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Judiciary Committee
January 20, 2010

[LB687 LB703 LB707 LB712 LB853]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, January 20, 2010, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB853, LB687, LB703, LB707, and LB712. 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 I'm sorry that I was a little bit late today but...and I appreciate Senator Wightman, of course, is always punctual, so thank you. We have five bills to hear today. LB853, LB687 and LB703, I think we'll take LB853 first and not group them with the other two, maybe take the other two together if that's okay. []

SENATOR WIGHTMAN: Okay. Well, we may have testimony on the others we don't have on LB853... []

SENATOR ASHFORD: Yeah, okay, should we just... []

SENATOR WIGHTMAN: ...so I...at least I don't think...we have Joanne Pepperl here who could address some issues, if need be. []

SENATOR ASHFORD: Is anyone here on LB853? No one. So, Senator Wightman... []

SENATOR WIGHTMAN: So maybe I just take the first two, if that's... []

SENATOR ASHFORD: Okay, why don't you take the first two, LB853 and LB687, and then we'll go from there. []

SENATOR WIGHTMAN: Okay. Chairman Ashford, members of the Judiciary Committee, for the record, my name is John Wightman, J-o-h-n W-i-g-h-t-m-a-n. I have introduced LB853 at the request of Joanne Pepperl, our Revisor of Statutes, and as you may recall when I've spoken on the floor where we've done Revisor statutes, those normally go directly to the floor rather than through a committee, but this one is a bit different and for that reason I think it's proper that it have a committee hearing. The intent of LB853 is simply to remove language from the...found unconstitutional by the Nebraska Supreme Court in 2005. In 2002, the Legislature held a special session to address Nebraska's capital sentencing scheme, in light of a U.S. Supreme Court case, Ring v. Arizona. During the special session, language was adopted to clarify that the current penalty for Class I felonies, when the death penalty is not utilized, is life imprisonment without parole. Six sections of the law were amended during the special session to add the two words "without parole." However, in 2005, the Nebraska

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Supreme Court, in State v. Conover, struck down the "without parole" language in two of the six sections where it had been added by the Legislature, holding that it was unconstitutional because it was outside the scope of the Governor's call, which related only to the Ring v. Arizona decision. Specifically, the Nebraska court held that, and I'll quote from that opinion, the 2002 amendments to Section 28-105(1) and 29-2520(1) which insert the phrase "without parole" after the words "life imprisonment" contravene the constitutional directive that the Legislature shall, quote, enter into...upon no business except that for which they were called together, end of quote, in a special session. We therefore conclude that whatever its intent, the Legislature lacked constitutional authority to amend the language of the statutory penalty for a Class IA felony during the 2002 Special Session. LB853 strikes the phrase "without parole" in all of the remaining sections, the four that were not found unconstitutional by the Supreme Court were inserted during the 2002 Special Session, thereby bringing the statutes into compliance with the Nebraska Supreme Court's decision. It seems clear to me and I would hope to all of you that if the Supreme Court specifically found two of the six sections unconstitutional because they were outside the special session call, then it follows that the other four sections are also unconstitutional because the same words were inserted. And why the Supreme Court...I guess probably the issue only involved the two sections. Why they didn't address that I'm not sure. So I would appreciate the committee's support in advancing LB853. I'd be happy to answer any questions. And if you want to hear from the Revisor of Statutes, Joanne Pepperl, she is here and available to answer any questions. [LB853]

SENATOR ASHFORD: Thanks, Senator Wightman. Why don't we go ahead and have some questions. [LB853]

SENATOR LATHROP: I do have a simple question. How come this isn't a Revisor bill going through Exec Committee rather than bringing it down to Judiciary? [LB853]

SENATOR WIGHTMAN: Number one, it was...number one, it was discovered later after we did the Revisor's bill and they were already put in. It probably could have been but because...and I guess we referenced it this way. It wasn't... [LB853]

SENATOR LATHROP: Is there a limit on when you can do a Revisor bill? [LB853]

SENATOR WIGHTMAN: Probably not. Probably could have gone directly. [LB853]

SENATOR LATHROP: Okay. [LB853]

SENATOR WIGHTMAN: I don't know if Joanne has an answer to that or not but... [LB853]

SENATOR LATHROP: It's the only question I have. I wonder why we're dealing with it.

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[LB853]

SENATOR ASHFORD: Yeah. Joanne, do you have anything to offer to this matter? You can...you can either sit down or... [LB853]

SENATOR WIGHTMAN: You want to sit down? [LB853]

JOANNE PEPPERL: (Inaudible) chair. [LB853]

SENATOR ASHFORD: ...it's usually our procedure but... [LB853]

SENATOR WIGHTMAN: No, just go ahead. [LB853]

SENATOR ASHFORD: Okay. [LB853]

JOANNE PEPPERL: Okay. For the record, I am Joanne Pepperl, Revisor of Statutes, last name is P-e-p-p-e-r-l. The reason this wasn't a Revisor's bill is partially the lapse of time between when it passed during the special session in 2002 and when the court issued its order in 2005, and I didn't know how many people might have been sentenced with the language that was in existence until the court declared it unconstitutional. And then also, the court opinion only addressed two of the six sections in their opinion and said they were unconstitutional. So the other four sections are potentially in doubt. And I thought when you're dealing with felony murder convictions, you don't want to throw into question the potential sentences that people have received. So I thought if there was a record and a hearing, it would be better to understand why this change was made. [LB853]

SENATOR ASHFORD: Okay. I think that's fairly clear. Thank you, Joanne, for your comments. Any other comments on this bill, LB853? Thanks, Senator Wightman. That will...well, why don't we go to the next bill? That closes the hearing on LB853. [LB853]

SENATOR WIGHTMAN: I might, in just closing, say that I would agree with that analysis and it does seem to me that we are talking about felony convictions and probably is deserving of committee hearing. But it does also seem to me that it's fairly obvious that the four sections would be unconstitutional as well as the two that the court addressed in the Conover case. [LB853]

SENATOR ASHFORD: Okay, LB687. [LB687]

SENATOR WIGHTMAN: Again, Chairman and members of the committee, I guess I'll spell my name. It's John Wightman, spelled J-o-h-n W-i-g-h-t-m-a-n. Hasn't changed much since three minutes ago. [LB687]

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SENATOR ASHFORD: Your last...yeah. [LB687]

SENATOR WIGHTMAN: I represent the 36th District. LB687, the intent is to update the dollar amounts of various sections, three sections, of the Nebraska Probate Code. Those dollar amounts were set in 1980, maybe one of them in 1978, I think all of them in 1980. The first one is the homestead allowance under Section 30-2322 of the Probate Code; second is the exempt property allowance under Section 30-2323; and the family allowance under Section 30-2325 of the Revised Reissued Statutes of Nebraska. As I said, this is all part of what's commonly called the Nebraska Probate Code. The legislation would adjust the dollar amount set in 1980, some 30 years ago, by using the Consumer Price Index inflation calculator of the U.S. Department of Labor as a guide for a 2009 amount. The calculated amounts have been rounded to the nearest thousand. Under LB687, the homestead allowance, which was set at \$7,500 in 1980, would be adjusted to \$20,000. The homestead exemption is limited to a surviving spouse or, if no spouse survives, to a minor or dependent children. It would never pass to any other heirs under the homestead provision of the Probate Code. Now you should realize that the Homestead Act insolvency and bankruptcy is a completely different section than this and some of you may remember that we addressed that issue, I think, for those of you who are in the same class as I am, in our first year down here. The exemption for...called the exempt property allowance is for personal effects, household furniture, various types of personal property other than intangibles, and would include an automobile and would be adjusted from \$5,000 to \$12,000. And the family allowance of \$9,000 is adjusted to \$20,000. This purpose of this is to provide support for a spouse and minor or dependent children during the time it takes to administer the estate. So of these three exemptions, two of them are limited to a spouse or minor children. The exemption, personal property exemption, can, if there is no spouse or minor children, pass to adult children as well, so it's the smallest of the three. I did not introduce this bill on behalf of any group or constituent. I did introduce it myself. We happened to have a case in our office a year ago in which there was a small equity in a house and I think we ended up having enough to cover it but barely. As a lawyer practicing in this area, it seems to me that it is the duty of the Legislature to update these from time to time. If they have any purpose at all, it's to carve out an exemption or exemptions in light of the present economy, and when the economy is as it was in 1980, it's obviously not the same as it was in 2010. There's been a lot of inflation in that period of time. So it seems to me, as a matter of fairness to the decedent's surviving spouse or widow or, if there's no surviving spouse, to minor children or dependent children, which could happen in the case of a disability, that these need to be adjusted from time to time. Again, I would point out a little more specifically with regard to the homestead allowance, that that was a \$12,500 allowance. I think it was \$12,500. It might have been \$12,000 but I'm almost sure it was \$12,500, prior to the 2007 Legislature taking action on that, and that was increased to \$60,000, almost five to one. I had some questions about the timing, that it seems to me that we've far exceeded the inflationary figure. But we are not asking that it be extended this amount. This homestead allowance applies to a household, a family

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situation, and is limited to a spouse and minor children, so it really is far more restrictive than the homestead allowance in an insolvency, which again would require a spouse but does not require that minor children. In contrast, the homestead allowance is, as I said, under the Probate Code, is very limited in its application; would not apply if there was no spouse or minor children, and it seems illogical that there would be as much difference as we right now have, \$7,500 to \$60,000, which is about eight times the amount. [LB687]

SENATOR ASHFORD: John, what did we do with the...it was \$60,000, wasn't it, for the... [LB687]

SENATOR WIGHTMAN: No, it is \$60,000 now. [LB687]

SENATOR ASHFORD: Right, for the... [LB687]

SENATOR WIGHTMAN: For the homestead allowance and insolvency. [LB687]

SENATOR ASHFORD: Yeah, we did that in this committee I believe. Yeah. That's right, I remember. So this is nowhere near that, that large. [LB687]

SENATOR WIGHTMAN: It seems to me that it's a pretty inescapable conclusion that the dollar amounts of these three Probate Code allowances should be modernized to at least fit our current economy. Just for your information, in 1960 Jimmy Carter was President of the United States; national average cost of a new home was \$86,000 compared to what I find now in Google at \$258,000, an increase of 300 percent; national average cost of a new car, which kind of surprises me, was \$5,413, \$27,600 now. So quite an indication that we're kind of out of step with the current economy. I would urge the committee to advance LB687 to make the Probate Code homestead allowance, exempt property allowance, and the family allowance more equitable and better reflect the present economy and cost of living. Thank you. [LB687]

SENATOR ASHFORD: Thanks, John. [LB687]

SENATOR WIGHTMAN: If you have any questions, I would certainly try to answer because I do believe there is other testimony on this. [LB687]

SENATOR ASHFORD: Okay, and do we have any other test... [LB687]

SENATOR WIGHTMAN: I'm not sure. Maybe there's not. We had a letter in support... [LB687]

SENATOR ASHFORD: Maybe not. We'll see. [LB687]

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SENATOR WIGHTMAN: ...I think and that might be all, so there may not be. (Exhibit 3) [LB687]

SENATOR ASHFORD In any event, Senator Council has a question. [LB687]

SENATOR COUNCIL: Yes. Thank you, Senator Ashford. Senator Wightman, on the personal property exemption, now that's an exemption that's not limited to the surviving spouse or the children, is it? [LB687]

SENATOR WIGHTMAN: It is if there is a surviving spouse or there are minor children. [LB687]

SENATOR COUNCIL: If there is, but if there are no surviving spouse or no minor children then it goes in accordance with the heirs. [LB687]

SENATOR WIGHTMAN: Well, it can only go to adult children beyond that. [LB687]

SENATOR COUNCIL: It can only go to adult children. [LB687]

SENATOR WIGHTMAN: It cannot go on down to remote relatives. [LB687]

SENATOR COUNCIL: Okay. So it can go down to adult children. [LB687]

SENATOR WIGHTMAN: Right. [LB687]

SENATOR COUNCIL: Okay. And when you look at the fiscal note, of there being no fiscal impact, aren't these allowances then reflected on... [LB687]

SENATOR WIGHTMAN: Inheritance taxes. [LB687]

SENATOR COUNCIL: ...inheritance tax. So it has some... [LB687]

SENATOR WIGHTMAN: It would have a very limited...you can keep in mind though that, because of the class of beneficiaries, it would never exceed 1 percent, so we're not looking at the 13 percent that...I have been here...and that may have been in Revenue Committee, and argued that we ought to reduce that 13 percent, because it is always limited to 1 percent since it can never pass to anyone other than a class one relative. [LB687]

SENATOR COUNCIL: Okay. [LB687]

SENATOR ASHFORD: Yes, Senator Lautenbaugh. [LB687]

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SENATOR LAUTENBAUGH: So just to clarify that, the change you're advocating can't really exceed a loss of revenue of \$200, could it? I'm rounding. [LB687]

SENATOR WIGHTMAN: Oh, it would be \$125 on the homestead, I guess we'd go, since it would be a \$12,500 increase. It could exceed that perhaps a little bit. Probably \$300 would be the limit. [LB687]

SENATOR LAUTENBAUGH: So that's...okay, but that's the...if we lump them all together. [LB687]

SENATOR WIGHTMAN: Right. [LB687]

SENATOR LAUTENBAUGH: Okay. And that's the maximum in any given case a county could lose... [LB687]

SENATOR WIGHTMAN: Right. [LB687]

SENATOR LAUTENBAUGH: ...in inheritance tax revenue. Okay. [LB687]

SENATOR ASHFORD: You know, it's refreshing to have someone come in this committee that really understands probate. I thought...that's kind of a lost art. Well, you probably do, Senator Council, but that's...at least that's kind of a lost art. When I first started practicing law, I don't know, do you ever remember Ralph Hetsner (phonetic)? [LB687]

SENATOR WIGHTMAN: Yes. [LB687]

SENATOR ASHFORD: Ralph and Bernie Boyle (phonetic) were partners and they were...he was in probate, that's all he did almost, but he really knew probate and it's hard to find anybody around that... [LB687]

SENATOR WIGHTMAN: And there are a lot of attorneys that do it. [LB687]

SENATOR ASHFORD: There are. [LB687]

SENATOR WIGHTMAN: Perhaps not very many down in the Nebraska Legislature. [LB687]

SENATOR ASHFORD: Well, I guess, yeah, I was just... [LB687]

SENATOR WIGHTMAN: Trial attorneys tend to gravitate maybe toward the Legislature more than probate counsel. [LB687]

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SENATOR ASHFORD: And us generalists can't do it because it's too complicated.
[LB687]

SENATOR COUNCIL: And, Senator Ashford, one other point...question of Senator Wightman, I mean. [LB687]

SENATOR ASHFORD: Yes, Senator Council. [LB687]

SENATOR COUNCIL: And in terms of the argument in support of these changes,...
[LB687]

SENATOR WIGHTMAN: Yes. [LB687]

SENATOR COUNCIL: ...last session we made changes in terms of the amount, I think it's the...that can be transferred without... [LB687]

SENATOR WIGHTMAN: Probate. [LB687]

SENATOR COUNCIL: ...without probate, and that reflects as well the change in the economies, the economic situation when prior to...I mean it was...a \$25,000 estate was deemed to be a small estate and now... [LB687]

SENATOR WIGHTMAN: Right. [LB687]

SENATOR COUNCIL: ...a \$50,000 estate is deemed to be a small estate. [LB687]

SENATOR WIGHTMAN: Fairly, fairly moderate... [LB687]

SENATOR COUNCIL: Right. [LB687]

SENATOR WIGHTMAN: ...to say the least. And even last year when we did that, we increased one of them higher because it had been longer. On the personal property, the real estate we increased very moderately because that had only recently gone into effect. So I think even though we maybe didn't gear those to inflation, in effect we did. [LB687]

SENATOR COUNCIL: We (inaudible) right. Thank you. [LB687]

SENATOR ASHFORD: Thanks, Senator Council. Thanks, John, and I don't know if there are any other testifiers, but you can... [LB687]

SENATOR WIGHTMAN: Didn't appear there were. I think we had a letter from AARP,...
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SENATOR ASHFORD: Okay. [LB687]

SENATOR WIGHTMAN: ...but I don't know that they've placed it into evidence. [LB687]

SENATOR ASHFORD: Actually, I think there is a letter from AARP, so... (Exhibit 3) [LB687]

SENATOR WIGHTMAN: Oh, okay. [LB687]

SENATOR LATHROP: Does the county have anything to say about this, the county officials? [LB687]

SENATOR WIGHTMAN: You know, they certainly have objected in front of Revenue, Senator Lathrop, with regard to changes in the inheritance tax rates. You know, again, I think they would know it and I think it's so minor that... [LB687]

SENATOR LATHROP: Because they get nicked a little bit. [LB687]

SENATOR WIGHTMAN: ...probably it would not be a very big concern. [LB687]

SENATOR LATHROP: Okay. [LB687]

SENATOR ASHFORD: Okay. Moving, you have LB703. [LB703]

SENATOR WIGHTMAN: Thank you, Chairman Ashford. For the record again my name is still John Wightman, spelled J-o-h-n W-i-g-h-t-m-a-n. I better get the right section. LB703? [LB703]

SENATOR ASHFORD: LB703 is the bill we're on now, powers of attorney. [LB703]

SENATOR WIGHTMAN: Still represent the 36th Legislative District. LB703 changes the law...would change the law relating to the Uniform Durable Power of Attorney Act, the Nebraska Short Form Act, and general powers of attorney. A power of attorney, which I assume most of you know, provides a simple, nonjudicial way for people to deal with their property, a lot of times is done to avoid the appointment of a guardian or conservator, and let someone act in their absence or sometimes in case they're in military service or in the case of their incapacity, and that was the whole idea of the durable power of attorney, that it would continue beyond someone's incapacity. In powers of attorney cases, a principal appoints an attorney-in-fact or an agent to deal with their property, maybe to do healthcare but here we'd be talking about property. Durable powers of attorney deal with property in cases where the maker, as I say, loses their legal capacity to deal with the property and are generally effective upon the

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incapacity, and that's the nature of a durable power. So they constitute a noncourt alternative frequently to trusts, guardianships, or conservatorships. While the concept of a power of attorney seems to be ideal, its actual use by the agent can result in abuses--I'm sure any attorney in here has probably run into some of those abuses--which deplete resources, divert assets to them, or result in court cases to resolve disputes. And what issue we're addressing here is someone may be appointed as a power of attorney, as attorney-in-fact to act for somebody. There may be various types of investments, some of which may be held with one child, some with another child, or maybe not a child but some other relative, and the power of attorney can come in, if they desire to do so, and maybe can change the ones that they're not the beneficiary on and not change the others that would pass other than by probate. What LB703 intends to do is add some of the additional safeguards for the protection of the incapacitated maker or principal of a durable power of attorney as found in the revised Uniform Durable Power of Attorney Act, as proposed by the National Conference of Commissions on Uniform State Laws. And I have talked to representatives of the bar association. They probably will be bringing that Uniform Act to you, not this year but perhaps next year or the following year. In the meantime, the bankers association thinks there are...feels that there are issues that need to be addressed prior to the time that is done. So, as I say, these changes deal with designating or changing a beneficiary, maybe creating joint ownerships or a right of survivorship designation on the principal's bank account or certificate of deposit or could even be titles on a mutual fund or a brokerage account. Banks have been subjected to lawsuits in cases where they allowed an agent to create or change a beneficiary or survivorship designation. They have also been sued for failing to allow such action. So they've been sued occasionally on both sides and that's a big issue to them. It's very difficult for a banker sitting there to know what the intent of that is, what the family situation is. So the representative of the Nebraska Bankers Association will follow me and provide some testimony, provide additional information concerning the cases that have gone to the Nebraska Supreme Court. Because of the uncertainty in the law, the Supreme Court decisions turn on facts and circumstances of each case, which are a little tough to root out if you're a banker sitting there talking to somebody serving under a power of attorney that wants to make those changes. LB703 will provide greater certainty by requiring the power of attorney document to contain express provisions if the maker or principal wishes to grant this type of authority to his agent, his or her agent. A number of other states have already addressed this uncertainty in the law by requiring specific authority for such actions. Among other states are California, Kansas, Missouri, and Washington. Other states will probably address these issues as they consider the new Uniform Power of Attorney Act and, as I say, probably that will become...will come before this committee, at least before the Legislature. Depending on what the Reference Committee does with it at some future date, but it probably would come... [LB703]

SENATOR ASHFORD: Maybe it will go to Transportation. [LB703]

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SENATOR WIGHTMAN: (Laugh) Yeah, it might, but probably will come before this committee. So actually, the changes made by this act would implement some of the provisions of Section 201 of the Uniform Power of Attorney Act, and I think the bar association is not ready to act on it yet but will be. The section of the act distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Among the lists of acts that require an expressed grant of specific authority in the power of attorney document under this act that we're proposing would be the creation or change in rights of survivorship or the creation or change in a beneficiary designation. Changes to this model act are proposed to address the same uncertainty, problems, and abuses that have occurred in Nebraska. The language...we urge you to advance LB703 even though it...you don't have before you the Uniform Power of Attorney Act. So I would try to answer any questions you have, but some of those might be better asked of the bankers as far as addressing specific issues. [LB703]

SENATOR ASHFORD: Thanks, John. Senator Lathrop. [LB703]

SENATOR LATHROP: You deal in the area of powers of attorney, don't you? [LB703]

SENATOR WIGHTMAN: Yes. [LB703]

SENATOR LATHROP: Okay. And so...and I want to use, as an example, a durable power of attorney, which means it survives your incapacity. [LB703]

SENATOR WIGHTMAN: Right. [LB703]

SENATOR LATHROP: So somebody signs a durable power of attorney and then they develop Alzheimer's and now whoever has been designated in a power of attorney can act just as that person would have been able to. [LB703]

SENATOR WIGHTMAN: And frequently they've maybe acted already but they would continue to act, and sometimes they only start upon the incapacity. [LB703]

SENATOR LATHROP: And that was my other...the other point, and that is generally the person is going to deal with their own business and somebody pulls that power of attorney out when they finally diagnose Mom or Dad with Alzheimer's and they can't do for themselves any longer. [LB703]

SENATOR WIGHTMAN: That would be correct. [LB703]

SENATOR LATHROP: And a lot of times these things are executed in the nursing home on a good day. So you go in, see the guy, you ask him who the President is, you make sure that they got their mental faculties, and then they sign it. [LB703]

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SENATOR WIGHTMAN: That's right sometimes. Sometimes you receive the call, Mom or Dad is pretty cognizant today. [LB703]

SENATOR LATHROP: Right, today is a good day, come on down. [LB703]

SENATOR WIGHTMAN: Good day. [LB703]

SENATOR LATHROP: So we put in front of them a document that has a list of things that the power of attorney is going to permit them to do and then they sign it. [LB703]

SENATOR WIGHTMAN: Pretty much correct. [LB703]

SENATOR LATHROP: And here's the concern I have with this idea, and that is if it's...and I'll just use me. If I have my daughters designated as beneficiaries under my life policies or I don't have anybody designated as a beneficiary under...or someone with rights of survivorship in a bank account and then I lose my mind, whoever my power of attorney is, is now going to decide what I would have wanted or make a change? My concern is...and somebody is shaking their head no and maybe they'll come up and explain it, and I'll tell you what my concern is and then you can address it if Senator Wightman can't. But if I...if I choose to leave a bank account in my name and my eldest daughter's name with rights of survivorship and I make the second daughter my power of attorney, this would give the second daughter the right to come in and change everything that I wanted as of the time I lost my mind. [LB703]

SENATOR WIGHTMAN: It would in the absence of this proposed bill. I think it would be far less likely in the event this bill is advanced, passed. [LB703]

SENATOR LATHROP: You think you can do it right now and this just requires that there be a specific grant? [LB703]

SENATOR WIGHTMAN: This would require a specific grant, that's correct. [LB703]

SENATOR LATHROP: Otherwise, the power of attorney can do that right now? [LB703]

SENATOR WIGHTMAN: Probably can. It might be challenged and that's where the lawsuits are probably involved... [LB703]

SENATOR LATHROP: Okay. [LB703]

SENATOR WIGHTMAN: ...and I'll let them address that issue, but that's absolutely right. Because you might have ten certificates of deposit, five of them might be in the name of only the incapacitated person, maybe four of them are in the name of the

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incapacitated person and one child. Now what probably should happen, Senator Lathrop, is that you should always use those that don't designate a beneficiary first and cash those in as they're needed for expenses. But the power of attorney, if you don't have something like this in there, can pick and choose and sometimes those attorneys-in-fact are self-serving. [LB703]

SENATOR LATHROP: That's my concern, is that they've put the... [LB703]

SENATOR WIGHTMAN: Right. And this will make it less... [LB703]

SENATOR LATHROP: ...get the grant and then make themselves a survivor. [LB703]

SENATOR WIGHTMAN: And this will make it less so, considerably less so. [LB703]

SENATOR LATHROP: One last question for you, Senator, and that is did you say that there is a uniform statute, this isn't the uniform statute but we might see that in a year's time? [LB703]

SENATOR WIGHTMAN: That's my thought, yes, but in the meantime, it's the bankers association's thought that they need some protection in this issue. [LB703]

SENATOR LATHROP: Okay. We'll look forward to hearing from them then. That's all I have. [LB703]

SENATOR ASHFORD: Thanks, John. Senator Council. [LB703]

SENATOR COUNCIL: And just kind of a follow-up question on Senator Lathrop's question, Senator Wightman. You made mention of powers of...agents in fact acting in a self-serving capacity, and at least in my experience that is what gives rise to these lawsuits, is that under, you know, a general durable power of attorney, the power of attorney is granted very broad authority and generally says and can take what...can take any action or do anything that the grantor of the power of attorney was able to do. And there are situations, as you suggested or in Senator Lathrop's hypothetical, one daughter is the beneficiary, the other daughter has the power of attorney, she changes the beneficiary to herself, that gives rise to a challenge because the law is pretty clear, too, that a power...an agent in fact cannot benefit themselves by use of that power of attorney. And so what I understand is being sought to be accomplished here is to make it clear in the first instance that, unless that is expressly provided, that authority is expressly provided to you, which is an indication that the person granting the power of attorney has given some thought to those things. [LB703]

SENATOR WIGHTMAN: Right. I think that's absolutely right, Senator Council. You know, you can do it other than change a beneficiary as well. You can just elect the order

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that you redeem them in as the person requires that money for care, because just take your three brothers first and redeem theirs one, two, and three, and leave your own out here, and you do the same thing. [LB703]

SENATOR COUNCIL: And between the...the Uniform Durable Power of Attorney Act is the act that you've indicated we should be expecting to see revisions coming to us as the bar association decides what portions of the Uniform...any changes to the Uniform Act to adopt. But in terms of the Nebraska Short Form Act, that...I mean that act just deals...and that's what gets confusing to some people that under...let me get this right, under the Short Form Act there are certain things that you don't have to expressly provide for. [LB703]

SENATOR WIGHTMAN: You can give them some pretty broad powers. [LB703]

SENATOR COUNCIL: You can give pretty broad powers... [LB703]

SENATOR WIGHTMAN: Right. [LB703]

SENATOR COUNCIL: ...under the Short Form Act that a power of attorney under the Uniform Durable Power of Attorney Act requires some greater degree of specificity. [LB703]

SENATOR WIGHTMAN: Right. [LB703]

SENATOR COUNCIL: And the intent here is at least in this area to have the...a power of attorney that's prepared in accordance with the Short Form Act to contain that same requirement for an express authorization... [LB703]

SENATOR WIGHTMAN: Well,... [LB703]

SENATOR COUNCIL: ...that ordinarily it wouldn't have to be stated. [LB703]

SENATOR WIGHTMAN: Even under the durable power of attorney, it could be a long-form power of attorney but it would still require these express authorizations in order to act in that manner. [LB703]

SENATOR COUNCIL: And, unfortunately, I've had the experience of dealing with a situation, questioning the extent of the authority granted in a case involving these exact issues. [LB703]

SENATOR WIGHTMAN: I would expect and almost guarantee you that for every one that involves a lawsuit, some of these acts...ten of these acts have taken place probably but in a less egregious manner perhaps. [LB703]

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SENATOR COUNCIL: Manner, right. That's all I have. [LB703]

SENATOR ASHFORD: Any other questions of Senator Wightman? Thanks, John. [LB703]

SENATOR WIGHTMAN: Thank you. [LB703]

SENATOR ASHFORD: How many proponents do we have today on this? Come on up. We do have the light system here but I think we only have one or...Bob, are you testifying to this, on this too? We won't do the lights on. I think everybody is focused here. We can...but if you go over three minutes, it's trouble, so... [LB703]

CARL SJULIN: Understood. [LB703]

SENATOR ASHFORD: Okay. Go ahead. [LB703]

CARL SJULIN: (Exhibit 1) Good afternoon, Mr. Chairman, members of the Judiciary Committee. My name is Carl Sjulin, last named spelled S-j-u-l-i-n. I am president of West Gate Bank, a state-chartered community bank located here in Lincoln. I'm also an attorney and member of the Nebraska State Bar Association. I'm testifying in favor of LB703 because it would eliminate the uncertainty that currently exists under Nebraska law when bankers, attorneys, and other third parties deal with people who seek to change beneficiary designations pursuant to the authority in a power of attorney. Given the aging demographics of our state, POAs are becoming increasingly common. Typically, the POA will grant the agent plenary authority to deal with financial institutions. Most POAs, however, do not expressly address the specific issue of whether the agent can change a beneficiary or survivorship designation previously created by the principal. When an agent presents a general POA to a bank, a dilemma is created: Should the bank continue to honor the designation made by its customer and refuse the POA authority, or should the bank allow the agent to change the designation and overrule the prior intent of the principal? Current law creates a gray area that can subject third parties to liability when dealing with these situations. The most common circumstance in the banking industry is a payable on death designation, what we call a POD. A POD serves as a simple estate plan where the owner of a checking account or CD directs the bank to make payment to a designated party upon the customer's death. When the account owner also executes a POA, banks can get caught in the middle of what is a POA versus POD conflict. One such instance occurred at West Gate Bank in 2007 that illustrates this point. West Gate had an elderly customer that designated a friend as the beneficiary of a \$500,000 account. A few months later, the customer became ill and incapacitated. The customer's son came into the bank with a POA that gave him plenary authority. The son requested that a new account be created that did not have a POD designation. After carefully considering the legalities involved, the bank

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decided to let the son make the change. The customer died a few days later. The POD designee sued the bank for allowing the son to make the change. It was clear to us that we also would have been sued by the son if we had not let him eliminate the POD, so we were in a darned if you do and darned if you don't situation. The litigation was ultimately settled, but the issue remains. Banks, trust companies, attorneys, and other third parties need a statutory safe harbor to protect them from liability when working with these difficult and emotional situations. LB703 will also help protect the elderly in our state by requiring express authorization to change a beneficiary or survivorship designation. Such designations operate as mini wills and the bar should be placed very high when allowing a POA to alter such testamentary intent. Thank you for the opportunity to testify and I'd be happy to answer any questions. [LB703]

SENATOR ASHFORD: Thank you, Carl. Any...Senator Council. [LB703]

SENATOR COUNCIL: Thank you, Senator Ashford. I don't have a question. I have a comment, Mr. Sjulin. I am intimately familiar with your case and, well, having reviewed it in connection with a matter that I was handling, and so that people have an appreciation, when the son changed the PO...the son didn't believe that his dad wanted to leave his friend all of this. [LB703]

CARL SJULIN: She was a caregiver in the nursing home, yes. [LB703]

SENATOR COUNCIL: Yeah. Yeah, he didn't believe that... [LB703]

CARL SJULIN: That's correct. [LB703]

SENATOR COUNCIL: And that was his understanding and not necessarily what his father's intent was. And you were in a... [LB703]

CARL SJULIN: It was a terribly difficult case. He was a minister as well. [LB703]

SENATOR COUNCIL: Exactly. You were in a darned if you do, darned if you don't. Because if you don't and he's asserting that you affected his testamentary rights, and if you do you've affected the right that was clearly, at least at one point in time, the person who granted the power of attorney's intent. So that... [LB703]

SENATOR ASHFORD: Was the power of attorney subsequent? [LB703]

SENATOR COUNCIL: No, the power of attorney was issued after the POD. [LB703]

SENATOR ASHFORD: Yeah. Very interesting. [LB703]

SENATOR COUNCIL: So thank you. [LB703]

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SENATOR ASHFORD: Thanks, Carl. Thank you. [LB703]

SENATOR COUNCIL: More of my probate cases come down here than any... [LB703]

SENATOR ASHFORD: You have a lot of these cases, Senator Council. (Laughter) [LB703]

SENATOR COUNCIL: Yeah. It's crazy. [LB703]

SENATOR ASHFORD: I know there are other lawyers and other cases, but you seem to have... [LB703]

SENATOR COUNCIL: Oh my God, this...last year there were two bills that dealt with exactly with two of my cases. This is crazy. [LB703]

SENATOR ASHFORD: Yeah. [LB703]

BOB HALLSTROM: (Exhibit 2) Chairman Ashford, members of the committee, my name is Robert J. Hallstrom. I appear before you today on behalf of the Nebraska Bankers Association to testify in support of LB703. Senator Wightman and Mr. Sjulin have already covered most of the points in my testimony that's being handed out. I would just like to real briefly review some of the Supreme Court cases on pages 3 and 4 of my materials, and I understand Senator Council is familiar enough with the issue, but just to highlight what banks and other third parties are faced with when they encounter a power of attorney trying to change a survivorship designation or a POD beneficiary designation. I refer to the Crosby and the First Colony cases in the Supreme Court--very similar factual scenarios and two different results. The court decisions made in each case honestly have arrived at the correct result or decision, but they provide little certainty for third parties dealing with an agent or attorney-in-fact, since the decisions have turned on findings of fact with regard to such issues as the wishes of the account owner, capacity, undue influence, self-dealing, conflict of interest, fiduciary duty and the like, all of which, as Mr. Sjulin suggested in his testimony, are not within the purview or the knowledge of the bank or the third party that's being approached by the power of attorney. Real briefly, in the Crosby case, we had a situation where there was preexisting POD beneficiary designation. A new account was opened and the POD beneficiary was not continued. What that affected was that instead of the property going to the POD beneficiary, it became part of the estate and then went to the beneficiaries. There was some indication in the court decision and the facts that the attorney-in-fact had been given oral instructions to make the transfer of money, as was accomplished, but the ultimate decision hinged on the fact that since the attorney-in-fact in this case was a relative, the ultimate disposition of the property benefited the agent and, therefore, it was self-dealing and the court said, you should not have done that. When

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you turn to the First Colony case, very similar set of facts, there was a life insurance policy. The principal granting the power of attorney had wanted to change the beneficiary designation. For some reason, that did not get accomplished and the power of attorney then had an oral conversation with the principal who suggested that it was his desire that the beneficiary designation be changed. That was accomplished by the power of attorney and, in this case, again, very similar facts, oral instructions, power of attorney carried those oral instructions out, but in this case the power of attorney was not related, did not benefit from the transfer, and the court upheld the change of beneficiary that was effectuated. So for those reasons, we feel that LB703 is a good position to take for the Legislature from a policy perspective. It provides a safe harbor, if you will, for third parties, not just financial institutions that are dealing with powers of attorney, and will avoid putting them at damed if you do, damed if you don't type of position and will ultimately assist in carrying out the estate planning intentions that may be effective through the pre-power-of-attorney disposition that's been made by the principal. With that, we would ask the committee to advance LB703 to the floor of the Legislature for further consideration. I'd be happy to address any questions. [LB703]

SENATOR ASHFORD: Any questions of Bob? Yes, Senator Lathrop. [LB703]

SENATOR LATHROP: Can I just ask Bob, is there a uniform law that addresses this? If there is, how come we're not proposing that? And tell me where we're at. [LB703]

BOB HALLSTROM: There is a...yeah, thank you, Senator. There is a proposed Uniform Power of Attorney Act by the National Conference of Commissioners on Uniform State Laws. I'm expecting...I've talked with representatives of the bar association. They're fully aware of this. My understanding, they have no objections to the legislation but they are in the process of conducting a review of the Uniform Power of Attorney. Probably within the next year or two, the bankers will be interested and involved. There are some provisions of the Uniform Power of Attorney Act, as there often are, that maybe aren't quite ready for prime time, may be somewhat controversial. So instead of waiting to determine whether or not the Uniform Power of Attorney will ever be adopted in Nebraska, or at least in its form, we have simply tried to go in very narrowly. Senator Wightman, for example, referenced Section 201. There are, I think, eight or nine different issues or activities that the Uniform Power of Attorney addresses that they have seen fit to recommend as activities that should have express authority in the power of attorney in order for the power of attorney to exercise those powers. We have only taken the two that directly relate, in our opinion, to some of these Supreme Court cases and to the day-to-day problems that are faced by financial institution employees and other third parties. So we've tried... [LB703]

SENATOR LATHROP: Have you...have you looked at the proposed draft or where they're at right now? [LB703]

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BOB HALLSTROM: Yes, the bankers... [LB703]

SENATOR LATHROP: And... [LB703]

BOB HALLSTROM: ...bankers association and the American Bankers Association have reviewed, have been participating with NCCUSAL and have made some recommendations for various issues that we think need to be maybe modified or considered for possible amendment. [LB703]

SENATOR LATHROP: This looks like it takes care of the bankers. In other words, we put this in there, there's a specific designation, they can do this and the bankers won't get sued. I'm thinking about the guy who right before he loses his mind thinks his housekeeper, who's the only person to visit him, ought to be the person that receives the account, and then they sign one of these powers of attorney with...you've seen them. They're pages of... [LB703]

BOB HALLSTROM: Uh-huh. [LB703]

SENATOR LATHROP: ...enumerated powers. Maybe they appreciate it; maybe they don't. And pretty soon their whole testamentary, everything they set up in terms of a will or estate plan, any of that can be undone by the... [LB703]

BOB HALLSTROM: Okay. And, Senator, to be clear on this, I think LB703 is going to do...take care, in large part, with the concern that you have. In that example that you've set forward, if that individual wants to benefit the caretaker, who's the only person that has any feelings for him or her anymore, and has gone to the bank, for example, or to their real estate and put joint tenancy designations on the real estate, those items, under this bill, could not be altered by the power of attorney. This says that having gone to the bank and put, you know, the caretaker on as a payable on death beneficiary designation, and then they have Alzheimer's and they've lost their capacity to take any actions on their own, the power of attorney under LB703 could not come into the bank and say I'd like to take the caretaker's name off of that, which would then put the property into the estate and go a different way. [LB703]

SENATOR LATHROP: And you think that's in here? [LB703]

BOB HALLSTROM: Yes. [LB703]

SENATOR ASHFORD: Where is that, Bob, because I...? [LB703]

BOB HALLSTROM: Well, I don't have the bill. [LB703]

SENATOR LATHROP: Because I'm looking at it and it looks more like it shall...you have

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to put them on there if you want to be able to do this activity, but it seems to be permissive in that if this is an enumerated power in a power of attorney, executed by the incompetent... [LB703]

BOB HALLSTROM: Yeah, the issue is if you want the power of attorney, under LB703, to have the authority to create or change a beneficiary designation or a right of survivorship, you would have had to have put that express authority in your power of attorney. Doesn't have anything to do with the designation of who you have previously put on as an owner, a co-owner, a POD beneficiary, a joint tenant survivor. That's an independent action. If that's been accomplished under this issue, unless your power of attorney said, "I designate Senator Lathrop as my power of attorney and he shall have the power to create or change any of the beneficiary designations that I've previously put in place," when the bank gets that power of attorney in front of it they'll leaf through it and, in the absence of express provisions to allow that POD beneficiary to be changed, they won't let it happen. [LB703]

SENATOR LATHROP: But if it's there, they will. [LB703]

BOB HALLSTROM: Yes. [LB703]

SENATOR LATHROP: So we are protecting the banks but this guy may be able to go...if this is an enumerated power and he's got the durable power of attorney and is...the person who signed it is in the nursing home with Alzheimer's, he can go out and change all the beneficiaries as he chooses and the bank doesn't have any responsibility and we could very well be authorizing... [LB703]

BOB HALLSTROM: Well, the issue.. [LB703]

SENATOR LATHROP: ...a change in... [LB703]

BOB HALLSTROM: Yeah. [LB703]

SENATOR LATHROP: ...and the person could completely undue whatever testamentary processes the person had in place. [LB703]

BOB HALLSTROM: Well, but I think, Senator, the issue to keep in mind is the designation of that authority in the power of attorney, should LB703 become law, is not going to be taken lightly. The attorney, in discussing, is going to presumably say, if you want to have Senator Lathrop as your power of attorney authorized to make changes in the beneficiaries designated under your existing power...POD accounts and so forth, you would have to specifically authorize him to do that and, once you do that, he can make the changes as he would believe you might do. He might not carry that out. So I think the fact that someone is going to specifically authorize that authority is not going to

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be anything that will be taken lightly in any respect. [LB703]

SENATOR LATHROP: And one last thought and it doesn't even call for an answer, although I'm not trying to cut you off. But my thought is, if the person, right up to the point when they are...lose their competency, if I designate Senator Rogert here to receive the balance of my checking account and then I lose my mind, who's the power of attorney to say that I would or I should or somebody else ought to be the recipient of that...the balance of the checking account on my death? [LB703]

BOB HALLSTROM: Well, the only reason that he or she would have that authority is when you were lucid and competent,... [LB703]

SENATOR LATHROP: You gave him that authority. [LB703]

BOB HALLSTROM: ...to have made...you gave them that authority with full knowledge and trust, I presume. Again, it's not going to be taken lightly. Yeah. [LB703]

SENATOR LATHROP: Well, if the trust didn't get abused, we'd never even be here. [LB703]

BOB HALLSTROM: That's correct. That's correct,... [LB703]

SENATOR LATHROP: Okay. [LB703]

BOB HALLSTROM: ...but the trust up-front in terms of making that decision. [LB703]

SENATOR LATHROP: Okay. Thanks. [LB703]

SENATOR ASHFORD: Thanks, Bob. [LB703]

BOB HALLSTROM: Thank you. [LB703]

SENATOR ASHFORD: Any further testimony on LB703? Senator Wightman, do you wish to close? You waive closing? Thank you. That closes the hearing on LB703, and we'll move to the next bill which is Senator Haar, who is here, LB707. Thank you for being ready to go and... [LB703]

SENATOR HAAR: You bet. [LB707]

SENATOR ASHFORD: Senator Haar. [LB707]

SENATOR HAAR: Senator Ashford, members of the committee, my name is Senator Ken Haar, H-a-a-r, and I'm awed by all the attorneys on this board so (laugh). LB707 is

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technically an unlawful intrusion statute. Normally, this would probably be called a Peeping Tom bill, but since my legislative aide is Tom, we're calling this the Peeping Bob bill. (Laughter) [LB707]

SENATOR ASHFORD: The what? (Laugh) No, that's all right. I was (inaudible). [LB707]

SENATOR HAAR: I can't say it twice. (Laugh) [LB707]

SENATOR ASHFORD: No, I understand that. Thank you. [LB707]

SENATOR HAAR: No offense against the Bobs of this world. What this does is to clarify the intrusion required to prosecute for Peeping Tom kinds of things. Right now, the statute carries...implies, I guess, that there be electronic recording, first of all, and in the second place it requires that a person be viewed in the state of undress. And what this bill would do would still require a person to be in a place where they would intend to be undressed but they don't have to be undressed. And this is a case that came up with a constituent of mine in Ashland where someone was peeking in the window and it was a place where you could expect to be undressed, but they didn't capture that person in the state of undress on video or anything, and so they were just charged with trespassing. And then it adds a dwelling place...a dwelling unit is a place where one would have a reasonable expectation of privacy, increases the penalty for a second offense to a Class I misdemeanor. And there is no fiscal note. [LB707]

SENATOR ASHFORD: Pretty straightforward, Senator Haar. Any questions of Senator Haar? Seeing none... [LB707]

SENATOR HAAR: That was easy. [LB707]

SENATOR ASHFORD: ...you're excused for the moment. [LB707]

SENATOR HAAR: Okay, thank you. [LB707]

SENATOR ASHFORD: Any proponents of this bill? Yes, sir, come on up. Good afternoon. [LB707]

DOUG WHITEHEAD: Good afternoon. I would first like to thank all the members of this dais for allowing me to come up and tell my story. I am a constituent of Senator Haar's that had this egregious act on our family. We had a... [LB707]

SENATOR ASHFORD: You're going to have to, just for the record, give us your... [LB707]

DOUG WHITEHEAD: Yes, I'm sorry. My name is Doug Whitehead. I'm a resident of

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Ashland, Nebraska, here as a private citizen. [LB707]

SENATOR ASHFORD: Go ahead. [LB707]

DOUG WHITEHEAD: A little brief history: We had a predator victimize our family in what culminated in a month, month's long I guess stalking or hunting, whatever you want to call it, this person was viewing our house, looking for opportunities to go to the window and view my wife and/or other family members that we're not aware of in states of undress. We had an opportunity to catch this person in the act, which finally brought it to an end, we hope. The person was charged with criminal trespass and unlawful intrusion, but those charges were subsequently dropped and amended to a disturbing the peace because of words, just the way the words of the laws were. I'd like to go through some of those just because I want to make the importance of words in how this is. The person, in his interrogation with police, admitted to more than a dozen times staking out our house, waiting for a light to come on in a bathroom, looking for an opportunity; parking down the street, waiting for one of my family members who would go jogging to return, knowing that would be a good opportunity to view the person in a state of undress. First thing that comes to mind is stalking. However, 28-311.03, "Any person who willfully harasses another person or family or household member of such person with the intent to injure, terrify, threaten, or intimidate commits the offense of stalking." Well, we weren't victimized by that because we didn't know it was happening. So stalking does not apply. Criminal trespass, second degree: Any person commits second-degree criminal trespass if, knowing that he is not licensed or privileged to do so, enters or remains in any place as to which notice against trespass is given. I live in the middle of a block in the city of Ashland. I have no fence, so fencing or other enclosure does not exclude (inaudible). I did not have this posted on my property. I find it offensive that I have to post this at my house. And I had not actually communicated to the person that he is not welcome on my property so that went away. Criminal attempt, 28-201, may have applied. However, what it does is it really charges someone with one count less, if I read this correctly, and we're at a Class III misdemeanor, so really, nothing left to charge with. Unlawful intrusion, you know, really fits the bill except at the time we caught the person doing this act, the victim was in the shower behind an opaque glass and it was going to be challenged to did they see them in the state of undress. Oh, I think it's offensive to us again that we have to prove that whether we were in a state of undress and then whether or not the perpetrator, the predator, viewed that, so words, again. Finally, disturbing the peace: Any person who shall intentionally disturb the peace or quiet of any person, family, neighborhood commits the offense of disturbing the peace. I'm very thankful that we had this bill, and it's very gray, that allowed us to at least proceed with something on this. The predator did plead guilty to disturbing the peace so we did have our day in court. What we're here though again is about words and what's the difference. We're still talking about a Class III misdemeanor and how it applies, however, I'm...my intent here is not to go back. It's to go forward in how I protect my family, my three-year-old little girl, my five-year-old little girl, my wife,

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my friends, your friends, your family from these predators. How we do that is awareness. Disturbing the peace is pretty catchall, you know. You've got your radio too loud and you offend your neighbor one too many times, you get charged for it. Unlawful intrusion raises a red flag. You go for a job interview. Most job interviews anymore follow up with background checks. Disturbing the peace on a background check, are they even going to ask the question? Unlawful intrusion, they're going to ask, which is going to protect me in case this person gets a job that serves the public or have access to records. So really what we're here for is words and how those words can affect our future and protect everyone at stake. I'd like... [LB707]

SENATOR ASHFORD: Thanks, Doug. Any questions of Doug? Thank you. Thanks very much. [LB707]

DOUG WHITEHEAD: Thank you. [LB707]

SENATOR ASHFORD: Any other proponents? Proponents? Opponents? Neutral? Coleen. [LB707]

COLEEN NIELSEN: Good afternoon, Chairman Ashford, members of the Judiciary Committee. I apologize because Criminal Defense Attorneys Association hasn't met to take a position on the bill, but I was listening to the testimony and that's why I'm in a neutral capacity. I do agree with the previous testifier that this statute is about words and, as I recall, this statute was put into place for a very specific reason and I believe it was recording...video recordings of people in dressing rooms. And so the language was meant to be very, very narrow for very specific reasons, and so I'm a little concerned with the word "surreptitious" because I think it might be a little broad, and the fact that we're just putting the term "a dwelling unit" into paragraph (b). If there is, you know, a hole in the law that needs to be fixed, then I would just state that I think it would be important maybe to do a separate bill in that regard rather than trying to fix this one. So with that, I'll be happy to answer any questions. [LB707]

SENATOR ASHFORD: Any questions of Coleen? Seeing none, thanks. Other neutral testifiers? Welcome back. [LB707]

SCOTT TINGELHOFF: Thank you. Good afternoon, Senator. I'm Scott Tingelhoff, Saunders County Attorney, on behalf of the Nebraska County Attorneys Association. I actually was the county attorney in Mr. Whitehead's case and it was a frustrating case because the circumstances that led to that incident didn't allow us much latitude. In that particular case, we had an individual that basically, in the middle of the yard, climbed up onto an air-conditioning unit and peeped into the window, so there were no statutes that actually allowed us to proceed other than the disturbing the peace. From the county attorneys' perspective, I believe that we would also question "surreptitious," the word being included in there. It's something that would be debated on, you know, how do you

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prove that they were trying to secretly do it or, in our case, it wouldn't even apply because he was very blatantly and openly trying to view or record in that incident. I do not see a problem with the...inserting "the dwelling unit." I think, as with the other locations, every one, you expect to have your privacy, be it your bathroom or be it public bathroom or a private bathroom, in a changing room or anything. So if there's any questions from the senators, I'd try to answer them. [LB707]

SENATOR ASHFORD: I think you're free to go. [LB707]

SCOTT TINGELHOFF: Thank you. [LB707]

SENATOR ASHFORD: Thank you. Any other neutral testifiers? Senator Haar, do you... [LB707]

SENATOR HAAR: Real briefly. Did you receive a letter from the Douglas County Attorney? [LB707]

SENATOR ASHFORD: Yes, we did. [LB707]

SENATOR COUNCIL: City prosecutor. (Exhibit 4) [LB707]

SENATOR HAAR: Okay. We had talked to him and... [LB707]

SENATOR ASHFORD: City prosecutor. [LB707]

SENATOR HAAR: Okay, city prosecutor, that supported I guess the bill. [LB707]

SENATOR ASHFORD: We have that, so... [LB707]

SENATOR HAAR: Again, I agree about the importance of words in this bill and one thing, the reason we took this very seriously from Mr. Whitehead is because any time your home is invaded, after that you always feel a bit creepy and you're not sure how this is going to happen again. So I would really appreciate you bringing this out of committee. We can look at those several words that concern people, but I think this is an important part of making people feel secure. [LB707]

SENATOR ASHFORD: Thank you, Senator Haar. [LB707]

SENATOR HAAR: Uh-huh. [LB707]

SENATOR ASHFORD: And...wait, Senator Council. [LB707]

SENATOR COUNCIL: Senator Haar, can...I appreciate your objective here and I

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certainly understand the situation that the Whitehead family found themselves in. I'm sitting here trying to figure out how we can circumscribe this and it kind of gets to the word "surreptitious." If I'm standing at a bus stop and your living room curtains are open and I turn and see a figure going past, and I stand there and I view you, and you are in state of undress, am I in violation of this law? [LB707]

SENATOR HAAR: Well, I don't believe so because, first of all, it talks about a place where you would intend to be in the state of undress. So a living room window wouldn't... [LB707]

SENATOR COUNCIL: Okay, but that's what I don't understand. It doesn't say a place where you intend to be in a state of undress, at least that's not how I read it. [LB707]

SENATOR HAAR: A place of solitude or seclusion, a place where a person... [LB707]

SENATOR COUNCIL: A place of solitude or seclusion, I mean, my living room is a place of solitude or seclusion. But if I have my curtains not all the way closed and you can see me going by, I mean I'm just...I want to address the issue that... [LB707]

SENATOR HAAR: Issue but make it right, yeah, yeah. [LB707]

SENATOR COUNCIL: ...is a legitimate concern, but I don't want to cast a net so broad that, you know, the unintended consequences, you know, anybody...and my neighbor might not like me and says, well, I saw...I turned and they were looking in my window as I walked past in my undergarments. Would Mr. Tingelhoff be required to press charges against me under the wording of this? Is that surreptitious? [LB707]

SENATOR HAAR: If that is unclear, we will work with your legal counsel to clear that up. [LB707]

SENATOR COUNCIL: Okay. [LB707]

SENATOR HAAR: Because I agree, we want to clear up this problem but we don't want to make it ridiculous either. [LB707]

SENATOR COUNCIL: Thank you. [LB707]

SENATOR ASHFORD: Thanks, Senator Haar. [LB707]

SENATOR HAAR: You bet. [LB707]

SENATOR ASHFORD: Senator Rogert. That concludes the hearing on LB707 so thank you all for coming. Now LB712, Senator Rogert. [LB707]

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Judiciary Committee
January 20, 2010

SENATOR ROGERT: Good afternoon, Chairman Ashford, members of the Judiciary Committee. My name is Kent Rogert. I represent the 16th Legislative District and I'm here today to introduce LB712. LB712 would amend the Disposition of Personal Property Landlord and Tenant Act, which sets forth what has to happen when a tenant has vacated the premises, such as an apartment or storage unit, and personal property has been left behind. Right now, if personal property is left on the vacated premises by the tenant, the landlord must give written notice to the former tenant or anyone believed to be the owner of the property that has been left behind, no matter the value. Additionally, if the resale value of the property is believed to be over \$250, the landlord must hold a public sale for the property. This bill very simply raises the threshold amount of personal property left on the premises by a former tenant that would require the public sale of such property. The bill says that a landlord would not have to hold a public sale unless the resale value on the property that was left by the tenant is believed to be over \$1,000. The effect of this change would be that notice must still be given to anyone who has personal property left on the premises after the premises has been vacated; that the property has been left and that the owner has the ability to reclaim the property. However, if the resale value of such property is believed to be less than \$1,000, no public sale will be required. Four words, short bill, I like them. That's all.
[LB712]

SENATOR ASHFORD: You're right. Okay. [LB712]

SENATOR ROGERT: And I believe there's somebody behind me... [LB712]

SENATOR ASHFORD: I was trying to...I found the four words now. I was looking.
[LB712]

SENATOR ROGERT: You got to search, big ones. [LB712]

SENATOR ASHFORD: Okay. Very good. Any questions of Senator Rogert? [LB712]

SENATOR COUNCIL: My clients love you for this,... [LB712]

SENATOR ASHFORD: (Laugh) It is an issue. I mean I... [LB712]

SENATOR COUNCIL: ...including me. [LB712]

SENATOR ASHFORD: ...we did have these issues at the housing authority quite a bit. Yes. Proponents? [LB712]

KATIE ZULKOSKI: Good afternoon, Chairman Ashford, members of the committee. My name is Katie Zulkoski, Z-u-l-k-o-s-k-i, and I am testifying today on behalf of the

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Nebraska Association of Commercial Property Owners in support of this bill. As Senator Rogert said, LB712 would be a small change to the Disposition of Personal Property Landlord and Tenant Act. This would simply be a change of the amount that would require a public sale to be held by the landlord when property has been left behind by a tenant that has vacated the property. Currently, the landlord must provide notice to the vacating tenant that property has been left behind. If it is believed...if the resale value of the property is believed to be over \$250, they are required to hold a public sale and sell the property to the highest bidder. This change would just say that unless the property is believed to be over \$1,000 in resale value, that public sale would not have to be held. This is intended to cut down on the costs of these sales. Before a public sale is held, public notice must be given, notice must also then be given to the tenant. What is happening is that people are not coming to these sales. The property is ultimately not sold and money cannot be recouped for the costs that were incurred when that sale is held. This bill would just be...would change the number of sales that are required to be held. I'd be happy to answer any questions. [LB712]

SENATOR ASHFORD: Any questions of Katie? Senator Council. [LB712]

SENATOR COUNCIL: Yes, thank you, Katie. [LB712]

KATIE ZULKOSKI: Uh-huh. [LB712]

SENATOR COUNCIL: Is what your clients see more often than not that is...essentially boils down to abandonment? I mean the tenant gives no indication that they want what's left behind but if it's viewed as having a value of more than \$250 currently then that landlord is obligated to advertise a public sale even when all indications are the tenant has just abandoned that property. [LB712]

KATIE ZULKOSKI: That's exactly the situation, so when the lease that they are under has expired or the property has been vacated and they're gone but their couch is left. [LB712]

SENATOR COUNCIL: Or eviction. Thank you. [LB712]

SENATOR ASHFORD: That does happen. Thank you, Katie. [LB712]

KATIE ZULKOSKI: Thank you. [LB712]

SENATOR ASHFORD: Any other proponents? Opponents? Neutral? Okay. Senator Rogert. Sally, I didn't...I just saw that you were here. Thanks for coming today. [LB712]

SALLY GORDON: My pleasure. [LB712]

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SENATOR ASHFORD: We didn't...we got done fairly quickly but still glad you're here.
[LB712]