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10/2/03

2003 HOUSE JUDICIARY

HB 1173

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1173

House Judiciary Committee

Conference Committee

Hearing Date 1-27-03

Tape Number	Side A	Side B	Meter #
2	XX		47.3-END
2		XX	0-37
Committee Clerk Signature <i>Al Penrose</i>			

Minutes: 13 members present.

Chairman DeKrey: We will open the hearing on HB 1173.

Rep. Belley: Introduced the bill.

Molly Brunner: Support (see attached testimony)

Chairman DeKrey: Thank you.

Rep. Onstad: It states in the bill that a person in a nursing home cannot execute a will in that nursing home. If they had the desire to execute a will or initiate that, how would that process be done.

Ms. Brunner: During some discussion, the language could be changed to allow a compromise - have impartial area and impartial person help an elderly person understand what is being said.

Rep. Wrangham: Was your aunt of sound mind?

Ms. Brunner: We have questions as to that, that was never really brought up at the trial. She was recuperating from a broken hip and pneumonia.

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Rep. Wrangham: What are you desiring to do? Exclude anyone who is in a nursing home from making or having the freedom of making a choice.

Ms. Brunner: We're not stopping them from making a will. We're saying that the nursing home is not the time and place to be making a will. If they can't leave the nursing home, what are they doing changing their will.

Rep. Klemm: If somebody wants to have a will drafted or changed, an employee of the nursing home is supposed to notify LAND (Legal Assistance of North Dakota)?

Ms. Brunner: Again, that language could be changed to provide some advocate other than people in the nursing home.

Rep. Klemm: Have you talked to LAND about their taking on this responsibility?

Ms. Brunner: No.

Rep. Klemm: If an employee of the nursing home doesn't notify LAND, is it correct to say that the last sentence would make that will void, because an employee of the nursing home didn't make the notification?

Ms. Brunner: Absolutely.

Rep. Delmore: Are you saying that most employees of the nursing home have no professional ethics.

Ms. Brunner: No. The social worker has his or her particular expertise and now we're asking them to make a decision about the person's capacity to make a will.

Rep. Maragos: Your great-aunt had two previous wills, were you able to ascertain why she wrote a third will.

Ms. Brunner: No.

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Rep. Galvin: Wasn't there an executor.

Ms. Brunner: There was a personal representative, yes.

Rep. Galvin: So your great-aunt's wishes weren't carried out in the will.

Ms. Brunner: We don't know what they were, because the 1999 will dramatically changed the essence of her 1995 will.

Rep. Galvin: Could this be expanded a little more to include those people not in a nursing home could be protected the same way.

Ms. Brunner: Yes.

Chairman DeKrey: Thank you. Anyone else in favor. Any testimony in opposition to HB 1173.

David Boeck, Protection & Advocacy Project: (see attached testimony) Opposed.

Rep. Onstad: Taking into account the previous testimony, what could change within the bill to address the problems.

Mr. Boeck: Don't have any suggestions right now, in how you could guard against fraud.

Chairman DeKrey: Thank you. Any other testimony opposed to HB 1173.

Christine Hogan, Executive Director, State Bar Association of ND: Neutral (see attached testimony).

Chairman DeKrey: This is about the third or fourth session in a row now, where we have had private citizens of North Dakota come into this committee with some kind of bill where they strongly feel that an attorney did their family wrong. Is there a larger problem out there than we are seeing of attorneys doing wrongdoing.

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Ms. Hogan: It is unethical for an attorney to take under the will that she/he drafts. There are legal protections dealing with undue influence, etc.

Rep. Boehning: Is a 15 page will long, and can you understand it in an hour.

Ms. Hogan: I don't know, I don't deal with wills and estates.

Rep. Delmore: If there's a problem in drafting a will with a lawyer, what is the process with the Bar Association as far as investigation of that, discipline.

Ms. Hogan: State Bar Association does pay 1/2 of the costs of disciplining attorneys. If a complaint is made to the Clerk of the Supreme Court, they make a recommendation to the Disciplinary Board, and then the attorney may appeal that decision.

Rep. Delmore: How often does it happen that the allegations would be brought before the Bar.

Ms. Hogan: It happens all the time.

Rep. Klemin: The Supreme Court did take action against an attorney in Fargo.

Ms. Hogan: Yes.

Rep. Maragos: If the family feels harmed - can they bring a cause of action against the lawyer to repair the harm.

Ms. Hogan: No, there are malpractice actions they can bring. They can bring a suit. Also if the attorney should embezzle funds, and the lawyer doesn't have insurance to cover that, there is a fund that covers that from the Bar Association to pay out on the claim.

Chairman DeKrey: Thank you.

Malcolm Brown, lawyer: Opposed. This bill is a reaction to a bad case. If a person is over the age of 18, they are competent to make a will. There are statutes on undue influence. Now you

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Hearing Date 1-27-03

would have to bring grandma down to the lawyer's office, she couldn't sign it at the nursing home.

Rep. Klemm: This doesn't just apply to elderly people, anyone living in a nursing home would be subject to this bill.

Mr. Brown: Yes. I've gone to the nursing home many times to have people sign wills, discuss a will with them, etc. Having a neutral party involved in your will, might be against privacy.

Rep. Bernstein: Can a 15 page will be understood in an hour. Is that reasonable?

Mr. Brown: First of all, the will that sets up a testamentary trust, could be viewed as complicated, but much is boilerplate, language used in most documents.

Rep. Klemm: According to law a person can sit down and write out their own will in their own handwriting and sign it themselves, they don't need to have witnesses or have a lawyer draft it.

Mr. Brown: Right, the resident couldn't do their own will.

Rep. Galvin: Can we try to amend the bill, the bill has merit.

Mr. Brown: It just is a bad bill, we already have laws dealing with undue influence.

Chairman DeKrey: Thank you.

Shelly Peterson, President of the ND Long Term Care Association: (see attached testimony)

Opposed.

Chairman DeKrey: I would think that there going to the nursing home would be a wake-up call to get your affairs in order.

Ms. Peterson: We encourage families to put their affairs in order.

Rep. Eckre: Do any states have this type of bill.

Ms. Peterson: I don't know.

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Hearing Date 1-27-03

Chairman DeKrey: Thank you. We will close the hearing.

(Reopened later in the same session)

Chairman DeKrey: What are the committee's wishes in regard to HB 1173.

Rep. Kretschmar: Made a motion of Do Not Pass.

Rep. Grande: Seconded.

10 YES 3 NO DO NOT PASS

CARRIER: Rep. Kretschmar

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Date: 1/27/03
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1173

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Rep. Kretschmar Seconded By Rep. Grande

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Vice Chairman Maragos		✓	Rep. Eckre	✓	
Rep. Bernstein	✓		Rep. Onstad		✓
Rep. Boehning		✓			
Rep. Galvin	✓				
Rep. Grande	✓				
Rep. Kingsbury	✓				
Rep. Klemin	✓				
Rep. Kretschmar	✓				
Rep. Wrantham	✓				

Total (Yes) 10 No 3

Absent 0

Floor Assignment Rep. Kretschmar

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

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REPORT OF STANDING COMMITTEE (410)
January 28, 2003 11:43 a.m.

Module No: HR-16-1181
Carrier: Kretschmar
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE
HB 1173: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS
(10 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1173 was placed on the
Eleventh order on the calendar.

(2) DESK, (3) COMM

Page No. 1

HR-16-1181

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2003 TESTIMONY

HB 1173

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**Testimony on HB 1173
House Judiciary Committee
January 27, 2003**

Chairman DeKrey and members of the House Judiciary Committee, thank you for the opportunity to testify on HB 1173. My name is Shelly Peterson, President of the North Dakota Long Term Care Association. We represent nursing facilities, basic care facilities and assisted living facilities in North Dakota.

When you enter a nursing facility, you do not give up the legal rights you had while living in the community. In fact, residents of North Dakota's nursing facilities have additional legal rights and responsibilities which are guaranteed by State and Federal law.

We believe HB 1173 directly violates 42CFR§483.10, entitled "Resident Rights." This regulation addresses the right of every residents of a skilled nursing facility to self-determination and communication with and access to services inside and outside the facility. Just as an elderly individuals living in the community has a right to execute a will and choose whatever attorney they prefer, so does a nursing facility resident.

All skilled nursing facilities that participate in Medicare (which all 84 North Dakota nursing facilities do) must "protect and promote the rights of each resident: including the exercise of his or her rights "as a citizen or resident of the United States - 42CFR§483.10(a)(1).

HB 1173 effectively eradicates a skilled nursing facility residents right to execute his or her will, or to execute changes to an existing will, after entering the facility as a resident. On behalf of all nursing facilities in their obligation to "protect and promote the rights of each resident," we aks for your NO vote on HB 1173.

Thank you again for the opportunity to voice our opposition to HB 1173. I would be happy to answer any questions.

Shelly Peterson, President
North Dakota Long Term Care Association
1900 North 11th Street
Bismarck, ND 58501
(701) 222-0660

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House Judiciary Committee
Fifty-eighth Legislative Assembly of North Dakota
House Bill No. 1173
January 27, 2003

Good afternoon, Chairman DeKrey, and Members of the House Judiciary Committee. I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project. The Protection & Advocacy Project serves people with disabilities. House Bill 1173 is very short but raises many questions.

I do not know the precise purpose of the bill. It appears designed to prevent a nursing home resident from creating or amending a will while the resident depends upon the nursing home for health- and life-preserving care lest the resident make an uncharacteristic bequest to the nursing home, a nursing home employee, or the nursing home's owner.

Another purpose of the bill may be to prevent a nursing home resident from creating or amending a will, based upon the presumption that all nursing home residents are incompetent or unable to resist pressure to make uncharacteristic bequests. The bill may have other or additional purposes.

Briefly, I summarize several concerns about the bill:

1. Most nursing home residents are fully competent to create or amend a will.

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2. Some nursing home residents live in the nursing home for years. These residents could be subject to the restrictions imposed by HB 1173 for a very long time.
3. Some nursing home residents cannot leave the nursing home without jeopardizing their medical conditions. HB 1173 would require them unnecessarily to risk their health (or lives) just to create or amend their wills.
4. Last session, the Legislature amended North Dakota laws to permit a health care provider to notarize or serve as one of two witnesses to a living will (section 23-06.4-03) or a durable power of attorney for health care decisionmaking (section 23-06.5-05). See 2001 N.D. Sess. Laws chapter 234. It would be peculiar to create conditions for the disposition of estate property that are more rigid than the conditions that govern life-and-death decisions.
5. I believe Legal Assistance of North Dakota, Inc., (LAND) currently has a grant through the Department of Human Services to provide certain legal services to elderly North Dakotans. I believe the grant is subject to competitive bidding, so LAND may not have the grant in the future. If LAND does not have this grant, LAND might not be able to provide appropriate legal services. It might then be necessary for the Legislature to appropriate money to pay LAND to provide the services.

House Bill No. 1173
January 27, 2003

In the alternative, it may be necessary for the Legislature to amend the law when a different entity is the grantee.

6. When a nursing home refers a resident to LAND, it may appear to be endorsing LAND over the resident's own private attorney.
7. If nursing homes provide LAND with information about a resident, the nursing home may run afoul of new federal regulations on the privacy of medical records.

There may be less intrusive ways to address the targeted issues effectively. I offer to draft an amendment to this bill once I know the intentions of the Committee.

Thank you. I am happy to answer any questions you may have.

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Molly Brunner
<mbrunner@ndak.net
>

To: <lbellew@state.nd.us>
cc:
Subject: HB 1173

01/26/2003 11:31 PM

Larry,
We will do our best to be in Bismarck by 2:00. The weather doesn't look good. I plan to leave school at noon. If for any reason, this hearing is postponed please give me a call at 701-857-4211.
In case we don't make it, here is what I wanted to say. Feel free to make copies for each of the committee members especially Andrew Maragos. He was a neighbor to us when we were growing up. Perhaps he will remember my parents.

Ladies and Gentlemen, thank you for allowing me to come here today to relate to you why HB 1173 is needed not only to protect the senior citizens residing in nursing facilities of North Dakota, but all the citizens of North Dakota.

My great grandparents homesteaded land near Lakota beginning in 1892. They had nine children. The land was passed down through natural succession to the last of the family, my great-aunt, Irene Howser. The legacy cannot be continued now because of a greedy neighbor and a unscrupulous attorney.

My grandmother was the only one in her family to have children. My parents, Garth and Eleanor Connole, raised all eight of their children in Minot. When we were little, our grandmother, Margaret Tierney St. Peter would take each of us in our own turn to the farm near Lakota to spend the summer with her and our great aunts and uncles. Some of our fondest memories as children were spent on the farm doing as many chores as a child could do. I remember being told that I was the best rock-picker in the county. The relationship with our great aunts and uncles continued until the death of our great-aunt, Irene Howser.

Great Aunt Irene had two previous wills both of which were generous to charities and the community. Evidently, both the the previous wills were not generous enough because the attorney/banker now controls All of the estate. This is not an isolated incident, I have discovered a similar incident involving another senior citizen in the same county, who was the last of his family and without children who left a sizable portion of his estate in control of the attorney who drafted his will. As I am sure you are aware, the United States and North Dakota in particular, is aging. Don't elude yourself for a moment that this kind of thing is not happening throughtout the state. Do you want attorneys and banks controlling the land of North Dakota? Do you want small towns in North Dakota shoring up their futures at the expense of the families?

As I explained in my email, I have asked Representative Bellew to draft this bill because of the travesty of justice that has been inflicted on my family. Everyone that we have told our story to cannot believe that this kind of thing has taken place in OUR state, a state where we pride ourselves with the ideals of honesty, and family.

This bill would not prevent wills from being drafted by attorneys. This bill would provide an advocate for senior citizens. Someone to ensure that one of the most important documents of a lifetime truly reflects the wishes of the individual.

Do you want an attorney to visit with your relatives in a nursing home, without an impartial witness? What hat was Aunt Irene's attorney wearing when he drafted her last will? What hat was the social worker and nurse wearing when they witnessed the will? How many of you have a 15-page will

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and would fully understand the complexities of such a document with less than an hour of explanation? I believe that Aunt Irene was duped by the very persons she trusted.

All of the attorneys, bankers, social workers, and nurses we have consulted have told us that they personally would not involve themselves in similar circumstances to avoid even the appearance of conflict of interest. These people have told us that there are codes of conduct which discourage unethical behavior. However, rules are simply rules. They do not carry the full weight of the law and a law is what is needed.

Please support HB 1173 and recommend a Do Pass.

Thanks for your help Larry. We'll hope for the best and cope with the rest!

Molly Brunner

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Testimony on HB 1173

House Judiciary Committee

January 27, 2003

Christine Hogan
Executive Director
State Bar Association of North Dakota

The State Bar Association of North Dakota represents the 1800 attorneys who are licensed to practice in North Dakota. The Association has not taken a position either for or against House Bill 1173 at this time, but, because the Legislative Committee and the Board of Governors of the Association believe the bill has potential impact on the legal system, we are offering our assistance and knowledge of the subject matter in respect to the issues addressed in the bill. Malcolm Brown is an attorney and a member of the Real Property and Probate Section of the State Bar Association and he is a registered lobbyist on behalf of the section. He will be presenting in more detail the specific concerns the Real Property Section has with this bill.

We have two primary concerns about this proposed legislation. First, as a general matter, our Association does question the concept of singling out a subset of the population, in this instance "individuals living in a nursing home," for the prohibition outlined in this legislation. The apparent purpose for singling out nursing home residents for the prohibition against executing a will seems to be an unstated presumption that persons in

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nursing homes are, as a group, incompetent to execute wills. This is certainly not the case. Many, if not most, individuals living in nursing homes are competent, and thus they do have the legal capacity to execute a will. Similarly, many people who are not currently in nursing homes are not legally competent and, they would not have the capacity to execute a valid will.

Secondly, the State Bar Association has a concern with the requirement of notifying Legal Assistance of North Dakota. The requirement implies something meaningful will happen when the notice is received. The implication of this notification seems to be that Legal Assistance would then step in and do something to assist individuals in nursing homes to prepare their wills. But Legal Assistance does not engage in will preparation or estate planning. Thus, LAND would probably not be in a position to do much of anything if it were notified. Also, the bill implies that individuals living in nursing homes would qualify for assistance from Legal Assistance of North Dakota. Since this would most likely not be the case, notification of LAND would seem to be a completely meaningless and inappropriate statutory requirement.

Thank you for this opportunity to appear before the committee. If there are no further questions, I would like to introduce Malcolm Brown on behalf of the Real Property and Probate Section.

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