MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
March 21, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 9:04 a.m. on Monday, March 21, 2011, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 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 Valerie Wiener, Chair
Senator Allison Copening, Vice Chair
Senator Shirley A. Breeden
Senator Mike McGinness
Senator Don Gustavson
Senator Michael Roberson

COMMITTEE MEMBERS ABSENT:

Senator Ruben J. Kihuen (Excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Tick Segerblom, Assembly District No. 9

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Bradley A. Wilkinson, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Mark A. Solomon, Cochair, Legislative Subcommittee of the Trust and Estate Section, State Bar of Nevada

Julia S. Gold, Cochair, Legislative Subcommittee of the Trust and Estate Section, State Bar of Nevada
Charles Duarte, Administrator, Division of Health Care Financing and Policy, Department of Health and Human Services
Layne T. Rushforth, Legislative Subcommittee of the Trust and Estate Section, State Bar of Nevada
Bill Uffelman, President and CEO, Nevada Bankers Association
William E. Ramsey, President, Whittier Trust Company

CHAIR WIENER:
I will open the hearing on Senate Bill (S.B.) 221.

SENATE BILL 221: Makes various changes relating to trusts, estates and probate. (BDR 2-78)

This is not the first time I have been honored to bring forward a bill for the State Bar of Nevada. Senate Bill 221 deals with trusts, estates and probate and is the product of 18 months of work by members of the State Bar of Nevada.

ASSEMBLYMAN TICK SEGERBLOM (Assembly District No. 9):
It is an honor to cosponsor this bill for the Bar. It seems like this bill generates more controversy every year than any other bill we do. At the end of the day, the changes in this bill all seem to be important.

MARK A. SOLOMON (Cochair, Legislative Subcommittee of the Trust and Estate Section, State Bar of Nevada):
I have provided the Committee with two documents to help them understand the provisions of S.B. 221: one titled "Comments to SB 221" (Exhibit C), and one titled "Comprehensive Summary of SB 221" (Exhibit D).

This bill is a joint effort of the Legislative Subcommittee of the Trust and Estate Section, State Bar of Nevada. The Subcommittee has 28 members—13 from northern Nevada and 15 from southern Nevada. For more than a decade, the Trust and Estate Section has been actively involved in an effort to revise and modernize Nevada's trust and estate law. Our goal is to make it more efficient, user-friendly and competitive with other states seeking to attract trust business. We have made great progress toward these goals, and S.B. 221 seeks to promote them further.

For example, one of the key components of this bill is comprehensive provisions governing nonprobate transfers at death. These provisions are designed to make it easier to avoid the tremendous expense and delays sometimes associated with the probate process, while at the same time providing a mechanism for bona fide creditors of the decedent to obtain payment for their just debts from people who have received transfers of the decedent's assets outside of probate. Another major component of S.B. 221 adopts provisions for independent administration of estates, which are designed to expedite the probate process, reduce administrative costs and eliminate court proceedings unless they are appropriate or needed to solve problems.

JULIA S. GOLD (Cochair, Legislative Subcommittee of the Trust and Estate Section, State Bar of Nevada):
I will go through sections 1 though 157 of the bill, using Exhibit C as a reference. Sections 1 through 3 are technical corrections to the 2009 modifications made to *Nevada Revised Statute* (NRS) 21.075 and NRS 21.090. These corrections relate to the exemptions of certain trust property, interests or powers from execution and attachment.

CHAIR WIENER:
On page 5 of the bill, item 17 deals with spendthrift provisions. What does the existing statute do, and why are we making the change?

MS. GOLD:
We are clarifying which interest is exempt from judgment from a creditor. There has been confusion as to whether the exemption applied only to a revocable living trust. That was not the intent. For that reason, we clarified the language to make it clear it was a present or future interest in the income or principal of a trust.

CHAIR WIENER:
How have you been handling this situation?

MS. GOLD:
For the last two years, there has been some question as to whether a creditor could access the assets of a revocable living trust.

Sections 4 through 47 relate to nonprobate transfers of property. I have received a comment from Charles Duarte, Administrator, Division of Health Care

Financing and Policy, Department of Health and Human Services. He expressed a concern about the statute of limitations in section 46. The purpose of this section was to consolidate, clarify and amplify law relating to nonprobate transfers while at the same time providing a mechanism for creditors to get paid. We will work with Mr. Duarte's office to try to incorporate his amendment.

CHARLES DUARTE (Administrator, Division of Health Care Financing and Policy, Department of Health and Human Services):
I have written testimony explaining my concerns about section 46 of the bill (Exhibit E). Medicaid runs an estate recovery program, as required under federal law. It allows individuals who otherwise might not be eligible for Medicaid to get the medical and long-term care services they need. Upon their death, assuming there is no spouse or dependent children, their part of the estate becomes available to us to help offset the government's share of the cost of providing medical services.

Our concern is that a significant number of our estate recovery cases involve probate. Section 46, subsection 10, paragraph (a) of this bill puts a one-year limit on such recovery. We currently operate under a separate section of the NRS that allows us three years. We would like to see if we can get an exemption from the provision in section 46 of the bill. I would like to have the Deputy Attorney General assigned to my office work with Ms. Gold to come up with some simple exemption language.

CHAIR WIENER:
What dollar amount are we talking about?

MR. DUARTE:
We have 60 to 70 cases a year that involve probate. I cannot tell you how many extend beyond the one-year time frame. My staff estimated an impact of perhaps $500,000 per year to the Division if we lose the ability to recover on those cases.

CHAIR WIENER:
Does this bill reflect the most current changes to the transfer-on-death (TOD) statutes?

MS. GOLD:
We have some additional suggested changes to the TOD statutes. We tried to coordinate all of the sections so there is one comprehensive statute that reflects the rights of the beneficiaries and the rights of the creditors in both of these sections.

CHAIR WIENER:
I want to be sure there is consistency.

MS. GOLD:
These sections were drafted to make sure there is consistency between TOD accounts, pay-on-death (POD) accounts, beneficiary designation of joint tenancy or community property with survivorship.

CHAIR WIENER:
Could you explain the "POD designation" mentioned in section 21?

MS. GOLD:
That is covered in sections 48 through 64. Those sections codify the forms that can be used within Nevada to designate whether it is a POD transaction or a TOD transaction and how the principal is designating the beneficiary. Part of the purpose of doing these amendments to the nonprobate transfer, the TOD and the POD sections was to try to coordinate them.

CHAIR WIENER:
Section 32, subsection 1, paragraph (b) states, "Money due or to become due under the contract ceases to be payable in the event of death of the promisee or the promisor before payment or demand." Could you give me an explanation or an example of how this works? What does "ceases to be payable in the event of death" mean?

MS. GOLD:
I believe this means that if the promisee dies, the benefit dies with them.

CHAIR WIENER:
Is this new language, or was it moved from another statute?

LAYNE T. RUSHFORTH (Legislative Subcommittee of the Trust and Estate Section, State Bar of Nevada):
This is new statutory language. We have recommended that pieces salted throughout the code with respect to nonprobate transfers be consolidated. The basis for this provision is the Uniform Nonprobate Transfers on Death Act, but we also took improved provisions from other states like Missouri. In addition, we "Nevada-ized" it significantly to be consistent with the rest of our statutes.

Section 32 is talking about rights that cease at death. I might have a right under an annuity that dies with me, but I have designated a beneficiary to take over. For probate purposes, my estate has nothing, but the beneficiary now has an interest. The decedent's interest is now passed on in a nonprobate, nontestamentary way. Subsection 1 defines nonprobate transfers and lists three provisions that define a nonprobate transfer. They are connected by "or" because any of these provisions constitutes a nonprobate transfer. It can be any contract in which you say that your interest dies with you at death. We are trying to simplify things so that people do not have to create trusts to avoid probate. I am not opposed to trusts; we are simply trying to make the process more user friendly and give citizens more options.

CHAIR WIENER:
Section 37 appears to be new language. Why the change?

MR. RUSHFORTH:
Let us say you have an agreement that you have rights. It might be a purchase agreement where you sold property or a business and you have rights under the contract. What we are now permitting is for you to assign those rights to beneficiaries so they do not have to go through probate.

CHAIR WIENER:
Without this, would they face the probate process?

MR. RUSHFORTH:
Correct.

CHAIR WIENER:
In section 38, what kind of instrument would qualify under this provision?

MS. GOLD:
It is a deed of gift, bill of sale or any other writing that is intended to transfer an interest in tangible personal property.

CHAIR WIENER:
Is there any kind of instrument that would not qualify under this section?

MS. GOLD:
It has to be signed before a notary public.

CHAIR WIENER:
Is section 40 not already in law? If not, what are we doing now?

MS. GOLD:
We are trying to coordinate current law with the rights of the beneficiary, the decedent and the creditors. This language has been incorporated into these sections dealing with nonprobate and TOD transfers.

CHAIR WIENER:
What have you been doing without this coordinated language?

MS. GOLD:
Joint tenancies pass at death, but the rights of the surviving tenant and the rights of creditors have been unclear. There has been some question about what happens if you have property in a joint tenancy deed and you divide that property in your will. There has been litigation about who controls the property in that situation. These statutes clarify what does control and how it controls. The hope is that S.B. 221 will minimize litigation and the court's involvement by codifying how these situations are to be handled.

MR. RUSHFORTH:
We have had some of these statutes in separate places throughout the NRS. This attempts to bring them together. We are also trying to expand this definition to cover different kinds of property.

CHAIR WIENER:
Section 41, subsection 1 states the change of a beneficiary designation regarding the property of joint owners may only be made with the agreement of

all owners then living. Is this another case of current law being moved to this section?

MS. GOLD:
When it is a joint bank account, yes, you need all of the owners to agree to sever the joint ownership.

CHAIR WIENER:
Section 41, subsection 4 mentions extrinsic evidence. Could you explain what extrinsic evidence is?

MR. SOLOMON:
The policy of law has always been that wills should be revoked in a most formal manner. If you wish to revoke a clause in your will, it has to be done with appropriate formalities. The court is not allowed to take extrinsic evidence, which in this case means someone telling the court, "The testator told me he wanted to revoke this."

CHAIR WIENER:
Have there been problems with that in the past?

MR. SOLOMON:
Yes, indeed. That happens all the time.

CHAIR WIENER:
Could you explain section 43? This provision deals with disqualification.

MS. GOLD:
If a person were to kill someone who had named him or her as a beneficiary, he or she would no longer be qualified to receive the property. It is coordinated with NRS 41B, which disqualifies somebody from receiving a benefit, whether under a will or a trust, if he or she has a part in that person's death.

CHAIR WIENER:
Could you explain section 45?

MS. GOLD:
This section says if property is lost or destroyed and a nonprobate transferee receives cash instead of property, beneficiaries would also receive cash instead of the property.

CHAIR WIENER:
Who determines the value of the property in that case?

MR. RUSHFORTH:
That is set by what replaces the lost property. If you have insurance proceeds, that sets the value. If you have a judgment or an award because something was destroyed, that sets the value. This is a matter of substituted assets. We have replaced one asset with another; for example, a piece of property that was given away might be replaced by cash. If you had a car that you wanted to transfer to a child on death and the car got destroyed, the insurance proceeds would pass to the child in lieu of the car.

CHAIR WIENER:
In section 47, which deals with the division of a marital estate, what are we doing now?

MS. GOLD:
Nevada law dealing with divorce and its effect on wills and trusts does not address beneficiary designations, joint tenancies or community property with rights of survivorship unless it is specifically addressed in the marital settlement agreement (MSA). This provision clarifies what happens to those matters when they are not addressed in the MSA.

CHAIR WIENER:
This is a substantial change. How are these issues resolved without this change in statute?

MS. GOLD:
When a former spouse is named as a beneficiary on a life insurance policy, the insurance company generally pays out the money to the spouse even though that was not the intent of the decedent. This has led to litigation regarding the intent of the parties at the time of the divorce. Often, the couple will go through the MSA and neglect to change the beneficiaries as they agreed. Sometimes the

insurance company will not honor the MSA. This provision makes the effect of the divorce clear.

CHAIR WIENER:
This is a substantial clarification that affects a lot of people. The Bar offers continuing education to its members. This is something that should be communicated to divorce attorneys in particular.

MS. GOLD:
I agree. Last year, we presented a comprehensive training for the Trust and Estate Section on these statutes in northern and southern Nevada. I assume this will also be disseminated to the Family Law Section of the Bar.

CHAIR WIENER:
In section 47, subsection 2, there is a reference to "good faith." This session, we have been changing "good faith" to "with reasonable care" when there is liability attached to it. I do not know how that would apply here, but I did see some liability references in the bill. That is something we might want to address.

MR. RUSHFORTH:
The purpose of this provision is to protect third parties. If an insurance company does not know about a divorce, or a purchaser thinks the survivor has a right of survivorship that was in fact terminated by divorce, this provision protects them. This is the reason for the use of the phrase "good faith" in this section.

CHAIR WIENER:
The phrase appears throughout the bill. Where it is appropriate, we might want to look at changing the language to conform to other changes we are making.

MS. GOLD:
Sections 48 through 64 adopt provisions governing accounts in financial institutions in which one or more persons have an interest and for which a transfer-on-death or a pay-on-death beneficiary may be designated.

CHAIR WIENER:
Section 51, subsection 4 states, "Any designation of an agent on an account is revocable and may be superseded by a subsequent designation." Is there any notification process with that?

MS. GOLD:
There is no notification process for owners of property who change beneficiaries. They can do that without notifying beneficiaries because they are still considered to be the owners.

CHAIR WIENER:
Section 54 looks like new language. What are we doing now?

MS. GOLD:
Section 54 deals with multiparty accounts. If you had two people on an account as joint tenants with rights of survivorship, and you also had a POD designation on the death of one of the joint tenants, the property would go to the surviving joint tenant. It would not go to the person named as a POD beneficiary until the death of the second joint tenant.

CHAIR WIENER:
Are we not doing this now?

MS. GOLD:
I believe we are. As Mr. Rushforth said, we are trying to consolidate and clarify the different areas of law. This is just another consolidation.

MR. SOLOMON:
That is a new provision, though it codifies what is common law. The courts have been using case law to decide cases for years, but it is not part of the code of Nevada. That is why we are proposing that it be codified so it is clear to everyone that this is the law.

CHAIR WIENER:
Has it been challenged?

MR. SOLOMON:
I do not think it has. This provision is fairly standard law throughout the Country. When you have a multiparty account with joint tenants, the POD provision does not occur until the last person dies.

CHAIR WIENER:
Could you explain section 57? It deals with community property and right of survivorship.

MS. GOLD:
Section 57 clarifies the community property laws, in that a deposit of community property in an account will not alter the character of the community property. That clarifies the character and nature of community property and shows that it is traceable in the event of divorce.

CHAIR WIENER:
Would record keeping be the responsibility of each party who contributes to that community account?

MS. GOLD:
Generally speaking, yes.

Sections 65 through 68 are technical amendments to coordinate the new nonprobate transfer statutes with the existing sections pertaining to probates.

Section 69 updates and clarifies the definition of "interested person" as it relates to trusts and estates.

CHAIR WIENER:
Section 69, subsection 2, paragraph (a) excludes certain parties from the term "interested person" except for the purposes of NRS 133.110, 133.160 and 137.080. What are those statutes?

MR. RUSHFORTH:
Those are exceptions for contested wills. We are not saying those parties may not contest the will. Those who have contested a will continue to receive such notifications under the referenced statutes. Otherwise, those who are not beneficiaries are no longer interested persons and will not receive notifications.

MS. GOLD:
Section 70 of S.B. 221 provides that a testator of a will may make a disposition of property and the appointment of a fiduciary dependent on conditions stated in the will as long as the conditions do not violate public policy.

CHAIR WIENER:
I note that this section allows removal with cause. Can you ever remove without cause?

MS. GOLD:
It is generally done with cause. You cannot remove someone because you do not like the person. If someone is named in the document, you cannot say you do not want this person to serve because you do not like him or her.

Section 71 clarifies that Nevada's "antilapse" statute only applies to blood relatives of the decedent.

Section 72 is a technical amendment to coordinate the new provisions set forth in section 47 concerning the revocation of certain transfers based upon divorce to transfers of property made pursuant to a will.

Section 73 clarifies NRS 137.005 to say that, with certain exceptions, a devisee's share may be reduced or eliminated under a no-contest clause by conduct contrary to the express wishes of the testator, even if the conduct does not relate to a formal contest of the will.

CHAIR WIENER:
Section 73, subsection 2, paragraph (b) lays out four conditions that are connected with "and." Does that mean all four of those conditions must be present?

MR. RUSHFORTH:
That is not our intent. Our intent was to list some of the potential conditions that might affect a person's status as a beneficiary.

BRADLEY A. WILKINSON (Counsel):
The word "and" in this context does not mean all four of those conditions must be present. It is a list of conditions, and if any one of those conditions occurs, the provision would apply.

CHAIR WIENER:
Would this work better if you used the word "or"?

MR. WILKINSON:
"Or" would also work. However, it does not make any difference. It means the same thing either way you say it.

MS. GOLD:
Section 74 is a technical amendment to clarify section 170, which deals with vexatious litigants.

Sections 75 through 144 adopt the Independent Administration of Estates Act, the purpose of which is to expedite the probate process, reduce the burdens on the courts and reduce the administrative costs of probate by allowing a personal representative to act more independently from the court in noncontested matters. This provision includes a number of safeguards and notices that must be given to interested persons so they know the will is being probated appropriately or that the intestate estate is being administered appropriately.

CHAIR WIENER:
Section 96 gives the personal representative the right to abandon property if its tangible value is less than the price of collecting it. How do we know its intangible value without notifying the beneficiaries?

MS. GOLD:
In these circumstances, the personal representative would file an inventory and appraisal, as you do when you administer an estate. The personal representative can only do this after giving notice to the beneficiaries. It is a judgment call. The personal representative notifies the beneficiaries that the asset has been determined to have no value or to be depreciating in value and informs them of his or her proposed action. The beneficiaries then have a certain period during which they can either object or bring it to the court's attention. They can also invoke the court to rule on the action if they do not agree with it.

CHAIR WIENER:
What if there are three beneficiaries who all want something in that list of tangible property? Who decides between them?

MS. GOLD:
Normally, that decision would be made by the personal representative. However, if there is a dispute as to how the property will be distributed and they cannot agree among themselves, the dispute would be brought to the court's attention prior to making any distribution of the property.

CHAIR WIENER:
In section 103, subsection 2, there is a reference to the distribution of tangible property with a value under $50,000. How did you come up with that number?

MS. GOLD:
We used a figure from a similar act passed in California. We were trying to make sure the time for filing creditor claims had expired and there would not be any issue with respect to harming a creditor's interest in this. We could change the dollar amount if you like.

CHAIR WIENER:
Are there different limits in other states?

MS. GOLD:
This one made sense to us. Valuing tangible personal property can be somewhat of an art, to say the least. This value is not excessive, and it gives you enough flexibility to make distributions. If you are trying to sell a residence or other real property, you can dispose of the tangible personal property within that residence as well.

CHAIR WIENER:
Section 108 gives the personal representative the ability to take certain actions without giving notice. How do you make a determination when to give notice and when not to give notice? What was the threshold there?

MS. GOLD:
One threshold is if the property is going to be sold or disposed of. If it is going to leave the estate, the personal representative must give notice. In section 108, the representative is managing the property and continuing to keep the property within the estate. Even now, personal representatives are allowed to manage the property in certain circumstances with some court involvement.

CHAIR WIENER:
Section 109, subsection 2 gives a timeline of "within 2 years." Is that current law? Why two years?

MS. GOLD:
I believe current law specifies that it must be one or two years. When it is over two years, you generally have to get court approval.

Sections 145 through 147 modify existing provisions of the probate statutes to coordinate with the Independent Administration of Estates Act.

Sections 148 and 149 permit the court to order the payment of the petitioner's attorney's fees in a set-aside proceeding. That can come from the property that is set aside.

Section 150 provides for limitations on when an attorney may be compensated for serving as the personal representative of the estate.

CHAIR WIENER:
Section 150, subsection 1, paragraph (b) refers to the best interests of the estate. This seems to be saying that under certain circumstances, the attorney can be both the personal representative and the attorney. That is basically double compensation.

MS. GOLD:
We attempted to limit that. Subsection 1 specifies that the attorney can be compensated either as an attorney or as a personal representative, but not both. What attorneys do during the administration of an estate could be considered something personal representatives should do, so paragraph (b) ensures attorneys are still receiving compensation when they serve in a dual capacity. At the same time, we do not want them to be getting too much compensation.

CHAIR WIENER:
They will not be double-dipping.

MS. GOLD:
Yes.

CHAIR WIENER:
Does section 150 need to be separated out for clarity?

MR. WILKINSON:
I do not think so, but I will look into it.

MS. GOLD:
Sections 151 to 153 contain technical wording modifications that do not change the substance of the statute but hopefully clarify it.

Section 154 modifies NRS 150.063 to allow the court to apportion legal fees when different personal representatives are represented by different attorneys.

Section 155 contains technical wording modifications.

Section 156 clarifies that a holder of a power of appointment does not have a fiduciary duty to anyone and has no duty to exercise the power of appointment. The purpose of this section is to avoid litigation against a person given a power of appointment.

Section 157 includes technical amendments to coordinate NRS 153.031 with section 193 of the bill, which pertains to accounting.

MR. RUSHFORTH:
I will describe sections 158 through 210 of S.B. 221.

Sections 158 through 169 codify case law by stating that any transfer that is the result of fraud, duress or undue influence is void. We expand it by establishing a presumption of fraud in cases of transfers in favor of the person who drafted the document, whether an attorney or a friend. If you draft a document, pay somebody to prepare it or just have the testator sign it, there will be a presumption that the transfer is void. The presumption can be negated if an independent attorney is used. We are trying to avoid abuse by people who are in a position of trust.

CHAIR WIENER:
In section 167, subsection 2, you list four types of transferees who would make the transfer invalid. Since you do not include the phrase "without limitation," can you think of any other situation or relationship we need to include here?

MR. RUSHFORTH:
We are trying to create a presumption of invalidity. We thought it best that the presumption be specific. The only window we left open is in section 169, where we say that provisions of sections 167 and 168 do not abrogate or limit any principle or rule of the common law. If a situation would be presumed invalid under common law, it will still be presumed invalid under S.B. 221.

CHAIR WIENER:
Are these the four primary scenarios?

MR. RUSHFORTH:
It is our experience that abuses come under these categories.

Section 170 is in response to a situation in probate and trust administration cases where people, usually beneficiaries, file motions without merit in order to harass the executor or trustee. The language in this section is adopted from provisions regarding guardianships. It says if the court finds evidence that people are being an annoyance and intentionally slowing down the administration of the estate or trust, they can be classed as vexatious litigants, which triggers attorneys' fees and can disqualify them from having standing to file additional motions.

CHAIR WIENER:
Does this happen often?

MR. RUSHFORTH:
All the time. In addition to delaying the process, it is a major expense. Whenever someone brings a motion to the court, attorneys' fees are triggered on all sides.

CHAIR WIENER:
Is this something that is determined by the court, or can there be a complaint from the other side?

MR. RUSHFORTH:
Someone can bring a motion, but the court makes the finding.

CHAIR WIENER:
Can an individual do it independently?

MR. RUSHFORTH:
Yes.

Section 171 has to do with requests for special notice. In the probate context, it is very common for someone who is interested in an estate to file a request for special notice in order to receive notification of accountings and petitions. When an attorney is hired for this purpose, there is a question as to whether that attorney has made a formal appearance on behalf of that person. It becomes onerous to the attorney to withdraw when all he or she did was file that request. This provision says an attorney who files a request for special notice is not making an appearance and can withdraw without leave of court.

CHAIR WIENER:
Section 168, subsection 5 refers to a transfer of property if the fair market value does not exceed $3,000. How did you come up with that amount?

MR. RUSHFORTH:
That was an arbitrary amount. If the property is worth less than $3,000, it is not worth litigating because fighting it would cost that much in attorneys' fees.

Section 172 clarifies NRS 155.140. Statute has always allowed the court to appoint attorneys for minors or incompetent persons, but we have not given courts the authority to fix their fees. That has been done as a practical matter. This section codifies that the court has the authority to do that.

With regard to section 173, we have always had a statute that said the Nevada Rules of Civil Procedure apply to probate and trust matters. This section clarifies that and says discovery is obtainable under the rules of civil procedure. You do not have to satisfy certain rules regarding the initial disclosure of experts or attendants at an early case conference starting with discovery. We are trying to clarify and simplify existing law to make sure people can get the discovery without having to file a complaint.

Section 174 relates to an anomaly in our law in the guardianship proceeding. Nevada law allows a person to waive bond for a guardian. However, the way the statute is written, that nomination has to be done in a will. More and more, guardians are being nominated in other documents, such as health care power of attorney or property power of attorney. There is no public policy benefit in not allowing the waiver of a bond in these other documents. This provision says if the person has nominated his or her own guardian in any document, the court has the authority to waive the bond. This does not mandate that the bond be waived; it just allows other documents to be evidence that the bond should be waved.

With regard to section 175, under *Charleson v. Hardesty*, 108 Nev. 878, 839 P.2d 1303 (1992), the Nevada Supreme Court declared that an attorney for a fiduciary has a duty to the beneficiaries or the heirs under an estate or trust. That decision raised many questions about the extent of that duty. The rule in most states is that there is no duty at all without some kind of direct contract. We did not want to go that far, but we did want to say that representing a trustee or the executor who does something wrong does not make the attorney liable. This provision says the attorney is responsible for his or her own negligence and intentional acts and does not become a guarantor of the malfeasance of the fiduciary.

Sections 176 through 178 use the same wording as section 73, except it deals with trusts rather than wills. We are trying to make it clear in Nevada law that settlors or testators have the right to put whatever conditions they want as long as they do not violate public policy.

Section 179 is a clarification to what we refer to as the decanting statutes in NRS 163. In this context, "decanting" means pouring assets from one trust to another. The idea of decanting is that a trustee has the authority to move money into a second trust. There are a lot of reasons to do that. You might have beneficiaries who do not get along; you might have trusts with different types of investments; you want to separate them for liability purposes. The current statute has a number of prohibitions that say you cannot decant if it will change the rights of beneficiaries. However, there are situations in which decanting is appropriate and no one is being hurt, and yet technically it still violates existing statute. This provision establishes some exceptions to existing statute to allow decanting in those situations.

CHAIR WIENER:
Section 178, subsection 4 says, "The rule that statutes in derogation of the common law are to be strictly construed has no application to this section." Could you explain this, please?

MR. RUSHFORTH:
Nevada law governing statute says unless abrogated by the statutes, common law applies in Nevada. The general rule throughout many jurisdictions has been that we strictly construe statutes that are contrary to the common law. In this case, we want to reverse that policy. The public policy of Nevada is that the settlor of a trust has the right to create that trust with whatever conditions he or she wants, and it could be argued that that is contrary to the common law because of the restrictions. We are saying if you are going to construe our statute, we want the court to favor the settlor's right to do what he or she

wants to do. We do not want it construed strictly; we want it construed liberally in order to carry out the settlor's intent.

Section 180 relates back to section 47 regarding the effect of divorce. Our rule is if you get divorced, all beneficiary designations and all rights of survivorship are terminated. Section 180 applies that same rule to trusts.

Section 181 is a technical correction. There is a provision in the probate code that puts a time limit on contesting wills and trusts. Once a trustee notifies beneficiaries that an existing trust has been converted from revocable to irrevocable, contests must be filed within 120 days of that notice. When the statute was first adopted, it also said that the trustee had to give notice of that time limit within a certain time period. The problem was sometimes we had incompetent trustees who did not give notice within that time period. If a subsequent trustee wants to give notice in order to cut off all contest, they cannot because the original time limit has expired. This provision specifies that there is no time limit as to when the trustee must notify beneficiaries. The 120 days begins when notice is given, whenever it happens.

Sections 182 and 183 relate to the Uniform Principal and Income Act (UPAIA). The UPAIA gives default rules about the terms of a will or trust. The idea of a default rule is that it applies to the largest number of situations. You try to specify what should happen if the trust is silent on a specific issue. One of the issues that has come up in this low-income environment has to do with the fees paid to the trustee. The trustee's fee can be based on the value of the principal. If the fee is 1 percent of the principal and the trust is $1 million, the fee will be $10,000. Under current law, half of that sum is paid out of trust income and half is paid out of the principal. Income beneficiaries will then get hit with a $5,000 trustee fee, and that can represent 25 percent or 50 percent of their income distribution. It is disproportionate to charge 50 percent of the administrative expenses to the income beneficiary. There are situations in which the investments are not producing income at all, and this can hurt the income beneficiary. I have had surviving widows to whom the trustees are distributing no income because all the income is being eaten up by expenses.

The purpose of this provision was to place a formula that protects the income beneficiary from being disproportionately hit with administrative expenses based on the principal. What we want to do here is put a cap on what can be paid out of trust income for trustee's fees. We do not know what the income environment will be, so we tied it to the default interest rate in NRS 99. We placed the default rate at 2 points and said that is the maximum that can come out of income to pay for any fees based on the value of the principal. We think most people want the income beneficiaries to get the lion's share of the income. Because the principal only pays a small percentage of the trustee's fees each year, it has less impact on their ability to benefit from the trust.

Sections 184 to 198 relate to the duty of a trustee to account. The statute, which is NRS 165.135, is inadequate to protect the rights of beneficiaries; at the same time, it can be a burden to the trustee to provide information to people who may never get an interest in the trust, such as contingent or remote beneficiaries. Our attempt here is to make sure the beneficiaries who have a real interest in the trust are entitled to an accounting of the trust by the trustee. Occasionally, someone will say that they do not want their beneficiaries to have the right to account. We took the position that even though we want the settlor to have complete power over the trust, if you totally abrogate the duty to account, it makes the trust unenforceable for the beneficiary's benefit. This provision basically tells trustees they do not have to provide an accounting. Instead, we can have the beneficiary represented by reviewers who can, without disclosing the information to the beneficiary directly, make sure the beneficiary's interests are being properly accounted for and therefore protect the beneficiary's interests. We feel this is a good extension of the current law and protects settlors' right to do what they want.

CHAIR WIENER:
Section 191 defines a remote beneficiary as "a beneficiary who may become a current beneficiary upon the death of two or more persons or upon the occurrence of some other event that cannot possibly occur during the beneficiary’s lifetime." Could you explain that or give me an example?

MR. RUSHFORTH:
The first part is easy. If I give a trust to my wife for her lifetime and then to my children, when my children die it goes to the grandchildren. In that case, my wife is the current beneficiary, and the next level is my children. The grandchildren, who will not benefit until all my children are dead, are remote beneficiaries.

For the second part, sometimes a trust will have a clause with a triggering event, saying that something will happen when the youngest beneficiary turns 21, for example. Occasionally the triggering event is set to happen in 365 years. That means it will not happen in the beneficiary's lifetime.

CHAIR WIENER:
Section 193, subsection 4 contains another reference to "good faith." We are trying to transition to the phrase, "with reasonable care."

MR. RUSHFORTH:
The point of this provision is that we do not want lawsuits against trustees if they have taken reasonable care. We do not want litigation against a trustee unless there is clear and convincing evidence that the trustee has not taken reasonable care.

Section 200 relates to the right of a settlor to remove a fiduciary on such terms and conditions the settlor wants. Unless there is some contrary public policy, the settlor can do what he or she wants in this regard.

Sections 201 through 206 are clarifications and a moderate expansion of NRS 166, which relates to spendthrift trusts. The clarifications include allowing a settlor to make gifts during his or her lifetime in appropriate trusts. The expansion says that if the settlor creates a grantor-retained annuity trust where the only interest is in an annual annuity, a charitable remainder trust in which the beneficiary gets an annual annuity for life, a personal residence trust or an annual unitrust payment, creditors will not to be able to attach those. We want to keep those trusts within the definition of the spendthrift trust.

The rest of S.B. 221 is technical corrections. Section 207 is technical corrections dealing with the TOD act and joint accounts. Section 208 deals with credit union accounts and deleting references to statutes that are being repealed by this bill. Section 209 indicates sections being repealed. Section 210 states that these provisions apply to all trusts and all wills whenever created, not just from now on. We created an exception saying if trustees have already done an accounting that complied with prior law, they do not have to do it under the new provisions. But if they have not provided an accounting, they have to comply with the new law.

BILL UFFELMAN (Nevada Bankers Association):
I have some concerns about portions of S.B. 221, particularly about section 182. This section of the NRS was amended in 2007 and 2009.

One thing a banker looks for is certainty. My question is whether, with respect to this section, we should be looking only about future trusts, rather than existing trusts that are in place now and the settlor is not deceased. I would rather see it say that whatever trusts exist now may stay as they are unless changed by the beneficiaries, not by the Legislature. You are literally going back and changing the rules. I remember a law professor of mine saying the thing he feared the most were the wills he had made years earlier that were going to come back and bite him when the person finally died. We need certainty.

SENATOR COPENING:
Have you had a chance to discuss this with the sponsors of the bill?

MR. UFFELMAN:
Only briefly.

WILLIAM E. RAMSEY (President, Whittier Trust Company):
I do not oppose the bill, but section 182 has aspects that concern us, particularly with regard to trusts that are irrevocable and that were not generated anticipating this dramatic change. When a grantor creates a trust, the body of laws in existence at that time are expected to carry forward. This variability is troubling because the grantor's intent may not be fulfilled. A different allocation of fees than was anticipated when the document was signed might not carry out the intent at all. I have seen trusts that indicate 100 percent of the fees are to be allocated to income, and that was based on the grantor's intention that the beneficiary learn to live on a level of income that the assets could support.

We are in an economic period that has dramatically impacted income beneficiaries. I am compassionate to that. As trustees, we have a duty to use every means at our disposal to assist beneficiaries, and those means are available in the law today. There is a unitrust conversion statute that allows a trustee to convert a trust to provide a fixed amount of the principal of that trust annually. If you had a $1 million trust and a 5 percent unitrust, beneficiaries would get $50,000 a year, period. Probably the most prevalent provision that the majority of trusts already have is that they grant the trustee the power to invade principal for the benefit of an income beneficiary under certain conditions. Sometimes those conditions are very narrow; sometimes they are very liberal. But I cannot think of a trust we administer that does not grant the trustee those kinds of powers.

One of the biggest impacts of S.B. 221 is the impact on automation. Having variability of an allocation of compensation for investment advisors is the largest component of expense in administering trusts. The fiduciary fee is typically the lesser amount. To have to allocate fees in variable amounts over a period of time creates a manual process. That could have the impact of increasing the cost of administering trusts to beneficiaries. That is not in the best interest of the beneficiaries. Increasing the efficiency of our operation can help us provide services at the lowest cost to the beneficiary and also to fairly allocate those expenses so they can maximize income.

In addition, the example given was a flawed one. If I had a $1 million trust in which the fees were a quarter to a half of the income, I would question how that fiduciary was investing the principal and whether there were other alternatives available. Many of our trusts, from small trusts with $25,000 to the larger trusts with $25 million, have yields much greater than the yield on a treasury bill. Even in this horrible economic environment, we are getting yields on portfolios of 2.5 percent to 3 percent, which means an income of $25,000 to $30,000 for that beneficiary. The example given therefore distorts the factors you need to know when considering this bill. Allocating $5,000 of fees is a substantial burden, but it is not as substantial as if you were thinking it was only yielding 1 percent.

SENATOR COPENING:
Mr. Ramsey and Mr. Uffelman, please get your information to the bill's sponsor. Perhaps you can work with her and/or the presenters to offer an amendment at some point.

MR. RAMSEY:
The Bar has done a good job with this bill overall. There are just a few small factors that would help us.

MR. RUSHFORTH:
With regard to the request that the bill be prospective and not retroactive, the UPAIA was made retroactive. The purpose of our proposal is to cure existing problems with existing trusts, not just on a going-forward basis.

The bankers talk about wanting automation, and they say they can make equitable adjustments. What they fail to mention is to convert a trust into a unitrust or to ask the court to make equitable adjustments requires a notice of proposed action and may require a court hearing; if there is disagreement, it creates a court action that requires expenses. All we are trying to do here is create a default rule that does not punish income beneficiaries. While bankers may be able to get a good return on some assets, not every trust has assets that are fully investable, and there are properties that are upside down.

We do not see that it is a big burden for bankers to make a little adjustment in their computer program on computing the default fees. If it is a burden, our proposal is a more equitable response to the average trust out there right now. If it becomes a problem for a specific situation, that is where the power to adjust could be implemented.

We think this is a good default rule to protect existing income beneficiaries who are seeing their income seriously eroded. A $5,000 fee on a $25,000 income is 25 percent being eaten by administrative fees. That is not a good thing for an income beneficiary.

CHAIR WIENER:
I will close the hearing on S.B. 221. Is there any public comment or further business to come before the Committee? Hearing none, I am adjourning the meeting at 10:51 a.m.

RESPECTFULLY SUBMITTED:

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Lynn Hendricks,
Committee Secretary

APPROVED BY:

____
Senator Valerie Wiener, Chair

DATE:____________________________________

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
S.B. 221	C	Mark A. Solomon	Comments to SB 221
S.B. 221	D	Mark A. Solomon	Comprehensive Summary of SB 221
S.B. 221	E	Charles Duarte	Written testimony regarding S.B. 221