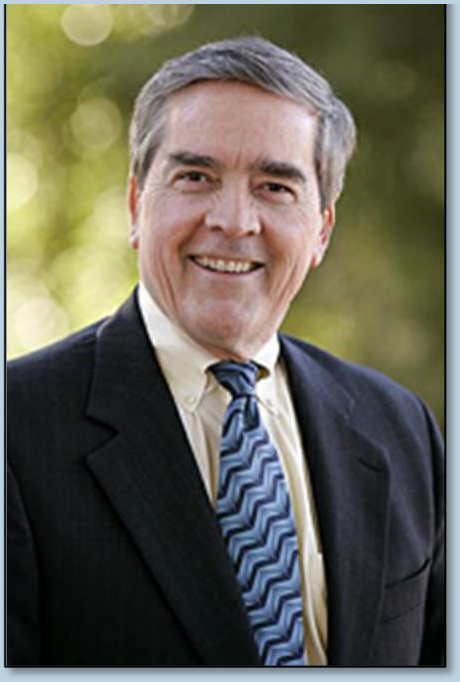
Welcome to the MMB&M Newsletter

Fall 2018

MONROE MCDONOUGH BRENT & MORALES, PLLC
ATTORNEYS AT LAW

Congratulations to Lawrence McDonough!

This summer marked the 50th anniversary of his admission as a licensed attorney!



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SOUTHERN ARIZONA REAL ESTATE LAW FIRM

Preparing for Estate Planning

By: Heidi Rib Brent
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My son and his wife, who live in another state, recently asked me what they need to know before they meet with an estate planning attorney. I share with you essentially what I sent to them:

You will each need a Will, which designates your Personal Representative (other states call this an "Executor"), who will gather your assets and direct them to the person you designated as beneficiary, for instance for your life insurance or "POD" (payable on death) or "ITF" (in trust for) accounts. The Personal Representative will distribute the rest of your assets as you designate in your Will. If you decide to have a Trust, generally probate will "pour over" the rest of your assets into your Trust.

The other important part of the Will for young families is the designation of a Guardian and Conservator for your minor children. The Will should be written to impact not just children you have now, but any subsequent children, so your Will does not need to be re-written each time. A Guardian cares for their health and welfare, decides where they live, go to school, activities, etc. A Conservator manages the money and determines if there are funds for the Guardian's decisions regarding your children. Your selection of Guardian and Conservator may be the same person, but doesn't need to be. It may be good to have different people for their strengths or as checks and balances; or the same people so as not to create conflict. Your choices depend on your circumstances and your people. You should be prepared with alternatives in case your designees are not willing or able to accept these important roles.

If you create a Trust, the two of you will be the Trustors or Settlors (same thing, meaning creators of the Trust) and also the original Trustees (ones who control the assets). If one of you is incapable, the other should be designated to act as sole Trustee. Then, if both are incapable, you should designate at least two alternatives to succeed the two of you as Trustees. These need to be people you trust to manage your money and assets. Your Successor Trustees are not necessarily the same people to make decisions for your health and children, but frequently the same people as you select for Conservator. You also will need to decide if part or all of the Trust becomes irrevocable once one of you becomes incapable or dies. That protects the assets from a subsequent relationship, but also ties the hands of the survivor.

A Durable (so it lasts even if you are incapacitated) Health Care Power of Attorney ("POA") designates a health care decision maker if you can't speak for yourself while you are alive. Designees are usually each other, then two alternatives, who know or you trust to learn your health decisions. Be sure this document says that your selection of health care POA would be your Guardian if you ever needed one.

A Living Will sets forth your ideas about extended life support, organ donation, etc. This document is shared with your Health Care designee so that person can make decisions as you would want made.

A Durable Financial Power of Attorney specifies who, while you are alive, can make financial decisions for assets that are outside your trust. It is always good to cover your bases and have this, too. It's part of the package. Generally, designate the same people as Successor Trustees. Be sure this document says that your selection of POA would be your Conservator if you ever needed one.

Some do-it-yourself forms you can buy in stores or online make it appear that you just plug in names and specifics; however, be mindful that these decisions are some of the most important you will ever make. You should fully evaluate your assets, including those directed through your Will and/or Trust and those that will pass outside of your Will or Trust, your intended beneficiaries, and your agents to carry out your wishes. You also should carefully review drafts and ask your attorney what you do not understand. You need to make sure that your documents reflect exactly what you intend.

Our firm does personalized estate plans and we are happy to meet with couples or individuals to review current estate plans and revise or rewrite them as necessary so you can be sure you get what you want.

Service of Process in the Digital Age

By: Anne Terry Morales
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In the recent case of *Ruffino v Lokosky*, No. 1 CA-CV 17-0353 (July 12, 2018), the Arizona Court of Appeals set aside a default judgment on the grounds that the Defendant, Lokosky, had not been given proper notice of the lawsuit. Ruffino, the Plaintiff, hired a process server who performed a "skip trace" to find where the defendant was living in order to serve the Defendant. The search came up with three potential residences. The process server went to the first residence and spoke with the Defendant's mother, who stated that the Defendant did not live there. At the second residence, the process server was told that the person living there was a renter and that the Defendant did not live there. After six unanswered attempts at service, the process server determined that the third residence was unoccupied. The Plaintiff then requested permission from the court to allow service by posting at the first two addresses, mailing at the third, or by publication. The court denied the request stating that only one attempt had been made to serve the Defendant at the first two addresses and that those attempts had been made during the holiday season. After one more unsuccessful attempt to serve the Defendant at the first address and without mailing a copy of the summons and complaint to any of the addresses, the Plaintiff served the Defendant by publication. A default judgment was thereafter entered for damages and for

injunctive relief, allowing the Plaintiff to take control of the Defendant's website. When control of the website was transferred to the Plaintiff, the Defendant immediately moved the court to set aside the default judgment. After an evidentiary hearing, the court set aside the default judgment, finding that the Defendant received insufficient service.

On appeal, the Arizona Court of Appeals agreed that the Defendant had not been served properly and that, notwithstanding the "skip trace," the Plaintiff had not demonstrated "reasonably diligent efforts" to determine the Defendant's address. In this dispute that arose from internet conduct, the Court of Appeals found that a "reasonably diligent effort by Ruffino would have included reaching out to Lokosky via telephone, email, or even social media to verify her correct address." In addition, the Court of Appeals found that service by publication was not the best means practicable to serve the Defendant. Instead "modern methods of communication, especially email, were more likely to give Lokosky notice of a suit than publication in a newspaper distributed in a rural area 70 miles from Lokosky's Scottsdale home."

Ruffino v. Lokosky has moved the requirements for valid service of process into the digital age. If "more practicable channels of communication are available," a serving party must now first attempt to contact the other party via those methods (i.e. cell phone and/or email, Facebook, Twitter, Instagram or other social media) to demonstrate that they have made "reasonably diligent efforts" to determine the address. In addition, those same methods must be considered before service by publication is permitted.

The firm enjoyed participating in the Tucson Association of REALTORS® 2018 Real Estate Expo, where the theme was TV "Sit Coms". We focused on the many legal Sit Coms over the years and created our own "TUCSON LEGAL".

Arizona Department of Housing Unveils its Proposed Eviction Prevention Program

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This summer, at meetings in Phoenix and Tucson, the Arizona Department of Housing ("ADOH") sought public input regarding its proposed Eviction Prevention Program. The Program is designed to combat the rising number of evictions occurring throughout the State of Arizona. Last year, in Pima County alone 13, 312 eviction actions were filed and almost 4,000 Writs of Restitution/Eviction were issued to tenants who did not move out after an eviction order was entered against them. ADOH's presentation emphasizes the breadth of issues caused by these eviction rates by quoting from sociologist Matthew Desmond's book "Evicted": "Eviction isn't just a condition of poverty; it's a cause of poverty…" and "a cause of residential instability, school instability [and] community instability."

In response ADOH has set aside $2 million as initial funding for its proposed three-prong eviction prevention program: (1) Referral, (2) Financial Assistance, and (3) Legal Aid Services. Under the "Referral" prong ADOH intends to establish a toll-free telephone number that will refer callers to applicable resources. The two primary resources also will be the two remaining prongs of the program: "Financial Assistance" and "Legal Aid Services." The "Financial Assistance" prong will make immediate financial assistance available to Qualifying Tenants facing an impending eviction. The proposal states that "Qualifying Tenants" are those tenants whose household incomes are at or below 60% of the area's average median income and who have received a five-day notice of eviction due to non-payment of rent. After being referred to a designated entity, the tenant will be interviewed to determine their program eligibility. Thereafter each eligible tenant will receive immediate financial assistance to prevent the eviction. Under the third prong, eligible tenants will be referred to a local entity for free or reduced-price Legal Aid Services regarding various legal issues. For instance, a tenant who is having difficulties with their landlord due to the landlord's failure to provide reasonable accommodations for the tenant's disability or a tenant who is confronted with unsanitary or uninhabitable living conditions will be referred to a lawyer help to solve those issues. In Pima County, tenants will be referred to Southern Arizona Legal Aid or Step Up to Justice. A copy of ADOH's presentation regarding the program is available on ADOH's website at https://housing.az.gov/sites/default/files/documents/files/Eviction-Prevention-PPT.pdf. The period for public comment on the Eviction Prevention Project Proposal ended on August 24, 2018. It is anticipated that the final version of the program will be available for use by Arizona tenants soon.

Do It Yourself Wills

By: Heidi Rib Brent
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Some people either to save money or due to urgent circumstances, decide to write their own Wills. It creates a sad situation when those Wills do not meet the statutory requirements to be enforceable. I recently encountered several such situations, so I felt this important to share.

In Arizona, a Will must be signed by the Testator (the person whose Will it is) or Testatrix (a female Testator) and at least two witnesses, who either witnessed the Testator's signature or the Testator's acknowledgement of his signature. A.R.S. §14-2502(A). Then, to admit such a Will to probate would require testimony of the witnesses that it was the signature of the Testator, who had the intent that it be his Will. Arizona statutes also provide that intent that a document be considered a Will may be established by other evidence, (A.R.S. §14-2502(B)); however, that would require testimony of a witness that could overcome cross-examination that the witness was simply testifying to benefit himself or herself.

To make a Will "self-proving" and avoid the need for any testimony to prove the signatures and intent, the Testator's signature, as well as the signatures of the witnesses, should be notarized. Thus, a self-proving Will should be signed by the Testator and the two witnesses in front of a notary licensed by the State of Arizona. A.R.S. §14-2504.

Arizona also provides for Wills to be valid as "holographic." A holographic Will must have all material provisions in the Testator's own handwriting and be signed by the Testator and then it does not need to be witnessed or notarized. A.R.S. §14-2503. However, if contested at all, a handwriting expert would be required to testify that the material provisions of the Will and signature match other known specimens of the Testator's handwriting.

In a recent situation, a Testator asked her daughter to write out her Will and then the Testator signed it without witnesses other than the daughter, who was one of the beneficiaries. Thus, the Will was not valid as holographic, as none of the material provisions were in the Testator's handwriting and the only witness was one who stood to inherit more under the proposed new Will. Any contest would easily set that Will aside in favor of a prior, fully self-proving Will.

In another recent situation, my client's mother wrote a letter to revise her fully self-proving Will. The mother wanted to include provisions for her long-term boyfriend to stay in her house cost-free for the remainder of his life and receive additional funds. The letter was typed, but signed and dated. There were no witnesses to the letter. Thus, it did not qualify as a holographic Will and no one could sufficiently testify as to the mother's signature and intent to overcome the prior self-proving Will.

Finally, I was asked if a friend could type up the Will for the Testator and for the Testator to sign it. They could not arrange for any other witnesses or a notary. I advised that in Arizona, it would be difficult to prove that as a Will, especially if the person preparing the Will also benefits under it.

The long and the short of it is, it is less costly to prepare a self-proving Will with all of the statutory requirements than to have to go to Court to later prove the Will valid. Our office can assist with self-proving Wills, usually as part of an estate planning package, which includes financial and health care powers of attorney.

Update to: Are Defaulting Homeowners Off the Hook

(from Spring 2017)

By: Heidi Rib Brent
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This summer the Arizona Supreme Court overruled the Arizona Court of Appeals decision in *Mertola, LLC v. Santos,* which impacts the statute of limitations (SOL) for collection of a written debt. *Mertola* involved collection of a credit card debt. The Court of Appeals held that a creditor must take some "affirmative act to make clear to the debtor it has accelerated the obligation" before the 6-year SOL begins to run. The Arizona Supreme Court, however, relied on the premise that a SOL is designed to protect borrowers from "stale claims and uncertainty." The Court held that since the contract contained an optional acceleration clause, the SOL on an action to collect the entire outstanding debt began when the borrower first failed to make a minimum monthly payment. This holding will require creditors to act promptly to collect on past due accounts. However, by bringing the account current, the debtor ends that cause of action and the next default begins a new action and restarts the SOL.

The Arizona Supreme Court specifically declined to decide whether to apply the same reasoning to closed-end or fixed installment loans such as home loans. The current Court of Appeals cases on home loans, including *Navy Federal Credit Union v. Jones* (App. 1996) and *Baseline Financial Services v. Madison* (App. 2012), hold that the lender cannot sue to collect the outstanding balance unless or until the borrower fails to comply with a demand for payment in full or a notice accelerating the debt. This current rule frustrates some borrowers who, especially during the housing crash, waited years for their lenders to act on past due home loans, adding years of bad credit, when the lender should have conducted a trustee's sale already. There was nothing the borrower could do to force the lender to conduct a trustee's sale, foreclose or accept a deed in lieu of foreclosure so that the borrower could move on and reestablish their credit. If the Arizona Supreme Court does apply the *Mertola* holding to home loans, lenders who wait more than 6 years to enforce the contract could wind up with borrowers owning their homes without making further payments!

Older-Age Restrictions Are Permitted

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For the most part, age discrimination in real estate matters if prohibited. An exemption in the Fair Housing Act of 1968, however, allows for 55-and-older age restrictions for retirement communities. To qualify for the exemption at least 80% of the homes in the community must be occupied by someone who is 55-years-old or older and the restriction must be put in place at the time of creation of the community and can't be imposed later. Various age-restricted retirement communities that were in existence at the time the Fair Housing Act was passed lobbied for the exemption. Given that many residents of retirement communities are on fixed incomes, avoiding the property taxes associated with building and funding schools continues to make the exemption an important factor in the proliferation of 55-and-older communities.

What's Happening Around Tucson 2018!

Mt. Lemon Ski Valley Octoberfest, October 6-21
http://www.skithelemmon.com/index.html

Buckelew Pumpkin Festival & Corn Maze, October 20, 21, 27, 28, 11am–5 pm, 17000 W. Ajo Way
http://tucsonpumpkins.com/?cid=mc-5c9a04b152103dd4d0e92809eec1e4d6&month=10&yr=2018

Tucson Fire Fighters Chili Cook-Off, November 3, 10 am-10 pm, Reid Park Bandshell
https://www.visittucson.org/event/tucson-firefighters-23rd-annual-chili-cook

El Tour de Tucson, November 17
http://www.perimeterbicycling.com/el-tour-de-tucson/

Holiday Arts & Crafts Fair at Reid Park, November 24-25
https://www.tucsonaz.gov/parks/announcement/annual-holiday-arts-and-crafts-fair

Tucson Happenings Calendar - http://tucsonhappenings.com

Tucson Entertainment Events Calendar - http://www.emol.org/tucson/events/

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