

1999 HOUSE JUDICIARY

HB 1268

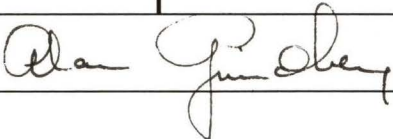
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1268

House Judiciary Committee

Conference Committee

Hearing Date January 19, 1999

Tape Number	Side A	Side B	Meter #
2		x	39.5
Committee Clerk Signature 			

Minutes:

REP. KEISER: South Dakota has a law allowing trusts to be permanent, not limited by the Rule Against Perpetuities which are called Dynasty Trusts. Since trusts are a great tool in estate planning, many North Dakota estate planners set up the trust in South Dakota. If we could set up such trusts here, it would be good for the economy of the state.

PAUL WOHNOUTKA: Presented prepared testimony, a copy of which is attached.

PAUL BIEBLEHEIMER: I have been a licensed insurance agent for 50 years and am still very active. When estate planning we use trusts to split the estate. If we could set these trusts up in North Dakota it would create jobs in this state.

CAROL BEISWANGER: (Kirkwood Bank) We are in favor of this as we want to keep these trusts in North Dakota

Page 2

House Judiciary Committee

Bill/Resolution Number 1268

Hearing Date January 19, 1999

DAVID GREEN (Act ERG) I am an assistant in the Attorney General's office, but I am testifying here as an individual. Don't throw out centuries of tradition without very strong consideration. I am an American and not Norwegian because Norway did not have a Rule Against Perpetuities. Since all the land there was tied up, my grandfather was forced to immigrate. If this passes, in time North Dakota's land may be tied up the same way.

SANDI TABOR: (SBAND) Explained that the purpose of the rule was not to cover trusts, but to keep land freely marketable.

SHELDON SMITH: (Attorney) We want to do this so we can use these trusts for estate planning. If you want to leave out land, we can live with that but I think an exception for real estate ought to be done in a separate bill.

COMMITTEE ACTION : February 2, 1999

REP. KLEMIN presented proposed amendments which would keep the Rule as it applies to real estate. He explained that the language used in the amendment is the same as is used in the corporate farming bill.

REP. MARAGOS moved the adoption of this amendment. Rep. Delmore seconded and the motion passed on a unanimous voice vote.

REP. HAWKEN moved that the committee recommend that the bill DO NOT PASS AS AMENDED. Rep. Mahoney seconded and the motion passed on a roll call vote with 12 ayes, 3 nays and 0 absent. Rep. Kelsh was assigned to carry the bill on the floor.

Date: 2/3
 Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1268

House JUDICIARY Committee

Subcommittee on _____
 or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass as Am

Motion Made By Hawken Seconded By McHoney

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY	✓	✓	REP. KELSH	✓	
REP. CLEARY	✓		REP. KLEMIN		✓
REP. DELMORE	✓		REP. KOPPELMAN	✓	
REP. DISRUD	✓		REP. MAHONEY	✓	
REP. FAIRFIELD	✓		REP. MARAGOS	✓	
REP. GORDER		✓	REP. MEYER	✓	
REP. GUNTER	✓		REP. SVEEN	✓	
REP. HAWKEN	✓				

Total Yes 12 No 3

Absent 0

Floor Assignment Kelsh

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

REPORT OF STANDING COMMITTEE

HB 1268: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (12 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1268 was placed on the Sixth order on the calendar.

Page 1, line 1, after "47-02-27.4" insert "and two new sections to chapter 47-02"

Page 1, line 2, after "perpetuities" insert "and restrictions on irrevocable trusts"

Page 1, line 3, replace "sections" with "section" and remove "and 47-02-27.2"

Page 1, line 4, remove "and contingent property interests"

Page 2, remove the overstrike over lines 10 through 19

Page 2, line 20, remove the overstrike over "~~death of the survivor of the specified lives.~~" and insert immediately thereafter "This subsection applies only to a trust or other property arrangement that owns or acquires real property in this state."

Page 2, remove lines 21 through 30

Page 3, remove lines 1 through 7

Page 3, line 11, after "irrevocable" insert "other than a trust that owns or acquires real property in this state"

Page 3, after line 11, insert:

"SECTION 3. A new section to chapter 47-02 of the North Dakota Century Code is created and enacted as follows:

Restriction on ownership of real property by trusts. A trustee of an irrevocable trust organized under the laws of any state may not, directly or indirectly, retain any interest, whether legal, beneficial, or otherwise, in any title to real property in this state beyond the period of time specified in subsection 5 of section 47-02-27.1. This section applies to trust ownership of real property in this state regardless of the means by which the real property is acquired by the trust and regardless of when or how the trust was created or when the trust became irrevocable.

SECTION 4. A new section to chapter 47-02 of the North Dakota Century Code is created and enacted as follows:

Enforcement. If the attorney general has reason to believe that any trustee is violating section 3 of this Act, the attorney general shall commence an action in the district court in which any real property relative to the violation is situated, or if situated in two or more counties, in the district court for that county in which a substantial part of the real property is situated. The attorney general shall file for record with the register of deeds in each county in which any portion of the real property is located a notice of the pendency of the action. If the court finds that the real property in question is being held in violation of section 3 of this Act, the court shall enter an order so declaring. The attorney general shall file the order for record with the register of deeds of each county in which any portion of the real property is located. The trustee owning the real property has a period of one year from the date of the order to divest the trust of the real property. The one-year limitation period is deemed a covenant running with the title to the real property against any grantee or assignee. Any real property not

divested within the time prescribed must be sold at public sale in the manner prescribed by law for the foreclosure of a real estate mortgage by action."

Renumber accordingly

1999 TESTIMONY

HB 1268

**HOUSE BILL 1268 HEARING
HOUSE JUDICIARY COMMITTEE
BY PAUL WOHNOUTKA, CPA
LOBBYIST NUMBER 396
JANUARY 19, 1999**

I am speaking in support of HB 1268 on behalf of the Red River Valley Estate Planning Council based in Fargo, the Western Dakota Estate Planning Council based in Bismarck and the North Western Dakota Estate Planning Council based in Minot.

NDCC 47-02-27.1 through 47-02-27.5 provides for rules against perpetuities regarding contingent property interest, general powers of appointment, special powers of appointment and general testamentary powers of appointment. They apply to property both inside and outside of a trust.

HB 1268 repeals the rule against perpetuities as they relate to trusts and leaves the rule against perpetuities in place for all the other situations covered by the current statute. Sections 1 and 2 of the Bill repeal wording referring specifically to trusts. Section 3 adds an additional item under "Exclusions from statutory rule against perpetuities."

The rule against perpetuities is a carryover from old English law. A few years ago, South Dakota repealed their rule against perpetuities and have been followed by 5 or 6 other states.

Currently, trusts are being drafted in North Dakota for domicile in South Dakota because their trusts are not governed by the rules of perpetuities plus they don't have a state income tax.

Some may say that changing this law will have no effect regarding trusts going to South Dakota. We disagree. The state income tax is only a factor when trusts accumulate income, in which case they quickly pay the highest federal income tax rate of 39.6%. Usually most, if not all, of a trust's income is distributed resulting in the income being taxed in the beneficiaries' state of residence.

Why should our residents, who want to have a longer trust, be forced to send their trust out of state? Why should we prevent people moving to North Dakota, who have a longer trust, from bringing their trust with them to North Dakota?

Do we really have a right to require people to distribute their accumulated wealth to their descendants at a very young age when doing so may wreck their descendants as a result of having too much wealth too early in life?

When professionals go to national tax conferences and national estate conferences, it usually comes up, more than once, that South Dakota is a good home for trusts because they do not have a rule against perpetuities and as a bonus, they don't have an income tax.

The rule against perpetuities as it relates to trusts is obsolete and the three North Dakota estate planning councils request that it be repealed.

47-02-27.3. Reformation. Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the ninety years allowed under subdivision b of subsection 1 of section 47-02-27.1, subdivision b of subsection 2 of section 47-02-27.1, and subdivision b of subsection 3 of section 47-02-27.1, if:

1. A contingent property interest or a power of appointment becomes invalid under section 47-02-27.1;
2. A class gift is not but might become invalid under section 47-02-27.1 and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or
3. A contingent property interest that is not validated by subdivision a of subsection 1 of section 47-02-27.1 can vest but not within ninety years after its creation.

Source: S.L. 1991, ch. 484, § 3.

47-02-27.4. Exclusions from statutory rule against perpetuities. Section 47-02-27.1 does not apply to:

1. A contingent property interest or a power of appointment arising out of a nondonative transfer, except a contingent property interest or a power of appointment arising out of a premarital or postmarital agreement, a separation or divorce settlement, a spouse's election, a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, a contract to make or not to revoke a will or trust, a contract to exercise or not to exercise a power of appointment, a transfer in satisfaction of a duty of support, or a reciprocal transfer.
2. A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income.
3. A power to appoint a fiduciary.
4. A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal.
5. A contingent property interest held by a charity, government, or governmental agency or subdivision, if the contingent property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision.
6. A property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or excluded by another statute of this state.

47-02-27.5. Prospective application.

1. Except as extended by subsection 2, sections 47-02-27.1 through 47-02-27.5 apply to a contingent property interest or a power of appointment that is created on or after July 1, 1991. For purposes of this section, a contingent property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.
2. If a contingent property interest or a power of appointment was created before July 1, 1991, and is determined in a judicial proceeding, commenced on or after July 1, 1991, to violate this state's rule against perpetuities as that rule existed before July 1, 1991, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the contingent property interest or power of appointment was created.