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# CURRENTS

## Nevada Asset Protection Laws Make National Legal News

**By: John C. Rogers**

As first mentioned in *CURRENTS*, Summer of 2011, recent changes in Nevada laws are significant for asset protection purposes. These changes have been noticed and commented upon in a national legal publication. *Lawyers USA* featured changes in Nevada asset protection laws in its December 2011 issue (pg. 9). These

changes can be of great benefit to those seeking asset protection from future creditors.

1. Self Settled Spendthrift Trusts (“SSST”): These are a type of “spendthrift” trust (“ST”) that provide asset protection and also allow the person creating the trust to access trust assets. The new law allows SSSTs created elsewhere

to move to Nevada without having to restart applicable statutes of limitations and without having to empty the trust to start over in Nevada. Nevada has a two year statute of limitations that limits claims of future creditors to a two year period following the date an asset is transferred to the trust. The date property is transferred into a ST is

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## Grim Statistics for Collection of Child Support Judgments

**By: Stacey F. Herhusky**

The outlook for parents with young children who are owed child support is getting worse, according to a recent report by the US Census Bureau. The percentage of custodial parents receiving full payment of court ordered child support amounts is dropping at an alarming rate. The report showed that fewer

parents received child support in 2009 when compared to 2007 payment percentages. Only 41.2 percent of parents received the full amount of support due in 2009, compared with 46.9 percent in 2007. Hundreds of thousands of families could be looking at a hole in their household budgets when child support payments do not arrive.

The big numbers

from the report, “Custodial Mothers and Fathers and Their Child Support: 2009” showed that child support is an economy on its own. The aggregate amount of support owed in 2009 was \$35.1 billion, of which only 61 percent was paid. The report centered on child support received by custodial parents from non-custodial parents, and

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## IVGID Wins Frank Wright Beach Access Case in Ninth Circuit

By: Andrew N. Wolf

*“A parcel conveyed by a private party to a public or quasi-public agency can be burdened by an enforceable deed restriction, so long as the enforcement of the deed restriction does not violate certain fundamental rights.”*

*“...a primary right bestowed by private property ownership is the right to exclude others...”*

On December 27, 2011, a three judge panel of the United States Court of Appeals for the Ninth Circuit issued a long-awaited decision in the case of *Frank Wright vs. Incline Village General Improvement District*. Mr. Wright’s case was one of two cases filed in 2008, seeking access to IVGID’s beaches. The second case, filed by Steven Kroll, is still proceeding in a Nevada state court in Carson City. In a nutshell, the Ninth Circuit upheld an earlier ruling in IVGID’s favor by U.S. District Judge Larry Hicks.

The reported Ninth Circuit decision explains an obscure but important intersection of federal constitutional law governing freedoms of speech and assembly and limits on the right to access private property and public property affected by deed restrictions.

The outcome of the case turned on the following critical facts and legal propositions, which were fairly unique to this particular case:

1. The IVGID beaches are not traditional public forums (“fora”). Here, the court examined the history of how IVGID’s beaches have been used, as well as their physical layout

and found as a factual matter that the beaches are not a traditional public forum – (a) there was no evidence in the record to show that they had been used for public speeches, political discourse, protests or other First Amendment purposes, (2) they are gated and fenced, (3) they are not a public thoroughfare, (4) since 1968 they have been subject to a deed restriction for *solely recreational uses* by owners, tenants and guests of the parcels that comprised IVGID as of 1968, and (5) the beaches were acquired by bonds levied against only the 1968 IVGID parcels.

2. The Court differentiated the particular configuration and prior uses of IVGID’s beaches from beaches and parks discussed in some other cases around the country that required open access. The court found the IVGID beaches are not typical parks.

3. A parcel conveyed by a private party to a public or quasi-public agency can be burdened by an enforceable deed restriction, so long as the enforcement of the deed restriction does not violate certain fundamental rights (e.g., a restriction on access based on race or religion). Wright did not directly challenge

the deed restriction to solely recreational use by owners, tenants and guests of 1968 IVGID parcels, although he did challenge IVGID’s ordinance that implements the deed restriction. The court found that IVGID Ordinance 7 does not violate Wright’s constitutional rights. The court also found that IVGID’s subsequent Policy No. 136, establishing free-speech areas on the beach parking lots and at other IVGID facilities, was likewise allowable.

4. Interestingly, the property rights recognized by the court in need of protection included the 1968 beach grantor’s right to convey the lands to IVGID subject to use restrictions. In other words, the court indicated that IVGID had to be allowed to enact Ordinance No. 7 as a means of reasonably protecting the private property rights and First Amendment rights of the party that conveyed the beaches to IVGID in 1968 to exclude certain people from using the beaches. The court reiterated that a primary right bestowed by private property ownership is the right to exclude others, and this right of the prior beach owner would be violated if the deed restriction could not be

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deemed the transfer date even though the property becomes part of a second spendthrift trust. Other states have longer statutes of limitation allowing for a longer claims period.

The recent changes in Nevada law also expanded the types of spendthrift trusts available for these protections. Now Nevada

specifically includes qualified personal residence trusts, charitable remainder trusts and grantor retained annuity trusts. This is a significant expansion of the law.

There are other technical provisions that allow other benefits such as making completed gifts and making gifts that remove property from the grantor's estate.

2. Charging Orders and Denial of Equitable Remedies: In the past, Nevada law provided that charging orders were the exclusive remedy for creditors trying to get at assets held in limited partnerships (LP) and in limited liability companies (LLC). A charging order essentially creates a lien on a partnership or LLC interest but does not

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## Foreclosure Mediation Updates

**By: Cassell von Baeyer**

Since the implementation of the Foreclosure Mediation Program (the "FMP") in July of 2009 the Nevada Supreme Court has issued numerous revisions and amendments to the Foreclosure Mediation Program Rules (the "Rules"). Additionally, the several cases have worked their way from the District Courts as Petitions for Judicial Review all the way up the Nevada Supreme Court where the Court has interpreted the application of the Rules.

In 2011 the Court issued a pair of rulings (*Leyva v. National Default Servicing Corp.*, 127 Nev. \_\_\_, 2011 and *Pasillas v. HSBC Bank USA*, 127 Nev. \_\_\_, 2011), which essentially provided that Lender's were

required to strictly comply with the FMP Rules and NRS 107.086 and specifically that Lenders are required to strictly comply with the documentation requirements specified in NRS 107.086 and the FMP Rules when it comes to "essential" documents such as Promissory Notes, Deed of Trust and Assignments.

In January of 2012, in unpublished decisions (which means they cannot be used as legal precedent), the Court again reiterated this strict compliance requirement in *Karl v. HSBC Bank USA*, 128 Nev. \_\_ and *Piazza v. Citimortgage, Inc.*, 128 Nev. \_\_\_. However, in *Piazza* the Court found that a Lender's submission of a Broker's Price Opinion ("BPO"), as allowed under the FMP Rules, was not sub-

ject to strict compliance and that the BPO need only to "substantially" comply with NRS 645.2515(3) which governs the requirements for valid BPOs.

There has been some misconception in the media that these rulings require Lenders to produce original Notes and Deeds of Trust at the actual mediation in order to strictly comply with the documentation rules. However, none of the NRS, FMP Rules or Nevada Supreme Court rulings governing these requirements have ever stated this. The Rules do require someone to certify that they are in possession of the original documents and the original certifications must be presented at the mediation. However, there is no requirement that the Lender produce

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## Grim Statistics for Collection of Child Support Judgments

*"...about one-fourth of all children under 21 years old [are] living with just one parent."*

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included cash child support payments and non-cash support, such as gifts, clothing and health insurance.

Here are some highlights from the report:

- Based on 2010 numbers, 22.0 million children lived with 13.7 million custodial parents, while their non-custodial parent lived elsewhere. That's about one-fourth of all children under 21 years old living with just one parent.
- Poverty levels in custodial parents' families were up about 5 percent in 2009 compared to 2001 numbers, with 28.3 percent of custodial parents in poverty.
- Child support is a key part of a custodial parent's income, making up 20.8 percent of income

for all custodial parents, and 62.6 percent of income for those living at poverty levels.

- Chances for receiving all child support owed go up along with a custodial parent's age, education level and employment.

The downward trend in our economy has not only caused a reduction in the percentage of child support paid, but has also increased litigation costs both for enforcement and modification proceedings. Changes in the economy often warrant a review of the amount of support being paid in a particular case. One change we see all too often is parents waiting to seek a lawyer's help when they can't make child support payments. Making up missed support payments is usually manageable when income loss is short-term.

However, when income loss is long-term or even permanent, child support debt can get out of control quickly. Normally, changes can only go back to the date of filing a petition for modification so it is important that you act promptly once you have experienced a change in financial circumstances. Another common mis-step is entering into verbal modification agreements with the custodial parent without formally modifying a court order. Child support orders can only be modified by formal stipulation and order or a motion to modify. It is important to seek help sooner rather than later to avoid the unintended consequence of a large arrearage judgment. Taking a proactive stance can help avoid use of costly court proceedings and enforcement methods.

*"...deed restrictions are enforceable by the beneficiaries of the deed restrictions."*

## IVGID Wins Frank Wright Beach Access Case in Ninth Circuit

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implemented by an ordinance like IVGID Ordinance No. 7.

5. Also important is the court's statement that the deed restrictions (as opposed to Ordinance No. 7) are enforceable by the beneficiaries of the deed restrictions – namely, the current owners of the parcels that comprised

IVGID in 1968.

At this point it is not clear what Mr. Wright will do next – his options include seeking a rehearing by the full Ninth Circuit court ("en banc"), an appeal to the U.S. Supreme Court, and possibly others. The present status of Mr. Kroll's "companion" beach access case, last seen in the Nevada state court in

Carson City, is not covered here. For those interested, the December 27, 2012, Ninth Circuit decision can be found at:

<http://www.ca9.uscourts.gov/datastore/opinions/2011/12/27/10-16043.pdf>



## Foreclosure Mediation Updates

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original documents at the mediation.

These recent cases also support the conclusion that the penalty for a Lender that does not comply with the FMP Rules and/or the NRS is that the Lender may not receive a certificate to foreclose from the FMP

and, therefore, must begin the process over again with a new Notice of Default and a new opportunity for the Borrower to mediate. Unfortunately, it is likely that the Borrower will bear the burden of this delay while the Lender continues to charge accrued interest, penalties and late fees.

If you are unfamiliar with the FMP or have questions about your right to mediate with your Lender, please feel free to contact us.

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allow a creditor to reach the entity assets or the interest of the debtor. The recent amendments to Nevada law provide that the charging order is now the **sole remedy** for creditors against Nevada LPs, LLCs and private corporations with less than 100 shareholders. More significantly, the law precludes a court from getting around the charging order protection by attempting to use what are known as "equitable remedies" such as reverse veil piercing or creating a constructive trust. These theories can no longer be used to make an entity's assets available to a creditor/plaintiff.

But as with all "good things," caution is still

necessary. This is exemplified by a recent Alaska bankruptcy case. Alaska has a four year statute of limitations for SSSTs. A settlor of such a trust waited out the four year statute, believing he had complied with the law. He then filed for bankruptcy intending to obtain freedom from past debts. He failed to account for a bankruptcy law that allowed a 10 year look back which made the assets transferred to the SSST available in his bankruptcy estate. Other commentators suggest that these Nevada law benefits are best for Nevada residents and they may not benefit residents of other states whose local courts may give precedence to local laws.

Notwithstanding the need for caution in planning, these recent amendments provide additional reasons for choosing Nevada entities to provide asset protection, particularly if you are already a resident of Nevada. For those not yet residents, it encourages them to consider moving here or at least establishing entities that are domiciled here.

If you wish to establish a Nevada entity or spendthrift trust please contact our office for more information.

*"...these recent amendments provide additional reasons for choosing Nevada entities to provide asset protection..."*

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Our areas of practice include change of residency, creation and management of entities, contracts, real estate, asset protection, family law, commercial transactions, civil litigation and estate planning.

All of our attorneys are licensed in Nevada and California.



From left to right:

Andrew N. Wolf, Stacey F. Herhusky, Cassell von Baeyer, John C. Rogers, & Vera A. Struc



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