



2017 NEVADA TRUST-AND-ESTATE LAW UPDATE

Developments in the Law regarding Trusts and Estates

Provided by RUSHFORTH LEE & KIEFER LLP

A. ASSEMBLY BILL 314 — GENERAL TRUST AND ESTATE LEGISLATION

AB 314, which is effective as of October 1, 2017, was sponsored by the Legislative Committee of the Probate and Trust Section of the State Bar of Nevada. Its key elements include:

A.1 Inherited IRAs and retirement accounts will be exempt from creditors' claims, subject to the \$500,000 overall limitation for all similar retirement accounts.

A.2 Assets received by exercise of a power of appointment are not "nonprobate transfers" for purposes of creditor liability.

A.3 No-contest clauses are to be enforced but strictly construed according to the "plain meaning of the express provisions" of the will or trust. A no-contest clause cannot be violated by seeking to enforce fiduciary duties or to ask the court for instructions.

A.4 The process of making a creditor's claim against nonprobate assets is clarified.

A.5 The interests retained by spouses as to property transferred to an irrevocable trust retain their character as separate or community property.

A.6 Trust protectors and financial advisers are fiduciaries unless the trust instrument provides otherwise.

A.7 Several procedural clarifications have been added to the probate code.

A.8 Noncharitable "purpose trusts" are permitted even without one or more specific beneficiaries.

A.9 The decanting statute is updated to permit the "second trust" to be a "special needs trust, pooled trust or third-party trust."

A.10 Court jurisdiction over trusts is clarified.

A.11 To download a copy of the final version of Assembly Bill 314, use this link: http://rkllegal.info/pdf/2017.AB314_EN.pdf.

B. ASSEMBLY BILL 239 — DIGITAL ASSETS

AB 239 adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADA), which sets forth the law with respect to a deceased person's "digital assets", including access to online financial sites and social media. Its key elements include:

B.1 A "digital asset" is any electronic record in which a living person has an interest. This includes online social media accounts, financial accounts, and digital files on computer media, cell-phone memory, and other media, such as e-mail messages, text messages, scanned documents, and scanned photos.

B.2 The bill allows a living person who has digital assets to use an "online tool" to delegate

authority to a custodian for each such asset and to empower or restrict the authority of fiduciaries designated by that person in his will, trust, power of attorney, or other legal documents.

B.3 A procedure is established for giving a court-appointed guardian the power to access the digital assets of the incompetent ward.

B.4 To download a copy of the final bill, use this link:
http://rkllegal.info/pdf/2017.AB239_EN.pdf.

C. ASSEMBLY BILL 413 — ELECTRONIC WILLS AND TRUSTS

AB 413, which is effective as of October 1, 2017, expands Nevada law with respect to electronic wills and other electronic documents. The original electronic will statute was enacted in 2001, but anecdotal evidence suggests that the statute was little used. The law permitted only one “authoritative copy” to exist, and any attempted alteration has to be “readily identifiable.” It required authentication by fingerprint, retinal scan, facial recognition, digitized signature, “or other authentication using a unique characteristic of the person.”

C.1 The 2017 version of the law permits “self-proving wills” if there are affidavits or declarations of the attesting witnesses, and a qualified custodian maintains the electronic record.

(a) A qualified custodian may not be a beneficiary under the will or an heir of the testator. A photo, audio, or video record taken contemporaneously with the execution must also be kept with the electronic will.

(b) An “electronic notary public” is permitted as long as the notary complies with the law under which he or she is acting.

(c) Audio-video communications allow the testator, witnesses, and notary to be in different locations.

C.2 An electronic nontestamentary trust (i.e., living trust) is also permitted under the new law.

C.3 Electronic wills and trusts that are validly created under the laws of another state will be valid in Nevada, too.

C.4 To download a copy of the final version of this bill, use this link:
http://rkllegal.info/pdf/2017.AB413_EN.pdf.

D. SENATE BILL 454 — UNIFORM POWERS OF APPOINTMENT ACT

SB 454 adopted the Uniform Powers of Appointment Act, which is effective as of October 1, 2017.

D.1 A “power of appointment” is defined as a power granted to a person “to designate a recipient of an ownership interest in or another power of appointment over the appointive property.” In plain English, a person holding power of appointment over any assets has the power to direct who will benefit from that asset.¹

¹This is not a change in the law, but merely a formal definition. Of course, the document granting a power of appointment, usually a trust, will contain specific directives as to what property (or share of the trust) is subject to the power, how that power is to be exercised, and in whose favor the power may be exercised.

D.2 A power of appointment is a “nonfiduciary power,” which means that it can be exercised in the power-holder’s discretion without any duty or liability to anyone for exercising the power in any manner or for not exercising the power at all.

D.3 The statute includes provisions that are coordinated with federal transfer-tax laws² to accomplish commonly desired tax consequences. As part of that, the provisions provide rules for what is a general power of appointment and what is a nongeneral power of appointment.

D.4 Except for fraudulent transfers, property subject to a nongeneral power of appointment is not subject to the claims of the power holder’s creditors.

D.5 To download a copy of the final version of this bill, use this link: https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB454_EN.pdf.

E. KLABACKA V. NELSON

In May of 2017, the Nevada Supreme Court made a ruling in a divorce case involving two self-settled spendthrift trusts that were funded with property that had been transmuted from community property into separate property.³ In its decision, the Supreme Court confirmed that Nevada does not have exception creditors (other than for fraudulent transfers), including spouses and dependent children in a domestic dispute, expressly rejecting the position given in section 59 of the Third Restatement of Trusts. The ruling also confirms the rule on the exclusion of extrinsic evidence as to valid and unambiguous documents, including the trust agreements and a property agreement transmuting community property into separate property. For a copy of the ruling, use this link: <http://rlklegal.info/pdf/nvsc.nelson.2017-05.pdf>.

F. IN THE MATTER OF THE ATS 1998 TRUST

In July of 2017, the Nevada Supreme Court decided *In the Matter of ATS 1998 Trust*, an unpublished decision.⁴ The case related to the triggering of a no-contest clause by a person seeking to enforce the trust. Even though the beneficiary’s interest had been terminated, the Court held that seeking to enforce the trust was within the “safe harbor” provisions of the statute relating to no-contest clauses.⁵ To download a copy of the court’s ruling in the case, use this link: http://rlklegal.info/pdf/nvsc_ats1998.pdf.

RUSHFORTH LEE & KIEFER LLP

Telephone: 702-255-4552 or 855-255-4552 | Fax: 702-255-4677 or 855-RUSH-FAX
E-mail: office@rlklegal.com | Web sites: <http://rlklegal.info/> and <http://rlklegal.com/>
Office: 1707 Village Center Circle, Suite 150, Las Vegas, Nevada 89134-0597
Postal Mail: P.O. Box 371655, Las Vegas, Nevada 89137-1655

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²The federal transfer-tax laws are the gift tax, the estate tax, and the generation-skipping transfer tax.

³*Klabacka v. Nelson*, 133 Nev. Adv. Op. 24.

⁴Supreme Court case number 68748. Available on Westlaw as 2017 WL 3222533.

⁵NRS 163.031.