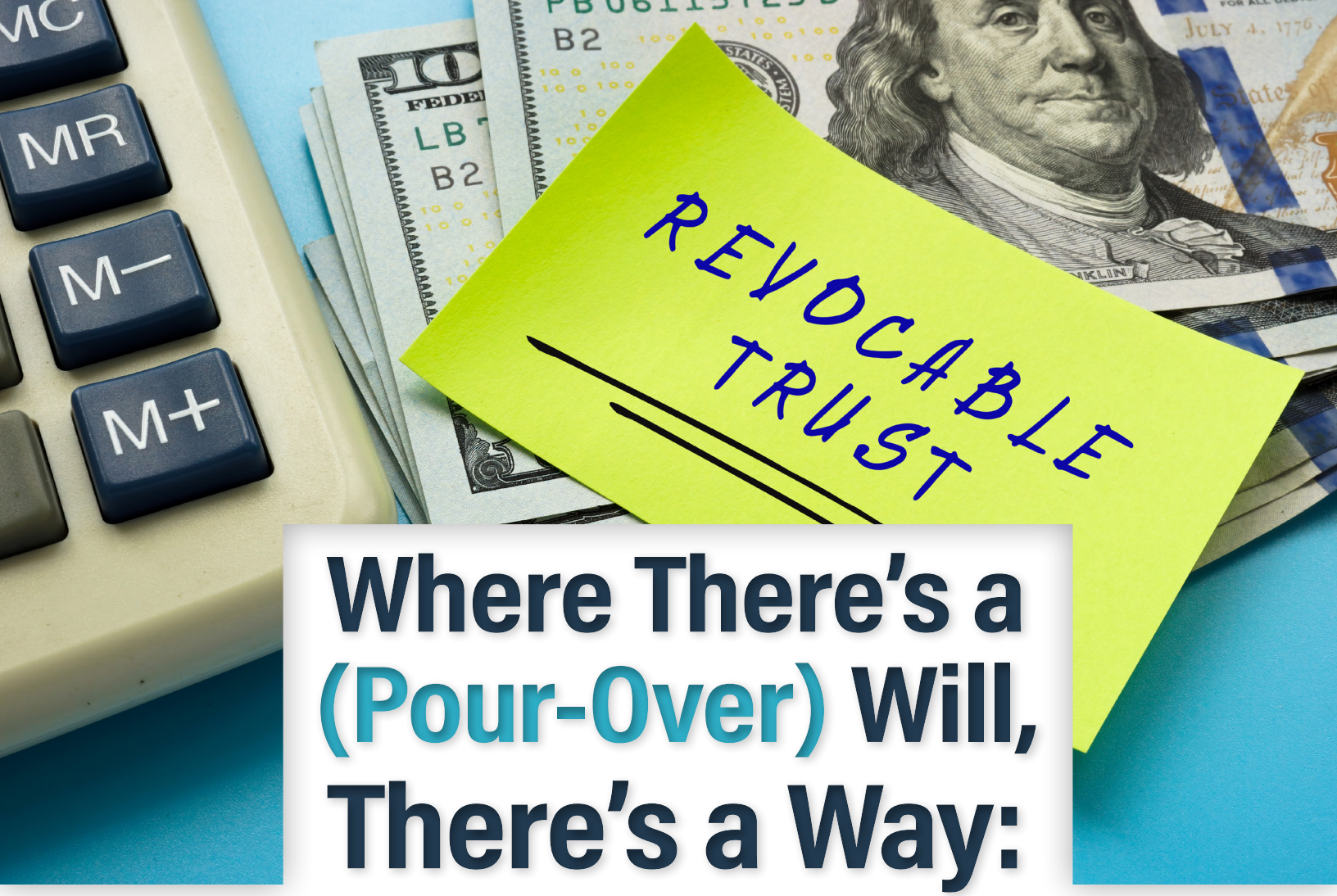

Where There's a (Pour-Over) Will, There's a Way:

Nevada's New Approach to Avoiding Probate with Revocable Trusts

BY EDMUND GORMAN, ESQ.

Revocable living trusts are among the first tools in the estate planning toolbox to help clients (and their families) avoid the costs and delay of probate proceedings while maintaining privacy and optimizing flexibility in the administration of assets after death. The device succeeds because once a person conveys all their assets into a trust, title to those assets is no longer held by that person as an individual, and when that person passes away, there are no assets in their name requiring probate. Instead, a successor trustee continues to administer or distribute the trust assets according to the terms of the trust instrument.[1] Much like the death of a corporation's president does not affect title to the assets of the corporation, death of a trust's settlor does not affect title to the trust's assets.

The caveat, however, is that in order to avoid probate by using a revocable trust, *all* the settlor's assets must be conveyed to the trust before the settlor's death. To do so requires only "a declaration by the owner of the property that he or she or another person holds the property as trustee." Nevada Revised Statute (NRS) 163.002(1)(a). As easy as this appears, however, and despite the best efforts of the estate planning attorney, it is all too common for a settlor to neglect to execute the necessary deeds, title certificates, and other instruments to convey property to a trust and satisfy the statute of frauds, *see* NRS 111.205, and the property not placed in trust is subject to probate proceedings after the settlor's death.

Heggstad and its Eastward Expansion

Help for these unfortunate settlors (and their attorneys) came beginning in the mid-1990s in the form of the groundbreaking California case known colloquially as

Heggstad[2], which gave rise to additional California caselaw and statutory changes that have been closely mirrored by statutory developments in Nevada. In *Heggstad*, the California Court of Appeals held that, where the settlor failed to execute a deed of real property to his trust, but identified the property by its common address in a schedule of assets, that he conveyed to the trust, "the written document declaring a trust in the property described in Schedule A […] constitutes a proper manifestation of his intent to create a trust."[3] Eventually the principle announced in *Heggstad* was expanded to apply even when the settlor does not identify the real property by name, but executes a "general assignment" or a statement in the trust granting to the trust the "right, title and interest" to "all of his real … property."[4]

The alignment of Nevada law with these developments in California law began with the addition of NRS 164.033 in 1999, allowing a trustee to petition the court "[i]f the trustee has a claim to property and another holds title to or is in possession of the property." NRS 164.033(1)(b). Even under this statute, a Nevada party seeking an order that un-deeded property should be declared property of a trust still had to rely on the persuasive authority of *Heggstad* and its California progeny.[5]

In 2015, the Nevada Legislature further amended Chapter 163 and Chapter 164 of the NRS to provide an independent statutory framework for *Heggstad*-type petitions completely independent of California law. The Legislature added an express basis for petitions seeking "a ruling that property not formally titled in the name of a trust or its trustee constitutes trust property pursuant to NRS 163.002." NRS 164.015(1). In addition, NRS 163.002 was amended to clarify that: "In the absence of a contrary declaration by the owner of the property or of a transfer of the property to a third party and *regardless of formal title to the property* […] p]roperty declared to be trust property, together with all income therefrom and the reinvestment thereof, must remain trust property." NRS 163.002(1)(a)(1) (emphasis added). After further amendments in 2017 and 2021, NRS 163.002 now also provides that "a declaration [of trust] may, but is not required, to include a schedule or list of trust assets that is signed by the owner of the property or that is incorporated by reference into a document that is signed by the owner of the property." NRS 163.002(2). And, under the same statute, a trust declaration that a person "holds *all* the property of the declarant in trust is sufficient to create a trust over *all* the property of the declarant that is reliably identified through the use of extrinsic evidence as belonging to the declarant at the time of his or her death."[6]

While Nevada has now codified the principles of *Heggstad*, allowing many trust settlors to avoid probate even when they fail to properly convey property into their trust, a petition under NRS 164.015(1) is not a panacea for all types of mistakes, inadvertence, surprise, or neglect. In order for an asset to be confirmed by the court as a trust asset, NRS 163.002 requires some type of "declaration" that the property is held in trust. In a case where, for example, there is no grant of property contained in the trust instrument itself, and the property is not included in a schedule of assets incorporated into the trust, then the property is not a trust asset, irrespective of the settlor's intentions, hopes, or beliefs. In another common situation, property once declared to be trust property might be conveyed out of the trust in order to satisfy a lender's requirements in a refinancing transaction. If the property is not subsequently deeded back into the trust, the newer deed constitutes a "contrary declaration" under NRS 163.002(1), and the property is no longer trust property. This is true even in cases where there is a will devising the estate to the trust (known as a pour-over will), because a pour-over will, while it controls the distribution of property after death, is not a "declaration" during the testator's lifetime that the property is (presently) trust property. Thus, even under the *Heggstad*-inspired Nevada statutes that make it considerably easier to avoid probate using a revocable trust, it remains all too possible that a settlor will expend the money and effort necessary to execute a revocable trust during lifetime, but through a lack of a sufficient "declaration" of conveyance under NRS 163.002, some or all of the settlor's property will still require probate after death.

Nevada's New Approach: Setting *Heggstad* Aside

Perhaps sensing the need for more uniform results in these unfortunate cases, in 2021 the Nevada Legislature enacted what has been codified as NRS 146.070(1)(b), which now provides:

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If a decedent's will directs that all or part of the decedent's estate is to be distributed to the trustee of a nontestamentary trust established by the decedent and in existence at the decedent's death, the portion of the estate subject to such direction may be set aside without administration.

Under this statute, the estate of a person who dies with a pour-over will can be distributed using the simple "set aside" procedure that was previously available in Nevada only for estates valued at $100,000 or less. The set-aside procedure involves a single petition and a single noticed hearing before the probate court, rather than the several petitions, hearings, and other procedural steps required in even the simplest of probate administration cases.

The ability for an estate involving a pour-over will and a revocable trust to be set aside without administration, without regard to the value of the estate, obviates the need for the vast majority of *Heggstad* petitions in Nevada, and helps to resolve the inequity that arises when certain estates can avoid probate through a *Heggstad* petition, while other *Heggstad* petitions fail because, through poor trust drafting, a lack of an asset schedule, or a refinance of real property, there is not a sufficient "declaration" that a property is held in trust. Under NRS 146.070(1)(b), any settlor who dies with a valid revocable trust and a pour-over will can avoid the probate process in Nevada, which is likely one of the primary reasons they created a trust in the first place. This change in Nevada law, which is (for now) unique among the 50 states, is likely to reduce costs, delay, and headaches for many thousands of Nevada families dealing with the transfer of assets after the loss of a loved one.

Of course, *Heggstad* petitions are still available under Nevada law, and it is unlikely that the need for them will disappear entirely. If, for example, a decedent's pour-over will cannot be found, or there is a will that does not devise the estate to the decedent's trust, reliance on NRS 163.002 may still be necessary to conduct the settlor's intent. A *Heggstad* petition might also be preferred if the trustee desires additional relief related to the trust under NRS 164.015. However, in most cases, NRS 146.070(1)(b) provides the easiest, most predictable, and most expedient means of avoiding probate by transferring a decedent's assets into trust when the decedent failed to do so before death.

ENDNOTES:

1. *See generally,* George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 231, at p. 5 (revised 2d ed.) (1992).
2. *Est. of Heggstad*, 16 Cal. App. 4th 943 (1993).
3. *Id.* at 16 Cal. App. 4th 943, 948.
4. *Ukkestad v. RBS Asset Fin., Inc.*, 235 Cal. App. 4th 156, 164 (2015)
5. Though Nevada adopted a statutory framework that no longer relies on the persuasive authority of *Heggstad*, a petition under NRS 164.015(1) seeking a ruling that property not formally titled in the name of a trust or its trustee constitutes trust property pursuant to NRS 163.002 is still commonly referred to as a "*Heggstad* petition" by attorneys in this state, and this article maintains this colloquial shorthand.
6. 163.002(2) (emphasis added); This amendment adopts the holding of the California Court of Appeals in *Ukkestad*, 235 Cal. App. 4th 156.

EDMUND J. GORMAN

serves as the Probate Commissioner for the Second Judicial District Court. Prior to joining the court, he maintained a general civil law practice in Reno, focusing on estate and business matters, and he served as chief judge for the Fallon Paiute-Shoshone Tribe.