

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIARY COMMITTEE

Monday, November 14, 2005
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Lois Delmore, Chairman, called the meeting to order at 10:00 a.m.

Members present: Representatives Lois Delmore, Bill Amerman, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar; Senators Dick Dever, Stanley W. Lyson, Carolyn Nelson, John T. Traynor, Thomas L. Trenbeath

Others present: See attached appendix

It was moved by Senator Dever, seconded by Senator Trenbeath, and carried on a voice vote that the minutes of the September 19, 2005, meeting be approved.

UNIFORM LAWS STUDIES

Uniform Trust Code

Chairman Delmore called on Ms. Michelle Clayton, Legislative Counsel, National Conference of Commissioners on Uniform State Laws (NCCUSL), for testimony regarding the Uniform Trust Code. Ms. Clayton said 14 states and the District of Columbia have passed the Uniform Trust Code and at least 10 are considering the Uniform Trust Code in current or upcoming legislative sessions. She said a number of states, including North Dakota and Montana, are currently studying the Uniform Trust Code. She said the Uniform Trust Code is a default law that applies only when the trust instrument is silent. She said the Uniform Trust Code was completed in 2000. She said the Uniform Trust Code was amended in 2001, 2003, 2004, and 2005.

In response to a question from Representative Delmore, Ms. Clayton said NCCUSL has prepared a section-by-section comparison of the changes made by the states that have enacted the Uniform Trust Code. Ms. Clayton provided to the committee a copy of the comparison. A copy of the comparison is on file in the Legislative Council office.

In response to a question from Senator Traynor, Ms. Clayton said Section 1106 of the Uniform Trust Code provides that the code generally applies to trusts created before its effective date. She said with respect to a judicial proceeding concerning a trust, the Uniform Trust Code applies unless the court determines that the code provision would substantially interfere with the effective control of the judicial proceedings or interfere with the rights of the parties. She said the rules of construction in the code apply to

trust instruments executed before the code's effective date unless there is a clear indication of a contrary intent in the terms of the trust. She said the 2004 amendments include an amendment clarifying that the duty to notify beneficiaries under Section 81(b)(2) and (3) is prospective only.

In response to a question from Senator Nelson regarding neighboring states, Ms. Clayton said South Dakota is working on a Uniform Trust Code bill for 2006, Iowa is planning to introduce a Uniform Trust Code bill, and Montana is currently studying the Uniform Trust Code.

Ms. Clayton said the Uniform Trust Code is intended to be a model. She said states may want to tailor the code to meet each state's needs.

In response to a question from Representative Koppelman, Ms. Clayton said some uniform laws, such as the Uniform Securities Act, have a greater need for uniformity than other uniform Acts. She said some uniform laws can be tailored by states without a lack of uniformity problem. If only half of the states adopt the Uniform Trust Code, she said, it will create more uniformity than there is now.

In response to a question from Senator Traynor, Ms. Clayton said it is helpful to have legislators who are also members of NCCUSL.

In response to a question from Senator Dever, Ms. Clayton said it is permissible for a North Dakota resident to create a trust in another state. She said if a trust is irrevocable and the beneficiary is over the age of 25, the Uniform Trust Code requires the beneficiary to be notified that the trust is irrevocable. She said there are a number of bracketed provisions in the Uniform Trust Code which allow a state to make some decisions regarding those provisions.

In response to a question from Senator Traynor, Ms. Clayton said a revocable trust is more flexible but an irrevocable trust has more tax advantages. She said the Uniform Trust Code contains provisions that allow for a change in trustee.

Ms. Clayton said the task force being formed by the State Bar Association of North Dakota may want to address the issues of beneficiary notice, spendthrift trusts, creditors' rights, and special needs trusts.

In response to a question from Senator Traynor, Ms. Clayton said Virginia passed the Uniform Trust Code with a delayed effective date of July 1, 2006.

She said this was done to allow time for attorneys to educate themselves on the new trust law.

In response to a question from Representative Klemin, Ms. Clayton said there is an article in the Uniform Trust Code packet she distributed which discusses the impact of the code on special needs trusts. She said another article in the packet discusses the Uniform Trust Code and its impact on other uniform laws. A copy of the packet is on file in the Legislative Council office.

Ms. Clayton said the Uniform Trust Code was drafted in close coordination with the revision of the Third Restatement of Trusts. She said once a state adopts a statute, the restatement is no longer considered to be the authority on the subject. She said the majority of North Dakota's statutes on trusts were passed in 1943 with periodic updates. She said North Dakota's laws on trusts are not as comprehensive as the Uniform Trust Code.

In response to a question from Senator Nelson, Ms. Clayton said NCCUSL is hopeful that there will not be a need for further amendments to the Uniform Trust Code. She said NCCUSL is receiving favorable comments from states that have passed the Uniform Trust Code.

In response to a question from Representative Koppelman, Ms. Clayton said the impetus for a new uniform act may be to avoid federal preemption. She said NCCUSL works with the Council of State Governments and other national legislative organizations to find the most effective solution to an issue. She said the goal is to get all 50 states involved and to draft a product that is fair and balanced for all states. Ms. Clayton provided a copy of the policy establishing criteria and procedures for designation and consideration of acts, a copy of which is on file in the Legislative Council office.

Chairman Delmore called on Mr. William L. Guy III, representing the State Bar Association of North Dakota, for testimony regarding the uniform laws studies. Mr. Guy said although 14 states and the District of Columbia have adopted the Uniform Trust Code, each has made extensive modifications to the Act. He said a 15th state, Arizona, adopted the Uniform Trust Code and then repealed it before its effective date. In 2003, he said, Minnesota considered the Uniform Trust Code and elected to "cherry pick" some of its provisions for inclusion in the existing Minnesota trust statute. He said some states, like Minnesota, have extensive resources to deploy in analyzing the Uniform Trust Code. He said other states, like North Dakota, do not have such resources. On a personal level, he said, the adoption of the Minnesota trust code by North Dakota would be the preferred route. He said, however, the interests of North Dakota are best served if the state could begin to utilize the Uniform Trust Code in a modified form. Mr. Guy provided written testimony, a copy of which is on file in the Legislative Council office.

Revised Uniform Commercial Code Article 1 - General Provisions

Ms. Clayton distributed information regarding the Revised Uniform Commercial Code Article 1 - General Provisions, a copy of which is on file in the Legislative Council office. She said Article 1 of the Uniform Commercial Code provides definitions and general provisions that, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code. She said Revised Article 1 contains technical, nonsubstantive modifications, such as reordering and renumbering of sections and adding of gender-neutral terminology. She said because of developments in the law, certain substantive changes in Article 1 have been made as well. She said Revised Article 1 contains a number of necessary changes that every state should adopt. She said these include a change in the scope of Article 1. She said this section provides that the substantive rules of Article 1 apply only to transactions governed by other articles of the Uniform Commercial Code. She said Revised Section 1-103 clarifies the application of supplemental principles of law and provides clearer distinctions about where the Uniform Commercial Code is preemptive. She said Section 1-201 of Revised Article 1 adopts the objective standard of "good faith" which applies in all of the recently revised Uniform Commercial Code articles except Revised Article 5. She said the default choice of law provisions have been revised and are now found in Section 1-301 to replace former Section 1-105. She said with respect to all transactions, an agreement by the parties to use the law of any state or country is generally effective regardless of whether the transaction bears a reasonable relation to that state. She said it appears that most states want to keep their current choice of law provisions.

In response to a question from Senator Traynor, Ms. Clayton said the choice of law provisions in Revised Article 1 tend to be more pro-consumer than the current choice of law provisions.

Chairman Delmore called on Mr. William Neumann, Executive Director, State Bar Association of North Dakota, for testimony regarding the uniform laws studies. Mr. Neumann said the State Bar Association has formed a task force to evaluate the Uniform Trust Code and a task force to evaluate Revised Uniform Commercial Code Article 1. Mr. Neumann provided a list of the membership of each task force, copies of which are on file in the Legislative Council office.

Senator Trenbeath said the Judiciary Committee's action will be heavily dependent on the conclusions of each task force.

Representative Klemin said he is serving on the Uniform Commercial Code task force and Senator Traynor is serving on the Uniform Trust Code task force.

DEPARTMENT OF HUMAN SERVICES REPORT

Chairman Delmore called on Mr. John Hougen, Director, Public Assistance, Department of Human Services, for presentation of a report on the alternatives-to-abortion services funding program. Mr. Hougen said the department was given the responsibility to establish an alternatives-to-abortion services program in North Dakota. He said the Legislative Assembly requested that the department seek funds from the federal Office of Faith-Based and Community Initiatives for this project. He said the department has learned that funds from this office were available only for abstinence programs or grants to agencies that would provide technical assistance to faith-based or community-based programs interested in applying for federal funds. He said with no funds available, temporary assistance for needy families (TANF) funds will be used to fund the alternatives-to-abortion services program. He said the Charitable Choice provisions in TANF will govern the administration of this program. He said there are two ways to fund this program. He said the direct method would be to issue contracts to agencies delivering the service. An indirect method, he said, would be to provide vouchers to individuals needing the service. These vouchers, he said, can be used to access the service and allow the agency delivering the service to bill the department. He said the indirect method was determined to be the best way to administer the program. He said the department has contacted all agencies now providing abortion alternative services. He said these agencies have been partners in developing this program. He said the department does not anticipate difficulties in getting the abortion alternative program set up before January 1, 2006. He said the agencies now providing this service agree in principle to what the department is proposing and its method of funding the service. He said a memorandum of understanding will be ready to sign in December 2005 and vouchers should be ready for distribution by the end of December 2005. Mr. Hougen provided written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Delmore, Mr. Hougen said \$500,000 was budgeted for the program. He said he is unsure of the expenditures at this point. He said whether this use of funds complies with TANF requirements is a judgment call. He said other states are using TANF funds for similar purposes.

In response to a question from Senator Nelson, Mr. Hougen said all providers are either religious-based or private.

In response to a question from Senator Dever, Representative Koppelman said he will be meeting with the first provider next week. He said people are very positive about the program.

In response to a question from Senator Nelson, Mr. Hougen said it is estimated that the providers will be reimbursed at a rate of \$40 to \$60 per hour. He said although many of the providers are not charging for these services now, the department's position is that there was a need to reimburse the providers.

In response to a question from Representative Delmore, Mr. Hougen said there has been some discussion about expanding the program for pregnancy counseling and abstinence education. He said the decision was made to keep the abortion alternatives program separate for now.

In response to a question from Representative Koppelman, Mr. Hougen said although the services are readily available in the larger cities in the state at no charge, reimbursement for the services will allow the services to be expanded to the more rural areas.

In response to a question from Representative Amerman, Mr. Hougen said the department will be tracking the program. He said the use of a voucher system will make it easier to create a history of the program and its results.

In response to a question from Senator Dever, Mr. Hougen said a portion of the funding will be used for advertising. He said the advertising will likely be in the form of fliers, posters, and the 211 services telephone number.

In response to a question from Representative Kretschmar, Mr. Hougen said it is not anticipated that the use of these TANF funds will affect any other TANF program. He said unlike other federal programs, TANF funds are not lost if the funds are not used.

Chairman Delmore said the committee would like another report later in the interim on the progress of the abortion alternatives program.

MARRIAGE LAWS STUDY

At the request of Chairman Delmore, committee counsel presented a background memorandum entitled [*Marriage License Fees by State*](#).

Representative Koppelman said it appears that North Dakota's fee is among the highest for mandated marriage license fees.

Representative Delmore said unlike other fees, for most people, the marriage license fee is a one-time fee.

Chairman Delmore called on Mr. Terry Traynor, Association of Counties, for testimony regarding the marriage fee increase. Mr. Traynor said the association passed a resolution of support for an increase in the county fee for marriage license issuance, noting that it had not been adjusted for at least 36 years. He said the association has long maintained the position that government services provided for the direct benefit of individual or businesses should be funded through user fees, rather than general property taxes paid by those that receive no specific benefit. He said it was obvious, based on a somewhat dated fee

analysis, that property taxpayers were subsidizing marriage license issuance. He said marriage license fees are deposited in the county general fund. Mr. Traynor submitted written testimony, a copy of which is on file in the Legislative Council office.

Chairman Delmore adjourned the meeting at 2:00 p.m.

Vonette J. Richter
Committee Counsel

[ATTACH:1](#)