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Floor Debate  
January 26, 2011

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[LB19 LB47 LB81 LB85 LB122 LB135 LB157 LB163 LB170 LB212 LB241 LB492]

SENATOR GLOOR PRESIDING

SENATOR GLOOR: (RECORDER MALFUNCTION, some recording lost)...One Hundred Second Legislature, First Session. Our chaplain for today is Senator Carlson. Please rise. []

SENATOR CARLSON: (Prayer offered.) []

SENATOR GLOOR: Thank you, Senator Carlson. I call to order the fifteenth day of the One Hundred Second Legislature, First Session. Senators, please record your presence. Roll call. Mr. Clerk, please record. []

CLERK: I have a quorum present, Mr. President. []

SENATOR GLOOR: Thank you, Mr. Clerk. Are there any corrections for the Journal? []

CLERK: I have no corrections, Mr. President. []

SENATOR GLOOR: Thank you. Are there any messages, reports, or announcements? []

CLERK: Mr. President, Reference report referring LB643, that report signed by Senator Wightman. Enrollment and Review reports LB170, LB19, and LB122 to Select File. Transportation Committee, chaired by Senator Fischer, reports LB163 and LB241 to General File without amendment. I have hearing notices from the Transportation Committee; the Banking, Commerce and Insurance Committee; and the Judiciary Committee, all signed by their respective chairs. Mr. President, I also have a conflict of interest form as filed by Senator Pirsch. That will be on file in the Clerk's Office. Gubernatorial appointment letters, appointments to the Game and Parks Commission, the Nebraska Commission for the Deaf and Hard of Hearing, and to the Board of Public Roads Classifications and Standards. And that's all that I have, Mr. President. (Legislative Journal pages 367-371.) [LB170 LB19 LB122 LB163 LB241]

SENATOR GLOOR: Thank you, Mr. Clerk. We will now proceed to the first item on the agenda, Mr. Clerk. []

CLERK: Mr. President, the first bill for consideration this morning, LB157. It's a bill introduced by Senator Coash. (Read by title for the first time.) The bill was introduced on January 7 of this year, at that time referred to the Judiciary Committee. The bill was reported to General File without committee amendment, Mr. President. (Legislative Journal page 371.) [LB157]

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SENATOR GLOOR: (Gavel) Thank you, Mr. Clerk. Senator Coash, you are recognized to open on LB157. [LB157]

SENATOR COASH: Thank you, Mr. President. Good morning, colleagues. Today we're going to talk this morning about LB157. And there's an amendment filed that I will speak to briefly. But I'm going to take my opportunity here to speak about why we are looking at changing the way we provide guardianship and conservator services to the citizens of Nebraska. LB157 is a bill to reform the guardian and conservator system here in our state. This bill is a product of a task force that was created at the direction of our Chief Justice last year. The Chief Justice noticed, as many of you did, that there are problems with the way that guardians and conservators work in our state, and these were highlighted and brought to our attention by a case that happened in Omaha. And I've given copies to all of you to illustrate what can happen when guardians and conservators happen to act in bad faith. The Chief put together a group of about 15 individuals. And I'm going to take some time to recognize some of those individuals--myself, Senator Nelson, Senator Wightman who chaired the task force, and Senator Council, and Senator Ashford. We all came together with judges, attorneys, law enforcement, and practitioners in the guardian and conservator realm. With this case as a backdrop and understanding that we have some work to do to improve this system, we embarked on a very aggressive task of putting together recommendations to improve the system. At the end of a very short four months there were over 55 recommendations on how to improve this system. Some of those recommendations are illustrated in LB157 and the amendments. Many of the recommendations the Chief took back and he is implementing through court rule. What LB157 does is address the legislative changes recommended by the task force. This committee was highly dedicated to making these needed changes while being cognizant of our state's financial situation. Many of the changes that we need to make require an appropriation. None of those changes made it into this bill. But what we do have in this bill I'm very proud of. This bill addresses two areas--it addresses the way the court does their business and the way the guardians and conservators do their business. And the theme of these changes can be characterized by more information. We are trying to put more information in the hands of judges so that when they make decisions about who is going to serve and how a guardian or conservator will serve a vulnerable person, the judge has at his or her fingertips all the information that we can provide them in order for them to make good decisions. We've given the court, in addition to more information, more flexibility. Many times the courts have trouble in making decisions because of the lack of information but also because of the lack of flexibility. So we've tried to increase to an extent the courts' flexibility. And finally, for the courts we've tried to increase their ability to oversee this process. For guardians and conservators, and I want to take a moment to thank all of the Nebraskans who step up to be a guardian or a conservator for a vulnerable individual. We've asked them to step up their responsibility as well. But we didn't want to make a process that was so burdensome that we would prohibit them

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from serving in the first place. So we pulled practitioners of this area of law in and we said, how can we help you be of better service to your wards? And so they have gladly, as a community, stepped up and said, this is what we're willing to do and I appreciate that very much. So we've worked with all these interested parties. In addition, I've worked with the Speaker and we've made appropriate changes to LB157 and the amendment that's coming, and these changes haven't changed the overall direction. We're still headed down the road of more information, increased oversight, more tools, and more accountability. So at this time I will close my opening on LB157. When we get to the amendment I'm going to...I will walk the body through all the particular changes that are included in AM106. Thank you, Mr. President. [LB157]

SENATOR GLOOR: Thank you, Senator Coash. Mr. Clerk. [LB157]

CLERK: Mr. President, I now have a series of amendments. But before, I believe, we get to the amendment Senator Coash would like to discuss, Senator Flood, I have AM67, AM68, AM69, AM70, AM71, AM72, AM73, AM74, AM66. And I understand, Senator, you'd like those all withdrawn. [LB157]

SPEAKER FLOOD: Yes, I would. Thank you. [LB157]

CLERK: Senator Coash, you had filed with me an amendment, I believe, yesterday, Senator, AM60. I understand that's to be withdrawn as well. [LB157]

SENATOR COASH: Yes and please replace it with AM106. [LB157]

CLERK: Mr. President, Senator Coash would move to amend with AM106. (Legislative Journal page 371.) [LB157]

SENATOR GLOOR: Senator Coash, you're recognized to open on your amendment. [LB157]

SENATOR COASH: Thank you, Mr. President. Thank you, colleagues. There are 11 areas of change to our statute to improve this system. So I'm going to walk my colleagues through each one of these changes and illustrate what they are and how they affect this process. So if you'll allow me, I'm just going to start at the top here. The first change has to do with filing letters of appointment with the register of deeds. This requires guardians or conservators to file a copy of their letters with the register of deeds, not just in the county where they reside, but in any county where the ward has...owns property or interest in property. What we know is that many times people with guardians or conservators have significant assets and those assets may be spread through several counties. And it was important that each county be made aware where there was a conservator in place for that property owner. That's the first change. Second change, guardian/conservator proceedings and dispute resolution. As we

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worked with the courts we realized that sometimes there are disputes and there is no way to resolve those without formal court proceedings. So we added language in this amendment that said when there is a disputed guardian or conservatorship there is an option for mediation. This is going to save some judicial resources. Third change is a technical change. Many times you'll see the word "party." We've changed that to "person." It's a more appropriate and fitting legal term. The fourth change, and you'll see it's a relatively long change. We amended into this statute basically what was or what is LB85, which is Senator Karpisek's bill, and this is the Nebraska Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. This is, as Senator Lathrop would put it, this is the Good Housekeeping seal of approval that we are harmonized. The fifth change is the definition of interested person. Interested persons are people in a ward's life who may have interest in how guardians and conservators do their business. And it's important that we include their role in this statute because if we're going to protect assets and protect vulnerable people we need to have any interested person as defined in AM106 having eyes on these things. And this gives a mechanism to do that. Senator Flood, I believe, will have an amendment to help clarify that even further. The next change has to do with ex parte orders. Here's what happens, colleagues, you'll have a protected person, a ward, and you may have a neighbor, a nephew, brother-in-law, somebody who's watching this and they see that there's something inappropriate going on. And they want to tell the judge, hey, you better watch out for this. Brother-in-law over here is taking money that is supposed to be used for this ward and he happens...and I think...and he's bought a brand new boat with it. Well, he doesn't have a mechanism to tell the judge that and this change takes care of that. So it allows for ex parte orders about the ward if it's through a sworn affidavit. Again, this is about having more eyes and more information in the judges hands. The next change has to do with background checks. This change requires that potential guardians or conservators complete the following background checks and file those background checks with the court ten days prior to the appointment hearing--criminal history, background check, central registry of abuse of adults or children, and the Sex Offender Registry check, and a credit check. A couple of things I want to make sure are clear. The results of these checks are not part of the public record. There is an exception if the conservator is a financial institution, such as a bank, this is waived. These checks can also be waived at the judges...at judicial discretion with good cause shown. The next change has to do with court permission to move the wards out of state. Right now if a guardian wants to move their ward out of the state, he or she has no duty to inform the court. So what we have is guardians who are...have, not for bad reasons sometimes, but they've moved their wards out of the state and haven't informed the court. And that causes problems with the process, and so we've made that change as well. We've made a change having to do with the filing of an inventory. This requires a guardian, if there is no appointed conservator, or a conservator to file an inventory with the court within 30 days of their appointment. Copies of this inventory are to be mailed to interested persons and sent to bonding companies if there is a bond on the assets. The interested persons will receive a form to fill out and mail back to the court if they want to

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continue receiving the reports on the ward. After this initial inventory, the guardian or conservator is required to submit an annual inventory to the court, the bonding company, and interested persons who requested to remain as interested persons. The reason for this is so that more eyes are on this process. What we found out through the practitioners, as we went through this task force, was that very often there were people trying to keep their eye on the best interests of the ward, however, they weren't being made aware of the information. And we want to make sure that they have the information so that they can also assist that ward. We have a bonding requirement if the assets of the ward are greater than \$10,000, we're going to require a bond on the ward's assets by the court. The bond is fixed at the aggregate capital value of the personal property of the estate plus one year's estimated income minus the value of securities and other assets deposited under arrangements requiring an order of the court for their removal. This requirement can be waived by the court especially if, well you're going to see an amendment from Senator Flood that will waive that requirement if there's a properly executed power of attorney. And finally, the change to this...that this amendment seeks to do is to remove language regarding a ward receiving a copy of his or her inventory. Current statute says that if the ward doesn't have mental capacity he or she is not required to receive a copy of their inventory. I believe that regardless of your mental capacity you have the right to see the inventory of your assets and we want to require that that be sent, it's the right thing to do. With that, those are the 11 changes. I'm going to pass out a copy of these changes so that you can see they're referenced by the page numbers so you can see where we've made these changes in this long amendment. And with that, I will close and take any questions. Thank you, Mr. President. [LB157 LB85]

SENATOR GLOOR: Thank you, Senator Coash. (Doctor of the day introduced.) Mr. Clerk. [LB157]

CLERK: Mr. President, I do have amendments to Senator Coash's amendment, if I might right before that acknowledge some messages. Senator Smith has an amendment to LB135 to be printed. I have hearing notices from the Revenue Committee and the Retirement Systems Committee, Mr. President. (Legislative Journal pages 372-374.) [LB157 LB135]

Mr. President, Senator Flood would move to amend Senator Coash's amendment. Senator Flood, I have AM110 in front of me. (Legislative Journal page 374.) [LB157]

SENATOR GLOOR: Senator Flood, you are recognized to open on your amendment. [LB157]

SPEAKER FLOOD: Thank you, Mr. President. Good morning, members. I want to first start by acknowledging the work that Senator Coash talked about by all of the folks across Nebraska as it relates to guardianships and conservatorships. I think there is

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some value to talking about the role of a guardian or conservator before I go into the underlying amendment that I have filed here. Guardians and conservators are appointed by the court as a last remedy to protecting an individual. I always caution clients that I see about rushing into a guardianship or conservatorship because you're essentially taking the rights of a person and taking them away and giving them to another person that has been appointed by the court. There's lots of different situations. Senator Coash, in his line of work, is most familiar with guardians appointed for those folks that are developmentally disabled and can't make decisions on their own--their place of abode, the checkbook, healthcare decisions--they can't make them on their own, after a showing to the court. So a developmentally disabled person would need a guardianship in limited circumstances depending on the severity of the disability. And then there's the type of guardianship that I think we're really familiar with where Aunt Esmeralda is aging and Alzheimer's or dementia or a health condition or her ability to track the decisions that need to be made on a daily basis are compromised. And you don't want somebody in the community that has less than good intentions from coming in and saying, Esmeralda, why don't I help you with some things here and then you pay me \$1,000 a week, or the salesman comes to the door and she buys a vacuum that she's never going to use for \$1,500. Those are situations where Esmeralda may need a guardianship or a conservatorship. A guardianship is power over the person--healthcare decisions, place of abode, nursing home. A conservatorship is power over the purse--the checking account, certificates of deposit, stocks and bonds, real estate, selling grandma's farm, things like that. And in between there, there is a whole set of circumstances that change. Maybe it's a mental illness that strikes somebody that you need a guardianship/conservatorship for, maybe it's a, you know, unknown problem that a juvenile has and they need a guardian because mom or dad is not able to make decisions. Whatever it is we have to remember there's a lot of different situations here. And when you're talking about money and somebody having real estate worth \$2 million, which is not uncommon in rural Nebraska, the issue of undue influence or manipulation of somebody that is unable to make their decisions is a real concern. I don't think guardianships/conservatorships are right for everybody. We have a whole system before we get there. You and I can execute a power of attorney. I could give...I'd give my wife power of attorney in the event that I can't make decisions, that works great for a lot of people. I could give Senator Harms power of attorney after my wife and he could make decisions for me. That doesn't require a guardianship, that just means that I've given him the ability to do it. While I think there's value to this bill, I think we have to go very carefully through this because we don't want to make knee-jerk changes, now I'm not saying these are, to assist them that exist not just in the worst of crises but also for those folks that need help later in their years with their finances or their health decisions. What I'm saying in this amendment, AM110 to AM106, if you pull up page 22 on Senator Coash's AM106 and you go to his paragraph on the definition of an interested person, and I think they've done a really good job in defining what an interested person is. An interested person in a probate proceeding is somebody that has the standing to come into court and say, I want to present evidence or I want to be

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heard regarding Jane's conservatorship/guardianship. In my case, if I was incapacitated and needed a guardianship, a conservatorship my wife would be first in priority under the law to come in and say, you know, Mike isn't able to make some decisions, I'm going to be the petitioner, I'm going to ask the court to give me the power to make all of Mike's decisions. If my wife didn't want to do that and my son's were of the age of majority, say they were 30 and I'm 80, you know, Brenden or Blake would be my conservator/guardian. I may in my estate planning nominate Senator Harms after my wife. My wife dies before me, I'm at the place in my life where I need some help making decisions because I'm going to probably compromise my financial stability or my healthcare if I don't, Senator Harms in my estate planning would be nominated by myself and he would be appointed in the priority system. What this definition does is very good because for the first time I think we have a real clear picture of who an interested party is. The one sentence that I want to take out in this definition is on line 24, page 22 of AM106. It starts with, "The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in any proceeding." My concern here is that this language is too broad. And when you have a protective proceeding for somebody, I'm familiar in the rural areas and you're talking about the family farm and Jane's husband died a couple years ago. Jane's got 2,000 acres. She's got kids and grandkids and they're wanting to keep the farm in the family name. And Jane's sister, Mary, used to have part of the farm. And Mary starts to talk to Jane. And I don't know that Mary should have a right to come in, in a proceeding, when Jane's already got...defined what she wants to happen. The minute you start letting the court bring in interested parties from other places, I think you create a situation where undue influence, it breeds itself. You know, if Jane wanted Mary to have a role in her financial welfare or the ability to make decisions for her, Jane would have nominated Mary in a power of attorney. And if Jane nominates somebody else Mary can collaterally attack the undue influence, if there is any, on the power of attorney. But what happens a lot of times around the dinner table, I think, around Christmas is that grandma will say to the kids, I want you to do this and this and this. And she says that back in 1995. She goes and makes a decision on estate planning in 1997, maybe grandma changes her estate planning in 2006. And she decides, you know, I've got one grandson that really wants to farm and I want him to get the farm. That's her decision, that's her right, that is her property, she can do that. But the other grandson says, no, no, no, no, grandma didn't want that. She told me in '95 she didn't want that. And suddenly you've got a big fight that has developed. I just think we have to be very careful ceding our authority as a Legislature to the court as it relates to who becomes an interested party. And so what I'm asking you to do today is let's strike this very broad language and let's let the probate community react to it. If they've got better language, you know, let's discuss it on Select File. But I think as written this is too broad. And our county courts shouldn't have the ability to let all sorts of people in. And this is a theme, I think, you'll see throughout the bill that I want to taper down a little bit because there is a role for the other grandson. But I don't know that making that individual an interested party is the way to do it. So basically what Senator Coash has

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done here, he's said, if you're entitled to notice under Chapter 30 for a guardianship or conservatorship you're in priority, you know, you're being recognized as an interested party. All I'm doing is saying let's not give the broad authority to the court to allow all these people to come in as interested parties. We have a job to do here too. And if we rush this bill through the system... [LB157]

SENATOR GLOOR: One minute. [LB157]

SPEAKER FLOOD: ...if we rush this bill through the system I guarantee we're going to see next year the bar association and others, practitioners, families come forward and say, wait a second, that grandson had no business being in grandma's affairs. She decided what she wanted. She was of sound mind when she did it. We've got to respect the wishes and the intent of the person. We can't allow the system to bring in all these other components. So I'm just striking a sentence. I would ask for your support. And I'm willing to...with Senator Coash who's been great to work with and I support everything in AM106 other than the amendments that I have. He has done a good job of outlining what needs to happen. But I think we've got an opportunity here to just tweak it a little bit more, put a product together on General File and let everybody react to it before Select because I think we're going the right direction. Thank you, Mr. President. [LB157]

SENATOR GLOOR: Thank you, Senator Flood. We now move to discussion. Senator Wightman, you are recognized. [LB157]

SENATOR WIGHTMAN: Thank you, Mr. President, members of the body. First of all, I want to thank Senator Coash for bringing this bill. As he said, several members of our Legislature here served on that committee, including himself, Senator Council, myself, and Senator Nelson. And while I was named as the Chair of that committee (laugh), many of the others carried on. I had some health problems during the summer and was not able to be at anywhere near all of the meetings, so. But I think they came out with a reasonably good bill. Of course, another bill has now been combined and merged into AM60. So Senator Flood is right when he talks about there are persons that maybe are...should be beyond the scope of the court as being interested parties. I assume and might address a question to Senator Flood, if he would yield. [LB157]

SENATOR GLOOR: Senator Flood, would you yield? [LB157]

SPEAKER FLOOD: Yes. [LB157]

SENATOR WIGHTMAN: Senator Flood, the only sentence that you're talking about striking is starting on 23, is that right? [LB157]

SPEAKER FLOOD: Line...page 22, line 24, after the period, it starts with, "The meaning as it relates..." [LB157]

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SENATOR WIGHTMAN: Right, in...I see that as being 23, "The meaning as it relates to particular persons." You're not striking the language with regard to a trustee of a trust... [LB157]

SPEAKER FLOOD: No. [LB157]

SENATOR WIGHTMAN: ...executed. And Senator Flood talked about other means and particularly powers of attorney. But one of the probably most complete means that a person could have, to have named somebody during his period of full capacity and competency, is a trust and are frequently done. People with a lot of property frequently do enter into trust agreements in which all of their property is handled by a trust and frequently have more powers in than most powers of attorney do. But I think we can get too broad with regard to this particular section. And we probably put the county court into a difficult situation as far as who they're going to require all of the notice if we specifically become too broad in that instance. So I probably will support AM110, certainly will support AM106 and urge your support of passage of that bill. Thank you, Mr. President. [LB157]

SENATOR GLOOR: Thank you, Senator Wightman. Senator Flood, you are recognized. Senator Flood waives. Senator Coash, the Chair recognizes you. [LB157]

SENATOR COASH: Thank you, Mr. President. Speaker Flood has brought us an amendment, AM110, and he illustrated very well the reasons for that amendment. And I will support the amendment and I will encourage my colleagues to do so as well. But I want to take a moment to ask Senator Flood a question, if he would yield. [LB157]

SENATOR GLOOR: Senator Flood, would you yield? [LB157]

SPEAKER FLOOD: Yes. [LB157]

SENATOR COASH: Thank you, Senator Flood. You illustrated very well the reason that we need to as a body narrow down the scope of this and to try to keep the right people in this process through the process. And you've been using this example of a grandson on grandma's assets here. And so one of the things that I'm concerned about and I want to see if its affected by your amendment is, what if grandma says, you know, I don't have...I've got a son, I've got some grandkids, but I don't really trust them, so they're not in the line of an heir. But I do have a brother-in-law who I would like to be included as an interested person. Is there a mechanism for grandma to make her wishes known to say that although I don't have any heirs that I want to have as interested persons but me, as the ward, I want to take control and let my brother-in-law serve as an interested person? Is there anything affected through your amendment for grandma's right? [LB157]

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SPEAKER FLOOD: Does your scenario assume that grandma didn't execute a power of attorney for healthcare or financial purposes or a last will and testament? Is that... [LB157]

SENATOR COASH: Let's make that assumption, sure. [LB157]

SPEAKER FLOOD: Okay. So if she's done no estate planning and she doesn't trust any of her family and the brother-in-law is the one she does trust. Okay? And most likely are there assets here we're talking about? [LB157]

SENATOR COASH: Yes. [LB157]

SPEAKER FLOOD: Okay. So grandma get...let's say her son, who cares a lot about her, wants or says we need a guardianship on grandma. He files with the county court of Lancaster County and grandma gets served by a sheriff or, you know, in Lancaster County it's usually always a sheriff. And she's advised of what rights are being taken away from her. If she knows she needs a guardian and she objects to her son getting it she can then advise the court, listen, I think a guardianship is proper but it's not going to be my son, I would agree to my brother-in-law. And then the court can weigh who's best qualified to do it. Certainly her son would be in priority, but he's going to be in priority anyway. I think a lot of times what happens in that situation is the son is concerned about mom, so if it's a brother-in-law he has to work with there's...most of the time there's an agreement. She'll go ahead and sign an acceptance of that brother-in-law being appointed and the son will withdraw and they'll nominate the brother-in-law. But that...there's going to be a fight there. You're talking about a situation where there's going to be a fight. And grandma is not without resources to advise the court of what she wants to do. She's got a remedy. But the problem is, and I think you bring up a great point and I think that goes to the heart of this, if you start...where does the brother-in-law business stop? Where does the by marriage relation stop? These are all very emotional decisions. And when grandma finds out she has her checkbook taken away and she's going to a nursing home, there's hell to pay. And that's probably why she's on her son's tail because he's saying, Mom, you can't live anymore, you can't cook, you have no business driving, you don't get enough food, your place is a pit, you've got to get into assisted living. And she's mad, as you can guess, at him for making her move out. And she may say,... [LB157]

SENATOR GLOOR: One minute. [LB157]

SPEAKER FLOOD: ...well the other brother-in-law, you know, I'm just telling you what I think is happening here in your story, the other brother-in-law is saying, ah, you know, Jane, I tell you what, you don't need, you know, we'll take care of you. You know, a lot of times there's some undue influence in situations like that. And they start grooming grandma. And the next thing you know they get a quarter of ground and the son is really

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upset. I'm not saying this is a perfect solution but I worry about the expansion. But I hope that answers your question. [LB157]

SENATOR COASH: It does. Thank you, Senator Flood. My concern is, is that although the folks who may have guardians and conservatives may be vulnerable, they still have the right to choose their own destiny. [LB157]

SPEAKER FLOOD: Yeah. [LB157]

SENATOR COASH: And I want to assure that through this legislation and following amendments that the wards get to control their own destiny and have a voice in the court to say who they wish to have...be as an interested person and who they don't. Thank you, Mr. President. [LB157]

SENATOR GLOOR: Thank you, Senator Coash. The Chair recognizes Senator Nelson. [LB157]

SENATOR NELSON: Thank you, Mr. President, members of the body. I'd like to address a question or two to Senator Coash, if he will yield. [LB157]

SENATOR GLOOR: Senator Coash, will you yield? [LB157]

SENATOR COASH: Yes, I will. [LB157]

SENATOR NELSON: Thank you, Senator Coash. As you mentioned, there were several of us that served on this committee. And we covered a great deal of material and I think 55 different recommendations. So it's a little hard to recall because we were divided into three different groups, weren't we. And your particular group took certain sections and my group took others. [LB157]

SENATOR COASH: That's right. [LB157]

SENATOR NELSON: My recollection is that if you're looking at...if you go on to page 23 here and starting with, I guess, line 7 or 8 there it talks about upon application of any interested persons or concerned individual regarding the welfare of the person for whom a guardianship is proposed. Wasn't this...I'm just going to ask you, back on line 24 and 22, was that inserted in there so this gives the judge a little more discretion from the standpoint of guardianships and conservatorships as to who might be an interested party? [LB157]

SENATOR COASH: Yes. In working with the judges what we found was that often judges are...judges get unsolicited correspondence from family members, neighbors. And there was inconsistency we found through the state on how judges could deal with

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that, and so what this is attempting to do is give judges a consistent mechanism to deal with those type of (inaudible). [LB157]

SENATOR NELSON: A little more discretion. And the other thing that we had to consider, and I think we will see later on, that notice has to be sent to interested parties. And so what are we going to do? Send it out to 15 or 20 or is there going to be some limitation? And this was a mechanism inserted here for the judge then to decide who would be interested parties so that there could be some limitation. Isn't that correct? [LB157]

SENATOR COASH: That's correct. [LB157]

SENATOR NELSON: All right. Well, it would seem to me that we might be better off, rather than striking this entirely, to modify it in some way with another amendment where we narrow it a little bit. That we are talking about, in this particular instance, about guardianships and conservatorships and so that it doesn't carry over into the probate area where we're talking about wills and powers of attorneys. And do you think that might be feasible to insert something in here by way of an amendment down the road that would a little better identify what we're trying to achieve here? [LB157]

SENATOR COASH: Yes. [LB157]

SENATOR NELSON: All right. We may take a look at that then. I suppose it would be all right, if you're supportive of this amendment, to take it out at this time. But we could put something in a little later here that might help us. [LB157]

SENATOR COASH: Yes, I think the concern is and the reason that this language is in there, and I understand why the language is in there and I understand why Senator Flood has given us good reasons to take it out. But there is a phenomenon that we do have to address. And I would love to work with you on Select File. [LB157]

SENATOR NELSON: All right. [LB157]

SENATOR COASH: What if there is no family? What if there are no heirs? What if, you know, this is an estranged individual, for example? [LB157]

SENATOR NELSON: Right. [LB157]

SENATOR COASH: We need to be able to address that. And I will work with Senator Flood and members of the task force and whoever else to make that change on Select File. [LB157]

SENATOR NELSON: All right, thank you, Senator. Thank you, Mr. President. [LB157]

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SENATOR GLOOR: Thank you, Senator Nelson. Senator Coash, you are recognized. [LB157]

SENATOR COASH: Thank you, Mr. President. I did have a question for, another question for Senator Flood, if he would yield. [LB157]

SENATOR GLOOR: Senator Flood, would you yield to a question from Senator Coash? [LB157]

SPEAKER FLOOD: Yes. [LB157]

SENATOR COASH: Thank you, Senator Flood. Kind of coming...I don't know if you were able to listen to the exchange Senator Nelson and I were having, but there is a concern out there. What if there are no family members? How do we address that? [LB157]

SPEAKER FLOOD: Well, and Senator... [LB157]

SENATOR COASH: What's your thoughts on that? [LB157]

SPEAKER FLOOD: ...Senator Wightman just pointed out, and I think it's in the notice paragraphs of guardian/conservator. In a second here, you should ask him. But the similar language that I'm striking from this definition is also found at different sections of the probate code. And what, I guess, I'm saying is, I still think it's worth taking out at this time. And I'd like to hear from the probate club before our next Select File discussion on LB157. I think that needs to be tightened. In light of what's happened with guardianships/conservatorships, Senator Nelson has a good point. If you've got no family, no heirs, no estate planning and you are flying blind, what's the court going to do? I think that this language needs to be reworked on Select File that says there has to be some nexus or, you know, to the individual, a next door neighbor that could demonstrate that he or she's been taking care of Roger for a long time, you know, a very distant relative that wouldn't show up, or in some cases, you know, courts may appoint a bank to come in and say, all right, the local bank with trust powers is going to take care of Roger and make sure he gets his medications. And, you know, I think that those things need to be considered. I just think this language is too broad in light of the other things that you talked about with concerned individuals. So I think Senator Nelson has a point. I'd like to maybe develop it a little bit more between now and Select File and make sure we get something in there with more of a nexus because I think right now it's too broad. [LB157]

SENATOR COASH: Well, I appreciate that answer. And I can agree with you. We can narrow this now that we've got...we've got to address that issue. And I appreciate your

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commitment to working on that between now and Select File. Thank you, Mr. President. [LB157]

SENATOR GLOOR: Thank you, Senator Coash. Senator Wightman, you are recognized. [LB157]

SENATOR WIGHTMAN: Thank you, Mr. President, members of the body. I just had it pointed out to me by a member of the bar association that Section 30-2209, which are the general definitions for all...that govern all probate matters, provides the same language that Senator Flood, under AM110, would have stricken here. So it will be part of the law. But I think we do need to take a look probably on Select File. But it's exactly, "The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding." So that certainly is there in the event of general probate questions. Again, if we're going to strike the language then it probably needs to be replaced by something. And certainly Senator Flood has indicated his willingness to work on that while this bill is placed on Select File. And I think it addresses probably Senator Nelson's questions as well that there will be instances perhaps where there is no interested party. And the judge is going to be confronted with that situation. So as long as it's going to be that the parties agree that they will look at this while the bill is on Select File, I will go ahead and vote for AM110. Thank you, Mr. President. [LB157]

SENATOR GLOOR: Sorry, Senator Wightman. Your request? [LB157]

SENATOR WIGHTMAN: No, I was finished. [LB157]

SENATOR GLOOR: Thank you, Senator Wightman. Chair recognizes Senator Flood. [LB157]

SPEAKER FLOOD: Mr. President, I want to, for the following reasons, withdraw AM110 to AM106, because Senator Coash and myself and Senator Wightman will be sitting down between now and Select File to massage the language as it relates to interested party. I think it's a very good thing that we're defining that. And I think Senator Coash's definition is very good. I want to sit down with Senator Wightman and Senator Coash, if you two agree, to go over that, and they indicate that they do. My only interest here is that we don't create a circus with too many people in Jane's case or Roger's case. And I think we will have discussions certainly with the State Bar Association about that. So I'd ask, Mr. President, to withdraw AM110 and refile the same on Select File. [LB157]

SENATOR GLOOR: Mr. Clerk. [LB157]

CLERK: Mr. President, the next amendment I have to Senator Coash's amendment, Senator Flood, AM111. (Legislative Journal page 374.) [LB157]

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SENATOR GLOOR: Senator Flood, you're recognized to open on your amendment.  
[LB157]

SPEAKER FLOOD: Thank you, Mr. President. This goes to the same but a little different issue. If you pull up page 23 on AM106, I am striking the words "concerned individual" in lines 7 and 8 on page 23. This is where the court wanted the authority to have...they apparently get these letters from people that come in and they say, listen, I live next door to Jane and I think her son is taking advantage of her. Okay. First of all, I don't like using the words "concerned individual." That is a recipe for a circus. I think "interested party" with the new definition that we develop between now and Select File will narrow who can write to the court, but it needs to be in an affidavit form. So that if the court is going to receive something it should be a sworn statement. Courts operate under the rules of evidence. And if we start making judges the recipients of anonymous letters, someone that says they are a concerned individual, I don't think they'd probably give them much weight, but you don't know. If you start letting judges get a long letter from somebody that's really bent out of shape that Jane's cut her out of the will, that's Jane's choice. I think if you're going to send something to the court it needs to be in a sworn affidavit form. And the judge, if the judge is going to use that information to issue an order ex parte, which means without a court hearing, you better be signing your name on the line in front of a notary and swearing so that it's a felony if you're lying to the court. That's one remedy. The other remedy is a Class II misdemeanor if you do it in bad faith. But I think that we are...I think this takes us the right direction. I don't think we should just let anybody, any Tom, Dick or Harry be able to send letters to the court. And if you are going to send one, you better be an interested party as the definition cites, not just a concerned individual. If you really are concerned, you can hire an attorney like the rest of the free world and try to motion the court to intervene as an interested party. But if you're going to send a letter, then sign your name to it and do it in front of a notary and make it a sworn statement. I think that's a necessary step. So I'm striking the words "concerned individual" and I am adding on language that says if it's going to be a Class II felony not to follow an ex parte...or Class II misdemeanor not to follow an order, it's also a Class II misdemeanor that if you do this in bad faith and it can be proven, which is admittedly a pretty high standard, fair is fair, you're also Class II misdemeanor sanction eligible. So I hope that this meets with the favor of folks. I think striking the words "concerned individual"...another issue here is we don't define "concerned individual" anywhere in the bill. So you talk about creating a problem, this is a problem. So please support AM111 to AM106. Thank you. [LB157]

SENATOR GLOOR: Thank you, Senator Flood. Senator Pirsch, you are recognized.  
[LB157]

SENATOR PIRSCH: Yes. I'd...thank you, Mr. President, members of the body. I wonder if Senator Flood would yield to a quick question? [LB157]

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SENATOR GLOOR: Senator Flood, will you yield? [LB157]

SPEAKER FLOOD: Yes. [LB157]

SENATOR PIRSCH: Thank you very much for your explanation of your amendment. I have a question with respect to a small part of the language that you include in your amendment. With respect to the...part of your amendment creates a new Class II misdemeanor which would carry with it the possible penalty of up to, my understanding, six months in jail, up to a \$1,000 fine or both. And the situation under your amendment in which this would be sprung it looks like a couple. If an interested party submits an affidavit either in bad faith, that's the first one as determined by a court; and then the second situation is--or submits an affidavit that lacks a factual basis. Could you kind of speak to situations in which an affidavit...well, first of all, who...these are not going to be technically in all cases lawyers submitting affidavits, is that correct? [LB157]

SPEAKER FLOOD: Well, that's right. I'm thinking about a situation where Jane's sister wants to make sure that that farm that was in the families name, that's in Jane's name, part of it goes to her daughter... [LB157]

SENATOR PIRSCH: Um-hum. [LB157]

SPEAKER FLOOD: ...and her son-in-law. And she decides that because Jane nominated her son, Bill, that Bill is not going to do anything to help the cousin. So I'm saying if you're going to let this evidence come in, and it is evidence, that there better be some protection that if you're going in there with an affidavit making outlandish statements about Jane's mental state or capacity or Bill, say that the sister of Jane says, listen, Bill is a drunk, he sexually assaults children, I mean, you name it and the allegation will come out in a family fight. I'm saying that there should be some penalty for coming in and throwing gas on the fire if that's done in bad faith and none of that stuff is true. And it sounds like the court is going to get into even more of this background check stuff. So I think that's okay. But I think there should be some sanction there. [LB157]

SENATOR PIRSCH: Sure. And that, I guess, that concern that you have is a valid, a very valid concern and one I think to be addressed. But I wonder if the...it's just the specific language. So it's either bad faith, which would clearly, I think, maybe be met by that, determined later by a judge or submits an affidavit that lacks a factual basis. Might there be more innocent type of filings of affidavits other than bad faith type of filings that would technically not...would lack a factual basis? And maybe even screened out by a judge as not even implicating a person's safety, health or financial welfare such that the person isn't necessarily operating in bad faith but yet it does, in fact, lack a factual basis and would be prosecuted equally on that basis? [LB157]

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SPEAKER FLOOD: You know, your question has actually got me thinking about another way to handle this. You know, if we're treating this like a situation where you try to get attorneys fees for filing a cause of action that lacks merit, you know, if you file a frivolous lawsuit then you get the award of attorneys fees. Maybe based on what... [LB157]

SENATOR GLOOR: One minute. [LB157]

SPEAKER FLOOD: ...you're saying there is, and I think this is valuable and that's why we have these debates, maybe a better way to do this is instead of assessing a Class II misdemeanor, like they do already in the bill, for my concern maybe you could give...you could make that intervenor, the concerned individual that we're striking, the interested party that we're striking, you could say, okay, you put in a bad faith affidavit, we're going to assess attorneys fees to you. And you pay that. You know, you want to come in and intervene, fine, then you can pay for all the attorneys fees this generated. Would you like that better? [LB157]

SENATOR PIRSCH: Well, yeah. And see, I don't even have a problem necessarily if somebody is coming in and doing the outlandish behavior of which you speak of, the bad faith is clearly implicated there. My concern is just with the second half that lacks a factual basis, which may involve more perhaps negligent type of behavior but...or...but again, these are not going to be in the filings done by individuals who may be entirely savvy. And so that...there may be a different way to skin that cat. And I'd be interested in just speaking with you about that as we go forward. Thank you. I'd... [LB157]

SENATOR GLOOR: Time, Senator Pirsch. Thank you, Senator Pirsch. The Chair recognizes Senator Wightman. [LB157]

SENATOR WIGHTMAN: Thank you, Mr. President. With regard to AM111, I would say that I generally do support the idea that it should be in affidavit form. As to exactly what the remedy for that should be, should it have no factual basis, I wonder if it wouldn't be better that the county court would have the authority to assess legal fees. Number one, if it's a criminal case you're talking about a whole additional case being filed in the criminal court or as a criminal file. A hearing will go on. There will be a dual track as far as what's actually required. If Senator Flood would yield to a question, I'd like to engage in conversation with him. [LB157]

SENATOR GLOOR: Senator Flood, will you yield? [LB157]

SPEAKER FLOOD: Yes. [LB157]

SENATOR WIGHTMAN: Senator Flood, I do think that the affidavit requirement is

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probably a good requirement, so that you just can't go in and tear off a piece of paper from a note pad and submit it to the judge. And I know you've engaged with Senator Pirsch with regard to whether there might be a better remedy than the Class II misdemeanor. I've suggested that a Class II misdemeanor would require, I think, still the filing of a criminal charge, could not be done in the same proceeding. And perhaps it would be better if the court just had the power in the same proceeding to, although that party may not be a party to this particular proceeding, maybe becomes one as an intervenor. But perhaps the assessment of legal fees is perhaps a better remedy. What would be your thought on that? [LB157]

SPEAKER FLOOD: Well, I think Senator Pirsch raises the question bad faith and lacks of factual basis, I don't need to have lacks of factual basis. You know, the reality is here, I think, a prosecutor in a civil probate matter would be hesitant to jump in and try and assess, in a court case they haven't been involved in, whether it's in bad faith. I want the...I like the idea of the Class II misdemeanor in there so there's at least a high bar that people see before they start sending stuff to the court. I like the idea of assessing attorneys fees for a bad actor. Because these estate, you know, fights, guardianship fights, you can drop 4,000 or 5,000 bucks on a month of full-time fighting. And I just, I mean, that's grandma's money. Grandma's paying for everything because it's in her estate. So I like the idea of the award of attorneys fees. So I think what I'm going to ask, Mr. President,...I guess, does that answer your question? [LB157]

SENATOR WIGHTMAN: Yes. [LB157]

SPEAKER FLOOD: Senator Coash, are you okay with that? I'd like to do the same thing with this amendment that I did before and Matt is helping me here on the floor. I'd like to withdraw and refile on Select File. [LB157]

SENATOR GLOOR: Mr. Clerk. [LB157]

ASSISTANT CLERK: Mr. President, AM111 is withdrawn and will be reoffered on Select File. In that case, Mr. President, Senator Flood would offer AM107. (Legislative Journal page 375.) [LB157]

SENATOR GLOOR: Senator Flood, you're recognized to open on your amendment. [LB157]

SPEAKER FLOOD: This is a conversation we have to have. And I...I know that I've put two amendments in and I've withdrawn them both. I think we're all going to be well-served by putting in a nice comprehensive amendment on Select File. But I'm a little concerned about requiring a potential conservator to put a credit report in. I'd been advised this morning before I got here that there's going to be an effort on Select File by a group in Nebraska to make sure we don't have any private/public records. So there's

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going to be an effort underway to put everything in the middle of the court file. You know, if somebody that wanted me to be their conservator, wanted me to do it, that's a high bar. But then they're going to ask me to print out my credit report and give it to a court of law so that a judge can look at it? What happens...you know, I think there's value there because you don't want somebody with a gambling problem managing grandma's money. I get it. If there's an issue with my credit and one of my family members knows about it, obviously which is often the case, they're going to come in and say, Mike has no business being grandma's conservator, he's got a gambling problem, he's got credit cards, he's got issues here and there, whatever it is. You know, he hasn't made his house payment for six months. But I think putting somebody's credit report together and making that part of the background is a little extreme. And I think we as a Legislature have to decide whether or not we want it. Now maybe it's a continuing conversation. But a credit report, you know, is like 30 pages. It shows every single payment you made from the time that you were 19 in college all the way to your, you know, sixties and beyond. I don't know. I'm just a little hesitant about credit reports. And if you want to be...if you want a credit report then you have to vote no on this amendment. I guess I'd rather see it taken out and make somebody come back in and show us why we need a credit report. I'm not against withdrawing the amendment, but this is a big deal. You know, checking the Sex Offender Registry, the Adult Abuse Registry, checking your criminal history, I get that, very easy to do. You should find out if there are issues there. But what about a credit report? Let's say a nominated conservator has a credit score of 495 and grandma really, really, really wants him. And the other son has a credit score of 790. How is the court going to weigh that? Is it who has the best credit report gets to watch grandma's money? Maybe the one with a 470 had a bankruptcy six years ago because his business went south and, you know, he's rebuilding his life. But he's been very good to grandma and he cares a lot about her and he's going to make the right decisions. When you start letting credit information come into court, I think...I know why the judges want it and I get that. But if you're going to put a credit check in the system then we better define what...how we want to treat it. Somebody that missed a couple of payments on a credit card in 2006 and has a credit score of 615 and his brother has 790 or 807, this makes me very nervous. And I think I'm interested to hear the discussion from other folks. At the same time, the last thing you want to do is let grandma get taken care of by somebody that needs the money and is siphoning off cash every month and paying themselves an exorbitant sum. And they'll take grandma, this is one of my favorites, they'll take grandma shopping. Well, you know, I'm grandma's guardian so I'm going to take grandma shopping. When they get back from their trip to the Westroads Mall, grandma got a really nice dress. And grandma wanted the guardian/conservator to get all sorts of stuff--a flat screen, you know, grandma wanted that person to have, you know, brand new Ralph Lauren wardrobe. That's wrong. That isn't how it's supposed to work. But that's how it does work sometimes. And you don't want that to happen. And I think that's the goal here is to prevent against somebody that siphons off cash. But I just don't know how you're going to deal with a credit report in this process. And I think it has to be kind of

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discussed before we rush into it. Thank you. [LB157]

SENATOR GLOOR: Thank you, Senator Flood. The Chair recognizes Senator Coash. [LB157]

SENATOR COASH: Thank you, Mr. President. Thank you, colleagues. I want to speak a little bit about how this requirement of a credit report made it into AM106 and into LB157. If you look at LB157 it said a credit check. And it was part of the...part of the requirements that...no choice, you did it. Well, AM106, and this is important, colleagues, because I want to make sure you're clear on what AM106 does. First of all, doesn't require it in every case. Not every case is going to require a credit check. This is only if ordered by the court. So this does open it up to some judicial discretion. Second thing I want to make sure is clear, these reports are private. This is not...the credit report does not become part of the public record of someone's guardianship. We've made that very clear. Why did the task force feel that this was an important piece to include in this reform of guardian and conservatorships? This is about information because this isn't...judges have the responsibility not only to appoint a guardian or conservator but there are other decisions that are made at the court's level. For example, should there be a bond required? Do we want...the judge right now...well, the bill will actually require a bond unless waived if the assets are over \$10,000. But within the court's order they can, for example, say, you know what, conservator, you're allowed to withdraw up to \$1,500 a month to meet the needs, and we're picking on grandma today. You know, I apologize to all the grandmas in the room. But the judge might say, you have the discretion to withdraw up to \$1,500 a month to meet grandma's needs, provide for her medical care and her mortgage, whatever it is, you can write the checks up to \$1,500. But if you need to spend in a month's time over \$1,500 then I want to...the court is going to require you to get permission to do that. Okay? So what the courts are asking for is information that they can use not just whether or not they're going to appoint somebody. That's not the only discussion that we need to keep this geared toward. But it's also as to what type of guardianship, limited guardianship or conservatorship. So that the judge can say, you know what? You are the best person but after seeing your credit report I'm a little concerned that you've got so much debt out there that grandma's assets are at risk. And so I'm going to put in my order, yes, you're the conservator, but before you spend more than X amount, you're going to have to get the court's permission. Or before I appoint you as a conservator, I'm going to require a bond on the assets of grandma up to this amount because I am nervous about how you may spend the money. That's the reason for this part in the bill. It is for judicial information as they set bonding requirements, as they set limited conservatorships. And it allows the judges to ask questions of the petitioner they might not have asked anyway. And at the end of the day the judges are still going to make a decision whether or not the person who's petitioning is the appropriate person to serve in that role or not, if they're going to make limits on bonds, limits on court orders or not. And ultimately it is their responsibility to make that decision. [LB157]

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SENATOR GLOOR: One minute. [LB157]

SENATOR COASH: The credit check is about information. You will see a lot, should this be part of the end bill, you'll see lots of guardians and conservatorships where there was never a credit check ordered. But what if one of those interested parties sends in a sworn affidavit to say, you know, the guy who petitioned this, he's got \$100,000 in debt and he's getting ready to file bankruptcy. Shouldn't the court know that? And do we want to take that guy's word or can the court say, you know what, let me see your credit so that I can make that decision. That's the reason for this part in the bill. Thank you, Mr. President. [LB157]

SENATOR GLOOR: Thank you, Senator Coash. Senator Council, you are recognized. [LB157]

SENATOR COUNCIL: Yes, thank you, Mr. President. The discussion that has been raised here, Senator Flood makes a valid point. And it was discussed not at great length in the committee as to what kinds of standards would apply if the credit report was provided. And, you know, is someone with a 590 appropriate to be appointed as a conservator or someone with a 460 is not? And so those were concerns. And I want you to know I have general concerns about the use of credit reports and legislation that's been introduced this session to address some of those issues where use of credit reports, in my opinion, have been abused. But I also think the context needs to be clarified to some extent. Most of the examples that have been used during this debate have been examples of situations where the ward has family members. And we have not really discussed the situation that, quite frankly, gave rise to the formation of the task force and that's the number of cases where some interested person is aware of the incapacitation of an individual and petitions the court to have a guardian and/or a conservator appointed for someone. The person petitioning the court may not necessarily be the individual who is seeking to be appointed as guardian or conservator but is just bringing to the attention of the court that there is an incapacitated person that is in need of someone to manage that person's affairs. And then the court then appoints oftentimes from a list of individuals who have indicated their willingness to serve as guardian or conservator. And the credit report insertion in this legislation was principally designed to address that situation where the person being appointed guardian or conservator is someone that's been selected by the court and has not been someone who has been nominated or has nominated themselves for that appointment. But the use of the credit report, and I appreciate Senator Flood making the point that while it was the task force's intent that the credit report not become a part of the court file, if it is filed with the court it will become a part of the court file which is a matter of public record. I think the fact that we have provided in the situations where there is the greatest likelihood and opportunity for abuse and mishandling of funds is when the assets of the ward exceed \$10,000. And LB157, as amended, provides that the court in

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those situations should require a bond. Now anybody who's had to have a bond knows that the bond criteria is basically your credit history. So in that regard, I think that the bonding requirement of LB157, as amended, will provide the kind of protection that the task force was seeking. I supported the recommendation that came out of the task force with some reservation in that regard, but I appreciate and understand what our intent was, and that's to provide the greatest degree of protection against misuse and abuse of... [LB157]

SENATOR GLOOR: One minute, Senator. [LB157]

SENATOR COUNCIL: ...the assets of an incapacitated person. So as a member of the task force and of the Judiciary Committee, I would not have any objection to removing the credit report requirement but basing it principally on the fact that the bill does have a bonding requirement which in and of itself is going to take into account someone's credit history. [LB157]

SENATOR GLOOR: Thank you, Senator Council. Senator Dubas, you are recognized. Senator Wightman, you're recognized. [LB157]

SENATOR WIGHTMAN: Thank you, Mr. President, members of the body. I was there when we discussed on our task force this particular requirement that there could be, and it was at the discretion of the court, could be a credit check ordered. I think you have to look at the background under what this committee was considering when it met, first met. And that was that there were several fairly high profile cases in the state of Nebraska in which conservators, occasionally a guardian, but mostly conservators that expended the funds of their ward. And at least in one of these high profile cases it happened to be one where gambling, actually withdrawals were made and the money taken to either the casino or the racetrack and was used to finance the conservator's gambling habits. And that was the reason out of which this arose. And it's going to be very difficult for the court to evaluate that without some ability to order a credit check. And certainly Senator Council is right that one of the matters that we were looking at was ones not where a family member or two competing family members came in and asked to be conservators. But in many cases there is no one there to be a conservator and they appoint somebody within the community, a neighbor perhaps. And it's a fine balancing act, quite frankly. Because we are really short on people who would accept that responsibility. And it may well be true that the right to order a credit check will discourage some of those who would have accepted that position to serve as the guardian or conservator of an incapacitated person. But at the same time, I do think that the credit check did address some of the problems that we saw that had led to these embezzlement cases or improper use of fund cases. So again, it's a very fine distinction as to how we are going to keep those from being public. And I think Senator Council is probably correct that in effect they either are all public or could become public upon the questioning of anybody that was an interested party. So it seems to me we need some

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protection in there that the court could order that within its discretion, and this is discretionary, under the...under LB157 as it would be amended by AM106. Again, maybe it's something that we could discuss what limitations we could put on that. I would hope maybe Senator Council would be involved in any of that discussion on Select File as well. So with that, I thank you, Mr. President. [LB157]

SENATOR GLOOR: Thank you, Senator Wightman. Senator Pirsch, you're recognized. [LB157]

SENATOR PIRSCH: Thank you, Mr. President, members of the body. I wonder if Senator Coash would just confirm that which was, you know, a statement that was just made by Senator Wightman, that being that the implementation of this safeguard would only be permissive, optional to the discretion of the judge. Is that correct? [LB157]

SENATOR COASH: That's correct. [LB157]

SENATOR PIRSCH: Okay. There are mechanisms in other courtrooms whereby sensitive information that is offered to the court doesn't become essentially a part of the public record. The juvenile courts, for instance, I think they have an exhibit file that they keep separate and apart from that which they call the court file. And in that way, sensitive information pertaining to the particular juvenile is, you know, obviously, protected. So that doesn't give me the heartache. But I just had a few questions, Senator Coash. Does this...are you familiar with how other states approach this issue? Did you look to other states for best practices? [LB157]

SENATOR COASH: Yes, Senator Pirsch, we did look at other states. And as you might imagine, many states do this very differently. Some states, with regard to the credit check, don't do anything. Some states mandate it. Some states go the route we did, which was discretionary. The original bill, LB157, didn't have any discretionary authority in there, the amendment adds the judicial discretion to that. So that... [LB157]

SENATOR PIRSCH: Yeah. [LB157]

SENATOR COASH: ...that was the route we went. [LB157]

SENATOR PIRSCH: Do you know where this was...where the a...I mean, was this just a conclusion they all came to or was this based upon some particular law that you decided to go with this paradigm of credit check? [LB157]

SENATOR COASH: This wasn't based on a particular law that I can point to. I can tell you it was based off of the judges' experience in appointing a conservator, not putting any limits on that and then later on finding out that the person they appointed was in danger of losing their house. And so... [LB157]

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SENATOR PIRSCH: Sure. And that's what I wanted to question as well. In the case...Senator Wightman mentioned a high profile case in which someone, I think, had some gambling debts and was, I think, took a large sum of money from a number of individuals then as a result. Would this cure have caught, in other words would this credit check have caught that woman's predicament such that the judges' would have been on notice if they had that information? [LB157]

SENATOR COASH: Well, I can't get into the mind of the judge who made that appointment. But this is what I think would have occurred. The judge who appointed that high profile case and... [LB157]

SENATOR PIRSCH: Um-hum. [LB157]

SENATOR COASH: ...appointed that conservator probably would...if there would have been information indicating high debt or something like that then that judge more than likely would have put some limits and said, you know, I'm going to allow you to serve the role of the conservator but I'm going to put some limits on how much you can spend and what kinds of things will require court notification of and things of that nature so. And that was the idea behind this part of the bill. [LB157]

SENATOR PIRSCH: Sure. And that's all I'm trying to get a sense of in these cases where guardian/conservators act in bad faith and take money, in most of the cases if we had this type of information would it have been helpful? Or is this just a few...I'm trying to get a sense of how helpful this measure will be, would be if enacted. [LB157]

SENATOR COASH: Well, I can tell you the committee felt and the committee had several judges who make these appointments regularly and the consensus of the committee and the reason it became an official recommendation... [LB157]

SENATOR GLOOR: One minute. [LB157]

SENATOR COASH: ...that made it into this bill was that they felt this would be a tool for judges to use in how they put parameters around their appointments. [LB157]

SENATOR PIRSCH: Okay. So it sounds like you feel it's a very important tool in the arsenal. [LB157]

SENATOR COASH: I do. [LB157]

SENATOR PIRSCH: Okay. I'd yield the balance of my time if you had any closing remarks. [LB157]

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SENATOR GLOOR: Forty seconds, Senator Coash. Senator Coash yields. Senator Schumacher, you are recognized. [LB157]

SENATOR SCHUMACHER: Thank you, Mr. President. I generally share Senator Flood's concern about the requirement of having a credit report floating around in the county court and possibly making it into the public record through the filings with the court. I think it's a legitimate concern. I think it also could act as a deterrent to a competent and well-qualified individual serving as guardianship. There should be some alternative available should the county judge require a credit report. And an alternative maybe in many cases should be something even alternative to a bond because bonds cost money and depending on the size of the estate may also be a deterrent. So, Senator Coash, would you yield to a question? [LB157]

SENATOR COASH: Yes. [LB157]

SENATOR GLOOR: Senator Coash. [LB157]

SENATOR SCHUMACHER: Okay. Senator Coash, would it be possible and would it fit the needs of this particular paradigm if we, the judge or if a person was required by the judge to submit a credit report, if alternatively he filed an affidavit of a certain degree of net worth? [LB157]

SENATOR COASH: I think a person filing their net worth, that's going to give the judge some information. I don't know if it's going to give the judge the type of information that they were looking for in order to make their orders. [LB157]

SENATOR SCHUMACHER: Yeah. Well, if the judge said, look at alternatively or our provisions say alternatively an affidavit of \$50,000 of net worth will satisfy this need, I mean that shows that you're not dealing with somebody who has no assets or has spent all their money gambling or something like that. [LB157]

SENATOR COASH: You know, I'm certainly open to that possibility, Senator Schumacher, because maybe that is a tool that is a way to get to the same end--which is really what we're trying to do here with this part of the bill, is judicial information so that they can make good decisions for their wards. And this information...you know, this may be better information or the same as a credit check and we can look into that. [LB157]

SENATOR SCHUMACHER: I have no further questions. I yield my time to Senator Coash. [LB157]

SENATOR GLOOR: Two minutes and 36 seconds, Senator Coash. [LB157]

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SENATOR COASH: Thank you, Mr. President. I will take the time to address a couple of things, and Senator Schumacher mentioned this and I think Senator Pirsch and even Senator Flood mentioned this. We have a problem in our state of getting people to step up to do this service, and we really do need to take this opportunity to thank those who do step up and take on this, because it is not something that people do because they make a lot of money at it. There's a lot that goes into becoming someone's guardian and/or conservator, and they do it because it's the right thing to do and that it really is the Nebraska way. So that is something to be considered. Senator Council mentioned that maybe these requirements were covered through the bond and the other elements of AM106 required bonds unless waived by the court. So we ought to consider all of those. At the end of day what I will say, colleagues, though, is that I believe this will be...I believe this part of judicial discretion will be used discretionary and I don't believe that it will be used when it's not to be used. I think we can trust our judges to understand when this is appropriate and when it's not. And I will end and when it comes back to my turn I'll ask Senator Flood a question. Thank you. [LB157]

SENATOR GLOOR: Thank you, Senator Coash. The Chair recognizes Senator Nelson. [LB157]

SENATOR NELSON: Thank you, Mr. President and members of the body. I'd just like to stand up and support what Senator Coash is saying about this. If you look at page 23, you'll see that--well, actually it's 24 there--starting with the three required checks: a national criminal history, a central register, and then the sex offender registry. Now those have been lumped together as things that really need to be done and they can be waived if you want an expedited hearing. And let me tell you a little bit about the practice in Douglas County; I don't know about the rest of the state. If you want to apply to have a conservator or a guardian appointed just in the regular course of affairs, you make your application, you get it signed, and it's not going to be heard for four or five or six weeks before it gets up. And that gives you time then to get these three required things put forward for the review by the court unless waived by the court for an expedited hearing. And I suppose later on the court can come...there will be a temporary appointment because it's an emergency of some sort. But then there will be another hearing down the road and these things can be considered. It's not clear to me this has been selected out. You have those three things and then on line 16 of page 24, there's (b). Shall...it provides that if someone has been nominated for appointment, then the court...and this implies...can ask for a credit report. And this implies to me that maybe this is something that's done at the time of the actual hearing where the judge takes a look and he sees that there's no problem with the nominee but is a little suspicious about something and may just require some additional information. And a credit report I think would be helpful. But again it's entirely discretionary. As Senator Coash says, it's hard to get guardians. You can have a family member if they're concerned. But in a lot of instances you're relying on attorneys or other individuals who make themselves available to serve as guardians. And I think the court in Douglas

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County maintains a list of people who might be available, and those people have been checked out, ordinarily, and there would have been a credit report done at some time if they're going to be doing a number of these--certainly in the future, based on the experience that we had with this one individual. It also says here that they shall...they're for a review of the court. They "shall not be disclosed or considered a public record." Now if Senator Coash will entertain a question. [LB157]

SENATOR GLOOR: (Gavel) Senator Coash, will you yield? [LB157]

SENATOR COASH: Yes, I will. [LB157]

SENATOR NELSON: My reading--thank you, Senator--my reading of this would be that that would also apply to the credit report. Is that your understanding that it would not be disclosed or be a matter of public record? [LB157]

SENATOR COASH: That is correct, and I think Senator Pirsch mentioned earlier that courts have a way of separating out pieces of the court record from the public. And the intent here is that should a credit report ever be ordered by a judge, that that would not be part of the public record. [LB157]

SENATOR NELSON: All right. Okay. So again I would emphasize that it is discretionary with the court. It might be used on an occasional basis depending on the appearance or (inaudible) of the nominee. And I just think it wouldn't impose an undue burden on the nominee in those individual cases probably, and probably would be helpful to the judge for the very purposes of avoiding what we see here: someone who has got debts and they're not satisfied. I don't think there's any bank who's going to lend money anymore that will do so unless they have a credit report to give them some indication. [LB157]

SENATOR GLOOR: One minute. [LB157]

SENATOR NELSON: You can fill out an affidavit. You can say, well, I have assets in excess of \$100,000, but those aren't necessarily true and only a strong penalty would avoid that sort of thing. So again I think I would support leaving this in. Thank you, Mr. President. [LB157]

SENATOR GLOOR: Thank you, Senator Nelson. Senator Coash, you're recognized. [LB157]

SENATOR COASH: Thank you, Mr. President. Would Senator Flood yield? [LB157]

SENATOR GLOOR: Senator Flood, will you yield to a question from Senator Coash? [LB157]

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SPEAKER FLOOD: Yes, I will. [LB157]

SENATOR COASH: Thank you, Senator Flood. Do you see any room in this amendment to...in order to narrow it down a little bit and give a little bit more direction to judges if we were to...do you think it's possible to insert some language where it might say "for probable cause a judge...", you know, to give them a reason to order that rather than no reason? Do you see any room for language that would get us there? [LB157]

SPEAKER FLOOD: I see what you're saying and that thought crossed my mind, but I don't know if I'm there yet. I think my light is on next, and, you know, I almost think maybe we vote on this amendment and then if it's stricken then we can talk about it; if it stays I'm fine then. I'm not going to come back at it again, but. I think we're making it...we'll make it even more difficult if we try and insert probable cause because, what's probable cause? I don't know how you'd define that. I don't...that's a criminal phrase in a civil context. So I'm...you know, that's something I'd think about between now and Select. [LB157]

SENATOR COASH: Okay. Thank you, Speaker Flood. I will yield the balance of my time to Speaker Flood. [LB157]

SENATOR GLOOR: Three minutes 46 seconds. [LB157]

SPEAKER FLOOD: I knew this would come out at some point in my debate on this bill, but the separation of powers is something we have to get our hands around in the Legislature. And what we have here is a group of lawyers, concerned folks, law enforcement, and then we have a couple of judges that are telling us from the bench: It would be nice to have this evidence. We've got to be very careful as a Legislature to maintain the separation of powers. It makes sense to put judges on the Community Corrections Council because they deal with the inmates and they deal with the suspects and the defendants. It makes sense to listen to their thoughts on what evidence they'd like to see. But if we create a system of government where the judiciary tells the legislative branch this is the evidence we need, that's not their job. It should never be their job because they stand in judgment of the laws that we pass to decide whether or not they're constitutional. They stand in judgment and they're supposed to look at the evidence that's presented to the court. I like mediation because it sends parties into a different process to try and find a...you know, resolve a dispute. But here we've got to be very careful. I know it makes sense to say, oh, give them the credit report. But we basically have judges here telling us: This is the evidence that I need. And I don't think they're doing it for the wrong reasons. They're doing it because it makes sense. But where does it stop? We set standards; we make the rules. They administer the rules through the court system and decide whether our rules are fair under the constitution. But I'm a little frustrated that we've got a court basically saying, or members of the court saying: This is the evidence that we need to process these kinds of cases. I understand

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why they want it. I just...you know, I haven't...I think Senator Coash has better language in this amendment than was in the green copy. The green copy says you just provide your credit report. Here the judge has to say, well, I see a reason to need a credit report. If you want to talk about people not willing to serve as conservators: Oh, by the way, you need to handle all of your brother's financial affairs; you've got to put him in the nursing home; you're going to have make the decisions with the doctor; and on top of that, we've got to make sure you're not a sex offender, a criminal, somebody that abuses adults. I get those three. Oh, and by the way, go down to the bank and get me a credit report and let's give it to the court. And it sounds so simple--Oh, the court will just seal this up; they'll just stick it in a special file. [LB157]

SENATOR GLOOR: One minute. [LB157]

SPEAKER FLOOD: That takes time to seal those things up. And then they go to a special place at the courthouse and maybe they don't know where it's at, but I guarantee you, from what I understand there are people coming back on Select File that are going to say: No secret records. I guess if there's going to be an order to get a credit check, then it has to be a very, very, very high standard. But what's to stop an opposing lawyer from saying, listen, you want Bill to be the guardian; then I'm going to make a...I'm going to issue a subpoena to get his credit report and I'll show that to the court as evidence. That's the officers of the court's job to bring that out in an adversarial system. I'm just not there yet. I'd like to strike this from the amendment and I'm not going to close down operations in trying to find a solution to the issue on Select File. Thank you. [LB157]

SENATOR GLOOR: Thank you, Senator Flood. The Chair recognizes Senator Dubas. [LB157]

SENATOR DUBAS: Thank you very much, Mr. President. I really have appreciated the dialogue going on with this bill this morning. I understand the gravity of what we're talking about and this is probably one of the more substantive bills we will be dealing with this session. I'm inclined to agree with what Senator Flood is talking about. I understand what credit reports give you. But I think it is really pretty much a black-and-white snapshot of a person's financial...the way they've conducted themselves financially. But I don't think the credit report really gives the story behind the numbers. You know, there are people out there who are in bad shape with their credit because they've made irresponsible decisions. But we have people out there who may have a low score on their credit report who have had to file a medical bankruptcy or, you know, with the economy and have lost their jobs, so they've been unemployed for a while. So it's not through any fault of their own that, you know, their credit score may have gone down. So I do have serious reservations about people having access to a person's credit score and credit history. Is Speaker Flood still available for a question? [LB157]

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SENATOR GLOOR: Senator Flood, will you yield to a question from Senator Dubas? [LB157]

SPEAKER FLOOD: Yes, I will. [LB157]

SENATOR DUBAS: Thank you very much, Senator Flood. Again I appreciate your comments and the things that you're bringing to this debate and discussion. So do the judges have any other way of accessing a person's financial history so that they can get an understanding of where this person has been or where they're at right now with their financial responsibility? [LB157]

SPEAKER FLOOD: Not really. I mean they review the evidence that's presented. In some cases I've seen a judge lean over to the witness and ask some questions. But to be honest, I don't think they do. [LB157]

SENATOR DUBAS: But I think your previous comment you said something about the opposing attorney has that ability to raise that issue... [LB157]

SPEAKER FLOOD: Right. [LB157]

SENATOR DUBAS: ...during the proceedings. [LB157]

SPEAKER FLOOD: Right. I think, you know, if I...I have never seen somebody get somebody's credit report, but I think if you put the guy that's been nominated on, or the female that's been nominated on for a guardianship or a conservatorship appointment, call him as a witness and say, what are your debts, what are your assets, where are your credit cards, what are the balances on those credit cards? And if the witness is there saying I don't know, I'll say you don't know how much money you owe on your credit cards? You don't know how much your house is worth; you don't know what the debt on your house is; you don't know how much is in your checking account, and you want to manage somebody else's money? I mean I think there are ways to get at that if you've got a bad actor. But I don't...I'm not a believer that you should get a credit report. I think you could probably subpoena one if you absolutely had to. [LB157]

SENATOR DUBAS: Well, I think that's what I'm looking for. I understand that this information would be important and I think you made a point earlier, too, if someone has a gambling problem or has been irresponsible with their finances, the family members know it and they're going to make sure that that is brought out. But I guess I just wanted to make sure that should a judge need this information, there is a way to get it brought into the proceedings. So thank you very much, Senator Flood. [LB157]

SPEAKER FLOOD: Okay. Oh no, I'm just reading. [LB157]

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SENATOR GLOOR: Thank you, Senator Dubas. Senator Council, you are recognized. [LB157]

SENATOR COUNCIL: Yes, thank you, Mr. President. Again, relating back to the discussion that took place during the task force meetings, a lot of this work was done in subcommittees and not all of the task force members were on each subcommittee, but in all fairness, my recollection of what the discussion was around credit reports, I don't believe that there are any restrictions currently on the judiciary to ask someone who is seeking appointment to provide a credit report. I understood one of the reasons that it was being placed in the statute was that there would be no question that the judge had the authority to, the judicial authority to request and obtain a credit report. I think many of the judges believe they currently have the authority to do that but wanted that to be definitive in terms of the amendments that were being made. Secondly, the second point--I'm going to still get back to it--AM106 does currently require a bond if the ward's assets exceed \$10,000. Surety bonds, the companies that issue surety bonds, they base the issuance of those bonds on their determination of an individual's credit worthiness and their ability to be responsible for the amount of money that is the subject of the bond. There is nothing in AM106 that prevents a judge in a case where the assets of the ward are less than \$10,000 from imposing a bonding requirement. But I submit to you that in that case the cost of obtaining--it's almost a ying and a yang--the cost of obtaining a \$5,000 surety bond against the cost of obtaining a copy of your credit report. So I just don't think that this particular provision would be utilized by the court that often because the cases where you're going to have the courts really being concerned about the conservator's ability to effectively manage someone else's assets are going to be when those assets generally exceed \$10,000. And you have a bonding requirement in here with respect to those types of situations, and surety bonds are issued on the basis of an individual's credit worthiness. So I think it does no harm to have the provision remain because, quite frankly, I think the cases will be few and far between where a judge would seek a credit report as opposed to imposing a bonding requirement. Thank you. [LB157]

SENATOR GLOOR: Thank you, Senator Council. There are no senators wishing to speak. Senator Flood, you're recognized to close on your amendment. [LB157]

SPEAKER FLOOD: Thank you, Mr. President. In the age of identity theft, a credit report is gold to a thief. By and large, in this state, we have good people that want to serve as conservators or guardians. I worry about them not wanting to serve because of the hoops that we run them through. I worry about dictating, as a Legislature, on behalf of judges what kind of evidence that they shall receive in a proceeding like this. But more than anything, I'm not convinced this is necessary. Senator Council brings up a good point: There's going to be a bond in most cases under AM106. I think we are crossing a line here with credit information that will come back again and again in other bills in

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other types of cases. That worries me. What's next? A personal representative in an estate has to provide a credit report? Do we want that? I'm asking you to vote yes on my amendment but I have committed to Senator Coash and I will commit to Senator Nelson and Senator Wightman: If there's a better way to do this, I'll--we're going to put an amendment together for Select File anyway--I'll work with them. I think the purpose is good. I just, on the credit report side, can't do it. With that, I would hope that you would vote yes on AM107. [LB157]

SENATOR GLOOR: Thank you, Senator Flood. The question is, shall the amendment to LB157 be adopted? All those in favor vote aye; all those opposed vote nay. Have you all voted? Record, Mr. Clerk. [LB157]

CLERK: 33 ayes, 6 nays, Mr. President, on the adoption of Senator Flood's amendment to Senator Coash's amendment. [LB157]

SENATOR GLOOR: The amendment is adopted. Items for the record, Mr. Clerk. [LB157]

CLERK: Mr. President, thank you. Your Committee on Transportation, chaired by Senator Fischer, reports LB47 and LB212 to General File with amendments; those reports signed by Senator Fischer. Government Committee, notice of hearing, signed by Senator Avery as Chair. Reference report referring certain gubernatorial appointees to a standing committee for confirmation hearing. I have an amendment from Senator Cornett to LB81 to be printed; Senator Flood to LB157 to be printed. Senator Mello would like to withdraw LB492, Mr. President. That will be laid over. (Legislative Journal pages 375-378.) [LB47 LB212 LB81 LB157 LB492]

And a priority motion. Senator Flood would move to adjourn the body until Thursday morning, January 27, at 10 a.m. []

SENATOR GLOOR: You've heard the motion to adjourn until 10 a.m. Thursday morning. All in favor signify with an aye. Those opposed, nay. We are adjourned.