MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
March 24, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:39 a.m. on Tuesday, March 24, 2009, 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 Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

GUEST LEGISLATORS PRESENT:

Senator William J. Raggio, Washoe County Senatorial District No. 3

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Kathleen Swain, Committee Secretary

OTHERS PRESENT:

Jerry Watson, Chief Legal Officer, Allegheny Casualty International Fidelity Associated Bond
Judy Cox, American Civil Liberties Union of Nevada
Mark Woods, Deputy Chief, Division of Parole and Probation, Department of Public Safety
Mark Solomon, Probate and Trust Section, State Bar of Nevada

Wesley Yamashita, Probate Commissioner, Eighth Judicial District Court, Clark County
Matthew A. Gray, Trust and Estate Section, State Bar of Nevada
Julia S. Gold, Trust and Estate Section, State Bar of Nevada
Bill Uffelman, Nevada Bankers Association

CHAIR CARE:
The hearing is open on Senate Bill (S.B.) 221.

SENATE BILL 221: Establishes a program of parole secured by a surety bond. (BDR 16-926)

SENATOR WILLIAM J. RAGGIO (Washoe County Senatorial District No. 3):
I came across a model bill that would have good application in our State where we have overcrowding in prisons and are considering various release plans for inmates. This bill is known as the Conditional Early Release Bond Bill, which I submitted to the bill drafter. Senate Bill 221 in its present form bears little resemblance to what I had intended or what is contained in the model bill. I direct your attention to a replacement for that language (Exhibit C).

As a result, I contacted Jerry Watson, who is familiar with the surety bond situation. You have Mr. Watson's resume (Exhibit D, page 6). I invited Mr. Watson to explain to this Committee how this might work to the benefit of our State.

Please disregard as much as possible the language in S.B. 221. Mr. Watson will address the suggested amendment, Exhibit C. He will describe his experience and why this is beneficial to the inmates, their families, supporters and the State. It has potential economic benefit. Mr. Watson spoke with Director Howard Skolnik of the Department of Corrections earlier in the year. I spoke with Mr. Skolnik, and he had some interest. I have also spoken with the Department of Parole and Probation. They have some concerns as they looked at the bill in its original form.

JERRY WATSON (Chief Legal Officer, Allegheny Casualty International Fidelity Associated Bond):
I have represented insurance companies who underwrite criminal court appearance bonds for the last 41 years. I support S.B. 221. I have some misgivings regarding the bill, and I have some substitute language to suggest for

your consideration in Exhibit C. This suggested language will address my concerns with S.B. 221 and perhaps the concerns of others.

The commercial bail bonding industry is an adjunct to and support of the criminal justice system and all the state and federal agencies working in that field. We do not intend to supplant any activities of those agencies. Senate Bill 221, in its current form, would seek to privatize some functions of Nevada's parole and probation workers.

The bill would impose upon the insurance company the obligation to establish drug-testing facilities, monitor and control inmates released early from prison, and report to the releasing authorities any noncompliance of those released early. We have never done this before. Our role has always been to support probation and parole officers, but never to take their place.

It would be financially prohibitive for us to engage in the business as laid out in the bill. None of my clients would participate in the program as it is currently drafted.

In the last few years, our industry leaders have been cognizant of problems related to early prison release. With the epidemic of prison overcrowding, correctional facility authorities must release prisoners early to make room for new prisoners.

The legislatures of our various states have done a good job passing legislation tough on crime. However, in doing so, they have exacerbated the overpopulation problem in state prisons. The problem with early releases is threefold—noncompliance with early release conditions, a high recidivism rate among those released early and participants absconding. This increases the number of crime victims in the State.

Our industry is interested in this problem because it is the same problem we have successfully dealt with for almost 100 years. Of those released from pretrial custody on our bail bonds, we have an excellent conditions-compliance rate. We have a low recidivism rate, and we have few participants absconding. Approximately 80 percent of those who abscond are retrieved into custody. Consequently, of those we bond out, we pay a bond loss on a little less than 2 percent.

The simple secret to our success is called the circle of influence. To illustrate, someone wants an inmate out of pretrial custody—perhaps a relative, employer, friend or anyone with an emotional or financial interest in seeing that person released. That person contacts one of our agents. Our agents arrange for the inmate's release on our insurance company's bond if the underwriting principles are successfully met. The power of attorney from the insurance company, attached to the bail bond, is just as good as money.

In order for the bail bond agent to feel comfortable posting that bond on one of my insurance company clients, one thing has to occur. Someone in the community must have an abiding interest in the release from custody of that inmate. We use that interest as a mechanism to influence the defendant to meet his release conditions, not recidivate and fulfill his obligations.

We explain to the interested person from the community that we have to put up our money. We are getting the defendant out of jail because they want him out of jail. We ask them to join with us in having an interest in the defendant meeting his release obligations. We have a blanket indemnity agreement, and we explain to these people that if we have to pay the money, we will ask them to reimburse us. They may have collateral to secure that risk. Most often they do not. Most of our bonds are unsecured other than the indemnity agreement. These people usually have something financial to lose. It may be nothing more than good credit. Having those indemnity agreements in hand, we secure the release of the defendant from custody and bring him into a room with the person sponsoring his release. We explain to the defendant we do not intend to financially harm the sponsors, but if he fails to abide by his release conditions and we have to pay the bond, we will seek reimbursement from the sponsor. If we cannot find a sponsor in the community interested in his release whom this defendant cares about and does not want to hurt, we will not write the bond.

My clients bonded almost 500,000 people out of pretrial custody last year. Our failure-to-appear rate was 8.13 percent. Eighty percent of those people were recovered back into custody. The recidivism rate among those people we bonded out was low.

The problems the State is having with early prison release are the same kind of problems we deal with in our pretrial world. We could craft a bill to serve as a model for state legislators by taking our bail bond business model and using it as a template for persons released early from prison.

We would use the circle of influence for these participants just like we do for pretrial release defendants. I have prepared a copy of a bill with some suggested language that accomplishes these simple things, Exhibit C. The bond put up under this model bill carries two penalties. The insurance company would pay a bond penalty to the State immediately if the participant violates one of his release conditions. There may be 15 or 16 potential release conditions, and the releasing authorities would impose one or more on the person being released early, such as restitution, a drug rehabilitation program, drug testing or gainful employment.

We would pay a financial penalty if a person violates an early release condition because it is a control tool for us. It works into the circle of influence. By signing the indemnity agreement with us, the sponsor from the community has agreed to reimburse us for the bond penalty. It is a useful mechanism for us.

The second penalty called for under the early release bond would be much larger and would apply if a participant is not brought back into custody within a set period of time. We know that many of these people abscond. It would be our job to find those people and bring them back into custody. Many of these people understand the bail system and know that we can find them and bring them back into custody. If we are unable find the person within a given period of time, we would pay a financial penalty to the State.

The Model Legislation in Exhibit C, page 4, paragraph (A), describes the breach penalty that would be paid. I leave it up to the State to put in whatever amount they want, but I will recommend some amounts to you. In paragraph (A) where it says, “a breach penalty,” I would recommend $1,250. Where it says, “shall be paid upon breach of a condition by the Principal,” I would recommend $25,000 if the principal is not back in custody within a certain period of time. You have two breach penalties—one, breach of a condition of the bond; two, breach of the condition not to leave the jurisdiction. The first penalty would be one-half the annual premium and the second would be $25,000.

The key player for us is not the defendant; it is the sponsors in the community who want that person released. We accommodate the financial needs of those who come to us and cannot pay the full bond premium, especially in today’s economy. Over 50 percent of all our agents sell bonds on terms without interest. We work out arrangements for the bond premium where they pay $250 or $200 for the first month and $200 per month until the premium is

paid. If the principal and those interested in his release cannot meet this arrangement, we would not want to bond that person anyway.

In the bail world, we have never lost a customer because they could not pay the bond premium over a period of a year. In my office with my clients, it is my personal responsibility to approve every bond over $1 million. We have never had anyone fail to pay their premium when we gave them terms. We would understand, if Nevada wanted to participate in this program, that we would have to accommodate people and allow them terms to pay the premium.

CHAIR CARE:
Ms. Eissmann, we will make the letter from Mr. Watson to Mr. Skolnik in August 2008 and Mr. Watson's resume part of the record in Exhibit D. You are basically deleting the bill as drafted as a whole and making the Model Legislation an amendment, Exhibit C. So, we can disregard the bill as introduced.

MR. WATSON:
Yes. I am proposing the bill be amended in its entirety with this new language supplanting the bill.

CHAIR CARE:
Did you get a response from your letter to Mr. Skolnik? The letter includes the concepts for the legislation, and there was no bill or draft legislation attached to the letter.

MR. WATSON:
No. I met with Mr. Skolnik in August in Las Vegas. We went through a lot of detail about how the market would develop and how the inmates and sponsors would be able to contact our agents. I cannot speak for Mr. Skolnik, but he told me he was impressed. He was most interested in the reduction in the recidivism rate, thereby reducing the number of crime victims in the State. He said if this would help only 5 percent in that regard, it would be good. He did not respond to my letter, and I did not expect him to.

CHAIR CARE:
Your proposed amendment on page 3, paragraph (O), of Exhibit C reads, "The Principal shall have, as a mandatory condition, that he or she personally report to the surety at such time ... ." Early in your testimony, you said it is a mistake

to assume this bill would privatize what Parole and Probation does. Explain how that would work and what role the traditional Parole and Probation would have under the provision.

MR. WATSON:
I included that language because when we bond someone out on a major offense, we want that person coming to our office once a week. We want enough control because we want to make certain they make their court appearances, are still working and have the same telephone number. We monitor the person to minimize our risk because we have learned those things are important in indicating he is not about to flee the jurisdiction. It is not the same kind of control and reporting that a parole officer does. If that were not in the bill, we would impose that condition upon the person anyway.

SENATOR WIENER:
You did contact Mr. Skolnik. Did you have any conversations with Parole and Probation?

MR. WATSON:
No, I did not. Mr. Skolnik told me there was a commission made up of several people whom he might want to familiarize with this concept.

SENATOR WIENER:
If I may ask Senator Parks, was this something that was considered in the work you did with Chief Justice James Hardesty?

SENATOR PARKS:
This is the Advisory Commission on the Administration of Justice. We did not go into the specifics of a program quite like this. We did discuss some possibilities, and we did look at a number of different areas. We also used subcommittees, and a subcommittee might have discussed this in detail.

SENATOR WASHINGTON:
I worked on some bail bonds issues some years ago with Annie's Bail Bonds. Given the current statute, are you indicating that our current laws are not sufficient to aid you and your industry?

MR. WATSON:
No, that was not our motivation. Because the states have problems with early release inmates, we thought we could assist in overcoming some of those problems. We are offering the assistance of our industry to a State problem.

SENATOR WASHINGTON:
We do have a problem with sex offenders who potentially have the possibility of tailing out. Have you thought about Tier 3 offenders who complete their sentences and do not require supervision, but have to register as sex offenders? Has your industry looked at that?

MR. WATSON:
We have. The best answer we have been able to bring to that area is global positioning system (GPS) monitoring where you can set boundaries on where the convicted sex offender can go. You can cordon off by satellite the geographical environment into which that person may not go. That typically is a condition of probation or parole. However, once the person has served his sentence, been released from prison and met any responsibilities to the State regarding his earlier offense, there may be due process problems in having him wear a GPS ankle bracelet.

SENATOR PARKS:
Is this program in place in other states?

MR. WATSON:
No. It is a new concept for us. It is being considered in some other states. Mississippi has taken this concept and almost the same model bill language and applied it to probation rather than parole. It has worked well regarding probation. It is doing all the things I have suggested can be done in early prison release by using our business model.

SENATOR PARKS:
How would the release interface with the functions of Parole and Probation? If someone were to violate the conditions of their release, would these individuals be turned over to Parole and Probation?

MR. WATSON:
They would be turned over to Parole and Probation if their condition breach resulted in a warrant. If that were the case, we would try to find that person

and bring them back into custody. Under this model bill, as opposed to the language of S.B. 221, we would not monitor these people in a parole-officer function to make sure they comply with their conditions and report that to the Parole Department. Our controls would be to minimize financial risk.

SENATOR PARKS:
I am told that roughly 80 percent to 90 percent of inmates used drugs, which was a direct or underlying factor in their criminal activity that got them into prison. I am concerned that is an issue where well-intentioned family members might spend a lot of money trying to assist a person who does not want to avoid drug use.

MR. WATSON:
A condition of their early release may be weekly drug testing or a drug rehabilitation program. That function would be financially underwritten. Most of the people we bond out on pretrial bonding got into trouble because of drugs too. Most of them are not back in trouble with drugs again because of the circle of influence. For almost 100 years now, as simple as it is, this business model has worked.

CHAIR CARE:
This amendment will go to our staff, and they will have to make changes so it comports with Nevada legislative drafting style. The bill will go on a work session. We usually do not take testimony in a work session unless we have a question. It probably will not be necessary for you to come again.

Ms. Eissmann or Mr. Wilkinson, please contact Mr. Skolnik or someone from the Parole Board for any comments they may have.

Ms. Cox, have you reviewed the proposed amendment?

JUDY COX (American Civil Liberties Union of Nevada):
Yes. We oppose S.B. 221, and we oppose the proposed amendment. The core problems with the bill and amendment are the same. The bill and amendment divide prisoners into two groups—those with money and those without. The bill would send a message to prisoners that even though their debt to society has been nearly paid, they should still have to pay for their freedom. This bill, including the amendment, creates potential equal process and due process violations. The surety parole program, even under the amendment, creates a risk

of due process and equal process violations because the Parole Board may choose to have more hearings based on the surety parole program rather than the traditional parole program. Under the amendment, it appears the surety company can monitor the parolee to check up on their investment.

There is a due process violation risk because the Parole Board apparently still has sole discretion to set the amount of money for the surety bond. Under the original bill, it appeared parole revocation would be easier under the surety program. I have not been able to thoroughly analyze the amendment.

SENATOR WIENER:
Based on the testimony and based on practice, do you have challenges with bail as well because people can put up collateral or security for that part of the administration of justice?

MS. COX:
We have no opinion on the bail bond program. I am here to testify on the surety parole program. There are differences between a bond program and a surety program. The surety program sets a certain amount of money, and there is an opportunity to get out of jail early based on whether or not your family can put up the money. Under the surety parole program, the time of freedom you can get is longer than under the bail program. With bail, you are only out of jail until you are either found guilty or innocent.

SENATOR WIENER:
I would think that someone would not want to be in jail before a proceeding before a judge. Sometimes a bond or bail requirement, even if it is 10 percent of what is set, is still a substantial sum of money. There are those who find a way to pay it so they do not have to be in jail. I am seeing parallels between bail bonds and surety paroles based on the testimony from the witness. Could you provide for the Committee the ACLU's position on the integrated bail system in terms of how that serves, discriminates or violates parallels to what this bill would do? Even though they are not exactly the same, there are some parallels. It would help me make my decision if I could understand your position on that as well.

MS. COX:
I would be happy to research and prepare written testimony describing our position as to why success in a bail bond program may not translate into success in a surety parole program.

CHAIR CARE:
Please submit additional comments regarding the proposed amendment, and we will make it part of the record. (We received ACLU's comments dated March 31, and it is made part of the minutes as Exhibit I.) We will give a copy of that to Mr. Watson. Mr. Watson, if you want to send us a letter with your comments regarding what you heard this morning from the ACLU, we will make that part of the record as well.

MARK WOODS (Deputy Chief, Division of Parole and Probation, Department of Public Safety):
I saw the amendment this morning. When a parolee and or inmate enters a program to come out into the community, we must investigate that program and where they choose to live. Unfortunately, many times when we go to a household, the residents tell us not to let the inmate come to their home, but not to tell the inmate that. They do not want the inmate mad at them, and they do not want to be victimized again. They are afraid to have this person live with them for many reasons. We become creative in finding out why the inmate cannot live there without victimizing these people again. The potential of victimizing family members is there.

I am not confident of the role of the Division of Parole and Probation in this. If there is no role, I do not understand how violations will be dealt with. Many violations are new arrests. When a parolee is arrested, they have due process rights. The clock starts ticking versus the federal law in *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) and *Morrissey v. Brewer,* 408 U.S. 471 (1972). They have only 15 days to have a hearing. We must serve paperwork, and they have a legal right to be advised of what is happening.

I understood Mr. Watson to say the offenders would come to their office. Most offenders are going to violate at their home, work or in the community. A big part of our job involves visiting these people and being out in the community to see them. They do not violate in the office. However, many of them will come in and test dirty. They know they will test dirty. I am not sure of the response with the bond.

Assembly Bill No. 510 of the 74th Session gave parolees credits for doing well in the community. It was difficult for the Division of Parole and Probation to integrate its electronic tracking system with the Department of Corrections to manage parolee's good-time credits. I am not sure how a private vendor would be able to do that. It is a parolee's right to earn those credits.

We are one of the best in the country at success in parole. We are about 80 percent successful in our parole. We would support anything that would help. At this time, there are too many unanswered questions regarding the right to parolees in this case.

SENATOR WIENER:
The business model Mr. Watson called the circle of influence would not be a substitution for what you are doing. It would be in addition to what you are doing. These visits to the vendor would be additional visits to protect their business investment.

MR. WOODS:
If that is the case, we do oppose it because you cannot answer to two masters. Putting parolees on a GPS ankle bracelet could be problematic because we might have them on our own house arrest. We want them to pay the victim and our supervision fees before they pay the surety bond. Many of our parolees report once a week. You can only have one person or one division in charge of supervision. Other issues could be created. For example, we might have a parolee who tests dirty. The parole officer knows that person. It might not be a violation to us because we know it is like taking cigarettes away from someone. We may take a different approach to deal with them. On the other hand, we will immediately violate a DUI parolee we find with one beer. It could result in problems if an inmate is required to report to more than one person.

MR. WATSON:
I understand what the witness is saying. I was not familiar with the legal requirements regarding the behavior of a parolee. I recommend striking out paragraph (O) in Exhibit C, page 3. If a parolee is on home arrest, there may be impediments to his checking in with us, and it may interfere with what the parole officer is doing with that parolee.

CHAIR CARE:
We will close the hearing on S.B. 221. We will open the hearing on S.B. 277. These bills came from the Trust and Estate Section of the State Bar of Nevada. We all received a letter from Layne T. Rushforth (Exhibit E). I direct the Committee's attention to the third paragraph on page 1 of the letter. Give it your full attention.

SENATE BILL 277: Revises various provisions relating to estates. (BDR 12-657)

SENATOR VALERIE WIENER (Clark County Senatorial District No. 3):
I am here to introduce S.B. 277. Legislators bring measures before this Committee at the request of others. That is the case with S.B. 277. I will turn this over to those with more expertise who can speak more thoroughly regarding S.B. 277.

MARK SOLOMON (Probate and Trust Section, State Bar of Nevada):
Our committee consisted of 15 members, seven in northern Nevada and eight in southern Nevada, including the Probate Commissioners from Clark and Washoe Counties. We have reviewed the Title 12 and Title 13 provisions of *Nevada Revised Statutes* (NRS) and updated them as necessary in light of the changing economic conditions and changing legal precedent. Our committee collected issues over the last two years. We solicited concerns from practitioners, banks, trustees, the courts and the general Bar Association throughout the State. We discussed these concerns and requests for changes or additions. We reached consensus to draft the language in S.B. 277 and S.B. 287. We tried to structure the bills for convenience to reflect the titles each bill addresses. Senate Bill 277 primarily addresses Title 12 of NRS governing probate and wills. Senate Bill 287 primarily addresses Title 13 of NRS concerning trusts and guardianships.

I prepared a document entitled Comments to S.B. 277 (Exhibit F). In section 1 of S.B. 277 on page 1 of Exhibit F, we propose changing the law providing that a person adopted as an adult is only deemed to be a child of the person who adopted him for purposes of who a child is under a will. This will resolve the general understanding of people when they leave gifts to children. They expect them to be natural children or adopted children as infants, not adult adoptions. A problem has arisen where people adopt adults solely to influence inheritance decisions in wills, intestate and trust situations. They adopt a person solely for the purpose of inheriting something as an adult, and they are not really an integrated portion of the family. We have left the ability of the testator or the

person who drafts the trust to change that if they really want an adult adopted child to receive as if they are a true child.

With the expanding use of trusts, it is important to amend the sections of the law regarding a pretermitted spouse, which is a spouse who becomes such after the date of a will, Exhibit F, page 1, section 2. The law assumed if you do your will first and then get married, you did not intend to cut out your spouse. So, your will was revoked unless that will expressly provided for that new spouse. We have expanded the law to say the will is not revoked if the new spouse is provided for under some other means that was clearly intended to so provide. A classic example is when someone does a will in the past, and after getting married, does a trust providing for the new spouse. For whatever reason, that person did not go back and amend the will.

We also clarified that an implied revocation of a will by the pretermitted spouse issue does not affect other provisions of the will, such as designation of personal representative.

Section 3 of the bill does the same thing as section 2 except with respect to a pretermitted child, which is a child born after the making of the will. If a trust or other instrument is prepared clearly showing the new child was intended to be provided for in this new instrument, there is no need to revoke the will, Exhibit F, page 1.

Section 4 is similar to section 1 and provides that an adult adoption only affects the heirship of the adopting parent, Exhibit F, page 1.

Section 5 changes the law back to its original form. Somehow it was changed. This is an heirship statute. It provides if you have no one closer to you than siblings, your siblings inherit your property if you have no will. It provides if one of the siblings predeceases the decedent leaving his own children, which would be nephews and nieces, those nephews and nieces step up, Exhibit F, page 1. The committee felt this more closely related to what a typical testator would want.

Section 6 is a technical amendment to accommodate section 9.

Section 7 on page 1 of Exhibit F is designed to make it easier to prove a lost will where it is obvious it was not intended to be revoked. An example would be

where you leave a trust that clearly exists at the date of your death, and the lost will pours over assets to that trust. Since the trust was not revoked, the decedent wanted any assets, more likely than not, to go to that trust for ultimate disposition.

In that same section, we made it easier to prove the terms of a lost will by allowing a photocopy of a will to prove its terms in the absence of any objection to the veracity of that document.

Section 8 codifies and clarifies existing case law regarding a no-contest clause in a will, Exhibit F, page 1. That is a body of Nevada Supreme Court law that has never been codified. It is appropriate for the Legislature to codify exactly what the law is in that area.

Section 9 gives the court discretion to consider whether a felony conviction should disqualify someone from serving as an executor, Exhibit F, page 1. Certain felony convictions are technical and do not necessarily have anything to do with truth and honesty or the ability to be an executor.

Section 10 on page 1 of Exhibit F does the same thing regarding a personal representative, which is someone serving without a will. This section grants the court discretion to appoint a non-Nevada resident as a personal representative if that person is named as an executor in a will already pending for submission to probate.

Section 11 is the same as section 10 regarding the court's discretion to appoint a non-Nevada resident named as an executor, Exhibit F, page 1. Section 12 is a technical amendment to accommodate section 9, Exhibit F, page 2.

Section 13 on page 2 of Exhibit F clarifies that the qualifications for a general administrator apply to a special administrator as well. That has been the law in Nevada, but it has never been codified.

Section 14 is another technical amendment to accommodate section 9.

Section 15 clarifies that the surviving family's rights under NRS 146.010 are subject to other provisions in NRS 146, Exhibit F, page 2. Nevada Revised Statute 146.010 is a roadmap saying a surviving family is entitled to certain things. Other sections within NRS 146 define and limit that.

Section 16 on page 2 of Exhibit F allows the court to consider the needs and resources of a surviving spouse and children in awarding exempt personal property. Section 17 does the same thing regarding the award of a family allowance. The committee felt it made no sense to award a large family allowance in a small probate when that same family is the recipient of a huge trust estate outside of probate. This allows the court to look at the surrounding circumstances to see if there is a need or resources that should be considered when deciding whether to grant either of those.

Section 18 defines family as the surviving spouse and minor children. These are the people who would be entitled to seek such support.

Section 19 provides if a real estate broker brings a potential buyer into court who wants to bid on real property and that buyer is out-bid, the court may give that broker some remuneration, Exhibit F, page 2. It is appropriate for the court to share the commission between the actual buyer's agent and the agent who brought in the initial bidder.

Section 21 allows an attorney for a personal representative to apply for extraordinary compensation if the attorney is being compensated on a percentage fee basis for ordinary services, Exhibit F, page 2. It also allows the court to preauthorize a contingency fee agreement where it is appropriate to the circumstances of the case. This section is a corollary to other sections. Attorneys can now apply for extraordinary commissions. This codifies that will only apply if an attorney is on a percentage fee. If an attorney is being paid hourly, they will get an hourly fee whether they work on ordinary or extraordinary services.

Section 22 codifies that a reasonable attorney fee, when dealing with multiple attorneys representing a personal representative, be apportioned between them, Exhibit F, page 2.

Section 23 on page 2 of Exhibit F provides a simple procedure for timing and how to seek a partial allowance of fees. Section 24 sets forth the procedure to seek final approval for an attorney's fee award.

Section 25 is a tax statute, Exhibit F, page 2. Our statute does not currently address this point. A recipient of a gift that generates federal gift tax or federal generation-skipping transfer tax has to bear their pro rata tax liability unless the

person who gave the gift specifically provided the tax be paid from another source. It also clarifies existing law that such a recipient is entitled to receive any type of tax exclusions or exemptions in priority to the time they receive their gifts.

Section 26 provides the court with discretion to adjust the statutory fee for personal representatives if the court is convinced the fee does not fairly compensate the personal representative for the work done, Exhibit F, page 2. This is important in small probates where it is necessary to do administration, but there are not enough assets to generate on a statutory percentage basis any type of meaningful compensation. More and more of those cases are going to the Public Administrator where it is probably not necessary to do that if we can adjust the fee.

Section 27 provides that attorneys for the personal representative may be paid on an hourly basis or pursuant to a new statutory percentage fee, all of which is subject to a written agreement that must be approved by the court, Exhibit F, page 3. This statute is in response to a series of case law, particularly the Nevada Supreme Court's decision in *Estate of Bowlds v. American Cancer Society*, 120 Nev. 990, 102 P.3d 593 (2004) that called into question the traditional methodology of working in estates for percentage fees. That case held that a flat 5 percent fee, which was customary in Clark County at that time, was not per se reasonable, and if there was an objection, the Court had a duty to review that.

We tried to take the uncertainty out of this area. Traditionally, attorneys work either hourly or on a percentage fee basis. It is usually negotiated at the time of an engagement with a client. The fee has traditionally been subject to court approval and will remain so, even more so, under this new proposal. We have proposed an alternative of working on an hourly basis by contract or a statutory percentage fee, which mirrors the percentage fees adopted in California. It is a sliding scale and lower than 5 percent.

Section 28 on page 3 of Exhibit F allows the court to authorize allocation of community property by value and not only by pro rata share. Certain trusts require the trustee or executor to allocate assets between various beneficiaries or a survivor in a decedent's estate. If the court finds it appropriate, it can allow the entire property to go to one side with a fair compensation on the other for the value.

Section 29 increases the jurisdictional limit of appealable decisions from probate court to $10,000 from $5,000. It clarifies that certain petitions can be filed in probate regarding decisions tolling the period of time within which to appeal, Exhibit F, page 3.

Section 30 on page 3 of Exhibit F provides that a maker of a will or trust or their legal representative, such as a guardian, can obtain declaratory relief regarding the validity of a will or trust in a petition brought under Title 12 and Title 13 of NRS. Section 31 is an adjunct to that and clarifies declaratory relief in estate, trust or guardianship proceedings are brought under Title 12 and Title 13 of NRS.

Section 32 seeks to remove language that unnecessarily limited the effect of a community property agreement between spouses, Exhibit F, page 3. This does not adversely affect anyone because if such an agreement were fraudulent to creditors, for example, those creditors would retain their right to challenge that agreement.

Section 34 parallels sections 1 and 3 regarding adult adoptions for both testamentary and inter vivos trusts. Section 35 parallels section 8 regarding no-contest clauses for trusts and restates the current law regarding no-contest laws, Exhibit F, page 3.

SENATOR WIENER:
In section 16 regarding the exempt personal property, will you give us an example of what that might be?

MR. SOLOMON:
Under Nevada law when a person dies, the surviving family, which we have defined to be the surviving spouse and minor children, are entitled to stay in the household, at least temporarily. They are entitled to maintain possession of the decedent's personal property, at least for a period of time. If the surviving spouse and minor children desire, they can file a petition with the probate court asking the court to award them certain things, irrespective of what the will might provide. It is designed to make sure we do not throw widows and orphans out in the street. They can ask for probate homestead, the furniture and furnishings, which are usually exempt under NRS 21, and a family allowance.

This is not done often, but it protects families who are in circumstances where they need to maintain possession of those items. This amendment allows that and does not interfere with the ability to do that. It tells the court that if someone makes such an application, it should look to see if the person really needs the assets. Do they have other resources? Why take these assets that could be used for people to whom they should go under the will, or to creditors who might be entitled to parts of an estate, if they really do not need it and they have adequate assets elsewhere?

SENATOR WIENER:
Section 18 on page 2 of Exhibit F defines a family as surviving spouse and minor children. One of my constituents contacted me in the past week. They are the natural mother and father of an adult child who is severely physically handicapped and is a dependent adult child. This person could never sustain life on his own. How are they provided for?

MR. SOLOMON:
They are not, nor were they under the existing statute. The other statutes refer to surviving spouse and minor children, and in one section it referred to family when it was intended to mean surviving spouse and minor children. This amendment was a minor change to reflect what the bill already said. It would be up to a surviving parent to apply for a family allowance. They would be entitled to receive some type of allowance because of their obligation to support the dependent adult child. If there is no surviving spouse, the law does not address this area.

WESLEY YAMASHITA (Probate Commissioner, Eighth Judicial District Court, Clark County):
I support these matters. I have been the Probate Commissioner for five months. I am concerned with the issue of attorney fees. The attorneys are under attack for the fees being charged, and it should be codified to give us a basis in ruling on those issues.

SENATOR WIENER:
Mr. Solomon said the intent is to codify what is the practice. When fees become a contentious issue before you, how is that resolved? Does that get in the way of doing other business?

MR. YAMASHITA:
Before the *Estate of Bowlds* decision, the fee was a routine 5 percent. With the directive from the Nevada Supreme Court in that decision, I am required to look at the reasonableness of the fee. Reasonableness is a nebulous term. You have to look at what assets are available, what kind of contentions are going on, sales, property, how much the attorney is doing versus how much his paralegal or office staff are doing. When percentages are codified, it is easy. You could say the attorney has met the requirements, and the fee is therefore reasonable and pursuant to the statute. If an attorney chooses to be paid hourly, I still have the same problem. I have to analyze whether the fee is reasonable in light of the results gathered, the size of the estate, and the participants involved. If this is codified and more attorneys choose the codified route, it would take a lot of pressure off the bench in making those decisions.

MATTHEW A. GRAY (Trust and Estate Section, State Bar of Nevada):
I have no further comments regarding S.B. 277.

CHAIR CARE:
I will disclose that Matthew A. Gray is an associate in my law firm. He is not a paid or unpaid lobbyist. This is all pro bono work. There is no remuneration involved here. I will check on the Senate Standing Rule No. 23 aspect with Legislative Counsel Bureau, but I do need to make that disclosure.

JULIA S. GOLD (Trust and Estate Section, State Bar of Nevada):
I have no further comments regarding S.B. 277.

BILL UFFELMAN (Nevada Bankers Association):
We support S.B. 277.

CHAIR CARE:
The hearing is closed on S.B. 277. Hearing no opposition, I will entertain a motion.

SENATOR PARKS:
Page 14 of S.B. 277 references fees. Are those in line with the fees elsewhere in NRS? I am presuming these are a new set of fees.

CHAIR CARE:
Normally, attorney fees are not that specific in statute. However, there is a reason for it in this bill.

MR. YAMASHITA:
Before this, there has never been a codified percentage basis in the law. We have looked to California. California has always had some fashion of that. When we looked at the statutes in neighboring jurisdictions, California was more closely related to what we are attempting to do. With that, the choice was to put in actual sliding scale percentages as opposed to a generic statement regarding reasonable compensation.

SENATOR AMODEI MOVED TO DO PASS S.B. 277.

SENATOR WASHINGTON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR CARE:
I will open the hearing on S.B. 287.

SENATE BILL 287: Makes various changes concerning the personal financial administration. (BDR 13-658)

SENATOR WIENER:
I am testifying in support of S.B. 287. This is the second bill I was privileged to sponsor on behalf of the members of the State Bar of Nevada who deal with these specialty aspects of the law. I have a concern regarding Senate Bill 287, and I will share that with the Committee as we go through the bill.

CHAIR CARE:
You are referring to section 56 of S.B. 287, the amendment made last Session to the Uniform Principal and Income Act.

MR. GRAY:
I prepared a summary of my comments to S.B. 287 (Exhibit G). In the estate planning field, individuals and families are forum shopping and finding the

jurisdiction with laws that best suit their needs for short- and long-term goals. Nevada is a competitive state, but many other jurisdictions are enacting legislation with some cutting-edge planning techniques. Nevada has fallen behind in that area. This bill will keep Nevada competitive to draw trust business to this State.

This bill provides flexibility to trustees, settlors and beneficiaries of various trusts to make minor but important changes down the road. Many trusts created in the 1960s and 1970s are old, outdated and irrevocable. Some provisions of the bill permit administrative changes to those trusts to take advantage of new tax laws or new trustee positions.

The committee Mr. Solomon spoke of included a good cross section of different practice areas in this field. Because of that, we were able to strike a good balance of language in S.B. 287 to meet the needs of the settlors, trustees and beneficiaries. We submitted some suggested amendments to S.B. 287 (Exhibit H).

Sections 1 and 2 on page 1 of Exhibit G change the standard for court determination of whether a person convicted of a felony may be appointed as a guardian. The standard used to provide that if the person had been convicted of a felony relating to the position of a guardian, they could not be appointed as a guardian unless the court found it was in the best interests of the ward. We have changed that to give the court more discretion to determine what factors would be appropriate in any given situation.

The second change is to NRS 159 and would permit an interested person, which is a defined term in NRS, to petition the court for an order authorizing or directing the guardian to take certain actions regarding the ward's estate plan. This is important because we were seeing circumstances where a settlor had created a trust. The settlor was no longer competent to manage their own affairs, so a guardian may or may not have been appointed. After the settlor had become incompetent, they would modify their trust and perhaps cut out a beneficiary. If the beneficiary learned about that, he or she had no recourse because the trust was still a revocable living trust. It was important to give the beneficiary some recourse and some manner to access the court in that limited circumstance.

Sections 3 through 19 classify a beneficial interest in a trust as one of three different interests—a discretionary interest, a support interest or a mandatory interest. It describes the rights and interests of the beneficiaries and other parties with respect to those interests, Exhibit G, page 1. This section also addresses what factors should not be considered in determining whether or not the settlor of the trust is the alter ego of the trustee. That is analogous to piercing the corporate veil. A settlor may create an irrevocable trust, and he accidentally writes a check from the trust to pay some expense. We do not want that one isolated incident to be used against him to say he is the alter ego of the trustee. There are certain other limited circumstances identified here where we do not want to see that determination made, such as if a beneficiary is nominated and serving as a trustee. The settlor beneficiary holds a power to remove or replace the trustee and some other factors we commonly see in our practice that we do not want to be used against a settlor beneficiary or trustee.

Sections 20 to 36 permit the appointment of a third party fiduciary to direct the trustee in carrying out certain duties, such as discretionary distribution decisions and investment decisions, Exhibit G, page 1. These are commonly referred to as directed trusts. In Nevada and most jurisdictions, we permit a trustee to delegate certain duties to other individuals. This would take it a step further and permit one fiduciary or a committee of fiduciaries to direct another fiduciary to take certain actions. If that fiduciary complies with that direction, he or she would not be liable for taking the action.

We commonly see distribution committees and investment committees where these people are limited to doing those functions. They will not be liable for the other party's actions.

Section 37 on page 1 of Exhibit G refers to a process called decanting permitted in a number of other states. This authorizes the trustee to appoint some or all of the trust assets to a second new trust. It gives the trustees and beneficiary flexibility in dealing with outdated irrevocable trusts, changed circumstances and laws. There are some examples in Exhibit G, page 1.

Section 38 provides that a trust may be created by exercise of a power of appointment in trust, Exhibit G, page 1.

Section 39 would permit a noncorporate trustee to lend trust funds to himself or others provided the power is included in the trust instrument and the transaction

is consented to by all beneficiaries, Exhibit G, page 1. We commonly have a problem where a trustee is a sibling in a family and administering a trust for five other siblings. If that sibling wants to enter into a transaction with the trust, even if all the other beneficiaries consent, they are prohibited from doing that if they are noncorporate trustees.

SENATOR WIENER:
Even though the agreement would be there, what penalty would be attached to that?

MR. GRAY:
It could be a surcharge of trustee's fees imposing a constructive trust over whatever benefit the trustee received for engaging in that transaction.

SENATOR WIENER:
Would that require someone bringing action against the violator?

MR. GRAY:
Yes, it would.

SENATOR WIENER:
So unless one of those siblings became unhappy, it would just slide?

MR. GRAY:
You are correct. In my practice, we go to court for approval. It is usually approved, especially if the consents are attached to all the petitions.

SENATOR WIENER:
If it is a borrowing situation, it might be an issue of timing as well. The need might be time-sensitive.

MR. GRAY:
Section 40 is similar, Exhibit G, page 2. This section would permit any trustee, as opposed to just a corporate trustee, to personally engage in purchase and sale transactions with trust property. It would have to be authorized by the trust instrument or consented to by all the beneficiaries. Right now, we have an exception in the NRS that permits corporate trustees to do this, but not individual trustees. We would like to extend that exception to individual trustees as well.

SENATOR WIENER:
In section 40 on page 2 of Exhibit G, regarding the consent requirement, can it be approved after the trustee engages in one of these transactions?

MR. GRAY:
As the statute is drafted now, it cannot be done before consented to by those who would be affected.

SENATOR WIENER:
If we do this, could it be done post-transaction?

MR. GRAY:
Yes. We would anticipate that the beneficiary would be able to ratify an action.

SENATOR WIENER:
Is that because of the timing issue?

MR. GRAY:
Correct. Section 41, as originally drafted, would have permitted the modification or termination of an irrevocable trust by the consent of the settlor and all beneficiaries. The Uniform Trust Code actually suggested this as some optional language for states to consider. It appears that by granting the settlor this kind of power to modify an otherwise irrevocable trust, major problems may arise with sections 2036 and 2038 of the Internal Revenue Service (IRS) Code. If the trustor has this kind of power and authority over an irrevocable trust, section 2038 of the IRS Code would bring all the assets of that trust back into his or her estate for estate tax purposes. It is not a good result. We suggest that section 41 be eliminated in its entirety, Exhibit G, page 2.

Section 42 automatically incorporates the provisions of NRS 163.265 to NRS 163.410, which are common trust powers we have codified by statute, Exhibit G, page 2. Currently, the settlor has to expressly incorporate these provisions into his or her trust. Some practitioners were seeing a bare-bones trust instrument that did not incorporate these provisions. It perhaps listed three or four powers. You were left with a trust where the trustee had no authority or ability to deal with the assets. By incorporating these, it would add a little more flexibility into some of these bare-bones trusts.

Sections 43 to 44 would permit a trustee to give notice to beneficiaries, heirs and other interested persons of when a revocable trust becomes irrevocable. In that notice, the trustee would be required to state that any action to contest a trust must be commenced within 120 days from the date the notice is received, Exhibit G, page 2. This would be an optional provision, and the trustee would not have to do it. We included this to afford a finite time limit for these interested parties to contest a provision of the trust. It would expedite the process of the trust administration.

Section 45 on page 2 of Exhibit G provides that otherwise unrepresented persons may be represented by another beneficiary with a similar beneficial interest. We commonly refer to this as virtual representation. All beneficiaries could mean contingent remainder beneficiaries or unascertained individuals, such as unborn children that may become part of a class of beneficiaries down the road. This would permit a beneficiary that is similarly situated to that individual to give consent or take other action on behalf of that person who is otherwise unrepresented.

Sections 46 through 49 would permit a trustee of an income trust to convert it to a unitrust, Exhibit G, page 2. After the conversion, the amount of income to be distributed is defined as a percentage of the total assets of the trust. In other words, you have an income trust where a beneficiary is entitled to all of the net income of the trust for any given year. Some trusts may not be earning a lot of income right now. To be fair and equitable to all beneficiaries, including the income beneficiaries and the remainder beneficiaries, it might be wise to convert that trust to a unitrust so the income beneficiary is to receive a fixed percentage of the assets each year regardless of how much the trust earns in that year. A unitrust interest of between 3 percent and 5 percent of the value of the assets in the trust would have to be distributed each year to the beneficiary. We have used that range because it has been blessed by the IRS. They permit this type of conversion and have deemed it will not be considered a general power of appointment provided it meets that and certain other conditions we have addressed in this proposal.

Section 50 authorizes the trustee to allocate community property assets among separate trusts on the basis of the value of the entire pool of community assets rather than on an asset-by-asset basis, Exhibit G, page 2. It provides more flexibility upon the death of one spouse and how we fund certain subtrusts.

Section 52 is a technical amendment. We added the definition of unitrust, Exhibit G, page 3. Section 53 is another technical amendment providing that a trustee must act impartially to all beneficiaries when exercising the power to convert an income trust to a unitrust, Exhibit G, page 3.

Section 54 is a technical amendment, Exhibit G, page 3. Right now, a trustee can give notice of proposed action to beneficiaries of certain actions the trustee is going to take. We have incorporated the ability of the trustee to give a notice of proposed action prior to decanting the trust, which was addressed in section 37.

Section 55 on page 3 of Exhibit G provides a trustee does not have a duty to convert an income trust to a unitrust.

Section 56 would restore NRS 164.900 to the way it was in 2007 with one exception. An interested person could petition the court for a different allocation, Exhibit G, page 3. The old law stated that trustees fees paid out of a trust were to be allocated equally between income and principal. In 2007, a change was made capping the amount of trustees fees allocated to income at 5 percent of that annual income. There were some unintended consequences. We received many comments from trust companies and banks that they were having a difficult time dealing with this—changing computer programs and having to manually go through and do this. There were sufficient other safeguards built into our statutes to address those concerns.

MS. GOLD:
I will address our proposed changes to NRS 164.900. Nevada is competing with other states to attract trust administrations and trust situses to locate in Nevada. Although this is a small section, it has a significant impact on trust companies which are working in Nevada as well as other jurisdictions. Trust departments find this section to be burdensome because they have to make sure any trust governed specifically under Nevada law is singled out and handled differently.

The statutes provide an alternative and address some of the concerns raised by the change made in 2007. For instance, NRS 164.795 gives the trustee the power to adjust between principal and income so they can change where their fees are allocated. Nevada Revised Statute 164.720 requires a trustee to administer trusts in an impartial manner between income beneficiaries and

remainder beneficiaries. The section Mr. Gray discussed about the unitrust conversions statute is a new section that would help address certain issues. If you have an income beneficiary of a relatively small trust who converts to a unitrust, there is a provision in that statute that does not allow them to take the fees out of the income portion being paid out.

Finally, if none of that works to address a situation outside of court, we can go to court and bring an action under NRS 164.010 and NRS 164.015. Nevada Revised Statute 164.900, as written with the 5 percent cap, is contrary to the other sections of Nevada law. It is contrary to other states that have enacted the Uniform Income and Principal Act. Instead of moving toward a more flexible approach to a trust administration, it is a mandate that we cannot get around.

CHAIR CARE:
Regarding section 56 of S.B. 287, I will get in touch with the office in Chicago and ask them if any other state has done what Nevada did. What we ended up doing two years ago was not the legislation that was proposed.

MR. GRAY:
Section 57 ensures that trustees of nontestamentary trusts must account annually to beneficiaries without the settlor having to incorporate the provisions of NRS 165, Exhibit G, page 3.

Section 58 will permit the settlor of a spendthrift trust to hold additional powers other than the power to make distributions to himself, Exhibit G, page 3. This was implied by current law but should be codified to make sure we have a good understanding of what a settlor can and cannot do with respect to a spendthrift trust.

Section 59 would eliminate a portion of the existing statute and permit a spendthrift trust to accumulate income and principal, Exhibit G, page 3. It also provides any action regarding a spendthrift trust has to be commenced under NRS 153 regarding a testamentary trust or NRS 164.010 regarding a nontestamentary trust.

On page 3 of Exhibit G, section 60 updates and clarifies NRS 166.170 regarding transfers to spendthrift trusts, specifically incorporating in the Uniform Act when a transfer to a spendthrift trust can be undone. It also provides that a person may not bring an action against an advisor of the settlor or trustee of a

spendthrift trust unless the advisor knowingly and in bad faith violated Nevada law and the adviser's actions caused the damage suffered by the person.

Sections 61 through 64 clarify and provide for the exemption of certain trust property, interests and powers of appointment from execution or attachment, Exhibit G, page 4.

CHAIR CARE:
Is there anything you want to add about the proposed amendments?

MR. GRAY:
The proposed amendments are not extensive. They clarify a couple of the provisions. There are only six suggested amendments in Exhibit H, including the suggestion to eliminate section 41.

SENATOR WIENER:
In the amendment to section 15, subsection 4, of S.B. 287 on page 1 of Exhibit H, the term "or marriage" is added. Would that be affected if married persons are separated, legally or otherwise?

MR. GRAY:
No, it does not. The provision expressly addresses the circumstances where a settlor beneficiary is not deemed to be exercising improper dominion or control over the trust. Whether it is a former or existing spouse should not affect what we are trying to achieve here.

SENATOR MCGINNESS:
In section 52 on page 3 of Exhibit G, is unitrust a new term?

MR. GRAY:
The unitrust is a new defined term. It is defined because sections 46 through 49 permit a trustee to convert an income trust to a unitrust.

CHAIR CARE:
I will make the same disclosure as to Mr. Gray regarding S.B. 287 that I did regarding S.B. 277.

MR. SOLOMON:
The committee hopefully ensured the proposed amendments had some input and insight into fraud issues. Our concern was to be careful of what is liberalized regarding authorities to do certain things in trust matters, not to unintentionally invite the fraudulent use of the same. We had substantial input into the original drafts trying to ameliorate that. The bill is reasonable, and I support it.

BILL UFFELMAN (Nevada Bankers Association):
Section 56 on page 3 of Exhibit G is better this way.

CHAIR CARE:
The hearing is closed on S.B. 287. There being nothing further to come before the Committee, the hearing is adjourned at 10:52 a.m.

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: