

PURSUING AND DEFENDING FIDUCIARY REMOVAL ACTIONS AND LITIGATION

By

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I. Probate Commissioner’s Report and Recommendation

A. Probate Commissioner as Special Master

The job description of the Clark county probate commissioner (“Probate Commissioner”) indicates that the Probate Commissioner acts as a special master in conducting evidentiary hearings of contested probate matters.¹

Rule 1.30 of the Local Rules of Practice for the Eighth Judicial District Court of the State of Nevada (“EDCR”) states that the Chief Judge must “share and direct responsibility for hearing overflow cases and the probate calendar with all trial judges.”² The Chief Judge must also,

“supervise . . . the administrative business of the court and have general supervision of the attachés of the court. The various commissioners, referees, hearing officers and masters shall report to and be directed by their supervising judge pursuant to local court rule; however, the chief judge will maintain general supervision over all such officers.”³

Therefore, in overseeing probate matters, the Probate Commissioner serves as a special master under the authority of the Chief Judge, who, by virtue of his or her authority may direct responsibility of a probate case to a trial court judge, who becomes the probate judge.

In practice, the Probate Commissioner initially hears all probate matters, and prepares a report and recommendation on the findings of fact and conclusions of law or, in the alternative, submits an order for signature of the district court judge sitting in probate (“Probate Court”) regarding the initial proceedings.

In Clark County, the Probate Commissioner conducts judicial proceedings independent of the probate judge’s calendar.⁴ Therefore, the Probate Commissioner’s

¹See Clark County Court’s website at <http://www.clarkcountycourts.us/employment.html>, Visited February 7, 2011.

² EDCR 1.30(b)(3).

³ EDCR 1.30(b)(7).

⁴ The Nevada Constitution sets forth the jurisdiction of the Nevada district courts. Nev. Const. Art. 6, § 6, states, “1. The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts. They also have final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law. The District Courts and the Judges thereof have power to issue writs of Mandamus, Prohibition, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction. The District Courts and the Judges thereof shall also have power to issue writs of Habeas

report and recommendations are issued in his role as a special master of the presiding probate judge pursuant to Rule 53 of the Nevada Rules of Civil Procedure (“N.R.C.P.”) and the Eighth Judicial District Rule 4.16(a).⁵

N.R.C.P. 53 governs not only the appointment of a “master,” but also the applicable standard of review relating to the master’s findings of fact and conclusions of law.⁶ While the rule appears to make synonymous the words, “master” and “referee,” the

Corpus on petition by, or on behalf of any person who is held in actual custody in their respective districts, or who has suffered a criminal conviction in their respective districts and has not completed the sentence imposed pursuant to the judgment of conviction. 2. The legislature may provide by law for: (a) Referees in district courts. (b) The establishment of a family court as a division of any district court and may prescribe its jurisdiction.”

⁵ EDCR 4.16(a) states, “The probate judge may hear whichever contested matters the judge shall select, and schedule them at the convenience of the judge’s calendar. The judge alone may also refer contested matters pertaining to the probate calendar to a master appointed by the judge for hearing and report. All other contested matters pertaining to the probate calendar will be assigned on a random basis to a civil trial judge, other than a trial judge serving in the family division. The judge to whom a matter is assigned may, upon resolution of the contested matter, return the case to the probate calendar, or continue with the case if further contested matters are expected.”

⁶ N.R.C.P. 53 states, “(a)(1) Appointment and compensation. The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(2) Any party may object to the appointment of any person as a master on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror.
2. Consanguinity or affinity within the third degree to either party.
3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of either party, or a partner in business with either party, or being security on any bond or obligation for either party.
4. Having served as a juror or been a witness on any trial between the same parties for the same cause of action, or being then a witness in the cause.
5. Interest on the part of such person in the event of the action, or in the main question involved in the action.
6. Having formed or expressed an unqualified opinion or belief as to the merits of the actions.
7. The existence of a state of mind in such person evincing enmity against or bias to either party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury,

save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) and statutes for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of accounts. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) Contents and filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order or reference, the master shall serve a copy of the report on each party.

(2) In non-jury actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The

term “referee” should not be confused with the same term referenced in the Nevada constitution, since an appointment of a “referee” originates from the legislature rather than from judicial designation.

Under the current local practice, the Probate Commissioner hears all probate matters without an individual order of reference from the Probate Court, which in other civil cases, would normally outline the specific scope of the duties of the designated special master. Some have opined that this time honored procedure is permissible because the Probate Commissioner makes no final ruling in any probate matter unless consented to by the parties, and is simply the ministerial conduit by which all probate cases are initiated with the presumed consent of the parties. Within this context, others have further opined that the parties, by virtue of their filing with the Probate Commissioner, have consented to the scope of his reports and recommendations.

The Nevada Supreme Court addressed the use of special masters in probate and trust proceedings stating, “NRCP 53(b) provides: 'A reference to a master shall be the exception and not the rule in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.' NRCP 53(c) contemplates a formal order of reference which would specify or limit the powers of the master.”⁷ Therefore, it is clear that the scope of the special master’s report and recommendation is not something that can be commandeered by the parties through consent or stipulation without an order of reference by the Probate Court.⁸ The Probate Court reserves the authority to appoint a special master based upon a special showing by the parties.⁹

court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In jury actions. In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft report. Before filing a report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

⁷ *In re Estate of Ray*, 79 Nev. 304, 308-310 (Nev. 1963).

⁸ Nev. EDCR 7.50 *Szilagyi v. Testa*, 99 Nev. 834, 673 P.2d 495 (1983) (a stipulation requires assent to its terms in order to be valid and will be enforced if it is entered in the minutes of the court in the form of an order or is in writing and subscribed to by the party against whom the stipulation is alleged. (decided under prior similar rule); See also *Humana, Inc. v. Nguyen*, 102 Nev. 507, 728 P.2d 816 (1986) (decided under prior similar rule) (agreement not properly considered by court. --even if the hospital expressly agreed to waive interest and fees in the foreclosure of its statutory lien on the insurance settlement, the agreement was neither reduced to a signed writing, nor entered by consent as an order, so the trial court could not properly have considered it.). The parties before the Probate Commissioner do not agree or consent with one another upon filing their petition and/or objection.

⁹ 79 Nev. 304 at 308-310.

Notwithstanding the differing opinions concerning the current local practice, the Probate Commissioners chosen to act on behalf of Probate Court are well versed in the area of probate and trust proceedings, and their findings hold substantial weight with the Probate Court. Attorneys should be prepared to properly present their matters before the Probate Commissioner in order to avoid prejudicing their client's position before the primary finder of fact.

B. Report and Recommendation

If an objection is filed against the initial petition, the Probate Commissioner will issue a report and recommendation concerning the findings of fact and conclusions of law.

C. Objections

Any party may object to the Probate Commissioner's report and recommendation within 10 days after being served with a copy of the report and recommendation. The report is deemed to have been served three days after the Probate Commissioner or the Probate Commissioner's designee places a copy in the attorney's file in the clerk's office or 3 days after mailing the report to the objector.¹⁰

Any party that files specific written objections to the Probate Commissioner's report and recommendation, must file and deliver a courtesy copy to the office of the Probate Commissioner. While EDCR 4.16(b) specifically states that, "No points and authorities from any party or oral argument are permitted without leave of court," the author believes that it is wise to always file points and authorities concerning the specific written objections to preserve and make a proper record for potential appellate review.

D. Standards for Review

The Probate Commissioner's report and recommendation is reviewed by the Probate Court. In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous. The court after hearing may adopt the report and

¹⁰ See NRCP 53(e)(2); See also EDCR 4.16(b) with states, "In any civil action in which the capacity or standing of a party to represent a decedent or an estate is in question, the judge may refer the matter to the probate commissioner for determination of standing or capacity. The commissioner shall conduct a review of all necessary documents, conduct hearings as needed, prepare and file a written report containing findings, conclusions and a recommendation for resolution. The probate commissioner may direct counsel to prepare the commissioner's report including the findings and recommendation in accordance with Rules 7.21 and 7.23. The probate commissioner or the commissioner's designee shall forthwith serve a copy of the report on all parties. The report is deemed received 3 days after the probate commissioner or the commissioner's designee places a copy in the attorney's file in the clerk's office or 3 days after mailing to a party or a party's attorney. Within 10 days after being served with a copy, any party may serve and file specific written objections to the recommendations with a courtesy copy delivered to the office of the probate commissioner. No points and authorities from any party or oral argument are permitted without leave of court."

recommendation or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.¹¹

In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.¹²

If the parties stipulate that the master's findings of fact shall be final, only questions of law arising upon the report and recommendation will be considered by the Probate Judge.¹³

The level of review depends upon the nature of the proceeding, namely whether it is a will contest or trust contest. In a will contest, the contestant is the plaintiff and the petitioner is defendant.¹⁴ The written grounds of opposition constitute a pleading and are subject to the same rules governing pleadings as in the case of a complaint in a civil action. An issue of fact involving the competency of the decedent to make a will, the freedom of the decedent at the time of the execution of the will from duress, menace, fraud or undue influence, the due execution and attestation of the will, or any other question substantially affecting the validity of the will, must be tried by the court unless one of the parties demands a jury.¹⁵

If an interested person contests the validity of a revocable nontestamentary trust, the interested person is the plaintiff and the trustee is the defendant. The written grounds for contesting the validity of the trust constitutes a pleading and must conform with any rules applicable to pleadings in a civil action. In a proceeding relating to 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, the questions of fact must be tried by the court.¹⁶

The Probate Court may consolidate the cases if there is a contest of a revocable nontestamentary trust and a contest relating to a will executed on the same date. If a jury is demanded pursuant to NRS 137.020 for the contest of the will, the court may instruct the jury to render an advisory opinion with respect to an issue of fact concerning the trust contest involving the claims set forth in the previous paragraph.¹⁷

¹¹ NRCPC 53(c)2.

¹² NRCPC 53(c)3.

¹³ NRCPC 53(c)4.

¹⁴ NRS 137.020(1).

¹⁵ NRS 137.020 (1)and (2); See also *In re Estate of Peterson*, 75 Nev. 255 (Nev. 1959).

¹⁶ NRS 164.015.

¹⁷ NRS 164.015(5) (A court may consolidate the cases if there is a contest of a revocable nontestamentary trust and a contest relating to a will executed on the same date. If a jury is demanded pursuant to NRS 137.020 for the contest of the will, the court may instruct the jury to render an advisory opinion with respect to an issue of fact pursuant to subsection 4 in the contest of the trust.) By implication, the statute does not grant a jury trial to a trust contest which is consolidated with the contest of a will which is

E. Timelines and Procedures

After a will has been admitted to probate, any interested person other than a party to a contest before probate or a person who had actual notice of the previous contest in time to have joined therein may, at any time within three (3) months after the order is entered admitting the will to probate, contest the admission or the validity of the will.¹⁸ The time period may be tolled in situations where extrinsic fraud prevents the contestant from filing a timely contest.¹⁹

A trust contest may be initiated upon confirmation of the trustee under the jurisdiction of the Probate Court.²⁰

II. Common Causes of Action

A. Breach of Fiduciary Duty

In order to fully understand the claims of a beneficiary against a fiduciary, it is helpful to first understand their relationship. For purposes of this discussion, the author has chosen to focus on the relationship between the beneficiary and the trustee. The individual that establishes the trust is commonly referred to as the grantor, creator, or settlor (hereinafter, “settlor”), while the individual that administers the provisions of the settlor is called the trustee or fiduciary. The individuals that are to receive assets from the settlor are the beneficiaries or “cestui que trust” (hereinafter, “beneficiaries.”)

The settlor creates instructions that the trustee is directed to carry out for the benefit of the beneficiaries. The relationship that is created by the intentions of the settlor is the relationship of trust (hereinafter, “fiduciary relationship”), which is commonly memorialized in a written document called the “trust.”

The terms “title” and “ownership” are distinctly different terms, and are commonly referred to respectively as “title ownership,” and “equitable ownership.” The trustee holds title ownership on behalf of the beneficiaries, who hold equitable ownership in the trust property, which is commonly referred to as the trust “trust res” or “trust corpus.”

executed on the same day. However, the statute is ambiguous with respect to a trust contest not based upon a concurrently signed will. The courts have generally taken the view that a trust contest is the proper subject of a bench trial, not a jury trial.; See RESTATEMENT (SECOND) OF TRUSTS, § 197 (An equitable remedy is a remedy given by a court of chancery or a court having and exercising the powers of a court of chancery.)

¹⁸ NRS 137.080; See also *Melvin v. Farmer*, 93 Nev. 166, 167 (Nev. 1977) concerning timely notice of the probate proceedings which prohibited contest after the settlement agreement;

¹⁹ *Fullerton v. Rogers*, 101 Nev. 306, 307 (Nev. 1985), (“There is no reason why extrinsic fraud cannot be used to toll the time limits imposed by NRS 137.080.”)

²⁰ NRS 164.010.

The relationship between the trustee and the beneficiaries is the fiduciary relationship under which the duties of the trustee arise.²¹ Under Nevada law, a fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another.²² It is important to remember that the office of the fiduciary is not one of compulsion, as each fiduciary is free to choose whether or not to serve in this capacity.

The fiduciary duties of a trustee are commonly divided into eight categories, which categories themselves encompass additional duties. Those categories are: (1) the duty to administer the trust in accordance with its terms and applicable law;²³ (2) the duty of prudence;²⁴ (3) the duty to act personally, and the related duties with respect to delegation;²⁵ (4) the duty of loyalty;²⁶ (5) the duty of impartiality;²⁷ (6) the duty to furnish information to beneficiaries;²⁸ (7) the duty to keep records and provide reports;²⁹ and (8) the duty to segregate and identify trust property.³⁰ These duties are not mutually exclusive, and overlap with each other so as to strengthen the individual responsibilities each trustee owes to the beneficiaries.

1. Duties in Administering the Trust

The trustee's general responsibilities in administering a trust include, but are not limited to, the following: "(a) ascertaining the duties and powers of the trusteeship, and identity of the beneficiaries and purposes of the trust; (b) collecting and protecting trust property; (c) managing the trust estate to provide returns or other benefits from trust property; and (d) applying or distributing trust income and principal during the administration of the trust and upon its termination."³¹ Other duties encompassed within the scope of these broader duties are: (1) creating an inventory of the settlor's estate; (2) filing and providing the beneficiaries with annual and final inventories; (3) keeping accurate records; (4) filing estate and final income taxes; and (5) distributing trust assets to beneficiaries and creditors of the settlor's estate.³²

²¹ NRS 162.020(1)(b) ("Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.)

²² *Lopez v. Corral*, 2010 Nev. LEXIS 69 (Nev. 2010) citing *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 700, 962 P.2d 596, 602 (1998) (Under Nevada law, "[a] fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another.")

²³ RESTATEMENT (THIRD) OF TRUSTS § 76 (2007).

²⁴ *Id.* § 77.

²⁵ *Id.* § 80.

²⁶ *Id.* § 78.

²⁷ *Id.* § 79.

²⁸ *Id.* § 82.

²⁹ *Id.* § 83.

³⁰ *Id.* § 84.

³¹ *Id.*

³² See generally Layne T. Rushforth, *Your Duties as Trustee for a Living Settlor: Guidelines for Trust Administration*, March 22, 2008, <http://rushforth.net/pdf/trustee.incapacity.pdf>.

Although a trustee can be held liable for failure to comply with any one of these duties, the overriding duties with which a trustee must comport are managing and administering the trust with care and skill and ensuring that he or she remains loyal to the trust beneficiaries in acting for their benefit.

2. Duty of Prudence

In administering a trust, the trustee has a duty to act as a prudent person, in light of the circumstances, purposes, and terms of the trust.³³ Prudence means that the trustee must exercise reasonable care, skill, and caution in administering the affairs of the trust.³⁴ However, where the trustee has advanced skills as compared to an ordinary trustee, the trustee must utilize those skills in the exercise of his or her fiduciary role.³⁵

The care and skill requirements of the trustee are generally not onerous; and thus, they do not disqualify most settlors' friends and family members from acting as trustee. The care requirement requires that the trustee exercise reasonable effort and diligence in performing the functions of the trustee, always keeping in mind the objectives of the trust and the interests of the beneficiaries.³⁶ As to the trustee's skill, the trustee must maintain the skills of a person of ordinary intelligence.³⁷ In addition to care and skill, the trustee must exercise caution in administering the trust over which he or she is a fiduciary. Although the trustee is not required to avoid all risks, he or she must exercise caution reasonably appropriate to the circumstances of the trust.³⁸

3. Duties with Respect to Delegation

While the care and skill requirements do not prevent most individuals from serving as trustee, certain aspects of trust administration require more skill and expertise than the average person possesses. The Restatement (Third) of Trusts points out that maintaining the necessary skills to administer a trust, and providing the proper level of care to the beneficiaries and the trust or estate generally, often requires advice and assistance from outside sources.³⁹ But, it must be remembered that a trustee is generally prohibited from delegating the balance of his or her responsibilities.⁴⁰ For example, the California Probate Code states: "The trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required personally to perform and may not transfer the office of trustee to another person nor delegate the entire

³³ RESTATEMENT (THIRD) OF TRUSTS § 77 (2007).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* § 77 cmt. b.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See Meck v. Behrens*, 252 P. 91, 94-96 (Wash. 1927) ("It is a general rule that a trustee in whom there is vested discretionary powers involving personal confidence cannot delegate his powers and shift his responsibility to other persons . . ." (quoting 39 Cyc. at 304)); *see also* RESTATEMENT (THIRD) OF TRUSTS § 80(1) (2007) ("A trustee has a duty to perform the responsibilities of the trusteeship personally").

administration of the trust to a cotrustee or other person.”⁴¹ Where, however, the administration of a trust requires additional skills beyond those possessed by the average person, such as in the areas of investing and/or maintaining the corpus of the trust, or where there is an express provision within the trust instrument providing for delegation, a trustee may delegate his or her functions in the same manner as a prudent person⁴² of comparable skill might delegate his or her duties.⁴³

In selecting an agent to whom duties are to be delegated, the trustee must exercise his or her “fiduciary or prudent discretion,” along with reasonable care and skill, to ensure that the individual or individuals chosen possess the requisite skill and experience necessary to satisfy the fiduciary demands of a trustee.⁴⁴ Although the trustee may delegate certain ministerial duties, the trustee does not thereby dissolve his or her duties of acting with care and skill, duties which he or she owes to the trust beneficiaries or to the trust generally. Instead, by his or her act of delegation, the trustee acquires the additional responsibility of supervising the agents he or she chooses to assist him or her in fulfilling the fiduciary role.⁴⁵

In addition to seeking out agents to whom duties may be delegated, it may also frequently become necessary to seek legal advice or representation in the administration of a trust. In retaining such counsel, the trustee does not absolve him or herself of liability for any breach of trust or failures to otherwise preserve and maintain the trust assets. The trustee remains liable for his or her actions regardless of whether counsel has been retained.⁴⁶ Exercising competence in selecting counsel, however, and following that advice prudently and in good faith, will generally be indicative of the trustee having exercised prudence in administering the affairs of the trust.⁴⁷

4. Duty of Loyalty

⁴¹ CAL PROB. CODE § 16012 (Deering 2008).

⁴² R.F.V. Heuston, *Salmond on the Law of Torts* 56 (17th ed. 1977) (“The reasonable man connotes a person whose notions and standards of behavior and responsibility correspond with those generally obtained among ordinary people in our society at the present time, who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equable. He is not necessarily the same as the average man—a term which implies an amalgamation of the counterbalancing extremes.”)

⁴³ *See, e.g.*, NEV. REV. STAT. § 164.770(1) (2008) (“A trustee may delegate functions of investment and management that a prudent trustee of comparable skills could properly delegate under the circumstances.”); RESTATEMENT (THIRD) OF TRUSTS § 80(1) (“A trustee has a duty to perform . . . except as a prudent person of comparable skill might delegate those responsibilities to others.”); *Estate of Vail v. First of Am. Trust Co.*, 309 Ill. App. 3d 435, 722 N.E.2d 248, 242 Ill. Dec. 759, 763 (4th Dist. 1999). (Corporate fiduciaries are required to keep all funds, both principal and income, which are awaiting investment or distribution, to be invested for the beneficiaries “at a rate of return commensurate with that available in trust quality investments.”)

⁴⁴ NEV. REV. STAT. § 164.770(1); RESTATEMENT (THIRD) OF TRUSTS § 80(2).

⁴⁵ *See, e.g.*, NEV. REV. STAT. § 164.770(1) (The trustee must establish the scope and terms of the delegation, and must also periodically review the agent’s performance.); RESTATEMENT (THIRD) OF TRUSTS § 80(2) (The trustee must exercise fiduciary discretion and act as a prudent person would in supervising and monitoring agents to whom duties have been delegated.).

⁴⁶ RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b(2).

⁴⁷ *Id.*

In addition to the duties of care and skill, the trustee owes the beneficiaries a strict duty of loyalty. The trustee must remember that the management and investment of trust property is always to be done “solely in the interest of the beneficiaries.”⁴⁸ The duty of loyalty prevents the trustee from self-dealing or placing his or her interests above those of the beneficiaries.⁴⁹ In fact, the laws of many states even prohibit the settlor of a trust from including within the instrument any provision for decreasing or eliminating the liability of a trustee for his or her actions, including deriving profit from the trust.⁵⁰

One potential for litigation due to a breach of the duty of loyalty arises where the trustee is also a beneficiary of the trust. The trustee chosen could be a close friend, family member, or business partner of the settlor. In these cases, it is wise to counsel the settlor regarding potential conflicts that could arise between the trustee and the beneficiaries.⁵¹ If a settlor names a business partner to serve as a trustee of a trust that owns as its primary asset, the stock or membership interests in the company for which the business partner is employed, provisions concerning compensation should be addressed to delineate between overlapping duties of the trustee and those of the employee. This delineation may prevent wasting of trust assets in the form of overcompensation of the business partner for duties that he would normally be required to render as a fiduciary of the company. An overlapping duty may include the requirement of the business partner as chief executive officer to create an annual accounting to the owners of the company and the beneficiaries of the trust, which are the same persons in this example.

The settlor(s) of the trust should be counseled to carefully consider their choice for trustee, keeping in mind the inherent risk that a beneficiary acting as trustee may betray the trust placed in them. The California Court of Appeals held, “[A] trustee cannot purchase or deal with the subject of the trust nor place himself in an attitude antagonistic to the trust. It is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust. This rule is unyielding....Courts will not permit an investigation into the fairness or unfairness of such a transaction or allow the trustee to show that the dealing was for the best interest of the beneficiaries. It is a trustee's duty in all things to first consider and always to act for

⁴⁸ NEV. REV. STAT. § 164.715 (2008). See CAL. PROB. CODE § 16002(a) (2008) (“The trustee has a duty to administer the trust solely in the interest of the beneficiaries.”); N.Y. EST. POWERS & TRUSTS LAW § 11-2.1 (Consol. 2008) (“A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen.”); see also UNIF. TRUST CODE § 802 (amended 2004) (“A trustee shall administer the trust solely in the interests of the beneficiaries.”).

⁴⁹ NEV. REV. STAT. § 163.160 (2008); RESTATEMENT (THIRD) OF TRUSTS § 78(2); see also *Meinhard v. Salmon*, 164 N.E. 545, 547 (N.Y. 1928) (“A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.”); see also *Golden Nugget v. Ham*, 95 Nev. 45, 48, 589 P.2d 173, 175 (1979) (“when a party who is relied upon in a fiduciary capacity fails to fulfill his obligations thereunder, and does not tell the other party of his failure, his omission constitutes constructive fraud.”)

⁵⁰ See, e.g., CAL. PROB. CODE § 16461(b) (Deering 2008); NEV. REV. STAT. § 163.160(3)(b).

⁵¹ UNIF. TRUST CODE § 802 cmt.

the best interests of the trust.”⁵² A proper trust document in which a beneficiary also serves as the trustee for the trust should include provisions addressing such potential conflicts.⁵³ Thereafter, a trustee should do everything in his power to avoid a conflict of interest.⁵⁴

5. Duty of Impartiality

The trustee must also administer the trust in a way that is impartial to the various beneficiaries of the trust.⁵⁵ This duty includes requirements that the trustee invest, protect, and distribute assets of the trust in an impartial manner, and also that the trustee communicate and consult with all beneficiaries equally.⁵⁶ Not only must the trustee act with loyalty to all beneficiaries and balance their interests equally, he or she must also act with recognition of the needs of any future beneficiaries as well.⁵⁷

In Nevada, the trustee is required to impartially invest and manage the trust property, “taking into account any differing interests of the beneficiaries.”⁵⁸ This duty of impartiality in the administration and distribution of the trust is mandatory in absence of a trust provision to the contrary.⁵⁹

6. Duty to Furnish Information to the Beneficiaries

Closely related to the duty of loyalty is the duty to communicate with beneficiaries and to inform them of all material facts with which the trustee has or should have knowledge.⁶⁰ Specifically, trustees are charged with keeping beneficiaries informed of changes in the trust, or trusteeship, and with promptly responding to any beneficiary requests for information.⁶¹ In general, the duty to inform means that the trustee must “inform the beneficiaries fully of all facts which would aid them in protecting their interests.”⁶² This includes “all material facts in connection with a nonroutine transaction which significantly affects the trust estate and the interests of the beneficiaries.”⁶³ A common example of information that should be provided by the trustee includes the

⁵² *Cagnolatti v. Guinn*, 140 Cal. App. 3d 42, 49 (Cal. Ct. App. 1983); *Toedter v. Bradshaw* (1958) 164 Cal.App.2d 200, 208 [330 P.2d 688]; see also *Estate of McLellan* 8 Cal.2d 49, 5463 P.2d 1120 (1936).

⁵³ UNIF. TRUST CODE § 802 cmt.

⁵⁴ *Riley v. Rockwell*, 103 Nev. 698, 701 (1987).

⁵⁵ NEV. REV. STAT. § 164.720 (2008); RESTATEMENT (THIRD) OF TRUSTS § 79(1) (2007); UNIF. TRUST CODE § 803 (“If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests.”).

⁵⁶ RESTATEMENT (THIRD) OF TRUSTS § 79(1) (2007).

⁵⁷ *Id.* § 79(2).

⁵⁸ NEV. REV. STAT. § 164.720(1)

⁵⁹ *Id.* § 164.720(2)

⁶⁰ RESTATEMENT (THIRD) OF TRUSTS § 78(3) (2007).

⁶¹ *Id.* § 82

⁶² *Allard v. Pac. Nat’l Bank*, 663 P.2d 104, 110 (Wash. 1983) (citing *Esmieu v. Schrag*, 563 P.2d 203 (1977)).

⁶³ *Id.*

issuance of an annual trust accountings, with accompanying schedule K-1 (IRS Form 1040) to each beneficiary receiving distributions from a trust.⁶⁴

7. Duty to Keep Records and Provide Reports

The duty to keep beneficiaries informed of the status and proceedings of estate administration includes the requirement that the fiduciary keep accurate records and provide accountings to the beneficiaries of the trusts over which they serve as fiduciaries.⁶⁵ For example, trustees must generally submit an intermediate accounting for each year in which the trust is active. This annual accounting is usually filed after the end of each calendar year and must inform the beneficiaries of the status of the trust, including additions, deductions, accounting for investments, and the values of assets, among other requirements.⁶⁶

In Nevada, an individual trustee must file an inventory of all property of which he or she has come into possession within seventy-five days after obtaining possession of that property.⁶⁷ Moreover, the trustee must file an annual inventory within sixty days after the end of each calendar year in which the trust is active.⁶⁸ This accounting must make reference to:

- (a) The period to which the account applies;
- (b) The names and addresses of any living or other potential beneficiaries known to the trustee;
- (c) Additions to, investments of, and deductions from the trust principal during the accounting period with the dates and sources of such acquisitions, investments, and deductions;

⁶⁴ Schedule K-1 (Form 1041) provides beneficiaries summarized reporting information for beneficiaries who file Form 1040. Generally, the beneficiary must report items shown on his or her Schedule K-1 (and any attached schedules) the same way that the estate or trust treated the items on its return. If the treatment on beneficiary's original or amended return is inconsistent with the estate's or trust's treatment, or if the estate or trust was required to but has not filed a return, the beneficiary must file Form 8082, Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR), with the beneficiary's original or amended return to identify and explain any inconsistency (or to note that an estate or trust return has not been filed. If the beneficiary is required to file Form 8082 but fails to do so, the beneficiary may be subject to the accuracy related penalty. This penalty is in addition to any tax that results from making the beneficiary's amount or treatment of the item consistent with that shown on the estate's or trust's return. Any deficiency that results from making the amounts consistent may be assessed immediately. See Schedule K-1 (Form 1041) 2006 Instructions for Beneficiary Filing Form 1040 at <http://www.irs.gov>.

⁶⁵ *Golden Nugget v. Ham*, 95 Nev. 45, 48, 589 P.2d 173, 175 (1979) ("when a party who is relied upon in a fiduciary capacity fails to fulfill his obligations thereunder, and does not tell the other party of his failure, his omission constitutes constructive fraud."); RESTATEMENT (THIRD) OF TRUSTS § 83 (2007).

⁶⁶ NEV. REV. STAT. § 165.040; *See, e.g.*, CAL. PROB. CODE § 16062 (Deering 2008) ("[T]he trustee shall account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed").

⁶⁷ NEV. REV. STAT. § 165.030 (2008).

⁶⁸ *Id.* § 165.040(1)

- (d) A description of the trust income and distributions for the accounting period;
- (f) A statement of unpaid claims, including a statement as to whether any taxes have become due with regard to the trust property;
- (g) A brief summary of the account; and
- (h) Such other facts as the courts may require.⁶⁹

A trustee's failure to provide an accurate accounting of the trust assets to the beneficiaries may result in multiple breaches of a trustee's fiduciary duty, due to the informational and record keeping requirements.

8. Duty to Segregate and Identify Trust Property

The duty to segregate trust property includes the duty to keep trust property completely separate from the trustee's own property, as well as from other property not subject to the trust.⁷⁰ The duty to keep trust property separate from other property means that, for purposes of money, stock, and other liquid assets, the trustee must maintain separate accounts or physically keep the assets separated. For example, a fiduciary may not place money from the trust in his or her own personal bank account, even if the trustee keeps accurate records and makes an effort to ensure that the funds are kept separate on paper.⁷¹ This prohibition against commingling also applies to property held in separate trusts. Thus, a trustee that administers multiple trusts is prohibited from commingling the property of the individual trusts.⁷²

Part of the trustee's duty of loyalty is the duty to ensure that trust property is designated or identified as trust property.⁷³ The fiduciary must take control of the assets of the trust upon the settlor's death, and must make a diligent effort thereafter to create an inventory of the trust property.⁷⁴ Trustees must also ensure that trust property is properly designated as an asset of the trust to eliminate any confusion concerning ownership issues.⁷⁵

B. Trustee Liability

With all the duties required of individual trustees, liability arising from neglect of those duties is an ever-present concern. Where the trustee has or threatens to commit a breach of trust,⁷⁶ the beneficiaries or co-trustees may initiate an action against the trustee

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* comment b.

⁷² *Id.* comment c.

⁷³ RESTATEMENT (THIRD) OF TRUSTS § 84.

⁷⁴ UNIF. PROB. CODE § 3-706

⁷⁵ RESTATEMENT (THIRD) OF TRUSTS § 84 comment d.

⁷⁶ *Chicago Title & Trust Co. v. Chief Wash Co.*, 368 Ill. 146, 155, 13 N.E.2d 153, 156 (1938) (The term "breach of trust" is sufficiently comprehensive to include every violation by a trustee of a duty which equity

seeking any number of remedies. These remedies could include: (1) compelling the trustee to perform his duties; (2) enjoining the trustee from committing the breach; (3) compelling the trustee to redress the breach through the payment of money;⁷⁷ (4) appointing a receiver or temporary trustee over the trust; (5) removing the trustee; (6) setting aside the trustee's objectionable actions; (7) reducing the trustee's compensation, or denying it all together; (8) imposing equitable liens or constructive trusts upon the trust property;⁷⁸ or (9) tracing and recovering trust property that has been wrongfully disposed of.⁷⁹

In addition to the remedies mentioned above, the trustee may be sued in a civil action, and collection may be had from the trust property, under certain circumstances. Generally, the measure of damages for a breach of trust by a fiduciary is "the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach."⁸⁰ Under some statutes, where the trustee was engaged in legitimate business activity, or where the loss to the trust was the result of the trustee's personal fault, the beneficiaries of the trust may recover the full amount of damage to the trust.⁸¹ Where the trustee's tort resulted simply in an increase in value to the trust, the beneficiaries may recover only that portion of the increase in value to the trust.⁸²

The settlor of a trust may also seek a remedy against the trustee of an inter-vivos trust for the trustee's breach of his or her duties. The settlor's options include: relieving the trustee from any or all duties, altering or denying any privilege or power conferred upon the trustee, or adding duties, restrictions, or liabilities to those imposed or granted by statute.⁸³ Interestingly, the settlor may relieve the trustee of liability for breaches of trust through provisions in the trust instrument; however, the settlor may not relieve the trustee for those liabilities listed above or for breaches of trust "committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of a

lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness. Included is every omission or commission which violates in any manner the three major obligations of carrying out a trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith.)

⁷⁷ *Stuart v. Continental Ill. Nat'l Bank & Trust Co.*, 68 Ill. 2d 502, 369 N.E.2d 1262, 12 Ill. Dec. 248, 258 (1977) ("A trustee is personally liable for any loss occasioned by a violation of his duties as trustee"); RESTATEMENT (SECOND) OF TRUSTS, §207 (1959) (The trustee is chargeable with interest at the legal rate).

⁷⁸ *Foley v. Morse & Mowbray*, 109 Nev. 116, 126 (Nev. 1993) (A constructive trust is a remedial device by which the holder of legal title to property is deemed to be a trustee of that property for the benefit of another who in good conscience is entitled to it.)

⁷⁹ NEV. REV. STAT. § 163.115(1) (2008).

⁸⁰ UNIF. TRUST CODE § 1002.

⁸¹ NEV. REV. STAT. § 163.140(1) (2008); See also *Herget Nat'l Bank of Pekin v. Lampitt*, 133 Ill. App. 3d 418, 478 N.E. 2d 904, 906, 88 Ill. Dec. 413 (3d Dist. 1985) (Any waste or other damage that the trustee may do to the *res* would be considered a breach of fiduciary duty, for which the common law give the beneficiary a remedy against the trustee.)

⁸² *Id.*

⁸³ *Id.* § 163.160(1).

beneficiary,” nor may the trustee be relieved from liability for deriving profit from his or her breach of trust.⁸⁴

In addition to the settlor’s power to relieve a trustee from liability, any beneficiary of full legal capacity, or the court, on its own initiative, may relieve the trustees of his or her obligations as that beneficiary.⁸⁵ Beneficiaries may also provide relief to a fiduciary who has neglected or otherwise violated one of his or her duties. For example, Nevada law provides that any beneficiary with statutory authority may release trustees from liability for past violations of any provision of the statutes.⁸⁶

To avoid liability, the trustee may seek to claim ignorance of the trust provisions concerning his or her duties. The Restatement (Third) of Trusts is very clear that ignorance will not absolve a trustee from liability.⁸⁷ The trustee has the duty to become familiar with the terms and purposes of the trust and to act so as to preserve the settlor’s intent.

In the end, the common themes running through the statutes, case law, and commentaries when the issue is trustee liability are that the fiduciary must act with appropriate care and skill and must also act with loyalty so as to maintain and preserve assets for the benefit of present and future beneficiaries.

C. Enforcement of the No-Contest Provision (Beneficiary Liability)

In most properly prepared wills and trusts, a no-contest provision or clause will be inserted into its language to avoid frivolous claims by disenchanted beneficiaries.⁸⁸ The no-contest provision/clause usually warns the beneficiaries that any legal challenge or other act by a beneficiary to disrupt or destroy the distribution of the estate and/or trust assets will result in the beneficiary receiving only one dollar.⁸⁹

While the court is obligated to enforce the no-contest provision/clause in a will and trust in accordance with the testator’s intent, there are exceptions to its enforcement.⁹⁰ A beneficiary’s share will not be reduced or eliminated if the beneficiary seeks only to enforce the terms of the will or trust; enforce the beneficiary’s legal rights in the probate proceeding, or obtain a court ruling with respect to the construction or legal effect of the will or trust.⁹¹

⁸⁴ *Id.* § 163.160(3).

⁸⁵ *Id.* §§ 163.170; 163.180.

⁸⁶ *Id.* § 163.170.

⁸⁷ *Id.* § 77 cmt. (c).

⁸⁸ The term beneficiary is used interchangeably with the terms devisee, legatee, and beneficiary for purposes of this article.

⁸⁹ NRS 137.005(5) ([A] “no-contest clause means one or more provisions in a will that express a directive to reduce or eliminate the share allocated to a devisee or to reduce or eliminate the distributions to be made to a devisee if the devisee takes action to frustrate or defeat the testator’s intent as expressed in the will”).

⁹⁰ NRS 137.005 (Wills); NRS 163.00195(Trusts)

⁹¹ NRS 137.005(3); NRS 163.00195(3).

Furthermore, a beneficiary's share must not be reduced or eliminated under a no-contest provision/clause because the beneficiary institutes legal action seeking to invalidate the will/trust if the legal action was instituted in good faith and based on probable cause that would have led a reasonably person, properly informed and advised, to conclude that there was a substantial likelihood that the will or trust was invalid.⁹²

III. Standing

The term "standing" is defined as the right of aggrieved party to make a legal claim or obtain judicial enforcement of a duty or right.⁹³ To have standing in a federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that there is causal connection between the conduct complained of and injury suffered, and (3) interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question and may be redressed by a favorable decision.⁹⁴

In *Lujan v. Defenders of Wildlife*, the United States Supreme Court explained that Lujan's standing requirements protect the limited jurisdiction of the federal courts arising under the "case or controversy" requirements of Article III of the United States Constitution. Under the "case or controversy" requirement, the federal judiciary cannot declare the rights of individuals or "determine the constitutionality of legislative or executive acts" without an "actual controversy" between the parties.⁹⁵

Thereafter, the Nevada Supreme Court held, "[S]tate courts are not required to comply with the federal "case or controversy" requirement. 'Standing is a self-imposed rule of restraint. State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits.' State courts are free to adopt a

⁹² NRS 137.005(4); NRS 163.00195(4)

⁹³ BLACK'S LAW DICTIONARY 1413 (7th ed. 1999); See also Joseph Vining, *Legal Identity* 55 (1978) ("The word *standing* is rather recent in the basic judicial vocabulary and does not appear to have been commonly used until the middle of our own century. No authority that I have found introduces the term with proper explanations and apologies and announces that henceforth *standing* should be used to describe who may be heard by a judge. Nor was there any sudden adoption by tacit consent. The word appears here and there, spreading very gradually with no discernible pattern. Judges and lawyers found themselves using the term and did not ask why they did so or where it came from.")

⁹⁴ *Id.*; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (U.S. 1992)(...our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized,(citations omitted), (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" (citations omitted). Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." (citations omitted) Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (citations omitted).

⁹⁵ 504 U.S. 555, 560 (U.S. 1992)

"case or controversy" justiciability requirement or open their courts to lawsuits that may not meet this requirement."⁹⁶

The Nevada legislature has given standing to the attorney general or any interested person, including a devisee under a former will, to contest a will by filing written grounds of opposition to the probate thereof at any time before the hearing of the petition for probate.⁹⁷

The issue of whether a party has standing as an interested person under the terms of the *inter vivos* revocable trust became the central focus of the Nevada Supreme Court in 2006. In *Linthicum v. Rudi*, the Nevada Supreme Court held that, "164.015(1) permits 'an interested person' to petition the court for proceedings 'concerning the internal affairs of a nontestamentary trust' and to obtain any appropriate relief provided with respect to a testamentary trust in NRS 153.031. NRS 153.031(1)(a) and NRS 153.031(1)(d) allow a trustee or beneficiary of a trust to petition the court to determine the existence of the trust and the validity of a trust provision, respectively. However, neither of these statutes directly addresses revocable *inter vivos* trusts,...Moreover, these statutes specifically refer to petitions by interested persons."⁹⁸

The Nevada Supreme Court concluded that because the trust at issue was a revocable inter vivos trust and the settlor retained the ability to revoke the trust during her lifetime, the beneficiaries thereunder had at most a contingent interest that had not yet vested. Therefore, the beneficiaries are not interested persons within the meaning of NRS 164.015 and NRS 153.031. The Court concluded that any action while the settlor was still living must be brought in the guardianship court⁹⁹

Three years later, the Nevada legislature amended NRS 164.015(1) to provide that the Probate Court has exclusive jurisdiction of proceedings initiated by the petition of an interested person concerning the internal affairs of a nontestamentary trust, including a revocable living trust while the settlor is still living if the court determines that the settlor cannot adequately protect his or her own interests or if the interested person shows that the settlor is incompetent or susceptible to undue influence.¹⁰⁰

Proceedings which may be maintained under NRS 164.015 are those concerning the administration and distribution of trusts, the declaration of rights and the

⁹⁶ *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 393 (Nev. 2006) (overruled on other grounds).

⁹⁷ NRS 137.010 (Personal notice must then be given by a citation directed to the heirs of the decedent and to all interested persons, including minors and incapacitated persons, wherever residing, directing them to plead to the contest within 30 days after service of the citation in the manner provided in NRS 155.050. A person so served may interpose any defense or objection to the contest by any motion authorized by the Nevada Rules of Civil Procedure in civil actions. If the motion is granted, the court may allow the contestant 10 days within which to amend the contest. If the motion is denied, the petitioner and other interested persons, within 10 days after the receipt of written notice thereof, may jointly or separately answer the contest. The times specified in this section may be extended by the court.)

⁹⁸ 122 Nev. 1452 (Nev. 2006).

⁹⁹ *Id.*

¹⁰⁰ NRS 164.015(1).

determination of other matters involving trustees and beneficiaries of trusts, including petitions with respect to a nontestamentary trust for any appropriate relief provided with respect to a testamentary trust in NRS 153.031.¹⁰¹

This new statutory amendment created standing for all beneficiaries named in a revocable intervivos trust, and created what is known as a “pre-mortem proceeding.” The pre-mortem proceeding may offer the trust settlor a method of assurance that their estate plan will not face a successfully post-mortem legal challenge by a disaffected beneficiary, by offering the beneficiary(ies) an opportunity to object to the terms of the trust prior to the settlor’s death. Proponents of the new law argue that the biggest handicap that a fiduciary faces in a legal challenge to their respective estate plan is the absence of the key witness to the estate plan, namely the settlor.

The pre-mortem proceeding is not without its drawbacks. While the settlor may avert a post-mortem challenge to his or her estate plan, any amendments will likely be required to pass through similar pre-mortem proceedings to maintain the same level of assurance in averting a post-mortem challenge. However, any subsequent pre-mortem proceedings relating to an amendment will likely only exacerbate an already contentious scenario among the beneficiary(ies) and/or settlor. This can create a costly scenario that benefits the litigator, while destroying the familial relations during the life of the testator through suspicion, loss of trust, and/or disunity.

IV. Jurisdiction: *In Rem vs. In Personam*

Almost one hundred years ago, Judge Farrington of the U.S. District Court in Nevada, wrote, “Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal that, if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.”¹⁰²

The United States Supreme Court acknowledged that *in rem* proceedings were developed primarily to expand the reach of the courts, which might have lacked *in personam* jurisdiction over the owner of property. In *Lewis v. Lewis & Clark Marine, Inc.*, the United States Supreme Court held that a proceeding *in rem* is not a remedy afforded by common law, it is a proceeding under the civil law.¹⁰³ The U.S. Supreme Court cited its earlier cases in which it held that when a proceeding *in rem* is used in the common-law courts, it is given strictly by statute.¹⁰⁴ The Nevada Supreme Court held, “It is a well-known rule that a judgment in an action *in rem* is only good to the extent of the amount realized from the specific property seized, actually or symbolically, in the

¹⁰¹ Id.

¹⁰² *Johnson v. Johnson*, 225 F. 413 (D. Nev. 1915).

¹⁰³ 531 U.S. 438, 444-445 (U.S. 2001).

¹⁰⁴ *The Moses Taylor*, 71 U.S. 411, 4 Wall. 411, 431, 18 L. Ed. 397, 32 How. Pr. 460 (1867) and *The Hine v. Trevor*, 71 U.S. 555, 4 Wall. 555, 571-572, 18 L. Ed. 451 (1867).

action.”(emphasis added).¹⁰⁵ The Nevada legislature created the *in rem* jurisdiction of the Probate Court over wills under NRS 136.010¹⁰⁶ and over trusts under NRS 164.010.

There are substantial differences between *in rem* and *in personam* jurisdiction that have been defined by the courts.¹⁰⁷ The Ninth Circuit defined the differences between *in personam* jurisdiction and *in rem* jurisdiction as such, “*In personam* jurisdiction, simply stated, is the power of a court to enter judgment against a person. *In rem* jurisdiction is the court's power over property. Before a court may exercise the state's coercive authority over a person or property, some statute must authorize the act.”¹⁰⁸

The Nevada Supreme Court held, “It is a fundamental and universal rule of law that a court must have jurisdiction of the matter before it and of the proceedings concerning that matter, or else its proceedings therein will be nullity.”¹⁰⁹ The Court explained that “it is the primal duty of all courts to keep strictly within their jurisdiction...But unless prohibited by the constitutional provisions creating a court and providing the jurisdiction thereof, such court may be given special and limited jurisdiction in certain specified cases by the legislature.”¹¹⁰

The Nevada Supreme Court also held, “It is one thing to possess jurisdiction. It is another to exercise it. Courts do not possess jurisdiction apart from and independent of the state. They are but instrumentalities through which the state itself exercises its own jurisdiction over a person. (citation omitted) By constitution and statute the state has affirmatively conferred upon its various courts authority to exercise the jurisdiction of the state within specified limits. These limits, however, have to do with types of actions and proceedings and establish the competency of the courts as among themselves to deal with such specified matters. (citation omitted) Within these bounds of competency and in the absence of other specified limitations, the state must be regarded as having conferred upon its courts general authority to exercise the whole of its jurisdiction.”¹¹¹

It further held that, “In addition to authority, however, the courts must by statute be provided with the necessary machinery. Thus it is recognized that exercise of jurisdiction through its courts by a state over its domiciliaries (other than by personal

¹⁰⁵ *Perry v. Edmonds*, 59 Nev. 60, 66 (Nev. 1938).

¹⁰⁶ NRS 136.010 (Wills may be proved and letters granted in the county where the decedent was a resident at the time of death, whether death occurred in that county or elsewhere, and the district court of that county has exclusive jurisdiction of the settlement of such estates, whether the estate is in one or more counties. The estate of a nonresident decedent may be settled by the district court of any county in which any part of the estate is located. The district court to which application is first made has exclusive jurisdiction of the settlement of estates of nonresidents.)

¹⁰⁷ *SEC v. Ross*, 504 F.3d 1130 (9th Cir. 2007); See also *Hanson v. Denckla* 357 U.S. 235, 246 fn 12 (1958) (“A judgment *in personam* imposes a personal liability or obligation on one person in favor of another. A judgment *in rem* affects the interests of all persons in designated property.”)

¹⁰⁸ *Sec. Investor Prot. Corp. v. Vigman*, 764 F.2d 1309, 1313-14 (9th Cir. 1985); See also *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 698-700 (1993) for a discussion of general and specific personal jurisdiction.)

¹⁰⁹ *State ex rel. Smith v. Sixth Judicial Court*, 58 Nev. 214 (Nev. 1937) (citation omitted).

¹¹⁰ *Id.*

¹¹¹ *State ex rel. Crummer v. Fourth Judicial Dist. Court*, 69 Nev. 276, 280-281 (Nev. 1952).

service of process) cannot be had in the absence of express statutory provision. (citation omitted) It should also be recognized, however, that while in connection with such statutory provision one sometimes sees reference to a state's "conferring" jurisdiction upon its courts, this is not done by a formal declaration of bestowal or an express conferral of authority. The requirement of statute does not go to the possession of jurisdiction (or to the extent of the jurisdiction possessed) but to the manner and means of its exercise. The requirement is founded not in the need for bestowal of authority already generally conferred by constitution, but in the need for due process and for the express enlargement of the common-law method for service of process which was limited to personal service.”¹¹²

The Nevada Supreme Court then concluded that if "the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him, a state in cases such as this, "may confer jurisdiction upon its courts by providing a method of service of process other than personal service.”¹¹³

In an action *in rem*, the court acquires jurisdiction over the estate or trust and all persons in their respective capacities under the estate or trust for the purpose of determining their rights to any portion of the estate or trust.¹¹⁴

A proceeding to establish *in rem* jurisdiction commences with a notice of hearing on a petition mailed to the interested parties of the Trust under NRS 155.010, rather than personal service of a summons and complaint required to establish *in personam* jurisdiction over an interested party under Rule 4 of the Nevada Rules of Civil Procedure (“NRCP”).

If the beneficiary or interested party in an *in rem* proceeding does not voluntarily submit to the jurisdiction of the Court, however, claims alleged by beneficiaries or interested parties can extend only to the property over which the Court has asserted proper *in rem* jurisdiction.

The Nevada Legislature was well aware that in the absence of voluntary submission to the Court’s jurisdiction by an interested party, an attempt by the Court to assert *in personam* jurisdiction under the relaxed requirements of NRS 155.010 over an interested party may violate the due process of law under the Fourteenth Amendment to the U.S. Constitution.¹¹⁵ Therefore, in order to avoid the improper assertion of *in personam* jurisdiction, the beneficiary or interested party must assert a defense of lack of jurisdiction, or risk waiving this defense.

Similarly under NRCP 4, where a defendant has been served with a summons and complaint and fails to assert a defense of lack of *in personam* jurisdiction, the defendant

¹¹² Id. At 281.

¹¹³ Id. at 281.

¹¹⁴ NRS 136.010; NRS 164.015(1); See also *Bergeron v. Loeb*, 100 Nev. 54, 58 (Nev. 1984).

¹¹⁵ *Mullane v. Cent. Hanover Bank & Trust Co.*, 336 U.S. 306, 314 (1950).

waives such a defense.¹¹⁶ The Nevada Supreme Court held that such defense to jurisdiction must be raised before a responsive pleading or within the responsive pleading itself, and explained that “objections to personal jurisdiction, process, or service of process are waived, however, if not made in a timely motion or not included in a responsive pleading such as an answer.”¹¹⁷ To avoid the waiver of a defense of lack of *in personam* jurisdiction, the defendant must assert the defense before the Court.¹¹⁸ It is clear that if an *in personam* claim is made against an interested party in a Court that lacks *in personam* jurisdiction, the defendant must move to dismiss this claim based upon lack of jurisdiction over the person; otherwise, the defendant has waived this defense.

Likewise, in the absence of service under NRCP 4, an interested party may voluntarily submit to *in personam* jurisdiction in a proceeding initially commenced as an *in rem* proceeding when the interested party fails to assert a defense of lack of jurisdiction in response to a claim requiring *in personam* jurisdiction of the Court or, if the interested party requests individual relief from the Court.¹¹⁹ If this Court lacks *in personam* jurisdiction over an interested party at the commencement of a legal proceeding or trial, this Court may obtain jurisdiction when the interested party fails to object to this Court’s jurisdiction.¹²⁰

It should be noted that when the trustee has been confirmed by the Probate Court under NRS 164.010, the Court does not have jurisdiction over them individually in other alternate capacities, (i.e. capacity as a corporate officer, as an individual litigant, etc.). The court could only gain jurisdiction in these other alternate capacities if Trustee (acting in the other alternate capacity) requested relief from the Court or failed to object to the Court’s assertion of jurisdiction in these alternate capacities.

V. Venue Determination

Venue must not be confused with jurisdiction. The Washington Court of Appeals defined the difference between venue and jurisdiction stating, “The Subject matter

¹¹⁶ *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657 (Nev. 2000).

¹¹⁷ *Fritz Hansen*, 116 Nev. at 657. (“...before a defendant files a responsive pleading such as an answer, that defendant may move to dismiss for lack of personal jurisdiction, insufficiency of process, and/or insufficiency of service of process, and such a defense is not ‘waived by being joined with one or more other defenses.’ Alternatively, a defendant may raise its defenses, including those relating to jurisdiction and service, in a responsive pleading...”)

¹¹⁸ *Id.*

¹¹⁹ *Schwartz v. Power Conversion, Inc.*, 115 Misc. 2d 217, 219 (N.Y. City Ct. 1982) (The parties continued participation in claim, *in rem*, will amount to submission to *in personam* jurisdiction. There is no doubt that participation in a trial of the merits of a case, even after a limited appearance to challenge jurisdiction, grants to the court authority to award a personal judgment consistent with the demands of the complaint or petition.); See also *In re Hanson*, 121 Idaho 507, 510(1992) (Both parties appeared before the court voluntarily, requesting relief from the court, and thus personal jurisdiction existed over both litigants.); See also *D.R. Four Beat Alliance, LLC v. Sierra Prod. Co.*, 2009 MT 319, P25-P27 (Mont. 2009) (When a party appears in court and seeks affirmative relief on non-jurisdictional grounds, the defense of lack of personal jurisdiction is waived. (citations omitted) Even if the District Court lacked personal jurisdiction over an interest party in his individual capacity on the opening day of the first trial, the Court may obtain jurisdiction when the interested party failed to object to the Court’s jurisdiction).

¹²⁰ *Id.*

jurisdiction typically refers to the authority of a court to provide relief, as granted by the constitution or the legislature. (citations omitted). A party may challenge subject matter jurisdiction at any time, and a judgment entered by a court lacking jurisdiction is void. (citations omitted). By contrast, venue pertains to the location(s) within the state where a suit may be brought. (citations omitted). "[V]enue is distinguished from jurisdiction in that jurisdiction connotes the power to decide a case on its merits while venue connotes locality (citations omitted)." ¹²¹

One commentator notes that, "Venue is of a distinctly lower level of importance; it is simply a statutory devise designed to facilitate and balance the objectives of optimum convenience for parties and witnesses and efficient allocation of judicial resources."¹²²

The proper venue for the estate probate proceedings of a decedent in Nevada is the county where the decedent was a resident at the time of death, whether death occurred in that county or elsewhere, and the district court of that county has exclusive jurisdiction of the settlement of his or her estate, whether his or her estate is located in one or more counties. The estate of a nonresident decedent may be settled by the district court of any county in which any part of the estate is located. The district court to which application is first made has exclusive jurisdiction of the settlement of estates of nonresidents.¹²³

The proper venue for a guardianship proceeding if the ward's home state is this State must be the county where the proposed ward resides. If the proper venue may be in two or more counties, the county in which the proceeding is first commenced is the proper county in which to continue the proceedings.¹²⁴

The proper venue for the administration of a trust is where the trustee resides or conducts business, where the situs of the trust is located or where trust property is held. NRS 164.010 states, "Upon petition of any person appointed as trustee of an express trust by any written instrument other than a will, or upon petition of a settlor or beneficiary of the trust, the district court of the county in which the trustee resides or conducts business, or in which the trust has been domiciled, shall consider the application to confirm the appointment of the trustee and specify the manner in which the trustee must qualify."

VI. Discovery

Prior to filing a petition, the petitioner may determine the time that he or she will need to conduct the necessary discovery to obtain the necessary documents in order to support their prayer for relief. After the Petitioner has filed the petition, they may take the petition off calendar and re-notice it if they need additional time to collect evidence.

The Probate Court is permitted this liberality pursuant to EDCR 4.20. Any necessary discovery may be initiated immediately without the mandatory formalities

¹²¹ J.A. v. State, 120 Wn. App. 654, 657 (Wash. Ct. App. 2004).

¹²² Jack H. Friedenthal et al., *Civil Procedure* §2.1, at 10 (2nd ed. 1993).

¹²³ NRS 136.010.

¹²⁴ NRS 159.037.

required under the N.R.P.C. EDCR 2.31 mandates that, “All cases which were not commenced by the filing of a complaint are exempt from the mandatory pre-trial discovery requirements of N.R.C.P. 16.1.”

Furthermore, pursuant to E.D.C.R. 2.55, all cases “not commenced by the filing of a complaint are exempt from the entry of a scheduling order pursuant to 16.1(b).” Due to this expedited process, formal discovery can begin immediately after the initial petition is filed. With these exceptions in mind, probate and trust litigation must generally adhere to the NRCP in other respects.

It is important to note current developments surrounding the NRCP 68, which are commonly known as the rule governing offers of judgment. An offer of judgment is a written offer of a specific sum of money made by one party to the other, which if accepted, will settle the lawsuit. If the eventual judgment for the offeree is less than the amount offered by the offeror, the offeror will normally be able to claim the attorneys fees and court costs as the prevailing party.

An offer of judgment can be an effective tool for settlement purposes, however based upon the most recent ruling by the Nevada Supreme Court, the attorney for the offeree is now tasked with a potentially insurmountable challenge. In *Lepome v. Berkson*, the Nevada Supreme Court held that under NRCP 68 and NRS 17.115, a judgment obtained on or after appeal can qualify as a "more favorable judgment" for purposes of the fee-shifting provisions of NRCP 68 and NRS 17.115, appellate fees are recoverable, and an unrepresented party who serves an offer of judgment may recover fees later paid to a lawyer hired to prosecute or defend the case.¹²⁵

The underlying dispute involved a contest over the distribution of Rose Miller's estate. Shortly before her death, Miller amended her estate plan to name Barbara LePome as her main beneficiary. Before this amendment, Marilyn Berkson and Gertrude Malacky had been Miller's primary beneficiaries.

Alleging that LePome had exercised undue influence, Berkson and Malacky sued to invalidate Miller's estate plan revision. Proceeding without a lawyer, LePome made separate \$ 12,500 offers of judgment to each of them. When her offers of judgment were rejected, LePome turned the defense of the suit over to counsel.

The jury favored Berkson and Malacky with a unanimous verdict (8-0). On appeal, however, the Supreme Court reversed the jury's unanimous verdict and ruled that because substantial evidence did not support the verdict, LePome deserved judgment as a matter of law. As a result, Berkson and Malacky ultimately failed to receive more favorable judgments than LePome had offered.

After the remittitur issued on our judgment of reversal, LePome moved the district court for attorney fees and costs pursuant to NRCP 68 and NRS 17.115. The district court initially determined that LePome's offers of judgment entitled

¹²⁵ 216 P.3d 239, 241 (Nev. 2009).

her to \$ 28,730.25 in costs and \$ 100,000 in attorney fees. Upon reconsideration, the district court reversed its decision and held as a matter of law that the offer of judgment rules do not apply to judgments won by appellate reversal. The Supreme Court reversed and held that offers of judgment rules do apply to judgments won by appellate reversal.¹²⁶

This ruling was a severe blow to the contesting beneficiaries of a will or trust, who often lack the financial resources of the Trust to litigate related issues. In addition to risking loss of their beneficial share under the no-contest provision, they may now be subject to attorney's fees and costs of the trustee/executor even if they win in the Probate Court, but are subject to remand/reversal upon appellate review.

Furthermore, this ruling places an almost insurmountable obligation on the attorney for the offeree to predict the ultimate outcome of the matter, in many instances, before discovery has even commenced. In the foregoing case, even the prediction of a unanimous verdict by the jury would be insufficient clairvoyance of the offeree's attorney to insulate the offeree from an appellate reversal and subsequent liability for the opposing party's attorneys fees and costs.

Attorneys that plan to litigate in the Probate Court, must pay particular attention to the local rules and procedures within the Probate Court. Unlike other non-probate civil litigation, much of the practitioner's strategy must be formed and implemented before the initial petition is even filed. Failure to properly prepare for the initial hearing before the Probate Commissioner can prejudice your client's claims before formal discovery ever begins.

F. Recovery of Damages, Attorneys Fees and Costs

Damages that arise from the misconduct or poor judgment of a fiduciary are subject to collection through the remedies discussed previously, including but not limited to a surcharge upon the trustee or beneficiary (fine upon the fiduciary or beneficiary).¹²⁷ The courts may require the trustee to disgorge his trustee's fees¹²⁸ in addition to becoming personally liable for any attorneys fees and cost resulting from the misconduct of the trustee.¹²⁹

¹²⁶ *Lepome v. Berkson (In re Estate & Living Trust of Miller)*, 216 P.3d 239, 241 (Nev. 2009)

¹²⁷ RESTATEMENT (SECOND) OF TRUSTS, § 243 (If the trustee commits a breach of trust, he is liable to the beneficiary for any loss thereby occasioned. . . . When the compensation of the trustee is reduced or denied, the reduction or denial is not in the nature of an additional penalty for the breach of trust but is based upon the fact that the trustee has not rendered or has not properly rendered the services for which compensation is given.)

¹²⁸ *Lurz v. Panek*, 527 N.E.2d 663, 669 (Ill. App.Ct.1988) *superceded by statute on other grounds* (forfeiture of salary during period of breach).

¹²⁹ *Foley v. Morse & Mowbray*, 109 Nev. 116, 126 (Nev. 1993); see also *In re Estate of Kettle*, 79 A.D.2d 860 (N.Y. App. Div. 4th Dep't 1980)

Attorneys fees may be recovered by a prevailing party for a breach of fiduciary duty.¹³⁰ In addition to the amount of compensation that a party may seek under the terms of a trust or will, the right to attorney's fees and costs may also be set forth within its provisions, or these rights may be set forth by contract or statute.¹³¹

Under proper circumstances, the court may require a trustee to pay attorneys' fees where the trustee's breach of fiduciary duty forces beneficiaries of an estate to go to court to protect their interests.¹³² The California Court of Appeals held that an award of attorney's fees can be made under "the broad equitable powers that a probate court maintains over the trust within its jurisdiction." In *Rucknick v. Rucknick*, the respondent contended the probate court could not award attorney fees under its supervisory power as costs or sanctions absent statutory authority or contract and thus the award was prohibited as a matter of law. This argument was rejected by the Court, which subsequently charged the attorney's fees against the appellant's beneficial interest under the Trust.¹³³

Costs may be recovered pursuant to state statute. NRS 164.015 states in pertinent part, "Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters trustees and beneficiaries of trusts...[concerning] the competency of the settlor to make the trust, the freedom from duress, menace, fraud or undue influence at the time of...the execution and attestation of the trust instrument..."¹³⁴

An understanding of the relationship between the litigants in an estate or trust proceeding, and the written documents over which litigation has arisen, is paramount to both the determination of appropriate attorneys fees, and the source from which those fees will be derived. Depending on the nature of the action, and the jurisdiction of the court over the parties, the attorney's fees may come from the trust corpus, the trustee, or both.

VII. Litigation Forms

With the exceptions outlined previously, the forms for probate and trust litigation are similar to those in other non-probate civil litigation discovery and litigation proceedings. The general forms used in the Probate Court are provided online by the Probate Commissioner's at <http://www.clarkcountycourts.us/ejdc/courts-and->

¹³⁰ NRS 18.010

¹³¹ *Harvey v. Streeter*, 81 Nev. 177, 184 (Nev. 1965) (The amount of the compensation is fixed either by the terms of the trust instrument, by contract between settlor and trustee, by statute or by court action.); See also Bogert, *Trusts and Trustees*, 2d Ed. (1962) § 975, at 280-282.

¹³² *Corrington v. Corrington*, 124 Ill. 363, 16 N.E. 252, 254 (1888) ("If the willful misconduct of the executor, or his gross negligence in conducting his trust render litigation necessary for the preservation of the rights of the distributees, it is manifestly just that he should bear the expense rather than it should fall upon them."); See also *In re Estate of Halas*, 209 Ill. App. 3d 333, 568 N.E.2d 170, 183, 154 Ill. Dec. 170, 183 (1st Dist. 1991) (citing *Corrington* for the principle and that "the decision to award attorneys' fees and costs is within the sound discretion of the trust's trial court.").

¹³³ *Rudnick v. Rudnick*, 179 Cal. App. 4th 1328, 1333 (Cal. Ct. App. 2009).

¹³⁴ NRS 164.015.

judges/probate/probate.html. The Nevada Civil Practice Manual written by the Continuing Education Committee of the State Bar of Nevada is also a helpful resource for practitioners, and provides numerous practitioner probate forms.¹³⁵

POST-SUBMISSION UPDATE
[ESTATE IS DEEMED AN ENTITY FOR PURPOSES OF LEGAL REPRESENTATION]
PURSUING AND DEFENDING FIDUCIARY REMOVAL ACTIONS AND LITIGATION

By
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The word, “trust,” is generally defined as a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another.”¹³⁶ A trust has also been defined as a right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds the legal title.¹³⁷ The common law did not define the trust as an independent legal entity. However, the Nevada legislature defined the word “person” to include a company, trust, or other unincorporated organization.¹³⁸ Based upon this statutory definition, the Nevada Supreme Court upheld this definition by classifying a trust as an entity akin to a company for purposes of legal representation.¹³⁹

In *Salman v. Newell*, the Nevada Supreme Court held that, “no rule or statute permits a [non-lawyer] to represent any other person, a company, a trust, or any other entity” in either the district court or this court.¹⁴⁰ The Nevada Supreme Court and others have based their position on the reasoning that:

“the conduct of litigation by a non-lawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court. The lay litigant frequently brings pleadings that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative. In addition to lacking the professional skills of a lawyer, the lay litigant lacks many of the attorney’s ethical responsibilities, e.g., to avoid litigating unfounded or vexatious claims.”¹⁴¹

¹³⁵ Nevada Civil Practice Manual, 5th Edition, Matthew Bender & Company, Inc., 2010.

¹³⁶ George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 1 (rev. 2d ed. 1984) BLACK’S LAW DICTIONARY 1513 (7th ed. 1999).

¹³⁷ BLACK’S LAW DICTIONARY 1513 (7th ed. 1999).

¹³⁸ NRS 0.039 “Person” defined. Except as otherwise expressly provided in a particular statute or required by the context, “person” means a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization. The term does not include a government, governmental agency or political subdivision of a government.

¹³⁹ *Salman v. Newell*, 110 Nev. 1333, 1336, 885 P.2d. 607, 608 (1994); See also *Guerin v. Guerin*, 116 Nev. 210, 214, 993 P.2d 1256, 1258 (2000)

¹⁴⁰ 110 Nev. 1333, 1336, 885 P.2d. 607, 608 (1994).

¹⁴¹ *Jones v. Niagara Frontier Transp. Authority*, 722 F.2d 20, 22 (2d Cir. N.Y. 1983).

The Nevada Supreme Court further explained that:

“The public interest . . . requires that in the securing of professional advice and assistance upon matters affecting one's legal rights one must have assurance of competence and integrity and must enjoy freedom of full disclosure with complete confidence in the undivided allegiance of one's counselor in the definition and assertion of the rights in question.”¹⁴²

This reasoning was again emphasized in *Guerin v. Guerin*, wherein the Nevada Supreme Court held that, “A proper person, . . . is not permitted to represent an entity such as a trust.”¹⁴³ While it was clear that a pro per litigant could not represent a trust due to its stated equivalence to that of a company, it was generally accepted that a personal representative could represent the estate without legal counsel.

In the *Estate of Nolan Klein*, the Nevada Supreme Court recently issued an unpublished opinion concerning the unauthorized practice of law by an executrix on behalf of the estate.¹⁴⁴ In this case, the executrix filed a notice of appeal on behalf of the estate, and maintained that she was not only the executrix, but also an heir of the estate. In dismissing her appeal, the Court held that the executrix, “cannot represent the Estate . . . and her notice of appeal is the product of the unauthorized practice of law and it fails to confer jurisdiction on this court.” Rather than treating the executrix (the personal representative) as the legal equivalent of the decedent, the Court seems to have quietly adopted the position that an estate is an entity, with is separate from the personal representative and more equivalent to a company and trust. The practice of representing one’s family estate as a personal representative is now confined to only attorneys, thereby further reducing access of the non-lawyer to the courts.

The Court does not appear to have addressed whether or not the executrix could have appealed this ruling in capacity as an heir of the estate, because it appears that the estate, not the heir, filed the petition for the writ of mandamus. Under Nevada Rule of Appellate Procedure 46, a party may file, in proper person, after obtaining leave of the court.¹⁴⁵

¹⁴² *Pioneer Title v. State Bar*, 74 Nev. 186, 189-90, 326 P.2d 408, 410 (1958); see also *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20 (2d Cir. 1983).

¹⁴³ 116 Nev. 210, 214, 993 P.2d 1256, 1258 (2000); See also *Sunde v. Contel of California*, 112 Nev. 541, 915 P.2d 298 (1996).

¹⁴⁴ *In re Matter of Estate of Nolan Klein*, No.11-12307, (Nev. Sup. Ct. April 26, 2011), unpublished.

¹⁴⁵ N.R.A.P. 46(b).