MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Third Session
May 2, 2005

The Committee on Judiciary was called to order at 8:15 a.m., on Monday, May 2, 2005. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. William Horne, Vice Chairman
Ms. Francis Allen
Ms. Sharon Angle
Ms. Barbara Buckley
Mr. John Carpenter
Ms. Susan Gerhardt
Mr. Brooks Holcomb
Mr. Garn Mabey
Mr. Mark Manendo
Mr. Harry Mortenson
Mr. John Oceguera
Ms. Genie Ohrenschall

COMMITTEE MEMBERS ABSENT:

Mr. Marcus Conklin (excused)

GUEST LEGISLATORS PRESENT:

Senator Terry Care, Clark County Senatorial District No. 7

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Risa Lang, Committee Counsel

Judy Maddock, Committee Manager

OTHERS PRESENT:

Frank Daykin, representing National Conference of Commissioners on Uniform State Laws, Reno, Nevada
Bill Uffelman, President, and CEO Nevada Bankers Association, Las Vegas, Nevada
Scott Anderson, Deputy Secretary of State, Commercial Recordings, Office of the Secretary of State, State of Nevada
Steve Oshins, Estate Planning Attorney, Oshins and Associates, Las Vegas, Nevada
James Endres, Executive Director, McDonald, Carano, and Wilson Law Firm, Reno, Nevada
Robert Armstrong, Attorney, McDonald, Carano, and Wilson Law Firm, Reno, Nevada
Gerald Dorn, Estate Planning Attorney, Law Offices of Anderson and Dorn, Reno, Nevada

Chairman Anderson:
[Meeting called to order. Roll called.]

We have 8 members present. Let's turn our attention to Senate Bill 198.

Senate Bill 198 (1st Reprint): Revises provisions of Articles 3 and 4 of Uniform Commercial Code. (BDR 8-542)

Senator Terry Care, Clark County Senatorial District No. 7:
This year we don't have any new Uniform Acts for the Committee. What you have in S.B. 198, S.B. 199, and S.B. 201 are all revised acts, for the most part, at least with the UCC [Uniform Commercial Code] matters, because times change and the way of doing commerce changes. A lot of transactions are conducted electronically. Some of the existing languages are archaic, but every so often the National Conference deems it necessary to revise some of its Uniform Acts, and that's what we have here today.

The NCCUSL [National Conference of Commissioners on Uniform State Laws] is a group of 300 active members. These state and federal trial appellate judges, law school professors, state legislators, and practitioners meet once a year for about 8 days to adopt various Uniform Acts after a drafting period that can take anywhere from 2 to 3 years for a particular act. Once the National Conference adopts a Uniform Act, the mission for the commissioners is to go to their respective states capitols, Virgin Islands, and Puerto Rico, and attempt to have the Uniform Acts enacted so that there is a body in uniform law when it comes to conducting all manner of activities, in this case uniformity as to the conduct and transaction of commerce.

[Senator Care, continued.] Looking at S.B. 198, we can get started with Articles 3 and 4.

Chairman Anderson:
Do you want me to start with Articles 1 and 7?

Senator Care:
We can start with S.B. 198. It's largely the bankers who are concerned with Articles 3 and 4 (Exhibit B). Article 3 is negotiable instruments and Article 4 is bank deposits and collections. We also had some input from Keith Rowley, who is a professor at the Boyd School of Law, and a representative from NCCUSL. They met, and everyone agreed to the language that is now before you as a first reprint of S.B. 198. Article 3 of the UCC goes up to about Section 14 of the Act and thereafter it is Article 4, negotiable instruments. There are some additions to the existing Article 3. In definitions at the bottom of page 2, Section 1, subsection (k), there is a definition for "record," which reflects the process of conducting business electronically. In subsection (m) on page 3, "a remotely-created item." I don't practice in this field of law; this is a reference to what is known as a telephonically generated check. Some people will actually call the bank and request that a check be issued; that is the "remotely-created item."

Section 6 is intended as a clarification, "the person seeking to enforce the instrument," that is, the negotiable instrument, "was entitled to enforce the instrument when loss or possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred." That language is a clarification of the existing language of Article 3. There are some provisions in Article 3, Sections 8 and 9, which discuss when someone presents a telephonically generated check, precisely when the transferee bank may or may not make the payment. Section 11 is for payments after the instrument has been transferred. These are changes to the existing Article 3, primarily because of the existence of business transactions electronically, and remotely generated items.

Article 4 of UCC, which is Section 15 of the bill, must be read in tandem with Article 3, because it talks about the "remotely-created telephonically generated check," and specifies when the transferee bank may or may not be required to make payment. That is what's contained in Article 3 and 4, or S.B. 198.

Chairman Anderson:
Even though the receiving bank doesn't have possession of the instrument, they can still cash it. If it was falsely created you don't have the liability, but the issuing branch does, correct?

Senator Care:
That is a pretty good grasp of the subject matter. That is Sections 8 and 9 of S.B. 198.

Frank Daykin, representing National Conference of Commissions Uniform State Laws, Reno, Nevada:
You basically have it correct. The real point here is that this remotely created item is generated as the result of the merchant's telephone call to the customer. The customer is supposed to originate the check. However, with respect to where the liability falls when there is an error in the check. If you will look at page 9, paragraph (f), "with respect to a remotely-created item, the person on whose account the item is drawn authorized the item in the amount for which the item is drawn." That is warranted by subsection 1 on the preceding page; "a person who transfers an instrument for consideration," the merchant transfers the instrument to his bank when he endorses it, therefore, he warrants that the check is good.

Bill Uffelman, President, Nevada Bankers Association, Las Vegas, Nevada:
The electronic payments that we are talking about in this remotely-created check item would be for example, when you call the utility company, and use visa or master card to pay your bill by phone. First they tell you they are recording your conversation, and then the document is created as an electronic file. You have authorized them to generate a check, and you have created an electronic file. That electronic file is then presented to my bank; all the warranties revolve around whether I authorized it, and whether it was entered correctly.

Chairman Anderson:
This piece of legislation is geared toward allowing that kind of electronic instrument to be utilized where we are used to seeing it in a written format; this moves it to an electronic format. The rules of basic banking procedures are not going to change in terms of issuing the instrument. This just happens to be the methodology of the transfer, because of the electronic age.

Bill Uffelman:
You are absolutely correct.

Assemblyman Mortenson:
If someone finds my old, canceled check and decides he is going to buy something by electronic check transfer, he concludes the transaction and receives the merchandise, but he is not the owner of the bank account. Who has the liability for that transaction?

Bill Uffelman:
When you discover that fraud has happened and you report it back to your bank, who then takes it up the chain of command? In the end, if they have accepted a fraudulent check, then the liability rests at the point of when the fraud was first discovered. It doesn't rest on you as the customer. Because it was electronically generated, this says that the person accepted that check electronically, and was assuming the liability for getting it right.

Assemblyman Mortenson:
You qualified that with 30 days. If the real owner of the bank account doesn't catch it within 30 days, what happens then?

Bill Uffelman:
The code specifically provides 30 days, but I would argue in a circumstance like that where there is actually fraud, the bank certainly has a relationship with you that they want to maintain. You do have some personal responsibility to keep track of your account, and know when something wrong has taken place.

Assemblyman Mortenson:
Quite often, the bank statement reflects a full month, and if this is done on the first day of the month, by the time you receive your transaction it has been over 30 days before you are even notified.

Bill Uffelman:
You had no reason to suspect that check was improperly executed. They have to present you with some notification that activity had taken place. The printed return says, "Please notify us of any errors or questions?"

Chairman Anderson:
I believe the 30 day question is covered in the existing law under Section 15 of this bill. Line 22, page 16, subsection 4 is the reference to the 30-day question under existing law of the Uniform Code.

Senator Care:
I would like to point out that this is fairly esoteric for most attorneys. These Uniform Acts get a two year review when they have the drafting committees.

Chairman Anderson:
I think living in the electronic age means that the average person has to make sure that their rights are being protected. We shouldn't be afraid of this new technology, and hopefully the Uniform Code is going to give people the same sense of security when cashing an instrument electronically as they have when cashing one by paper.

I will close the hearing on Senate Bill 198.

Let's turn our attention to Senate Bill 201.

Senate Bill 201 (1st Reprint): Revises provisions of Articles 1 and 7 of Uniform Commercial Code. (BDR 8-357)

This is the Article 1 and 7 of the Uniform Commercial Code.

Senator Terry Care, Clark County Senatorial District No. 7:
Article 1 of the Uniform Commercial Code is codified as NRS 104 [*Nevada Revised Statutes*] (Exhibit C). Article 1 is the operating manual for the remaining articles. The various articles govern sales, leases, letters of credit, warehouse receipts, bills of ladings, investment security, and secure transactions. Article 1 is the manual for the other articles, and it governs when there is not a provision in one of the remaining articles. It contains largely definitions and general provisions applying if there is some question in the other articles.

On the Senate side we elected not to adopt some of the revisions to Article 1. We did adopt good faith language that is contained in the revised Article 1, and that is on page 6, Section 9, subsection (t):"Good faith, except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standard of fair dealing." There has been some question as to whether there should be an essence to definitions, one for merchants of sales and goods, and another for everyone else. Here, we have adopted the new definition.

The scope is clarified in Section 4, subsection 2, page 3. It says, "unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity…." That is basically to cover the scope of Article 1. Because the new choice of law provisions are not in here, most of what you see in Article 1, other than what I have discussed, is really not substantive at all. It is mostly changes in style and to get rid of some archaic language, which are Sections 1 through 24 of the bill.

[Senator Care, continued.] Article 7 is basically called "documents of title," but its warehouse receipts and bills of lading. Normally, nobody in this Committee would ever confront Article 7. The general idea is for the goods, whatever the goods are. When they end up in the showcase of the store, they have to leave the manufacturer, they are put on trains, and trucks, and they go into warehouses. Somewhere along the way people have to take possession, and they want some reassurance that they are not going to be subject to claims by third parties. What has happened since Article 7 was first promulgated? We have entered the age of conducting business electronically.

The changes in Article 7 deal with accommodating the way business is done today: generating some of these documents electronically, and providing the reassurance to whoever happens to be holding these goods, while they're on their way to the consumer, that they are not subject to third party claims. Those are the general ideas of the revised Article 1 and Article 7. Article 1 is something that you only look to in the absence of language in a particular article that you happen to be involved with.

Chairman Anderson:
Senate Bill 198 is something that we might all come in contact with, but you are saying that we are going to rarely deal with, S. B. 201, unless we happen to be dealing with a business that may be coming into Nevada that operates predominately as a catalog company, that is set up for the electronic transfers, and that you are not obligated to pay until those goods reach you?

Frank Daykin, representing National Conference of Commissioners on Uniform State Laws, Reno, Nevada:
Your example would be covered in Article 2, the article on sales, which is not before the Legislature at this time for amendment. These documents of title largely pass between merchants, rather than from merchant to customer.

Chairman Anderson:
So it is our friends at Cantor Fitzgerald stock fund company that would be dealing with this? Is this between the bank and Sears?

Frank Daykin:
Yes.

Bill Uffelman:
In the situation that you are describing, the manufacturer produces 10,000 widgets and ships them off to a bonded warehouse, which is the distribution point. It's the documents related to those 10,000 widgets. I will sell 1,000 to Ms. Allen's retail store when she comes in with a piece of paper that says, "Deliver to me 1,000 widgets," out of this bonded warehouse. This piece of the Uniform Commercial Code accounts for all of the electronic files related to that first shipment of 10,000 widgets, and then the ultimate redistribution of it. It then accounts for Ms. Allen paying through me to the manufacturer for the materials that were delivered to her. That's what this is all about. The issues that were a major concern to the banking community and to others involved the good faith question, and then the question of choice of laws. Nevada law, 99.9 percent of the time, will be the law that we are using as provided at the bottom of page 10, Section 15. That is the "to die for" section for bankers. We know Nevada law, and we don't want to get tied up in New Jersey or Pennsylvania law. We are here, and let's do business here.

Chairman Anderson:
Nevada's warehousing industry might be concerned about this particular sections effect in keeping that industry somewhat on the cutting edge.

Frank Daykin:
Article 1 brings into the Uniform Commercial Code for the first time a reference to the electronic signatures in the Global and National Commerce Act, 15 U.S.C. [United States Code], Section 7.001, et cetera. This article modifies, supercedes, and limits that act, as the act itself authorizes, but does not modify, limit, or supercede Section 101 (c) of that act, nor authorize electronic delivery of certain notices. That is what the consumer advocates have been concerned with. The article takes care of their concerns.

Chairman Anderson:
Did the consumer advocate give testimony on the Senate side in support of the bill?

Senator Care:
I don't recall that we heard from any consumer groups. I can tell you that the consumer groups closely monitor these Uniform Acts.

Frank Daykin:
Confirming what Senator Care said, I have not heard from Ms. Buckley on this act, presumably because she is satisfied, but I know from exhaustive discussions at the 72nd Legislative Session that this was precisely the sort of thing with which she was concerned.

Chairman Anderson:
Which article are you speaking about?

Frank Daykin:
Article 1, Section 27, page 15.

Chairman Anderson:
At the end of the section, this article modifies, limits, and supercedes federal electronic signature.

Frank Daykin:
Yes, sir.

Chairman Anderson:
I will close the hearing on Senate Bill 201.

I will open the hearing on Senate Bill 199.

Senate Bill 199 (1st Reprint): **Adopts Uniform Partnership Act (1997) and provides for its applicability on voluntary basis. (BDR 7-358)**

Senator Terry Care, Clark County Senatorial District No. 7:
Senate Bill 199 is the Uniform Partnership Act. Here is an example. As a Commissioner I consulted with Nevada Business Law Section, which is headed by a Las Vegas attorney by the name of Mr. Robert Kim. In your handout you will find a letter from him to me (Exhibit D). They decided that this was not the time for Nevada to adopt the revised Uniform Liability Partnership Act, which was originally contained in S.B. 199. That is why we have a first reprint. We don't want to do anything to offend those Nevada attorneys who live and die with bills like this, so we eliminated much of S.B. 199, and that is why you have the first reprint which is exclusively a revised Partnership Act itself.

The revised Partnership Act would not take effect until 2006, and that is after consulting with the Secretary of State's office which would need time to gear up its apparatus to accept the filings. There would be a filing under the revised Partnership Act, and it also has an opted-in provision. No existing Nevada partnerships would be affected by this bill unless they choose to be under its purview. Any partnerships formed in Nevada after the effective date, which is July 1, 2006, would not be impacted by this bill.

[Senator Care, continued.] The revised Partnership Act does a couple of things. It establishes a partnership as a distinct body, and in Nevada you can create a partnership on the basis of a handshake. This bill says that in the absence of controlling or governing language in an oral partnership agreement, what's contained here applies. It recognizes that a partnership is its own separate legal entity. In Nevada, partnerships are recognized as aggregates, on groups of partners who do business with each other. Here you are going to be filing a document with the Secretary of State's office, and the partnership would be recognized as its own legal entity. It could sue in the name of the partnership, the partnership can be sued in its own name, and the partnership may acquire property in its own name under this bill.

The partner's interest is viewed as a separate group of rights. If you have a judgment creditor who is going after the partner's assets, he can only go after the assets of the partner, but not the partnerships assets; it makes those distinctions. A partnership under this act would not automatically dissolve because the partner happens to leave; that is case law now. There are provisions in here that say that would not apply. I can't tell you which future partnerships might want to make use of this vehicle, but some do, and some have, in states that have adopted the revised Partnership Act.

This is intended to be another vehicle that exists in Nevada for those entities that want to form a Nevada partnership and operate under an agreement such as this. There are partnerships in Nevada that would not want to be covered by this, there are even entities, largely in Canada, that look to the partnership law in Nevada and would not want to take advantage of this. It has something to do with trust law, et cetera. This is another vehicle available for future potential partners in Nevada who want to get together and have a written operating agreement that is filed with the Secretary of State, which recognizes that their partnership is a separate, legal entity.

Chairman Anderson:
The opt-in, opt-out part of the amendment provision is something that came in a Senate amendment that is going to take effect July 1, 2006, unless I don't want it to take effect July 1, 2006, in which case I can do what they have already been doing. If I am an existing corporation, I get to go to the new provision if I want to. If I am a new corporation and I don't want to go with the new, I can go with the old, is that correct?

Senator Care:
A new partnership, yes, that is correct.

Chairman Anderson:
Was that a compromise that was reached in order to put this in place, or is this something that we are going to see destroyed somewhere down the road? I can understand why the Secretary of State may be concerned about not having enough time to set up the new corporation. I am curious as to why a new partnership would get to go under the old rules, if we want partnerships to transition to the new Uniform Code, rather than stay with the old.

Senator Care:
It depends on what the partnership does. We often hear the phrase, "Nevada is the Delaware of the West." Time has come for us to say we are not the Delaware of the West, we are Nevada. We have had all manner of bills the last few sessions that go speak to conversions, mergers, limited liability, and limited partnerships, all of this intended to generate revenue in Nevada for entities that want to be located in Nevada. There are partnerships that have been created in Nevada that would not want to take advantage of this. They are here for a reason, and the advantages of that have to do with trust law. There may be partners who would like to create a partnership so that they're recognized as a legal entity, maybe affording some protection, and affording the remaining partners some protection in the event that one of the existing partners had a judgment against him personally.

Chairman Anderson:
In reading the summary of the bill, if I dissolve a corporation, it continues on unless there are expressed specifics within 90 days that you are going to get out of it. For example, if you are in the middle of a lawsuit and the new law might be more beneficial to a partnership than the old, can I transfer in the middle of the partnership from the old code to the new?

Senator Care:
You are saying if there is litigation and somebody has sued the partnership. That is going to depend on the facts of the case. If the question is, can somebody opt-in after July 1, 2006 and somehow escape liability, I can't see that happening.

Chairman Anderson:
I thought that was an unusual concept to suggest that we are going to do something on July 1, 2006, unless you don't want to, especially when it's a Uniform Code question. I thought the whole purpose was to try to get everybody on the same page, even if it's time certain in the future.

Senator Care:
Yes, that is true. Nevada has done a lot in the last five sessions to make it such an attractive place to do business and to create entities. The feeling in Nevada was that it would be great for some people, but not everybody, so let's go ahead and adopt the revised Partnership Act, not the Limited Partnership Act.

Chairman Anderson:
The Secretary of State's office will not have problems dealing with these two?

Scott Anderson, Deputy Secretary of State, Commercial Recordings, Office of the Secretary of State, State of Nevada:
We met with Senator Care several weeks ago in regards to S.B. 199, and we would be able to implement the database that is necessary for this filing on or before July 1, 2006. We were not part of the Uniform Laws discussion. This was not brought to our attention until the bill was introduced, and we met with Senator Care. The Secretary of State is in support of any legislation that will attract businesses to our state and organize under the laws of Nevada. This bill is acceptable to us at this time.

Chairman Anderson:
By repealing those sections, chapters 87, pages 94, 95, and 96, will those older corporations still be there, and are they going to have their reference tool form?

Scott Anderson:
Currently, general partnerships are not filed in the Secretary of States office. This would be a new filing where a general partnership would file the statement of authority with us; this is a brand new filing for us. There are no existing general partnerships on file with the Secretary of State.

Chairman Anderson:
Should we expect the money committees to pick this bill up?

Scott Anderson:
I do not know.

Chairman Anderson:
So you are not anticipating any additional costs?

Scott Anderson:
No. The cost would be included in our current maintenance and enhancement agreement with our provider on our system.

Assemblyman Horne:
Senator Care, I have concern on the liability portion of the partnership in Sections 38 and 39. You mentioned how only a partner may be personally liable, but not part of the partners in the partnership. If a partner acts in such a way that benefits the partnership and the partners turn a blind eye and benefit from that, would they still be personally liable?

Senator Care:
Under an existing law, if there is a judgment against a partner he is exposed in all sorts of ways. I wasn't talking about a transaction involving a partnership itself. This is new language, "partners can't turn a blind eye." That's true under existing law, and also true under this revised act. Is there some way for a partner to escape liability just because he has turned a blind eye, and it's a transaction that has been conducted by a partner on behalf, or with the apparent authority, of the partnership? Is that what you are talking about?

Assemblyman Horne:
Yes, sir.

Frank Daykin:
This does not change existing law as to partnerships that remain in the old style. If the new entity is created, it adds that the creditor or injured party can go after the new entity, but nobody escapes.

Steve Oshins, Estate Planning Attorney, Oshins and Associates, Las Vegas, Nevada:
I think this is a good bill because it gives two alternatives. Most of the estate planning lawyers would opt for the current law as it exists, because you get bigger valuation discounts and better creditor protection. As Senator Care noted, not everyone wants that particular loss. Because Nevada is pro-taxpayer, it will give people alternatives in case they do not want the other law, and that will bring more business to the Secretary of State in Nevada. The more alternatives we give, the better Nevada looks to all the other states, and it might allow us to bring in additional business.

Chairman Anderson:
I will close the hearing on Senate Bill 199.

Let's turn to Senate Bill 382.

Senate Bill 382 (2nd Reprint): Makes various changes relating to property. (BDR 13-727)

James Endres, Executive Director, McDonald, Carano, and Wilson Law Firm, Reno, Nevada:
I have passed out a Business Week article that came out in January (Exhibit E). The purpose of this is to highlight to you the need for Nevada to continue to be and remain competitive with other states as relates to trust law. I don't know anything about trust law, but it caught my attention and I think it may catch your attention and help support the testimony that Mr. Armstrong will be delivering today in terms of the importance of this update to Nevada's trust law.

Robert Armstrong, Attorney, McDonald, Carano, and Wilson Law Firm, Reno, Nevada:
I am here to speak on Section 1 of S.B. 382. As we have heard in earlier testimony, Nevada has been distinguished in trying to be progressive in a number of areas of its law. It remains a very favorable jurisdiction for people to locate businesses and trusts. It has become highly competitive among a number of jurisdictions in the United States with regard to the preferred sites for trust administration. Section 1 of the bill, in several ways, allows Nevada to continue to be in the forefront in these areas along with several other preferred jurisdictions.

Increasingly, trust administration fiduciaries are faced with managing liability, and, in order to do that, they need to form different entities for different purposes, like holding real estate, and, increasingly, handling aspects of trust administration. Both Section 1 and 2 promote the flexibility of using entities during the trust administration process. A number of large corporate fiduciaries no longer want to handle trust work for highly concentrated assets. So this gives Nevada a preferred ability to allow fiduciaries and grantors of trusts to form entities that protect them during the trust administration process. I think it will be beneficial with regard to business here in the state in order for us to operate under Section 2. These entities have to be either an organized form, or registered here in the state, generating revenue for the state of Nevada.

Chairman Anderson:
The nature of the amendment on the Senate side, however, concerns me a little. We had a Constitutional question several sessions ago which tried to do away with the rule of perpetuity [Uniform Statutory Rule Against Perpetuity], that is, the ability to control your estate through trust. Now we have gone from 90 years in this bill to 1,000 years. Other than the fact that we are trying to make this a trust friendly state, 1,000 years seems a long time for long-term planning.

Robert Armstrong:
I was also surprised by the amendment on the Senate side. I think a little background is helpful. The 15 jurisdictions in the United States have done some alternation of the rule against perpetuities. The jurisdictions that we compete with in terms of trust business are South Dakota, Delaware, and Alaska. They have been at the forefront relative to the abolishment of the rule against perpetuities. For example, Florida recently passed legislation modifying their rule against perpetuities to 360 years; other jurisdictions have gone to 150 years. There is some movement with regard to trying to interpret the rule against perpetuities, and I think 1,000 years is not magical here. I think it would be very beneficial for us in Nevada to have a loosening up of the rule against perpetuities, because effectively anybody in this room can form a South Dakota trust and have the benefit of evolution to the rule against perpetuities. That business is going to South Dakota, Alaska, or Delaware. Considering what is happening with the baby boomers and the shifting of wealth that's occurring, it is very important for us to make sure that we have a series of trust laws that are able to deal with this situation effectively, so that we become a preferred jurisdiction, because right now we are not. We are starting to get behind relative to several of our trust laws that these other jurisdictions have adopted, and we see trust business leaving the state, rather than coming into the state. That is why Section 1 is important for me. With regard to the rule of perpetuities, active dialogue needs to take place with regard to the rule against perpetuities, because it is affecting our ability to attract business and it is allowing grantors the ability to opt-into a longer rule against perpetuities.

Assemblyman Horne:
You named four states that are moving toward the abolishment of the rule. Any thoughts on why the other jurisdictions are reluctant to move in that direction?

Robert Armstrong:
I am aware of 15 states that are modifying the rule. The rule under Nevada law is called USRAP [Uniform Statutory Rule Against Perpetuity]. This is where 15 states are starting to part from the enactment of UCC and uniform laws that we just talked about, because they are seeing that this is an area that is not necessarily a good application of trust administration law. Those jurisdictions that want to have uniform laws in these 15 states are breaking away from that concept because they want to give their citizens more flexibility in the estate planning process. There are some benefits from a long-term planning perspective from a federal and state transfer tax scenario.

In order for a well-heeled client in Nevada to get the benefit of those types of laws, they have to form a trust in another jurisdiction. Washoe County is one of the 19 wealthiest counties in the United States. We have a lot of people moving here who are going to be doing estate planning and trust administration, and I think it's important for us to retain the business.

Assemblyman Horne:
It seems that long-term planning is one thing, 1,000 years is yet quite another.

Robert Armstrong:
You get right to our point. If you don't want to do it, you don't have to do it. You can design a trust that does exactly what you want for your own personal well being, and what your family values are. I think it's really a matter of choice.

Gerald Dorn, Estate Planning Attorney, Law Offices of Anderson and Dorn, Reno, Nevada:
I echo many of the comments that Mr. Armstrong made. This is clearly a trend that is occurring, and its something that Nevada should get involved with as well, to maintain its competitive foothold within the estate planning jurisdictions.

Professors Robert Sitkoff and Max Schanzenback from Northwestern University School of Law have estimated that, dating back to when this trend first began, which was in the mid 1990s, there has been approximately $50 billion in assets flown into these jurisdictions that have either repelled or modified the rule against perpetuities. This is an issue that can bring, or at least maintain, a lot of investments in Nevada. A significant number of wealthy clients that I have are taking advantage of this planning through the various jurisdictions that have repelled the rule against perpetuities. I perceive long term that many of these assets will eventually leave the state of Nevada and be managed and invested in other states. This represents not only investment into the state of Nevada, but also an opportunity for the creation of jobs both within the banking, financial, and trust company sectors.

Steve Oshins, Estate Planning Attorney, Oshins and Associates, Las Vegas, Nevada
I was the author of this perpetuities bill and also the attempted change in our *Constitution* a number of years ago. I can speak to some of the history, and I can also address some of these questions that have been asked. Nevada is traditionally pro-business. We were able to get very favorable, limited liability partnership laws passed in the last few years. We have been a tax-haven as well with having no state income tax, but the one thing that we are lacking is a favorable perpetuities law. There are currently 17 jurisdictions that have either abolished their rule against perpetuities, or have enacted an opt-out perpetuities period, plus an additional four jurisdictions that have enacted a term of years

period. Two of them were 150 and 360 years, but there are two others, Wyoming and Utah, which have enacted a 1,000-year period similar to what we have here. To address questions of why are we enacting a 1,000 year law when the perpetual constitutional prohibition was not changed years ago, is the example of the state of Wyoming. Wyoming, two years ago, was able to pass a 1,000 year perpetuity, even though they have a constitutional prohibition against perpetual trust on their books that is nearly identical to Nevada's. We can follow exactly what they do, that is why I picked the 1,000 years: I was modeling it after what Wyoming just did.

[Steve Oshins, continued.] To speak to the economic effects of passing this bill, I have personally, in my law firm, moved probably in the neighborhood of $5 billion to $10 billion in assets to South Dakota, which is my favorite choice of jurisdiction. I would look to move most of that back to Nevada. Three quarters of my clients are outside of Nevada, so that's not just Nevada money being moved, that is money from all over the country being moved to South Dakota, which I would immediately move to the banks and trust companies in Nevada upon passage of this bill.

If you look at all of the attorneys that are setting up these dynasty trusts, I think there are actually more assets than were found in the study that Mr. Dorn mentioned. I believe he found that study in the *Wall Street Journal* article by Rachel Silverman, who also has another article coming out soon on the inheritors' trust, which is a form of a dynasty trust. They are all over the country, and if you go back to 1995, there were only four states that had abolished the rule against perpetuity. The trend in these states is to change the perpetuities law in order to compete with the other states. One of the questions was, "Why aren't the other states doing it?" Well, they are, that's the problem. We need to keep up with the other states. In the last 10 years, 11 states have abolished it, and four others have created a term of years law.

I am going to echo what Mr. Dorn said as far as what this bill means to us. It increases the assets at the banks and financial institutions in Nevada, it stops them from leaving Nevada, and it creates lots of jobs. I think if you will be creating hundreds of jobs because there will be so much business coming into Nevada. To give you an idea of how many of these are done, I myself set up about 150 of these per year.

Chairman Anderson:
Mr. Oshins, I am sure that you left out the District of Columbia when you corrected Mr. Armstrong, which would have made it 18.

Steve Oshins:
You are correct. I left that out.

Chairman Anderson:
On the question of whether to remove from the *Constitution* the Rule of Perpetuity, which has been a long standing concern historically, did Wyoming put that vote in front of the people when they chose to move to the 1,000 years? Had they lost a similar election, or did they choose to go the legislative route rather than the constitutional route?

Steve Oshins:
I do not know what the rationale was. They might have had the same problem. The reason it lost in Nevada was the perception that it's just for the rich, and I think that's the way it was worded in the bill that Mr. Goldwater and I worked on a number of years ago. I think that if it had emphasized all the jobs it could create by moving assets, rather than creating the perception that only the wealthy are going to benefit from it, then it would have passed. It was close. It went through the Senate and Assembly unanimously, and it lost 40 to 60 percent in the vote of the people.

Assemblyman Carpenter:
If we raise this to 1,000 years, is Wyoming going to raise theirs to 1,500? Is this a bidding war?

Steve Oshins:
It doesn't really matter. Once you get that far out, I don't think people can see much farther than that.

Chairman Anderson:
The research from this *Wall Street Journal* article (Exhibit F) deals with the fact that if you put $1 million into a trust, in 100 years you will have $867.7 million at a 7 percent interest rate. Obviously there is some economic advantage. The concept of 1,000 years, does it really make that big of a difference? Once you move beyond 100 years, haven't you accomplished your goals? Hasn't the difficulty that we are having explaining this to the public arisen because of the Rockefeller mentality and these huge numbers?

Steve Oshins:
I think the perception is that it's just for the Rockefellers, but it's also for the little people, the people who might only put $500,000 in. You just gave us the numbers, and even putting in $1 million, you can see the benefits over hundred years. I think the significant reason to pass this bill is that we are losing too

much business to the other states, and we are not bringing business in when we are supposed to be a pro-business state.

Chairman Anderson:
Are we doing this because it's a good selling point for trusts, because everybody else is doing it? I am trying to figure out why we are doing this large quantum leap in time.

Steve Oshins:
We are not doing it just because everyone else is doing it. We are doing it to compete business-wise with all these other states that are taking our business away, and creating jobs. We are doing it because we are a pro-business state, and we are losing too much business. If a few states are changing their laws every few years, one day we will look back and find that we are the only state that hasn't done it.

Bob Uffelman:
You have heard from the experts. I think the discussion of the creation of jobs is good business for the state of Nevada. Is 1,000 years an essential policy decision? I can recall that in Illinois, one of the family trusts owned significant portions of farm land. Because of the rule against perpetuities, that trust was coming apart and they had to sell significant portions of the land to pay the taxes.

Gerald Dorn:
The rule against perpetuities actually evolved and has its origins in 17th century English Common Law. At that time, most of England's wealth was tied up in land, and many land owners were seeking to tie up the land so that ultimately their heirs could not sell the land, or it was done out of concerns that the family wealth would be squandered. As a result the courts were very concerned about the possibility of these land owners creating a string of life estates, and thereby dramatically affecting the land market and the overall economy in England at that time. That is what the rule against perpetuities was borne out of. I think there was a time in this country when the rule made some sense. You referred to the Rockefellers. A significant amount of wealth was tied up in land at one time in this country, and a significant amount of the wealth was tied up within a few families. That concentration of wealth no longer exists, so I question whether the underlying purpose of the rule is as applicable today as it once was.

A thousand years sounds like a long time, but I contend it's not so much from the perspective of the trust creator. Most of these long-term trusts are created with a tremendous amount of flexibility that allows successor generation beneficiaries to ultimately appoint the assets, as they exist at their death, to or among their heirs. Sometimes included are charitable organizations and a surviving spouse. It allows the successor generations to foresee the interests of their heirs, and the concerns that they have for their heirs, and to plan with respect to those assets from generation to generation. Mr. Armstrong commented on the benefits that are provided structuring a plan in that manner for federal estate tax purposes. When we look at a top rate of 47 percent being assessed against the value of one's estate, that is a significant amount. This minimizes that and allows individuals to keep those assets within the family.

[Gerald Dorn, continued.] Other benefits are the creditor protection benefits that are afforded to assets being held in trust. In Nevada we have very favorable spendthrift laws which allow the assets to be maintained in trust and remain protected from beneficiaries' creditors. In addition, for wealthy individuals, it allows them to structure inheritances so that ultimately it supplements their successor generation's lifestyles, provides opportunities, but does not supplant the beneficiaries' requirement to go out and have to produce and create. That is a big concern for many of my clients today. When you look at the statistics, approximately 90 percent of all inheritances are spent within the first year. Very few, even large estates, make it down to the third generation, so it's not so much wanting to control the future, but structuring things in a manner that will provide opportunities, but not supplant one's need to get out and be a productive member of society.

I saw another interesting statistic in Scott Fithian's book, *Values Based Estate Planning*, where they did a study over a five-year period and concluded that approximately 65 percent of individuals who received an inheritance of $250,000 quit their jobs. The types of considerations that go into this planning are extremely varied and ultimately depend on the client. It's not just a desire to tie up the assets for 1,000 years; quite the contrary. Certainly with Nevada's implementation and adoption of the Uniform Prudent Investor Act, these assets will continue to be productive. We still have the laws against waste, and these assets will be available to the various markets for investment and for the creation of businesses, and things of that nature.

Chairman Anderson:
I have not seen this statistic since a 1990 census study, but I was under the impression that 90 percent of the real property of the country was held by approximately 10 percent of the population.

Gerald Dorn:
I am unaware of that statistic, but I think as far value is concerned, the capital markets have evolved to a degree that the majority of the wealth in this country

is not tied up in land, or at least we are getting very close to a balance of that wealth.

Assemblywoman Allen:
When the trust-holder dies, is that trust subject to federal estate tax if it's over $1.5 million?

George Dorn:
For the person creating the trust, if it's done through a revocable trust, yes. Those assets are included in the estate of the trust maker. As far as successor generations are concerned, you also have to be aware of generations skipping transfer taxes. There is also an exemption of $1.5 million for federal generation skipping transfer tax which is a tax assessed on property passing to an individual who is two generations or more below the original creator of the trust. There is a way to allocate that generation skipping transfer tax exemption amount of $1.5 million into an exempt trust, and upon the death of the beneficiaries, those assets can go down from generation to generation intact without being subject to further federal estate taxes.

Chairman Anderson:
Including the additional dollars that would be generated over the $1.5 million?

George Dorn:
That is correct. Including the growth on those assets.

Chairman Anderson:
I will close the hearing on Senate Bill 382. All four of the bills will go to the Wednesday work session.

There being no further business, the meeting is adjourned [at 9:51. a.m.].

RESPECTFULLY SUBMITTED:	RESPECTFULLY SUBMITTED:
______________________	______________________
Judy Maddock	Linda Ronnow
Committee Attaché	Transcribing Attaché

APPROVED BY:

____
Assemblyman Bernie Anderson, Chairman

DATE:_________________________________

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 2, 2005 **Time of Meeting: 8:15 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
SB 198	B	Senator Care	Amendments to Article 3 and 4 of the UCC (4 pages)
SB 201	C	Senator Care	Facts about Revised Uniform Commercial Code Article 1 (3 pages)
SB 199	D	Senator Care	2 page letter from Robert Kim
SB 382	E	James Endres / McDonald, Carano Law Firm, Reno, Nevada	*Business Week* article "Where to Entrust Your Trust" (1 page)
SB 382	F	James Endres / McDonald, Carano Law Firm, Reno, Nevada	*Wall Street Journal* Article, "Research on Return of Investment of Trust"