



The
Advocate

Official Publication
of the Idaho State Bar
Volume 55, No. 8 August 2012

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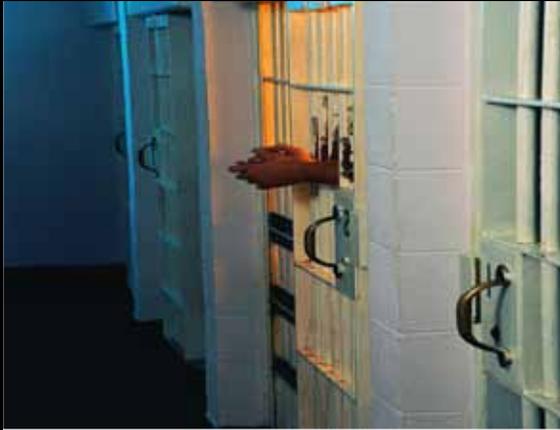
ISB President Molly O'Leary took this photo of Daisy Tappan in 1980. Molly said her subject "embodied the grit and spirit of the American woman." Daisy grew up in the Idaho backcountry along the Middle Fork of the Salmon River and later returned there to raise her two sons on a small homestead where she and her husband ranched and raised a garden. The photo was selected as part of Parade Magazine's 1988 "The American Woman" touring exhibit and book. It is also featured on the back cover of Cort Conley's book, "The Middle Fork of the Salmon River – A Guide." Molly and her husband Neil were planning to take a rafting trip in late July into the back country to install a commemorative sign honoring Daisy's life, (page 19).

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Special thanks to the August editorial team: Anna E. Eberlin, Gene A. Petty and Brent T. Wilson.



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Get to Know Concordia Law Q&A with Matt Comstock, 1L



Members of Concordia University School of Law's inaugural class have been hard at work preparing for law school. For one student, this has required regular virtual meetings with a volunteer group committed to developing the Student Bar Association (SBA).

Boise native, Matt Comstock has eagerly participated in drafting the SBA constitution despite living over 2300 miles away in Washington D.C. Aside from a quick visit to Boise in April, his interactions with the staff and other admitted students have been conducted via email, LinkedIn, and by Skype(ing) in on SBA discussions.

When Concordia became an option for law school, the decision was easy. I've desired to return to my hometown for many years.

—**Matt Comstock**
United States Investigative Services in Washington, D.C.
Incoming Concordia Law 1L

As part of a new law school, the SBA will play a significant role in developing a positive, supportive, and active student body while promoting fellowship and communication between students, faculty, administration, and the legal community.

—**Tamara Martinez-Anderson**
Assistant Dean of Admission
Concordia University
School of Law

Q: As a Boise native, how do you see having a law school in Boise impacting the legal community?

A: Having a law school in Boise means there will be a readily available source of motivated, hardworking, and intelligent students willing and eager to help out with public service projects, pro bono work, internships, and externships. In addition, the Legacy Mentor Program being established at Concordia Law gives it a mutually beneficial relationship to the Boise legal community.

Q: What kind of law do you see yourself going into?

A: While I do have an interest in becoming a trial lawyer, I plan to keep my options open. There are many areas of law I'm interested in learning about. I'd like to go into any kind of law where I'm able to use my knowledge of the law to help others and I think there are many different types of law which could enable me to do so.

Q: What are you most excited about when school begins?

A: I'm most excited about being challenged in a way that will allow me to gain the knowledge and develop the skills I'll need as a future attorney. I'm excited about the whole adventure of it. This really feels like the beginning of the rest of my life. This is where my career begins. It's not when I get a job as a lawyer. It's right now while I'm learning and being taught how to use my mind as a legal instrument.

Concordia Law SBA Planning Committee

Chynna Tipton: A Lead Intelligence Analyst for the Idaho National Guard, Chynna recently returned from Baghdad, Camp Victory Iraq.

Craig Cannon: A father of two daughters and a recent graduate of Central Washington University.

Erik Person: A combat veteran, Eric returned from Iraq and became involved with the Agency for New Americans working with Iraqi refugees.

James Page: A small business owner and father of four, James completed his degree in Criminal Justice at Boise State.

James Corpstein: An import/export compliance manager with an MBA from Boise State, James is eager to start an International Law Society at Concordia Law.

Lisa Carlson: A freelance writer who majored in Biological Science and minored in Chemistry.

Matt Hitchcock: An Iraqi Freedom veteran, Matt teaches high school in Meridian while serving as a Staff Sergeant in the U.S. Army Reserve.

Lance Pounds: A graduate of NNU, Lance is a long-time board member for the Eastern Oregon Center for Independent Living.

Spencer Lay: A veteran who served as a U.S. Marine in both Afghanistan and Iraq, Spencer returned to Boise and used his leadership skills as president of the BSU Pre-Law Society.

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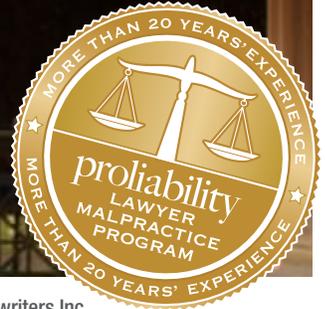
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ADVOCATE STAFF

Dan Black

Managing Editor

dblack@isb.idaho.gov

Bob Strauser

Senior Production Editor

Advertising Coordinator

rstrauser@isb.idaho.gov

Kyme Graziano

Member Services Assistant

LRs Coordinator

kgraziano@isb.idaho.gov

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September

September 25

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“Why Do I Have To Be The One To Take Care Of Dad?”



When Dad started slipping mentally and mom was overwhelmed, somebody had to be the one to help. I still lived in the same town, and I was the “girl” so the role fell to me.

But I have my own family. Dad won’t move, so now I have two households to run. My husband is starting to get resentful. I thought about moving Dad to an assisted living facility, but they are very expensive and my brothers claim they can’t afford to help financially. I don’t want to abandon my parents, but what do I do?

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DIVERSITY – WHAT IS PAST IS PROLOGUE

Molly O'Leary
President, Idaho State Bar
Board of Commissioners

I would like to dedicate this inaugural column as president of our state bar to my mother, Mary Kathryn Callaghan O'Leary. As a song my younger brother penned in honor of her 93rd birthday described her, "She was a lover and a fighter and one busy letter writer." That line captured her compassion towards others, her willingness to stand up for what she believed in, and her life-long habit of sharing her thoughts through neatly typed letters to the editors of her local newspapers and to elected officials from town hall to the halls of Congress. When she got connected to the brave new World Wide Web in the 90s we joked, "Watch out Washington, Mary O'Leary's got e-mail!" She passed away in 2009 at the age of 95.

Apart from the fact that Mom was an incredible role model during the 56-plus years our lives intersected, it seems fitting to dedicate this column to her as she had once dreamed of going to law school. It wasn't until I announced that I intended to go to law school that she revealed her aspiration to me. When I asked why she had not gone to law school – for clearly she had the intellect and civic passion to have excelled as a lawyer – she responded with only a hint of regret that, due to the Great Depression and the limited job opportunities that followed, she elected to go to business school instead and use a portion of her earnings as an executive assistant to help put her younger brother through law school.

So, Mom, this one's for you.

Diversity in the legal profession

Have we really come a long way, baby?



Molly O'Leary

When I read about pioneer women such as Daisy, or Polly Bemis, or the World War II feats of the Rosie the Riveter brigades, I can't help but wonder why diversity is even a topic of discussion?

The cover of this month's *Advocate* is graced by another strong, capable woman, the likes of which my mother would've thoroughly enjoyed meeting. Her name was Daisy Erma Paulsen Tappan. I had the good fortune of meeting Daisy in her early seventies, when she lived on and single-handedly worked a ranch property in the Pahsimeroi Valley, next to an anthropology field school where I was teaching photography.

Daisy was born in Prineville, Oregon, to Alex and Fannie Watson Paulsen in 1908. Her family moved to the Middle Fork of the Salmon River when she was a young girl and she and her brother Fred spent their childhood years living in what is now the Frank Church River of No Return Wilderness near Indian Creek.

Daisy later returned to the Middle Fork area with her husband Fred Tappan to raise their two sons in a small log cabin on what has been known ever since as the Tappan Ranch, at the mouth of Grouse Creek. Together they raised cattle, horses and a few milk cows, and put up hay to feed their stock through the long winters. As if raising hay in such rough country wasn't daunting enough, Daisy and Fred had to pack the haying equipment into the back country by horses when they set up their home.

In addition to tending to the ranching chores, Daisy grew a big garden with strawberries, watermelons, blackberries, raspberries and muskmelons, as well as corn for her chickens. She canned all of their fruits and vegetables. When she wasn't growing and preserving food for

the family's subsistence, Daisy looked after her sons and fought off the bears that frequently swam the river to feast on the bounty of her orchard.

After several years of investing their sweat equity to improve the hand-hewn homestead, the Tappans were forced to move from the Middle Fork when their grazing permit was discontinued. From there, they moved on to Yellow Pine, Idaho, where Daisy transported her sons three miles to school each day by dogsled team in the winter, and then mushed six miles out to the nearby landing strip to pick up the day's mail, before returning to Yellow Pine to deliver the mail and retrieve her sons from school for the sled-ride home.

Joe Anderson, an early pioneer of boating on the Middle Fork, recalled at the time of Daisy's passing that "Daisy loved the great outdoors. She loved her animals, especially a good horse. She could handle a pack string of horses or mules better than most. And she could break, train and ride a horse with the best of them. When it came to handling a gun, she was a crack shot. I believe Daisy could outwork, out shoot and outride most men, and she didn't mind telling them."

So, what does Daisy's story have to do with diversity in the legal profession? I don't know about you, but when I read about pioneer women such as Daisy, or Polly Bemis, or the World War II feats of the Rosie the Riveter brigades, I can't help but wonder why diversity is even a topic of discussion? What distorted looking glass did our culture fall through that causes our society to even entertain a de-

DAISY ERMA PAULSEN TAPPAN

MARCH 5, 1908 – APRIL 24, 1984



Daisy was born in Prineville, Oregon, to Alex and Fannie Watson Paulsen. Her family moved to the Middle Fork of the Salmon River when she was a young girl. Daisy and her brother Fred spent several of their childhood years living in the Middle Fork area near Indian Creek.

In 1925, Daisy married Fred Tappan and they had two sons, Stanley Charles Tappan and James Howard Tappan. Daisy and Fred raised their two sons in this cabin on what has been known ever since as the Tappan Ranch, at the mouth of Grouse Creek. The Tappans reportedly bought the homestead from Willis Jones for \$1200. They raised cattle and grew a big garden with strawberries, watermelons, blackberries, raspberries and muskmelons.

Joe Anderson, an early pioneer of boating on the Middle Fork, recalled at the time of Daisy's funeral that, "Daisy loved the great outdoors. She loved her animals, especially a good horse. She could handle a pack string of horses or mules better than most. And she could break, train and ride a horse with the best of them. When it came to handling a gun, she was a crack shot. I believe Daisy could outwork, outshoot and outride most men, and she didn't mind telling them."

SOURCES:

Daisy Erma Paulsen Tappan Obituary, published April 28, 1984, *The Challis Messenger*.
Daisy Tappan – The Legend Lives On, published May 3, 1984, *The Challis Messenger*.
Mile-by-Mile Guide, www.middleforkofthesalmon.com, ...

This interpretive sign was scheduled to be placed at the Tappan Ranch up the Middle Fork of the Salmon River in July by Molly O'Leary. It was designed by Mark Baltess and is made of ceramic and iron.

bate about whether women – or other political minorities – are qualified to work shoulder-to-shoulder with their political majority peers, regardless of the task?

Lead a pack train over mountainous terrain? Check. Hay the upper and lower fields to provide feed for the stock through the winter? Check. Sew, grow, harvest and preserve the land's bounty? Check. Ward off bears and face the fears of an uncertain, hard-scrabble existence? Check. Educate the future generation and deliver the mail through rain, snow sleet and ice? Check.

Diversity? Bring it on. I think we can handle it.

About the Author

Molly O'Leary represents business and telecommunications clients throughout Idaho, and is a managing member of

Richardson & O'Leary, PLLC, in Boise (www.richardsonandoleary.com). Ms. O'Leary began her service on the Idaho State Bard Board of Commissioners in August 2010 and will serve through July 2013. Her term as President of the ISB began at the conclusion of the Bar's annual meeting in July of this year. In addition to her service to the Bar, Ms. O'Leary serves on the statewide advisory council for the Idaho Small Business Development Center and is actively involved in a variety of community and neighborhood-related issues. You can follow her on Twitter: @BizCounselor.

Endnotes

- ¹ Biographical sources for Daisy Tappan:
- ² *The Middle Fork – A Guide*, by Johnny Carrey and Cort Conley, Backeddy Books, © 1992.
- ³ *Daisy Tappan – Her legend Lives On*, *The Challis Messenger*, May 3, 1984.

What distorted looking glass did our culture fall through that causes our society to even entertain a debate about whether women – or other political minorities – are qualified to work shoulder-to-shoulder with their political majority peers, regardless of the task?

ABA honors Idaho Public Television for documentary

The American Bar Association announced its selections for the Silver Gavel Awards for Media and the Arts, which recognize outstanding work that fosters the American public's understanding of law and the legal system. This is the ABA's highest honor in recognition of this purpose, and no more than one Silver Gavel is presented in each category.

For television, the Silver Gavel was awarded to Idaho Public Television's program called *The Color of Conscience: Human Rights in Idaho*. The work was produced, written and hosted by Marcia Franklin and filmed and edited by Jay Krajic.



Marcia Franklin

The awards presentation was held on July 17 at the National Press Club in Washington, D.C. ABA President Wm. T. (Bill) Robinson III will present the awards.

The ISB Diversity Section and Idaho Public Television will hold a panel discussion and documentary screening on Tuesday, Sept. 25, from 4 - 7 p.m. (MDT), which will be eligible for 1.0 CLE credit - RAC. It will be held at the offices of Idaho Public Television, 1455 N. Orchard Street, Boise. The event will also be web-cast. Cost for CLE is \$35.

Family Law section selects Judge DeMeyer for award

Third District Magistrate Judge Gary Dale DeMeyer has been selected by the Family Law Section for its Annual Award, which was presented at the Annual Meeting in Boise. The Section stated Judge DeMeyer earned the recognition because he "shows concern about how the outcome of a case involving custody will affect the children. Every family law attorney appreciates Judge DeMeyer's demeanor and char-



Hon. Gary D. DeMeyer

acter in the courtroom, whether the attorney wins or loses. Simply put, Judge DeMeyer makes the attorneys and the parties before him feel better about the process."

Fourth District Magistrate Judge appointed

The Magistrate Commission for the Fourth Judicial District has appointed Lynnette L. McHenry of Boise as magistrate judge in Ada County. Judge McHenry has been employed as senior counsel at Naylor and Hales law firm in Boise since 2011. She also currently serves as a hearing officer for the Idaho Department of Education Special Education Division.



Hon. Lynnette L. McHenry

Since 2000, Ms. McHenry also serves as the Loss Control Officer for the Idaho Counties Risk Management Program, (ICRMP), where she provides loss control legal advice and training to over 750 ICRMP members. From 1995-2000, Ms. McHenry served as Chief Deputy Prosecutor for the Nez Perce County Prosecutor's Office, where she handled all civil matters for the county, including juvenile and child protection, as well as misdemeanor and mental commitment hearings.

Ms. McHenry is admitted to the practice of law with the State Bar of Idaho and the United States District Court. She holds a Bachelor's of Science degree from Lewis-Clark State College and a J.D. from the University of Idaho College of Law.

Ms. McHenry began her Ada County assignment to the Juvenile Court on July 2.

Third District Magistrate Judge appointed

Third Judicial District Administrative District Judge Thomas J. Ryan announced the selection of Jayme Beaber Sullivan of Nampa as a Magistrate Judge for Canyon County to fill the vacancy being created by the retirement of Hon. Robert M. Taisey on July 6. Ms. Sullivan was selected from a field of five applicants at a meeting of the Third District Magistrates Commission in Caldwell on May 24.

Ms. Sullivan received both her undergraduate degree in English and Spanish

literature and law degree from the University of New Mexico. She began her practice of law in Boise at the Herrington Law Offices. She was associated with the Wiebe & Fouser, P.A. law firm for six years practicing criminal defense law as a public defender in addition to practicing in the areas of divorce, adoption, immigration and administrative law. For the past five years, Judge Sullivan has been in general practice with the law office of Coffel & Beaber, P.C. in Nampa, where she has focused on the intersection of family, criminal and immigration law. Ms. Sullivan was involved as a core team member on Canyon County's first problem-solving court, the felony drug court, and she served on the committee that drafted the guidelines and regulations for the Canyon County Mental Health Court.



Hon. Jayme Beaber Sullivan

Ms. Sullivan is a resident of Canyon County and began her judicial duties on July 9 at the Nampa Section of the Canyon County Magistrates Division.

Fourth District appoints new Idaho Legal Aid Board member

Fourth District Bar Association President Teresa Hill announced that the new designee on the Idaho Legal Aid Board for the Fourth District is Ammon Hansen, an associate at Holland and Hart in Boise. He replaces the outgoing board member, Susan Graham. Hill said that the Fourth District "greatly appreciates Ms. Graham's commitment to the Board and service on behalf of the Fourth District."

The Executive Committee for the Fourth District selected Mr. Hansen. Idaho Legal Aid Services is governed by a 19-member board of directors, comprised of attorneys and clients. These board members are appointed by Bar Associations and client organizations. They serve as volunteers and oversee ILAS' policies and operations.



Ammon R. Hansen

Pro bono legal clinic helps fire victims

A wildfire in Pocatello ended up destroying 66 homes and 29 outbuildings, prompting the Sixth District Bar Association to organize a pro bono legal clinic on July 11 at the Bannock County Courthouse. Its purpose is to assist the victims of this devastation with any fire-related issues they may have (e.g. completing insurance claims, reassembling estate documents, etc.). Shifts were organized depending on the number of volunteers. Those interested in learning about the effort can contact Steve Herzog at sherzog@pocatello.us or (208) 241-6928.

Sherman J. Bellwood Memorial lecture Oct. 3

This year's University of Idaho College of Law Bellwood Lecture features Kenneth R. Feinberg, who will speak about "Unconventional Responses to Unique Catastrophes: Tailoring the Law to Meet the Challenges."

Named the "Lawyer of the Year" in 2004 by the National Law Journal, and listed repeatedly in the Journal's "Profiles in Power: The 100 Most Influential Lawyers in America," Kenneth Feinberg is the nation's leading authority on mediating disputes and administering compensatory awards in mass injury cases.

Mr. Feinberg has earned his national prominence through high-profile service in many of America's most controversial and emotionally laden cases. He may be best known for serving, upon request by then-U.S. Attorney General John Ashcroft, as Special Master of the Federal September 11th Victim Compensation Fund of 2001, a 33-month pro bono undertaking in which he evaluated applications, determined appropriate compensation, and paid awards to victims of the 9/11 terrorist attacks.

He later described this heart-rending work in his book, *What Is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11* (Public Affairs, 2005). A few years later, Mr. Feinberg was designated as administrator of the Hokie Spirit Memorial Fund following the tragic shootings at Virginia Tech. Most recently, he has served at the request of the Obama

Administration and British Petroleum as administrator of the BP Deepwater Horizon Compensation Fund, established to expedite compensation to victims of the Gulf oil spill.

The schedule for his Idaho visit includes a reception and presentation in Boise at 5:30 (MDT), Oct. 3 at the Boise Centre. This event is free and open to the public; however, seating is limited and an RSVP is required by September 14. You may register online at www.uidaho.edu/law-events, via email at law-events@uidaho.edu, or call (208) 885-2256.

He will also give a public lecture in Moscow on Thursday, Oct. 4 at 3:30 (PDT), at the Administration Auditorium.

The lecture is free and open to the public, with doors opening at 3 p.m. It will also be available via webcast on U-Idaho Live (www.uidaho.edu/live).

To learn more, please visit www.uidaho.edu/bellwood.

East Idaho takes on pro bono challenge

The Seventh District Bar has accepted the challenge thrown down by the Fifth and Sixth District Bars and joined this year's Pro Bono Golf Challenge. The rules of engagement are as follows:

For the time frame May 1 to Sept. 1, each district will receive one point for:

1. Each new pro bono case taken
2. Each hour spent on a pro bono case whether a new one, or an ongoing case that the lawyer started prior to May 1
3. Each hour spent in the community advancing the legal profession. Examples of Category 3 hours include, but are not limited to, hours spent on Law Day activities, Lawyers in the Classroom, Citizen's Law Academy, Court Assistance Office Clinics, Ask a Lawyer and preparing and teaching CLEs.

If you are donating time to advance the profession in other ways, let the District President know what you did and the

hours you contributed. Pro Bono mediation hours qualify as well. Also, if you haven't adopted a pro bono policy for your office, each new policy adopted by an office will still count for a point.

This year districts are not going to add in judicial hours spent doing good deeds. If you have a little time, please consider getting on board with those who are already working at this in the three districts. The local bar officers of all of the districts are on board.

The Fifth District Pro Bono Committee is led by, among others, Mike McCarthy, (mikemccarthy@idaholegalaid.org), the Sixth by, among others, Dave Gardner, (dpg@moffatt.com), and the Seventh District has a new committee spearheaded by Matt Romrell, (matt.romrell@mcbrid-eandroberts.com).

Fifth District reports hours and good deeds to Judge Mick Hodges, (mhodes@cassiacounty.org); Sixth to Judge Rick Carnaroli (ricke@co.bannock.id.us); Seventh to Judge Michelle R. Mallard (mmallard@co.bonneville.id.us).

We wish to thank everyone for their past and ongoing efforts to advance the profession through pro bono service and for your efforts to make this competition a lot of fun.

What about the golf?

Mark your calendars. The Annual Eastern Idaho Golf Tournament will be held in Pocatello this year on Friday, Sept. 7 in the early afternoon at Highland Golf Course following a morning CLE. We have invited Ninth Circuit Court of Appeals Judge Randy Smith to participate and barring a change in his busy schedule we hope he will participate in both the CLE and the golf. District Presidents like to get a preliminary head count of the number of golfers so let the representatives above know if you plan to attend.

Publisher celebrates Boise author with 25th anniversary reprint

Neil McFeeley, a partner at Eberle Berlin in Boise, has published a paperback version of the "Appointment of Judges: the Johnson Presidency," by the University of Texas Press to celebrate the book's 25th anniversary.



Kenneth R. Feinberg

Idaho Academy for Leadership for Lawyers graduates its inaugural class of 12

The Idaho Academy of Leadership for Lawyers held a graduation celebration on July 13 for their 2011-12 inaugural class. Twelve Idaho attorneys fulfilled their first year of a two-year commitment in an interactive leadership training program designed specifically for lawyers who have practiced law for a minimum of five years. After completion of their coursework, the class will now focus their second year on legacy projects, which are designed to provide a service of perpetuity to their local respective communities. The class and their legacy projects include:

Paul L. Arrington, *Barker Rosholt & Simpson, LLP*

Javier L. Gabiola, *Cooper & Larsen*
Iraq/Afghanistan War Vet Legal Volunteer Lawyer Program

Nicole C. Hancock, *Stoel Rives LLP*
Idaho Women Lawyers Celebratory Dinner

R. William Hancock, Jr., *Merrill & Merrill, Chtd.*
Iraq/Afghanistan War Vet Legal Volunteer Lawyer Program

Paul D. McFarlane, *Attorney at Law*

Gene A. Petty, *Ada County Prosecuting Attorney*
Sporting Goods for Youth

Joseph N. Pirtle, *Elam & Burke*
Idaho Suicide Prevention Hotline

Benjamin C. Ritchie, *Moffatt Thomas Barrett Rock & Fields, Chtd.*
Idaho Suicide Prevention Hotline

Monica E. Salazar, *Salazar Law, PLLC*
Idaho Intensive Summer Law Academy

Christine M. Salmi, *Perkins Coie, LLP*
Idaho Intensive Summer Law Academy

Timothy W. Tyree, *Hawley Troxell Ennis & Hawley LLP*
Camp Rainbow Gold Leadership Manual

Jonathan M. Volyn, *Racine, Olson, Nye, Budge & Bailey, Chtd.*

6th District Attorneys Against Hunger

The Idaho State Bar wishes to express appreciation to the following for their generous financial contribution to the Idaho Academy of Leadership for Lawyers:

Idaho State Bar Business and Corporate Law Section, Idaho State Bar First District Bar Association, Idaho State Bar Fourth District Bar Association, Idaho State Bar Sixth District Bar Association, Moffatt, Thomas, Barrett, Rock & Fields, Chtd., Mr. Dennis E. Wheeler and the Hon. Mike Williams.



Bowling for pro bono in Nampa

Anne Kunkel, Jason Pintler, and Liz Donick were among the about 50 people at the bowling fundraising event for Idaho Legal Aid Services at the Nampa Bowl this June. Organized by the Third District Bar, about \$3,500 was raised through a \$7 entry fee, raffles, and general donations. There was a nice cross section of local attorneys, judges and families attending. Many asked for an annual event because it was so affordable, kid-friendly and in support of a worthy cause. Sponsors included the Third and Fourth District Bar Associations; DeFord Law, PC; Mark Clark, PLLC; Coffel & Beaber, PC; Hessing Law, PLLC; Hamilton Michaelson & Hilty, LLP; White Peterson; Lovan, Roker and Rounds, PC; Scarlett Law, PLLC; Yost Law, PLLC; Anne Kunkel; Jason Pintler; Missey Pearson.



Photo by Ali Nelson

Environmental and Natural Resources Law Section plants 300 cottonwood trees along Boise River

To stabilize the riparian zones along the Boise River, volunteers with the Environment & Natural Resources Law Section planted about 300 cottonwood starts just northwest of the Bown Bridge located in SE Boise. Section members cut the starts in March and planted them on June 2. Over the two days, there were 11 volunteers working with Trout Unlimited volunteer coordinators. The trees will provide shade to cool the water and their roots will stabilize the earth during high water. Pictured are Andy Brunelle, Trout Unlimited, and E&NR volunteer Alicia Warren.

REINSTATEMENT

THOMAS G. MAILE, IV (Reinstatement)

On June 5, 2012, the Idaho Supreme Court issued an Order Granting Petition for Reinstatement reinstating Eagle, Idaho attorney Thomas G. Maile, IV to the practice of law in Idaho. Mr. Maile had previously been suspended by the Idaho Supreme Court on July 28, 2011, for a period of six months for engaging in professional misconduct.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

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2012 RESOLUTION PROCESS AND A SPECIAL THANKS TO REED

Diane K. Minnich
Executive Director, Idaho State Bar

Proposed Resolutions Due September 25

Do you, your Practice Section, committee or district bar association have an issue, proposed rule revision or legislative matter that you think should be voted upon by the Idaho State Bar membership? If so, the fall resolution process, or "Roadshow" is the opportunity to propose issues for consideration by members of the bar.

Unlike most state bars, the Idaho State Bar cannot take positions on legislative matters, or propose changes to rules of court, or substantive rules governing the Bar itself at its Annual Meeting, or by act of its Bar Commissioners, without first submitting such matters to the membership through the resolution process.

This year, proposed resolutions may include revisions to I.B.C.R. Section IV MCLE and I.B.C.R. Section IX General Rules.

Idaho Bar Commission Rule 906 (page 287 of the 2012-2013 Desk Book Directory) governs the resolution process. Resolutions for the 2012 resolution process must be submitted to the bar office by September 25, 2012. If you have questions about the process or how to submit a resolution,



Diane K. Minnich

please contact me at dminnich@isb.idaho.gov or (208) 334-4500.

Thank you

Each year at the Annual Meeting, the presidential gavel is passed to the next ISB President. In July, Pocatello attorney Reed Larsen concluded his year as President and Molly O'Leary, Boise, starts her six-month term as President (she shares the presidential year with Commissioner Paul Daugharty from Coeur d'Alene).

I want to thank Reed Larsen for his generous commitment of time, energy, knowledge and expertise. Reed's theme for the year was the importance of mentoring, in all areas of our lives. I will forever consider Reed a mentor. I learned a

great deal from watching Reed approach issues, people, and situations. His ability to remain calm, reasonable and open minded during difficult interactions was extraordinary. He is thoughtful, respectful of others and their views. He offers his views, he listens and considers different views, he's not hesitant to admit a mistake or pass on taking credit for his efforts. Reed represents the best of the profession.

I also want to thank Reed and his wife for hosting the Board of Commissioners at their beautiful Pocatello home several times.

We will miss Reed but know he will be pleased to have more time to focus on his law practice and getting back on the rodeo circuit.



Past-president Reed Larsen addresses the Annual Meeting of the Idaho State Bar in Boise in July. His term as president included a renewed emphasis on mentoring. Molly O'leary now begins her term as president.

2012 District Bar Association Resolution Meetings

| District | Date/Time | City |
|---------------------------|-----------------------|---------------|
| First Judicial District | November 7 at Noon | Coeur d'Alene |
| Second Judicial District | November 7 at 6 p.m. | Lewiston |
| Third Judicial District | November 1 at 6 p.m. | Nampa |
| Fourth Judicial District | November 2 at Noon | Boise |
| Fifth Judicial District | November 13 at 6 p.m. | Twin Falls |
| Sixth Judicial District | November 14 at Noon | Pocatello |
| Seventh Judicial District | November 15 at Noon | Idaho Falls |

WELCOME FROM THE TAXATION, PROBATE & TRUST LAW SECTION

D. James Manning
*Moffatt, Thomas, Barrett, Rock
& Fields, Chtd.*

The Taxation, Probate & Trust Law Section of the Idaho State Bar is pleased to sponsor the August edition of *The Advocate*.

The Taxation, Probate & Trust Law Section is one of the first practice sections established when the Idaho State Bar decided to organize and recognize practice sections within the State Bar. The Section is also one of the largest Sections with about 250 members across the state.

As the name implies, the focus of the Section is on federal and state tax issues, the probate process and estate planning (including Federal estate, gift and generation-skipping transfer tax issues).

The principal activities of the Section are educational opportunities for the members of the Section. Some of the activities draw non-member participation, as well.

During the year, the Section conducts three combination business/CLE meetings at the Law Center in Boise, in which Section members from around the state participate by telephone, in addition to the Boise-area members that are able to attend in person. These meetings



D. James Manning

are held in the winter, spring and fall. Typically, the CLE speakers are knowledgeable Section members addressing current topics of interest in the tax, estate planning or probate areas, such as new legislation related to these areas.

Generally, the Section hosts a dinner during the fall calendar of U. S. Tax Court in Boise, with the presiding Tax Court Judge as the speaker.

This year, as was the case last year, the Section presented 1.5 hours of CLE at the Bar Annual Meeting in Boise.

The principal educational activity for the Section is the annual Advanced Estate Planning Institute held in Sun Valley in September, and attended by attorneys (Section members and non-Section members), trust officers and CPAs.

The Taxation, Probate & Trust Law Section emphasizes estate planning and taxation in this edition of *The Advocate*. John McGown and Rick Smith take a

*The principal educational activity
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(Section members and non-Section members),
trust officers and CPAs.*

more in-depth look at general durable powers of attorney and analyze some of the more obscure applications of this estate planning vehicle. Kimmer Callahan reviews the more important considerations in the planning process where the client family has young children. Carla Ranum and Elizabeth Mathieu explore the various applications of the trust protector role now authorized by statute in Idaho. Natasha Hazlett encourages attorneys to individualize their estate planning documents and to think through why they are including various planning provisions and the overall goal.

About the Author

D. James Manning is a shareholder in the Pocatello office of *Moffatt Thomas Barrett Rock & Fields, Chtd.* where he concentrates his practice in the areas of Federal and state taxation, estate planning and probate.

Taxation, Probate & Trust Law Section

*2011 Recipient of the ISB Section of the Year Award
Presented by the ISB Board of Commissioners*

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D. James Manning
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
P.O. Box 817
Pocatello, ID 83204-0817
Telephone: (208) 233-2001
Email: djm@moffatt.com

Vice Chairperson

Christopher J. Moore
Creason, Moore, Dokken & Geidl PLLC
P.O. Drawer 835
Lewiston, ID 83501-0835
Telephone: (208) 743-1516
Email: cmoore@cmd-law.com

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Angstman Johnson
3649 N. Lakeharbor Lane
Boise, ID 83703
Telephone: (208) 384-8588
Email: natasha@angstman.com

THE EVOLUTION OF POWERS OF ATTORNEY IN IDAHO: WHAT A PRACTITIONER NEEDS TO KNOW ABOUT THEIR ADVANTAGES, LIMITATIONS, AND HOW TO USE THEM

John S. McGown, Jr.
Richard G. Smith
Hawley Troxell Ennis & Hawley,
LLP

Twenty years ago, many attorneys thought of powers of attorney as forms to be printed out for one-time use when a spouse was unavailable to sign a document at a real estate closing. Today, the use of powers of attorney has expanded dramatically, to the point that a power of attorney has become one of the three standard documents in the estate planning toolkit (along with Wills/Trusts and the Living Will/Durable Health Care Power of Attorney). This article will discuss the reasons for that growth, and in particular the growth in the use of financial powers of attorney (as distinguished from health care powers of attorney). We will focus on the advantages of financial powers of attorney, particularly in light of statutory changes that give greater recognition of their flexibility and utility in estate and financial planning, including Idaho's adoption of a new uniform act in 2008. Finally, we will discuss some of the limitations of powers of attorney, and some specific issues involved when they are used in certain situations.

Background on financial powers of attorney

If you wanted a cup of coffee 20 years ago, the only likely decisions were cream or sugar. Stop by a Starbucks today and the decisions are much more complex.

Financial powers of attorney have had a similar transformation in Idaho. There are many reasons for this. A combination of medical advances and Alzheimer's disease has resulted in not only longer lives, but also in more individuals lacking the capacity to make prudent financial decisions. Children travel without their parents to out-of-state sporting events with no legal capacity to make medical decisions on injuries they may suffer. Elderly parents find that their children are unable to assist on financial matters because the children have moved to far-flung states or even countries.

Those without a financial power of attorney may die without ever needing one. But because of medical advances, Alzheimer's, and other changes in our society, this need continues to increase.

Financial institutions have become much more compliance-oriented and less service-oriented. In addition, the applicable rules are much more stringent (have you recently tried to add an out of state child as an authorized signer on a safe deposit box?). For a variety of reasons individuals may be unable to act on their own behalf.

Powers of attorney have long been a tool to deal with these issues. A power of attorney is a creature of the law of agency, and is simply a document to evidence an agency relationship and to define its scope and duration. However, the common law rule was that the authority of an agent terminated upon the principal's incapacity.¹ The concept of a "durable" power of attorney was initially adopted by statute in Virginia in 1950, and became a part of the Uniform Probate Code (UPC) in 1969.² That model act was adopted in Idaho in 1971.

The original UPC power of attorney provisions were quite modest. The UPC contained only five sections on this subject, intended primarily to justify the use of the power of attorney as a planning device by allowing the agent to continue to act following the incapacity of the principal.

The UPC provisions were expanded in 1979 in the Uniform Durable Power of Attorney Act, which was adopted in Idaho in 1982. Many other states adopted the act, but over time states began to enact non-uniform provisions to deal with a number of issues not addressed by the 1979 model act, including 1) the authority of multiple agents; 2) the authority of

a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal's marriage to the agent; 4) activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent conduct and liability.³ The Uniform Power of Attorney Act was drafted by the Uniform Law Commission to address these issues and further strengthen the power of attorney as a tool for use in the estate planning process and for other purposes. That Act was adopted by the National Conference of Commissioners on Uniform State Laws in 2006 and in Idaho in 2008, effective July 1, 2008.⁴

Financial powers of attorney are now common, but many adults do not have one in place. Some adults never discuss a power of attorney with an attorney while others have the discussion but decline to use this tool. Some of those who decline feel as if they are potentially giving up control while others have no one they trust to act as their agent. Whatever the reason, it is estimated that about only 48% of older Americans (age 65 or older) have a financial power of attorney.⁵

Those without a financial power of attorney may die without ever needing one. But because of medical advances, Alzheimer's, and other changes in our society, this need continues to increase.

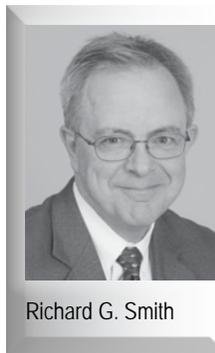
Alternatives to a financial power of attorney

One reason many do not use financial powers of attorney (among those who have even considered their use) is that there have been alternatives available that could accomplish the same objectives. However, given the flexibility and "power" of a power of attorney under current law, those alternatives have become less and less attractive.

The judicial alternative is for the court to appoint a guardian and/or conservator, pursuant to Chapter 5 of Title 15 of the



John S. McGown, Jr.



Richard G. Smith

Idaho Code. These are not easy processes, and usually involve physicians, guardians ad litem, court visitors, etc. They can also be demeaning for the incapacitated or disabled person. There is a huge emotional difference between choosing to authorize an agent to act on one's behalf and being forced to give up the right to make one's own financial decisions.

The contractual alternative is to make a lifetime transfer of assets to a revocable (or even an irrevocable) trust. The trustee of such trust assumes financial control of the assets. While this can be an effective tool, it is not perfect. For example, the choice of trustee is critical, and transitions can be problematic if the initial trustee cannot or will not serve. Although the principal may have confidence in the initial trustee, there is often not as much care taken in naming a successor trustee. Another limitation of trusts is that it is often the case that some assets were not transferred to the trust. As such, the assets held outside the trust are not subject to the trustee's power.⁶

A practical alternative is to have a joint bank account. Many individuals add a spouse, child or other relative to their main bank account as a "joint owner." Either owner can write checks on the account. Deposits, such as from social security or a pension, are often made automatically. In fact, a joint account might be viewed as advantageous over a financial power of attorney in that the joint owner can continue to write checks after the primary owner's death. A financial power of attorney expires at the principal's death. This distinction can be important. For example, a joint owner can write a check for funeral expenses while an agent under a financial power of attorney could not. One downside to a joint account is the potential for disputes after one of the owners dies. Idaho Code Section 156104(a) provides in part:

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent if an intent to give the account can be shown by the surviving party or parties. (Emphasis added.)

This statute raises the question of whether the child was added to the account for convenience, or as an owner intended to receive the funds to the exclusion of the other children on the death of the primary owner. The answer to this question can become quite challenging and potentially divisive.

Idaho joined the trend toward encouraging greater use of powers of attorney with the adoption in 2008 of the Uniform Power of Attorney Act (the "Uniform Act").

Evolution of power of attorney statutes: Expanding authority while managing risk

One reason financial powers of attorney have gained acceptance over these and other alternatives is the adoption and expansion of statutes that give greater recognition of the binding authority created by a power of attorney, that give attorneys and their clients more options in their use, and that address some of the concerns about potential abuses of financial powers of attorney in the past. Idaho joined the trend toward encouraging greater use of powers of attorney with the adoption in 2008 of the Uniform Power of Attorney Act (the "Uniform Act").

General need for agent to have broad powers

A common feature of all the uniform acts has been the authorization of broad powers for the holder of the financial power of attorney. That theme is carried forward in the current Uniform Act. Idaho Code Section 15-12-201 authorizes grants of general authority, and the new law even facilitates broad grants of authority by adopting an approved form that attorneys and their clients can use to authorize general or more limited powers.⁷

Indeed, for a power of attorney to serve its intended purpose, the authority given should be broad. The usual objective, after all, is for a trusted agent to have the authority to perform the same actions the principal could but for his or her inability to act. As noted, the most common historical alternative was the cumbersome court procedure of appointment of a guardian or conservator, who normally would have full powers to make decisions on behalf of the principal. If the power of attorney device is to serve that same purpose but without court intervention, the agent's powers must be similarly broad.

There is, of course, the potential for abuse when a general power of attorney is granted. As we know from examples ranging from Cain and Abel to Enron ex-

ecutives and beyond, there is almost no limit to mankind's potential for acts of betrayal, and breaches of trust can occur in countless variations no matter how close the relationship. Indeed, even court-supervised proceedings are not bullet-proof means of preventing abuse when the property or affairs of a person are placed in another's care; the supervision is often superficial and the degree of oversight may depend upon competing interests of family members or others in the incapacitated person's financial estate. There is greater potential for abuse by agents appointed pursuant to a power of attorney, since there is often no supervision at all. However, this risk is usually outweighed by the benefits of low cost, flexibility and privacy associated with the power of attorney device. Moreover, that risk can be managed.

The usual way of managing the risk of abuse of the power of attorney is to appoint a trusted family member, friend or associate — someone unlikely to act in way inconsistent with the principal's intentions. For those who are particularly risk-averse, or who do not have relationships with potential agents who are suitable to take on this responsibility, there are other ways to obtain protection.

Managing the risk of abuse — use of co-agents

One way to manage the risk of giving extensive powers to an agent is through the appointment of co-agents. The Uniform Act authorizes the use of co-agents, but states the default position that unless the power of attorney otherwise provides, each co-agent may exercise its authority independently. Idaho Code § 15-12-111(1). The Official Comments to this section point out how this default position does not help much with the issue of limiting the risk of abuse: "For a principal who can still monitor the activities of an agent, naming co-agents multiplies monitoring responsibilities and significantly increases the risk that inconsistent actions

will be taken with the principal's property. For the incapacitated principal, the risk is even greater that co-agents will use the power of attorney to vie for control of the principal and the principal's property." Id., Official Comment to § 15-12-111. The Comment notes that requiring co-agents to act by majority or unanimous consensus addresses this concern, but raises the separate problem that "such a requirement impedes use of the power of attorney, especially among agents who do not share close physical or philosophical proximity."

An intermediate position that may be appropriate in many situations is to require unanimous consent for transactions of a certain type (i.e., sale of real property), or over a certain dollar amount. This alternative could be used either with both co-agents having independent authority for all other transactions, or by delegating the general authority to one agent with the second agent having only the authority to concur or veto transactions over the threshold level.

Managing risk with accountability

As long as the principal has capacity to monitor his or her own affairs, there is probably no need to oversee the actions of an agent holding a power of attorney. The principal is presumably receiving copies of bank statements or other reports on the status of the principal's assets. However, upon incapacity, there is a greater need to consider steps to monitor the actions of the agent.

The Uniform Act does not require accountings by the agent (although there is a requirement for the agent to keep records of all receipts, disbursements, and transactions). Idaho Code §§ 15-12-114(f)(8), -114(d). However, the power of attorney can be drafted to require accountings, and the Uniform Act does give certain parties the right to request accountings—a court, guardian, conservator or other fiduciary, or a governmental agency having authority to protect the welfare of the principal. The Act also has a broad standing provision that allows anyone with a financial interest in the estate of the principal to seek judicial review of the agent's conduct. Idaho Code § 15-12-116.

A drafting option that is less cumbersome than a rigid accounting requirement is to provide for duplicate bank or account statements to be sent to another family member or interested person, or to require accountings for certain types of transactions. Such steps can provide protection to the incapacitated principal without much additional burden to the agent or expense to the principal's estate.⁸

Further, by keeping physical possession of the original of the power of attorney, the principal has created a barrier to the unauthorized or unexpected use of the power of attorney.

Managing risk by granting authority only on incapacity/durability

An obvious means of limiting the authority of the agent is to confine the time period over which the power of attorney is effective. The most common technique here is to provide that the power of attorney is effective only when the principal is incapable of managing his or her own affairs. The disadvantages of this provision — known as a "springing" power — include the fact that there now must be some means of determining when the principal is incapacitated. There also may be a delay in that process, during which access to funds or property could be impeded.⁹

Although there is a natural desire to limit or delay access to one's property and estate to a third party, the agent was presumably chosen based on the relationship of trust and confidence with the principal. Denying the agent access to or even information about the principal's estate is not consistent with the objectives of having an informed and capable agent to make decisions in the principal's absence. An immediately effective power increases the likelihood that there will be good communication between the principal and agent while the principal still has capacity and can share his or her decision making approach and goals with the agent.

The Uniform Act's default provision is that the power of attorney is effective immediately upon execution. Idaho Code §15-12-109(1). The Official Comment to this section describes this as a "best practice" — as noted above, "any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power." Where a springing power is selected, the Act also has default provisions for determining when that power would be triggered: when there is an inability to manage property or business affairs because of medical incapacity, as determined by a doctor or licensed psychologist, or because the principal is missing, detained or outside the United States and unable to return. Idaho Code §§ 15-12-109(3); 15-12-102(5).

Managing risk by controlling access to original documents

The general rule is for a principal to keep the original power of attorney with his or her other important documents. That may be in a file cabinet at home or office, in a fire proof safe, in a safe deposit box or at the attorney's office. Each of these locations has advantages and disadvantages.

Regardless of the choice of location, it generally is advisable for the primary (and usually the secondary) agent to know of the location and to be able to access the location. For example, the safe at home can be a problem if the principal has had a stroke and is unable to communicate — especially if no one else knows the combination.

Further, by keeping physical possession of the original of the power of attorney, the principal has created a barrier to the unauthorized or unexpected use of the power of attorney.

Statutory improvements in assuring enforceability of the power of attorney upon third parties

One problem that has slowed the greater use of powers of attorney is that they have not always been accepted by third parties. See Idaho Code § 15-12-119, Official Comment (in a survey, "a majority of respondents had difficulty obtaining acceptance of powers of attorney"). The best-drafted power of attorney will have no value unless the persons with whom the principal would have interacted will accept the power, and will deal with the agent in the manner intended by the principal. The Uniform Act has addressed this problem in two ways—by offering protection to persons who are asked to accept powers of attorney, and by affirmatively imposing liability on those persons in certain circumstances where they refuse to accept the power.

Idaho Code Section 15-12-119 provides a safe harbor for recipients of a power of attorney. If the power is ac-

knowledge, the recipient may rely on the power as long as the person acts in good faith and has no actual knowledge that the power is void, invalid or terminated or that the agent is acting beyond his or her authority. The Official Comments note that this provision “places the risk that a power of attorney is invalid upon the principal rather than the person that accepts the power of attorney.”

The Act provides further motivation by imposing liability on the recipient of the power of attorney for refusal to accept it. This liability is triggered upon presentation of an acknowledged power, which the person must either accept or request an agent’s certification, a translation or an opinion of counsel within seven days after presentation. This requirement does not apply if the recipient has not previously engaged in business with the principal in these circumstances, if the transaction would be inconsistent with federal law, if he or she has actual knowledge of the termination of the agent’s authority or does not believe in good faith that the power is valid. The liability is limited; the recipient may be subject to a court order mandating the acceptance of the power, or attorney’s fees and costs incurred in such a proceeding.

Multistate issues

The Uniform Act recognizes that movement from one state to another is common in today’s dynamic society, and it contains provisions designed to enhance the “portability” of powers of attorney. Sections 15-12-106 and 15-12-107 provide that a power executed in another state will be valid in Idaho if, when executed, it complied with the laws of the jurisdiction which provides the governing law, as specified in the power of attorney, or if no state is indicated then the law in which it was executed will govern.

The Official Comments make it clear that a principal’s intent cannot be enlarged or narrowed by virtue of the agent using the power in a different jurisdiction. It is important, therefore, when drafting a power of attorney, to clearly state in the document the jurisdiction that will provide the governing law. And it is also important, in both drafting and applying a power, to understand any limits on powers of attorney in that jurisdiction.

Record with county recorder (or not)

None of the uniform acts requires that a power of attorney must be recorded in order to be effective as to third parties. However, recording may be necessary whenever a deed or other instrument is required to be recorded, in order to show

A principal could have co-agents, for instance, and could give each agent the same authority. Or a principal could give different types of authority to different agents.

for the record the authority of the agent. Idaho Code § 55-806 governs powers of attorney that authorize conveyances of real property. These powers of attorney must be recorded. Similarly, a power of attorney to execute a mortgage or deed of trust must also be recorded. See Idaho Code § 45-908. To effectively revoke a recorded power of attorney for grants of real property or for executing instruments that affect real property, the revocation must be recorded. Idaho Code at § 55-814.¹⁰

Improvement of procedures to deal with disputes

As with any area of the law, disputes can arise with the use of powers of attorney. The improvements brought about by recent legislation, including Idaho’s 2008 adoption of the Uniform Act, address these issues. The following discussion summarizes provisions of the Uniform Act that improve the procedures for dealing with disputes affecting financial powers of attorney.

Avoiding dueling powers of attorney

There are many situations in which disputes can arise concerning the scope of a power of attorney, and in fact who has the authority to act on behalf of the principal. One of those situations is where the principal has given more than one power of attorney to more than one agent. Unlike a proxy or a will, where the grant or execution will automatically terminate the effect of a prior document, it is possible to have more than one power of attorney. A principal could have co-agents, for instance, and could give each agent the same authority. Or a principal could give different types of authority to different agents.

Under Section 15-12-110, a power of attorney does not become “stale,” but will continue indefinitely. Even a subsequently executed power of attorney will not revoke a prior power unless it does so expressly or states that all prior powers of attorney are revoked. This is the case even if the two powers of attorney are in-

consistent with each other. (See Official Comments.) Such provisions obviously require some care by the lawyer in drafting powers of attorney: the lawyer should inquire whether there are any outstanding powers of attorney and should advise the client on whether they should be revoked as part of the current planning process.

Power of attorney followed by court action

Another situation in which the holder of a power of attorney may find his or her authority threatened is where a conservator or guardian is appointed for the principal. The law in effect in Idaho prior to 2008 provided that a court-appointed fiduciary would have the same power to terminate the power of attorney as the principal would have possessed. This provision had the potential to enable family members or others to circumvent the principal’s intent; a carefully thought-out plan to have a trusted agent handle his or her affairs could be frustrated by a separate appointment of a conservator or guardian who had no restriction on the ability to terminate that agent.

The Uniform Act provision, now contained in Idaho Code § 15-12-108, makes a subtle change in this process. It provides first that in the power of attorney, the principal may nominate a conservator “for consideration by the court if protective proceedings for the principal’s estate are thereafter commenced.” Presumably, the court would give significant weight to the principal’s choice of a conservator. The statute then provides that if a conservator is appointed, the agent is accountable to the conservator as well as to the principal, and the power of attorney is not terminated but “continues unless limited, suspended or terminated by the court.” In other words, it is now the court who determines whether the agent is terminated, not the new conservator as the old law provided. This should reduce the potential for mischief by those who seek to bypass the agent appointed in a power of attorney by having a new conservator appointed.

Compensation of agent

The Uniform Act makes no major changes to the standards for compensating agents. Idaho Code Section 15-12-112 provides an agent is entitled to reimbursement of expenses and to “compensation that is reasonable under the circumstances.” The Official Comment to this section includes an interesting observation that could justify higher payments for family members: “Although many family-member agents serve without compensation, payment of compensation to the agent may be advantageous to the principal in circumstances where the principal needs to spend down income or resources to meet qualifications for public benefits.” The phrase “reasonable under the circumstances” provides considerable flexibility. It also could be a fertile area for dispute. This is especially true because typically the agent making the determination of reasonableness has no oversight.

Revocation of a power of attorney

It has always been the law that a power of attorney may be terminated at any time, without cause. The rule is unaffected by the Uniform Act, and applies to any power of attorney. Idaho Code § 15-12-110(1)(c). That should include powers of attorney created under security agreements or other contracts. It is common, for instance, for a borrower to give a power of attorney in favor of a bank or other contracting party, to empower the bank or other party to protect or deal with property that serves as security for a loan. It may be a breach of the agreement for a principal to terminate the power of attorney in these situations, but the right of revocation is absolute.

The power of attorney is also terminated by the death of the principal. The Uniform Act does provide, however, that if an agent or another person acts in good faith and without knowledge of a termination (for this cause, or any other), the principal and “the principal’s successors in interest” will be bound. Idaho Code § 15-12-110(4).

A new provision of the Uniform Act as adopted in Idaho concerns the validity of a power of attorney after a divorce action has been filed. Section 15-12-110(2)(c) now provides that a power of attorney terminates when an action is filed for divorce, separation or annulment between the principal and agent (unless the power of attorney otherwise provides).

Special situations

The modern uniform acts, including the Uniform Act adopted in Idaho in 2008, address a number of special situations and

It has always been the law that a power of attorney may be terminated at any time, without cause.

issues that can arise with the use of powers of attorney. We will discuss here some of those situations that occur most often. As with other changes affected by the uniform acts, the law has evolved to address these issues in a way that makes powers of attorney more useful.

Can powers of attorney be used by or for minors?

Chapter 5 of the Uniform Probate Code does not explicitly say whether minors are or are not capable of executing powers of attorney. The language of Idaho Code § 15-5-104, however, provides that “a parent or guardian of a minor” may execute a power of attorney. The possibility of a minor parent is not addressed, nor are the age requirements for guardianship made clear. Under Idaho Code § 15-1-102, a guardian is “a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment...” A minor who is at least 14 can object to a testamentary guardian appointment, but that seems to be the extent of a minor’s power when it comes to guardianship. Idaho Code § 15-5-203. Thus, minors are probably not capable of executing powers of attorney, but they can be affected by them. Section 15-5-104 provides that a parent or guardian of a minor or incapacitated person may delegate to another person, by a power of attorney, any of the parent’s or guardian’s powers regarding care, custody, or property of the minor or ward, including powers for medical and educational care (except the parent’s or guardian’s power to consent to marriage or adoption of a minor or ward). The duration of such authority is limited to six months, unless the agent is the grandparent or sibling of the minor or sibling of the parent, in which case the duration can be whatever is provided in the power of attorney (and if no time period is provided, for three years). The purpose of this provision is to address the situation where “a parent or a guardian becomes ill or has to be away from home for less than six months. The parent or guardian under this section could execute a power

of attorney delegating to another some or all of the powers of the parent or guardian.”¹¹ Such powers of attorney are also useful for children who are traveling with another adult, or who are attending school away from home.

How does a general power of attorney interact with health care authorizations?

The Medical Consent and Natural Death Act identifies persons who may give consent to care for others. Idaho Code § 39-4504. The list includes relatives and “[a]ny other competent individual representing himself or herself to be responsible for the health care of such person.” Thus, the person could be the same person holding a power of attorney. However, the Uniform Act specifically excludes the power to make health care decisions from its coverage. Idaho Code § 15-12-103(2). Therefore, the holder of such authority must look to the provisions of the Medical Consent and Natural Death Act for guidance on how authority for medical treatment is given and exercised.

The Uniform Act does provide that the agent under a power of attorney shall “cooperate with a person that has authority to make health care decisions for the principal; to carry out the principal’s reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal’s best interest.” Idaho Code § 15-12-114(2)(e).

Another health-related provision is contained in Section 15-12-109. Where the authority of the agent does not commence until the incapacity of the principal, and where an agent is designated in the power of attorney to make that determination, that person is authorized to obtain information about the principal’s health care pursuant to the Health Insurance Portability and Accountability Act (HIPAA).

What happens when an agent becomes incapacitated?

Section 15-12-111 of the Uniform Act as adopted in Idaho retains the customary provisions that a principal may name successor agents to act in the event of the

resignation, death, or incapacity of the agent, and that unless the power “otherwise provides,” the successor shall have the same powers as the original agent.

The Official Comments to this section state that this “otherwise provides” language is important, because in some cases the successor should not have the same powers as the original agent:

While [the] default provision ensures that the scope of authority granted to the original agent can be carried forward by successors, a principal may want to consider whether a successor agent is an appropriate person to exercise all of the authority given to the original agent. For example, authority to make gifts, to create, amend, or revoke an inter vivos trust, or to create or change survivorship and beneficiary designations ... may be appropriate for a spouse-agent, but not for an adult child who is named as the successor agent.

The attorney and client should consider whether the successor has the qualities necessary to exercise the scope of powers held by the originally named agent.

Do the Internal Revenue Service and Idaho Tax Commission accept financial powers of attorney?

The Uniform Act has two provisions that will assist in dealing with potential tax issues. The first is whether a valid gift has been made when an agent makes a gift under the purported authority of a power of attorney. The IRS has taken the position that unless state law would recognize the power of an agent to make a gift, the gift is voidable by the principal and, thus, ineffective to take the property out of the estate. The Tax Court has upheld that position, although it also has held that if the power of attorney included an unlimited power to convey any property and to perform all necessary tasks, a gift will be recognized if the principal had a pattern of giving.¹²

Idaho Code Section 15-12-201(1)(b) takes the guesswork out of this issue by affirmatively requiring an express grant of authority to make gifts in the power of attorney. The Official Comments indicate that this approach “follows a growing trend among states to require express specific authority for such actions,” because of “the risk those acts pose to the principal’s property and estate plan.”¹³

Where the power of attorney is broad, and includes a power to make gifts, another tax issue that has arisen is as to whether the ability to make gifts represents a power of appointment that could be taxable in

The Uniform Power of Attorney Act has given practitioners more tools, and greater clarity, in using powers of attorney more effectively.

the agent’s estate. If the power of attorney includes the power to make gifts to the agent herself, or to someone to whom the agent is legally obligated, the property over which the power related could be taxable notwithstanding the agent’s fiduciary duty to the principal.

Idaho Code Section 15-12-201(2) gives some guidance on this issue by adding the additional requirement—in addition to the requirement to specifically authorize gifts—that the power of attorney must specifically authorize gifts to the agent or persons he or she is obligated to support. Section 15-12-217 has a further default rule that unless otherwise provided, the agent’s authority to make gifts is limited to the amount of the annual gift tax exemption (\$13,000 in 2012). And although this rule can be overridden in the power of attorney, there is an additional provision in this section that the agent is limited in making gifts to situations where they are consistent with principal’s objectives and best interests. These provisions are probably not enough to eliminate the risk of a power of appointment in the agent, if the principal overrides all the default provisions and gives the agent (such as a surviving spouse) unlimited authority to make gifts. But at least these statutes put hurdles in the way of an unintentional grant of a general power of appointment.

There is anecdotal evidence that the IRS accepts powers of attorney as authorization to deal with the IRS on the tax issues of the principal. However, some IRS employees may insist on IRS Form 2848. If so, the provisions of Sections 15-12-119 and -120 (discussed above) may need to be utilized. Further, consideration should be given to having the agent sign the Form 2848 on behalf of the principal. The fact of having a completed form may be sufficient to satisfy an otherwise doubtful IRS employee.

In informal conversations with key employees at the Idaho State Tax Commission, they indicated that they will generally accept powers of attorney as authorization to communicate with the agent.

Their preference, however, is to have an executed ISTC Power of Attorney (Form EFO00104)(2010).

Conclusion

Financial Powers of Attorney should not be “fill in the blank” forms for the novice. Rather, the circumstances should be evaluated and then decisions made to best accomplish the client’s goals. The Uniform Power of Attorney Act has given practitioners more tools, and greater clarity, in using powers of attorney more effectively.

We must not only be aware of the nuanced application of these tools, but also know what circumstances call for their use. With knowledgeable use, financial powers of attorney resolve conflict, a notable achievement for all involved.

About the Authors

Richard G. Smith and John McGown, Jr., both of whom are CPAs in addition to being attorneys, are proud to have been associated with Hawley Troxell Ennis & Hawley LLP during most of their professional careers. Rick started with Hawley Troxell in 1979, while John started in 1982. While both are experienced tax attorneys, Rick has developed niches in tax planning, tax disputes work and high end property tax litigation. John’s niches include estate planning, probate, mediation, tax-exempt organizations and tax disputes.

Endnotes

¹ National Conference of Commissioners on Uniform State Laws, Uniform Probate Code, art.5, pt. 5, prefatory note (2006).

² *Id.*

³ See Idaho Code § 15-12-101, prefatory note.

⁴ The original Uniform Durable Power of Attorney Act was last amended in 1987. As noted above, while there was initial uniformity, a majority of the states had enacted nonuniform provisions to deal with specific matters upon which the original Act was silent. The Uniform Power of Attorney Act has been adopted in Alabama, Arkansas, Colorado, Idaho, Maine, Montana, Nevada, New Mexico, Ohio, U.S. Virgin Islands, Virginia, and Wisconsin. Further adoptions are anticipated. There has been almost no Idaho case law on powers of attorney since Idaho’s adoption of the Uniform Durable Power of

Attorney Act in 1982. In *Webb v. Webb*, the Idaho Supreme Court held that a parent can delegate his or her visitation rights by power of attorney under Idaho Code § 15-5-104. 143 Idaho 521, 148 P.3d 1267 (2006).

⁵ A. Ebeling, *Americans Lack Basic Estate Plans*, Forbes Magazine (March 1, 2010), citing a Harris Interactive Poll. Another poll also conducted in 2010 for Lawyers.com showed that for all adults, only 29% had any kind of power of attorney—financial or health care—in 2009, and that figure was down from 46% in 2004. The percentage of Americans with wills was 35% in 2009, down from 45% in 2007. See <http://press-room.lawyers.com/2010-Will-Survey-Press-Release.html>.

⁶ Prior to the development of the durable power of attorney, the creation of a trust was typically used to give an agent a “durable” power over a principal’s property—a power that will survive the principal’s death or disability. This is a good option for individuals with substantial assets, especially when those assets include real property located in several states. The comments to the original UPC show that the durable power of attorney concept was intended as a surrogate tool for those who could not afford to set up a trust: “The purpose was to recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts for persons who are unwilling or unable to transfer assets as required to establish a trust.” National Conference of Commissioners on Uniform State Laws, Uniform Probate Code, art.5, pt. 5, prefatory note (2006).

⁷ The form is located at Idaho Code Section 1512301 and is available in pdf on the Section of Taxation,

Probate and Trust Law website found at <http://isb.idaho.gov/>, then by proceeding to Attorneys, Section and Legal Resources at the bottom.

⁸ Another option to control risk, of course, is to use a revocable living trust instead of a power of attorney, as noted above. The trustee typically has similar powers over the estate of the principal as an agent under a general power of attorney. If the principal uses a revocable living trust, he or she can monitor the actions of the trustee for as long as the principal is capable of doing so, and can replace the trustee if the trustee does not perform in a satisfactory manner. Of course, the power of attorney provides the same ability, since it is revocable while the principal has the capacity to do so. The additional advantage of the revocable trust is that the trustee can also manage the estate of the principal after his or her death—which cannot be accomplished through a power of attorney. However, that advantage is tempered by the disadvantage of requiring the actual transfer of the property of the principal to the trust, while title to the property remains with the principal when he or she uses a power of attorney. This can involve not only inconvenience and additional expense (along with the additional expense of drafting trust documents and maintaining the trust), but also some marginally greater loss of control of the assets.

⁹ The Health Insurance Portability and Accountability Act (HIPAA) protects health care privacy and prevents disclosure of health care information to unauthorized people. HIPAA authorizes the release of medical information only to a patient’s “personal representative.” HIPAA can be a problem especially for a “springing” power of attorney. This means the agent does not have any authority until the principal

declared incompetent, but, under HIPAA, the agent won’t be able to get the medical information necessary to determine incompetence until the agent has authority. To make sure the agent does not get caught in this “Catch-22”, the power of attorney and health care proxy should contain a clause that explains that the agent is also the personal representative for the purposes of health care disclosures under HIPAA.

¹⁰ If a power of attorney delegating the powers of a parent or guardian is recorded, it must be revoked by recording. Idaho Code § 15-5-104. However, this type of power of attorney does not have to be recorded at all. *Id.*

¹¹ National Conference of Commissioners on Uniform State Laws, Uniform Probate Code, art.5, § 5-105, comment (2006).

¹² *Estate of Gagliardi v. Commissioner*, 89 T.C. 1207 (1987). See also *Estate of Swanson v US*, CA-FC, 2001-1 USTC ¶60,408 (gifts made by someone who lacked express authority in a power of attorney to make gifts had to be included in the decedent’s estate even though the decedent orally instructed the person to make the gifts).

¹³ Other situations in which an express grant is necessary in the power of attorney are the following: to create, amend, revoke or terminate an inter vivos trust; to create or change rights of survivorship; to create or change a beneficiary designation; to delegate authority granted under the power of attorney; to waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or to exercise fiduciary powers that the principal has authority to delegate. Idaho Code § 15-12-201(1)(a), (c)-(g).

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Barbara Schaefer Pedersen
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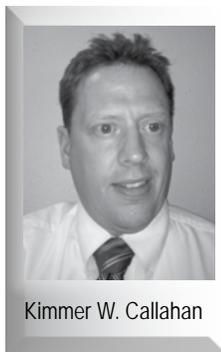
“I just need a *simple* will.” From cocktail party to conference room, the claim is made. “My situation is so *simple and straightforward*, a basic will is all I need, right? Even attorneys are sometimes lulled into a false sense of security when a case seems *simple*. Reality is often far different from perception, however. Many factors complicate a seemingly simple estate plan. This is especially true of parents with minor children. The mere involvement of a minor increases the level of complexity to the planning process and estate administration. There is no such thing as a simple will when consideration must be given to planning for minors and administering the estate left to a minor.

A minor named as beneficiary under a will

Sure, a will may be very simple – “I give all of my real and personal property to my spouse. If my spouse does not survive me, to my children in equal shares.” This type of simplicity creates significant complexities for the personal representative. Who should the personal representative pay the funds over to? To the child? The child’s parent or legal guardian? Should the personal representative keep the funds and make distributions at his or her own discretion? Ideally, the will (or other testamentary document) will provide that guidance, but often does not. If the will is silent on these matters, the question is dictated by the value of the assets or the available funds.

Small Estates:

If the value of the share for a minor child does not exceed \$10,000, the personal representative may deliver the child’s share to: (1) the child if the child is married or 18 years or older; (2) the person having the care and custody of the minor and with whom the minor resides; (3) the guardian of the minor; or (4) an account in the name of the minor.¹ Provided, however, if there is a conservator, or a pending petition for a conservator, payment must be made to the conservator.²



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Should the personal representative keep the funds and make distributions at his or her own discretion? Ideally, the will (or other testamentary document) will provide that guidance, but often does not.

Large Estates:

If the value of the share exceeds \$10,000, the personal representative has two options: (1) pay the funds over to a conservator, if there is one;³ (2) or seek court approval to transfer the funds under the Idaho Uniform Transfer to Minors Act⁴ (“UTMA”) or the Idaho Uniform Custodial Trust Act⁵ (“UCTA”). The UTMA is only an option if the personal representative considers the transfer to be in the child’s best interest, the transfer is not inconsistent with the provisions of the will, and the court approves the transfer.⁶

Options for Dealing with the UTMA:

There are a number of drawbacks to relying on UTMA provisions for managing the child’s share of an estate. First and foremost, the custodian has no guidance or instructions as to what the parent’s wishes or desires were. There is no direction as to who the custodian should be. There is no guidance as to how the custodian should use, manage, and invest the funds. There is no instruction on when to make distributions to or for the benefit of the child. Further, the custodian is required to deliver the funds to the child at the age of 18.⁷ Very few parents would want their child to have complete control of their inheritance at such a young age.

The establishment of a conservatorship does little, if anything, to address the drawbacks of the UTMA approach. As with the UTMA, a conservatorship will terminate when the child obtains the age of 18.⁸ With court approval, a conservatorship may be extended to age 21.⁹ The conservatorship comes with the added baggage and expense, however, of complying with the mandatory reports and accountings that must be prepared and filed annually.¹⁰

The good news is that there are several options to address the vast majority of the concerns raised by the issue of a minor beneficiary – some without requiring complex drafting.

Option A – Within the will add a paragraph that nominates a custodian for any beneficiary under the age of 21. It is advisable for parents of minor children to also write a “letter of instruction” to the custodian expressing their thoughts about investment approaches and distributions. Further, by authorizing the custodial arrangement within the will, the custodial arrangement may continue up to age 21, rather than age 18.¹¹ Although this approach may not address every issue or problem, at least it provides the basic framework for asset management and avoids a required distribution at age 18.

Option B – The UCTA provides another option that may provide a little more flexibility, as well as a way to *possibly* continue the custodial arrangement beyond the age of 21. Under a strict reading of the UCTA, a beneficiary has the right to terminate the trust and direct distributions from the trust at age 18.¹² The UCTA, however, may be used to create the backbone of a custodial trust that will continue until a designated age of the beneficiary. For example, the will may include a provision similar to the following:

The share for any beneficiary under the age of 30 shall be held In Trust for the benefit of the beneficiary and administered under the provisions of the Idaho Uniform Custodial Trust Act (UCTA). The provisions of the UCTA are incorporated herein by reference. Any person under the age of 30 shall be deemed to be incapacitated. The Trustee shall be . . .

This creates a very simple method of trust administration without the complexities of drafting a formal trust. It also avoids the drawbacks of the age 18 or age 21 terminations provided for under the UTMA and conservatorship statutes. As with Option A, above, parents should provide a “letter of instruction” to the trustee to provide guidance regarding asset management and distributions.

Option C – Draft a complete testamentary trust provision. This gets beyond the concepts of a “simple” will, but provides a comprehensive method of planning. By engaging in a detailed discussion with the client about their goals, wishes, and concerns, as well as providing education to the client about issues that they may not have considered, a testamentary trust allows for the drafter to address and craft a solution based on the unique situation of the client. Short of provisions or restrictions that violate either public policy or statutory limitations, a testamentary trust allows virtually unlimited flexibility in controlling and managing an inheritance.

Option D – Finally, consider the use of a revocable living trust containing a continuation trust provision, substantially similar to the provisions of a testamentary trust. Additionally, this option avoids the necessity of the probate process.

Minor as beneficiary under non-probate transfers

The restrictions on making a distribution to a minor discussed above apply equally to probate transfers and non-probate transfers alike. Many people understand that Pay on Death (“POD”) and Transfer on Death (“TOD”) designations basically provide for automatic transfer of assets at death. This is also true of beneficiary designations under life insurance policies and retirement accounts such as IRA’s, 401(k)s, and the like. Unfortunately, the statutory restrictions preventing distribution to the designated minor are often overlooked. As a result, people move forward with a false sense of security.

This problem is compounded by the fact that it is often grandparents and other family members that set up these types of non-probate transfers. As such, the parents have little or no control or input into how these beneficiary designations are made. Often, in an effort to save a few dollars in seeking legal advice, a person unwittingly establishes a method of distribution that may cost thousands of dollars to rectify. The options for obtaining delivery of the designated funds are very limited. For transfers that are less than \$10,000 the rules are the same as those discussed above relating to a beneficiary under a will. If the value exceeds \$10,000 the UTMA is not an option.¹³

Possible Solutions:

There are a number of viable options to this non-probate transfer problem, many of which are similar to those discussed above relating to wills.

There are a number of viable options to this non-probate transfer problem, many of which are similar to those discussed above relating to wills.

Option A – First and foremost, the solution is education. By helping clients think through the various issues involved, by providing them with the necessary knowledge to make informed decisions, and by equipping them with an understanding of the flexibility of beneficiary designations, attorneys may help clients avoid the complications caused by naming a minor as a direct beneficiary of a non-probate asset. Not only do attorneys need to help clients consider these issues for their own accounts, but also attorneys should encourage clients to discuss these issues with grandparents and others who may name their children as beneficiaries of non-probate assets.

Option B – All of the planning options discussed above relating to wills may also be used with non-probate transfers. Rather than naming the child as beneficiary, the beneficiary designation may look something like “John Smith as custodian for Billy Smith under the Idaho Uniform Transfer to Minors Act;” or, “John Smith as Trustee under the Billy Smith Trust, under agreement dated June 12, 2012.” An additional planning option is to name the parent’s estate as the beneficiary, relying on the planning provisions drafted within the will. This provides a centralized planning document and removes the need to make sure that each account has the necessary beneficiary designation provisions. The tax considerations of beneficiary designations on tax-deferred accounts are beyond the scope of this article, but should always be considered when making a beneficiary designation.

Option C – The UCTA may provide an alternative to filing a conservatorship proceeding. The UCTA allows for transfers under \$20,000.00 (as opposed to the \$10,000.00 limitation under the UTMA) to a custodial trustee without court approval.¹⁴

Option D – Seek court approval of a single-transaction protective arrangement.¹⁵ Upon a showing that the basis for a protective proceeding exist, the court, without appointing a conservator, may approve and ratify a deposit contract or trust.

As such, it should be possible to obtain a court order authorizing the establishment of a UTMA account, UCTA account, or other trust arrangement allowing for the management of the funds without incurring the ongoing costs, complications, and obligations of a full conservatorship. Unfortunately, the consensus among many Idaho attorneys is that a number of judges across the state refuse to approve single transactions requests, forcing the establishment of full conservatorships.

Nomination of guardian

Even more difficult than the issue of transfers to minors is the issue of identifying who will look after a minor in the event both parents pass away. The apparent simplicity of the process of nominating a guardian for a minor child belies the complexities that lurk below the surface. The actual process of nominating a guardian for a minor child is by will.¹⁶ The role of an attorney in the process of nominating a guardian is not to simply draft a document that complies with the request of a client, but to help counsel and educate the client to confirm that the client clearly understands the choice being made. This involves counseling with clients on three important issues related to guardian nomination.

Issue 1 – Who should be Named Guardian:

This question may be a huge stumbling block to parents – often causing parents putting off estate planning for years. As a result, parents continue in the absolute worst position possible of having not nominated a guardian at all for their minor children. Absent a valid nomination, the court is left with little to guide its decision as to who to appoint as guardian. In all cases, the court must consider the best interests of the child as the primary factor in determining whether to appoint, and who to appoint, as a guardian for a child.¹⁷ Unfortunately, judges are usually forced to make this decision with very little information about the family dynamics, religious beliefs, and lifestyle preferences of the parents.

Issue 2 – Inter Vivos Guardianship:

Other than via a testamentary appointment within a valid will, there is no other apparent statutory or other legally binding provision for the nomination of a guardian under Idaho law. However, the need for an inter vivos appointment of a guardian may arise for any number of reasons, such as the permanent incapacity of the parent, the incarceration of the parent, or the disappearance of the parent. A nomination of a guardian under a will does not become operative until the death of the testator.¹⁸ As such, a testamentary nomination within a will is not an affective inter vivos nomination of a guardian.

A court may appoint a guardian for a minor if parental rights have been terminated, upon a finding that the child was neglected, abused, abandoned, or when parents are unable to provide a stable home environment.¹⁹ Just as a court is required to give deference to the decisions a parent in custody actions,²⁰ deference should be given to the decisions of a parent in guardianship actions. Although a court may consider the testamentary nomination within a Last Will and Testament as indicative of the parent's choice, it is not an enforceable nomination.²¹ Best practice is to execute a stand alone *inter vivos* nomination.

Issue 3 – Temporary Protective Need:

As with an inter vivos nomination, state law does not address the question of care for a minor on a temporary basis. The need for temporary care may arise from countless situations, ranging from care of the child pending the arrival and appointment of the nominated testamentary guardian, to providing care while a parent is hospitalized due to an accident. Not only is it important that someone have the means to take custody of the child, that person needs the legal authority to make decisions regarding the child's care, including making necessary health care decisions.

Possible solutions

The solutions to these guardian issues include a combination of education, counseling, and comprehensive planning. Simply naming a guardian within the will is insufficient and leaves parents with a false confidence that they have adequately provided for their children's care. Following is an outline of a more complete approach to guardianship planning.

First, who should be nominated? In helping clients make this decision, a simple three-step process is recommended.

• **Step One:** the client should write a list of the names of 5 potential guardians in no particular priority. If the client is unable

to decide on any names, have the client think of a person that they would absolutely not want to be their child's guardian. Now have the client name 3 people who would be a better choice than that person. If the client is still unable to list any names, have the client list the names of 3 people that would do a better job than the foster care system.

• **Step Two:** have the clients list the factors that are most important to them in regards to whom they would want as a guardian. Factors may include the age of the guardian, marital status, religious beliefs, existing relationship with the kids, parenting styles, etc. One factor that should not be considered is finances. The parents should provide through life insurance or other means the necessary finances for the care of their children.

• **Step Three:** the final step is to rank the people listed in step one based on the factors listed in step two. An important issue to consider if a couple is named as guardian is the possibility of the death of one of the persons, or the divorce or separation of the couple. Does the couple serve as guardian only as a couple, or does one or the other members of the couple serve alone? In addition to naming a guardian, backup guardians should be nominated as well.

Second, the nomination of the guardian should be properly documented. Preparing three distinct nomination documents is recommended. First, nominate a testamentary guardian within a last will and testament. Second, prepare an inter vivos guardian nomination, following the formality requirements of wills. Third, prepare an appointment of temporary guardian, again following the formality requirements of a will.²² The purpose of the inter vivos guardian nomination is to provide a means of documenting the parent's desires of who the guardian should be in the event a court appointed guardian is necessary. The purpose of the Appointment of Temporary Guardian is to provide documentation that may be used to help avoid the need of the involvement of Child Protective Services in an emergency situation. A copy of the Appointment is provided to the named guardian, along with instructions on what to do in case of an emergency. The client is also provided with an ID Card identifying who should be contacted in case of an emergency to take custody of the minor children. Further, the client is provided with an Exclusion of Guardian Form that documents and identifies who should not be appointed as guardian, along with an explanation as to why. Additional documents include a medical power of attor-

ney for each child and a Parental Power of Attorney.²³

Third, appropriate instruction and guidance should be provided. One of the greatest gifts a parent can leave a minor child is a record of the parents' thoughts, wishes and desires. This may be accomplished by providing an outline that helps parents write a letter of instruction to express their thoughts and wishes regarding any issue of importance to them, including how finances should be used, how to teach the child about financial management, personal and spiritual values, educational goals and desires, etc. This will also provide invaluable guidance to the guardians in making decisions regarding the child's care.

Conclusion

This article is not a complete analysis of all the issues that should be considered by parents and attorneys when planning for the care and support of children. Hopefully, the issues addressed here will prompt those who practice in the area of estate planning to take a closer look at the planning process to confirm clients are receiving comprehensive planning and for those who do not practice in the area of estate planning, to question if drafting that "simple" will is as straightforward as it appears at first glance.

About the Author

Kimmer W. Callahan, is the principal attorney at Callahan & Associates, Chtd., in Coeur d'Alene. Mr. Callahan practices in the areas of estate planning, probate, trusts, and elder law. He received his J.D. from Gonzaga University School of Law and an LL.M. (Taxation) from the University of Denver. Mr. Callahan is a member of the National Academy of Elder Law Attorneys, The Elder Care Matter Alliance, and serves on the governing council for the Taxation, Probate & Trust Section of the Idaho State Bar.

Endnotes

- 1 Idaho Code §15-5-103
- 2 Idaho Code §15-5-103
- 3 Idaho Code §15-5-103
- 4 Idaho Code §68-806(1)
- 5 Idaho Code §68-1305(1)
- 6 Idaho Code §68-806(3)
- 7 Idaho Code §68-820(2)
- 8 Idaho Code §15-5-430; Idaho Code §15-1-201(29)
- 9 Idaho Code §15-5-433
- 10 Idaho Code §15-5-419
- 11 Idaho Code §68-820(1)
- 12 Idaho Code §§68-1301(1), (8); 68-1302(5); 68-1307(2)
- 13 Idaho §68-807(3)
- 14 Idaho Code §68-1305
- 15 Idaho Code §15-5-409
- 16 Idaho Code §15-5-201
- 17 Idaho Code §15-5-204
- 18 Restatement Third, Property (Wills and Other Donative Transfers) §3.1, Comment a.
- 19 Idaho Code §15-5-204
- 20 Idaho Code §32-1702
- 21 Restatement Third, Property (Wills and Other Donative Transfers) §3.1, Comment a.
- 22 Idaho Code §15-2-502
- 23 Idaho Code §15-5-104

TRUST PROTECTORS - A PANDORA'S BOX?

Carla S. Ranum
Elizabeth L. Mathieu
Mathieu & Ranum, PLLC

The concept of trust protectors was first introduced to practitioners in the U.S. in connection with offshore asset protection trusts.² However, in the last two decades, practitioners have also slowly begun to add them to domestic trusts' governance structures for reasons other than creditor protection.

A large body of legal commentary now exists that addresses the myriad of issues associated with the use of trust protectors.³ Additionally, a number of states,⁴ including Idaho, have enacted specific trust protector legislation. Nevertheless, it still appears that the trust protector function is often misunderstood, and therefore oftentimes not used, even if a trust protector could be a useful addition to a trust's administration.

The Idaho trust protector statute "the Statute"⁵ sets forth a framework for using trust protectors in trusts governed by Idaho law. Referencing the Statute, this article discusses what a trust protector is, when a trust protector can be useful, and key issues that should be addressed in a trust document when a trust protector is included.

What is a trust protector and when can one be useful?

A trust protector is an individual or institution named in a trust document with decision-making powers that are in addition to or replace specific powers normally held by a trustee. Idaho's Statute does not provide an exclusive list of permissible powers, but does list examples.⁶ A drafter may incorporate some or all of the powers listed in the Statute into a will or trust instrument by making specific reference to the Statute.⁷ Usually trust protectors act as the final decision maker when specific issues defined in the trust document arise, creating a sort of "springing protector."⁸ Common powers include:

- **Removing and/or replacing trustees.** For example, a beneficiary with the power



Carla S. Ranum



Elizabeth L. Mathieu

to remove a trustee may shop the market for one more likely to distribute income as the beneficiary desires - potentially disregarding a grantor's wishes. Giving the power to remove and replace trustees to a disinterested trust protector may make it more likely that the grantor's intent is respected and trust assets are not wasted.

- **Making decisions where a trustee has a conflict of interest.** Giving authority to a third party regarding matters where a trustee may have a conflict of interest can protect the trustee from litigation and enable the trust to take advantage of beneficial investments.

- **Directing a trustee-beneficiary regarding matters that could adversely affect him or her.** For example, if a beneficiary is also a trustee of a trust, and has the power to distribute principal or income to himself or herself, there can be

adverse estate tax consequences, and probable loss of any protection of the trust assets from the beneficiary's creditors. There could also be adverse gift tax consequences if he or she makes distributions to other beneficiaries. Giving a trust protector the

authority to make trust distribution decisions can prevent these problems.⁹

- **Directing a trustee regarding moving a trust's situs or appointing assets from one trust to another.** Such changes may result in the original trustee either being replaced or losing income so that a trustee might be reluctant to make such a decision. Therefore, a grantor may not want to rely on the trustee to make such a change, but rather rely on a disinterested third party trust protector to make these decisions.

Usually trust protectors act as the final decision maker when specific issues defined in the trust document arise, creating a sort of "springing protector."⁸

- **Amending a trust to correct drafting mistakes or respond to unanticipated needs of beneficiaries in long-term trusts.** In the absence of a power to amend an irrevocable trust, a trustee would be required to petition a court to make such a change. Aside from the cost and delay that can arise from this, a court could deny the petition. If a present or future trustee could also be a beneficiary, or be swayed by beneficiary pressure, a trust protector may be a better choice than the trustee to address these issues.

- **Terminating a trust.** A trustee may have a financial interest in continuing the trust. Vesting the power to terminate a trust in a disinterested third party could avoid this conflict of interest.

Who can be appointed as a trust protector?

While most clients prefer that their trust protector be their attorney or accountant, some clients wish to name a beneficiary, often a financially successful child, instead. The Statute, however, clearly states that a trust protector is a "disinterested third party"- thereby excluding the grantor, beneficiaries, and all of their related and subordinate parties, from being trust protectors in the State of Idaho.

The Idaho Trust Institutions Act further limits who can serve as a trust protector. Idaho Code §26-3204(1) states that "no person shall act as a fiduciary in this state except "certain qualifying state or national banks or trust companies" and "such other person as may be authorized by the director, in his discretion, and upon such conditions as he may require." Idaho Code §26-3205 states that a person is "not engaged in the trust business or in any other business in a manner requiring a charter under this act, or in an unauthorized trust activity... [if they obtain] trust business as a result of an existing attorney-client relationship or certified public

accountant-client relationship¹⁰... [or if they are] “acting as a fiduciary for relatives”¹¹.

Because of the existence of both the Idaho trust protector statute, and the Idaho Trust Institutions Act, the trust drafter should be aware of the implications of appointing anyone as a trust protector other than:

- A chartered bank or trust institution,
- An attorney or accountant with a pre-existing attorney-client or accountant-client relationship who is also a “disinterested third party,”
- A person authorized by the director of the Idaho department of finance, or
- Relatives of the grantors or beneficiaries — subject to the caveat that a “relative” today may not be a “relative” tomorrow due to divorce or other changed circumstances.

State the applicable standard of care in the trust instrument

The default standard of care for a trust protector under the Idaho Statute is clearly a fiduciary one. The Statute states the “powers and discretions of a trust protector shall be as provided in the governing instrument and may, in the best interests of the trust, be exercised or not exercised”.¹² The Statute further defines a “fiduciary” to include a “trust protector, who is acting in a fiduciary capacity for any person, trust or estate.”¹³ If the trust protector is a fiduciary, beneficiaries have standing to hold the trust protector accountable.

In contrast, several states including Alaska and Arizona do not subject trust protectors to a fiduciary standard of care¹⁴. If a trust protector’s conduct is subject to a personal standard of liability, rather than a fiduciary standard, then, short of fraud or violation of the trust’s terms, the trust protector can make decisions on a whim, with no reasonable basis, benefiting him/herself, disadvantaging beneficiaries, and violating the grantor’s intent. Thus, when a fiduciary standard does not apply, the beneficiaries may have very limited or no recourse against the protector.¹⁵

Because the Idaho Statute’s provisions could be changed, and because the situs of an Idaho trust may be moved to another state with other liability default provisions (to take advantage of more favorable tax and/or trust laws), it is important to ***state the standard of care that is applicable to a trust protector in the trust instrument***. It is also important to inform a client that the beneficiary may have very limited ability to hold a trust protector le-

The Statute states the “powers and discretions of a trust protector shall be as provided in the governing instrument and may, in the best interests of the trust, be exercised or not exercised”.¹²

gally accountable if he or she is subject to a personal standard of care.

Specify the trust protector’s duties and responsibilities

Merely stating that a trust protector has a power to do something may be insufficient to provide guidance to the trust protector as to what he/she is required to do - and, in a worst case, may result in litigation as to the scope of his/her obligations. The trust instrument should ***not only list the powers of a trust protector, but also address whether the power constitutes a duty to act or just the right to act, and the scope of, and limitations on, the duty***.

The importance of being very specific in the trust agreement regarding these questions was highlighted in the one case in the US addressing, although not resolving, trust protector duties and liability. *Robert T. McLean Irrevocable Trust v. Davis* (2009)¹⁶ was a case in Missouri that had no trust protector statute at that time¹⁷. The trust at issue involved special needs trust funded by a legal settlement awarded because of an automobile accident that left a young man a quadriplegic. The trustees depleted the trust assets in a short period of time through wasteful spending.

The case involved the allegation that the trust protector knew about the trustees’ wasteful spending of the trust assets and had a duty to remove them. The trust agreement was clear that the trust protector was held to a fiduciary standard, but the court stated that it was not clear to whom the duty was owed and whether not removing the trustees was an act of bad faith thus subjecting the trust protector to liability. The district court dismissed the case on summary judgment and the appellate court reversed for outstanding questions of material facts. The case is instructive on a number of fronts, not the least of which is the increased risk of litigation when the trust instrument does not clearly set forth the duties and respon-

sibilities of the trust protector and when a court is confronted with a new issue in trust law.

State whether the trustee is an “excluded fiduciary”

Not all trust protector statutes address the priority of decision-making between trust protectors and trustees, but the Idaho Statute does so by: (i) making the exercise by a trust protector of powers and decisions “binding on all other persons”¹⁸ and (ii) relieving an “excluded fiduciary” from liability for “any loss resulting from any action taken upon such trust protector’s direction.”¹⁹

The Statute defines an “excluded fiduciary” as:

“any fiduciary excluded from exercising certain powers under the instrument, which powers may be exercised by the grantor or a trust advisor or trust protector.”²⁰

The Statute, however, is silent on whether the trust agreement must use the term “excluded fiduciary” for the trustee to actually be relieved of liability.²¹ Because failure to include such language might result in a trustee refusing to follow a trust protector’s direction (due to a perception of continued exposure to liability), it is advisable to use that specific term when defining the role and responsibility of a trustee. In addition, if the trustee is stated *not* to be an “excluded fiduciary”, then the drafter should address potential overlap in duties and address the applicability of section (6) of the Statute, which renders a trust protector’s exercise of authority binding on “all other parties”.

Additionally, the Statute relieves an “excluded fiduciary” from liability for any “loss resulting from any action taken upon such trust protector’s direction.”²² This language does not expressly relieve a trustee from failing to take action regarding decisions within the scope of the authority of a trust protector²³ if the

trustee “sought but failed to obtain authorization”²⁴ from the trust protector. For example, if a trust protector has authority to terminate a trust once assets fall below a certain level and the trustee sought, but did not obtain, a direction to terminate the trust, is the trustee liable if he/she exhausts the remaining assets through continued deduction of trust fees and expenses?

Obviously, if the grantor insists on a personal standard of liability for a trust protector, the trust instrument should not name the trustee as an “excluded fiduciary.” If the instrument names the trustee as an “excluded fiduciary,” the beneficiaries may be without recourse to anyone in the event of run-away trust administration. Similarly, section (6) of the Statute (that states that the powers and discretions of a trust protector are binding on all other persons) should not be used as a default provision in the trust instrument if the standard of care is lowered.

In summary, given the above, the drafter should consider: (1) *expressly stating in the trust instrument whether the trustee is an “excluded fiduciary” or not*, (2) *broadening liability relief to include a failure to act after seeking, but failing to receive, direction from a trust protector and*, (3) *providing the beneficiaries specific recourse if the trust protector is subject to a personal standard of care*.

Clarify decision making priority

Unlike trust protector statutes in some other states, the Idaho Statute distinguishes “Trust Advisors” from “Trust Protectors.” While an “advisor” is commonly understood to refer to someone who merely provides recommendations, the Idaho Statute provides that, unless the trust document states otherwise:

- An “Investment Trust Advisor” has the power to: “(a) direct the trustee with respect to the retention, purchase, sale or encumbrance of trust property and the investment and reinvestment of principal and income of the trust, (b) vote proxies for securities held in trust; and (c) select one (1) or more investment advisors, managers or counselors, including the trustee, and delegate to them any of its powers;”²⁵ and
- A “Distribution Trust Advisor” “shall direct the trustee with regard to all discretionary distributions of beneficiaries”²⁶.

Due to the specificity of the default powers listed above, it appears the intent of the Statute is for trust advisors to focus on investment and distribution decisions. However the Statute does not expressly

Use of trust protectors may provide grantors hope that their intent will be followed and unforeseen difficulties addressed - even in very long-term trusts.

limit trust advisors’ decision-making authority to those areas. The Statute also does not exclude distribution and investment decisions from the possible powers of trust protectors. Even if a trust advisor is appointed, grantors often want the trustee or trust protector to oversee the trust advisor’s activities and to have priority with respect to certain investment decisions or deviations from an investment plan. Because the Statute provides that the powers and discretions exercised or not exercised by both trust protectors and trust advisors are “binding on all other persons”²⁷ (including each other), *whenever there is an overlap in decision making authority between or among fiduciaries, the priority of decision making should be clarified*.

State the rights of the trust protector

The drafter should also determine what rights the trust protector should have to effectively exercise his/her duties. Depending on the trust protector’s duties, useful rights might include:

- Periodic reports from the trustees regarding the administration of the trust,
- Access to accounting and other records in the possession of the trustees such as notices from regulators, taxing authorities and beneficiaries,
- Ability to hire other advisors at the expense of the trust, and
- Ability to petition a court for instructions.

Address all administrative matters

Additional factors that should be addressed with both trust protectors and trust advisors are compensation, resignation, removal, replacement, indemnification, and tax implications. This is particularly important if powers are held in a fiduciary capacity and can be exercised for the trust protector’s benefit, or in favor of someone to whom the trust protector owes a legal obligation of support.²⁸ In summary, *any*

issue that should be addressed in relation to a trustee should also be addressed for a trust protector or trust advisor.

Summary

Use of trust protectors may provide grantors hope that their intent will be followed and unforeseen difficulties addressed - even in very long-term trusts. However, the Idaho trust protector statute does not, and indeed could not, address all of the issues that can arise in each client’s situation. Therefore, it is important to address the applicable standard of care, the trust protector’s powers, duties, and rights, and the priority of each fiduciary’s decision-making authority relative to other fiduciaries.

About the Authors

Carla S. Ranum and Elizabeth L. Mathieu are founding members of Mathieu & Ranum, PLLC, focusing on estate planning, probate and trust administration, asset protection, and tax-exempt organization law in Idaho, New York and Illinois. Ms. Ranum holds a JD from DePaul College of Law and a MBA from the University of Texas-Austin. Ms. Mathieu holds a JD from Suffolk University Law School, and a Masters in International Affairs from Columbia University.

Endnotes

¹ The authors wish to gratefully acknowledge the very valuable comments provided by Robert L. Aldridge, Esq. about the Idaho trust protector statute.

² Under US law, if a grantor retains control over the administration of a trust, depending on the level and type of control, such a trust can be subject to creditor claims. Using a trust protector to control a foreign trust’s administration (e.g. distributions to the grantor and his or her family) was long thought to be an effective way for a grantor to keep control, but only indirectly, thus protecting trust assets from creditor claims. This strategy has been thoroughly debunked by a solid line of cases decided on a range of principles the most important of which is that the assets of foreign trusts over which the grantor retains control, even if indirectly through a trust protector, are not insulated from the claims of creditors. See Jay D. Adkisson and Christopher M. Riser, *Asset Pro-*

tection Concepts & Strategies for Protecting Your Wealth (McGraw-Hill 2004).

³ See, e.g., Gideon Rothchild and Alexander A. Bove, Jr., *Trust Protector Trust(y) Watchdog or Expensive Exotic Pet*, 46 Heckerling Institute Special Session IVA materials (2012), Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 Real Prop. Est. & Tru. J. 319 (2010); Philip J. Ruce, *The Trustee and Trust Protector A Question of Fiduciary Power*, 59 Drake Law Rev. 67 (2010); Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 Cardozo L. Rev. 2807 (2006); Austin Scott & William Fratcher, *The Law of Trusts* (4th ed. Little Brown 1987); Alexander A. Bove, Jr., *The Trust Protector: Friend or Fiduciary?*, Asset Protection Strategies-Wealth Preservation Planning with Domestic and Offshore Entities, Vol. 2 (American Bar Association 2005); Alexander A. Bove, Jr., *The Trust Protector, Trust(y) Watchdog or Expensive Exotic Pet*, Estate Planning, Vol. 30, No. 8 (August, 2003) (hereinafter "Bove. A. (2003)"); Joseph A. McDonald III, *Bibliography of Articles on Directed Trusts, Trust Protectors and Open Architecture Trust Designs*, McDonald & Kanyuk, PLLC (2003). For a discussion of trust protectors and offshore trusts, see Jan Dash and Herman Liburd, *The Role of Protectors in Offshore Trusts*, LiburdDash.com (2003).

⁴ See for example, Alaska Stat. §13.36.370; Arizona Rev. Stat. §14-10818; Del. Code. §3313 and §3570; Idaho Code Ann. §15-7-501; Rhode Island Code §18-9-2-2 and §18-9-2-4; Tenn. Code Ann. § 35-15-808; S.D. Codified Laws 55-1B-6; Wyo. Stat. Ann. §4-10-710. Additionally, on May 18, 2012 the Missouri Legislature passed a trust protector statute by approving S.B. 628 revising R.S. Mo. 456.8-808 to be effective August 28, 2012 unless vetoed by the Governor.

⁵ Idaho Code §15-7-501 (hereinafter, the "Statute"). For an interesting discussion of the codification of trust law in the US, see John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 Ala. L. Rev. 1069, 1080 (2007).

⁶ Idaho Code Ann §15-7-501 (6) states that the powers and discretions of a trust protector may include the following: "(a) To modify or amend the trust instrument to achieve favorable tax status or because of changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder; (b) To increase or decrease the interests of any beneficiaries to the trust; (c) To modify the terms of any power of appointment granted by the trust...(d) To terminate the trust; (e) To veto or direct trust distributions; (f) To change situs or governing law of the trust,

²¹ During a conversation with the authors, Mr. Robert L. Aldridge stated that he recalled the intent of the Statute's drafters was for the trust instrument to specify whether the trustee is an "excluded fiduciary".

or both; (g) To appoint a successor trust protector; (h) To interpret terms of the trust instrument at the request of the trustee; (i) To advise the trustee on matters concerning a beneficiary; and (j) To amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust."

⁷ Statute, note 5 at §(8).

⁸ Bove, A. (2003), note 3.

⁹ Under the Idaho Statute, drafters can also address these issues by incorporating a "Distribution Trust Advisor". See discussion below.

¹⁰ Idaho Code §26-3205(2).

¹¹ Id., at §(11). What is a "relative" for purposes of this statute remains unclear. For example, if a relative of a husband is named as a trustee of a trust for the benefit of the wife and then the husband and wife divorce, is the trustee still a "relative" for purposes of this statute?

¹² Statute, note 5 at §(6).

¹³ Id., at §(1)(b).

¹⁴ See e.g., Alaska Stat. §13.36.370; Arizona Rev. Stat. §14-10818.

¹⁵ This statement may beg the question: When would a "personal" as opposed to "fiduciary" power be preferable? One answer could be, although not recommended, when a trust protector has the power to remove a litigious beneficiary for "misbehaving". For a discussion of the dangers of not holding a trust protector to a fiduciary standard, see Alexander A. Bove, Jr., *The Case Against the Trust Protector*, ACTEC Journal 37, p. 77 (2011).

¹⁶ *Robert T. McLean Irrevocable Trust v. Davis*, 283 S.W. 3d 786 (MO. Ct. App 2009).

¹⁷ Although Missouri had enacted section 808 of the Uniform Trust Code that provides that "A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required

to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries."

¹⁸ Statute, note 2, at § (6).

¹⁹ Id., at §(5).

²⁰ Id., at §(1)(b). Note that if the trust instrument states that the trust protector is not a fiduciary and that the trustee is an excluded fiduciary with respect to the trust protector's decisions, and further if the powers of the trust protector are broad, covering for example trustee replacement, distributions, and investments, the trust might not actually exist as there would be no fiduciary administering the trust! Notwithstanding this observation, under Idaho law, all the functions of a trustee cannot be delegated to another. See Idaho Statute 68-107. For an interesting discussion of this issue, see Alexander A. Bove, Jr., *The Trust Protector Mighty Mouse or Just a Cat in a Bag*, 46 Heckerling Institute Special Session IVA materials (2012).

²¹ During a conversation with the authors, Mr. Robert L. Aldridge stated that he recalled the intent of the Statute's drafters was for the trust instrument to specify whether the trustee is an "excluded fiduciary".

²² Statute, note 2 at § (5).

²³ In contrast to the Statutory provisions applicable to trust protectors, section (2)(b) of the Statute does exempt an "excluded fiduciary" from loss that results from a failure to take action, if prior authorization is sought, but not obtained from a trust advisor.

²⁴ Id., at §(2)(b).

²⁵ Statute, note 5 at §(10)(a).

²⁶ Statute, note 5 at §(11).

²⁷ Statute, note 5, see §(6) (regarding trust protectors), §(10) (regarding investment trust advisors), and §(11) (regarding distribution trust advisors).

²⁸ See, e.g., Bove (2003), note 3.



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THE IDAHO ATTORNEY'S GUIDE TO AVOIDING THE McWILL OR McTRUST

Natasha N. Hazlett
Angstman Johnson

I have taught my fair share of Estate Planning CLEs over the years, and I always begin my seminar by posing an “easy” question to the audience: “Why are you here?”

The response I naturally expect is: “Natasha, I heard you are a sublimely entertaining and intelligent speaker; I’m wide awake and ready to take copious notes on everything you have to say!” Admittedly, I have yet to actually *receive* this response.¹ Instead, I typically get one of two answers: “My CLE deadline is on Friday, so I need the credits” or “I just came for the forms.”

I, like most of you, rarely decline an opportunity to use a good form. They save me a lot of time and most importantly, they save my clients money. That said, just because you have a form from a highly talented estate planner, woe to the attorney who drafts a “McWill” or “McTrust.”

Unfortunately, some attorneys have a tendency to treat wills and trusts like an order form.

Check here if married. Check there for kids. You get the idea. Looking at estate planning in this manner is dangerous because you will likely overlook some major areas where your clients need planning.



Natasha N. Hazlett

Contrary to popular belief, estate planning is *not* just about taxes or selecting a personal representative or trustee. A will or trust is the final expression of your client’s wishes. For those of you who haven’t had the pleasure of probating or administering a large number of estates, trust me when I say that many a family memory has been tarnished due to bitter family battles that ensued upon the death of a family member, where a will failed to sufficiently address family dynamics.

A will or trust affects many people’s lives, and not just at the time of the decedent’s death. I have witnessed siblings not speaking for years as a result of a bitter estate battle over seemingly insignificant items like sun catchers.

Before I continue, many of you are scratching your heads right now, ponder-

That said, just because you have a form from a highly talented estate planner, woe to the attorney who drafts a “McWill” or “McTrust.”

ing the definition of a sun catcher. Since Black’s Law Dictionary is silent on the topic of “sun catchers,” I will provide an entirely inadequate and unscientific definition. A “sun catcher” is a small piece of stained glass with a suction cup that you place on a window to, alas, “catch the sun.” Yes, a collection of these trinkets was a major catalyst of a costly estate battle.²

If your client has entrusted you with the task of preparing her estate planning documents, the questions you ask, the suggestions you make and the documents you draft should be well thought out and given the care and attention they deserve. Serving up a McWill or McTrust could create massive family conflicts upon the decedent’s death. Malpractice issues aside, do you *really* want to be responsible for family feuds that could have been avoided by simply asking the right questions?

As problematic as the McWill or McTrust is the well-meaning attorney that treats the client as though she is the “estate planner.” Asking your client for basic information such as the names of proposed fiduciaries or the value of her assets and liabilities is just the starting point of the estate planning process. You are treating your client as if she is the estate planner if your final question to her is: “So, who do you want to have your assets at your death?”

While I do ask my clients about their choice of beneficiaries, my client’s answer to that question is the springboard for numerous follow-up questions. The reason for the follow-up questions is simple: for the most part, your clients don’t know what sorts of issues come up after death, issues such as:³

- An 18 year old child who inherits \$500,000 and spends it within a couple of months.
- The spouse who remarries and then leaves all of the first spouse’s assets to a

new spouse to the exclusion of the children from the previous marriage.

- The financially irresponsible former spouse who dissipates the minor children’s assets.
- The distrusted son-in-law who inherits and controls the assets for the grandchildren.
- The alcoholic or drug-addicted grandchild who inherits \$50,000.

Unless you, as the estate planner, ask the right questions, you cannot draft a comprehensive estate plan. You need to investigate the family dynamics like Jerry Springer on a family reunion episode. In short, your clients don’t know what they don’t know. That’s where you step in as the competent estate planner.⁴

Plan for more than just Uncle Sam and family feuds

While planning for Uncle Sam and the inevitable family feud are critical, there is another oft-overlooked aspect of estate planning that I can almost guarantee you *won’t* find on a form: values (and no, I’m not referring to asset valuation).

Your client will have hopefully lived a long and fulfilling life. During her lifetime, she has likely lived by certain principles and values — values that she has attempted to instill in her loved ones. A will or trust should also address the legacy she wishes to leave behind.

Elizabeth Arnold,⁵ in her book *The Good Will*,⁶ gives the example of a husband and wife to whom she posed the question, “What is most important to you?” Both responded that financial security for their son and giving back to their community were of the utmost importance. The couple had worked hard all of their lives and both indicated that they wished that their parents had given them more of a financial head start in life. As a result, both had a desire to give their own son the advantage they never had.

When their attorney dug deeper, she discovered that the wife wanted to give her son a lump-sum with no strings attached when he reached a certain age. However, the husband wanted to instill a strong work ethic in their son, and therefore preferred to distribute the funds at certain milestones in his son's life. The attorney facilitated a compromise by creating a trust that gave their son enough money at 18 to pay for education and living expenses, with the remainder to be distributed at certain milestones, such as receiving a college degree and working for a certain number of years.

With respect to their desire to help the community, the attorney asked the right questions and discovered that the couple was committed to land conservation. As a result, the couple's estate plan included a bequest of ten acres of land to their community for the purpose of developing a park with a playground and walking trails.

Ultimately, the couple developed a video for their son explaining the thought process behind their estate plan.⁷ In addition to talking about the conditions for his inheritance, the video incorporated images of them walking the family land, pointing out where certain things were planted and the reasons for doing so, and why they had chosen that particular tract of land to gift to their community. As you can tell, this sort of information simply cannot come from a "form". Yet, this sort of planning helped the couple feel satisfied that their values would live on after their death.

Serving as the myth buster

In addition to uncovering family dynamics, assets and personal values, to create a thorough estate plan, you may have to serve as the Myth Buster⁸ (not to be confused with a Ghostbuster) to uncover your client's true desires.

Believe it or not, your clients may have spoken with their friends or neighbors about estate planning. As a result, your clients likely have fallen prey to several myths which warrant correction at your initial consultation so that you can feel confident that you are not drafting a McWill or McTrust. Below are a few of the most common myths I have encountered.

1. I have to divide my estate equally between my kids.

Inheritance is a gift, not a right. Your client should not feel compelled to treat her children equally. You would be surprised how much of a relief this is to clients. Your client's wishes may be quite

In addition to uncovering family dynamics, assets and personal values, to create a thorough estate plan, you may have to serve as the Myth Buster⁸ (not to be confused with a Ghostbuster) to uncover your client's true desires.

different after having the guilt of treating her children unequally removed.

Along these same lines, despite the fact that your client has always given money to a charity or educational institution for years, when it comes to their estate plan, many clients forget about their charitable giving. In this volatile economy, many charities are struggling financially. As a result, I make it a point to inquire about whether or not my clients are interested in donating a portion of their estate to a charity, school, social cause, etc. Just by posing this simple question, you are allowing your client to expand her final legacy beyond her family.

2. The oldest child should serve as personal representative.

Many clients believe that the eldest child, both children, or worse, *all* of the children should serve as the Personal Representative or Trustee. Having multiple personal representatives can cause unnecessary administrative burdens and disputes. You should consider letting your client know that she is probably not doing her children any favors by appointing all of them as personal representative.

The eldest child is likewise not always the best option. Distance from the estate assets and fiscal maturity are two very important factors that your client should consider when selecting a fiduciary.

Once your client has selected the proposed fiduciaries, you should encourage your client to speak with these individuals *before* signing the documents, just to ensure that the nominated individual is willing to take on this role. I have had several clients discover that their friend or relative has no interest in serving in a fiduciary capacity.

3. My family won't have an issue dividing my personal items.

At the end of the day, families are typically *not* fighting over the 401(k). They are fighting over Grandma's gravy bowl that was used every Thanksgiving or sun

catchers. You need to let your clients know that these sorts of disputes arise more often than not.

What typically happens is that one year mom promised the gravy bowl to one child. Ten years later, mom promised the gravy bowl to the other child. At your client's death, *both* children have an accurate memory of mom telling them that they can have Grandma's gravy bowl. A bitter and costly battle ensues over this memory-laden \$10 trinket.

Your client has the power to resolve these issues in advance by drafting a tangible personal property statement. As the estate planner you will need to ensure that the will or trust references said statement. I encourage my clients, while estate planning is on their mind, to talk with their family members and prepare a tangible personal property statement at a minimum for the most prized family heirlooms. Otherwise, this all-important task may not get accomplished.

4. It's too early to worry about funeral preferences.

Right under "estate planning" on the list of things that your client does not want to think about is her funeral or burial preferences. This is another post-death dispute in the making. Although it is a morbid subject (unless you are a funeral director), I encourage my clients to think about their preferences, and I include a provision in the will or trust that incorporates a funeral and burial letter. I have been surprised at the number of clients who actually have thought about their preferences and are relieved to have the opportunity to document them and eliminate the burden of this decision from their loved ones.

Ultimately, drafting a complete estate plan is typically not technically difficult (unless you are engaging in tax-planning). It simply requires that you take the time⁹ to ask the right questions to ensure that the

will or trust that you draft is not a McWill or McTrust, but instead is an accurate reflection of your client's final wishes.

About the Author

Natasha N. Hazlett is an estate planning and probate attorney with *Angstman Johnson* in Boise. She received her undergraduate and law degrees from Southern Methodist University in Dallas, Texas. Natasha focuses her practice primarily on estate planning and probate. She is experienced in administering and settling complex and contested decedent's estates, establishing guardianships/conservatorships, and drafting estate planning documents. Natasha is a frequent speaker on the topics of estate planning and probate.

Endnotes

¹ Come to one of my seminars and respond to my question with those magic words, and you'll walk away with a copy of Elvis Presley's Last Will & Testament. Yes, it's a shameless bribe...but after you read the next paragraph of this article, can you blame me? By the way, if you want to know how I came to possess The King's will, you'll have to attend one of my seminars.

² This is the same estate where deposition questions were posed with respect to a couple of "mooning"

incidents between siblings shortly after the decedent's death.

³ This list is not meant to be exhaustive, but instead is just a sampling of potential post-death issues.

⁴ If you do not feel comfortable asking the hard questions, or do not know what questions to ask, consider referring your client to an estate planning attorney. Just "winging it" with a McWill or McTrust often-times does your client and her loved ones a tremendous disservice.

⁵ Elizabeth Arnold is an estate planning attorney with a *J.D.* from Harvard University, an *LLM* from New York University and a *B.A.* in Religious Studies from Yale.

⁶ Elizabeth Arnold, *THE GOOD WILL* 8-9 (Penguin Group) (2005).

⁷ Most estate planning attorneys (the author included) do not advocate the use of videos in estate planning due to the fact that they can be used to cast doubt on

a testator's competence if, for example, the testator looks extremely tired, appears confused in the video, etc. It appears that the family in *The Good Will* only had one child and that the parent-child relationship was solid. Thus, if there is no fear of a potential will contest, such a video may be beneficial to helping their son understand their values behind their estate plan and would become a cherished memory.

⁸ I love the show *Myth Busters* on the Discovery Channel. If you haven't had a chance to check it out, I highly recommend that you do so. How else will you find out if using a cell phone near a gas pump can truly cause an explosion? (The answer, thankfully, is "no.")

⁹ If your current estate planning fee does not compensate you sufficiently for the time needed to prepare a complete estate plan, you may want to consider increasing your fee.

I encourage my clients to think about their preferences, and I include a provision in the will or trust that incorporates a funeral and burial letter.

James B. Lynch

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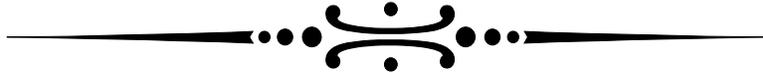
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Regular Fall Terms for 2012

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Twin Falls August 28 and 29
Boise September 17
Coeur d'Alene, Moscow, and Lewiston
..... September 19, 20, and 21
Boise September 28
Boise November 1, 2, and 5
Rexburg (Brigham Young University - Idaho)
..... November 8
Pocatello (Idaho State University) November 9
Boise December 3, 5, 7, 10, and 12

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OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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Regular Fall Terms for 2012

Boise August 9, 16, 21 and 23
Boise September 11, 13, 18 and 20
Eastern Idaho October 15, 16, 17, 18 and 19
Boise (as needed) October 23 and 25
Boise November 13, 15 and 20
Boise December 11 and 13

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NOTE: The above is the official notice of the 2012 Fall Terms of the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court Oral Argument for August 2012

Monday, August 20, 2012 – BOISE

8:50 a.m. Steven Clay Anderson (Petition for Review)#39187-2011
10:00 a.m. Washington Federal Savings v. Van Engelen#38484-2011

Wednesday, August 22, 2012 – BOISE

8:50 a.m. Rex Rammell v. State#38724-2011
10:00 a.m. Dept. of Transportation v. Van Camp (Petition for Review)#38958-2011
11:10 a.m. CDA Dairy Queen v. State Insurance Fund#38492-2011

Friday, August 24, 2012 – BOISE

8:50 a.m. Idaho Wool Growers Association, Inc. v. State#38743-2011
10:00 a.m. Kyle Athay v. Rich County, Utah#38683-2011
11:10 a.m. Pacificorp v. State Tax Commission#38307-2010

Tuesday, August 28, 2012 – TWIN FALLS

8:50 a.m. First Federal Savings Bank of Twin Falls v. Riedesel Engineering#38407-2011
10:00 a.m. A&B Irrigation District v. Spackman#39196-2011
11:10 a.m. Vierstra v. Vierstra#39005-2011

Wednesday, August 29, 2012 – TWIN FALLS

8:50 a.m. Indian Springs, LLC v. Andersen#38369-2010
10:00 a.m. Brooksby v. Geico General Insurance Company#38761-2011
11:10 a.m. Hobson Fabricating v. Dept. of Administration#38202/38216-2010

Idaho Court of Appeals Oral Argument for August 2012

Thursday, August 9, 2012 – BOISE

9:00 a.m. Gosch v. State#38791-2011
10:30 a.m. State v. Olin#38056-2010
1:30 p.m. State v. Critchfield#38540-2011

Thursday, August 16, 2012 – BOISE

1:30 p.m. Gerardo v. State#38592-2011

Tuesday, August 21, 2012 – BOISE

9:00 a.m. State v. Mangum#38294-2010
10:30 a.m. State v. Guel, Jr.#38149-2010
1:30 p.m. Park v. State#38672/38784-2011

Thursday, August 23, 2012 – BOISE

9:00 a.m. State v. Dewitt#38556-2011
10:30 a.m. State v. Herren#38783-2011
1:30 p.m. State v. Tyler#39014-2011

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 4/1/12)

CIVIL APPEALS

Contract

1. Did the court err in concluding that Albar, Inc., breached its contract with JLZ Enterprises, Inc. for remediation?

Vanderwal v. Albar, Inc.
S.Ct. No. 38085
Supreme Court

Damages

1. Whether the district court abused its discretion when it denied Kafader's motion for additur or in the alternative new trial.

Kafader v. Baumann
S.Ct. No. 39195
Court of Appeals

Habeas corpus

1. Did the court abuse its discretion in dismissing Gray's petition for writ of habeas corpus upon a finding that he failed to state a due process claim involving his prison disciplinary hearing?

Gray v. Lynch
S.Ct. No. 39604
Court of Appeals

Insurance

1. Whether the district court erred in affirming the Department of Insurance order that found Altrua Healthshare was in violation of I.C. § 41-305(1) by transacting insurance in Idaho without first obtaining a certificate of authority.

Altrua Healthshare, Inc. v. Deal
S.C. No. 39388
Supreme Court

Post-conviction relief

1. Did the district court err in summarily dismissing Rios-Lopez's successive petition as untimely?

Rios-Lopez v. State
S.Ct. No. 38865
Court of Appeals

2. Whether the court erred in rejecting McCall's claim of ineffective assistance of counsel.

McCall v. State
S.Ct. No. 39271
Court of Appeals

3. Did the court err in summarily dismissing Saxton's petition?

Saxton v. State
S.Ct. No. 39080
Court of Appeals

4. Did the court err by summarily dismissing Smith's claim that her counsel provided ineffective assistance of counsel in relation to the entry of her guilty plea?

Smith v. State
S.Ct. No. 37524
Court of Appeals

5. Did the court err by summarily dismissing Caplinger's claim challenging the grand jury process?

Caplinger v. State
S.Ct. No. 38745
Court of Appeals

6. Did the court err when it summarily dismissed Schultz's claims that he received ineffective assistance of counsel?

Schultz v. State
S.Ct. No. 39065
Court of Appeals

Substantive law

1. Did the district court err in entering an order compelling settlement of the case under material terms different from what was placed on the record by the parties?

Zinman v. Resler
S.Ct. No. 39384
Supreme Court

2. Whether the district court erred in reversing the magistrate court's decision that I.C. § 37-2744(a)(4) allows conveyances to be forfeited when used to transport controlled substances.

*Ada County Prosecuting Attorney v.
2007 Legendary Motorcycle*
S.Ct. No. 39359
Supreme Court

CRIMINAL APPEALS

Due process

1. Did the introduction of evidence that Gallegos invoked his right to remain silent constitute fundamental error?

State v. Gallegos
S.Ct. No. 38785
Court of Appeals

2. Were Ciccone's speedy trial rights violated when, on the eve of trial, the district court granted the State's motion for a continuance because many of the witnesses were active military personnel on duty outside the state?

State v. Ciccone
S.Ct. No. 38817
Court of Appeals

Evidence

1. Did the court err when it did not allow Payne to present testimony as to his motive for possessing methamphetamine, rejecting his proffered defense?

State v. Payne
S.Ct. No. 38918
Court of Appeals

Instructions

1. Did the change in the jury instruction relating to being a persistent violator constitute fundamental error as it could have led the jury to believe an element of the offense had already been established?

State v. Parsons
S.Ct. No. 38980
Court of Appeals

Pleas

1. Did the court abuse its discretion by denying Walsh's motion to withdraw his guilty plea and by finding he had not presented just cause for doing so?

State v. Walsh
S.Ct. No. 39135
Court of Appeals

2. Whether the court had a *sua sponte* duty to conduct an inquiry into the factual basis for the plea after learning in the PSI that the defendant denied the crime to police and whether failure to do so was fundamental error.

State v. Sileoni
S.Ct. No. 38986
Court of Appeals

3. Did the court abuse its discretion by denying Gendron's motion to withdraw his guilty plea filed prior to sentencing because of his implied assertion of innocence, which was based on his counsel's failure to obtain full discovery?

State v. Gendron
S.Ct. No. 39103
Court of Appeals

**Search and seizure –
suppression of evidence**

1. Did the court err in denying Loman's motion to suppress evidence discovered pursuant to a search incident to his arrest on a warrant?

State v. Loman
S.Ct. No. 39269
Court of Appeals

Sentence review

1. Did the court abuse its discretion by allowing the victim's father to make an informal statement at the sentencing hearing?

State v. Hansen
S.Ct. No. 39061
Court of Appeals

2. Did the court abuse its discretion by relinquishing jurisdiction and by denying Staples' Rule 35 motion?

State v. Staples
S.Ct. No. 38568
Court of Appeals

3. Did the court abuse its discretion when it failed to reduce Moss's sentence upon revoking probation?

State v. Moss
S.Ct. No. 38541/38590/38600
Court of Appeals

4. Did the court abuse its discretion when it imposed a unified sentence of fifteen years, with four fixed, after Brown pled guilty to aggravated battery with a deadly weapon?

State v. Brown
S.Ct. No. 38857
Court of Appeals

Substantive law

1. Did the court abuse its discretion when it failed to order an additional competency evaluation prior to trial in light of defense counsel's request?

State v. Day
S.Ct. No. 38825
Court of Appeals

2. Did the court err in denying Smith's motion for credit for time spent on probation?

State v. Smith
S.Ct. No. 39390
Court of Appeals

Summarized by:
Cathy Derden
Supreme Court Staff Attorney
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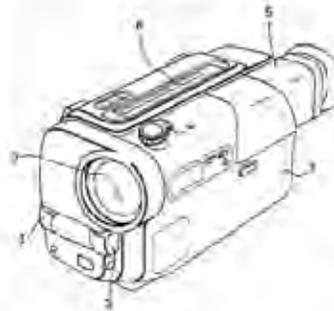
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VERBS: THE BASICS ON TENSE AND VOICE

Tenielle Fordyce-Ruff
Concordia University
School of Law

At the end of my first year of teaching, one of my students approached me with a sheepish question: He wanted help understanding the difference between voice and verb tense. At first, I was aghast. But then I realized his confusion made sense. I had just addressed passive voice, in the context of finding and fixing passive voice—an activity that requires you to look for a combination of verbs in a particular tense. Of course voice and verb tense could get mixed up!

I'm sure there are other writers out there who also get a little confused by verbs in all their permutations. After all, verbs have voice, mood, tense, number, and person. There are regular verbs and irregular verbs; a verb can be linking, transitive, or intransitive, depending on the types of objects or complements it can take; verbs can be auxiliary or main verbs; verbs even stop functioning as verbs and appear as verbal phrases or gerunds.

Whew! Covering all that would be way too much grammar for one month. So, here's a refresher on the basics of verb tense and voice.

Tense

Tense refers to when in time an action happened (or is happening, or will happen). Each verb has three tenses: past, present, and future. Each tense has four different aspects: simple, continuous, perfect, and perfect continuous.

A verb with a simple aspect indicates actions that occur at a point in time or on a repeated or habitual basis.

I researched yesterday. (past simple)

I research everyday. (present simple)

I will research tomorrow. (future simple)

A verb with a continuous aspect indicates that the action takes place over time; in the past and future tense verbs with continuous aspect are used to indicate the temporal relationship with another action. These verbs always use part of the verb



“be” as the first part of the verb phrase and end with the main verb + ing.

I was researching when the phone rang. (past continuous)

I am researching now. (present continuous)

I will be researching next week when you visit. (future continuous)

A verb with a perfect aspect indicates either that an action happened at an unspecified time in the past or that the action has or will end before another action. These verbs always use part of “to have” as the first part of the verb phrase and ends with the past form of the main verb.

I had researched one issue when the phone rang. (past perfect)

I have researched many issues. (present perfect)

I will have researched all the issues by Friday. (future perfect)

Finally, a verb with a perfect continuous aspect indicates that the action happens over time and continues into the present, or happened over time before another action. These verbs start with the relevant part of the verb “to have” followed by “been” and ends with the main verb + ing.

I had been researching only a short time before I found the answer. (past perfect continuous)

I have been researching for over fourteen hours. (present perfect continuous)

I will have been researching all day. (future perfect continuous)

Each verb has three tenses: past, present, and future. Each tense has four different aspects: simple, continuous, perfect, and perfect continuous.

Tense and aspect work together to create layers of action. By combining different tenses and aspects, we can re-create the reality of time in our writing.

It was a dark and stormy night. I had been researching for only twelve hours when the phone rang. I heard an ominous voice say, “That motion must be filed tomorrow. You should plan on being here all night.”

Active v. passive voice

Verbs can be either active or passive, depending on whether the subject of the sentence is doing the action of the verb. A verb is active when the subject of the sentence is performing the action of the **verb**.

The driver **had been drinking**.

A verb is passive when the subject of the sentence isn't performing the action of the **verb**.

She **was hit** by a drunk driver.



Tenielle Fordyce-Ruff

To identify passive verbs, you have to look for a specific two-verb combination. Passive verbs are always formed with a form of the verb “to be” and the past participle of another verb (a verb ending in -d, -ed, -n, -en, or -t).¹ In the example above, we have a form of “to be” (was), and a past participle (hit).

Now, passive voice can get a confusing because it can happen in several tenses.

The truck **is being driven** by Bob.
(passive/present continuous)

The unsuspecting pedestrian **was hit** by a blue pick-up truck. (passive/past tense)

And it can also get confusing because two-verb combinations can be used to form active verbs in various tenses.

The public defender **had defended** this client before. (active/ past perfect)

He **is preparing** a motion in limine to exclude his client’s history of leaving rehab. (active/ present progressive)

So, don’t be fooled when you see a “to be” verb or a two-verb combination. Instead, look first to see if the subject of your sentence is doing the action of the verb and then look for a “to be” verb and a past participle.

So, don't be fooled when you see a "to be" verb or a two-verb combination. Instead, look first to see if the subject of your sentence is doing the action of the verb and then look for a "to be" verb and a past participle.

Conclusion

By understanding tense and voice, we can help the reader understand the reality of time and action. You can also create layers of time and hide or expose actions.

About the Author

Tenielle Fordyce-Ruff is an Assistant Professor of Law and the Director of the Legal Research and Writing Program at Concordia University School of Law in Boise. She is also Of Counsel at Rainey Law Office, a boutique firm focusing on civil appeals. You can reach her at

tfordyce@cu-portland.edu or tfr@rainey-lawoffice.com.

Sources

- Terri LeClercq, *Guide to Legal Writing Style* 37-38 (Aspen 2004).
- Bryan A. Garner, *The Redbook: A Manual on Legal Style* 158-60 (2d ed., West 2006).

Endnotes

¹ For tips on fixing passive voice in your writing, see “Adding People to Your Writing: Eliminating Passive Voice and Vague “ing” Words,” *The Advocate* 68-69 (November/December 2010), available at <https://isb.idaho.gov/pdf/advocate/issues/adv10novdec.pdf>.

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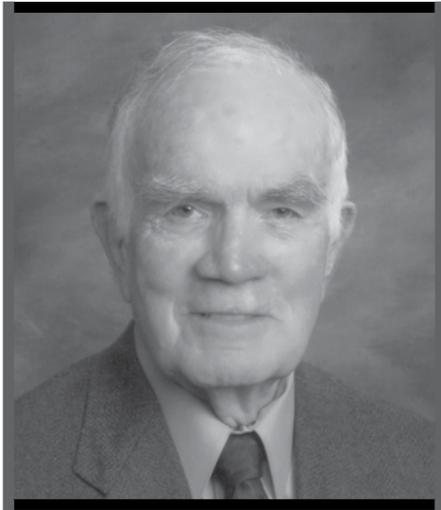
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The Idaho State Bar's highest recognition goes to those lawyers who best exemplify the profession.

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Hon. Charles F. McDevitt
Boise

"If you work with smart people, you better be prepared," Justice Charles F. McDevitt said when asked about his extensive legal career. "That's what motivated me."

Justice McDevitt recalled that he was fortunate that in every job he has had, there were things that were interesting. And, especially due to his supportive wife, he had a good deal of success. He counts as one of his accomplishments serving in the Idaho Legislature and working with power brokers to establish a state sales tax. This was needed, he said, because the state had fiscal problems funding its school system and the sales tax would diversify the state's revenue sources.

Another significant legacy for Justice McDevitt involves soccer fields and green space. He served for many years on the Boise Parks and Recreation Board and was involved in gathering large donations for the Simplot Soccer Fields and establishment of the expansive Charles F. McDevitt Youth Sports Complex in West Boise. The complex includes a skateboard

Distinguished Lawyer Award

The Distinguished Lawyer Award is presented each year at the Idaho State Bar Annual Conference to one or more attorneys who have distinguished the profession through exemplary conduct and through their many years of dedicated service to the legal profession and to the citizens of Idaho. In 2012, the Idaho State Bar honors three renowned Idaho lawyers.

park, playgrounds and 30 acres of green space for youth sports.

Brief biography

Born: Pocatello

Influenced to practice law – Father was a "country lawyer"

Admitted to the Idaho State Bar – 1956

Family – Spouse Virginia and eight children

Reason for success – Support from wife

Firms – Richards, Haga and Eberle; Boise Cascade general counsel; Co-founder Farmers and Merchants State Bank; President and CEO of Beck Industries; Senior corporate management at Singer Company; Ada County Public Defender; co-founder Givens, McDevitt, Pursley and Webb; McDevitt and Miller

Practice areas – Water law, Corporate law

Academics

University of Idaho College of Law, 1956

Civic work

Idaho House of Representatives 1963-66 (elected to two terms and successfully pushed for a sales tax to stabilize funding for education)

Idaho Supreme Court 1989-1997

Idaho Supreme Court Chief Justice 1993-1997

Initiated mediation for family courts and in civil litigation; initiated the statewide Court Assistance Offices, initiated State Court-Tribal Court Forum.

Boise Parks and Recreation Commission

Section member – Business and Corporate Law, Professionalism and Ethics, Water Law

Organizer – Simplot Sports Complex, (161 acres)

Namesake - Charles F. McDevitt Youth Sports Complex (30 acres)

Foothills Conservation Advisory Board

Awards

2005 ISB Professionalism Award

2009 ISB Service Award

Award of Legal Merit, University of Idaho College of Law

Robert M. Artz Award, National Recreation and Park Association

In others' words

"It's no exaggeration to say that Chuck McDevitt's service to Idaho and the state bar has established a standard of excellence that few ever attain. . . . On the Court he maintained his lifelong commitment to access and fairness for all Idahoans and served as a diligent administrator and ad-

vocate for judicial efficiency and accountability.”

– Cecil Andrus,
Former Idaho Governor

“Our state is indeed fortunate to have the services of Judge McDevitt. I can think of no one more deserving of this honor.”

– David H. Bieter,
Mayor of Boise

“He is known as a hard-working and no nonsense lawyer, and you ought to be well prepared if you faced him in court or across the table. . . . I observed the massive amount of time he spent helping the young lawyers in his employ learn how to do their job and to organize an effective and smooth operating office. Later, when I served on the Idaho Supreme Court from 1989 to 1997 with Chuck, I had a close opportunity to see and appreciate his legal skills, as well as his executive capability when he became Chief Justice. He worked diligently and expertly at the task of making wise and correct decisions in the hundreds of cases upon which we shared the responsibility of helping the Court make a decision.”

– Justice Byron J. Johnson

“Our office sees a constant stream of people coming to him for advice and guidance on charitable and civic affairs – whether it be masterminding the Boise Foothills Initiative, putting together a complicated land exchange for the Idaho Foundation for Parks and Lands or fundraising for the Girl Scouts. He is fond of quoting the remark attributed to General George C. Marshall, ‘It is amazing what you can accomplish if you let other people take the credit.’”

– Dean J. (Joe) Miller

“Among the initiatives that he authorized to modernize courts were innovative approaches to mediation both in family courts and in civil litigation, the statewide Court Assistance Offices, and the State Court-Tribal Court Forum. The Judicial Fairness Committee also was prominently a part of judicial conferences and bar conventions, in which issues of gender, racial, religious and ethnic diversity and respect were brought forth, all under the Chief Justice’s sponsorship.”

– Cathy R. Silak,
Dean, Concordia School of Law

“He, perhaps, is one of the best “grouches” I have had the pleasure to practice law with.”

– William F. “Bud” Yost



Scott Reed
Coeur d’Alene

Scott Reed’s distinguished career in law began almost by accident. Like many young people after graduation, he could have gone in many directions. He graduated from Princeton University, “and dad made sure I was in ROTC,” Scott said. “My soon-to-be wife said ‘why not go to law school?’” to avoid an automatic trip to Korea. So he went to Stanford Law School, where student ranks had been depleted by the draft, and he was accepted before even taking an exam. “They told me, ‘you can take the test later.’” After two years in school, he got called up anyway and served in Germany. When the tour was up, he decided to finish law school, so a legal career was born.

While living in California, Scott was interested in the outdoors and eventually in water law. “Environmental Law was more of a hobby than anything,” he said, “because it didn’t pay anything. But after they passed environmental protection laws it became more interesting.”

Brief biography

Born - 1928, Klamath Falls

Influenced to practice law – His wife.

Admitted to the Idaho State Bar – 1956

Family – Spouse Mary Lou and two children and four grandchildren.

Reason for success – “From a personal perspective, it has been a success because the subject matter was interest-

ing. When I moved to Coeur d’Alene, the lawyers were all known for their integrity, courtesy and civility. It still is like that. I like the research and the writing. It’s been a good place to practice law.”

Firms – Solo practitioner except a two-year stint at U.S. Attorney’s office; and two years as a partner in Smith, Kimball and Reed.

Practice areas – Administrative Law, Business Law, Environmental Law, Real Estate Law.

Near miss - In 2010 Five Coeur d’Alene police officers surprised Mr. Reed in his office above a bank in the early morning hours and promptly cuffed him as the prime suspect in a bank heist. “In retrospect, it was rather complimentary that someone in my condition walking only with a cane was thought physically capable of robbing a bank,” he later wrote to the police chief.

Academics

Princeton University AB 1950

Stanford Law School LLB 1955

Civic work

Assistant U.S. Attorney in Boise, 1959-61

Attorney in private practice in Coeur d’Alene

President Eighth District Bar Association, 1965-66

Member, Board of Trustees of North Idaho College, 1966-1972

Member Coeur d’Alene Planning Commission, 1965-75

Member of Idaho Water Resources Board, 1971 – 1983

Member of Board of Directors, National Audubon Society, 1975-81, 1984-96

Member of Board of Trustees, North Dakota Wetlands Trust, 1986-1995

Member of Board of Trustees, Idaho Nature Conservancy, 1994-2005

Member of Coeur d’Alene Library Board 1996-2003

Authored book: “The Treasure Called Tubbs Hill,” 2008

Member of Board of Directors, Western

Environmental Law Center, 1994-2012

Member Board of Directors Idaho Legal History Society 2004-2012, President 2011-2012

Awards

1969 American Motors Corporation Conservation Award

1971 Rocky Mountain Center on Environment Award

1971 Conservationist of the Year (with Mary Lou) – Idaho Wildlife Federation Governor's Award

Idaho Conservationist of the Year with wife Mary Lou by Idaho Wildlife in 1984

Contributing Author, *Justice in Our Time* (1990)

1998 ISB Professionalism Award

2005 University of Idaho's President's Medallion Recipient

2008 Justice Byron Johnson Distinguished Service Award – Idaho Legal History Society

2009 Fund for Idaho Nelle Tobias Philanthropy Award, with wife, Mary Lou

2010 Idaho Rivers United Idaho Legacy Award with wife, Mary Lou

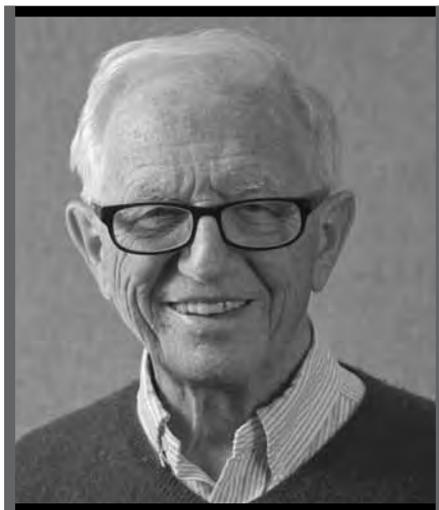
In others' words

"I cannot think of a better example for a young lawyer to emulate than Scott Reed. He is highly skilled at representing his clients, unfailingly courteous to opposing counsel and always willing to mentor a less experienced practitioner. In short, Scott is a true professional in the classic sense of the word."

– Ausey "Rusty" Robnett

"Scott's passion for the practice of law and his distinguished legal career have brought honor to the profession. In addition, his many achievements and activities outside the legal profession have contributed greatly to building a better society. We can think of no one more deserving of this prestigious award than Scott."

– C. Timothy Hopkins,
John D. Hansen
D. Fredrick Hoopes



Archibald W. Service

Pocatello

It takes a special kind of person to help families with wealth management and tax issues upon a loved one's death. Perhaps that is why Archie has gained the wide respect of his peers in the Bar and deep gratitude from his clients in eastern Idaho. Those who know Archie talk about a personable, trustworthy and competent professional who is always willing to lend a hand.

Archie is also known for his keen interest in sharing the fine points of trusts and estates. He has shared his extensive knowledge in numerous educational outlets including as a founding member of the Idaho State University's Annual Tax Institute.

Brief biography

Born - 1926

Influenced to practice law – "After serving two years in the Navy as an electrician I knew I didn't want to do that."

Admitted to the Idaho State Bar – 1953

Family – Adult twin sons.

Reason for success – "Stay in contact with the client. Remember who you are representing. Do what is best for your client."

Firm – Service and Spinner

Practice areas – Taxation, Trusts, Estate and Probate.

Academics

After getting out of the service, he went to school at Idaho State University and Stanford University for a bachelor's degree.

University of Idaho College of Law

Civic work

Taxation, Probate and Trust Law Section
Founding member (now emeritus), Idaho State University's Annual Tax Institute
Sixth District Bar Association president, 1962

Chairman of Lava Hot Springs Foundation, 1959-64

Treasurer of the Bannock Memorial Hospital Board, 1978-79

President of the Pocatello Estate Planning Council, 1978-79

Member of the Idaho Department Board of Health and Welfare, thrice chairman, 1979-87

Pocatello Chiefs (city leaders) member

Pocatello Rotary member

Former director of the Downey State bank

Member and past president of the Juniper Hills Golf and Tennis Club

Awards

2003 ISB Professionalism Award

2003 ISB 50-year attorney

Fellow in the American College of Trust and Estate Council, 1986-2006

In others' words

"Archie is the consummate professional in probate and estate administration and planning. His estate filings are never lacking and he promptly moves his cases from start to finish. He is a meticulous estate planner. He is always focused on the duty to be sure that the client's wishes are clearly stated and understood in the wills, living wills, and trust documents he prepares. He is a problem solver and has consistently kept himself abreast of changes in the probate and tax laws affecting his clients.

– Hon. Rick Carnaroli

"His knowledge related to probate, trust and estate administration and planning rivals those who are charged with teaching such things in law school. Archie's practice of law emphasized that a lawyer's duty is to ensure that the client's wishes are clearly stated and understood in the wills, living wills, and trust documents he prepares for them.

– Ron Kerl

"He has always maintained an interest in continuing to learn about the law and keep up on new legislation and developments. He is one of the top estate and probate lawyers in the state."

– Jim Spinner

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EVERYONE WAS RIGHT AND EVERYONE WAS WRONG: THE SUBTLE ECHOES OF THE SUPREME COURT'S HEALTHCARE REFORM DECISION

Brian P. Kane¹

Office of the Attorney General

On June 28, 2012, the United States Supreme Court handed down its most eagerly anticipated decision of this young century. By now, word has spread that the individual mandate is constitutional based on Congress's taxing power; still, Congress may not coerce states into expanding their Medicaid programs by threatening their existing funding. Although rapidly distilled to these two points, the opinion is much more sophisticated and legally substantive.

The two primary holdings can be broken down into the following:

1. The individual mandate was not a tax for purposes of the Anti-Injunction Act;
2. The individual mandate was outside Congress's authority under the Commerce Clause;
3. The individual mandate could not be saved under the Necessary and Proper Clause;
4. The individual mandate was a tax, not a penalty, authorized under Congress's taxing power; and
5. The expansion of Medicaid was unconstitutionally coercive because it terminated all existing Medicaid funding if states refused to comply.



Brian P. Kane

Beyond the text of the Court's decision, the depth of the Court's reasoning both in agreement and dissent emerge. For example, although the Chief Justice wrote the majority opinion, at times, it is only the Chief Justice's opinion. Quirkily, while the dissent agrees substantively with portions of the Chief Justice's opinion (such as the portion regarding the Commerce Clause), the dissent did not join that portion. This is a departure from the usual conduct of the Court wherein justices join in with those portions of the opinion they agree with. This means that the decision to uphold the individual mandate was 5-4 (Chief Justice Roberts, Justices Ginsburg, Kagan, Sotomayor and Breyer). The portion of the opinion rejecting the individual mandate as falling



within Congress's constitutional authority under the Commerce Clause, as well as the Necessary and Proper Clause, is exclusively the Chief Justice's opinion, but nonetheless receives its other four votes of support through Justice Scalia's dissent, even though the latter wrote separately. The opinion's Medicaid expansion portion finds itself with a 7-2 split, with only Justices Sotomayer and Ginsburg dissenting, but again curiously, lacking the formality of the Justices Scalia, Kennedy, Thomas and Alito joining it, but only Sotomayer and Ginsburg dissented from that portion.

This article briefly summarizes each of the holdings, reconciles some of the seemingly logically challenging portions of the decision, and provides a forward-looking perspective of the impact of this decision. Much attention has been focused on the Court's upholding of the individual mandate, but within the analysis, a rebalancing of the relationship between the federal government and the states may be occurring. In this respect, the Court seems willing to establish outer boundaries for Congressional authority under the Commerce Clause, the Necessary and Proper Clause, and Congress's Spending Power. As explained in greater detail below, the Court appears poised to evaluate federal exercises of authority over the states and individuals to determine whether they truly permit a choice with regard to action, or, instead, serve as coercive requirements negating the balance of dual sovereigns.

Much attention has been focused on Court's upholding of the individual mandate, but within the analysis, a rebalancing of the relationship between the federal government and the states may be occurring.

You say tax, I say penalty... let's call the whole thing off!²

The Tax Anti-Injunction Act³ was enacted in 1867 to require that a challenge to a tax must be made by first paying the tax, and then filing for a refund.⁴ This provision is significant within the context of a challenge to the Affordable Care Act (ACA) because a penalty would not be assessed until the 2014 taxes were due, meaning that a valid challenge likely could not arise until 2015.⁵ This Act created an apparent logical inconsistency within the U.S. Supreme Court's decision because the majority found that the pen-

alty was not a tax for purposes of the Tax Anti-Injunction Act, yet found that it still constituted a tax within Congress's taxing power.

In application, this analysis is fairly straightforward, if creative. The Tax Anti-Injunction Act is a statute enacted by Congress, and therefore Congress could set the rules of when and how it applies. By labeling the "tax" a penalty, Congress removed this portion of the ACA from the delayed challenge umbrella of the Tax Anti-Injunction Act. This labeling is made all the more significant because, throughout the ACA, other provisions expressly use the label "tax" as opposed to "penalty."⁶ Legally, this is a significant point. A legislative body has the ability to set its own definitions and determine how its own acts will be applied, including providing exemptions. Thus, by labeling the tax a penalty, Congress sought to exempt it from application of the Tax Anti-Injunction Act.⁷ The Court thus reached the merits by finding that the penalty associated with the Individual Mandate is not an exaction subject by the Act.⁸

An activity is required prior to regulation

The ACA was advanced by the federal government as a valid extension of Congress's authority to regulate commerce. This power arises from Article 1, § 8, cl. 3 of the Constitution, which provides: "To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." Historically, the power has been broadly read to extend even to personal use and consumption of commodities, as well as activities having a substantial effect on commerce.⁹ But the ACA represented the first time that Congress attempted to use its Commerce Power to compel a purchase.

This constituted a reach too far for the Chief Justice in an opinion in which none of the other Justices joined. Chief Justice Roberts recognized the expansiveness of the Commerce Power, but recognized a single caveat—virtually all of the previous cases examining the Commerce Power described "the power as reaching 'activity.'"¹⁰ In distinguishing the individual mandate, the Chief Justice recognized that it did not regulate existing activity, but instead required individuals to purchase a product (the insurance) to become active within the commercial stream.¹¹ This compulsion also created a virtually limitless power, which was conceded by the federal government.¹²

A claim of limitless power should immediately set off warning bells with any student of our nation's meticulous and

In holding that the individual mandate could not be upheld under the Commerce Power, Chief Justice Roberts definitively recognized limits thereto.¹⁴

ingenious system of checks and balances. It was precisely the limitless claim of commerce power that ultimately doomed it as a justification for the individual mandate. As the Chief Justice recognized, "The Framers gave Congress the power to *regulate* commerce, not to *compel* it."¹³ In holding that the individual mandate could not be upheld under the Commerce Power, Chief Justice Roberts definitively recognized limits thereto.¹⁴

Necessary & proper is cabined by enumerated powers

The Necessary and Proper Clause has also enjoyed a historically broad, but not unlimited reading. Article 1, § 8, cl. 18 permits Congress:

[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Chief Justice, again speaking only for himself, analyzed this power as simply an exercise of authority incidental to existing enumerated powers, but not as creating an independent class of powers that were not enumerated.¹⁵ The individual mandate exceeded this limit because it reached outside of the scope of authority to draw into its purview non-participants.¹⁶ In sum, the government could not reform insurance by requiring every citizen to purchase insurance.

Wait, I thought it wasn't a tax?

In the most intellectually challenging portion of the decision, the Chief Justice (joined by four other Justices), after determining that the Individual Mandate did not constitute a tax for purposes of the Tax Anti-Injunction Act, upheld the individual mandate as a valid exercise of Congress's enumerated power to "lay and collect Taxes."¹⁷ To reach this conclusion, the "tax" maintained its label as a "penalty" in order to survive application

of the Tax Anti-Injunction Act, but could not be disguised as such for purposes of a constitutional analysis.¹⁸ In other words, Congress could craft its own definition of the tax as a penalty, but it could not remove the Constitution's application for purposes of the Taxing Power by changing its name.

To identify the penalty as a tax, the Court recognized that the penalty had the following attributes of a "tax:"

1. Paid into treasury when taxes are paid;
2. Does not apply to individuals who do not pay federal income taxes;
3. Amount determined by taxable income, dependents, filing status;
4. Requirement is found in IRS Code;
5. Enforced by the IRS; and
6. Yields revenue (estimated \$4 billion).¹⁹

Based upon these factors, it seems apparent that although the "tax" was shrouded as a penalty, the shroud is easily torn off when examined under the Congress's taxing power. Many have expressed disbelief at this analysis, but it seems a fairly routine legal premise that a legislative body can craft a definition of one thing for statutory purposes, only to have it interpreted differently constitutionally. For this reason, it is often practical to examine a statute for constitutional authority prior to its effect on statutory authority.

Within his analysis, the Chief Justice re-characterized the individual mandate from being a mandate (or coercive) to simply an incentive to lower your individual tax burden.²⁰ According to the Chief Justice, the penalty is not actually a penalty, but rather an incentive to purchase health insurance.²¹ In making this distinction, the individual mandate carries only a higher tax burden, but does not involve any punitive sanction—if you forgo insurance and pay the penalty, you are in full compliance with the law.²² Thus the mandate is not a coercive mandate, but rather a financial inducement to purchase insurance in order to lower an individual's tax burden.

A two-government system requires two functioning governments

A central piece of the ACA was the expansion of Medicaid.²³ The expansion of Medicaid would cover everyone under 65 with incomes of up to 133% of the federal poverty line.²⁴ In order to facilitate this expansion, the federal government will pay 100% of the costs and then decrease its contribution from 100% over the course of several years. Ominously though, if a state failed to expand its program according to the ACA, the Secretary of Health and Human Services was required to terminate all future payments to the state.²⁵

Unlike the situation in *South Dakota v. Dole*, in which only 5% of federal funds comprising one-half of a percent of the state's budget were at risk, the ACA places 100% of Medicaid funding at risk. This all or nothing proposition in turn threatens more than 10% of individual state budgets — a threat the Court likened to “economic dragooning.”²⁶ This dragooning therefore eliminated any “option” that a state would have, instead forcing them to acquiesce in the expansion of Medicaid.²⁷ The Court therefore permitted the expansion of Medicaid under the ACA, but prohibited the Secretary from removing the existing funds if a state opts out of the expansion.²⁸ By removing the threat of loss of all existing funding, the Court also re-balanced the federal-state relationship by permitting the states to simply refuse to yield to the federal enticement.²⁹

The forward impact of the decision

Eagerly anticipated, the decision proved disappointing to virtually everyone. The President and Democratic enthusiasts were given victory that allowed the individual mandate to stand, but as an albatross because it had to be labeled a tax to survive. Republicans lost the individual mandate, but gained significant ground with regard to limiting the expansion of the Commerce and the Spending Clauses. Notably there are now measurable parameters with regard to both of these Clauses which may further reinvigorate the positions of the states with regard to their sovereignty. Additionally, the federal government cannot loop its purse strings around the necks of states to throttle them into compliance.³⁰ In short, this decision highlights the check that the individual states can place on the power of the federal bureaucracy by recognizing that certain decisions should remain local.³¹

When treading upon legislative enactments, tread lightly

Perhaps the most enduring outcome of this decision will be the Chief Justice's



commitment to the concept of judicial minimalism. Throughout his opinion, the Chief Justice demonstrated a commitment not only to adhere strictly to the law, but also to avoid inserting his or the Court's policy choices for those of our elected leaders.³² Most compelling in this regard is that the Chief Justice, after finding that the Commerce Clause and the Necessary and Proper Clause did not afford the appropriate authority, went further analyzing the penalty as a “tax” under Congress's Taxing Power. The Chief Justice's ability to find a “saving construction” for the Individual Mandate reflects his dedication to the concept of judicial restraint or minimalism as well as deference to the acts of Congress.³³

This is particularly instructive to both the bench and bar. Often, laws are analyzed for weaknesses and then the weak points are eviscerated, resulting in the striking down of a law. But the Chief Justice's analysis seems to turn this approach on its head because instead of looking for ways to strike a law down, this decision seems to instruct us to actively look for ways to uphold the enactments of our elected representatives. In this regard, this opinion is likely to become a hallmark of judicial minimalism because of the multiple opportunities that the Court had to strike broadly, but instead patiently and surgically upheld with minimal removal. For example, the principal dissent not only would have struck down the individual mandate, but also the entirety of the Act. In contrast, the Chief Justice found authority under the taxing power to uphold the individual mandate, and removed only the provision allowing the secretary to withhold all existent funding.

By removing the threat of loss of all existent funding, the Court also re-balanced the federal-state relationship by permitting the states to simply refuse to yield to the federal enticement.²⁹

Conclusion

The decision on the ACA was a politically and legally mixed bag, with almost every interested party finding vindication of some sort in the result, but also having missed the mark in some fashion. The true impact will be measured as both implementation of the ACA unfolds and as the state and federal government face the reality of the never-ending ebbs and flow of Federalism. For the time being, there appear to be five votes in favor of a more limited federal government tempered by the Chief Justice's endorsement of a more judicially restrained bench. It appears the only guarantee is that judicial forecasting remains the most dubious of endeavors.

About the Author

Brian Kane is the Assistant Chief Deputy Attorney General for Idaho's longest serving Attorney General, Lawrence

Wasden. The views within this article are Brian's own and should not be considered those of Attorney General Lawrence Wasden or the Idaho Office of Attorney General. Brian also serves as an Advisory Board member of the National Attorneys General Training and Research Institute. Within that capacity, Brian develops curricula and conducts training in the areas of civility, professionalism, ethics, administrative representation, professional development, management, and technology law among others.

Endnotes

¹ Brian Kane is the Assistant Chief Deputy within the Idaho Office of Attorney General. The views and analysis herein are solely the authors and should not be construed or interpreted in any way to be a legal analysis or opinion of the Idaho Attorney General. Although familiar with this topic, Brian still routinely confuses his Blue Cross with his Blue Shield.
² *Let's Call the Whole Thing Off*, George & Ira Gershwin, performed by Louis Armstrong.
³ 26 U.S.C. § 7421(a). Although the title is cumbersome, it is necessary; otherwise this Act could be confused with the Anti-Injunction Act, 28 U.S.C. § 2283, which generally prohibits federal courts from issuing injunctions against state courts (with three exceptions).
⁴ Notably, neither the Government nor the challengers argued that the Tax Anti-Injunction Act applied—both agreed that it did not, which then required the Supreme Court to appoint Robert A. Long to brief and argue the point that the Tax Anti-Injunction Act applies. *National Federation of Independent Business v. Sebelius*, 565 U.S. __ 132 S. Ct. 603 (2011).
⁵ The Fourth Circuit dismissed a challenge through application of the Tax Anti-Injunction Act. See *Liberty University, Inc. v. Geithner*, 671 F.3d 391 (4th Cir. 2011).
⁶ *National Federation of Independent Business v. Sebelius*, ___ S. Ct. ___, 2012 WL 2427810, at *12 (2012).
⁷ Of significant note, Congress removed some of the classic tax enforcement mechanisms from the mandate provision including criminal prosecution (26 U.S.C. § 5000A(g)(2)(A)), and the use of liens and levies (§ 5000A(g)(2)(B)).
⁸ *National Federation* at *14.
⁹ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (farmer's use of wheat); *U.S. v. Darby*, 312 U.S. 100

(1941) (Congress may prohibit shipment of lumber manufactured by employees in violation of Fair Labor Standards Act).

¹⁰ *National Federation* at *16.

¹¹ *Id.*

¹² *Id.* at *17; see also *Seven-Sky v. Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011) (federal government's position that no exercise of mandate for any product or service would be unconstitutional).

¹³ *Id.* at 18 (emphasis in original).

¹⁴ *Id.* at *20.

¹⁵ *Id.* at *21.

¹⁶ *Id.* at *22.

¹⁷ U.S. Constitution Art. I, § 8, cl. 1.

¹⁸ *National Federation*, at *24.

¹⁹ *Id.*

²⁰ *Id.* at *25.

²¹ The Chief Justice demonstrates that, for someone making \$100,000 a year, the penalty would be approximately \$200, while the price of a qualifying policy may be \$400 a month. An individual therefore has the choice as to whether to pay the \$200 penalty, or \$4,800 for a year of qualifying coverage. This small amount to pay for compliance and avoidance of qualifying coverage negates the "penalty" label and instead qualifies it as an inducement. *Id.* In n.8

²² *Id.* at *26.

²³ Medicaid is a joint federal/ state health program for certain low income individuals and families. It was created with the addition of Title XIX to the Social Security Act in 1965 and allowed states to opt in to the program. All 50 states did not become a part of Medicaid until 1982, with Arizona being the last to opt-in.

²⁴ 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

²⁵ 42 U.S.C. § 1396c.

²⁶ *National Federation* at 34.

²⁷ In fact, Idaho could be more affected by this "dra-gooning" than other states. Idaho receives close to \$1 Billion in various Medicaid grants comprising almost 20% of the state's budget.

²⁸ *National Federation* at *37.

²⁹ *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923).

³⁰ States are already exercising this option. For example, Texas Governor Rick Perry recently refused to expand Texas's Medicaid program under the ACA. Currently approximately 8 other states are considering a rejection of the Medicaid expansion including Idaho. See <http://www.kaiserhealthnews.org/Stories/2012/July/02/state-costs-Medicaid-expansion.aspx> (Accessed July 10, 2012).

³¹ *National Federation* at *7, quoting Federalist No. 45, at 293 (J. Madison).

³² *Id.* at *8.

³³ This deference may be highlighted by the fact that by quantifying the Individual Mandate penalty as a tax, if Congress were to take the measure up, it likely would not be subject to the rules permitting a filibuster because as a tax it would be subject to the reconciliation process — which requires a simple majority and cannot be filibustered. The Senate determines its own rules of proceeding, which means this could be a procedurally interesting aspect if this measure does return to the Senate in some form or another. See http://online.wsj.com/article/SB10001424052702304708604577501070693548652.html?mod=googlenews_wsj (Accessed, July 10, 2012).

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PRO BONO CASE HELPS A FATHER KEEP HIS SON

A phone call from the Idaho Volunteer Lawyers Program took members of the firm Lukins and Annis in Coeur d'Alene into uncharted territory. The firm doesn't do much family law practice, but the assignment sounded interesting.

Attorney Peter Smith and a few of his colleagues at Lukins and Annis agreed to help a single dad establish formal custody over his son. The mother had showed little interest in helping to raise the boy for the past six years, but had now asserted he wasn't the dad's biological son, and she now wanted custody. The court ordered a DNA test which indicated the boy was not related to the dad.

The mother "likely thought it was a slam dunk," said Lindsey Simon, who, along with Michelle Fulgham, did the pro bono trial work. J.D. Hallin also helped on the case.

"We decided we're not giving up," Lindsey said, adding that "I was pretty taken aback about the emotional connection. The thought that a parent could lose custody because they didn't have the money to mount a legal fight - that's upsetting. We just felt that the facts and the law all came together for us."

In December of 2010, the father won at trial and he was awarded joint custody and the mother was ordered to pay child support. The mother appealed and lost. She then stipulated to a modification to waive all her custody time with the removal of her child support obligations.

Lindsey said the firm normally does commercial, real estate and civil law



Lukins and Annis rallied to help a family needing court services recently, pulling in the expertise of several attorneys. Pictured from left are: Lindsey R. Simon, Michelle R. Fulgham and Peter J. Smith.

practice, which perhaps helped them "think outside the box" to overcome the DNA evidence.

"That was just one piece of evidence to show parenthood," she said. "There is actually a lot of law out there on this. That dad WAS the father."

The case was greatly helped by an affidavit signed at the time of birth stating the name of the father as the client.

Regarding pro bono work, Lindsey said, "I would encourage anyone who has time to do it to do it. It has been really rewarding."

— Dan Black

The thought that a parent could lose custody because they didn't have the money to mount a legal fight - that's upsetting.

— Lindsey R. Simon



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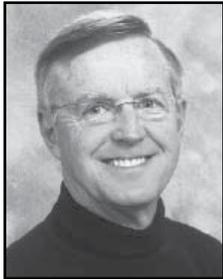
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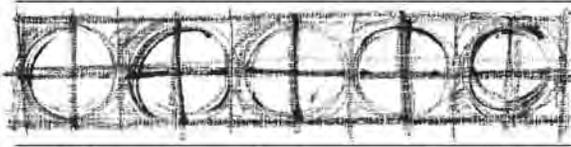


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LAW FOUNDATION RELEASES 2012 ANNUAL REPORT

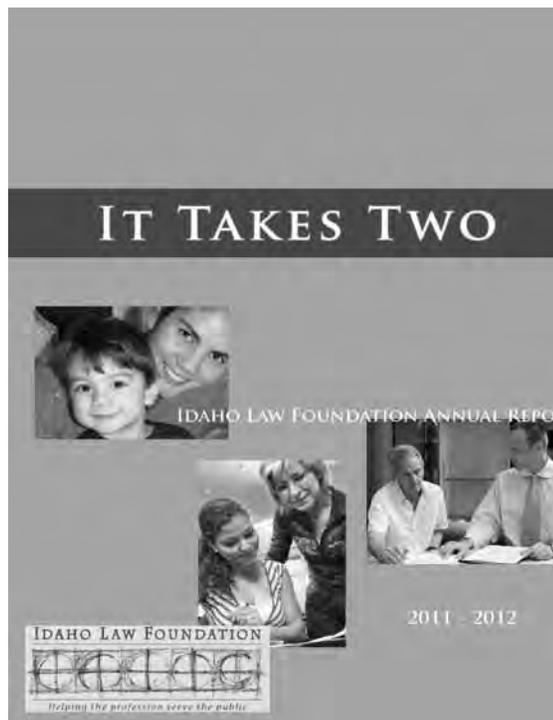
The Idaho Law Foundation recently released its 2011-2012 annual report. This report contains information about ILF programs, including Idaho Volunteer Lawyers Program, Law Related Education, Continuing Legal Education, and Interest on Lawyers' Trust Accounts. It also includes a financial statement for the period ending December 31, 2011.

In the period from July 1, 2011 to June 30, 2012 many attorneys and others gave generously of their time and treasure to the Idaho Law Foundation and its programs, including:

- 838 volunteers
- 651 donors (including donations to the new Access to Civil Justice Fund)

Some of the Law Foundation's accomplishments for 2011-2012 include:

- **Idaho Volunteers Lawyers Program** provided legal services in 555 cases, impacting 1,224 family members
- **Law Related Education's** mock trial team placed fifth in the national mock trial competition, the highest ever place for an Idaho team.
- **The IOLTA Grant Program** granted \$179,000 to community programs in all parts of Idaho.
- **Continuing Legal Education** online rentals were up 42.7%.



A copy of the annual report has been mailed to people and organizations that made donations to ILF between July 1, 2011 and June 30, 2012. Additionally, a copy of the report has been placed on the Idaho Law Foundation website at www.isb.idaho.gov.

If you have any questions or would like to make a donation to or volunteer your time with any of the Foundation's programs, contact Carey Shoufler, ILF Development Director, at 208-334-4500 or cshoufler@isb.idaho.gov.

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John C. Hepworth

IN MEMORIAM

Gilbert C. Norris 1919 - 2012

Gilbert C. Norris, 93, of Weiser, passed away peacefully at home on May 11. Gilbert was born in Payette, and attended Payette schools, graduating in 1936. He attended Whitman College, graduating with a B.A. degree in Business Administration and Economics in 1940.

In 1938, as a member of Whitman College Track Team he set an All Northwest College Conference 440-yard track record which stood for 28 years until 1966 when it was broken by 1/10 of a second.

He married Barbara Jane Sabin who was also a Payette High School graduate. In 1946 he completed his LLB Degree from the College of Law at the University of Idaho. He served as Deputy Sheriff for Payette County, Payette City Attorney, and Prosecuting Attorney for Payette County along with practicing law in the firm of Norris and Norris.

His daughter, Rachel, was born in 1946 and his son, George arrived in 1951. By 1952 he was appointed as District Judge, first for the 7th and then 3rd Judicial Districts of Idaho, retiring in 1983 after having won several consecutive elections.

He was the recipient of two Honorary Doctorate Degrees but was usually addressed as "Your Honor." However, he preferred to just be called "Judge." At the time of his death, he had been a member of the Idaho State Bar for 65 years.

In 1953, Gilbert moved his family to Weiser to be closer to his work, spending the remainder of his life there in the community he loved. He was a man of many varied interests including motorcycling, fishing, boating, hunting, photography, astronomy and rock hounding. He also was a skilled musician on the piano, organ and violin.

He is survived by his daughter, Rachel Norris Hiskey of Hunters, Washington, and his son, George Arthur Norris of Weiser, grandchildren Karl Norris of Boise, Dusti Hiskey of Spokane Valley, WA, Jon Hiskey of Spokane, WA, Scott Hiskey of Port Orchard, WA and Daven Hiskey of Gold Bar, Washington and seven great-grand children.



Gilbert C. Norris

Thomas V. Munson 1952 -2012

Thomas Veness Munson, died June 28, 2012 from cancer at the age of 60. According to longtime associate Paul Penland, Munson had "a near encyclopedic knowledge of worker's comp law."

Tom was born June 16, 1952 in Ithaca, New York to his parents, Theodore E. Munson and Bonalyn Alethe Veness Munson. He was one of five children. During his childhood the family lived in Syracuse, NY; Juneau, Alaska; Cleveland, Ohio; Fullerton, CA; and finally Boise, ID. Tom graduated from Boise High School in 1970. He attended College of Idaho and then Boise State University. He graduated from BSU in 1978. Tom then attended the College of Law at the University of Idaho and graduated in 1981. While at the University of Idaho he met his future wife, Susan Butz. Tom and Susan were married on August 17, 1981.

He was a familiar face in the Boise legal community, most recently having worked as an attorney for Anderson, Julian and Hull, LLP, doing workers compensation law. Prior to that, he worked for two years as a general practitioner with Jeff Strother Law Offices. Munson was a partner for three years for Paul, Penland and Munson, Chtd., and was an associate with Penland, Munther and Goodrum, Chtd., practicing workers compensation law. He worked for two years at Ibsen and Perry and before that about one decade with Moffatt, Thomas, Barrett and Blanton on worker's comp and civil litigation.

He served on the Board of the Idaho Shakespeare Festival and as an officer for the Bronco Booster organization. He was a fitness enthusiast and ran with weights in his hands.

Tom's passions in life were his family, his many, many friends, his beautiful guitars, voraciously reading non-fiction, watching The History Channel, and Bronco Football.

Tom had many friends all over the country and had a knack for keeping friends for a lifetime. Tom was a true BSU Bronco fan! He loved the tailgate parties, OBNUG, and of course -watching BSU football.

Tom leaves behind his wife, Susan; son, Paul; mother, Bon Munson; siblings:



Thomas V. Munson

Gayle Munson, Jan (Lon) Madarieta and Rick Munson, all of Boise; brother-in-law, Steve (Terri) Butz of Boise.

Tom was preceded in death by his father, Ted; and sister, Lynn Webster.

Kenneth G. Bergquist 1922-2012

Kenneth G. Bergquist, 89, passed away peacefully at home on July 2. He was born Oct. 10, 1922 in Boise, Idaho and graduated from Boise High School in 1940. Ken attended Boise Junior College and the University of Idaho before enlisting in the military in 1942.

He attended Officers' Training School at Indiana University in Bloomington and Military Engineer School at Fort Belvoir in Virginia. Ken was a Veteran of World War II and the Korean War, having served in the U.S. Army Corps of Engineers in the South Pacific, New Guinea, the Philippines and Japan during World War II and in Austria during the Korean War.

He served in the Army Reserves and was a retired Lt. Colonel in the Army Judge Advocate General Corps. After being released from active duty in the South Pacific, Ken met his future wife of 56 years, Kathleen, while waiting for an airport limousine at the Olympic Hotel in Seattle.

Ken and Katie were married on January 18, 1949 in Seattle and moved to Moscow, Idaho where he graduated from the University of Idaho College of Law in 1950. Ken was called back to active military duty in May 1951 and was assigned to Salzburg, Austria, where his oldest son, Bruce was born in 1951.

Upon release from active duty in 1953, Ken and Katie returned to Boise, where they raised five boys. Ken served as an Assistant Attorney General for the State of Idaho, assigned to the Idaho Public Utilities Commission, and as the United States Attorney General for Idaho during the Eisenhower Administration before entering private practice in 1961, specializing in public utility law and administrative law.

During his more than 50 years of law practice, he served as Chairman of Pre-litigation Hearing Panels for the Idaho State Board of Medicine for 25 years and as a Hearing Officer for the Idaho Person-



Kenneth G. Bergquist

IN MEMORIAM

nel Commission. In 2011, Ken was recognized by the Idaho State Bar for his 60 years as a member of the Bar.

Ken is survived by his five sons. He is preceded in death by his loving wife Kathleen.

Bradley E. Rice 1947 - 2012

Bradley E Rice died Monday, July 2, 2012, at his home in Twin Falls at the age of 65. He was born in Boise, Idaho, in 1947, the son of Ralph and Bonnie Rice. Rice attended school in Boise and graduated from the University of Idaho in 1969.

In 1969, he married Eva Patricia Stanke. That union ended in 1993.

Rice worked for Beneficial Finance, Bank of Idaho, Larry Barnes Chevrolet, Meridian Ford and Con Paulos Chevrolet in the finance industry.

In 1992 he realized a life-long dream by being accepted into the University of Idaho College of Law and was admitted to the Idaho State Bar in September, 1995. His legal career began as the



Bradley E. Rice

public defender for Minidoka County, Idaho, and Pedersen Law Office, then culminating in his own law firm.

Rice enjoyed fishing, hunting, golfing and shotgun sports. He was a member of the American Bar Association, American Trial Lawyers' Association, Idaho State Bar, Jerome Rod and Gun Club and Past President of the Jerome Optimist Club.

He is survived by his two children, Aaron (Erin) Rice, and Catherine Williams; three grandchildren; his sister, Natalie (Rick) Boyer; and numerous aunts, uncles and cousins.

He was preceded in death by his parents.

OF INTEREST

Former EPA Regional Administrator, US Department of the Interior Counselor joins Parsons Behle & Latimer

L. Michael Bogert, former Regional Administrator for the U.S. Environmental Protection Agency's Region 10 office in Seattle and Counselor to the Secretary of the Department of the Interior, has joined Parsons Behle and Latimer as a shareholder. Bogert joins a team of more than 20 highly respected Environmental Law attorneys and will lead the firm's environmental law practice in Idaho.

"Michael is an extremely talented and experienced lawyer and will be a very valuable asset to our firm, bringing an extraordinary background in environmental and natural resources law," said Raymond J. Etcheverry, chairman and CEO of the firm.

"Environmental law is constantly

evolving – especially here in the West, where approaches to balanced development of natural resources by the regulated community are under constant pressure," said John Zarian, managing shareholder of Parsons Behle & Latimer's Boise office. "Michael's experience in Washington D.C. working with federal regulators, coupled with his deep knowledge of law and issues relating to energy and natural resources in the West will



L. Michael Bogert

greatly benefit the firm's environmental and natural resources practices."

Appointed in 2006 by President George W. Bush as Counselor to Secretary of the Interior Dirk Kempthorne, Bogert advised the Secretary on matters such as implementation of the Endangered Species Act, Indian water rights settlements and other federal law and policy relating to water and natural resources development on public lands. He coordinated negotiations and policy for the Department on the Avista/Coeur d'Alene Tribe FERC hydropower relicensing settlement discussions, and served as the lead policy negotiator for the Hydropower Agreement in Principle with Pacific Northwest Native American Tribes, California, Oregon and PacifiCorp as part of President Bush's Klamath Basin Initiative.

Appointed to this position by President Bush in 2005, Bogert was the EPA's representative on two important collaborations with the Coeur d'Alene Basin Commission and Puget Sound Partnership. The collaborations made significant advancements in the Administrations' Cooperative Conservation initiative.

Bogert also served as counsel to Idaho Governor Dirk Kempthorne from 1999-2004, as counsel to California Governor-elect Arnold Schwarzenegger in 2003 and as chief deputy legal affairs secretary to California Governor Pete Wilson from 1995-1998.

Bogert attended The George Washington University L.L.M. Program in Environmental Law in 1994-1995. He received a J.D. degree from the University of Idaho College of Law in 1985 and a bachelor's degree from the University of Santa Clara in 1979. He is admitted in

Idaho, California and District of Columbia.

Richard Eppink and Leo Morales join ACLU of Idaho

The American Civil Liberties Union of Idaho is proud to announce the hire of its new Legal Director, Richard Eppink and Public Education/Communications Coordinator Leo Morales.

Eppink's law practice has focused exclusively on defending the constitution, improving access to justice, and helping children and families escape abuse. He comes to the ACLU of Idaho from his position as Justice Architect for Idaho Legal Aid Services, where he helped homeowners challenge the deceptive practices of big banks during the foreclosure crisis and represented victims of domestic violence and sexual assault.

The top of his graduating class at the University of Idaho's College of Law, Ritchie was granted a Fulbright Fellowship to study ways to make the law more understandable for ordinary people.

Some of his clients have included entire residential communities facing the loss of their land, organizations fighting for more transparency in government, and adults with developmental disabilities all over the state. On taking his new position as



Ritchie Eppink

OF INTEREST

Legal Director of the state's ACLU affiliate, Eppink commented: "I love America and its heritage of freedom and opportunity—and there couldn't be a better place to stand up for liberty and the constitution than here in Idaho."

Leo Morales, a native of Oaxaca, Mexico has lived in Idaho for the last 23 years. Prior to joining the ACLU of Idaho he worked for the Idaho Community



Leo Morales

Action Network as a senior staff responsible for leading racial justice campaigns, legislative lobbying, civic engagement voter work, and community organizing. Leo is recognized statewide for his work on immigrant rights and farmworker advocacy. In 2005 he led successful efforts to bring about attention to pesticide poisoning of area farmworkers in the Treasure Valley.

Attorney Steve Telford opens firm in Nampa

Attorney Steve Telford and his fiancée, Valerie Clark, have opened a new law office called Telford Law and AP Consultants in Nampa. Telford has 27 years of legal experience, practicing in the area of wealth preservation planning with an emphasis on asset protection through entity and trust structuring. His work includes assisting clients with wills, trusts, and contracts, as well as other business and legal advising, strategizing, and structuring relating to personal, business, professional and corporate liability.

Clark, as the office administrator, will manage the business aspects of Telford Law. The new law office is located at 1303 12th Avenue South in Nampa. The building where their new law office is located has been previously used by other attorneys for over 50 years.



Steve Telford

Telford is a member of the Boise Estate Planning Council. In the past, he served as President, Vice President, and Secretary of the Eastern Idaho Estate Planning Council. Telford plans to join

the Southwest Estate Planning Council this fall. He has been a frequent lecturer on asset protection planning and wealth preservation planning. He has also published several articles addressing various issues in these areas. Telford is an active member of the Offshore Institute and has also been an active member of the Idaho State Bar's Taxation, Probate and Trust Law Section, and has served on the Legislative Committee for the Section.

Williams joins Naylor & Hales

Naylor & Hales, P.C., is pleased to announce the addition of Associate Attorney Tyler D. Williams to the firm. Mr. Williams' practice concentrates on municipality and public entity defense; Section 1983 prison litigation; and administrative law.



Tyler D. Williams

Tyler received his Juris Doctorate from Gonzaga School of Law where he graduated *cum laude* in 2010. He graduated from Utah State University with a degree in History in 2005. While in law school, Tyler interned at a small plaintiff's firm in Spokane, Washington and was a supervising articles editor of the Gonzaga Journal of International Law.

Prior to joining Naylor & Hales, Tyler clerked for the Honorable Patrick H. Owen of the Idaho Fourth Judicial District from August 2010 through April 2012.

Attorney Seubert joins Jones, Brower & Callery

Attorney Karin Seubert has joined the Lewiston law firm of Jones, Brower and Callery, P.L.L.C..

Seubert focuses on family law, real estate, probate and general litigation. A Washington College of Law at American University graduate, Seubert joins Jones, Brower and Callery from Keeton and Tait. She is a member of the Family Law Section Council of the Idaho State Bar and twice past president of the Second District



Karin Seubert

Bar. She is admitted to practice in Idaho and Nez Perce and Coeur d'Alene Tribal Courts.

Moore joins Wilson and McColl

Wilson and McColl is pleased to announce the addition of associate attorney Christopher R. Moore to the firm. Mr. Moore's practice areas include creditor's rights, banking & finance, commercial litigation, business law, real estate and land use law. Moore earned his B.A. in History from the University of Puget Sound and his J.D. from Willamette University College of Law, where he served as Editor-In-Chief of *Willamette Law Online*. During law school, Mr. Moore also worked as a clerk for a San Diego-based firm specializing in credit union law. Mr. Moore is licensed to practice in all Idaho courts, including the United States District Court for the District of Idaho.

Moore can be contacted by telephone at (208) 345-9100 or by email at cmoore@wilsonmccoll.com.



Christopher R. Moore

Attorney Mau joins Farley Oberrecht Barton & Burke, PA

Jason R. Mau joined Farley, Oberrecht, Harwood & Burke, P.A. as an associate. Mr. Mau most recently served as law clerk to Idaho Supreme Court Chief Justice Roger S. Burdick and Justice Daniel T. Eismann. He is a 2010 graduate of the Dickinson School of Law at Penn State University where he served on the Penn State Law Review and is a 1996 graduate of the University of Utah. Prior to law school Mau was employed in the title insurance industry in various capacities. Mr. Mau joins the firm's commercial and litigation practice.

Mau can be reached by telephone at (208) 395-8500 or by email at jrm@farleyoberrecht.com.



Jason R. Mau

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A Passion for Teaching



Greg Sergienko serves Concordia Law as the Associate Dean of Academics. An experienced law professor and administrator, Dean Sergienko has been instrumental in developing Concordia Law's educational curriculum and assisted in hiring the founding faculty. Known by his peers for his scholarship on legal education, Dean Sergienko devotes time and energy to deconstructing his own methods in the classroom and to the development of new teaching techniques. Observe him in front of a law school class and you'll quickly be moved by his passion for teaching and commitment to preparing students for the practice of law.

Greg Sergienko,
Associate Dean of Academics

GETTING TO KNOW GREG SERGIENKO

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Q&A with Dean Sergienko

Q. You had a successful career in environmental, insurance, and other complex commercial and corporate litigation as an associate with Barrett, Hale & Gilman in Seattle. Why did you choose to move into teaching?

A. I'd thought about teaching even when I was in law school. But I wanted to make sure that I had experience in practice before I went into teaching, so that I could provide students with the knowledge and skills that would be most relevant to their needs. While my litigation practice was successful and intellectually challenging, it didn't offer many opportunities to work directly with people. Helping students gives me a lift in a way that private practice did not.

Q. What did you look for when hiring the founding faculty of Concordia Law?

A. First and foremost, we sought individuals with a commitment to teaching. In addition, we wanted to have people from diverse legal backgrounds. Criminal lawyers do things differently from those who try civil cases, and judges bring a different background from those who negotiate contracts. We're very excited about the group who will teach our inaugural class of 1Ls.

Q. What is your teaching philosophy?

A. Good teaching comes from good learning.

Q. What do you mean by that?

A. I believe that the best professors exhibit self-confidence, humility, and a willingness to learn. They are not only comfortable with themselves and their abilities but they are eager to improve and expand their knowledge and skills.

Q. Which law professors impacted you most during your law school years?

A. Al Sacks, Civil Procedure. Professor Sacks exposed me to the idea that the process for discovering the facts and deciding cases has as much to do with justice as do the rules that tell us who is right or wrong in a particular case.

Zipporah Wiseman, Commercial Transactions.

Professor Wiseman exposed me to carefully reading complex substantive statutes and to keeping legal rules in touch with commercial reality.

Andy Kaufman, Ethics. Professor Kaufman taught ethics as encompassing the big question of what kind of lawyers we wanted to be.

ABRAHAM LINCOLN: TYRANT?

Bruce D. Skaug
Goicoechea Law Offices, LLP

I enjoy reading *The Advocate* publication and, on rare occasion, comment about articles privately and publicly. The May issue had two items titled, “Former AG Rekindles Lincoln’s Light” and “Mediate, Arbitrate or Litigate: What would Lincoln Do?” In the words of my youngest daughter, who aspires to become a Constitutional law attorney, “Lincoln wasn’t such a great guy.”

I have no quarrel with the Advocate articles, but would like to shed a little more light on Abraham Lincoln. I am a history enthusiast, especially on the War Between the States. My interest started at age five when my father, a history teacher, told me the basic story of the 1861 war. At Halloween, I would dress as a Union soldier and through life have devoured numerous books on the subject. I have had the privilege to visit battlefields, attend lectures and collected paraphernalia from the time period.

Our family had six soldiers who served honorably in the war; two Federal and four Confederate. (One served in the same division as attorney Eric Rossman’s ancestor. 84th Ill. Inf.) Only two of my six survived the war. One of the survivors migrated to Nampa, Idaho and is buried not far from my office. The Union family daughter married a Confederate surviving ancestor. I am a distant product of this marriage.

My Confederate ancestors of Tennessee voted with their state to stay in the Union when seven states were peaceably seceding. They were content on their successful farm to be a part of the United States of America. However, when the new president, Abraham Lincoln, put out an executive order, without the consent of Congress, to raise a 75,000 soldier army to invade the seven states which had left the Union, my ancestors and the state of Tennessee voted to join their Southern neighbors and defend against invasion. At that point, they saw Lincoln, as a tyrant, only interested in collecting large tariffs for the U.S. Treasury collected from Southern ports.

Today, it would be akin to Texas deciding to secede from the United States peaceably. Then, President Obama raising new army divisions to invade the state, without congressional support, so he could get the oil revenue.

The tyrant?

As a young man, like most of us in Idaho, I liked the positive Carl Sandburg view of Abraham Lincoln and never questioned it. But I knew my

*When Republican
and Democrat presidents
or Congress blatantly ignore
Constitutional limitations
on government power,
they often cite
Abraham Lincoln
as their example.
The end justifies the means.*

family roots and wondered how some of them could have opposed Abraham Lincoln, taking up arms and referring to him as a tyrant. My Tennessee family was not made up of racists, radicals or warmongers. They were educated, leaders in their church and community. Why did they call Lincoln a tyrant? “Tyrant” is what the founding fathers of our nation called King George III. A tyrant is an “absolute ruler who exercises power cruelly and unjustly.” Was Lincoln all that?

Facts

Abraham Lincoln:

- Illegally suspended the writ of habeas corpus without the consent of Congress. ([Constitutional Problems Under Lincoln](#) by James G. Randall)
- Had most of the Maryland legislature imprisoned without due process along with a congressman and the mayor and police commissioners of Baltimore
- Put out an arrest warrant for the 84 year old Chief Justice Roger Taney of the United States Supreme Court when Lincoln did not like the justice’s opinion regarding the military arrests and takeover of the Maryland civil government. Ex parte Merryman 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487)
- Launched a military invasion without the consent of Congress.
- Imprisoned up to 13,000 political prisoners and political opponents from mostly Northern states

*At that point,
they saw
Lincoln as a
tyrant, only
interested in
collecting large
tariffs for the
U.S. Treasury
collected from
Southern ports.*

(Fort Lafayette – Think Guantanamo) The Real Lincoln by Thomas J. DiLorenzo, P. 140, Freedom under Lincoln by Dan Sprague pp. 281-282

- Forcibly closed down over 275 Northern newspapers and arrested 3,000 Northern journalists, editors and publishers. “You will take possession by military force, of the printing establishments of the New York World and Journal of Commerce . . . and prohibit any further publication thereof . . . you are therefore commanded forthwith to arrest and imprison . . . the editors, proprietors and publishers of the aforesaid newspapers.” - Order from Abraham Lincoln to General John Dix, May 18, 1864 (As quoted in The Real Lincoln, p. 131)
- Put in a program to censor telegraph communications.
- Arranged for the secession of western Virginia from Virginia through unlawful means.
- Imprisoned and deported a U.S. Congressman (Vallandigham of Ohio) for responding negatively to his State of the Union speech, primarily regarding taxation issues. The Congressman was arrested at his home by 67 soldiers. Record of Hon. C. L. Vallandigham (Jackson, MS: Crown Rights Publishers, 1998); Lincoln Unmasked by Thomas DiLorenzo, pp. 163-166)
- Forcibly took arms from private citizens in Northern states, en masse.
- Ordered martial law in cities across the Northern border states.
- Lincoln’s military bombarded citizens in Southern cities, executed civilians without trial, burned and pillaged courthouses, businesses, farms and homes. (Think Atlanta and General Sherman’s March to the Sea)

Lincoln took these types of actions in the North throughout the war, even when victory was apparent. Free speech, freedom of the press and the right to jury trial were suspended in the North during the war. The U.S. Constitution was de facto null and void.

Thoughts

Lincoln apologists do not deny the occurrences listed above. Their defense arguments for the 16th president are summed up in “He saved the Constitution and Union by destroying them during his presidency.” Ah, the end justifies the means argument.

Why write about this issue 150 years later? I was prompted by the Advocate articles to share the less popular side of the Lincoln story. When Republican and Democrat presidents or Congress blatantly ignore Constitutional limitations on government power, they often cite Abraham Lincoln as their example. The end justifies the means. Attorneys should be the first to acknowledge past or present trespasses by government of our beloved Constitution.

It is not popular to oppose a popular presi-



Bruce Skaug holds an 1862, .577 caliber, Enfield rifle used in the Civil War.

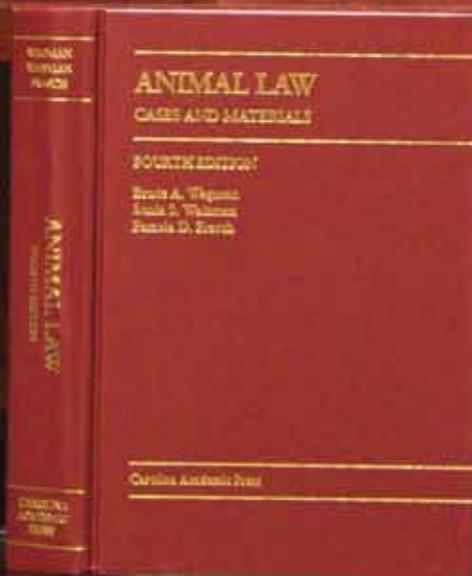
dent, past or present. I am not a history revisionist, neo-Confederate or neo-Conservative. The popular Lincoln legacy is worthy of our praise, but when it comes to the abuse of our Constitutional government, I agree with my middle school daughter, who told her class, “Lincoln wasn’t such a great guy.”

Comments welcome by email to bruce@legaleaglesnw.com (I am currently arranging a public debate on the Lincoln legacy between David Leroy and a worthy opponent.)

About the Author

Bruce D. Skaug has been the managing partner of Goicoechea Law Offices, LLP in Nampa since 1992. Bruce is an Idaho native who began practicing law in 1988 at the Ada County Prosecutor’s Office. He and his wife, Debbie, have six children.

THE ANIMAL WORLD TAKES A SPECIAL PLACE IN SOCIETY AND OUR COURTCOURTS



*By Adam P. Karp
Animal Law Offices*



Practicing Animal Law Has Not Yet Earned Formal Recognition in Idaho

Appealing to a universal respect for our pets, U. S. Senator George Graham Vest articulated their value 140 years ago in his “Eulogy on the Dog,” delivered in the case *Burden v. Hornsby*, 50 Mo. 238 (Mo. 1872). Vest represented a client whose hunting dog was killed by a sheep farmer. The jury reportedly deliberated for less than two minutes before awarding \$500, although the plaintiff had asked for \$150. A classic of American courthouse oratory, the below passage from his closing argument captures the pathos motivating plaintiff’s case and those of animal lovers generally. It also inspires any litigator’s defense of animals themselves, one of many topics that populates the field more commonly known as “animal law.”

Gentlemen of the jury: the best friend a man has in the world may turn against him and become his worst enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and our good name, may become traitors to their faith. The money that man has, he may lose. It flies away from him, perhaps when he needs it the most. A man’s reputation may be sacrificed in a moment of ill-considered action. The people who are prone to fall on their knees to do us honor when success is with us may be the first to throw the stone of malice when failure settles its cloud upon our heads.

The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him and the one that never proves ungrateful or treacherous ... is his dog.

Gentlemen of the Jury: a man’s dog stands by him in prosperity and in poverty, in health and in sickness. He will sleep on the cold ground, where the wintry winds blow and the snow drives fiercely, if only he may be near his master’s side. He will kiss the hand that has no food to offer, he will lick the wounds and sores that come in encounters

with the roughness of the world. He guards the sleep of his pauper master as if he were a prince. When all other friends desert he remains. When riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens. If fortune drives the master forth an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying him to guard against danger, to fight against his enemies, and when the last scene of all comes, and death takes the master in its embrace and his body is laid away in the cold ground, no matter if all other friends pursue their way, there by his grave-side will the noble dog be found, his head between his paws, his eyes sad but open in alert watchfulness, faithful and true even to death.

Decades since this oratory have only buttressed society’s bond to animals. According to the American Veterinary Medical Association, 2007 *U.S. Pet Ownership & Demographics Sourcebook*, 37.2% and 32.4% of all American households care for at least one dog or cat, respectively.¹ The total number of dogs and cats in American households exceeds 153 million.² The American Pet Products Association’s 2011-2012 *National Pet Owners Survey* concluded that 62% of all American households have an animal companion. The APPA estimates that nearly \$53 billion will be spent on them in 2012 .

Looking farther than one’s own favorite animal, you realize that the world is comprised not just of humans, but countless other species possessing sentience, a capacity to co-evolve with us, and a level of domestication all deserving of judicial respect.

A new trend

Over the past 13 years, I have handled hundreds of animal injury and death cases throughout Washington State, recovering intrinsic value for deceased animal companions (and even their remains) as well as general damages in the instance of intentional or malicious harm. I also had the privilege of prompting appellate courts to

Courts recognize this quality of the human-nonhuman diad and numerous jurisdictions have joined the trend to permit recovery of veterinary bills far in excess of acquisition price.

create and affirm trends that protect animals and those who love and rely on them.³ With increasing vigor, pet owners and animal lawyers are litigating such issues and changing the way courts address, compensate, and punish. Aside from hoary cases like *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), concerning the capture of *ferae naturae*, animal law really found itself in 1972.⁴

But let's not get ahead of ourselves. So much of animal law is premised on the assumption that pets are property. Therefore, let us begin there. Even the Idaho legislature thought it necessary to proclaim that dogs (but not cats?) were property in the fullest sense of the word.⁵ Whenever an animal suffers harm or perishes, one conceptualizes damages to the guardian as property damage (economic) and parasitic personal injury (non-economic).

Economic damages

A dog may, while sitting behind the bars of an animal control shelter or the glass at a pet store, receive attention from many human visitors, but only a long-term caretaker truly develops a connection with that specific, unique animal, in which strangers do not share. It is this relationship that the law is beginning to systematically recognize as a valid element of damages, as it should, for with what other piece of "property" do we so affiliate ourselves? While books and microwaves are inherently incapable of forming relationships, cats, dogs, birds, and other nonhuman animals have identities. Courts recognize this quality of the human-nonhuman diad and numerous jurisdictions have joined the trend to permit recovery of veterinary bills far in excess of acquisition price.⁶

In an important genetic and social sense, companion animals are not commercial products "manufactured" for marketing, though they constitute "goods" under the Uniform Commercial Code and "products" under product liability acts. We form relationships with companion animals, causing their value to appreciate with deepening of the bond, in contrast to other market goods. Awards obtained over the years show that Americans' valuation of animals in the five-figure range falls within normal, rational limits of human experience, typifies "usual" sentimentality, and reaffirms the propriety of the intrinsic measure.⁷

Consider the following judicial pronouncements reaffirming what we know, without question, to be true:

- Nearly 20 years ago, in a case involving a hunter shooting plaintiff's dogs who were chasing deer, Justice Andell wrote: "The law should reflect society's recognition that animals are sentient and emotive beings that are capable of pro-

I also had the privilege of prompting appellate courts to create and affirm trends that protect animals and those who love and rely on them.

viding companionship to the humans with whom they live. In doing so, courts should not hesitate to acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for many people, pets are the only family members they have. ... Even an heirloom of great sentimental value, if lost, does not constitute a loss comparable to that of a living being. This distinction applies even though the deceased living being is a nonhuman."⁸

- Over four decades ago, in a wrongful burial case where plaintiff opened the casket to find a deceased feline instead of her dog, a New York jurist penned: "A pet is not an inanimate thing that just receives affection; it also returns it. ... To say [a pet] is a piece of personal property and no more is a repudiation of our humaneness."⁹

- And seven years ago, in a highly publicized case involving the shooting of Hells Angels' guard dogs during warrant execution, the Ninth Circuit acknowledged: "The emotional attachment to a family's dog is not comparable to a possessory interest in furniture."¹⁰

Idaho presently allows only fair market value for the wrongful death of an animal.¹¹ In light of the above, a good faith basis to seek reversal of existing law on that subject, now nearly 30 years old, assuredly exists. *Gill*, however, offers a ray of hope in permitting recovery of mental anguish damages in the case of intentional infliction of emotional distress (or outrage).¹² Furthermore, *Gill* implies the cognizability of negligent infliction of emotional distress provided that objective physical manifestations accompany the emotional disturbance.¹³

Noneconomic damages

Whether styled as part of "intrinsic value" economic damages or an independent legal basis for noneconomic recovery, courts are increasingly honoring the poignancy and duration of the human-nonhuman bond and valuing it accordingly. How does chopping down my Japanese Cherry Blossom or spilling sewage on my Coeur



d'Alene lakefront property differ, as a matter of law, from recklessly killing or maiming my six-year-old Basset Hound, Sherlock?¹⁴ The old ways of thinking about animals may have served Americans well, but the changing demographics of society, in which animals become part of the family and pet product manufacturers, veterinarians, veterinary health insurers, and other animal service providers profit from human-animal bond, warrants a new approach. Then again, as recited in the preface of this article with Senator Vest's "mans' best friend" closing in the case of Old Drum, maybe times have not changed all that much.

Loss of companionship/utility

The decision to disallow loss of use and companionship damages from the death or injury to a nonhuman animal would undermine precedent supporting recovery of loss of use damages for destroyed non-economically productive personalty. Idaho allows for the recovery of loss of use of property while it is being repaired, so long as it is "reasonably susceptible" to repair and for a "reasonable period" of repair, although it caps loss of use at pre-damage market value.¹⁵ While certainly distinguishable from an inanimate hunk of steel, an analogy could be made to renting a dog for a day.¹⁶ The "economic value" of playing with a dog for pleasure (like renting a limousine for a refined evening out on the town with 10 of your closest friends) may be calculated though it has nothing to do with emotional distress or sentimental value, but is pure *joie de vivre*.¹⁷ So long as companion animals share the legal category

*And seven years ago,
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Hells Angels' guard dogs
during warrant execution,
the Ninth Circuit acknowledged:
"The emotional attachment
to a family's dog is not
comparable to a possessory
interest in furniture."*

of personalty with their inanimate counterparts, there is no justification to prevent companion animal owners from recovering loss of utility damages as they would be entitled were their catamaran or Corvette totaled.

Pain and suffering for the animal

If the courts were to more accurately reflect today's social values, animals should be able to sue for heinous cruelties committed upon them. Idaho civil and criminal law already acknowledge the unacceptability of animal suffering and



injury and exact stiff penalties upon people who inflict such harm, most recently by Gov. Butch Otter signing Idaho's first felony cruelty law (even though it leaves much to be desired by requiring a third conviction to trigger the enhanced penalty).¹⁸

Of course, if animals are property, what sense does it make for property to have standing to sue for injury to itself? By that logic, some might argue, a car owner could sue for property damage to his car, and the car itself could sue for cosmetic disfigurement. Then again, certain federal laws with citizen-suit provisions provide an injunctive relief avenue to give voice to those illegally "taken," hunted, maimed, or killed.¹⁹ And while nothing stops Congress from giving animals standing in this regard,²⁰ at this time, no state grants a deceased or injured animal standing to sue in its own name for even the most monstrous torment. One reason? They lack legal personhood and therefore suffer juridical disenfranchisement.

Some countries other than the United States, however, are years, if not decades, ahead of our legal system in conferring upon all creatures the dignity of personhood. For instance, in 1992, Switzerland, by constitutional amendment, was the first nation-state to acknowledge that animals were "beings," and not things.²¹ Eight years later in 2000, in *Nair v. Union of India*, the High Court of Kerala in India handed down an opinion that stated, "[I]t is not only our fundamental duty to show compassion to our animal friends but also to recognize and protect their rights. If humans are entitled to fundamental rights, why not animals?"²² Following their lead, Germany

"[I]t is not only our fundamental duty to show compassion to our animal friends but also to recognize and protect their rights. If humans are entitled to fundamental rights, why not animals?"

— High Court of Kerala in India

amended Article 20a of the German Basic Law to read: "The State, in a spirit of responsibility for future generations, also protects the natural living conditions and the animals within the framework of the constitutional rules through the legislation and as provided by the laws through the executive power and the administration of justice," adding "and animals" in June 2002.²³ Recently, in 2011, Israel criminalized non-therapeutic declawing, joining a list of over 20 countries to act similarly. And just this year, the State of Rhode Island permitted Court Appointed Special Advocates for abused and neglected *animals*,²⁴ not just children, returning the Berghian favor, as it were.²⁵

Idaho Deserves an Animal Law Section to Take on Cutting Edge Issues

Aside from the humane attraction to this sub-discipline and the moral issues that arise, fascinating legal and equitable questions emerge upon consideration of the many interactions and conflicts between humans and nonhumans. Lacking consistent standards and clear theoretical contours, the development of animal law remains a critical endeavor.²⁶

In April 2002, the Washington State Bar Association Board of Governors voted to form the third such practice Section in the nation, following Michigan and Texas. Today, the number is 22.²⁷ I invite you to become a founding member of the 23rd state's Section by indicating your commitment to join an ISBA Animal Law Practice Section, one dedicated to serving the jurisprudential needs of Idahoans who love and rely upon animals as well as individual members of the millions of nonhuman species who inhabit the State of Idaho. Animal law encompasses every dispute or legal transaction where the nature of the animal – genetic, phenotypic/morphological, behavioral, evolutionary, social significance or totemistic/religious value, ecosystemic role or impact – dictates or guides the procedural, evidentiary, ethical, and substantive outcome or handling of the matter. Admittedly, animal law has its paws, flippers, wings, and legs in as many areas as exist in substantive legal disciplines including some less anticipated, such as intellectual property (patenting life forms and chimerae)²⁸, bankruptcy (nondischargeability of debts related to dogfighting under 11 U.S.C. § 523(a)(6)²⁹) and cats

who vomit on carpet by command), tax law (service animal status for deductibility of care costs; deductibility of volunteer's unreimbursed animal rescue expenses,³⁰ and the debate in the criminal bar over allowing courthouse facility dogs to provide emotional support to child victims.³¹

Idaho does not deviate meaningfully from its sister states when it comes to animals. For instance, one of the nation's pet insurers operates out of Boise (i.e., Pets Best Insurance). The two states with which Idaho offers reciprocity – Oregon and Washington – both have Animal Law Practice Sections. The American Bar Association also touts a national animal law committee. Though less populous than other states (est. 1.6 million (2011)), its citizens do not love or rely upon animals less. Their selection of the mountain bluebird, cutthroat trout, appaloosa, monarch butterfly, and peregrine falcon as the state animal emblems show a discernment worthy of representation among its legal institutions. And while Idaho's higher courts have started to develop animal law, the jurisprudential landscape remains rather sparse.³² I encourage you to disseminate this article to any lawyers, judges, professors, paralegals, and law students whom you believe share such an interest. With 25 signatories, the Board of Commissioners will have the opportunity to create such a practice section. If you would like to become a charter member of an animal law practice section, please contact me at adam@animal-lawyer.com.

Idaho civil and criminal law already acknowledge the unacceptability of animal suffering and injury and exact stiff penalties upon people who inflict such harm.

Conclusion: Why animal law matters

One cannot seriously deny that nonhuman animals are “public stakeholders” given what society takes from them for its ongoing operation — their skins, organs, muscles, bones, and labor, their whimsical and yielding temperament to provide us entertainment, their bodies as platforms for human medical discoveries, their mere existence for our aesthetic enjoyment, their physical prowess for protection and gambling spoils, their heightened sensory abilities to provide us advanced warning, and their unconditionally loving natures for familial companionship. Statute and common law should pay forward these offerings, by facilitating meaningful access to the courts.

As ambassadors of an equitable legal system that affects all animals, human and nonhuman, one of our inherent roles includes giving a voice to its most disenfranchised and legally disabled members. That is, after all, why our system provides advocates.

About the Author

Adam P. Karp practices animal law throughout the states of Washington and Idaho, founded the WSBA Animal Law Section, graduated from the University of Washington School of Law in 1998, and teaches animal law at the University of Washington and Seattle University. This summer, he will receive the ABA's Excellence in the Advancement of Animal Law award. For more information, go to www.animal-lawyer.com.

*Just this year,
the State of
Rhode Island
permitted Court
Appointed
Special Advoca-
tes for abused
and neglected
animals.*



Endnotes

¹ American Veterinary Medical Association, *Market Research Statistics: U.S. Pet Ownership – 2007*, <http://www.avma.org/reference/marketstats/ownership.asp>.

² *Id.*

³ See, e.g., *Sherman v. Kissinger*, 146 Wash.App. 855 (Wash. Ct. App. 2008) (medical malpractice statute does not apply to veterinarians; affirming trial court's decision not to restrict plaintiff to fair market value; permitting emotional damages for conversion of animal); *Womack v. von Rardon*, 133 Wash. App. 254 (Wash. Ct. App. 2006) (creating cause of action for malicious injury to an animal); *Mansour v. King County*, 131 Wash.App. 255 (Wash. Ct. App. 2006) (procedural due process in dangerous dog setting by presuming innocent till proven guilty, requiring subpoena powers, and clear notice in charging document); *Downey v. Pierce County*, 165 Wash.App. 152 (Wash. Ct. App. 2011) (pay-to-play regime requiring payment to secure evidentiary hearing on dangerous dog declaration violates procedural due process); *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash.App. 185 (Wash. Ct. App. 2008) (government privatizing animal control services does not permit evasion of public disclosure responsibilities under state law, finding private corporation "functional equivalent" of government with respect to euthanasia records).

⁴ See Joyce Tischler, *The History of Animal Law, Part I (1972-1987)*, 1 STAN. J. ANIMAL L. & POL'Y 3-12 (2008), available at <http://sjalp.stanford.edu/pdfs/Tischler.pdf>.

⁵ I.C. § 25-2807.

⁶ See *Burgess v. Shampoo Pet Indus., Inc.*, 35 Kan.App.2d 458 (Kan. Ct. App. 2006), *Kaiser v. U.S.*, 761 F.Supp. 150 (Dist. D.C. 1991), *Hyland v. Borrás*, 316 N.J.Super. 22 (N.J. Super. Ct. App. Div. 1998), *Leith v. Frost*, 387 Ill.App.3d 430 (Ill. App. Ct. 2008), *Kimes v. Grosser*, 126 Cal.Rptr.3d 581 (Cal. Ct. App. 2011).

⁷ *Evers v. Palmer, D.V.M.*, Orange County Sup. Ct. No. 773909 (Jan. 4, 2000, plaintiff's attorney Michael Rosten) (California judge awarding \$7699.31 in special damages and \$20,000 general damage related to nonlethal injury to dog); *Ingwerson v. Whitman*, Curry County Cir. Ct. No. 01CV0230

*It is this relationship that the
law is beginning to
systematically recognize
as a valid element of damages,
as it should, for with
what other piece of
"property" do we so affiliate
ourselves?*

(Sept. 12, 2002, plaintiff's attorney Scott Beckstead) (Oregon jury awarding \$135,000 in noneconomic damages for poisoning death of two dogs and \$600 in economic damages); *Blue-stone v. Bergstrom*, Orange County Sup. Ct. No. 00CC00796 (Jul. 14, 2004, plaintiff's attorney Theresa Macellaro) (California jury awarding \$30,000 special value of dog and \$9000 for veterinary care); *Impala v. Pet's Choice, Inc.*, Pierce County Sup. Ct. No. 04-2-04710-8 (Oct. 19, 2004, plaintiff's attorney Adam P. Karp) (Washington arbitrator awarding \$900 for intrinsic value of lost cremated remains of dog); *Westerhold v. Costa*, King County Dist. Ct. No. 45-6392 (Feb. 7, 2005, plaintiff's attorney Adam P. Karp) (Washington court awarding default judgment for intrinsic value depreciation, loss of companionship, and emotional distress resulting from

nonlethal attack on dog by dogs in sum of \$15,179.88); *Romer v. Gray*, King County Dist. Ct. No. 45-9514 (May 2, 2005, plaintiff's attorney Adam P. Karp) (Washington court awarding default judgment for intrinsic value and emotional distress for lethal killing of cat by dog in sum of \$45,480.12); *Van de Ven v. Hardt*, Whatcom County Sup. Ct. No. 05-2-02686-0 (Jul. 25, 2006, plaintiff's attorney Adam P. Karp) (Washington arbitrator awarding \$6700 for intrinsic value of cat killed by neighbor dogs); *Hane v. James*, King County Sup. Ct. No. 05-2-31243-2KNT (Aug. 21, 2006, plaintiff's attorney Adam P. Karp) (Washington arbitrator awarding \$10,000 for intrinsic value of dog killed by neighbor dogs); *Zauper v. Lababit*, Kitsap County Sup. Ct. No. 06-2-01591-8 (Nov. 20, 2006, plaintiff's attorney Adam P. Karp) (Washington court awarding default judgment of \$75,501.09 for intrinsic value and emotional distress related to cat killed by neighbor dog); *Giurbino v. Rashchuk*, King County Sup. Ct. No. 07-2-33438-6KNT (Sept. 25, 2008, plaintiff's attorney Adam P. Karp) (Washington arbitrator awarding \$15,000 for intrinsic value of Chihuahua and \$15,000 emotional distress upon lethal shooting of dog by intoxicated young adult); *DeGidio v. Moore*, Pierce County Sup. Ct. No. 07-2-11863-8 (Feb. 26, 2009, plaintiff's attorney Adam P. Karp) (Washington arbitrator awarding \$16,675 for intrinsic value, training, and purchase price for adolescent German Shorthaired Pointer killed by neighbor's discharge of air rifle); *Sherman v. Kissinger*, King County Sup. Ct. No. 06-2-29605-2SEA (May 4, 2009, plaintiff's attorney Adam P. Karp) (Washington arbitrator awarding \$22,300 related to intrinsic value and emotional distress for veterinary-related death of toy poodle); *Smith v. LeFevers*, Broward County Cir. Ct. No. 0605642-03 (Apr. 27, 2009, plaintiff's attorney Marcy LaHart) (Florida jury awarding \$20,000 for value of dog and \$10,000 in veterinary care/cremation expenses); *Vorhies v. Chlarson*, Thurston County Sup. Ct. No. 11-2-01832-3 (Mar. 16, 2012, plaintiff's attorney Adam P. Karp) (Washington arbitrator awarding \$15,000 for intrinsic value and \$10,000 for emotional distress related to intentional and malicious harm to ten-year-old feline, resulting in her death).

⁸ *Bueckner v. Hamel*, 886 S.W.2d 368, 376-78 (Tex. App. 1994) (Andell, J., concurring).

⁹ *Corso v. Crawford Dog and Cat Hospital, Inc.*, 415 N.Y.S.2d 182 (N.Y.C. Civ. Ct. Queens County 1979).

¹⁰ *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962 (9th Cir. 2005).

¹¹ *Gill v. Brown*, 107 Idaho 1137, 695 P.2d 1276 (Ct. App. 1985).

¹² *Id.*, at 1138-39.

¹³ See also *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741 (2012).

¹⁴ In a 1970's Florida case, the guardians to a dog who suffered severe burns after being placed on a heating pad at an animal hospital and left there for a day and a half received a \$1000 award for their mental suffering upon learning of the dog's injury. This was awarded independent of veterinary bills. *Knowles Animal Hospital, Inc. v. Wills*, 360 So.2d 37 (Fla. Dist. Ct. App. 3d Dist. 1978), cert. den'd, 368 So.2d 1369 (Fla. 1979). A 1960's Texas case awarded the dog guardian \$200 for mental pain and suffering resulting from the unlawful police shooting of his pedigree, registered, three-year-old male Boxer. *City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App. Eastland 1963), writ refused n.r.e. (Oct. 2, 1963). Police slayings have dramatically increased in trial value since *White*. For instance, consider *Fuller v. Vines*, N.D.Cal. C-92-2412 (see 36 F.3d 65) [12/28/98 (jury verdict of \$143,000 in compensatory and \$10,000 in punitive damages for the shooting and killing of plaintiffs' dog); *Russell v. City of Chicago*, N.D.Ill. No. 10-CV-00525 (undifferentiated jury verdict of \$175,000 compensatory damages to one brother,

er, \$85,000 to other brother, \$70,000 to parents, \$2,000 punitive damages for killing family's 9-year-old black Lab named Lady, false arrest, and other issues arising from 2009 raid to search for drugs in home with warrant); *Jenkins v. Brooks*, Frederick County, Md. No. 10-C-10-003778 (Apr. 2, 2012) (jury verdict of \$20,000 economic damages and \$200,000 general damages for nonlethal shooting of family's Chocolate lab, as well as \$400,000 in general damages related to illegal home entry).

¹⁵ See *Thompson v. First Sec. Bank of Idaho, National Ass'n*, 82 Idaho 259, 352 P.2d 243 (1960).

¹⁶ Such dog rental operations as FlexPetz do exist, although for many good reasons, the practice should be banned. Tony Barboza, *Dog Rental Company Facing Resistance in Boston*, L.A. TIMES, Jun. 30, 2008.

¹⁷ Though not "economically-productive," utility derives from cable TV (recreational), a fine piece of artwork enjoyed over the mantelpiece (aesthetic), tickets to a movie (aesthetic), or a massage (therapeutic). Each service or product has value which, when withheld, results in lost utility.

¹⁸ See I.C. 25-3504(2).

¹⁹ See Endangered Species Act, 16 U.S.C. § 1540(g).

²⁰ See *Cetacean Comm. v. Bush*, 386 F.3d 1169 (9th Cir. 2004) ("But we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of judicially incompetent persons such as infants, juveniles, and mental incompetents.")

²¹ See Erin Evans, *Constitutional Inclusion of Animal Rights in Germany and Switzerland: How Did Animal Protection Become an Issue of National Importance?*, 18 Society and Animals 231-250 (2010).

²² *Nair v. Union of India*, No. 155/1999, at 38 (Kerala H.C. Jun. 6, 2000), aff'd on o.g., *Nair v. Union of India*, No. 328/2001 (India May 1, 2001).

²³ Grundgesetz für die Bundesrepublik (Basic Law), amended July 26, 2002, § 2, art. 20(a).

²⁴ Gen. Laws of R. I. § 4-1-31(c-e) (2012).

²⁵ Henry Bergh, founder of the ASPCA, relied upon animal abuse laws to save nine-year-old Mary Ellen, victimized by whippings and shear-slashings, by arguing she was a member of the animal kingdom and deserved protection akin to her fellow nonhumans. <http://www.americanhumane.org/about-us/who-we-are/history/mary-ellen-wilson.html>.

²⁶ To learn more, subscribe to the *Animal Law Journal* of Lewis & Clark Law School and join the Animal Legal Defense Fund.

²⁷ www.aldf.org/article.php?id=277.

²⁸ See *Commissioner of Patents v. President and Fellows of Harvard College*, 4 S.C.R. 45, 2002 SCC 76 (Canada).

²⁹ See *In re Zauper*, WW-09-1020-MoPaR, WW-09-1030-MoPaR, 2009 WL 7751426 (B.A.P. 9th Cir. 2009).

³⁰ See *Van Dusen v. Commissioner of Internal Revenue*, 136 T.C. 515 (2011).

³¹ See www.courthousedogs.com.

³² See, e.g., *Gill v. Brown*, 107 Idaho 1137 (Ct. App. 1985) (IIED allowed for shooting of donkey); *Boots ex rel. Boots v. Winters*, 145 Idaho 389 (Ct. App. 2008) (landlord owes no duty to third party victims bitten by tenant's dog under various theories of first impression); *Smith v. Costello*, 77 Idaho 205 (Idaho 1955) (statute declaring dog running at large in territory inhabited by deer a public nuisance unconstitutional and provided no protection to conservation officer who shot dogs) *superseded by statute as recognized in American Oil Co. V. Neill*, 90 Idaho 333, 414 P.2d 206 (1966); *U.S. v. Park*, 658 F.Supp.2d 1236 (D. Idaho 2009) (dogs could be considered livestock).

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