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Memo

TO: HON. BERNIE ANDERSON, CHAIRMAN, ASSEMBLY JUDICIARY COMMITTEE
DATE: MARCH 24, 2003
SUBJECT: AB 365 - GUARDIANSHIP
FROM: MARK A. SOLOMON, PROBATE & TRUST SECTION, STATE BAR OF NEVADA

We offer the following amendments to AB 365:

1. Sec. 93 (amending NRS 159.113)

Add a new subsection (t) to NRS 159.113(1) as follows:

> "(t) The court shall not enter an order granting the guardian the right and power to take the action set forth above in subsections (l),(m),(o),(r) and (s), unless the guardian makes a showing that the ward, if competent, would actually, or as a reasonably prudent person, have taken the proposed action and such action does not contradict the ward's prior testamentary intent."

Modify subsection (q) to NRS 159.113(1) as follows:

> "(q) Submit a trust to the jurisdiction of the court *sitting in probate* if the ward is the grantor and sole beneficiary of the income of the trust."

Modify subsection (b) to NRS 159.113(3) as follows:

> "(b) The heirs of the ward who are *the ward's spouse or who are* related within the second degree of consanguinity so far as known to the petitioner."

ASSEMBLY JUDICIARY
DATE: 3/25/03 ROOM: 3138 EXHIBIT K
SUBMITTED BY: MARK SOLOMON

Explanation for change: The reason for the addition of new subsection (v) to NRS 159.113(1) is that it has long been the traditional rule in this country and the law in Nevada that if the ward's incapacity has left him without testamentary capacity, his estate plan or status of intestacy becomes frozen unless and until he regains his capacity. Estate planning documents prepared for Nevada residents have assumed these rules and testators under wills and settlors of trusts do not expect that should they become incompetent, their guardian would have the right or power to change their estate plan or testamentary intent. This right and power has traditionally been considered too personal to the ward to allow its exercise by a guardian. However, some of the more progressive states have amended their law to modify the common law rule so as to allow a guardian to modify the ward's testamentary plan in limited circumstances consistent with what the ward would have wanted to do had he still been competent. The most prevalent standard used to define these circumstances is known as the doctrine of substituted judgment. Under this standard, a guardian may modify a ward's estate plan upon a showing that the ward, if competent, would actually, or as a reasonably prudent person, have made the proposed modification and such modification does not contradict the ward's prior testamentary intent. The problem with the proposed amendment, as currently drafted, is that there is absolutely no standard to guide the court in deciding whether or how to allow a guardian to modify the estate plan or intestacy status of the ward.

The reason for the modification to subsection (q) of NRS 159.113(1) is that some Nevada counties have district courts hearing trust matters which are different from the district courts hearing guardianship matters. In fact, under NRS 164.015, the court handling trust matters has exclusive jurisdiction to hear petitions concerning the internal affairs of the trust. Thus, the modification to subsection (q) clarifies that if the guardianship court grants authority to the guardian to submit the ward's trust to the jurisdiction of the court, that court would be the one which regularly hears trust matters.

The reason for the addition of language to subsection (3)(b) of NRS 159.113 is that we do not believe it is necessary or appropriate for the relatives of the ward's spouse to always have to receive notice of this guardianship petition. Thus, the proposed change limits notice to the family to the group consisting of the ward's spouse and the ward's relatives to the second degree of consanguinity. It eliminates automatic notice to other relatives through marriage (i.e., affinity) to the second degree, which would have included grandparents-in-law, parents-in-law, siblings-in-law, stepchildren and step-grandchildren.

2. Sec. 94 (amending NRS 159.115)

Add a new subsection (g) to NRS 159.115(3) as follows:

"(g) The beneficiaries and heirs whose interest may be affected by making or changing a will, trust or beneficiary designation as provided in NRS 159.113."

Explanation for change: Although the proposed amendment to NRS 159.113 would allow the court to authorize the guardian to make or change the ward's will, trust and beneficiary designations, NRS 159.115, as presently drafted does not require notice of the petition for such authority to be sent to the persons who may be adversely affected by such action; that is, the pre-existing heirs and beneficiaries.

3. Sec. 102 (amending NRS 159.169)

Modify subsection (2) of NRS 159.169(1)(e) as follows:

"(2) The right to take under a will, trust or other devise, *which issue shall be determined by the court sitting in probate.*"

Explanation for change: The reason for the modification is to ensure that the probate court is the court that will determine the probate matters proposed to be added to this statute. The fact that a ward may have a right to take under a will or trust should not allow the guardian to drag all other persons interested in the will or trust before the guardianship court.

4. Sec. 23 (adding a new section)

Subsection 2 of Sec. 23 should be amended to read as follows:

"2. If the amount realized on the resale of the property is insufficient to cover the bid and expenses of the previous sale, the original purchaser is liable to the estate of the ward for the deficiency."

Explanation for change: This new Sec. 23 is the analogue of NRS 148.300 governing sales of real property in estate matters. The proposed change more closely tracks NRS 148.300 and makes the defaulting purchaser liable for the real loss sustained by the ward. As presently drafted, the liability of the defaulting purchaser is unclear.

5. Sec. 47 (adding a new section)

The initial phrase of Sec. 47 should be amended to add the following words:

> "In addition to any order from which an appeal is expressly authorized pursuant to this chapter, an appeal may be taken to the Supreme Court within 30 days after *notice of* its entry from an order:"

Explanation for change: Under Nevada law, the time to appeal is generally measured from notice of entry of an order from which the appeal is taken, not the entry of the order. In fact, NRS 155.190 was amended effective October 1, 2001, to add notice of entry as the measure for the appeal period with respect to probate orders, thereby making this provision conform to other Nevada law.

6. Sec. 57 (amending NRS 159.044)

The initial phrase of subsection 2 of NRS 159.044 should be amended to add the following words:

> "2. The petition must state *and provide, to the extent known, or reasonably ascertainable to or obtainable by the petitioner:*"

Subsection (e) of NRS 159.044(2) should be amended to read as follows:

> "(e) The names and address, so far as they are known to the petitioner, of the relatives of the proposed ward who are the ward's spouse or are within the second degree of consanguinity of the ward."

Explanation for change: The proposed amendment to this section mandates that the initial guardianship petition "must" state certain information which is not required to be in the petition under current law. Although there may be good reason why the court would like to have this information, the petitioner simply may not have access to the newly required information regarding the ward (such as the ward's social security number, tax payer identification number, driver's license number, passport number or identification card number). Similarly, at the time of filing the petition the petitioner may be unable to obtain the physician or governmental agency documentation proposed to be required by subsection (2)(h) of this section. This would be particularly true in a situation where the petitioner is seeking to initiate a guardianship because the ward and his documentation are inaccessible because they are being sequestered by another individual.

The reason for the proposed change to subsection (2)(e) of NRS 159.044 is that we do not believe it is necessary or appropriate for the court to be concerned as to the identity and address of

the relatives of the ward's spouse. Thus, the proposed change limits the necessity for providing information concerning the name and address of the ward's family to the group consisting of the ward's spouse and the ward's relatives to the second degree of consanguinity. It eliminates the necessity of stating such information with respect to other relatives through marriage (i.e., affinity) to the second degree, which would have included grandparents-in-law, parents-in-law, siblings-in-law, stepchildren and step-grandchildren

7. Sec. 59 (amending NRS 159.047)

Subsection (2) of NRS 159.047(2)(b) should be amended as follows:

> "(2) *The spouse of the ward or who are* within the second degree of consanguinity."

Subsection (2) of NRS 159.047 (2)(c) should be amended as follows:

> "(2) Within the second degree of consanguinity."

Explanation for change: We do not believe it is necessary or appropriate for the relatives of the ward's spouse to have to receive notice of a guardianship petition in all cases. Thus, the proposed change limits notice to the family to the group consisting of the ward's spouse and the ward's relatives to the second degree of consanguinity. It eliminates automatic notice to other relatives through marriage (i.e., affinity) to the second degree, which would have included grandparents-in-law, parents-in-law, siblings-in-law, stepchildren and step-grandchildren.

8. Sec.12 (adding a new section)

Subsection 2 of Sec. 12 should be modified to read as follows:

> "2. If a claim has been filed upon the debt secured by the mortgage or lien, the court shall not confirm the sale unless the holder of the claim files a signed and acknowledged document which releases the estate from all liability upon the claim, *or the mortgage or lien is required to be paid off from the proceeds of the sales escrow.*"

Explanation for change: Even if the holder of a mortgage or lien claim fails to sign and acknowledge a document releasing his claim, the court should be able to confirm a sale if that lien or mortgage will be paid off from the proceeds of the sale.

9. Sec. 72 (amending NRS 159.061)

A new subsection (7) should be added to NRS 159.061(3)(d) as follows:

> "(7) Friend of the ward."

The initial phrase of subsection 4 of NRS 159.061 should be modified to read as follows:

> "4. If the court finds that there is no suitable person to appoint as guardian who is related by blood, adoption or marriage, who is nominated in a written instrument or who is a friend of the ward, the court shall appoint as guardian:"

Explanation for change: The proposed changes to NRS 159.061 seek to provide a priority list for the court's consideration in choosing a qualified person who is most suitable and is willing to serve as guardian. In this list of priority, however, the ward's friends have been ignored. Indeed, as presently drafted, subsection 4 of the proposed bill would mandate the appointment of a private fiduciary over a long-term companion of the ward, even though that companion or friend may be the most qualified to serve. Because NRS 253.200 provides that a Nevada resident is eligible to have the Public Guardian appointed only when he has no relative or friend able and willing to serve, the proposed amendment as drafted actually gives the private fiduciary priority over the Public Guardian in situations where a friend of the ward is willing and able to serve as guardian.

10. Sec. 95 (amending NRS 159.117)

Section 4 of NRS 159.117 should be modified to eliminate subsection (b) as follows:

> "4. A guardian of the estate may maintain the assets of the ward in the manner in which the ward had invested the assets before his incapacity upon approval of the court and for a period authorized by the court."

Explanation for change: Subsection (b) of this new section 4 to NRS 159.117 would allow a guardian, without court authority, to hold on to the ward's assets in the form they had been invested in by the ward, until an account is filed and approved by the court pursuant to NRS 159.177. That period of time would generally be more than 14 months from the appointment of the guardian, and we believe that may be way too long of a period for a fiduciary to reasonably hold on to certain speculative assets, such as a stock margin account. Rather, we believe general fiduciary law does

and should require the guardian to review how the ward's assets are held within a more reasonable time after his appointment.

11. Sec. 112 (amending 159.193)

Subsection (c) of NRS 159.193(1) should be amended to read as follows:

> "(c) Upon approval of the court *and notice to the personal representative of the estate of a deceased ward*, for more than 90 days if the guardian is awaiting certification from the appropriate authority acknowledging that the guardian has no further liability for taxes on the estate , *unless the guardian can otherwise be protected from such liability.*"

Explanation for change: We believe the personal representative the deceased ward's estate should be notified of a petition by the guardian to hold on to the ward's assets for more than 90 days after the ward's death, when the guardianship property would otherwise be required to be turned over to the personal representative. Also, we believe the guardianship property should be turned over to the personal representative if sufficient protection can be made for the guardian's exposure to tax liability.

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cc: John Dawson, Esq., Chairman, Probate & Trust Section, Nevada State Bar