

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1034

2007 HOUSE JUDICIARY

HB 1034

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1034

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/24/07

Recorder Job Number: 1770

Committee Clerk Signature

J. Penrose

Minutes:

Chairman DeKrey: We will open the hearing on HB 1034.

Vonette Richter, LC: (see attached testimony).

Rep. Delmore: I would like to thank Vonette for her hard work during the interim.

Chairman DeKrey: Thank you. Further testimony in support.

Rep. Larry Klemin: I am a sponsor of the bill, explained the bill; I served on the Task Force for the State Bar Association that worked on the review of the Uniform Trust Code, and I along with Rep. Kretschmar are also members of the Uniform Law Commission. I handed out two things, 18 states have adopted it. Many of these states have made a number of changes to the Uniform Trust Code also, and as the task force progressed and its review of the Uniform Trust Code, we evaluated all of the amendments that were made by those other states and it was quite a lengthy and time consuming project and members of the task force spent many hours on this. The result that we have is a combination of two things, one is the bill that was introduced through the Interim Judiciary Committee and at the time the committee adjourned, the task force had not yet completed its review of the Uniform Trust Code and what the other states had done. Consequently, the bill was introduced with the amendments that we had up to that point in time, which was last August, and after that the Task force continued to look at

the bill and Uniform Trust Code and came up with additional amendments and those 7 pages of amendments that I already handed out to you. That goes through the completion of the review by the task force. This bill is very large and very complex. One item in the amendments that you see is that it has a staggered effective date. It would apply effective August 1, 2007 for all new trusts completed after the date, but for existing trusts, those that are in existence prior to the effective date, the effective date will be August 1, 2009. This will give the parties involved with those existing trusts the opportunity to review the language of their trusts and make their revisions that they think are appropriate to comply with the new trust code in ND.

Rep. Koppelman: How much can we vary before it doesn't become uniform anymore? Are all the states amending it along the same lines?

Rep. Klemin: A lot of the amendments that we have included in here were amendments that were done by other states. We looked at what they did. The trust law in ND is largely case law and not statutory law, so we are really adopting something new. How uniform is it, by and large it's very uniform but there are wrinkles here and there. We tended to amend this so that it would comply with the way we are doing things here in ND.

Chairman DeKrey: Thank you. Further testimony in support.

William Guy, Uniform Trust Code Drafting Task Force: (see attached testimony).

Rep. Delmore: Thank you for your work. I have a question on the special needs trust. Are we strong enough in protecting those in this bill?

William Guy: I believe that we are; because the chapter 59-08 is the specific chapter pertaining to that specific type of trust and has been effective up to this point. That trust will supercede the general terms of the UTC. The UTC will apply to some special needs trusts to the extent that 59-08 doesn't apply. I don't believe there will be any problems.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1034

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/31/07

Recorder Job Number: 2459

Committee Clerk Signature

Delmore

Minutes:

Chairman DeKrey: We will take a look at HB 1034.

Rep. Klemin: HB 1034 is the Uniform Trust Code and Bill Guy was here to explain the bill. Explained his amendment. I move the amendment.

Rep. Boehning: Second.

Chairman DeKrey: We will take a voice vote. Motion carried. We now have the bill before us as amended.

Rep. Delmore: I move a Do Pass as amended.

Rep. Wolf: Second.

13 YES 0 NO 1 ABSENT

DO PASS AS AMENDED

CARRIER: Rep. Klemin

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1034

Page 1, line 6, after "chapters" insert "30.1-32,"

Page 8, line 26, after "the" insert "North Dakota"

Page 20, line 3, after "trust" insert "or the attorney general"

Page 20, after line 4, insert:

- "4. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not impair the rights and powers of the attorney general with respect to any trust.
5. In all cases of charitable trusts, the attorney general and the state's attorney of the county in which the trust is located are interested persons with respect to the trust estate.

Page 25, line 1, after "a" insert "self-settled" and after "trust" insert "or a third-party special needs trust under chapter 59-08 nor to any trust"

Page 25, line 2, replace "42 U.S.C. 1396p(d)(4)(A) if the application of" with "42 U.S.C. 1396p(d)."

Page 25, remove lines 3 through 7

Page 28, line 16, remove "and the settlor has capacity to revoke the trust"

Page 28, line 24, replace "may" with "shall"

Page 28, line 25, replace "at" with "immediately before"

Page 28, line 30, replace "at" with "immediately before"

Page 29, after line 7, insert:

- "4. This section does not impose a duty upon the trustee to give notice under this section unless the notice is expressly required in the trust agreement."

Page 29, line 18, replace "reject" with "decline"

Page 29, line 20, replace "rejected" with "declined"

Page 29, line 23, replace "rejection" with "declination"

Page 30, line 3, replace "regulated financial service institution qualified to do trust business" with "bank or trust company qualified to act as a trustee"

Page 30, line 19, replace "not delegate to a cotrustee the performance of a function the settlor" with "delegate to a cotrustee the performance of any function other than a function that the terms of the trust expressly require to be performed by the trustees jointly"

Page 30, line 20, remove "reasonably expected the trustees to perform jointly"

Page 31, line 1, replace "rejects" with "declines"

Page 31, line 2, after "identified" insert ", cannot be located,"

Page 31, line 10, after "trust" insert "or appointed under the terms of the trust"

Page 31, line 16, after "trust" insert "or appointed under the terms of the trust"

Page 31, line 25, replace "upon at least thirty days' notice to the qualified beneficiaries," with ":

- a. Upon at least thirty days' notice to the settlor, if living, to all cotrustees, and the qualified beneficiaries, except those qualified beneficiaries under a revocable trust that the settlor has the capacity to revoke; or
- b. With the approval of the court."

Page 31, remove line 26

Page 32, after line 24, insert:

- "3. Title to all trust property must be owned by and vested in any successor trustee without any conveyance, transfer, or assignment by the prior trustee."

Page 33, line 9, after the underscored period insert "The lien under this subsection does not apply to a common or collective fund that is exempt under 26 U.S.C. 584."

Page 37, line 15, after "upon" insert "written", remove "of a beneficiary", and remove "to the beneficiary"

Page 37, line 16, after "instrument" insert ":

- a. To a qualified beneficiary of a revocable trust; and
- b. To a beneficiary of a trust that is not revocable"

Page 38, after line 8, insert:

- "8. The duties of a trustee specified in this section are not subject to section 59-14-03.
9. Subsections 3 and 4 do not apply to a trustee who accepts a trusteeship before August 1, 2007, to an irrevocable trust created before August 1, 2007, or to a revocable trust that becomes irrevocable before August 1, 2007."

Page 38, line 13, remove "terms and" and remove "and the interests of the beneficiaries"

Page 39, line 6, remove "competent" and after "owner" insert ", who is not an incapacitated person."

Page 39, line 17, replace "trust money in an account in a regulated financial service institution" with "or invest trust money in a regulated financial institution, including one operated by the trustee or an affiliate of the trustee"

Page 39, line 18, after "security" insert "from any financial institution, including a financial institution that is serving as a trustee or one of its affiliates"

Page 40, line 16, remove "arising from the administration of"

Page 40, line 17, remove "the trust"

Page 40, line 18, after "Abandon" insert ", distribute."

Page 42, after line 11, insert:

- "26. Purchase and pay from trust principal the premiums on life insurance.
27. Allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence or amortization, or for depletion in mineral or timber properties.
28. a. With respect to the administration of trust assets as one or more trusts to:
- (1) Receive and administer additional property as part of the trust estate or as a separate trust having terms identical to the terms of the existing trust;
 - (2) Sever any trust estate on a fractional basis, before or after a trust is funded, into two or more separate trusts for any reason;
 - (3) Segregate by allocation to a separate account or trust a specific amount or gift made from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirements or elections, or to reduce potential generation, skipping transfer tax liability, in a manner consistent with the rules governing disclaimers, such federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and any income earned on a segregated

amount or gift after segregation occurs passes to the designated taker of such amount or gift; and

(4) Consolidate two or more trusts having substantially similar terms into a single trust.

b. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts created. A separate account or trust created by severance or segregation must be treated as a separate trust for all purposes from and after the date on which the severance or segregation is effective. The trustee shall hold such separate account or trust on terms and conditions that are substantially equivalent to the terms of the trust from which it was severed or segregated so that the aggregate interests of each beneficiary in the several trusts are substantially equivalent to the beneficiary's interests in the trust before severance or segregation; provided, however, that any terms of the trust before severance that would affect qualification of the trust for any federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in each of the separate trusts created.

29. Employ persons, including attorneys, auditors, investment advisors or agents, to advise or assist the trustee in the performance of administrative duties. A trustee may act based on the recommendations of professionals without independently investigating the recommendations.

30. Deal with the personal representative, trustee, or other representative of any other trust or estate in which a beneficiary of the trust estate has an interest, notwithstanding the fact that the trustee is a personal representative, trustee, or other representative of the other trust or estate."

Page 42, line 12, replace "26." with "31."

Page 42, line 17, after "beneficiaries" insert ", and the attorney general in the case of a charitable trust," and after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 42, line 18, after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 42, line 20, after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 43, line 3, after "in" insert "sections 59-16-02, 59-16-03, 59-16-05, 59-16-06, and 59-16-07 and in"

Page 44, line 16, remove "of this chapter"

Page 44, line 18, after "under" insert "sections 59-16-02, 59-16-03, 59-16-05, 59-16-06, and 59-16-07 and under"

Page 45, line 22, remove "A trustee is accountable to an"

Page 45, remove line 23

Page 45, line 24, remove "trust, even absent a breach of trust."

Page 45, line 27, replace "(1004) Attorney's fees and costs. In a judicial proceeding involving the" with "**RESERVED**"

Page 45, remove lines 28 through 30

Page 46, line 4, after "beneficiary" insert "in the report or in a separate notice accompanying the report"

Page 46, line 24, remove "the interests"

Page 46, line 25, remove "of the beneficiaries or"

Page 46, line 27, replace "An" with "Unless the settlor was represented by an attorney not employed by the trustee with respect to the trust containing the exculpatory term, an"

Page 47, line 6, after "beneficiary" insert "lacked capacity or"

Page 47, line 11, after the underscored period insert "The addition of the phrase "trustee" or "as trustee" or a similar designation to the signature of a trustee on a written contract is considered prima facie evidence of a disclosure of a fiduciary capacity."

Page 47, after line 19, insert:

"4. Whenever a trust instrument reserves to the settlor, or vests in an advisory or investment committee, or in any other person, including one or more cotrustees to the exclusion of the trustee or to the exclusion of one or more of several trustees, authority to direct the making or retention of any investment, the excluded trustee or trustees are not liable, either individually or as a fiduciary, for any loss resulting from the making or retention of any investment pursuant to such direction.

5. In the absence of actual knowledge or information that would cause a reasonable trustee to inquire further, a trustee may not be held liable for failure to take necessary steps to compel the redress of any breach of trust or fiduciary duty by any predecessor personal representative, trustee, or other fiduciary. This section may not be construed to limit the fiduciary liability of any trustee for the acts or omissions of the trustee with respect to the trust estate.

Page 47, line 25, replace "in the contract or in a statement previously filed under title 45" with ":

a. In the contract;

b. In a registration of the partnership as a limited liability partnership filed pursuant to chapter 45-22 in which the trustee is listed as a managing partner; or

c. In a certificate of limited liability limited partnership filed pursuant to chapter 45-23 in which the trustee is listed as a general partner

Page 48, line 24, replace "Instead of furnishing a copy of the trust instrument to a person other than a" with "Unless otherwise required by chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, or 59-19"

Page 48, line 25, remove "beneficiary"

Page 48, line 26, after the second "the" insert "effective", after "date" insert "of", and remove "was"

Page 48, line 27, remove "executed", after the first underscored comma insert "the name of the trust, if a name is given,", and replace the second "the" with "each"

Page 48, line 28, after the first "the" insert "applicable" and after the second "trustee" insert ", which may make reference to the powers set forth in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19"

Page 48, line 29, after the underscored comma insert "and"

Page 49, line 1, remove ", the trust's taxpayer"

Page 49, line 2, remove "identification number, and the manner of taking title to trust property"

Page 50, replace lines 5 through 27 with:

- "1. Except as otherwise provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19, effective August 1, 2007, these chapters:
 - a. Apply to all trusts created after July 31, 2007; and
 - b. Apply to all judicial proceedings concerning trusts which are commenced after July 31, 2007.
2. Except as otherwise provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19, from August 1, 2007, through July 31, 2009:
 - a. A trust created before August 1, 2007, may elect to be subject to chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19; however, that trust must be in compliance with those chapters by August 1, 2009;
 - b. Any rule of construction or presumption provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 applies to trust instruments executed before August 1, 2009, unless there is a clear indication of a contrary intent in the terms of the trust;
 - c. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not apply to judicial proceedings concerning trusts which are commenced before that date unless the

court finds that application of a particular provision of these chapters would not substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of these chapters applies and the superseded law does not apply; and

- d. An act done before August 1, 2009, is not affected by chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19.
3. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before August 1, 2007, for those trusts that are subject to subsection 1, or before August 1, 2009, for those trusts that are subject to subsection 2, that statute continues to apply to the right even if it has been repealed or superseded."

Page 52, line 16, after "Chapters" insert "30.1-32,"

Renumber accordingly

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1034

Page 1, line 1, after "enact" insert "a new section to chapter 59-08 and"

Page 1, line 5, remove "and"

Page 1, line 6, after "38-13-01" insert "and subsection 2 of section 59-08-01" and after
"chapters" insert "30.1-32,"

Page 1, line 7, remove "59-04.2,"

Page 8, after line 22, insert:

"SECTION 13. A new section to chapter 59-08 of the North Dakota Century Code is created and enacted as follows:

Conflicts with other chapters. If any provision of this chapter conflicts with chapter 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, or 59-19, the provision of this chapter takes precedence.

SECTION 14. AMENDMENT. Subsection 2 of section 59-08-01 is amended and reenacted as follows:

2. "Self-settled special needs trust" means a trust created by an individual with a disability after August 10, 1993, which qualifies under 42 U.S.C. ~~1396p(d)(4)(A)~~ 1396p(d)(4)."

Page 8, line 26, after "the" insert "North Dakota"

Page 8, replace lines 27 through 30 with:

"59-09-02. (102) Scope.

1. Except as provided in subsection 2, chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 apply to express trusts, whether charitable or noncharitable and testamentary or inter vivos, and to trusts created pursuant to a statute or a judgment or decree that requires the trust to be administered in the manner of an express trust.
2. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not apply to:
 - a. A trust that is part of an employee benefit arrangement or an individual retirement account.
 - b. A trust account established under a qualified tuition savings program pursuant to section 6-09-38.
 - c. Trust accounts maintained on behalf of clients or customers by licensed service professionals, including trust accounts maintained by attorneys pursuant to the North Dakota Rules of Professional Conduct and by real estate brokers pursuant to chapter 43-23.

- d. An endowment care fund established by a cemetery authority pursuant to chapter 23-21.
- e. Funds maintained by public bodies as defined by chapter 1-07 or other governmental unit entities.
- f. Trust funds held for a single business transaction or an escrow arrangement.
- g. Trusts created by a depository agreement with a financial institution.
- h. An account maintained under the North Dakota Uniform Transfers to Minors Act as contained in chapter 47-24.1.
- i. A fund maintained pursuant to court order in conjunction with a bankruptcy proceeding or a business liquidation.
- j. A voting trust described in chapter 10-19.1.
- k. Funds maintained to manage proceeds from class actions.
- l. A trust created solely to secure the performance of an obligation.
- m. A trust created on behalf of a resident of a residential facility.
- n. A trust managed by a nonprofit association for disabled individuals under 42 U.S.C. 1396p(d)(4), as in effect on the effective date of chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 and under the rules adopted by the department of human services.
- o. A resulting or constructive trust."

Page 9, line 1, after the second boldfaced underscored period insert "Any term not specifically defined in this section has the meaning provided in title 30.1."

Page 9, replace lines 3 through 31 with:

- 1. "Action", with respect to an act of a trustee, includes a failure to act.
- 2. "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.
- 3. "Beneficiary" means a person that:
 - a. Has a present or future beneficial interest in a trust, vested or contingent; including the owner of an interest by assignment or transfer; or
 - b. In a capacity other than that of a trustee, holds a power of appointment over trust property.
- 4. "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in subsection 1 of section 59-12-05.
- 5. "Conservator" is as defined in section 30.1-01-06.

6. "Distributee" means any person who receives property of a trust from a trustee, other than as a creditor or purchaser.
7. "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.
8. "Guardian" is as defined in section 30.1-01-06.
9. "Internal Revenue Code" means the Internal Revenue Code of 1986, or corresponding future provisions of federal tax law.
10. "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.
11. "Jurisdiction", with respect to a geographic area, includes a state or country.
12. "Permissible distributee" means a beneficiary who is currently eligible to receive distributions of trust income or principal, whether the distribution is mandatory or discretionary.
13. "Power of withdrawal" means a presently exercisable general power of appointment other than a power:
 - a. Exercisable by a trustee and limited by an ascertainable standard; or
 - b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
14. "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
15. "Qualified beneficiary":
 - a. Means a beneficiary who, on the date the beneficiary's qualification is determined:
 - (1) Is a permissible distributee of trust income or principal;
 - (2) Would be a permissible distributee of trust income or principal if the interests of the distributees described in paragraph 1 terminated on that date without causing the trust to terminate; or
 - (3) Would be a permissible distributee of trust income or principal if the trust terminated on that date.
 - b. Does not include a contingent distributee or a contingent permissible distributee of trust income or principal whose interest in the trust is not reasonably expected to vest.
16. "Record" means information that is enshrined on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.
17. "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.
18. "Settlor" means a person, including a testator, that creates, or contributes property to a trust and if more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust

property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

19. "Signed" means:
- a. That the signature of a person, which may be a facsimile affixed, engraved, printed, placed, stamped with indelible ink, transmitted by a facsimile telecommunication or electronically, or in any other manner reproduced on the record, is placed on a record or instrument with the present intention to authenticate the record or instrument.
 - b. With respect to a record or instrument required by this chapter to be filed with the clerk of court, that:
 - (1) The record or instrument has been signed by a person authorized to do so by this chapter or by the trust instrument; and
 - (2) The signature and the record or instrument are communicated by a method or medium acceptable to the clerk of court.
20. "Special needs trust" means special needs trust as defined in section 59-08-01.
21. "Spendthrift provision" means a term of a trust which restrains either the voluntary or involuntary or both the voluntary and involuntary transfer of a beneficiary's interest and does not include or prevent a disclaimer of an interest of a beneficiary.
22. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
23. "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.
24. "Trust instrument" means a record signed by the settlor that contains terms of the trust, including any amendments to the record and any modifications permitted by court order or by binding nonjudicial settlement agreement.
25. "Trustee" includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court."

Page 10, remove lines 1 through 20

Page 17, line 20, after "attorney" insert "or" and after "having" insert "other"

Page 20, line 3, after "trust" insert "or the attorney general"

Page 20, after line 4, insert:

- "4. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not impair the rights and powers of the attorney general with respect to any trust.
5. In all cases of charitable trusts, the attorney general and the state's attorney of the county in which the trust is located are interested persons with respect to the trust estate."

Page 25, line 1, after "a" insert "self-settled" and after "trust" insert "or a third-party special needs trust under chapter 59-08 nor to any trust"

Page 25, line 2, replace "42 U.S.C. 1396p(d)(4)(A) if the application of" with "42 U.S.C. 1396p(d)."

Page 25, remove lines 3 through 7

Page 25, after line 30, insert:

- "5. If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim if the beneficiary was not acting as trustee or cotrustee."

Page 28, line 16, remove "and the settlor has capacity to revoke the trust"

Page 28, line 24, replace "may" with "shall"

Page 28, line 25, replace "at" with "immediately before"

Page 28, line 30, replace "at" with "immediately before"

Page 29, after line 7, insert:

- "4. This section does not impose a duty upon the trustee to give notice under this section unless the notice is expressly required in the trust agreement."

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Page 29, line 20, replace "rejected" with "declined"

Page 29, line 23, replace "rejection" with "declination"

Page 30, line 3, replace "regulated financial service institution qualified to do trust business" with "bank or trust company qualified to act as a trustee"

Page 30, line 19, replace "not delegate to a cotrustee the performance of a function the settlor" with "delegate to a cotrustee the performance of any function other than a function that the terms of the trust expressly require to be performed by the trustees jointly"

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Page 31, line 16, after "trust" insert "or appointed under the terms of the trust"

Page 31, line 25, replace "upon at least thirty days' notice to the qualified beneficiaries," with ":

- a. Upon at least thirty days' notice to the settlor, if living, to all cotrustees, and the qualified beneficiaries, except those qualified beneficiaries under a revocable trust that the settlor has the capacity to revoke; or
- b. With the approval of the court."

Page 31, remove line 26

Page 32, after line 24, insert:

- "3. Title to all trust property must be owned by and vested in any successor trustee without any conveyance, transfer, or assignment by the prior trustee."

Page 33, line 9, after the underscored period insert "The lien under this subsection does not apply to a common or collective fund that is exempt under 26 U.S.C. 584."

Page 37, line 15, after "upon" insert "written", remove "of a beneficiary", and remove "to the beneficiary"

Page 37, line 16, after "instrument" insert ":

- a. To a qualified beneficiary of a revocable trust; and
- b. To a beneficiary of a trust that is not revocable"

Page 38, after line 8, insert:

- "8. The duties of a trustee specified in this section are not subject to section 59-14-03.
9. Subsections 3 and 4 do not apply to a trustee that accepts a trusteeship before August 1, 2007, to an irrevocable trust created before August 1, 2007, or to a revocable trust that becomes irrevocable before August 1, 2007."

Page 38, line 13, remove "terms and" and remove "and the interests of the beneficiaries"

Page 38, line 15, replace ", a" with ":

a. A"

Page 38, line 18, replace "relating to the trustee's" with "; and

b. A"

Page 38, remove lines 19 and 20

Page 38, line 21, remove "corresponding future provisions of federal tax law, and a"

Page 38, line 28, replace "a" with ":

a. A"

Page 38, line 30, remove "of 1986, or corresponding future provisions"

Page 38, line 31, remove "of federal tax law," and replace the first "any" with:

"b. Any"

Page 39, line 1, replace "a" with:

"c. A"

Page 39, line 3, remove "of 1986, or corresponding future provisions of federal tax law"

Page 39, line 6, remove "competent" and after "owner" insert ", who is not an incapacitated person,"

Page 39, line 17, replace "trust money in an account in a regulated financial service institution" with "or invest trust money in a regulated financial institution, including one operated by the trustee or an affiliate of the trustee"

Page 39, line 18, after "security" insert "from any financial institution, including a financial institution that is serving as a trustee or one of its affiliates"

Page 40, line 16, remove "arising from the administration of"

Page 40, line 17, remove "the trust"

Page 40, line 18, after "Abandon" insert ", distribute,"

Page 42, after line 11, insert:

26. Purchase and pay from trust principal the premiums on life insurance.

27. Allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence or amortization, or for depletion in mineral or timber properties.

28. a. With respect to the administration of trust assets as one or more trusts to:

- (1) Receive and administer additional property as part of the trust estate or as a separate trust having terms identical to the terms of the existing trust;
- (2) Sever any trust estate on a fractional basis, before or after a trust is funded, into two or more separate trusts for any reason;
- (3) Segregate by allocation to a separate account or trust a specific amount or gift made from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirements or elections, or to reduce potential generation, skipping transfer tax liability, in a manner consistent with the rules governing disclaimers, such federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and any income earned on a segregated amount or gift after segregation occurs passes to the designated taker of such amount or gift; and
- (4) Consolidate two or more trusts having substantially similar terms into a single trust.

b. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts created. A separate account or trust created by severance or segregation must be treated as a separate trust for all purposes from and after the date on which the severance or segregation is effective. The trustee shall hold such separate account or trust on terms and conditions that are substantially equivalent to the terms of the trust from which it was severed or segregated so that the aggregate interests of each beneficiary in the several trusts are substantially equivalent to the beneficiary's interests in the trust before severance or segregation; provided, however, that any terms of the trust before severance that would affect qualification of the trust for any federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in each of the separate trusts created.

29. Employ persons, including attorneys, auditors, investment advisors or agents, to advise or assist the trustee in the performance of administrative duties. A trustee may act based on the recommendations of professionals without independently investigating the recommendations.
30. Deal with the personal representative, trustee, or other representative of any other trust or estate in which a beneficiary of the trust estate has an interest, notwithstanding the fact that the trustee is a personal representative, trustee, or other representative of the other trust or estate."

Page 42, line 12, replace "26." with "31."

Page 42, line 17, after "beneficiaries" insert ", and the attorney general in the case of a charitable trust," and after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 42, line 18, after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 42, line 20, after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 43, line 3, after "in" insert "sections 59-16-02, 59-16-03, 59-16-05, 59-16-06, and 59-16-07 and in"

Page 44, line 16, remove "of this chapter"

Page 44, line 18, after "under" insert "sections 59-16-02, 59-16-03, 59-16-05, 59-16-06, and 59-16-07 and under"

Page 45, line 22, remove "A trustee is accountable to an"

Page 45, remove line 23

Page 45, line 24, remove "trust, even absent a breach of trust."

Page 45, line 27, replace "(1004) Attorney's fees and costs. In a judicial proceeding involving the" with "RESERVED."

Page 45, remove lines 28 through 30

Page 46, line 4, after "beneficiary" insert "in the report or in a separate notice accompanying the report"

Page 46, line 24, remove "the interests"

Page 46, line 25, remove "of the beneficiaries or"

Page 46, line 27, replace "An" with "Unless the settlor was represented by an attorney not employed by the trustee with respect to the trust containing the exculpatory term, an"

Page 47, line 6, after "beneficiary" insert "lacked capacity or"

Page 47, line 11, after the underscored period insert "The addition of the phrase "trustee" or "as trustee" or a similar designation to the signature of a trustee on a written contract is considered prima facie evidence of a disclosure of a fiduciary capacity."

Page 47, after line 19, insert:

- "4. Whenever a trust instrument reserves to the settlor, or vests in an advisory or investment committee, or in any other person, including one or more cotrustees to the exclusion of the trustee or to the exclusion of one or more of several trustees, authority to direct the making or retention of any investment, the excluded trustee or trustees are not liable, either individually or as a fiduciary, for any loss resulting from the making or retention of any investment pursuant to such direction.
5. In the absence of actual knowledge or information that would cause a reasonable trustee to inquire further, a trustee may not be held liable for failure to take necessary steps to compel the redress of any breach of trust or fiduciary duty by any predecessor personal representative, trustee, or other fiduciary. This section may not be construed to limit the fiduciary

liability of any trustee for the acts or omissions of the trustee with respect to the trust estate."

Page 47, line 25, replace "in the contract or in a statement previously filed under title 45" with ":

- a. In the contract;
- b. In a registration of the partnership as a limited liability partnership filed pursuant to chapter 45-22 in which the trustee is listed as a managing partner; or
- c. In a certificate of limited liability limited partnership filed pursuant to chapter 45-23 in which the trustee is listed as a general partner"

Page 48, line 24, replace "Instead of furnishing a copy of the trust instrument to a person other than a" with "Unless otherwise required by chapter 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, or 59-19"

Page 48, line 25, remove "beneficiary"

Page 48, line 26, after the second "the" insert "effective", after "date" insert "of", and remove "was"

Page 48, line 27, remove "executed", after the first underscored comma insert "the name of the trust, if a name is given,", and replace the second "the" with "each"

Page 48, line 28, after the first "the" insert "applicable" and after the second "trustee" insert "1, which may make reference to the powers set forth in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19"

Page 48, line 29, after the underscored comma insert "and"

Page 49, line 1, remove ", the trust's taxpayer"

Page 49, line 2, remove "identification number, and the manner of taking title to trust property"

Page 50, replace lines 5 through 27 with:

1. Except as otherwise provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19, effective August 1, 2007, these chapters:
 - a. Apply to all trusts created after July 31, 2007; and
 - b. Apply to all judicial proceedings concerning trusts which are commenced after July 31, 2007.
2. Except as otherwise provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19, from August 1, 2007, through July 31, 2009:
 - a. A trust created before August 1, 2007, may elect to be subject to chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16,

59-17, 59-18, and 59-19; however, that trust must be in compliance with those chapters by August 1, 2009;

- b. Any rule of construction or presumption provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 applies to trust instruments executed before August 1, 2009, unless there is a clear indication of a contrary intent in the terms of the trust;
 - c. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not apply to judicial proceedings concerning trusts which are commenced before that date unless the court finds that application of a particular provision of these chapters would not substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of these chapters applies and the superseded law does not apply; and
 - d. An act done before August 1, 2009, is not affected by chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19.
3. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before August 1, 2007, for those trusts that are subject to subsection 1, or before August 1, 2009, for those trusts that are subject to subsection 2, that statute continues to apply to the right even if it has been repealed or superseded."

Page 52, line 16, after "Chapters" insert "30.1-32,"

Page 52, line 17, remove "59-04.2"

Renumber accordingly

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 1, line 1, after "enact" insert "a new section to chapter 59-08 and"

Page 1, line 5, remove "and"

Page 1, line 6, after "38-13-01" insert ", and subsection 2 of section 59-08-01" and after
"chapters" insert "30.1-32,"

Page 1, line 7, remove "59-04.2,"

Page 8, after line 22, insert:

"SECTION 13. AMENDMENT. Subsection 2 of section 59-08-01 is amended and reenacted as follows:

2. "Self-settled special needs trust" means a trust created by an individual with a disability after August 10, 1993, which qualifies under 42 U.S.C. ~~1396p(d)(4)(A)~~ 1396p(d)(4).

SECTION 14. A new section to chapter 59-08 of the North Dakota Century Code is created and enacted as follows:

Conflicts with other chapters. If any provision of this chapter conflicts with chapter 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, or 59-19, the provision of this chapter takes precedence.

Page 8, line 26, replace "uniform trust code" with "North Dakota Uniform Trust Code"

Page 8, replace lines 27 through 30 with:

"59-09-02. (102) Scope.

1. Except as provided in subsection 2, chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 apply to express trusts, whether charitable or noncharitable and testamentary or inter vivos, and to trusts created pursuant to a statute or a judgment or decree that requires the trust to be administered in the manner of an express trust.
2. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not apply to:
 - a. A trust that is part of an employee benefit arrangement or an individual retirement account.
 - b. A trust account established under a qualified tuition savings program pursuant to section 6-09-38.
 - c. Trust accounts maintained on behalf of clients or customers by licensed service professionals, including trust accounts maintained by attorneys pursuant to the North Dakota Rules of Professional Conduct and by real estate brokers pursuant to chapter 43-23.
 - d. An endowment care fund established by a cemetery authority pursuant to chapter 23-21.
 - e. Funds maintained by public bodies as defined by chapter 1-07 or other governmental unit entities.
 - f. Trust funds held for a single business transaction or an escrow arrangement.
 - g. Trusts created by a depository agreement with a financial institution.
 - h. An account maintained under the North Dakota Uniform Transfers to Minors Act as contained in chapter 47-24.1.
 - i. A fund maintained pursuant to court order in conjunction with a bankruptcy proceeding or a business liquidation.

- j. A voting trust described in chapter 10-19.1.
- k. Funds maintained to manage proceeds from class actions.
- l. A trust created solely to secure the performance of an obligation.
- m. A trust created on behalf of a resident of a residential facility.
- n. A trust managed by a nonprofit association for disabled individuals under 42 U.S.C. 1396p(d)(4), as in effect on the effective date of chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 and under the rules adopted by the department of human services.
- o. A resulting or constructive trust."

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 9, line 1, after the second boldfaced underscored period insert "Any term not specifically defined in this section has the meaning provided in title 30.1."

Page 9, replace lines 3 through 31 with:

1. "Action", with respect to an act of a trustee, includes a failure to act.
2. "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.
3. "Beneficiary" means a person that:
 - a. Has a present or future beneficial interest in a trust, vested or contingent; including the owner of an interest by assignment or transfer; or
 - b. In a capacity other than that of a trustee, holds a power of appointment over trust property.
4. "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in subsection 1 of section 59-12-05.
5. "Conservator" is as defined in section 30.1-01-06.
6. "Distributee" means any person who receives property of a trust from a trustee, other than as a creditor or purchaser.
7. "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.
8. "Guardian" is as defined in section 30.1-01-06.
9. "Internal Revenue Code" means the Internal Revenue Code of 1986, or corresponding future provisions of federal tax law.
10. "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.
11. "Jurisdiction", with respect to a geographic area, includes a state or country.
12. "Permissible distributee" means a beneficiary who is currently eligible to receive distributions of trust income or principal, whether the distribution is mandatory or discretionary.
13. "Power of withdrawal" means a presently excisable general power of appointment other than a power:
 - a. Exercisable by a trustee and limited by an ascertainable standard; or
 - b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
14. "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
15. "Qualified beneficiary":

- a. Means a beneficiary who, on the date the beneficiary's qualification is determined:
- (1) Is a permissible distributee of trust income or principal;
 - (2) Would be a permissible distributee of trust income or principal if the interests of the distributees described in paragraph 1 terminated on that date without causing the trust to terminate; or
 - (3) Would be a permissible distributee of trust income or principal if the trust terminated on that date.
- b. Does not include a contingent distributee or a contingent permissible distributee of trust income or principal whose interest in the trust in not reasonably expected to vest.
16. "Record" means information that is enshrined on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.
17. "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.
18. "Settlor" means a person, including a testator, that creates, or contributes property to a trust and if more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.
19. "Signed" means:
- a. That the signature of a person, which may be a facsimile affixed, engraved, printed, placed, stamped with indelible ink, transmitted by a facsimile telecommunication or electronically, or in any other manner reproduced on the record, is place on a record or instrument with the present intention to authenticate the record or instrument.
 - b. With respect to a record or instrument required by this chapter to be filed with the clerk of court, that:
 - (1) The record or instrument has been signed by a person authorized to do so by this chapter or by the trust instrument; and
 - (2) The signature and the record or instrument are communicated by a method or medium acceptable to the clerk of court.
20. "Special needs trust" means special needs trust as defined in section 59-08-01.
21. "Spendthrift provision" means a term of a trust which restrains either the voluntary or involuntary or both the voluntary and involuntary transfer of a beneficiary's interest and does not include or prevent a disclaimer of an interest of a beneficiary.
22. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
23. "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

24. "Trust instrument" means a record signed by the settlor that contains terms of the trust, including any amendments to the record and any modifications permitted by court order or by binding nonjudicial settlement agreement.
25. "Trustee" includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court."

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Page 10, remove lines 1 through 20

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 17, line 20, after "attorney" insert "or" and after "having" insert "other"

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 20, line 3, after "trust" insert "or the attorney general"

Page 20, after line 4, insert:

- "4. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not impair the rights and powers of the attorney general with respect to any trust.
5. In all cases of charitable trusts, the attorney general and the state's attorney of the county in which the trust is located are interested persons with respect to the trust estate."

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 25, line 1, after "a" insert "self-settled" and after "trust" insert "or a third-party special needs trust under chapter 59-08 nor to any trust"

Page 25, line 2, replace "42 U.S.C. 1396p(d)(4)(A) if the application of" with "42 U.S.C. 1396p(d)."

Page 25, remove lines 3 through 7

Page 25, after line 30, insert:

- "5. If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim if the beneficiary was not acting as trustee or cotrustee."

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 28, line 16, remove "and the settlor has capacity to revoke the trust"

Page 28, line 24, replace "may" with "shall"

Page 28, line 25, replace "at" with "immediately before"

Page 28, line 30, replace "at" with "immediately before"

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Page 29, after line 7, insert:

"4. This section does not impose a duty upon the trustee to give notice under this section unless the notice is expressly required in the trust agreement."

Page 29, line 18, replace "reject" with "decline"

Page 29, line 20, replace "rejected" with "declined"

Page 29, line 23, replace "rejection" with "declination"

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 30, line 3, replace "regulated financial service institution qualified to do trust business" with "bank or trust company qualified to act as a trustee"

Page 30, line 19, replace "not delegate to a cotrustee the performance of a function the settlor" with "delegate to a cotrustee the performance of any function other than a function that the terms of the trust expressly require to be performed by the trustees jointly"

Page 30, line 20, remove "reasonably expected the trustees to perform jointly"

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 31, line 1, replace "rejects" with "declines"

Page 31, line 2, after "identified" insert ", cannot be located,"

Page 31, line 10, after "trust" insert "or appointed under the terms of the trust"

Page 31, line 16, after "trust" insert "or appointed under the terms of the trust"

Page 31, line 25, replace "upon at least thirty days' notice to the qualified beneficiaries." with ":

- a. Upon at least thirty days' notice to the settlor, if living, to all cotrustees, and the qualified beneficiaries, except those qualified beneficiaries under a revocable trust that the settlor has the capacity to revoke; or
- b. With the approval of the court."

Page 31, remove line 26

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Page 32, after line 24, insert:

- "3. Title to all trust property must be owned by and vested in any successor trustee without any conveyance, transfer, or assignment by the prior trustee."

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 33, line 9, after the underscored period insert "The lien under this subsection does not apply to a common or collective fund that is exempt under 26 U.S.C. 584."

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 37, line 15, after "upon" insert "written", remove "of a beneficiary", and remove "to the beneficiary"

Page 37, line 16, after "instrument" insert ":

- a. To a qualified beneficiary of a revocable trust; and
- b. To a beneficiary of a trust that is not revocable"

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 38, after line 8, insert:

- "8. The duties of a trustee specified in this section are not subject to section 59-14-03.
9. Subsections 3 and 4 do not apply to a trustee that accepts a trusteeship before August 1, 2007, to an irrevocable trust created before August 1, 2007, or to a revocable trust that becomes irrevocable before August 1, 2007."

Page 38, line 13, remove "terms and" and remove "and the interests of the beneficiaries"

Page 38, line 15, replace ", a" with ":

a. A"

Page 38, line 18, replace "relating to the trustee's" with " ; and

b. A"

Page 38, remove lines 19 and 20

Page 38, line 21, remove "corresponding future provisions of federal tax law, and a"

Page 38, line 28, replace "a" with ":

a. A"

Page 38, line 30, remove "of 1986, or corresponding future provisions"

Page 38, line 31, remove "of federal tax law," and replace the first "any" with:

"b. Any"

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 39, line 1, replace "a" with:

"c. A"

Page 39, line 3, remove "of 1986, or corresponding future provisions of federal tax law"

Page 39, line 6, remove "competent" and after "owner" insert ", who is not an incapacitated person,"

Page 39, line 17, replace "trust money in an account in a regulated financial service institution" with "or invest trust money in a regulated financial institution, including one operated by the trustee or an affiliate of the trustee"

Page 39, line 18, after "security" insert "from any financial institution, including a financial institution that is serving as a trustee or one of its affiliates"

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 40, line 16, remove "arising from the administration of"

Page 40, line 17, remove "the trust"

Page 40, line 18, after "Abandon" insert ", distribute."

Page 42, after line 11, insert:

- "26. Purchase and pay from trust principal the premiums on life insurance.
27. Allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence or amortization, or for depletion in mineral or timber properties.
28. a. With respect to the administration of trust assets as one or more trusts to:
- (1) Receive and administer additional property as part of the trust estate or as a separate trust having terms identical to the terms of the existing trust;
 - (2) Sever any trust estate on a fractional basis, before or after a trust is funded, into two or more separate trusts for any reason;
 - (3) Segregate by allocation to a separate account or trust a specific amount or gift made from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirements or elections, or to reduce potential generation, skipping transfer tax liability, in a manner consistent with the rules governing disclaimers, such federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and any income earned on a segregated amount or gift after segregation occurs passes to the designated taker of such amount or gift; and
 - (4) Consolidate two or more trusts having substantially similar terms into a single trust.
- b. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts created. A separate account or trust created by severance or segregation must be treated as a separate trust for all purposes from and after the date on which the severance or segregation is effective. The trustee shall hold such separate account or trust on terms and conditions that are substantially equivalent to the terms of the trust from which it was severed or segregated so that the aggregate interests of each beneficiary in the several trusts are substantially equivalent to the beneficiary's interests in the trust before severance or segregation; provided, however, that any terms of the trust before severance that would affect qualification of the trust for any federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in each of the separate trusts created.
29. Employ persons, including attorneys, auditors, investment advisors or agents, to advise or assist the trustee in the performance of administrative duties. A trustee may act based on the recommendations of professionals without independently investigating the recommendations.
30. Deal with the personal representative, trustee, or other representative of any other trust or estate in which a beneficiary of the trust estate has an

interest, notwithstanding the fact that the trustee is a personal representative, trustee, or other representative of the other trust or estate."

Page 42, line 12, replace "26." with "31."

Page 42, line 17, after "beneficiaries" insert ", and the attorney general in the case of a charitable trust." and after "beneficiary" insert ", or the attorney general in the case of a charitable trust."

Page 42, line 18, after "beneficiary" insert ", or the attorney general in the case of a charitable trust."

Page 42, line 20, after "beneficiary" insert ", or the attorney general in the case of a charitable trust."

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

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House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

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House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

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Page 46, line 24, remove "the interests"

Page 46, line 25, remove "of the beneficiaries or"

Page 46, line 27, replace "An" with "Unless the settlor was represented by an attorney not employed by the trustee with respect to the trust containing the exculpatory term, an"

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 47, line 6, after "beneficiary" insert "lacked capacity or"

Page 47, line 11, after the underscored period insert "The addition of the phrase "trustee" or "as trustee" or a similar designation to the signature of a trustee on a written contract is considered prima facie evidence of a disclosure of a fiduciary capacity."

Page 47, after line 19, insert:

- "4. Whenever a trust instrument reserves to the settlor, or vests in an advisory or investment committee, or in any other person, including one or more cotrustees to the exclusion of the trustee or to the exclusion of one or more of several trustees, authority to direct the making or retention of any investment, the excluded trustee or trustees are not liable, either individually or as a fiduciary, for any loss resulting from the making or retention of any investment pursuant to such direction.
5. In the absence of actual knowledge or information that would cause a reasonable trustee to inquire further, a trustee may not be held liable for failure to take necessary steps to compel the redress of any breach of trust or fiduciary duty by any predecessor personal representative, trustee, or other fiduciary. This section may not be construed to limit the fiduciary liability of any trustee for the acts or omissions of the trustee with respect to the trust estate."

Page 47, line 25, replace "in the contract or in a statement previously filed under title 45" with ":

- a. In the contract;
- b. In a registration of the partnership as a limited liability partnership filed pursuant to chapter 45-22 in which the trustee is listed as a managing partner; or
- c. In a certificate of limited liability limited partnership filed pursuant to chapter 45-23 in which the trustee is listed as a general partner"

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 48, line 24, replace "Instead of furnishing a copy of the trust instrument to a person other than a" with "Unless otherwise required by chapter 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, or 59-19"

Page 48, line 25, remove "beneficiary"

Page 48, line 26, after the second "the" insert "effective", after "date" insert "of", and remove "was"

Page 48, line 27, remove "executed", after the first underscored comma insert "the name of the trust, if a name is given,", and replace the second "the" with "each"

Page 48, line 28, after the first "the" insert "applicable" and after the second "trustee" insert ", which may make reference to the powers set forth in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19"

Page 48, line 29, after the underscored comma insert "and"

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 49, line 1, remove ", the trust's taxpayer"

Page 49, line 2, remove "identification number, and the manner of taking title to trust property"

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 50, replace lines 5 through 27 with:

- "1. Except as otherwise provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19, effective August 1, 2007, these chapters:
 - a. Apply to all trusts created after July 31, 2007; and
 - b. Apply to all judicial proceedings concerning trusts which are commenced after July 31, 2007.
2. Except as otherwise provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19, from August 1, 2007, through July 31, 2009:
 - a. A trust created before August 1, 2007, may elect to be subject to chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19; however, that trust must be in compliance with those chapters by August 1, 2009;
 - b. Any rule of construction or presumption provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 applies to trust instruments executed before August 1, 2009, unless there is a clear indication of a contrary intent in the terms of the trust;
 - c. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not apply to judicial proceedings concerning trusts which are commenced before that date unless the court finds that application of a particular provision of these chapters would not substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of these chapters applies and the superseded law does not apply; and
 - d. An act done before August 1, 2009, is not affected by chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19.
3. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before August 1, 2007, for those trusts that are subject to subsection 1, or before August 1, 2009, for those trusts that are subject to subsection 2, that statute continues to apply to the right even if it has been repealed or superseded."

House Amendments to HB 1034 (70143.0104) - Judiciary Committee 02/01/2007

Page 52, line 16, after "Chapters" insert "30.1-32,"

Page 52, line 17, remove "59-04.2,"

Renumber accordingly

Date: 1-31-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1034

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Rep. Delmore Seconded By Rep. Wolf

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Meyer	✓	
Rep. Charging	✓		Rep. Onstad	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller					
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 13 No 0

Absent 1

Floor Assignment Rep. Klemin

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

REPORT OF STANDING COMMITTEE

HB 1034: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1034 was placed on the Sixth order on the calendar.

Page 1, line 1, after "enact" insert "a new section to chapter 59-08 and"

Page 1, line 5, remove "and"

Page 1, line 6, after "38-13-01" insert ", and subsection 2 of section 59-08-01" and after "chapters" insert "30.1-32,"

Page 1, line 7, remove "59-04.2,"

Page 8, after line 22, insert:

"SECTION 13. AMENDMENT. Subsection 2 of section 59-08-01 is amended and reenacted as follows:

2. "Self-settled special needs trust" means a trust created by an individual with a disability after August 10, 1993, which qualifies under 42 U.S.C. ~~1396p(d)(4)(A)~~1396p(d)(4).

SECTION 14. A new section to chapter 59-08 of the North Dakota Century Code is created and enacted as follows:

Conflicts with other chapters. If any provision of this chapter conflicts with chapter 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, or 59-19, the provision of this chapter takes precedence.

Page 8, line 26, replace "uniform trust code" with "North Dakota Uniform Trust Code"

Page 8, replace lines 27 through 30 with:

"59-09-02. (102) Scope.

1. Except as provided in subsection 2, chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 apply to express trusts, whether charitable or noncharitable and testamentary or inter vivos, and to trusts created pursuant to a statute or a judgment or decree that requires the trust to be administered in the manner of an express trust.
2. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not apply to:
 - a. A trust that is part of an employee benefit arrangement or an individual retirement account.
 - b. A trust account established under a qualified tuition savings program pursuant to section 6-09-38.
 - c. Trust accounts maintained on behalf of clients or customers by licensed service professionals, including trust accounts maintained by attorneys pursuant to the North Dakota Rules of Professional Conduct and by real estate brokers pursuant to chapter 43-23.

- d. An endowment care fund established by a cemetery authority pursuant to chapter 23-21.
- e. Funds maintained by public bodies as defined by chapter 1-07 or other governmental unit entities.
- f. Trust funds held for a single business transaction or an escrow arrangement.
- g. Trusts created by a depository agreement with a financial institution.
- h. An account maintained under the North Dakota Uniform Transfers to Minors Act as contained in chapter 47-24.1.
- i. A fund maintained pursuant to court order in conjunction with a bankruptcy proceeding or a business liquidation.
- j. A voting trust described in chapter 10-19.1.
- k. Funds maintained to manage proceeds from class actions.
- l. A trust created solely to secure the performance of an obligation.
- m. A trust created on behalf of a resident of a residential facility.
- n. A trust managed by a nonprofit association for disabled individuals under 42 U.S.C. 1396p(d)(4), as in effect on the effective date of chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 and under the rules adopted by the department of human services.
- o. A resulting or constructive trust."

Page 9, line 1, after the second boldfaced underscored period insert "Any term not specifically defined in this section has the meaning provided in title 30.1."

Page 9, replace lines 3 through 31 with:

- "1. "Action", with respect to an act of a trustee, includes a failure to act.
- 2. "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.
- 3. "Beneficiary" means a person that:
 - a. Has a present or future beneficial interest in a trust, vested or contingent; including the owner of an interest by assignment or transfer; or
 - b. In a capacity other than that of a trustee, holds a power of appointment over trust property.
- 4. "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in subsection 1 of section 59-12-05.
- 5. "Conservator" is as defined in section 30.1-01-06.

6. "Distributee" means any person who receives property of a trust from a trustee, other than as a creditor or purchaser.
7. "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.
8. "Guardian" is as defined in section 30.1-01-06.
9. "Internal Revenue Code" means the Internal Revenue Code of 1986, or corresponding future provisions of federal tax law.
10. "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.
11. "Jurisdiction", with respect to a geographic area, includes a state or country.
12. "Permissible distributee" means a beneficiary who is currently eligible to receive distributions of trust income or principal, whether the distribution is mandatory or discretionary.
13. "Power of withdrawal" means a presently excisable general power of appointment other than a power:
 - a. Exercisable by a trustee and limited by an ascertainable standard; or
 - b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
14. "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
15. "Qualified beneficiary":
 - a. Means a beneficiary who, on the date the beneficiary's qualification is determined:
 - (1) Is a permissible distributee of trust income or principal;
 - (2) Would be a permissible distributee of trust income or principal if the interests of the distributees described in paragraph 1 terminated on that date without causing the trust to terminate;
or
 - (3) Would be a permissible distributee of trust income or principal if the trust terminated on that date.
 - b. Does not include a contingent distributee or a contingent permissible distributee of trust income or principal whose interest in the trust is not reasonably expected to vest.
16. "Record" means information that is enshrined on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

17. "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.
18. "Settlor" means a person, including a testator, that creates, or contributes property to a trust and if more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.
19. "Signed" means:
 - a. That the signature of a person, which may be a facsimile affixed, engraved, printed, placed, stamped with indelible ink, transmitted by a facsimile telecommunication or electronically, or in any other manner reproduced on the record, is place on a record or instrument with the present intention to authenticate the record or instrument.
 - b. With respect to a record or instrument required by this chapter to be filed with the clerk of court, that:
 - (1) The record or instrument has been signed by a person authorized to do so by this chapter or by the trust instrument; and
 - (2) The signature and the record or instrument are communicated by a method or medium acceptable to the clerk of court.
20. "Special needs trust" means special needs trust as defined in section 59-08-01.
21. "Spendthrift provision" means a term of a trust which restrains either the voluntary or involuntary or both the voluntary and involuntary transfer of a beneficiary's interest and does not include or prevent a disclaimer of an interest of a beneficiary.
22. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
23. "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.
24. "Trust instrument" means a record signed by the settlor that contains terms of the trust, including any amendments to the record and any modifications permitted by court order or by binding nonjudicial settlement agreement.
25. "Trustee" includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court."

Page 10, remove lines 1 through 20

Page 17, line 20, after "attorney" insert "or" and after "having" insert "other"

Page 20, line 3, after "trust" insert "or the attorney general"

Page 20, after line 4, insert:

- "4. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not impair the rights and powers of the attorney general with respect to any trust.
5. In all cases of charitable trusts, the attorney general and the state's attorney of the county in which the trust is located are interested persons with respect to the trust estate."

Page 25, line 1, after "a" insert "self-settled" and after "trust" insert "or a third-party special needs trust under chapter 59-08 nor to any trust"

Page 25, line 2, replace "42 U.S.C. 1396p(d)(4)(A) if the application of" with "42 U.S.C. 1396p(d)."

Page 25, remove lines 3 through 7

Page 25, after line 30, insert:

- "5. If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim if the beneficiary was not acting as trustee or cotrustee."

Page 28, line 16, remove "and the settlor has capacity to revoke the trust"

Page 28, line 24, replace "may" with "shall"

Page 28, line 25, replace "at" with "immediately before"

Page 28, line 30, replace "at" with "immediately before"

Page 29, after line 7, insert:

- "4. This section does not impose a duty upon the trustee to give notice under this section unless the notice is expressly required in the trust agreement."

Page 29, line 18, replace "reject" with "decline"

Page 29, line 20, replace "rejected" with "declined"

Page 29, line 23, replace "rejection" with "declination"

Page 30, line 3, replace "regulated financial service institution qualified to do trust business" with "bank or trust company qualified to act as a trustee"

Page 30, line 19, replace "not delegate to a cotrustee the performance of a function the settlor" with "delegate to a cotrustee the performance of any function other than a function that the terms of the trust expressly require to be performed by the trustees jointly"

Page 30, line 20, remove "reasonably expected the trustees to perform jointly"

Page 31, line 1, replace "rejects" with "declines"

Page 31, line 2, after "identified" insert ", cannot be located,"

Page 31, line 10, after "trust" insert "or appointed under the terms of the trust"

Page 31, line 16, after "trust" insert "or appointed under the terms of the trust"

Page 31, line 25, replace "upon at least thirty days' notice to the qualified beneficiaries," with ":

a. Upon at least thirty days' notice to the settlor, if living, to all cotrustees, and the qualified beneficiaries, except those qualified beneficiaries under a revocable trust that the settlor has the capacity to revoke; or

b. With the approval of the court."

Page 31, remove line 26

Page 32, after line 24, insert:

"3. Title to all trust property must be owned by and vested in any successor trustee without any conveyance, transfer, or assignment by the prior trustee."

Page 33, line 9, after the underscored period insert "The lien under this subsection does not apply to a common or collective fund that is exempt under 26 U.S.C. 584."

Page 37, line 15, after "upon" insert "written", remove "of a beneficiary", and remove "to the beneficiary"

Page 37, line 16, after "instrument" insert ":

a. To a qualified beneficiary of a revocable trust; and

b. To a beneficiary of a trust that is not revocable"

Page 38, after line 8, insert:

"8. The duties of a trustee specified in this section are not subject to section 59-14-03.

9. Subsections 3 and 4 do not apply to a trustee that accepts a trusteeship before August 1, 2007, to an irrevocable trust created before August 1, 2007, or to a revocable trust that becomes irrevocable before August 1, 2007."

Page 38, line 13, remove "terms and" and remove "and the interests of the beneficiaries"

Page 38, line 15, replace ", a" with ":

a. A"

Page 38, line 18, replace "relating to the trustee's" with "; and

b. A"

Page 38, remove lines 19 and 20

Page 38, line 21, remove "corresponding future provisions of federal tax law, and a"

Page 38, line 28, replace "a" with ":

a. A"

Page 38, line 30, remove "of 1986, or corresponding future provisions"

Page 38, line 31, remove "of federal tax law," and replace the first "any" with:

"b. Any"

Page 39, line 1, replace "a" with:

"c. A"

Page 39, line 3, remove "of 1986, or corresponding future provisions of federal tax law"

Page 39, line 6, remove "competent" and after "owner" insert ", who is not an incapacitated person,"

Page 39, line 17, replace "trust money in an account in a regulated financial service institution" with "or invest trust money in a regulated financial institution, including one operated by the trustee or an affiliate of the trustee"

Page 39, line 18, after "security" insert "from any financial institution, including a financial institution that is serving as a trustee or one of its affiliates"

Page 40, line 16, remove "arising from the administration of"

Page 40, line 17, remove "the trust"

Page 40, line 18, after "Abandon" insert ", distribute,"

Page 42, after line 11, insert:

- "26. Purchase and pay from trust principal the premiums on life insurance.
- 27. Allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence or amortization, or for depletion in mineral or timber properties.
- 28. a. With respect to the administration of trust assets as one or more trusts to:
 - (1) Receive and administer additional property as part of the trust estate or as a separate trust having terms identical to the terms of the existing trust;
 - (2) Sever any trust estate on a fractional basis, before or after a trust is funded, into two or more separate trusts for any reason;
 - (3) Segregate by allocation to a separate account or trust a specific amount or gift made from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirements or elections,

or to reduce potential generation, skipping transfer tax liability, in a manner consistent with the rules governing disclaimers, such federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and any income earned on a segregated amount or gift after segregation occurs passes to the designated taker of such amount or gift; and

(4) Consolidate two or more trusts having substantially similar terms into a single trust.

b. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts created. A separate account or trust created by severance or segregation must be treated as a separate trust for all purposes from and after the date on which the severance or segregation is effective. The trustee shall hold such separate account or trust on terms and conditions that are substantially equivalent to the terms of the trust from which it was severed or segregated so that the aggregate interests of each beneficiary in the several trusts are substantially equivalent to the beneficiary's interests in the trust before severance or segregation; provided, however, that any terms of the trust before severance that would affect qualification of the trust for any federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in each of the separate trusts created.

29. Employ persons, including attorneys, auditors, investment advisors or agents, to advise or assist the trustee in the performance of administrative duties. A trustee may act based on the recommendations of professionals without independently investigating the recommendations.

30. Deal with the personal representative, trustee, or other representative of any other trust or estate in which a beneficiary of the trust estate has an interest, notwithstanding the fact that the trustee is a personal representative, trustee, or other representative of the other trust or estate."

Page 42, line 12, replace "26." with "31."

Page 42, line 17, after "beneficiaries" insert ", and the attorney general in the case of a charitable trust," and after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 42, line 18, after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 42, line 20, after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 43, line 3, after "in" insert "sections 59-16-02, 59-16-03, 59-16-05, 59-16-06, and 59-16-07 and in"

Page 44, line 16, remove "of this chapter"

Page 44, line 18, after "under" insert "sections 59-16-02, 59-16-03, 59-16-05, 59-16-06, and 59-16-07 and under"

Page 45, line 22, remove "A trustee is accountable to an"

Page 45, remove line 23

Page 45, line 24, remove "trust, even absent a breach of trust."

Page 45, line 27, replace "(1004) Attorney's fees and costs. In a judicial proceeding involving the" with "Reserved."

Page 45, remove lines 28 through 30

Page 46, line 4, after "beneficiary" insert "in the report or in a separate notice accompanying the report"

Page 46, line 24, remove "the interests"

Page 46, line 25, remove "of the beneficiaries or"

Page 46, line 27, replace "An" with "Unless the settlor was represented by an attorney not employed by the trustee with respect to the trust containing the exculpatory term, an"

Page 47, line 6, after "beneficiary" insert "lacked capacity or"

Page 47, line 11, after the underscored period insert "The addition of the phrase "trustee" or "as trustee" or a similar designation to the signature of a trustee on a written contract is considered prima facie evidence of a disclosure of a fiduciary capacity."

Page 47, after line 19, insert:

- "4. Whenever a trust instrument reserves to the settlor, or vests in an advisory or investment committee, or in any other person, including one or more cotrustees to the exclusion of the trustee or to the exclusion of one or more of several trustees, authority to direct the making or retention of any investment, the excluded trustee or trustees are not liable, either individually or as a fiduciary, for any loss resulting from the making or retention of any investment pursuant to such direction.
5. In the absence of actual knowledge or information that would cause a reasonable trustee to inquire further, a trustee may not be held liable for failure to take necessary steps to compel the redress of any breach of trust or fiduciary duty by any predecessor personal representative, trustee, or other fiduciary. This section may not be construed to limit the fiduciary liability of any trustee for the acts or omissions of the trustee with respect to the trust estate.

Page 47, line 25, replace "in the contract or in a statement previously filed under title 45" with
":

- a. In the contract;
- b. In a registration of the partnership as a limited liability partnership filed pursuant to chapter 45-22 in which the trustee is listed as a managing partner; or
- c. In a certificate of limited liability limited partnership filed pursuant to chapter 45-23 in which the trustee is listed as a general partner"

Page 48, line 24, replace "Instead of furnishing a copy of the trust instrument to a person other than a" with "Unless otherwise required by chapter 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, or 59-19"

Page 48, line 25, remove "beneficiary"

Page 48, line 26, after the second "the" insert "effective", after "date" insert "of", and remove "was"

Page 48, line 27, remove "executed", after the first underscored comma insert "the name of the trust, if a name is given,", and replace the second "the" with "each"

Page 48, line 28, after the first "the" insert "applicable" and after the second "trustee" insert ", which may make reference to the powers set forth in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19"

Page 48, line 29, after the underscored comma insert "and"

Page 49, line 1, remove ", the trust's taxpayer"

Page 49, line 2, remove "identification number, and the manner of taking title to trust property"

Page 50, replace lines 5 through 27 with:

"1. Except as otherwise provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19, effective August 1, 2007, these chapters:

a. Apply to all trusts created after July 31, 2007; and

b. Apply to all judicial proceedings concerning trusts which are commenced after July 31, 2007.

2. Except as otherwise provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19, from August 1, 2007, through July 31, 2009:

a. A trust created before August 1, 2007, may elect to be subject to chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19; however, that trust must be in compliance with those chapters by August 1, 2009;

b. Any rule of construction or presumption provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 applies to trust instruments executed before August 1, 2009, unless there is a clear indication of a contrary intent in the terms of the trust;

c. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not apply to judicial proceedings concerning trusts which are commenced before that date unless the court finds that application of a particular provision of these chapters would not substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of these chapters applies and the superseded law does not apply; and

- d. An act done before August 1, 2009, is not affected by chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19.
3. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before August 1, 2007, for those trusts that are subject to subsection 1, or before August 1, 2009, for those trusts that are subject to subsection 2, that statute continues to apply to the right even if it has been repealed or superseded."

Page 52, line 16, after "Chapters" insert "30.1-32,"

Page 52, line 17, remove "59-04.2,"

Renumber accordingly

2007 SENATE JUDICIARY

HB 1034

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1034**

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: February 28, 2007

Recorder Job Number: 4121

Committee Clerk Signature

M. L. Solberg

Minutes: Relating to Uniform Commercial Code general provisions contracts and leases.

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following hearing:

Testimony in Favor of the Bill:

Vonette Richter, Legislative Council Introduced the bill, speaking to the conference committee information on the feasibility of the Uniform Trust codes being adopted in ND Spoke of the Task Force and there opinion also when it was heard in the house they provided the house with 11 pages of additional amendments incorporated into this bill– Att. #1 The house did not make any other amendments on top of these.

Rep. Klemin, Dist. # 47 Introduced the bill and gave testimony – Att. #2 reviewing the bill and also the Uniform Law committees statement Att. 2b

Additional Testimony Submitted:

William L. Guy III, Chair of the Uniform Trust Code Drafting Task Force – Att. #3

Patricia Kauffman, The Humane Society of the United States, ND – Att. #4

Sen. Nelson spoke to (meter 12:51) the existing laws being repealed are overridden. **Sen. Olafson** further defined (meter 14:00) the default statute. If a trust is not established then the trust laws apply. A trust code can do this-a trust takes precedencies over statutory rules. The committee discussed the difference between civil law verses criminal law. They reviewed Sec. 15 and the cross references.

Sen. Fiebiger spoke (meter 14:66) the trend for the states in adopting this law and the lengthy time it takes. Not every state adopts every law and continued with the work of the committee.

Marilyn Foss, Legal Council for the Bankers Assoc. (meter 21:46) Spoke to there participation of the process and the thoroughness in the committee with the adoption of each line. She elaborated on the work in other states and the U.T.C. controversy being over. More and more states will be reviewing. This is better then the laws ND currently have in our books.

Bill Neumann, SBAND (Meter 24:24) Spoke in support of the bill and it's passage, also referred to the progress of the bill. He referred to 1969 and the history. The committee discussed with Mr. Neumann how they train attorneys, Banks and CPA's on the new law.

Testimony Against the bill:

None

Testimony Neutral to the bill:

None

Senator David Nething, Chairman closed the hearing.

Sen. Lyson made the motion to Do Pass HB 1034 and **Sen. Olafson** seconded the motion.

All members were in favor and the motion passes.

Carrier: **Sen. Nelson**

Senator David Nething, Chairman closed the hearing.

REPORT OF STANDING COMMITTEE (410)
February 28, 2007 3:36 p.m.

Module No: SR-38-4135
Carrier: Nelson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1034, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1034 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

HB 1034



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:

Alabama	North Carolina
Arkansas	Ohio
District of Columbia	Oregon
Florida	Pennsylvania
Kansas	South Carolina
Maine	Tennessee
Missouri	Utah
Nebraska	Virginia
New Hampshire	Wyoming
New Mexico	

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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211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

tel: (312) 915-0195 | fax: (312) 915-0464 | e-mail: nccusl@nccusl.org

EXCERPT FROM FINAL REPORT OF LEGISLATIVE COUNCIL'S INTERIM JUDICIARY COMMITTEE

UNIFORM TRUST CODE

Senate Concurrent Resolution No. 4031 directed a study of the Uniform Trust Code to determine the feasibility and desirability of adopting the Uniform Trust Code in North Dakota. The 2005 Legislative Assembly considered Senate Bill No. 2122, which would have provided for the adoption of the Uniform Trust Code. The bill was opposed by the North Dakota Bankers Association, the North Dakota Credit Union League, and the State Bar Association of North Dakota. Senate Bill No. 2122 failed to pass the Senate. This resolution was passed to provide the opponents of the Uniform Trust Code the opportunity to identify the specific provisions that would be detrimental to settlors, beneficiaries, and trustees and those provisions that should be modified to make North Dakota unique in the area of laws governing trusts.

Background

North Dakota Statutory Provisions

North Dakota law regarding trusts is contained in NDCC Chapters 59-01 through 59-05. Chapter 59-01 provides for the general provisions with regard to trusts; Chapter 59-02 provides for trusts for the benefit of third persons; Chapter 59-03 provides for trusts in relation to real property; Chapter 59-04 provides for procedures for the administration of trusts; Chapter 59-04.2 is the codification of the Uniform Principal and Income Act; and Chapter 59-05 addresses powers in relation to real property. With the exception of Chapter 59-04.2, which was enacted in 1999, the majority of the statutes contained in these chapters are based upon the California Civil Code and have remained unchanged since their enactment in 1877.

Uniform Trust Code (2000)

According to the National Conference of Commissioners on Uniform State Laws (national conference), the purpose of the Uniform Trust Code is to provide a comprehensive model for codifying the law on trusts. According to the national conference, 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 Uniform Trust Code is intended to enable states that enact it to specify their rules on trusts with precision and to provide individuals with a readily available source for determining their state's law on trusts. The Uniform Trust Code was completed by the national conference in 2000. The Uniform Trust Code has been enacted in Alabama, Arkansas, the District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Utah, Virginia, and Wyoming.

A trust is a fiduciary relationship with respect to property in which one person--the trustee--holds the legal title to the trust property, subject to enforceable equitable rights in another--the beneficiary. It is basically a device, whereby one or more persons manage the property for the benefit of others. The trustee ordinarily has legal title to the property and the beneficiaries have equitable title. The testator or grantor who creates an express trust is the trustor or settlor. Most trusts have identifiable beneficiaries. There are, however, charitable and honorary trusts, which do not have actual beneficiaries. These trusts 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 (Second) of Law of Trusts, and the Restatement (Third) of Law of Trusts. 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 an example.

In 2000 the national conference adopted the first national codification of the law of trusts with the Uniform Trust Code. The Uniform Trust Code has its basis in common-law sources, including the Restatements. Existing statutory law is also a source. The objective of the Uniform Trust Code is a codification of existing law, but with elements of law reform. According to the national conference, the reforms are intended to conform trust law to modern needs. The Uniform Trust Code provides fundamental rules that apply to all voluntary trusts.

According to the national conference, 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 1st and 11th articles do not address substantive topics but deal with general provisions, such as 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.

Testimony and Committee Considerations

The committee received extensive testimony and information from the national conference, the State Bar Association of North Dakota, and the North Dakota Bankers Association regarding the Uniform Trust Code and the feasibility and desirability of adopting the Uniform Trust Code in North Dakota. The committee also received extensive information and recommendations from the Uniform Trust Code Task Force, a group formed by the State Bar Association of North Dakota to conduct an in-depth review of the Uniform Trust Code. The task force provided information and recommendations regarding proposed changes to the Uniform Trust Code.

National Conference of Commissioners on Uniform State Laws

The committee received extensive testimony from a representative of the national conference regarding the Uniform Trust Code. It was noted that often the impetus for a new uniform Act is to avoid federal preemption. According to the testimony, the national conference works with the Council of State Governments and other national legislative organizations to find the most effective solution to an issue. The testimony indicated that the goal of the national conference is to get all 50 states involved and to draft a product that is fair and balanced for all states.

According to the testimony, 18 states and the District of Columbia have passed the Uniform Trust Code and at least 8 states are considering the Uniform Trust Code in current or upcoming legislative sessions. The testimony indicated that the Uniform Trust Code is a default law that applies only when the trust instrument is silent. The Uniform Trust Code was completed in 2000 and was amended in 2001, 2003, 2004, and 2005. The committee received a section-by-section comparison of the changes made by the states that have enacted the Uniform Trust Code. It was noted several area states, including South Dakota, Iowa, and Montana, are studying the Uniform Trust Code or have plans to introduce the Uniform Trust Code. It was also noted that the Uniform Trust Code is intended to be a model and that a state may want to tailor the Uniform Trust Code to meet that state's needs.

According to the testimony, the Uniform Trust Code was drafted in close coordination with the revision of the Restatement (Third) of Law of Trusts. It was noted that once a state adopts a statute, the Restatement is no longer considered to be the authority on the subject. The majority of North Dakota's statutes on trusts were passed in 1943 with periodic updates. The testimony indicated that North Dakota's laws on trusts are not as comprehensive as the Uniform Trust Code.

Uniform Trust Code Task Force

The Uniform Trust Code Task Force, a group formed by the State Bar Association of North Dakota to conduct an indepth review of the Uniform Trust Code, also provided information and recommendations regarding the Uniform Trust Code, the feasibility and desirability of adopting the Uniform Trust Code in North Dakota, and proposed changes to the Uniform Trust Code.

Throughout the course of the committee's study of the Uniform Trust Code, the committee received extensive information and frequent updates from representatives of the task force regarding its review of the Code. The task force conducted a thorough section-by-section review of the Uniform Trust Code. In addition to reviewing each section of the Uniform Trust Code, the task force reviewed the modifications to each section which have been enacted by other states. It was noted that although 18 states and the District of Columbia have adopted the Uniform Trust Code, each has made extensive modifications to the Code. It was also noted that a 19th state--Arizona--adopted the Uniform Trust Code and then repealed it before its effective date. In 2003 Minnesota considered the Uniform Trust Code and elected to adopt some of its provisions for inclusion in the Minnesota trust statutes. According to the testimony, the interests of North Dakota would be best served if the state could begin to utilize the Uniform Trust Code in a modified form.

Testimony from the task force indicated that within certain parameters, an individual is free to make the decisions on how a trust is set up. It was noted that the Uniform Trust Code provides for retroactive application and thus it will affect existing trusts. For this reason, the testimony indicated that the spendthrift provision was carefully reviewed. It was also noted that the task force carefully reviewed the special needs trusts provisions of the Uniform Trust Code. According to the testimony, in reviewing the Uniform Trust Code, every attempt was made to preserve the intent of currently existing trusts. The task force also emphasized that the Uniform Trust Code is not a revision of an existing uniform law. There are certain trust topics on which the North Dakota Century Code is silent. The Uniform Trust Code addresses those topics.

At the final meeting of the committee, the task force reported that it completed a review of the first six articles of the Uniform Trust Code. According to the testimony, the task force planned to continue to meet to review and recommend proposed changes to the remaining articles.

The committee considered a bill draft relating to the Uniform Trust Code. Testimony in explanation of the bill draft indicated that the bill draft is substantially similar to the version considered by the 2005 Legislative Assembly; however, the bill draft included those changes recommended by the task force to date.

Recommendation

The committee recommends House Bill No. 1034 to adopt the Uniform Trust Code. The bill includes those changes recommended by the Uniform Trust Code Task Force as of the date the committee completed its work for the interim. The committee also recommends that further changes to the Uniform Trust Code as recommended by the task force be presented to the Legislative Assembly as amendments. The task force was requested to forward the additional changes to the Legislative Council to be prepared as amendments.

TESTIMONY OF WILLIAM L. GUY III, CHAIR
UNIFORM TRUST CODE DRAFTING TASK FORCE
IN SUPPORT OF
HOUSE BILL NO. 1034

Mr. Chairman and members of the Committee, I am here on behalf of a task force (see the attached list at the end of my testimony for the names and addresses of the task force members) which was assembled in January 2006 at the request of the Interim Judiciary Committee to undertake a review of the proposed Uniform Trust Code ("UTC") and to recommend any modifications we believed necessary for enactment of the UTC in North Dakota. Accordingly, the legislation that you have before you as House Bill No. 1034 represents the results of that review. This legislation repeals Chapters 30.1-33 and 30.1-34 and all of Title 59 (Chapters 59-01, 59-02, 59-03, 59-04, 59-04.2 and 59-05) except for Chapter 59-08 (relating to Special Needs Trust) and enacts new Chapters 59-09 through 59-20. Although this legislation absorbs and recodifies the Uniform Prudent Investor Act as a part of the UTC, it does not alter the Uniform Principal and Income Act (Chapter 59-04.2), Management of Institutional Funds Act (Chapter 15-67), and Testamentary Additions to Trusts Act (Chapter 30.1-08-11). While the UTC is very comprehensive, some topics such as the interpretation of trust terms and remedies for breach of trust are not covered and will continue to be governed by the common law of trusts and principles of equity.

The National Conference of Commissioners on Uniform State Laws organized the UTC in the eleven (11) Articles which are reflected in the eleven (11) chapters of this legislation. The following is an overview of those eleven (11) chapters:

- **Chapter 59-09** includes:
 - **Section 3** which contains the definitions which are key to an understanding of this legislation. Three of the definitions that are relevant to this testimony are:
 - **"settlor"** is a person who creates a trust.
 - **"beneficiary"** is a person with a present or future beneficial interest in the trust.
 - **"spendthrift provisions"** are trust provisions that protect the assets of the trust from the claims of creditors of the beneficiary and from

attempts by the beneficiary to sell or mortgage his or her share of the trust.

- **Section 5** contains the default and mandatory rules governing all trusts.
 - **Subsection 2** sets out twelve (12) mandatory rules that prevail over any provision to the contrary in the trust agreement.
 - **Subsection 1** provides that, other than the twelve (12) mandatory rules set forth in Subsection 2, the default provisions of the UTC may be modified or overridden by the terms of any particular trust agreement. However, if not modified or overridden by the terms of the trust agreement, the default provisions of the UTC are applicable to all trusts.
- **Section 7** allows the trust agreement to designate the state whose trust law will govern the administration of the trust.
- **Section 11** authorizes trustees and interested persons to enter into binding non-judicial settlement agreements with respect to any matter involving a trust except certain items which are specifically prohibited.
- **Chapter 59-10** consists of only four (4) sections pertaining to judicial proceedings involving trusts.
 - To the extent not provided in this chapter, the North Dakota Rules of Civil Procedure apply.
 - Other than the deletion of **Section 3** from the proposed UTC, no changes were made to this chapter.
- **Chapter 59-11** deals with representation of beneficiaries, including representation by fiduciaries (such as personal representatives, trustees, guardians and conservators) and what the UTC refers to as "virtual representation" of beneficiaries.
 - "Virtual representation" allows a beneficiary who has substantially identical interests as other beneficiaries to represent the interests of the group.
 - A typical example would be a trust providing for distribution of income and principal to the settlor's children as a class or group.

- Virtual representation could allow an adult child to represent the interests of all of the settlor's children who are either minors or who are unborn (again, as long as the interests of the adult child are not in conflict with the interests of his or her minor or unborn siblings who are the other members of the class).
- The task force made numerous changes to this chapter, primarily incorporating provisions which have been previously made in other states.
- **Chapter 59-12** sets forth the requirements for creating, modifying and terminating a trust.
 - Relatively minor modifications were made to this chapter. Again most changes being changes also made in other states.
 - One of the interesting aspects of this chapter is **Section 8** which authorizes trusts for the care of an animal (under common law a trust (other than a charitable trust) must benefit a human being).
 - Out of concern for potential estate and gift tax consequences, the task force deleted the power that would otherwise be given in **Section 11** to a settlor and the beneficiaries to modify or terminate an otherwise irrevocable trust.
 - In **Sections 15 and 16** the court is authorized to reform the terms of a trust to conform to the apparent intention of the settlor if clear and convincing evidence demonstrates a mistake in the terms of the trust or to achieve the apparent tax objectives of the settlor.
- **Chapter 59-13** addresses spendthrift provisions and the rights of creditors (with claims against either the settlor or a beneficiary).
 - This chapter was among the most difficult and complex.
 - To the extent that the share of a beneficiary in a trust is not protected by a spendthrift provision, **Subsection 1** provides that a court may authorize a creditor of the beneficiary to reach the share of the beneficiary by attachment of present or future distributions (this would be consistent with prior common law).

- **Subsection 2** sets forth the requirements for a spendthrift provision as being one which restrains either the voluntary *or* involuntary transfer or the voluntary *and* involuntary transfer of the share of a beneficiary in the trust. In other words, a beneficiary cannot sell or mortgage his or her share of the trust and the creditors of the beneficiary may not attach the share of a beneficiary in the trust, except as provided in Subsection 3.
- **Subsection 3** sets forth the exceptions to a spendthrift provision (i.e. those claimants who may breach a spendthrift provision and attach trust assets) which are limited to:
 - A child, spouse or former spouse of the beneficiary who has a court order against the beneficiary for *support and maintenance*;
 - A judgement creditor who has provided services for the protection of the share of the beneficiary in the trust; and,
 - A claim of a state or the United States to the extent provided by applicable law.
- **Subsection 3** makes clear that the above exceptions to Subsection 2 do not apply to Special Needs Trusts (authorized under Chapter 59-08 for beneficiaries who are disabled and receiving Medicaid or Supplemental Security Income).
- **Section 4** effectively eliminates the distinction between discretionary trusts and support trusts (by effectively abolishing the concept of support trusts). The elimination of this distinction affects only the rights of creditors and does not affect the right of a beneficiary to compel a distribution which is determined in a case-by-case basis depending upon the terms and conditions of the distribution standard for that beneficiary from the trust in question.
- **Section 5** pertains to a claim of a creditor against the settlor.
 - A spendthrift provision will not protect the *settlor*.
 - During the lifetime of the settlor, property in a *revocable* trust is fully subject to the claims of the settlor's creditors.

- With respect to irrevocable trusts, the creditor may reach any amount that could otherwise be distributed to or for the benefit of the settlor.
- After the death of the settlor, property of a trust that was revocable immediately prior to the death of the settlor is subject to the claims of creditors, costs of administration and expenses in the same manner as would be assets which were subject to probate.
- **Chapter 59-14** pertains to revocable trusts and was relatively uncontroversial and relatively little changed by the task force.
- **Chapter 59-15** deals with the office of trustee and includes numerous rules such as rules on:
 - acceptance of the trusteeship by the trustee;
 - rights and obligations of co-trustees;
 - the procedure for resignation;
 - grounds for removal;
 - methods of appointing successors; and,
 - trustee compensation.

Again this was a relatively uncontroversial chapter and the task force made few changes.

- **Chapter 59-16** describes the duties and certain powers of the trustee.
 - Those duties are set out in **Sections 1 through 6 and 9 through 13** and include:
 - The duty to administer the trust;
 - The duty of loyalty;
 - The duty of impartiality;
 - The duty of prudent administration;
 - The duty to incur only reasonable costs of administration;
 - The duty to use any special skills or expertise held by the trustee;
 - The duty to control and protect the trust property;
 - The duty of record keeping and identification of trust property;
 - The duty to collect trust property;

- The duty to enforce and defend claims; and,
- The duty to inform and report.
- The powers described in **Sections 7 and 8** include:
 - The power of the trustee to delegate; and,
 - The power to direct the trustee (held by the settlor while the trust is revocable);
- **Section 14** eliminates two estate tax traps for the unwary that apply unless its provisions are specifically overridden by the trust agreement:
 - A person who is both a beneficiary and a trustee of a trust that gives the trustee the power to make discretionary distributions to the trustee/beneficiary or for the personal benefit of the trustee/beneficiary may only do so in accordance with an ascertainable standard pertaining to the *health, education, support and maintenance* of the trustee/beneficiary as those terms are defined in the Internal Revenue Code; and,
 - The trustee/beneficiary may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee/beneficiary personally owes to another person.
- **Sections 15 and 16** spell out the general and specific powers of a trustee (which are quite broad so long as they are exercised for the benefit of the beneficiary).
- **Chapter 59-17** is a re-enactment of the Uniform Prudent Investor Act (previously set forth in Sections 59-02-08.1 through 59-02-08.11).
- **Chapter 59-18** addresses the liability of trustees and the rights of beneficiaries regarding breaches of trust by a trustee. Relatively little change was made to this chapter.
- **Chapter 59-19** is a miscellaneous chapter, which among other things sets forth the applicability of the UTC in North Dakota to existing trusts and to trusts created in the future. The task force will be presenting a recommended amendment by the end of this month that upon its enactment will make the UTC immediately effective with

regard to all trusts created on and after the date of enactment and with regard to trusts created prior to the date of enactment, the recommended effective date will be August 1, 2009.

On behalf of the members of the task force, I want to thank the members of this committee for the opportunity to have input on this legislation. As a group we particularly want to thank Representative Klemin for his seasoned advice and for his computer skills in communicating our modifications to the Legislative Council for inclusion in this legislation. If you have any further questions, I would be glad to answer them. Again, thank you.

UNIFORM TRUST CODE TASK FORCE

Bradley C. Bergman
P.O. Box 1548
Minot, ND 58702-1548
Telephone: 701-857-6231
Fax: 701-857-1412
bcbergman@bremer.com

Kelley P. Boyum
US Bank
505 2nd Avenue North
Fargo, ND 58102
Telephone: 701-214-8219
Fax: 701-214-8239
kelly.boyum@usbank.com

Malcolm H. Brown
P.O. Box 2692
Bismarck, ND 58502-2692
Telephone: 701-224-8825
Fax: 701-224-08820
mhblaw@btinet.net

Douglas C. Carpenter
Alerus Financial
2300 South Columbia Road
Grand Forks, ND 58201
Telephone: 701-795-3211
Fax: 701-795-3211
dcarpenter@alerusmail.com

Marilyn K. Foss
P.O. Box 2216
Bismarck, ND 58502-2216
Telephone: 701-355-4538
Fax: 701-355-4539
foss@btinet.net

William L. Guy III
Vogel Law Firm
P.O. Box 1077
Moorhead, MN 56561-1077
Telephone: 218-236-6462
Fax: 218-236-9873
(Send emails to:
khearnen@vogellaw.com)

Melissa A. Hauer
Human Services Department
600 E. Boulevard Ave.
Bismarck, ND 58505-0240
Telephone: 701-328-2311
Fax: 701-328-2173
sohaum@state.nd.us

Lawrence R. Klemin
P.O. Box 955
Bismarck, ND 58502-0955
Telephone: 701-258-8988
Fax: 701-258-8486
lklemin@bkmpc.com

William A. Neumann
State Bar Association of North Dakota
P.O. Box 2136
Bismarck, ND 58502-2136
Telephone: 701-255-1404
Fax: 701-224-1621
bill@sband.org

Robert E. Rosenvold
Ohnstad Twichell, PC
P.O. Box 458
West Fargo, ND 58078-0458
Telephone: 701-282-3249
Fax: 701-282-0825
rosenvold@ohnstadlaw.com

Sherry Gronhovd Schrock
State Bank & Trust
P.O. Box 829
Fargo, ND 58107-0829
Telephone: 701-451-3109
Fax: 701-451-3290
sschrock@statebanks.com

Jeanne Schlittenhard
State Bar Association of North Dakota
P.O. Box 2136
Bismarck, ND 58502-2136
jeanne@sband.org

Senator John T. Traynor
P.O. Box 838
Devils Lake, ND 58301-0838
Telephone: 701-662-4077
Fax: 701-662-7537
Send emails to:
dantraynor@traynorlaw.com

Att # 2
2-28-07

Senate Bill No. 1034
Representative Lawrence R. Klemin
Senate Judiciary Committee
February 28, 2007

Mr. Chairman and members of the committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here today to testify in support of House Bill 1034, the North Dakota Trust Code. I am also a member of the North Dakota Uniform Laws Commission and the National Conference of Commissioners on Uniform State Laws.

House Bill 1034 is based on the Uniform Trust Code, which has now been adopted in 18 other states and the District of Columbia. House Bill 1034 was the subject of an interim Judiciary Committee study over the past 2 years in conjunction with a taskforce organized by the State Bar Association of North Dakota. The taskforce included lawyers who draft trust documents for their clients, trust company representatives, bank representatives, lawyers in state government agencies that may be affected by trusts, and others. I also served on this taskforce on behalf of the Legislature. The taskforce thoroughly examined the Uniform Trust Code, as well as amendments made by other states, and relevant provisions of existing North Dakota law. This bill implements a comprehensive trust code in North Dakota. Prior to this time, trust law in North Dakota has largely been a matter of case law as interpreted by the courts with some statutory provisions.

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.

House Bill 1034 is a long bill. Please refer to the written testimony of Bill Guy, chair of the SBAND taskforce, which contains more detailed information on House Bill 1034. I will discuss the major provisions. Sections 1 through 13 of the bill are amendments to various parts of the North Dakota Century Code where there are references to trust statutes in order to insert the correct citations to the new North Dakota Trust Code.

Section 14 at the bottom of page 8 of the bill creates a new section to Chapter 59-08 of the North Dakota Century Code relating to trusts for individuals with

disabilities. Chapter 59-08 was just enacted in 2003 and is still good law. This new section provides that if there is any conflict between the new North Dakota Trust Code and existing chapter 59-08, the provisions of Chapter 59-08 control.

Section 15 on page 9 is the beginning of the 11 chapters in the new North Dakota Trust Code. Section 15 creates a new chapter 59-09, which specifies the scope of the trust code, contains definitions which are used throughout the trust code, and contains various other rules of interpretation.

Section 16 beginning at the bottom of page 17 creates a new chapter 59-10, relating to judicial proceedings involving trusts.

Section 17 beginning at the bottom of page 18 creates a new chapter 59-11, relating to representation of beneficiaries.

Section 18 begins on page 21 and creates a new chapter 59-12. This chapter sets forth the requirements for creating, modifying and terminating a trust.

Section 19 begins on page 26 and creates a new chapter 59-13. This chapter contains provisions relating to creditor claims against a beneficiary or the settlor, who is the person who created the trust.

Section 20 begins at the top of page 30 and creates a new chapter 59-14, relating to revocable trusts.

Section 21 on page 32 creates a new chapter 59-15, which deals with the office of trustee. This chapter includes numerous rules relating to acceptance of the trusteeship by the trustee; rights and obligations of co-trustees; procedures for resignation; grounds for removal of a trustee; methods of appointing successors; and trustee compensation.

Section 22 on page 36 creates a new chapter 59-16, relating to the powers and duties of trustees.

Section 23 on page 47 creates chapter 59-17, which is a re-enactment of the Uniform Prudent Investor Act. This is already the law in North Dakota. The old provisions are in existing chapter 59-02 and are being repealed in order to rearrange them in the new North Dakota Trust Code.

Section 24 at the bottom of page 49 creates chapter 59-18. This chapter addresses the liability of trustees and the rights of beneficiaries regarding breaches of trust by a trustee.

Section 25 on page 55 creates chapter 59-19, which is a miscellaneous chapter. New section 59-19-02 states that the new North Dakota Trust Code applies to all trusts created after July 31, 2007, when the law becomes effective. Existing

trusts will have 2 years, until August 1, 2009, to conform their trust provisions to applicable provisions of the North Dakota Trust Code, although such trusts can elect to be covered by the new law earlier.

Section 26 on page 56 creates chapter 59-20, and contains provisions relating to private foundations, charitable trusts, and split-interest trusts as defined in the Internal Revenue Code.

Section 27 on page 58 repeals existing chapters of the law that are no longer needed due to the new North Dakota Trust Code.

Although this is a comprehensive new law, the 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. The Trust Code contains 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.

Mr. Chairman and members of the committee, I ask for your favorable recommendation on House Bill 1034, the North Dakota Trust Code.

Att #3

2-28-07

TESTIMONY OF WILLIAM L. GUY III, CHAIR
UNIFORM TRUST CODE DRAFTING TASK FORCE
IN SUPPORT OF
HOUSE BILL NO. 1034

Mr. Chairman and members of the Committee, I am here on behalf of a task force (see the attached list at the end of my testimony for the names and addresses of the task force members) which was assembled in January 2006 at the request of the Interim Judiciary Committee to undertake a review of the proposed Uniform Trust Code ("UTC") and to recommend any modifications we believed necessary for enactment of the UTC in North Dakota. Accordingly, the legislation that you have before you as the first engrossment of House Bill No. 1034 represents the results of that review.

This legislation repeals Chapters 30.1-33 and 30.1-34 and all of Title 59 (Chapters 59-01, 59-02, 59-03, 59-04, 59-04.2 and 59-05) except for Chapter 59-04.2 (the Uniform Principal and Income Act) and Chapter 59-08 (relating to Special Needs Trusts) and enacts new Chapters 59-09 through 59-19. Although this legislation absorbs and recodifies the Uniform Prudent Investor Act as a part of the UTC, it does not apply to:

- A trust that is a part of an employee benefit arrangement or individual retirement account;
- A trust account established under a qualified tuition savings program pursuant to Section 6-09-38;
- Trust accounts maintained on behalf of clients or customers by licensed service professionals, including trust accounts maintained by attorneys pursuant to the North Dakota Rules of Professional Conduct and by real estate brokers pursuant to Chapter 43-23;
- An endowment care fund established by a cemetery authority pursuant to Chapter 23-21;
- Funds maintained by public bodies as defined under Chapter 1-07 or other governmental unit entities;
- Trust funds held for a single business transaction or an escrow arrangement;
- Trusts created by a depository agreement with a financial institution;

- An account maintained under the North Dakota Uniform Transfers to Minors Act pursuant to in Chapter 47-24.1;
- A fund maintained pursuant to court order in conjunction with a bankruptcy proceeding or business liquidation;
- A voting trust described in Chapter 10-19.1;
- Funds maintained to manage proceeds from class actions;
- A trust created solely to secure the performance of an obligation;
- A trust created on behalf of a residential facility;
- A trust managed by a non-profit association for disabled individuals under 42 U.S.C. 1396p(d)(4); and
- A resulting or constructive trust.

In addition the UTC does not alter the Uniform Principal and Income Act (Chapter 59-04.2), Management of Institutional Funds Act (Chapter 15-67), and Testamentary Additions to Trusts Act (Chapter 30.1-08). While the UTC is very comprehensive, some topics such as the interpretation of trust terms and remedies for breach of trust are not covered and will continue to be governed by the common law of trusts and principles of equity.

The National Conference of Commissioners on Uniform State Laws organized the UTC in the eleven (11) Articles which are reflected in the eleven (11) chapters of this legislation. The following is an overview of those eleven (11) chapters:

- **Chapter 59-09** includes:
 - **Section 3** which contains the definitions which are key to an understanding of this legislation. Three of the definitions that are relevant to this testimony are:
 - ***“settlor”*** is a person who creates a trust.
 - ***“beneficiary”*** is a person with a present or future beneficial interest in the trust.
 - ***“spendthrift provisions”*** are trust provisions that protect the assets of the trust from the claims of creditors of the beneficiary and from attempts by the beneficiary to sell or mortgage his or her share of the trust.

- **Section 5** contains the default and mandatory rules governing all trusts.
- **Subsection 2** sets out the following twelve (12) mandatory rules that prevail over any provision to the contrary in the trust agreement:
 - The requirements for creating a trust;
 - The duty of a trustee to act in good faith and in accordance with the purposes of the trust;
 - The requirement that a trust and its terms be for the benefit of its beneficiaries and that the trust have a purpose that is lawful and possible to achieve;
 - The power of the court to modify or terminate a trust;
 - The effect of a spendthrift provision and the rights of certain creditors and assignees to reach the assets of a trust (even though protected by a spendthrift provision);
 - The power of the court to require, dispense with, or modify or terminate a bond;
 - The power of the court to adjust (either upward or downward) a trustee's compensation from that which is specified in the trust agreement;
 - The effect of an exculpatory term relieving a trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or which was inserted in the trust agreement as a result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor (unless the settlor was represented by an attorney or unless the trustee proves the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor);
 - The rights of a person other than a trustee or a beneficiary;
 - Periods of limitation for commencing a judicial proceeding;
 - The power of the court to take action and exercise jurisdiction

- as may be necessary in the interest of justice; and,
- The subject matter jurisdiction of the court and venue for commencing a proceeding.
 - **Subsection 1** provides that, other than the twelve (12) mandatory rules set forth in Subsection 2, the default provisions of the UTC may be modified or overridden by the terms of any particular trust agreement. However, if not modified or overridden by the terms of the trust agreement, then the default provisions of the UTC are applicable to all trusts.
 - **Section 7** allows the trust agreement to designate the state whose trust law will govern the administration of the trust.
 - **Section 11** authorizes trustees and interested persons to enter into binding non-judicial settlement agreements with respect to any matter involving a trust except certain items which are specifically prohibited.
 - **Chapter 59-10** consists of only four (4) sections pertaining to judicial proceedings involving trusts.
 - To the extent not provided in this chapter, the North Dakota Rules of Civil Procedure apply.
 - Other than the deletion of **Section 3** from the proposed UTC, no changes were made to this chapter.
 - **Chapter 59-11** deals with representation of beneficiaries, including representation by fiduciaries (such as personal representatives, trustees, guardians and conservators) and what the UTC refers to as "virtual representation" of beneficiaries.
 - "Virtual representation" allows a beneficiary who has substantially identical interests as other beneficiaries to represent the interests of the group.
 - A typical example would be a trust providing for distribution of income and principal to the settlor's children as a class or group.
 - Virtual representation could allow an adult child to represent the interests of all of the settlor's children who are either minors or who are unborn (again, as long as the interests of the adult child are not

in conflict with the interests of his or her minor or unborn siblings who are the other members of the class).

- The task force made numerous changes to this chapter, primarily incorporating provisions which have been previously made in other states.
- **Chapter 59-12** sets forth the requirements for creating, modifying and terminating a trust.
 - Relatively minor modifications were made to this chapter. Again most changes being changes also made in other states.
 - One of the interesting aspects of this chapter is **Section 8** which authorizes trusts for the care of an animal (under common law a trust (other than a charitable trust) must benefit a human being).
 - Out of concern for potential estate and gift tax consequences, the task force deleted from **Section 11** the power that would otherwise be given to a settlor and the beneficiaries to modify or terminate an otherwise irrevocable trust.
 - In **Sections 15 and 16** the court is authorized to reform the terms of a trust to conform to the apparent intention of the settlor if clear and convincing evidence demonstrates a mistake in the terms of the trust or to achieve the apparent tax objectives of the settlor.
- **Chapter 59-13** addresses spendthrift provisions and the rights of creditors (with claims against either the settlor or a beneficiary).
 - This chapter was among the most difficult and complex.
 - To the extent that the share of a beneficiary in a trust is not protected by a spendthrift provision, **Subsection 1** provides that a court may authorize a creditor of the beneficiary to reach the share of the beneficiary by attachment of present or future distributions (this would be consistent with prior common law).
 - **Subsection 2** sets forth the requirements for a spendthrift provision as being one which restrains either the voluntary *or* involuntary transfer or the voluntary *and* involuntary transfer of the share of a beneficiary in the trust. In other words, if a trust is protected by a spendthrift provision, then a

beneficiary cannot sell or mortgage his or her share of the trust and the creditors of the beneficiary may not attach the share of a beneficiary in the trust, except as provided in Subsection 3.

- **Subsection 3** sets forth the exceptions to a spendthrift provision (i.e. those claimants who may breach a spendthrift provision and attach trust assets) which are limited to:
 - A child, spouse or former spouse of the beneficiary who has a court order against the beneficiary for *support and maintenance*;
 - A judgement creditor who has provided services for the protection of the share of the beneficiary in the trust; and,
 - A claim of a state or the United States to the extent provided by applicable law.
- **Subsection 3** makes clear that the above exceptions to Subsection 2 do not apply to Special Needs Trusts (authorized under Chapter 59-08 for beneficiaries who are disabled and receiving Medicaid or Supplemental Security Income).
- **Section 4** effectively eliminates the distinction between discretionary trusts and support trusts (by effectively abolishing the concept of support trusts). The elimination of this distinction affects only the rights of creditors and does not affect the right of a beneficiary to compel a distribution which is determined in a case-by-case basis depending upon the terms and conditions of the distribution standard for that beneficiary from the trust in question.
- **Section 5** pertains to a claim of a creditor against the settlor.
 - A spendthrift provision will not protect the *settlor*.
 - During the lifetime of the settlor:
 - In a *revocable* trust, all trust property is fully subject to the claims of the creditors of the settlor; and,
 - In an *irrevocable trust*, only trust property that could otherwise be distributed to or for the benefit of the settlor is subject to the

claims of the creditors of the settlor.

- After the death of the settlor, property of a trust that was revocable immediately prior to the death of the settlor is subject to the claims of creditors, costs of administration and expenses in the same manner as would be property which was subject to probate.
- **Chapter 59-14** pertains to revocable trusts and was relatively uncontroversial and relatively little changed by the task force.
- **Chapter 59-15** deals with the office of trustee and includes numerous rules such as rules on:
 - acceptance of the trusteeship by the trustee;
 - rights and obligations of co-trustees;
 - the procedure for resignation;
 - grounds for removal;
 - methods of appointing successors; and,
 - trustee compensation.

Again this was a relatively uncontroversial chapter and the task force made few changes.

- **Chapter 59-16** describes the duties and certain powers of the trustee.
 - Those duties are set out in **Sections 1 through 6 and 9 through 13** and include:
 - The duty to administer the trust;
 - The duty of loyalty;
 - The duty of impartiality;
 - The duty of prudent administration;
 - The duty to incur only reasonable costs of administration;
 - The duty to use any special skills or expertise held by the trustee;
 - The duty to control and protect the trust property;
 - The duty of record keeping and identification of trust property;
 - The duty to collect trust property;
 - The duty to enforce and defend claims; and,

- The duty to inform and report.
- The powers described in **Sections 7 and 8** include:
 - The power of the trustee to delegate; and,
 - The power to direct the trustee (held by the settlor while the trust is revocable);
- **Section 14** eliminates two estate tax traps for the unwary that apply unless its provisions are specifically overridden by the trust agreement:
 - A person who is both a beneficiary and a trustee of a trust that gives the trustee the power to make discretionary distributions to the trustee/beneficiary or for the personal benefit of the trustee/beneficiary may only do so in accordance with an ascertainable standard pertaining to the *health, education, support and maintenance* of the trustee/beneficiary as those terms are defined in the Internal Revenue Code; and,
 - The trustee/beneficiary may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee/beneficiary personally owes to another person.
- **Sections 15 and 16** spell out the general and specific powers of a trustee (which are quite broad so long as they are exercised for the benefit of the beneficiary).
- **Chapter 59-17** is a re-enactment of the Uniform Prudent Investor Act (previously set forth in Sections 59-02-08.1 through 59-02-08.11).
- **Chapter 59-18** addresses the liability of trustees and the rights of beneficiaries regarding breaches of trust by a trustee. Relatively little change was made to this chapter.
- **Chapter 59-19** is a miscellaneous chapter, which among other things sets forth the applicability of the UTC in North Dakota to existing trusts and to trusts created 'in the future':
- The UTC will be immediately effective with regard to all trusts created on and after the August 1, 2007 date of enactment; and,

- With regard to trusts created prior to the date of enactment, it will be effective on and after August 1, 2009.

On behalf of the members of the task force, I want to thank the members of this committee for the opportunity to have input on this legislation. As a group we particularly want to thank Representative Klemin for his seasoned advice and for his computer skills in communicating our modifications to the Legislative Council for inclusion in this legislation. If you have any further questions, I would be glad to answer them. Again, thank you.

UNIFORM TRUST CODE TASK FORCE

Bradley C. Bergman
Bremer Trust
P.O. Box 1548
Minot, ND 58702-1548
Telephone: 701-857-6231
Fax: 701-857-1412
bcbergman@bremer.com

Kelley P. Boyum
US Bank
505 2nd Avenue North
Fargo, ND 58102
Telephone: 701-214-8219
Fax: 701-214-8239
kelley.boyum@usbank.com

Malcolm H. Brown
P.O. Box 2692
Bismarck, ND 58502-2692
Telephone: 701-224-8825
Fax: 701-224-08820
mhblaw@btinet.net

Douglas C. Carpenter
Alerus Financial
2300 South Columbia Road
Grand Forks, ND 58201
Telephone: 701-795-3211
Fax: 701-795-3211
dcarpenter@alermail.com

Marilyn K. Foss
P.O. Box 2216
Bismarck, ND 58502-2216
Telephone: 701-355-4538
Fax: 701-355-4539
foss@btinet.net

William L. Guy III
Vogel Law Firm
P.O. Box 1077
Moorhead, MN 56561-1077
Telephone: 218-236-6462
Fax: 218-236-9873
(Send emails to:
khearnen@vogellaw.com)

Melissa A. Hauer
Human Services Department
600 E. Boulevard Ave.
Bismarck, ND 58505-0240
Telephone: 701-328-2311
Fax: 701-328-2173
sohaum@state.nd.us

Lawrence R. Klemin
P.O. Box 955
Bismarck, ND 58502-0955
Telephone: 701-258-8988
Fax: 701-258-8486
lklemin@bkmpc.com

William A. Neumann
State Bar Association of North Dakota
P.O. Box 2136
Bismarck, ND 58502-2136
Telephone: 701-255-1404
Fax: 701-224-1621
bill@sband.org

Robert E. Rosenvold
Ohnstad Twichell, PC
P.O. Box 458
West Fargo, ND 58078-0458
Telephone: 701-282-3249
Fax: 701-282-0825
rosenvold@ohnstadlaw.com

Sherry Gronhovd Schrock
State Bank & Trust
P.O. Box 829
Fargo, ND 58107-0829
Telephone: 701-451-3109
Fax: 701-451-3290
sschrock@statebanks.com

Jeanne Schlittenhard
State Bar Association of North Dakota
P.O. Box 2136
Bismarck, ND 58502-2136
jeanne@sband.org

Senator John T. Traynor
P.O. Box 838
Devils Lake, ND 58301-0838
Telephone: 701-662-4077
Fax: 701-662-7537
Send emails to:
dantraynor@traynorlaw.com

Testimony of

**THE HUMANE SOCIETY
OF THE UNITED STATES**

In support of H.B. 1034

Submitted by Patricia Kauffman
February 27, 2007

AH #4
2-28-07

On behalf of The Humane Society of the United States and our over 17,000 members in North Dakota, I thank you for the opportunity to submit testimony in support of H.B. 1034, which allows for the creation of pet trusts.

Studies have found that predeceasing a pet is a problem that many owners of companion animals, especially the elderly, ignore. Most assume a family member or neighbor would take care of their pet after the owner's death or incapacitation. Hence, pets may end up at overextended animal shelters, where they will be euthanized, if not adopted within a certain amount of time. Some shelters will not take older animals.

The best way to ensure that pets will be taken care of should the unthinkable happen is by making formal arrangements through a trust or will that specifically covers the care of the pets. A trust can provide for the pets immediately, whether the owner dies or becomes ill or incapacitated.

In the past courts have refused to recognize pet trusts because they considered animal companions to be property. Property can't hold title for other property, therefore any bequest to an animal was void. Pet trust legislation will ensure that owners' intent for their pets can be protected in the courts, which will not legally allow a person to ignore the trust.

There is precedent for this legislation; the following 33 states and the District of Columbia already allow for pet trusts: Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, Wyoming and the District of Columbia. Additionally, South Dakota allows for pet trusts in the notes that accompany their statute. Bills are pending in Alabama, Connecticut, Maryland, Massachusetts and Minnesota.

This is important legislation that affects North Dakota constituents; therefore I urge you to support the bill. Thank you again for your time and consideration. Please feel free to contact The Humane Society of the United States with any questions or for additional information.

Respectfully,

Patricia Kauffman
The Humane Society of the United States
pkauffman@hsus.org; (301) 258-3130

NDLA, S JUD

From: Klemin, Lawrence R.
Sent: Tuesday, February 27, 2007 12:13 PM
To: Tami Santelli
Cc: Nething, David E.; NDLA, S JUD
Subject: RE: Testimony for HB 1034

Yes there is a provision allowing for trusts for pets. You may submit written testimony to Sen. David Nething, Chair of the Senate Judiciary Committee and he will decide whether to accept it or not. The hearing is on 2/28 so I suggest you either fax it to the committee or send it as an email attachment to the committee clerk and Sen. Nething.

Rep. Larry Klemin

From: Tami Santelli [mailto:tsantelli@hsus.org]
Sent: Tuesday, February 27, 2007 11:52 AM
To: Klemin, Lawrence R.
Subject: Testimony for HB 1034

Dear Representative Klemin:

I work on state legislation in the Government Affairs Department of The Humane Society of the United States and cover legislation in North Dakota. We are excited by the progress of H.B. 1034, which would allow the creation of pet trusts. I understand that you sponsored this legislation? We would like to submit written testimony in support of this bill for the Senate Judiciary Committee hearing tomorrow, but I wanted to check with you before doing so. If our testimony seems appropriate, please let me know how I can submit it.

Thank you for your leadership on this important issue.

Sincerely,

Tami Santelli
State Legislative Specialist
The Humane Society of the United States
519 C. Street, NE
Washington, DC 20002
(202) 955-3661

Interested in taking action online to help animals? Then join our online community and sign up for our Humane Action Network. Go to www.hsus.org/join .

2/27/2007