

Nevada 2011 Trust Law Update

Lance N. McKenzie

Avansino, Melarkey, Knobel, Mulligan & McKenzie

7565 W. Lake Mead Blvd, Suite 100

Las Vegas, Nevada 89128

(702) 562-8144

lancem@amkmlaw.com

“Investment Trust Advisors”

- NRS 163.5557
- Trust Instrument may provide for Appointment
- May be a Fiduciary (See NRS 163.5551)
- Powers may include:
 - Power to Direct Investment of Trust Assets
 - Vote Proxies
 - As Trust Instrument otherwise provides

“Trust Protectors”

- Concept Used Prior to 2009 Statute
- May be a Fiduciary (See NRS 163.5551)
- Now specifically provided for in NRS 163.5555
- May be Named in the Trust Instrument
- May be Appointed in Future (“Springing Trust Protector”)
- Generally Oversees Trustee and Investment Advisors

Typical Trust Protector Powers

- Remove Trustee
- Name Successor Trustee if none named in Instrument
- Remove or Appoint Investment Advisor
- Demand or Approve Accountings
- Change Trust Situs
- Amend Trust for Tax or Non-Dispositive Purposes
- Direct or Veto Distributions
- Ratify or Veto Large Transactions (Sales of Property)

“Decanting”

- NRS 163.556
- Allows Trustee to “Appoint” Assets from Old Irrevocable Trust to a New Trust subject to Certain Limitations
- Effectively can Amend or Update Non-Dispositive Trust Terms
- Generally Cannot Change Beneficial Interest in Trust

Unitrust Conversion

- Unitrust - percentage of annually assessed fair market value of trust property is paid to a trust beneficiary
- NRS 164.796
- Trustee may convert Income and/or “HEMS” principal distribution to Unitrust Payment
- Trustee must give Notice to Current and Remainder Beneficiaries
- Beneficiaries may Object and Court determines if Conversion will “better carry out the intent of Settlor”
- Marital Trust Concerns – SS must receive all Income

Rule Against Perpetuities

- Common Law Rule - Trusts must finally Vest or Terminate within 21 years after the Death of the Last Identifiable Individual living at the time the Trust was created ("life in being").
- Nevada Amended Common Law Rule - to permit Trusts to continue for up to 365 years (NRS 111.1031)
- Allows for creation of “Dynasty Trusts” or Trusts that continue for Numerous Generations

“Self Settled Spendthrift Trusts”

- NRS Chapter 166
- Common Law Rule – Settlor cannot Self Create *and* be Beneficiary of Trust that is Free from Claims of Settlor’s Creditors
- Common Law rule overturned in DE, AK and NV
- Two Year “Seasoning Period” for Future Creditors
- Current Creditors have 6 months after Discovery of Transfer (may start with public record filing)

SSST - Requirements

- One Trustee Must be Nevada Resident, Bank or TC
- Trust Must be Irrevocable
- All Distributions (including Income) must be Entirely Discretionary by Trustee
- Settlor may hold All Powers over the Trust except the Power of Distribution
- Settlor may control Investment Decisions, etc
- Rules do not apply to Protection of 3rd Party Beneficiaries

Issues with Current Estate Plans

- Problems with Funding Formula in Current Documents
 - Second Marriage
 - Old Documents
- Estate tax “repeal” can lead to trust overfunding or underfunding, resulting in:
 - Exclusion of Family Beneficiaries
 - Exclusion of Charitable Beneficiaries
- GST Issues
- Capital Gains and Basis Issues
- State Estate Tax Issues

Unintentional Disinheritance of Family Members

- Unintentional disinheritance of spouse
 - Marital trust funded with “marital deduction amount” or “minimum amount required to eliminate estate tax”
 - With no estate tax, thus no marital deduction amount, marital trust would be unfunded and spouse would be disinherited/lose income stream if not otherwise provided for
- Unintentional disinheritance of children
 - Credit shelter trust funded with “applicable exclusion amount” or “maximum amount that can pass free of estate tax”
 - With no estate tax, thus no applicable exclusion amount, credit shelter trust would be unfunded and beneficiaries of such trust, often children, would be disinherited

Recommended Actions

- Review existing estate plans and update if necessary
 - Repeal provisions
 - Do documents include provisions that sufficiently address the estate/GST tax repeal and/or modified carryover basis regime?
 - If not, what changes are required?
 - Funding formulas
 - Will funding formulas work as originally intended?
 - If not, what modifications are necessary?
- Consider planning opportunities and related risks (e.g., 2010 gifting may be advantageous but retroactive law is a risk)

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