

Dying to Pay

Creditors' Claims in Probate Court

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Experienced Lawyers Committed to Results



ANNOUNCEMENTS

Tiffany & Bosco Named Law Firm of the Year

Tiffany & Bosco was recognized in May by *Arizona Business Magazine* as Law Firm of the Year at the 2012 Arizona Real Estate Achievement Awards (AREA). Selected because of its innovative service to the real estate and banking community since 1967, the firm was honored as among those that have made a major contribution to the real estate industry and have given back to the community.

Acknowledging leadership

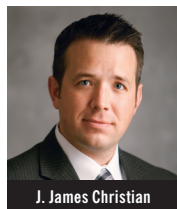


Michael E. Tiffany

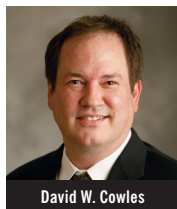
Michael E. Tiffany has been listed as a leader in his field in the 2012 edition of Chambers USA: America's Leading Lawyers for Business in the

Real Estate practice area. Mr. Tiffany has more than 40 years' experience of Arizona legal practice.

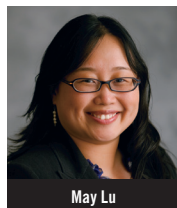
Associates Recognized as "Rising Stars"



J. James Christian



David W. Cowles

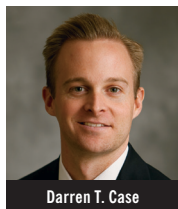


May Lu

Super Lawyers recognizes and selects outstanding attorneys with a high degree of peer recognition and professional

achievement. In 2012, **J. JAMES CHRISTIAN** (Securities Litigation), **DAVID W. COWLES** (Business Litigation), and **MAY LU** (Mergers & Acquisitions) were selected as "Rising Stars," which consists of attorneys who are 40 years old and younger or have practiced 10 or fewer years.

PROFESSIONAL AND PERSONAL ACHIEVEMENT



Darren T. Case

DARREN T. CASE was selected as a new co-author for West's *Arizona Estate and Probate Planning Handbook*.

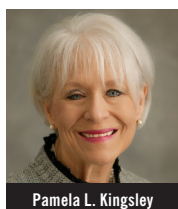
ALISA J. GRAY was a faculty presenter for "Beyond Burnout: The Search for



Alisa J. Gray

Happiness and Satisfaction in the Practice of Law" at the 2012 State Bar of Arizona Annual Convention. This program was

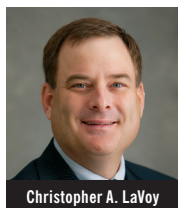
awarded the "President's Award" for its novelty and benefit to Bar members. Ms. Gray was also reappointed as a Judge *Pro Tempore* for the Superior Court in Maricopa County for the 2013 fiscal year in the probate and mental health division. She has been a Judge *Pro Tempore* since 2005.



Pamela L. Kingsley

As Chair of the Law and Legislative Advocacy Committee for Valley of the Sun Human Resources Association, **PAMELA L. KINGSLEY** had

primary responsibility and was a panel member for the very successful May 3rd Workshop, "What to do to Keep the EEOC and DOL from Knocking at Your Company's Door, or When One is Already on Your Doorstep!"



Christopher A. LaVoy

CHRISTOPHER A. LAVOY was a faculty presenter for "From Tiny Acorns Grow Mighty Oak Trees: How to Spot a Potential Class Action from

Your Individual Case," at the 2012 State Bar of Arizona Annual Convention.

MAY LU was appointed recently to the State Bar of Arizona's Arizona Attorney Editorial Board Committee and has joined the ABA Young Lawyers Division - Arizona Host Committee. Ms. Lu also was selected to be a member of

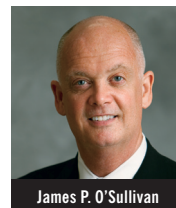
the Small Business Leadership Council of the Greater Phoenix Chamber of Commerce.



Leonard J. McDonald

LEONARD J. MCDONALD was named Chairman of the Board of Directors for the National Kidney Foundation of Arizona. The Founda-

tion has been in operation since 1963 as a charitable, non-profit agency dedicated to improving the quality of life of those challenged by chronic kidney disease. Mr. McDonald and his service to the National Kidney Foundation were featured in the August/September issue of the *Scottsdale Business + Life* magazine.

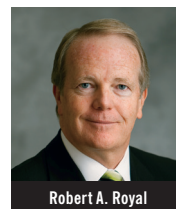


James P. O'Sullivan

JAMES P. O'SULLIVAN presented the seminar: "Lions, Tigers and Bear Markets (Oh My!): Managing the Legal

Issues (and Lawyers!) in the M&A Process" for the Spring 2012 M&A Source Conference held on June 4, 2012 in San Antonio, Texas.

JAMES P. O'SULLIVAN and **ROBERT A. ROYAL** chaired a seminar in San Diego on Limited Liability Companies in Arizona, their history, today's issues, and what the future holds for the development of the law.



Robert A. Royal

ROBERT A. ROYAL was named in the *Arizona Business Magazine's* separate publication of the 2012 Mediation Guide

as a top alternative dispute resolution attorney in Arizona. His practice emphasizes intra-corporate disputes and director, officer, and manager liability, which has led Mr. Royal to give back to the legal profession by publishing, lecturing, and serving as an expert witness and arbitrator in the area.

ANNOUNCEMENTS



Tiffany & Bosco Supports Back to School Drive

Tiffany & Bosco participated in its First Annual Back to School Drive. The firm raised over \$600 and collected 11 boxes filled with new school supplies. The donations enable students to go back to school with new supplies and clothes, and provide students with pride and self-confidence on their first day of school. The donations from the firm were met with overwhelming gratitude.

Tiffany & Bosco Supports 14th Annual SARRC Community Breakfast

Through the participation of Mark S. Bosco, Michael A. Bosco, Jr., Alex Poulos, and Michael E. Tiffany, Tiffany & Bosco, P.A. served as a Presenting Sponsor for the **Southwest Autism Research & Resource Center (SARRC)** 14th Annual Community Breakfast "Rooted for Life," which helped raise over \$1 million. Through contributions from firms like Tiffany & Bosco, Arizona has become one of the leaders in autism research, therapy, treatment, and support.



Tiffany & Bosco Supports Greater Scottsdale Boys & Girls Clubs

Tiffany & Bosco, P.A., represented by Mark and Amanda Bosco, served as a Presenting Sponsor of the Boys & Girls Clubs of Greater Scottsdale 2012 Youth of the Year Gala & Auction, which raised more than \$352,000 for the Clubs. The program, a premier character and leadership initiative, plays an important role in developing and mentoring today's youth.

Shareholders Recognized as Leading Attorneys

The *Best Lawyers in America* is a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement. The 2012 listing recognized the following shareholders: **Michael A. Bosco, Jr.** (Real Estate Law); **Mark S. Bosco** (Litigation – Banking & Finance and Mortgage Banking Foreclosure Law); **David L. Case** (Litigation – Trust & Estates and Trusts and Estates); **Richard G. Himelrick** (Litigation – Securities); **Christopher R. Kaup** (Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law and Litigation – Bankruptcy); **James P. O'Sullivan** (Closely Held Companies and Family Business Law); and **Michael E. Tiffany** (Real Estate Law).

During 2011 and 2012, the following Shareholders were recognized by the *Arizona Business Magazine* as Top Lawyers: **Alternative Dispute Resolution:** James P. O'Sullivan and Robert A. Royal; **Banking:** Mark S. Bosco and Michael A. Bosco, Jr.; **Bankruptcy:** Mark S. Bosco, Michael A. Bosco, Jr., Christopher R. Kaup, and J. Lawrence McCormley; **Commercial Litigation:** Richard G. Himelrick, Pamela L. Kingsley, Dow Glenn Ostlund, and Robert A. Royal; **Construction:** William J. Simon; **Corporate:** David L. Case, William H. Finnegan, James P. O'Sullivan, and Robert A. Royal; **Intellectual Property:** Richard E. Oney and Dow Glenn Ostlund; **Labor and Employment:** Pamela L. Kingsley and Stephen P. Linzer; **Tax:** David L. Case and William H. Finnegan; **Trusts and Estates:** Michael A. Bosco, David L. Case, and William H. Finnegan; **White-Collar Criminal Defense:** Alexander Poulos.

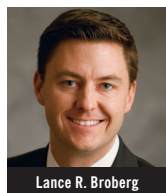
FIND AN ATTORNEY

See the directory on the back page of this newsletter or visit us online at www.tblaw.com.

ANNOUNCEMENTS

NEW FACES

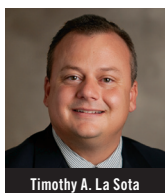
NEW SHAREHOLDERS



Lance R. Broberg

LANCE R. BROBERG has been named Shareholder in the firm's Phoenix office. Mr. Broberg joined the firm in 2005 and practices in the area of general civil and commercial litigation. Mr. Broberg focuses in matters relating to

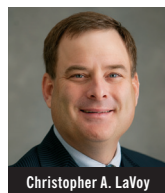
intra-corporate disputes and "business divorce." Mr. Broberg also serves clients with commercial landlord-tenant disputes, assists creditors in bankruptcy actions, and prosecutes appellate matters. Mr. Broberg is a 2002 graduate of Arizona State University and received his J.D. from the University of Arizona James E. Rogers College of Law in 2005. He is actively involved in the Arizona State High School Mock Trial Program.



Timothy A. La Sota

TIMOTHY A. LA SOTA joined the firm as a Shareholder in June 2012. Mr. La Sota has over 10 years of experience as an attorney in the areas of Government Relations, Regulatory and Administrative Law, Election Law, Land Use,

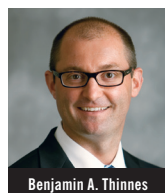
and Procurement. Prior to joining the firm, Mr. La Sota worked as the Chief of Staff to Scottsdale Mayor, Jim Lane, where he advised the Mayor on public policy and various legal matters related to municipal government. Before that, Mr. La Sota served as a Special Assistant Deputy Maricopa County Attorney. In that capacity he represented the County Attorney's Office at the Arizona Legislature, supervised the Community Action Bureau, and advised on criminal justice and legal matters. Mr. La Sota is from Phoenix and is actively involved in the community, serving on various boards.



Christopher A. LaVoy

CHRISTOPHER A. LAVOY joined the firm as a Shareholder in August 2012. His practice generally focuses on commercial litigation, including partnership, shareholder, and corporate governance disputes. Mr. LaVoy accepts some high-value matters on a contin-

gency-fee basis. His contingency-fee work has included consumer class actions, commercial claims, non-medical professional liability claims, insurance coverage claims, and patent infringement claims. Mr. LaVoy has been practicing for 17 years and regularly speaks and writes on class action law. He has an AV Preeminent Peer Review Rating from Martindale Hubbell, is listed in Super Lawyers (commercial litigation) and Arizona's Finest Lawyers, and is also a member of Litigation Counsel of America. Mr. LaVoy received his undergraduate degree in 1991 from Georgetown University, *magna cum laude*, and his law degree in 1995 from the University of Arizona James E. Rogers College of Law, *magna cum laude*, where he was a member of the Arizona Law Review.

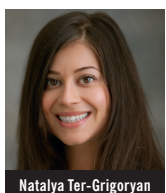


Benjamin A. Thinnes

BENJAMIN A. THINNES has been named Shareholder in the firm's Phoenix office. Mr. Thinnes practices in the area of real estate transactions and finance. Prior to joining the firm in 2011, Mr. Thinnes served as general counsel for one of the country's

preeminent private golf-community developers, during which time he acted as counsel in all facets of the law relating to the planning, development, and operation of private golf communities, both in the United States and abroad. He graduated from the University of Arizona in 1996 and received his J.D. from the University of San Diego School of Law in 2002.

NEW ASSOCIATE



Natalya Ter-Grigoryan

NATALYA TER-GRIGORYAN joined the firm in September 2012. Ms. Ter-Grigoryan graduated *summa cum laude* from Arizona State University with a degree in Political Science and a Certificate in International Relations. While completing her law degree at

the Sandra Day O'Connor College of Law at Arizona State University, she interned in the Arizona Attorney General's Office, the Maricopa County Superior Court,

and the Arizona Court of Appeals, and was recognized for her pro bono work in the public sector. She also served as Symposium Editor of the *Arizona State Law Journal* and published *Improving the Law of Negotiable Instruments: Support for Arizona's Adoption of the 2002 Proposed Revisions to Uniform Commercial Code Section 3-309*, 43 Ariz. St. L.J. 1331 (2010). Before joining the firm, Ms. Ter-Grigoryan clerked for the Honorable Maurice Portley of the Arizona Court of Appeals.

IN FOCUS

Dying to Pay

Creditors' Claims in Probate Court

BY ALISA J. GRAY AND JAMES A. FASSOLD



Arizona law protects creditors of decedents' estates, but numerous traps lie in wait for the unwary. This article offers a short introduction to creditors' claims in probate.

As a threshold matter, secured creditors do not have to deal with probate and may proceed to a trustee's sale or foreclosure just as if the debtor were still alive. A.R.S. § 14-3104; *In re Estate of Stephenson*, 217 Ariz. 284, 173 P.3d 448 (App. 2007). If no one has opened a probate, any creditor can do so after 45 days from the date of death and be appointed personal representative. A.R.S. § 14-3203(A).

A known creditor who receives actual notice (i.e., a Notice to Creditors is sent to the creditor) or a creditor unknown to the personal representative must present a claim within four months from the date the Notice to Creditors is first published in a newspaper of general circulation. A.R.S. §§ 14-3801(A), 14-3803; *In re Estate of Van der Zee*, 228 Ariz. 257, 265 P.3d 439 (App. 2011). However, a known creditor who does not receive actual notice has two years from the date of death to present the claim. A.R.S. § 14-3803(A)(1); *Van der Zee*. The two-year limit has no exceptions, regardless of any longer limitations period that might apply. Although a tardy probate may

be opened more than two years after death, the sole purpose for doing so is to transfer assets to the proper owner, not to satisfy creditors' claims.

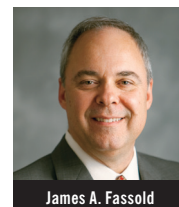
Presentation of a claim consists of notifying the personal representative of the basis for the claim, the name and address of the creditor, and the amount. A.R.S. § 14-3804(1). Some creditors prefer

to file the notice of claim in the probate proceeding to eliminate any argument that the notice was not received, but filing is not necessary.

Once the creditor presents the claim, the personal representative must allow or disallow it within 60 days after the final date for presenting claims. A.R.S. § 14-3806. If the claim is disallowed, a creditor has 60 days to file a Petition for Allowance of Claim or a civil complaint for recovery. A.R.S. § 14-3806. This deadline may not be extended, tolled, or waived, even if the personal representative agrees in writing. *Van der Zee*.

If all of the decedent's assets were transferred outside of probate, the personal representative would need to bring an action to pull the non-probate assets back into the estate to provide a

continued on page 6 >>



James A. Fassold



Alisa J. Gray



For more information about Tiffany & Bosco's resources in this area, please contact the attorneys above.

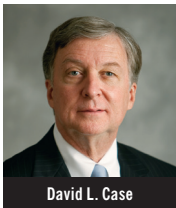
LEGAL REVIEW

Year End Wealth-Transfer Tax Planning

BY DAVID L. CASE

On December 31, 2012, the estate, gift, and generation-skipping transfer tax provisions of the Tax Relief Act of 2010 will expire. There is little chance Congress will extend these rules before that. Even if Congress elects to renew them retroactively next year, it likely would be for a limited period only.

The 2012 maximum tax rate and exemption level for all three wealth transfer taxes (gift, estate, and generation-skipping) are 35% and \$5.12 million.



David L. Case

This compares to the law of 2009, which had a maximum transfer tax rate of 45%, a lifetime exemption for gift tax of \$1 million, and a lifetime exemption for estate tax and generation-skipping transfer tax of \$3.5 million. The current administration is promoting a return to the 2009 rules, and pushing to eliminate or greatly curtail many traditional planning techniques, which should be reviewed for current use before possible elimination.

If Congress fails to act, the rules existing before the Economic Growth and Tax Relief Reconciliation Act of 2001 will again take effect on January 1, 2013, due to the "sunset" structure of the 2010 Act. The maximum transfer tax rate will be 55% and the lifetime ex-



emption (adjusted for inflation) will be \$1 million for all three wealth transfer taxes. Individuals in a position and with the desire to do further planning should review their estate plans and determine their amount of remaining wealth transfer tax credit and the available types of planning techniques.

Current and historically low Internal Revenue Service interest rates further enhance many planning techniques. As a result, additional planning this year still may make great sense, even for those individuals who already have used up their credit amounts or may have paid gift tax or generation-skipping transfer tax as a result of prior estate planning. For example, the IRC §7520 rate for grantor retained annuity trusts ("GRATs") and charitable lead annuity trusts ("CLATs")

funded in August of 2012 was 1.0%. Thus, the aggregate of income earned and increase in value in excess of 1.0% during the annuity term can pass to family free of estate and gift tax.

Similarly, the applicable federal rates for loans announced by the IRS for August of 2012 was 0.25% for a note of three years or less, 0.88% for a note of more than three and up to a nine years, and 2.230% for a note of more than nine years — incredible! The law provides that if lending rates are set at no less than these amounts, interest income will not be imputed and taxable gifts will not be deemed to have been made. For example, an individual could make a nine-year loan of any amount to a family member, or to an irrevocable trust for the benefit of family, including an irrevocable life insurance trust to cover premiums, with a rate of only 0.88%, without recognizing additional interest income and without being deemed to have made a taxable gift to the family member or trust. During the nine years, any amounts earned on the borrowed funds greater than the 0.88% interest rate could be viewed, in effect, as a tax free transfer.

As can be seen, the current impact and tax savings leverage of estate planning techniques, with values very depressed and interest rates at historic lows, can be extraordinary.

>> PROBATE continued from page 5

source of funds to pay creditors. A.R.S. § 14-6102(F). If the personal representative refuses to do so, the creditor may bring the action, but must file within two years of the date of death. A.R.S. § 14-6102(G).

Life insurance proceeds are an exception. Whether paid to an individual beneficiary or to a trust, they cannot be reached by creditors. *May v. Ellis*, 208 Ariz. 229, 92 P.3d

859 (2004); *In re Estate of King*, 228 Ariz. 565, 269 P.3d 1189 (App. 2012).

Arizona's probate statutes allow for a streamlined, swift administration of estates through unwaivable deadlines. Creditors who wait to enforce their rights do so at their peril. Tiffany & Bosco is ready to respond to any questions you may have in this area.

LEGAL REVIEW

'Speak Now or Forever Hold Your Peace'

New court rulings make post-trustee's sale lawsuits more difficult in Arizona

BY WILLIAM M. FISCHBACH, III

Two recent cases will make it more difficult to bring lawsuits after a trustee's sale in Arizona. The two cases are *BT Capital, LLC v. TD Serv. Co. of Arizona*, 229 Ariz. 299, 275 P.3d 598 (2012), and *Madison v. Groseth*, 230 Ariz.



William M. Fischbach III

8, 279 P.3d 633 (App. 2012). Both cases address the operation of Arizona Revised Statute Section 33-811(C). That statute states in relevant part:

The trustor, its successors or assigns, and all persons to whom the trustee mails a notice of sale under a trust deed...shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order [halting the sale]...on the last business day before the scheduled date of the sale.

Section 33-811(C) became law in 2003. *BT Capital* and *Madison* are the first authoritative cases explaining the application of Section 33-811(C).

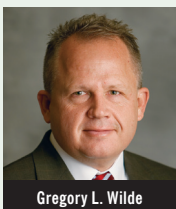
In *BT Capital*, two trustee's sales of a commercial property had occurred on the same day, each with a different winning bidder. The successful bidder at the second sale, BT Capital, had filed a lawsuit against the successful bidder of the first sale, Point Center Financial ("PCF"). BT Capital's lawsuit was unsuccessful, and while its case was on appeal, there was a third trustee's sale at which PCF was the winning bidder. The Arizona Supreme Court held BT Capital's appeal was moot under Section 33-811(C) because BT Capital did not obtain a court order halting the third and final sale. The Court read Section 33-811(C) broadly, holding that BT Capital's appeal was a post-sale challenge barred by Section 33-811(C).

In *Madison*, there had been a trustee's sale on the borrower's property, and the borrower did not get a court order halting the sale the day prior. After the sale, the borrower filed a lawsuit alleging fraud and other tort claims against the bidder that purchased the property at the trustee's sale. The Court of Appeals found the borrower's tort claims depended on her "objections to the validity of the trustee's sale." Because the borrower had not obtained a court order halting the sale, the Court of Appeals held she had "waived those objections," thus terminating her tort claims.

BT Capital and *Madison* demonstrate that Section 33-811(C) means what it says: If a borrower or other party with notice of a trustee's sale does not get a court order halting the sale, it waives all defenses and objections to the sale. In other words, "Speak now, or forever hold your peace."

Nevada Foreclosure Legislative Update

BY GREGORY L. WILDE



Gregory L. Wilde

In the last two legislative sessions, Nevada legislators radically altered foreclosure requirements, making it extremely difficult for residential lenders to foreclose.

A foreclosure in Nevada is initiated by recording a Notice of Default ("NOD"). For years, Nevada has led the nation in foreclosures, but the number of NODs dropped over 95% in October

2011, when Nevada Assembly Bill 284 took effect. This Bill requires lenders to record, prior to the NOD, an affidavit of personal knowledge detailing many items, including but not limited to, the ownership history of the loan. Violators of this requirement face a \$5,000 fine and potential criminal charges. Eleven months later, lenders have only recently begun to test the waters and initiate foreclosures.

The previous effort to curb foreclosures was in 2009 when the Nevada legislature implemented a Foreclosure Mediation Program. If a homeowner elects mediation, the foreclosure is stayed and the lender is required to meet and discuss a loan modification or other arrangements. If an agreement is not reached, and the lender wants to proceed with foreclosure, the mediator decides if the lender strictly complied with all program requirements. Any non-compliance results in cancellation of the foreclosure. In contrast, the homeowners need only use their best efforts to comply and there is no mention of a penalty.

If the foreclosure survives mediation, but the homeowner is not pleased with the mediation result, the homeowner can file a Petition

for Judicial Review with the District Court. This stays the foreclosure again without requiring the homeowner to seek an injunction or post a bond while waiting for the Petition to be decided.

If the lender prevails at the petition level and the homeowner is not pleased with the result, the homeowner can appeal the decision to the Nevada Supreme Court. This also stays the foreclosure without requiring the homeowner to seek an injunction or post a bond while waiting for a decision on appeal. These three "stays" of the foreclosure allow a homeowner to remain in a property for several months, or even years, without making any payments to the lender.

There is no written legislative, legal, or procedural authority providing for injunctive relief after the mediation. It is an assumed byproduct not addressed yet by the Nevada legislature. From an objective point of view, the biased mediation rules and gratis injunctive relief are contrary to the notions of due process and general fairness.

The Arizona legislature recently considered a similar mediation program, but did not adopt it. The boom and bust of the Nevada and Arizona real estate markets, along with their foreclosure rates, were almost mirror images of each other until shortly after Nevada adopted its mediation program. Interestingly enough, property values in Arizona have continually increased since 2010 while Nevada's values are declining and sales remain stagnant.

Hopefully Nevada's judiciary, 2013 legislators, and mediators can be objective in their decision making process. Allowing legitimate foreclosures will assist eventually in stabilizing the real estate market. Postponing the inevitable only adds to the many problems stalling Nevada's economic recovery.

Tiffany & Bosco, P.A. has provided a wide range of legal services to the business community since 1967. The firm's experienced attorneys represent domestic and foreign clients on a local, national and international basis. Tiffany & Bosco, P.A. is the Arizona law firm member of MSI, a worldwide network of independent legal and accounting firms. Tiffany & Bosco, P.A. is also a member of the USFN, and the FNMA and FHLMC designated counsel programs.

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Nora L. Jones	(602) 255-6014	nlj@tblaw.com	Civil and Commercial Litigation
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