MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Sixth Session
May 2, 2011

The Committee on Judiciary was called to order by Chairman William C. Horne at 9:12 a.m. on Monday, May 2, 2011, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 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/76th2011/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 William C. Horne, Chairman
Assemblyman Steven Brooks
Assemblyman Richard Carrillo
Assemblyman Richard (Skip) Daly
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Jason Frierson
Assemblyman Scott Hammond
Assemblyman Ira Hansen
Assemblyman Kelly Kite
Assemblyman Richard McArthur
Assemblyman Tick Segerblom

COMMITTEE MEMBERS ABSENT:

Assemblyman James Ohrenschall, Vice Chairman (excused)
Assemblyman Mark Sherwood (excused)

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Nick Anthony, Committee Counsel
Lenore Carfora-Nye, Committee Secretary
Michael Smith, Committee Assistant

OTHERS PRESENT:

Julia S. Gold, Legislative Subcommittee, Trust and Estate Section, State Bar of Nevada
Layne Rushforth, Legislative Subcommittee, Trust and Estate Section, State Bar of Nevada
Robert E. Armstrong, McDonald Carano Wilson LLP
John McCormick, Rural Courts Coordinator, Administrative Office of the Courts
Tina Leiss, Operations Officer, Public Employees' Retirement System

Chairman Horne:
[The roll was called.] There are two bills on the agenda for today. Senate Bill 405 was pulled from the agenda by the sponsor. I will open the hearing with Senate Bill 221 (1st Reprint).

Senate Bill 221 (1st Reprint): Makes various changes relating to trusts, estates and probate. (BDR 2-78)

Assemblyman Segerblom, Clark County Assembly District No. 9:
Senate Bill 221 (1st Reprint) is a bill that Senator Wiener and I sponsor every two years. The State Bar has a probate division, which produces technical changes. We sponsor the bill for the State Bar. I am here to present the bill for Senator Wiener today. Although I do not fully understand all aspects of the bill, there are experts present who do. Julia Gold is here in Carson City, and Layne Rushforth is present in Las Vegas. Ms. Gold can go through the bill section by section, if you would like.

Chairman Horne:
Yes, and it is a pretty thick bill. Please proceed.

Julia S. Gold, Legislative Subcommittee, Trust and Estate Section, State Bar of Nevada:
I am here on behalf of the State Bar of Nevada's Legislative Subcommittee, Trust and Estate Section. I am joined by Layne Rushforth, who is in Las Vegas. I will provide a summary. We have previously provided two handouts, with a

brief summary (Exhibit C), and a more detailed summary (Exhibit D). I will go through the first few pages, and then Layne Rushforth will continue. If you have any questions, please do not hesitate to interrupt me.

The bill is intended to improve the laws that relate to estates and trusts. It simplifies the process for transferring assets at death, whether or not probate is required. It clarifies creditor rights as to nonexempt assets belonging to trusts and decedents. It clarifies exemptions from creditors' claims, and it improves or updates our laws, making Nevada a more ideal jurisdiction for probate and trust matters. That is an overview of the bill's purpose. I will now go through the sections of the bill, keeping it as brief as possible. [Continued reading from prepared testimony (Exhibit C).]

Assemblyman Frierson:
It has been a long time since I have worked with wills and trusts. When we are being walked through some of the sections, we may require a more detailed explanation. For instance, in section 1 through section 3, I would like to know what it is we are clarifying.

Julia S. Gold:
During the last legislative session in 2009, there were certain provisions dealing with properties that were exempt from creditors. When we modified that section, it made it somewhat ambiguous as to whether or not assets held in a revocable living trust were exempt from creditors. That was not the intent of the modification. Sections 1 through 3 are clarifying that assets held in a revocable living trust are not assets exempt from creditor claims. Nevada has a spendthrift section making certain assets that are transferred into an irrevocable trust exempt from creditor claims after certain factors are met. This is just to clarify that assets transferred into revocable living trusts are not exempt assets.

Assemblyman Frierson:
Can you define spendthrift? We had a conversation before the hearing, and some of the Committee members do not understand the common terms in wills and trusts.

Julia S. Gold:
A person who is considered a spendthrift has spending problems. In other words, he may spend too much. The term spendthrift trust was historically created in order to protect assets, not allowing the beneficiary to spend them recklessly. It would also stop creditors from being able to access those assets. It is also referred to as an asset protection trust. In Nevada, it is oftentimes referred to as an onshore asset protection trust, as opposed to an offshore

foreign asset protection trust. There are certain states that have enacted these statutes which protect them from creditors. Some of these states are Delaware, Alaska, South Dakota, Nevada, and a few more. We are unique because we have a statute which says a settlor can create a trust during his lifetime and have the assets which are transferred into the irrevocable trust protected from creditors, after certain factors are met. To sum it up, sections 1 through 3 were designed to make some technical corrections to enactments in 2009, clarifying what assets are exempt.

Sections 4 through 47 relate to nonprobate transfers of property, including certain real property, at the death of the owner. [Continued reading from prepared testimony (Exhibit C).]

Chairman Horne:
Excuse me, Ms. Gold; I am having trouble keeping up. In section 39, addressing the transfer of property to another transferee, how is that different than transferring from one trustee to another trustee?

Julia S. Gold:
This is actually dealing with nonprobate transfers. They are not even necessarily dealing with trusts or a will. These transfers are by contract. For instance, these transfers occur if you have a life insurance contract naming a beneficiary designation. The transfers are not occurring through your typical wills or through probate.

Section 71 clarifies that Nevada's antilapse statute only applies to blood relatives of the decedent. It will not apply to spouses. If somebody dies and wills something to someone who is not a blood relative, it will only go to a blood relative of the decedent. [Continued reading from prepared testimony (Exhibit C).] Sections 95 through 144 adopt the Independent Administration of Estate Acts. If the matter is contested, someone can still request court supervision. Only in certain circumstances will a court allow a personal representative to proceed under this act. Essentially, everyone has to receive notice and agree. When using the term "everybody," I am talking about the beneficiaries under a will.

Sections 145 through 147 modify existing provisions to coordinate with the Independent Administration of Estates Act. Sections 148 through 150 permit the court to order the payment of the petitioner's attorney's fees in a set aside proceeding. [Continued reading from prepared testimony (Exhibit C).] The purpose of section 156 is to avoid litigation against a person who is given a power of appointment, which should limit litigation. Section 157 contains

technical amendments to coordinate *Nevada Revised Statutes* (NRS) 153.031 with section 193 of this bill pertaining to accountings.

Unless you have any specific questions, I will turn it over to Layne Rushforth, in Las Vegas.

Chairman Horne:
Regarding section 156, please explain to the Committee exactly what the power of appointment is, and why we would absolve the beneficiary of a power of appointment from any fiduciary responsibility.

Julia S. Gold:
A testator or settlor of a trust may give a beneficiary power to appoint property. If my mother creates a trust and gives me the power to appoint where the assets go before I die, and I do not exercise that power of appointment, it will go pursuant to the document. I cannot be held liable for not exercising it. In this case, we are talking about the fiduciary duties. If the power of appointment is given to someone that is a fiduciary, a trustee, or a personal representative, and that person has the power to appoint those assets and fails to do so, he is not held liable. It gives flexibility to the document by allowing a testator to give a power of appointment to somebody, taking into account circumstances that might not exist at the time the document is drafted. Additionally, there is no duty to exercise that power if the appointed party does not deem it advisable to do so.

Chairman Horne:
This says "to the exercise or non-exercise." I suppose you can step outside the intent of the settlor, regarding how the property was supposed to be appointed. It seems that they can go way outside that, and be held harmless.

Julia S. Gold:
Many times, if a person is given a power of appointment, the power within itself has restrictions. The restrictions could limit them to exercising it to the issue of the person who created the document. The fiduciary must exercise the power he is given, within any limitations.

Chairman Horne:
I imagine that if it is exercised it outside of those limitations . . .

Julia S. Gold:
If exercised outside of those limitations, it would not be a valid exercise. The beneficiary will only be held harmless if he is exercising it within the terms

of the document itself. Because it is a fairly broad power, we do not want the person who receives it to accept liability just by having that power.

Chairman Horne:
Now I understand, but as I read the language, it does not state that we are going to have those protections only if the beneficiary of the power of appointment operates within the limits of those powers.

Layne Rushforth, Legislative Subcommittee, Trust and Estate Section, State Bar of Nevada:
I would like to address that. This proposed statute resulted because it is very common for a settlor of a trust or a testator of a will to give his spouse or child the right to change beneficiaries. We call it the power of appointment. For example, he might say to his spouse, "You can give this to our children, equally or unequally, based on the circumstances that exist during your lifetime or your death." The power of appointment is very broad by saying to the surviving spouse, "You can exercise that right all you want, but you have to limit it within the kids." What has happened is some of the kids have said, "You have a fiduciary duty to be equal," even though the power of appointment specifically says it can be equal or unequal. This statute is not giving them carte blanche, and saying they can ignore the terms of the power of appointment. We are just saying that whether they decide to exercise it or not exercise it, as long as the person is within the terms of the power of appointment, nobody can claim the person has a fiduciary duty to something that is not specifically in the power of appointment direction itself. We are just trying to avoid litigation, because somebody may have given a spouse or child the right to make unequal distributions, or change beneficiaries. We do not want them saying a duty is owed because that is not something within the terms of the power of appointment.

Chairman Horne:
I understand that, Mr. Rushforth. My issue is concerning section 156, because it does not specify the party is required to be within the restrictions of that power. That is what I am getting at.

Layne Rushforth:
We would be happy to have that language included.

Julia S. Gold:
If I may clarify, this is based on the summary that was presented. If you look at the actual language in section 156, it does specifically say, "Except as otherwise provided in a will establishing a testamentary trust, a person holding a power of appointment pursuant to a testamentary trust does not owe

a fiduciary duty to any person and is not liable to any person with respect to the exercise or nonexercise of the power of appointment." If you would like for us to limit that to make it clear that this is limited to the document, we can. Although I believe that is based on the fact that establishing the testamentary trust is provided in the will, it is governed by the document's terms itself. Would you like that further clarified?

Chairman Horne:
I will check with the legal division. Before we move down south to Mr. Rushforth, we have a few questions.

Assemblywoman Dondero Loop:
When you were talking about blood relatives, does that include spouses? Can you clarify blood relatives?

Julia S. Gold:
This is just a revision to our current antilapse statute. Blood relatives would not include spouses. It would include the children. If we are talking about your linear descendants, it would be your children, your grandchildren, et cetera. However, it would not include spouses.

Assemblyman Frierson:
Are we trying to correct some things that are actually happening, or are we trying to create model legislation? Can you give some examples of actual events that have happened that we are trying to correct with this proposed language?

Julia S. Gold:
Sections 1 through 3 are trying to correct something that happened in 2009, regarding limiting the properties that are exempt from creditors' claims.

Assemblyman Frierson:
What was it that happened that we are trying to correct?

Julia S. Gold:
I do not know whether there was litigation with respect to this specific provision, so I do not have a real-life case to refer to. Hypothetically, if somebody created a revocable living trust, and a creditor tried to go after the assets within the trust, it could have been asserted that NRS 21.075 and NRS 21.090 exempted those assets from the collection by the creditor in the revocable living trust. That was not the intent, therefore this section is correcting that. Some of these sections are trying to make our statutes better by costing the estate less. An example is the Independent Administration of

Estates Act. In an estate that does not have any contests or disagreements, the personal representative has the power to take certain actions such as selling real property without having to go to court. Right now, for an estate to sell real property, someone would have to go to court to receive the approval to do so. This section changes that so that the personal representative should only send out a notice of proposed action to beneficiaries of the estate. The notice of proposed action will cover, in detail, plans for the estate. Therefore, if the beneficiaries want to object, they can file with the court. If everyone is in agreement, the personal representative can turn around and sell the property without incurring the court expense, and without the tedious actions of having the attorney file a petition, making an appearance, have the court hear the petition, and waiting for the court to issue the order. It will streamline the probate process, and it has protections built in so that beneficiaries have a means to be heard if they do not agree with what the personal representative is doing.

Assemblyman Daly:
From what I can see, this bill touches on approximately 15 or 16 different chapters of law. I may just need someone to personally explain the details to me because there is a lot to digest in this bill. It is difficult to take it all in. I would appreciate it if you could have someone come and go over it with me. Basically, what I need to understand is what we are trying to fix.

Julia S. Gold:
We are trying to fix certain provisions, but we are also trying to make the process better, while providing more clarity with respect to the sections that govern trusts and estates. Our Committee is composed of a number of attorneys in both the North and South. We try to include the rural counties as well, although we have not had much participation from them. Our Committee will research other state's laws, and bring in certain changes to improve Nevada's laws regarding trusts and estates. The result is what you are seeing in these sections. The goal is to try to make Nevada one of the leading jurisdictions with respect to trusts and estates. I was asked to speak in San Diego last year, on a panel that had others from Alaska, South Dakota, and Delaware, because Nevada is seen as one of the leading jurisdictions in trust and estate law. In our practice, we see certain issues come up involving litigation, and realize that if we had greater clarity we could minimize litigation. Additionally, we are looking at what we can do to make the probate and trust administration process more streamlined and less costly for beneficiaries. I would be happy to meet with you and spend some time to go through the sections in more detail.

Chairman Horne:
Also, please take note that this is being brought by the Trust and Estate Section of the Nevada State Bar, which is the group practicing in this area of the law.

Julia S. Gold:
Yes, and we are trying to make these sections work better for the practice and for the courts. We understand the courts currently have a significant burden.

Layne Rushforth:
I am willing to take questions as we go along, so feel free to interrupt me. As Julia has mentioned, a goal of our committee was to keep Nevada competitive with other jurisdictions. We feel this would encourage people to do business in Nevada.

I will begin with sections 158 through 169, which are in reaction to some real problems. One of the real problems occurring is that there are many situations where people will contact someone that they do not know very well. They may decide to place a property in the name of a caregiver, a nephew, or a niece. Or, the person may add this party as a joint tenant to a bank account. We may even have elderly people becoming susceptible to undue influence. The elderly people, who may even have dementia, trust others to make asset transfers by deed, change of beneficiary designation, or by change of ownership. There is a real problem with people who are inheriting assets by trust, will, or under a nonprobate transfer such as a joint tenancy or pay on death account. People who should not be receiving assets are receiving them because they exercised undue influence. This particular group of sections is intended to make it easier to set aside a transfer due to fraud, duress, or undue influence. Therefore, if certain people are involved in the production of these documents such as a caregiver, family friend, or attorney, and they have done something to favor themselves or their family members, it will create a presumption that the transfer triggered by that document is invalid. We are going to make it harder to take advantage of someone by putting documents in front of them to sign. We have made some exceptions, such as having a second attorney look at the documents. The main purpose is that it is presumed to be invalid, putting the burden of proof on the recipient. This whole section is intended to make it more difficult for people to take advantage of others.

Section 170 is addressing another very real situation. We get people who are beneficiaries of a will or heirs of an estate who constantly file motions and oppositions, going to court unnecessarily for very frivolous matters. Several years ago, the legislature adopted a provision in the guardianship code in NRS Chapter 159. This provision created a classification called the vexatious litigant. If a person is constantly bringing motions without merit, this statute

would give the judge the right to classify someone as a vexatious litigant for causing unnecessary legal fees and expenses, and allow the court to order the reimbursement of those legal expenses. The vexatious litigant will be placed on a second-class status in terms of what he is entitled to do. Therefore, section 170 is copying from the guardianship code and bringing in the classification of vexatious litigant to give the judges the discretion to deal with problem people accordingly.

Section 171 corrects a very simple problem. In Nevada law, if a probate case is opened and a creditor, heir, or potential beneficiary wants to be notified of probate updates, he can file a request for special notice. In some cases, attorneys will receive a phone call from a party, who is usually out of state, asking for the attorney to file a request for special notice on his behalf. If the attorney becomes the attorney of record, he would have to accept the service of process, and must go through a formal withdrawal petition if the client does not engage him to do anything further. This statute says that if the only thing the attorney does is file a request for special notice, it does not make him the attorney of record. The attorney can simply give notice that he is not involved and will not have to apply for a formal withdrawal.

We have always had a provision that has said if minor beneficiaries or incompetent persons were not represented by counsel, a court could appoint an attorney for them. The statute never gave the court any jurisdiction to set their fees or to determine what the attorney would get paid. Section 172 allows the court to do this.

Section 173 is another clarification and a slight expansion. In the probate code, except as provided otherwise, the regular general rules of discovery apply. Probate does not begin with a complaint and summons like a civil litigation does. It was not clear when interrogatories or depositions could begin. In order to expedite matters, and save people from filing special motions, we are proposing this legislation that would allow once the probate commences, discovery to begin, which simplifies matters.

Section 174 relates to a provision in the guardianship section in *Nevada Revised Statutes* (NRS) Chapter 159. In Nevada, we allow a person to act as guardian of an estate with practically any document. However, in order to waive bond for such guardian, the provision that waives the bond must be in the person's will. This section is saying if a person is making the designation of guardianship through any legal document, and it is a proper nomination, bond may be waived, even if not specified in a will.

Section 175 is providing clarification of some real cases. Years ago, there was a Supreme Court ruling in the case of *Charleson v. Hardesty*, 108 Nev. 878, 839 P.2d 1303 (1992). Basically the ruling said that an attorney for a fiduciary has a duty to not injure the beneficiaries of a trust. Therefore, if I represent the trustee of a trust, I have a duty to the beneficiaries. The unfortunate part about *Charleson* is it did not clarify what that duty was, nor did it say how far it goes. In most states, there is no duty of the attorney to the beneficiaries of a will or trust. There is no privity of contract, and therefore no duty. The attorney's only duty is to the fiduciary. When we met as a committee, we decided that we liked the idea of holding attorneys who represent fiduciaries responsible if they are acting in a way that would injure beneficiaries. This statute is saying that an attorney cannot be held responsible for a fiduciary acting without the attorney's knowledge. Unless the attorney can be proven to have done something wrong knowingly, he should not be held personally responsible, and essentially be a guarantor for the bad acts of a fiduciary. We are not eliminating the duty of the attorney. The section will clarify that issue and make *Charleson* a little bit more meaningful. Currently, it only creates an ambiguity.

I will provide you with a little background on sections 176 through 178. Over the years, there has been a split between states regarding whether or not no contest clauses are enforceable. In 2009, the Legislature adopted a statute that says the no contest clauses are enforceable. There were situations where people were putting special conditions in their documents. For example, a document may specify that if the beneficiary goes to college, he would be entitled to something. Or the document might say the beneficiary may only receive distributions of the trust if a drug test is passed. Our Committee decided that those types of clauses are reasonable and do not violate public policy. A testator of a will or a settlor of a trust should be able to put those conditions in a document as long as the conditions do not violate public policy. We have had a number of judges that have said that no contest clauses only apply if there is a formal opposition to the trust. We are saying this no contest clause should apply if the settlor indicates so by specific provision. In the previous example, if the recipient does not pass the drug test, that is not a formal contest, yet it is a violation that should prohibit him from receiving something under the terms of the will or trust. Our decision is a position that every person who creates a trust or writes a will should be able to use whatever terms he wishes, as long as the terms are reasonable and not do not violate public policy.

Chairman Horne:
Let me interrupt you for a moment, Mr. Rushforth. I remember from law school, it was common law that there should be limits on how much control the deceased should have on the property and lives of the living. Typically, there

are prohibitions on what he or she was legally entitled to do. Let us look at your example about the drug test. Because it is unlawful to use illegal drugs, it would be acceptable for the testator to will something on the condition that the recipient refrains from illegal drug use. However, it would be different if there were a clause which said the beneficiary is not allowed to partake in fast food, because fast food is legal. What you are saying is testators may use any provision they choose. Is that correct?

Layne Rushforth:
That is correct. We are not going to accept something outrageous like saying, "You will get your share if you go and kill someone." That example is clearly a violation of law and public policy. Let me provide you with another example. Recently, a client whose son has a gambling problem came to see me. Gambling in Nevada is perfectly legal. However, this person is spending his entire paycheck on gambling. His family is having the mortgage foreclosed, and having cars repossessed because he is not paying the bills. Fast food is not a good example because that will be difficult to enforce. We are saying that if a person has a track record of spending more than 25 percent of his take home pay in gambling, defining this person as a problem gambler, his share should be held in trust rather than being distributed to him. I believe the settlor or testator should have the right to do that. If you are saying you do not want the person to restrict fast food, you will most likely have to vote against this provision because that is what we want. We want to give the testator and settlor the right to do as they wish with their property.

Chairman Horne:
A testator may say, "Susie cannot marry Snake." Or he may say, "You have to divorce Betty Boxsprings."

Layne Rushforth:
Those would be against public policy.

Chairman Horne:
Perhaps Snake is a six-time felon. We have the argument of whether it is against public policy or is this person seeking the well-being of his heir. I think it is a slippery slope, when you have such a broad range of what can be controlled after testator or trustee is deceased. To say, "You can have this only if you marry this socialite," instead of someone the beneficiary wants to marry. These are the issues that I have with regard to that particular provision.

Layne Rushforth:
One of the reasons that we included the exception of public policy is because we wanted to give the courts the discretion to decide whether it is against

public policy. We did not feel as though we were in a position to make a laundry list of what is or is not against public policy. We felt that the judiciary could do that. Under current law, we have situations where we have conditions in wills and trusts where the court will not force the issue because it is too vague or ambiguous. We do not want to change that. If you say that a person has to abstain from McDonald's for the rest of his life, the court will say that is unenforceable because it is too vague. You cannot have a policeman guarding the person to be sure he does not go out and have a Big Mac. Our main concern is to allow a person to choose the provisions. If I have certain provisions in my will or trust, and if the court rules that my provisions are against public policy, my son will get zero. I do not think we want to do that. I think we would rather say that Johnny can have his trust, but he has it under the strings that dad wants, even if it requires him to be drug tested or get involved in Gamblers Anonymous.

Chairman Horne:
I believe we will agree to disagree.

Layne Rushforth:
Okay, I will move on. Section 179 is a clarification. Under trust law, certain trusts are created with some becoming irrevocable immediately, while others become irrevocable after someone dies. Although a trust may have been appropriate when it was created, situations change. We want to be able to divide the trust for different purposes, without changing the beneficiaries. For example, we may want to change the tax impact or relating rules. In 2009, the Nevada Legislature adopted a section that allows a trustee who has the discretion to make distributions to split the trust. This particular section is a clarification with the intent to keep up with other jurisdictions such as Delaware and South Dakota. It will allow for the division of irrevocable trusts in situations where it does not hurt the beneficiary's share, giving the trustee the ability to divide the trust. As a real life example, sometimes there will be a situation where a trust is created by a husband or wife who each have children from different marriages. Sometimes it is best for family relationships to split that trust into two, with one part for one family and another part for the other family. As long as fair market values are used, and beneficiaries are not denied rights they already have, this particular section allows them to do that. It is simply a technical correction.

Section 180 relates to the transfer on death act, which Julia discussed. To recap what Julia said, for nearly 30 years, we have allowed some sort of transfer on death beneficiary designations for bank accounts, credit union accounts, et cetera. A few years ago, we allowed transfer on death deeds to be added. We ended up with a hodgepodge of statutes that were sprinkled

throughout the code. The sections that Julia discussed consolidate them all. We also indicated that there will be certain transfers affected by divorce. Currently under Nevada law, it is not clear what happens with certain transfer on death designations. If an ex-spouse is still on an insurance policy, Nevada has some court cases saying that if the divorce decree does not address that policy, and you have left your spouse on the policy, the ex-spouse gets awarded the policy. Most people do not want that. Most will expect the ex-spouse to be automatically excluded. Therefore, this is a technical correction that says if there is a spouse named, he is basically deemed deceased, unless the trust is amended after the divorce.

Section 181 is another technical correction. In 2009, the Legislature adopted a statute allowing us to limit when people can contest a trust. There was an artificial deadline saying the notice had to be filed within a certain period of time after the trust became irrevocable. The problem with that is that sometimes the first trustee who was serving was incompetent and did not know what he was doing. Therefore, that time frame for providing notice of filing a will contest expired. The next trustee would then want to give the beneficiaries 90 days to file a will contest, but it was too late. We are simply taking off the limits. It basically says that once a trust becomes irrevocable, a trustee can give the beneficiaries notice at any time. There would be 120 days to file a contest. The whole purpose of this is to not have trust contests arise years after the fact.

Chairman Horne:
For clarification, we are removing the 90-day provision according to this bill. Instead of lengthening the time, you are removing it completely. Yet, it is not limitless, as you mentioned 120 days.

Layne Rushforth:
There are two time limits. One is the time for the trustee to give notice. The other is for the beneficiaries to file a contest. We are eliminating the deadline for providing notice. The 120 days for a beneficiary to file a contest after receipt of the notice has not changed. Let us say that my mother dies. A year later, the trustee of my mother's trust sends me a notice saying that I have the right to contest this trust. Under current law, the notice is invalid because the trustee did not provide the notice within the 90-day period. Under the proposed law, we are saying that providing notice a year later is okay. The beneficiary will still have 120 days from the day the notice is received to file a contest. We do not care when it starts, but we want the ability of a trustee to limit when a contest can be filed.

Chairman Horne:
We will have to pick up the pace, Mr. Rushforth. We still have another bill to be heard and floor session at 11:00 a.m.

Layne Rushforth:
Sections 182 and 183 are in response to a real life situation. Because of the low-income environment that we are in, the administrative expenses, especially trustee's fees, are eating into the income beneficiaries' earnings. Under current law, half of trustee's fees are charged to the income beneficiary. If we are talking about a multi-million dollar trust which is billing the trustee's fees based on a percentage of the trust, and only a part of the assets are producing income, the income beneficiary can lose half of his income because he is paying half of the trustee's fees. This provision places a cap, based on a formula, on what can be charged out of the income to pay for attorney's fees. It does favor income beneficiaries. I also want to emphasize that this says, "Except as expressly provided otherwise in the trust instrument." The settlor can do as he chooses. This is a default provision which would apply if the trust is silent.

Section 184 through 198 clarifies the duty of a trustee to provide an accounting. Our current statute has some ambiguities regarding the entitlement of the accounting, and how much detail there is. We have adopted a proposal that says the trustee must provide an accounting. If it is a complex accounting, the trustee may provide a summary as long as the backup can be provided on demand.

Section 199 is part of NRS 165.135. Sections 184 through 198 are to clarify what information must be provided to a beneficiary and which beneficiary, by a trustee. It basically requires the trustee to report all its receipts and all of its disbursements, and to provide a backup of the accounting. This section makes it unnecessary for a trustee to provide an accounting to a remote beneficiary.

Section 200 allows a settlor to decide what is happening in terms of the duties of a fiduciary. For example, a fiduciary always has a duty to be impartial, unless the trust provides otherwise. Sometimes we might say, "I want them to favor my spouse over my children," or vice-versa. This is saying to the public that if the settlor wants to place a contrary provision in the document, which says for instance that no diversity is required in the stock portfolio of the trust, it will be considered valid.

Sections 201 through 206 clarify our existing spendthrift trust. As Julia pointed out, spendthrift trusts are trusts for the benefit of people who cannot handle money. By definition, it is a trust that creditors cannot access. In 2009, there was a provision added that said in order for a transfer to be set aside, the

transfer must be established to be wrongful. However, there was no definition provided. We are clarifying that. We are also adding a few other types of trusts such as qualified personal residence trusts, and charitable trusts to the list of creditor-exempt trusts.

The remaining parts of the bill are technical corrections that coordinate everything we just discussed into the appropriate sections of the trust.

Chairman Horne:
Thank you, Mr. Rushforth, and Ms. Gold. I do not see any questions at this time, although someone else has come to sit at the table.

Robert E. Armstrong, McDonald Carano Wilson LLP:
I am a trust and estate lawyer who has practiced in Nevada for over 30 years. I would like to speak about a particular provision in S.B. 221 (R1).

Chairman Horne:
Are you in favor of this bill?

Robert E. Armstrong:
I am in favor of all of the provisions, except section 182. I have had the privilege of being the chief author of the Nevada Civil Practice Manual of the Decedent's Estates Chapter for the last 20 years. I am also a fellow of the American College of Trust and Estate Counsel, along with my colleague Layne Rushforth. [Continued reading from written testimony (Exhibit E).]

Chairman Horne:
Did you put these concerns on record at the Senate hearing?

Robert E. Armstrong:
I did not. I have addressed these concerns with the Nevada State Bar Trust and Estate Committee. I was out of state when the Senate held the hearing. A few of my colleagues did attend the meeting and opposed this section of the bill, for fundamentally the same reasons.

Assemblyman Segerblom:
You indicated that this particular section was due to one particular client.

Robert E. Armstrong:
It is my understanding that in the 2007 Legislature, a provision was introduced that changed this statute, yet none of the trust and estate practitioners were aware of it. In 2009, the Nevada State Bar Trust and Estate Committee reenacted the uniform law that exists in all 50 states, therefore correcting it.

Now it is coming back in and is really addressed to somebody who has a unique circumstance. I have even volunteered to assist that person correct it pro bono. I feel that strongly against this provision.

Assemblyman Brooks:
Section 182, subsection 2, limits the amount that can be deducted from income to a percentage of income called "the applicable income percentage." The applicable income percentage is a default rate under NRS, plus two points. In 2011, the amount payable from trust income for principal value basic expenses could not exceed 5.25 percent of the trust income. Are you asking for us to remove this section so that you do not have to abide by the principal value basic expenses?

Robert E. Armstrong:
I am a real believer in uniform laws. I want our provisions to be uniform with all other 50 states. As a practitioner, if I saw Nevada starting to do things with regard to fundamental provisions, I would avoid this state like the plague. This is what the inequity is. Additionally, many of us have suffered through the longest drought in our lifetime. Many people's principal went down over the last 10 years. Under this provision, although the income beneficiary may have been earning income, the principal beneficiary would have been bearing almost 95 percent of the charges associated with that investment performance. That is fundamentally unfair, and it really affects how a trustee will manage the affairs of a trust. I think we all remember when people were investing in hard-money loans, earning 12 percent interest. If the monies were in trust, the income beneficiaries were earning 12 percent interest. Under this provision, if adopted, even if they were earning 12 percent, the income beneficiaries would only retain 5.25 percent, using your example, Assemblyman Brooks. We are getting into very uncharted water here. I am worried about having unintended consequences. I do not want that to happen to Nevada.

Assemblyman Brooks:
A person who had some type of investment giving a return of 12 percent would only be able to take out 5.25 percent under this statute. Is that correct?

Robert E. Armstrong:
Usually trustees' fees run around 1 to 1.2 percent. Under this provision, the current law charges 60 basis points to an income beneficiary for the privilege of having trustee fees and investment expenses for the administration of the estate. Currently, 60 basis points would be taken off the income earned on the trust. Many people may only be earning 2 percent on their passbook savings account. These people may feel as though a 60-point reduction would take nearly a quarter of their earnings away. At the same time, the principal

beneficiary may not be earning any income on his capital appreciation occurring inside the trust. This just highlights how difficult a process this is, and how flawed this particular provision will apply in real-life situations.

Chairman Horne:
Mr. Rushforth, you did not mention it in your presentation; however, I am assuming that you disagree with Mr. Armstrong regarding section 182. Is that correct?

Layne Rushforth:
That is, in part, correct.

Chairman Horne:
I am going to suggest something. I would like for you and Mr. Armstrong to prepare a one-page bullet-point presentation, listing the positive and negative aspects of section 182. Additionally, you can add suggestions for how you believe each area of the section can be improved. Please provide it to the Committee for review. Gentlemen, this is your area of expertise, and I would like to give each of you the opportunity to voice your concerns in clear concise language. Mr. Armstrong, please summarize your ideas on why the section should be deleted. Mr. Rushforth, you may summarize your thoughts on why you believe the section should be kept, and what you may agree on to be deleted or modified. Once the Committee looks over your summaries, we can reach out with any questions we may have, before bringing the bill to a work session. Do you both agree to have that to me by the end of the week?

Layne Rushforth:
Yes, will do.

Robert E. Armstrong:
That is not a problem, and I think it is an excellent suggestion.

Chairman Horne:
Are there any other questions? Is there anyone in opposition or neutral? We are now closing the hearing on S.B. 221 (R1), and will open the hearing on Senate Bill 436 (1st Reprint).

Senate Bill 436 (1st Reprint): Revises provisions concerning pension benefits for justices of the Supreme Court and district judges. (BDR 1-1177)

John McCormick, Rural Courts Coordinator, Administrative Office of the Courts:
Senate Bill 436 (1st Reprint) was a bill brought by the Nevada Department of Administration, Division of Budget and Planning, to shift the responsibility for

making a deposit of money to pay the retirement benefits for justices of the Supreme Court and judges of the District Court. The responsibility would shift from the Department of Administration, Division of Budget and Planning, to the Administrative Office of the Courts (AOC). It is basically just a technical change regarding who makes the deposit into an existing account. On the Senate side, an amendment was offered by the AOC to clarify that along with the shift of responsibility to the AOC to make the deposit, the money should come along, as well. It simply clarifies that the existing General Fund obligation of the state remains a General Fund obligation of the state. That summarizes the two things that S.B. 436 (R1) does.

Chairman Horne:
The hearing of the last bill left us a bit frayed, and there may not be a lot of questions at this time; therefore, we may not move this bill today. Are there any questions for Mr. McCormick?

Assemblyman Frierson:
Can you explain how it is occurring right now versus how it would occur with passage of the bill? What exactly are we changing, or is it only changing language?

John McCormick:
What is changing is that the state is giving the money to the Department to deposit into the judicial retirement fund, therefore funding the obligations for that fund. Instead of it being sent to the Department of Administration, Budget and Planning Division, this bill would shift the responsibility to the Supreme Court and the AOC to make the deposit. It basically just shifts the responsibility of who is making the transfer to the retirement fund.

Assemblyman Frierson:
Are we simply changing the delivery method?

John McCormick:
That is correct. That is essentially all this bill does.

Assemblyman Segerblom:
What is the problem currently?

John McCormick:
This is an area that I am not well versed in. This came from the Department. I believe its desire was to not have to administer the judicial retirement fund. The Department felt that the judicial matters should be handled by the Supreme Court. I believe it is alleviating an administrative burden on them.

Chairman Horne:
I see no other questions. Is there anyone else wishing to testify with regard to S.B. 436 (R1)?

Tina Leiss, Operations Officer, Public Employees' Retirement System:
The retirement board has taken a neutral position on this bill. The bill has no impact to the system itself, as it only changes who submits the payment to us. The payment is still required, and the bill does not change the timing or amount of the payment. This bill has no impact on the financing of the judicial retirement system. I will be happy to answer any questions.

Assemblyman Frierson:
Is this going to save money by relieving the Department of Administration of responsibility?

Tina Leiss:
To my knowledge, no, it will not. It is just taking the responsibility from the Department of Administration and giving it to the AOC. As we normally correspond with the AOC, it is almost like removing the middle-man out of the transaction. As far as I know, it does not save money.

Assemblyman Frierson:
Does it save any man-hours or time?

Tina Leiss:
Not as far as the retirement system is concerned. We will be shifting whom we send the bill to. It does not create any more work either.

John McCormick:
I suppose by removing the middleman it could save the time incurred by the Department of Administration to act as the middleman in the transaction.

Chairman Horne:
I see no other questions. Is there anyone else in the neutral position? We will close the hearing on S.B. 436 (R1). Is there any other business to come before the Committee? Seeing no other concerns, we are adjourned [at 10:38 a.m.].

RESPECTFULLY SUBMITTED:

_____
Lenore Carfora-Nye
Committee Secretary

APPROVED BY:

_____
Assemblyman William C. Horne, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 2, 2011 **Time of Meeting: 9:12 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 221 (R1)	C	Julia S. Gold, Legislative Subcommittee, Trust and Estate Section, State Bar of Nevada	Comments to S.B. 221
S.B. 221 (R1)	D	Julia S. Gold, Legislative Subcommittee, Trust and Estate Section, State Bar of Nevada	Comprehensive Summary of S.B. 221
S.B. 221 (R1)	E	Robert E. Armstrong, McDonald Carano Wilson LLP	Prepared Testimony