

PROBATE AND THE ESTATE TAX: BASICS

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Introduction

- Obstacles to distribution of property at death:
 - Probate
 - Taxes

Outline

- Wills
- Trusts
- Capacity
- Estate, Gift and GST Tax
- Probate

Wills

- Testate: Individual dies with a will
 - Will provides for disposition of property
- Intestate: Individual dies without a will
 - Nevada law provides for disposition of property
 - This may result in a distribution of property that the decedent did not intend

Elements of a Will

- All Wills:
 - Testamentary Intent
 - Intend to create a will
 - Testamentary Capacity
 - 18 years of age
 - "Of sound mind"

Attested Wills

- Writing
- Signed by the testator or by another person in the testator's presence at the testator's direction
- Signed by two competent witnesses who sign in the presence of the testator

Holographic Wills

■ NRS 133.090 provides:

- A holographic will is a will in which the **signature, date and material provisions** are written by the hand of the testator, whether or not it is witnessed or notarized. It is subject to no other form, and may be made in or out of this State.

Electronic Wills

■ NRS 133.085 provides:

- 1. An electronic will is a will of a testator that:
 - (a) Is written, created and stored in an electronic record;
 - (b) Contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator; and
 - (c) Is created and stored in such a manner that:
 - (1) Only one authoritative copy exists;
 - (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;
 - (3) Any attempted alteration of the authoritative copy is readily identifiable; and
 - (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.

Nuncupative or Oral Wills

■ NRS 133.100: Nuncupative or oral wills are not valid in Nevada.

Pour-Over Wills

- Property passing by the will *pours over* to a trust on the death of the person making the will.
- NRS 163.020: Testamentary Additions to Trust

Capacity

- Four-part test to capacity
 - Did the testator understand the nature of her act?
 - Did the testator know the nature and extent of her property?
 - Did the testator know the persons who are the natural objects of her bounty?
 - Did the testator understand the nature of the disposition (i.e., did she understand the effect of making a will)?

Insane Delusion

- A belief that is so against the evidence and reason that it must be the product of derangement.
 - While an insane person is not deprived from making a transfer of property, a particular transfer will be invalid to the extent it was the product of an insane delusion

Undue Influence

- Influence that overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made.
- Presumption of undue influence
 - Arises upon a showing that the alleged wrongdoer was in a **confidential relationship** with the donor and there were **suspicious circumstances** surrounding the execution of the donative transfer

Trusts

- Revocable Living Trusts
 - Established by the settlor during the settlor's lifetime
 - Settlor can terminate or amend the terms of the trust
 - Irrevocable at the death of the settlor
- Irrevocable Trusts
 - Departs with direct ownership and control of the property in the trust

Advantages of Living Trust

- Avoids Probate
- Can be managed by Settlor or Trustee
- Provides distribution provisions
- Can be amended or revoked by Settlor

Advantages of Irrevocable Trusts

- Irrevocable life insurance trust (“ILIT”)
 - Avoids probate costs and estate taxes on the insurance proceeds
- Creditor Protection
 - Discretionary Trusts
 - Self-Settled Spendthrift Trusts (NRS 166)

Elements of a Trust

- Transfer “legal title” to a trustee
- “Equitable title” is in the beneficiary
- NRS 163.002:
 - A declaration by the owner of property that he holds the property as trustee.
 - A transfer of property by the owner during his lifetime to another person as trustee.
 - A testamentary transfer of property by the owner to another person as trustee.
 - An exercise of a power of appointment to another person as trustee.
 - An enforceable promise to create a trust.

Additional Elements

- NRS 163.002 through 163.006:
 - The settlor properly manifests an intention to create a trust,
 - There is trust property,
 - The trust is created for any purpose that is not illegal or against public policy,
 - The trust, other than a charitable trust, has either an ascertainable beneficiary (or class of beneficiaries) or grants power to the trustee or some other person to select the beneficiary.

Estate, Gift and GST Taxes

■ “Transfer Taxes”

- All seek to transfer wealth of one individual to another

Estate & Gift Tax

■ Estate Tax

- Imposes a tax on property owned by an individual at death

■ Gift Tax

- Imposes a tax upon the gratuitous transfer of property from one person to another during his or her lifetime

Gift and Estate Tax

■ “Unified” in 1976

- Same tax rate
- Same credit amount

■ Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA)

- Different credit amounts
- Increasing credit amounts through 2009
- Decreasing tax rate through 2009

Estate Tax

Year	Estate Tax Max Rate
2002	50%
2003	49%
2004	48%
2005	47%
2006	46%
2007	45%
2008	45%
2009	45%
2010	Repealed
2011	55%

Estate Tax

Year	Estate Tax Applicable Exclusion Exemption Amount	Estate Tax Applicable Credit Amount
2002	1,000,000	345,800
2003	1,000,000	345,800
2004	1,500,000	555,800
2005	1,500,000	555,800
2006	2,000,000	780,800
2007	2,000,000	780,800
2008	2,000,000	780,800
2009	3,500,000	1,455,800
2010	Repealed	Repealed
2011	1,000,000	345,800

Gift Tax

Year	Gift Tax Max Rate
2002	50%
2003	49%
2004	48%
2005	47%
2006	46%
2007	45%
2008	45%
2009	45%
2010	35%
2011	55%

Gift Tax

- Gift Tax Exemption: \$1,000,000 (\$345,800 credit amount)

GST Tax

- Before GST, wealthy grandparents were able to transfer assets to grandchildren while avoiding any imposition of estate tax at the generational level in-between
- Same Exemption/Credit amount as Estate Tax
- Tax rate: Flat tax at top marginal rate

Probate

- Court proceeding whereby the estate of a deceased person is administered
 - Resolving claims against the decedent
 - Distributing the decedent's property
- Does not apply to assets that pass by contract or by operation of law ("Non-probate" assets)
 - Joint tenancy
 - Living trusts

Estates Valued at \$20,000 or Less

- If the probate estate is valued at \$20,000 or less and it does not include any interest in real property, an affidavit can be made by the person or persons entitled to the property and such persons may receive the property without a court proceeding. NRS 146.080.

Estates Valued at \$100,000 or Less

- If the value of the probate estate does not exceed \$100,000, after deducting any encumbrances, "and there is a surviving spouse or minor child or minor children of the decedent, the estate must not be administered upon, but the whole estate, after directing such payments as may be deemed just, must be, by an order for that purpose, assigned and set apart for the support of the surviving spouse or minor child or minor children..." NRS 146.070.
 - A petition and a court hearing are required for this process, but an executor or administrator is not appointed

Estates Valued at \$200,000 or Less

- NRS 145.040: "If it is made to appear to the court that the gross value of the estate, after deducting any encumbrances, does not exceed \$200,000, the court may, if deemed advisable considering the nature, character and obligations of the estate, enter an order for a **summary administration** of the estate."
 - Period for creditors' claims is shortened to 60 days
 - No requirement to confirm sales of *personal* property.

Regular Administration

■ Steps

- If necessary, a petition for the appointment of a special administrator (See NRS 140.010)
- A petition for the appointment of a personal representative (i.e., the executor or an administrator) and for probate of a will.
- Notice of the hearing on the petition must be given to all "interested persons" (e.g., heirs and beneficiaries of the will).
- Contests that are filed in opposition to the appointment of the personal representative or to the probate of the will.
- A hearing on the petition and court appointment of a personal representative.

Regular Administration

■ Steps continued...

- Notice to creditors is published. The claim period is 90 days.
- The personal representative takes possession of the estate, gathers the assets, obtains appraisals and prepares an inventory of the estate.
- The personal representative pays claims and debts of the decedent in the order of priority specified in NRS 147.195.
- The personal representative holds, protects, invests and manages the remaining assets as provided in Chapter 143 of the Nevada Revised Statutes.

Regular Administration

- After the payment of claims, if the estate is ready for final distribution, the estate will be distributed.
- If the estate is not yet closed after 6 months (or after 15 months where an estate tax return is required to be filed), the personal representative must file an explanation as to why the estate remains open. NRS 143.035(2).
- Generally, the estate must be closed within 18 months of the appointment of the personal representative, though exceptions apply. NRS 143.037.
- During the time the estate remains open, an accounting must be made until the court orders final distribution of the estate and final discharge of the personal representative.

Resources

■ Clark County Eighth Judicial District: Probate

- *Synopsis of Nevada Probate Law*
 - http://www.clarkcountycourts.us/ejdc/courts-and-judges/probate/Probate_Forms/Probate_Law.pdf
- *Attorney's Procedure Checklist*
 - http://www.clarkcountycourts.us/ejdc/courts-and-judges/probate/Probate_Forms/Attorney_Procedure_Checklist.pdf
- *Forms Library*
 - <http://www.clarkcountycourts.us/ejdc/courts-and-judges/probate/probate.html>

Nevada Revised Statutes

- Title 12: Wills and Estates of Deceased Persons
- Title 13: Guardianships; Conservatorships; Trusts
