

2009 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1300

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1300

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: January 20, 2009

Recorder Job Number: 7294

Committee Clerk Signature

Ellen LeTang

Chairman Keiser: Opened the hearing on HB relating to the modification of irrevocable trusts.

Carlee McLeod~Representing the North Dakota Chapter of the National Academy of Elder Law Attorneys in support of HB 1300. See testimony attachment 1.

Anyone here to testify in opposition, neutral?

Julie Leer~Attorney with the legal Advisory Unit for the Department of Human Services and we take a neutral position. See testimony attachment 2.

Vice Chairman Kasper: Is a irrevocable trusts, is irrevocable in the past and continues in the future, this would have no effects under your department guidelines, would it?

Leer: That correct.

Vice Chairman Kasper: Do you have the power to look at a trust document that was drafted by a estate attorney in North Dakota, that says it's an irrevocable trust, and when you read the document, you can dispute it that it's not irrevocable it's revocable. Do you have the power to make that decision without going to court or do you have to get a court order that agrees with you?

Leer: We have the obligation to insure that it's truly irrevocable.

Chairman Keiser: This is a very complicated issue and by adding this, it does clearly states that the Department of Human Services can't come back in make a ruling. Then it goes back to court.

Anyone else in the neutral position.

Closes the hearing of HB 1300.

Vice Chairman Kasper: Moves a Do Pass

Representative Boe: Second.

Roll Call was taken on HB 1300 with 12 yea's, 0 nay's, 1 absent and Representative Sukut is the carrier.

Date: Jan 20 - 2009
Roll Call Vote # 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1300

House House, Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☒ Do Pass ☐ Do Not Pass ☐ As Amended

Motion Made By Vice Chair Kasper Seconded By Rep Boe

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	x		Representative Amerman	x	
Vice Chairman	x		Representative Boe	x	
Representative Clark	x		Representative Gruchalla	x	
Representative N Johnson	x		Representative Schneider	x	
Representative Nottestad	x		Representative Thorpe	x	
Representative Ruby	x				
Representative Sukut					
Representative Vigesaa	x				

Total (Yes) 12 No 0

Absent 1

Floor Assignment Representative Sukut

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

REPORT OF STANDING COMMITTEE (410)
January 20, 2009 12:43 p.m.

Module No: HR-11-0581
Carrier: Sukut
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1300: Industry, Business and Labor Committee (Rep. Keiser, Chairman)
recommends **DO PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING).
HB 1300 was placed on the Eleventh order on the calendar.

2009 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1300

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1300

Senate Industry, Business, and Labor Committee

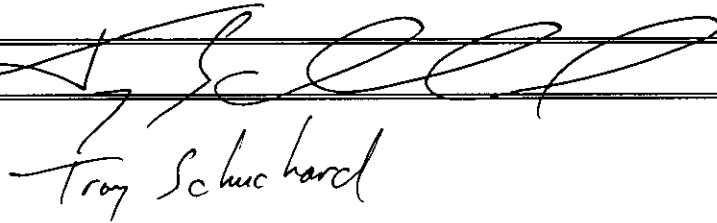
☐ Check here for Conference Committee

Hearing Date: March 9, 2009

Recorder Job Number: 10458

Committee Clerk Signature

Minutes:


Troy Schuchard

Chairman Klein: Opened hearing on HB 1300, all members present.

George Keiser: Representative District 47 introduced HB 1300. This bill attempts to make a clarification relative to the definition of an irrevocable trust. This bill comes to you because of some concerns from financial planners and state attorneys felt that it needs to be better defined...what an irrevocable trust is. When one enters into an irrevocable trust, there are very strict guidelines set up as to what will happen, who the participants are, and all of the elements of the trust contract. If there is a change to that trust, in any form, does that then make it irrevocable? In theory, if it is irrevocable, it cannot be changed. But on the other hand, there are situations where the courts will allow for a change without problem to an irrevocable trust. An example; 3 siblings with extremely wealthy parents don't want an outside person or entity to manage the money so they set up an irrevocable trust to distribute the money equally to each of the 3 sibling. Now one of the children goes on their own and makes it to where they don't need the trust money and allow the two siblings to share in the remaining 3rd. The courts change the trust and in the eyes of the court the irrevocable trust has now been changed. This bill simply states that as long as the courts maintain it as irrevocable, even though there has been a change, it is still rendered irrevocable by definition.

Carlee McLeod: Representing the North Dakota Chapter of the National Academy of Elder Law Attorneys testified in support of HB 1300. (See attachment #1)

Senator Andrist: If a judge authorizes a change within the trust, and it continues to be irrevocable, can the judge decide to make the trust revocable?

Carlee McLeod: Yes, there are other parts to this law that do allow for irrevocable trusts to be dissolved and then you can transfer the contents to another trust or create a revocable trust in some way.

Senator Wanzek: I would assume those cases would have to be pretty compelling situations to do so?

Carlee McLeod: Yes, they would have to be pretty compelling. The court has some guidelines to follow.

Linda Johnson-Wurtz: Associate State Director for AARP North Dakota testified in support of HB 1300.

Julie Leer: Legal Advisory Unit for the Department of Human Services testified in the neutral position for HB 1300. (See attachment #2)

Chairman Klein: Your concern is somebody would change their trust to skirt paying their fair share as it applies to their acceptability into the Medicaid program?

Julie Leer: There is a concern that people will find a way to make sure their assets are not countable for counting towards their eligibility to Medicaid. There will probably be a little impact.

Senator Wanzek: Aren't there time periods set when somebody put their assets into a trust as far as being able to go back. Isn't there time periods set by statute to protect from that

happening?

Julie Leer: You can go back 5 years and if there were any transactions of assets within that time period, then those assets would be deemed available for purpose of determining eligibility for Medicaid.

Senator Wanzek: So someone couldn't take all of their farmland into an irrevocable trust and 2 months later go into a nursing home?

Julie Leer: Not exactly, they could put their assets into a trust and they could go into a nursing home, however, they wouldn't be eligible for Medicaid to cover those nursing home costs.

Senator Horne: Your goal with this bill is to make sure irrevocable trust are truly irrevocable?

Julie Leer: That is correct, we want to make sure that if it is an irrevocable trust, that its money that the person who put it into trust cant go in and use that money at will because that money is no longer available for that person to use.

Senator Horne: Does this bill reach the goal that you have?

Julie Leer: I don't think that it is completely inconsistent with that goal, I think we have some latitude to determine to identify when irrevocable trusts are treated as revocable.

Senator Potter: What trusts are left when we get done with this?

Julie Leer: What we want to make sure is if someone has the assets to provide for their own care, that is what happens before Medicaid comes in.

Senator Potter: This legislation won't change your policies one bit, all trusts will still be treated as irrevocable?

Julie Leer: That is correct.

Chairman Klein: What % of ND nursing home residents are on Medicaid?

Julie Leer: Between 50%-60%.

Chairman Klein: Closed the hearing on HB 1300.

Senator Andrist: Motion for a Do Pass on HB 1300

Senator Horne: Seconded

Chairman Klein: Motion for Do Pass was successful 7-0, **Senator Nodland** to carry

Date: 3/9
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1300

Senate

Committee

Industry, Business and Labor

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☒ **Pass** ☐ **Do Not Pass** ☐ **Amended**

Motion Made By Senator Andrist Seconded By Senator Horne

[illegible]

Total (Yes) 7 No 0

Absent _____

Floor Assignment Senator Noddland.

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

REPORT OF STANDING COMMITTEE (410)
March 9, 2009 12:56 p.m.

Module No: SR-42-4308
Carrier: Nodland
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1300: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1300 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

HB 1300

House Bill 1300
House Industry Business and Labor
January 20, 2008

*Same given
to Senate.*

Chairman Keiser, members of the committee, my name is Carlee McLeod, and I come before you today representing the North Dakota Chapter of the National Academy of Elder Law Attorneys in support of House Bill 1300.

This bill is necessary to clarify subsection 1 of section 59-12-11 of the Century Code which provides for both the termination and the modification of an irrevocable trust. The language of the existing provision of might seem clear to most readers. However, in some situations, modified irrevocable trusts are being treated as revocable, and that poses a problem to many in the profession of advising clients on retirement and financial planning. Our position is that if the law provides for a modification of an irrevocable trust under certain circumstances, that modification does not change the designation of the trust. Thus, we are asking for the additional language proposed in this bill modification.

Irrevocable trusts are made for a purpose: to protect the assets of a trust in a way that the person making the trust, or anyone else, cannot attack the assets of that trust. Simply put, these trusts are used to lock up assets for the benefit of someone else so that the intent of the grantor is exercised. Some common uses of irrevocable trusts consist of the protection of life insurance policies and to provide supplemental assistance to disabled individuals. Once made, even the grantor cannot destroy the trust.

However, our law acknowledges that nothing is ever certain, and there are times when it is proper to terminate or modify an irrevocable trust, yet permit it to retain its

irrevocability. The provision of the Code featured in this bill allows for both termination and modification of an irrevocable trust. An irrevocable trust may be terminated if the material purpose of the trust cannot be achieved, and only if all the beneficiaries agree and with the consent of the Court. Similarly, if all beneficiaries agree, a trust may be modified if the Court agrees the modification is not inconsistent with the material purpose of the trust. The proposed language of this bill seeks to clarify that if an irrevocable trust has been modified, with consent of all beneficiaries and the Court, it maintains its irrevocable status.

Allow me to offer an example of how this subsection applies: Let's say a father had four children and set up an irrevocable trust to preserve his farmland for the four children. After thirty years, Son1 decided that he didn't want to be the beneficiary of the trust and, with the other beneficiaries and permission of the Court, modified the trust so that he was no longer a beneficiary. The father had no knowledge of the modification of the trust. However, one of the children had a creditor who became aware of the modification of the trust. Without the irrevocable designation, the creditor attacked the farmland on the basis that the trust is no longer irrevocable. Father's intent for the children to benefit from the farm was destroyed. Further, the children who agreed to modify the trust were unaware of the creditor, and their livelihood is now gone.

This example illustrates the damage that can occur without proper clarification to the current language. As lawyers, we advise our clients on their estate planning options, and we rely on clear laws to guide us. While the existing law seems clear on its face, further clarification would alleviate this problem in the future.

We urge a DO PASS recommendation.

Same given to Senate.

Testimony
House Bill No. 1300 – Department Of Human Services
House Industry, Business and Labor Committee
Representative George Keiser, Chairman
January 20, 2009

Chairman Keiser, members of the Industry, Business and Labor Committee, I am Julie Leer, an attorney with the Legal Advisory Unit for the Department of Human Services. I am here today to provide information on House Bill No. 1300.

House Bill No. 1300 provides that an irrevocable trust modified under section 59-12-11 continues to be an irrevocable trust. The Department understands that this is, at least in part, an effort to ensure that the Department treats a modified irrevocable trust as irrevocable after its terms have been changed under section 59-12-11.

The Department reviews trusts to determine the trust's impact on a person's eligibility for Medicaid. Part of the review is to determine whether a trust is revocable or irrevocable since the nature of the trust impacts how it is treated for purposes of determining eligibility. North Dakota Administrative Code section 75-02-02.1-31(3) specifies conditions under which a trust identified as irrevocable must be considered to be revocable for purposes of determining Medicaid eligibility. Specifically, that subsection reads:

Trusts may be categorized in many ways, but the revocability of a trust is a fundamental characteristic. A revocable trust is a trust that the grantor, or someone acting at the request, direction, or influence of the grantor, has the power to revoke, remove from, or

otherwise end the trust. An irrevocable trust is a trust that may not be revoked in any way by the grantor or anyone acting at the request, direction, or influence of the grantor. The determination of trust revocability is not based solely on trust terms stating the trust is irrevocable. A trust is treated as revocable, regardless of its terms, if:

- a. The trust reserves a power to amend to the grantor, or grants a power to amend to some other person, unless the power to amend is limited to authority to terminate the trust for impossibility of administration, and the trust also provides for distribution of the trust assets to the primary beneficiary, free of trust;
- b. The grantor and the beneficiaries consent to the revocation;
- c. The grantor is also the sole beneficiary of the trust;
- d. The grantor of a trust and all trust beneficiaries are part of a medicaid unit;
- e. The grantor is a parent, and beneficiaries of the trust include only the grantor, the grantor's spouse, or the grantor's minor children;
- f. The trust has been amended subsequent to its establishment;
- g. The trust provides for termination and disbursement to the grantor upon conditions relating to the grantor during the grantor's lifetime; or
- h. The trust provides for revocation or amendment only upon order of a court.

The Department expects to make some modifications to this rule to reflect changes made under House Bill No. 1300. The amendment appears to apply to a relatively narrow subset of trusts. No fiscal note

has been requested of the Department. If a request were made, we would expect it to say that we are unable to determine the impact. As with any change that has the potential to increase the number of people eligible for Medicaid, however, the change also may result in a need for a comparable increase in Medicaid funding.

I will try to answer any questions you may have. Thank you.