



CURRENTS

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Where Did All the NODs Go?

By Cassell von Baeyer

As mentioned in our last newsletter, numerous changes were made to Nevada foreclosure law in the last legislative session. One significant piece of legislation was AB 284 which amended the requirements for filing a Notice of Default, which is really the first legal step in a foreclosure. The provisions of AB 284 went into effect on October 1, 2011. AB 284 requires that any

assignment of a mortgage or deed of trust must now be recorded and that the exercise of the power of sale under the deed of trust (i.e. the right to foreclose non-judicially) is unenforceable unless the assignments have been recorded first.

A Notice of Default must now also contain an affidavit signed by the beneficiary of the deed of trust, or the trustee under the deed of trust, that

verifies, under oath and penalty of perjury, the name and address of the current beneficiary, the name of every prior beneficiary, that the foreclosing agent is in actual or constructive possession of the promissory note secured by the deed of trust, that the trustee has actual authority to exercise the power of sale, the amount owed (inclusive of foreclosure costs) and the re-

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Nevada Supreme Court Adopts Public Trust Doctrine

By Andrew N. Wolf

The Nevada Supreme Court has formally adopted the Public Trust Doctrine in regard to navigable waterways within its borders. *Lawrence v. Clark County*, 127 Nev. Adv. Op. No. 32 (July 7, 2011). In doing so, the Nevada high court has so far avoided the public access contro-

versy that exists on California lakefront property at Lake Tahoe.

The dispute: The Nevada Legislature originally enacted the Fort Mohave Valley Development Law (FMVDL) to allow the Colorado River Commission (CRC), a Nevada state agency, to acquire certain federal land within Clark County limits. The FMVDL

was amended to require the CRC to transfer its Fort Mohave Valley land to Clark County. To make the transfer, the Nevada State Land Registrar, appellant James R. Lawrence, deeded to Clark County the CRC's interest in the land, except for 330 acres of land adjacent to the Colorado River that

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he believed was nontransferable under the public trust doctrine, pursuant to which the state must hold the beds and banks of navigable waterways in trust for the public.

The Issue: Can Nevada state-owned land that was once submerged under a waterway be freely transferred to Clark County, or does the public trust doctrine prohibit such a transfer?

The ruling: Generally, under the public trust doctrine, a state holds the banks and beds of navigable waterways within its borders in trust for the public and subject to restraints on transfer.

Whether the formerly submerged land is transferable, such that it can be deeded to Clark County, turns on unanswered questions of whether the stretch of water that once covered the land was navigable at the time of Nevada's statehood (October 31, 1864), whether the land became dry by reliction or by avulsion, and whether transferring the land contravenes the public trust.

Land is held by the state in trust for the public if the land was submerged beneath navigable water

when Nevada joined the United States on October 31, 1864. When Nevada joined the United States, it obtained title to all land below the high-water mark of Nevada's navigable waters. A body of water is navigable if it can be used for commerce, trade or travel.

The public trust prohibits the state from conveying affected land out of state ownership unless (1) the dispensation is made for a public purpose, (2) the state received fair consideration, and (3) the dispensation satisfies the state's special obligation to maintain the trust for the use and enjoyment of present and future generations.

If land was beneath navigable waters when Nevada joined the United States, but is now dry and exposed, whether that land remains subject to the public trust doctrine's transfer restrictions generally depends on the manner in which it became dry—whether by reliction or avulsion. When the exposure is caused by reliction, the gradual and imperceptible exposure of the land, title to the dry water bed is passed to the adjoining shoreland owners. The

event causing the exposure of the water bed may be considered reliction even when the gradual changes to the water bed come about by artificial means. In contrast, when changes to the water bed occur by avulsion, that is, by "sudden changes in the course of a stream," title is not taken away or bestowed. Thus, whether the disputed land became dry through reliction or avulsion is critical.

What this means for Nevada lakefront owners at Lake Tahoe:

If the Lake gradually and permanently recedes below 6,223' the exposed land is created by reliction. Under Nevada's newly-minted public trust framework, the exposed land could eventually become property of the lakefront (littoral) land owner. Nevada, however, already has a statute that explicitly states that the boundary of state-owned lakebed land at Lake Tahoe is the line traced by 6,223' elevation per Lake Tahoe Datum. (NRS 321.595.) Moreover, under a leading Nevada court case, if title to a Lake Tahoe lakefront parcel in Nevada is described by reference to the "meander line" of Lake Tahoe (a line

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"Can Nevada state-owned land that was once submerged under a waterway be freely transferred to Clark County, or does the public trust doctrine prohibit such a transfer?"

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corded document number of each assignment of interest in the deed of trust.

If you have any knowledge or understanding of securitized mortgages or the Mortgage Electronic Registration System, you are probably getting a good chuckle out of these new requirements. If you aren't aware of these fascinating and complicated mortgage machinations, let me explain why the person leaning over your shoulder is laughing: Most lenders bought and sold loans multiple times, never once recording an assignment, and frankly they may not even

know to whom they sold the deed of trust. Often lenders registered loans with an organization called MERS (the Mortgage Electronic Registration System) which acted as a supposed clearing house, alleviating the need for the recordation of assignments and the transfer of the actual physical loan documents. Many lenders have no idea where the original promissory note for a mortgage loan is held or the chain of title to the loan or deed of trust.

As you might imagine, lenders may be scrambling to figure out how to recreate the history of a title to a loan. The evidence of

this is the sheer and precipitous drop in the number of filings of Notices of Default since AB 284 went into effect. In Washoe County alone, in the month of September, 2011, there were over 600 Notices of Default recorded with the Washoe County Recorder's Office. From October 1 through October 21, 2011, after AB 284 became effective, approximately 8 Notices of Default have been recorded. 8. Yes, Eight. In case you missed that, the number was 8.

Under the existing foreclosure statutes, a lender has about four months from

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"Many lenders have no idea where the original promissory note for a mortgage loan is held or the chain of title to the loan or deed of trust."

Independent Administration of Estates Act

By John C. Rogers

In the Summer 2011 issue of *CURRENTS*, there is a brief summary of some significant changes in Nevada Estate Planning and Probate practice. This article highlights one of those changes: the addition of the "Independent Administration of Estates Act" to Nevada law.

Senate Bill 221 was adopted and became law on October 1, 2011. Among its provisions was the adoption of the Independent Administration of Estates Act. This act is intended to simplify and make less expensive the ad-

ministration of estates in Nevada. The act documents, makes uniform and authorizes many actions and procedures that can happen without court supervision or permission. In the past, every action that required court approval required the expenditure of time and money by the estate and it also cost the court time to deal with applications for approval and orders. Reducing these requests and supervision will save estates and the courts time and expense and will streamline the administration of estates.

Personal representa-

tives of estates can be granted "full authority" or "limited authority." The significant difference between the two is that "limited authority" does not permit, without prior court approval, the power to sell or exchange or grant options for real property, or the borrowing of funds using real property as security. Otherwise, the powers are generally the same.

When these independent administrative powers are applied for, there are procedures for heirs or interested parties to consent or object. Even when the inde- (continued on page 6...)

"This act is intended to simplify and make less expensive the administration of estates in Nevada."



Where Did All the NODs Go?

“A lender has about four months from the date of recording a Notice of Default before they can conduct a sale on the courthouse steps.”

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the date of recording a Notice of Default before they can conduct a sale on the courthouse steps. The reality in this market is that it is often much longer than four months. Thus, it would be reasonable to expect that the number of ac-

tual foreclosure sales on the courthouse steps, foreclosure mediations under the Nevada Foreclosure Mediation Program and standing REO (properties owned by banks after foreclosure sale) home inventory are likely to also decline, substantially, probably beginning in the

next 6-8 months.

How long will it take lenders to get on track with the new legislation? I would be curious to know if the bookies have laid odds on it.

New Case Expands Grandparent Visitation Rights in California

By Stacey F. Herhusky

It is a growing fact that more and more grandchildren are being raised in the homes of their grandparents. Grandparents often become a family's first reserve in times of crisis.

Grandparents act as fun playmates for children, role models, and family historians, mentors, and help establish self-esteem and security for children. (Blau, 1984; Kornhaber & Woodward, 1981). Unfortunately, in unhappier times some well meaning grandparents find themselves at odds with their own child or the child's spouse (or former spouse) regarding their role in the lives of their grandchildren. Grandparents often feel they are held in limbo because they do not know their rights or may think they have no rights. It can be a very sensitive and painful situation,

especially when your children, the parents of your grandchildren, are flailing and unable to provide care to your grandchildren. Whether they are suffering from alcohol or drug addiction, cannot maintain and safe and stable home or do not have the emotional or financial resources to adequately care for a child, it can be difficult to intervene without damaging your relationship. Things can become even more difficult if your child has predeceased you or is divorced from your grandchild's other parent and the surviving parent or custodial parent is reluctant to allow you to continue to participate in your grandchild's life. The U.S. Supreme Court's landmark 2000 case, *Troxel v. Granville*, commands a presumption that a surviving parent's objection to grandparent visitation rights is in

the best interest of the children. This has often been a real obstacle for grandparents seeking to assert custody and visitation rights. Fortunately, this year, in *Hoag v. Diedjomahor* the California Fourth Appellate District court refused to permit a parent to use the *Troxel* presumption in his personal war with the grandparent stating that a surviving parent cannot use spite as a "Big Bertha" in a grandparent visitation rights dispute.

The facts of this case are as follows: Melville Diedjomahor (the father) and Kristen Hoag (the mother) were married in 2005. They lived with Kristen's mother, Shannon Hoag (the grandmother). In 2006, their first daughter was born. In 2007, they separated. The father went to live in Desert Hot
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shown on old government surveys of the Lake), the parcel boundary is deemed to be the boundary of the State's land at 6,223'.

If Lake Tahoe "permanently" recedes and land is exposed by reliction, someone in the future might argue that the boundary between the State's ownership of the Lakebed and adjoining land moves or must be moved downward/ waterward, thereby adding land area to the Lakefront Parcel.

The *Lawrence* case does not discuss whether the public has rights to access the shore area between the Lake Tahoe's natural rim (6,223) and the high watermark 6,229' created by the Tahoe City dam at Lake Tahoe. However, *Lawrence* defines the State's title to land underlying waterways (i.e., the extent of the public trust) as the land that was situated below the high-water mark of Nevada's navigable waters on October 31, 1864. The natural Rim of Lake Tahoe is at approximately 6223' above sea level. This is the elevation of the *natura*/sandbar or spillway at

the head of the Lower Truckee River, at Tahoe City. The natural rim was by physical imperative the natural high water mark of Lake Tahoe as no water could accumulate above that height before the Tahoe City Dam was first constructed in 1870 and rebuilt in 1913 - after Nevada's statehood. After the Dam was built, a new, artificial high water line was established by the Dam. Subsequently, the Dam has been managed to prevent water from exceeding approximately 6,229'.

Applying *Lawrence* to these facts, Lake Tahoe was a navigable waterway at the inception of Nevada's statehood on October 31, 1864. The high water mark at that time, before the Dam was built, was the Lake's natural rim at 6,223'. Thus, the public trust applies only to the State's Lands below 6,223' -- the natural high water mark when the State joined the Union. On this basis, this writer believes that *Lawrence* should be read to mean that there is no public trust over the area between the natural rim at 6,223' (the state lands boundary per NRS

321.595) and the shore area above 6,223' that is periodically inundated by water retained behind the Tahoe City Dam.

How this rule differs from California: The foregoing interpretation indicates no change in Nevada law pertaining to lakefront land rights at Lake Tahoe. Conversely, in California, in addition to the State's ownership of land below 6,223', the area between the natural rim (6,223') and the mean high water mark produced by the Dam (6,228.75') is subject to a public trust *easement* that includes rights of the public to recreate on that artificially inundated area, in addition to its regulation by the State of California. (*State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210 ; *State of California, et al. v. Superior Court of Placer County (Fogerty I)*, 29 Cal 3d 240 (1981); *Fogerty v. State of California (Fogerty II)* (1986) 187 Cal.App.3d 224 [high watermark of Lake Tahoe constituting the uppermost limit of the public trust *easement* is located at 6,228.75'.])

"...someone in the future might argue that the boundary between the State's ownership of the Lakebed and adjoining land moves or must be moved downward..."

Independent Administration of Estates Act

“One effect of the procedure to sell real property under “full authority” is that there is no need for a hearing to ‘confirm the sale.’”

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pendent powers have been authorized, there are requirements that the personal representative must give notice in advance before using certain of those powers. This notice gives those interested the opportunity to consent or object or request limitations on such planned action.

One effect of the

procedure to sell real property under “full authority” is that there is no need for a hearing to “confirm the sale.” A potential drawback to this is that there is no open bidding in court before a sale is confirmed which might generate additional funds for an estate. A positive benefit is that a sale on agreed terms will be concluded and the cost, de-

lays and uncertainties of a confirmation hearing will be avoided.

There are some matters that require court approval regardless of “full” or “limited” authority. These include payment of compensation to personal representatives and to attorneys for their services.

The adoption of Independent Administration of Estates Act is a welcome addition to Nevada’s laws.

New Case Expands Grandparent Visitation Rights in California

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“...Troxel does not leave all decision-making power with regard to grandparent visitation rights in the hands of the surviving parent.”

Springs; the grandmother, the mother, and the daughter all remained in La Habra. In April 2008, the mother and father reconciled; the mother, daughter, and grandmother moved into the father's apartment in Desert Hot Springs. The couple's second daughter was born later in 2008. In February 2009, the mother filed for divorce. According to the grandmother, the mother moved out and went to live with her oldest brother (the uncle), accompanied by the children and the grandmother.

According to the father, the mother did not move out; she merely went

to the uncle's house for a weekend visit. In March 2009, during this stay at the uncle's house, the mother died suddenly. In the immediate aftermath of her death, the children remained with the grandmother, at the uncle's house. The father visited them every couple of days.

The grandmother filed a petition for guardianship, arguing that the father was an unfit parent. The petition was subsequently dismissed. After the guardianship case was dismissed, the father attempted to retaliate by denying grandparent visitation rights to the grandmother.

The court, finding

that the father's arguments for denying visitation were neither reasonable nor credible, affirmed the trial court order granting the grandmother's petition for visitation rights. The Court made it very clear that *Troxel* does not leave all decision-making power with regard to grandparent visitation rights in the hands of the surviving parent. There has to be a reasonable objection to the grandparent visitation or the court can order the visitation even over the objection of the surviving parent. If you would like to learn more about grandparent rights, please feel free to contact our office to schedule a consultation.



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From left to right:

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



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