

2019 HOUSE JUDICIARY

HB 1226

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1226
1/16/2019
30895

- Subcommittee
 Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to the collection of property by affidavit and the effect of the affidavit.

Minutes:

1,2

Chairman K. Koppelman: Opened the hearing on HB 1226.

Rep. Boschee: Introduced this bill. (Attachment #1) (:55-3:14)

Chairman K. Koppelman: You mentioned the \$50,000 limit. Is there an inflator attached to those sections of real property?

Rep. Boschee: Yes that is the same threshold as personal property. There is not an inflator attached.

Rep. Paur: Looking at our email it appears he doesn't own the land?

Rep. Boschee: Correct. The lots were purchased by her husband who is now deceased so when he bought the land he did not put the appropriate deed on it that would then transfer to her. The deed has only the husbands name on it, or in order for the family to access those lots specially, they would have to go through the probate process. Because it is one small project the costs actually increase since it is just the land they are trying to transfer so the cost is more than the lots are worth.

Rep. Paur: So she doesn't own it so how is releasing unencumbered real property going to assist her?

Rep. Boschee: That is what she is asking for; just to transfer it to her ownership. If it is not listed in a will or with a personal representative in terms of transferring it upon some one's death you can go through an affidavit process.

Chairman K. Koppelman: How do you determine if the property is unencumbered?

Rep. Boschee: I did look at the testimony last time.

Lonnie Hass, Son of Margaret Hass: Discussed the lot in the outskirts of Bowbells, ND; that his mother is trying to get in her name. Said she has no recourse except to go through probate and that is going to cost more than the lot is worth. Mom is paying the taxes on it which is a property which she does not own legally. I am hoping that you will approve this.

Opposition:

Nick Hacker, ND Title Land Title Association: We understand the challenge that landowners have with trying to convey that real estate. Probate process is a very important one. The process is about find out all the other people we don't know that may have an interest in the real estate. Unfortunately, this could cause more pain down the road. There is a difference between possession and ownership. The probate process is very important to us. This could cause some unintended consequences for real estate. We would hope the committee would oppose this bill.

Representative Jones: How expensive is to do a quiet title?

Nick Hacker: It could be from \$700 on up. If you own minerals it can cause a problem and if it is processed. It is too bad this family already probated everything and dealt with everything that was owned by the estate, but they missed a piece of land and that is common. They probably need to reopen the probate.

Chairman K. Koppelman: Is there a way to do that without the help of an attorney?

Nick Hacker: Someone would self-represent, but that can create problems too. There are alternatives, but that takes place before a person passes without probate.

Chairman K. Koppelman: I am thinking about specifically surviving spouses. That is probably typically where it is used most often. What is the different if there is a TOD on the title; you don't do a title search or insure clear title and later you might have the problems you are talking about.

Nick Hacker: We still don't know who would have an interest in the real estate. We are going to require the same action regardless.

Chairman K. Koppelman: When those transfers take place you don't know who has another claim on the title.

Nick Hacker: Whether it was the county looking to collect taxes; they would not really know who to collect taxes from.

Chairman K. Koppelman: Has the TOD caused any problems.

Nick Hacker: If the TOD is recorded after the death then we will still have to probate no matter what. How do you know the property is unencumbered? Many different ways it can have liens on the property and we don't know who the heirs are.

Chairman K. Koppelman: The other sections of code deal with personal property.

Nick Hacker: There is a difference in dealing with real property

Tony Weiler, The Executive Director of the State Bar Association: Would like to have you hold the bill for further opposition testimony from Mr. Blaine Johnson. There are procedures in place to protect title on property with the heirs. There is a court self-help center too. This statute is intended to deal with personal property.

Debbie Kroshus, Burleigh County Recorder: (Attachment #2) Read testimony. (25:52-29:00)

Rep. Paur: Discussed the description of the real property.

Debbie Kroshus: Not necessarily. People come in with their tax statement and there are discrepancies on the tax statements.

Recess until Monday.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1226
1/21/2019
31148

- Subcommittee
 Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to the collection of property by affidavit and the effect of the affidavit.

Minutes:

1

Chairman K. Koppelman: Reopened the hearing on HB 1226.

Opposition:

Blaine Johnson, State Bar Association and Crowley Fleck PLLP: (Attachment #1) (:30-10:31)

Representative Jones: Do you see any way where we can we set a lower threshold that says if it is under \$10,000 something would be less?

Blaine Johnson: It is a common issue especially with mineral titles. There are a number of recommendations and have outlines and will present to the committee. Instead of obtaining and attorney to create probate it is typically a self-help affidavit that would be completed and turned into a probate raster or member of the court that would review that to make sure it is properly filled out. California is one that have a well thought out and detailed process. I would recommend the committee to consider if we are focusing on mineral title issues with respect to avoiding probate you may wish to establish an amount of mineral acres rather than a dollar amount.

Chairman K. Koppelman: If you have an overview of what other states have done; are there any you would consider good?

Blaine Johnson: California is one of the best flushes out statutes in existence since 1999 for real property. Our court does have an informal system.

Rep. Paur: Did I hear you cannot transfer property with an affidavit even if this bill was passed?

Blaine Johnson: Our current law requires a written instrument with a provision for the verbiage. It is inefficient to transfer real property and if this law was passed I would still question it.

Rep. Paur: We would have to be through with the affidavit.

Hearing closed.

Chairman K. Koppelman: Selected a Subcommittee: Rep. Paur, Chairman; Rep. Jones and Rep. Buffalo.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1226
1/23/2019
31351

Subcommittee
 Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to the collection of property by affidavit and the effect of the affidavit.

Minutes:

1

Members present: Rep. Paur, Chairman, Rep. Buffalo, Representative Jones:

Rep. Paur: opened the subcommittee hearing on HB 1226.

Rep. Paur: Spoke to about the Christopher Joseph who drafted this bill is transferring it to our Century Code. California and this bill are the same as ours. The difference is one requires 30 days and one requires 40 days after death. It also has different dollar amounts from \$50,000, \$20,000. Those are the only differences between California and this bill.

Representative Jones: Someone was complaining that we didn't have a requirement for a death certificate. (Attachment #1) Nebraska Legislature. Maybe Christopher Joseph could rewrite this so the committee can review it.

Rep. Paur: Noticed there is no death certificate be necessary. Thank you for noticing that death certificate was needed. The thirty days and dollar amount various by states.

Representative Jones: There is some wording in that you should notify all the interested parties and I like that because it leaves the door open for anyone who might have a claim.

Rep. Paur: Rep. Jones noticed in the bill there is no provision for presenting a death certificate.

Representative Jones moved that we amend the bill before us to include the language similar to what we have in the Nebraska document with a copy of the death certificate. Seconded by Rep. Buffalo.

Motion carried.

Rep. Paur: Just so the interested parties are satisfied. Will bring the proposal as an amendment to the committee. Need to require an affidavit. Rep. Jones brought up some things we want in this bill. We probably will have to amend it.

Representative Jones: In committee discuss there was no reference to a copy of the death certificate.

Chris Joseph: We could so that in a subsection for proof of death.

Representative Jones: Can you put together something for an amendment to add to the bill using Nebraska's example.

Rep. Paur: Would there be notification in the paper? If they sign an affidavit they claim there is no prior liens; then they have a legal claim. This is only for real property and the claim will be filed where the property is located.

Representative Jones: This refers to unencumbered real property.

Chris Joseph explained the proposal to the committee with these changes. Will work on a proposed amendment for the committee to work with using Nebraska example. Will bring it to the committee.

Closed

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1226
1/28/2019
31532

Subcommittee
 Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to the collection of property by affidavit and the effect of the affidavit.

Minutes:

1

Members present: Rep. Paur, Chairman, Rep. Jones; Rep. Buffalo

Rep. Paur reopened the subcommittee hearing on HB 1226.

Rep. Jones: (Attachment #1) This amendment proposed covers all the important points they brought up. The affidavit would have to be filed in the courthouse where the property is located. I think this would provide what we would need for protection. I think it is a good addition to the bill,

Rep. K. Koppelman: As a subcommittee you can receive subsequent amendments and impute.

Additional information:

Blaine Johnson, Chair of the Real property of the State Bar Association of ND: I greatly appreciate the things you have been working on. Under subparagraph a. subsequent will should be changed. We are not doing anything with a will if one should exist. The affidavit should state that the decedent died either in testate with a will or without a will. The most recent will that would be in affect gives the title examiners time to review the terms of the will to be sure they conform to the affidavit. I appreciate that the statement is now made under the penalty of prudery, which is a criminal offense. Best language comes out of California and I don't have that with me. That language Specifies the affiance is liable to any individual that value of the property that would be transfer. Specifies that the affiance is liable to any individual that would be liable for the transfer of the property. Suggest the affidavit include a copy of the will that is recorded and that gives the opportunity of title examiners to determine the terms of the will. I would suggest that the affidavit include a statement that the affiance has checked any outstanding creditors and there are no outstanding claims. All the heirs should be send the affidavit unless all the heirs are attesting to it so notice could be forgone.

I would ask the subcommittee to consider the unencumbered language if the purpose of the legislation is to allow real property to be transferred in an estate valued at less than \$50,000 so that would make it a little cleaner. This legislation is directed toward mineral rights and in most worlds the tracts would run more than that \$50,000 so we have to figure out how to value those minerals. It would run \$2000-\$3000 to get those done so those are things to consider.

Rep. Jones: If there is a legitimate claim out there they should be covered for the value.
1. Will; 2 Existing liens, 3 The original will should be attached. Otherwise there should be a statement to that effect. We are trying to address small lots of land that were not deeded to both the husband and wife. I was not thinking of mineral rights.

Blaine Johnson: If this was limited to surface tracks it would be far more simplistic. Those surface tracks have a tax assessed values on them from the tax rolls. Mineral title is more complex.

Rep. Jones: Maybe we should review this amendment and see if we can limit it to surface property rights.

Blaine Johnson: Since the bill was based on Nebraska law they don't really have the same concerns in regard to minerals rights issues.

John Ward, Lobbyist Representing the ND Land Title Association: We echo a lot of the same concerns. We have suggested revisions that we think would be advisable. Nebraska has managed to insure over these in the state. There may be other sections of the code that relate to the ability to relay property in ND that should be modified. There could be a lot of sections that could be affect by this bill.

Rep. Paur: Could you please email your concerns to me.

Recessed.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB1226
2/11/2019
32544

Subcommittee
 Conference Committee

Committee Clerk: DeLores D. Shimek by Caitlin Fleck

Explanation or reason for introduction of bill/resolution:

Relating to the collection of property by affidavit and the effect of the affidavit.

Minutes:

Subcommittee members: **Chairman Paur, Representative Jones, Representative Buffalo**

Opened subcommittee hearing at 9.28 on recording #32544.

Chairman Paur: I move to move the amendments to the full committee and to adjourn the subcommittee.

Representative Jones: Second.

Voice Vote: Motion carries. Subcommittee is dissolved.

Meeting closed at 10.15 on recording #32544.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1226
2/11/2019
32544

- Subcommittee
 Conference Committee

Committee Clerk: DeLores D. Shimek by Caitlin Fleck

Explanation or reason for introduction of bill/resolution:

Relating to the collection of property by affidavit and the effect of the affidavit.

Minutes:

1

Representative Paur: The gentleman from the attorney's office for the land was concerned that we didn't address mineral rights. I told that to Joseph, and he said that neither does Nebraska, but we could further amend it to include mineral rights.

Chairman Koppelman: I'm not sure Nebraska has as much of an issue with mineral rights as we do.

Representative Paur: Motion to adopt amendment 19.0710.01001.

Representative Buffalo: Seconded.

Rep. Vetter: I'm curious, I don't see anything changed with the unencumbered real property, wasn't that one of the issues? There was a huge issue with this and I think many people testified against that.

Chairman K. Koppelman: I don't think that the amendments address all of the components of the bill. These amendments would clean up the bill, but wouldn't negate the concerns of the opponents?

Rep. Paur: Christopher Joseph highlighted the concerns on the bill.

Chairman K. Koppelman: All concerns were the legal recording abstracts and it didn't allow for a complete title search.

Representative Paur: I asked them to send their concerns and they were all addressed in the amendment except for (can't hear due to technical difficulties).

Chairman Koppelman: Ok, now here this is from John Ward, and he didn't testify so that might be additional testimony.

Voice Vote: Motion carries.

Meeting recessed at 9.28 on the recording.

Meeting reopened at 10.15 on the recording.

Representative Roers Jones: In light of not having a resolution, I move a do not pass.

Representative Vetter: Seconded.

Roll Call Vote: 11 yes, 3 no, 0 absent. Motion carries for a Do Not Pass as amended on HB 1126. .

Floor assignment: **Representative Roers Jones**

Hearing concluded.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1226

Page 2, line 1, after "2." insert "A person claiming to be a successor to the decedent's interest in unencumbered real property shall file the affidavit with the county recorder of the county the unencumbered real property of the decedent which is subject to the affidavit is located. The affidavit must be signed by all persons claiming to be successors or by legal parties legally acting on those person's behalf, and is prima facie evidence of the facts stated in the affidavit. The affidavit must include a certified or authenticated copy of the decedent's death certificate attached to the affidavit. In addition to the requirements under subsection 1, an affidavit for the collection of unencumbered real property must state:

- a. The claiming successor has made an investigation and has been unable to determine any subsequent will;
- b. Another person does not have a right to the interest of the decedent in the described unencumbered real property;
- c. The claiming successor's relationship to the decedent and the value of the entire estate of the decedent; and
- d. The person claiming to be a successor under the affidavit swears or affirms all statements in the affidavit are true and material and further acknowledges any false statement may subject the person to penalties under section 12.1-11-02.

3."

Renumber accordingly

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. HB 1226**

House Judiciary Committee

Subcommittee

Amendment LC# or Description: Include the language similar to the Nebraska document with a copy of the death certificate.

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Rep. Jones Seconded By Rep. Buffalo

Representatives	Yes	No	Representatives	Yes	No
Chairman Paur					
Rep. Buffalo					
Rep. Terry Jones					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice vote: Motion passed.

**2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
HB 1226**

House **Judiciary** Committee

Subcommittee

Amendment LC# or Description: 19.0710.01001

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Representative Paur Seconded By Representative Buffalo

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman			Rep. Buffalo		
Vice Chairman Karls			Rep. Karla Rose Hanson		
Rep. Becker					
Rep. Terry Jones					
Rep. Magrum					
Rep. McWilliams					
Rep. B. Paulson					
Rep. Paur					
Rep. Roers Jones					
Rep. Satrom					
Rep. Simons					
Rep. Vetter					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice vote. Motion carries.

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 HB 1226**

House **Judiciary** Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Rep Roers Jones Seconded By Representative Vetter

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman	X		Rep. Buffalo		X
Vice Chairman Karls	X		Rep. Karla Rose Hanson	X	
Rep. Becker	X				
Rep. Terry Jones		X			
Rep. Magrum		X			
Rep. McWilliams	X				
Rep. B. Paulson	X				
Rep. Paur	X				
Rep. Roers Jones	X				
Rep. Satrom	X				
Rep. Simons	X				
Rep. Vetter	X				

Total (Yes) 11 No 3

Absent 0

Floor Assignment Representative Roers Jones

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

Motion carries.

REPORT OF STANDING COMMITTEE

HB 1226: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1226 was placed on the Sixth order on the calendar.

Page 2, line 1, after "2." insert "A person claiming to be a successor to the decedent's interest in unencumbered real property shall file the affidavit with the county recorder of the county the unencumbered real property of the decedent which is subject to the affidavit is located. The affidavit must be signed by all persons claiming to be successors or by legal parties legally acting on those person's behalf, and is prima facie evidence of the facts stated in the affidavit. The affidavit must include a certified or authenticated copy of the decedent's death certificate attached to the affidavit. In addition to the requirements under subsection 1, an affidavit for the collection of unencumbered real property must state:

- a. The claiming successor has made an investigation and has been unable to determine any subsequent will;
- b. Another person does not have a right to the interest of the decedent in the described unencumbered real property;
- c. The claiming successor's relationship to the decedent and the value of the entire estate of the decedent; and
- d. The person claiming to be a successor under the affidavit swears or affirms all statements in the affidavit are true and material and further acknowledges any false statement may subject the person to penalties under section 12.1-11-02.

3."

Renumber accordingly

2019 TESTIMONY

HB 1226



North Dakota
House of
Representatives

State Capitol
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Bismarck, ND 58505-0360

Representative
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Minority Leader

January 16, 2019

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JB

HB 1226 Testimony
House Judiciary Committee

Chairman Koppelman and members of the House Judiciary Committee.

House Bill 1226 was introduced at the request of a Minot woman, whom you have received testimony via e-mail. She does have a family member here today, to testify on the family's behalf.

The purpose of this statute change is treat unencumbered real property valued under \$50,000 to be treated like personal property during the probate process. This would allow real property that has no liens on it, valued under \$50,000 to be claimed by a descendent of a deceased person through the affidavit process in District court.

I recognize that this committee considered this legislation in the last Legislative Assembly and did not support the statute change. In the interim, the estate attorney who the family consulted only knows of the formal estate process as a means to convey the property to the descendants. Testimony in opposition of the legislation last session indicated that there was a low cost process available for individuals to self process the estate property. Neither the family requesting this statute change, nor the estate attorney they consulted, who has 40 years experience in this field, were aware of this process.

This brings me back to you all with this recommended change in hopes of the committee expertise to assist in solving the issue, which according to the estate attorney would benefit many families he works with in reducing legal fees, primarily for vacant lots in rural communities throughout North Dakota.

I appreciate the committee's consideration of this legislation and hope that you can assist in developing a solution.

I will try my best to answer any questions committee members may have.

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TO: Chairman Kim Koppelman

Judiciary Committee

From: Debbie Kroshus, Burleigh County Recorder

RE: HB 1226

Chairman Koppelman, and Committee Members,

My name is Debbie Kroshus and I am the Burleigh County Recorder. I am here to oppose HB 1226, A bill for an act to amend and reenact 30.1-23-01 and 30-1-23-02 of the North Dakota Century Code, relating to the collection of property by affidavit and the effect of the affidavit. I would like to take this opportunity to request a **Do NOT Pass** on **HB 1226**.

SECTION 1. AMENDMENT. I strongly oppose the request for adding "unencumbered real property" to paragraph 1, lines 9 and 12 of page 1. When adding "unencumbered real property" to this chapter addressing collection of property by affidavit it makes for an unintended consequence of clouding title. Line 22 and 23 of page one adds paragraph 1.e "A description sufficient to identify each tract of unencumbered real property owned by the decedent at the time of the decedent's death." causes great concern as it does not define an adequate, complete legal description but rather may suggest a brief description of the legal pertaining to the property. This could make it very difficult to identify which actual property is being transferred. It is unclear if this bill requires recordation of an affidavit with the county recorder for the unencumbered real property.

SECTION 2. AMENDMENT again adds "unencumbered real property" and appears to allow for title to transfer on unencumbered real property with an affidavit. If presented for recording, an affidavit would not be sent over to the Auditor's office to check taxes or change names on the tax rolls. NDCC 11-18-02.1.

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"Duty of recorder to notify county auditor of certain transactions – Correction of tax rolls" says we "notify the county auditor of the filing of deeds, patents, plats and vacation of plats, streets, or roads at the time such documents are filed in the recorder's office". It does not mention notification of affidavits. When we send such documents to the Auditor, they verify an accurate legal description and update their tax rolls. The county recorder receives several different types of affidavits for recording on a number of different issues but we should not be tasked with the determination if an affidavit is transferring title.

There are many other chapters in NDCC that address what legally needs to be completed before transfer of title can be complete and this bill clouds several other requirements.

Therefore I strongly urge a **DO NOT PASS on HB 1226**.

Thank you for your time.

Do you have any questions for me?

January 21, 2019

Chairman Kim Koppelman
House Judiciary Committee

TESTIMONY OF BLAINE T. JOHNSON
IN OPPOSITION TO HB 1226

Chairman Koppelman and members of the Judiciary Committee, good afternoon. My name is Blaine Johnson and for those of you who do not know me, I am a partner at the law firm of Crowley Fleck PLLP in Bismarck, North Dakota. I have been in private practice for 16 years focusing on real estate related matters, banking, estate planning and probate. I am the current chair of the Real Property, Probate & Trust Section of the State Bar Association North Dakota, a member of the mineral title standards committee, and a member of SBAND's legislative committee. I have presented seminars across the United States on North Dakota real property issues ranging from construction liens, oil and gas leasing, mineral title issues, and probate. I have also authored a law review article on North Dakota's Marketable Title Act and other real estate title issues for the University of North Dakota Law Review.

I testify in opposition to HB 1266 for many reasons. While I understand and appreciate the desire to provide low cost, simple mechanism to avoid probate it should never be done in a manner that jeopardizes the integrity of real estate title. This committee must balance a number of competing public policy grounds. On one hand we have the desire to effectively and efficiently pass property from a decedent to the individuals entitled to the property; on the other hand there is a responsibility to those involved in the process to insure that the process is done correctly, that the correct heirs or devisees receive the property, that the claims of the estate are properly paid, and that any amounts paid by the ND Department of Human Services are repaid. Currently there are 10 states that have promulgated laws for small estate administration. Most of those have incorporated a number of safeguards such as publication of the affidavit, filing the affidavit with the probate court to be reviewed by a probate registrar or judge, providing notice of the affidavit to heirs, devisees, state human services departments, and those with claims against the estate, requiring the affidavit to be signed under penalty of perjury, holding the affiant accountable to heirs, devisees, and creditors.

In reality the process developing the processes and procedures of small estate administration is one of determining an acceptable level of risk in exchange for reducing the costs and burden of

handling an estate. This bill includes absolutely no safeguards and leaves the process wrought for fraud.

The Affidavit of Collection provisions were intended to handle small financial accounts or de minimus personal property that the decedent had forgotten to include in his or her estate plan or made transfer on death/pay on death/beneficiary designations. The statute was originally limited to estates having a value of less than \$15,000.00 and included personal property items that would be easily valued (the account balance). The small value lessened the risks of fraud or at least minimized the potential for damages.

Real property transfers, however, are governed by other laws including N.D.C.C. § 47-10-01 which states that “An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by an instrument in writing, subscribed by the party disposing of the same or by the party’s agent thereunto authorized by writing.” This has been in fact the law for centuries. First year law students will learn the term livery of seisin, a ceremony of sorts in which the owner of the property and the grantee stood upon the property and the owner picked up a clump of soil and handed it to the grantee effectuating the transfer. The process by which an owner conveys to a grantee creates a chain of title evidencing ownership from one party to the next. When that owner of real property is deceased, the appropriate method of conveyancing is identified through the probate process wherein the court appoints an agent to represent the estate of the decedent – the personal representative. The personal representative has all of the authority of the decedent. The probate process provides safeguards for both the heirs or devisees of the decedent and the decedent’s creditors. It is a time tested and well vetted process. Our courts have interpreted the provisions, there is adequate oversight and in simple cases of limited assets without adversity, is uncomplicated and while having a cost – is not overly expensive. Probate provides the safeguards of court oversight, and often times the assistance of a trained attorney.

This bill, if enacted into law, flips the process of conveyancing on its head. Instead of a property owner conveying to a third party, it is the third party that lays claim to the property by way of affidavit. First and foremost, an affidavit is simply written declaration under oath made without notice to the adverse party. *See* N.D.C.C. § 31-04-02. An affidavit does not convey property. It does not have the proper words of conveyancing or grant. Even when affidavits are used to reflect the termination of joint tenancy or a life estate, it is the deed that created the real property interest not the affidavit. The affidavit merely reports the facts causing the joint tenancy or life estate to terminate.

In collecting property of a decedent, the claimant must provide the affidavit to the person having possession of the property. That in and of itself raises a problem with real property. The one in proper possession of real property upon the death of the owner, with limited exception, is the court appointed personal representative. There is no one to receive this affidavit and to turn over possession of the property to the affiant. This bill does not identify the manner in which the estate is to be valued or even require proof of the decedent’s death. It does not provide a mechanism for recording of the affidavit or require attachment of a certified death certificate. This bill does not provide any safeguards to the heirs, devisees, interested parties, or creditors of the decedent’s

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estate. There is no requirement of notice to interested parties of the decedent. It does not even require that the affidavit be verified and attested to under the penalty of perjury. As is, it is ripe for fraud, mistake, and improper use.

I have examined hundreds of abstracts and completed numerous oil and gas title opinions. In the course of doing so I have reviewed countless Affidavits of Heirship. A significant majority of these affidavits are incomplete, inaccurate or otherwise contradict other information of record. The affiant may exclude the black sheep of the family, may reference a will but not disclose who the appropriate devisees are, may include step-children but not biological children, or will not identify an heir that was alive at the time of decedent's death and entitled to distribution, but had passed away prior to the affidavit being executed. An out of state affiant may use the laws of his or her state to answer questions about the succession of the decedent's interest rather than the laws of North Dakota. Creditors may try to usurp the interest of heirs or devisees by collecting property outside of the claims process established by the Uniform Probate Code. The potential for this process to be misused should cause great concern to anyone interested in preserving and protecting the ownership of real property for those rightfully entitled to the same.

Finally, even if the claimant were to do everything required under this bill and do so accurately, the claimant would not have established marketable title to real estate. N.D.C.C. § 30.1-23-02 provides that the claimant is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right. That is to say that the ownership of such a claimant is subject to the claims of a personal representative that may be appointed at some time in the future or some other heir or devisee who has a superior interest in the real property. In fact there is no provision within the bill or the laws amended thereby which actually causes a change of ownership of the real property. The statute provides for possession of the asset, but not necessarily its ownership. The statute dictates only a transfer agent of any security is required to re-title such security.

To the extent this bill is amended to reflect "unencumbered" real estate we must be mindful that an encumbrance is anything that impairs the ownership of the property. Encumbrances include not only mortgages or liens, but oil and gas leases, restrictive covenants, easements for roads, utilities or other purposes. A claimant would necessarily be required to search not only the records of the county recorder, but also the clerk of courts, child support lien registry, bankruptcy filings and the like. This amendment may protect to an extent lienholders from such affidavits, but it will only complicate the process and create further litigation in showing that the affidavit somehow did not apply to the real property because of an encumbrance, and may cause problems when such lienholders attempt to foreclose; *ie.* must notice be given to a claimant through this affidavit as well as the mortgagor?

While creating avenues for the administration of small estates is important and admirable; North Dakota Courts have developed self-help forms for those insistent upon avoiding legal fees to complete the process accurately. This bill, if enacted, will not simplify the process; it will cause title problems and deteriorate the integrity of the land title records all for the benefit of a few. The costs of such problems greatly outweigh the cost of transferring real property the right way. The way that has been vetted and used for well over 100 years.

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Testimony of Blaine T. Johnson
Opposition to HB 1266
January 21, 2019

For these reasons and the many other reasons identified by those testifying today, I respectfully ask this committee to resolve to DO NOT PASS HB 1266.

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Arizona §14-3971 Collection of personal property by affidavit; ownership of vehicles; affidavit of succession to real property

Arizona allows small estate administration for both personal and real property. Personal property must be less than \$75,000 and may be claimed after 30 days from decedent's passing. Real property must have an assessed value less liens and other encumbrances less than \$100,000 and may be claimed after 6 months from decedents passing.

The individual(s) entitled to the real property must fill out an Affidavit for Transfer of Title to Real Property. The Affidavit must include the original will, if any. The Affidavit must also include a death certificate. The Affidavit must be executed and notarized and the Affiant must swear under the penalty of perjury that the contents are true and correct.

The affidavit must state the following:

- name and date of death of the decedent,
- where the decedent died for jurisdictional purposes,
- the relationship of the Affiant to the decedent,
- legal description of the real property
- the decedent's interest in the real property
- the assessed value of all real property located within the state,
- that six months has passed from the date of death,
- that no application or petition for appointment of a personal representative is pending or has been granted
- all funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid
- an explanation of why the Affiant(s) is entitled to the real property (justification of heirship or devisee).
- Verification that no other person has a right to the interest of the decedent.
- Verification that no federal or state estate taxes are due

The process set forth to transfer title:

- Completion of the Affidavit to Transfer Real Property
- Filing the probate coversheet, Affidavit of Transfer of Real Property Checklist, and Affidavit of Transfer of Real Property with the probate registrar.
- File the original will and certified copy of death certificate with probate registrar.
- Pay filing fee
- If the probate registrar deems the Affidavit and supporting information complete, the registrar issues a certified copy of the affidavit.
- Certified copy of Affidavit of Transfer of Real Property Checklist is recorded with the county recorder.

Safeguards established by process:

- Affidavit is reviewed by probate registrar and filed with the court
- Affidavit is completed under the penalty of perjury
- Affidavit includes death certificate and original will

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- Value of real property is established by tax assessor
- All individuals with an interest in the decedent's estate must execute the affidavit or execute a relinquishment of the property
- Not available to creditors
- The Affidavit does not limit the rights of heirs and devisees

Arkansas §28-41-101 Collection of small estates by distributee.

Arkansas allows collection of both personal property and real property by way of Affidavit.

The Affidavit must include the following:

- Name and date of death of the decedent
- Certified copy of Death Certificate
- Statement that no petition for appointment of a personal representative is pending or has been granted
- More than 45 days have elapsed since the date of death
- The value of all property, less any encumbrances, excluding the homestead, is less than \$100,000
- There are no unpaid claims or demands against the estate
- The Department of Human Services furnished no federal or state benefits to the decedent or has been fully repaid
- Legal description of the property
- Itemized inventory of all property with values and liens
- Names, ages, and relationship of all people entitled to receive decedent's property (surviving spouse, heirs, or devisee's)

The process set forth to transfer title:

- Affidavit must be completed under penalty of perjury
- Affidavit, death certificate, and original will must be filed with the probate clerk and filing fee paid
- If estate contains real property, a notice of the decedent's death and the filing of affidavit must be published with the legal description; published once a week for two consecutive weeks including a statement that all persons having claims against the estate to raise such claims within 3 months from the date of first publication
- Deed of Distribution pursuant to statute executed by Distributees of Estate is recorded in the County Recorder's office.

Safeguards established by process:

- Affidavit is completed under the penalty of perjury
- Affidavit includes death certificate and original will
- Value of real property is established by tax assessor
- All individuals with an interest in the decedent's estate must execute the affidavit or execute a relinquishment of the property
- Not available to creditors
- Notice of Affidavit must be published with three month window for claims to be asserted

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California Probate Code Division 8, Part 1, Chpt. 5 §13200

California offers a simplified probate procedure for estates containing less than \$50,000.00 in real estate.

The Affidavit must contain the following:

- Name and date of death of decedent
- Location of decedent's death for jurisdictional determination
- Verification that at least six months has elapsed since the date of death
- Legal description of the real property and Assessor's property tax parcel number
- Identification of decedent's interest in real property
- Explanation of Affiant's interest in the real property – heir/devisee
- Identify any guardian or conservator of decedent
- An inventory and appraisal of all property located within the state must be attached; the value of real property must be less than \$50,000.00.
- Verification that no proceeding is now being or has been conducted in California for administration of the estate
- Funeral expenses, expenses of last illness, and all known unsecured debts of the decedent have been paid.

Process for transfer of real property:

- Affidavit must be completed under penalty of perjury
- Affidavit, death certificate, and original will must be filed with the probate clerk and filing fee paid
- If the decedent had a guardian or conservator when s/he died, a copy of the affidavit must be mailed to them.
- At least six months has passed from the date of death
- Upon filing, the probate clerk after determining the affidavit is complete will issue a certified copy of the affidavit
- Certified copy of the affidavit must be filed with the county recorder

Procedural Safeguards:

- Affidavit is completed under the penalty of perjury
- Affidavit includes death certificate and original will
- Value of real property is established by tax assessor
- All individuals with an interest in the decedent's estate must execute the affidavit or execute a relinquishment of the property
- Not available to creditors
- A person acting in good faith and for a valuable consideration with a person designated as a successor of the decedent has the same rights and protections as the person would have if each person designated as a successor in the recorded certified copy of the affidavit had been named as a distribute of the real property in an order for distribution that had become final.
- A successor of decedent is liable to any person having a superior right by testate or intestate succession and treble damages in cases of actual fraud. Three year statute of limitations.

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Michigan

Section 3982 of the Estates and Protected Individuals Code (MCLA 700.3982) provides a simplified procedure for distributing small estates if the balance of the gross estate after the payment of decedent's funeral and burial expense consists of property of \$15,000 or less. The \$15,000 is computed by adding the fair market value of all property of the decedent as of the date of death. Liens or debts of the decedent are not subtracted in making the calculation. Therefore, the \$15,000 is a gross estate value. The \$15,000 amount is adjusted annually for inflation beginning January 1, 2001, and has increased to \$23,000 as of 1/1/2018. The form to use is Petition and Order for Assignment (PC 556).

Missouri

Under Missouri statute, where an estate is valued at less than \$40,000, an interested party may, thirty (30) days after the death of the decedent, file an affidavit of administration of a small estate. A copy of the affidavit and certificate shall be filed in the office of the clerk of the probate division and copies of the affidavit and certificate shall be furnished by the clerk. The affiant shall collect the property of decedent described in the affidavit. The property of decedent shall be liquidated by the affiant to the extent necessary to pay debts of decedent, and the remainder shall be distributed to any beneficiaries of the estate.

Procedural safeguards:

- The value of the estate is less than \$40,000
- 30 days must elapse from the date of death
- A bond in the amount of the value of the property must be obtained unless the court dispenses with the filing of a bond
- Affidavit must affirm that all debts, claims or demands against the decedent or estate have been paid.
- An itemized description of all property owned by the decedent
- The Affidavit must be submitted to the probate clerk.
- If more than \$15,000 the affidavit must be published once a week for two weeks
- The Court may order appraisal of the property

Nebraska 30-24,129 Succession to real property by affidavit.

- Affidavit must be signed by all persons claiming as successors or by parties legally acting on their behalf and shall be prima facie evidence of the facts stated in the affidavit.
- The value of the decedent's interest in all real property in Nebraska must be less than \$50,000.00. The value is determined by the tax assessment rolls.
- 30 days must have elapsed from the date of death and death certificate must be attached
- No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction
- The claiming successor is entitled to the real property by reason of the homestead allowance, exempt property allowance, or family allowance, by intestate succession, or by devise under the will of the decedent.
- The claiming successor has made an investigation and has been unable to determine any subsequent will.
- No other person has a right to the interest in the property

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- Affidavit is made under the penalty of perjury
- Affidavit is recorded in the county recorder's office.
- A successor named in an affidavit under section 30-24,129 shall have the same protection as a distributee who has received a deed of distribution from a personal representative as provided in section 30-24,106.
- A purchaser of real property from or lender to a person named as a successor in an affidavit under section 30-24,129 shall have the same protection as a person purchasing from or lending to a distributee who has received a deed of distribution from a personal representative as provided in section 30-24,108.
- Nothing in this section affects or prevents any proceeding to enforce any mortgage, pledge, or other lien upon the real property described in the affidavit.

New Jersey Title 3b – Administration of Estates-Decedents and Others

A spouse is entitled to administration of the estate of an intestate decedent where the entire estate is valued at less than \$50,000.00. Upon filing the affidavit with the court, the surviving spouse is entitled to act with all powers of a personal representative.

Heirs are entitled to receive the assets of an intestate decedent where the entire estate is valued at less than \$20,000.00. Upon filing the affidavit with the court, the heir is entitled to act with all powers of a personal representative.

Oregon

Affidavit must include the following information:

- Name and address of the Affiant
- Explanation of how Affiant is related to the decedent
- If a creditor, at least 60 days has passed since decedent's death.
- A certified copy of the decedent's death certificate
- Legal description of all real property and the fair market value (Maximum value of \$200,000)
- Itemized listing of all personal property with fair market value (maximum total value of \$75,000)
- The residence at the time of decedent's death
- Verification that no application or petition for the appointment of a personal representative has been granted in Oregon
- If there is a will an original of the will must be attached
- Identify each heir and devisee of the decedent.
- Affiant must give notice to all heirs and devisees including a copy of the affidavit and a copy of the will.
- The affiant must identify all creditors and the amounts of their claim and give notice to each of the creditors.
- The affiant must give notice to the Department of Human Services.
- 30 after filing the affidavit, the Affiant must record an "affiant's or claiming successor's deed" conveying the property to the entitled persons with the county recorder where the property is located.
- If a personal representative is not appointed within four months after the filing of the affidavit, the interest of the decedent in all property described in the Affidavit is transferred to the person or persons shown by the affidavit to be entitled thereto.

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Wisconsin

- Decedent's name, last residence, and date of death
- The Affiant's relationship to the decedent
- Verification that the total gross value of the decedent's estate in Wisconsin is less than \$50,000
- Verification that the decedent did or did not receive benefits from the State of Wisconsin
- The marital status of the decedent
- Description of the Assets to be transferred
- Affiant must agree to apply property to payments of debt before distributing property.
- If benefits were received, a copy of the affidavit must be provided to the Wisconsin Estate Recovery Program.
- A person named in the will as personal representative may not receive real property as an affiant.
- Affidavit must be recorded with the county recorder.

1/22/2019



Nebraska Legislature

NEBRASKA LEGISLATURE

The official site of the Nebraska Unicameral Legislature



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Nebraska Revised Statute 30-24,129

[Revised Statutes](#) >> [Chapter 30](#) >> 30-24,129

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Chapter 30 Section 24,129

30-24,129.

Succession to real property by affidavit.

(a) Thirty days after the death of a decedent, any person claiming as successor to the decedent's interest in real property in this state may file or cause to be filed on his or her behalf, with the register of deeds office of a county in which the real property of the decedent that is the subject of the affidavit is located, an affidavit describing the real property owned by the decedent and the interest of the decedent in the property. The affidavit shall be signed by all persons claiming as successors or by parties legally acting on their behalf and shall be prima facie evidence of the facts stated in the affidavit. The affidavit shall state:

- (1) the value of the decedent's interest in all real property in the decedent's estate located in this state does not exceed fifty thousand dollars. The value of the decedent's interest shall be determined from the value of the property as shown on the assessment rolls for the year in which the decedent died less real estate taxes and interest thereon if any is due at the time of death;
- (2) thirty days have elapsed since the death of the decedent as shown in a certified or authenticated copy of the decedent's death certificate attached to the affidavit;
- (3) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction;
- (4) the claiming successor is entitled to the real property by reason of the homestead allowance, exempt property allowance, or family allowance, by intestate succession, or by devise under the will of the decedent;
- (5) the claiming successor has made an investigation and has been unable to determine any subsequent will;
- (6) no other person has a right to the interest of the decedent in the described property;
- (7) the claiming successor's relationship to the decedent and the value of the entire estate of the decedent; and
- (8) the person or persons claiming as successors under the affidavit swear or affirm that all statements in the affidavit are true and material and further acknowledge that any false statement may subject the person or persons to penalties relating to perjury under section [28-915](#).

(b) The recorded affidavit and certified or authenticated copy of the decedent's death certificate shall also be recorded by the claiming successor in any other county in this state in which the real property of the decedent that is the subject of the affidavit is located.

Source

- [Laws 1999, LB 100, § 2;](#)
- [Laws 2009, LB35, § 23;](#)
- [Laws 2014, LB693, § 1.](#)

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STATE OF NEBRASKA)
)
COUNTY OF _____)
(county in which the document will be signed)

Affidavit for Transfer of Real Property without Probate

I, _____, under penalty of perjury (Nebraska Revised Statute § 28-915),
(your name)
affirm the following to be true:

1. Thirty days have passed since the death of _____ and I have attached
(deceased's name)
to this affidavit a certified or authenticated copy of the death certificate;

2. The deceased is the sole owner of the real property described as _____

_____;

3. Based on the assessed value of the real property through the County Assessor/Register of Deeds in
the year of death, less real estate taxes and interest on real estate taxes if any is due at the time of
death, the value of all the real property in Nebraska belonging to the deceased is
\$50,000.00 or less and the value of the entire estate (real property value *plus* personal property
value) is \$ _____;

There is no Personal Representative, application for Personal Representative, or petition for
Personal Representative either pending or granted in another court;

5. I am the _____ of the deceased and am entitled to the real
(your relationship to the deceased)
property by reason of the homestead allowance, exempt property allowance, family allowance, or by
intestate succession pursuant to Nebraska Probate Code §30-24,129

OR

I am entitled to the real property per the will of the deceased and I have made an
investigation and have been unable to determine any subsequent will;

6. No other person has a right to the real property;

7. I will file this affidavit with the Register of Deeds Office of the county in which the real property is
located (_____ County); and

8. I will file the affidavit and certified or authenticated copy of the death certificate in any other county in
Nebraska in which the deceased owns real property that is subject to this affidavit.

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Date

Address (line 1)

Address (line 2)

Signature
(do NOT sign UNTIL A NOTARY IS PRESENT AND WITNESSES YOU SIGNING)

Attachment: certified or authenticated copy of Death Certificate

NOTARY

State of Nebraska, County of _____

This document was acknowledged before me on the _____ day of _____, 20_____,
(day) (month) (year)

by _____
(name of Affiant)

Signature of Notary (Seal, if any)

My commission expires: _____

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PROPOSED AMENDMENTS TO HOUSE BILL NO. 1226

Page 2, line 1, after "2." insert "A person claiming to be a successor to the decedent's interest in unencumbered real property shall file the affidavit with the county recorder of the county the unencumbered real property of the decedent which is subject to the affidavit is located. The affidavit must be signed by all persons claiming to be successors or by legal parties legally acting on those person's behalf, and is prima facie evidence of the facts stated in the affidavit. The affidavit must include a certified or authenticated copy of the decedent's death certificate attached to the affidavit. In addition to the requirements under subsection 1, an affidavit for the collection of unencumbered real property must state:

- a. The claiming successor has made an investigation and has been unable to determine any subsequent will;
- b. Another person does not have a right to the interest of the decedent in the described unencumbered real property;
- c. The claiming successor's relationship to the decedent and the value of the entire estate of the decedent; and
- d. The person claiming to be a successor under the affidavit swears or affirms all statements in the affidavit are true and material and further acknowledges any false statement may subject the person to penalties under section 12.1-11-02.

3."

Renumber accordingly