

1999 SENATE JUDICIARY

SB 2174

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2174

Senate Judiciary Committee

Conference Committee

Hearing Date January 18, 1999

Tape Number	Side A	Side B	Meter #
1		x	3912 - end
2	x		0 - 950
1-26-99 1	x		1400 - 1630
Committee Clerk Signature <i>Jackie Follman</i>			

Minutes:

SB2174 relates to claims against nonprobate transferees.

SENATOR STENEHJEM opened the hearing on SB2174 at 10:30 A.M.

All were present except SENATOR NELSON.

JAY BURINGRUD, Legislative Counsel, Commission on Uniform State Laws, testified to explain SB2174. Testimony attached.

TOM SMITH, ACLI, testified in opposition of SB2174. An amendment is proposed and with the amendments we would be neutral on SB2174. Amendment attached.

SENATOR WATNE asked why annuities should be included.

TOM SMITH stated they are the same as life insurance in that the annuity has a beneficiary also.

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Senate Judiciary Committee
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TAPE 2, SIDE A.

SANDI TABOR, Executive Director of the State Bar Association, testified to explain the technical ramifications of Section 6 of SB2174. I would like to have an expert look this over and I will bring back some testimony on the technical ramifications by the end of the week.

SENATOR STENEHJEM CLOSED the hearing on SB2174.

January 26, 1999 Tape 1

Discussion.

SENATOR WATNE made a motion for Amendments, SENATOR TRAYNOR seconded.

SENATOR WATNE made a motion for DO PASS AS AMENDED, SENATOR BERCIER seconded. Motion carried.

SENATOR TRAYNOR will carry this bill.

6 - 0 - 0

Prepared by Thomas O. Smith
American Council of Life Insurance

PROPOSED AMENDMENT TO SENATE BILL 2174

Page 7, line 6, after "than" insert "life insurance or annuities and"

Renumber accordingly

Date: 1-26-99
 Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2174

Senate Judiciary _____ Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken Amendment

Motion Made By Watne Seconded By Traynor

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
Senator Caroloyne Nelson	X				

Total (Yes) 6 No 0

Absent _____

Floor Assignment _____

Date: 1-26-99
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2174

Senate Judiciary _____ Committee

Subcommittee on _____
or

Conference Committee

Legislative Council Amendment Number _____

Action Taken Do PASS AS Amended

Motion Made By Watne Seconded By Bercier

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
Senator Caroloyne Nelson	X				

Total (Yes) 6 No 0

Absent _____

Floor Assignment Traynor

REPORT OF STANDING COMMITTEE

SB 2174: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2174 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "to create and enact section 30.1-31-01.1 of the North Dakota Century Code,"

Page 1, line 2, remove "relating to claims against nonprobate transferees;"

Page 1, line 4, after the first comma insert "and" and remove ", sections 30.1-31-01,"

Page 1, line 5, remove "30.1-31-11, and 30.1-31-29"

Page 1, line 6, replace "; and to repeal section 30.1-31-12 of the North Dakota Century Code, relating to claims" with a period

Page 1, remove line 7

Page 6, remove lines 9 through 30

Page 7, remove lines 1 through 31

Page 8, remove lines 1 through 30

Page 9, remove lines 1 through 19

Re-number accordingly

1999 HOUSE JUDICIARY

SB 2174

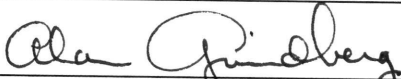
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2174

House Judiciary Committee

Conference Committee

Hearing Date : February 16, 1999

Tape Number	Side A	Side B	Meter #
1	X		0
Committee Clerk Signature 			

Minutes:

JAY BURINGRUD (LC) During the time a model act is on the books, state courts interpret the language in them and the meaning gets changed. This bill has technical correction covering the last eight years.. The purpose of this bill is to get the act to where it was intended to be at the time it was enacted.

COMMITTEE WORK

REP. HAWKEN moved that the committee recommend that the bill DO PASS. Rep. Delmore seconded and that motion carried on a roll call vote with 12 ayes, 0 nays and 3 absent. Rep. Disrud was assigned to carry the bill

Date: 2/16
 Roll Call Vote #: _____

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2174

House JUDICIARY _____ Committee

Subcommittee on _____
 or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Hawken Seconded By Delmore

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 0

Absent 3

Floor Assignment Disrud.

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

REPORT OF STANDING COMMITTEE (410)
February 16, 1999 1:10 p.m.

Module No: HR-31-3135
Carrier: Disrud
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2174, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS (12 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). Engrossed SB 2174 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

SB 2174

PRESENTATION TO THE JUDICIARY COMMITTEE

Jay E. Buringrud, Secretary, ND Commission on Uniform State Laws

Monday, January 18, 1999

The North Dakota Commission on Uniform State Laws is established by North Dakota Century Code Section 54-55-01. The commission consists of:

- a practicing lawyer -- David Hogue, Minot
- a full-time faculty member of the UND Law School -- Professor Patricia Brumfield Fry, Grand Forks
- a law-trained judge of a court of record -- District Judge Gail Haggerty, Bismarck
- a member of the House -- Representative William Kretschmar (not reelected)
- a member of the Senate -- Senator Wayne Stenehjem
- a member of the Legislative Council staff -- Jay Buringrud
- life members of the conference -- Judge Eugene Burdick; Frank Jestrab
- residents with 5 years prior service -- Mike Unhjem; Owen Anderson

Commissioners are required to attend the annual meeting of the National Conference of Commissioners on Uniform State Laws. Major duties are to:

- promote uniformity in state laws on those subjects where uniformity may be deemed desirable and practicable; and
- promote uniform judicial application and construction of all uniform state laws.

The Commission requested introduction of 3 bills:

1. Senate Bill No. 2152 - The Uniform Child Custody Jurisdiction and Enforcement Act.

2. Senate Bill No. 2169 - The Uniform Principal and Income Act (1997).

This is a revision of the Uniform Principal and Income Act of 1962 (originally promulgated in 1931), which North Dakota enacted in 1969 as NDCC Chapter 59-04.1. A trustee of a trust must serve the interests of both income and remainder beneficiaries. Assets allocated to income are generally paid to the income beneficiaries and assets allocated to principal are distributed to the remainder beneficiaries at the termination of the trust. The Uniform Act has always provided the default rules for such allocation if the trust instrument is silent. The objectives of the 1997 revision are to:

- Make principal and income rules conform to prudent investor rules under the Uniform Prudent Investor Act, which North Dakota enacted in 1997 as NDCC Sections 59-02-08.1 through 59-02-08.11. Under that Act (59-02-08.2), the main principle is to invest for total return by evaluating the trust portfolio as a whole, rather than a certain level of "income".

This Act deals conservatively with the tension between modern investment theory and traditional income allocation. If prudent investing of all the assets in the trust and traditional allocation effectuate the intent of the settlor, nothing need be done. But the Act helps the trustee who has made a prudent, modern

portfolio-based investment decision that has the initial effect of skewing return from all the assets under management between income and principal beneficiaries. The Act gives that trustee a power to reallocate the portfolio return suitable. Otherwise, a trustee would not be able to fully implement modern portfolio theory. **104-** Purpose is to enable trustee to select investments using standards of a prudent investor with having to realize a particular portion of the portfolio's total return in the form of traditional accounting income such as interest, dividends, and rents. **Under 103(2) trustee must administer a trust impartially, based on what is fair and reasonable to all beneficiaries, unless the terms of the trust require favoritism to one or more beneficiaries.** Why is section important? For a trustee who is operating under the prudent investor rule and decides that portfolio should include financial assets whose total return will result primarily from capital appreciation rather than dividends or interest, and at that time can decide the extent to which an adjustment from principal to income may be necessary. Examples: (1) income to son, remainder to daughter; high inflation, double digit return on bonds, allows investment in bonds, T may transfer part of interest to principal. (2) trust includes large amount of undeveloped land, income covers taxes, land may be high value in near future, T may transfer cash from other principal to provide income to income beneficiary.

- Clarify better allocations of acquired assets: **401-** income from a partnership is based on actual distributions, the same as corporate distributions; **401(4)(b)-** distributions exceeding 20% of gross assets are considered principal.
- Provide for investment modalities that were not in existence in 1962, such as derivatives, options, deferred payment obligations, and synthetic financial assets.
- Deal with any problem of disbursements because of environmental laws.
- Deal with allocation imbalances as a result of tax laws.

3. Senate Bill No. 2174 - Technical amendments approved by the National Conference's Executive Committee which affect uniform acts enacted in North Dakota.

- **Section 1 (1-403) - (2)** - clarifies that an order binds others to the extent their interests are subject to the power and that minors are included as those bound by judicial orders.
- **Section 2 (2-606)** - clarifies language.
- **Sections 3 and 4 (2-803 and 2-804)** - clarifies that the interests are equal interests, without regard to individual contributions by either party (to address a Montana case).
- **Section 5 (3-703)** - last sentence is clarified to reflect original intended meaning that a personal representative does not owe a fiduciary duty to a person having a claim against the estate until the claim has been allowed.
- **Section 6 (3-803)** - "nonprobate transferees" added to clarify that the codes non-claim bar protects probate as well as nonprobate successors against claims of unsatisfied creditors of the decedent.

WHEELER WOLF

ATTORNEYS

Albert A. Wolf
Jack McDonald
Gregory C. Larson
Steven L. Latham
Sarah Vogel

Arnold V. Fleck
Michael L. Wagner
Melissa Hauer
Courtney Koebel

Legal Assistants
Dianne M. Taft, CLAS
Char J. Jacober, CLA

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January 19, 1999

Sandi Tabor
Attorney at Law
P.O. Box 2136
Bismarck, ND 58502-2136

VIA FAX ONLY: 224-1621

RE: SENATE BILL NO. 2174 - OUR FILE: 98-614

Dear Sandi:

Following are my observations regarding this bill:

- Existing statute imposes liability on nonprobate transferee.** Section 8 of SB 2174 imposes liability upon a transferee of a nonprobate transfer to satisfy claims against the probate estate and statutory allowances. Currently, N.D.C.C. §30.1-31-12 provides that: "A transfer resulting from a right of survivorship or POD designation under §§30.1-31-02 through 30.1-31-20 is not effective against the estate of a deceased party to the extent needed to pay claims against the estate and statutory allowances to the surviving spouse and children."

§30.1-31-12(2) provides that a beneficiary who receives payment from an "account" after death of a party is liable to account to the personal representative of a decedent for a proportionate share necessary to discharge claims and allowances described in subsection 1 remaining unpaid after application of the decedent's estate. This reference to "account" refers to the contracts of deposit between the depositor and a financial institution. Therefore, it would not apply to real property. The new section is not applicable to a transfer of survivorship interest in a joint tenancy of real estate. Therefore, the existing section and the new section would seem to generally have the same applicability.
- Typographical error.** It appears to me that under Section 8, line 13, the third word "that" should be omitted. The reference should be to "decedent's probate estate."
- Imposition of liability to nonresident transferees.** Paragraph 6 of Section 8 provides that the liability imposed by this section is enforceable in proceedings in this state, whether or not the transferee is located in the state. This is a new section and contrary to existing law in North Dakota.

Jurisdiction over nonresident defendants is governed by Rule 4, N.D.R.Civ.P. Jahner v. Jacob, 252 N.W.2d 1, 6 (N.D. 1977). Rule 4 requires that the nonresident defendant have sufficient minimal contacts with the state of North Dakota to permit the courts here to exercise personal jurisdiction without offending the basic requirements of due process. *Id.* Each question of personal jurisdiction must be decided on a case by case basis depending on the particular facts and circumstances of each case. *Id.*

In Jahner v. Jacob, Jacob owed a substantial sum to Jahner as a result of a physical altercation between the two. After the altercation, Jacob transferred nearly all of his property to his children who resided out of state. Seeking to obtain recovery of the funds from the children, the representatives of Jahner's estate sued the children. The North Dakota Supreme Court held that the mere receipt of money outside the state of North Dakota, was insufficient contact for the courts of North Dakota to acquire jurisdiction. *Id.*


The court went on to say that all of the categories in Rule 4 upon which personal jurisdiction may be based imply voluntary conduct which makes it fair to subject the person in question to the jurisdiction of our courts. *Id.* at 8. A court does not acquire personal jurisdiction by being the "center of gravity" of the controversy, or the most convenient forum location for litigation. There must be such minimum contacts as to make jurisdiction consistent with fair play and substantial justice. *Id.*

Paragraph 6 mentioned above would be a statutory change of existing case law and contrary to Rule 4 mentioned above. Additionally, it is probably unconstitutional as violating due process.

4. **Conclusion.** I have been operating under the existing statute and find that it is very adequate to handle these matters. Section 8 of SB 2174 expands somewhat on the existing statute without making a substantial change with the exception of paragraph 6 regarding nonresident transferees mentioned above. If that section was omitted and the typographical error was corrected, I would not be completely adverse to this legislation.

If you have any further questions regarding this matter, please contact me.

Sincerely,


Gregory C. Larson ^{by} BH

30.1-31-12. Rights of creditors and others.

1. If other assets of the estate are insufficient, a transfer resulting from a right of survivorship or P.O.D. designation under sections 30.1-31-02 through 30.1-31-20 is not effective against the estate of a deceased party to the extent needed to pay claims against the estate and statutory allowances to the surviving spouse and children.

2. A surviving party or beneficiary who receives payment from an account after death of a party is liable to account to the personal representative of the decedent for a proportionate share of the amount received to which the decedent, immediately before death, was beneficially entitled under section 30.1-31-08, to the extent necessary to discharge the claims and allowances described in subsection 1 remaining unpaid after application of the decedent's estate. A proceeding to assert the liability may not be commenced unless the personal representative has received a written demand by the surviving spouse, a creditor, a child, or a person acting for a child of the decedent. The proceeding must be commenced within one year after death of the decedent.

3. A surviving party or beneficiary against whom a proceeding to account is brought may join as a party to the proceeding a surviving party or beneficiary of any other account of the decedent.

4. Sums recovered by the personal representative must be administered as part of the decedent's estate. This section does not affect the protection from claims of the personal representative or estate of a deceased party provided in section 30.1-31-19 for a financial institution that makes payment in accordance with the terms of the account.

Source: S.L. 1991, ch. 351, § 3; 1993, ch. 334, § 48; 1995, ch. 322, § 27.

Effective Date: The 1993 amendment by section 48 of chapter 334, S.L. 1993 became effective January 1, 1996, pursuant to section 51 of chapter 334, S.L. 1993, as amended by section 27 of chapter 322, S.L. 1995.