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## Keeping Current - Probate [notes]

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# KEEPING CURRENT PROBATE

## CASES

**COMMON LAW MARRIAGE:** Test for common law marriage revised to reflect circumstances of different couples. Recognizing that the social and legal context of marriage has changed since the court last addressed the test for establishing a common law marriage in *People v. Lucero*, 747 P.2d 660 (Colo. 1988), the Supreme Court of Colorado abrogated that case in *In re Marriage of Hogsett v. Neale*, 478 P.3d 713 (Colo. 2021). The court held that common law marriage may be established by a couple's mutual consent or agreement to enter into marriage and, in the absence proof of an express agreement to marry, such an agreement may be inferred by the couple's conduct, which must be assessed in context rather than against a fixed list of behaviors and actions.

**DISINHERITANCE:** Definition of issue does not disinherit unmentioned child. The parent's will stated that references to the testator's "son" referred to child X and that references to "my children and/or my issue" "shall include" X and all children born to or adopted by the testator after execution of the will. The only other child of the testator, Y, filed a motion to construe the will, and the trial court entered judgment including Y in the gift of the residue to the testator's issue. On appeal, the Supreme Court of Nebraska affirmed. The court found that the word "include" creates a patent ambiguity because its use includes only persons on the list or class of the testator's issue and does not exclude any one from that class. Because nothing in the will

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expressly disinherits Y, the term "issue" must be construed to include Y. *In re Estate of Brinkman*, 953 N.W.2d 1 (Neb. 2021).

**FRAUDULENT TRANSFER:** Rearrangement of property interests so that debtors remain owners is a transfer. The Uniform Voidable Transfers Act (UVTA) is an up-to-date statement of the remedies available to unsecured creditors who seek payment from reluctant debtors. In *Nagel v. Westen*, 274 Cal. Rptr.3d 21 (Ct. App. 2021), a California intermediate appellate court held that as a matter of first impression the meaning of "transfer" includes rearrangement of a debtor's property interests that does not involve a transfer to a third party. Thus, the creditor of a married couple who moved their personal property to another jurisdiction and reinvested the proceeds of the sale of a home in a jurisdiction with a generous homestead exemption is not deprived of UVTA remedies.

**LOST WILL:** Evidence that the testator's estate plan remained unchanged was sufficient to show that lost will was in existence at the testator's death. Nevada's lost will statute allows probate of a will which cannot be found after the testator's death if the will was in legal existence at the testator's death and at least two credible witnesses prove the provisions of the will. Nev. Rev. Stat. § 136.240(3). The testator's

will disinherited the testator's child in favor of the testator's partner and, if the partner predeceased, to charity. On appeal of denial of probate of a copy, the Supreme Court of Nevada in *Matter of Estate of Scheide*, 478 P.3d 851 (Nev. 2020), held that the proponent of a lost will may prove that the will was in "legal existence" at the testator's death by presenting evidence relevant to whether the testator's wishes did not change after execution of the will. The requirement that two witnesses prove the provisions of the will can be satisfied where one witness can prove the provisions and the second can testify to the will's execution at least where a copy of the will exists as was in this case.

**PARENTAGE:** Parent's spouse is de facto parent of child notwithstanding other parent's opposition. Washington State enacted the Uniform Parentage Act (2017), including the optional provision that allows a court to find that a child has more than two parents if failure to do so "would be detrimental to the child." The Court of Appeals decision in *In Matter of L.J.M.*, 476 P.3d 636 (Wash. Ct. App. 2020), reversed the trial court's dismissal of the spouse of the child's parent's petition for de facto parentage and remanded for decision on the petition. The opinion contains a thorough discussion of the application of the requirements of the new statute.

**RIPENESS:** Litigation of membership in contingent class gift not ripe before trust termination. The parent's will created a testamentary trust for the benefit of a child for life, remainder to child's "then-living descendants" per stirpes. The child brought a construction case against the trustee for declaratory relief to determine whether child's descendants included two of the child's children. The trial court granted the trustee's motion for

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summary judgment on the grounds that the issue was not ripe for review. In *Ackers v. Comerica Bank & Trust, N.A., Trustee*, No. 11-18-00352-CV, 2020 WL 7863332 (Tex. App. – Eastland Dec. 31, 2020), a Texas intermediate appellate court affirmed because the identity of the remainder beneficiaries would not be known until the termination of the trust.

### **SAME-SEX COMMON LAW MARRIAGE: Same-sex common law marriage valid although entered into before same-sex marriage protected.**

In its opinion in *Lafleur v. Pyfer*, 479 P.3d 869 (Colo. 2021), the Supreme Court of Colorado held that a same-sex couple could enter into a valid common law marriage even before the decision of the Supreme Court of the United States in *Obergefell v. Hodges*, 576 U.S. 644 (2015), which struck down state statutes limiting marriage to different-sex couples.

## **TAX CASES, RULINGS, AND REGULATIONS**

### **ESTATE AND GIFT TAX: Discounts for lack of control and marketability are affected by LLC operating agreement and should be applied to charitable deductions.**

The decedent and her husband created a family trust that became the majority interest holder of multiple LLCs. The decedent's two sons and granddaughters held minority interests in the companies. The Tax Court rejected the estate's valuation of the majority interests because the operating agreements gave the majority interest holder great powers, and the minority owners were unlikely to pursue litigation. The Tax Court held that the discount for lack of control should be low. Upon the decedent's death, one of the LLCs in the family trust was gifted to two charities: 75 percent to a family foundation and 25 percent to a church. In *Estate of Warne v. Commissioner*, 121 T.C.M. 1134 (2021), the Tax Court required that the estate include 100 percent of the company's value in the gross estate but applied a discount for lack of control

and marketability to the charitable contribution deduction.

### **TRUST: Trust modifications and judicial proceedings concerning the trust have estate and gift tax consequences.**

The decedent's father created a trust for the benefit of the decedent and the descendants of the father before September 25, 1985. A few judicial proceedings had been held regarding the trust over the years. PLR 202108006 made several determinations. First, administrative modifications to the trust concerning corporate trustee succession were administrative and did not adversely affect the exempt status of the trust for generation-skipping transfer tax purposes. In that same vein, a declaratory judgment construing the ambiguous term of "earnings" did not affect the exempt status of the trust for estate and gift tax purposes. Second, after an examination of the decedent's and his father's wills, codicils, a declaration of the attorney, and representations of the parties, the IRS concluded that decedent's exercise of his testamentary power of appointment was not the exercise of a general power of appointment and did not cause the trust assets to be included in decedent's estate. Third, decedent's exercise of the power of appointment over the trust to direct the trustee to distribute the trust property to the trustees of new trusts for his children was not treated as an addition to the trust and cause the trust to lose

its exempt status for GST tax because it did not postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in a property for a period. Fourth, the in-kind distribution of the trust assets on an equal basis among the decedent's children's trusts did not result in the realization of a gain or loss. Fifth, a declaratory judgment that construed scrivener's errors and ambiguities in the decedent's will and codicils was consistent with state law and did not result in a gift by a beneficiary of the trust. Sixth, the declaratory judgment terms did not constitute a transfer such that the trust must be included in the gross estate of the decedent.

## **LITERATURE**

**ATTORNEY'S FEES:** In *Attorney's Fees In Judicial Proceedings Involving Trusts, Estates, and Protected Persons: When Is an Award Just and Equitable?*, 72 S.C. L. Rev. 145 (2020), Daniel F. Blanchard III discusses the considerable body of case law from around the country interpreting and applying various state versions of Uniform Trust Code § 1004.

**CALIFORNIA—ELECTRONIC WILLS:** In her article, *Electronic Wills: COVID-19 Relief or Inevitable Trouble for California*, 52 U. Pac. L. Rev. 435 (2021), Francesca Torres discusses existing California law relating to electronic wills and previous legislative attempts





relating to electronic wills in California and explores the evolution of electronic wills.

**CONSTRUCTION:** Lee-ford Tritt's article, *Litigation Blues for Red-State Trusts: Judicial Construction Issues for Wills and Trusts*, 72 Fla. L. Rev. 841 (2020), addresses real-world construction issues in the estate planning context, where a particular state's approach to the redefinition of both words and policy may influence the deemed intent ascribed to a donor's words.

**CONVICTS AS FIDUCIARIES:** Consideration of the appointment of a fiduciary with a criminal record can create a difficult decision for the court in a state where appointing fiduciaries with such records is prohibited. In *Criminal Justice and the Probate World: Why a Conviction Should (or Should Not) Matter in the Appointment of Fiduciaries*, 33 Quinnipiac Prob. L.J. 57 (2019), James N. Rotondo explores the different routes that states have taken and which attributes of these laws Connecticut might consider passing.

**DIGITAL ASSETS:** Patricia Sheridan's article, *Inheriting Digital Assets: Does the Revised Uniform Fiduciary Access to Digital Assets Act Fall Short?*, 16 Ohio St. Tech. L. J. 363 (2020), outlines the framework of RUFADAA, summarizes its key provisions, and discusses whether forum selection and choice of law provisions contained in standard terms of service agreements should be enforceable against a fiduciary acting on behalf of a deceased account holder's estate.

**ELECTRONIC WILLS:** In her Note, *Life, Death, and Revival of Electronic Wills Legislation in 2016 through 2019*, 67 Drake L. Rev. 983 (2019), Nicole Krueger analyzes the electronic wills legislation proposed in 2016 through 2019, discusses the concerns raised by the legislation, and identifies technological advances that can alleviate many of those concerns.

**ESTATE PLANNING ADVICE:** In *Thoughts at 5 a.m.*, Ill. B.J., Feb. 2021, at 24, Gary R. Gehlbach provides sage insights into best practices for estate planning and administration.

**EXPERTS:** Gregory W. MacKenzie, Stewart A. Marshall, J. Clay Singleton, and Mark E. Swirbalus explore the challenges of using attorneys as experts, discuss the difference between consulting and testifying experts, and provide a practical guide to vetting subject matter experts where the controversy involves fiduciary financial liability in *The Role of Experts in Trust and Estate Litigation*, 43 Am. J. Trial Advoc. 29 (2019).

**INTERNATIONAL ESTATE PLANNING:** Gilda Almeida warns that nonresidents should be aware of potential US tax implications and suggests the benefits of international estate tax planning, which can assess the impact of these taxes and reduce the impact on nonresidents' beneficiaries, in *Estate Planning Considerations for Global Families*, 32 J. Int'l Tax'n 57 (2021).

**MARITAL DEDUCTION:** In *First Comes Love, Then Comes the Marital Deduction*, 13 Est. Plan. & Comm. Prop. L.J. 1 (2020), Kristin L. Brown revisits "familiar marital deduction concepts," highlights "some of the less common ways to qualify for the marital deduction," and considers "how and when using an unconventional approach may be beneficial."

**SOLICITATION OF ESTATE PLANNING BUSINESS:** Diane J. Klein argues that the current prohibition against solicitation is overbroad, unnecessary, and in tension with other deep principles both of probate law and professional responsibility, in *Knocking on Heaven's Door: Closing the Racial Estate-Planning Gap by Ending the Ban on Live Person-to-Person Solicitation*, 44 J. Legal Prof. 3 (2019).

**SUPPORTED DECISION-MAKING AGREEMENTS:** In her Comment, *Supported Decision-Making Agreements in*

*Texas*, 13 Est. Plan. & Comm. Prop. L.J. 311 (2020), Gabrielle Bechynne explains how supported decision-making agreements work in Texas, compares and contrasts them with those of eight other states, and makes several proposals to remedy existing problems.

**TEXAS—FIDUCIARY COMPENSATION:** In *Fiduciary Compensation and Forfeiture in Texas*, 13 Est. Plan. & Comm. Prop. L.J. 143 (2020), David F. Johnson "discusses many of the common issues that arise when a trustee seeks compensation, compensation standards for other fiduciaries, and the concept of compensation forfeiture."

**TEXAS—FIDUCIARY DISCLOSURE TO BENEFICIARIES:** The factors affecting a fiduciary's duty to disclose to beneficiaries is the focus of W. Cameron McCulloch, Jr. and Laurel M. Smith's article, *The Porridge of Disclosure to Beneficiaries: Too Hot, Too Cold, or Just Right*, 13 Est. Plan. & Comm. Prop. L.J. 207 (2020).

**TEXAS—PERSONA RIGHTS:** In his Comment, *Whose Life Is It Anyway: An Analysis and Proposal for the Texas Property Code When Everyone Acts Like a Celebrity and Everything Is an Advertisement*, 13 Est. Plan. & Comm. Prop. L.J. 353 (2021), Barrett Lewis explains how Texas handles the right of publicity and makes a proposal for creating and protecting a living person's right to publicity.

**TEXAS—SPOUSAL ABUSE:** In her Comment, *Spousal Abuse Disqualification Statute: It's Time to Protect Other Victims*, 13 Est. Plan. & Comm. Prop. L.J. 269 (2020), Macie Alcoser advocates for the Texas Legislature to "enact a spousal disinheritance statute because the current probate law does not protect battered spouses nor deter abusive behavior."

**TORTIOUS INTERFERENCE WITH INHERITANCE:** Lauren Davis Hunt, Christopher T. Hodge, and Brian T. Thompson explain options available



to litigation practitioners in states like Texas that do not recognize the tort in *Alternatives to Tortious Interference with Inheritance*, 13 Est. Plan. & Comm. Prop. L.J. 59 (2020).

#### TRUSTS AND COLLECTIVE

**ACTION:** Using the estate of music superstar Prince as an example, Amnon Lehave provides insights that demonstrate the challenge of collective action for some types of assets or estates and suggests how trust governance can aid in alleviating conflicts among multiple beneficiaries in *The Law of Trusts and Collective Action: A New Approach to Property Deadlocks*, 89 U. Cin. L. Rev. 388 (2021).

#### UNIFORM PARTITION OF HEIRS'

**PROPERTY ACT:** R. Shaun Rainey provides a detailed analysis of the Act in *Uniform Partition of Heirs' Property Act: Partition with an Acetate Overlay*, 13 Est. Plan. & Comm. Prop. L.J. 233 (2020).

#### LEGISLATION

**ALABAMA** passes Elderly and Vulnerable Adult Financial Protection Act of 2021. 2021 Ala. Laws Act 2021-78.

**DISTRICT OF COLUMBIA** adopts Uniform Fiduciary Access to Digital Assets Act. 2020 D.C. Laws 23-189.

**IOWA** passes Uniform Custodial Trust Act. 2021 Ia. Legis. Serv. S.F. 240.

**MICHIGAN** updates its statutes governing out-of-hospital do-not-resuscitate orders. 2020 Mich. Legis. Serv. P.A. 363.

**MONTANA** allows homestead exemption to be claimed when homestead transferred into a revocable trust. 2021 Mont. Laws. Ch. 33.

**NORTH DAKOTA** enacts Uniform Electronic Wills Act. 2021 N.D. Laws 1077. ■

## RPTE PUBLICATIONS

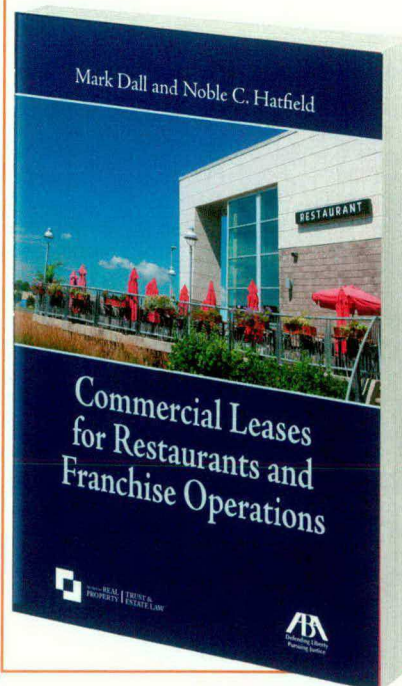
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