

A REPORT OF LEGAL TRENDS

Susan Ward Harris, Editor

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Welcome to Frazer Ryan Goldberg & Arnold LLP



Brad Ostroff joined the firm this year as a partner to continue his tax controversy practice. Brad had been a partner at Burch & Cracchiolo, P.A. for 25 years before joining Frazer, Ryan, Goldberg & Arnold LLP.

He specializes in representing taxpayers involved in civil and criminal tax controversies with the Internal Revenue Service, as well as the state of Arizona. Earlier in his career, Brad spent six years with the Internal Revenue Service, first as a tax refund litigation attorney with the Office of Chief Counsel in Washington, D.C. from 1975 to 1978 and then as a Senior Trial Attorney with the Office of District Counsel in Phoenix, Arizona from 1979 to 1981.

Brad is an AV* attorney and is a Certified Tax Specialist by the State Bar of Arizona. He is listed in *The Best Lawyers in America*® under tax disputes and has been featured in *Phoenix Magazine* as one of the Best Lawyers in Phoenix for civil and criminal tax disputes. Brad is a frequent speaker on civil and criminal tax topics for attorneys and certified public accountants. He has resolved the vast majority of his cases with the IRS without having to proceed to trial.

Brad has been married for 36 years to his wife Robin, a teacher. They have two daughters. Brad enjoys skiing, hiking, traveling and hanging out with good friends.

*AV, BV and CV are registered certification marks of Reed Elsevier Properties Inc., used in accordance with Martindale-Hubbell certification procedure's standards and policies.



Keith Lyman joined the firm as an associate in 2008. As an estate planning attorney, Keith has significant experience in estate planning, from basic planning to complex matters. In addition, he has become an expert in long-term care planning, including Medicaid eligibility, disability planning, and the use of Special Needs Trusts. As a Certified Financial Planner®, Keith is able to incorporate the financial impact of his planning effectively for his clients.

Keith has several publications and has engaged in numerous speaking engagements on topics including estate planning, financial planning, long-term care and Medicaid eligibility. Those publications and engagements include:

- *Teach Yourself Estate Planning in 24 Hours*, published by Pearson Education, a division of Macmillan Publishing
- *Strategy of Long-Term Care – How Middle and Upper Middle Class America Qualifies for Medicaid*, published by Brooke-Matthews Publishing Co., Inc.
- Technical Editor of *The Complete Idiot's Guide to Wills and Estates*, published by Pearson Education, a division of Macmillan
- Technical Editor of *Personal Financial Planning Guide*, to be published by Pearson Education, a division of Macmillan
- National Speaker for Professional Education Systems, Inc. (PESI), The Complete Trust Course - Washington, Arizona, Kansas, Montana, West Virginia, Alabama, Georgia, New Mexico
- National Speaker for Professional Education Systems, Inc. (PESI), Medicaid and Special Needs Trusts - Indiana, Arizona
- National Speaker for Professional Education Systems, Inc. (PESI), Divorce Financial Planning – Indiana

Keith had a private estate planning practice in Indiana for 27 years prior to his move to Arizona in 2006. He enjoys writing, tennis, and spending time with his two children, Matthew and Brooke. ●

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How Will the New Arizona Trust Code Affect You?

By James W. Ryan, Certified Estate and Trust Law Specialist, and Liana C. Cocanower, Attorney At Law

Arizona has enacted a new Arizona Trust Code ("ATC"), to become effective January 1, 2009. The ATC applies not only to trusts created on or after January 1, 2009, but also to all existing trusts, whether revocable or irrevocable. If your estate planning involves one or more trusts, or you are the trustee or beneficiary of an Arizona trust, the new law will affect you. Here is a partial list of ways the new law affects you:

- 1. The ATC requires that a trustee of an irrevocable trust that is created or becomes irrevocable on or after January 1, 2009, give notice to qualified beneficiaries of the existence of the trust, the beneficiary's right to relevant portions of the trust, and an annual accounting of income or principal.**

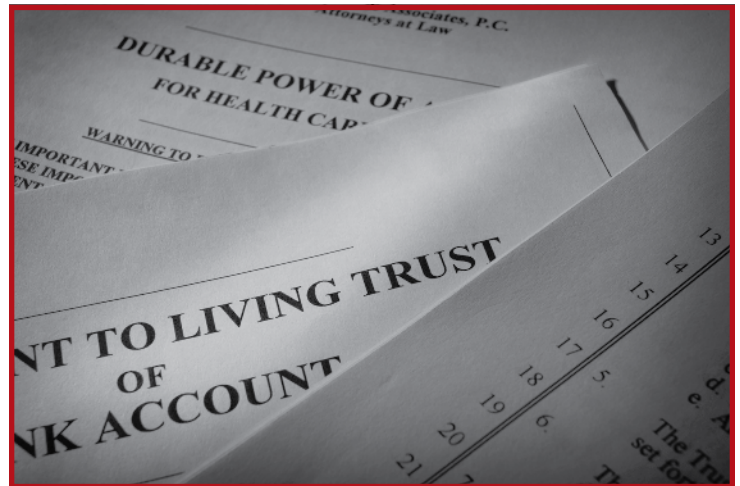
Qualified beneficiaries include beneficiaries with a current right to income or principal and those who would have rights to income or principal upon the death of the beneficiaries holding current rights.

A typical irrevocable life insurance trust has children as beneficiaries and grandchildren as contingent beneficiaries. Each would be a qualified beneficiary. There may be good reasons for not disclosing the existence of the trust to the grandchildren. Some grandchildren, even if young adults, may lack the maturity to handle the knowledge that they may be the beneficiary of a large trust, and may make bad decisions based on the knowledge.

The ATC permits a trust instrument to override this notice requirement. The trust instrument can limit the classes of beneficiaries entitled to receive notice or provide that notice be given to a third party, such as a trust protector. Consequently, if you have concerns about this notification requirement, we should discuss potential modifications to your trust limiting the disclosure.

- 2. The ATC has expanded the protections available under the "spendthrift" provisions of a trust.**

The new law allows a parent to protect the inheritance they leave to their children against the claims for alimony made by the child's divorcing spouse. This was not the case under current Arizona law. Also, numerous other enhancements were made to the Arizona's spendthrift provisions in order to increase the protection that beneficiaries have against claims of their creditors. Special Needs Trusts are additionally now more clearly protected under the new ATC provisions.



- 3. Irrevocable trusts can now be more easily modified or terminated.**

If all of the beneficiaries consent, a court may modify an irrevocable trust or may terminate it, if the court concludes that modification or termination is not inconsistent with a material purpose of the trust. A court may also modify the administrative or dispositive terms of a trust if, because of circumstances not anticipated by the settlor, the modification or termination will further the purposes of the trust.

If you have a situation where the facts have changed since the trust was established, such as, for example, the share of a child now should be in a Special Needs Trust due to a child's changed circumstances, the ATC will allow the necessary changes to be made to the trust instrument, once the new law goes into effect.

- 4. Include all material purposes in your trust instrument.**

If your trust instrument does not clearly state your material purposes in setting up the trust, you should consider amending it. For example, if keeping wealth in trust for future generations (a "dynasty trust") is a material purpose for setting up the trust, a statement to that effect in the trust document may prevent the beneficiaries from seeking an early termination of the trust.

- 5. A trust can now last for up to 500 years.**

If you want to set up a dynasty trust, it can now last through multiple generations—but you'll need to amend any existing trust to take advantage of this provision of the ATC.

- 6. The ATC contains specific provisions with respect to trust protectors.**

A trust protector is a third party who has certain powers with respect to a trust, generally to serve as a monitor of the trustee's actions. For example, your trust instrument could appoint your accountant as trust protector to receive annual accountings on behalf of grandchildren. If the trust protector felt that the trustee needed to be replaced, he could replace the trustee. The ATC specifically provides that the trust protector is not a fiduciary and is not liable or accountable as a fiduciary for any acts or omissions in performing his or her duties as trust protector. This may make third parties more willing to act as trust protectors.

We encourage you to set an appointment with one of us to discuss how the ATC may affect your estate plan. ●

Why Professionalism Matters

By Scott A. Erickson, Certified Estate and Trust Law Specialist

We live in a time of intense personal and societal conflict. In politics, in public discourse, on the pages of newspapers and magazines, and on the airways, everyone seems to be talking, even shouting, while very few people are listening. Instead of considering one another's thoughts and ideas, we are entrenched in deeply dug positions, tightly clenching our agendas, hurling edicts and ultimatums, ruled more by emotions than carefully reasoned thoughts and responses.

The prevailing view seems to be that civil litigation is this kind of adversarial face-off, in which the objective is to break another human being, personally conquer him, or even destroy him. People who carry this attitude into the litigation process fail to understand that it takes years to repair the damage done by a war, if it can be repaired at all. And the damage is not done simply to the vanquished. The very act of war can turn the warrior into a monster. It exacerbates dysfunctional personality traits like animosity, hyper-aggressiveness, dishonesty, manipulation, and the need to dominate and humiliate.

One could postulate that this is at the root of the disdain many people have for the legal profession. But professionalism in the practice of law means much more than maintaining composure, focus, and perspective in the heat of battle. In this author's humble opinion, it means taking pride in one's work, eschewing mediocrity, keeping abreast of recent developments, being prepared, being meticulous, and being a staunch advocate without engaging in wasteful, discourteous, and/or unethical conduct. It means continually looking for ways to improve. It means knowing that when one comes to that proverbial fork in the road, it is *always* more advantageous in the long term to take the high road. It means understanding that the most skillful and respected lawyers are not necessarily the ones who win the most cases, but the ones who listen to and know their clients, have the foresight to anticipate disputes and identify potentially contentious issues, formulate plans that minimize risk and the probability of conflict, draft thorough, well-organized, and unambiguous legal documents, and, when disputes do arise, are able to resolve them with a minimum of emotional and economic loss.



Notwithstanding public opinion polls, there are many competent lawyers, each operating under his or her own concept of professionalism. Retired Justice Sandra Day O'Connor once described professionalism as "a commitment to develop one's skills to the fullest and to apply that responsibly to the problems at hand."¹ However one defines professionalism in the practice of law, one thing is certain: professionalism matters to the lawyer, the client, and a legal system that strives, however imperfectly, to provide justice for all.

It has been said that one of the critical elements for achieving success in any endeavor is to surround yourself with people who share your fundamental values. At Frazer Ryan Goldberg & Arnold LLP, I am privileged to be surrounded by people who share an unwavering commitment to excellence. For that, I am truly grateful. ●

¹*Court of Appeals of Maryland Professionalism Course for New Admittees to the Maryland Bar, Professionalism Above and Beyond Ethics 15 (1992).*

Creditors Can Proceed Against Secured Property Without Consent

By Joshua D. Moya, Attorney At Law

Recently, the Arizona Court of Appeals ruled that a secured creditor can proceed against a decedent's secured property without first obtaining the personal representative's consent or court approval. In *AHCCCS v. Allen*, the decedent owned a piece of real property encumbered by a deed of trust at the time of her death. After a probate proceeding had been initiated but before the appointment of a personal representative, the trustee recorded notice of its intent to conduct a trustee's sale of the property. Despite the fact that a personal representative was appointed before the trustee's sale occurred, the secured creditor did not seek or receive the personal representative or probate court's permission to conduct the sale. At the trustee's sale, the secured creditor purchased the property with a credit bid.

After learning of the sale, the personal representative petitioned the probate court to set aside the sale. The personal representative contended that the

secured creditor did not have the right to sell the property without the approval of the personal representative or the probate court. The Court of Appeals disagreed and ruled that the existence of a probate proceeding does not impair a secured creditor's right to proceed against secured property. The court proclaimed that "commercially reasonable" sales will not be set aside under these circumstances.

In light of this ruling, personal representatives should be vigilant to protect encumbered estate property. Often, sales that are "commercially reasonable" in the eyes of the courts do not maximize the sales price of property, and personal representatives may be able to realize a higher sales price by selling secured property themselves. Because they are not entitled to notice of proceedings against secured property, personal representatives should take the initiative to locate secured creditors and regularly monitor a decedent's mail in order to avoid unfavorable sales arranged by secured creditors. ●

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