

# TB LAW

NEWSLETTER

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## Landing a Fair Deal

‘Public Use’,  
eminent  
domain, and  
redevelopment

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# ANNOUNCEMENTS

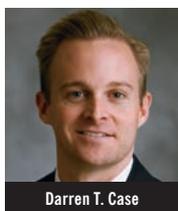
## PROFESSIONAL AND PERSONAL ACHIEVEMENT



Lance R. Broberg

**LANCE R. BROBERG** was elected to the Executive Board of the Boy Scouts of America, Grand Canyon Council. Lance is an Eagle Scout with two young

prospective scouts at home and looks forward to giving back to the program.



Darren T. Case

**DARREN T. CASE** was a keynote speaker for the Arizona chapter of the Financial Executives International on February 9, 2016, presenting on

the topic of personal estate and tax planning strategies for wealth preservation. Darren also presented a legal education seminar on interstate taxation for the State Bar of Arizona on March 24, 2016. The seminar included discussion on tax planning strategies utilizing community property and state income taxation laws.



David L. Case

**DAVID L. CASE** was an organizer and presenter for the December 9, 2015 program for the State Bar of Arizona, entitled *Selected*

*Topics on Complexities Facing Estate Planners And Their Clients Regarding Tax Planning And Liability.*



Alisa J. Gray

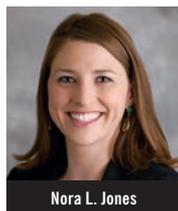
**ALISA J. GRAY AND JAMES A. FASSOLD** presented two seminars on work-life balance — a webinar in January 2016 for the State Bar of Arizona and a workshop in March 2016 at Desert Song Healing Arts Center in Phoenix.



James A. Fassold

**NORA L. JONES** was selected by *The Ahwatukee Foothills News* as one of the “Top Three Best Attorneys in Ahwatukee” in its annual Best of Ahwatukee

issue. This is the second year Nora has won this award, which recognizes outstanding businesses and practitioners making significant contributions to the community.



Nora L. Jones

Additionally, Nora presented a seminar entitled *Introduction to Elder Law* to the Ahwatukee Foothills Senior Association in January 2016. In this well-attended seminar, Nora provided an overview regarding elder law, including guardianships, conservators, recovery for financial exploitation, and probate and trust administration and litigation.

**PAMELA L. KINGSLEY** presented two seminars on the topic of one of the articles in this Newsletter — *Workers: Independent Contractors or Employees?* — to human resource professionals at a Society for Human Resource Management Greater Phoenix meeting in



Pamela L. Kingsley

January 2016 and a webinar for employers in March 2016. Pamela also co-chaired a full day seminar for attorneys, *Wage and Hour Litigation*, for the State Bar of Arizona and the Arizona Employment Lawyers Association in January 2016.



May Lu

**MAY LU** was elected as the Secretary for the Arizona Asian American Bar Association for 2016-2017. Additionally, May was a panelist for The M&A Source Fall 2016 Conference Workshop titled, *Brat Pack Revisited – Recruiting and Retaining New Talent.*



Kevin P. Nelson

For the third year **KEVIN P. NELSON** authored *Arizona Real Estate Law* and *Arizona Construction Law Annotated*, published by Thomson Reuters-West in November 2015. In

December 2015, Kevin spoke at the *Legal Aspects of Condominium Development and Homeowners' Associations* seminar sponsored by the National Business Institute. Kevin's presentation provided a legislative framework and overview of common interest communities.

**JAMES P. O'SULLIVAN** spoke at the 2016 CLereg Mid-Year Meeting on February 8, 2016. Additionally, Jim was the Moderator for The M&A Source Fall 2016 Conference Workshop titled, *Brat Pack Revisited – Recruiting and Retaining New Talent.*



James P. O'Sullivan

**JAMES P. O'SULLIVAN AND ROBERT A. ROYAL**, co-authors of *Arizona Corporate Practice*, are celebrating the 20th anniversary of this seminal two-volume treatise on Arizona corporate law, which is published nationally by Thomson Reuters-West.



Robert A. Royal

**MICHAEL E. TIFFANY** was selected by Chambers USA (2016) as one of the best real estate attorneys in Arizona. He was also recognized as an Az Business Leader (2016) for his work in real estate law by Az Big Media in its annual publication, *Az Business Leaders.*



Michael E. Tiffany

**ASHLEY N. ZIMMERMAN** will serve on the 2016 Steering Committee for the Maricopa Chapter of the Arizona Women Lawyers Association (“AWLA”). Ashley was also selected as the Chair for AWLA's Judicial Appointment Committee, which monitors the process of judicial appointments in Arizona and assists AWLA members seeking appointment or election to judicial office.



Ashley N. Zimmerman

# ANNOUNCEMENTS

## FIRM NEWS

### Firm Shareholders Recognized as Leading Attorneys

*Super Lawyers*®, a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement, selected the following shareholders for 2016: **David L. Case** (Estate & Probate), **Richard G. Himelrick** (Securities Litigation), **Christopher A. LaVoy** (Business Litigation), **Leonard J. Mark** (Family Law), **Robert D. Mitchell** (Securities Litigation), and **Robert A. Royal** (Business Litigation).

### Shareholders and Associates Recognized as 'Rising Stars'

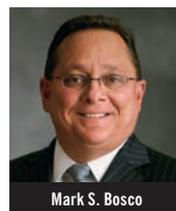
*Super Lawyers* recognizes and selects outstanding attorneys with a high degree of peer recognition and professional achievement. In 2016, **Lance R. Broberg** (Business Litigation), **Darren T. Case** (Estate & Probate), **Sarah K. Deutsch** (Securities Litigation), and **May Lu** (Mergers & Acquisitions) were selected as "Rising Stars," which consists of attorneys who are 40 years old or younger or have practiced 10 or fewer years.

## FIND AN ATTORNEY

See the directory on the back page of this newsletter or visit us online at [tblaw.com](http://tblaw.com).

## Recent Publication

The firm had an article published in a national publication that covers mortgage banking and loan default servicing issues. **Mark S. Bosco** co-authored the article "To Robocall or not to Robocall," which was published as the lead/cover article in the January edition of *Servicing Management* (Vol. 27, No. 6).



Mark S. Bosco

## NEW FACES

### Four New Associates Join Firm

**SHAINE T. ALLEMAN** joined the firm in September 2015. Shaine concentrates his practice in zoning, land use, real estate development, and governmental relations. Shaine earned a Bachelor of Arts from California State University Fullerton, a Masters in urban and regional planning



Shaine T. Alleman

from the Arizona State University, College of Design, and a Juris Doctor from Arizona Summit Law School. Prior to pursuing a legal career, Shaine was an urban planner with some of the best local law firms and served as a faculty associate at ASU, lecturing on urban planning practices and other real estate law topics. Shaine is licensed to practice in Arizona.

**JAMES J. FARLEY II** joined the firm in December 2015. James practices in the areas of real estate and banking litigation as well as commercial litigation, business planning, and business formations.



James J. Farley

James obtained his Bachelor of Science degree from the Eller College of Management at the University of Arizona where he majored in management information systems. He earned his Juris Doctor from The John Marshall Law School in Chicago, Illinois. Previously, James worked at the Phoenix office of a national law firm and later founded Farley Law Group. James is licensed to practice in the state of Arizona, U.S. District Court (District of Arizona), U.S. Court of Appeals (9th Circuit), and U.S. Bankruptcy Court (District of Arizona).

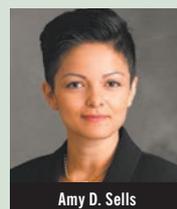
**WILLIAM F. MCDONALD III** joined Tiffany & Bosco's San Diego office in August 2015. William's practice specializes in bankruptcy matters and creditors' rights litigation. William is licensed to practice law in Oregon and California, and is admitted to all district courts in the two states. He graduated



William F. McDonald III

*summa cum laude* from Northern Arizona University with a Bachelor of Science in psychology. William earned his Juris Doctor from the University of Oregon and an LL.M in taxation from the University of Washington School of Law.

**AMY D. SELLS** joined the firm in November 2015. Amy's areas of concentration include commercial and business



Amy D. Sells

litigation, real estate litigation, banking, and bankruptcy and creditors' rights. She graduated from Marymount Manhattan College with a Bachelor's Degree in English literature and received her Juris Doctor from the Maurice A. Deane School of Law at Hofstra University, with a concentration in litigation.

## ANNOUNCEMENTS

# Holiday Angel Support for Families with Sick Children



Tiffany & Bosco's Staff Committee coordinated the firm's effort to brighten the holidays for four families with children then receiving treatment at the Phoenix Children's Hospital Center for Cancer of Blood Disorders. Tiffany & Bosco partnered with the Jaydie Lynn King Foundation to provide 370 gifts for family members during these trying times. The gifts ranged from toys to clothing and basic household supplies. In addition, each family was provided a \$200 grocery store gift card as well as gas gift cards.

## Tiffany & Bosco Continues to Support the Arts

Tiffany & Bosco's Financial Services department is proud to have partnered again with the Scottsdale Cultural Council to offer complimentary tickets to veterans, students, and teachers. During last season, nearly 3,000 free tickets were provided to the target group. These opportunities help provide shared art experiences for our veterans, students, and teachers that help to inspire, entertain, and educate everyone in attendance.

The Financial Services department was also the Presenting Sponsor for ARTrageous held on the 5th of December starring Martin Short, with all proceeds benefiting the Scottsdale Center for the Performing Arts. A key part of Tiffany & Bosco's firm culture is to build successful, lasting partnerships with the local arts community. Investing in the arts not only improves quality of life but creates awareness of all the great cultural events Arizona has to offer.

## In Support of the Boys and Girls Clubs of Greater Scottsdale

Mark and Mike Bosco, along with the Financial Services department at Tiffany & Bosco, were again the Presenting Sponsor of The Boys and Girls Clubs of Greater Scottsdale 2016 Blue Door Ball held on February 20, 2016, to select the Youth of the Year. The honor of being named Youth of the Year is the highest honor given to a member of the Boys and Girls Clubs organization. The winner is announced at the conclusion of the evening. Boys and Girls Clubs of Greater Scottsdale currently serve more than 18,000 youth and provide only the highest-quality programming that benefits our youth in the biggest ways.

### GOOD WORKS

## Client Donates \$1 Million to American Cancer Society

One of the more fulfilling aspects of practicing in tax and estate planning law involves the charitable giving component. **Darren T. Case**, a tax and estate planning shareholder attorney for Tiffany & Bosco, was able to partake in quite a unique experience for one of his clients in early February 2016.



On behalf of his anonymous client, Darren, and his wife **Ashley L. Case**, also an estate planning attorney at the firm, presented a surprise donation to the American Cancer Society in the amount of \$1,000,000.

The donation will go to immediate use for the Phoenix Hope Lodge, located on the Mayo Clinic campus in north Scottsdale, a facility that provides a home-like atmosphere to cancer patients and their caregivers throughout the duration of treatment — completely free of charge.

The presentation of the surprise donation occurred at the Board of Directors meeting for the American Cancer Society, in which several cancer survivors who were residents of the Phoenix Hope Lodge attended. Darren and Ashley were honored to be able to make such a large charitable donation on behalf of the wonderful and caring client.

## ANNOUNCEMENTS



GOOD WORKS

# ‘The Greenest Show on Grass’

## TIFFANY & BOSCO IS PART OF THE RECORD TURNOUTS AT WASTE MANAGEMENT PHOENIX OPEN

**G**olf fans and non-golf fans alike descended on the TPC Scottsdale for “The Greenest Show on Grass.” The Waste Management Phoenix Open welcomed just over 618,000 fans during the week long tournament, shattering its all-time-attendance record. Saturday alone hosted over 200,000 fans, who came to see some of golf’s best play in the PGA Tour’s annual February tournament in Scottsdale. The weather was beautiful for most of the week, with highs in the mid 70s, and fans enjoyed every minute of soaking up sun and taking in golf.

Tiffany & Bosco was present for the action at its usual location, the two-story penthouse suite on the 18th green next to the main entrance. Throughout the week, Tiffany & Bosco welcomed clients and friends to this golf tournament, giving them a great way to experience one of golf’s most beloved tournaments. The tournament was a thriller with two of golf’s younger pros battling right down to the wire. It culminated in 23-year-old Hideki Matsuyama beating out 27-year-old Rickie Fowler in a Super (four-hole) Sunday playoff to win the tournament.

Tiffany & Bosco recognizes that on par with the great golf is the charitable giving of the event. Through sponsoring the golf tournament again this year, Tiffany & Bosco was a part of the over one hundred million dollars in giving that the tournament has provided to Arizona charities. As a sponsor, Tiffany & Bosco is proud of the benefit it is able to provide to the community and looks forward to contributing again next year.

### Tiffany & Bosco Supports “Birdies For Charities”

The Thunderbirds and Waste Management created an exciting way for Arizona’s charities to cash-in on the birdies made during the competitive rounds of the 2016 Waste Management Phoenix Open. The program titled “Birdies For Charity” has two separate components – the Waste Management Phoenix Open Arizona Charity Pledge Drive component and the Corporate Partners component — both geared towards raising thousands of additional dollars for Arizona charities. The significant donation by Tiffany & Bosco’s Real Estate and Financial Services departments was matched by The Thunderbirds — all to benefit the Boys and Girls Clubs of Greater Scottsdale and the 100 Club of Arizona.

By WILLIAM E. LALLY



# Landing a Fair Deal

## *‘Public Use’, eminent domain, and redevelopment*

The power of eminent domain is well-established black letter law created under the U.S. Constitution’s Fifth Amendment. The original intention of the power was to provide a mechanism for the government to acquire land for public use so long as the property owner was justly compensated. The U.S. Supreme Court’s 1875 case of *Kohl v. United States*<sup>1</sup> was the first time a U.S. court recognized the existence of eminent domain power. Over time, a main controversy surrounding this power has been determining what constitutes actual “public use.”

In some cases, the government has taken property that is intended to eventually end up in the hands of private property owners. The argument under these circumstances has been that eminent domain can be warranted for a private use so long as the taking produces a general public benefit.<sup>2</sup> For instance, this view could justify the redevelopment of a downtown property, a manufacturing plant, or a stadium that arguably benefits the public. However, there are often other options besides the eminent domain power that a government can utilize for its development efforts.

The seminal Arizona case that tested the limits of the public use clause for redevelopment is the 2003 case of *Bailey v. Mesa*.<sup>3</sup> In *Bailey*, the case became a head-to-head battle with the City of Mesa in which Bailey asserted that the government’s taking of his family’s long-held property for the future private development of a hardware store was an overreach of its power. Mesa argued that since Bailey’s property was in the

Mesa Town Center Redevelopment Area, the redevelopment of the property would bring immense public benefits to Mesa. In the end, a costly battle ended with the Arizona Court of Appeals siding with Bailey stating that, “[t]he constitutional requirement of ‘public use’ is only satisfied when the public benefits and characteristics of the intended use substantially predominate over the private nature of that use.”<sup>4</sup>

Because of the *Bailey* case, Mesa put a 10-year stop to general redevelopment efforts on the property. Now that the decade is up, Mesa has changed its approach.

In November 2015, Mesa issued a formal request for proposals (“RFPs”) to attract a private developer to redevelop the entire northwest corner of Country Club Road and Main Street for “high intensity, modern, urban development that contributes to an active and livable downtown Mesa.” The RFP closed in January 2016 with a timeline of potential development to begin by the end of 2016.

This time around, Bailey has found himself to be a willing participant in the process. In 2010, Mesa invited Bailey to be on its planning advisory committee for creating the Central Main development plan. Bailey felt that this inclusion allowed him to have a voice in Mesa’s redevelopment efforts and expressed his feelings that Mesa’s new approach allowed additional opportunities for redevelopment that were not present before. Mesa’s approach has also included its willingness to provide property owners incentives such as assistance with property demolition

and cleanup, site preparation, tax relief, infrastructure improvements, and reduction in city permitting fees.

While eminent domain may play an important role in the scheme of real estate development, the *Bailey* case is a great example of how other alternatives to eminent domain, such as creative redevelopment options and forming strong public-private relationships, can be used as a way to overcome the many challenges of development. At Tiffany & Bosco, the Land Use and Zoning Team is poised and experienced to create success in real estate development cases where the intricacies of future redevelopment, including eminent domain, may create roadblocks for development.

<sup>1</sup> 91 U.S. 367 (1875).

<sup>2</sup> See 2A P. NICHOLS, EMINENT DOMAIN (3d ed. rev. 2003, J. Sackman ed.) § 7.02[3] (“Any eminent domain action which tends to enlarge resources, increase industrial energies, or promote the productive power of any considerable number of inhabitants of a state or community manifestly contributes to the general welfare and prosperity of the whole community and thus constitutes a valid public use.”).

<sup>3</sup> 206 Ariz. 224, 76 P.3d 898 (Ct. App. 2003).

<sup>4</sup> *Id.* at 904.

### GET ANSWERS

Please contact Tiffany & Bosco if you need assistance in, or have any questions regarding, this practice area.

# Diversity Driving the Bottom Line

BY ROSARY A. HERNANDEZ  
& ASHLEY N. ZIMMERMAN

Deceased publicist and corporate icon Malcolm Forbes defined diversity as “[t]he art of thinking independently together.” A deceptively simple phrase to describe a complex concept that has grown to encompass myriad issues including, but not limited to, race, gender, age, religion, sexual orientation, disability, and economics. Recognizing the importance and value of diversity has become a widely accepted theme throughout society and corporate America. Over a decade ago, the U.S. Supreme Court acknowledged this notion, stating major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

The discussion of how diversity affects business has centered around two main themes. The first is the morally based idea that diversity “is the right thing to do.” The second is the “business case” for diversity. Under the business model, companies have recognized the necessity of appealing to a more diverse customer base. Diversity is critical to understanding various cultures and decisional processes, and groups with a wide variety of perspectives outperform groups of like-minded people. Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (Princeton Univer-



sity Press, 2008). Additionally, diversity has been credited in driving business’s employee recruitment and retention, and as a way to distinguish a business in the marketplace.

In an effort to accommodate the corporate and societal desire to increase diversity, employers should be aware of which actions foster diversity without fear of potentially violating Title VII and other antidiscrimination laws. Notably, two U.S. Supreme Court cases discuss how an employer may legally adopt a policy that aims to increase diversity in the workplace.

In *United Steelworkers of Am. v. Weber*, the Supreme Court held that Title VII prohibited race-conscious employment decisions but did not prohibit affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories. 443 U.S. 193 (1979). In the plurality opinion, Justice Brennan outlined a four-prong test explaining that affirmative action plans must: (1) be necessary to remedy the discrimination and erase its lingering effects; (2) be regarded as a flexible goal rather than a strict racial quota; (3) be a temporary

## EMPLOYMENT

# Classifying Workers

*Are the independent contractors your business engages really misclassified employees?*

BY PAMELA L. KINGSLEY

Many businesses engage, or are engaged as, independent contractors, thereby avoiding certain obligations imposed by employer/employee relationships under the Fair Labor Standards Act (“FLSA”) and the Internal Revenue Code. The advantage for employers is to avoid paying minimum wage or overtime, making employer contributions for Social Security and Medicare taxes, and providing for workers’ compensation or unemployment insurance.

Problems arise when businesses misclassify workers as independent contractors. Not only are the employer’s classification decision and the job title never controlling, they also are not even relevant. Nor does it matter that the worker originally insisted on being considered an independent contractor.

The financial consequences can be severe. Either the Department of Labor or the worker can seek the difference between what was paid and what should have been paid (“back pay”) for up to the past three years. The employer will then have to pay an equal amount as liquidated damages, as well as prejudgment interest. The employer will also have to pay the worker’s attorneys’ fees, if any,

as attorneys’ fees are guaranteed to successful plaintiffs.

To avoid misclassification, businesses have applied a number of “tests” to their relationships, often focusing on the common law “control test”: whether the company has the right to control only the end result of the project and not how the worker accomplishes it.



measure; and (4) not unnecessarily trammel the rights and interests of non-minority employees. *Id.* at 208.

Correspondingly, in *Johnson v. Transportation Agency, Santa Clara County*, the Supreme Court clarified the validity of affirmative action plans in the private sector by holding that a plan to promote diversity was valid if it met three criteria: (1) the plan was aimed at remedying a manifest imbalance in a traditionally segregated job category; (2) the plan was a temporary measure that sought to

Businesses that have historically attempted to check all the boxes recognize that, over time, judicial decisions have impacted the process dramatically. As a result, in an Interpretation<sup>1</sup> issued last July, the Department of Labor’s U.S. Wage and Hour Administrator David Weil identified a number of cases where the many factors of an “economic realities test” have been used to decide whether workers are independent contractors or employees. The Administrator

DIVERSITY continued on page 10 >>

WORKERS continued on page 10 >>

# EMPLOYMENT



**DIVERSITY** continued from page 9 >>

eradicate the effects of segregation and not simply to maintain a permanent racial and sexual balance; and (3) the plan did not unnecessarily trammel the rights of non-beneficiaries by requiring non-beneficiaries to be dismissed or by creating an absolute bar to their advancement. 480 U.S. 616 (1987).

Today, most diversity policies adopted by employers do not focus on remediating the effects of past discrimination as described in *Weber* and *Johnson*, but rather advance diversity for the sake of implementing good social policy or for competitive reasons. Because multiple companies have experienced real financial benefits as a direct result of various types of diversity initiatives, we anticipate these types of efforts will continue to expand in our increasingly multicultural world. It is critical that these new programs be based on a sound and legally permissible foundation. While some diversity initiatives certainly carry the potential risk of discrimination or related claims, there are permissible approaches that attorneys at Tiffany & Bosco can help craft in aims of creating a diverse workplace and driving the bottom line.

**WORKERS** continued from page 9 >>

analyzed the case law in the context of “the overarching principle that the FLSA should be liberally construed to provide broad coverage for workers.”

According to the Interpretation, this goal of extending the benefits of the law to all workers derives from the FLSA’s definition of “employ” as “to suffer or permit to work.” 29 U.S.C. § 203(g). An entity “suffers or permits” a person to work if, “as a matter of economic reality, the individual is dependent on the entity.”

In looking at the economic realities of a company and worker’s relationship, all of the following should be evaluated:

(A) the extent to which the work performed is an integral part of the employer’s business; (B) the worker’s opportunity for profit or loss depending on his or her managerial skill; (C) the extent of the relative investments of the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control exercised or retained by the employer.

While the Administrator cautions readers not to give greater weight to one factor over another, “[c]ourts have found the ‘integral’ factor to be compelling.” “[W]hether the worker’s work is an integral part of the employer’s business should always be analyzed in misclassification cases.”

A fair inference is that when workers are performing the primary work of the business, they are employees regardless of what the parties call them. Cake makers’ decorators, pickle companies’ pickle pickers, call centers’ phone answerers, and framing contractors’ carpenters are examples offered by the Administrator, who also warns that the work may be “just one component of the business.”

The Interpretation’s lesson is that businesses wanting to establish lawful independent contractor relationships need to consider numerous factors or tests (including ones not covered in this article). The key is whether the workers are economically independent. Where even one test is failed, companies will need to determine the significance by strict scrutiny, being mindful of the Administrator’s conclusion that “most workers are employees under the FLSA’s broad definitions.”

If you or your business needs assistance in evaluating the factors as applied to your situation, or you find yourself defending a prior position, Tiffany & Bosco can help you through the process.

<sup>1</sup> Administrator’s Interpretation No. 2015-1 – July 15, 2015 – Issued by Administrator David Weil – “The Application of the Fair Labor Standards Act’s ‘Suffer or Permit’ Standard in the Identification of Employees Who Are Misclassified as Independent Contractors” (the “Interpretation”). Unless otherwise indicated, all quoted language is from the Interpretation.

## ESTATE PLANNING

# Don't Try to Fight It

*The increasing interest in no-contest provisions in wills and trusts*

BY DAVID L. CASE



The incidence of disputes involving Wills and Trusts, and the amount of and right to an inheritance, has increased substantially over the last couple of decades. As a result, many clients have increased interest in pursuing ways to limit or prevent this type of litigation and preserve the intent of the estate plan, including the use of “No-Contest” provisions in their estate planning documents. Because such litigation can be factually intensive, and frequently involves alleged mental incapacity of the decedent in structuring the estate plan and the improper undue influence by a beneficiary, these cases can become extremely emotional and costly.

A No-Contest clause in a Will or Trust Agreement, sometimes referred to as an “in terrorem” or “forfeiture” clause, typically provides for the forfeiture of one’s entire interest under the document (and usually under the entire estate plan) if the beneficiary directly or indirectly participates in a Will or Trust contest or other legal action or petition seeking to have the court set aside and declare ineffective all or part of the document. Moreover, these clauses frequently state the disinherited person will be considered to have predeceased the decedent without any surviving issue or descendants, which magnifies the penalty by extending the disinheritance to the contestant’s offspring.

It is now common for a Will or Trust contestant also to file a separate tort action for the intentional interference with inheritance, which makes defense of the action more difficult and costly. Therefore, many No-Contest clauses also encompass disinheritance for bringing or participating in this type of tort action. A majority of states now recognize and allow this tort action. Though arguably Arizona has not yet specifically recognized this tort, these tort actions are being litigated here.

This area of law in Arizona continues to evolve, but with the existence of A.R.S. §14-2517 (which technically only applies to Wills and not Trusts), and some recent Arizona appellate decisions, use of No-Contest provisions in Arizona estate plans currently is an effective way to discourage unnecessary, expensive, and divisive litigation involving disputes over inheritance with respect to both Wills and Trusts. Interestingly, Arizona’s statute merely states a No-Contest clause is unenforceable if there is “probable cause” for bringing the contest or other action. The language does not specifically state such provisions are enforceable if probable cause does not exist, but Arizona case law has construed the statute in this manner.

Case law provides guidance in determining probable cause. It turns on whether a reasonable person at

the time of the challenge would have believed a “substantial likelihood [existed] that the contest or attack will be successful.” Although good faith and the ultimate outcome are allegedly irrelevant in defining probable cause, these factors likely color the analysis.

Of course, for a No-Contest clause to have an impact and for the contestant to have an incentive not to litigate, the person must be a beneficiary under the Will or Trust in order to have something to “forfeit” under the clause. Thus, where the decision is whether a family member should be completely disinherited under the estate plan, in some cases it may make sense to provide enough of an interest to make the No-Contest clause factor into the contestant’s decision to file a contest or tort action.

As shown, this area is complicated and an attorney with sufficient experience and knowledge is needed to draft No-Contest clauses effectively, and to prosecute or defend legal actions and petitions filed on these issues.

### GET ANSWERS

The attorneys at Tiffany & Bosco are available to answer your questions regarding wills and trusts. See the directory at the back of this newsletter or go online to [tblaw.com](http://tblaw.com).



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