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Judiciary Committee
February 03, 2010

[LB727 LB756 LB757 LB758 LB1026 LB1047 LB1104]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 3, 2010, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB756, LB757, LB758, LB1026, LB1047, LB1104, and LB727. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Brenda Council; Scott Lautenbaugh; Amanda McGill; and Kent Rogert. Senators absent: None.

SENATOR ASHFORD: Good afternoon, everyone and welcome to the...welcome, Senator Wightman. What we're going to do today is we're going to hear Senator Wightman's bills, six or five of them. And Senator Wightman is going to introduce all five and then we will go down the list on testifiers, take each bill at a time. But they will all be introduced at the same time. So we'll start with LB756, John, and then just go ahead and introduce all five of them.

SENATOR WIGHTMAN: Thank you, Chairman Ashford, members of the Judiciary Committee. I'm John Wightman, maybe I can just spell it once, W-i-g-h-t-m-a-n. I represent the 36th Legislative District. LB756 would enact the Nebraska Real Property Transfer on Death Act. The bill provides an asset specific mechanism for the nonprobate transfer of land. The Nebraska State Bar Association brought this bill to me for introduction, your consideration and for broader comment by other interested parties. An important part of the legislative process is to provide notice to the public of proposed changes to the law. This will be addressed by a member of the bar association later when you open it up specifically to the various bills. The Nebraska Real Property Transfer on Death Act mirrors the Uniform Real Property Transfer on Death Act promulgated by the Uniform Law Commission in 2009. The act permits owners of interest in real property to execute and record a transfer on death deed which enables an owner of real property to pass the property to a beneficiary on the owner's death, simply, directly and without probate. By this deed, the owner identifies the beneficiary or beneficiaries who will succeed the property at the owner's death. During the owner's lifetime the beneficiaries have an interest...have no interest in the property and the owner retains full power to transfer or encumber the property or to revoke the transfer on death deed. And for a little background for those who are not lawyers on the committee, you know, that's done pretty much today by a deed of remainder interest, in which the transfer or reserve the life estate, and that's very common out in our area, or to place it into joint ownership. In both of those instances you do have an immediate interest in the grantee or beneficiary which requires that if the transferor of that interest ever sells or mortgages the property or whatever he might do with the property, that that beneficiary would have to sign because he has an immediate interest in the property. So that's how it differs substantially from the current methods of transfer. The Nebraska Real Property Transfer on Death Act establishes the requirements for (one) the creation and revocation of a transfer on death deed; and clarifies the effect of the transfer on

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Transcriber's Office

Judiciary Committee
February 03, 2010

death deed on all parties while the transferor is living and after the transferor dies. The Nebraska Real Property Transfer on Death Act further provides optional forms to create or revoke a transfer on death deed. The transfer on death deed must contain all of the essential elements and formalities of a properly recordable deed executed during the life of the maker, because it is going to be recorded in the register of deeds office. The transfer on death deed must state that a transfer to the beneficiary occurs on the transferor's death and must be properly recorded during the transferor's lifetime in the Office of the Recorder of Deeds where the property is located. The capacity required to create a transfer on death deed is the same as the capacity to make a will. A transfer on death deed does not operate until the transferor's death and remains revocable until then. The transferor may revoke the deed by recording a "revocatory" or instrument of revocation such as an instrument to revoke the transfer or death deed or a subsequent transfer on death deed. In other words, if he makes a new one that would revoke it, it names a different beneficiary. If the transferor disposes of the property during lifetime, the transfer of death deed is ineffective. Until the transferor's death a recorded transfer on death deed has no effect, does not affect any right or interest in the transferor or any other person in the property. The transfer on death deed creates no legal or equitable interest in the designated beneficiary. Liability of the beneficiary and property proclaimed against the transferor's estate is limited to cases where the estate is solvent. A designated beneficiary may disclaim all or part of the transferred interest. And that's the same as it is under any other type of transfer under a will or other methods of transfer. In summary, the Nebraska Real Property Transfer on Death Act provides an uncomplicated, effective and affordable option to pass real estate at death. I urge you to consider the comments you hear today. LB756 is based upon a uniform law and its provisions must be carefully reviewed. The Nebraska State Bar Association has assured me that a study committee will be established to further educate the parties involved with the administration of this new uniform law. We understand that the bar association representative who will speak after me will really be asking that this...advancement of this bill would be delayed. It's really more to give the bar association a chance to familiarize themselves with the terms of this bill and to get it before members of the bar association. It's felt that this was a better method of doing that than just writing them all a letter which they might put in some file that they forget about. I would be happy to address any questions. But I know that there will be a member of the bar association who will discuss this probably in more detail. But I still would try to answer any questions you might have. [LB756]

SENATOR ASHFORD: Senator Lathrop. [LB756]

SENATOR LATHROP: I'm just wondering if I'm going to get some CLE credits if I have to sit through this hearing today? (Laughter) [LB756]

SENATOR WIGHTMAN: You could ask a member of the bar association. But I am a member of the bar association. [LB756]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR LATHROP: Good, I just wonder if they'll certify this and I can pick up three hours and maybe we can cover a little ethics along the way, too. (Laughter) [LB756]

SENATOR WIGHTMAN: And that may be able to be arranged. [LB756]

SENATOR LATHROP: Good, good, all right. [LB756]

SENATOR ASHFORD: I've learned more in the last five minutes than I...good point. Senator Rogert. [LB756]

SENATOR ROGERT: Senator Wightman, whenever we have a new act I get a little curious. What are we trying to solve here by creating a whole new... [LB756]

SENATOR WIGHTMAN: What we're trying to do...let me give you some distinctions between if you, and I mentioned some of these, if you used the methods that are available right now so that you don't have to probate that property or administer it upon your death, which is more costly and a much longer procedure, this would automatically transfer that property upon the death of the transferor. It would not require a deed. It would not require a probate of the estate. It will be subject to inheritance taxes. The other methods that we have of doing that, Senator Rogert, are the ones I mentioned. You can transfer a life estate or a remainder interest to someone and that would perhaps do the same thing, except it creates an interest in the beneficiary so that if the transferor deals with that property later, tries to sell it, tries to mortgage it, whatever it might be, the beneficiary, whether it's a remainder beneficiary or a joint owner, has got to join in every document. If he tries to sell it or mortgage it, he has an immediate interest in it. If that transferee dies, the beneficiary dies, it would be probated as part of his estate. This creates no immediate interest in the transferee or the beneficiary so that you don't ever have to deal with that third party, as you continue to deal with the property during your lifetime. [LB756]

SENATOR ROGERT: Okay. Well, the current methods we have for transferring property were set up for a reason, to protect certain interests. Correct? Am I right in saying that? [LB756]

SENATOR WIGHTMAN: I think probably that's correct. [LB756]

SENATOR ROGERT: And I understand those procedures. Does this open us up or any...does this provide any lack of protection by speeding the process up or going around a certain provision? [LB756]

SENATOR WIGHTMAN: Well, it certainly would speed up the process, Senator, if you were to...need to mortgage that property or deed that property during your lifetime just

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

because it's created no interest in the transferee of that interest. [LB756]

SENATOR ROBERT: Okay. [LB756]

SENATOR WIGHTMAN: So it really is kind of like a transfer...it is really very much identical to a transfer on death or payable on death designation on a CD or any other type of security. So it really is just transferring the availability of those TOD accounts to real estate. [LB756]

SENATOR ROBERT: Okay. And this is a move, you mentioned, towards a uniform law? [LB756]

SENATOR WIGHTMAN: It is...it will be...it is a uniform law at the present time. [LB756]

SENATOR ROBERT: Okay. [LB756]

SENATOR ASHFORD: Yes, Senator Lathrop. [LB756]

SENATOR LATHROP: I do have a question. Maybe this is in view of the comments we had on the floor this morning about fiscal notes. Did you look at this one, John? [LB756]

SENATOR WIGHTMAN: This one has a fiscal note. And it does because the Department of Health and Human Services, I think they were going to submit a letter, indicates that it might be more difficult for them to follow their lien through if they have liens where they've given aid to the person who is the owner of the property at the time of his death. I've talked to members of the bar association that think maybe they can tweak that enough. And since we aren't going to be looking at probably advancing this until next year, that maybe we can get rid of all or major portions of that fiscal note. [LB756]

SENATOR LATHROP: Is that going to involve...I was just trying to read it while you were talking. Is that going to involve us...we had a bill in here that would have required lawyers to notify HHS every time, essentially, they open an estate. And the bar association had a problem with that because they were concerned that we'd be putting lawyers...putting a duty on lawyers that would create a trap or an occasion for malpractice for failing to notify. And is that the solution to the fiscal note? [LB756]

SENATOR WIGHTMAN: It may...well, I'm not sure it will be because I think it will still be more difficult unless we tweak the language of the uniform act somewhat. Because if this is passing automatically, it's not quite the same as if it was passing as part of the estate. It may be the same as it would be if it were passing as a remainder interest, which would be probably an alternative method that you would use today. [LB756]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR LATHROP: But just as a matter, and then I guess the other question is, this doesn't change the ability to tax that transfer... [LB756]

SENATOR WIGHTMAN: No, it will still be... [LB756]

SENATOR LATHROP: ...as inheritance or as an estate? [LB756]

SENATOR WIGHTMAN: ...subject to inheritance taxes. [LB756]

SENATOR LATHROP: Okay. Thanks. [LB756]

SENATOR ASHFORD: Senator Council. [LB756]

SENATOR COUNCIL: Yes, thank you, Senator Ashford. Senator Wightman, I'm sitting here, I'm just trying to go through how this would operate practically. And Senator Lathrop asked one of my questions that if the transfer on death deed becomes operative and an estate is not probated, then there is no...people don't normally go out and file an inheritance tax statement when there's no probate. [LB756]

SENATOR WIGHTMAN: You know, I would think that this could be very easily monitored by the county attorneys of various counties who are the party that would have the responsibility of enforcement of an inheritance tax lien. That's certainly a problem that I have addressed on the floor when I have asked to have a reduction in inheritance taxes. And that's a problem right now with regard...and it certainly might become a problem where all of the assets are jointly owned or all of the assets are transferable upon death, I have no doubt that there are a lot of parties who do not file a separate inheritance tax. Now with real estate they've always had to do that because it was going to be a lien upon the title to the real estate, that potential inheritance tax. I don't think this will...again, this will probably be a lien on the...as far as the county inheritance tax is concerned, would probably retain its character as lien upon this real estate. So again, I think this is much safer and would have more safeguards with regard to inheritance tax than a CD or other forms of investment because there's no record of those in the county courthouse anywhere. [LB756]

SENATOR COUNCIL: Okay. But I own five parcels of land and I don't want to prepare and file a will, I just want to file five TOD's and give it to my...give the land to each of my colleagues here. I file a TOD payable...then it's transferred to them on death. What reason would there be to probate my estate if I've disposed of all of my real property through a TOD? [LB756]

SENATOR WIGHTMAN: Well, I think you're right, Senator. There wouldn't be any reason if that was all of the assets of the estate. But, and I suppose it could affect a creditor, which a creditor has the same problems now as far as tracing those items of

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

personal property. But I think we can continue it in our lien law. As a matter of fact, I think our inheritance tax lien right now would cover that real estate because it covers jointly owned real estate, it covers situations where the remainder interest has been transferred, because I just think by its nature it's real estate. And the fact that you're going to have to prove the death of the transferor in order to pass title, that there will be an effective lien for inheritance tax purposes. And now as to other creditors, there may be a question, and perhaps that could be addressed to a member of the bar association committee that would follow me. [LB756]

SENATOR COUNCIL: Okay. My final question is, I'm a beneficiary of a TOD. What prevents me from executing a quit claim deed with regard to that property and then affecting the chain of title? [LB756]

SENATOR WIGHTMAN: You mean apart from what we're considering here today? [LB756]

SENATOR COUNCIL: Yeah, right, right, I mean, because when you go to the...if you file this TOD, you're going to be filing it in the register of deeds office so it's now in the chain of title. And I pull up the chain of title and I go, oh my gosh, I get this property on the death of grantor A. And I say, well, I'm in need right now, so I issue a quit claim deed to someone in exchange for some compensation, what prevents that from occurring? You place the responsibility on the register of deeds to... [LB756]

SENATOR WIGHTMAN: Senator, what would prevent that from occurring, in my estimation, is that this specifically provides there is no interest in the transferee until the death of the transferor. And so they really have no interest that they can convey at that time. And that would not ripen until the death of the transferor. [LB756]

SENATOR COUNCIL: Ah ha, how do I establish the death of the transferor? Or who disputes the death, so what do I do? Do I take... [LB756]

SENATOR ASHFORD: The body, maybe. (Laughter) [LB756]

SENATOR COUNCIL: No. But the register of deeds doesn't know this. [LB756]

SENATOR WIGHTMAN: You file a death certificate, the same as you do now on either of the two transfer types that I've talked about. [LB756]

SENATOR COUNCIL: Okay, okay. [LB756]

SENATOR WIGHTMAN: If you had made a joint tenancy, the only way you're going to be able to convey title to that property... [LB756]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR COUNCIL: Is to file a certificate. [LB756]

SENATOR WIGHTMAN: ...is to file the death certificate. [LB756]

SENATOR COUNCIL: Okay, okay. [LB756]

SENATOR WIGHTMAN: And the same with...if you're the transferee of a... [LB756]

SENATOR COUNCIL: ...the beneficiary on the TOD. Yeah, I have to file. [LB756]

SENATOR WIGHTMAN: Right. [LB756]

SENATOR COUNCIL: Okay. [LB756]

SENATOR ASHFORD: In as much as there has been comment, I think we better stick with this bill and then we'll see where we go after that. [LB756]

SENATOR WIGHTMAN: Okay. [LB756]

SENATOR ASHFORD: Why don't we get the testifiers, proponents on this bill before we go to the next one. Then we'll see how we go on the next one. Who wants to testify on LB756? Bill. Okay, come on up, Bill. [LB756]

WILLIAM LINDSAY: Senator Ashford, senators, I'm William Lindsay, Jr. I'm an attorney in Omaha, been practicing law for about 30 years. I'm currently chair of the continuing legal ed section of the bar, so hopefully, Steve, we can get you the credits, but we'll check. (Laugh) [LB756]

SENATOR LATHROP: Hopefully? [LB756]

WILLIAM LINDSAY: Hopefully. I'm a member of the American College of Trust Estate Council. I've been involved with this particular bill. I had prepared a draft of a bill based on Colorado law, which was sent around several years ago. It was decided to wait for the Uniform Law to proceed. The Uniform Law was approved last summer, and so that is what has now been proposed. The bill as you see it now has some changes specific to Nebraska law. Professor Gradwohl of the University of Nebraska at Lincoln Law School, Adam Pavelka, Frank Heinisch and I worked on those particular provisions. There was a question that was raised about the lien. Yes, the lien would still apply for inheritance tax. And there is a requirement in order to sell a property, you have to clear the inheritance tax lien. So the county does get something. The county attorney could have something set up with the register of deeds to say, give us a list once a month of everyone who has filed a death certificate with the register of deeds. And then they explore it and see if there's an inheritance tax due. As far as the fiscal note is

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

concerned, I did hear a question about that. The fiscal note is based, I think, primarily on a letter that we got from the Department of Health and Human Services with regard to them not being able to collect on Medicaid recovery. Colorado resolved that problem by requiring people to cancel the beneficiary deed when they apply for Medicaid. So that might be a simple solution to that particular problem. One of the questions that came up earlier was, why do we do this? Well, I'll give you an example that I have seen duplicated time and time again in my practice. Mom or dad has died, the other surviving parent comes in and they want to avoid a probate. They've got everything else set up in joint tenancy. And what do they do? They want to put a deed naming their child. Okay, the child has a child support judgment against them. If they do a joint tenancy deed they've immediately created a lien. They can lose their house. What if their child files bankruptcy? I've spoken at seminars to older people. When I bring this point up you should see how faces get when they realize the possibilities of being involved in their children's lives. This method would avoid that problem. There is no ownership interest during the lifetime of the person. It's just like a life insurance policy. I have a life insurance policy and today I name Senator Ashford, I can change it tomorrow and make it Senator Lathrop. Thank you. [LB756]

SENATOR ASHFORD: That's very good testimony, Bill, very helpful. [LB756]

SENATOR ROBERT: Way better than Senator Wightman's explanation. (Laughter) [LB756]

SENATOR ASHFORD: Compounded knowledge is good. Thanks, Bill. Next proponent. And thanks for all your work on this, by the way. Next testifier on LB756. Come on up. [LB756]

BOB EPPLER: (Exhibit 1) Senator Ashford and other senators of the committee, I appreciate the opportunity to speak to you this afternoon. My name is Bob Eppler, B-o-b E-p-p-l-e-r. I'm here today on behalf of AARP to speak in favor of LB756. This bill will simplify the process of transferring property to a designated beneficiary upon death of the owner. It is a sensible approach to what can be a complicated process while safeguarding the interests of the property owner and the designated beneficiary. There is considerable misunderstanding about the process of transferring property at the time of death. Delays and costs of the probate process have created a demand for legislation in states across the nation to simplify the process for the average consumer. LB756 is based on the Uniform Real Property Transfer on Death Act. Thirteen states in the United States have enacted legislation authorizing a transfer on death deed including Kansas, Ohio, New Mexico, Arizona, Nevada, Colorado, Arkansas, Wisconsin, Montana, Oklahoma, Minnesota, and Indiana. And if you ask me to repeat those in the same order, because I have them written down, I think I could do it. The device is popular in those states and experience with it is favorable. The transfer on death deed has proved to be a useful addition to the tools available to estate planners in those

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

states. LB756 is a step toward simplifying a process that is complex and occurs at a difficult time. We commend Senator Wightman for introducing this bill. We encourage the committee to forward LB756 to General File. As a personal comment, recently my wife died and there was probate. And we basically had a situation where there was a dispute over property. And it wound up taking a great deal of time to settle that particular dispute. Something of this nature would have very seriously shortened that process and made that process extremely easier. Again, thank you for your time. And I'm open to any questions. [LB756]

SENATOR ASHFORD: Thank you, Bob. Any questions? Thanks for coming down. [LB756]

BOB EPPLER: Thank you. [LB756]

SENATOR ASHFORD: Any other testifiers on LB756? John, do you want to go to the next bill or do you want to add some... [LB756]

SENATOR COUNCIL: Before, can...if Senator Wightman, the one question on LB756, if I may ask,... [LB756]

SENATOR ASHFORD: Yeah, come on up, John. [LB756]

SENATOR WIGHTMAN: I'll be glad to entertain a question in lieu of closing. [LB756]

SENATOR COUNCIL: ...and then move right into...we discussed the inheritance tax lien issue. But we also have a letter here from Health and Human Services that expresses concerns about the effect of this bill on Health and Human Services' ability to recapture Medicaid costs. Has there been any discussion of that issue and how to... [LB756]

SENATOR WIGHTMAN: Yes. As a matter of fact, Mr. Lindsay did discuss that saying that one of the options that might be considered was what the state of Colorado did when they enacted it. And they enacted a provision, whether it was part of the bill or not, I assume it was when it was finally advanced, maybe in the form of a committee amendment or maybe one that was offered, in which they had to revoke the transfer instrument at the time that they received Medicaid. That was a requirement for them to receive Medicaid was that... [LB756]

SENATOR COUNCIL: Okay, so is that...when you said you drafted it, is that in the bill? [LB756]

WILLIAM LINDSAY: No, that is not in the bill currently. It's an option... [LB756]

SENATOR WIGHTMAN: No. [LB756]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

WILLIAM LINDSAY: ...and I think it would change the fiscal note. [LB756]

SENATOR COUNCIL: Okay. [LB756]

SENATOR WIGHTMAN: And you understand, Senator Council, we're not asking this to be advanced this year... [LB756]

SENATOR COUNCIL: In any event, right. [LB756]

SENATOR WIGHTMAN: ...at any rate, so it will be, I think that's correct. And it will be the subject of another bill another year, since we won't be carrying over bills from this session to the next Legislature. [LB756]

SENATOR ASHFORD: (See also Exhibit 5) Any other questions of John on this bill? Then let's go to LB757, John. [LB756]

SENATOR WIGHTMAN: Thank you, Mr. Chairman, members of the committee. I'm still John Wightman, still spelled W-i-g-h-t-m-a-n, representing the same district as I was before, District 36, unless they've revoked my (laugh) representation. That may be a possibility too. LB757 is much like LB756, except it's probably a much simpler bill. It allows for motor vehicles governed by a certificate of title to be titled so that the vehicle automatically transfers to another designee upon the death of the owner. Again, this is frequently done through a joint owner which creates problems of its own because the person has an interest immediately in the motor vehicle. You've got insurance problems that he or she has to be included in the insurance, would be entitled to coverage. This would avoid that problem. So a person who owns a motor vehicle may provide, under this bill, for transfer of such vehicle upon his or her death or the death of the last survivor of a joint tenancy with right of survivorship by including in that certificate of title a designation of beneficiary or beneficiaries to whom the vehicle will be transferred on death. So it would be treated much like a transfer on death on a CD, a transfer on death provision that it would pass to one or more persons at the time of the death of the decedent. A transfer on death beneficiary differs from some of the other methods that I described, has no interest in the motor vehicle until the death of the owner or the last survivor of the joint tenant with right of survivorship owners. A beneficiary designation may be changed at any time by the owner or owners without the consent of any beneficiary by filing an application for a subsequent certificate of title. So if the parent and child have had a little blowup at some time since that designation was made, they wouldn't have to rely upon that child being willing to sign. Ownership would vest in the beneficiary at the death of the owner or last survivor of the joint tenant with right of survivorship owner subject to prior lienholders. LB757 provides an uncomplicated, effective and affordable option to pass ownership of a motor vehicle at death. We do urge you to advance LB757. I would be happy to try to address any questions you may

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

have. Again, somebody from the bar association will speak or perhaps this one is not complicated enough we maybe can go onto the next three bills. But that will be a decision of the Chair, not mine. [LB757]

SENATOR ASHFORD: Well, thank you. I'll ponder it. Let's see how many questions? No questions. [LB757]

SENATOR ROBERT: I have one. [LB757]

SENATOR ASHFORD: Yes, Senator Robert. [LB757]

SENATOR ROBERT: Is this to solve that hedge between if you don't have a right of survivorship written onto a piece of property that it gets...is this pre-intestate or... [LB757]

SENATOR WIGHTMAN: Is this for what? [LB757]

SENATOR ROBERT: Is this bill, is this for without a will intestate? [LB757]

SENATOR WIGHTMAN: It would be without a will, but so is a joint ownership. [LB757]

SENATOR ROBERT: Okay. [LB757]

SENATOR WIGHTMAN: But I don't even know, maybe there's some method you could transfer a remainder interest, I've never heard of that with regard to an owner, like you would a remainder interest of real estate. But I don't think there's any such method right now that you could even do that. So... [LB757]

SENATOR ROBERT: What happens then? [LB757]

SENATOR WIGHTMAN: Upon the death of the transferor? [LB757]

SENATOR ROBERT: In lieu of this action here. [LB757]

SENATOR WIGHTMAN: In lieu of this, of course, if it's a joint owner... [LB757]

SENATOR ROBERT: Right. [LB757]

SENATOR WIGHTMAN: ...it passes automatically. [LB757]

SENATOR ROBERT: Sure. [LB757]

SENATOR WIGHTMAN: You may need a death certificate when you go in to get the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

title reissued. So it wouldn't vary a great deal from that, except that here you've got no ownership interest in the transferee as long as the transferor is alive. You don't have the insurance problems that you would have with a joint ownership. [LB757]

SENATOR ROBERT: Got it, okay. [LB757]

SENATOR COUNCIL: Then quickly. [LB757]

SENATOR ASHFORD: Yes, Senator Council. [LB757]

SENATOR COUNCIL: I'm just...scenarios. My husband and I own a vehicle as joint tenants with rights of survivorship. So I have an interest in that vehicle by virtue of my joint tenancy. I want to do a transfer on death to my sister, and he files a transfer on death to his brother. How would it work? [LB757]

SENATOR WIGHTMAN: Well, I think, first of all, Senator Council, you've got a power to revoke. I don't know that, I say that, but I think that is true the same as in real estate. [LB757]

SENATOR COUNCIL: But I don't want to revoke. I say on my death I want it to go to A, and he says on his death he wants it to go to B. Under...as I understand it, if I died first then it doesn't go to anyone until he passes because he's the last survivor of the joint tenancy. So which of the two beneficiaries would get the vehicle? [LB757]

SENATOR WIGHTMAN: Since the... [LB757]

SENATOR COUNCIL: They'd get it in joint tenants? [LB757]

SENATOR WIGHTMAN: Since the owner has the power to revoke, my response to that would be that whoever lives longest controls and could revoke the instrument of transfer. And so I think the survivor wins in two ways, they outlive the other one and they also have the power to revoke. [LB757]

SENATOR COUNCIL: Okay. Okay. So when you say owner, it's anyone having an ownership interest, not... [LB757]

SENATOR WIGHTMAN: Right. Now you can ask that same question because there will be a member of...somebody from the bar association who will testify in that regard. And if it's different than that, I assume, that person will let you know. [LB757]

SENATOR COUNCIL: Okay, I've got you. [LB757]

SENATOR ASHFORD: John, let's go to LB758 and then we'll... [LB757]

SENATOR WIGHTMAN: Okay. Bear with me until I find the right notebook here. Again, for the record, I am John Wightman, representing District 36. Still spelled the same, W-i-g-h-t-m-a-n. LB758 amends the Nebraska...would amend the Nebraska Probate Code by specifically providing that the doctrine of cy pres, and I'll explain cy pres to you, applies to wills, grants a personal representative the power to incorporate an unincorporated business into any form of limited liability organization unless otherwise prohibited, and grants a personal representative the power to operate an unincorporated sole proprietorship indefinitely, unless otherwise prohibited by deleting the current four month limitation. Back to the cy pres doctrine. First of all, cy pres is a word that means "as nearly as possible." So that as I talk about cy pres, if you can translate that by inserting the words "as nearly as possible" you get pretty close to what we're talking about. LB758 clarifies the Nebraska Trust Code that the cy pres doctrine shall be applied to a trust only if the document creating the charitable interest does not otherwise provide for an alternate disposition of the property. In the event of a trust charitable purpose becomes unlawful, impractical, impossible to achieve or wasteful. And that could be perhaps the beneficiary, the charitable beneficiary is no longer in existence. As I said, cy pres means as nearly as possible. And it can be applied by a court when a testator, one who has made a will, had a charitable purpose that can no longer be carried out exactly as it was specified in the will. And that could be for a number of different reasons. The doctrine of cy pres allows the court to order that the funds be directed to another charitable purpose that closely approximates the testator's intention as nearly as possible. So the person that made the will, I guess, they try to read their mind as nearly as they can and find a charity that would fit the designation of the testator as nearly as they can. This doctrine is used to prevent charitable gifts from lapsing and to continue as nearly as possible the overall charitable purpose of the maker of the will, even if the specific intent as it was written in the will could not be carried out. Now we presently recognize the doctrine of cy pres. The Nebraska statutes apply the doctrine of cy pres to trusts but the corresponding section of law relating to wills was repealed when the Uniform Trust Code was put into the Nebraska statutes. Section 2 of this bill would insert the doctrine of cy pres back to the Nebraska Probate Code. So it's not a big change, it's already a recognized doctrine, it would broaden the scope but only in restoring what was once the law. Now there are two other purposes, the bill further amends the Nebraska Probate Code as it relates to the powers of a personal representative in the estate. The amendment provides that the personal representative of an estate...or gives the personal representative of an estate the power to incorporate an unincorporated business into any form of limited liability organization, subject to any direction otherwise contained in the will or court order. Current law allows the personal representative to change an unincorporated business into a corporation. The amendment would also allow, subject to a contrary provision in the will or court order, the continuation by the personal representative of any unincorporated sole proprietorship indefinitely by deleting the current four-months limitation. So in other words, the personal representative could form a limited liability company, limited liability

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Transcriber's Office

Judiciary Committee
February 03, 2010

partnership or other unincorporated form of entity to continue the decedent's business. Finally, Section 4 of the bill amends 30-3839 of the Nebraska Trust Code and clarifies that the cy pres doctrine shall be applied to a trust only if the document creating the charitable interest does not otherwise provide for an alternate disposition of the property in the event the trust's charitable purpose becomes unlawful, impractical,...impracticable, impossible to achieve or wasteful. So none of these really change anything all that much. The cy pres doctrine would restore the power of the court with regard to wills, already applies to trusts, used to apply to wills but that got repealed at an earlier date only as part of the adoption of cy pres, as I understand it, to the trust documents. And this power to change the form of business of a decedent from a corporation, many of these other forms have been established by statute, more recently the limited liability company, limited liability partnership. And so it's just to broaden it so that they would have that power as well as the power to incorporate. Again, I urge you to advance LB758 and would be happy to address any questions that you might have. There will be a member of the bar association, will be one of the Board of Regents who will testify on the cy pres doctrine. [LB758]

SENATOR ASHFORD: Yes, Senator Rogert. [LB758]

SENATOR ROBERT: This is, I assume, because...why would you want to form an LLC or a corporation for a death benefit? [LB758]

SENATOR WIGHTMAN: Possibly for two reasons. Number one might be a limitation on the liability of the personal representative in that the limited liability company or limited liability partnership or perhaps some other form of organization would limit the liability that he might personally have as a personal representatives or even that the estate itself might have. [LB758]

SENATOR ROBERT: Liability transfers to a personal representative upon death? [LB758]

SENATOR WIGHTMAN: Not on all things, but it could, in operating a business it could. [LB758]

SENATOR ROBERT: Okay. [LB758]

SENATOR WIGHTMAN: The other reason could be tax considerations, although that's maybe... [LB758]

SENATOR ROBERT: Okay, I was hoping you'd say that. Okay. [LB758]

SENATOR ASHFORD: Thanks, John. Let's take LB757 and LB758 and then we'll... [LB758]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR WIGHTMAN: That was...we've done...you mean go ahead and take the other... [LB758]

SENATOR ASHFORD: Let's take the testimony on those two. [LB758]

SENATOR WIGHTMAN: ...testimony on those. That's fine. [LB758]

SENATOR ASHFORD: The first one on the certificates of title, LB757, Bill, are you going to talk about that one as well? Okay. [LB758]

WILLIAM LINDSAY: Again, senators, I'm William Lindsay, Jr. I'm here to testify in favor of LB757. This bill is based upon Kansas law that has been in place for a number of years. Within the bar associations and... [LB757]

SENATOR ASHFORD: Is that safe or... (laughter) [LB757]

WILLIAM LINDSAY: Well, the Kansas bar tells me it is, so... [LB757]

SENATOR ASHFORD: Okay. (Laugh) [LB757]

WILLIAM LINDSAY: I had a recent case that reminds me of why this is important. Had a situation where a will left everything to a trust. Unfortunately, the car was not titled in the trust. Its value was under our value that we can transfer without a probate. So we took the affidavit the Motor Vehicle Department has and took it to the Department of Motor Vehicles, went up several levels, still couldn't get it done. So the goal of avoiding the probate wasn't going to happen. I ended up opening what's called a special administration just to transfer title to an automobile, which seemed to me to be a waste of judicial resources to do that when we could find another way around it. As Senator Wightman said, this is, you know, similar to the beneficiary on a CD, there is no interest whatsoever in the motor vehicle until the person dies. And, Senator Council, yes, it is true, it would be the second person would have control. Now let's say though that you had named your sister and you died and your husband didn't do anything, your sister would get it, even though you died first. That's true on a joint automobile anyway. If you died first, his will now controls what happens to that automobile. So it doesn't really change what the law is, it's, I guess, the law is whoever is the survivor wins. I find that this is a way to also deal with trusts. Because if we're going to title cars in a trust it gets very messy. And trying to get the insurance coverage on them is very difficult. So it might be an easier way to do it if we have the motor vehicle be a transfer on death to the trustee of the trust. So thank you. Does anyone have any questions? [LB757]

SENATOR ASHFORD: Any questions of Bill. Seeing none, thank...ah, yes, Senator Lautenbaugh. [LB757]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR LAUTENBAUGH: Just more of a comment. I just wanted to say how refreshing it is to have a Lindsay testifying and be sitting here nodding. Yeah, I don't get that. (Laughter) So I thank you for coming down today and good job. [LB757]

WILLIAM LINDSAY: Thank you, Senator. [LB757]

SENATOR ASHFORD: This is a great committee. (Laughter) Okay, let's...LB758, welcome. Thanks for coming down. Come on over. I don't think we've had a regent here at least in the last three years, so this is an opportunity to bring up as many issues as we want, guys. (Laughter) [LB757]

TIM CLARE: (Exhibit 2) Good afternoon, Senator Ashford, members of the Judiciary Committee. My name is Tim Clare, T-i-m C-l-a-r-e. I'm an attorney in private practice here in Lincoln. I'm a fellow in the American College of Trust and Estate Counsels, and I'm here to testify in support of LB758. In the interest of time, I'll be...I'll cut right to the arguments. First, I'd like to discuss very briefly the issue of cy pres, which I feel is most easily explained in a case that I worked on. Many years ago, John Doe drafted a will and provided for a \$10,000 charitable bequest to a Lincoln-owned city hospital to be used to provide care for those who could not otherwise afford it. However, when the decedent, John Doe, passed away, the city of Lincoln no longer owned a hospital. The issue was what happens to the charitable bequest to the city hospital. The doctrine of cy pres would allow a court to order that these funds be directed to another charitable organization which closely resembles the decedent's charitable intent. In other words, instead of a \$10,000 bequest passing through the will's catchall residuary clause to John Doe's distant relatives, the \$10,000 would actually go to a currently existing charity which provides medical services to those who could not otherwise afford those services. The doctrine of cy pres for wills was previously provided, as Senator Wightman noted, was previously provided in statute but was repealed with the passage of the Nebraska Trust Code. For your convenience, I've attached to my testimony a copy of the doctrine cy pres as it appeared in the statutes before it was repealed, as well as how it appears in statutes currently. When an attorney is presented with a situation similar to the city-owned hospital case referenced above, the first place that the attorney is likely to look is the Nebraska Probate Code. Upon looking at the code, the attorney will immediately see that the doctrine of cy pres has been repealed. The attorney might look a little farther and could argue that case law already provides for the doctrine of cy pres for wills. However, in order to be successful in making that argument the attorney would have to litigate the issue, resulting in more legal fees for the attorney and less for the estate and resulting charitable beneficiary. I might add that the result of assets passing to the new charitable beneficiary, in essence, following the doctrine of cy pres, I believe to be far more certain than the current situation. Approval of LB758 would end that speculation, benefitting the estate and other charitable beneficiaries. The doctrine of cy pres as provided in LB758 benefits citizens of the state of Nebraska as it would carry

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

out the testator's charitable purposes. In my almost 20 years of practice, which consists almost exclusively in the estate planning area, estate planning clients who choose to leave money to a charity do so because they have a real passion for that charity, passion for a cause, and not so much for a particular specific charitable organization. Passage of LB758 would allow for those charitable passions to be satisfied regardless of whether or not the respective charitable entity is still in...do I have to stop now?
[LB758]

SENATOR ASHFORD: Go ahead, continue if you got a little more here. [LB758]

TIM CLARE: Finally, passage of LB758 and adding the doctrine of cy pres to the Nebraska Probate Code would be consistent with the Nebraska Trust Code's treatment of similar situations. The Nebraska Trust Code already provides...already applies the doctrine of cy pres to charitable gifts included in a trust. I don't see any reason for a differing result simply because a charitable gift is included in a will rather than in a trust. With regard to the personal representatives, Section 3 of LB758 provides more flexibility to personal representatives when administering unincorporated businesses. If a person passes away owning a sole proprietorship, Section 3 would allow the PR to continue operating the business as is during the probate, or in the alternative the PR would also be given the option to change the sole proprietorship into a corporation, an LLC or an LLP, which all provide for limited liability, as Senator Rogert was asking about. This ends my testimony in support of LB758. I'd be pleased to answer any questions.
[LB758]

SENATOR ASHFORD: Any questions of Tim? Seeing none, thank you. Thanks for coming. [LB758]

TIM CLARE: See Bill Mueller if you want CLE credit on this. [LB758]

SENATOR LATHROP: Bill Mueller? [LB758]

TIM CLARE: Bill Mueller. [LB758]

SENATOR LATHROP: I think Bill Lindsay sounds like he's the guy. (Laughter) [LB758]

SENATOR ASHFORD: Thanks for your service, Tim, to the state. [LB758]

TIM CLARE: Thank you. [LB758]

SENATOR ASHFORD: Okay. Let me see, where are we? Any other testifiers on LB758? John, you want to go to the next bill, LB1026? This is yeoman work on your part. [LB758]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR WIGHTMAN: Next one would be LB1026, is that right? [LB1026]

SENATOR ASHFORD: I think so, yeah. Yes, LB1026. [LB1026]

SENATOR WIGHTMAN: (Exhibit 3) Mr. Chairman, members of the committee, for the record, I'm John Wightman, representing District 36. Section 25-410 of the...revised in 2008 of the Nebraska statutes grants the authority of a district court to transfer any civil action to the district court of another county in the state. But the law does not provide a specific process or procedure for how this transfer is to occur. And this bill was brought to me by the Association of County Officials and primarily the clerks of the district court and judges. This gap in the law would be corrected by this bill and by AM1691, which I offer for the committee's consideration. And I don't know whether that's been...here, it is now being submitted to you. Under the green copy of LB1026, the transferor court issues an order that would provide direction to the clerk of the district court on the process as follows: the transfer must occur within 15 days after the date of the order; the clerk of the transferor court is required to (1) certify the proceeding in the original papers of such action; (2) certify a transcript of docket entries; and (3) certify the payment of record of any judgment except judgments involving support order having records maintained by the Department of Health and Human Services Collection and Disbursement Unit of child support order of payment. Now most of this information that I give you is going to be with regard to divorces. However, the procedure can apply to other causes of action as well. And sometimes they are transferred for the convenience of the parties to another court, and that can be done as well. The court order also is to specify how filing fees for...this would be under this act, for the filing of a new civil action shall be paid by the transferring party. And if the transferred case involves a child support judgment, Health and Human Services Collection and Disbursement Unit is to transfer the records of the action. I am advised that most transferred cases do involve domestic relations actions where the filing of a transcript of a judgment under Section 25-1303 of the revised statutes does not provide adequate information for the second or transferee court to administer the terms of the divorce decree. LB1026 and the amendment that I offer today, which has been passed out to you, will expedite the transfer process in aiding the administration of transferred cases. As I said, I was asked to introduce this bill by the Nebraska Association of County Officials. Also being a member of the bar association, I agreed to do so only if the provisions that allowed the assessment of a second filing fee were removed from the bill. I didn't want to be crucified by my fellow attorneys and their clients who might oppose paying a second filing fee. And that would be included in the green copy, but would be amended out. The reason for my position is twofold. Even though some counties are charging a filing fee, under current law no fee is authorized for the transfer of a case from one district court to another, and no filing fee is charged for filing a transcript of judgment in any county. The white copy, AM1691, provides that no additional fee is required for the transfer of a case from one district court to another. I'm assuming if you adopt that it would become a committee amendment. Whether it will bear the same number, I have no idea. However,

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Transcriber's Office

Judiciary Committee
February 03, 2010

I did say that a fair, equitable and workable amendment could be offered to share the initial filing fee. I would not have an objection to the amendment. I also should explain why the amendment is presented in the form of a white copy. The reason is that upon further review, I agreed with the Bill Drafter's Office that the new language should take the form of an amendment to the existing law. Whereas we originally had it as a stand alone section of the statute, this would actually amend the section that I think would make more sense providing the amendment. As drafted, LB1026 restated the provisions of prior law but did not repeal the prior law. Faced with the choice of repealing existing law or amending it, the white copy takes the approach to amend existing law to include a specific process and procedure for the transfer of cases from one district court to another. An advantage of this approach is that court cases that have interpreted the current law will continue to be "annexated" in the Nebraska statutes. The final change found in AM1691 is to shorten the time period for the clerk of the district court to transfer the records to the second court from 15 days to 10 days. I am advised that ten days are adequate. And that comes from the Association of County Officials. I wished to shorten the time that an unfiled judgment may become a lien on property located in the transferee court's jurisdiction. The process of the law for transferring cases for district clerk should be one clear and specific, clear that no additional filing fee is authorized for the transfer of a case from one district to another. With these changes, I would urge you to advance LB1026 with the provisions of AM1691 and hopefully make it eligible for the consent calendar or other prior designation. That will be your decision, not mine. I would be willing to try to answer any questions. I know I will be followed by someone representing County Officials, at least that's my understanding. [LB1026]

SENATOR ASHFORD: I see some county official people here. Any...yes, Senator Lathrop. [LB1026]

SENATOR LATHROP: John, does the law somewhere else address when to transfer? This seems to be how do you transfer. But is it clear somewhere else in the law on when you can transfer, when you should? [LB1026]

SENATOR WIGHTMAN: This is the process. I believe there is sufficient provision in the current law that would say that you can transfer and would provide discretion to the district court to do that. [LB1026]

SENATOR LATHROP: Okay. Okay. [LB1026]

SENATOR WIGHTMAN: So this is more to provide a process once that transfer takes place. [LB1026]

SENATOR LATHROP: Thanks. [LB1026]

SENATOR ASHFORD: Thanks, John. Why don't we go to the proponents. No, let's go

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

to the proponents. Because your other bill seems, it's an estate...estates. Okay, let's go to the proponents of this bill, LB1026. [LB1026]

JANET WIECHELMAN: (Exhibit 4) Good afternoon, Chairman Ashford and senators. My name is Janet Wiechelman. Wiechelman is spelled W-i-e-c-h-e-l-m-a-n. I'm the clerk of the district court from Cedar County and also legislative liaison for the Clerks of the District Court Association. I'm here in support of LB1026. This legislation was brought on behalf of NACO due to the issues that were occurring within the district courts due to the lack of direction in the transferring of a civil action from one district court to another district court. Currently, the statute allows the party to transfer a civil action for the convenience of the parties, the witnesses or in the interest of justice. Civil actions include those transferred prior to judgment and after judgment. The cases that are being transferred after judgment are mainly domestic relation actions where the case is transferred to another county where one or both the parties or the children reside. The judgments would include those that are maintained by the court or those maintained by Health and Human Services due to a support order. An example would be a dissolution action that originally was filed in Dawes County in November of 1995, 12 years later this matter was transferred to Cedar County as the custodial parent and the minor children now resided in Cedar County. After the case was transferred to Cedar County, one of the parties filed a complaint for modification of the child support. The need to have a procedure in place on how to transfer the civil action and judgment is evidenced by a situation that occurred between Franklin and Frontier Counties. The clerk from Franklin County had provided this information as to the confusion of the transferring of a civil action. The original action was filed in Frontier County and an order transferring the action to Franklin County was filed in August of 2009. The physical court file was transferred to Franklin County. However, the judgments that had been entered in the original action in Frontier County from the dissolution action remained in Frontier County. The child support was thereafter modified in Franklin County. However, the judgment was still remaining in Frontier County. The clerk forwarded a copy of that order modifying the child support to Frontier County. To further complicate the issue, a release of child support lien was filed in Franklin County. However, that release of child support lien was on property that was being held in Frontier County. If this legislation bill is passed the direction will be given to the clerks as to how to process the civil action files and the judgments. Specifically, the support orders would be indicated that the new...the transferring court would start the record of the new judgment effective the first day of the following month, as most child support and spousal support orders are due on the first day of the following month. Therefore the clerk who's transferring the case would know anything as far as payments applied to that end of the month would apply to their case and following the first day of the next month that judgment then would apply to the transferee court. Also this legislative bill would give direction to HHS to move the child support related judgments from one county to another. When I had this case that occurred in Cedar County, I had talked to one of the workers at HHS, and she was concerned about the fact there was a lack of statute or something stated within the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

court order that required them to transfer that judgment to the other. If there are any questions by the senators, I'd be willing to listen...take any questions. [LB1026]

SENATOR ASHFORD: Any questions of Janet? Thanks for the explanation, Janet. [LB1026]

JANET WIECHELMAN: Thank you. [LB1026]

SENATOR ASHFORD: Other proponents? Opponent? Okay, we have a few more proponents first. [LB1026]

BETH BAZYN FERRELL: Good afternoon, Chairman Ashford, members of the committee. For the record, my name is Beth Bazyn B-a-z-y-n, Ferrell F-e-r-r-e-l-l. I'm an assistant legal counsel with the Nebraska Association of County Officials. We'd like to thank Senator Wightman for introducing this bill on our behalf and working through the amendments so that I think we've got some resolution here. We believe that this bill would help provide a process for when these civil actions are transferred. There's already authority to do it, but there is no process in place. I would be happy to try to answer questions. [LB1026]

SENATOR ASHFORD: Any questions? Okay, thank you. Next proponent. [LB1026]

THOMAS MAUL: Senator Ashford and other senators, good afternoon. My name is Tom Maul. I'm a practicing attorney in Columbus, Nebraska, and a member of the executive council of the bar association. I'm also the legislative chair of the committee. We took a look at this. It has been testified here earlier, this doesn't change any of the requirements on what it takes to transfer a case. But what it does do is it helps clarify what it's going to take, when the judge orders a transfer, how do you do it, what becomes part of the record that goes to the other court. The main thing that this does, for the practicing attorneys, is you're not having to pay two filing fees. For those of you who obviously practice in the district court, a judge order under the old...under the current law, the judge transfers the action, hopefully you get most of the file together to go to file it with the other court. And oftentimes, I'm not talking about Cedar County, the ladies in the clerk of the district court's office, unless you have a filing fee to file, they won't file it. This takes care of that. This says that when you go to transfer the action, and again I'm speaking to the amendment here, AM1691, when you go to transfer the action there's going to be no additional fees. So this doesn't change procedurally what it takes to be able to transfer an action from one district court to another. But it does clarify what we're going to need procedurally to do it. So I'd be happy to answer any questions you might have. [LB1026]

SENATOR ASHFORD: Questions of Tom? Any questions? Thanks. [LB1026]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

TOM MAUL: Thank you. [LB1026]

SENATOR ASHFORD: Okay, I think opponents. [LB1026]

KENT RADKE: My name is Kent Radke, R-a-d-k-e, and I'm appearing on behalf of the Nebraska Land Title Association. I work with a local title insurance company in Lincoln, Nebraska. Prior to that I was in private practice for 27 years. I'm not opposed to the concept. I'm opposed to a couple of time frames involved in this particular act or bill rather because it creates some huge problems for title examiners. For example, it states that a judgment commences upon the entry of an order by the transferor court on the first day following the date that that order is entered. So the second thing it says is that that order has to be transferred from the transferor court to the transferee court within 15 days. So I'm going to give you an example. I own real estate in Douglas County. I have a judgment, a child support judgment against me in Lancaster County. I'm going to sell that Douglas County property and I decide to sell that property on March 1. Someone has an order entered in Lancaster County on February 28. The clerk has 15 days currently, and I've heard that perhaps it will be shortened to 10 days, to actually enter that order. So once that order is entered on February 28, this current bill says that that judgment commences on the following first day of the following month, which is March 1. So if I close on that property that I'm selling in Douglas County on March 5, the clerk doesn't get that action transferred to Douglas County. As a title examiner looking at the records in Douglas County I don't see anything. So I pass the title, the sale occurs, that order then subsequently gets filed in Douglas County. We have a new owner of the property, that judgment lien follows, it attaches to the property and we have a claim that's submitted to us as a title insurance company. The problem can be solved very easily, in my opinion. If you looked at, and I saw where a lot of this information came from. But if you look at Section 25-1303 of the Nebraska revised statutes, which currently deals with transferring or transcribing judgment, it has some very specific language in terms of when that judgment becomes effective once it's transcribed. And it simply says that...talks about transcription of judgment. Says, "any judgment shall commence in the transferee court when so filed and entered on the judgment record." That's the language I would suggest using instead of language that currently says, "any judgment shall commence in the transferee court on the first day of the month following the order of transfer." So by cleaning that language up, if that judgment becomes effective when it's actually filed, then we as examiners will see that and then we can note that on our record in terms of disclosing any judgments that are entered against that particular person so that we're not dealing with issues that happen subsequent to our examination of the title. Be happy to answer any questions. [LB1026]

SENATOR ASHFORD: Interesting point. Any questions? I think I see what you're saying. Thanks. Seeing no questions, thank you. [LB1026]

KENT RADKE: Thank you. [LB1026]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR ASHFORD: We have made note of it. Okay. Any other opponents? Neutral? John, do you want to comment on anything on this bill? [LB1026]

SENATOR WIGHTMAN: Well, I don't want to have a prolonged close nor do you want me to, Mr. Chairman. But you know, it may be an issue that we need to address, the time issue. And maybe we can clean up the language or propose something in the way of cleaning up the language that would take care of that time issue. We certainly are not trying to do anything that would create a problem with title on real estate or title examiners or title insurance writers. So whatever it takes, we would certainly be glad to work with the parties to try to clean that up. Otherwise, I think it is a good bill. It could have some problems with regard to the time issues. [LB1026]

SENATOR ASHFORD: Okay. Thanks, John. Last one for you at least is LB1047. [LB1026]

SENATOR WIGHTMAN: Then I'll try to get out of your hair. [LB1026]

SENATOR ASHFORD: (See also Exhibit 6) I don't know, this has been very interesting stuff. Cy pres always was an interesting (laughter) concept. I think I have it now. I think I get it now. [LB1026]

SENATOR WIGHTMAN: Well, it's been a bit of an education to me as well. Thank you, Mr. Chairman. This is a little more complex probably from the standpoint, and some of this will be addressed by, again, a member of the bar association. I do understand the concept of it. Unfortunately, out in my area with the \$3.5 million exemption, I don't get to handle nearly enough estates that approach the exemption limit or exceed the exemption limit but I'd like to. But the intent of LB1047 is to write a default rule of construction for the decedent who does not or could not change their estate plan to account for the year when there would be no federal estate tax or generation-skipping transfer tax. Let me tell you a little bit about what we're...the dilemma we're in as far as the federal estate tax at the present time. Congress, and I can't tell you what year, but in the late 1990's, passed a law that provided that the exemption amount would go up and would reach \$3.5 million in the years 2008 and 2009. In 2010, there would effectively be no federal estate tax, there would be an unlimited exemption. Warren Buffett could die, Bill Gates could die, leave all their property to their kids, which they apparently don't intend to do, and pass it all tax free in 2010. Then in 2011, we'd go back to the previous exemption amount. And I'd have to check whether it's \$1 million or \$600,000. But at any rate, it's a very small exemption amount. I think it was passed with the idea that Congress would act. But with the gridlock in Washington that we seem to have from time to time or most of the time, they were unable to pass a new bill that would correct this situation or modify this situation. I understand that one of the houses of Congress, prior to getting bogged down in the healthcare bill, did pass legislation but it only got

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Transcriber's Office

Judiciary Committee
February 03, 2010

through one house, that would have extended the \$3.5 million exemption that was in effect for 2008 and 2009 for two years. Unfortunately, the other house, and I don't remember whether it was...I think Congress, House of Representatives passed it and the Senate did not act upon it. But it could be the other way around. And so it has never been extended. And so right now, practicing lawyers are left with this situation where they don't know what the law is going to be. And a lot of wills and trusts were drafted to take advantage of the federal estate tax exemptions for spouses and children, used terms and formulas referring to such things as the applicable credit amount, unified credit, federal estate tax, and generation-skipping transfer tax. But they assumed the situation would be closed and they could redraft their wills. Now they're in the situation where they don't know what the law is going to be. And since there's no federal estate tax in 2010 and if somebody dies in 2010 it would all pass, under most of these clauses, to someone other than the surviving spouse because they don't need anything to take advantage of the marital deduction. Therefore many of the formulas used in drafting wills and trusts will not function to fund trust or estate plans as intended when the will or trust document was created because of the fact that we have no federal estate tax. We may have because it may be passed with a retroactive provision. But nobody knows this. And as far as I know, there hasn't been any action yet this year that would change that. The language of LB1047 provides that a will or trust that contains a formula referring to the unified credit, which is the amount that could pass tax-free, the estate tax exemption is another term, applicable exemption amount, applicable credit amount, applicable exclusion amount, generation-skipping transfer tax exemption, and a number of others, GST, generation-skipping trust exemption, marital deduction, a number of other terms that are used in these formula clauses or that measures a share of an estate or trust based on the amount that can pass tax-free of an estate...federal estate tax or generation-skipping transfer tax, or that is otherwise based on a similar provision of federal estate or generation-skipping transfer tax law shall be deemed to refer to the federal estate and generation-skipping transfer tax laws as they applied with respect to estates of decedent dying on December 31, 2009. So we would preserve that language instead of what would happen in 2010, if Congress does not act. This default rule will protect the intent of those decedents who use such formulas that depended on the existence of a federal estate tax or generation-skipping transfer tax. Section 2(b) and 2(c) of LB1047 ensure that the language of the testator will control the disposition of a testator. If the testator expresses an intent that the language used in the will or estate document apply even though there is no estate tax or regardless of the estate tax exemption, then the testator will be allowed to pass the property as they intended. So I realize this is fairly complicated, much more so than probably the prior four bills. Section 2(a) of LB1047 further provides that this default rule of construction will not apply if the decedent dies on a date on which there is a then applicable federal estate or generation-skipping transfer tax. Again, some of the questions might be better directed at somebody that will follow me as far as testimony. Although, I think, I could answer many of your questions. But they could answer them with more specificity than perhaps I can. I urge you to advance LB1047. [LB1047]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR ASHFORD: I don't think we have any questions. [LB1047]

SENATOR LATHROP: I don't even think I could formulate a question. (Laughter) [LB1047]

SENATOR ASHFORD: I don't think we...we have no questions of anyone, John. (Laughter) [LB1047]

SENATOR LAUTENBAUGH: On the up side, you did remind Senator Lathrop and I why we do litigation. (Laughter) [LB1047]

SENATOR WIGHTMAN: Thank you. I guess, I urge you to advance LB1047 for consideration so that it may be eligible again, maybe, perhaps with a consent calendar or some other priority designation. I will try to answer any questions that anybody might think they can formulate, try might be the key word there. [LB1047]

SENATOR ASHFORD: Okay. Well, let's see if we have any proponents. Tom is coming up here. [LB1047]

TOM MAUL: Senators, again, Tom Maul, it's M-a-u-l, Columbus, Nebraska. I appear here on behalf of the State Bar Association. This legislation came from Bill Lindsay's group. And the good news is he's still here. So, formulate your questions, we'll have Bill come up and answer them. The Senator did a good job of explaining. You recall it was in 2002 that we became on track for our current exemptions for federal estate tax. And as you recall, we started out it was \$1 million, and went to \$1.5 million. The whole idea was we're going to have no tax in 2010. The theory being that between 2002 and 2010 Congress is going to get together and then they're going to actually set it. Okay? And so they did that so that while it's not a huge money maker for the government, certainly it's a tax, they do make money on it. They thought if we have no tax that will make Congress do something. So we can finally set it. For about 14 years it was \$600,000, and then we continued to grow. So for the last two years it's been \$3.5 million. We get...they get a little bogged down with the healthcare debate and they don't set the federal estate tax. So in January 1 there's no federal estate tax. Anyone dying thus far in 2010, regardless of the size of your estate, you're going to pay no federal estate tax. As the Senator indicated, most of those who are fortunate, and I'm not always one of them, that gets to plan these huge estates, you...in the will or the trust you make provisions, it's generally a formula that says based upon the applicable unified credit or federal estate tax exemption, you craft this formula so that you can put part of your estate over here, part of your estate over here, and then you can save a bunch of federal estate tax. The problem is the formulas don't work if there's no federal estate tax. So this law, and again, Bill Lindsay's committee brought it to the bar association. This law says it's a default. It says, so for purposes of construction, why we're doing this

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

is to try and avoid some litigation in the state between the second spouse and the children from the first marriage so that we can...it says then so if you die when there's no federal estate tax, for formula purposes, we're going to use the federal estate tax exemption which was then in effect on December 31 of 2009. If there's a federal estate tax, trust me, Congress will get around to it this year. If there's a federal estate tax when you die or if the language of the documents say, you know, we don't...we understand this, we're going to provide those that would apply. But like I said, this came from Virginia. I don't know if Virginia has adopted it. I know Texas meets every other year, they don't meet this year. They haven't...I don't think they're going to do anything. But the idea from the bar association's point of view, this really would have the potential to cut down on a lot of litigation. Come May 1, if they pass a federal estate tax, you know, then we don't use this law. So again, I'm happy to try and answer any questions that you might have. [LB1047]

SENATOR ASHFORD: Questions of Tom? Seeing none, thanks, Tom. Bill. Any clarifying remarks? [LB1047]

SENATOR LATHROP: Not having a tax has got to be bad for the probate planner guys, the estate planners. [LB1047]

SENATOR ASHFORD: Yeah, I know I get credit for this. Any... [LB1047]

WILLIAM LINDSAY: I'm here to see if there are any questions that you might have. Primarily, this is, as we said, you think about it, over the years I've tried to define my clauses in my wills. They're all, you know, based on the federal estate tax. It's been an assumption since it's been in place since about 1924 that it was going to remain in place. Now we look at it and we see it's not. This has been extensively discussed on the American College of Trust and Estate Counsel list serve. The last few days, they're trying to get a chart of how many states are looking at it. It's more than just a few are looking at this. The problem that you get is you define this in terms of mathematical formula and, going back to math when I was in school, now we're at the equivalent of dividing by zero since there is no federal estate tax. So it makes your formulas very difficult to apply. If you have a clause that says I want to put the maximum amount in that will reduce the federal estate tax to zero, we often use that, that would increase the exempt...the part that goes to the family trust. If you use a clause that says I want to put the minimum amount in to the marital trust that will reduce the estate tax to zero, well, that, you know, decides the size of the marital trust. Right now that answer is zero. So you end up with a spouse who isn't going to receive anything, now we have elective share litigation resulting. So there is that possibility. What is in the mind of a testator? We're trying to give a rule of construction here. It's designed to try to be narrowly limited, only if there's no federal estate tax and only if they didn't change it. If they changed their will after January 1, then they've taken care of it themselves. And if they didn't provide anything else in the will saying what happens, there's a number of wills

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

that I've done that have specifically said, if there's no federal estate tax this is what's to happen. So that's an example. The language is based upon the language that was introduced in Virginia. Does anyone have any questions? [LB1047]

SENATOR ASHFORD: Senator Lathrop. [LB1047]

SENATOR LATHROP: This is a real simple one. But shouldn't we pass this like now with the emergency clause? [LB1047]

WILLIAM LINDSAY: I would think so. [LB1047]

SENATOR LATHROP: I don't see the emergency clause on there, which you need...if before this becomes effective, somebody dies, then it's subject to all this litigation and uncertainty you've described, right? [LB1047]

WILLIAM LINDSAY: I think you raise a very good point, Senator. [LB1047]

SENATOR LATHROP: Okay. [LB1047]

SENATOR ASHFORD: It would seem, yeah, thanks, Bill. That's very good explanations from someone who knows what they're talking about. Thank you. John, do you see a need to discuss this further? (Laughter) [LB1047]

SENATOR WIGHTMAN: Only for half a minute. You can set the light for that amount, if you'd like. The only thing I would say is that as Mr. Lindsay suggested and I think actually Senator Lathrop suggested that that probably is a great idea, that this be passed out with the emergency clause so that it could take effect immediately. It's not going to affect a great deal of estates. But I think...because most estates of the people I know are not going to be using these clauses because the estates aren't large enough to... [LB1047]

SENATOR ASHFORD: But they could have the clauses...I mean, just... [LB1047]

SENATOR WIGHTMAN: Right. [LB1047]

SENATOR ASHFORD: ...as a way of...they just do it and it's there. And then all of a sudden you're... [LB1047]

SENATOR WIGHTMAN: Again, I think passing it out but adding the emergency clause would be a great idea because it might save some that would otherwise fall in the crack, so... [LB1047]

SENATOR ASHFORD: Right. It seems so. [LB1047]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR WIGHTMAN: Thank you. [LB1047]

SENATOR ASHFORD: It seems so. Thanks, John. And thanks for all your willingness to stay this whole time and get us through the five bills. [LB1047]

SENATOR WIGHTMAN: I'd say thank you for setting all of mine in order so that I didn't have to run back and forth so much. [LB1047]

SENATOR ASHFORD: Well, thanks, thanks to everybody that stayed. Okay, let's go to Speaker Flood, LB1104, change judges salaries. Didn't we...we didn't do this last year. (Laugh) Good afternoon. [LB1047]

SENATOR FLOOD: Good afternoon. My name is Mike Flood, F-I-o-o-d. I represent District 19. I introduced this bill to further the discussion regarding the salaries of Nebraska judges. It potentially changes the salaries of the Chief Justice and the other Supreme Court judges. And, as you know, a change in Supreme Court salaries triggers a change automatically in all of the salaries of the other judges throughout the state. The Supreme Court and the judges are well aware of the tough budget decisions that the Legislature has made and will most likely be making in the future. In fact, the Supreme Court has already taken action to reduce expenditures prior to the special session, the court restricted hiring, travel and large purchases. As the Chief Justice has affirmed, the court continues to look for ways to make cuts, while at the same time maintaining necessary court services. I know that the court and the judges are working with us as they have throughout this process, especially last year, in setting judges salaries. I remind the committee that last year we approved, as your committee did and as the Legislature endorsed, a 2.5 percent increase each year of the biennium for all judges in the state of Nebraska, together with a 1 percent retirement contribution. There are a lot of issues at play here. We do not know what our financial situation is going to be. I brought this bill at the request of the Chief Justice of our Supreme Court as he continues to work with the executive and legislative branches of government to determine what we can afford and maintain services in all of our county, district and appellate courts as well as the special courts that we have. So I know that the bill is ambiguous as to the amount of the pay. That was done intentionally. It is my hope that we do not have to take away a planned pay increase in July. But I intend to work with your committee in the event that revenues are such that we need to readdress this. And I know that the Chief Justice is the primary point of contact in terms of negotiating for the judges. And I believe you'll hear some testimony today, I would just say I understand if people come in opposition. I understand the lay of the land. I'm doing this to provide a public hearing for the citizens of this state to know that this is potentially an issue. Thank you. [LB1104]

SENATOR ASHFORD: Thanks, Mike. Any questions of Mike? I fully understand what

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

you're doing, appreciate it. Thanks. [LB1104]

SENATOR FLOOD: And I will waive my closing. [LB1104]

SENATOR ASHFORD: You'll waive it? [LB1104]

SENATOR FLOOD: Yes. [LB1104]

SENATOR ASHFORD: Okay. Proponents of the XXX. Okay, that closes the hearing then. (Laughter) No, opponents, I'm sorry. Oh, there is one. [LB1104]

JOHN LINDSAY: Senator Ashford, members of the committee, for the record, my name is John Lindsay, L-i-n-d-s-a-y, appearing as a registered lobbyist on behalf of the County Judges Association. For the record, Senator Ashford, on the last bill as that last witness finished you said, good testimony from someone who knows what he's talking about. That would be the other Lindsay. [LB1104]

SENATOR ASHFORD: No, that's clearly who I was referring to. (Laugh) Thanks for the clarification, though. [LB1104]

JOHN LINDSAY: Senators, we understand Speaker Flood has been in contact with our association, with me, over the course of his dealings on this. We...the county judges have concerns about a couple of sides. One is, potential constitutional issues with the varying of salary; and secondarily, the potential precedent in doing in effect a salary reduction, which I don't know that has ever happened before in our history. That having been said, we understand the fiscal condition that we're in, we understand the financial condition we're in. And when Speaker Flood talked to us about this, we had...I had a conference call with our executive counsel of our association to talk about the need to identify...potentially identify cuts that you may need to look at, depending upon the forecast. But we discussed that and the conversation moved pretty quickly to the judges speaking among themselves about how to help each other out in the event that judicial vacancies have to be delayed to achieve some vacancy savings, and talked about how that could be done amongst themselves working with the Supreme Court to make that as smooth as possible. So they understand...I think the message is that they understand the condition or the potential condition that the state's looking at. And they are willing to help out on that, but we do have concerns that go beyond the short-term of whether judges get a pay raise or not, questions of those constitutional and precedent setting issues. With that, I'd be happy to try to answer any questions. [LB1104]

SENATOR ASHFORD: Senator Council. [LB1104]

SENATOR COUNCIL: Understanding the issue with regard to establishing precedent, could you elaborate on the constitutional issue. [LB1104]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

JOHN LINDSAY: Well, there's quite...actually, I think, a couple. Last year, there was legislation that was passed that had judges...gave judges a pay increase but also required to help cover the deficit in the retirement fund. They required...it added a percentage of what they would have to pay over, I believe, a five-year period towards the retirement fund. The law seems to be pretty clear that you cannot require of an employee to pay an additional amount into retirement without a commensurate increase in a retirement benefit. That retirement benefit did not occur. But it was something that, I think, certainly the County Judges Association agreed to at that time because it was part of a...kind of a package that was put together at that time. So if we're unwinding part of that deal, the question is, how does that affect the balance of that? [LB1104]

SENATOR COUNCIL: Thank you. [LB1104]

SENATOR ASHFORD: You mean, the 1 percent remains in effect. But you're unwinding the salary. [LB1104]

JOHN LINDSAY: Right. [LB1104]

SENATOR ASHFORD: Okay. Thanks, John. Bill. [LB1104]

BILL MUELLER: Senator Ashford, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of the Nebraska State Bar Association as well as the Nebraska District Court Judges Association. I'm going to speak primarily on behalf of the judges. Bob Bartle, the president-elect of the bar association, who's behind me will testify on behalf of the bar. This is a first for both Mr. Lindsay and I to be opposing or to be testifying in opposition to a judges salary bill. We appear here today...I appear here today opposing a reduction in the judges' salaries. We do thank the Speaker and the Chief Justice for working with the Governor to make certain that the second year of the salary increase that the Legislature awarded judges last year does occur. We will be working with the Chief and with the Speaker, with the Appropriations Committee so that the Appropriations Committee will give the Supreme Court the flexibility in their budget that they can find the money to fund the second year of this salary increase. These are difficult budget times. The judges of the state certainly understand that. We are hopeful that the second year of the increase that was given last year will actually take effect. I'd be happy to answer any questions that the committee may have. [LB1104]

SENATOR ASHFORD: All I would add is I think it was the Speaker and also Senator Lathrop from our committee was involved in that negotiation. [LB1104]

BILL MUELLER: Absolutely. [LB1104]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR ASHFORD: And I...Steve, do you have any... [LB1104]

SENATOR LATHROP: I am curious, though. Is anything about that changing? Are we going to the cash accounts that the Supreme Court has control over more than we anticipated when we struck the bargain that we made during the special session? [LB1104]

BILL MUELLER: This issue probably arose after the special session, so there may be... [LB1104]

SENATOR LATHROP: Then what's this issue? [LB1104]

BILL MUELLER: Well, the issue about the second year of the judges salary increase not being funded. [LB1104]

SENATOR LATHROP: But the money was provided for in the Appropriations bill that we passed a year ago, right? [LB1104]

BILL MUELLER: Correct. [LB1104]

SENATOR LATHROP: And we're not...we haven't taken any of that back, other than what we took back in the special session. [LB1104]

BILL MUELLER: Correct. There is some indication that there may be an effort to take money out of the budget that would fund the second year of the salary increase. [LB1104]

SENATOR LATHROP: Is there a bill introduced to that effect? [LB1104]

BILL MUELLER: No. I mean, other than the bill that you have before you, I think that the Appropriations Committee could probably do that in their deliberations. [LB1104]

SENATOR LATHROP: Do you have any reason to think the Appropriations Committee is going to take any money away from the judicial branch of government, that would require the Chief to go into the cash accounts that he has control over, to make it happen? [LB1104]

BILL MUELLER: We don't have any indication that the Appropriations Committee will do that. But this... [LB1104]

SENATOR LATHROP: Is there a...well, you're choosing your words carefully, Bill, and I just want to make sure that we're communicating. [LB1104]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

BILL MUELLER: There have been discussions. Well, I am... [LB1104]

SENATOR LATHROP: Is there any movement afoot that you've heard of or any discussions that would take more money away from the court and send them to the cash accounts, any more than they'd have to after the deal is struck during the special session? [LB1104]

BILL MUELLER: The question of whether the state should give the judges the second year of their increase has arisen. [LB1104]

SENATOR LATHROP: Well, we've already appropriated that money. [LB1104]

BILL MUELLER: Yes. [LB1104]

SENATOR LATHROP: In order for this to be an issue somebody would have to be suggesting that we take money away from the court and make it up by reducing their salary. Is that true? [LB1104]

BILL MUELLER: Yes. [LB1104]

SENATOR LATHROP: Is there somebody that's advocating, proposing, talking about taking any money away from the judiciary? [LB1104]

BILL MUELLER: I think as a part of the discussion about state salaries, the Governor has suggested that the judiciary and their second increase should be looked at. [LB1104]

SENATOR LATHROP: If...let's say that we amend Senator Flood's bill and send it out and there's no pay raise. We take back the 2.5 percent. Where is the money going? Does it just sit in the judiciary? [LB1104]

BILL MUELLER: Well, it wouldn't be appropriated, it would not be spent for the next fiscal year, July 1. You would just spend \$440,000 less than you'd budgeted for last year. [LB1104]

SENATOR LATHROP: And where would it...where would it...has somebody got a bill to take that back and put it into the General Fund? [LB1104]

BILL MUELLER: No, no, not that I'm aware of. The money would remain in the General Fund, if the state had the money. [LB1104]

SENATOR LATHROP: Is this... [LB1104]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

BILL MUELLER: It just wouldn't be spent. [LB1104]

SENATOR LATHROP: Is this second year of the salary increase, does it require a new appropriation this year? [LB1104]

BILL MUELLER: No. My understanding is that would have been appropriated last year in the two-year budget cycle. And since we're not in that second year, I suppose it could be taken out and then it wouldn't be funded the second year. [LB1104]

SENATOR LATHROP: Are you engaged in any discussions with anybody who suggested that's something they're interested in doing? [LB1104]

BILL MUELLER: Yes. Taking it out? [LB1104]

SENATOR LATHROP: Yeah. [LB1104]

BILL MUELLER: No. Again, in the context of a... [LB1104]

SENATOR LATHROP: Here's the concern I have, and maybe I should have asked Senator Flood this. But we had a special session and the question was cutting the judiciary's budget. We went down, met with Appropriations. They put out a bill that cut it less than the Governor had proposed, right? [LB1104]

BILL MUELLER: Yes. [LB1104]

SENATOR LATHROP: But we made ends meet for the biennium, did we not? [LB1104]

BILL MUELLER: We did. [LB1104]

SENATOR LATHROP: Is there some suggestion that there needs to be further cuts in the judiciary in this biennium? [LB1104]

BILL MUELLER: I don't know that there have been suggestions that cuts be made in the judiciary. There has been a suggestion that we look at, that you look at whether you will fund the second year of the judges' salary increase. [LB1104]

SENATOR LATHROP: And that would require that we amend Senator Flood's bill to put a number in there. [LB1104]

BILL MUELLER: Correct, correct. [LB1104]

SENATOR LATHROP: And that would essentially create some kind of a surplus, right,... [LB1104]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

BILL MUELLER: Yes. [LB1104]

SENATOR LATHROP: ...that would then go back to the General Fund? [LB1104]

BILL MUELLER: Yes. [LB1104]

SENATOR LATHROP: What's the status of those discussions as far as you know? [LB1104]

BILL MUELLER: As far as I know the Chief has requested that the second year of the judges' salary increase not be rolled back, not be stopped, but that instead the court find the money within its budget to fund that second year, to fund the \$4-hundred and I think it's \$40,000. [LB1104]

SENATOR LATHROP: You're being very careful about the way you're answering my questions, and it makes me think that I'm just not asking the right one. And... [LB1104]

BILL MUELLER: (Laugh) Well,... [LB1104]

SENATOR LATHROP: ...it feels like...well, here's the... [LB1104]

BILL MUELLER: Well, no, no, there... [LB1104]

SENATOR LATHROP: Here's what I'm wondering. Are we approaching a process where we are going to allow them to have their raise but send them to the Community Corrections or the Probate Cash Funds to pay for it? [LB1104]

BILL MUELLER: I don't know. I wish that's...I wish that the Chief were here. The Chief is out of town at a meeting that he's paying out of his own pocket to attend. But he's not in town today. [LB1104]

SENATOR LATHROP: All right. [LB1104]

BILL MUELLER: And I would ask that we have discussions with the Chief about that. I don't know where he's planning to... [LB1104]

SENATOR LATHROP: Well, I will express my view, and that is I have concerns. If we have gone through in the special session and dealt with the judiciary's budget and we did it in a way that allowed the judiciary to feel the pinch and participate in the pain in a separate branch of government that's 95 percent salaries, right? [LB1104]

BILL MUELLER: Right. [LB1104]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR LATHROP: ...that we've addressed it. And if there are discussions that involve having them make further cuts because somebody doesn't feel like they had enough pain or didn't take the prescribed medicine that they were being administered, I'd like to know about that. Okay? [LB1104]

BILL MUELLER: Yes. [LB1104]

SENATOR LATHROP: Thanks. [LB1104]

SENATOR MCGILL: Maybe I could help clarify or the Speaker will when he comes up. But isn't...you know, we could get our forecast in next month and it could be that we are way off on the budget. And this is one way to then cut part of the budget is to go in with this bill, change the judges' salaries. I mean, I don't think that they're looking to trade it off or anything, but it's just if we're really in a deficit and need to find a way to cut. Is that why this bill is brought? [LB1104]

BILL MUELLER: I mean, we're all waiting to see what the revenues are. As Senator Lindsay, as John Lindsay... [LB1104]

SENATOR MCGILL: Yeah, everybody may need to be making more cuts. Yeah. [LB1104]

BILL MUELLER: Yes. You know, this is a more difficult situation because as John Lindsay stated last year, as part of the negotiation, the judges paid more in retirement benefits in exchange for getting a salary increase. So now if you take away half the salary increase, you've impaired their contract. And we think that violates the constitution. And we've had litigation on this before. We hope not to have that litigation. But that is a complicating factor with this particular budget item. [LB1104]

SENATOR LATHROP: Well, I just don't want the...Bill, I don't want the...I want to know and not have it disguised as something else. If we're sending the judiciary into the cash accounts, and I think they control a probate cash...probation cash account and a community corrections cash account, if they're going in there to do something I'd like to know about it... [LB1104]

BILL MUELLER: Um-hum. [LB1104]

SENATOR LATHROP: ...because the concern that was expressed to me after that arrangement was reached during the special session is, watch, they're going to go in there and spend too much out of the cash accounts. I don't want somebody to send them there without it being done in a transparent way. [LB1104]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

BILL MUELLER: I agree. [LB1104]

SENATOR LATHROP: Okay. [LB1104]

BILL MUELLER: Thank you. [LB1104]

SENATOR ASHFORD: Thanks, Bill. [LB1104]

BILL MUELLER: Thank you. [LB1104]

SENATOR FLOOD: Members of the committee, my name is Mike Flood, F-l-o-o-d. I am still waiving closing but I want to appear as a testifier, just to clear this up. I do have to be somewhere at 3:30. And I didn't want to miss an opportunity to clear this up. The executive branch, as it prepared its budget recommendations to the Legislature, was looking at...was planning...planned no pay raises for executive branch employees, was contemplating making other recommendations in its budget as it related to judges and judges' salaries. Chief Justice had a meeting with the Governor, I had a meeting with the Governor. The discussion was the Chief Justice felt he could, in his administrative budget, through several different types of measures, including not immediately filling judicial vacancies, absorb if necessary the \$440,000 of what would be a planned increase. And I think in the Governor's recommended budget...budget recommendations you see a \$440,000 reduction in administrative salaries of the Supreme Court. I don't know if I have it exactly right because it's not in front of me. I do have serious concerns about taking this away. This bill was introduced to preserve the issue for the Legislature in the event the Legislature wants to or feels it's necessary to make a change in light of the fact that the February 26th forecast could be so far below what we were projecting for revenue and in the event that receipts are under water in terms of the forecast. And so I did this at the request of the Chief Justice. And he is making decisions. At no time have I ever heard the Supreme Court, especially its Chief, talk about accessing cash fund authority from probation or community corrections. Additionally, at no time have I heard anybody talking about reducing the appropriations that they receive for county court salary and staff in our county courts across Nebraska. I'm especially sensitive to that because I know it's a big issue. So that's as straightforward as I can be on what I think the situation is. And if there's an additional question, then let's discuss it. [LB1104]

SENATOR LATHROP: Well, maybe I'll just make this clear. And that is when I was involved in, and Senator Ashford and I met with Senator Heidemann to talk about the judges or the judiciary's share of the cuts, they were going to take the cuts that we agreed to, that ultimately became the cut in the special session, with the understanding that he would make it up from essentially two places: one was from cash accounts, and the other was from not filling vacancies right away. So the discussion that he might provide for further cuts to the judiciary, by not filling vacancies, that was already part of

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Transcriber's Office

Judiciary Committee
February 03, 2010

how he was going to make ends meet when we had the special session and the judiciary was told that they had to cut their budget. So I'm telling, just because you weren't there,... [LB1104]

SENATOR FLOOD: Yeah. [LB1104]

SENATOR LATHROP: ...and that's what...where he was going to make it up from. And I have some concerns about going to the judiciary. If it is a fair and an equitable, relative to the executive branch of government or the legislative branch of government, a fair additional cut, I understand that. But if it's about, well, I had proposed a 2.5 and a 2.5 percent cut for the judiciary, and you did better than that, and now I'm going to go find another way to get it, then I do have a problem with that. [LB1104]

SENATOR FLOOD: My sense is the Supreme Court felt strongly there was value in having a continued conversation with both branches of government. And this was one of the conditions that was reported to me to make that conversation go forward. This branch of government, the one that you and I are part of, I think will have strong reservations about making this change. I certainly hope it does not happen. [LB1104]

SENATOR LATHROP: Okay, okay. [LB1104]

SENATOR FLOOD: So I don't want anybody to misread my intent. But it does preserve the issue. And we don't know what that issue...what...how it...it's complicated with the revenue. So I think we know where we're going. [LB1104]

SENATOR LATHROP: Fair enough. [LB1104]

SENATOR ASHFORD: Thank you, thanks, Mike. [LB1104]

SENATOR LATHROP: Thanks. [LB1104]

SENATOR FLOOD: And I'm going to, if I can, be excused. I need to head off somewhere. [LB1104]

SENATOR ASHFORD: Okay. [LB1104]

BOB BARTLE: Bob Bartle, president-elect of the Nebraska State Bar Association, B-a-r-t-l-e. I, on behalf of the bar association, specifically the executive council, am opposing and find myself in sort of a paradoxical position of thanking Senator Flood for his clarification as amplified by the questions of Senator Lathrop. But we oppose the bill to the extent it would result in any decrease in judicial salaries, certainly in light of essentially the bargain that was achieved during the special session. From both a point of view of the need to maintain judicial salaries, to draw the best candidates, as well as

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

some of the constitutional issues, the separation of power issues, previously articulated, we are in a position to oppose the bill. Other than that, I think most of the questions have been answered. But I'll gladly answer any others. [LB1104]

SENATOR ASHFORD: Okay, thanks. [LB1104]

BOB BARTLE: Thank you. [LB1104]

SENATOR ASHFORD: Any other opponents? Neutral testifiers? Okay, that closes the hearing. Thank you. LB727, Colby. [LB1104]

SENATOR COASH: Good afternoon, members of the Judiciary. My name is Colby Coash, I'm the senator from District 27. That's C-o-a-s-h, here today to introduce LB727. As this committee will remember, last year following many discussions at different levels on judicial resources, I promised to work over the interim to examine judicial resources. And to that end I bring you LB727. This is the result of a collaborative effort with Speaker Flood, Senator Ashford, Senator Lathrop, judges, the bar and the Supreme Court. During Nebraska's current fiscal struggle we are challenged to find the most effective and cost-effective means to meet our state's judicial demands. With LB669, last year, we would have added five additional judges to the behest of...recommendations of the Judicial Resources Commission. We did secure one additional judge for Lancaster County district court. While our tax revenue decreases, unfortunately the need for judicial resources does not. So in response to this, I bring you LB727. I do want to make it clear to the committee this doesn't mean I believe we are done examining the issue of judicial resources or the need for them, but it does give us something else to work with this year. In 2008, the Legislature passed LB1014 which expanded statutory authority for the Supreme Court as they determined to compensate retired judges willing to hear court proceedings on a temporary basis. The intent of LB727 is to provide the Supreme Court an additional mechanism for compensating these retired judges. This bill would allow the Supreme Court to give those retired judges who have agreed to serve a minimum amount of annual time, referred to as extended service, an additional stipend according to the amount of time they have agreed to serve. The intent of this additional stipend is to cover the cost of healthcare insurance premiums. The feedback that we got from the judges is this would be an additional incentive to induce retired judges to serve. Last session, the Supreme Court was appropriated \$80,000 to pay retired judges so this meant there is some money to be used. Other states have similar programs, including Iowa and Indiana. This legislation was modeled mainly after the Iowa statute which I found to be amenable. So with that, I'll be glad to answer any questions. [LB727]

SENATOR ASHFORD: Colby, thanks for all your work on this. You've done a lot of hard work. And this is a very good suggestion in my view. So appreciate it. Thanks. [LB727]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

SENATOR COASH: Thanks. [LB727]

SENATOR ASHFORD: Seeing no questions, Bob. [LB727]

BOB BARTLE: Again, Senator Ashford, members of the committee, Bob Bartle on behalf of the Nebraska State Bar Association. I join Senator Ashford in thanking Senator Coash for his yeoman work this session and last on behalf of bills such as this. If there is one resource that both meets the fiscal crisis and meets the needs of the Chief Justice it's the model we have of using the resource of retired judges. For obvious reasons, you have individuals, men and women, who have already achieved significant stature and you don't have the added expense of creating a new judgeship. And what we hear uniformly, and I know I speak on behalf of the Chief Justice because he's told us this, is that if we can address this health insurance issue and meet that just with respect to the judge herself or himself and the spouse, that would be huge and being able to have this as far as, to some extent, a stopgap measure. Because I don't want this to be misinterpreted as a means to avoid creating additional judgeships where fundamentally necessary, such as the situation in Lancaster County last year. [LB727]

SENATOR ASHFORD: Yeah, let me just, Bob, and thank you for your testimony and for all the work that you're doing in this area. This committee, I think, for the three years, fourth year now we've been together, has tried to send the message that we would like to see some changes in how these resources are allocated. In LB1014, initially we gave the, and the bar supported the effort to give the Chief more authority in moving judges around. I strongly support that. I know members of the committee may have slightly different views and we'd probably have some slight disagreement. But I think the message is somehow we're going to have to address this issue. Obviously, Senator Coash has given us a real nice piece here. But we need to get...we can't go through what we had to go through on the Lincoln judge and LB35. We've had that discussion and I don't mean to go over it again. But there is a need. And with technology it would seem to me, and wouldn't it to you, that with technology that will enhance our ability to do some more in that area. [LB727]

BOB BARTLE: I think so. And I think, again, I don't claim to speak on behalf of the court, much less the Chief Justice, but I think that is one of his strong areas. I think he would agree in that regard. And certainly the bar association agrees with that regard. [LB727]

SENATOR ASHFORD: And I remember, I remember, I hate to do this and I know I bore people, but when we, 20 years ago, and John was here, John Lindsay, we had a unified court bill. I mean, we...and it...I'm not suggesting that is the way to go necessarily. But I think it's been on our...the desire of the Legislature not to take away from the judges any authority or their ability to be judges but to just try to get the resources allocated in a more appropriate manner. It's got to be something...that's, I think, what the people want. I know that's my understanding in talking to people out there. [LB727]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

BOB BARTLE: It's a huge issue, it's a judicial access issue. [LB727]

SENATOR ASHFORD: It's a huge issue. And we're not going to get it done this year, other than hopefully Colby's bill. But in the next four years or two years or whatever it is, it's got to be a high priority. But thank you for all your efforts. [LB727]

BOB BARTLE: Thank you, Senator. Any other questions? I appreciate your time. [LB727]

BILL MUELLER: Senator Ashford, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today in support of LB727 on behalf of the Nebraska District Court Judges Association. I would echo everything that everyone said prior to this. We do support giving the Supreme Court the authority to award a stipend to a judge who agrees to serve a certain number of days. And that stipend would...could be used by that judge or that judge's spouse to purchase health insurance. In talking to judges, one of the major considerations that a judge goes through in deciding whether he or she is going to continue serving is whether they're 65 years old and they can go on Medicare. That is a huge consideration. And we think with this that that would give the court the opportunity, if the Appropriations Committee appropriated the money, that they could use this stipend to encourage judges to serve. I think a prime example of the situation where a retired judge would have been very helpful, and there are many, when there were the multiple murders in Madison County, that's a rural county. There are two judges in that...two district judges in that district. That made a significant immediate impact in their caseload. Well, now that those cases have been filed, they don't have that need. So it wouldn't have made any sense to add a judge to that district permanently. That, it seems to me, would have been an example of where you could use a retired judge to help out in that case. Be happy to answer any questions you may have. [LB727]

SENATOR ASHFORD: Thanks, Bill. [LB727]

BILL MUELLER: Thank you. [LB727]

SENATOR ASHFORD: John. [LB727]

JOHN LINDSAY: Thank you, Senator Ashford, members of the Judiciary Committee. For the record, my name is John Lindsay, L-i-n-d-s-a-y, appearing as a registered lobbyist on behalf of the Nebraska County Judges Association. And I, for reasons already stated by Mr. Mueller on behalf of the district judges, we also support the bill. But I would like to just note for the record that Senator Coash went well beyond his duty. We were in a meeting hosted by Senator Coash, Senator Ashford, Senator Lathrop and Speaker Flood, members of the bar association, County Judges Association, District

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 03, 2010

Judges Association. And the only nonlawyer in the room was Senator Coash, in a large room. [LB727]

SENATOR ASHFORD: And the only one with a good idea was Senator Coash,...(Laugh) [LB727]

JOHN LINDSAY: That's where the good idea came from. [LB727]

SENATOR ASHFORD: ...which is...thanks, John. [LB727]

SENATOR LATHROP: We did, maybe I'll just use while John's there, in that meeting, you're right, that was a terrific meeting. There was a lot of people, judges who said, I suspect there's a lot of people who hang on and continue to work and might retire because there is a cliff, you're either on the bench or you're done. And some of them would probably retire and then take advantage of this just so they can keep their feet wet. [LB727]

JOHN LINDSAY: And that was the discussion, that there's years of experience, maybe we'd want to slow it down but not completely shut it off, could still be a resource, a valuable resource to the state, probably more efficient and more judicious use of... [LB727]

SENATOR ASHFORD: Yeah, I just can't think of a reason on earth we wouldn't do this. It's good thinking. Thanks, thanks, John. Any other proponents? Opponents? Neutral? Senator Coash waives. Okay. I think we're going to do a little "Execing" here for awhile. [LB727]