MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fourth Session
March 29, 2007

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9:17 a.m. on Thursday, March 29, 2007, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chair
Senator Maurice E. Washington, Vice Chair
Senator Mike McGinness
Senator Dennis Nolan
Senator Valerie Wiener
Senator Terry Care
Senator Steven A. Horsford

GUEST LEGISLATORS PRESENT:

Senator John J. Lee, Clark County Senatorial District No. 1

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Brad Wilkinson, Chief Deputy Legislative Counsel
Barbara Moss, Committee Secretary

OTHERS PRESENT:

Scott Coffee, Clark County Public Defender's Office; Nevada Attorneys for Criminal Justice
Cotter C. Conway, Washoe County Public Defender
Christy Craig, Clark County Public Defender
Don W. Ashworth, Probate Commissioner, Clark County

Leah Ellenhorn Stromberg, LCSW, Neighborhood Justice Center, Conflict Resolution Services, Department of Administrative Services, Clark County

CHAIR AMODEI:
The hearing is opened on Senate Bill (S.B.) 380.

SENATE BILL 380: Makes various changes concerning defendants in criminal actions. (BDR 14-279)

SCOTT COFFEE (Clark County Public Defender's Office; Nevada Attorneys for Criminal Justice):
There are concerns about what happens to a mentally ill person found guilty of a crime. There are inherent problems with section 18, subsection 2 of S.B. 380 which says, "The Department of Corrections shall provide any treatment ordered by a court pursuant to subsection 1."

A number of mentally ill people receive probation. That being the case, it is nonsensical for the Department of Corrections to provide treatment. The Department of Corrections is not in the business of treating people who are on the street; therefore, additional language is needed to say this section applies if the defendant receives a period of incarceration or if their sentence includes a period of incarceration. Without that language, the Department of Corrections is put in the position of providing mental health treatment to people who are on the street.

There are concerns about the way section 2 of S.B. 380 is set up to ensure mental health treatment for people found guilty but mentally ill. Some of them can barely function, cannot put a sentence together, are like children and may end up returned to the general population due to lack of resources. Additional language should allow the Department of Corrections leeway to designate placement in a facility, such as a specific wing or unit of prison. A provision is also needed that as long as they receive mental health treatment, they will not be placed with the general population. This protects the general population from those who may be actively psychotic or inherently dangerous. It provides protection and treatment for people found guilty but mentally ill. It is not expected to affect many people because we expect this as a rare verdict.

Based upon past history in Nevada and before *Finger v. State*, 117 Nev. 548, 27 P.3d 66 (2001), there was a plea of guilty but mentally ill wherein a person

went to prison without receiving treatment because it was not specifically designated. We suggest the following language:

> The treatment shall take place in a facility designated by the Department of Corrections and the defendant shall not be returned to the general prison population until such time as he is found no longer mentally ill by a licensed psychologist or psychiatrist.

Pressure would be taken off the court system if this language was adopted. As a practicing criminal defense attorney, I do not plead a client guilty but mentally ill because there is no guarantee they will receive treatment. I would resolve a number of cases that way if a treatment program was in place.

If we knew of treatment, even inside the prison system, wherein people would be treated and placed back into the general population after their mental illness was cured, we would be more likely to negotiate cases that would then be resolved.

COTTER C. CONWAY (Washoe County Public Defender):
We are looking for the third part of the definition of the M'Naghten rule as set forth on page 5, line 26 of S.B. 380. In *Finger* it was listed as an example of the application of the first two conditions, which we would like stricken. It also requires the same on page 11, line 12 of S.B. 380, which has the same definition. That brings it into line with the M'Naghten Rule without the dicta *Finger* put forth.

To give true meaning to this type of plea or finding of guilty but mentally ill, there should be a restriction that any penalties imposed on someone found guilty but mentally ill not include a life without parole or death sentence.

Pursuant to Mr. Coffee's request, it is important to include mandatory treatment, particularly if a person is incarcerated. A genuinely mentally ill person should not be in the general population. That plea or finding is useless if the person does not receive necessary treatment. Current language says when treatment is available. Treatment is not available in many prisons in Nevada and there should be some form of mandatory treatment to give the plea meaning.

I echo the comments of Lee B. Rowland, Staff Attorney, American Civil Liberties Union of Nevada, concerning the ability to do this at the request of the

defendant. I do not want the guilty, but mentally ill plea to swallow up any legitimate not guilty, by reason of insanity case. I am concerned this may be used as a blockade any time the defense raises the issue.

CHRISTY CRAIG (Clark County Public Defender):
My comments are limited to sections 38 through 45 of S.B. 380 regarding people declared incompetent without probability of attaining competency in the foreseeable future. There are concerns regarding the constitutionality of the bill as it pertains to those particular sections. Christopher J. Lalli, Nevada District Attorneys Association, said people are declared incompetent without probability of attaining competency in the foreseeable future prior to, or at the beginning of, any criminal case. Two doctors examine the person at district court level and declare him or her incompetent; sometimes, they are declared permanently incompetent or incompetent without probability of attaining competency in the foreseeable future. They are sent to the Lake's Crossing Center for the Mentally Disordered Offender and observed 24 hours a day, 7 days a week by a treatment team.

At some point during treatment, doctors may decide the person is incompetent without probability of attaining competency in the foreseeable future. As a result, the charges against him or her must be dismissed because a person has to be competent for the state to proceed against them. When the charges are dismissed, the person is generally released from custody because no charges hold them. They are returned to their county of origin and the state can then seek civil commitment against them if they are a danger to themselves or others.

Senate Bill 380 contemplates changing that process. When the charges against a person who is incompetent without probability of attaining competency in the foreseeable future are dismissed, the state wants the opportunity to seek their commitment to the Division of Mental Health and Developmental Services of the Department of Health and Human Services based on some interesting procedures. The Division wants 30 days after charges are dismissed to decide whether to seek conditional release for people who are incompetent without probability of attaining competency. I wonder where the person will be for those 30 days because once charges are dismissed, there is no way to hold them in jail or Lake's Crossing.

MS. CRAIG:
If the state decides to seek the conditional release contemplated in this part of the bill, the Division has 30 days to decide and another 30 days for the hearing, which will be 60 days of custody for the incompetent person at some facility based on charges that no longer exist. At the contemplated hearing in section 42, subsection 2 of S.B. 380, the state must show by clear and convincing evidence that this particular defendant committed the crime. We already know the person was found incompetent without probability of attaining competency in the foreseeable future. Incompetency means a person does not have rational or reasonable understanding of the proceedings and is unable to aid or assist their lawyers. Therefore, it is a hearing wherein the defendant has no ability to participate in a meaningful way.

At the end of the hearing, if the judge decides by clear and convincing evidence the person committed the crime, he or she will be committed to the Division for the length of their sentence, which is a substantial period of commitment. Burglary, a commonly charged crime, could potentially be a ten-year commitment to the custody of the Division. When a person is remanded to the custody of the Division, they are held at Lake's Crossing or a similar, secure forensic facility until a hearing. A treatment team does a risk assessment, that is not particularly well-defined, after which section 43.3 of S.B. 380 contemplates release to a Mental Health Court program because one exists in Clark County.

The Mental Health Court program only accepts people who are competent, but we already know these people are incompetent. They do not have the ability to understand rules, and many are on medication but still incompetent without probability of attaining competency. I do not know how they can enter the Mental Health Court program with any hope of success or be accepted into the program. If unsuccessful in this conditional release, they can be remanded back into custody at Lake's Crossing. After a hearing, a judge decides whether the conditional release should be continued, modified or terminated. I assume terminated means the person remains in custody of the Division for the length of his or her sentence. There are substantial due process and equal protection concerns. Sections 38 through 45 of S.B. 380 contain unfixable problems and should be stricken.

CHAIR AMODEI:
The hearing is closed on S.B. 380 and opened on S.B. 420.

SENATE BILL 420: Makes various changes to provisions relating to property. (BDR 13-1305)

SENATOR JOHN J. LEE (Clark County Senatorial District No. 1):
In 1997, I introduced a bill that worked on the Uniform Probate Code. Senate Bill 420 is a continuation of the work done on the original bill.

DON W. ASHWORTH (Probate Commissioner, Clark County):
In 1999, the Uniform Probate Code did not pass, although a substantial amount of it changed with A.B. No. 400 of the 70th Session. Senate Bill 420 attempts to bring unity to the code. The bill is bifurcated and the first part deals with the spendthrift trust and Title 12, which is the NRS probate section.

Section 1 of S.B. 420 changes the language to ensure everyone understands if they are, in fact, an interested party in regard to the trust as either a beneficiary or a trustee; they have the right to bring a petition.

Section 3 of S.B. 420 deals with notice in regard to the spendthrift trust. One is the public record filing with the recorder's office with regard to a deed. This time period starts the statute of limitations in regard to this statute or the filing under NRS 104, which is the Uniform Commercial Code statute. Those are already public records. We want it understood they will be taken into consideration insofar as the spendthrift trust provision is concerned in relation to this matter.

In subsection 4 of section 3 of S.B. 420, the definition of the "creditor" has the meaning ascribed in subsection 4 of NRS 112.150.

Section 4 of S.B. 420 contains language changes made by the Legislative Counsel Bureau.

SENATOR CARE:
As I read section 4 of S.B. 420, putting myself into the position of a judgment creditor, I am trying to ascertain whether it would be more difficult to attach the assets of a judgment debtor who becomes the settlor of a spendthrift trust to his own benefit.

COMMISSIONER ASHWORTH:
The changes in section 4, subsection 1 of S.B. 420 were made by the Legislative Counsel Bureau. Section 4 of S.B. 420 contains a change that did not come from the Legislative Counsel Bureau. To ensure no misunderstanding, this section says it is an exception. The part starting at line 5 does away with the exception if, in fact, the beneficiary is the settlor of the trust as well as the beneficiary. In other words, you cannot set up a spendthrift trust if you are the beneficiary and the settlor.

SENATOR CARE:
Thank you for clarifying it.

COMMISSIONER ASHWORTH:
Section 7 of S.B. 420 deals with succession where there is no will. It stops the inheritance at the nieces and nephews of brothers and sisters. There would be no inheritance to second, third, fourth or fifth nieces and nephews who the decedent probably did not know. It brings it closer to people the decedent would have known as brothers and sisters and their children. It was the change from the right of representation to the change per capita.

Section 8 of S.B. 420 brings the triple penalty into line with another statute. It deals with a personal representative who takes proceeds from an estate. If found that the proceeds should have been in the estate, but the personal representative has them, the penalty is triple damages. Another identical section relates to anyone, other than the personal representative, which is already triple damages. Therefore, this statute aligns with the prior statute insofar as triple damages are concerned.

There are four ways to handle estates in the State of Nevada. The first is in NRS 146.070 and called the set aside, which is a $75,000 or less estate set aside by one petition with a ten-day notice, but it goes to a specific group. It first goes to spouse and minor children. If there is no spouse or minor children, it goes to creditors and then heirs as set up under succession.

The second is summary administration in which the gross estate is less than $200,000; it must be published 60 days to the public instead of 90 days.

The third is general administration in which the estate is over $200,000 and must be published 90 days to the public.

Attorneys were taking the definitions under the set aside that says the estate for $75,000 is actually the net estate, which means the gross estate less encumbrances. An estate of $300,000 with $150,000 in encumbrances, which means the net estate is actually $150,000, lawyers define as a summary administration. We have to tell them it is not a summary administration because it is the gross estate, not the net estate. This requires them to return, convert the probate into a general administration and give another 30-day notice to the newspaper and the world in regard to that probate. From that vantage point, this statute makes the definition of summary administration, insofar as the amount of the estate, the same as the set aside, which is the gross estate less any encumbrances. Therefore, an estate of $300,000 with $150,000 encumbrances is a summary administration whereas it currently is a general administration. It saves money for the people we serve because attorneys will not have to refile, give notice and open up the creditors' period. This is a good change.

COMMISSIONER ASHWORTH:
Section 11 of S.B. 420 is a one-step matter of one petition, ten days and raising the amount from $75,000 to a $100,000 limit. There is one drawback—if your will says you want your estate to go to a third party, not your wife or minor child, this statute overrides it. It is a family statute set up for the benefit of the wife and minor children and goes in succession, which provision already exists. Raising the amount another $25,000 has never been a problem in 95 percent of estates. If it is a problem, perhaps it needs to state people must be married for a period of time before it becomes effective. This avoids people married two or three months suddenly swinging into this section.

Nevada Revised Statute 153.031 deals with testamentary trusts and NRS 164, under Title 13, deals, by reference, to inter vivos trusts. Section 12, subsection 1, paragraph (q) is added, which says, "Compelling compliance with the terms of the trust or other applicable law."

There are many inter vivos irrevocable trusts with trustees who are not doing anything. This happens when a husband and wife set up a trust, one dies and the survivor does not segregate or set up two separate entities. Section 12, subsection 3 of S.B. 420 allows a person to file a petition against the trustee if they are not acting. If the court finds in the petitioner's favor, the court has the alternative of allowing the money spent—i.e., the cost plus attorney fees—to be charged against the estate, trust or trustee. Why should

a beneficiary have to pay for something that benefits everybody, but he or she has to pay out of their own pocket? It is a situation in which if the trustee is at fault, he or she may not be held personally liable for payment of such costs unless the court determines the trustee was negligent in the performance or breach of his or her fiduciary duty. If the court finds that, the court has the alternative of saying the trustee has to pay for reasonable attorney fees and costs, which would be set by the court.

SENATOR CARE:
Pursuant to section 11 of S.B. 420, the will that does not provide for the surviving spouse or minor child is trumped by the statute—is this a common provision in other jurisdictions?

COMMISSIONER ASHWORTH:
Other jurisdictions have other ways to handle estates and most states have done away with dower. You give up something when you marry, which is basically what is done in this legislation. I am in my sixteenth year as probate commissioner. When I began, the amount was $25,000 and, since that time, it has been raised to $75,000. I feel good that the minor and the wife or husband do not have to go through a probate proceeding in order to get the estate, but I also realize in a situation where a will requires doing it some other way, the will has actually been emasculated. Senate Bill 420 does not change the statute.

CHAIR AMODEI:
The hearing on S.B. 420 is closed, and the hearing is opened on S.B. 292.

SENATE BILL 292: Enacts the Uniform Mediation Act. (BDR 3-1114)

SENATOR TERRY CARE (Clark County Senatorial District No. 7):
Senate Bill 292 is not about binding, or sometimes nonbinding, arbitration in which a finder of fact and witnesses tell their stories. This is an informal and relaxed mediation in which parties voluntarily go before an impartial individual to attempt to come to a resolution before turning to an attorney. This mediation can be done prior to filing a lawsuit and happen during litigation. It can even happen after trial because there is still possibility of an expensive appeal process. The parties say, "This does not make sense. The attorneys will get all the money. Why not find somebody to step in and help us resolve this matter?" That is what is meant by mediation.

The Uniform Mediation Act stems from the fact that the National Conference of Commissioners on Uniform State Laws determined approximately 2,500 statutes nationwide go to mediation. The problem is no fundamental uniform rules apply. For example, NRS 561.247, which is the agricultural loan mediation program, does not explain how mediation is supposed to proceed. Under NRS 383.170, there is a provision for mediation for disposition of disturbed remains when an Indian burial site is discovered. We are familiar with NRS 40, which has mediation for construction defect cases. Nevada has a couple dozen provisions for mediation in other circumstances as well.

Parties are not always sure what laws and/or rules apply, which led to S.B. 292. The significant provisions of this Act are in regard to confidentiality. It is important for people entering mediation to understand there are provisions for confidentiality. Sometimes mediation does not work. If the matter goes to trial, there must be assurance that certain communication during mediation is privileged—not necessarily the facts discovered in mediation but the communications of "he said, she said" and so forth. There is a provision that if the parties agree to mediate, they can opt out of the confidentiality and privileged provisions if they choose to do so.

A provision states there are no qualifications for a mediator because sometimes parties want to choose their own mediator. They may not want an attorney and would rather have a person with background in a certain area. It is left up to the parties to determine who they have for a mediator, whatever the qualifications.

SENATOR CARE:
There is a provision for disclosures of conflicts by the mediator. This Act has been approved by the American Arbitration Association, Judicial Arbitration and Mediation Service, National Arbitration Forum and American Bar Association.

I received a letter from Chris Beecroft, Arbitration Commissioner for the court annexed arbitration program in Clark County. There is a similar program for Washoe County. I would not want this Act to apply to the Nevada Supreme Court's mediation program because it contains provisions regarding qualifications for a mediator, such as ten years in legal practice as a judge and five years as a mediator. I would be agreeable to language specifying the Act would not apply to the Nevada Supreme Court's mediation program.

Sections 3 through 12 of S.B. 292 contain definitions.

Section 13 of S.B. 292 is the scope of the Act and does not include collective bargaining. Over decades of collective bargaining, that field has come up with its own rules of mediation and the drafters of the Act did not feel it necessary to add that entity. It does not include peer mediation or primary and secondary schools. Section 13 of S.B. 292 contains the provision wherein a party can opt out or all parties must agree.

Section 14 of S.B. 292 discusses privilege against disclosure, admissibility and discovery. Sometimes, facts are discovered in mediation, which is different than communications made during the course of mediation. Communications are privileged, although section 15 takes it to waiver and preclusion of the privilege.

Section 16 of S.B. 292 covers exceptions to privilege which are enumerated.

Section 17 of S.B. 292 prohibits mediation reports.

In regard to mediation of cases already in statute involving custody or visitation of a child, the mandatory language in sections 25 and 26 of S.B. 292 demonstrates that certain mediation reports are not filed with the court and do not go to the judge. These matters are already in litigation, and these sections maintain the provisions of confidentiality.

SENATOR CARE:
Section 18 of S.B. 292 covers confidentiality.

Section 19 of S.B. 292 requires the mediator to make disclosures. When the mediator is approached about mediation and a conflict is discovered, there is a provision for disclosure to all parties.

Section 20 of S.B. 292 covers participation in mediation and permits a party to be represented by an attorney or other.

Section 21 of S.B. 292 is international commercial mediation. A model law on international commercial conciliation was adopted by the United Nations Commission on International Trade Law on June 28, 2002. This section allows parties in mediation to pursue mediation governed by this Act as opposed to the model law because this Act has a broader scope of privilege and confidentiality. Parties may choose it if they are involved in international mediation.

Sections 22 and 23 of S.B. 292 are boilerplates the Committee has seen from other uniform acts.

Section 24 of S.B. 292, NRS chapter 40, provides an amendment consistent with the Act as to admissibility of a statement made by a party in the course of mediation, which would be privileged and confidential.

Sections 25 and 26 of S.B. 292 make clear that pursuant to this Act, as opposed to existing statute, reports of any mediator do not go to the court.

Section 27 of S.B. 292, NRS chapter 48, is a chapter that governs admissibility of evidence. The deletion is consistent with what the Act does.

We are not telling mediators how to do their jobs or discussing rules of evidence during the course of mediation. This legislation simply ties up loose ends and governs elements most essential to mediation and with which parties will be comfortable. It covers disclosures by mediators, issues of privilege and confidentiality, and the scope of the Act's application.

I submitted a letter from Trip Barthel (Exhibit C) from the Neighborhood Mediation Center in Reno who was unable to attend the hearing. He is seeking amendments which he and I will discuss further.

LEAH ELLENHORN STROMBERG, LCSW (Neighborhood Justice Center, Conflict Resolution Services, Department of Administrative Services, Clark County):
I am the supervisor in charge of the Clark County Neighborhood Justice Center. We are part of the courts and a partner-sister organization of the Neighborhood Mediation Center in Washoe County, started under NRS 244.1607 to provide residences of our respective counties with mediation services at no cost. Clark County does approximately 700 mediations a year.

I have questions and concerns about S.B. 292 relating to confidentiality of mediation. *Nevada Revised Statute* 48.109 details the confidentiality essential to mediation. We are happy to have that NRS in Nevada because it provides for the type of candor necessary for people to express themselves, reveal their interests and negotiate privately and confidentially in the mediation room. The only information we are currently required to disclose or breach confidentiality on are matters relating to threats of bodily harm and/or elder or child abuse. It is

consistent with mandates regarding breach of confidentiality for reporters in Nevada and we are comfortable with it.

There is concern that under S.B. 292, confidentiality may broaden to include comments made in private in the mediation center regarding other types of criminal activity. For instance, my neighbor has guns for which he has no permits or somebody in the mediation room is driving with an expired license. Those are the type things about which we would not like to breach confidentiality in mediation.

On the other hand, we are happy communications occurring prior to the mediation session related to setting up mediation, getting the backgrounds of the parties and so forth, are protected under S.B. 292. Currently, those communications are exposed and not covered by NRS 48.109.

Trip Barthel and I have discussed mutual concerns, and I concur with the comments provided in his letter, Exhibit C.

SENATOR CARE:
In regard to exceptions of privilege, particularly criminal acts, I will contact Mr. Barthel and ask him to share with members of the Neighborhood Mediation Center the thoughts of the drafting committee that put the uniform act together and explain the reason they went in that direction.

CHAIR AMODEI:
Ms. Stromberg, please provide the staff with your contact information to continue communication between yourself, Mr. Barthel and Senator Care.

The hearing is closed on S.B. 292 and opened on S.B. 212.

SENATE BILL 212: Revises provisions governing the issuance of nonrestricted gaming licenses in certain counties. (BDR S-998)

Senator Schneider requested S.B. 212 be removed from the agenda while he works with representatives from the State Gaming Control Board. Therefore, S.B. 212 will be re-calendared on or before April 6.

I request Committee staff to draft an amendment to the appropriate budget bill to fund additional positions in the Legislative Counsel Bureau for bill drafters due to the amount of work required of them in 120 days.

There being no further business to come before the Committee, the hearing is adjourned at 10:17 a.m.

RESPECTFULLY SUBMITTED:

Barbara Moss,
Committee Secretary

APPROVED BY:

Senator Mark E. Amodei, Chair

DATE: