The meeting was called to order at 10:00 a.m. Senator Close was in the Chair.

PRESENT: Senator Close
Senator Hernstadt
Senator Don Ashworth
Senator Dodge
Senator Ford
Senator Raggio
Senator Sloan

ABSENT: None

SB 98 Provides for filing and enforcement of foreign judgments.

Judge Charles Thompson, Eighth Judicial District, Clark County stated he would be speaking on behalf of the District Judges Association as well as some of the lawyers he has talked with. SB 98 proposes to enact the uniform enforcement of Foreign Judgments Act. The present procedure is as follows, "if a litigant in another state sues someone, and obtains a judgment, and wishes to collect on that judgment in Nevada, he must come to this state and file a new law suit upon the judgment, seeking a new judgment on the previous judgment". The problem is the United States Supreme Court has outlawed quasi in rem jurisdiction. This means if the plaintiff is suing on a judgment from another jurisdiction, he has to serve the defendant personally within the state. If the defendant's property is in this state, Nevada can't enter a judgment upon the foreign judgment, unless there is a registration of judgment, such as is being proposed in SB 98. Seventeen states have adopted the Uniform Act. Most other states that have not adopted this act have a similar provision. The Federal Courts allow for a registration of a judgment from one jurisdiction to another. There would be no cost to government from the standpoint of the filing fee. The same filing fee is charged for the registration of a judgment, as for the commencement of another action.

Senator Raggio asked how this would affect foreign divorce judgments.

Judge Thompson stated that a divorce is a decree, as opposed to judgments. There is a distinction.

Senator Raggio stated he felt divorce decrees should be excluded from this act. Many people come to this state to get relief from another jurisdiction and this state should be consistent with that situation.

Senator Close stated that either a divorce is valid, or it isn't. If it isn't then you have the right to contest it, according to Section 125.

Senator Hernstadt stated he had a problem with the notification. He questioned why a copy couldn't be sent, first class, to all the known addresses as well as the certified copy. He felt a creditor might deliberatly mail the certified copy to the person where he wouldn't receive it, and then file the judgment to collect on the assets.

Judge Thompson stated that type of thing had never been brought to his attention. Many individuals refuse anything from an attorney whether it is certified or not. They don't want to look at it and send it back.

Senator Ashworth asked if the Judge could see a problem with the word "exemplified" copy. Many people don't know what exemplified is.

Judge Thompson stated that most people in this state are willing to accept a certified copy in evidence, rather than an exemplified copy. However, as this is the wording in the bill, he felt it must have something to do with the wording in the Uniform Act.

SB 99 Consolidates various provisions relating to wrongful death actions.

Senator Hernstadt asked what would happen if you had two people living together under common law. The man or the woman is killed in a wrongful death situation. If there were no blood relatives, would that go under the intestate statute as legal heirs?

Judge Thompson stated that despite inconsistent rulings among judges, under this law persons living together would not be entitled to bring a cause of action.

Senator Close stated that as far as he knew, common law marriages cannot be formed in the state of Nevada.

Judge Thompson stated that you cannot perfect a common law marriage in this stated. However, those perfected in another jurisdiction are recognized. Paragraph 2, describes that there are two causes of action for wrongful deaths. One by the heirs and one by the personal representative of the decedent, that is not intended. The personal representative of the decedent is frequently a surviving spouse who likes to bring a cause of action on behalf of the children of a prior marriage of her late husband. Or she wants to collect a fee as the executrix. The action should be maintained by the immediate heirs. There is also another action by the personal administrator or executor for other damages. Section 3 states that these may be joined. Section 4 describes what the defendant may recover. It does state that you may not recover damages 60 for pain and suffering.

Senator Ashworth asked what happens to the individual who is critically injured and is kept alive for a period of months. He goes through a tremendous amount of suffering. This bill would mean that his estate cannot recover for that pain and suffering.

Judge Thompson stated that this was the California rule. Frank Daykin helped him draft the bill so it would conform. He stated he doesn't care if this rule is adopted or not, just so there is some rule adopted.

Senator Close stated that as Judge Thompson was only up here for the day, the Committee would go through and hear the Judge's testimony and then reschedule these bills for further hearings.

SB 101 Limits peremptory challenges of jurors by each side.

Judge Thompson stated this bill corrects an error that was made last session when SB 262 was passed. The bill extensively revised Chapter 16. In deleting a phrase from Section 1, it changed the meaning of the final sentence in that Chapter. The Statute says, "each party is entitled to four peremptory challenges." It was always intended that each side be entitled to four peremptory challenges, with additional perempts applicable if there were diverse parties on a side. This bill merely clarifies what was intended in the beginning.

SB 104 Revises provisions relating to disqualification of judges.

SB 111 Reinstates provision for one change of judge upon filing of affidavit alleging bias.

Judge Thompson stated he would like to talk about SB 104 and SB 111 together. Before the last session, there were two methods by which a judge could be removed from hearing a civil case. A litigant could come in and file an affidavit of bias or prejudice against the judge. If you thought the judge was prejudiced, he would voluntarily remove himself and assign the matter to another judge. The second judge would hear the context and then decided if the first judge was in fact biased and prejudiced. The second method provided that a litigant could file, based on bias and prejudice, and pay a sum of $25. This method somehow gave credence to the affidavit. However, the judge was not entitled to respond, no hearing was held, and he was automatically removed from the case. The judges, and members of the bar came to the Legislature last session and said they wanted that portion repealed that removed a judge without giving him an opportunity to respond. Now, for reasons that only the Supreme Court can adequately explain, in

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Johnson vs. Goldman (see Attachment A), they declared unconstitutional the portion of the statute that created the peremptory challenge. In so doing they said, "because the present statute is unconstitutional, the prior statute which had been repealed by the present statute, remains in effect". What they did in essence was to revive that which the Legislature had repealed.

Senator Raggio stated he felt the courts reasoning on this was an invasion of the judicial process. He questioned why, if this is an invasion, wasn't the previous statute a similar invasion? He felt there could be a problem with this.

Judge Thompson stated that SB 111 is called the revisors bill by Frank Daykin. Mr. Daykin feels that whenever the Supreme Court purports to put back into the statute something that has been repealed, he is obligated to write a bill that physically puts it back into the statutes. This is what this bill does. SB 104 would repeal once again, that which has been repealed before. This time the court cannot revive it, because nothing was enacted in its place. It would be like having a will which was revoked. By revocation of the will you revive a prior will. Frank Daykin states the the Legislature can repeal a provision of the law. When you did this before, you enacted the peremptory challenge statute at the same time. If this had been done separately there would be no problem.

Senator Sloan asked what constitutes actual bias?

Judge Thompson stated the law today provides for a method of removing or disqualifying a judge for actual or implied bias or prejudice. However, this is a factual thing, it is like saying what is negligence.

Senator Raggio stated that when the Supreme Court came down with their decision, they informed him they were in fact going to adopt a rule which was in essence the wording of the peremptory challenge statute. However, that action has never seen the light of day. He brought out the fact that Northwestern Law Review has done an excellent article on the whole issue and pointed up that the court was improper.

Judge Thompson stated the $25 affidavit is really the one that offends everyone. This is used by the lawyers as a delaying tactic. They come in on the eve of a trial, the judge won't let them have a continuance, so they run over, pay the $25 to file an affidavit, and you can't do anything about it.

SB 102 Adds to procedural requirements for disqualification of judges.

Judge Thompson stated this bill would enable disqualification of a judge by the filing of an affidavit. This is the procedure by which the judge has an opportunity to file an opposing affidavit within two days. Last session we neglected to provide that the judge or his chambers be served with a copy of the affidavit so he would know when the two days would start. This would simply provide for the notification to the judge or his chambers.

SB 103 Requires bail to continue through different proceedings on same charge.

Judge Thompson stated this bill has to do with individuals arrested for crimes, who post bail with the Justice Court and then for whatever reason, the proceedings in Justice Court do not continue. Usually the District Attorney takes the matter to a grand jury and the defendant is indicted. The defendant is then brought to District Court by summons. What unfortuantely happens, is that because there are no further proceedings in the Justice Court, the J.P.'s exonorate the bond that has been posted. The defendant than appears in District Court without bond being posted for him. The District Judges are reluctant to order a new bond because that costs the defendant a new premium. Most of the present bonds are written so that they preclude transfers from one court to another. Those that have been transferred are not authorized by Statute. This would provide a mechanism for the transfer of bonds from one court to another to follow the same charge or proceedings. This is substantially the procedure that is followed in California.

Senator Close stated he had a call from the bondsmen and they have a real problem with this. They feel that a different risk exists after a person has in fact been convicted of a crime, and asks for an appeal. If they surrender him, he has to go back to jail. They would rather have the bond expire after a conviction. If the fellow wants an appeal bond they would want a higher premium because of the additional risk involved. They are also concerned over the 30 day limitation.

Judge Thompson stated the reason for that limitation is to give the District Attorney an opportunity to indict if he wants to. Most indictments are presented to the Grand Jury within 30 days. This also is the California rule.

Senator Sloan stated that often the police department will get the person into the wrong place because they are not certain where the crime occurred. This rule would at least put the bondsman on notice that for up to 30 days he may still be liable on that bond. It is exactly the same offense, but misfiled because of the police department.

SB 108 Makes a technical change concerning challenges to sufficiency of evidence before grand jury.

Judge Thompson stated this merely clarifies the intent of Assembly Bill 38 of last Session. Two years ago the procedure was revised. A defendant in a criminal case could file a petition for a writ of habeas corpus to test the probable cause to hold him for trial. We provided a system by which he had 21 days after his initial hearing to file the writ. The intent and express reason for that bill was to provide that the courts could go ahead and arraign him, take a plea, and set a trial date all at one time. When we enacted the bill we overlooked Section 172.155. It made the application after the plea. This will make application before the plea or you waive your right.

SB 129 Eliminates appeals from the granting or denial of writs of habeas corpus.

Judge Thompson stated there is a provision for testing probable cause, by filing a writ in District Court, 21 days after the initial arraignment. There is a provision in the present existing statute for an appeal of a decision denying that petition. There are from 3 to 500 appeals each year from the denial of petitions for writs of habeas corpus. Not more than one or two percent are reversed. This bill would eliminate the right of appeal on the denial of petition for writ of habeas corpus. The one problem here is that you are also denying the state the right of appeal.

SB 89 Specifies when monetary judgments for minors may be paid to parents or must be paid to appointed guardians.

Judge Thompson stated this is a housekeeping bill. Over the years, the judges have been somewhat lax in protecting the estates of children. If a child has a claim, usually a personal injury case which he compromises, his attorney settles it. The attorney goes in with the order of compromise on the claim, the judge signs the order and the proceeds go to the parents without requiring a bond being posted. The parents use the money. They buy a car, add onto the house, or something of that nature. The proposal here is to require the judges in larger estates, where guardians are not already otherwise appointed for the minor, to appoint one and post a bond. He also believes that the base figure should be $2,500. A lesser figure would leave you with almost nothing after all the costs are taken out.

SB 27 Abolishes causes of action for seduction and criminal conversation.

Judge Thompson stated that to begin with there were 4 torts that fall within the category of interference with family relationships. These were alienation of affection, breach of contract to marry, seduction, and criminal conversation. The first two were abolished in 1943. For some reason seduction and criminal conversation were overlooked. Most other states have abolished these. Criminal conversation is the tort of an outsider having sexual intercourse with a husband or wife. It is in essence defilement of a marriage bed. Its criminal counterpart is adultry. Seduction is the act of inducing a female of previously chaste character, usually a minor, to have sexual intercourse by the use of arts, or persuasion. The action was historically brought by the father. Its criminal counterpart is statutory rape. The problem is there are few causes of action brought for criminal conversation or seduction, but they are frequently threatened to extort settlements. It would be illegal for a lawyer to threaten a cause of action if that action has been abolished by the Legislature. He then read a caption from Prosser to sum up his feelings on this bill (see attachment B).

As there was still some time left Senator Close stated he would take testimony on these bills from anyone that was here to testify.

SB 103 Requires bail to continue through different proceedings on same charge.

Bill Reynolds with the Insurance Commissioners Office, stated he had been dealing with the bail bondsmen and bail bond companies for the past few years. He had misgivings about the way the bill was written. It could possibly allow the companies to apply for a rate increase. The present rate is 10% of the penal value. Presently when you post a bond you pay for the bond up through your sentencing. If at the time of sentencing you want to appeal you have a new consideration or new risk factor. The way this bill is written it could be interpreted that everyone would have to pay on contemplation of an appeal. The Insurance Division fees that there has been too much latitude and discretion on the part of the individual agent. If the agent is unwilling to write the risk, that decision should be made before the bond premium is accepted. This shouldn't be some subterfuge to get the money and then surrender the client.

SB 99 Consolidates various provisions relating to wrongful death actions.

Mr. Peter Neumann, Nevada Trial Lawyers Association read briefly from a letter he had written to this Committee. As time was short he left copies with all the members for their consideration (see attachment C).

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Senator Close stated that he had one BDR for Committee introduction.

BDR 41-1172 Tightens certain provisions relating to gaming licensing and control.

The Committee voted unanimously for Committee introduction.

Meeting adjourned at 10:58 a.m.

The meeting reconvened at 11:35. Senator Close was in the Chair and all were present.

Senator Close stated they would try to take action on some of these bills as time would permit, as Commerce and Labor were to meet at 1:30 p.m.

SB 19 Raises monetary limit of jurisdiction of justices' courts.

After some discussion by the Committee as to what the limiting figures should be for small claims and Justices' Courts they decided to go with the $600 and $1,000 figures and see what the impact was on local governments during the next two years.

Senator Sloan made a motion to set the figures at $600 maximum for Small Claims Court and $1,000 for Justices' Court.

Seconded by Senator Dodge.

Motion carried unanimously.

Senator Close stated he had a note to extend the jurisdiction of the municipal courts for the purpose of collecting their bonds and things like that. He was not sure that it was appropriate to add this to this bill. He will check and if it is not appropriate he will get a new bill drafted. He also stated that he would have to talk with Frank Daykin as to making all courts,courts of record. He felt that would have to require that a new bill be drafted.

Senator Dodge stated he had figures for fee schedules which could be used for a starting point. After some discussion the Committee agreed on the following fee schedule. In small claims up to $100 would be $5, $101 to $300 would be $8, $301 to $450 would be $12 and from $451 to $600 the fee would be $15. In the higher court it would be the same with the fee of $25 for $601 to $1,000. Executions would be $5 each. Filing an answer would be $5 in the lower court and $10 in the higher court.

Senator Ford moved to amend and "do pass" and rerefer back to this Committee.

Seconded by Senator Raggio.

Motion passed unanimously.

SB 89 Specifies when monetary judgments for minors may be paid to parents or must be paid to appointed guardians.

Senator Raggio suggested they amend line 4 to include the compromise of a claim. Delete "ad litem." Increase the amount to $2,500. "exlusive of costs and attorneys fees."

Senator Raggio moved amend and "do pass" on SB 89.

Seconded by Senator Hernstadt.

Motion carried unanimously.

SB 101 Limits peremptory challenges of jurors by each side.

Senator Raggio moved "do pass" on SB 101.

Seconded by Senator Hernstadt.

Motion carried unanimously.

SB 108 Makes a technical change concerning challenges to sufficiency of evidence before grand jury.

Senator Raggio moved "do pass" on SB 108.

Seconded by Senator Sloan.

Motion carried unanimously.

Meeting adjourned at 1:30 p.m.

Respectfully submitted,

Virginia C. Letts, Secretary

APPROVED:

Senator Melvin D. Close, Jr., Chairman

ATTACHMENT A

the custody of his son. There was substantial evidence submitted to support the apparent conclusion of the court that the child's welfare would not be enhanced by a change of custody.

Affirmed.

James Robert JOHNSON, Petitioner,
v.
Paul S. GOLDMAN, as Judge of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, Respondent.

No. 10327.

Supreme Court of Nevada.

Jan. 25, 1978.

Petitioner brought original proceeding in prohibition seeking to prohibit judge from presiding over his trial. The Supreme Court held that: (1) statute passed in 1977 entitling any party who pays $100 in any civil action or proceeding pending in any court except Supreme Court to a peremptory challenge against judge assigned to try or hear case and making no provision for filing of affidavit of bias or prejudice or otherwise alleging any grounds for disqualification is unconstitutional and (2) inasmuch as statute passed in 1977 is unconstitutional with result that such enactment is null and void, 1975 statute establishing procedures governing judicial recusal by a party's affidavit alleging bias or prejudice remains in effect.

Writ denied.

1. Constitutional Law ⇐55
Judges ⇐40

Statute passed in 1977 entitling any party who pays $100 in any civil action or proceeding pending in any court except Supreme Court to a peremptory challenge against judge assigned to try or hear case and making no provisions for filing of affidavit of bias or prejudice or otherwise alleging any grounds for disqualification is unconstitutional, inasmuch as such statute constitutes an unwarranted interference with courts in exercise of their judicial function and violates doctrine of separation of powers. N.R.S. 1.240.

2. Statutes ⇐168

Inasmuch as statute passed in 1977 entitling any party who pays $100 in any civil action or proceeding pending in any court except Supreme Court to a peremptory challenge against judge assigned to try or hear case is unconstitutional with result that such enactment is null and void, 1975 statute establishing procedures governing judicial recusal by a party's affidavit alleging bias or prejudice remains in effect. N.R.S. 1.230(5–7), St.1975, c. 415; N.R.S. 1.240, St.1957, c. 46.

Peter L. Flangas, Las Vegas, for petitioner.

Robert List, Atty. Gen., Carson City, George E. Holt, Dist. Atty., and Thomas D. Beatty, Asst. Dist. Atty., Las Vegas, for respondent.

OPINION

PER CURIAM:

[1] In this original proceeding, petitioner James Robert Johnson seeks an extraordinary writ prohibiting respondent judge from presiding over his trial. Without filing an affidavit of bias or prejudice or otherwise alleging any grounds for disqualification, petitioner sought to disqualify respondent by utilizing the peremptory challenge procedure established by 1977 Nev. Stats. ch. 398, § 2 (codified as NRS 1.240).[1]

1. 1977 Nev.Stats. ch. 398, § 2 (codified as NRS 1.240) provides:

"1. Any party to any civil action or proceeding pending in any court except the supreme court is entitled to a peremptory challenge against the judge assigned to try or hear the case, subject to the provisions of this section. The peremptory challenge shall be filed in writing with the clerk of the court in which the case is pending and a copy served on the opposing party. The filing shall be accompanied by a fee of $100 which the clerk shall transmit to the state treasurer. The fee shall be deposited in the state treasury to the credit of the state general fund for the support of district judges' travel.

"2. Except as provided in subsection 3, the peremptory challenge shall be filed:

ATTACHMENT A

Respondent contends 1977 Nev.Stats. ch. 398, § 2 constitutes an unwarranted interference with the courts in the exercise of their judicial function and violates the doctrine of separation of powers. We agree and hereby declare the enactment null and void.

Pursuant to 1977 Nev.Stats. ch. 398, § 2, upon paying $100, "[a]ny party to any civil action or proceeding pending in any court except the supreme court is entitled to a peremptory challenge against the judge assigned to try or hear the case, . . ." Nothing more is required.[2]

In *C. V. L. Co. v. District Court*, 58 Nev. 456, 83 P.2d 1031 (1938), we struck down a recusal statute nearly identical to 1977 Nev. Stats. ch. 398, § 2, wherein the legislature attempted to subject the judicial power of a duly appointed or elected and qualified judge to the whims and caprices of the litigants and their attorneys.[3] Other statutory recusal procedures, such as those envisioned by the 1977 enactment, have also been declared unconstitutional. *See, for example, State v. Vandenberg*, 203 Or. 326, 280 P.2d 344 (1955); *Austin v. Lambert*, 11 Cal.2d 73, 77 P.2d 849 (1938).

[2] Because 1977 Nev.Stats. ch. 398, § 2 (codified as NRS 1.240) is unconstitutional, the procedures which previously governed judicial recusal by affidavit, set forth in 1975 Nev.Stats. ch. 415, § 1, paras. 5, 6 & 7 (previously codified as NRS 1.230(5), (6) & (7)) and 1957 Nev.Stats. ch. 46, § 2 (previously codified as NRS 1.240) and which were purportedly repealed by 1977 Nev. Stats. ch. 398, remain in effect.[4] *See C. V. L. Co. v. District Court, supra.*

Accordingly, the writ is denied.

"(a) Not less than 30 days before the date set for trial or hearing of the case; or

"(b) Not less than 3 days before the date set for the hearing of any pretrial matter.

"3. If a case is not assigned to a judge before the time required for filing the peremptory challenge, the challenge shall be filed:

"(a) Within 3 days after the party or his attorney is notified that the case has been assigned to a judge; or

"(b) Before the jury is empaneled, evidence taken or any ruling made in the trial or hearing, whichever occurs first.

"4. If one of two or more parties on one side of an action or proceeding files a challenge, no other party on that side may file a separate challenge, but each is entitled to notice of the challenge and may file the name of any other judge to whom he would object. When the action or proceeding is transferred, it shall be transferred to a judge to whom none of the parties has objected, or if there is no such judge within the category of judges to whom it may be transferred, then to the judge to whom the fewest parties on that side have objected.

"5. The judge against whom a peremptory challenge is filed shall transfer the case to another department of the court, if there is more than one department of the court in the district, or request the judge of another district to preside at the trial or hearing of the matter.

"6. The provisions of this section do not apply in delinquency cases in juvenile court proceedings under chapter 62 of NRS."

2. Petitioner's challenge to respondent judge provided, *in toto*:

"I, JAMES ROBERT JOHNSON, pursuant to NRS 1.240 as amended, peremptorily challenges [*sic*] the Honorable PAUL S. GOLDMAN, District Judge, Department X, assigned to try this case."

3. That statute provided:

"[I]f any of the parties to a civil action or proceeding to be tried in any district court of this state, or his or its attorney or agent, shall make and file a request for a change of judge in the hearing and trial of such civil action or proceeding, such district judge shall at once transfer the action or proceeding to some other department of the court, if there be more than one department of said court in such district, or in the event there is only one department of the district court in such district, such district judge shall call in a district judge from some other district of this state to preside at the hearing and trial of said civil action or proceeding and to hear all further proceedings to be had therein; . . ." 1937 Nev.Stats. ch. 117, p. 214 *et seq.*

4. The portions of the prior enactments which remain in effect are:

1975 Nev.Stats. ch. 415, § 1, paras. 5, 6 & 7 (previously codified as NRS 1.230(5), (6) & (7)), which provide:

" . . .

"5. A judge shall not act as such if either party to a civil action in the district court shall file an affidavit alleging that the judge before whom the action is to be tried has a bias or prejudice either against him or in favor of an opposite party to the action. The judge shall proceed no further therein but either transfer the action to some other department of the court, if there be more than one department of the court in the district, or request the judge of some other district court of some other district to preside at the hearing and trial of the action. Every affidavit must be filed at least 10 days

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ATTACHMENT A

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In the Matter of Samuel B. FRANCOVICH, Attorney at Law.

No. 8862.

Supreme Court of Nevada.

March 2, 1978.

Disciplinary proceeding was brought. The Supreme Court, Thompson, J., held that isolated instance of neglect in failing to communicate with client, to respond to request for status report, and to return all or part of retaining fee when it became apparent that criminal appeal could not be perfected warrants public reprimand.

Order accordingly.

Gunderson, J., dissented and filed opinion.

Manoukian, J., dissented and filed opinion.

1. Attorney and Client ⟹44(1)

The failure to perform promised legal services, if a pervasive course of conduct by an attorney, may warrant severe discipline of suspension or disbarment.

2. Attorney and Client ⟹57

In disciplinary proceedings, although recommendation of the Board of Governors is persuasive, Supreme Court must exercise its independent judgment.

3. Attorney and Client ⟹58

Isolated instance of neglect in failing to communicate with client, to respond to request for status report, and to return all or part of retaining fee when it became apparent that criminal appeal could not be perfected warrants public reprimand.

Harry E. Claiborne, Las Vegas and Peter A. Perry, Reno, for petitioner.

David R. Belding, Reno, for respondent.

OPINION

THOMPSON, Justice.

This matter is before us on petition to review recommendations of the Board of Governors of the State Bar of Nevada that Samuel B. Francovich be suspended from the practice of law subject to reinstatement upon meeting certain conditions.[1]

Francovich accepted a $1,000 retaining fee from Frederick Maclaine, brother of

before the hearing of a contested matter if a judge has been assigned to hear such matter or, if a judge has not been assigned at least 10 days prior to such hearing, the affidavit must be filed when the party or his attorney is notified that a judge has been assigned to hear the matter. No affidavit shall be filed unless accompanied by a certificate of the attorney of record for affiant that the affidavit is made in good faith and not for delay, and the party filing the affidavit for change of judge shall at the time of filing same pay to the clerk of the court in which the affidavit is filed $25, which sum shall be by the clerk transmitted to the state treasurer who shall place the same to the credit of the district judges' traveling fund. The right hereby granted may be lost by the failure of a party to comply with the requirements set forth in this subsection or by a waiver in writing executed by the party or by his attorney, and not otherwise. The provisions of this subsection do not apply in delinquency cases in juvenile court proceedings under chapter 62 of NRS.

"6. No judge or court shall punish for contempt anyone making, filing or presenting . . an affidavit pursuant to subsection 5.

"7. This section shall not apply to the arrangement of the calendar or the regulation of the order of business. . . ."

1957 Nev.Stats. ch. 46, § 2 (previously codified as NRS 1.240), which provides:

"Not more than one change of judge may be granted in any civil action under the procedure provided by subsection 5 of NRS 1.230, but each party to the action shall have an opportunity to urge his objections to any judge before the action or proceeding is assigned to another judge, and the assignment shall be to the most convenient judge to whom the objections of the parties do not apply or are least applicable."

1. The Board recommended:

"(1) That Samuel B. Francovich be suspended from the practice of law for six months subject to being reinstated after three months if, within thirty days from the date of suspension, Mr. Francovich has:

(a) repaid the $1,000 retainer to Mr. Frederick Maclaine; and

PROSSER ATTACHMENT B

No better reasons have been given than the lack of any right to services, the absence of precedent, and the conclusion that any change must be for the legislature. At the time of writing the courts of four jurisdictions[24] have recognized a cause of action in the child analogous to that of the wife for alienation of affections. It has been contended, with obvious reason, that the interest of the child in an undisturbed family life is at least of equal importance with that of either parent, and is entitled to equal consideration and redress;[25] and the prediction may be ventured that the legal remedy will gain ground in the future, and that the protection of the interests of children will not be left entirely to other agencies of social control.

Statutory Abolition of Actions

Those actions for interference with domestic relations which carry an accusation of sexual misbehavior—that is to say, criminal conversation, seduction, and to some extent alienation of affections—have been peculiarly susceptible to abuse. Together with the action for breach of promise to marry, it is notorious that they have afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement. There is good reason to believe that even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives; that it is impossible to compensate for such damage with what has derisively been called "heart balm;" that people of any decent instincts do not bring an action which merely adds to the family disgrace; and that no preventive purpose is served, since such torts seldom are committed with deliberate plan.[26] Added to this is perhaps an increasing notion of personal or even sexual freedom on the part of women, and the feeling, illustrated by the current attitude toward divorce, that a home so easily broken up is not worth maintaining.

The result of all this has been a legislative attack upon the actions named. Statutes abolishing them, which were first proposed by a woman member of the Indiana legislature, have been enacted to date in some ten or twelve states.[27] Their constitutionality has for the most part been upheld against all objections raised.[28] Their desirability is another matter. They reverse abruptly the entire tendency of the law to give increased protection to family interests and the sanctity of the home, and undoubtedly they deny relief in many cases of serious and genuine

1950, 86 U.S.App.D.C. 97, 180 F.2d 385; and see cases cited supra, note 22. See Notes, 1965, 34 U. Cin.L.Rev. 545; 1965, 22 Wash. & Lee L.Rev. 247.

In three other courts the action has been held to be barred by the "heart balm" statutes. See infra, p. 888.

24. Daily v. Parker, 7 Cir. 1945, 152 F.2d 174, affirming, N.D.Ill.1945, 61 F.Supp. 701; Miller v. Monson, 1949, 228 Minn. 400, 37 N.W.2d 543; Russick v. Hicks, W.D.Mich.1949, 85 F.Supp. 281; Johnson v. Luhman, 1947, 330 Ill.App. 598, 71 N.E. 2d 810.

25. See Nocca, Should a Child Have a Right of Action Against a Third Person Who Has Enticed One of His Parents Away from the Home, 1956, 2 N.Y. Law Forum 357; Notes, 1951, 39 Cal.L.Rev. 294; 1952, 32 Bos.U.L.Rev. 82; 1953, 6 Vand.L.Rev. 926; 1953, 6 Okl.L.Rev. 500; 1953, 2 St. Louis U.L.J. 305; 1954, 14 La.L.Rev. 713; 1954, 37 Marq.L.Rev. 271; 1956, 8 S.C.L.Q. 477; 1956, 42 Corn.L.Q. 115; 1957, 6 Kan.L.Rev. 95.

26. See, generally, Feinsinger, Legislative Attack on "Heart Balm," 1935, 33 Mich.L.Rev. 979; Feinsinger, Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections and Related Actions, 1935, 10 Wis.L.Rev. 417; Kane, Heart Balm and Public Policy, 1936, 5 Ford.L.Rev. 62; Kingsley, The Anti-Heart Balm Statute, 1939, 13 So.Cal.L.Rev. 37; Notes, 1935, 22 Va.L.Rev. 205; 1936, 5 Brook.L.Rev. 196.

27. See Vernier, American Family Laws, 1938 Supp., §§ 158, 252, 265.

28. Hanfgarn v. Mark, 1937, 274 N.Y. 22, 8 N.E.2d 47, second appeal, 1938, 274 N.Y. 570, 10 N.E.2d 556, appeal dismissed, 302 U.S. 641; Magierowski v. Buckley, 1956, 39 N.J.Super. 534, 121 A.2d 749; Chiyoko Ikuta v. Shunji K. Ikuta, 1950, 97 Cal. App.2d 787, 218 P.2d 854; Rotwein v. Gersten, 1948, 160 Fla. 736, 36 So.2d 419.

I see no worthwhile purpose

ATTACHMENT C

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Jan.31, 1979

Hon. Mel Close, Chairman
Senate Judiciary Committee
Nevada State Senate
Carson City, Nevada

Re: SB 99 (Wrongful Death Act)

Dear Senator Close and Committee Members:

On behalf of Nevada Trial Lawyers Association, representing over 400 trial attorneys of our State, I would appreciate your careful consideration of the merits vs. the drawbacks, of the above bill.

N.T.L.A. opposes this bill for the reasons expressed below.

Although the stated purpose of SB 99 ("Consolidates various provisions relating to wrongful death actions") is meritorious, the bill does much more than that.

Under SB 99, for example; the following important legal rights of widows, children or other dependends would be abolished:

(1) The right to have a jury consider as one element of the damages in a civil suit for wrongful death, damages for "CONSCIOUS PAIN & SUFFERING" of the decedent before he died. In a case I recently tried in Alaska, my Reno clients' husband and step-father was killed due to injuries in a helicopter crash on the North Slope But before his death, he survived some 17 hours, lying on the snow, dying from his burns received in the post-crash fire. Because the Court recognized the right of the widow and children to claim damages not only for their loss of economic support from decedent, but also for the recognition that the decedent himself would have-had he lived - been entitled to damages for 17 hours of horrible suffering from the burns -- and a recognition that this element of damages ought to pass to the survivors upon his death.

As a practical matter, such a legal right will often - as it did in the above case - stimulate settlement. After 6 days of trial, the insurance carrier for the persons responsible for the helicopter crash did settle with the widow and children. I believe the fact that they were entitled to claim damages for "conscious pain and suffering" played a major part in the decision of the insurer to settle their claim.

If SB 99 were enacted into law, this important legal right would be abolished, and cases such as the above would be all the more difficult to settle. And of course widows, children or dependents would be stripped of an important element of damages.

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ATTACHMENT E

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(2) The right which presently exists under the statutory and case law pertaining to wrongful death cases, of the widow and children to have the jury consider as an element of damages their "GRIEF, ANGUISH, SORROW, EMOTIONAL INJURY AND SUFFERING" would be abolished under SB 99.

This important legal right is recognized in the Supreme Court of Arizona's landmark decision of City of Tucson vs. Wondergem, 466 P.2d 383. In that case, which went before the Supreme Court three times, it was held that the widow was entitled to a jury instruction that the jury could consider, as an element of the damages for the wrongful death of her deceased husband, any grief, sorrow, emotional injury, etc. that the jury found she suffered.

The Second Judicial District Court of Nevada, Hon. James Guinan, has followed the case-law of the Wondergem case in at least three trials before him; Judge Foreman in at least two trials. The reason: the Arizona Wrongful Death Statute is almost identical to the Nevada Statute. Both statutes give the broadest latitude to the jury in determining damages in a death case. Indeed, our present statute (NRS 41.080, NRS 41.090 and NRS 41.100 make it clear that the legislature has intended that the jury "may give such damages, pecuniary and exemplary, as it shall deem fair and just."

This important language of the present statute was recognized and given particular credence by Judge McNamee in the case of Porter v. Funkhauser, 79 Nev.273, 382 P.2d 216, in which the Nevada Supreme Court upheld the right to loss of future companionship, society & comfort.(Cf. McGarry v.U.S,,370 F.Supp.525 for good history of our Death Statute by Federal Judge Roger Foley).

To abolish that broad recognition that the jury or the court sitting without a jury should have certain latitude and discretion in deciding damages in death cases, would seem unjustified. Yet, that is exactly what SB 99 would do.

(3) The right of an unmarried dependent to damages for the death of a person would be abolished by SB 99. Section 1, paragraph 1 defines "heir" only as a person entitled to participate in the decedent's estate under the laws of intestate succession.

But what about so-called "common-law" spouses? Or dependent children who have never been formally adopted by the decedent before his wrongful death. Under present law, they have the legal right to claim damages, if they can prove their entitlement.

For example, if a man lives for 15 years with a woman, supports her, supports her children, pays her taxes, and does all the things that a married spouse would do, the present law recognizes the moral and justifiable right to damages when her "husband" is wrongfully taken from her. Under SB 99, the fact that the marriage was "without benefit of clergy" would abolish that person's right to damages. The tortfeasor who caused the death would escape without paying any damages.

(4) In so-called "survival actions", where the person is injured , brings suit for his personal injuries, but then dies before his case gets to trial, SB 99 would again abolish any right to damages the person sustained in the nature of pain, suffering, disability, and anguish -- and prevent his widow and children from maintaining and action for those damages.

This is equivalent, it seems, to a law which would prevent a widow from collecting a debt owed by the debtor to her husband, simply by virtue of the fact that the creditor died before the debt was paid. SB 99 would wipe out the debt, at the instant of death, as to the damages the injured person suffered before his death.

A careful analysis of SB 99 leads to the conclusion that it would be a windfall for the casualty insurance industry writing insurance for anyone (either resident or non-resident) who happens to wrongfully cause a death in the State of Nevada.

I would sincerely appreciate the consideration of you and your committee members, to the above analysis. I would ask you to vote "NO" on SB 99. Thank you.

Very truly yours,

Peter Chase Neumann
Peter Chase Neumann
For Nevada Trial Lawyers Assoc.

PCN/np

(REPRINTED WITH ADOPTED AMENDMENTS)

FIRST REPRINT **S. B. 89**

SENATE BILL NO. 89—SENATORS CLOSE, WILSON AND RAGGIO

JANUARY 23, 1979

Referred to Committee on Judiciary

SUMMARY—Specifies when monetary judgments for minors may be paid to parents or must be paid to appointed guardians. (BDR 2-541)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to judgments; specifying when sums may be paid directly to parents or must be paid to appointed guardians upon judgments entered or compromises approved in favor of minors; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 17 of NRS is hereby amended by adding thereto a new section which shall read as follows:

Whenever a judgment for a sum of money is entered in favor of a minor for whom no guardian has been appointed, or a court approves a compromise of a claim of such a minor:

1. If the sum is less than $2,500, exclusive of costs and attorney's fees, the court may make it payable directly to the parents of the minor or the parent having custody of the minor.

2. If the sum is $2,500 or more, exclusive of costs and attorney's fees, the court shall make it payable to a guardian appointed for the minor.

S. B. 101

SENATE BILL NO. 101—COMMITTEE ON JUDICIARY

JANUARY 24, 1979

Referred to Committee on Judiciary

SUMMARY—Limits peremptory challenges of jurors by each side. (BDR 2-385)
FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to trial by jury; limiting peremptory challenges of jurors to four such challenges by each side in a trial; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 16.040 is hereby amended to read as follows:

16.040 1. Either party may challenge the jurors. The challenges [shall] *must* be to individual jurors and [shall either] be peremptory or for cause. Each [party] *side* is entitled to four peremptory challenges.

2. If there are two or more parties on any side and their interests are diverse, the court may allow additional peremptory challenges, but not more than four, to the side with the multiple parties. If the multiple parties on a side are unable to agree upon the allocation of their additional peremptory challenges, *the court shall make* the allocation. [shall be made by the court.]

S. B. 108

SENATE BILL NO. 108—COMMITTEE ON JUDICIARY

JANUARY 24, 1979

Referred to Committee on Judiciary

SUMMARY—Makes a technical change concerning challenges to sufficiency of evidence before grand jury. (BDR 14-391)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to proceedings after commitment and before indictment; making a technical change concerning challenges to the sufficiency of evidence before a grand jury; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 172.155 is hereby amended to read as follows:

172.155 1. The grand jury ought to find an indictment when all the evidence before them, taken together, establishes probable cause to believe that an offense has been committed and that the defendant has committed it.

2. The defendant may object to the sufficiency of the evidence to sustain the indictment only by application for a writ of habeas corpus. [If no such application is made before the plea is entered, unless the court permits it to be made within a reasonable time thereafter, the objection is waived.]