Annual Probate and Estate Administration Conference in Nevada

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Annual Probate and Estate Administration Conference in Nevada

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Presenters

ANTHONY L. BARNEY is the president and sole shareholder of Anthony L. Barney, Ltd., where he practices in the areas of estate planning and business planning and litigation, including the preparation of wills, revocable living trusts, irrevocable trusts and domestic asset protection trusts; as well as business formation, organization and trust administration. He is licensed to practice law in the Nevada and Idaho state and federal courts. Mr. Barney and his associates have drafted bill legislation for representatives in the Nevada state senate, and has participated as a member of the State Bar of Nevada and Idaho State Bar. Mr. Barney worked with the trust and probate section of the Nevada bar to revise the Eighth Judicial District Court local rules for probate proceedings. He earned his B.S. degree from Brigham Young University; his M.S. degree from the University of Nevada, Las Vegas; and his J.D. and L.L.M. (taxation) degrees from the University of Missouri, Kansas City.

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BRYAN D. DIXON is of counsel in the Las Vegas office of Fabian VanCott where he provides tax planning advice on a wide range of issues and represents clients nation-wide in examination, appellate, and collection matters pending before the Internal Revenue Service and state tax authorities. Mr. Dixon is also a visiting instructor in Western Governors University's College of Business where he teaches courses on business law and sales and lease contracts under the Uniform Commercial Code. He is admitted to practice in Nevada and before the U.S. District Court District of Nevada and the U.S. Court of Federal Claims. Mr. Dixon serves as a mediator/arbitrator with the Fee Dispute Committee of the Nevada State Bar. He earned his B.A. degree from Brigham Young University, M.B.A. degree from the University of Cincinnati College of Business, J.D. degree from the University of Cincinnati College of Law, and M.S. tax degree from the University of Cincinnati College of Accounting.

THOMAS R. GROVER is an attorney with BlackRock Legal where he aggressively litigates trust, probate and other civil disputes. Mr. Grover is one of the most frequent litigators to appear each Friday in Clark County Probate Court. He also advises families through non-litigated probate administration. Mr. Grover is admitted to practice in Nevada and before the Nevada Supreme Court and the United States District Court for the District of Nevada. He is a member of the State Bar of Nevada. Mr. Grover earned his B.S. degree from Utah State University and J.D. degree from the University of Nebraska College of Law.

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KENNEDY E. LEE is the managing partner of Lee Kiefer & Park and leads the probate and trust administration practice group. He is recognized as one of the most experienced and knowledgeable probate attorneys in Clark County, Nevada. Mr. Lee focuses his practice entirely on probate and trust administration. His extensive experience enables him to handle non-contested matters quickly and efficiently. Mr. Lee also serves as a third-party neutral fiduciary and is often active in mediations to help settle cases. He is admitted to practice in Nevada. Mr. Lee is a member of the State Bar of Nevada. He earned his B.S. degree, magna cum laude, from the University of Nevada, Las Vegas and his J.D. degree from J. Reuben Clark Law School, Brigham Young University.

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TAYLOR K. MORRIS is an attorney at Morris Estate Planning Attorneys in Henderson/Las Vegas, Nevada. Mr. Morris focuses his practice on estate planning, asset protection, business succession and probate. He has presented on estate planning and probate topics for legal education seminars, wealth management firms, real estate offices, local businesses, and the College of Southern Nevada, among other settings and audiences in the Henderson/Las Vegas area. Mr. Morris earned his B.S. degree in accounting from Brigham Young University and J.D. degree from William S. Boyd School of Law at UNLV. He has been recognized as an AV-Rated attorney by Martindale-Hubbell and as a Legal Elite by *Nevada Business Magazine*. He is a member of the Southern Nevada Estate Planning Council and the Probate and Trust Law Section of the State Bar of Nevada.

ELYSE M. TYRELL is the founding member of Tyrell Law, PLLC, where her practice is devoted to elder law, estate planning, tax law, probate and guardianship law. She is a member of the Clark County Bar Association, the Elder Law Section of the State Bar of Nevada and the National Academy of Elder Law Attorneys. Ms. Tyrell is a certified elder law attorney by the National Elder Law Foundation. She is a frequent speaker on estate planning and elder law for various seminar groups. Ms. Tyrell earned her B.A. degree from the University of Nevada at Reno, J.D. degree from Gonzaga University School of Law, and LL.M. degree from the University of San Diego School of Law.

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What's New This Year in Probate and Trusts Practice

Submitted by Thomas R. Grover

What's New This Year In Nevada Probate & Trust Practice

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Developments in Case Law

Recent Decisions from the Nevada Supreme Court

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In the Matter of the Jordan Dana Frasier Living Trust, 136 Nev. Advance Opinion 56 (August 27, 2020)

- Family member challenged the validity of trust documents based upon theories of incapacity and undue influence.
- The Court affirmed the validity of the documents without an evidentiary hearing or factual findings.

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3

In the Matter of the Jordan Dana Frasier Living Trust, 136 Nev. Advance Opinion 56 (August 27, 2020)

"Because the district court did not hold an evidentiary hearing or provide factual findings regarding the challenge to the settlor's mental capacity prior to approving the amendments to the trust, as required by NRS 164.015, we reverse and remand for further proceedings."

NRS 164.015(3): "In a proceeding pursuant to subsection 3, the competency of the settlor to make the trust, the freedom of the settlor from duress, menace, fraud or undue influence at the time of execution of the will, the execution and attestation of the trust instrument, or any other question affecting the validity of the trust is **a question of fact and must be tried by the court**"

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In the Matter of the Jordan Dana Frasier Living Trust, 136 Nev. Advance Opinion 56 (August 27, 2020)

- They arrive at this conclusion in part because probate and trust filings are pleadings, not motions. That's why we title our filings as petitions, not motions.

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In the Matter of the Jordan Dana Frasier Living Trust, 136 Nev. Advance Opinion 56 (August 27, 2020)

- "Based on the plain language of the statute, it is clear that district courts must resolve questions of fact in a trial before the court. At a minimum, an evidentiary hearing is required on the factual question raised in the challenge under NRS 164.015."

- I interpret this to mean that the district court must either resolve challenges to trust agreements and amendments on a motion for summary judgment standard at a law and motion hearing or hold an evidentiary hearing. Either way, the district court must issue factual findings.

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In the Matter of the Raggio Family Trust, 136 Nev. Adv. Op. 21 - Nev: Supreme Court 2020

Issue before the Court: Does a Trustee have an obligation to consider outside resources available to a beneficiary when exercising discretion under a support or HEMS (health, education maintenance support) standard?

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In the Matter of the Raggio Family Trust, 136 Nev. Adv. Op. 21 - Nev: Supreme Court 2020

- HEMS Standard & Discretion: Financial Need v. Amount of Disbursement
- Financial need: First consider what resources are available to the beneficiary.
- Amount: Disbursement made by based without regard to beneficiary resources.

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- ***"Thus, Nevada trust law does not obligate a trustee to consider other assets or resources before making a distribution unless the trust instrument itself sets forth such a requirement."***

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In the Matter of the Raggio Family Trust, 136 Nev. Adv. Op. 21 - Nev: Supreme Court 2020

- Note: This ruling is based on the specific language of this Trust. "Section 5.1 of the Marital Trust states, in relevant part, that the trustee 'shall pay to or apply for the benefit of [Dale] as much of the principal of the Trust as the Trustee, in the Trustees discretion, shall deem necessary for the proper support, care, and maintenance' of Dale."

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In the Matter of the Raggio Family Trust, 136 Nev. Adv. Op. 21 - Nev: Supreme Court 2020

- Reasons given:

1. Settlor did not restrict the discretion and require examination of other assets.
2. Section dealing with another beneficiary explicitly directs consideration of other assets.
3. Reliance on the explicit language of NRS 163.4175

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- ***NRS 163.4175: "Except as otherwise provided in the trust instrument, the trustee is not required to consider a beneficiary's assets or resources in determining whether to make a distribution of trust assets."***

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In the Matter of the Raggio Family Trust, 136 Nev. Adv. Op. 21 - Nev: Supreme Court 2020

- "NRS 163.4175 clearly provides that, if a settlor wants trustees to consider a beneficiary's other assets, the settlor must so state in the trust instrument. We cannot infer an exception to NRS 163.4175 based solely on the terms "necessary" and "proper" in the trust instrument, as those terms appear frequently in trusts but their meanings depend on the circumstances and text of the instruments."

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Probate Practice During the Pandemic:

Lodging Wills With the Clerk of the Court

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Probate Practice During the Pandemic: Lodging Wills With Clerk of the Court

- Normal Practice

- Original must be lodged with the Clerk of the Court
- NRS 136.050: "Any person having possession of a will shall, within 30 days after knowledge of the death of the person who executed the will, deliver it to the clerk of the district court which has jurisdiction of the case or to the personal representative named in the will."

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Probate Practice During the Pandemic: Lodging Wills With Clerk of the Court

- Pandemic Practice

- "Original wills may be sent by certified or express mail. In lieu of mailing an original will for filing, a photograph (not a scanned copy) of the original will may be electronically filed with the Clerk of the Court. The original will shall be submitted to the Clerk within 30 days of the re-opening of the Clerk's Office." Administrative Order 20-13, at pg. 6:25-7:2.
- If you are going to mail the will, the best practice, in my opinion, is to have at least two people sign affidavits that they saw the original will, keep a copy, and then submit the original by certified or express mail.

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Probate Practice During the Pandemic: Lodging Wills With Clerk of the Court

- NRS 136.240(3): In addition, no will may be proved as a lost or destroyed will unless its provisions are clearly and distinctly proved by two or more credible witnesses and it is:
  - (a) Proved to have been in legal existence at the death of the person whose will it is claimed to be and has not otherwise been revoked or destroyed without the knowledge, consent or ratification of such person; or
  - (b) Shown to have been fraudulently destroyed in the lifetime of that person.

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Probate Practice During the Pandemic:

Sales of Real Property

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Probate Practice During the Pandemic: Sales of Real Property

- Normally
- Anyone can come in off the streets and make a higher oral bid at the hearing.
- No proof of funds or prequalification required.
- Failure to close after confirmation is surprisingly rare.

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- ***NRS 148.300: "If, after the confirmation, the purchaser neglects or refuses to comply with the terms of the sale, the court, on motion of the personal representative, and after notice to the purchaser, may vacate the order of confirmation and order a resale of the property. If the amount realized on the resale does not cover the bid and the expenses of the previous sale, the purchaser is liable to the estate for the deficiency."***

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Probate Practice During the Pandemic: Sales of Real Property

- Pandemic Procedure
- "Sale confirmations currently set will be confirmed upon the papers filed with the Court and without the necessity of placing the sale for public bid, unless a notice of intent to overbid is electronically filed and served 72 hours before the date of the sale confirmation hearing. Any petition to confirm sale filed after the issuance of this Administrative Order shall contain, in addition to the statutory requirements, language advising that the notice of intent to overbid must be electronically filed 72 hours before the scheduled hearing. After receiving an electronically filed notice of intent to overbid, the Court will set a remote hearing through video or telephonic means. Otherwise the sale will be approve in accordance with the notice. All orders on approved matters will be electronically filed by the Court and electronically served." Administrative Order 20-17, at pg. 27:12-21

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Probate Practice During the Pandemic: Sales of Real Property

- Pandemic Procedure Summary
- No persons off the street – you must file a notice of intent to bid by Tuesday at noon.
  - NOTE: This **does not** obligate the bidder to actually purchase or bid on the property. No penalty for not proceeding to offer bid.
- Must provide notice of this procedure.
- Hearings are done by videoconference Friday mornings (BlueJeans)

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Probate Practice During the Pandemic:

Hearings & Probate Calendar

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Probate Practice During the Pandemic: Hearings & Probate Calendar

- Normally
- Probate Court held every Friday at the Regional Justice Center
  - Sales
  - Uncontested Matters
  - Litigated Matters
- Anyone can show up at the hearing and make an oral objection.
- The Commissioner then usually gives two weeks to file a brief.

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Probate Practice During the Pandemic: Hearings & Probate Calendar

- Pandemic Procedure

- Oral objections are no longer an option.
- Orders are filed at about 8:00 AM on Friday mornings.
- All hearings conducted by video conference (BlueJeans)
  - Sales are at 9:30
  - Litigated matters at 9:45
- No opportunity to make an oral objection

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Probate Practice During the Pandemic: Hearings & Probate Calendar

- Pandemic Procedure

- "Probate hearings on the Probate Commissioner's calender that are opposed or require a hearing shall go forward and be heard by alternative means unless the Probate Commissioner determines that a personal appearance is necessary. Matter that can be approved without a hearing will be on the approved list if no objection has been electronically filed by 9:30 am on the day before the hearing." Administrativer Oder 20-17, at pg. 26:23-27.

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Probate Practice During the Pandemic: Hearings & Probate Calendar

- Pandemic Procedure
- "Probate matters on the Probate Judges' calendars will be decided on the papers or heard by video or telephonic means, unless the Judge determines a personal appearance is necessary." Administrative Order 20-17, at pg. 27:3-4.
- In practice, the Commissioner almost always holds oral arguments by video conference.

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Probate Practice During the Pandemic:

Orders

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Probate Practice During the Pandemic: Orders

Normally

- Submit them by Tuesday at noon for uncontested/non litigated matters. EDCR 4.14(b).
- Probate staff will email counsel regarding any deficiencies with the filing. These deficiencies usually have to do with notice.
- Orders issued if no written objection is made prior to the hearing or oral objection made at the hearing EDCR 4.14.

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Probate Practice During the Pandemic: Orders

Pandemic Procedure

- Submit them electronically.
- Still due by noon on Tuesday.
- Filed Friday morning by probate staff at about 9 AM.

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Affording Nursing Home Care and its Effects on the Decedent's Estate

Submitted by Elyse M. Tyrell

Affording Nursing Home Care and its Effects on the Decedent's Estate

Elyse M. Tyrell, Esq.

1

Self-pay v. Qualifying for Medicaid - Medical Criteria

Two ways to medically qualify for Medicaid: (1) a disabled individual who receives SSI usually also receives Medicaid benefits; and (2) an individual residing in a nursing facility who meets all other eligibility requirements. For purposes of this discussion, we will be talking about those individuals receiving care in a nursing facility.

2

Where Medicare Stops and Medicaid Begins

Generally, when a person receives Medicare coverage, and first receives a minimum of three hospital day stay, and then he or she is admitted into a skilled nursing facility for rehabilitation or skilled care, Medicare will cover some portion of the first 100 days. After those 100 days, if all eligibility requirements are met for Medicaid, Medicaid benefits will cover the costs of custodial nursing home care. Parkinson's disease, Alzheimer's disease and other dementias generally only require custodial care.

3

What Assets are Exempt - Countable and Non-countable Assets

Definition of non-countable assets:

One home, primary residence and for single people, there must be an intent to return, and with a married couple, the community spouse residing in it; One automobile; Up to $2,000; Burial spaces, containers, markers, and certain related items for the community spouse, with no limitation on value; Up to $1,500 designated as a burial fund for the Medicaid recipient and spouse; Term life insurance - no limit on value; Whole life insurance with a cash surrender value no greater than $1,500; Real property listed for sale with listing agreement. Once it is sold, however, the cash proceeds become countable.

Everything else is countable.

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Financial Criteria for Applicants

1. Single applicants: the applicant can only have the non-countable resources as outlined above, and is limited to a gross monthly income of $2,349.

2. Married applicants: No division of assets: the institutionalized spouse cannot have assets in excess of those non-countable listed above, the community spouse cannot have assets in excess of $25,728, and the institutionalized spouse's gross monthly income not in excess of $2,349. If gross monthly income greater than $2,349, the income of both spouses can be added together and divided by two, and then if one-half does not exceed $2,349, the institutionalized spouse will be eligible for Medicaid.

5

Beginning 2019, a division of assets is done without the requirement of a Court Order: the institutionalized spouse is limited to $2,349 of gross monthly income and the non-countable assets listed above. With a division of assets, however, the community spouse can maintain the non-countable resources, along with the greater of fifty percent of the community assets or $128,640. Additionally, if the community spouse does not receive $3,216 of gross monthly income alone, he or she can seek to receive a monthly maintenance needs allowance from the institutionalized spouse, an amount to get them to the $3,216.

6

Effects on the Decedent's Estate

States mandated to recover the value of Medicaid benefits upon the death of the recipients. Nevada's estate recovery statute requires recovery of benefits from the estate of a recipient, "estate" defined as assets included in the estate of the deceased recipient, as well as "any other assets in or to which he had an interest or legal title immediately before or at the time of death to the extent of that interest." This includes assets passing by reason of joint tenancy, reserved life estate, survivorship, trust, annuity, homestead or other arrangement.

The entire value of Medicaid payments made on behalf of the recipient are expected to be recovered.

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Recovery upon death of Medicaid Recipient

Upon the death of the Medicaid recipient, if they died owning a home, a lien is placed on that home. The lien must be limited to the deceased Medicaid recipient's interest in the home.

I. The Process and Procedure of Recovery. Upon the death of the Medicaid recipient, Nevada State Welfare will send a letter indicating the balance owed by the Decedent for Medicaid payments made on his or her behalf. If the Medicaid recipient left a surviving spouse, child under the age of 21, or blind or disabled child, a lien will be placed on the Decedent's home. If there is no home, or no surviving spouse, child under the age of 21, or blind or disabled child, the Department of Health and Human Services will seek recovery from any remaining assets of the deceased Medicaid recipient. Notice must be given to them on every Probate administration opened as well as on certain Guardianship hearing.

8

Hardship Waiver and Prohibited Recovery

Recovery from estate assets may be waived when the requesting party is able to show, through convincing evidence, that the State's pursuit of estate recovery subjects them to undue and substantial hardship. Nevada defines hardship as undue and substantial hardship resulting in severe financial duress or a significant compromise to an individual's health care or shelter needs.

Federal law prohibits recovery from assets due to pass on to a disabled beneficiary, Additionally, recovery during the lifetime of a spouse, when there are surviving children under the age of 21, or when there are children who are blind or disabled.

9

Priority of Medicaid Lines in Estate Administration

NRS 147.195: The debts and charges of the estate must be paid in the following order:

1. Expenses of administration.
2. Funeral expenses.
3. The expenses of the last illness.
4. Family allowance.
5. Debts having preference by laws of the United States.

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6. Money owed to the department of human resources as a result of the payment of benefits for Medicaid.

7. Wages to the extent of $600, of each employee of the decedent, for work done or personal services rendered within 3 months before the death of the employer. If there is not sufficient money with which to pay all such labor claims in full, the money available must be distributed among the claimants in accordance with the amounts of their respective claims.

8. Judgments rendered against the decedent in his lifetime, and mortgages in order of their date. The preference given to a mortgage extends only to the proceeds of the property mortgaged. If the proceeds of that property are insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate.

9. All other demands against the estate.

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Exceptions to Recovery

Caregiver Exception in Real Life - A house of a Medicaid recipient can be transferred to a child caregiver, who has lived in the home with and has provided care for the recipient for two years leading up to the recipient applying for and receiving Medicaid.

Income-Producing Property Exception - If the recipient's asset to be recovered against is the sole source of income for a relative or beneficiary who is inheriting it, he or she can ask for a waiver, and seek non-recovery against this asset.

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Home Maintenance Expenses Exception - With a division of assets, a community spouse can maintain the non-countable resources (home and one vehicle), along with fifty percent of the community assets or an unequal amount, up to $128,640. Additionally, if the community spouse does not receive $3,216 of gross monthly income alone, he or she can seek to receive a monthly maintenance needs allowance from the institutionalized spouse, an amount to get them to the $3,216.

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Small Estates Exception - NRS146.070.

1. If the value of a decedent's estate does not exceed $100,000, the estate may be set aside without administration by the order of the court.

2. Except as otherwise provided in subsection 3, the whole estate must be assigned and set apart in the following order:

(a) To the payment of the petitioner's attorney's fees and costs incurred relative to the proceeding under this section;

(b) To the payment of funeral expenses, expenses of last illness, money owed to the Department of Health and Human Services as a result of payment of benefits for Medicaid and creditors, if there are any;

(c) To the payment of other creditors, if any; and

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(d) Any balance remaining to the claimant or claimants entitled thereto pursuant to a valid will of the decedent, and if there is no valid will, pursuant to intestate succession in accordance with chapter 134 of NRS.

3. If the decedent is survived by a spouse or one or more minor children, the court must set aside the estate for the benefit of the surviving spouse or the minor child or minor children of the decedent, subject to any reduction made pursuant to subsection 4 or 5. The court may allocate the entire estate to the surviving spouse, the entire amount to the minor child or minor children, or may divide the estate among the surviving spouse and minor child or minor children.

4. As to any amount set aside to or for the benefit of the surviving spouse or minor child or minor children of the decedent pursuant to subsection 3, the court must set aside the estate without the payment of creditors except as the court finds necessary to prevent a manifest injustice.

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5. To prevent an injustice to creditors when there are nonprobate transfers that already benefit the surviving spouse or minor child or minor children of the decedent, the court has the discretion to reduce the amount set aside under subsection 3 to the extent that the value of the estate, when combined with the value of nonprobate transfers, as defined in NRS 111.721, from the decedent to or for the benefit of the surviving spouse or minor child or minor children of the decedent exceeds $100,000.

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II. Affording Nursing Home Care and its Effects on the Decedent's Estate

A. Self-pay v. Qualifying for Medicaid - Medical Criteria

Generally speaking, there are two ways to medically qualify for Medicaid: (1) a disabled individual who receives SSI usually also receives Medicaid benefits; and (2) an individual residing in a nursing facility who meets all other eligibility requirements. For purposes of this discussion, we will be talking about those individuals receiving care in a nursing facility.

B. Where Medicare Stops and Medicaid Begins

Generally, when a person receives Medicare coverage, and first receives a minimum of three hospital day stay, and then he or she is admitted into a skilled nursing facility for rehabilitation or skilled care, Medicare will cover some portion of the first 100 days. After those 100 days, if all eligibility requirements are met for Medicaid, Medicaid benefits will cover the costs of custodial nursing home care. Parkinson's disease, Alzheimer's disease and other dementias generally only require custodial care.

C. What Assets are Exempt - Countable and Non-countable Assets

It is easiest to first define non-countable assets: (*see 42 U.S.C.A 1382b(a) and 20 C.F.R. 5416.105, 1210-1237*)

1. One home, maximum equity of $893,000, so long as it is the primary residence and for single people, there must be an intent to return, and with a married couple, the community spouse residing in it.
2. One automobile
3. Up to $2,000
4. Burial spaces, containers, markers, and certain related items for the community spouse, with no limitation on value
5. Up to $1,500 designated as a burial fund for the Medicaid recipient and spouse
6. Term life insurance - no limit on value
7. Whole life insurance with a cash surrender value no greater than $1,500

Real property listed for sale with proof shown of the listing is considered a non-available asset. Once it is sold, however, the cash proceeds become countable.

Everything else is considered a countable asset.

D. Asset Classification and Transfers

Assets held in joint tenancy are considered one-hundred percent available to the Medicaid applicant.

When filing out an application for Medicaid, one must disclose any and all transfers of assets to an individual or trust within the 60 months leading up to the application.

E. Financial Criteria for Single and Married Applicants - Spousal Impoverishment Rules

1. Single applicants: the applicant can only have the non-countable resources as outlined above, and is limited to a gross monthly income of $2,349 (2020 figure).

2. Married applicants:

a. No division of assets: the institutionalized spouse cannot have assets in excess of those non-countable listed above, the community spouse cannot have assets in excess of $25,728 (2020 figure for Minimum Community Spouse Resource Allowance), and when the institutionalized spouse has gross monthly income not in excess of $2,349 he or she will qualify. If he or she has gross monthly income greater than $2,349, the income of both spouses can be added together and divided by two, and then if one-half does not exceed $2,349, the institutionalized spouse will be eligible for Medicaid.

b. In 2019, changes were made that now allow a division of assets without the requirement of a Court Order: the institutionalized spouse is limited to $2,349 of gross monthly income and the non-countable assets listed above. With a division of assets, however, the community spouse can maintain the non-countable resources, along with the greater of fifty percent of the community assets or $128,640 (2020 figure for Maximum Community Spouse Resource Allowance). Additionally, if the community spouse does not receive $3,216 (2020 figure) of gross monthly income alone, he

or she can seek to receive a monthly maintenance needs allowance from the institutionalized spouse, an amount to get them to the $3,216 (2020 Maximum Monthly Maintenance Needs Allowance).

F. Effects on the Decedent's Estate: In 1993, the Federal Government passed a law that requires States to recover the value of Medicaid benefits upon the death of the recipients. Nevada's estate recovery statute requires recovery of benefits from the estate of a recipient, and it defines "estate" as assets included in the estate of the deceased recipient, as well as "any other assets in or to which he had an interest or legal title immediately before or at the time of death to the extent of that interest." This includes assets passing by reason of joint tenancy, reserved life estate, survivorship, trust, annuity, homestead or other arrangement.

G. What Types of Expenses and What Amount Can be Recovered? In 1993, the Federal Government mandated that the entire value of Medicaid payments made on behalf of the recipient are expected to be recovered. *Section 1917 of the Social Security Act, and N.R.S. 422.2935.*

H. TEFRA "Pre-Death" Liens. Upon the death of the Medicaid recipient, if they died owning a home, a lien is placed on that home. The lien must be limited to the deceased Medicaid recipient's interest in the home.

I. The Process and Procedure of Recovery. Upon the death of the Medicaid recipient, Nevada State Welfare will send a letter indicating the balance owed by the Decedent for Medicaid payments made on his or her behalf. If the Medicaid recipient left a surviving spouse, child under the age of 21, or blind or disabled child, a lien will be placed on the Decedent's home. If there is no home, or no surviving spouse, child under the age of 21, or blind or disabled child, the Department of Health and Human Services will seek recovery from any remaining assets of the deceased Medicaid recipient. Notice must be given to them on every Probate administration opened as well as on certain Guardianship hearing. They are to be noticed at the following address:

Medicaid Estate Recovery (MER)
Division of Health, Care, Finance

and Policy
1100 E. Williams Street, Suite 109
Carson City, NV 89701-3103

J. Estate Hearings and Undue Hardship Waivers. Although there is no hardship waiver available at the time a lien is placed on the deceased Medicaid recipient's home, recovery from estate assets may be waived when the requesting party is able to show, through convincing evidence, that the State's pursuit of estate recovery subjects them to undue and substantial hardship. Nevada defines hardship as undue and substantial hardship resulting in severe financial duress or a significant compromise to an individual's health care or shelter needs.

K. Federal law prohibits recovery from assets due to pass on to a disabled beneficiary, Additionally, recovery during the lifetime of a spouse, when there are surviving children under the age of 21, or when there are children who are blind or disabled.

L. Priority of Medicaid Lines in Estate Administration. The priority of payment of debts, expenses, and charges is outlined in NRS 147.195, which states as follows:

"The debts and charges of the estate must be paid in the following order:

1. Expenses of administration.
2. Funeral expenses.
3. The expenses of the last illness.
4. Family allowance.
5. Debts having preference by laws of the United States.
6. Money owed to the department of human resources as a result of the payment of benefits for Medicaid.
7. Wages to the extent of $600, of each employee of the decedent, for work done or personal services rendered within 3 months before the death of the employer. If there is not sufficient money with which to pay all such labor claims in full, the money available must be distributed among the claimants in accordance with the amounts of their respective claims.

8. Judgments rendered against the decedent in his lifetime, and mortgages in order of their date. The preference given to a mortgage extends only to the proceeds of the property mortgaged. If the proceeds of that property are insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate.

9. All other demands against the estate."

M. Caregiver Exception in Real Life - A house of a Medicaid recipient can be transferred to a child caregiver, who has lived in the home with and has provided care for the recipient for two years leading up to the recipient applying for and receiving Medicaid. This is to essentially reward the child for providing care which kept the recipient from looking to Medicaid sooner. The child must be able to prove he or she resided in the home and provided care for the two year period. This is also limited to a natural born child or adopted child, and does not extend to step-children or any other relative.

N. Income-Producing Property Exception - If the recipient's asset to be recovered against is the sole source of income for a relative or beneficiary who is inheriting it, he or she can ask for a waiver, and seek non-recovery against this asset.

O. Home Maintenance Expenses Exception - With a division of assets, a community spouse can maintain the non-countable resources (home and one vehicle), along with fifty percent of the community assets or an unequal amount, up to $128,640.00 (2020 figure for Maximum Community Spouse Resource Allowance). Additionally, if the community spouse does not receive $3,216.00 (2020 figure for Maximum Monthly Maintenance Needs Allowance) of gross monthly income alone, he or she can seek to receive a monthly maintenance needs allowance from the institutionalized spouse, an amount to get them to the $3,216.00.

P. Small Estates Exception - NRS146.070. Estates not exceeding $100,000: Procedure to set aside estate; exceptions; petition; notice; fees; reduction of estate by nonprobate transfer; hearing; findings; distribution of interest of minor.

1. If the value of a decedent's estate does not exceed $100,000, the estate

may be set aside without administration by the order of the court.

2. Except as otherwise provided in subsection 3, the whole estate must be assigned and set apart in the following order:

(a) To the payment of the petitioner's attorney's fees and costs incurred relative to the proceeding under this section;

(b) To the payment of funeral expenses, expenses of last illness, money owed to the Department of Health and Human Services as a result of payment of benefits for Medicaid and creditors, if there are any;

(c) To the payment of other creditors, if any; and

(d) Any balance remaining to the claimant or claimants entitled thereto pursuant to a valid will of the decedent, and if there is no valid will, pursuant to intestate succession in accordance with chapter 134 of NRS.

3. If the decedent is survived by a spouse or one or more minor children, the court must set aside the estate for the benefit of the surviving spouse or the minor child or minor children of the decedent, subject to any reduction made pursuant to subsection 4 or 5. The court may allocate the entire estate to the surviving spouse, the entire amount to the minor child or minor children, or may divide the estate among the surviving spouse and minor child or minor children.

4. As to any amount set aside to or for the benefit of the surviving spouse or minor child or minor children of the decedent pursuant to subsection 3, the court must set aside the estate without the payment of creditors except as the court finds necessary to prevent a manifest injustice.

5. To prevent an injustice to creditors when there are nonprobate transfers that already benefit the surviving spouse or minor child or minor children of the decedent, the court has the discretion to reduce the amount set aside under subsection 3 to the extent that the value of the estate, when combined with the value of nonprobate transfers, as defined in NRS 111.721, from the decedent to or for the benefit of the surviving spouse or minor child or minor children of the decedent exceeds $100,000."

New End-of-Life Options and the Effects of Voluntary Death on the Estate

Submitted by Brandon Bybee

New End-of-life Options And The Effects Of Voluntary Death On The Estate

Presented by
Brendan Bybee, Esq.
Stone Law Offices

1

End-of-life Options:

1. **Pain Management:** Managing pain and other deleterious symptoms is critical to one's quality of life in their remaining days.
2. **Hospice Care:** A terminal individual may prefer hospice care to extended hospitalization when they are in their final stages of life.
3. **Voluntarily Stopping of Eating and Drinking (VSED):** As death nears, especially when declining mental capacity is accelerating, some individuals choose to voluntarily stop eating and drinking.
4. **Succession of Life-Sustaining Treatment**: To ensure death on an individual's terms we may need to relieve the physician of the obligations of their Hippocratic oath to maintain or prolong life.
5. **Palliative Sedation**: When an individual has had life sustaining treatments withdrawn, they may still have a great deal of pain or discomfort before natural death occurs which can be treated with sedation.

2

Medically Assisted Death

- Legal in nine states and the District of Columbia, including: Oregon, Washington, California, Montana, Vermont, Colorado, Hawai‘i, New Jersey, and Maine.
- Generally, accomplished through the prescription of death inducing drug.
- Sought by a small subset of terminal patients.
- Concluded by about 60% of the smaller number of patients for whom the drug is actually prescribed.

3

Medical Aid-In-Dying and Nevada:

- **Nevada has yet to pass a law permitting medically aided death**
  - Issue originally considered by legislature in 2015 where it failed to even be scheduled for committee hearing
  - In 2017, Passed Senate committee and full Senate vote but died in Assembly committee
  - In 2019, passed vote in Senate committee before running out of time for a Senate vote.

4

Qualifying for Medically Aided Death in Other States:

- **California – the individual must:**
  - Be a resident of the state
  - Be 18 years or older
  - Have been diagnosed with a terminal illness
  - Have a prognosis of six months or less to live
  - Be mentally capable of making their own health care decisions
  - Capable of self-ingesting the aid-in-dying medication
  - Making an informed decision and voluntary request

5

Primary Estate Planning/Medical Documents Involved

- **Legal Documents**
  - **Health Care Power of Attorney**: names agents to make medical decisions for a patient and includes some end-of-life care directions.
  - **Living Will**: the "pull the plug" document. Permits medical staff to withdraw life sustaining treatment
- Medical Oders
  - **"Do Not Resuscitate" ("DNR"):** simply tells medical staff not to resuscitate the patient if found unconscious.
  - **"Physician's Order for Life Sustaining Treatment" ("POLST"):** more comprehensive; can include DNR along with other end-of-life requests.

6

Treatment of the Body Following Death

- **Anatomical Gifts:** donation of bodily tissue after death**.**
  - Usually noted on driver's license or in one's will
  - Unless anatomical gifts have been expressly refused in writing, the decision can be made after death by authorized agents or family.
- **Burial or Cremation**:
  - Certain persons are authorized to request the burial, cremation or "aquamation"
  - Client's wishes should be clear and consistent to avoid delays.

7

Cryogenics and Estate Planning

- **Cryogenics and "death"**
  - NRS 451.007: death is the "irreversible cessation of: (a) Circulatory and respiratory functions; or (b) All functions of the person's entire brain, including his or her brain stem."
  - Cryogenic process subjects the body to sustained temperatures well below -150 degrees Fahrenheit
  - Revival not a certainty
- **Revival Trusts**
  - Need to ensure preserved person financially provided for upon revival while dealing with the possibility of unsuccessful revival.
  - Need to anticipate and prevent challenges that could deplete or terminate trust
  - Long perpetuities period

8

Thank you!

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9

NEW END-OF-LIFE OPTIONS AND

THE EFFECTS OF VOLUNTARY DEATH ON THE ESTATE

A. END-OF-LIFE OPTIONS:

End of life options are among the most difficult decisions clients must contemplate. Often, very little consideration has been given to the morbid details beforehand precisely because they are uncomfortable topics. More to the point, in many cases, clients just don't know what their options are. Some decisions can be made in legal estate planning documents, like the statutory form Health Care Power of Attorney[1], but others may need to be expressed in medical orders.

A.1 Pain Management

Managing pain and other deleterious symptoms is critical to one's quality of life in their remaining days. An individual may have preferences regarding medications and therapies as well as non-medical interventions, including massage or acupuncture. As well, an individual may have personal or religious beliefs against accepting certain treatments, such as a Jehovah's Witness's belief against blood transfusion. In the face of great pain and a short life, one may also consider highly addictive drugs that they would not consider if recovery was possible, even when those drugs may shorten their remaining life. Some of these subjects are included in the Nevada statutory form Health Care Power of Attorney and additional instructions can be included if needed.

A.2 Hospice Care

A terminal individual may prefer hospice care to extended hospitalization when they are in their final stages of life. Hospice care takes a holistic approach, caring for mental as well as physical needs, prioritizing quality of life over extension of life. Hospice care can be provided in a health care facility or in the

[1] See NRS 162A.860

home and may include family services including counseling and/or relief for caregivers.

A patient must generally receive a physician's prognosis of six months or less to live to qualify for hospice. As hospice is designed to prioritize comfort, treatments aimed at recovery or preservation are typically, though not always, excluded. It is not entirely uncommon for a person admitted to hospice to outlive their prognosis and a person can move in and out of hospice care as their condition changes.

A.3 Voluntarily Stopping of Eating and Drinking (VSED)

As death nears, especially when declining mental capacity is accelerating, some individuals choose to voluntarily stop eating and drinking. This generally hastens death and is preferable to some who are anticipating a severe decline and prolonged suffering before death.

While anyone can refuse food or drink at any time when they are competent, if they lose capacity a physician may feel a Hippocratic obligation to order artificially administered nutrition and hydration, which may greatly prolong life without restoring health and function. Nevada law allows one to state such desire in their advance directive[2]. Additionally, it can be very helpful to discuss such wishes with health care agents named in such direction so that they may have greater confidence in ordering succession of such interventions.

A.4 Seccession of Life-Sustaining Treatment

In keeping their Hippocratic oath, physicians may employ various treatments to maintain or prolong life. This can include feeding tubes, IV administered hydration, intubation for breathing support, and cardiopulmonary resuscitation, among other things. When such treatment fails to restore health and functioning it may serve only to prolong death and increase suffering.

[2] Id.

This issue is a natural result of medical advances in preservation of living tissue outpacing advancement in restoration and recovery of health. The famous case of Terri Schiavo brought the issue to the popular consciousness, resulting in many requesting the right to "pull the plug" and allow death to result naturally. This is generally covered in the "living will" component of one's advance directive. It is important for individuals to consider what they want in the way of medical treatment when restoration of health is no longer a reasonable expectation so they can express such desires in legally enforceable documents.

A.5 Palliative Sedation

When an individual has had life sustaining treatments withdrawn, they may still have a great deal of pain or discomfort before natural death occurs. Individuals may wish to request or permit palliative sedation rather than experience conscious suffering up to death. To ensure treatment, such requests should be included in a Health Care Power of Attorney and otherwise communicated to one's health care agent for the avoidance of doubt.

B. Medically Assisted Death

B.1 Made famous to many by the exploits of Dr. Jack Kevorkian, Medical aid in dying has gained some broader acceptance as its legalization in some states has allowed the development of standards for its safe administration. Nine states and the District of Columbia currently permit medically aided death for residents, including: Oregon, Washington, California, Montana[3], Vermont, Colorado, Hawai'i, New Jersey, and Maine. Generally, when assisted death is permitted, it results in the prescription of death inducing drug. Those seeking medically aided death appear to be a rather small subset of terminal patients. Among the even smaller number of those prescribed the drug, it is believed that about 60% actually follow through and take it.

[3] Montana has not passed a law regarding medically assisted death but the Montana Supreme court has stated that there is no law prohibiting it (See Baxter v. Montana, 354 Mont. 234). Though there have been attempts to pass laws to permit or prohibit medically assisted death in Montana, none have passed so far.

B.2 Medical Aid-In-Dying and Nevada:

Nevada has yet to pass a law permitting medically aided death after considering it in the legislature three times.

The Nevada legislature first took up the issue in 2015 session in bill SB 336, Patient Self-Determination Act. This bill did not make it out of committee as it was never scheduled for hearing.

The issue was raised again in 2017 in bill SB 261 which was sponsored by a group of sixteen state senators and assemblymembers. This time the bill passed through the full Senate before dying in the Assembly committee.

In 2019, SB 165, the Nevada Death with Dignity Act, passed out of the State Senate Health Committee but failed to pass the full Senate and missed the legislative deadline.

B.3 Qualifying for Medically Aided Death in Other States:

Without the ability to rely on medically aided death in Nevada, individuals interested in this option must consider how to take advantage of the laws of a state that has permitted it. Most states that have such laws have similar requirements. To be eligible in California, the individual must:

(a) Be a resident of the state

(b) Be 18 years or older

(c) Have been diagnosed with a terminal illness

(d) Have a prognosis of six months or less to live

(e) Be mentally capable of making their own health care decisions

(f) Capable of self-ingesting the aid-in-dying medication

(g) Making an informed decision and voluntary request

Additionally, the process requires the patient to make two verbal requests to their

physician at least fifteen days apart and then a third request in writing. The decision must then be made by two physicians, the attending/prescribing physician and a consulting physician. Due to the residency requirement, a Nevada resident who seeks such services must go to lengths to establish residency before even beginning the process. Besides changing the location of one's residence, this will usually entail, at a minimum, obtaining a drivers license and voter registration in the new state. This option may still be desirable enough for some to make the effort but it is a very high barrier for most Nevadans to consider seriously.

C. Estate Planning/Medical Documents Involved – the Advance Directive[4]

Choosing and memorializing end-of-life wishes is a legal and medical matter. Though all decisions include a mix of legal and medical issues, some documents will be prepared with legal counsel while others can only be issued by licensed medical personnel. The term "Advance Directive" refers to one or more of several kinds of documents regarding one's healthcare wishes.

C.1 Legal Documents

Though hospitals sometimes have forms for these for use with patients coming in for planned surgery, these are considered essential documents included in every comprehensive estate planning package prepared by an attorney. The following documents can be separate or combined in a single document.

(a) **Health Care Power of Attorney**: A health care power of attorney names agents to make medical decisions for a patient. As long as the patient is mentally competent to make and communicate their own medical decisions, they remain in control of their health care. However, if they should be incompetent or non-communicative when a medical decision needs to be made, the health care agent is authorized to act for them and direct their care. A statutory form is provided at NRS 162A.860.

[4] NRS 449A.703

(b) **Living Will**: A living will is the "pull the plug" document that permits medical staff to withdraw life sustaining treatment when all treatment calculated to restore health has been exhausted without success and medical care providers can only provide treatment which extends life without recovery or restoration. This is often confused with a "Do Not Resuscitate" order which will be discussed later.

C.2 Medical Documents

The following documents cannot be obtained from an estate planning attorney but must be issued by an attending physician, in the physician's discretion, and only for patients in a terminal condition who request them.

(a) **"Do Not Resuscitate" ("DNR")**: DNRs have high recognition but are not well understood by most outside the legal or medical fields. It is simply an order that tells EMT and attending medical staff not to resuscitate the patient if found unconscious. These are provided for under Nevada law at NRS 450B.420. Emergency medical staff are not obligated to search for or inquire about a patient's DNR. It may be important (or at least interesting) to note that DNR by tattoo, even if the signature is part of the tattoo, is not generally accepted as a valid order and can create a very confusing situation[5].

(b) **"Physician's Order for Life Sustaining Treatment"** ("**POLST**"): A POLST is a more comprehensive document regarding medical care wishes than the DNR as it can include an order not to resuscitate along with other end-of-life requests. Nevada law provides for POLSTs in NRS 449A.500 et seq. Like a DNR, it must be executed by a patient and their physician.

D. Treatment of the Body Following Death

There is no common law right to one's bodily remains after death but statutes provide some opportunities to memorialize one's choice made during life.

[5] https://www.washingtonpost.com/news/to-your-health/wp/2017/12/01/a-man-collapsed-with-do-not-resuscitate-tattooed-on-his-chest-doctors-didnt-know-what-to-do/

D.1 **Anatomical Gifts:** Under Nevada law[6], an individual is authorized to designate, in life, anatomical gifts for medical or scientific use to be made from their bodily tissue after death. If the individual has made no statement on the matter, the health care agent, if any, may do so unless specifically restricted under the power of attorney, otherwise this decision may be made by the person's parents or guardian. Most often such gifts are made known through a notice on their driver's license or through will though other methods are also permissible[7]. Unless one has expressly refused anatomical gifts in writing, the decision can be made after death by those authorized[8].

D.2 **Burial or Cremation:** Under Nevada law, certain persons are authorized to request the burial, cremation or "aquamation"[9] of your remains after death and after all anatomical gifts have been made[10]. Because cremation is irreversible and crematoriums are sensitive to family disputes, it pays to make sure that a client's wishes are clear and consistent.

E. Cryogenics and Estate Planning

Some notable celebrities, including Ted Williams but not Walt Disney, and other wealthy individuals have chosen to have their remains cryogenically frozen in hopes of reanimating later when medical science has advanced sufficiently to permit them additional years of life. This raises a number of novel concerns and unique estate planning issues.

E.1 **Cryogenics and "death"**: NRS 451.007 defines death as the "irreversible cessation of: (a) Circulatory and respiratory functions; or (b) All functions of the person's entire brain, including his or her brain stem." Setting aside any technical, scientific, or logistical questions about cryogenics, it is clear that whether or not one is deceased before going through a cryogenic process, which generally involves subjecting a body to temperatures well below -150 degrees Fahrenheit, after going through the process, that

[6] NRS 451.556
[7] NRS 451.558
[8] NRS 451.566
[9] Alkaline Hydrolysis, popularly referred to as "aquamation", is a chemical decomposition defined under NRS 451.607 and included in the definition of "cremation" provided for under NRS 451.617.
[10] NRS 451.024

individual will be considered legally deceased. Though it is the intent to return to a state of life in the future, and whether or not that occurs, the person is now deceased under Nevada law. This raises questions about the administration of their estate and any trusts. In fact, establishing a trust is a central part of the process for those organizations providing cryogenic preservation. Though this trust is primary to ensure funds to support the individual once their life has been restored. Such trusts are sometimes referred to as "Revival Trusts".

E.2 **Revival Trusts**: As cryogenic preservation involves cutting edge technology and long-term custody of physical remains, it tends to be a rather costly affair with some costing over $200,000, plus funds to provide for ongoing custodial fees. Since the preserved person is legally deceased, their trust has to be written to avoid or survive challenge from surviving heirs who may have expected to be beneficiaries. It also must provide for the deceased to regain control or beneficial interest upon their anticipated revival. As well, given the speculative nature of long term cryogenics preservation and the challenge of successful revival (not to mention the difficulty of having to revive a body that was already deceased before the freezing process took place), such a trust must also provide for distribution in the event that revival is not a success. Given the length of time one may remain in a frozen state, these trusts are generally set up in states, like Nevada, with very long perpetuities periods to ensure the trust can still be in existence if and when the individual is revived.

Determining Testator Capacity and Spotting Undue Influence

Submitted by Brandon Bybee

Determining Testator Capacity and Spotting Undue Influence

Presented by
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Stone Law Offices

1

Modern Factors Increasing Frequency of Litigation:

1. **The "Great Wealth Transfer"**: Baby Boomer's passing their heirs an estimated $30 trillion over the next 30-40 years.
2. **Long-Term Disability Trends**: The large boomer population is also experiencing more disability than the preceding generation, providing increased opportunity for exploitation.
3. **Modern Families**: Less than half the population living in a "traditional" two-parent, first-marriage home compared to 73% in 1960. Diverse family structures complicate estate planning and increase possibilities for disappointment, disagreement, and litigation.

2

Plausible Deniability and Legal Balancing

Sincere

- Surprise
- Suspicion
- Concern
- Good faith contest

Disingenuous

- Disappointment
- Resentment
- Greed
- Nuisance litigation

3

Circumstances Prompting Litigation:

- **Changes made in advanced age, near death, or during illness.**
  - Raises suspicion of duress, diminished capacity, undue influence, or fraud.
- **Competing documents/Oral promises.**
  - Violates expectations; raises authenticity concerns; creates latent ambiguities; risk incomplete revocation/competing terms.
- **Pattern change; informal execution; execution in care facility.**
  - Manner of execution differs from past behaviors (new attorney; no attorney); questionable compliance with legal formalities; circumstances raising legal presumptions.

4

Parties Prompting Litigation:

- **New unexpected beneficiaries.**
  - "Helpful" neighbors;
  - "selfless" caregivers;
- **Sibling rivalries.**
  - Mistrust of sibling fiduciaries;
  - fights over favored assets;
  - complications of dividing family business.
- **New spouse/Blended families.**
  - Non-parent surviving spouse;
  - young spouse/deferred inheritance;
  - disinheritance in favor of spouse's family.

5

Substantive Changes Prompting Litigation:

- **Disinheritance; Unequal shares.**
  - Can be a surprise "parting shot" prompting litigation from a beneficiary that is in disbelief or has nothing left to lose.
- **Fiduciary changes.**
  - Have they changed from family to a stranger? From a bank to an individual? From one family member to another (who has exercised undue influence)?

6

Preventing Challenges in the Preparation Stage

7

Plan Early:

- **Avoid Death-bed Planning**
  - Notable health events and diagnoses implicating declining ability present significant challenges to planning occurring thereafter.
  - Easier to prove capacity before it has had more time to decline.

Plan Privately:

- **Avoid beneficiary participation.**
  - Legal counsel chosen and paid for by client.
  - Client speaks and explores options freely.
  - Client instructs counsel on drafting decisions.
  - Disinterested witnesses without connections to beneficiaries.

8

Professional Planning:

- **Formal processes–Sound policies**
  - More formalities = more client investment.
  - Increased confidence that client understands his or her planning and that the terms of the documents match the client's intentions.
  - Professional reputation of preparer lends credence to documents and provides witness to client capacity and intentions.
  - Experience and expertise to ensure compliance with legal requirements.
  - Policies and procedures in place to guard against easy attacks.

9

Direct Client Contact:

- **In-person meetings/in-office execution.**
  - Client identity verified and certainty as to parties involved in the communication (rather than a phone call in which another party may be present and influencing).
  - Easier to discuss details and illustrate complex options; reading and responding to a client's non-verbal communication.
  - Formal execution "ceremony" with drafting attorney and experienced staff as witnesses; ensuring compliance with legal formalities.
- **House Calls**
  - A telephone conversation is not usually enough. If a person is unable to come into the office, a "house call" may be necessary.

10

Drafting to Prevent Successful Challenges

11

Clear and Accurate Drafting:

- **Declaration of Intent.**
  - Affirms and gives context to client decisions.
  - Sincere parties less inclined to contest; more difficult for insincere parties to argue against client intent.
  - Not always wise to offer specific reasons.
- **Clear Straightforward Terms**
  - Avoid unnecessary complication

12

Terms that Raise the Stakes for Contestants:

- **In Terrorem or No-contest clause.**
  - Disincentivizes litigation from those with vested interest.
  - Draft carefully to prevent non-enforcement by overactive Judge.
- **Conditional distributions.**
  - Prevents vesting, rendering beneficiary "contingent" until condition met.
  - Sometimes work in state where no-contest clauses are not enforceable (check your jurisdiction).

13

Fiduciaries:

- **Third-party professional trustee**
  - No personal history or pattern of dealing with family members.
  - Avoids costly mistakes of a lay fiduciary
- **Absolute discretion for the trustee.**
  - Harder for beneficiaries to challenge BUT harder for beneficiaries to challenge.
- **Trust protectors**
  - Powers to change trustees and interpret trust terms without court involvement

14

Thank you!

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15

DETERMINING TESTATOR CAPACITY AND SPOTTING UNDUE INFLUENCE

Testamentary capacity is conceptually simple but can be significantly complicated by facts and circumstances. The specific period of time during which such capacity must be present is brief—only upon the signing a testamentary document(s). As a technical matter, this could occur within a small window of time for an otherwise severely incapacitated person, but as a practical matter, the more notorious and often one operated under diminished capacity, the easier and more likely such capacity is to be successfully challenged. As estate litigation appears to be on the rise, it is all the more important to understand how capacity can attacked and defended to overcome or enforce one's testamentary wishes.

1. Legal Formalities and States of Capacity:

(a) **Execution of Wills**. In Nevada, a will that is completely handwritten, dated, and signed by the testator is a valid "holographic" will. If it is not holographic, a written will must be signed in the presence of two disinterested (non-beneficiary, non-fiduciary) witnesses who must be physically present in the room when the will is signed. Nevada does not accept oral wills for probate.

(b) **Testamentary Capacity**. Testamentary capacity is that mental capacity necessary for a person to make a legally valid will. It requires that the person (1) knows the natural objects of his or her bounty (i.e., family and close friends), (2) knows the nature and extent of his or her assets, and (3) understands how he or she wishes to dispose of his or her assets. This is a low standard, and the Nevada Supreme Court has ruled that one can have sufficient capacity to make a will despite old age, blindness, senility, physical weakness, infirmity, disease, and even hallucinations with "horses flying".[1]

(c) **Contractual Capacity**. To enter into a valid contract, one must understand the subject matter of the contract and the terms of the contract. It is generally accepted that this is a higher standard than that required for

[1] *In re Peterson's Estate*, 77 Nev. 87 at 102 and 109, 360 P.2d 259 at 267 and 270 (1961).

testamentary capacity.

(d) **Capacity to Make A Trust**. Courts have differed on whether contractual capacity or testamentary capacity is required to make a valid trust. The Nevada Supreme Court has made no definite distinction but seems to lean towards a testamentary standard.

(e) **Undue Influence**. "Undue influence" or "coercion" is found where a person is so influenced by another to cause the influenced person to give up his or her free will for that of the influencer. Undue influence may be presumed if the person being influenced is physically or mentally weak.[2]

(f) **Nevada Legal Presumption**. In Nevada, if a person assists in the preparation of a transfer document — including will, trust, deed, or other document affecting property interests — and the transfer document benefits that person, it is assumed that the document is void.[3]

(g) **Burden of Proof**. The law generally assumes that a person has sufficient mental capacity to understand the document they are signing and that they are not acting under "undue influence". However, there are some legal presumptions against transfers to certain people which can shift the burden of proof. Inter vivos and testamentary transfers to certain persons are presumed invalid (NRS 155.097), specifically: (i) caregivers; (ii) the drafter of the transfer document(s); (iii) a person paying for or otherwise participating in the design/construction of the transfer document(s); or (iv) a person related or subordinate to one of the aforementioned.

2. **Scenarios that Trigger Litigation:** Litigation can arise from disputes that are sincere or disingenuous; from surprise or incredulity just as well as from anger or greed. Thou testators are broadly granted the right to direct distribution of their property, there are circumstances that make the novel exercise of that power more or less likely to be

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[2] "It must appear, either directly or by justifiable inference from the facts proved, that the influence was exercised, so as to destroy the free agency of the testator and control the disposition of the property under the will." *In re Peterson's Estate*, 77 Nev. 87 at 111, 360 P.2d 259 at 271 (1961).

[3] NRS 155.097(2).

successfully challenged.

(a) Disinheritance; inequality.

(1) Disinheritance is a parting shot, the last insult, pouring salt in a known wound. Especially when coming as a surprise, it can motivate litigation for a beneficiary that is in disbelief or has nothing left to lose.

(2) Probate is more likely to encourage contests since it is a public process and requires notice to parties who may be disinherited. However, other than for estranged, remote, or otherwise disconnected parties, Trusts won't completely avoid conflict from the type of personalities that are likely to bring will contests.

(b) Changes made near death or during illness.

(1) Reasonably raises suspicions of diminished capacity, undue influence, or even forgery.

(A) Exacerbated when certain children/beneficiaries are closer to home than others

(2) Scrivener's errors more likely if documents are being prepared under truncated timeline.

(c) Remote/informal execution; execution in care facility.

(1) Execution outside of an attorney's office raises concerns about legal formalities required for valid execution.

(A) Did the "witnesses" actually witness the signing?

(B) Are the witnesses "interested parties"?

(C) Are the documents fraudulent or forgeries?

(2) Execution under medical care raises suspicions and may also implicate statutory requirements for execution in care facility (NRS 162A.220 re POAs and requiring certificate of competency)

(d) Addition of new beneficiaries, especially caregivers and other strangers.

(1) They could be helpful unexpecting neighbors or parties with ulterior or nefarious motives. If the family doesn't even know who they are, they are reasonably likely to expect undue influence, etc.

(e) Changes of fiduciaries.

(1) Have they changed from family to a stranger? From a bank to an individual? From one family member to another (who has exercised undue influence)?

(f) New spouse/Blended families.

(1) Family mistrust of a new spouse.

(2) If the new spouse is close in age to the testator's children there is and issue of practical disinheritance by near permanent deferral.

(3) Potential for actual disinheritance by the new spouse. Inheritance from parent may instead pass to the new spouse's children intentionally or accidentally through intestate succession.

(g) Competing documents.

(1) Surprise factor: If heirs are aware of a certain prior intent or earlier version of documents, they may be surprised by more recent documents expressing a different intent. They may have difficulty accepting the newer document as authentic.

(2) Inconsistency: Are there inconsistent expressions in the documents? Multiple valid documents seeming to cover the same property (e.g. a will directing life insurance different from the beneficiary designation)?

(3) Draft vs. Execution: Draft documents, whether predating or

following executed documents can support disputes.

(4) Multiple Governing Documents: Sometimes there are multiple amendments that don't cover the same ground and must be read together for the full picture. This can sometimes cause confusion or create inconsistency.

(h) Oral promises.

(1) Raises expectations that are unmet

(2) May raise suspicion as to the veracity of the executed documents

(3) May raise questions of fact regarding purposes upon which some gifts or exclusions may have been made

(i) Sibling rivalries

(1) Trustee mistrust

(A) Lack of transparency or mistrust is so high, no amount of transparency is enough

(2) Business Succession questions

(A) Difficult to make equal, arguments over valuation, family members involved to different degrees

(3) Favored assets

(A) Family home/cabin

(B) Property expected to appreciate vs. depreciate

(C) Heirlooms and other items of high sentimental value

3. Reducing the Likelihood of successful Litigation

(a) In the document-preparation stage: Policies, process, & recommendations

(1) Do not procrastinate if mental capacity is declining.

(A) Planning can only be done while the individual is alive and has capacity. Planning or changes should be done when capacity is the most demonstrable. If capacity is in decline, that time is now.

(B) The more capacity declines, the more difficult to rebut attacks on planning.

(2) Avoid participation by any beneficiary, especially a favored beneficiary.

(A) Maintain attorney-client privilege where things can be spoken freely without disclosure

(B) Limit the opportunities to argue undue influence. The presence of a party that will especially benefit at the expense of others is good fodder for an extended battle. Most of the "undue influence" argument will center on influence.

(C) Best if benefitting family member isn't even in the building. The client should have confidence that they can speak without being heard by a party that may be exercising influence over them and that you can testify to that effect.

(3) Professional preparation.

(A) More formalities require more client investment, making it more difficult to argue that they did not intend what they did.

(B) Professional reputation of preparer lends creedence and provides witness to client capacity and intentions.

(C) Explain financial and relational implications of decisions, contrast client decisions with ordinary expectations, and

probe client intent. Ensure you can testify to those topics you may be called upon to answer.

(4) In-person meetings.

(A) Easier to verify client identity.

(B) Certain knowledge as to the parties involved in the communication (rather than a phone call in which another party may be present and influencing).

(C) Usually easier to discuss details and illustrate options and read and respond to client non-verbal communication, increasing confidence in the planning matching intentions

(b) In the documents:

(1) Declaration of Intent. Provides explanation giving context to client decisions.

(2) No-contest clause. Disincentive to challenges. Must be carefully drafted to avoid too much room for Judge not to enforce. Must have teeth, a party with nothing to lose has no reason to accept the result.

(3) Conditional distributions. Can provide a workaround for Jxs where no-contest clauses are not enforceable.

(4) Third-party professional trustee. Without a personal history or pattern of dealing, a professional can avoid family issues being played out in the trust administration. Avoids costly mistakes of a lay fiduciary.

4. Additional Steps to Overcome Negative Presumptions

If there are circumstances which could lead to a natural or legal presumption of undue influence or limited mental capacity, additional steps can be taken to ensure documents are enforced.

(a) Certificate of Independent Review. Where Nevada law includes

a presumption that would void a will or other document, an independent attorney can meet with the client and certify that the documents express the client's actual intentions by preparing and signing a "Certificate of Independent Review" (NRS 155.0975(4)). Though it does not eliminate all challenges to the document, it reverses the presumption of invalidity and shifts the burden of proof. It is also helpful to confirm a person's intent to refute challenges based on age or aberrational planning.

(b) **Psychological Evaluation.** If you anticipate challenges relating to mental capacity and undue influence, the should undergo examination by a qualified psychologist or psychiatrist and get a notarized statement from the doctor. Though a complete diagnostic is stronger, a Mini-Mental Exam (MMSE) and/or a Mini-Cog test can be helpful for this. The greater the likelihood of a challenge and greater the financial stakes, the more formal and in-depth the examination should be.

(c) Pre-Death Court Ruling. If the stakes are great and the client is greatly concerned to avoid challenges after death, Nevada law allows a court process to have documents declared valid.

Sale of Real Estate and Special Proceedings

Submitted by Kennedy E. Lee

Sale of Real Estate

KENNEDY E. LEE

1

Probate Overview

Probate is the legal process of gathering a deceased person's assets and transferring them to creditors and heirs, as well as settling any of the decedent's other remaining affairs

Supervised by a judge in probate court

Selling real property during the probate process has its own requirements that are different from ordinary real property sales in Nevada

2

Assets Subject to Probate

Asset ownership is the key to determining what assets are subject to probate and, therefore, subject to the rules governing real property sales in probate.

The “probate estate” includes all assets not passing by operation of law or under the terms of a contract. In other words, the probate estate consists of assets for which there is no co-owner with a right of survivorship and for which there is no beneficiary designation.

3

Assets Subject to Probate

Certain real property may be subject to the probate estate depending on how it’s ownership is held:

A. Joint Tenants – Affidavit of Death of Joint Tenant
- Can include two or more persons owning real estate in joint tenancy (which presumes a “right of survivorship”). NRS 111.675 sets forth that property held as joint tenants automatically passes to the surviving owner(s) when one owner dies. Because of this, no probate is necessary. If a property is owned in joint tenancy is going to be sold after the death of one of the owners, the probate rules do not apply.

B. Tenants in Common – Probate
- In Nevada, tenancy in common is the default provision in a deed. Co-owners hold an undivided interest in property. This type of ownership does not include a right of survivorship. If property that is owned as a tenancy in common is going to be sold after the death of one of the owners, the probate rules do apply.

C. Deed upon Death – Affidavit of Death of Grantor
- NRS 111.671 permits a landowner to make a deed upon death, which conveys his or her interest in real property to a beneficiary or multiple beneficiaries upon the death of the landowner. If property passes via a deed upon death, the probate rules regarding a sale do not apply.

4

Assets Subject to Probate

Wait 18 months before sale and insurance

Pursuant to NRS 111.689, creditors of the decedent may enforce their claims against property transferred pursuant to a deed upon death for up to 18 months following the owner's death.

Because of this, title insurance often requires this period to expire before they will insure a transaction.

5

Publish Notice of Sale

Notice of all real property sales must be published three times over a period of two weeks before the day of sale or, in the case of a private sale, before the day on or after which the sale is to be made.

The publication must be in a newspaper published in the county in which the property, or some portion of the property, is located.

6

Publish Notice of Sale - Exceptions

The court may waive the publication requirement if:

1. The personal representative is the sole heir of the estate, or if all devisees or heirs of the estate consent in writing;
2. The personal representative provides proof that the property has been publicly listed in a public property listing service for a period of not less than 30 days; or
3. The estate is subject to a lien or mortgage on the property in excess of the value of the real property and the estate has entered into an agreement with the holder of the lien or mortgage to waive the deficiency and accept the net sales proceeds.

7

Listing the Property

1. Once the personal representative is appointed, they have authority to hire an agent to list the property for sale.
2. Normally, it is the best course of business to start preparing the property to be listed for sale soon after probate is opened so that the estate can be wrapped up within a reasonable period of time.

8

Listing the Property

A. RPA - Memorialized contract setting forth the specific terms of the sale of real property

1. Sign as Personal Representative
   - Personal representatives are the only authorized individuals to enter into contracts regarding estate property

2. Subject probate court confirmation
   - All sales of real property must be confirmed by the Court. Only after confirmation by the Court is the sale of real property binding.

B. Disclosures - The personal representative generally has no information regarding the underlying condition and history of the property. It is important to indicate this in the SRPD section of the contracts, so the personal representative does not incur possible liability down the road if a defect in the house later discovered.

9

Petition to Confirm Sale of Real Property

All property sales must be reported to the court and confirmed by the court. A certified copy of the Order confirming the real property sale must be recorded in the county recorder's office where the real property is located.

The Petition confirming sale should include:

A. Notice of Sale

B. Appraisal

Requirement of an appraisal can be waived if all beneficiaries consent in writing. Waiver of an appraisal is common when there are relatively few beneficiaries, there are no disputes, and everyone agrees on the sale terms.

10

Petition to Confirm Sale of Real Property

C. Outstanding Mortgage

The outstanding mortgage balance must be satisfied from the sale proceeds after paying the necessary expenses of the sale.

D. Residential Purchase Agreement

E. Commission

The Petition must include a request for Court approval of agents' and broker's commissions.

11

Overbid/Hearing Process

Before confirming the sale, the court will consider the appraisal to make sure that the sales price is not disproportional to the value of the property.

At the hearing, the court will solicit bids from other potential purchasers, and will confirm the highest bid.

A. Starts at $5,000 or 5% above current contract

B. Order serves as the addendum—do not need new RPA
   - If the court accepts a higher bid at the hearing, the court will confirm the new buyer at the new price in the form of an order.

C. Penalty for backing out (fees and costs)
   - If the purchaser fails or refuses to comply with the terms of the sale, the purchaser is liable to the estate for the difference between the bid amount and the final sales price plus costs to confirm the new buyer.

D. Commission split if outbid
   - If the original buyer is outbid, then the real estate commission allocated to the buyer's agent is split equally between the original buyer's agent, and the overbid buyer's agent.

12

Independent Administration

A personal representative who has been granted full authority to administer the estate under the Independent Administration Act may sell real property without court confirmation using a Notice of Proposed Action.

Notice of Proposed Action

- Notice to any proposed action in an independent administration, including sale of real property, must be sent to all interested parties.
- The notice must provide the details of the sale (similar to the contents of a petition).
- The interested parties may consent or object to the proposed sale of real property. An objection must be received within 15 days of the notice.

13

Proceeds to Estate Not Heirs

1. All net proceeds from the sale of real property are held by the Estate.
2. The net proceeds are not distributed to the heirs/beneficiaries until the estate is closed or a partial distribution is authorized.

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Practical Pointers

A. Personal Property and Household Items

1. Keep

The parties involved in the case, including family, beneficiaries, and interested parties, should allocate among themselves in accordance with the decedent's Will or as they agree, how the household items will be split. Some items may have little to no monetary value, but could have sentimental value.

2. Donate

Items the interested parties do not want, but still have practical use, should be donated to a charity so others can benefit from these items.

3. Trash

Items that the interested parties do not want, and cannot be donated, should be trashed in order to prepare the property to be sold.

4. Estate sales are rarely worthwhile

Generally, estate sales have very limited monetary return for the Estate. The expenses incurred with an estate sale usually offset most of the sale proceeds.

15

Practical Pointers

B. Repairs and maintenance can be paid from Estate or proceeds of sale

- Often, real property that is subject to probate can be a bit run down and in need of repairs and maintenance. These repairs can be important in order to obtain the highest and best possible offer for the estate.
- The personal representative can use estate funds to pay for the necessary repairs and maintenance.
- If there are no liquid funds, these costs can be paid at closing from the net proceeds of the sale as a cost of administration.

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PROBATE OVERVIEW

Probate is the legal process of gathering a deceased person's assets and transferring them to creditors and heirs, as well as settling any of the decedent's other remaining affairs. Except for very small estates, the probate process is supervised by a judge in probate court. It is the judge's job to make sure that everything in the estate is handled properly and lawfully. Selling real property during the probate process has its own requirements that are different from ordinary real property sales in Nevada.

ASSETS SUBJECT TO PROBATE

Asset ownership is the key to determining what assets are subject to probate and, therefore, subject to the rules governing real property sales in probate. The "probate estate" includes all assets not passing by operation of law or under the terms of a contract. In other words, the probate estate consists of assets for which there is no co-owner with a right of survivorship and for which there is no beneficiary designation. Certain real property may be subject to the probate estate depending on how its ownership is held:

A. Joint Tenants—Affidavit of Death of Joint Tenant

Joint tenants can include two or more persons owning real estate in joint tenancy (which presumes a "right of survivorship"). NRS 111.675 sets forth that property held as joint tenants automatically passes to the surviving owner(s) when one owner dies. Because of this, no probate is necessary. If a property is owned in joint tenancy is going to be sold after the death of one of the owners, the probate rules do not apply.

B. Tenants in Common

In Nevada, tenancy in common is the default provision in a deed. Under tenancy in common, the co-owners hold an undivided interest in property. This type of ownership does not include a right of survivorship. If property that is owned as a tenancy in common is going to be sold after the death of one of the owners, the probate rules do

apply.

C. Deed upon Death

NRS 111.671 permits a landowner to make a deed upon death, which conveys his or her interest in real property to a beneficiary or multiple beneficiaries upon the death of the landowner. If property passes via a deed upon death, the probate rules regarding a sale do not apply.

Wait 18 months before sale and insurance

It is important to note many title companies will not issue a title insurance policy until the new owner has owned the property for at least 18 months after the owner's death. Pursuant to NRS 111.689, creditors of the decedent may enforce their claims against property transferred pursuant to a deed upon death for up to 18 months following the owner's death. Because of this, title insurance often requires this period to expire before they will insure a transaction.

PUBLISH NOTICE OF SALE

Notice of all real property sales must be published three times over a period of two weeks before the day of sale or, in the case of a private sale, before the day on or after which the sale is to be made. NRS 148.220(1). The publication must be in a newspaper published in the county in which the property, or some portion of the property, is located. *Id*.

Exceptions: There are exceptions to this publication requirement. Specifically, the court may waive the publication requirement if:

1) The personal representative is the sole heir of the estate, or if all devisees or heirs of the estate consent in writing;

2) The personal representative provides proof that the property has been publicly listed in a public property listing service for a period of not less than 30 days; or

3) The estate is subject to a lien or mortgage on the property in excess of the value of the real property and the estate has entered into an agreement with the holder of the lien or mortgage to waive the deficiency and accept the net sales proceeds. NRS 148.220(2).

LISTING THE PROPERTY

One the personal representative is appointed, they have authority to hire an agent to list the property for sale. Normally, it is the best course of business to start preparing the property to be listed for sale soon after probate is opened so that the estate can be wrapped up within a reasonable period of time.

A. RPA

The RPA is the memorialized contract setting forth the specific terms in the sale of real property.

1. Sign as Personal Representative

Personal representatives are the only authorized individuals to enter into contracts regarding estate property.

2. Subject probate court confirmation pursuant to NRS 148

All sales of real property must be confirmed by the Court. Only after confirmation by the Court is the sale of real property binding. NRS 148.110.

B. Disclosures

The personal representative generally has no information regarding the underlying condition and history of the property. It is important to indicate this in the SRPD section

of the contracts, so the personal representative does not incur possible liability down the road if a defect in the house later discovered.

MUST PETITION THE COURT TO CONFIRM THE SALE OF REAL PROPERTY

All property sales must[1] be reported to the court and confirmed by the court before the title to the property passes. NRS 148.060 & 148.260. The report and a petition for confirmation of the sale must be made within 30 days after each sale. *Id*. A certified copy of the Order confirming the real property sale must be recorded in the county recorder's office where the real property is located. NRS 148.280.

PETITION CONTENTS

The Petition confirming the sale should include:

A. Notice of Sale

An affidavit must be filed acknowledging the publication of the Notice to Sale was completed as required under NRS 148.220. NRS 143.380(2)(a).

B. Appraisal

An appraisal of the property to be sold must accompany the petition. However, the requirement of an appraisal can be waived if all beneficiaries consent in writing. NRS 148.260. Waiver of an appraisal is common when there are relatively few beneficiaries, there are no disputes, and everyone agrees on the sale terms.

The written consent, to be signed by each interested person, to waive the appraisal may include language like the following:

"I, [BENEFICIARY NAME], as a beneficiary of the Estate of [DECEDENT NAME], declare under penalties of perjury under the laws

[1] If the personal representative has been granted authority under the Independent Administrations Act, then a sale may proceed without court confirmation if a proper Notice of Proposed Action was completed.

of the State of Nevada, that I waive the requirement of an appraisal for the [PROPERTY DESCRIPTION] pursuant to NRS 148.260(2)."

C. Outstanding Mortgage

The Petition should include the outstanding mortgage balance. Pursuant to NRS 148.130, the outstanding mortgage balance must be satisfied from the sale proceeds after paying the necessary expenses of the sale.

D. Residential Purchase Agreement

Since all sales for real property must be reported to the Court under NRS 148.060, the Petition should include a reference to, including the agreed upon sale price, and an attached copy of the Residential Purchase Agreement ("RPA"), as well as any addendum and counter offer.

E. Commission

The Petition must include a request for Court approval of agents' and broker's commissions. NRS 143.380(2)(b).

OVERBID/HEARING PROCESS

At the hearing for the confirmation of sale, the Court will consider the necessity of the sale—the benefit and interest of the Estate in having the sale made—as well as examine the appraisal of the property and compare it to the RPA sale price to make sure that the sale bid is not disproportional to the value of the property. NRS 148.270(1). At the hearing, the court will solicit bids from other potential purchasers, and will confirm the highest bid.

A. Starts at $5,000 or 5% above current contract

Any bidding starts at $5,000 above the current price listed in the RPA, or 5% above the listed sale price if the RPA price is less than $100,000.00.

B. Order serves as the addendum—do not need new RPA

If the court accepts a higher bid at the hearing, the court will confirm the new buyer at the new price in the form of an order. NRS 148.270(5). The order confirming the sale serves as an addendum to the original RPA to enable the sale to close on the new terms. *Id*.

C. Penalty for backing out (fees and costs)

If the purchaser fails or refuses to comply with the terms of the sale, the personal representative can petition to vacate the order confirming the sale. NRS 148.300. When the property is eventually sold, if the amount realized on the resale does not cover the prior confirmed amount plus the expenses to vacate the order, the prior purchaser who failed to close is liable to the estate for the deficiency. *Id*.

D. Commission split if outbid

When there is no overbid, the commission is split between the listing agent and buyer's agent as indicated in the purchase documents. NRS 148.120. If the original buyer is outbid, then the real estate commission allocated to the buyer's agent is split equally between the original buyer's agent, and the overbid buyer's agent. *Id*.

INDEPENDENT ADMINISTRATION

A personal representative may petition the court to administer the estate under Independent Administration Act. A personal representative who has been granted full authority to administer the estate under the Independent Administration Act may sell real property without court confirmation using a Notice of Proposed Action.

A. Notice of Proposed Action

Notice to any proposed action in an independent administration, including sale of real property, must be sent to all heirs. NRS 143.735. The notice must provide the details of the sale (similar to the contents of a petition). The heirs may consent or object to the proposed sale of real property. An objection must be received within 15 days of the notice.

PROCEEDS TO ESTATE NOT HEIRS

All net proceeds from the sale of real property are held by the Estate. The net proceeds are not distributed to the heirs/beneficiaries until the estate is closed or a partial distribution is authorized.

SHORT SELL

When selling real property via short sell, the same requirement to petition the Court for confirmation of sale, as outlined above, still applies. However, notice of the sale via publication may be waived.

PRACTICAL POINTERS

PREPARE PROPERTY

A. Personal Property and Household Items

1. Keep

The parties involved in the case, including family, beneficiaries, and interested parties, should allocate among themselves in accordance with the decedent's Will or as they agree, how the household items will be split. Some items may have little to no monetary value, but could have sentimental value.

2. Donate

Items the interested parties do not want, but still have practical use, should be donated to a charity so others can benefit from these items.

3. Trash

Items that the interested parties do not want, and cannot be donated, should be trashed in order to prepare the property to be sold.

4. Estate sales are rarely worthwhile

Generally, estate sales have very limited monetary return for the Estate. The expenses incurred with an estate sale usually offset most of the sale proceeds.

B. Repairs and maintenance can be paid from Estate or proceeds of sale

Often, real property that is subject to probate can be a bit run down and in need of repairs and maintenance. These repairs can be important in order to obtain the highest and best possible offer for the estate. One of the duties of a personal representative is to preserve and maintain the assets of the estate, including the real property. NRS 143.020. In order to fulfill this duty, the personal representative can use estate funds to pay for the necessary repairs and maintenance. If there are no liquid funds, these costs can be paid at closing from the net proceeds of the sale as a cost of administration. NRS 147.195(1).

Locating and Accessing All Assets Without the Traditional "Paper" Trail and Handling Digital Assets

Submitted by Jeffrey P. Luszeck

Locating and Accessing All Assets Without the Traditional "Paper" Trail and Handling Digital Assets

JEFFREY P. LUSZECK, ESQ.

1

1. How to Find a Decedent's Digital Assets and Important Information

a. Overview

b. What are digital assets?

   i. NRS 722.110 "Digital asset" defined. "Digital asset" means an electronic record in which a natural person has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

      1. Examples of digital assets include email, documents, photographs, books, blog, videos, social medial accounts, web domain names, etc.

c. Leaving Access Instructions

d. Post-Mortem Searches and Account Access

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2. Nevada Law on Digital Assets

a. NRS 143.188 - Power to direct termination of certain electronic or digital accounts or assets.

1. Except as otherwise provided in subsection 2, subject to such restrictions as may be prescribed in the will of a decedent or by an order of a court of competent jurisdiction, a personal representative has the power to direct the termination of any account of the decedent, including, without limitation:

(a) An account on any:

(1) Social networking Internet website;

(2) Web log service Internet website;

(3) Microblog service Internet website;

(4) Short message service Internet website; or

(5) Electronic mail service Internet website; or

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2. Nevada Law on Digital Assets

(b) Any similar electronic or digital asset of the decedent.

2. The provisions of subsection 1 do not authorize a personal representative to direct the termination of any financial account of the decedent, including, without limitation, a bank account or investment account.

3. The act by a personal representative to direct the termination of any account or asset of a decedent pursuant to subsection 1 does not invalidate or abrogate any conditions, terms of service or contractual obligations the holder of such an account or asset has with the provider or administrator of the account, asset or Internet website.

b. In summary, NRS 143.188 allowed a personal representative to terminate a decedent's accounts on electronic mail, social networking, messaging, and other similar web-based services, but not financial accounts or to alter contractual obligations the deceased account holder had with the service provider.

i. It was also silent regarding accessing and/or copying the digital assets.

1. This would limit personal a representative's ability to identify potential assets.

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2. Nevada Law on Digital Assets

c. NRS Chapter 722 – Fiduciary Access to Digital Assets

i. In 2017 Nevada enacted the Revised Fiduciary Access to Digital Assets Act promulgated by the Uniform Law Commission in 2015.

ii. Chapter 722 enacted provisions to give: (1) certain fiduciaries and other designated persons the legal authority to manage the digital assets and electronic communications of deceased or incapacitated persons; and (2) custodians of digital assets and electronic communications the legal authority to deal with a fiduciary or designated recipient of a person holding an account with the custodian.

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3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

a. Applicability – NRS 722.300

i. Applies to:

1. Fiduciary acting under a will or power of attorney
2. A personal representative acting for a decedent
3. A guardianship proceeding commenced
4. A trustee acting under a trust

ii. Does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business

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3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

b. Other important terms

i. NRS 722.030 "Account" defined. "Account" means an arrangement under a terms-of service agreement in which a custodian carries, maintains, processes, receives or stores a digital asset of the user or provides goods or services to the user.

ii. NRS 722.090 "Custodian" defined. "Custodian" means a person that carries, maintains, processes, receives or stores a digital asset of a user.

iii. NRS 722.110 "Digital asset" defined. "Digital asset" means an electronic record in which a natural person has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

iv. NRS 722.120 "Electronic" defined. "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

v. NRS 722.130 "Electronic communication" defined. "Electronic communication" has the meaning set forth in 18 U.S.C. § 2510(12).

vi. NRS 722.280 "User" defined. "User" means a person that has an account with a custodian.

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3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

c. NRS 722.310 - User Direction for disclosure of digital assets

1. A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney or other record.

2. If a user has not used an online tool to give direction under subsection 1 or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

3. A user's direction under subsection 1 or 2 overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

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3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

d. NRS 733.320 - Terms-of-service agreement

1. This chapter does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

2. This chapter does not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

3. A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law or by a terms-of-service agreement if the user has not provided direction under NRS 722.310.

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3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

e. NRS 722.330 - Procedure for Disclosing digital assets

1. When disclosing digital assets of a user under this chapter, the custodian may at its sole discretion:
   (a) Grant a fiduciary or designated recipient full access to the user's account;
   (b) Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or
   (c) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

2. A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this chapter.

3. A custodian need not disclose under this chapter a digital asset deleted by a user.

4. If a user directs or a fiduciary requests a custodian to disclose under this chapter some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:
   (a) A subset limited by date of the user's digital assets;
   (b) All of the user's digital assets to the fiduciary or designated recipient;
   (c) None of the user's digital assets; or
   (d) All of the user's digital assets to the court for review in camera.

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3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

f. NRS 722.340 - Disclosure of contents of electronic communications of deceased user

If a deceased user consented to or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

1. A written request for disclosure in physical or electronic form;
2. A certified copy of the death certificate of the user;
3. A certified copy of the court order appointing the representative;
4. Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney or other record evidencing the user's consent to disclosure of the content of electronic communications; and
5. If requested by the custodian:
   - (a) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
   - (b) Evidence linking the account to the user; or
   - (c) A finding by the court that:
     - (1) The user had a specific account with the custodian, identifiable by the information specified in paragraph (a);
     - (2) Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. §§ 2701 et seq. or 47 U.S.C. § 222 or other applicable law;
     - (3) Unless the use provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or
     - (4) Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

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3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

g. NRS 722.350 - Disclosure of other digital assets of deceased user

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:

1. A written request for disclosure in physical or electronic form;
2. A certified copy of the death certificate of the user;
3. A certified copy of the court order appointing the representative; and
4. If requested by the custodian:
   - (a) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
   - (b) Evidence linking the account to the user;
   - (c) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or
   - (d) A finding by the court that:
     - (1) The user had a specific account with the custodian, identifiable by the information specified in paragraph (a); or
     - (2) Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

12

3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

h. NRS 722.420 - Fiduciary duties and authority

1. The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:
   (a) The duty of care;
   (b) The duty of loyalty; and
   (c) The duty of confidentiality.

2. A fiduciary's or designated recipient's authority with respect to a digital asset of a user:
   (a) Except as otherwise provided in NRS 722.310, is subject to the applicable terms of service;
   (b) Is subject to other applicable law, including copyright law;
   (c) In the case of a fiduciary, is limited by the scope of the fiduciary's duties; and
   (d) May not be used to impersonate the user.

3. A fiduciary with authority over the property of a decedent, protected person, principal or settlor has the right to access any digital asset in which the decedent, protected person, principal or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

4. A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, protected person, principal or settlor for the purpose of NRS 205.473 to 205.513, inclusive.

5. A fiduciary with authority over the tangible personal property of a decedent, protected person, principal or settlor:
   (a) Has the right to access the property and any digital asset stored in it; and
   (b) Is an authorized user for the purpose of computer-fraud and unauthorized-computer-access laws.

6. A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

7. A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:
   (a) If the user is deceased, a certified copy of the death certificate of the user;
   (b) A certified copy of the court order appointing the representative or the court order, power of attorney or trust giving the fiduciary authority over the account; and
   (c) If requested by the custodian:
      (1) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
      (2) Evidence linking the account to the user; or
      (3) A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph (1).

13

3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

i. NRS 722.430 - Custodian compliance and immunity

1. Not later than 60 days after receipt of the information required under NRS 722.340 to 722.420, inclusive, a custodian shall comply with a request under this chapter from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

2. An order under subsection 1 directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. § 2702.

3. A custodian may notify the user that a request for disclosure or to terminate an account was made under this chapter.

4. A custodian may deny a request under this chapter from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

5. This chapter does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this chapter to obtain a court order which:
   (a) Specifies that an account belongs to the protected person or principal;
   (b) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and
   (c) Contains a finding required by law other than this chapter.

6. A custodian and its officers, employees and agents are immune from liability for an act or omission done in good faith in compliance with this chapter.

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3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

j. Misc. provisions of NRS Chapter 722

i. Disclosure of content of electronic communications and digital assets of a principal – NRS 722.360 & 722.370

ii. Disclosure of content of electronic communications and digital assets of a trustee – NRS 722.380 & 722.390

iii. Disclosure of content of electronic communications and digital assets of a guardian – NRS 722.400 & 722.410

15

4. Federal Law

a. Computer Fraud and Abuse Act

i. The Computer Fraud and Abuse Act (CFAA) was enacted in 1986, as an amendment to the first federal computer fraud law, to address hacking. Over the years, it has been amended several times, most recently in 2008, to cover a broad range of conduct.

b. Electronic Computer Privacy Act

i. A federal statute that protects certain wire, oral, and electronic communications from unauthorized interception, access, use, and disclosure.

c. Stored Communications Act.

i. Protects the privacy of wire and electronic communications (for example, emails) and records (for example, email service subscriber names) while in electronic storage. Among other things, the SCA makes it unlawful to: (1) access without authorization (or exceed authorized access to) a system used to transmit wire or electronic communications; and (2) through such access, obtain, alter, or prevent another's authorized access to a wire or electronic communication stored on the system.

16

Locating and Accessing All Assets Without the Traditional "Paper" Trail and Handling Digital Assets

1. How to Find a Decedent's Digital Assets and Important Information

a. Overview

b. What are digital assets?

i. NRS 722.110 "Digital asset" defined. "Digital asset" means an electronic record in which a natural person has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

1. Examples of digital assets include email, documents, photographs, books, blog, videos, social medial accounts, web domain names, etc.

c. Leaving Access Instructions

d. Post-Mortem Searches and Account Access

2. Nevada Law on Digital Assets

a. NRS 143.188 - Power to direct termination of certain electronic or digital accounts or assets.

1. Except as otherwise provided in subsection 2, subject to such restrictions as may be prescribed in the will of a decedent or by an order of a court of competent jurisdiction, a personal representative has the power to direct the termination of any account of the decedent, including, without limitation:

(a) An account on any:

(1) Social networking Internet website;

(2) Web log service Internet website;

(3) Microblog service Internet website;

(4) Short message service Internet website; or

(5) Electronic mail service Internet website; or

(b) Any similar electronic or digital asset of the decedent.

2. The provisions of subsection 1 do not authorize a personal representative to direct the termination of any financial account of the decedent, including, without limitation, a bank account or investment account.

3. The act by a personal representative to direct the termination of any account or asset of a decedent pursuant to subsection 1 does not invalidate or abrogate any conditions, terms of service or contractual obligations the holder of such an account or asset has with the provider or administrator of the account, asset or Internet website.

b. In summary, NRS 143.188 allowed a personal representative to terminate a decedent's accounts on electronic mail, social networking, messaging, and other similar web-based services, but not financial accounts or to alter contractual obligations the deceased account holder had with the service provider.

i. It was also silent regarding accessing and/or copying the digital assets.
1. This would limit personal a representative's ability to identify potential assets.

c. NRS Chapter 722 – Fiduciary Access to Digital Assets

i. In 2017 Nevada enacted the Revised Fiduciary Access to Digital Assets Act promulgated by the Uniform Law Commission in 2015.

ii. Chapter 722 enacted provisions to give: (1) certain fiduciaries and other designated persons the legal authority to manage the digital assets and electronic communications of deceased or incapacitated persons; and (2) custodians of digital assets and electronic communications the legal authority to deal with a fiduciary or designated recipient of a person holding an account with the custodian.

3. Summary of NRS Chapter 722 – Fiduciary Access to Digital Assets

a. Applicability – NRS 722.300

i. Applies to:

1. Fiduciary acting under a will or power of attorney

2. A personal representative acting for a decedent

3. A guardianship proceeding commenced

4. A trustee acting under a trust

ii. Does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business

b. Other important terms

i. NRS 722.030 "Account" defined. "Account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives or stores a digital asset of the user or provides goods or services to the user.

ii. NRS 722.090 "Custodian" defined. "Custodian" means a person that carries, maintains, processes, receives or stores a digital asset of a user.

iii. NRS 722.110 "Digital asset" defined. "Digital asset" means an electronic record in which a natural person has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

iv. NRS 722.120 "Electronic" defined. "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

v. NRS 722.130 "Electronic communication" defined. "Electronic communication" has the meaning set forth in 18 U.S.C. § 2510(12).

vi. NRS 722.280 "User" defined. "User" means a person that has an account with a custodian.

c. NRS 722.310 - User Direction for disclosure of digital assets

1. A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney or other record.
2. If a user has not used an online tool to give direction under subsection 1 or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

3. A user's direction under subsection 1 or 2 overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

d. NRS 733.320 - Terms-of-service agreement

1. This chapter does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.
2. This chapter does not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.
3. A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law or by a terms-of-service agreement if the user has not provided direction under NRS 722.310.

e. NRS 722.330 - Procedure for Disclosing digital assets

1. When disclosing digital assets of a user under this chapter, the custodian may at its sole discretion:
   (a) Grant a fiduciary or designated recipient full access to the user's account;
   (b) Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or
   (c) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.
2. A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this chapter.
3. A custodian need not disclose under this chapter a digital asset deleted by a user.
4. If a user directs or a fiduciary requests a custodian to disclose under this chapter some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:
   (a) A subset limited by date of the user's digital assets;
   (b) All of the user's digital assets to the fiduciary or designated recipient;
   (c) None of the user's digital assets; or
   (d) All of the user's digital assets to the court for review in camera.

f. NRS 722.340 - Disclosure of contents of electronic communications of deceased user

If a deceased user consented to or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

1. A written request for disclosure in physical or electronic form;
2. A certified copy of the death certificate of the user;
3. A certified copy of the court order appointing the representative;
4. Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney or other record evidencing the user's consent to disclosure of the content of electronic communications; and
5. If requested by the custodian:
    (a) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
    (b) Evidence linking the account to the user; or
    (c) A finding by the court that:
        (1) The user had a specific account with the custodian, identifiable by the information specified in paragraph (a);
        (2) Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. §§ 2701 et seq. or 47 U.S.C. § 222 or other applicable law;
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   (b) Is subject to other applicable law, including copyright law;
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2. An order under subsection 1 directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. § 2702.
3. A custodian may notify the user that a request for disclosure or to terminate an account was made under this chapter.
4. A custodian may deny a request under this chapter from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.
5. This chapter does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this chapter to obtain a court order which:
   (a) Specifies that an account belongs to the protected person or principal;
   (b) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and
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Tax Basis Reporting Requirements in Estate Administration

Submitted by Bryan D. Dixon

VII Tax Basis Reporting Requirements in Estate Administration

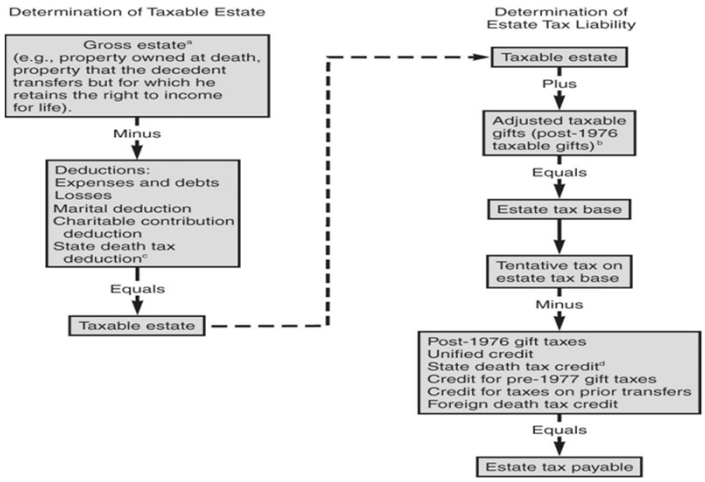
1

Estate Taxes

- Transfer taxes levied upon money and property transferred upon owner's death to beneficiaries.

2

Estate Tax Formula



[a]Valued at decedent's date of death or alternate valuation date.
[b]Valued at date of gift.
[c]For decedents dying after 2004.
[d]For decedents dying before 2005.

3

Gross Estate – Inclusions

- Gross Estate includes all property owned by individual on date of death.
  - Owned by legal title; or
  - Certain property previously transferred by decedent.
  - Includes Dower or Curtesy Rights.
- Probate Estate is different than Gross Estate.
  - Probate Estate = property passing under a will.
  - Gross Estate usually encompasses Probate Estate.

4

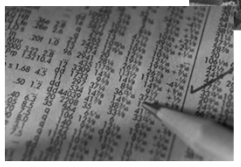
Basis

- The cost or "Basis" is the starting point for determining the amount of gain or loss.
- It is also the measure of the maximum amount of depreciation or amortization allowable for certain types of assets.
- Basis is not always what you think it will be – how you treat an investment on your taxes can change its cost basis for tax purposes.

5

Investor's Original Basis

- An investor's original basis in a purchased asset is its cost.
  - The cost of property is the amount the investor paid for it in cash or other property.
  - For example, if Bob buys a rental property for $100,000 cash, his original basis in the acquired property is $100,000.
- Basis applies not just to real property – but to all assets.



6

Basis of Property Acquired from a Decedent

- Under current law, when an investor dies the beneficiary of his property does not "carry over" the decedent's basis.
- Instead, the basis of property acquired from or passing from a decedent is the fair market value of the property as of the date of:
  - The investor's death; or
  - The federal estate tax alternate valuation date if that date (typically six months after the date of death) is elected by the estate's executor.

7

Basis of Property Acquired from a Decedent Step-up Basis

- Therefore, if the value of an investment held until death increases from the date of its acquisition, the potential gain (or loss in the case of a decrease in value) is never recognized for income tax purposes.
- An increase in the property's basis to its federal estate tax value is called a "**step-up**" in basis.

8

Basis of Property Acquired from a Decedent
Step-up Basis

- This "step-up" in basis to the fair market value has the effect of wiping out the income tax burden on all pre-death appreciation in the property (particularly if the asset it sold timely after the fair market value adjustment is made).

9

Basis of Property Acquired from a Decedent
Step-down in basis

- Assets can also depreciate in value and receive a "step-down" in basis at the decedent's death (to the fair market value at the time of death). While the readjustment in basis to the value of the property as of the property owner's date of death is an advantage for the heirs when the rule results in a "step-up" in basis, it might actually be detrimental to the heir if the property has declined in value and thus results in a "step-down" in basis.
- Proper tax planning is required to avoid this loss of basis (often, it is wise for the owner to sell the asset before death so the owner can enjoy the tax benefits of the loss).

10

Determining Basis in Property

- To determine if the sale of inherited property is taxable, you must first determine your basis in the property
- The basis of property inherited from a decedent is generally one of the following:
  - The fair market value (FMV) of the property on the date of the decedent's death
  - The FMV of the property on the alternate valuation date (value the property at six months after the date of death)

11

Property Acquired from a Decedent

- Generally, beneficiary's basis in inherited assets will be the FMV of the asset at decedent's date of death
  - Exception: if the executor/administrator of the estate elects alternate valuation date, basis is FMV on such date.
- Inherited property is always treated as long-term property

12

Gross Estate – Valuation Methods

13

Property Acquired from a Decedent

- Inherited property valuation date
  - Date assets valued for estate tax is either:
    - Date of the decedent's death, which is called the primary valuation date (PVD)
    - 6 months after date of decedent's death, which is called the alternate valuation date (AVD)
  - Can only be elected if both the value of gross estate and the estate tax liability are lower than if PVD was used

14

Property Acquired from a Decedent (Cont.)

- Inherited property valuation date
  - When PVD is used, beneficiary's basis will be the FMV at date of decedent's death
- When AVD is used, beneficiary's basis will be the FMV at the earliest of:
  - Date asset is distributed from estate
  - 6 months after date of decedent's death

15

Alternate Valuation Method

- The alternate valuation method may be elected by an executor or administrator only if the election will **decrease:**
  - The value of the gross estate; and
  - The amount of the federal estate tax imposed.
- Generally, an election to use the alternate valuation date means that property will be included in the gross estate at its fair market value as of six months after the decedent's death.
- However, if any property is distributed, sold, exchanged, or otherwise disposed of within six months after the decedent's death, the value of the property at that disposition date becomes the "alternate value."

16

Gross Estate – Alternative Valuation Date ("AVD")

- AVD is earlier of:
  - 6 months after date of death.
  - Date property is disposed of or distributed.
- Can use only if:
  a) It decreases the value of the estate; AND
  b) It decreases the estate tax liability.
- Cannot use AVD if it merely increases the marital deduction.

17

Unified Credit

- Estate Tax Base < Exempt Amount is not subject to tax.
- Exempt Amount = $ 11.58 million in 2020.

18

Compliance Issues

- Generally, no need to file Form 706 if Gross Estate + taxable gifts < exemption amount.
- Filing required if surviving spouse wants to port deceased spouse's exemption equivalent.
- Due date – 9 months after decedent's death. Can extend 6 more months.
- Valuation – Can have 20% penalty if property on return is valued at less than 65% actual FMV.

19

Code § 1014(f) - Consistency

1. Basis Consistency. Code § 1014(f) provides rules requiring that the basis of certain property acquired from a decedent, as determined under Code § 1014, may not exceed the value of that property as finally determined for federal estate tax purposes, or if not finally determined, the value of that property as reported on a statement made under section 6035. ***Failure to comply with the consistency requirements may result in the disallowance of basis.***

20

Code § 1014(f) – Consistency (Cont.)

2. Reporting Requirement. Section 6035 imposes requirements with regard to the value of property included in a decedent's gross estate for federal estate tax purposes.

21

Code § 1014(f) – Consistency (Cont.)

2. Reporting Requirement (cont).

a) Section 6035(a)(1) provides that the executor of any estate required to file a return under section 6018(a) must furnish, both to the Secretary and the person acquiring any interest in property included in the decedent's gross estate for federal estate tax purposes, a statement identifying the value of each interest in such property as reported on such return and such other information with respect to such interest as the Secretary may prescribe.

22

Code § 1014(f) – Consistency (Cont.)

b. Section 6035(a)(2) provides that each person required to file a return under section 6018(b) must furnish, both to the Secretary and each other person who holds a legal or beneficial interest in the property to which such return relates, a statement identifying the information described in section 6035(a)(1).

23

Code § 1014(f) – Consistency (Cont.)

c. Section 6035(a)(3)(A) provides that each statement required to be furnished under section 6035(a)(1) or (a)(2) shall be furnished at such time as the Secretary may prescribe, but in no case at a time later than the earlier of (i) the date which is 30 days after the date on which the return under section 6018 was required to be filed (including extensions, if any) or (ii) the date which is 30 days after the date such was required to be filed.

24

Code § 1014(f) – Consistency (Cont.)

d. Section 6081(a) provides that the Secretary may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by this title or by regulations. Except in the case of taxpayers who are abroad, no such extension shall be for more than 6 months.

25

Form 8971

- Death
  - Step up in Basis
- Consistent Basis reporting
  - Between Estate & Beneficiary
  - Estate
    - Low value
  - Beneficiary
    - High value
    - Basis cannot exceed estate tax return value

26

Form 8971 (Cont.)

- Estate required to file Federal Estate tax return Form 706
  - Earlier of 30 days after Estate tax return filled or due to be filed
  - Decedent, executor, and beneficiaries' names and tax id numbers

27

Form 8971 (Cont.)

- Schedule A- beneficiary receives their assets
  - No distribution – list of property could be used for distribution
  - Changed in assets distributed to beneficiary – supplemental Schedule A

28

Form 8971 (Cont.)

- Beneficiary transfer property to relate transferee
  - Schedule A must be refiled within 30 days of that transfer
    - Doesn't apply to filing only for portability
    - Cash, tangible property under $3,000, property sold by estate and IRD assets (no step up in basis)
- Not filed
  - Penalties for executor

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VII. TAX BASIS REPORTING REQUIREMENTS IN ESTATE ADMINISTRATION

OVERVIEW

Different rules apply to inherited capital assets versus capital assets received as a gift. When a person sells an asset that they acquired themselves or received as a gift and that asset has appreciated in value, the gain recognized generally equals the sale price minus the seller's "tax basis" in the property. This "tax basis" is usually the amount originally paid to acquire the asset.

In a nutshell, the higher the basis, the less the gain, and the less the tax. Conversely, the lower the basis, the higher the gain, and the higher the tax. As a result, taxpayers typically want the highest basis possible.

When a beneficiary inherits property from a decedent, the asset can receive a step-up in basis to its value on the date of death – which can be both a tax perk for inheritors, as well as a form of tax simplification (as beneficiaries otherwise may not know what the decedent's original cost basis was anyway). From a tax perspective, the death of a person can actually lead to some associated tax benefits.

BASIS OF INHERITED PROPERTY

Step-Up Basis

When a person dies owning appreciated property, the property generally acquires a new tax basis which is equal to its fair market value as of the date of death. This basis adjustment to the fair market value as of the date of a property owner's death is often referred to as a "step-up" in basis. (The term "step-up" assumes that the asset will be worth more upon the death of the property owner than the property owner's basis).

This "step-up" in basis to the fair market value has the effect of wiping out the income tax burden on all pre-death appreciation in the property (particularly if the asset is sold timely after the fair market value adjustment is made).

Step-Down Basis

It is important to understand the other side of the basis adjustment rule: capital assets do not always appreciate in value. Assets can also depreciate in value and receive a "step-down" in basis at the decedent's death (to the fair market value at the time of death). While the readjustment in basis to the value of the property as of the property

owner's date of death is an advantage for the heirs when the rule results in a "step-up" in basis, it might actually be detrimental to the heir if the property has declined in value and thus results in a "step-down" in basis. Proper tax planning is required to avoid this loss of basis (often, it is wise for the owner to sell the asset before death so the owner can enjoy the tax benefits of the loss).

Which Assets Benefit Most from a Step-Up in Tax Basis

It's important to understand which types of assets will benefit from a step-up in tax basis. A highly appreciated asset will typically benefit the most, while an asset that is depreciated or has a tax basis equal to its fair market value will not benefit at all. Asset types that typically benefit the most from a step-up in tax basis include:

- Intellectual property owned by its creator
- Oil and gas interests
- Collectibles
- Highly appreciated stock
- Real estate

DETERMINING BASIS IN PROPERTY

To determine if the sale of inherited property is taxable, you must first determine your basis in the property. The basis of property inherited from a decedent is generally one of the following:

- The fair market value (FMV) of the property on the date of the decedent's death (whether or not the executor of the estate files an estate tax return (See *IRS Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return)*).
- The FMV of the property on the alternate valuation date (value the property at six months after the date of death), but only if the executor of the estate files an estate tax return (Form 706) and elects to use the alternate valuation on that return. See the *Instructions for IRS Form 706.*

Note: even if the beneficiary doesn't actually receive the property until after a significant time has passed, the fair market value will still be established based upon the date of death (or the alternative valuation date).

BASIS CONSISTENCY RULES

Traditionally, when dealing with hard-to-value assets, there often would be a disagreement between the valuation for estate tax purposes, and the value used by the beneficiary for cost basis reporting.

To illustrate, the decedent's estate would prefer to identify a small value to the asset (to minimize potential estate taxes) while the beneficiary would want the highest possible value reported (to get a higher basis step-up). In fact, in the past it was even possible for the executor and beneficiary to report different amounts, each to their own benefit.

"Basis Consistency" is a Statutory Requirement

Prior to tax legislation in 2015, the IRS was short on authority to challenge date-of-death valuations — particularly when stepped-up values for basis were not consistent with the values used for estate tax purposes. This all changed in 2015 with the passage of the Surface Transportation and Veterans Health Care Choice Improvement Act, P.L. 114-41, which provided that the income tax basis of property received from a deceased person can't exceed the property's fair market value (FMV) as finally determined for estate tax purposes.

The 2015 law created Tax Code Sections 1014(f) and 6035, which requires that the executor of an estate that must file an estate tax return (Form 706 or Form 706-NA) to also provide certain statements (regarding the basis of property distributed from the estate of a decedent) to the IRS and to the beneficiaries receiving inherited property.

Executor's Reporting Requirements (IRS Form 8971)

If an estate is required to file a federal estate tax return (*IRS Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return*), the executor is required to report valuation information to both beneficiaries and to the IRS. The report is made on IRS Form 8971, *Information Regarding Beneficiaries Acquiring Property from a Decedent* (as well as including a Schedule A regarding property acquired).

Form 8971 isn't required when: (i) the gross estate plus adjusted taxable gifts is less than the basic exclusion amount; (ii) the estate tax return is filed solely to elect portability of the deceased spousal exclusion amount (DSUE); (iii) the estate tax return is filed solely to make an allocation or election respecting the generation-skipping transfer

tax; (iv) estate tax-related forms (for example, Forms 706-QDT, 706-CE, and 706-GS(D), other than those mentioned above are filed).

Form 706 Exclusion Amount

IRS Form 706 must generally be filed (along with any taxes due) within nine months of the decedent's date of death. However, not every estate needs to file Form 706. It depends upon the value of the estate.

Form 706 must be filed when their gross estate (plus any taxable gifts given during their lifetime) are valued up to the following exclusion amounts for the respective years:

- $1,500,000 (2004-2005)
- $2,000,000 (2006-2008)
- $3,500,000 (2009)
- $5,000,000 (2010-2011)
- $5,120,000 (2012)
- $5,250,000 (2013)
- $5,340,000 (2014)
- $5,430,000 (2015)
- $5,450,000 (2016)
- $5,490,000 (2017)
- $11,180,000 (2018)
- $11,400,000 (2019)
- $11,580,000 (2020)

A decedent's gross estate includes everything he owned at the time he died. Assets are valued at the fair market value at the time of death, not the amount paid to purchase the assets.

It should be kept in mind that the requirement to file Form 706 doesn't mean taxes are owed. After figuring the gross estate, the IRS allows several deductions to reduce the size of the estate, including bequests to a surviving spouse or charities as well as debts owed by the decedent. For example, if a decedent dies with a $12 million estate and leaves it all to the decedent's spouse, Form 706 is required because the estate exceeds the threshold amount, but no estate taxes would be due because the bequest to the spouse isn't taxable.

Portability of Unused Estate Tax Exclusion Amount

Even if the decedent's estate isn't required to file because the estate isn't large enough, it might still be beneficial to file Form 706 to pass along the unused exemption to the spouse. For example, say one spouse dies but only uses $9.580 million of the exemption, leaving $2 million unused. The estate can pass on that remaining $2 million

to the surviving spouse to use when she eventually dies, but only by filing Form 706. If Form 706 isn't filed, the unused exemption is lost.

Note: For many individuals, the use of a bypass trust and other traditional estate planning techniques may be more appropriate than relying on portability. Both tax and non-tax factors should be considered when determining whether portability is appropriate.

IRS Forms 8971 and Schedules A

Form 8971 is a separate filing requirement from the estate's Form 706 or 706-NA, and should not be attached to the respective estate tax return. Form 8971 and attached Schedule(s) A must be filed with the IRS, separate from any and all other tax returns filed by the estate.

The value of the property to be reported on the initial Form 8971 and the attached Schedules A is the fair market value of the asset as reported on the estate tax return. However, the final value for purposes of the federal estate tax may differ from that reported on the estate tax return. A value is considered "final" when:

- The value of the property shown on an estate tax return filed with the IRS isn't contested by the IRS before the period of assessment expires;
- The value of the property is specified by the IRS and isn't timely contested by the estate (or other person required to file under Section 6018(b)); or
- The value of the property is determined by a court order or pursuant to a settlement agreement with the IRS, including the resolution of a claim for abatement or refund.

If information reported on Form 8971 and the Schedule(s) A filed with the IRS or provided to a beneficiary differs from the final value (as the result of the resolution of a valuation dispute or otherwise), the executor or other person required to make this filing must file a supplemental Form 8971 and affected Schedule(s) A with the IRS and provide an updated supplemental Schedule A to each affected beneficiary no later than 30 days after the adjustment.

Due Dates

Form 8971 (including all attached Schedule(s) A) must be filed with the IRS within thirty days following the filing of Form 706 (or 30 days after Form 706 is supposed to be filed).

Note: An automatic six-month extension of time to file is granted to estates that file IRS Form 4768, the Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes. Filing Form 4768 automatically gives the executor of an estate or the trustee of a living trust an additional six months to file a tax return. Form 4768 must be filed on or before the due date for Form 706, or for the equivalent form for a given estate. The estimated tax should also be paid by that date.

Schedule A

The executor is also required to list the names of all of the beneficiaries receiving property from an estate, their addresses and their taxpayer identification numbers. The executor also is required to identify on Schedule A to Form 8971 each item of property passing to a beneficiary and its estate tax value. Schedule A provides specific details on every asset valuation that is reported by the estate.

Each separate Schedule A for each beneficiary that must be provided to the beneficiary by the same time the Form 8971 is due with the IRS. The beneficiary only receives the Schedule A identifying them and the property they receive. They do not receive a Schedule A for any other beneficiary.

If a beneficiary is a trust, the executor may furnish this information to the trustee rather than to each underlying beneficiary of the trust. If the executor has not determined what property will pass to each particular beneficiary by the time Form 8971 is due (which may be the case if a beneficiary is to receive a share of the decedent's estate, but the particular items have not yet been selected), the executor must report on the statement for each beneficiary all of the property that the executor could use to satisfy the beneficiary's interest.

Potential Penalties

Failure to file

Penalties apply if the fiduciary fails to: (1) file a timely Form 8971 or Schedule A; (2) include all information required to be shown; (3) include correct information; or (4)

file a correct supplemental Form 8971 or Schedule A by the due date. The penalty is $260 per return (a single penalty can be assessed for each Form 8971 and Schedule A), but is reduced to $50 per return if the return is filed within 30 days after the due date.

Intentional disregard of filing requirements

If any failure to file a correct Form 8971 or Schedule A is due to intentional disregard of the requirements to file a correct Form 8971 and Schedule(s) A, the minimum penalty is at least $530 per Form 8971 and the Schedule(s) A required to be filed with it, with no maximum penalty.

Penalties for Inconsistent Filing

The valuations that are used for estate tax reporting must not only be accurate, they must also *match the basis claimed by the beneficiary*. Beneficiaries who report basis in property that is inconsistent with the amount on the Schedule A may be liable for a 20% accuracy-related penalty under Section 6662.

In addition, an accuracy-related penalty applies under Sections 6662(b)(5) and (g) for an underpayment of tax resulting from "any substantial estate or gift tax valuation understatement" defined as the value of property claimed on an estate or gift tax return that is 65% or less of what is determined to be the correct value.

Lastly, professional advisers are now wary of a wide range of penalties that might apply to valuation misstatements. Tax return preparers face a risk of penalty under Section 6694 if they knew, or should have known, of a valuation misstatement that constituted an unreasonable position lacking reasonable cause. A valuation professional who knew, or should have known, about a substantial valuation misstatement that was used on a tax return or claim for refund faces a risk of penalty under Section 6695A.

Tax Returns and Tax Saving Tidbits Under TCJA

Submitted by Bryan D. Dixon

VIII Tax Returns and Tax Savings Tidbits Under TCJA

1

Background

The decedent and their estate are separate taxable entities

- All income up to the date of death using Form 1040.
- Income generated by assets of the decedent's estate($600+) using Form 1041.
- Estate tax for transfer of assets from decedent to beneficiaries/heirs using Form 706.

2

Tax Returns for the Estate

- Income tax return if the assets of the estate generate more than $600 in annual income.
  - Necessary to obtain a tax identification number for the estate .
- Estate tax for transfer of assets that exceed the exemption amount ($11.58 million for 2020).

3

Election under § 645

- Allows the executor of an estate and the trustee of a revocable trust to elect to treat the estate and the trust as one for tax purposes.
  - Only one tax return
  - Allows the trust to use a fiscal year
  - Other benefits: charitable causes, S Corp stock, exemption

4

Income Tax for Trusts and Estates

- The TCJA reduced tax rates and brackets for trusts and estates from 2018 through 2025.
  - Four brackets (10%, 24%, 35%, and 37%)
  - Itemized deductions for trusts
  - Section 199A

5

Estate Tax

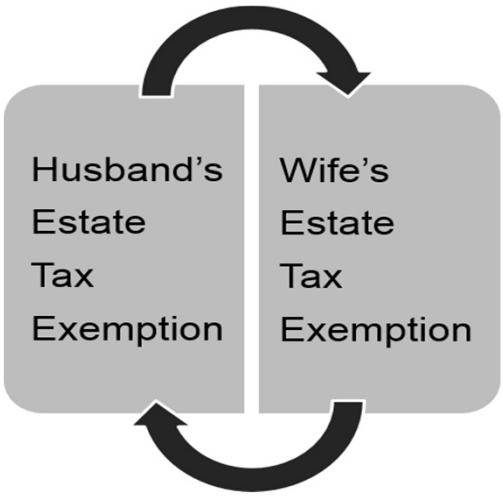
- The Tax Cuts and Jobs Act doubled the exemption to $11.18 million in 2018 (indexed for inflation).
  - Scheduled to revert back to $5.49 million (w/ inflation adjustment) in 2026.
- In 2020, the exemption is $11.58 million.
- Rates starting at 18% to a top rate of 40% (12 brackets).
  - Form 706

6

Estate Tax Payable

7

Portability between Spouses of Exemption Amount (1 of 2)



8

Portability between Spouses of Exemption Amount (2 of 2)

- Any unused exemption amount from first spouse to die can be added to surviving spouse's exemption.
- Surviving spouse can only use the unused exemption for the last deceased spouse.

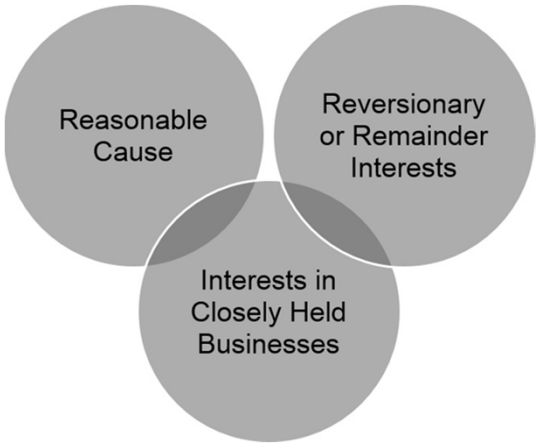
9

No "Clawback" of Gifts

- The IRS finalized regulations to prevent a "clawback"
  - Had potential to retroactively deny taxpayers who die after 2025 the full benefit of the higher exclusion amount applied to previous gifts.

10

Situations Where Delay Is Permitted in Paying Estate Taxes



11

VIII. TAX RETURNS AND TAX SAVINGS TIDBITS UNDER TCJA

BACKGROUND

A decedent and their estate are separate taxable entities. As such, if filing requirements are satisfied, an estate administrator may have to file different types of tax returns. These tax returns may be:

First, an estate administrator may need to file income tax returns for the decedent (Form 1040 or 1040-SR series). The decedent's Form 1040 or 1040-SR for the year of death, and for any preceding years for which a return was not filed, are required if the decedent's income for those years was above the filing requirement.

Second, an estate administrator may need to file income tax returns for the estate (Form 1041). To file this return it is necessary to obtain a tax identification number for the estate (called an employer identification number or EIN). An estate is required to file an income tax return if assets of the estate generate more than $600 in annual income. For example, if the decedent had interest, dividend or rental income when alive, then after death that income becomes income of the estate and may trigger the requirement to file an estate income tax return.

Taxes Owed by the Estate

There are two kinds of taxes owed by an estate: One on the transfer of assets from the decedent to their beneficiaries and heirs (the estate tax – Form 706), and another on income generated by assets of the decedent's estate (the income tax – Form 1041).

When someone dies, their assets become property of their estate. Any income those assets generate is also part of the estate and may trigger the requirement to file an estate income tax return. Examples of assets that would generate income to the decedent's estate include savings accounts, CDs, stocks, bonds, mutual funds and rental property. IRS Form 1041, U.S. Income Tax Return for Estates and Trusts, is required if the estate generates more than $600 in annual gross income.

The decedent and their estate are separate taxable entities. As mentioned above, it is necessary to obtain a tax ID number for the estate before filing Form 1041. An estate's tax ID number is called an "employer identification number," or EIN, and comes in the

format “12-345678X”. It is possible to apply for this number online. It is also possible to apply by FAX or mail.

A decedent’s estate figures its gross income in much the same manner as an individual. Most deductions and credits allowed to individuals are also allowed to estates and trusts. However, there is one major distinction. A trust or decedent’s estate is allowed an income distribution deduction for distributions to beneficiaries. Income distributions are reported to beneficiaries and the IRS on Schedules K-1 (Form 1041).

For calendar year estates and trusts, file Form 1041 and Schedule(s) K-1 on or before April 15th of the following year. For fiscal year estates and trusts, file Form 1041 by the 15th day of the 4th month following the close of the tax year. If more time is needed to file the estate return, apply for an automatic 5-month extension of time to file using IRS Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns.

In general, an estate must pay quarterly estimated income tax in the same manner as individuals. For more information on when estimated tax payments are required see the Form 1041 instructions. For more information on how to make estimated tax payments for an estate see IRS Form 1041-ES, Estimated Income Tax for Estates and Trusts.

Estate tax on the transfer of assets from the decedent to beneficiaries and heirs is reported on IRS Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

Election Under Section 645

An election under IRC Section 645 treats a qualified revocable trust as part of the decedent’s estate for Federal income tax purposes. This will generally simplify the administration of the estate and can provide several tax advantages, since the electing trust will follow the income tax rules for an estate rather than a trust for the first two years.

OTHER TCJA PROVISIONS AFFECTING TRUSTS AND ESTATES

Income Tax Rates and Brackets for Trusts and Estates

The TCJA reduced tax rates and brackets for trusts and estates from 2018 through 2025, reducing the number of brackets for trusts and estates to four (10%, 24%, 35%, and

37%) (Sec. 1(j)(2)(E)). Previously, there were five brackets: 15%, 25%, 28%, 33%, and 39.6%.

Yet the brackets remain compressed and, unlike those for individuals, nearly the same as before, with the highest bracket starting at $12,500 in 2018, $12,750 in 2019, and $12,951 in 2020.

Further, the rules for capital gains rates have changed, with the introduction of a "maximum zero rate amount" for trusts and estates of up to $2,600 in taxable income in 2018, $2,650 in both 2019 and 2020; a "maximum 15% rate amount" of up to $12,700 in taxable income in 2018, $12,950 in 2019, and $13,150 in 2020; and a "maximum 20% rate amount" for taxable income over $12,700 in 2018, $12,950 in 201, and $13,150 in 2020.

Itemized Deductions for Trusts

Prior to the 2017 Tax Cuts and Jobs Act (TCJA), individual taxpayers could deduct a variety of miscellaneous itemized deductions subject to a limitation of 2% of their adjusted gross income (AGI) under Internal Revenue Code ("IRC") Section 67.

Estates and trusts, which are subject to similar income tax provisions, could also deduct miscellaneous itemized deductions under various other code sections. Under the Code, most expenses related to administering an estate or trust were deductible, allowing deductions for amounts paid for "the production or collection of income" and "management, conservation, or maintenance of property held for production of income."

Initially it was believed that the elimination of the itemized deductions for *individual taxpayers*, also applied to qualifying estates and trusts. However, the IRS has clarified in May of 2020 (See IRS Notice 2018-61) that deductions through proposed regulations (REG-113295-18) claimed by estates and trusts, are not suspended by the TCJA and remain deductible. Thus, estates and trusts can still deduct certain costs.

Specifically, the proposed regulations clarify the following deductions are allowable in figuring adjusted gross income and are not miscellaneous itemized deductions:

- Costs paid or incurred in connection with the administration of the estate or trust which would not have been incurred otherwise.

- Deductions concerning the personal exemption of an estate or non-grantor trust.
- Deductions for trusts distributing current income to beneficiaries.
- The distribution deduction for estates and trusts accumulating income.

Finally, the guidance clarifies how to determine the character, amount and manner for allocating excess deductions that beneficiaries succeeding to the property of a terminated estate or non-grantor trust may claim on their individual income tax returns.

Section 199A

Section 199A, enacted as part the Tax Cuts and Jobs Act (TCJA), allows individual taxpayers and certain trusts and estates to deduct up to 20 percent of certain income (section 199A deduction).

The Section 199A deduction is available to eligible taxpayers with qualified business income (QBI) from qualified trades or businesses operated as sole proprietorships or through partnerships, S corporations, trusts, or estates, as well as for qualified REIT dividends and income from publicly traded partnerships. The section 199A deduction is not available for C corporations.

Regulations issued June 24, 2020 (IR-2020-128) provide additional guidance on the treatment of previously disallowed losses that are included in QBI in subsequent years and provide guidance for taxpayers who hold interests in split-interest trusts or charitable remainder trusts.

Estate Tax Rates and Brackets

The estate tax is a tax on the transfer of property after death. The federal estate tax is a tax on property (cash, real estate, stock, or other assets) transferred from deceased persons to their heirs. Property left to a surviving spouse generally isn't subject to estate tax.

According to the Joint Committee on Taxation in 2015, only the estates of the wealthiest 0.2 percent of Americans — roughly 2 out of every 1,000 people who die — owe any estate tax. Thus, 99.8 percent of estates owe no estate tax at all (Note: these numbers do not take into account those who implemented tax planning to avoid the estate tax).

The exemption amount is subject to significant changes due to constantly changing legislation. It has jumped from $650,000 per person in 2001 to $5.49 million per person in 2017. The Tax Cuts and Jobs Act doubled the exemption to $11.18 million in 2018 (indexed for inflation after 2018), but the estate tax cut is scheduled to expire after 2025 (along with most other provisions of the new law).

Due to the "sunset provision" the exemption amount for 2026 is scheduled to revert back to the 2017 amount of $5.49 million with a cumulative inflation adjustment for 2018-2025.

In 2020, the federal estate tax generally applies when a person's assets exceed $11.58 million at the time of death.

The estate tax is graduated — like the income tax — with a beginning rate of 18% a top rate of 40% (and a total of 12 brackets). Additionally, some states also assess estate tax.

IRS Form 706 has the details on exactly which assets count in the calculations, how to find their value and how to figure the tax. But in general, a person figures the tax by applying the rates below to the amount of the estate that's subject to tax.

Making Large Gifts Now Won't Harm Estates After 2025 (i.e. "clawback")

The 2020 gift tax annual exclusion amount will remain unchanged from 2019, at $15,000 per donee. A person who makes cumulative lifetime gifts in excess of the exemption amount, the excess is taxed at a flat 40% rate. Thus, if a person passes away with an estate valued at more than the exemption amount, the excess is taxed at the same flat 40% rate.

In November 2019, the IRS finalized proposed regulations issued November 20, 2018 so that individuals taking advantage of the increased gift tax exclusion amount in effect from 2018 to 2025 will not be adversely impacted after 2025 when the exclusion amount is scheduled to drop to pre-2018 levels.

The statutory sunset of the higher basic exclusion amount and reversion to the lower amount could have, in effect, retroactively deny taxpayers who die after 2025 the full benefit of the higher exclusion amount applied to previous gifts. This scenario has sometimes been called a "clawback" of the applicable exclusion amount.

The regulations implement changes made by the Tax Cuts and Jobs Act (TCJA), tax reform legislation enacted in December 2017. The regulations apply to estates of decedents dying after Nov. 26, 2019, the date they are scheduled to be published as final in the *Federal Register*, but they may be applied to estates of decedents dying after Dec. 31, 2017, and before Nov. 26, 2019.

IRA Beneficiary Designations and Inherited IRAs Update

Submitted by Bryan D. Dixon

IX. IRA Beneficiary Designations and Inherited IRA's Update

1

Changes under the SECURE Act

- On December 20, 2019, a significant piece of retirement plan legislation known as the "Setting Every Community Up for Retirement Enhancement Act of 2019" or the "SECURE Act" was signed into law.

- This legislation had a significant impact on the retirement plan landscape and includes changes intended to expand and preserve retirement savings, improve the administration of such plans, and provide other related benefits.

2

General items impacted by SECURE Act

Some key takeaways regarding the act are:

- The SECURE Act will make it easier for small business owners to set up "safe harbor" retirement plans that are less expensive and easier to administer.
- Many part-time workers will be eligible to participate in an employer retirement plan.
- The Act pushes back the age at which retirement plan participants need to take required minimum distributions (RMDs), from 70½ to 72, and allows traditional IRA owners to keep making contributions indefinitely.
- The Act mandates that most non-spouses inheriting IRAs take distributions that end up emptying the account in 10 years.
- The Act allows 401(k) plans to offer annuities.

3

Post 70 ½ Traditional IRA Contributions

- For tax years beginning after 2019, the Secure Act repeals the age restriction on contributions to traditional IRAs.
- So, for tax years beginning in 2020 and beyond, you can make contributions after reaching age 70½. That's good news.
- Note: Already allowed for Roth IRAs

4

Required Minimum Distributions

- THE NEW RULE CHANGES THE REQUIRED MINIMUM DISTRIBUTION (RMD) AGE FROM 70.5 TO 72 YEARS OLD
  - Assets that are held in an IRA typically haven't been taxed yet, but will be taxed as income upon withdrawal. RMD's force us to take a percentage of those assets out of our IRA upon reaching a certain age
- .

5

Contributions to IRA's

- Traditional IRA Contributions
  - If you continue to work past age 70.5, you can now take annual contributions up to $7,000 into a Traditional IRA.
  - If you making Qualified Charitable Distributions, you will have to subtract the amount of your IRA contribution from your QCS's for the year.

6

No More "Stretch" RMDs

- **Description**: RMDs must be complete within 10 years of death of participant (whether or not in pay status at death).
- **Plans Impacted**: 401(k), Profit Sharing, Money Purchase Pension, 403(b), Defined Benefit, 457(b) Tax Exempt, 457(b) Governmental, IRAs
- **Effective Date**: Generally, death after 2019

7

No More "Stretch" RMDs (cont.)

General Impact:

- Under the SECURE Act, there's no limit on when or how often the beneficiary withdraws money from the account, as long as the account is empty by the end of the 10 years.
- Assets not distributed by the end of the 10th year, will be subject to a 50% penalty.

8

No More "Stretch" RMDs (cont.)

Exceptions to the 10-Year Rule:

- Spouse of original owner
- Minor child (not grandchild) of original owner
- Individuals who are not more than 10 years younger than original owner
- Disabled and Chronically ill individuals

9

Exemptions to 10-Year Rule

The spouse of the decedent.

- In order to be considered an Eligible Designated Beneficiary by virtue of this provision, an individual must have been legally married to the decedent.
- Can still rollover an inherited IRA into own retirement account (unimpacted by the SECURE Act).
- Spouse may choose to remain a beneficiary by establishing an inherited IRA (or other inherited retirement account) and will not have to take RMDs until year deceased spouse would have been age 72

10

Exemptions to 10-Year Rule (cont.)

Minor child (not grandchild) of *owner*

- Minor children only enjoy EDB status until they reach the age of majority.
- Upon reaching age of majority, the child 'flips' from being an Eligible Designated Beneficiary (stretching based on their life expectancy) to being a Non-Eligible Designated Beneficiary, triggering the beginning of the application of the 10-Year Rule (which will generally force 10-year liquidation generally by age 28).

11

Exemptions to 10-Year Rule (cont.)

Individuals who are not more than 10-years younger than the decedent

- *Anyone* who is not more than 10 years younger than the decedent can continue to stretch distributions without regard to the SECURE Act's new 10-Year Rule.
- Beneficiaries who may be most likely to benefit from this provision include parents, siblings, and unmarried partners of the decedent (provided that they are not more than 10 years younger).

12

Exemptions to 10-Year Rule (cont.)

Disabled Individuals

- An individual is considered "disabled" if they meet the rules outlined by IRC Section 72(m)(7),which states:

  …an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.

13

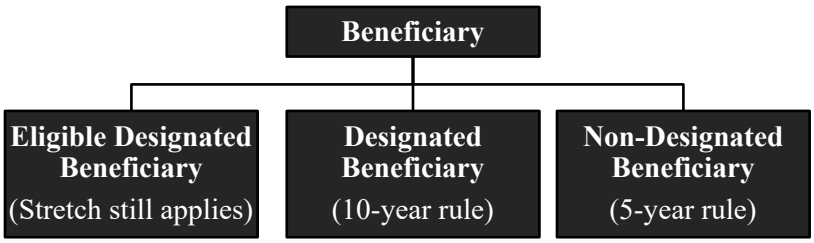
Exemptions to 10-Year Rule (cont.)

Chronically ill persons

- Considered "chronically ill" if they meet the rules outlined by IRC Section 7702B(c)(2), be unable to perform at least two of the six activities of daily living (ADLs) for "an indefinite one which is reasonably expected to be lengthy in nature". (Not 90 days).
- Six activities of daily living:
  - Eating; Toileting; Transferring; Bathing, Dressing; and Continence

14

IRA Beneficiaries after the SECURE Act



- Minor Children
- Disabled
- Chronically Ill
- Not more than 10 year younger
- Spouses

- Non-spouses
- Certain Trusts

- Charities
- Your estate
- Certain Trusts

15

Inherited IRA's for Non-Spouse Beneficiaries

- Old Rule
  - Non-spouse beneficiaries had the ability to stretch the tax deferral of an IRA out over their life expectancy by only taking out a small percentage of the account value on a yearly basis.

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Inherited IRA's for Non-Spouse Beneficiaries (cont.)

- New Rule
  - Non-spouse beneficiaries must withdraw and pay taxes on inherited IRA assets within 10 years of receipt.
  - Owners of inherited IRA's created and funded before December 31, 2019 can continue to stretch the tax liability out over their life expectancy.
  - There is no requirement to take assets out of the account according to a specific schedule.

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IX. IRA BENEFICIARY DESIGNATIONS AND INHERITED IRA UPDATE CHANGES UNDER THE "SECURE ACT"

The Setting Every Community Up for Retirement Enhancement Act of 2019 (known as the SECURE Act), was enacted on December 20, 2019 as part of the Further Consolidated Appropriations Act 2020. This far-reaching bill includes significant provisions aimed at increasing access to tax-advantaged accounts and preventing older Americans from outliving their assets.

Some key takeaways regarding the act are:

- The SECURE Act will make it easier for small business owners to set up "safe harbor" retirement plans that are less expensive and easier to administer.
- Many part-time workers will be eligible to participate in an employer retirement plan.
- The Act pushes back the age at which retirement plan participants need to take required minimum distributions (RMDs), from 70½ to 72, and allows traditional IRA owners to keep making contributions indefinitely.
- The Act mandates that most non-spouses inheriting IRAs take distributions that end up emptying the account in 10 years.
- The Act allows 401(k) plans to offer annuities.

Among its positive changes, the Secure Act raises the age to start required minimum distributions for Qualified Plans (including IRA's) from age 70 ½ to age 72 after January 1, 2020; allows deductible IRA contributions for individuals who qualify after age 70 ½; and many small modifications to the Qualified Plan rules to incentivize employers to adopt some sort of Qualified Plan.

Stretch IRAs

However, one of the most notable changes was the elimination (with some exceptions) of the 'stretch' provision for non-spouse beneficiaries of inherited retirement accounts. For many who inherit IRAs (or 401(k)s) starting in 2020, the SECURE Act eliminated the ability to "stretch" your taxable distributions and related tax payments over the beneficiary's life expectancy.

For someone inheriting an IRA on or after January 1, 2020, they generally cannot stretch the distributions and must withdraw assets from the inherited account within 10 years.

Background

The stretch IRA is an industry term that isn't legally defined (it's not mentioned anywhere in the tax code) to describe the ability of IRA beneficiaries to stretch distributions from an inherited IRA over their lifetimes. For example, a 30-year-old beneficiary would be allowed to stretch distributions over 53.3 years, according to IRS life expectancy tables that govern this, the 30-year-old would begin by withdrawing only 1/53.3th (roughly 1.8 percent) of the total account value as of December. 31 of the prior year.

Such a small amount of distributions would allow the account to keep growing despite the withdrawals. Each year the size of the required minimum distribution (RMD) will increase slightly until the end of the 53.3 years, when the full balance must be withdrawn. The beneficiary, however, can always take more than the RMD. That is the basic stretch IRA concept.

Stretch IRAs Under SECURE Act

The SECURE Act did away with this for most people who inherit in 2020 or later and replaced it with a 10-year payout provision for most non-spouse beneficiaries. Under the SECURE Act, there's no limit on when or how often the beneficiary withdraws money from the account, as long as the account is empty by the end of the 10 years. That is, the beneficiary can choose to withdraw all of the money at once, the beneficiary can leave it sitting there for a decade and then take it all out, or the beneficiary can withdraw distributions over time. (Just note that with a traditional IRA, each withdrawal will be counted as income and subject to taxes in the year you make the withdrawal.)

Any assets that are not distributed by the end of the 10th year, will be subject to a 50% penalty.

Exceptions to the 10-Year Rule

However, the SECURE Act carves out exceptions by creating a new class of designated beneficiaries now called **eligible designated beneficiaries**, or

EDBs. (Determining whether or not a beneficiary is an EDB is done upon the death of the IRA participant).

The following EDB's can still generally stretch out the **required minimum distributions** (**RMDs**) over their lifetime:

- **Spouse of original owner** – (in other words, not much has changed for them). Not: the life expectancies for surviving spouses can continue to be recalculated annually, unlike any other EDB's.
- **Minor child (not grandchild) of original owner** – use up to the age of majority (age 18 in most states) and then the 10-year rule applies when the child reaches the age of majority (or age 26 if child is enrolled in certain education programs).
- **Individuals who are <u>not more</u> than 10 years younger than original owner** – in other words, the age difference is 10 years or less. (examples: a partner, friend, sampling, etc.).
- **Disabled individuals** – defined as individuals who are unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment expected to result in death or be of long-continued and indefinite duration, with proof of such condition required.
- **Chronically ill individuals** – defined as individuals who cannot independently complete two or more "activities of daily living" (e.g. eating, toileting, transferring, bathing, dressing, and/or continence), with proof of such condition required.

SPOUSE AS BENEFICIARY

Planning for spousal beneficiaries has not changed. If a traditional IRA is inherited from a spouse, the surviving spouse generally has the following four choices:

- **Disclaim the IRA** - By disclaiming (or not accepting) the inheritance, you allow the assets to pass to an alternate beneficiary named by the original account holder. This option can be useful for those who don't need the assets and want to avoid the tax consequences of having additional income. By disclaiming the asset, you can potentially pass these assets on to someone in a lower tax bracket. To disclaim, you need to make this choice within nine

months of the original owner's death and before taking possession of any assets.

- **Take a lump sum distribution** - Beneficiary may take all the assets in the account as a lump sum distribution without facing a 10% early withdrawal penalty. However, they will have to pay taxes on the withdrawal if the assets were in a traditional IRA (tax-deferred account). Using this option could place beneficiary in a higher tax bracket and beneficiary may lose out on potential benefits of any additional tax-deferred appreciation.
    - Under the SECURE Act, "eligible designated beneficiaries" (EDB), including spouses, are largely able to use the old rules for distributions from an inherited retirement account.
- **Treat the IRA as if it were the surviving spouse's IRA** – Surviving spouse will treat the IRA as their own IRA by designating the surviving spouse as the account owner (i.e. **spousal transfer** or "**assuming**" the IRA). The surviving spouse is allowed to re-title the IRA account in the surviving spouse's own name (the IRS will treat it as though it has been theirs all along), and can even contribute to the account in the future and name their own IRA beneficiary. However, if the surviving spouse is under 59½, they will be subject to the same distribution rules as if the IRA had been theirs originally, (cannot take distributions without paying the 10% early withdrawal penalty—unless they meet one of the IRS penalty exceptions). The surviving spouse must be the sole beneficiary of the decedent spouse's IRA.

- **Roll over the IRA into a traditional IRA or a qualified employer plan, including 403(b) plans.** If a surviving spouse receives a distribution from his or her deceased spouse's IRA, it can be rolled over into an IRA of the surviving spouse within the 60-day time limit, as long as the distribution is not a required distribution, even if the surviving spouse is not the sole beneficiary of his or her deceased spouse's IRA.
- **Treat themselves at the beneficiary (not treating the IRA as their own)**. This option often is the best choice if the beneficiary is under the age of 59½ or their older than the decent spouse. When the beneficiary sets-up the distributions of the

inherited IRA, the required minimum distributions are determined by the decedent spouse's age at the time of their death. This dating can present two possibilities for the beneficiary to navigate. If the spouse died after their RMDs began—because they were over age 70½—the beneficiary must take distributions based on the longer of:

- The deceased spouse's life expectancy based on their previous RMD schedule, or
- The beneficiary's own single life expectancy

- If the spouse died before their RMDs began, the beneficiary can defer distributions until their RMDs would have started and take distributions then over your single life expectancy.
- The advantage of this choice is that the beneficiary can take withdrawals if necessary and no penalty tax will apply if the beneficiary is not yet 59½. And if the beneficiary is older than the decedent spouse, the beneficiary can defer the RMDs until the decedent spouse would have been required to take them, which will be a later date than the beneficiaries own age of 70½.

TRUST AS BENEFICIARY

A beneficiary can be any person or entity the owner chooses to receive the benefits of a retirement account or an IRA after he or she dies. Beneficiaries of a retirement account or traditional IRA must include in their gross income any taxable distributions they receive.

The single biggest impact of the changes made to the post-death distribution rules made by the SECURE Act will be felt by Non-Eligible Designated Beneficiaries, who do *not* qualify for the list of Eligible Designated Beneficiaries and thus will not be permitted to stretch anymore (unlike their Eligible Designated Beneficiary brethren). Which, notably, may change not only the rules for Designated Beneficiaries who are in the "Non-Eligible" status, but also certain trusts as well.

Under the SECURE Act, a trust may still be a beneficiary. The rules in this area have not changed, but the more limited stretch also applies to trusts. As a reminder, a trust beneficiary will fall into one of two categories.

- A **non-qualifying trust** will not be treated as a designated beneficiary. As a result, it will be subject to the 5-year rule.
- A **qualifying trust** (often referred to as a "**see-through**" trust), will be able to use the entire stretch period, just as before. What is different, however, is that the stretch period is the shorter 10-year deferral. The five requirements to have a qualifying trust remain the same, namely"
    - The trust must be valid under state law;
    - The trust must be irrevocable or become irrevocable upon the death of the owner;
    - The beneficiaries must be identifiable;
    - A copy of the trust must be provided to the trust administrator no later than October 31 of the year following the year of the participant's death.

INHERITED FROM SOMEONE OTHER THAN SPOUSE

The rules for inheriting IRA assets depend on the relationship to the original IRA owner and the type of IRA inherited. If the inherited traditional IRA is from anyone other than a deceased spouse, the beneficiary cannot treat it as his or her own. This means that the beneficiary cannot make any contributions to the IRA or roll over any amounts into or out of the inherited IRA. If a person inherits an IRA asset from someone other than their spouse, you have several options:

Transfer the assets to an inherited IRA and take RMDs

When a traditional IRA is transferred into an inherited IRA, sometimes also referred to as a beneficiary distribution account, there are RMD rules to follow, set by the IRS. The options for taking distributions from the IRA are based on when the original IRA owner died.

It should be noted that the CARES act temporarily waives required minimum distributions (RMDs) for all types of retirement plans (including IRAs, 401(k)s, 403(b)s, 457(b)s, and inherited IRA plans) for calendar year 2020. This includes the first RMD, which individuals may have delayed from 2019 until April 1, 2020.

If the original IRA owner died before December 31, 2019

- **Died before reaching age 70½,** the beneficiary can start taking RMDs no later than December 31 of the year following death. Beneficiary also has the option of distributing the inherited IRA under the 5-year rule. This allows beneficiary to take distributions however they like without penalty, so long as all assets are completely distributed from the inherited IRA by December 31 of the 5th year following the IRA owner's death.
- **Died after reaching age 70½:** beneficiary may elect to calculate those RMDs by using their own age or by using the original IRA owner's age in their year of death, whichever was longer. This option may be advantageous if the original IRA owner was younger than the beneficiary. In the case of a nonspouse inheritor, RMDs are generally required to begin in the year after the year of death.

If the original IRA owner died on or after January 1, 2020

- **Died before reaching age 70:** The SECURE Act requires beneficiaries to withdraw all assets from an inherited IRA by December 31 of the 10th year following the IRA owner's death. Exceptions to the 10-year rule include payments made to an eligible designated beneficiary (a surviving spouse, a minor child of the account owner, a disabled or chronically ill beneficiary, and a beneficiary who is not more than 10 years younger than the original IRA owner or 401(k) participant). These beneficiaries can "stretch" payments over their life expectancy.

Caution: If money is transferred to a different custodian, make sure that any assets transfer directly from one account to another or from one IRA custodian to another. There is no option for a 60-day rollover when a nonspouse beneficiary is inheriting an IRA asset.

For example, if a beneficiary receives a check, the money will generally be taxed as ordinary income, and will be ineligible to be deposited into an inherited IRA a beneficiary may own at another firm, as well as ineligible to go back into the inherited IRA that it was withdrawn from to begin with.

Instead, the beneficiary can make a trustee-to-trustee transfer as long as the IRA into which amounts are being moved is set up and maintained in the name of the deceased IRA owner for the benefit of the beneficiary.

In other words, a portion of the assets are put into a new IRA set up and formally named as an inherited IRA; for example, (Name of Deceased Owner) for the benefit of (Your Name). Be aware that no additional contributions are allowed in the new, inherited IRA account.

Like the original owner, the beneficiary generally will not owe tax on the assets in the IRA until he or she receives distributions from it.

Roth IRA

Generally, the entire interest in a **Roth IRA** must be distributed by the end of the fifth calendar year after the year of the owner's death unless the interest is payable to a designated beneficiary over the life or life expectancy of the designated beneficiary.

If paid as an annuity, the entire interest must be payable over a period not greater than the designated beneficiary's life expectancy and distributions must begin before the end of the calendar year following the year of death. Distributions from another Roth IRA cannot be substituted for these distributions unless the other Roth IRA was inherited from the same decedent.

NO BENEFICIARY

If a person does not have a named beneficiary on the IRA account, the value of the account will be transferred to the person’s heirs through a will or intestacy, which involves the probate process. If a person does not have a will, the court will determine who receives the assets. The IRA account will be liquidated, and the tax benefits of the IRA account will be gone.

For those people who end up inheriting a retirement account through an estate, the distribution method used will generally follow the old rules from before the SECURE Act.

In general, one of the following methods must be used to distribute the assets:

- Disclaim the inherited retirement account
- Take a lump sum distribution

- Distribute the assets within 5 years (there is no annual RMD requirement). This method is used when the original account owner died before their RMD age.
- Take RMDs based on the original account owner's life expectancy. This method is used when the original account owner died after their RMD age.

Modifying Broken Trusts and Other Trust Management Conundrums Today

Submitted by Taylor K. Morris

MODIFYING BROKEN TRUSTS AND OTHER TRUST MANAGEMENT CONUNDRUMS

NATIONAL BUSINESS INSTITUTE
ANNUAL PROBATE AND ESTATE ADMINISTRATION CONFERENCE

PRESENTED BY: TAYLOR K. MORRIS, ESQ.

1

WHAT IS A BROKEN TRUST?

- Purpose no longer relevant
- Changed circumstances
- Trust does not address issue or situation
- Mistakes/Scrivener's Errors

2

HOW TO FIX BROKEN TRUST?

- Identify Type of Trust
- Solutions Within Trust Instrument
- Solutions Outside Trust Instrument

3

TYPE OF TRUST

- Revocable
  - Amend/Restate to fix problems
- Irrevocable
  - Express provision for third party to modify?
  - Outside solutions
    - Non-judicial Settlement Agreements
    - Decanting
    - Judicial Reform/Modification

4

NON-JUDICIAL SETTLEMENT AGREEMENTS

- NRS 164.940
- Indispensable parties execute
- No violation of material purpose
- Court could otherwise approve
- Wide range of trust matters

5

NON-JUDICIAL SETTLEMENT AGREEMENTS

- Option to notice parties who do not execute
- Option to have court approve agreement

6

DECANTING

- NRS 163.556
- Appointing assets from one irrevocable trust into a new irrevocable trust
- Not the same as amending or revoking
- Review statute closely

7

DECANTING

- Consider purpose of decanting and whether it meets statutory requirements
- Consider fiduciary issues even if statute permits
- Only Trustee executes
- Notice not required
- Can elect to notice parties and/or seek court approval

8

JUDICIAL SOLUTIONS

- Court approval for non-judicial settlement agreement or decanting
- Judicial Reformation
- Judicial Modification

9

JUDICIAL REFORMATION

- Correction dates back to execution of trust instrument
- As if it had been drafted that way from the beginning
- Trust instrument contains a mistake or error that frustrates the Trustor's intent

10

JUDICIAL MODIFICATION

- Correction effective ongoing, from date the correction is approved
- Trust instrument is unclear or deficient of provisions needed to address a situation surrounding the Trust

11

JUDICIAL PROCEDURE

- Petition by trustee, settlor, or beneficiary
- Establish jurisdiction
- Court hearing
- Notice to interested parties
- Attend hearing
- Obtain court order

12

TRUST MANAGEMENT CONDUNDRUMS

- May not require a medication or correction of trust instrument
- May need guidance or confirmation prior to taking action
- Petition for Instructions
- Notice of Proposed Action

13

PETITION FOR INSTRUCTION

- NRS 164.030
- Seek court instruction for a course of action relating to the trust
- Gives trustee assurance to proceed with course of action without liability
- Petition to set forth requested instruction
- Set hearing date and notice the interested parties
- Attend hearing and obtain order from the court

14

NOTICE OF PROPOSED ACTION

- NRS 164.725
- Gives beneficiaries of a trust a chance to consent or object to a course of action
- Protects trustee in taking the course of action
- Send notice to the beneficiaries explaining the action and the reasoning
- Allow at least 30 days prior to taking the course of action

15

NOTICE OF PROPOSED ACTION

- If no objection, then trustee may proceed without liability
- If objection is made, then trustee or beneficiary may petition the court to proceed or to stop the action
- If trustee decides not to take action, then must notify the beneficiaries

16

MODIFYING BROKEN TRUSTS
AND
OTHER TRUST MANAGEMENT CONUNDRUMS

Prepared and Presented by

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for

NATIONAL BUSINESS INSTITUTE

as part of

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X

MODIFYING BROKEN TRUSTS AND OTHER TRUST MANAGEMENT CONUNDRUMS TODAY

WHAT IS A BROKEN TRUST?

A trust instrument can become "broken" in various ways. A trust could be considered broken if the purpose of creating the trust is no longer relevant. A trust might become broken if it is deficient of certain substantive or administrative provisions. A trust can become broken due the changed circumstances of the parties to the trust. A trust could be deemed broken if it fails to address a particular scenario or situation that was not contemplated at the time it was created. There might be a multitude of reasons as to why a trust becomes broken. Due to the limited time and scope of this presentation, I will not focus as much on the myriad of ways a trust can become broken, but more so on how we can mend them through the legal mechanisms available.

HOW TO FIX A BROKEN TRUST?

To modify or fix a broken trust, you should first identify the type of trust at issue, then analyze whether or not the trust instrument itself allows for a solution by way of its terms or provisions, and if it does not, then you need to consider legal solutions outside of the trust instrument.

Identify the Type of Trust

To determine how to modify or fix a broken trust, it is vital to identify the type of the trust at issue. In general, every trust will be one of two types-a revocable trust or an irrevocable trust.

Ideally, the trust instrument will directly state whether the trust is revocable or irrevocable. If the trust instrument is silent, then in Nevada, a trust is presumed to be irrevocable (NRS 163.004(2)). "A trust is irrevocable except to the extent that a right to amend the trust or a right to revoke the trust is expressly reserved by the settlor or is granted to one or more persons under the terms of the trust instrument…" (*id.)*

Solutions Within Trust Instrument

After identifying the type of trust, you should next look to the trust instrument itself to identify a solution to modify the trust. If the trust is revocable, then you need not look any further, because the settlor of the trust retains full power and authority to amend and revoke the trust. This means that the settlor simply has to execute a legal amendment, or restate the trust in its entirety, in order to fix the problem.

If the trust is irrevocable, then there still may be provisions in the trust that allow for a party other than the trustor, such as a trustee or trust protector, to modify certain provisions of the trust, despite the fact that it is irrevocable. Normally, this type of authority is limited to administrative provisions, such as being able to remove and/or appoint a successor trustee, change the jurisdiction or situs of the trust, or similar provisions that do not compromise a material purpose of the trust. This allows some flexibility in the administration of the trust without compromising the trustor's dispositive intent. However, irrevocable trusts often do not expressly reserve this type of authority within the instrument itself. In these scenarios, you must look to solutions outside of the trust instrument.

Solutions Outside of Trust Instrument

When the trust instrument is broken and does not have the requisite provisions for modification or correction, then there may be several options to consider. In Nevada, practitioners may explore non-judicial solutions or judicial solutions to fix broken irrevocable trusts.

Non-judicial Settlement Agreements

Nevada law allows the interested parties of a trust to enter into a non-judicial settlement agreement to resolve various trust-related issues, without the need to seek approval from the court (NRS 164.940). These agreements must be executed by the indispensable parties to the trust, cannot violate the material provisions of the trust, and the terms and conditions must be ones that could be approved by the court (*id*.) The indispensable parties typically include the trustee and the beneficiaries of the trust.

These agreements are an efficient way to modify or fix broken trusts and avoid the time and cost of going to court. The matters that may be resolved by these agreements are

considerably flexible and can cover a wide range of issues (see NRS 164.940(3)(a)-(o) for a complete list). If the parties are inclined, these agreements can still be approved by the court to add a further layer of protection prior to modifying the trust.

Ideally, these agreements would be executed by all the indispensable parties to the trust. If not all parties sign, then you could still proceed by giving a notice of proposed action to the parties who do not sign, and then moving forward with the agreement if those parties do not object (NRS 164.942).

Decanting

In recent years the use of decanting has become more prevalent in fixing broken irrevocable trusts. Not every state allows for the use of decanting, but Nevada does and was one of the first states to adopt a decanting statute, which is NRS 163.556.

Interestingly, Nevada's decanting statute does not contain the word "decant" or "decanting." Decanting refers to pouring a liquid (often wine) from an old bottle or vessel into a new bottle or vessel in order to preserve the liquid. The term is commonly used to explain the process of taking the assets of an irrevocable trust that is broken or outdated and pouring those assets into a new irrevocable trust in order to fix the flaws of the old trust or bring it up to date. In other words, decanting is used to modify an irrevocable trust that cannot be amended or revoked. It is important to note that the use of decanting is not the same as having a power of amendment or revocation (NRS 163.556(13)).

Decanting a trust requires a careful analysis of the decanting statute. Practitioners must ensure that the reason or purpose behind the decanting does not violate the statute. Nevada's statute can be unwieldy, so it is a best practice to examine it every time a practitioner is considering decanting a trust.

Pursuant to NRS 163.556, a trustee has the ability to decant one irrevocable trust into another irrevocable trust so long as certain requirements are met and certain provisions are not violated. Some of the more common reasons to decant a trust are to modify the method of distributions, modify the successor trustee provisions, grant a power of appointment to a beneficiary, incorporate special needs provisions for a disabled beneficiary,

change the governing law of the trust, and correcting drafting mistakes or ambiguous provisions. Generally, decanting is prohibited or discouraged to reduce a beneficiary's share or add or eliminate a beneficiary of the trust altogether.

In contrast to a non-judicial settlement agreement, decanting a trust is accomplished solely by the trustee of the trust. In other words, there is no requirement that any of the beneficiaries sign off on the decanting or that a beneficiary even be noticed. However, the trustee may decide to notice the beneficiary and/or seek approval from the court prior to decanting the trust (NRS 163.556(7). Additionally, decanting a trust requires the creation of an entirely new second trust instrument, whereas non-judicial settlement agreements do not.

Judicial Solutions

There are several judicial solutions that practitioners might consider when needing to fix a broken trust. If the parties decide to enter into a non-judicial settlement agreement or to decant the trust, then the trustee of the trust may still petition the court to ratify or approve of the non-judicial settlement agreement or the decanting. This might insulate the trustee from liability if the reason for the agreement or decanting is one that might subject the trustee to risk of liability.

Aside from petitioning the court to ratify or approve a non-judicial settlement agreement or a trust decanting, the trustee may petition the court to reform or modify a trust. A trust reformation normally entails subjecting the trust to the court's jurisdiction in order to correct a mistake or ambiguity that compromises the trustor's original intent. Reforming a trust means that the correction dates back to the date of execution, as if the trust had been drafted that way from the beginning. A trust modification entails subjecting the trust to the court's jurisdiction in order to change the terms of a trust at a point in time after the execution of the trust. This means that the change or modification is effective as of that time, as opposed to dating back to the time of execution.

Regardless of the formal characterization of reforming or modifying a trust under the court's jurisdiction, the overall objective is the same – to modify or fix the trust by obtaining the court's approval. A trust might be reformed or modified to correct scrivener's

errors that create a substantive problem, such as misidentifying a beneficiary, or to clear up an ambiguity, among other reasons.

Under Nevada law, a trustee, settlor, or beneficiary, may petition the court to assume jurisdiction over the trust in order to hear the matter and ultimately decide whether or not to grant the requested relief (NRS 164.010). The court will have jurisdiction so long as the trust expressly states that Nevada is the situs of the trust or has jurisdiction, if the appropriate person otherwise designated that Nevada is the situs or has jurisdiction, if the trust owns property in Nevada, if a beneficiary of the trust resides in Nevada, or if the trust is administered in Nevada (*id.*). Once the petition is filed, a hearing needs to be set and notice sent to the interested parties of the trust (NRS 155.010). Once the court has jurisdiction, it can hear matters pertaining to the reformation or modification of the trust as set forth in the petition and enter an order as it deems appropriate (NRS 164.015).

TRUST MANAGEMENT CONUNDRUMS

Aside from issues pertaining to the modification of trusts, there might be other issues pertaining to the administration of the trust that do not necessarily require a modification. Perhaps a trustee of a trust might be unsure on how to proceed with a particular provision of the trust. Perhaps there are circumstances surrounding the beneficiaries or trustee that might create some uncertainty. For example, a beneficiary of the trust may not be responding to the trustee's inquiries or a beneficiary or co-trustee may not be cooperating with the administration and causing delays. A non-judicial settlement agreement or decanting may not be the best option, but the trustee might want some security before deciding on a course of action. The trustee could consider a couple of options in these situations, such as petition the court for instruction or sending a notice of proposed action to the parties.

Petition for Instruction

The trustee of a trust may petition the court for instruction regarding the administration or construction of the trust at anytime (NRS 164.030). A petition must be filed to set forth the desired instructions, a hearing date must be set, and the interested parties must

be noticed, unless they waive it in writing (*id.*). At the hearing, the court will enter an ordered as it deems appropriate regarding the instructions sought.

Notice of Proposed Action

If a trustee of a trust desires or needs to move forward with a course of action, he or she can send a notice beforehand to the beneficiaries of the trust (NRS 164.725). In lieu of sending a notice, a beneficiary can also ahead of time sign a written consent as to the action to be taken (*id.*) The notice must set forth the proposed action and the reason for it and the time it will take place, which must be at least 30 days prior to the notice, among other requirements (*id.*). If the beneficiary does not object, then the trustee may move forward without liability (*id*.) If the beneficiary does object, then the trustee may petition the court to continue or the beneficiary may petition the court to stop the action (*id*.) If the trustee decides not to take action after the notice has been sent, then he or she must notify the beneficiaries (*id.*).

New and Tricky Forms of Wills and Their Authentication

Submitted by Anthony L. Barney

ANNUAL PROBATE AND ESTATE ADMINISTRATION CONFERENCE

XI. New And Tricky Forms Of Wills And Their Authentication
XII. Legal Ethics Update

Anthony L. Barney, Esq., M.S., J.D., LL.M.

1

XI. NEW AND TRICKY FORMS OF WILLS AND THEIR AUTHENTICATION

2

UNDERSTANDING TERMINOLOGY OF A WILL

- Abatement
- Ademption
- Dependent Relative Revocation
- Specific Gift (devise or bequest)
- Demonstrative Gift (devise or bequest)
- General Gift (devise or bequest)
- Precatory Language
- Mandatory Language
- Discretionary Language

3

AUTHENTICATION

(PROVING THE VALIDITY OF A WILL)

- **Holographic Will-** a will in which the signature, date, and material provisions are written by the hand of the testator, whether or not it is witnessed or notarized.
- **Electronic Will-** a written will that is created and stored in an electronic record, and contains the date and the electronic signature of the testator
- **Nuncupative or Oral Will**- NOT VALID IN NEVADA

4

TANGIBLE PERSONAL PROPERTY LISTS

- In Nevada, a testator may make gifts of tangible personal property in a separate written statement or list without having to make a formal change to his or her will if the list is referred to in the will. NRS 133.045(1). This list can be used to designate beneficiaries for:
    - Numismatic coin collections
    - Jewelry
    - Automobiles
    - China
    - Silverware
    - Musical instruments
    - Photo albums
    - Library
    - Etc.
- However, this list cannot be used to designate beneficiaries for cash gifts, stock or other securities, contract rights, or any interest in real estate. NRS 133.045(1).

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ANNUAL PROBATE AND ESTATE ADMINISTRATION CONFERENCE

XI. NEW AND TRICKY FORMS OF WILLS AND THEIR AUTHENTICATION

XII. LEGAL ETHICS UPDATE

By: Anthony L. Barney, Esq., M.S., J.D., LL.M.

XII. New and Tricky Forms of Wills and Their Authentication

A. Understanding the Terminology of a Will

The following are a few of the terms commonly used in determine the extent and/or existence of an asset within an estate plan with their respective definitions:

Abatement is a term used to describe the reduction of a devise in a will to enable the personal representative to pay claims due and owing by the estate. Oftentimes your client will desire to make a specific gift to a beneficiary, but at the time of their death they left debts that reduced their estate to a point that such a specific gift was required to be reduced. If the assets of a decedent's estate prove insufficient to pay the debts…., the specific legacies are not encroached upon until the general legacies are exhausted….The general legacies abate, therefore, for the payment of debts before the specific; and the specific abate only among themselves, and with the demonstrative.[1]

Ademption is a term used to describe the termination of a specific gift, because it does not exist in the estate at the time of distribution.[2]

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[1] *Early v. Early*, 21 Va. 124, 126 (1820); See also *Estate of Jenanyan*, 31 Cal. 3d 703, 711-12, 183 Cal. Rptr. 525, 529, 646 P.2d 196, 200 (1982) (the statute expresses the "almost universally followed" rule that general gifts abate proportionally before specific gifts.)

[2] *Feder v. Weissman*, 81 Nev. 668, 670, 409 P.2d 251, 252 (1965).

Dependent Relative Revocation is a "[a] common-law doctrine that operates to undo an otherwise sufficient revocation of a will when there is evidence that the testator's revocation was conditional rather than absolute."[3]

The following are terms that describe assets commonly found in an estate. The classification of assets as "specific," "demonstrative," or "general" carries with it particular incidents of each classification.[4]

A **specific gift (devise or bequest)** is a gift of a specific article or portion of the testator's estate that is described by the will in a manner that distinguishes it from other articles of the same general nature. A specific gift is adeemed by extinction, while a general gift survives.[5]

A **demonstrative gift (devise or bequest)** partakes of the nature both of a general and specific gift. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails. A specific bequest is subject to ademption, but such is not true of a general or a demonstrative legacy …and that where there is ambiguity [regarding specificity], "courts are disposed to interpret gifts as general or demonstrative…."[6] By definition, a demonstrative disposition is a "testamentary disposition of property to be taken out of a specified or identified property'.[7] A demonstrative legacy is in truth a chameleon in the law of testamentary dispositions. It

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[3] *State v. Palm (In re Estate of Melton)*, 128 Nev. 34, 50, 272 P.3d 668, 678 (2012) citing BLACK'S LAW DICTIONARY 503 (9th ed. 2009). (The Restatement (Third) of Property distills the doctrine's general application as follows:(a) A partial or complete revocation of a will is presumptively ineffective if the testator made the revocation: (1) in connection with an attempt to achieve a dispositive objective that fails under applicable law, or (2) because of a false assumption of law, or because of a false belief about an objective fact, that is either recited in the revoking instrument or established by clear and convincing evidence. (b) The presumption established in subsection (a) is rebutted if allowing the revocation to remain in effect would be more consistent with the testator's probable intention. Restatement (Third) of Prop.: Wills and Other Donative Transfers § 4.3 (1999). Consistent with its purpose, "[t]he doctrine can only apply where there is a clear intent of the testator that the revocation of the old will is made conditional on the validity of the new one.")

[4] *Feder v. Weissman*, 81 Nev. 668, 671, 409 P.2d 251, 252 (1965).

[5] *Id.* at 670.

[6] *Estate of Hill v. Warberg*, 484 P.2d 121, 123 (Colo. App. 1971).

[7] *In re Estate of Wallace*, 86 Misc. 2d 175, 177, 380 N.Y.S.2d 866, 868 (Sur. Ct. 1976).

takes on aspects of both a general and a specific disposition. It "partakes of the nature of a general legacy by bequeathing a specified amount and also of the nature of a specific legacy by pointing out the fund from which the payment is to be made."[8]

A **general gift (devise or bequest)** is a gift payable out of the general assets of the estate not amounting to a bequest of a particular thing, money, or fund.[9]

The Nevada Supreme Court has held that, "It is essential to the validity of a trust, whether express or precatory, that the language employed definitely indicate an intention to create a trust, that the subject matter thereof be certain, and that the beneficiaries be certain."[10] Understanding the type of language that may be used in a trust or will affects the nature and extent of the duties provided for under the terms of the trust or will, and the requirements of distribution to the beneficiaries.

Precatory language constitutes words of recommendation, requests or words of hope, but are not strong expressions of confidence and trust.[11] In order to create a precatory trust, the words must be such that it will appear from them that they were intended in an imperative sense, and that both the subject and the object of the recommendation or wish is certain.[12] Generally precatory words are defined as words expressing direction, recommendation, desire, wish, request, and the like. When appearing they are more often deemed mandatory when directed to an executor, but generally when directed to devisees, will not be made imperative unless it appears that they were intended to create a legal obligation. They generally imply discretion unless a different sense is irresistibly forced by the context."[13]

Mandatory language is language that is made in accordance with a mandate or is authoritatively ordered and obligatory leaving no discretion for a judge to alter.[14] The

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[8] *Id.*
[9] *Feder v. Weissman*, 81 Nev. 668, 670-71, 409 P.2d 251, 252 (1965).
[10] *Soady v. First Nat'l Bank*, 82 Nev. 97, 102, 411 P.2d 482, 484 (1966).
[11] *Gardella v. Santini*, 65 Nev. 215, 227, 193 P.2d 702, 707 (1948).
[12] *In re ESTATE OF LAVENDOL*, 46 Nev. 181, 185, 209 P. 237, 238 (1922).
[13] *Carson v. Simmons*, 198 Va. 854, 859, 96 S.E.2d 800, 804 (1957).
[14] *People v. Wilcox*, 486 Mich. 60, 68-69, 781 N.W.2d 784, 789 (2010).

words “shall” or “must” are mandatory terms unless a statute demands a different construction to carry out the clear intent.[15]

Discretionary language is language that is not obligatory and is left to the determination of an individual or court as to whether action or inaction is the proper response thereto.[16]

B. Authentication (Proving the Validity of a Will)

In Nevada, the testator must be of sound mind and over the age of 18 years in order to execute a valid **will**.[17] With the exception of holograph and electronic will, a will must be in writing and signed by the testator or by an attending person at the testator’s express direction,[18] and attested by at least two competent witnesses who subscribe their names to the will in the presence of the testator.[19] A notary public has also been deemed as the second competent attesting witness if the notary public signed in the presence of the testator.[20]

An attesting witness may sign a declaration under penalty of perjury or an affidavit before any person authorized to administer oaths in or out of the state of Nevada, stating such facts as the witness would be required to testify to in court to prove the will. The declaration or affidavit must be written on the will or, if impracticable, on some paper attached thereto.[21]

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[15] *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011); See also *Moultrie v. State*, 2015 Nev. App. LEXIS 15, *21, 364 P.3d 606, 614; See also *Johanson v. Eighth Judicial Dist. Court*, 124 Nev. 245, 249-50, 182 P.3d 94, 97 (2008) ("'[S]hall' is mandatory and does not denote judicial discretion." (alteration in original) (quoting *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006).

[16] *Nev. Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 9-10, 866 P.2d 297, 302 (1994) ("It is a well-settled principle of statutory construction that statutes using the word 'may' are generally directory and permissive in nature, while those that employ the term 'shall' are presumptively mandatory.").

[17] NRS 133.020.

[18] *In re Gordon’s Estate*, 40 Nev. 300, 161 P. 717 (1916). (A signature to a last will and testament is not rendered invalid by reason of another having aided the hand of the testator; in order for this rule to apply, it must appear that the testator, at the time of requesting or receiving the aid in the signing of the instrument, had the present volition to affix the signature, and was aware and fully cognizant of the details of the instrument of will or testament to which he, by the aid of the other, was affixing his signature.

[19] NRS 133.040

[20] In re *Estate of Friedman*, 116 Nev. 682, 6 P.3d 473(2000).

[21] For an example of the sworn statement see NRS 133.050 or Appendix II-1.

Any beneficiary that is designated to receive any devise[22] under a will, should not serve as an attesting witness, because the devise in favor of the beneficiary would be void unless there are two other competent subscribing witnesses to the will.[23]

A **holographic will** is a will in which the signature, date, and material provisions are written by the hand of the testator, whether or not it is witnessed or notarized. It is subject to no other form and may be made in or out of this State. The testator must still be of sound mind and over the age of 18 years of age.[24] It is important to note that if a testator types the will and then signs and dates it by their hand, the will is not a validly executed holographic will. The material provisions of the will must be written by the hand of the testator.

An **electronic will** is a written will that is created and stored in an electronic record, and contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentic characteristic of the testator; and is created and stored in such a manner that only one authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will; any attempted alteration of the authoritative copy is readily identifiable; and each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.[25]

A **nuncupative or oral will** is not valid in Nevada.[26]

C. Tangible Personal Property Lists

In Nevada, a testator may make gifts of tangible personal property in a separate written statement or list without having to make a formal change to his or her will if the list is referred to in the will.[27] This list can be used to designate beneficiaries for numismatic coin collections, jewelry, automobiles, china, silverware, musical instruments, photo albums, library, etc. However, this list cannot be used to designate beneficiaries for cash

[22] A devise in a will generally refers to property (usually real property), while legacy typically refers to personal property.
[23] NRS 133.060
[24] NRS 133.090.
[25] NRS 133.085; See also NRS 133.086 for self-proving electronic will requirements.
[26] NRS 133.100.
[27] NRS 133.045(1).

gifts, stock or other securities, contract rights, or any interest in real estate.[28] The testator must include on the list of tangible personal property: (i) the date of its execution, (ii) the title indicating its purpose, (iii) a reference to the will to which it relates, (iv) a reasonably certain description of the items to be disposed of and the names of the devisees, (v) and the testator's handwritten or electronic signature.[29]

The statement or list may be (i) referred to as a writing to be in existence at the time of the testator's death (ii) prepared before or after the execution of the will (iii) altered by the testator after its preparation (iv) a writing which has no significance apart from its effect upon the dispositions made by the will.[30] A common mistake by practitioners that don't practice regularly in the estate planning area of the law is to attempt to transfer one of the prohibited categories of assets set forth in NRS 133.045(1).

[28] NRS 133.045(1).
[29] NRS 133.045(2).
[30] NRS 133.045(3).

Legal Ethics Update

Submitted by Anthony L. Barney

XII. LEGAL ETHICS UPDATE

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WHO IS YOUR CLIENT?
WHAT DOES THAT MEAN?

- The practitioner's determination of who constitutes his or her client is integral in determining the application of the Nevada Rules of Professional Conduct ("NRPC").
- Determine whose rights the attorney is representing .
- Analyze what right is being affected.
- Be diligent in informing the client of decisions and circumstances regarding client's consent.
- A violation of the ethical rules often results in parallel violations of statue and the NRCP occurs when an attorney fails to exercise due diligence in their involvement with the client. *See NRCP 11*

7

CONFLICTS OF INTEREST

- ATTORNEY AWARENESS AND ADDRESSING CONFLICTS OF INTEREST
  - A lawyer may represent clients where a conflict of interest exists if:
    1. The lawyer reasonably believes that he may provide competent and diligent representation to each affected client;
    2. Representation is not prohibited by law;
    3. It is not a claim of one client against the other client represented by the lawyer in the same litigation or other proceeding before a tribunal;
    4. *Each affected client gives informed consent in writing.*
- CORPORATE AND CHARITABLE ORGANIZATION LEGAL COUNSEL
  - Many practitioners who sit on the board of a corporation or charitable organization find themselves faced with a client who wishes to leave bequests to that particular charity or business.
  - When an attorney's responsibilities to a third party may impair representation of a client or potential, that attorney must decline to represent the client.

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LAWYERS SERVING AS FIDUCIARIES

- A lawyer is a fiduciary to each of his or her clients when he or she is acting in his or her professional legal capacity on behalf of the client.
- A lawyer engaged in an ancillary business unrelated to the lawyers' law practice is nevertheless required to follow the NRPC where applicable.
- A lawyer cannot simultaneously represent a client and then acting as their social worker, because the of mandatory reporting requirements for suspected child abuse under NRS 432B.220(4)(a)

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GUARDING CLIENT INFORMATION: CONFIDENTIALITY AND DATA SECURITY

WHAT IS PRIVILAGED INFORMATION?

A client has the right to refuse to disclose any of the following information:

- 1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer
- 2. Between the client's lawyer and the lawyer's representative
- 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

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GUARDING CLIENT INFORMATION: CONFIDENTIALITY AND DATA SECURITY

GENERAL RULE OF CONFIDENTIALITY OF PRIVILEDGED INFORMATION

- A lawyer may not reveal privileged information gained from the representation unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation

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GUARDING CLIENT INFORMATION: CONFIDENTIALITY AND DATA SECURITY

LIMITED EXCEPTIONS TO THE RULE OF CONFIDENTIALITY

- The lawyer may reveal confidential information if reasonably necessary.
- However, the lawyer must, where he or she is able, to first make a reasonable effort to persuade the client to take suitable action.

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GUARDING CLIENT INFORMATION: CONFIDENTIALITY AND DATA SECURITY

LIMITED EXCEPTIONS TO THE RULE OF CONFIDENTIALITY

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GUARDING CLIENT INFORMATION: CONFIDENTIALITY AND DATA SECURITY

INCAPACITATED CLIENT AND DUTY OF CONFIDENTIALITY

- Whenever a client has diminished capacity, either from a mental impairment, minority, or otherwise, the lawyer must, as far as possible, maintain a normal attorney-client relationship with the client. NRPC 1.14(a)(2020).

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GUARDING CLIENT INFORMATION: CONFIDENTIALITY AND DATA SECURITY

POST-MORTEM DUTY OF CONFIDENTIALITY; NO FIDUCIARY EXCEPTION IN NEVADA

- A lawyer may not reveal confidential information of a former client except as permitted with respect to disclosure of information from a former client. NRPC 1.9(c)(2) (2020).

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GUARDING CLIENT INFORMATION: CONFIDENTIALITY AND DATA SECURITY

DATA SECURITY

- Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a ***period of seven years*** after termination of the representation.
- The U.S. Federal Trade Commission for data security suggest the following:

1. Start with security.
2. Control access to data sensibly.
3. Require secure passwords and authentication.
4. Store sensitive personal information securely and protect it during transmission.
5. Segment your network and monitor who's trying to get in and out.
6. Secure remote access to your network.
7. Apply sound security practices when developing new products.
8. Make sure your service providers implement reasonable security measures.
9. Put procedures in place to keep your security current and address vulnerabilities that may arise.
10. Secure paper, physical media, and devices.

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QUESTIONS?

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XIII. Legal Ethics Update

A. Who Is Your Client? What Does That Mean?

The practitioner's determination of who constitutes his or her client is integral in determining the application of the Nevada Rules of Professional Conduct ("NRPC"). The NRPC are structured to address, in part, the duties of an attorney owed to their respective clients. While the NRPC do not deal with every potential situation that could be encountered by a practitioner, they provide a basis for the framework for further interpretation by the Nevada State Bar and the Nevada court system. An electronic version of the NRPC can be located at the following website: https://www.leg.state.nv.us/CourtRules/RPC.html. An electronic version of the ethics opinions prepared by the Standing Committee on Ethics and Professional Responsibility are located at the following website: https://www.nvbar.org/member-services-3895/ethics-discipline/ethics-opinions.

[28] NRS 133.045(1).
[29] NRS 133.045(2).
[30] NRS 133.045(3).

In order to determine the identity of a client, the practitioner must first determine whose rights the attorney is representing. This is a markedly simple task at times, but in other situations it can be more difficult to ascertain, especially if the attorney's potential client has both a personal and representative capacity such a company officer or business owner.[31]

In circumstances where a legal agency exists,[32] fiduciary responsibilities arise, and/or litigation exists, the determination of the attorney's client is crucial to understand from the outset of legal representation and obligations of the attorney to the client.[33]

A proper analysis requires the attorney to determine what right is being affected. A likely oversimplistic but useful analysis requires the attorney to determine if the right for which legal representation is sought belongs to the individual or if such right is derived based upon that individual's relationship with another individual or entity. If the right does not require the practitioner to address another person or entity, then the right likely belongs

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[31] See Enron and Corporate Lawyer, Roger C. Cramton, 58(1): 143-188 (Nov. 2002) (This Article summarizes the law governing such matters as the scienter requirement, the duty to make further inquiry when circumstances suggest the possibility of misconduct by corporate agents, and the new requirement included in the Sarbanes-Oxley Act of 2002 that the lawyer "climb the corporate ladder" to the board of directors, if necessary, to prevent or rectify the wrongful conduct. The vexing question of disclosure of confidential information outside the corporation is also considered. The Article closes with recommendations for legislative, regulatory or rule changes that would provide greater guidance to lawyers and more protection to public interests. See: https://www.americanbar.org/groups/business_law/publications/the_business_lawyer/find_by_subject/buslaw_tbl_mci_sarbanes_oxley

[32] The Nevada Supreme Court held that an agent under a power of attorney is a fiduciary to the principal, and owes her the highest duties of fidelity, loyalty, and honesty. The Court further held that the object of agency is to ensure the best business advantage of the principal, and that an agent may not seek personal gain in hostility to the principal. *LeMon v. Landers*, 81 Nev. 329, 332, 402 P.2d 649 (1965) (citing Restatement 2d, Agency § 387). In Nevada, the principal's agent owes the highest fiduciary duties to the principal, including those of fidelity, loyalty, and care. In addition, the agent must seek to further the principal's best interests. However, it would be pure folly for an attorney to condition his or her fiduciary duties to the client-principal upon any reliance or expectation that the agent of the principal is proper performing his or her fiduciary duties under the power of attorney. The attorney must focus on the client's needs and wishes when working with the client-principal's agent and should make decisions based upon the attorney's fiduciary duty to safeguard and preserve the client-principal's best interests.

[33] *Charleson v. Hardesty*, 108 Nev. 883, 839 P.2d 1303 (1992) (…if Hardesty was the attorney for the trustee, we conclude that he owed the Treleases [beneficiaries] a duty of care and fiduciary duties."); See also NRS 162.310 (1) (An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal.).

to that individual independent of any other person or entity, that individual is the client. The identity determination of the client by the practitioner sets the stage for all other analysis regarding the attorney-client relationship.

A lawyer has a duty of competence to his clients under the attorney-client relationship. This requires legal knowledge, skill, thoroughness, and preparation necessary to represent the client.[34] The lawyer must also be diligent in representing the client. [35] A lawyer must abide by the client's decisions regarding the purpose of the representation and must consult the client about the means by which that objective will be fulfilled. This means that the lawyer must promptly inform the client of decisions and circumstances requiring the client's consent and must explain matters to the extent necessary for the client to make informed decisions. In addition, the lawyer must keep the client informed of the status of the matter and promptly comply with requests for information.[36]

A violation of the ethical rules often results in parallel violations of statute and the Nevada Rules of Civil Procedure ("NRCP") occurs when an attorney fails to exercise due diligence in their involvement with the client. Oftentimes, an attorney will lose sight of the objectives during litigation to represent the interests of the client, and will often become emotionally involved in the matter and make unwarranted representations not discussed with the client in order appeal to gain an advantage with the sympathies of the judge or jury. This behavior often results in legal expenses to the client when such representation or evidence are disregarded by a court of competent jurisdiction. The U.S. Supreme Court has long declared that, "Evidence that serves no purpose other than to appeal to the sympathies or emotions…has never been considered admissible.[37] Such representations or proffered evidence are a waste of valuable client and court resources. The Nevada Legislature has sought to reduce and or eliminate such misconduct from our courtrooms with the passage of NRS 7.085 (1)-(2), which states in pertinent part that,

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[34] Nevada Rules of Professional Conduct 1.1 (2020) (hereinafter "NRPC").
[35] NRPC 1.3.
[36] NRPC 1.2; 1.4.
[37] *Payne v. Tennessee*, 501 U.S. 808, 856-57, 111 S. Ct. 2597, 2626 (1991).

> "If a court finds that an attorney has filed, maintained or defended a civil action or proceeding in any court in this State and such action or defense is not well-grounded in fact or is not warranted by existing law or by an argument for changing the existing law that is made in good faith; or unreasonably and veraciously extended a civil action or proceeding before any court in this State, the court shall require the attorney personally to pay the additional costs, expenses and attorney's fees reasonably incurred because of such conduct. The court shall liberally construe the provisions of this section in favor of awarding costs, expenses, and attorney's fees in all appropriate situations. ***It is the intent of the Legislature that the court award costs, expenses and attorney's fees pursuant to this section and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public. (Emphasis added).***

NRCP 11 addresses the unfortunate fact that lawsuits, if not based on allegations supported by actual fact as opposed to biased guesswork designed to stir emotion, will be often be used as slanderous weapon of oppression, rather than an instrument of truth. NRCP 11(b) states:

> By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically, so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically, so identified, are reasonably based on belief or a lack of information.[38]

In order to guard the integrity of the judicial system, our Nevada Supreme Court has also authorized our courts to act *sua sponte* when it determines that an attorney has misrepresented the factual contentions to the court.[39]

Once a court of competent jurisdiction has found a NRCP 11 violation, imposition of sanctions is mandatory.[40] In the case of a Rule 11 violation, a court of competent jurisdiction "could conceivably warrant an imposition of fees covering the entire litigation, if, for example, a complaint or answer was filed in violation of the Rule. The court generally may act *sua sponte* in imposing sanctions under the Rules." [41]

It is good practice to have the client (in writing when possible) verify the contents of each pleading prior to its submission to a court of competent jurisdiction. Consulting the client about the means by which that objective will be fulfilled reduces any tendency to misrepresent the necessary fact to a court of competent jurisdiction. Remember to inform the client of decisions and circumstances requiring the client's consent and explain matters to the extent necessary for the client to make informed decisions. Such practice

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[38] NRCP 11.

[39] NRCP 11(c)(3) ("On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)").

[40] *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988*); Wise v. Pea Ridge School District No*. 109, 675 F. Supp. 1524 (W.D.Ark. 1987), aff'd, 855 F.2d 560 (8th Cir. 1988); *Exec. Mgmt. v. Ticor Title Ins. Co.,* 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (Federal cases interpreting the Federal Rules of Civil Procedure "are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.")

[41] *Chambers v. NASCO, Inc.,* 501 U.S. 32, 42 n.8, 111 S. Ct. 2123, 2131 (1991).

techniques typically reduce and or eliminate not only bar complaints, but civil penalties and fines against the practitioner.

B. Conflicts of Interest

1. Attorney Awareness and Addressing Conflicts of Interest. Determining the identity of your client is vital in avoiding conflicts of interest. A conflict exists where representation of one person will adversely affect representation of another or there is a risk that representation will be materially limited by responsibilities to another client, or there is significant risk that the representation of one client will be directly adverse to another client; or there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[42] A lawyer may represent clients where a conflict of interest exists if (1) the lawyer reasonably believes that he may provide competent and diligent representation to each affected client; (2) representation is not prohibited by law; (3) it is not a claim of one client against the other client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) *each affected client gives informed consent in writing*.[43]

Whenever you have more than one individual enter your office, you need to be aware that you may have a potential conflict of interest. Many practitioners fail to understand that seemingly happily married couples may be taking steps to divorce one another or that an individual company owner may be planning to defraud his own company. Problems may also arise between married couples when children from prior marriages are involved, the spouses have significantly different sizes of estates, or where the spouses simply have different goals, due to age differences or other factors. In addition, problems may arise where children are involved, especially where one or more children are becoming involved in a family business. In each of these cases, separate representation may be advisable to avoid potential conflicts.[44]

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[42] NRPC 1.7 (2020).
[43] *Id. (emphasis added).*
[44] 36 MODERN ESTATE PLANNING § 36.04.

In the estate planning context, one spouse's desires may reduce or eliminate a distribution or other benefit that would otherwise inure to the benefit of the other spouse. It is important to remember that a lawyer may not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent.[45] The practitioner should consider drafting the client's engagement agreement with this potential situation in mind.

A lawyer may represent multiple potential clients (i.e., husband and wife or parent and child), but should review the terms and potential problems with the representation and should also consider holding separate interviews with the clients in which potential conflicts could more easily surface.

2. Corporate and Charitable Organization Legal Counsel. Many practitioners who sit on the board of a corporation or charitable organization find themselves faced with a client who wishes to leave bequests to that particular charity or business. An opinion recently released by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada addressed this particular situation.[46] That opinion provided that a "lawyer, as a member of the board of directors, holds a fiduciary relationship to the company and is under the duties of loyalty, confidentiality and impartiality. The lawyer's duties to the company would limit his or her ability to be a fair advisor for the estate planning client because of the inability to disclose information that could be pertinent to the client's decision."[47]

While the Nevada Bar Opinion No. 47 specifically addresses a lawyer, who is a member of the board of directors of a company, the committee appears to include lawyers who may have performed *pro bono* work for charities. The Committee on Ethics cites to a Maryland Bar Association Committee on Ethics opinion regarding a lawyer's offer of pro bono estate planning services.[48] The lawyer's offer of pro bono estate planning services

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[45] NRPC 1.8(b) (2020).
[46] See STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinion No. 47, Issued October 27, 2011.
[47] *Id*.
[48] *Id*.

to church parishioners in exchange for bequests to the church "violated the lawyer's ethical responsibilities as the lawyer was a member of the church's legacy committee."[49] The Maryland Bar Association found that the lawyer's "role as a Legacy Committee Chair and/or [his] own interest in advancing the church's financial interests would be the sort of responsibilities to a third person and/or personal interest that are governed by [ABA Model] Rule 1.7(b)."[50]

When an attorney's responsibilities to a third party (i.e. a corporation or charity) may impair representation of a client or potential, that attorney must decline to represent the client.[51] "The lawyer's fiduciary relationship with the company can lead to a conflict of interest when the lawyer has obligations and responsibilities to the company that could ultimately cause the lawyer's independent judgment and loyalty to the estate planning client to be compromised."[52] The lawyer may seek to obtain the written consent of both the charity or corporation and the estate planning client only if the lawyer "reasonably believes that the representation will not be adversely affected."[53] Regardless of whether there is an actual conflict of interest, he or she should disclose to the estate planning client that he or she is associated with the particular company or charity and that there may be a conflict.[54]

C. Lawyers Serving as Fiduciaries

A lawyer is a fiduciary to each of his or her clients when he or she is acting in his or her professional legal capacity on behalf of the client.[55] The fiduciary duties of loyal and

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[49] *Id*. citing Maryland State Bar Ass'n, Inc., Comm. on Ethics, Docket 2003-09 (2003).
[50] *Id*.
[51] NRPC 1.7.
[52] See STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinion No. 47, Issued October 27, 2011.
[53] *Id*.
[54] *Id*.
[55] *Stockton v. Ford*, 52 U.S. (11 How.) 232, 247 (1851) There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.)

confidentiality are personal to each client,[56] and therefore an attorney cannot represent two adverse clients in which he owes conflicting fiduciary duties.[57] However, an attorney may own an ancillary business that provides nonlegal fiduciary services, including but not limited to medical, financial, brokerage services or other related services.[58] The Nevada Standing Committee on Ethics and Professional Responsibility ("NCE") has opined that, "In operating an ancillary business, the lawyer must be cognizant that the ethical obligations imposed by the NRPC apply to the lawyer in all circumstances."[59]

In operating an ancillary business, the NCE has further opined that, "While the rules of professional conduct are primary geared towards the lawyer's professional capacity,[60] acts unrelated to the practice of law may violate the NRPC, as some conduct in a private capacity reflects adversely on professional fitness.[61] Conduct of a lawyer in operating an ancillary business, such as dishonesty, deceitful conduct or the inability to manage financial affairs, may violate general rules such as NRPC Rule 8.4(c), which are applicable to lawyers at all times. Accordingly, a lawyer engaged in an ancillary business unrelated to the lawyers' law practice is nevertheless required to follow the NRPC where applicable.[62]

The NCE further also articulated the potential constraints upon any attorney in the context of his or her ancillary business. The NCE stated, "If there is a pre-existing attorney

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[56] *Oceania Ins. Corp. v. Cogan*, 2020 Nev. App. Unpub. LEXIS 141, *21, 457 P.3d 276, 2020 WL 832742(a malpractice cannot be assigned from one entity to another because such a claim derives from an attorney-client relationship whose fundamental attributes—the duties of loyalty and confidentiality—always stay with the original client.)

[57] NRPC 1.7(a)(1).

[58] See STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinion No. 45, Issued October 27, 2011.

[59] *Id*., See also *Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Millen*, 357 N.W.2d 313, 315 (Iowa 1984) ("Lawyers do not shed their professional responsibility in their personal lives."); *Notopoulos v. Statewide Grievance Committee,* 890 A.2d 509, 518 (Conn. 2006) ("It is well established that the Rules of Professional Conduct bind attorneys to uphold the law and to act in accordance with high standards in both personal and professional lives."); *Attorney Grievance Com'n of Maryland v. Childress*, 758 A.2d 117, 122 (Md. 2000)("A lawyer is subject to professional discipline under the Rules of Professional Conduct for conduct the lawyer engages in outside his or her role as a lawyer.")

[60] NRCP 1.0A(b). See also ABA Formal Opinion 336 (June 1974) ("Many, if not most, disciplinary rules by their nature relate to conduct of a lawyer acting in his professional capacity.")

[61] NRPC 8.4(b) and (c). See also *In re Kennedy*, 542 A.2d 1225, 1228 (D.C. 1988).

[62] See STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinion No. 45, Issued October 27, 2011.

client relationship and the client's resultant trust in and dependence upon the lawyer's independent judgment, a lawyer is generally prohibited by the NRPC from referring a client to an ancillary business owned and operated by the lawyer. An ethical referral may occur only where the lawyer has satisfied the requirements for transacting business with a client (NRCP 1.8(a)) and the client has properly waived the potential conflict of interest arising from the lawyer's personal interests (NRPC 1.7(b)). However, even where these ethical considerations are met and the lawyer has obtained the client's informed consent, in some instances it may be impermissible for the lawyer to concurrently represent the client in a professional capacity and provide services through an ancillary business."[63]

The NCE has previously opined that a lawyer cannot simultaneously represent a client and act as an investment broker for the client.[64] The NCE used that analogy that actually highlights the fiduciary nature of an attorney toward his or her client, quoting, "Counsel's loyalty, whether consciously or unconsciously, is directed primarily toward the management company and toward the fund,"[65] not to the client. The NCE has also previously opined that a lawyer cannot simultaneously represent a client and then acting as their social worker, because the of mandatory reporting requirements for suspected child abuse under NRS 432B.220(4)(a), which attorneys are specifically exempted from if suspected perpetrator of the abuse is a client.[66] This delineation highlights to differing fiduciary duties of an attorney versus a social worker.

Oftentimes an attorney is asked by a client to serve as a fiduciary for their estate plan. Such role is permissible, but is fraught with peril if the attorney is not cognizant of the previously discussed fiduciary duties owed to a beneficiary under such an

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[63] See STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinion No. 45, Issued October 27, 2011.
[64] See STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinion No. 24, Issued June 18, 1987.
[65] See STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinion No. 24, Issued June 18, 1987, quoting Attorneys' Conflict of Interest in the Investment Company Industry, 6 U. Mich. J.L. Ref. 58, 67-68 (1972).
[66] See STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinion No. 49, Issued October 27, 2011.

arrangement.[67] An understanding of the duties owed to one's client is paramount in avoiding violations of the NRPC.

D. Guarding Client Information: Confidentiality and Data Security

1. What is Privileged Information? The Nevada Legislature has defined what constitutes privileged information providing that, "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications: 1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer. 2. Between the client's lawyer and the lawyer's representative. 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest."[68] It is important to note that mere facts are not privileged, but communications about facts in order to obtain legal advice are protected information.[69] However, the physical delivery of a client's notes is not required to be made to the attorney for the information to be protected under the attorney-client privilege.[70] So long as the content of the notes was previously or is subsequently communicated between a client and attorney, the notes constitute communications subject to the attorney-client privilege.[71] Furthermore, the party asserting the privilege does not have to prove that the client spoke each and every word written in his or her notes to counsel verbatim as such a requirement would lead to disclosure of privileged information that was not orally conveyed exactly as it was recorded on paper, or vice versa..[72]

There is no privilege if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.[73] Communications relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or

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[67] See *Charleston v. Hardesty*, 108 Nev. 883, 839 P.2d 1303 (1992).
[68] NRS § 49.095.
[69] *Canarelli v. Eighth Judicial Dist. Court of Nev*., 464 P.3d 114, 120 (Nev. 2020) citing *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017).
[70] *Id.* at 120.
[71] Id. at 114.
[72] *Id.*
[73] NRS 49.115(1).

intestate succession or by *inter vivos* transaction at not privileged.[74] Communications relevant to an issue of breach of duty by the lawyer to his or her client or by the client to his or her lawyer are also not privileged.[75] Communications relevant to an issue concerning an attested document to which the lawyer is an attesting witness are also not privileged.[76] Finally, a communication relevant to a matter of common interest between two or more clients is not privileged if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.[77] This is commonly referred to in Nevada caselaw as the "common interest exception." When a lawyer acts as the common attorney of two parties, their communications to him are privileged as far as concerned strangers, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations. [78]

2. General Rule of Confidentiality of Privileged Information. A lawyer may not reveal privileged information gained from the representation unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation.[79] The Nevada Supreme Court declared, "The attorney-client privilege is a long-standing privilege at common law that protects communications between attorneys and clients. The purpose of the attorney-client privilege is to encourage clients to make full disclosures to their attorneys in order to promote the broader public interests of recognizing the importance of fully informed advocacy in the administration of justice."[80]

3. Limited Exceptions to the Rule of Confidentiality. The lawyer may reveal confidential information if reasonably necessary: to prevent reasonably certain death or substantial bodily harm; to prevent the client from committing a criminal or fraudulent act in furtherance of which the client has used or is using the lawyer's services, however, the

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[74] NRS 49.115(2).
[75] NRS 49.115(3).
[76] NRS 49.115(4).
[77] NRS 49.115(5).
[78] *Livingston v. Wagner,* 23 Nev. 53, 42 P. 290, 1895 Nev. LEXIS 30 (Nev. 1895).
[79] NRPC 1.6(a) (2020).
[80] *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev.,* 399 P.3d 334, 341 (Nev. 2017)

lawyer must, where he or she is able, to first make a reasonable effort to persuade the client to take suitable action; to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been or are being used, but the lawyer must, where he or she is able, first make a reasonable effort to persuade the client to take corrective action; to secure legal advice about the lawyer's compliance with the Nevada Rules of Professional Conduct; to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or to comply with other laws or a court order.[81]

A lawyer must also reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm.[82]

4. Incapacitated Client and Duty of Confidentiality. Whenever a client has diminished capacity, either from a mental impairment, minority, or otherwise, the lawyer must, as far as possible, maintain a normal attorney-client relationship with the client.[83] The lawyer may seek to have a guardian *ad litem*, conservator or guardian appointed if the lawyer reasonably believes that the client has a diminished capacity, or is at risk of physical, financial, or other harm, and if the client cannot act in his own best interests.[84] If a guardian *ad litem*, conservator, or guardian is appointed, the lawyer must continue to keep the client's information confidential, but may reveal information that is necessary to protect the client's interests.[85]

5. Post-Mortem Duty of Confidentiality; No Fiduciary Exception In Nevada. A lawyer may not reveal confidential information of a former client except as permitted with respect

[81] NRPC 1.6(b) (2020).
[82] NRPC 1.6(c) (2020).
[83] NRPC 1.14(a) (2020).
[84] NRPC 1.14(b) (2020).
[85] NRPC 1.14(c) (2011).

to disclosure of information from a former client.[86] A lawyer's duty of confidentiality extends beyond the client's death. However, the general rule with respect to confidential communications between attorney and client for the purpose of preparing the client's will is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client.[87] The U.S. Supreme Court concurs with what has come to be known as the testamentary/posthumous disclosure exception, stating, "The rationale for such disclosure is that it furthers the client's intent."[88]

The Nevada Supreme Court held that statements made by the decedent to his attorney during the preparation of a will could be disclosed where the parties to the litigation were heirs and next of kin.[89] However, it also recognized that a legal stranger to the estate is not entitled to the exception.[90]

Several states have adopted a fiduciary exception to the attorney-client privilege, which prevents a fiduciary such as a trustee or personal representative from asserting the attorney-client privilege against beneficiaries of a trust or estate on matters of administration. However, the Nevada Supreme Court specifically declined to adopt such an exception.[91]

In order to avoid the unauthorized disclosure of confidential information, the practitioner should consult with the client prior to his or her death about the potential need to disclose confidential client information to promote the integrity and effect of the client's

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[86] NRPC 1.9(c)(2) (2020).
[87] *United States v. Osborn*, 561 F.2d 1334, 1340 (9th Cir. Or. 1977).
[88] *Swidler & Berlin v. United States*, 524 U.S. 399, 405 (1998) citing Osborn at 1340, n. 11.
[89] *Clark v. Second Judicial District of the State of Nevada*, 101 Nev. 58 (1985) *citing Glover v. Patten*, 165 U.S. 394, 406 (1897)
[90] *Id.* (An exception to the application of the privilege on behalf of a deceased client has long been recognized when the dispute is between various parties claiming "through" or "under" the client, as opposed to a dispute between the estate and a "stranger." A claimant asserting breach of contract to a will is a "stranger" to the estate, and therefore is not entitled to claim an exception to the attorney-client privilege).
[91] *Canarelli v. Eighth Judicial Dist. Court of Nev*., 464 P.3d 114, 123 (Nev. 2020).

estate plan, and if necessary and where applicable, obtain the appropriate client waivers to disclose such confidential information.

6. Data Security

Many practitioners wonder how long they are required to hold client records. NRPC 1.15(a) provides, "A lawyer shall hold funds or other property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. All funds received or held for the benefit of clients by a lawyer or firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts designated as a trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property in which clients or third persons hold an interest shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a ***period of seven years*** after termination of the representation. *(Emphasis added).*

Therefore, client property should be retained for a period of seven years by the practitioner. However, during this period the practitioner must "properly safeguard" this property for the benefit of the client. Due to the increasing digital nature of the legal profession, a discussion of the Nevada Electronic Filing and Conversion Rules ("NEFCR") is necessary. In 2011, the Nevada Supreme Court altered the NEFCR to include a new provision – 11(e) – which requires practitioners to use the electronic filing system to retain an original of the document being filed for ***seven years after termination of representation***. (Emphasis added).

While the NRPC do not address the particular safeguards that are required by practitioners, best practices by the U.S. Federal Trade Commission for data security suggest the following:

1. Start with security.
2. Control access to data sensibly.

3. Require secure passwords and authentication.
4. Store sensitive personal information securely and protect it during transmission.
5. Segment your network and monitor who is trying to get in and out.
6. Secure remote access to your network.
7. Apply sound security practices when developing new products.
8. Make sure your service providers implement reasonable security measures.
9. Put procedures in place to keep your security current and address vulnerabilities that may arise.
10. Secure paper, physical media, and devices.[92]

Practitioners may also limit the retention of records by addressing post-representation retention of applicable records in the parties' engagement agreement or by subsequent agreement to have the respective client retain their own records (where applicable), thereby shifting applicable record retention to the client.

[92] Start with Security: A Guide For Business, Federal Trade Commission, June 2015 at https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business visited on August 15, 2020.

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