee. Having said this, I do not think it is good legislative action to adopt these with a late effect date. There may be well thought reasons for not having these adopted in ND. By holding their feet to the fire, that is very tempting, I would like to work something out during the interim. My goal is to keep them as uniform as possible.

Sen. Nelson stated that she too served on the interim committee that had that stack of stuff, they have indeed had this for some time. I have not read it due to the fact that I was waiting to see what they were going to come with. Last session we had a uniform trust code. No one has

contacted me about it. My concern is that the surrounding states around us have not adopted this yet. Discussed history of bills being passed.

Sen. Trenbeath told the committee the complicated process (meter 4600) that goes into the preparation of these.

Senator Syverson spoke in support of the delayed effective date.

Sen. Traynor stated making a motion on the floor, stating the concerns for the records that a future presentation of this bill will be looked at favorably and should be taken seriously.

Senator Syverson wants more then a verbal warning on the floor.

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2122

Senate Judiciary Committee

☐ Conference Committee

Hearing Date January 31, 2005

Tape Number	Side A	Side B	Meter #
1		X	720- 1700
Committee Clerk Signature <i>Maria L Solby</i>			

Minutes: Relating to Trusts; and to provide for retractive application

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following committee work:

Sen. Traynor introduced a study resolution - Att. #2 in replace of the bill.

Sen. Nelson made the motion to Do Not Pass SB 2122 and **Senator Triplett** seconded the motion. All were in favor.

Carrier: **Sen. Nelson**

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Date: 1/31/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2122

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Sen. Nelson Seconded By Sen. Triplett

Senators	Yes	No	SenatorsSen. Nelson	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) _____ 6 No _____ 0

Absent _____ 0

Floor Assignment Sen. Nelson

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

REPORT OF STANDING COMMITTEE (410)
January 31, 2005 1:57 p.m.

Module No: SR-20-1461
Carrier: Nelson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2122: Judiciary Committee (Sen. Traynor, Chairman) recommends DO NOT PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2122 was placed on the
Eleventh order on the calendar.

2005 TESTIMONY

SB 2122

Att #1



A Few Facts About The...

UNIFORM TRUST CODE

PURPOSE:

To provide a comprehensive model for codifying the law on trusts. While there are numerous Uniform Acts related to trusts, such as the Uniform Prudent Investor Act, the Uniform Principal and Income Act, the Uniform Trustees' Powers Act, the Uniform Custodial Trust Act, and parts of the Uniform Probate Code, none is comprehensive. The UTC will enable states which enact it to specify their rules on trusts with precision and will provide individuals with a readily available source for determining their state's law on trusts.

ORIGIN:

Completed by the Uniform Law Commissioners in 2000, and amended in 2001 and 2003.

APPROVED BY:

American Bar Association
ABA Real Property, Probate and Trust Law Section
AARP

STATE ADOPTIONS:

District of Columbia	New Hampshire
Kansas	New Mexico
Maine	Tennessee
Missouri	Utah
Nebraska	Wyoming

For any further information regarding the Uniform Trust Code (2000), please contact Michelle Clayton, John McCabe or Katie Robinson at 312-915-0195.

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Uniform Law Commissioners

The National Conference of Commissioners on Uniform State Laws

SUMMARY

Uniform Trust Code

When a person transfers property to another person "in trust" for beneficiaries or for a legally-acknowledged beneficial purpose, a "trust" is formed. The recipient of the property is called a "trustee." The person who transfers property to the trustee "in trust" is usually called the settlor. Most trusts have identifiable beneficiaries. There are, however, charitable and honorary trusts, which do not have actual beneficiaries. They have a beneficial purpose that substitutes for named or identifiable beneficiaries. Trusts are recognized in the law for many purposes. Trusts are commonly used as part of an individual's estate plan, to avoid probate and to obtain favorable tax consequences.

A trustee is a fiduciary, sometimes described as the utmost fiduciary. A fiduciary has enforceable obligations to the settlor, beneficiaries or beneficial purpose. There are many kinds of fiduciary relationships in the law. The vulnerability of the beneficiaries or the beneficial interest is the reason that the law imposes special obligations on the trustee as a fiduciary.

The prior law governing the trust relationship is fundamentally American common law, best represented in the Restatement of the Law of Trusts, 2nd and the subsequent, still being drafted, Restatement of the Law of Trusts, 3rd. The restatements come from the American Law Institute. There are also statutes in most states that govern aspects of the trust relationship. A handful of states have attempted a codification of the law of trusts. California is a leading example.

In the year 2000, however, the Uniform Law Commissioners have promulgated the first truly national codification of the law of trusts with the Uniform Trust Code. It draws from the common law sources, including the Restatements. The existing statutory law is also a source. The objective is a codification of existing law, but there are elements of law reform, also. The reforms tune trust law to modern needs. The Uniform Code provides fundamental rules that apply to all voluntary trusts.

However, the Uniform Trust Code does not try to incorporate detailed rules for every conceivable kind of trust, nor does it incorporate all of the kinds of trusts there are. It does not contain statutory rules that are already governing trusts in many jurisdictions, and that are working just fine. It does not displace, for example, the Uniform Prudent Investor Act or the Uniform Custodial Trust Act. What the Uniform Trust Code contains is a set of basic default rules that fairly, consistently and clearly govern voluntary trusts. It is a default statute for the most part, because the terms of a trust instrument will govern even if inconsistent with the statutory rules.

The Uniform Trust Code is divided into 11 articles. The first and eleventh articles do not address substantive topics, but deal with general provisions like definitions and rules of statutory interpretation. Article 9 has no content, but may be used to include the Uniform Prudent Investor Act within the Uniform Trust Code if a state wishes to include it there. The eight substantive articles are Article 2, Judicial Proceedings; Article 3, Representation; Article 4, Creation, Validity, Modification, and Termination of a Trust; Article 5, Creditor's Claims; Spendthrift and Discretionary Trusts; Article 6, Revocable Trusts; Article 7, Office of Trustee; Article 8, Duties and Powers of a Trustee; and, Article 10, Liability of Trustees and Rights of Persons Dealing with Trustee. It is not possible to provide a complete summary of the entire Uniform Trust Code, but what follows highlights central characteristics of this important code.

Article 2, Judicial Proceedings, deals with jurisdiction over a trust in any state. It asserts the important rule that a trust is not supervised by a court unless there is a proceeding by an interested person that invokes the jurisdiction of the appropriate court. The place of administration of the trust is the place with jurisdiction over the trustee and beneficiaries of that trust.

Article 3, Representation, deals with the rather complex issues of who may represent whom in transactions or proceedings relating to a trust. In part, this article sets out a series of specialized agency rules, answering the question of who may be the agent of whom. Some of it is fundamental, such as the clear rule that the trustee represents the beneficiaries of a trust. Some of it is common-sense, such as the rule that a guardian represents a ward or a conservator (if appointed) represents the estate of a ward. The most significant innovation is the provision for "virtual" representation. A minor, incapacitated person, unborn individual, or a person whose identity is not known, may be represented by and legally bound "by another having a substantially identical interest with respect to the particular question or dispute" to the extent there is no conflict of interest in that representation.

Article 4, Creation, Validity, Modification and Termination of a Trust, has a self-evident set of rules. A trust is created when property is transferred to a trustee with the intent to create a trust relationship. There must be a definite beneficiary or the trust must be a charitable trust, a trust for animals (specially provided for as a kind of honorary trust), or a trust for a noncharitable purpose (also a kind of honorary trust). These kinds of honorary trusts, which have a limited life, legitimize honorary trusts that are not generally allowed under the common law. They are, therefore, an innovation in the Uniform Trust Code.

It is not necessary to have a trust instrument to create a trust. Oral trusts are allowed, but the standard of proof for an oral trust is the higher "clear and convincing evidence" standard. By not requiring a writing, the Uniform Trust Code avoids issues of electronic record and signature adequacy.

There are clear (default) rules that apply upon consent of the parties to the trust or that govern a court in modifying or terminating a trust. A court may apply the doctrine of cy pres to charitable trusts, when the charitable purpose is no longer obtainable. A comparable charitable purpose may be selected.

Article 5, Creditor's Claim, Spendthrift and Discretionary Trusts deals with creditor claims against the interests of a beneficiary or a settlor. "A spendthrift provision in a trust restricts a beneficiary's creditor from attaching the beneficiary's interest in the trust until there is a distribution to the beneficiary. If there is no spendthrift provision, a creditor of a beneficiary may attach a distribution interest before it is distributed. A spendthrift provision is created simply by general reference to "spendthrift trust" in the trust instrument. A creditor may not compel a trustee to make a distribution to a beneficiary that is discretionary. A beneficiary who owes child support, spousal maintenance, or a creditor for services provided to protect the beneficiary's interest in the trust, cannot rely on spendthrift provisions in a trust to avoid attachment of that interest. Creditors of the settlor of a revocable trust may attach the corpus of the trust, but only a settlor's distribution interest in an irrevocable trust.

Article 6, Revocable Trusts, expressly recognizes the most popular, modern trust form for estate planning. A revocable trust is one in which the settlor retains the power to control, amend, or revoke the trust. Property held in trust reverts back to the settlor if it is revoked. The revocable trust is viewed primarily as a will substitute, used to avoid probate. A trust is revocable unless a trust instrument expressly provides that it is irrevocable. While the settlor of a revocable trust yet lives and has capacity, the trustee owes its duties exclusively to the settlor. The settlor controls the rights of beneficiaries. If the settlor becomes incapacitated or dies, the beneficiaries control their rights under the trust and the duties of the trustee shift to the beneficiaries. The trust is no longer a revocable trust.

Article 7, Office of Trustee, deals with acceptance of the trust by the trustee, bond for the trustee, decision-making by co-trustees, and like matters. Perhaps the most important of the rules govern

removal and compensation of the trustee. The settlor, a co-trustee, a beneficiary or the court on its own initiative may request that a trustee be removed. The grounds are breach of trust, lack of cooperation among co-trustees substantially impairing the administration of the trust, defects of the trustee that require removal in the best interests of the beneficiaries, or substantial change of circumstances. The trustee may be removed upon the request of all qualified beneficiaries if removal is in the best interests of the beneficiaries, is not inconsistent with trust purposes and a successor trustee is available. A trustee is entitled to reasonable compensation. A court may review and change a trustee's compensation.

Article 8, Duties and Powers of the Trustee, articulates the basic fiduciary obligations of a trustee, except for those articulated in the Uniform Prudent Investor Act. The basic duty is the duty of loyalty, which requires the trustee to manage the trust solely for the beneficiaries and to avoid conflicts of interest between trustee's interests and beneficiaries' interests. If a trustee provides services to an investment company or investment trust in which the trust invests money pursuant to the Uniform Prudent Investor Act, conflict of interest is not presumed.

Other fiduciary obligations include the duty of impartiality, the obligation of prudent administration, the obligation to incur only reasonable costs, and the obligation to apply the trustee's special skills when there is reliance on those skills when the trustee is named. A trustee may delegate certain duties and powers, but is held to a prudent standard of appointment in so doing. An agent is held to the fiduciary standard of the trustee in accepting an appointment. Delegation has not generally been permitted under the common law, but is an important feature of the Uniform Prudent Investor Act. The Uniform Code provision is based on the one in the Uniform Prudent Investor Act. The delegation rules in both acts are an innovation in trust law.

A trustee generally has all the powers necessary to carry on the business of the trust. The Uniform Code contains an updated list of specific powers derived from the widely accepted Uniform Trustee's Powers Act.

Article 10, Liability of Trustees and Rights of Persons Dealing with the Trustee provides for remedies when there is breach of an obligation by the trustee, who and under what circumstances there is a right of action by anybody, and a trustee's immunity from personal liability when doing business with others on behalf of the trust. A breach of duty to a beneficiary invokes a court's equity powers to compel performance, suspend or remove the trustee upon grounds noted earlier in this summary. Available damages restore a beneficiary's position as if breach had not occurred. The trustee's profit (if any) is also a measure of damage. A trust instrument may not waive or vary the obligation of good faith or exculpate the trustee for reckless indifference. An exculpatory term in a trust is not enforceable if the inclusion of the term abuses the settlor's confidential relationship with the trustee.

A trustee does not incur personal liability to third parties for contracts on behalf of the trust so long as the fiduciary status of the trustee is disclosed. A trustee is not liable for a tort action against the trust unless the trustee also has personal liability.

A third party dealing with a trust, also, is not liable for any breach of the trustee's obligations to the beneficiaries resulting from the transaction, unless the third party has knowledge of the actual breach by the trustee.

The article on liability concludes the substantive parts of the Uniform Trust Code. The Uniform Trust Code provides a first effort at true codification of trust law. There is a serious need for certainty and clearly articulated rules as the use of trusts burgeons in the United States. The Uniform Trust Code is timely in the year 2000. It meets the needs of the citizens of the United States for decades to come.

Fifty-ninth
Legislative Assembly
of North Dakota

SENATE CONCURRENT RESOLUTION NO.

HH #2

Introduced by

Judiciary Committee

1 A concurrent resolution directing the Legislative Council to study the feasibility and desirability
2 of adopting the Uniform Trust Code.

3 **WHEREAS**, the Uniform Trust Code provides a comprehensive model for codifying the
4 law on trusts; and

5 **WHEREAS**, the Uniform Trust Code was completed by the Uniform Law
6 Commissioners in 2001, with amendments in 2003; and

7 **WHEREAS**, the American Bar Association and AARP have approved the Uniform Trust
8 Code; and

9 **WHEREAS**, at least 10 states have enacted the Uniform Trust Code and a majority of
10 the states in the nation have created study groups to review the Uniform Trust Code before
11 enactment; and

12 **WHEREAS**, the Uniform Trust Code was introduced in North Dakota as Senate Bill
13 No. 2122 (2005); and

14 **WHEREAS**, the North Dakota Bankers Association, North Dakota Credit Union League,
15 and State Bar Association of North Dakota opposed revising the law on trusts as proposed by
16 Senate Bill No. 2122; and

17 **WHEREAS**, an interim study of the Uniform Trust Code would provide opponents of a
18 comprehensive law on trusts as provided by the Uniform Trust Code the opportunity to identify
19 the specific provisions that would be detrimental to settlors, beneficiaries, and trustees and
20 those provisions that should be modified to make North Dakota unique in the area of laws
21 governing trusts;

22 **NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF NORTH DAKOTA, THE**
23 **HOUSE OF REPRESENTATIVES CONCURRING THEREIN:**

24 That the Legislative Council study the feasibility and desirability of adopting the Uniform
25 Trust Code; and

1 **BE IT FURTHER RESOLVED**, that the Legislative Council report its findings and
2 recommendations, together with any legislation required to implement the recommendations, to
3 the Sixtieth Legislative Assembly.

Att #3

TESTIMONY OF MARILYN FOSS OPPOSING SB 2122

Chairman Traynor, members of the Senate Judiciary Committee, my name is Marilyn Foss. I am appearing before you this morning to ask that the Uniform Trust Code not be adopted in North Dakota this legislative session. Frankly, this is a position that I did not expect to be taking. When I first learned that the UTC would likely be proposed for adoption, I expected to be supporting it with amendments. (I indicated that to the interim judicial process committee, but also advised that committee that the NDBA Trust Committee review process for the legislation was not complete and could change my outlook.) As we learned more about the UTC, we concluded a "go slow" approach would be advisable.

NCCUSL approved a Uniform Trust Code in 2000 and amended it in 2001 and 2003. Additional amendments were approved at the 2004 Annual Meeting. This need for immediate and ongoing amendments to a uniform law is unusual and indicates to me that there may be problems remaining hidden within the Act. This deeply concerns us.

We understand the UTC has been enacted in some form by nine states (Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, Tennessee, Utah, and Wyoming) and the District of Columbia, but that each of these jurisdictions has amended it. The Act was also adopted in Arizona and then repealed. It has been rejected by Oklahoma and Colorado. When I asked the general counsel for the South Dakota Bankers Association whether South Dakota- a state which has actively "modernized" its trust laws in an effort to make itself attractive as a place in which to establish trust operations and from which to offer nationwide trustee services- was planning on adopting the UTC, his response was to the effect, "why would anyone want to do that?!!" Then NDBA trust

committee members let me know of their hesitancy to support the UTC given the controversy which the Act is creating in the trust industry. One sent me articles which contend the UTC includes provisions that compromise privacy of grantors, endangers estate plans, and interferes with special needs trusts which are established for disabled persons.

I understand that the general attitude of North Dakota lawyers toward the UTC is that our trust laws aren't broken, so why fix them with a law that has been read by very few in this state, and, likely, understood by even fewer. Even the trust committee member who was originally enthusiastic about adopting the UTC now holds the view that there is nothing critical to require its adoption.

With this uncertainty and at best, ambivalence in the trust industry and among lawyers, now does not appear to be the time to adopt the UTC "on faith". It is our position that the UTC should be "tabled" at this time in the form of a DNP from this committee. If the problems are worked out and the naysayers shown to be wrong the Act can be taken up in future legislative sessions. With that, I'll be happy to stand for questions from the committee.

Att #4

COMMENTS OF MALCOLM H. BROWN, ATTORNEY AT LAW, ON SB 2122

Before the Senate Judiciary Committee, January 12, 2005.

I represent the Real Property, Probate and Trust Section of the State Bar Association of North Dakota. I offer these comments with regard to SB 2122, the proposed Uniform Trust Code.

This is a complex bill. It is a rewrite of the entire trust law section of the current Century Code. Based on my limited research, the Uniform Trust Code, or variations of it, has been adopted in only 9 states and the District of Columbia. Arizona adopted it but then repealed it a year later. The Uniform Trust Code has been defeated in Colorado, Virginia and Oklahoma. In Minnesota, Indiana and Texas, the Bar Associations have, for the most part, rejected it and it has not been adopted.

My Section is concerned about the adoption of a new law concerning trusts without any input or study by the Bar Association or lawyers who must work with trusts created or that will operate in the future under this Code. We have a significant body of case law based on our existing provisions regarding trusts that may be overturned by the enactment of this uniform law.

From the information I have read, a major concern in other states has been the change in the Uniform Trust Code in the distinction between discretionary trusts and support trusts. In North Dakota, support trusts are sometimes called "special needs trusts" and, in fact, we have specific sections of the Code that were enacted in 2003 to define and provide for

special needs trusts. This law is found in Chapter 59-08, N.D.C.C., Trusts for Individuals with Disabilities. The Uniform Trust Code has no specific provisions for special needs trusts.

Section 13 of SB 2122 found at page 21 creates a chapter for trusts where a beneficiary's interest may be protected by a "spendthrift" clause. In other words, a trust that gives some protection to the beneficiary from exhausting the trust. However, this section is not clear with regard to special needs trusts as we now have in North Dakota, and by the proposed language Section 59-13-03(3) at page 22 it would appear that a future change in state or federal law may invalidate or hinder the effectiveness of an existing special needs trust.

I am currently involved in litigation regarding the interpretation of a trust. This law is stated to be retroactive and could be applied to pending judicial proceedings and thus could introduce new issues into litigation that could not have been anticipated by the parties or the courts.

In conclusion, I would observe that to my knowledge this Bill has not been studied by the State Bar Association of North Dakota or any committees thereof. Neither has it been tested in the courts of any jurisdictions where it has been enacted. This might be an attempt to fix something in North Dakota that may not be broken.

TESTIMONY IN OPPOSITION OF SENATE BILL NO. 2122

GREG TSCHIDER, ND CREDIT UNION LEAGUE

Mr. Chairman and Members of the Judiciary Committee, I am Greg Tschider and I represent the North Dakota Credit Union League. The North Dakota Credit Union League is requesting that the Uniform Trust Code not be adopted this Legislative session.

I do not pretend to be a trust law expert, so my statements hereafter are based on actions of other states and opinions from other individuals.

The bill as presented has been the result of numerous changes. Almost every year, additional amendments have been adopted by the uniform committee. This causes serious concern that this bill will need further amendments by the uniform committee.

As stated by Ms. Marilyn Foss of the North Dakota Bankers Association, Arizona adopted the Act but then repealed it. Oklahoma and Colorado rejected the Act. Nine states enacted the Act in some form. Thirty-eight (38) other states have not adopted the UTC. Obviously, other states have either rejected the Act in its entirety or adopted the Act with material changes. The Act as submitted in this bill is 48 pages in length. In-depth analysis of this bill will take substantial time which is not available to affected parties, this Committee, and the Legislature during this Legislative session. Further study is necessary.

At the present time there does not appear to be complaints with North Dakota's existing trust law. What is the need for this major change?

It is submitted that the present trust law adequately protects North Dakota citizens. Other states have not embraced this uniform law. Therefore, it is requested that this Committee submit a "Do Not Pass" recommendation to the Senate floor.

Thank you.

#6

SENATE JUDICIARY COMMITTEE
JOHN T. TRAYNOR, CHAIRMAN
JANUARY 12, 2005

TESTIMONY BY
PARRELL D. GROSSMAN
DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL
SENATE BILL NO. 2122
(NEUTRAL)

Mr. Chairman and members of the Senate Judiciary Committee. I am Parrell Grossman, Director of the Consumer Protection and Antitrust Division of the Attorney General's Office. ~~The Attorney General and the Consumer Protection Division support Senate Bill No. 2228.~~

I appear on behalf of the Attorney General in a neutral position with proposed amendments for your consideration.

This legislation may inadvertently diminish the Attorney General's statutory authority over charitable trusts. As you are aware, the Attorney General represents the public interest in charitable trusts. Notwithstanding many years of common law authority to act in the public interest in the area of public trusts it is important and prudent that the legislature provide the Attorney General necessary statutory authority to carry out these responsibilities when necessary and appropriate.

The first proposed amendments on page 12, lines 19 and 20 are to ensure the Attorney General is a qualified beneficiary **period**, without any unintended limitations. The current language could be read as giving the Attorney General standing to object to the place of administration of the trust, but no ability to enforce the trust. The proposed change would make the Attorney General a qualified beneficiary for broader purposes.

The proposed amendments on page 17 are the most significant proposed amendments in this legislation. On page 17, line 8, the change would clarify that the Attorney General may maintain a proceeding to enforce a charitable trust.

On page 17, after line 9, it is necessary to insert "Chapters 59-09 through 59-19, do not impair the rights and powers of the Attorney General with respect to any trust." This language mirrors language in Section 20 of this bill, page 48, lines 16 through 17, relating to charitable trusts. This language and provision has been in North Dakota law in section 59-02-22. Chapter 59-02 is repealed by this legislation and the provisions of section 59-02-22 are reincorporated in Section 20 of this bill as new section 59-20-01. However, the critical language about the rights and powers of the Attorney General is limited to the new section 59-20-01, and would not apply to the new chapters 59-09 through 59-19. The proposed amendment on page 17, after line 9, would accomplish this change.

Next, the Attorney General is proposing language that has always been in the law, but was previously contained in chapter 59-04 which is being repealed by Section 21 of this bill. The proposed amendment states: "In all cases of charitable trusts, the Attorney General is an interested person with respect to the trust estate." The existing law in section 59-04-02,

now being repealed, states: "In all cases of public or charitable trusts, the attorney general and the state's attorney of the county where the trust is located are deemed persons interested in the trust estate." The new legislation in Section 10, pages 18-19, states: "The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law." The Attorney General is not included as an interested person in this legislation. The omission of the Attorney General's standing and authority as an "interested person" in charitable trusts would be an unintentional abrogation of the Attorney General's long-standing statutory authority to protect and represent the public interest in charitable trust proceedings.

The proposed amendment on page 27, line 27 is just a technical amendment that recognizes the new legislation is not just establishing an order of priority for successor trustees but is also really providing the processes for that order of priority.

Finally, the last 4 proposed amendments on page 38, lines 26 through 29, provide some clarification of the Attorney Generals' role in the distribution of proceeds in the termination of a charitable trust.

The proposed amendments are consistent with current trust law and the Attorney General's existing authority, as well as the purposes of the proposed Uniform Trust Code.

For these reasons, the Attorney General respectfully urges this committee to adopt the proposed amendments, if you give Senate Bill 2122 a "do pass" recommendation.

Thank you for your time and consideration. I will be available to try and answer any questions.

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PROPOSED AMENDMENTS TO SENATE BILL NO. 2122
SENATE JUDICIARY COMMITTEE COMMITTEE
JOHN T. TRAYNOR, CHAIRMAN
JANUARY 12, 2005

PRESENTED BY
PARRELL D. GROSSMAN, DIRECTOR
CONSUMER PROTECTION & ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL

Page 12, line 19, remove "with"

Page 12, line 20, remove "respect to a charitable trust having its principal place of administration in this state."

Page 17, line 8, after "trust" insert "or the attorney general"

Page 17, after line 9 insert "4. Chapters 59-09 through 59-19 do not impair the rights and powers of the attorney general with respect to any trust. In all cases of charitable trusts, the attorney general is an interested person with respect to the trust estate."

Page 27, line 27, after "filled" insert "by means of the following processes."

Page 38, line 26, after "beneficiaries" insert ", and the attorney general in the case of a charitable trust."

Page 38, line 26, after "beneficiary" insert ", or the attorney general in the case of a charitable trust."

Page 38, line 27, after "beneficiary" insert ", or the attorney general in the case of a charitable trust."

Page 38, line 29, after "beneficiary" insert ", and the attorney general in the case of a charitable trust."

Renumber accordingly



AH #1

Bob Stenehjem
State Senator
Chairman

JOHN D. OLSRUD
Director

JAY E. BURINGRUD
Assistant Director

JIM W. SMITH
Legislative Budget
Analyst & Auditor

JOHN WALSTAD
Code Revisor

North Dakota Legislative Council

STATE CAPITOL, 600 EAST BOULEVARD, BISMARCK, ND 58505-0360 (701) 328-2916 TTY: 1-800-366-6888

January 20, 2005

Honorable John T. Traynor
State Senator
Senate Chamber
State Capitol
Bismarck, ND 58505

Dear Senator Traynor:

This letter is in response to your request for information as to major uniform Acts that the Legislative Assembly has passed with delayed effective dates. We searched the files going back to 1965 and discovered these uniform Acts with delayed effective dates:

1. In 1965 the Legislative Assembly enacted Senate Bill No. 60, the Uniform Commercial Code, with a delayed effective date of July 1, 1966.
2. In 1973 the Legislative Assembly enacted House Bill No. 1040, the Uniform Probate Code, with a delayed effective date of July 1, 1975.
3. In 1991 the Legislative Assembly enacted Senate Bill No. 2100, Uniform Commercial Code Articles 2A, 3, 4, and 4A, with a delayed effective date of July 1, 1993.
4. In 1991 the Legislative Assembly enacted House Bill No. 1101, the Uniform Foreign-money Claims Act, with a delayed effective date of January 1, 1992.
5. In 1993 the Legislative Assembly enacted House Bill No. 1111, Uniform Probate Code Revised Article II, with a delayed effective date of August 1, 1995.
6. In 1995 the Legislative Assembly enacted House Bill No. 1110, the Uniform Partnership Act (1994), with a delayed effective date of January 1, 1996.
7. In 1995 the Legislative Assembly enacted House Bill No. 1111, Uniform Probate Code Revised Article III, with a delayed effective date of January 1, 1996.

In addition to uniform Acts with delayed effective dates, the Legislative Assembly enacts several bills during each legislative session with delayed effective dates. For example, in 2003 the Legislative Assembly enacted two bills with an effective date of January 1, 2004; one bill with an effective date of April 1, 2004; one bill with an effective date of July 1, 2004; one bill with an effective date of

January 1, 2005; six bills with an effective date of July 1, 2005; one bill with an effective date of August 1, 2005; two bills with an effective date of January 1, 2006; and two bills with an effective date of July 1, 2006.

Please contact this office if you have any questions.

Sincerely,



Jay E. Buringrud
Assistant Director

JEB/AAV

Att #16

PROPOSED AMENDMENTS TO SENATE BILL NO. 2122

Page 1, line 7, remove "and" and after "application" insert "; and to provide an effective date"

Page 46, line 13, replace "2005" with "2007"

Page 46, line 29, replace "2005" with "2007"

Page 48, after line 19, insert:

"SECTION 22. EFFECTIVE DATE. This Act becomes effective on August 1, 2007."

Renumber accordingly