MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fifth Session
May 6, 2009

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:09 a.m. on Wednesday, May 6, 2009, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman Tick Segerblom, Vice Chair
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman William C. Horne
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Richard McArthur
Assemblyman James Ohrenschall
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

Assemblyman Harry Mortenson (excused)

GUEST LEGISLATORS PRESENT:

Senator David R. Parks, Clark County Senatorial District No. 7
Senator Valerie Wiener, Clark County Senatorial District No. 3

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Nicolas Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Julie Kellen, Committee Secretary
Steve Sisneros, Committee Assistant

OTHERS PRESENT:

Brad Spires, Gardnerville, Nevada, representing Nevada Association of Realtors
Teresa McKee, Reno, Nevada, General Counsel, Nevada Association of Realtors
Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada
Rocky Finseth, representing Nevada Land Title Association, Las Vegas, Nevada
Mark Solomon, Chair, Legislative Subcommittee, Trust and Estate Section, State Bar of Nevada, Las Vegas, Nevada
Matthew Gray, Private Attorney, Reno, Nevada
Gordon Muir, Reno, Nevada, representing the State Bar of Nevada, Las Vegas, Nevada

Chairman Anderson:
[Roll called.] I will open the hearing on Senate Bill 128 (1st Reprint).

Senate Bill 128 (1st Reprint): Requires certain persons to record foreclosure sales and sales of real property under a deed of trust within a certain period of time. (BDR 9-841)

Senator David R. Parks, Clark County Senatorial District No. 7:
I am here to introduce Senate Bill 128 (1st Reprint). Currently, the law provides that a trustee must execute the power of sale on real property after a breach of obligation or lack of payment to the trustee. What we are finding is that when a property is foreclosed, quite often it does not get recorded for many months and upwards of more than a year. It is recorded only when a buyer is found.

Section 1 of this bill amends the existing law to require the beneficiary of the deed of trust to cause the recordation of the sale of the property with the appropriate office of the county recorder within 30 days after the date of sale and make the beneficiary liable for certain damages for failure to cause such a recordation.

Section 2 of the bill amends existing law to require the sheriff who conducted a foreclosure sale pursuant to such an action to record the sale with the appropriate office of the county recorder, also within 30 days.

The bill did have an amendment put on it in the Senate, and we do have a request to make a minor change to what was put into the amendment in the Senate. That will be presented to you.

I do have two individuals here who would like to provide testimony.

Brad Spires, Gardnerville, Nevada, representing Nevada Association of Realtors:
As Senator Parks mentioned, when the property is sold, it is oftentimes not recorded through foreclosure, or it is recorded under a nominee who has no address and no way of being contacted. What this means is that from a homeowner's perspective, and from a homeowners' association (HOA) perspective, the HOA does not know how to contact these people, and the only person they can bill is the previous owner who has since left, and nobody knows where that person is either. Everyone who has lived in an HOA has seen the homes sitting with what we in the industry now call real estate owned (REO) landscaping, where the grass is dying, the house is falling into disrepair, and the value of the surrounding homes is being brought down. The HOAs today are in such dire straights because of the number of properties that are in foreclosure.

As a sidelight, there are a million homes in foreclosure nationwide right now, and there are six million more in the pipeline with that number growing every day. The problem continues to exacerbate itself.

What happens is that the HOA, and the people who are remaining and paying their dues, have to step up and pay for the maintenance of this property. The share of that individual who is not paying has to be paid for by reserves of remaining funds in the association, and special assessments come forward and that is a negative impact for everybody who owns homes in that HOA. The only way to absorb the cost of that property is by the people who live there. Many of these people are hanging on by a thread trying to make their house payment and HOA dues. When you throw in a $1,000 special assessment because the HOA reserves are going down from paying for these homes that are

not being paid for by the nominee that owns the home, whom the HOA cannot find, it is a downward spiral that gets worse and worse. While the HOA has the ability to lien for six months, many of these homes are out there for a year or more.

As a direct result of the delay in recording, it exacerbates the situation and makes the other people in the HOA pick up the slack. We would encourage you to support this bill, and we think it will be very helpful for everyone who is in an HOA in Nevada.

Teresa McKee, Reno, Nevada, General Counsel, Nevada Association of Realtors:
I will explain what we have done with this proposed amendment (Exhibit C). This does not change the substance of what we are trying to do, rather they are technical amendments. After speaking with the escrow and title companies and trustees who are handling these sales, we found out we were using some terms that would possibly make their job more difficult. In talking to them, we found out what terms we need to use exactly to make their job flow and not tie up the foreclosure process. That is not our intent, and we do not want to change anything to cause things to move slower in any way.

We still require recordation within 30 days, but in talking with the trustees, the way we structured it now is that there are two options. Either the trustee who is handling the sale will record the trustee's deed within 30 days of the sale, or there are circumstances where a trustee may have instruction not to record the sale or the successful bidder in the foreclosure is not the trustee's client. The bidder may be an individual who has no tie to the trustee who bought the property, and in that case, the trustee shall deliver that trustee's deed to the successful bidder within 20 days of the sale. The bidder shall then have 10 days to record that trustee's deed.

Instead of using the term "beneficiary," we changed that term to "successful bidder" because after a foreclosure sale, the term "beneficiary" does not fit properly. It is not a term that is used after the sale; only before the sale. We changed it to "successful bidder" to make this process cover all types of foreclosure sales.

Chairman Anderson:
This will be a question for our Legal Division as to whether we are using language that is preferable to the real estate section or to the Legislative Counsel Bureau (LCB). We recognize that it is a problem.

Are we setting a penalty in place that was not there before regarding the $500?

Teresa McKee:
No, that penalty, I believe, was agreed to on the Senate side. The penalties are in the 1st reprint. We changed it to the sum of up to $500 rather than a flat $500. We do not want to turn this into a situation where someone gets the idea that he can file a case and get that $500 just because no one wants to fight over the $500, so we changed that. That was in the 1st reprint.

Chairman Anderson:
The Senate had agreed to take it out, and now we are putting it back in? Or was it not intended to be removed?

Teresa McKee:
I do not see that it was removed. In the 1st reprint on page 4, lines 12 through 18 are where the civil penalties are located. In my amendment, it is paragraph (b). I did not mean for it to appear like it was taken out.

Chairman Anderson:
I was assuming that all the dark lettering was new language, but I see that is not the case.

Teresa McKee:
I apologize. We did not have the ability to make color copies for the Committee. The only language we are taking out is the strikethrough in my proposed amendment.

Chairman Anderson:
And that is the 30 days?

Teresa McKee:
That is the 30 days and a couple of phrases after that.

Chairman Anderson:
And the "senior priority" and "successful bidder."

Teresa McKee:
Correct.

Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada:
We supported this bill on the Senate side. In looking at the amendment this morning, I believe there is an error. In the amendment as presented to you, in paragraph (b), it still says the "beneficiary" on line 3. I think that should be "successful bidder." I will leave it to the sponsors of the amendment. They

said that they took out references to "beneficiary," and I think they were right in changing it to "successful bidder," but it seems that they missed that one.

Chairman Anderson:
I am sure that Legal will comb through it pretty well for any grammatical errors. I am sure that Mr. Anthony appreciates you pointing it out.

Are you in support of this piece of legislation?

Bill Uffelman:
I am in support, as we were on the Senate side, even with the amendment.

Rocky Finseth, representing Nevada Land Title Association, Las Vegas, Nevada:
The Association is in support of S.B. 128 (R1) and the proposed amendment. We appreciate Senator Parks bringing forward the proposal.

Chairman Anderson:
I will close the hearing on S.B. 128 (R1).

Let us turn our attention to Senate Bill 277.

Senate Bill 277: Revises various provisions relating to estates. (BDR 12-657)

Senator Valerie Wiener, Clark County Senatorial District No. 3:
Mr. Chairman, if I could ask the indulgence of the Committee and Chairman, could I give a generic introduction to Senate Bill 277 and Senate Bill 287 (1st Reprint) and turn it over to those who know more about these measures than I do? I am not here to address content in either measure.

Chairman Anderson:
That is okay.

Senator Wiener:
Senate Bill 277 deals with estates, and S.B. 287 (R1) deals with personal financial administration. I brought both of these measures at the request of my longtime friend Mark Solomon and those who work in these areas of the State Bar of Nevada. They have been updating and cleaning up according to the needs of our communities in our state to fine-tune and modernize these two areas of law. I was privileged to be the person who carried these bills on behalf of the Bar.

Anything specific to either of the measures, Mr. Solomon and the other representatives can address them more specifically.

Chairman Anderson:
Would you like me to start in the south or up here in the north?

Senator Weiner:
Start in the south with Mr. Solomon.

Mark Solomon, Chair, Legislative Subcommittee, Trust and Estate Section, State Bar of Nevada, Las Vegas, Nevada:
The Probate and Trusts Legislative Subcommittee consists of 15 members with seven in the north and eight in the south, including both Probate Commissioner Linda Bowman, from Washoe County, and Clark County Probate Commissioner, Wesley Yamashita, who is here with me today to testify. I understand that we have two other members of our Committee up in the north with you today, Matt Gray and Gordon Muir, who will also testify with respect to both bills.

The Subcommittee spent about two years trying to update *Nevada Revised Statutes* (NRS) Titles 12 and 13. Senate Bill 277, with respect to estates and wills, and S.B. 287 (R1), with respect to trusts, are the result. The Subcommittee solicited general comments throughout our own section but also outside of our section to the general Bar, trust companies, banks, people who represent interests of creditors, and beneficiaries to solicit their comments on how our statutes were working and if anything needed to be fixed. We have had an ongoing set of judicial precedent over the last few years that have also affected these two titles. With all of this in mind, we collected thoughts and ideas from the broad spectrum of people that we spoke to, brought those ideas back into Subcommittee, and reached a consensus on a number of them that now appear in these bills.

For convenience, we tried to separate the bills into one that dealt primarily with wills and estates, which is S.B. 277, dealing with Title 12 of NRS. The second bill, S.B. 287 (R1), deals primarily with trusts and Chapter 163 of NRS.

We would like to thank the Legislative Counsel Bureau (LCB) for its tremendous assistance in putting these bills together. They are extremely technical by the nature of the laws that we are dealing with. The LCB did a phenomenal job of working with us to keep the intent clear and greatly aided us in articulating as such.

I would also like to thank Senator Wiener for sponsoring these bills and your Vice Chair, Tick Segerblom, for his assistance in helping us present these today.

I have been selected to provide the comments with respect to S.B. 277, and Matt Gray will handle the comments with respect to S.B. 287 (R1). With that, I would like to provide a brief overview of S.B. 277.

Mark Solomon:
We have submitted a written account of the sections (Exhibit D).

Chairman Anderson:
We have all received the detailed section-by-section explanation of the bill.

Would you touch on what you think may be the more controversial points? You do not need to go over it section-by-section as we have outstanding attorneys on the Committee.

Mark Solomon:
I do not know if there are any terribly controversial points, but I will go over some of the bigger highlights briefly.

There are several sections in S.B. 277 that deal with the issue of adult adoption. The feeling of the Subcommittee and the people who we talked to is that when a person adopts another adult, the adopting parent expects that child to be his heir and the natural object of his bounty for his will and his trust, but that is not true with respect to that adopting parent's other heirs. There are several sections in this bill that now say that an adopted child is deemed an heir of the person who adopts them for all purposes, whether it is a trust, will, or intestate succession. For other relatives' estates and trusts, that adult adopted child will not be considered a child unless expressly stated.

We have a couple sections on the issue of a pretermitted spouse and child. Current law says that a spouse or child who comes into existence after somebody makes their will can take their intestate share against the will and severely restricts any proof as to other provisions made. In this day and age with the advent of trusts being so prevalent, the Subcommittee thought it was wise to make it clear that if that spouse or child is provided for in a trust or some other way that is clear it was the intent to provide, the will should not be revoked.

We made an effort to deal with the issue of lost wills. It is not uncommon for someone to die and others cannot find the will, but it is clear, under the circumstances, that there was never any intent to revoke that will. The most obvious example that comes to mind is when someone dies leaving a trust that disposes of their entire estate, and the will was merely a "pour over" will that said, "If I forgot to put any of my assets into the trust, then probate them and

send them back to the trust for disposition because that is where I have all of my testamentary desires set forth." Under current law, if you cannot find the original of that will, then that property goes intestate defeating the intent to let it go through the will. We have softened up the requirements and made it easier to prove a lost will when it is obvious that it was not intended to be revoked.

We have codified the issue of the validity of no-contest laws, both in a will and a trust. We have tried to follow, fairly closely, the Nevada Supreme Court's pronouncements on the subject. We have tried to codify it so everybody understands what Nevada law is with respect to an attempt by a testator in a will, or trustor in a trust, to set forth what they consider to be a contest and how somebody should be written out of that instrument if they try to defeat any of the intention.

Assemblyman Horne:
There are a couple things that give me a little concern, and those are the provisions in sections 2 and 3 dealing with the spouse and the child outside of the will. The phrase "the spouse is provided for by a transfer of property outside of the will and it appears that the maker intended the transfer to be in lieu of a testamentary provision" concerns me, especially the "it appears" language. It seems there should be a way to get that tightened up.

Secondly, in the child portion, I get concerned about who we are talking about. Are we talking about minor children or any child? What if the testator, or the child that we are talking about, is under the age of 18? I think they should be presumed to be in the will as we currently have it.

Mark Solomon:
We are open to any amendment if the word "appears" creates an issue. We thought it did not because the sense and flow of this statute is that the will will be deemed revoked unless somebody can come in and affirmatively establish that the child in one case, or the spouse in the other case, was intended to be provided for by some other instrument. For example, a classic case would be a "pour over" will where we have a flow of assets that did not get over to the trust. It must be probated through the will, but if you go to the trust, it is all for the benefit of the child or spouse, and it is clear that the estate plan intended to benefit the spouse and child, but maybe it does not go 100 percent to them. The spouse or child comes in and says that they did not expressly name me in that will, which the current statute requires, so he gets to take his intestate share of what is in the estate on top of what he will get under the trust even though the court, when presented with that circumstance, would otherwise feel that it is clear that it appeared the trustor intended to provide for that child and

spouse in a different way. I think we have covered your concern in the sense that you have to understand that it is going to be presumed to be revoked, and someone will have to come in and show the court that it is not what the testator intended. That is the sense of this statute.

With respect to the minor, it does not make a distinction between a minor child and an adult child because under the current law, either child would be a pretermitted child if they had not been named, excluded, or otherwise provided for expressly in the will. Under the statute, it does not matter whether you are a minor or an adult, but it would have the same sense. You would have a presumption that it is going to be revoked as to them unless somebody can come in and convince the court that it was clear that the testator or trustor intended to provide for them some other way. You have court protection with this.

Assemblyman Horne:
Thank you for the clarification. On the provisions on the adoption of an adult, if this situation as to where you have, for instance, foster children who have been in the home for quite some time, let us say from the age 10 on, but they had never been adopted. The family chooses to adopt this child after they turn 18 years old because they are going off to college or wherever, and it would benefit them. Can there be provisions made to protect such circumstances like that? In the scenario that I am thinking about, a child is with this family for eight to ten years until going off to college, and as far as they are concerned, grandpa is their grandpa, but the adoption did not take place until after they were an adult. It should be presumed that the child is still part of the family and should be considered to be taken in the will.

Mark Solomon:
We address that issue in terms of where the default should fall. By way of explanation, it was the sense of the Subcommittee that the overwhelming number of people that we talked to about this issue were more concerned about the adult adoption occurring as a way of sliding into some remote relative's estate plan as a technical error than it being a legitimate issue like you have just described where you have had a long relationship with the child, and for some reason, you do not adopt until late into adulthood. There will be other scenarios we could posit where it would be a loving, true family relationship and not just some type of ruse to get into a remote relative's estate. The Subcommittee erred on the side of the default rule being that a remote relative would not want an adult adoptee to be their heir because they did not have anything to do with adopting that adult. On the other hand, if they adopted as a child, it is more likely they were raised in the home and integrated into the family and the relative would want that person to be considered an heir of theirs.

What we did do to deal with the circumstance as you posited is to give that remote relative the right, at any time, to set forth in his testamentary instrument whether he wants adult adopted children of some other relative to be considered one of his heirs. That is why we cut the distinction the way we did. We felt, in the situation you posited, if this newly adopted adult child was truly integrated into that family, and the remote relatives considered him part of the family, it would be likely that the relatives would name that person as an heir anyway.

Assemblyman Horne:
I can appreciate that, but there is also the instance where that parent who adopted this adult child predeceases their parent, and those children take an equal share, but that adopted child would not. If it could be done, I think you should explore a way to show that the relationship had long existed and he had always been a member of that family, and that can override this provision and you would not have to worry about those technical slide-ins.

Chairman Anderson:
Mr. Solomon, if you could explain section 10 of the bill and how we are expanding the representatives.

Mark Solomon:
Yes, it is in both sections 9 and 10. Sections 9, 10, and 11 deal with two concepts, and I will cover those quickly.

We thought it was appropriate to give the court discretion to determine whether someone who has been convicted of a felony should be disqualified from acting as a personal representative, either as an executor under a will where he is named or as a personal representative of an intestate's estate. It was the feeling that there are some felonies that have nothing to do with qualities of a person that should automatically disqualify them, so we added provisions to give the court that discretion to allow such a person, even though he has a felony conviction, to serve if the court determines it would be appropriate under the circumstances.

The other change affected by sections 10 and 11 is that currently, a non-Nevada resident cannot serve as a personal representative unless they associate a copersonal representative who is a Nevada resident or a Nevada banking institution. We added one more category that we thought was appropriate. The court has discretion to allow a non-Nevada resident to serve as a personal representative when that person has been named as a personal representative under a will that has not yet been admitted to probate. A classic example of that would be if you named your brother from California as

executor, but someone else brought a will contest and your brother was not involved in that will contest and had no stake in it. Even though you wanted him to serve as your executor, he could not serve as a personal representative during that entire period of the will contest because he was a non-Nevada resident, unless he went to the expense and effort of hiring a coadministrator. This would allow the court to appoint that person as personal representative during the pendency of that contest until the will was admitted.

Chairman Anderson:
That is my understanding from what we had done earlier with needing someone here in Nevada or an associate in Nevada to carry this out. Will this expand my ability to state in my will someone who is not a resident of the state to take on administrator responsibilities without having to fight to prove that I have that right?

Mark Solomon:
Yes. The intent of this was to honor the testator's desire to have a particular person to run his estate and to hold down the cost of having a coadministrator come in here from Nevada when it was not necessary.

Chairman Anderson:
Does it do away with the requirement that you have to be a resident of the state since I can name anyone I want in my will?

Mark Solomon:
No, it would still have some effect unless you had that circumstance where the testator did name a non-Nevada resident as the executor of his will and the court deemed that person suitable to be the administrator during the pendency of the contest or other thing that prevented the will from coming in.

If you would like, I can explain a couple more quick issues that the bill presents.

Chairman Anderson:
I think you have got it unless you feel compelled.

Mark Solomon:
I do not.

Matthew Gray, Private Attorney, Reno, Nevada:
I have nothing to add to S.B. 277.

Chairman Anderson:
I will close the hearing on S.B. 277.

I will open the hearing on Senate Bill 287 (1st Reprint).

Senate Bill 287 (1st Reprint): Makes various changes concerning personal financial administration. (BDR 13-658)

Matthew Gray, Private Attorney, Reno, Nevada:
I will start out with a quick summary and hit on some of the major changes and proposals that we have set forth in this bill (Exhibit E).

What we have seen in the last several years are individuals and families actually shopping for forums and for the right state and right laws that fit their estate planning needs. A number of other jurisdictions had been proactive in enacting statutes that make trust planning more flexible and provide some other advantages, and Nevada has somewhat fallen behind in that area. What Senate Bill 287 (1st Reprint) intends to do is bring Nevada back on par with some of the statutes and make Nevada a more friendly place to do trust business. It will also update some fairly old statutes that we have in place and, ultimately, provide some more flexibility to the trustee and beneficiaries of all types of trusts that can be created.

Some of the major proposals that we are suggesting begin in section 37, which would give the trustee of an existing trust the ability to decant the assets. What that does is give that trustee the ability to exercise a power of appointment to appoint those assets to a new trust. Certain circumstances where that may be useful would be to improve the administrative provisions of the trust to alter the trustee arrangements, consolidate multiple trusts, divide trust property into separate trusts, and correct drafting errors, among a number of other things. One common circumstance may be you may have an irrevocable trust that is decades old, and it has old administration provisions that do not make sense or fit in today's circumstances. What this would do is permit the trustee to essentially create a new trust with updated administrative terms and appoint the assets of the old trust into this new trust.

Another somewhat major proposal would be occurring in sections 46 through 49. What this would do is permit the trustee of an income trust to convert that trust to a unit trust. An income trust would be where a beneficiary is entitled to all of the income every year. In this circumstance, the trustee could convert that trust to provide that a certain set percentage of the entire trust corpus would be distributed out to that income beneficiary every year. For example, this year where investment returns are very low, meaning the income coming into the trust would be very low, and in some cases $0, the income beneficiary would get nothing. In this circumstance, if you made the unit trust conversion, rather than just relying on the income, the trustee would be guaranteed to get a

certain percentage of the trust corpus distributed out every year. The other thing it permits is that it gives the trustee greater latitude in investing for total return. When you have an income beneficiary and remainder beneficiaries, you will have competing interests, and you will have the income beneficiary encouraging the trustee to invest in investments that will produce a large amount of fiduciary income. The remainder beneficiaries are going to be encouraging that trustee to invest for growth because they know that is what they will be getting in the end. What this does is allow the trustee to manage their portfolio in a way to seek a total overall return of the trust without having to balance the income beneficiary's needs and the remainder beneficiaries' needs and instead distribute a set amount of trust corpus to that income beneficiary on an annual basis.

Chairman Anderson:
For example, I have my stock portfolio and trust, and the income from that portfolio is not reinvested but rather distributed within the trust among my grandchildren and part of it into assets for use by my spouse. However, the amount of money going in declines because the stock market is not doing well, and as a result, the flow of dollars into those various funds and various subtrusts within the trust document itself are not receiving assets. Now, the amount available to the spouse is not as substantial either. Will the spouse be able to transfer money from the subtrusts?

Matthew Gray:
Probably not in that circumstance because there are many safeguards built in regarding converting an income trust to a unit trust. One of those would be if you have multiple beneficiaries with one who is entitled to income but one who is entitled to principal out of the same pot of assets in a trust; the conversion will not make sense at this point because it is not a pure income trust. This would arise where the spouse is the beneficiary of this trust for her lifetime and is entitled to the income from that trust and the children are the remainder beneficiaries and get the assets of the trust once she passes away. Where this comes into play is when the surviving spouse may, say, go out and invest in income-tax-free bonds where it will be a small rate of return, but I know that it will be coming in as fiduciary income, whereas the remainder beneficiaries will be saying invest in equities and capital gain assets where it will be fiduciary principal. Rather than having those competing interests, we will be able to permit these trustees to get a balance portfolio that you or I would do in our everyday lives to try to maximize the return while still weighing certain risks but permit that surviving spouse, the income beneficiary, to at least be guaranteed a certain sum of money on an annual basis.

Assemblyman Cobb:
If I understand, you are now looking at the trust, especially if combining two trusts, in terms of the overall worth long-term. Does this affect the valuation of assets within a trust especially given the current economy with real estate the way it is? One of the issues I think is coming up more often is that those assets are upside down. So when you are talking about what the will of the remainder would be rather than those receiving income, how would you be valuing assets, and would it be greater long-term value of the assets or immediate value of the assets?

Matthew Gray:
The unit trust percentage would actually be determined on a rolling three-year prior average value of all the trust assets. Every year, we would be revaluing the assets to determine what amount is distributed out to that income beneficiary. By doing this, it is not going to have an affect on the value of the assets, per se, but the value of the assets is going to have an affect on what amount is distributed out to this beneficiary.

Assemblyman Cobb:
I am talking more about when you are reorganizing the trust. This gets a little fact-specific, but for instance, if one beneficiary is reaching a certain age, and you need to start distributing some of the corpus and you also have remaindermen, you need to make the valuation, but you are saying, "Let us start looking long-term in terms of what the overall value of that property would be down the line." The issues I see coming up are that you are dealing with property, which current value is upside down, but the remaindermen are in it for the long-term, so you could forecast that is going to be different down the line. However, is that fair to the remaindermen when you are dealing with an immediate distribution of the assets to an individual who has reached a certain age and is a beneficiary, and you need to make that distribution?

Matthew Gray:
If the trust is going to call for an outright distribution of trust corpus, and not just income, for example, if someone is going to turn 30 years old and is entitled to 30 percent of the trust, this would not have an affect on it. That person would still be getting 30 percent of their trust outright at that time. In your example, we are talking about a unit trust interest of anywhere between 3 to 5 percent of the trust corpus on an annual basis that can be distributed out to this income beneficiary. Right now, real estate values are depressed, so their 3 to 5 percent is going to be depressed because the real estate values are down. As those rebound and start coming back up, then their distribution amount is going to be increased, but the remaindermen are also protected to the

extent that assets will increase over time and will end up in the trust corpus and benefit them as well.

Assemblyman Cobb:
An asset is upside down right now. We are assuming there will be a turnaround long-term. Is that a proper determination to make within the understanding of a fiduciary due to all of the beneficiaries and to hold on to that asset now for the long-term of the remaindermen and distribute the corpus now to the beneficiary who has reached a certain age? The thought being that you do not want to sell an asset that is upside down right now and split equally between the two parties because you want to hold onto it long-term if there is going to be a turnaround in the market.

Matthew Gray:
Going on an asset-by-asset basis, one of the fundamental duties a trustee has is to properly invest trust assets. If they are holding onto a piece of property that has declined in value and is underwater, it is exclusive of what we are trying to do here. The trustee has a duty to evaluate that and make a determination as to whether or not this is a sound investment and hopes that it comes back. There are a number of circumstances, especially if in your example you said the property is underwater. Are they still continuing to make payments on that property over time? We are seeing a lot of that right now, and in some circumstances, the answer is no, it does not make sense to continue to make those payments. It may make sense to let it go into foreclosure and try to get a short sale approved. The facts and circumstances are going to determine what the trustee should properly do. If they have a sufficient amount of liquidity and are confident that this is a good piece of property and it will rebound in value, then maybe they should continue to pay it off.

As it relates to the conversion to a unit trust from a typical income trust, in that circumstance, if this property is underwater, it is not an income-producing property; it is not a rental property. The income beneficiary is certainly getting hurt in that perspective because it is not producing any income to be distributed out to this beneficiary.

Assemblyman Cobb:
The added interest there in terms of how you look at these different assets, is that it is producing income but not enough to cover the mortgage. It is technically losing money.

Matthew Gray:
If it is losing money, then the income beneficiary would be getting nothing until the conversion is made.

Chairman Anderson:
I think the question comes down to: nothing in this bill changes the responsibility for the proper management of the assets within a trust by the trustee who has the responsibility for making those investments, both long-term and short-term, and managing the trust in such a fashion that the people within it are not going to be harmed because of his mismanagement of it. For example, I could own a billion shares of General Motors Corporation (GMC), and it was in a great position three years ago but not now. Is that my responsibility as trustee that GMC fell? Is that not the question? If any piece of property falls into a similar situation, for example, I could be the owner of a $1,000,000 home, and now it is only worth $100,000. You do not change that responsibility within this statute. Those kinds of questions remain exactly as they always have been.

Matthew Gray:
You are exactly right. The fiduciary duties of the trustee remain the same.

Chairman Anderson:
That is not the nature of what you are trying to change?

Matthew Gray:
No.

Chairman Anderson:
Are you trying to clarify the ability to manage the trust by all of these programs?

Matthew Gray:
That is correct. This also somewhat permits the trustee to meet his fiduciary duty impartially between the remainder beneficiaries and the income beneficiary.

Chairman Anderson:
He gets to rank those assets in terms of whether there should be liquidity to them as opposed to those that are more static and can wait for the long-term response.

Matthew Gray:
Correct.

Assemblyman Carpenter:
In the handout, under section 37, number 2, it says "altering trustee arrangements." Could they actually rearrange this trust to make it into something it was not supposed to be? If someone entered into a trust years

ago for a specific purpose, can they alter the meaning of that trust that was set up years ago?

Matthew Gray:
In terms of altering the meaning of the trust, no, they could not. In section 37, there are certain safeguards built in to make sure the beneficiaries of that existing trust are protected. For example, one of those is that the power to decant cannot be exercised if the second trust, the new trust, includes a beneficiary who was not a beneficiary of the original trust. Beneficiaries need to remain the same, but what could possibly come up is if the trust no longer made economical sense, and it was starting to be depleted, and it was directed to be held in trust for a lifetime, you could potentially alter it to say that there was an outright distribution at some point down the road. It does build in flexibility. Certain things of the original trust could be changed. There are also additional safeguards in here by providing that the trustee give the beneficiaries, prior to taking any action, a notice of proposed action. The trustee would send this notice of what he is proposing to do to all of the beneficiaries, and the beneficiaries have a certain period of time to object to that.

Assemblyman Carpenter:
Does this have to go to a court to be decided?

Matthew Gray:
Absolutely. If there was an objection, then yes, it would go to the probate court in Washoe County or Clark County or into the district courts in any other county.

Assemblyman Carpenter:
There are people "in the brush," as I call them, who are doing trusts. How do they learn what these changes are? Is there any way that you contact them and say that the statutes and language of trusts are changing? What kind of chance do they get to review them, or is it an in-house deal with the Bar?

Matthew Gray:
If these changes are enacted, I am planning on writing an article that will hopefully be distributed, or I will be doing presentations to bring people up to speed as to what has been changed. In terms of what we have done prior to this point to get feedback, I gave a presentation to one of our Bar committees a couple months ago on what we were proposing to change. We have gone to the Trust and Estate Section of the State Bar of Nevada, in addition to other practitioners, banks, and other fiduciaries soliciting comments in what we would like to change here.

Chairman Anderson:
Mr. Gray, I think our concern is that while there tends to be a particular section of the Bar that is terribly concerned about this and actively participating in it, there are many other practitioners who may occasionally deal with wills and trusts but that is not the primary focus of their work. There is a mechanism within the State Bar of Nevada to provide for all of these uniform codes, State Bar of Nevada actions, and *Nevada Revised Statutes* (NRS) changes so that business law sections are well reviewed. The people who practice in this area generally try to keep themselves abreast of both the current federal statutes and tax codes. Is there a regular mailing that goes out?

Matthew Gray:
There is. The changes being made here are not going to set people up to fall into traps. It is not creating new statutes that people are going to need to comply with. These are elective items. If a client came to an attorney who did not regularly practice in trusts and estates and wanted to do a particular thing, the attorney can go through these chapters to find out if the client could do it. It is not going to set them up so they are unknowingly doing something that they have always done in the past that is now incorrect. That is not the case with these.

Chairman Anderson:
It is a code maze that allows you to take into consideration potential choices that people are going to have to make dependant upon the complexity of their particular trust.

Matthew Gray:
That is correct.

Chairman Anderson:
Mr. Gray, is there any other particular part of this that you feel compelled to tell us why this is a great piece of legislation and should be immediately passed?

Matthew Gray:
I think that is all.

Chairman Anderson:
Mr. Solomon, one of the concerns that was raised could potentially come to you. Is there any additional information that you need to make the Committee aware of for either S.B. 287 (R1) or S.B. 277?

Mark Solomon, Chair, Legislative Subcommittee, Trust and Estate Section, State Bar of Nevada, Las Vegas, Nevada:
Yes, I indicated in my opening comment, tersely, that we did make a concerted effort to broadcast what we were doing in committee, not only to the trusts and estates lawyers who have the most interest in this, but also to the general Bar. We have published, in several media, the work of the Subcommittee, and we made regular reports through the Bar and through our channels about what we were doing. We actively solicited comments from members of the Bar, not only in trusts and estate sections, but also in other sections where we thought they would have any interest. We went to banks, trust companies, and creditor groups; we felt that we had fairly good input with respect to the legislation we are proposing.

Chairman Anderson:
The bank and trust companies are generally in support of the legislation and have not appeared in opposition?

Mark Solomon:
On the Senate side, they appeared in support of both bills.

Chairman Anderson:
Mr. Muir, would you like to get anything on the record?

Gordon Muir, Reno, Nevada, representing the State Bar of Nevada, Las Vegas, Nevada:
I do not think I would add much more.

Assemblyman Segerblom:
I wanted to thank Mr. Solomon for all of the work he did on behalf of the State Bar. He is a fantastic attorney.

Chairman Anderson:
I will close the hearing on S.B. 287 (R1).

The Chair will entertain a motion.

> ASSEMBLYMAN COBB MOVED TO DO PASS SENATE BILL 287 (1st Reprint).
>
> ASSEMBLYMAN GUSTAVSON SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN MCARTHUR AND MORTENSON WERE ABSENT FOR THE VOTE.)

[The meeting adjourned at 9:26 a.m.]

RESPECTFULLY SUBMITTED:

_____
Julie Kellen
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 6, 2009 **Time of Meeting: 8:09 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 128 (R1)	C	Teresa McKee	Proposed amendment.
S.B. 277	D	Mark Solomon	Written testimony.
S.B. 287 (R1)	E	Matthew Gray	Written testimony.