MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
May 8, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 8:09 a.m. on Wednesday, May 8, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 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 Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Assemblywoman Marilyn Dondero Loop, Assembly District No. 5

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Ilena Madraso, Committee Secretary

OTHERS PRESENT:

Robert P. Dickerson
Julia S. Gold
Steve Oshins
Layne T. Rushforth
Mark Solomon, Chair, Probate and Trust Law Section, State Bar of Nevada
Rocky Finseth, Nevada Association of Realtors; Carrara Nevada

Joel Searby, Nevada Association of Realtors
Michele W. Shafe, Assessor, Clark County
Laura Fitzpatrick, Treasurer, Clark County
Bill Uffelman, President and CEO, Nevada Bankers Association
Venicia Considine, Legal Aid Center of Southern Nevada

Chair Segerblom:
I will open the meeting with Assembly Bill (A.B.) 378.

ASSEMBLY BILL 378 (1st Reprint): Revises provisions governing spendthrift trusts. (BDR 13-656)

Assemblywoman Marilyn Dondero Loop (Assembly District No. 5):
Assembly Bill 378 relates to spendthrift trusts. This bill came about because Robert P. Dickerson, who is an attorney specializing in family law, and I were discussing what happens to families when divorce occurs. A law passed in the 76th Session allowed a spouse, domestic partner or child to be treated as a creditor in a divorce. The result of that action could be denial of access to assets needed by an individual to live his or her daily life. I voted for this bill as did many others, but I do not think we realized the unintended consequences of our action. We did not understand the intention of the bill was to prevent women and children from obtaining support ordered and agreed to in a court divorce decree. Assembly Bill 378 would create an exception to the spendthrift trust rule by asking that a spouse, domestic partner or child not be considered a creditor.

A spendthrift trust is generally a trust that restrains the voluntary or involuntary transfer of a beneficiary's interest. The beneficiary of a spendthrift trust cannot voluntarily transfer his or her interest in the spendthrift trust to another person. An accreditor of a beneficiary cannot reach the beneficiary's interest in the spendthrift trust to satisfy the debt of the beneficiary. A self-settled spendthrift trust is a spendthrift trust of which the settlor of the trust is a beneficiary. The settlor's beneficiary interest in a self-settled spendthrift trust is beyond the reach of a settlor's child, spouse, domestic partner or former spouse or domestic partner. This bill is intended to prevent self-settled spendthrift trusts from causing financial harm to the settlor's children, spouse, domestic partner or former spouse or domestic partner.

Robert P. Dickerson:
I am an attorney in Las Vegas and have practiced law for over 30 years. For the last 20 years, I have focused on the area of family law. I support A.B. 378. This bill proposes to carve out one exception to the creditor claim exemption in the self-settled spendthrift law provisions in *Nevada Revised Statutes* (NRS) 166. The provisions of this statute were originally enacted in 1999. It was amended in later Legislative Sessions. This statute allows an individual to transfer his or her assets into an irrevocable, self-settled spendthrift trust in which the settlor is a beneficiary of the trust. All of an individual's assets can be shielded by placing them into a spendthrift trust; all an individual has to do is wait 2 years before accessing them. From that point forward, any creditor claims cannot be satisfied from that trust, but the settlor is allowed to use and benefit from the assets. He or she can use these funds to pay bills after the 2-year waiting period without the risk of being subject to claims.

This type of trust would allow an ethically challenged individual to engage in intentional tortious or illegal conduct and still be protected from claims. An individual, such as a doctor, would be exempted from claims by use of this type of trust. This could cause some to not see a reason for carrying malpractice insurance. This has been a problem in the Las Vegas area.

Chair Segerblom:
A group of Dr. Dipak Desai's patients in Las Vegas contracted hepatitis C at his clinic. Are those patients able to sue the doctor, or are his assets protected by the spendthrift trust?

Mr. Dickerson:
The assets are protected in these trusts. An alcoholic could do something similar. By placing all of his or her assets in a spendthrift trust, an individual could protect those assets. If he or she maimed, killed or injured another citizen while driving drunk, that person or his or her estate would not be able to access the protected assets.

I am not here to debate the morality of these trusts; I am here to ask for an exception to the claim exemption in respect to court-ordered support—child support or spousal support. An individual having his or her assets in a self-settled spendthrift trust is allowed by law to refuse to honor the court-ordered support obligation. There is no recourse for obtaining court-ordered child support or spousal support through the trust.

Assembly Bill 378 addresses individuals who voluntarily refuse to satisfy support obligations.

This bill may require some clarification. I have submitted a letter of support (Exhibit C) to the Committee providing additional information about the issues addressed by A.B. 378. I have also proposed an amendment (Exhibit D) to clarify its purpose. This bill proposes if an individual, against whom there is an spousal support or a child support order, voluntarily and intentionally refuses to honor the order and has all of his or her assets in a self-settled spendthrift trust available for his or her benefit, a court should be allowed to order support be paid from the trust. I propose adding the language " ... and a settlor is in default by thirty (30) or more days of making a payment pursuant to a family support order ... " to section 1.3 and section 1.9 to clarify the purpose of this bill and avoid the unintended issue of federal estate tax.

Chair Segerblom:
Is this a situation you have dealt with in your practice as an attorney?

Mr. Dickerson:
This law has been in effect since 1999. I have had one case where the issue has occurred. I am not sure this law applies to that case as we are dealing with other issues as well. The case is now before a judge. A threat has been made by the trust that the judge can issue any child support or spousal support order he or she sees appropriate, but the trust cannot be compelled to pay it. In that case, the husband has no other assets from which to satisfy the obligation. This case has yet to be adjudicated.

Potential problems can occur under NRS 166. The proposed exemption will not create problems as will be suggested by the opposition.

Senator Ford:
Are we discussing spendthrift trusts created during the pendency of a divorce or trusts set up during or before a marriage?

Mr. Dickerson:
This would apply to trusts set up during a marriage. If the trust was set up in the course of a divorce, it would most probably be set aside as a fraudulent transfer. We are concerned about spendthrift trusts set up during or before a marriage that are in effect and where a creditor has all of his or her assets in

that trust. If the creditor refuses to pay court-ordered support, a question develops regarding how that support will be paid. The simple method would be to pay an individual through the trust then have him or her pay the support obligation using these funds. The obligor could also ask the trustee to pay the support obligation. Problems occur when there is a refusal to pay due to lack of funds. All of the assets are in an irrevocable spendthrift trust, and this same trust is paying the mortgage and other bills for the person refusing to make support payments.

Senator Ford:
A spendthrift trust is designed to shield assets from seizure. What other states allow an exception for support payments?

Mr. Dickerson:
Fifteen other states have provisions for spendthrift trusts. Only Nevada and Utah do not provide exemptions for court-ordered support claims. Although it does not have an exemption, Utah provides that the trustee of a self-settled spendthrift trust can distribute money to the settlor. If there is a court-ordered support order, the trustee must notify the individual who has the court order 30 days before any funds are distributed to the settlor to give that person the opportunity to receive those funds when they are received by the settlor.

Senator Ford:
Are you saying only 15 other states have spendthrift trust provisions?

Mr. Dickerson:
That is correct, and all those states have exemptions for child support or spousal support orders except Utah and Nevada. Utah recently passed legislation to remove the child support and spousal support exemption. It was replaced with the provision requiring notice 30 days in advance of any monies being distributed.

Senator Ford:
The policy question we are discussing is if we should allow children and ex-spouses access through a court order to a spendthrift trust or whether the trust should be shielded. Is that correct?

Mr. Dickerson:
Yes, that is the policy question. We must determine if we want to allow an individual to support himself or herself with a large sum of money held in a spendthrift trust and not pay child or spousal support, thereby requiring the taxpayers to support the children or spouse through the welfare system.

Senator Jones:
My experience is that self-settled spendthrift trusts are sophisticated and require counsel to set up. I am not sure the children or spouse of someone who has one of these trusts would end up on welfare. An individual should be allowed to set up an estate plan as he or she sees fit. Could a couple make the determination to include child or spousal support as an exemption in the trust when setting it up?

Mr. Dickerson:
They could make this determination if it is pointed out to them as a need by the attorney who drafts the trust.

Senator Jones:
That is an obligation of the drafting attorney.

Mr. Dickerson:
No, it is not an obligation. That is one problem with statute. Another problem occurs if the self-settled spendthrift trust is set up before the couple is married, when this would not have been a consideration. If the trust is set up during marriage, I have observed that one spouse usually controls the financial issues and determines what will be included in the trust. People getting married do not contemplate divorce. The purpose of A.B. 378 is not to remove the assets voluntarily placed into the trust. Provisions in the bill require written consent to the addition of community property to the trust. The bill's primary purpose is to address what happens during a divorce proceeding or after the divorce when there is a court-ordered support obligation. The bill does not attempt to remove assets from the trust. It requires the settlor to pay the court-ordered obligation. If he or she does not, an order could be issued to the trust to make the monthly payments. We are not changing the property rights of spouses. We are requesting an exception to cover payment of court-ordered obligations.

Senator Jones:
Could a spouse voluntarily waive these things in writing with the assistance of counsel?

Mr. Dickerson:
That can only be done with a premarital agreement, it cannot be done postmarriage. Spousal support can be waived or limited in a premarital agreement. Married couples can enter into contracts affecting their property rights. After marriage, Nevada caselaw has shown neither party can affect his or her right to support the other in case of divorce—child support cannot be waived.

Senator Jones:
California allows for this to happen after marriage.

Senator Brower:
The vast majority of child support obligors have no idea what a spendthrift trust is and certainly do not have one. What is the percentage of child support obligors who have spendthrift trusts?

Mr. Dickerson:
I do not have that number. Fifteen states have created these trusts even though the vast majority of citizens in this Country have no idea what a self-settled spendthrift trust is. Thirteen of these states also create some level of claim exemption for court-ordered support. Utah and Nevada do not have such exemptions. However, Utah has a mechanism by which a support obligation can be satisfied. Nevada does not—it is the only state that completely excludes a spouse or child from recovering either child support or spousal support.

Senator Brower:
This bill is searching for a problem that does not exist. Will typical child support obligors begin setting up spendthrift trusts in order to avoid child support obligations if we do not pass this legislation?

Mr. Dickerson:
If the trust is set up for the purpose of avoiding child support, it would be set aside because it would be fraudulent. Concern arises when a trust is already legitimately set up and a couple decides to divorce. The self-settled spendthrift

trust would allow one party to attempt to avoid spousal or child support payments because assets would be protected by the trust.

Senator Brower:
The private agreement made by that couple is something each party agreed to, hopefully with the advice of counsel. I am not sure this is something that requires a new law.

Mr. Dickerson:
Section 1.6 of A.B. 378 requires the consent of both spouses, in writing, to transfer property into a spendthrift trust. A self-settled spendthrift trust can be set up prior to marriage or during a marriage using an individual's sole and separate property. This allows a person to transfer assets in an effort to avoid obligations. When a joint trust is set up during a marriage, divorce is not contemplated. An amendment has been suggested by Layne Rushforth to allow divorce courts to divide any joint self-settled spendthrift trusts set up during a marriage funded by community property (Exhibit E). This would allow both spouses the benefit of the trust. Under statute, one spouse now has use and benefit of all the assets in the trust and the other does not. There is no way to provide for support of a spouse or child if ordered.

Senator Brower:
Are you familiar with a case where a trust was used in this way?

Mr. Dickerson:
I have only had one case like this. In that case, a threat has been made to not pay support using trust monies. The case is still being adjudicated. Less than 5 percent of the individuals who have a support obligation refuse to pay, but this problem does exist.

Chair Segerblom:
How long has this law been in effect?

Mr. Dickerson:
It has been in effect since 1999. It was revised in 2011.

Senator Hutchison:
I have received many emails from a wide variety of professionals, CPAs, estate planning officers, trust officers and others regarding this bill. The Board of

Governors of the State Bar of Nevada can sign off and sponsor legislation that comes before this Committee. There is also a process by which the Family Law Section and the Probate and Trust Law Section of the State Bar of Nevada can sign off on legislation. Given the controversy over this bill, did you attempt to go through the process of having it approved by either of these groups?

Mr. Dickerson:
No, I did not. I realize I am in the minority by supporting A.B. 378. It was developed after a discussion with Assemblywoman Dondero Loop and is her bill. I presented to her the potential of what can occur in these situations and the threats that are being made to not comply with child support obligations. She developed the bill. I am not here on behalf of the Family Law Section or the State Bar of Nevada. I did not believe it was necessary to have this bill approved by those groups. I have the support of several family law attorneys who agree our spendthrift law should include the same exemption as 13 other states.

Senator Hutchison:
Should this Committee consider the concerns of the many groups that feel this legislation could cause the demise of a State Bar of Nevada practice section? Trust and estate lawyers have built practices around the development of spendthrift trusts since 1999 when they were first implemented. They are concerned this bill will have a major impact on their area of practice.

Assemblywoman Dondero Loop:
This bill has been in process since the beginning of this Session, and I have heard no concerns about it from members of the Assembly. It simply asks that in the case of divorce, a wife, husband, or domestic partner and children not be considered creditors the same as a credit card company would be. I have also received many emails, all of them during the last week. Prior to that, I received no emails relating to this bill. The Assembly voted unanimously in support of this bill.

Senator Hutchison:
Unless the practice sections involved in implementation of this bill have been consulted and had the chance to weigh in on the bill, we may not be aware of its unintended consequences.

Assemblywoman Dondero Loop:
As some opposed to this bill have stated, the bill's intention is not to put people out of business but to undo the unintended consequences of the legislation from the 76th Session.

Senator Hutchison:
I do not want to create more unintended consequences.

Mr. Dickerson:
I would like to address the five concerns about A.B. 378 expressed by the opposition. The first concern is A.B. 378 will unnecessarily expose irrevocable self-settled trusts to the assessment of an estate tax under Title 26 CFR section 20.2036-1. The opposition is unable to cite a court decision at any level that supports this belief. An argument could be made that this section of the CFR applies, but there is no definitive answer to the question of whether it does apply. This is why I suggest clarifying this statute to state it is only imposed if an individual is in arrears by 30 or more days in his or her support obligation. This could resolve this concern.

An individual chooses whether to pay his or her obligation. Only an individual who is 30 or more days in arrears would be exposed to court-ordered payment under this legislation. That individual would have the ability to decide if the risk of exposure to an estate tax issue is justified.

When assets are placed into a trust, there is a gift tax consequence. There is a question about taxing a trust—previously taxed with a gift tax—a second time with an estate tax. Would a credit be given for the gift tax paid? If it is made clear that this legislation provides a solution that can be put in effect when a settlor refuses to pay his or her obligation, the court can then impose the obligation. This allows the settlor the choice of subjecting the estate to a possible tax by paying his or her obligations or paying the obligation willingly.

Another argument against this bill is it would impose administrative burdens on the trustees. The settlor would make demands of the trustee prior to having the components of this bill invoked. The responsibility for the trustee to pay the spousal support or child support obligation would be only one of many that already occur.

Opponents say the requirements of this legislation would add inappropriate limitations on eligible trustees. This relates to section 1.9 of the bill, which sets out who should not be allowed to be an independent or distribution trustee. The purpose of this section is to avoid fraud by helping to identify someone who is willing to say no if necessary in the disbursement of money from the trust.

The fourth claim is this legislation would ignore statute of limitations and equitable considerations. Property transfers are not voided by this bill. There is a 2-year grace period after transferring assets into a self-settled spendthrift trust. After that time, assets cannot be removed from the trust. The exception proposed in this bill would allow the court-ordered obligations of child support and spousal support to be paid through the trust if necessary.

The final claim is A.B. 378 impairs and discourages trust business and investment in Nevada. The taxpayers in this State do not benefit from these businesses. The State does not receive a fee when a self-settled spendthrift trust is created. Attorneys have created successful practices around this area of law—this law is not targeted at those attorneys. Nevada has the strongest asset protection statute in the Country, but it is the only state that does not carve out an exception for child or spousal support. I am not aware the issue of estate tax has arisen in any of the 13 states that allow an exception for payment of child or spousal support. These issues are further addressed in Exhibit C.

Senator Ford:
Did you say you are not aware of any IRS estate tax implications in other states having a spendthrift trust?

Mr. Dickerson:
I am not aware of any court decisions in this area. There is a revenue ruling that may suggest it could be considered.

Senator Ford:
I have also received emails and phone calls regarding this bill. Have you met with those opposed to it to discuss an amendment to address the concerns you reviewed with the Committee?

Mr. Dickerson:
Yes, I met with Layne Rushforth and Steve Oshins. Julia S. Gold joined the conversation by telephone. We discussed potential amendments. Mr. Rushforth

has proposed amendments to the bill, Exhibit E. There is disagreement regarding the appropriateness of amending this bill. It cannot definitively be said there will be an estate tax consequence if this bill is implemented. I will meet with any interested party to resolve these problems. It is important for this bill to be passed this Legislative Session. We do not want to create an estate tax problem or affect the work of estate planning attorneys, trusts and banks in the State.

Senator Ford:
I am concerned about the child support portion of this legislation. Spousal support could be argued, but child support cannot be.

Mr. Dickerson:
We are dealing with innocent victims who have no voice in the process. Child support cannot be contracted out, even from a premarital agreement. The agreement would be void if a party attempted to do so. Statute provides child support cannot be waived or contracted out.

Senator Ford:
Would you be open to omitting spousal support from this bill and only including child support?

Mr. Dickerson:
I will leave that to Assemblywoman Dondero Loop. Special circumstances arise when a trust is created by a party before marriage. Section 1.6 of the bill requires the signature of both parties in writing to place community property in the trust. In his proposed amendment, Exhibit E, Mr. Rushforth has proposed section 1.6 be amended to ensure parties participating in opening the spendthrift trust understand they are waiving their community property rights under the provisions of the trust. I approve this idea. I also approve his idea allowing a joint trust to be separated into two trusts by the Nevada family courts in case of divorce. I would like to work on this amendment further.

Senator Ford:
Assemblywoman Dondero Loop, how do you feel about leaving the spousal support issue out of this bill and focusing on child support?

Assemblywoman Dondero Loop:
I defer to Mr. Dickerson and the parties involved on the opposition to work on this. The important part of this legislation is ensuring a spouse is taken care of

appropriately. I intend to prevent a situation where one spouse decides to leave a marriage and sets up a self-settled spendthrift trust, knowing the other will be unable to access the assets after 2 years.

Senator Jones:
Would this legislation apply to existing self-settled spendthrift trusts, or would it be prospective?

Mr. Dickerson:
The provisions relating to the court order would apply prospectively. If an individual currently has a self-settled spendthrift trust, the court would be allowed to carve out the exception for support. That provision needs to deal with everything. Issues of who can act as distribution trustee or the third party to approve would apply prospectively. The waiver provision of section 1.6 would also apply prospectively.

Senator Jones:
This needs to be better defined. I would be less concerned if this legislation did not affect estate plans established between 1999 and now.

Mr. Dickerson:
The intent is not to affect an estate plan; it is to provide a mechanism for satisfying court-ordered child or spousal support obligations.

Chair Segerblom:
Instead of pursuing this legislation, would you object to implementation of a process similar to that used in Utah?

Mr. Dickerson:
I have no objections to any actions this Committee might take. My goal is to make you aware of a problem. This bill provides one suggestion for how to fix that problem.

Senator Hutchison:
Is the intent of this bill that a court order could be issued to require an irrevocable self-settled spendthrift trust to pay child support or spousal obligations regardless of when that trust was created?

Mr. Dickerson:
Yes, that is the intent; however, sections 1.3 and 1.9 could not and should not be applied retroactively.

Julia S. Gold:
I am a cochair of the Legislative Committee that is part of the Probate and Trust Law Section of the State Bar. This committee was not approached when A.B. 378 was being developed.

Senator Jones:
Why did that committee not become involved with this bill earlier to avoid the type of discussion we are having today?

Ms. Gold:
We did not know about this bill.

Senator Jones:
What did you not know? I am baffled that we are having this discussion.

Ms. Gold:
We did not see this bill. We welcome the opportunity to work with Mr. Dickerson in amending this bill. I suggest postponing action on this bill until all parties have been able to work together on it. I do not think an amendment to address estate tax issues and other concerns can be developed in the 10-day timeline we have in this Session. Part of the purpose of the State Bar Legislative Committee is to promote laws that better the ones we currently have in Nevada.

Chair Segerblom:
Your concern is about 26 CFR 20.2036-1. Is that correct?

Ms. Gold:
One concern is the IRS code and having inclusion for estate tax purposes. The effect of 26 CFR 20.2036-1 is not unsettled. The ramifications have been settled. Practitioners involved with spendthrift trusts have not seen these trusts used to avoid child or spousal support obligations.

Chair Segerblom:
Do you agree a court order for child or spousal support is exempt from a spendthrift trust?

Ms. Gold:
I agree it is exempt if the trust is set up correctly. When set up correctly, not all of an individual's assets are in the spendthrift trust. There are adequate assets available outside the trust to make support payments. A family law judge who sees over 1,000 cases a year has yet to see a case where a spendthrift trust has been used to avoid spousal or child support obligations. This is not an epidemic where child or spousal support is not being paid. It is not an emergency. We have time to work together to create a better bill and avoid the unintended consequences. Limited liability companies (LLCs) are created each time a spendthrift trust is created. This legislation would have a fiscal impact on these LLCs. Many areas have not been adequately examined. We invite the proponents of this bill to work with us.

Chair Segerblom:
The proponents of A.B. 378 have invited you to work with them. This bill passed the Assembly unanimously. There is a week for you to work together.

Ms. Gold:
Mr. Rushforth has submitted an amendment, Exhibit E.

Senator Ford:
Have the other states with spendthrift trusts ever seen the IRS implication raised by those opposing the bill?

Ms. Gold:
If you are referring to 26 CFR 20.2036-1, yes. It is a fact. If there is an ability to pay creditors and creditors can go after assets in a spendthrift trust, it cannot be a completed gift. There are various uses. An individual can use a spendthrift trust to make a completed gift or not. In the states that allow for an exception creditor, it will be included in the estate and it cannot be used for estate tax planning. That is one of the advantages Nevada has.

Senator Ford:
You have seen problems related to 26 CFR 20.2036-1 in the other states having spendthrift trusts?

Ms. Gold:
It prevents them from using that trust for one purpose.

Senator Ford:
I am not sure what that answer means.

Ms. Gold:
Yes, I have.

Senator Ford:
Are you saying you have seen that the IRS implication, the estate tax issue you have addressed, has been applied in other states having the exception?

Ms. Gold:
Yes, I have seen that.

Senator Ford:
What parts of A.B. 378 do you approve relative to protecting a child as the legislation relates to allowing child support obligations to be paid from a spendthrift trust?

Ms. Gold:
We are opposed to the bill as written. It appears to be about one case Mr. Dickerson has dealt with. Spendthrift trusts are generally not used as a way to avoid paying child or spousal support. When a trust is properly set up and does not have a fraudulent conveyance, one-half to two-thirds of an individual's assets are outside of the trust. A trust is not set up so the individual is essentially indigent because all of his or her assets have been placed in trust.

Senator Ford:
I understand these trusts have not generally been used to shield individuals from spousal or child support obligations, but this could occur. Is there an amendment or language that could be included in this bill that would at least allow child support payments to be made out of the trust?

Ms. Gold:
I would require time to review this. I do not believe it is necessary to include this. The amendments proposed by Mr. Rushforth in Exhibit E provide sufficient protection. This bill attempts to legislate a problem that does not exist.

Chair Segerblom:
Are we the only state that does not have an exemption for child or spousal support?

Steve Oshins:
The trend in the various states is to remove the exception creditors. Utah removed these exception creditors and does not allow either to access the trust. Wyoming does not allow a divorcing spouse to access a trust. It has a special type of trustee that can be drafted into the document to allow for not accessing child support out of the trust. Virginia and Oklahoma only allow child support as an exception. Colorado does not allow either exception. South Dakota recently enacted legislation to not allow either exception unless it was already a debt before the transfer to the trust. Enactment in this area has been progressive, and other states are trying to match Nevada. No bills or statutes have been regressive like this bill would be.

Chair Segerblom:
That depends on how you define regressive. I say it is progressive to protect a spouse and child.

Mr. Oshins:
Many precautions are built into Nevada law to protect against the problems this bill is trying to overlegislate. There are 15 states that allow self-settled asset protection trusts or domestic asset protection trusts. Competition exists in this area, and it affects the number of LLCs in a state. Changing the legislation, as proposed in A.B. 378, would cause Nevada to lose business to a state like South Dakota that has better domestic asset protection laws. Attorneys that set up one or two LLCs in Nevada with each domestic asset protection trust would instead take their business to states with better laws. Several thousand LLCs in Nevada today have been set up in combination with domestic asset protection trusts.

Senator Ford:
Are the 15 states that have legislation regarding self-settled spendthrift trusts trying to change their legislation to resemble that of Nevada?

Mr. Oshins:
Yes, we have become the model for these trusts. When this type of trust first started, states were copying Delaware law. That law has some serious flaws; as

a result of copying it, other states now have problems in their laws. The trend is to get rid of the problem, not to go in reverse and create the same problem that exists in Delaware.

Senator Ford:
I am concerned about child support. You stated some states already allow child support to be taken from a spendthrift trust. Is that correct?

Mr. Oshins:
That is correct. Oklahoma does this.

Senator Ford:
Do other states allow this?

Mr. Oshins:
Yes, they do.

Senator Ford:
Is there an issue with Nevada law? Is our legislation comparable to that of other states in allowing child support payments to be made? I do not want Nevada to be known as a state where an individual can set up a trust and not have to pay child support.

Mr. Oshins:
I believe Nevada law already takes care of this problem. There has never been a case where an alimony payment has come out of a self-settled trust—not one case in 15 jurisdictions, over the course of more than 16 years. I was the expert on the case Mr. Dickerson has spoken about, and it has nothing to do with this legislation. This situation is not going to happen because most attorneys advise their clients to put approximately 50 percent of their net worth into one of these trusts. No attorney will encourage a client to put all or substantially all of his or her net worth into one of these trusts. One of the 11 badges of fraud in a fraudulent conveyance action is: "Did you put all or substantially all of your net worth into the trust?" This will not happen.

Ms. Gold:
Even if someone was to set up a trust for the purpose of avoiding payments, if we provide an exception in Nevada, people will go to a different state.

Senator Jones:
What happens in a divorce if a trust is set up properly and other assets not placed in the trust are reduced or subject to bankruptcy court and no longer available?

Mr. Oshins:
It is theoretically possible a case does not fall under the protected category. If an individual has $2 million and places $1 million in a trust and loses the other $1 million, the other side would have trouble collecting. This is true for any creditor. The settlor could take the trust to another state, such as Utah, and the child or spousal support would not be paid from the trust. Other states would take our business at that point.

Chair Segerblom:
Are you saying once the trust is drafted, it can be taken to another state and the law of that state regarding child or spousal support exemptions applies?

Mr. Oshins:
That is correct. If the trust is drafted with the choice of law provision that says the trustee may move the trust to another jurisdiction from time to time by doing so in writing, it can be done by adding a cotrustee from the state of choice.

Chair Segerblom:
Why do the people having trusts drafted in Nevada not use them in another state?

Mr. Oshins:
Do we want to lose our business to other states by enacting this legislation?

Chair Segerblom:
I do not mind losing business to other states if it means our spouses and children are protected. I would like to discuss the IRS code issue. Spendthrift trusts in other states are not exempt from estate tax because of the exemption in those states for child and spousal support. Is that correct?

Mr. Oshins:
Code of Federal Regulations 20.2036-1(a)(1) requires if a transfer is made with the retained use of assets or if those assets are open to creditors, they are

subject to an estate tax at an individual's death. This would impose a needless 40 percent estate tax on the assets of those setting up self-settled spendthrift trusts under Nevada law. Mr. Dickerson stated there have been no court rulings on this issue. I disagree. I will research this topic and find examples for the Committee. As an estate attorney, I know there are many cases. In 26 CFR 20.2036-1(b)(2), it is required the trust be included in the estate if it satisfies a legal obligation of the decedent. The term "legal obligation" is defined as including a legal obligation to support a dependent during the decedent's lifetime.

Layne T. Rushforth:
We are concerned about the possible unintended consequences of this bill. If there is a perception Nevada self-settled spendthrift trusts will be subject to the estate tax pursuant to laws that have been on the books for many years, millions of dollars are going to go somewhere else—the perception alone will impact jobs and our economy. This is the reason other states are trending in the opposite direction. If the proponents of this bill are willing to discuss implementation of an approach similar to that being used in Utah, we may be able to reach an agreement. Utah eliminated its exceptions in statute and provided a requirement for notice instead.

I have provided the Committee a memo explaining my opposition to this bill (Exhibit F). I have also provided the Committee a memo outlining my suggestions for amending A.B. 378 (Exhibit G). These have been worked into the proposed amendment, Exhibit E.

Senator Hutchison:
We do not want to create a haven for deadbeats. Those of you who practice law in this area indicate no cases where spousal or child support obligations have been shielded because a self-settled spendthrift trust has been reported. Is that correct?

Mark Solomon (Chair, Probate and Trust Law Section, State Bar of Nevada):
I have practiced law in Nevada for 37 years. I have been on the Legislative Committee of the State Bar Probate and Trust Law Section since 1999 and was chair of that committee for many years. I know of no cases where these obligations have been shielded other than the one I am currently involved in with Mr. Dickerson. I know of no other case where a self-settled spendthrift trust in Nevada has ever been used in a divorce case to shield a child support or

alimony obligation. If all the assets end up in the self-settled spendthrift trust, it is theoretically possible, but the likelihood of that happening is almost nil. In the case currently in process the parties entered into a postnuptial agreement and specifically divided their assets. Two years after enactment of the self-settled spendthrift trust legislation, they moved these assets into self-settled spendthrift trusts. Each of these trusts has many millions of dollars and millions of dollars are outside of each trust. No threat or attempt to block child support or alimony obligations has been made in that case, and I know of none in Nevada. I have inquired of colleagues in other states, and they are aware of no cases in their jurisdictions.

This bill tries to solve a problem that does not exist. If this problem does exist, I would be happy to work on a solution. Enacting this legislation would destroy something that took 14 years to build that has made Nevada one of the best jurisdictions for promoting this type of estate planning. This type of trust is not designed to foster deadbeat mothers or fathers. It is designed to foster legitimate estate planning goals in a way that is being recognized in all states.

Senator Ford:
I do not mean to imply spendthrift trusts are being used to purposefully shield assets, but situations such as bankruptcy or loss of assets occur. The trust may not have been originally set up to shield assets, but a child may be left with no opportunity to receive child support. Is there anything that can be done to include an exception in our statutes for child support?

Mr. Solomon:
There are things that can be done, but not with the way A.B. 378 is structured. This bill creates a class of predators who would be able to go into a trust and reach its assets. That would create an issue with 26 CFR 20.2036-1. The amendment proposed by Mr. Rushford, Exhibit E, addresses this in another way.

This bill did not draw our attention when it was introduced in the Assembly. Had we been aware of it, we would have addressed legitimate issues about this topic before now. We are not opposed to looking for a way to prevent the theoretical possibility that a spendthrift trust could be used to shield assets.

Senator Ford:
As Legislators, we do not only have to pass reactive legislation; we pass proactive laws all the time. We can say that spendthrift trusts will not be set up to avoid payment of spousal or child support in Nevada as a matter of policy.

Chair Segerblom:
Please think about a resolution to this bill.

Senator Jones:
Are those of you opposed to this bill representing the State Bar?

Mr. Solomon:
I do not represent the State Bar. The State Bar has not heard this bill due to the timelines involved. Coincidentally, those of us testifying in opposition to A.B. 378 are all members of the State Bar Probate and Trust Law Section. I am not opposed to meeting with the authors of this bill to resolve any potential problems that may exist in Nevada regarding spendthrift trusts. The amendment proposed by Mr. Rushforth, Exhibit E, moves us toward addressing our concerns about this bill. I have not heard a reaction to this proposed amendment from the other side. We are willing to revise the amendment as needed.

Senator Jones:
If the amendment is adopted, will the State Bar Probate and Trust Law Section support the bill as amended, or will that group continue to oppose it?

Mr. Rushforth:
I would support A.B. 378 if my proposed amendment is enacted. It is a start, not a refined product. This biggest problem with this bill is the issue of prospective versus retroactive application. That needs to be clarified. Statutes of limitations exist. Exempt assets exist in Nevada that cause certainty. A problem exists when a trust in existence since 1999—and set up correctly—would have a hole in it because of legislation. This could have the potential of triggering an estate tax when a gift tax was already paid.

We need to determine to what trusts this legislation would apply. The concern about 26 CFR 20.2036-1 is a real one. I prefer the approach used in Utah. Tens of thousands of trusts have been created here which have brought in millions of dollars that are invested in Nevada. Some of these trusts have brought people here because of the protection of Nevada law. We need to look

at the consequences of creating a law that would impact these trusts by creating an exception. Even though this exception may only be theoretical and applied to a narrow situation, it still creates a problem in respect to other jurisdictions that have improved their laws.

Section 1.3 of the proposed amendment, Exhibit E, would create the presumption that if an individual transfers property into a self-settled spendthrift trust within 1 year prior to a divorce action, there is intent to defraud.

The bill requires a declaration in regard to each transfer of property. The proposed amendment would change the language in section 1.6, subsection 2. Once both parties have acknowledged giving up community property rights consistent with the trust, neither individual would have to waive the community property rights again. In the bill, this must be done each time property is moved into the trust.

The removal of section 1.9, subsection 2, paragraph (b) and subsection 3 in Exhibit E would eliminate restrictions on the distribution trustee. The duty of this trustee is identical regardless of who performs this role. Assignment of who performs this duty would not impact collection of a family support order. Restricting who can be the distribution trustee will not further public policy in regard to collection of family support order.

Section 1.6, subsection 3, paragraph (b) of Exhibit E outlines the division of individual self-settled spendthrift trusts in case of divorce. Divorce courts now sometimes want to divide the assets of these trusts in the same way as assets in revocable trusts. This can have negative income, estate and gift tax implications if not done appropriately. This amendment would allow reallocation of the trusts without destroying them or causing adverse consequences.

Chair Segerblom:
I suggest you work together on improving this bill. There is concern self-settled spendthrift trusts could be misused. We want to be sensitive to the fact that you are now asking us to eliminate this bill that unanimously passed in the Assembly.

Senator Brower:
Passing this bill with four votes of approval is not the way to create good policy. We often hear bills that we previously approved. We have to modify

them in the next Legislative Session because we got them wrong the first time for a variety of reasons. Sometimes we rush to get things done, and this is not how to create good policy. I advise you to work together but do not agree to an amendment if it does not create good policy. If you do not like the bill or the amendment, tell us. We do not want to hear you supported a bill but actually think it is a bad idea.

Senator Hutchison:
I would like each of the practitioners working in trust law to tell me if he or she is aware of any case where an individual attempted to shield funds from spousal or child support obligations in either Nevada, during the 16 years self-settled spendthrift trusts have existed in the State, or in any of the other states having this legislation.

Mr. Rushforth:
I am a member of the State Laws Committee of the American College of Trust and Estate Counsel, and I meet with attorneys from across the Country. I have not heard of a case like this. Other states are moving in the direction of adopting legislation similar to Nevada statute. The legislation creating exemptions was well-intended but has proven unnecessary.

Mr. Oshins:
There have been no cases in Nevada or in any of the other 14 jurisdictions during the 16 years domestic asset protection trusts have existed. This bill is overlegislating. I am not as strongly in favor of the proposed amendment as Mr. Rushforth. It was an attempt to fix what we feel would be a catastrophe if implemented. This idea needs to be tabled until the next Legislative Session. It is unfixable because the other side does not understand the ramifications of the estate tax.

Ms. Gold:
I am not aware of any cases in the 20 years I have been practicing law.

Mr. Dickerson:
The comment has been made that if these trusts are set up properly, adequate assets would remain outside the trust. But it is not necessary for a trust be set up in this way. If a judgment creditor exists at the time a transfer is made, an individual would not want to transfer all of his or her assets because that would be viewed as an effort to defraud creditors. However, if no creditors exist at the

time of transfer, all assets can be transferred into the trust. After the 2-year waiting period, the trust would shelter the assets even if creditors then existed.

Mr. Oshins referred to a number of cases and indicated states are moving in the direction of Nevada statute, yet a chart provided by Mr. Oshins indicates only Nevada and Utah do not provide exemptions for child and spousal support. Colorado, which he rates as the worst state in the Country for self-settled spendthrift trusts, is not clearly shown as providing protection from any creditor. I do not understand how he can justify his statement regarding states moving in the direction of adopting Nevada statutes. I asked Mr. Oshins and Mr. Rushford for case authority on the issue of taxability of assets in a spendthrift trust. They could not provide this to me. I would like to see this information so we can work around it.

I am willing to work with those who have spoken in opposition to this bill. I do not think it should be placed on hold until the next Legislative Session. The issue needs to be addressed. I would like to see it addressed now.

Senator Ford:
We continue to discuss the lack of examples showing spendthrift trusts have been used to shield assets from child or spousal support obligations. If Nevada statute requires these assets not be exempted, it is not surprising there are no examples. A savvy spouse could, however, use this type of trust to keep assets from the other spouse and attorneys would not necessarily hear about it. I find it less persuasive we do not have examples or that it is not in caselaw. We need to rely on our ability as Legislators to be preventive. We should make a statement in our State that an individual needs to go elsewhere if he or she wants to shield assets from child or spousal support obligations.

Assemblywoman Dondero Loop:
I agree with Senator Ford. We have always taken care of the families and children living in Nevada. We have worked hard over the last Legislative Sessions to make our State better for our families and children. Just because we have no examples of spendthrift trusts being used to shield assets does not mean we should not have a proactive bill. We should look forward and be known as a state that takes care of problems before they happen, not after they happen.

Chair Segerblom:
I will close the hearing on A.B. 378. I will open the presentation on the economic impact of A.B. No. 284 of the 76th Session.

Rocky Finseth (Nevada Association of Realtors; Carrara Nevada):
I have provided the Committee with two reports produced by the Nevada Association of Realtors, *Nevada's Face of Foreclosure* (Exhibit H) and *Nevada's 2013 Foreclosure Report* (Exhibit I). Joel Searby of Strategic Guidance Systems will review these documents with the Committee.

Chair Segerblom:
We are having this presentation in preparation for hearing A.B. 300, which attempts to correct A.B. No. 284 of the 76th Session that became effective on October 1, 2011.

ASSEMBLY BILL 300 (First Reprint): Revises provisions governing real property. (BDR 9-961)

Joel Searby (Nevada Association of Realtors):
In 2008, Strategic Guidance Systems began studying the Nevada foreclosure crisis for the Nevada Association of Realtors. At that time, a lot of data were being shared, but little input had been sought from individuals who had personally experienced foreclosure, narrowly avoided foreclosure or who lived in neighborhoods hard-hit by this crisis. The goal of this study was to understand the numbers behind the foreclosure crisis and to bring in what we considered to be the faces of foreclosure.

The methodology used for this study is explained on pages 1 and 2 of Exhibit H. Page 1 details the sources of data and the methods used to analyze the data. Foreclosure filings were acquired from the RealtyTrac company. Data from Clark County and Washoe County were additionally reviewed to ensure high quality. Over 550,000 individual filings were compiled for this study. These included notices of default, notices of trustee sale and real estate owned filings as well as a small number of judicial foreclosures that occurred due to the involvement of other states. Filings were geocoded to analyze where the foreclosures occurred. Details about foreclosures by voting districts are available in Exhibit I. This was possible to determine because all foreclosures since 2009 have been geocoded.

Additional data collected are listed on page 2 of Exhibit H. Included in these data are the delinquency report from the Mortgage Bankers Association and 500 phone surveys gathered through mobile and landline phones. We surveyed people in 2009 in similar studies. In total, almost 3,000 people were surveyed as part of this study since 2009. This large sample group ensures the conclusions of this study are statistically valid. Census data and data from the U.S. Bureau of Labor Statistics were also reviewed. A focus group was conducted with licensed Realtors to discuss data. Information about this focus group is provided on page 2 of Exhibit H. Personal interviews with other individuals having experience in the foreclosure crisis were also conducted.

I will show a video we produced that shares the results of our opinion and raw data research about foreclosures in Nevada. It can be viewed at <www.FaceOfForeclosure.com>. This video supports the data indicating the desire of Nevada residents to move on from foreclosure.

Job loss is the No. 1 factor in foreclosures. People know this intuitively, but we wanted to verify this with data. In our latest research interviews, 53 percent of the individuals who experienced a foreclosure indicated the loss of a job in their family in the previous year.

Page 4 of Exhibit H provides information on what we call the plus-one factor. This means there was not only the loss of a job, but an individual also experienced at least one other major life event during the year preceding the foreclosure. These events could include unexpected medical bills, death of the primary wage earner, a new baby, an increase in taxes or other major life experiences. Over 41 percent of the individuals surveyed experienced unexpected medical bills as well as a job loss in the year prior to a foreclosure.

Residents of Nevada are divided in their opinions on the financial decision to strategically default, which is defined on page 20 as having the ability to pay a mortgage but choosing not to pay it. Of those surveyed, 45 percent said strategic default is an acceptable financial decision; another 45 percent said a homeowner should not choose this option if they have the ability to pay. Survey information about opinions on strategic defaulting is also shown on page 4 of Exhibit H.

Sixty-three percent of those surveyed resided in their home for more than 5 years, page 8. The problem of foreclosure is not strictly related to

questionable loan practices. We asked those surveyed if programs offered by the U.S. Department of the Treasury and the U.S. Department of Housing and Urban Development under the Making Home Affordable program such as the Home Affordable Modification Program and the Home Affordable Refinance Program or if State programs such as the State of Nevada Foreclosure Mediation Program were helping or hurting. There were 52 percent of the responders who said these programs were not having an impact, 20 percent said they are making things worse and only 10 percent said they are improving the situation. This indicates these programs have not been helpful to the majority of homeowners facing foreclosure. Studies conducted by other groups have had similar findings.

Nevadans are still hopeful about the direction our State is moving in regard to home ownership. This is detailed on page 4 of Exhibit H. One-quarter of those experiencing a foreclosure express plans to purchase another home in the future. Our research does not support the idea home ownership is no longer an option or that the next generation has no interest in owning a home.

Page 27 of Exhibit H details the foreclosure rates since January 2009. The chart indicates weekly foreclosure filings have remained fairly steady based on seasonal influences. This chart also indicates a gradual decline in foreclosure activity since 2011. This plays into the larger economic picture.

The Mortgage Bankers Association produces delinquency data. As delinquencies increase, it is expected foreclosures would increase. In the first quarter of 1979, foreclosures and past due mortgages were low. In the late 1980s, because of problems in the oil industry, past due mortgages spiked slightly in Alaska, but foreclosures did not increase significantly. In the 1990s, the economic picture was steady. Nevada was in the middle of national statistics in regard to past due mortgages and foreclosures. In 2005, Hurricane Katrina caused a large number of mortgages to become past due in Louisiana and Mississippi, but foreclosures did not increase because banks worked with storm victims. In 2008, Nevada and Florida began to see higher rates of foreclosure. Prior to this, delinquencies had not spiked as would be expected. Arizona and California experienced an increase in foreclosures over the following several years. Rates in Nevada began to drop back into the middle statistically in 2010, then through 2011 and into 2012. This is important because the downward trend in delinquencies and foreclosures began well before the implementation of A.B. No. 284 of the 76th Session.

Page 17 of Exhibit I compares the unemployment rate in Nevada with seriously delinquent mortgages and shows a direct correlation between the two. Delinquent mortgages began to drop at the beginning of 2010. They have dropped significantly since then. The numbers have held steady as opposed to what might be expected due to what is called the large shadow inventory in the Las Vegas area. An increase in delinquencies is normally expected when defaults are not being filed; however, delinquencies are also down in this area. They have been down since 2010 and appear to be trailing with the unemployment rate.

Senator Hutchison:
Why does the data not indicate a shadow inventory problem?

Mr. Searby:
A shadow inventory is defined as the idea that a number of houses should be on the market but are not because of various market factors including bills like A.B. No. 284 of the 76th Session. If the shadow inventory in Nevada is expanding, we would expect delinquent mortgages to flatline or increase because people fall behind in their payments. The notices of default or foreclosure would also flatline or decrease, and the growing gap would indicate a group of homes in the middle that should be on the market but are not. That is not the case in Nevada. Delinquencies continue to decline steadily over time. We do not see evidence of a huge shadow inventory. Some inventory exists, but that is because banks do what they want with certain pieces of property. I do not believe there are 70,000 pieces of property in this category as has been stated.

Senator Hutchison:
Would the best data come from the banks? Would a bank be able to tell how many properties are in the backlog?

Mr. Searby:
That is a gap in our data. Banks are not compelled to share how many properties they have in default unless they actually place them in default. The data from the Mortgage Bankers Association is aggregated from the lenders and voluntarily shared with the Association as part of its research package. In my opinion, the only way a shadow inventory could exist is if banks are holding onto thousands of properties and doing nothing with them—not reporting them as delinquent, not defaulting on them and not foreclosing on them.

The 2013 sales numbers for single-family homes in the Las Vegas area are strong. The total number of closings thus far is stronger than in 2003.

Chair Segerblom:
Are these numbers for new homes or for new and existing homes?

Mr. Searby:
That does not include new-built homes. Market prices have risen since January 2012, but are not increasing at the rate they were during the housing bubble. An article by Eli Segall in *Vegas Inc.* on April 12 references a report by Redfin, a real estate listing and research service, that indicates the growth and pricing in the Las Vegas market has not been what it considers a bubble.

Nearly 59 percent of the home sales in the last reporting period were cash sales, 24 percent were conventional sales and the rest were supported by Federal Housing Administration or U.S. Department of Veterans Affairs home loans.

Several types of properties are being sold. Real estate owned properties have virtually disappeared since the beginning of 2012, with the market today comprising less than 10 percent of total available properties. The percentage of short sale properties has increased, but since January 2013 it appears to be decreasing slightly. The percentage of the market consisting of classic nondistressed properties continues to grow and today comprises almost 60 percent of the market.

Senator Hutchison:
What was the time frame for those percentage figures?

Mr. Searby:
These are the percentages for homes closing in April 2013.

Senator Hutchison:
Is this a trend that has continued over time? Have the percentages stayed at these levels?

Mr. Searby:
This trend has been consistent over the last several reporting periods. I do not know the statistics prior to that time.

Senator Hutchison:
Are these homes being purchased by investors? Do you have data to support this?

Mr. Searby:
I do not know the percentage of homes being purchased by investors.

Senator Jones:
The statistics for short sales over time appear inversely proportional to those for classic sales. Are we selling fewer homes through short sales now, or are we doing more classic sales?

Mr. Searby:
These are percentages of the total market. We also need to discuss negative equity—what is often defined as being underwater. Nevada still leads the Country in this area. We do not have all the information from banks, and a property must be valued by a bank in order to determine if it is underwater. CoreLogic, a company that provides property analytics, has determined that nearly 60 percent of homes in Nevada are underwater.

Chair Segerblom:
I have read housing prices have risen 20 percent in the last year. That tells me the number of mortgages that are underwater should have decreased. Do you know if this has happened?

Mr. Searby:
The number of underwater mortgages has held stable. Banks have data we do not have access to regarding this topic. There is no clear indication the number of underwater mortgages is decreasing just because prices have risen slightly.

Senator Hutchison:
Is that because you are only looking at the sales of existing homes? If the sales of existing homes go up, I would not expect these homes to be underwater. Perhaps prices need to improve a lot more before the underwater problems of existing homeowners will be affected.

Mr. Searby:
That is correct. Many existing homes were sold at extremely inflated prices. They will not be at a stable level for a long time if we define being underwater

as a comparison between how much a buyer originally owed compared to how much the home is now worth. A home now valued at $150,000 that originally sold at $350,000 will not be affected by a 20 percent increase in the market.

The enactment of A.B. No. 284 of the 76th Session essentially stopped notices of default. The chart on page 26 of Exhibit H illustrates the impact of this bill. What has been falsely reported is that all activity related to foreclosure stopped as well. The columns titled Notice of Trustee Sale and Real Estate Owned show that actions continued at a strong pace after the enactment of this legislation. This chart indicates the foreclosure problem is improving. This is not only a reaction to the legislation but to a combination of factors including rising market values, decreases in unemployment, implementation of the National Mortgage Settlement and others. The trend is consistent and gradual; the foreclosure problem is improving. The impact of A.B. No. 284 of the 76th Session was on the defaults.

Chair Segerblom:
There was a spike right before that legislation took place.

Mr. Searby:
There was a small spike in defaults, but all of the factors including trustee sales and real estate owned properties must be considered. A trend line for these sales nearly mirrors that of the unemployment rate. These data tell us is there is an overall strengthening of the economy in Nevada. We are not seeing major spikes or dips that appear to be directly related to A.B. No. 284 of the 76th Session. That does not mean this bill is perfect, but it does not appear to have created a huge bubble.

The unemployment rate is dropping, delinquent mortgages are dropping and defaults are dropping. Settlements are improving and the economy is improving overall. Opinion data indicates the people of Nevada are beginning to feel the results of these improvements. This will positively affect consumer spending. It appears the worst is behind us and another bubble is not coming in this market.

Historical foreclosure activity by voting districts is provided in Exhibit I. These data include some extreme spikes. These could be caused by different factors. One factor would be banks releasing many properties at one time because of internal processes not related to other factors. Another factor would be multiple units in a single development being entered into default on the same day.

Senator Hutchison:
I draw three conclusions from your testimony. The first is there is no direct cause and effect relationship between A.B. No. 284 of the 76th Session and the foreclosure crisis. Is that accurate?

Mr. Searby:
Yes, it is.

Senator Hutchison:
The second is a shadow inventory exists; therefore, A.B. No. 284 of the 76th Session cannot be blamed for creating a shadow inventory. Is that correct?

Mr. Searby:
That is correct. The data do not show a shadow inventory specifically because of A.B. No. 284 of the 76th Session.

Senator Hutchison:
The third conclusion is the prospects for Nevada are improving and the foreclosure crisis, as we have defined it, is behind us.

Mr. Searby:
Overall, I would say that is correct, but areas of struggle will still exist.

Senator Hutchison:
Are there other big picture conclusions we should draw from these data?

Mr. Searby:
The data reviewed after implementation of A.B. No. 284 of the 76th Session indicates this legislation enacted boundaries as opposed to implementing a program. The boundaries appear to have maintained and pushed forward the trends already happening. This bill gave the market and practitioners boundaries having to do with process. These boundaries may need to be strengthened. I see no detrimental effect having occurred from the implementation of A.B. No. 284 of the 76th Session. The overall data do not indicate this bill alone has had a major detrimental impact, nor has it created a bubble in the market.

Senator Hutchison:
You were hired by the Nevada Association of Realtors. Is that correct?

Mr. Searby:
Yes, it is.

Senator Hutchison:
Do you have specific recommendations for the Committee to consider regarding A.B. No. 284 of the 76th Session?

Mr. Searby:
I will leave that to the Realtors and their staffs.

Chair Segerblom:
Do you know the average sales price of a home?

Mr. Searby:
I can research that information.

Chair Segerblom:
Please do.

Mindy Martini (Policy Analyst):
I have provided the committee a packet of information (Exhibit J) provided by Clear Capital, a provider of mortgage industry data headquartered in Truckee, California. Page 1 of Exhibit J provides a chart with the median sale price of homes in the Las Vegas metropolitan statistical area from 2008 to the present. During the high end in 2008, the median sale price was $240,000. During the first quarter of 2012, at the low end, the median price dropped to $110,000. Assembly Bill No. 284 of the 76th Session went into effect October 1, 2011. That bill would have been implemented during the fourth quarter of 2011 when the median sale price was $112,000. These prices decreased to $110,000 during the first quarter of 2012 but are now rising again. During the first quarter of 2013, the median sale price has risen to $135,000. This is also illustrated on the graph provided on page 3 of Exhibit J.

Page 2 of Exhibit J provides data from 2008 to the present about the median price per square foot. The high price of $135 occurred in 2008. The low of $64 occurred in last quarter of 2011. The price per square foot was valued at $64 when A.B. No. 284 of the 76th Session went into effect during the quarter dated December 21, 2011. This price has risen and today is valued at $77 per square foot.

Chair Segerblom:
It appears the low point occurred near the time A.B. No. 284 of the 76th Session took effect. The value has been trending toward the positive since that time.

Michele W. Shafe (Assessor, Clark County):
I have provided data sheets to the Committee with information about vacant land and residential property taxes in Nevada (Exhibit K). Land in Nevada is valued according to market data showing sales of similarly situated properties. Residential property is valued by determining replacement cost and applying a statutory depreciation of 1.5 percent per year for each year of age on the property. In a rising market, which is what we had until the last several years, this would complete our valuation process. The market value of the homes was historically much higher than the replacement cost. Now the reverse is true. When the replacement cost is compared to market sales, many sales costs are below the replacement cost. In these cases, an economic obsolescence must be used to reduce the replacement cost so we do not exceed the market value of the property. We have been experiencing this problem since 2009.

A property tax cap was put into place in 2005. That cap provided a 3 percent property tax cap on the tax bill of owner-occupied properties. All other types of properties could have up to an 8 percent tax cap on their bills. Each year we do revaluation of properties starting on July 1. If a property exists on July 1, it will be taxed for the next year. A notice of value card must be sent to each property owner by December 18 according to statute. This card informs the homeowner as to the value of the property in the preceding year and the current year. It informs him or her of appeal rights. Residential units for this report include single-family dwellings, condos and townhomes. Apartment buildings are usually classified as commercial and are generally not included in this category.

The first column on page 1 of Exhibit K differentiates the parcels. Those having a 3 percent cap are owner-occupied. Those not having a 3 percent cap are nonowner-occupied or rentals. Property values are set in December of the year prior to receiving a tax bill. Over 361,000 parcels are owner-occupied, and approximately 244,000 are rentals. Income from property taxes on residential parcels has dropped. A change in the trend of owner-occupied homes versus rental units has occurred. The number of people living in homes they own is declining. Previous statistics have been reversed, with fewer owner-occupied homes now than rentals. Nevada has experienced a small overall increase in

property values in fiscal year (FY) 2013-2014. For properties increasing in value, the 3 percent cap would once again apply. The cap on other properties has also dropped. Beginning July 1, it will be 4.2 percent in Clark County. This makes a difference of 1.2 percent between the owner-occupied cap and the nonowner-occupied cap.

Chair Segerblom:
Is the tax cap on commercial property based on a formula?

Ms. Shafe:
Yes, it is. The formula includes the Consumer Price Index. It also includes a review of value changes over time. The original 8 percent cap has now declined to 4.2 percent using this formula.

Chair Segerblom:
According to this formula, a commercial property that increased in value by 10 percent would experience a property tax increase of only 4.2 percent? Is that correct?

Ms. Shafe:
That is correct. The property taxes would only be 4.2 percent higher than the previous year.

Chair Segerblom:
According to page 1 of Exhibit K, in 2008 the total taxable value of all residential property was $183 billion. That value dropped to approximately $84 billion and has now risen to $86 billion. Is that correct?

Ms. Shafe:
That is correct.

Chair Segerblom:
When was property value at its lowest point?

Ms. Shafe:
Values began to decline in FY 2010-2011 with properties revalued in 2009. This was the biggest fall in property values. These values began to rise in FY 2012-2013 after hitting the lowest level. Values are up for FY 2013-2014.

Chair Segerblom:
Are these dates for property revaluations that occur in December of the year prior to receiving a tax assessment?

Ms. Shafe:
Yes, they are.

Chair Segerblom:
We are examining the impact of A.B. No. 284 of the 76th Session, which took effect October 1, 2011. Shortly after this date, the taxable value of the real estate market bottomed out. Since that time has the value of the market improved slightly?

Ms. Shafe:
Yes.

Chair Segerblom:
Are property taxes as a whole increasing? Are residential property taxes increasing or decreasing? We are concerned about taking action that might cause a decline in property taxes.

Laura Fitzpatrick (Treasurer, Clark County):
Property taxes have stabilized. Values have gone up in Clark County. This year, even though values are beginning to increase, we project a decrease in these taxes of approximately 1.59 percent. This is partially related to the property tax cap. Although values in owner-occupied or other properties may increase, the caps limit the tax increases we are able to charge.

Chair Segerblom:
What year did you collect the most property taxes? How does the income from that year compare to that from the current year?

Ms. Fitzpatrick:
The highest levied was in FY 2008-2009. In that year, $2.3 billion was levied after the abated amount. In FY 2011-2012, the taxes levied were down to $1.6 billion. I cannot make a clean comparison between FY 2008-2009 and FY 2012-2013. Starting in FY 2012-2013, some personal property formerly billed on the real property tax roll is being separately billed as personal property. This year, FY 2012-2013, that accounts for approximately $23 million.

Chair Segerblom:
Are you stating there was a decrease of approximately $600 million in tax revenue?

Ms. Fitzpatrick:
Yes. The taxes levied decreased from $2.3 billion to $1.6 billion for a $700 million decrease; for FY 2012-2013, it is a $1.5 billion decrease.

Chair Segerblom:
How are property tax funds used?

Ms. Fitzpatrick:
The money goes to schools, cities and special districts. Some of it goes to the State. The impact of the tax cap from the time it began is that $3.6 billion in taxes were not levied—taxpayers have not had to pay this $3.6 billion.

Chair Segerblom:
Will the tax rate for nonresidential properties ever increase back to 8 percent?

Ms. Shafe:
The rate will not increase until the Consumer Price Index and the value of property increase.

Chair Segerblom:
How low can the tax rate on these properties drop? Is the 3 percent cap on residential properties adjusted, or is it fixed? We want to avoid inadvertent decreases in taxes.

Ms. Shafe:
The 3 percent is a fixed rate. I do not know how low the nonresidential rate can drop.

Bill Uffelman (President and CEO, Nevada Bankers Association):
I surveyed three large banks that are the major servicers in Nevada. These banks service a total of 351,000 mortgages in the State. Of those mortgages, 308,000 are current and 43,000 are delinquent. Depending on the bank, between 15 percent and 25 percent of these homes are "portfolio," meaning the bank is holding the mortgage in its portfolio. Approximately 70,000 of the 351,000 mortgages fall into this category.

Chair Segerblom:
Is this what is called a shadow inventory?

Mr. Uffelman:
No. These are mortgages owned by the bank. The interest on these mortgages accrues to the bank. The remaining 280,000 mortgages have notes owned by investors. These include Fannie Mae, Freddie Mac, investment groups such as the Public Employees' Retirement Fund or individual retirement funds.

Depending on the bank, the delinquency rate ranges from 9 percent to 16 percent. In many cases, this depends on how the mortgage was first acquired. There is a wide variety in individuals who do not pay a mortgage.

Sixty percent or more of the mortgages that banks process on a servicing-only basis are held by government-sponsored enterprises (GSEs) such as Fannie Mae or Freddie Mac. The current status regarding GSEs is that these mortgages cannot be mediated if an individual experiences problems paying the loan. It has been stated this is to protect the interest of the taxpayers. I question this decision.

Senator Ford:
What percentage of the mortgages are owned by GSEs?

Mr. Uffelman:
Approximately 60 percent.

Senator Ford:
Are the other 40 percent owned by the banks?

Mr. Uffelman:
No. There are 351,000 mortgages serviced in Nevada and approximately 70,000 of these are owned by the banks. Sixty percent of the remaining 280,000 mortgages are owned by the GSEs. These are the loans the servicer cannot reduce in principal through remediation.

Senator Ford:
Can the servicer enter into remediation with the 40 percent of the loans not owned by the GSEs?

Mr. Uffelman:
The potential exists for that to occur. Some of the servicers of those portfolios follow the same rules as the GSEs; it depends on the owner of the note.

Senator Ford:
Do the owners of these notes have discretionary rights in this area? The GSEs are bound by law, but the owners can make their own determinations. Is that correct?

Mr. Uffelman:
That is correct. A private party has greater discretion than a GSE.

Senator Ford:
What percentage of the 40 percent of the note holders that have the discretion to make principal reductions have utilized this option to help keep owners in their homes?

Mr. Uffelman:
I do not have that number because of data reporting procedures. One owner reported preventing approximately 18,000 foreclosures. Of this 18,000, 7,800 participated in loan modification, 9,000 were short sales and 100 were deed in lieu of foreclosure actions. The remaining 1,200 homeowners participated in other foreclosure prevention programs.

Assembly Bill No. 284 of the 76th Session went into effect on October 1, 2011. The National Mortgage Settlement went into effect in spring 2012. An IRS rule change at that time also allowed tax breaks that encouraged short sales. After 2009, the NRS allowed the purchase money portion of new mortgages to include antideficiency protection. In 2011, this protection was extended to cover second mortgages in certain cases.

If we presume all residential properties in Clark County dropped by 50 percent, a $300,000 property would now be worth $150,000 to $175,000, and a short sale would show a deficiency of $125,000. Under the current tax rate, this would place the homeowner in the top tax bracket. Absent the IRS rule protection, an individual in this situation would owe the government approximately $60,000 he or she never received. The IRS rule change expires on December 31, 2013. Nevada, Florida and parts of California are still

experiencing a crisis in the housing market. Unless this crisis is indexed against states like these, the pressure to extend this legislation is not significant.

When the first Home Affordable Refinance Program set the level for homes underwater at 105 percent, there was excitement. In Nevada, however, many homes were 120 percent or more underwater; this continues to worsen. National programs often do not catch up with the reality in Nevada. Many of these programs require a loan be in default before an owner is eligible to participate, encouraging negative behavior. Nearly 43,000 of the mortgages being serviced by the three major servicers in Nevada are delinquent.

Shadow inventory is created when a bank owns a property and is taking no action with it. One bank reports a real estate owned property count of 65 homes. A bank that reports 5,500 homes in the foreclosure process may have over 1,800 of these homes in bankruptcy. This means the bank is unable to process one-third of the homes it has in foreclosure.

The foreclosure report of numbers by voting district, Exhibit I, shows a drop on October 1, 2011. Care must be taken when discussing the filing of the notices of default, the notices of sale and conversions to real estate owned property. October 2011 indicates the time when initial notices of default were filed. Note holders reviewed paperwork to ensure it was correct and reviewed documents to ensure the personal knowledge requirements were met.

Chair Segerblom:
Have the banks held off on filing notices of default because of the affidavit requirement?

Mr. Uffelman:
I regularly hear reports this is true. A smaller bank that portfolios all of its loans has been able to process 20 foreclosures because all documentation is physically kept at the bank. The bank opened the mortgage and the mortgage remained at the bank.

Chair Segerblom:
Is there a shadow inventory? How many homes are waiting to receive notices of default?

Mr. Uffelman:
The affidavit requirement of A.B. No. 284 of the 76th Session made it difficult in most cases for banks to sign the affidavit because they could not fulfill the personal knowledge requirement. Having this knowledge is critical to the affidavit because of a $5,000 penalty if the affidavit is signed without it.

Chair Segerblom:
How do we calculate the shadow inventory? The number of foreclosures is steady.

Mr. Uffelman:
The Mortgage Bankers Association reports it takes approximately a year to complete a foreclosure in Nevada because of mediation and other actions that are required by statute. If everything happened as soon as it could happen, a foreclosure would take 6 months.

Chair Segerblom:
If the affidavit requirement is removed, what would happen?

Mr. Uffelman:
Assembly Bill 300 would not remove the affidavit requirement. It allows personal knowledge or review of the business record to constitute the personal knowledge required for the affidavit.

Chair Segerblom:
Does that alleviate the problem you have been discussing?

Mr. Uffelman:
It would allow affidavits for notices of default to be filed. That means 43,000 homeowners serviced by the three large servicers would receive notices of default. These include homeowners who are more than 30 days late, 30 to 60 days late or more than 180 days late on their payments.

Chair Segerblom:
If the guidelines of A.B. 300 were followed, the holders of these mortgages would be ready to serve notices of default. Is that correct?

Mr. Uffelman:
A notice of default motivates a homeowner. For a period of time, there has been no consequence for late payments.

Senator Hammond:
What are banks in other states doing in regard to notices of default? Why is Nevada experiencing an uptick in these filings?

Mr. Uffelman:
Some of the notices filed after A.B. No. 284 of the 76th Session became effective were portfolio loans. These loan holders were comfortable serving the notices of default because their documentation was kept in house. The foreclosure process in other states, such as Arizona, is easier and quicker. It has been easier for these states to clear the market and encourage it to improve. Arizona is also a nonjudicial foreclosure state, which changes all the factors. A comparison between Phoenix and Las Vegas, cities that had similar property problems, indicates Phoenix has cleared the market and increased home prices, while Las Vegas is still struggling. The data provided by Realtors is resale data, not real homes. New home sales are up in Las Vegas. The price per square foot of a home in Las Vegas is not increasing, but new home sales are increasing due to lack of supply.

Senator Hammond:
Has the number of filings of notice of default increased?

Mr. Uffelman:
These have increased. Bills are being discussed regarding the filing of notices of default by homeowners' associations (HOAs) to collect back HOA fees. Notices of default must be individually reviewed in order to determine the type of institution doing the filing. The number of bank filings has been lower since implementation of A.B. No. 284 of the 76th Session.

Chair Segerblom:
Do you believe bank filings of these notices have increased?

Mr. Uffelman:
No, bank filings have not increased overall.

Chair Segerblom:
If the 43,000 homes having delinquent payments are released into the market, what will happen to property values?

Mr. Uffelman:
The ability to file for foreclosure triggers other things, such as mediation. These notices of foreclosure will not be filed the day after A.B. 300 is enacted.

I have provided a document to the Committee (Exhibit L). Page 1 of Exhibit L shows closings by type. Classic closings are those made by individuals who have made the decision to sell their homes. In April 2013, 57 percent of sales in the Las Vegas market were of this type. Real estate owned closings comprised 11 percent of the closings, and short sales comprised 32 percent. This indicates an increase in the perceived value of homes in Las Vegas. A home purchased before the bubble is not valued at the same level as when purchased.

Chair Segerblom:
Would you agree property values are increasing?

Mr. Uffelman:
Yes, they have definitely increased. The market fell by 50 percent. It is necessary to recover 100 percent of that loss to get back to even. The recovery is directly related to availability.

Chair Segerblom:
If A.B. 300 passes, will it cause the market to regress?

Mr. Uffelman:
In my opinion it will not. Homes will filter into the market. All of the homes available will not enter the market the day A.B. 300 is enacted. Page 3 of Exhibit L indicates the rate of real estate owned properties has gone down since implementation of A.B. No. 284 of the 76th Session. As the backlog of homes available prior to implementation of this bill tapered off, properties were no longer available to become real estate owned. The rise in short sales occurred relates to the National Mortgage Settlement.

Venicia Considine (Legal Aid Center of Southern Nevada):
I am an attorney for the Legal Aid Center of Southern Nevada, and I am thankful to the previous speakers who have validated with data what we believe has

been occurring. In late 2009, the real estate bubble burst and homeowners began to receive notices of default or foreclosure. This was just prior to implementation of the Foreclosure Mediation Program in Nevada. At that time, there were 10,000 notices of default a month being delivered. That was the height of the problem. After the Foreclosure Mediation Program went into effect, there was a precipitous drop in these notices while the banks acclimated to working with the mediation process. After that time, the number of notices began to rise once again. The numbers of notices of default began to slow down once again in 2010. In 2011, A.B. No. 284 of the 76th Session was enacted, and we had the National Mortgage Settlement in 2012, but it was being discussed in 2011. The month the Nevada law went into effect, foreclosures dropped to nearly zero in Clark County. Banks began acclimating to this legislation soon after its implementation. Fannie Mae did not see a reason to stop nontraditional foreclosures. It moved to a different servicing company in order to once again initiate notices of default because other servicers were not able to do this. Other owners of loans held by GSEs found ways to meet the requirements of both the A.B. No. 284 of the 76th Session and the National Mortgage Settlement. They utilized the nontraditional foreclosure process as a last option.

When this bill went into effect, the relationship between notices of default and short sales reversed. Mr. Uffelman stated that 9,000 of the 14,000 foreclosures prevented by one bank were from short sales. In most cases, this means homes did not go into the foreclosure process. Homeowners had the opportunity to short-sell their houses with, in most cases, waivers of deficiency, and homeowners were able to reintegrate financially into the community.

The National Mortgage Settlement incentivized banks and servicers to support a higher number of short sales and loan modifications in place of continuing to only issue notices of default. Similar to when the Foreclosure Mediation Program first started, the number of notices of default being processed slowed and the banks reviewed these procedures and then restarted.

Assembly Bill No. 284 of the 76th Session and the National Mortgage Settlement went into effect at nearly the same time. These pieces of legislation gave homeowners who had received notices of default the opportunity to go through notices of trustee sale process. It gave real estate agents the opportunity to make more short sales. It gave banks the opportunity to meet National Mortgage Settlement numbers by exploring other loss mitigation

options. It gave homeowners a greater opportunity to exert control over keeping their homes or determining how they lost their homes. It gave investors the opportunity to step into the housing market. Investors purchased many of these homes. Today, a higher percentage of homes in Clark County are owned by investors than are owner-occupied.

The backlog of homes already in the foreclosure process was processed at a pace that allowed absorption into the market, especially in Clark County. Today, the inventory is low across the Country. After the implementation of A.B. No. 284 of the 76th Session, Legal Aid saw that the greatest detriment caused by the lack of filings was the creation of a vacuum for homeowners who were not paying their mortgages and were not able to get loan modifications or for those who were waiting to see what would happen next. This may have caused HOA foreclosures to occur. It is unclear if this was caused by A.B. No. 284 of the 76th Session, the National Mortgage Settlement or a lack of willingness by some servicers to file the affidavits. We do not know the answer to why HOA foreclosures occurred.

Chair Segerblom:
Because of the affidavit required by A.B. No. 284 of the 76th Session, do you feel the banks are reluctant to move forward with notices of default?

Ms. Considine:
My organization still hears this concern. I am pleased to see the data presented today. Banks continue to state they will not sign the affidavits because of the personal knowledge requirement. We are seeing the number of notices of default increase each month. In October 2011, there were less than 100 of these notices. Today, there are many hundreds each month. The number has risen each month since A.B. No. 284 of the 76th Session went into effect. I do not know if this applies to banks that do not own the loans. There have been more short sales. There has also been more outreach to keep people in their homes because of the National Mortgage Settlement. The side effects of these affidavits not being filed are beneficial for our community.

Chair Segerblom:
Are the banks being more cooperative in negotiating with homeowners?

Ms. Considine:
Yes. We have been seeing that since the National Mortgage Settlement went into effect. Homeowners have more options. If options do not exist for homeowners to keep their homes, we have seen more cooperation from the servicers and the banks to facilitate short sales. Since short sales spiked, they have been consistent. Properties are getting back into the community.

Chair Segerblom:
Hearing no further business, the meeting is adjourned at 11:48 a.m.

RESPECTFULLY SUBMITTED:

_____
Diana Jones,
Committee Secretary

APPROVED BY:

_____
Senator Tick Segerblom, Chair

DATE:_____

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	1		Agenda
	B	6		Attendance Roster
A.B. 378	C	8	Robert P. Dickerson	Letter of Support
A.B. 378	D	2	Robert P. Dickerson	Proposed Amendment
A.B. 378	E	5	Layne T. Rushforth	Proposed Amendment
A.B. 378	F	5	Layne T. Rushforth	Memo of Opposition
A.B. 378	G	2	Layne T. Rushforth	Memo—Proposed Amendment
	H	27	Rocky Finseth	*Nevada's Face of Foreclosure*
	I	167	Rocky Finseth	*Nevada's 2013 Foreclosure Report*
	J	4	Mindy Martini	Clear Capital Documents
	K	2	Michele W. Shafe	Data Sheets
	L	10	Bill Uffelman	Presentation