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Chairperson Diane Larson
Senate Judiciary Committee

TESTIMONY OF BLAINE T. JOHNSON
IN OPPOSITION TO HB 1364

Chairperson Larson, Vice-Chair Dwyer, and members of the Senate Judiciary Committee, I submit the following testimony in opposition to House Bill 1364 seeking to restrict the powers of the personal representative in estate administration and create unnecessary procedural burdens upon the court system. I am a partner with the law firm of Crowley Fleck in Bismarck, North Dakota and have served as the chair of the Real Property, Probate, Trusts and Estates Section of the State Bar Association of North Dakota for the last five years.

The Uniform Probate Code has been the basis of estate administration in North Dakota since its adoption in 1973. Notably, drafting of the UPC began in 1964 by the National Conference of Commissioners on Uniform State Laws in conjunction with the Real Property, Probate and Trust Law Section of the American Bar Association. Legal scholars and experienced attorneys in the estate field spent over five years drafting the model legislation and have continued to update and amend the act as necessary when changes in law occur. The UPC seeks to provide flexibility in administration in order to effectively and expeditiously accommodate the testamentary wishes of decedents. It is intentionally designed to accommodate the broadest range of circumstances possible. HB 1364 if passed will impinge upon that flexibility and efficiency as well as create a myriad of problems when administering estate property.

The UPC provides the personal representative with wide latitude over control and possession of the decedent's estate. HB 1364 is contrary to this philosophy and directly contradicts other provisions of the UPC. North Dakota Century Code § 30.1-18-11 provides that the personal representative "has the same power over the title to property of the estate than an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing or order of court." The UPC further places responsibilities and duties on the personal representative to preserve and safeguard the estate assets as a fiduciary for the heirs and devisees of the decedent. HB 1364 does not consider the liabilities that a personal representative may be held accountable for when real property is in the possession of a presumptively entitled person.

The drafters of the UPC generally sought to make probate proceedings more administrative in nature with the court's role passive until some interested person invokes its power to secure resolution of a matter. Generally, an informal probate application does not provide the ability for court oversight. This will likely mean that practitioners will need to file formally rather than informal when the estate holds real property. This greatly increases the cost of a probate as well as the time necessary to complete the probate.

- With increasing use of probate avoidance techniques such as beneficiary designations, transfer on death designations, and pay on death designations, estates are becoming less liquid and often real estate is the primary asset. In order to create liquidity and provide for the payment of debts, such as medical bills and nursing home expenses, it is often the case that real property must be sold. Seeking a court order to sell real property will add unnecessary time and expense to the administration of the estate and ultimately further reduce the value that is passed on to the heirs or devisees.
- N.D.C.C. § 30.1-18-09 currently permits the personal representative to leave real property or personal property with the person presumptively entitled to it. In other words, when circumstances exist where it makes sense for the property to be possessed by the individual who will ultimately receive it, the personal representative has the power and authority to do so. The statute intentionally uses the singular “person” rather than persons. It is common for a decedent to leave property to a class or group of people, such as his or her children, or in cases where there is no will the heirs of the decedent. In situations where there are multiple individuals presumptively entitled to real property, it rarely is beneficial for a personal representative to leave real property in the possession of all. Multi-party ownership of real property becomes a logistical nightmare with no one individual responsible for the upkeep and maintenance of the property.
- It is common to have circumstances where the person presumptively entitled to the real property does not desire to have the property but would prefer it to be sold. In order to accomplish this wish, despite the fact that the personal representative is likely cooperative, a court order would be required. If the individual presumptively entitled to the real property is given possession of the real property by the personal representative, it may also impinge upon that person's ability to disclaim any interest in it. N.D.C.C. § 30.1-10.1-10 permits disclaimer only when the beneficiary has not acted in any way to indicate acceptance or ownership of the interest – which would include possession.
- Assume that the real property is left with a presumptive person. Who is ultimately responsible for maintaining insurance coverage, payment of property taxes, and payment of any encumbrances during the course of the probate administration? Is a presumptive person entitled to reimbursement of those expenses if he or she pays them? HB 1364 provides that the personal representative is responsible for those expenses while in the possession of the personal representative. It does not address expenses while in the possession of the presumptively entitled person.

- Will the presumptively entitled person be responsible for any damage or waste caused to the real property while in his or her possession? In the event that the estate must take possession of the real property in order to raise funds to cover the decedent's debts, will the presumptively entitled person be financially responsible for any diminution in the property value while in his or her possession?
- Will the personal representative be absolved from any liability in the event the real property is in the possession of a presumptively entitled person and the property is catastrophically damaged by fire, flood, or other act and the presumptively entitled person has not maintained insurance coverage? Will an insurance company even permit a personal representative to maintain insurance coverage on a property possessed by a presumptively entitled person?
- HB 1364 will impede the ability of the personal representative in preserving and administering other assets of the estate. For instance, personal property located or stored on the decedent's real property. A personal representative will be required to obtain a court order to enter into real property of the decedent in order to remove the decedent's personal property without the permission of the presumptively entitled person. Even to obtain innocuous items such as the decedent's last will and testament stored in the safe in the decedent's home will be affected.

For these reasons and the many other reasons identified by those testifying today, I respectfully ask this committee to resolve to **DO NOT PASS HB 1364**.