

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

24442

2001 SENATE JUDICIARY

SB 2442

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2442

Senate Judiciary Committee

Conference Committee

Hearing Date February 13th, 2001

Tape Number	Side A	Side B	Meter #
1	x		15.7-40
Committee Clerk Signature			

Minutes: **Senator Watne** opened the hearing on SB 2442; A BILL FOR AN ACT TO CREATE AND ENACT A NEW SECTION TO CHAPTER 30.1-30 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO THE DURABLE POWERS OF ATTORNEY; AND TO PROVIDE A PENALTY.

**Senator O'Connell**, representing district 6. A lady had her mother wiped out from someone who had power of attorney. I have no problem with cleaning up this bill.

**Senator Nelson**, on line 12 "creating or confirming a false impression." My mother has Alzheimer's. I don't think she knows if she is being lied to. I also need an explanation of subsection 3. Where might I go wrong under this?

**Senator O'Connell**, that isn't the intent of the bill. Its tough. I don't have a problem with clean up.

**Thomas Mayer**, from the office of the Attorney General. (testimony attached) Some things need to be changed if the bill becomes law.

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Senate Judiciary Committee

Bill/Resolution Number *Click here to type Bill Number*

Hearing Date *Click here to type Hearing Date*

**Senator Watne**, do you have amendments to remedy the bill?

**Tom Mayer**, I don't, in my testimony I have them.

**Senator Trenbeath**, I have the impression that what this bill is trying to cover is already in the law. This bill looks like it may make someone fear getting power of attorney.

**Tom Mayer**, I'm not sure this really changes the law regarding deceit. If they create a false impression it would need to be proved.

**Senator Bercier**, this makes someone wary of becoming power of attorney.

**Tom Mayer**, in section 4 it covers intimidation. If the person deceived, they are subject to the law. Your problems are covered elsewhere in the law.

**Senator Trenbeath**, section 4 wants to define fraud, that is already covered in the law.

**Tom Mayer**, yes.

**Senator Trenbeath**, with agency laws, this sets a pretty tight standard. If you're an agent under power of attorney you're under a fiduciary obligation, are you not?

**Tom Mayer**, yes.

**Malcom Brown**, representing the Probate Section of the State Bar Association of ND.

(testimony attached)

**Senator Watne** closed the hearing on SB 2442.

**SENATOR TRENBEATH MOTIONED TO DO NOT PASS, SECONDED BY SENATOR BERCIER. VOTE INDICATED 6 YEAS, 0 NAYS AND 1 ABSENT AND NOT VOTING.**

**SENATOR LYSON VOLUNTEERED TO CARRY THE BILL.**

Date: 2/13/01  
 Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES  
 BILL/RESOLUTION NO. 2442

Senate Judiciary Committee

Subcommittee on \_\_\_\_\_  
 or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Not Pass

Motion Made By Trenbeath Seconded By Bercier

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman			Bercier, D.	X	
Watne, D. Vice Chairman	X		Nelson, C.	X	
Dever, D.	X				
Lyson, S.	X				
Trenbeath, T.	X				

Total (Yes) 6 No 0

Absent 1

Floor Assignment Lyson

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

REPORT OF STANDING COMMITTEE (410)  
February 13, 2001 2:10 p.m.

Module No: SR-26-3227  
Carrier: Lyson  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**SB 2442: Judiciary Committee (Sen. Traynor, Chairman) recommends DO NOT PASS**  
(6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2442 was placed on the  
Eleventh order on the calendar.

2001 TESTIMONY

SB 2442

OFFICE OF ATTORNEY GENERAL  
STATE OF NORTH DAKOTA

MEMORANDUM

██████████  
ATTORNEY GENERAL  
Wayne Stenehjem

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TO: Senator David O'Connell  
FROM: Thomas A. Mayer, Assistant Attorney General  
RE: Senate Bill No. 2442  
DATE: February 9, 2001

I reviewed Senate Bill No. 2442 for the Office of Attorney General. I am assigned as general counsel to the Department of Human Services and have worked with the State Hospital, The Developmental Center, and State Ombudsman concerning guardianship issues.

I want to flag some potential problems with the bill.

On page two, line 20 there is reference to a witness initialing certain provisions of a power of attorney when there is no requirement for a witness for a power of attorney under N.D.C.C. ch. 30.1-30. I suggest the words "and the witness" be deleted.

The second sentence in paragraph five on page two, beginning on line 25, provides that the agent, when a defendant in a criminal proceeding under chapter 12.1-23, has a burden of proof regarding the capacity of the principal. N.D.C.C. § 12.1-01-03(1) provides that in a criminal proceeding the state has the burden of proving each element of an offense beyond a reasonable doubt. I suggest that the second sentence in paragraph five on page two be deleted.

The next sentence, that is the third sentence in paragraph five, is stated twice.

I think with the corrections the bill is a good one.

Our office receives many letters and phone calls from relatives of an elderly parent where a sibling has obtained a power of attorney from the parent and is suspected of financially exploiting the parent. A big problem is that there is no requirement for an accounting by an agent under a power of attorney unless someone other than the agent obtains some authority relative to the elderly parent. For example, a son or daughter complaining about the abuse of an agent under a power of attorney could obtain an accounting if the complaining son or daughter would be appointed a guardian or conservator of the elderly parent.



Senator David O'Connell  
February 9, 2001  
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After death the complaining son or daughter might be appointed a personal representative of the estate and then could sue for an accounting. But, in many instances that seems impractical because the complaining sibling is out of state or indigent, and because the sibling-agent lives within the state he or she probably would be appointed the guardian or conservator.

Many times the agent suspected of exploiting an elderly parent will not communicate with other siblings. Sometimes the elderly parent is in a nursing home. The nursing home will not provide any information to a sibling that doesn't have a power of attorney if the agent does not instruct them to because of fears of liability regarding confidentiality. It is a problem area that needs more study. Some states provide for an accounting by agents under a power of attorney and this well might be the subject of an interim study.

Incidentally, N.D.C.C. ch. 50-25.2 provides for investigations by the Department of Human Services of possible instances of abuse and exploitation of elderly vulnerable adults. This chapter was enacted in 1989, but unfortunately the Department was never given funding to implement it. Cass County has implemented the chapter with the use of county funds and there is a pilot project in which some funding was obtained to implement the chapter in Ramsey County. Although the law is in effect and the provisions requiring the state's attorney to address this issue are in place, many state's attorneys do not get involved because the Department has no basis for asking them to provide the services under that chapter. For example, N.D.C.C. § 50-25.2-14 provides that there is no requirement to implement the chapter unless funding is provided. No funding has ever been provided. Consequently, there is no agency that actively investigates complaints about exploitation of elderly vulnerable adults.

By making this suggestion about a study, I do not intend to discourage the enactment of Senate Bill No. 2442. I think it may well serve as a deterrent to financial exploitation by an agent under a power of attorney. And by providing for recovery of triple damages in a civil action, it provides some incentive for relatives and lawyers to ferret out abuse.

If I can be of further assistance to you or the committee, please let me know.

TESTIMONY OF MALCOLM H. BROWN  
SENATE JUDICIARY COMMITTEE  
SB 2442  
FEBRUARY 13, 2001

Mr. Chairman and Members of the Committee:

I am a lawyer here in Bismarck and appear on behalf of the Probate Section of the State Bar Association of North Dakota. While our Section and the State Bar Association are not taking a position for or against this particular bill, we have some concerns regarding its intent and applicability.

Initially, I note that this bill puts into a proposed new section of the century code many legal principles that are already in the law. For instance, Subsection 1 of SB 2442 provides that the agent must act solely for the principal's benefit when that principle is already embodied in North Dakota law on agency found in Chapter 3-01, et seq.

Likewise, § 59-01-08, NDCC, provides that one who voluntarily assumes a relation of personal confidence with another (for instance, by accepting a power of attorney) is deemed a trustee. Chapter 59-01, NDCC, goes on to provide that a trustee is bound to act in good faith, shall not benefit by use of trust property, shall take no action adverse to the beneficiary, may not use influence to obtain an advantage from the trust beneficiary. Violations of the sections creating the above responsibilities are considered to be a fraud against the beneficiary (§ 59-01-15). In other words, existing North Dakota law, specifically Chapter 59-01, NDCC, already covers many of the situations proposed by SB 2442.

Section 12.1-31-07, NDCC, currently makes it a crime to take advantage of a "vulnerable elderly adult" as defined in that section.

We also have some concern regarding the definitions used in SB2442. Subsection 1(b) defines "capacity" and then uses the term "incapacitated" (which we assume means the opposite of the definition of "capacity") to define certain violations of the attorney-in-fact. We already have a definition of "incapacitated person" in § 30.1-26-01(2), NDCC, which is much broader than the definition of "capacity" contained in SB2442.

Subsections 2 and 4 of SB 2442 speak to damages, but it is unclear as to whether or not this may be an amount that was misused by the agent, or would it mean other general damages that might be incurred?

Subsection 5 states that a power of attorney executed by an adult who does not have capacity (or is incapacitated?) is invalid. That is already the law under our general statutes regarding competence.

TESTIMONY OF MALCOLM H. BROWN

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SB 2442, if enacted, would appear to apply to powers of attorney currently in existence. Many powers of attorney currently are in existence that have not been used for one reason or another. Many families, at the time of execution of a will also give their spouse or child a general durable power of attorney to have available if needed. Because currently a power of attorney is not affected by disability, individuals use them as they need them (§ 30.1-30-02, NDCC).

Finally, we are concerned regarding the various burdens of proof set forth in Subsection 5. Frankly, this would only confuse issues relating to incapacity and undue influence that may already exist in litigation surrounding a power of attorney.

We believe that the enactment of this kind of the law will lessen the use of powers of attorney in situations where they might normally be used. Without a power of attorney the next answer to handling someone else's affairs is a conservatorship which can be brought under Chapter 30.1-29, NDCC. However, this is a court proceeding and brings with it all of the legal and other expenses required by a formal court proceeding.

We urge you to give careful consideration as to whether or not SB 2442 is the answer to any problems that exist in North Dakota today.