The St. Louis Bar Journal

The Bar Association of Metropolitan St. Louis

Vol. 68, No. 4 Spring 2022

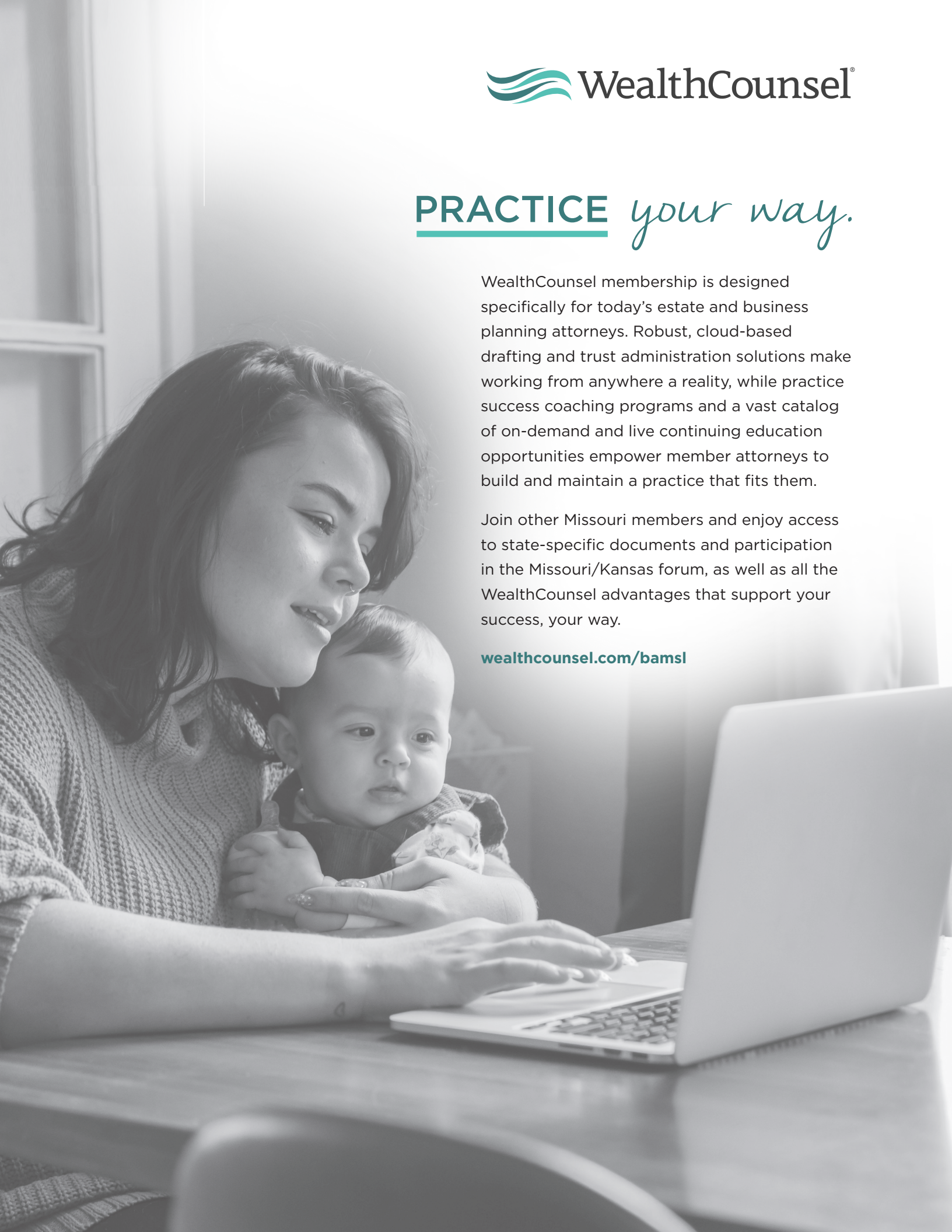
Trusts and Estates

As Time Goes By: Options for Distribution of Assets after One Year from Date of Death

Page 15

Go Paperless
Opt out of print in your account settings.

THE BAR ASSOCIATION OF METROPOLITAN ST. LOUIS
BUILDING BETTER LAWYERS



WealthCounsel®

PRACTICE *your way.*

WealthCounsel membership is designed specifically for today's estate and business planning attorneys. Robust, cloud-based drafting and trust administration solutions make working from anywhere a reality, while practice success coaching programs and a vast catalog of on-demand and live continuing education opportunities empower member attorneys to build and maintain a practice that fits them.

Join other Missouri members and enjoy access to state-specific documents and participation in the Missouri/Kansas forum, as well as all the WealthCounsel advantages that support your success, your way.

wealthcounsel.com/bamsl

The St. Louis Bar Journal

The Bar Association of Metropolitan St. Louis

Vol. 68, No. 4 Spring 2022

ARTICLES

5 **Due Process and Best Interests: The Challenges of Guardianship Cases**
BY HEATHER HALL AND JOSH ROSE

10 **High Times — They Are A-Changing**
BY RENE MORENCY

15 **As Time Goes By: Options for Distribution of Assets after One Year from Date of Death**
BY THOMAS G. GLICK

24 **Trigger Warning: the "Safe Harbor" at Section 420**
BY RUSS WILLIS

FEATURES

4 **The President's Page**
BY ROBERT TOMASO

29 **Precedent: The Legal History of St. Louis**
The Suffragists of St. Louis: Part 1 of 3
BY TAYLER BERTELSMAN

32 **The Brief Case**
BY CHARLES A. WEISS

36 **Tax Wise**
Limitations on Statues of Limitations
BY RICHARD M. WISE, CPA, JD

38 **Books in Brief**
Profit and Punishment: How America Criminalizes the Poor in the Name of Justice
REVIEWED BY HON. ARTHUR LITZ

On the Cover: *St. Louis Civil Courts Building*
(Photo by William Greenblatt)

THE ST. LOUIS BAR JOURNAL:

EDITOR-IN-CHIEF: David R. Truman
ADVERTISING: Jennifer Macke
LAYOUT & GRAPHIC DESIGN: Rebecca Hedrick
STAFF LIAISON: Susan Sagarra

The St. Louis Bar Journal (ISSN 05813344, USPS 002055) published quarterly for members, by The Bar Association of Metropolitan St. Louis (BAMSL), 555 Washington Avenue, Suite 100, St. Louis, MO 63101-1249 (314-421-4134). Periodicals postage paid at St. Louis, Missouri. Postmaster: **Send address changes to:** *The St. Louis Bar Journal* c/o The Bar Association of Metropolitan St. Louis, 555 Washington Avenue, Suite 100, St. Louis, MO 63101-1249. The opinions expressed herein are those of the authors and are not necessarily those of the editor or The Bar Association of Metropolitan St. Louis. Direct advertising inquiries to Jennifer Macke at (314) 421-4134. Acceptance of advertising does not imply endorsement of products advertised or listed nor of statements concerning them.

The President's Page

by Robert Tomaso

COVID has affected the world in many ways, and it has surely had a significant impact on the delivery of legal services. Prior to March of 2020, I had ripped the camera off the top of my monitor and thrown the camera into a drawer in my credenza (yes, I still have a credenza). I told myself I would never participate in a video call. Ever. It seemed stupid to let clients see my messy office and fat face when I could just talk with them on the phone like a normal person, just as I had done for the first 31 years of practicing law. Less than 2 years later, even a Neanderthal like me has at least one video call per day. Going forward, it seems that some lawyers will likely rarely meet face to face with clients, and many more have mastered the art of "working from home."

I am not one of those work-from-home lawyers. I tried it for about two days and could not stand it. Noises, distractions, mediocre equipment, dogs, and family were all negative forces at home. Even eating lunch at home seemed awkward. In mid-March 2020, two days after we told all our lawyers they could not come back into the office, I returned to the office. At first, I rationalized that as managing partner of our office, I needed to be there in case anyone else came in. Besides, since no one else was there, I reasoned, the office was a safer place for avoiding COVID than my crowded house. Then I made myself useful by watering other people's plants. Sure, I went home at night and watched "Tiger King" on some streaming service just like everyone else, but I would be in the office during the day. All by myself. Just where I belonged. Just the way I liked it.

To be sure, a significant number of business clients called (our office phones were automatically re-routed to our cell phones), and many had questions about state and local "Stay at Home" orders. "Are we not an essential business? Can't we stay open? Can you write us a letter that says we are 'essential' under the official Stay at Home orders issued by [for example only] Allegheny County, Pennsylvania?"

Not long after making what I thought was my solo return to the office, as I walked the empty halls of a modern law office that usually buzzed with almost 200 lawyers and even more staff, I heard noises on our 6th floor, an area that also housed our then-abandoned reception desk. Noises? In this space?

I investigated and came across a sight that startled me. Several of our private wealth (or estate planning) lawyers, and related staff members, had been coming into the office as well. When I asked these private wealth lawyers what they were doing in the office, they all said COVID had made them busier than ever. Some high net-worth clients were so worried about the impact of COVID, they wanted to make certain their "affairs were in order" in case they caught the dreaded virus and passed away. And, notwithstanding their natural fears of COVID, some of those clients were determined to have face-to-face meetings to execute new or revised plans.

The remarkable swings of the Spring 2020 stock market also worried many clients, and our pipeline of referrals from the wealth planning industry was also growing. Startled, as I watched this private wealth group working feverishly, I felt a little like The Grinch when he realizes that all the Whos down in Whoville were still going on with their celebration even after he "stole" Christmas. "Well, I'll be…"

So, life went on for our private wealth group, as I am told it went on for other estate planning practices at other law firms. Sure, medical malpractice lawsuits and some other litigation came to a screeching halt, but the private wealth practice area rolled along undaunted. Cheers and thanks to our estate planning lawyers who never really worked from home.

Due Process and Best Interests: The Challenges of Guardianship Cases

by Heather Hall and Josh Rose

The primary purpose of guardianship is to protect the well-being of individuals who are unable to care for themselves.[1] As in most states, the appointment of a guardian under Missouri law is statutory,[2] and authorized by the state's power of *parens patriae*.[3] The power of *parens patriae* is historically understood as a state's power to protect citizens who cannot protect themselves.[4] To this end, since at least 1939, Missouri has enacted statutory provisions for the appointment of guardians for individuals who are unable to meet their essential requirements for food, clothing, shelter, and safety.[5]

Over time, however, a predisposition toward the beneficial aspects of guardianship has overshadowed the reality that guardianship entails a loss of fundamental liberties.[6] Among the fundamental liberties implicated in a guardianship proceeding is the right to own and enjoy property;[7] to personal dignity and autonomy;[8] to speech and free expression;[9] and to travel and go unimpeded about one's ordinary affairs.[10] With limited exception, decisions regarding the support, care, education, health, and welfare of a ward are entrusted to the guardian.[11]

In 1986, the Missouri Supreme Court recognized that the predisposition toward the beneficial aspects of guardianship has caused an atmosphere of procedural informality in guardianship proceedings that is inconsistent with the right to due process. Indeed, the Missouri Supreme Court has compared the rights implicated in a guardianship proceeding to those of defendants in criminal proceedings, noting that, under a "façade of beneficence," the incapacitated are deprived of the same freedoms without the same strict procedural safeguards.[12]

The tension between an individual's "best interest" and their right to due process is highest when an individual

is incapacitated by reason of mental illness. The diagnosis and treatment of mental illness is complex, and symptoms affect all aspects of the individual in various degrees, at various times, and in various ways.[13] Capacity to manage essential requirements for food, clothing, shelter, and safety may depend on adherence to a prescribed treatment plan, access to mental health resources, or other circumstances. An atmosphere of procedural informality is not suitable in these difficult cases.

To be sure, guardianship is not always inappropriate, and our courts do well to uphold due process when fundamental liberties are at risk. Nevertheless, as the Missouri Supreme Court did in 1986, this article re-examines the statutory and procedural safeguards under Missouri law to assist you in navigating your next guardianship case.

Right to be Represented by an Attorney

A respondent's rights begin with the right to counsel. When a petition is filed, courts are directed to immediately appoint an attorney to represent the respondent and actively investigate the factual background of the petition.[14] The role of court-appointed counsel, however, is often misunderstood.

Commonly, the role of court-appointed counsel is confused with the role of guardian ad litem. The duty of a guardian ad litem is to act in the ward's best interest, rather than advocate for their wishes.[15] In so doing, a guardian ad litem substitutes their judgment for that of the ward and proceeds independently of their will.[16]

The duty of court-appointed counsel, on the other hand, is to advocate for the respondent's wishes, no matter the wisdom of their choice, through submission of all relevant arguments and defenses.[17] Court-appointed counsel are not to make an independent judgment of capacity, determine the respondent's best interest, and thereafter report their conclusions to the court.[18] If the respondent opposes the petition, counsel must oppose it.[19]

Of course, court-appointed counsel must initially determine the respondent's ability to advance their interests,[20] and if the respondent is capable, to obtain from the respondent all possible aid.[21] Even if the respondent is incapable, however, the duty of court-appointed counsel remains to safeguard and advance the respondent's interests under the circumstances.[22]

With anything less, the right to counsel becomes a mere formality, and does not meet constitutional and statutory guarantees of due process and representation.[23]

Right to Be Present and Participate

The right to be present and participate in hearings is a substantial right, and coincides with a respondent's right to present evidence, to cross-examine witnesses who testify against them, and the right to trial by jury. Waiver of the right to be present and participate must be made on the record and indicate whether the decision to waive the right is the respondent's own choice or a product of their counsel's best judgment.[24] The same standard applies to the right to trial by jury.[25]

A difficulty arises when a respondent is alleged to be incapacitated by reason of mental illness. The duty falls on the court to determine whether the respondent is capable of a knowing and intelligent waiver of their rights.[26] That the respondent ultimately chooses differently than court-appointed counsel might advise does not indicate the respondent is incapable of a knowing and intelligent waiver.[27] Indeed, respondents are equally entitled to potentially unwise litigation

Heather M. Hall is a member of Schormann Law Firm, LLC, where she focuses her practice on fiduciary litigation, probate and trust administration, and minor and adult guardianships. She formerly clerked for the Hon. Kathleen Forsyth in the Probate Division of the Circuit Court of Jackson County, Mo. She is frequently appointed by St. Louis County as court-appointed counsel for respondents in guardianship and conservatorship proceedings. She received her J.D. with honors from the University of Missouri – Kansas City School of Law.

Joshua S. Rose joined the St. Louis office of Kirkland Woods & Martinsen LLP in August 2020. Josh focuses his practice in fiduciary litigation, trust and estate administration, and guardianship/conservatorship. He routinely serves as court-appointed counsel for respondents in guardianship and conservatorship proceedings in St. Louis County. He was recently admitted to the BAMSL Probate and Trust Law Steering Committee, is a graduate of the Heart of America Fellows Institute of the American College of Trust and Estate Counsel, and was included in the 2022 edition of Best Lawyers: Ones to Watch in America for his work in Trusts and Estates. He received his J.D. from St. Louis University School of Law.

decisions as litigants whose competency is not at issue.[28]

Rules of Evidence

Another common misconception is that the rules of evidence in civil proceedings do not apply in guardianship proceedings. By statute, however, respondents are afforded the right to a hearing conducted in accordance with the rules of evidence in civil proceedings (except as modified by Section 475.075.8, RSMo.).[29]

Historically, our courts have applied the ordinary rules of evidence in mental health proceedings.[30] The common law rule regarding hearsay evidence, for example, is no less applicable to guardianship proceedings than civil proceedings.[31] Equally applicable is the requirement that evidence be relevant and material, as the determination of capacity is based on the respondent's condition at the time of the hearing.[32] Accordingly, evidence should be material to the respondent's capacity at the time of trial, with evidence more remote in time tested for relevancy to the court's determination.

These principles are particularly important given the nature of mental illness, where historical periods of incapacity may demonstrate a need for intervention but may not otherwise assist the court in determining capacity at a single point in time. A respondent may show insight into their illness, accept treatment when necessary, and therefore qualify for a less restrictive alternative to guardianship. The seemingly permanent nature of a finding of incapacity may not fit the needs of these individual cases.

Right to Less Restrictive Alternatives

Before appointing a guardian, the court must first consider whether the respondent's needs may be met by a less restrictive alternative, and whether the respondent's needs may be met without appointment of a guardian at all.[33]

"Least restrictive alternative" is defined as a course of action or alternative that allows the respondent to live, learn, and work with minimum restrictions on their person, considering their physical and mental condition.[34] "Least restrictive alternative" also means choosing the decision or approach that places the least possible restriction on the respondent's personal liberty and exercise of rights, and promotes the greatest possible inclusion of the person into their community.[35]

In practice, application of the "least restrictive alternative" principle may include a finding of total or partial incapacity, and in conjunction therewith, an addition or subtraction of the rights and privileges to which the respondent should be entitled under the evidence.[36]

To continue the example of the mentally ill: the "least restrictive principle" could require that a guardian be appointed to make health care and placement decisions, to ensure the symptoms of mental illness are appropriately managed over time; but also require that the respondent retain certain other rights and liberties, including the right to drive, to a spending allowance, and to enter into basic contracts (employment applications, gym memberships, cellphone plans, etc.).

While not characterized as such, Missouri law is clear that a finding of total incapacity is a last resort, and that alternatives to guardianship should be part of the relevant defenses and arguments made by court-appointed counsel.

Right to Remain Silent

A respondent's statutory right to remain silent is supported by the Fifth Amendment of the United States Constitution.[37] The right to remain silent extends to pre-trial discovery by deposition, interrogatories, request for production, and requests for admission.[38]

The right to remain silent also extends to court-ordered mental examinations.[39] Although the court may order that the respondent be examined by a physician, licensed psychologist, or other professional, the respondent must first be advised that (1) the purpose of the examination is to produce evidence which may be used to determine their capacity; (2) they have the right to remain silent; and (3) anything they say may be used in court.[40]

The right to remain silent does not bar testimony based on a review of medical records or other information acquired from the respondent.[41] Often, however, the testimony of a physician or medical professional is based on the mental examination alone because the respondent's physician will not testify to capacity, medical records are unavailable, or the respondent has no documented history of incapacity. In such an instance, a failure to advise the respondent of their

rights prior to examination would cause the results of the examination to be inadmissible at trial.

Use of Medical Evidence

A respondent retains a physician-patient privilege to confidential medical information until prima facie proof of incapacity is established.[42] Commonly, prima facie proof of incapacity is attempted through a Motion for Mental Examination at the onset of a guardianship case, which if sustained, not only permits [43] a physician or other medical professional to examine the respondent, but may also permit the discovery of other medical records and testimony despite otherwise applicable physician-patient privileges. [44]

But medical evidence is most often introduced through affidavit, filed contemporaneously with the Petition for Appointment of Guardian. Despite widespread use, however, the concept of a "medical affidavit" or "physician interrogatory form" has no basis in Missouri law generally, let alone Chapter 475. Medical affidavits and physician interrogatories are a concept of local practice and process to facilitate the use of medical evidence at trial, and are therefore susceptible to the same atmosphere of procedural informality identified in this article.

Often, court-appointed counsel will stipulate to the admission of a medical affidavit to save the medical professional from appearing in court to testify, which can be burdensome and expensive for all parties. Stipulation to the admission of medical affidavits is so commonplace, in fact, that a refusal of court-appointed counsel to so stipulate can be viewed as obstructive or unreasonable.

Frequently overlooked, however, is the effect of stipulations on the respondent's other substantial rights. By stipulating to the admission of a medical affidavit, the respondent forfeits the right to cross-examine the witness who will testify against them and risks the admission of certain other statements in the affidavit that, if made in court, would otherwise be objectionable (*i.e.*, hearsay, foundation). A stipulation also has the effect of waiving the respondent's physician-patient privilege, assuming prima facie proof of incapacity has not otherwise been established. The medical affidavit itself is not prima facie proof of incapacity until offered and admitted into evidence.[45] Indeed, absent stipulation, the "medical affidavit" or "physician interrogatory form" is not evidence at all.

To be clear, there are acceptable reasons for court-appointed counsel to stipulate to the admission of a medical affidavit. A respondent may expressly authorize court-appointed counsel to so stipulate, for example, following a discussion of the right to cross-examination and physician-patient privilege, or court-appointed counsel may so stipulate when capacity is not in dispute.

Conclusion

In a trust and estate practice, guardianship cases are among the most difficult. Given the fundamental liberties at stake, it is perhaps for good reason that a Petition for Appointment of Guardian can be burdensome to file and prosecute. The procedural informality addressed in this article makes guardianship less burdensome for petitioners and their counsel but may come at the detriment to respondents and their right to due process. A renewed attention to statutory and procedural safeguards is necessary to protect this careful balance.

[1] *In re Link*, 713 S.W.2d 487, 493 (Mo. banc 1986).
[2] *In re Myles*, 273 S.W.3d 83, 85 (Mo.App. E.D. 2008).
[3] *Addington v. Texas,* 441 U.S. 418, 426 (1979).
[4] *In re Link*, *supra* note 1, at 493.
[5] *In re Myles*, *supra* note 2 at 85.
[6] *Id.*
[7] *Lynch v. Household Finance Corp*., 405 U.S. 538, 544 (1972).
[8] *Lawrence v. Texas*, 539 U.S. 558, 592 (2003).
[9] *Gitlow v. New York*, 268 U.S. 652, 666 (1925).
[10] *Kent v. Dulles*, 357 U.S. 116, 125 (1958).
[11] § 475.120.3, RSMo (2021).
[12] *In re Link*, *supra* note 1, at 493.
[13] Matthew J. Edlund, *Psychiatric Diagnosis is Difficult and so is Tteatment* Psychology Today (2018), https://www.psychologytoday.com/us/blog/the-power-rest/201807/psychiatric-diagnosis-is-difficult-and-so-is-treatment (last visited Feb 8, 2022); see also MENTAL ILLNESS, MAYO CLINIC (2019), https://www.mayoclinic.org/diseases-conditions/mental-illness/diagnosis-treatment/drc-20374974 (last visited Feb 8, 2022).
[14] § 475.075.4, RSMo (2018); *In re Link, supra* note 1, at 497.

[15] *Matter of O'Reilly,* No. SD36874 (Mo.App. S.D. January 18, 2022), at p.4 n.7.
[16] *Id.*
[17] *Id.*
[18] *In re Link, supra* note 1, at 496.
[19] Missouri Supreme Court Rule 4-1.3, Comment [1].
[20] *In re Link*, *supra* note 1, at 497; *In re Myles*, *supra* note 2, at 85
[21] § 475.075.4, RSMo.
[22] § 475.075.4, RSMo.
[23] *In re Link*, *supra* note 1, at 496.
[24] *In re Myles*, *supra* note 2, at 86.
[25] *Couch v. Couch*, 824 S.W.2d 65, 72 (Mo.App. W.D. 1991) (Fenner, J., dissenting); *Matter of Conservatorship Estate of Moehlenpah*, 763 S.W.2d 249, 259 (Mo. App. E.D. 1988).
[26] *Flair v. Campbell*, 44 S.W.3d 444, 454 (Mo.App. W.D. 2001); *Moehlenpah, supra* note 25, at 259.
[27] *In re Link*, *supra* note 1, at 497 n.9.
[28] *Id.*
[29] § 475.075.10(7), RSMo.
[30] *In re Delany*, 226 S.W.2d 366, 375 (Mo.App. St.L.D. 1950), *superseded on other grounds by statute.*
[31] *Id.*
[32] *Matter of Mitchell*, 914 S.W.2d 844, 847 (Mo.App. S.D. 1996).
[33] § 475.075.13, RSMo.
[34] § 475.010(13), RSMo (2018).
[35] *Id.*
[36] *Matter of Nelson*, 891 S.W.2d 181, 187 (Mo.App. W.D. 1995).
[37] *State ex rel. Simanek v. Berry*, 597 S.W.2d 718, 720 (Mo.App. W.D. 1980).
[38] 5C Missouri Practice: Probate Law & Practice § 1950 ("Hearing rights of alleged incapacitated person—Right to remain silent") (3d ed. 1999).
[39] § 475.075.6(2), RSMo.
[40] § 475.075.6, RSMo.
[41] *In re Estate of Moormann*, 709 S.W.2d 160, 161 (Mo.App. E.D. 1986).
[42] S*ee State ex rel. Dixon Oaks Health Ctr., Inc. v. Long,* 929 S.W.2d 226 (Mo.App. S.D. 1996).
[43] An Order for Mental Examination does not require the respondent to undergo a mental examination. The respondent may still exercise his or her right to remain silent pursuant to § 475.075.10(5).
[44] § 475.075.8.
[45] *Matter of Crocker*, 629 S.W.3d 846, 852 n.7 (Mo.App. E.D. 2021).

High Times — They Are A-Changing

by Rene Morency

Estate and gift tax exemptions are high. Higher than ever. Changes to those amounts are likely. Practitioners and taxpayers have multiple considerations to weigh. The following article seeks to identify and briefly discuss some of those considerations in light of recent events and existing law.

Estate and Gift Limits

The lifetime gift, estate, and generation-skipping ("GST") tax exemption amount for 2021 is $11,700,000 individually, and twice that per married couple.[1] This exemption limit is an aggregate cap on transfers, irrespective of the number of donees. The law also permits for annual exclusion of gifts of up to the inflation-adjusted amount of $15,000. These annual exclusion gifts may be given to any number of persons, so long as the gift is not a gift of future interests in property.[2] A few notable special categories of annual gifts exist, like transfers for the benefit of a minor, tuition to an educational organization, and medical care payments.[3] Any amount of these exceptional gifts is excluded. Indeed, no amount of qualified exclusion gifts counts against or reduces the lifetime exemption amount.

While Section 2056 of the Internal Revenue Code provides an unlimited marital deduction for the gross estate, and § 2523 provides an unlimited spousal gift deduction, these do not apply when the donee spouse is not a United States citizen. Instead, for 2021, the first $159,000 of gifts (other than gifts of future interests in property) to a non-citizen spouse are excluded from the total amount of 2021 taxable gifts under §§ 2503 and 2523(i)(2).[4]

For 2022, the lifetime gift, estate, and GST exemption amount has increased to $12,060,000, doubled per married couple. Annual exclusion gift limits are increased to $16,000 per donor, per recipient. The annual exclusion limit for gifts to a non-citizen spouse is increased to $164,000.[5]

Take It To the Limit

Under current law and absent further Congressional action, beginning in 2026, the lifetime applicable base exclusion amount returns to $5,000,000 per person (indexed for inflation), doubled per married couple.[6] This sunset back to normal has always been part of the 2017 Tax Cut and Jobs Act.[7] This is the proverbial cliff about which so many taxpayers and practitioners have been preoccupied.

Fortunately, effective November 26, 2019, the final regulations made explicit that exempt gifts and bequests that were made when the unified credit was doubled will not incur any retroactive tax liability as a result of the 2026 expiration of the inflated exemptions.[8]

That said, the last few years have been fraught with hype, hysteria, and hand-wringing over what Congress and the President might or might not do. Prognosticating

Rene Morency is an attorney at the law firm of Sandberg Phoenix & von Gontard P.C. in St. Louis. His practice focuses on estate planning, corporate, entity formation, mergers and acquisitions, and tax. He is a Past Fellow of the ABA Real Property, Trust and Estate Law Section and serves as ABA Vice-Chair of Estate and Gift. He was recently named a Dennis Belcher ACTEC Young Leader by the American College of Trust & Estates Counsel. He sits on the Board of the Estate Planning Council of St. Louis. He is the Immediate Past Chair of BAMSL's Young Lawyers Division. He has an M.B.A. with a concentration in Finance, a J.D., and an LL.M. in Taxation, all from Washington University.

over President Biden's Build Back Better initiative has become a cottage industry. As we approach the mid-term elections, the BBB banter may or may not abate. This author boasts of no crystal ball, and my experience is that lawyers often make for lackluster fortune-tellers. Financial traders who speculate on values of commodities, futures, and options eat risk for breakfast. These speculators make data-driven bets on interest rates, inflation, laws, and even the weather. Lawyers, on the other hand, and estate planning lawyers in particular, do our best work managing risk based on what we know today. We counsel our clients to comply with, and maximize their value within, the laws as they currently exist.

One popular tool worthy of mention is the spousal lifetime access trust ("SLAT"). SLATs bring together three objectives: growth of assets outside of the grantor's estate, maximizing use of a high estate and gift tax exemption, and creditor protection. Certain concomitant risks do exist. Those include grantor's loss of control, opportunity cost of the basis step-up at death for assets with built-in gain, and the risk of unintended inclusion of assets into the gross estate if formation of the trusts is not undertaken properly.

Given the assurances of T.D. 9884, clients may feel free to move about their maximum use of available exemption. We practitioners hold a bevy of tools to remove assets from the gross estate. That said, prudence dictates that we remember that all of the facts and circumstances of a taxpayer's life, including liquidity needs, retirement planning, life expectancy, marital status, family dynamics, hopes, dreams, and all the rest — and not taxes — should be the primary purpose that drives major financial decisions. Tax-efficiency is the million-dollar secondary pursuit.

Before turning to greater detail about recent events that touch and concern estate inclusion, let us raise one relevant reminder: charitable giving.

No limit

Charitable gifts are always fully deductible for estate and gift tax purposes and are not subject to the lifetime estate and gift tax exemption.[9] This is an often-overlooked opportunity. It continues to be true that clients often benefit from exploring philanthropy as part of their estate plans. Those of us who counsel estate planning clients serve those clients by raising opportunities that the clients have not yet considered. Not only does charitable giving reduce the size of the gross estate, but it can also sometimes strengthen donor families.

To add to the estate and gift tax advantages of charitable giving, 2020 (and 2021) came with a unique opportunity to expand the income tax benefits. Section 2205 of the CARES Act replaced the § 170(b)(1) maximum charitable deduction of 60% of AGI with a limit of 100% of AGI. This applies only to § 170(c) qualified charitable contributions by individuals to § 170(b)(1)(A) qualified organizations, if paid in cash during calendar year 2020 (and 2021), if the taxpayer itemizes their deductions, and if the taxpayer elects to apply this higher limit. The donor even still gets to carry forward contributions in excess of the limit, for five years. Note, however, that the provision explicitly omits donations to donor advised funds or § 509(a)(3) organizations. Additionally, even corporate donors receive a boost. Their charitable deductions are increased from the § 170(b)(2) limit of 10% of income, to 25%.[10]

Although 2021 has ended, 2021 tax preparation is ongoing. Estate planners will be wise to consider each donor's situation, to help the donor to determine whether taking the 100% deduction is prudent. Relevant factors will include the projected need for charitable deductions in the coming years as well as the forecast for the donor's AGI in the next few years.

Inclusion and Family Values

Returning to inclusion, the obvious bears noting: that estate planning regards the totality of the circumstances. A thorough analysis considers not estate tax efficiency at the expense of income tax efficiency, nor the converse.

We have discussed the estate and gift exemption limits, but what counts in that number? Consternation, cases, and controversies about estate inclusion have sprung from the few paragraphs of §§ 2036 and 2038 since their 1954 enactment and subsequent amendment. Section 2036 includes in the gross estate the value of any interest of which the decedent had retained the possession or enjoyment during life, or of any right to the income from property, or of the right to designate who shall do the same. This includes the right to vote 20% of the total combined voting power of all classes of stock. Section 2038 includes in the

gross estate the value of any property the enjoyment of which the decedent had the power to alter, amend, revoke, or terminate. Both sections provide for a safe harbor—in case of a bona fide sale for adequate and full consideration.[11]

The question of what to include is naturally married to the question of how much to include – valuation. Consider the following recent cases.

Estate of Morrissette v. Commissioner sought to answer several legal questions. The decedent matriarch, her three sons, and their business had an integrated plan for succession and their estates. The plan included a revocable trust, irrevocable multigenerational trusts, and split-dollar insurance agreements. The revocable trust would pay the trusts the money that they used to pay premiums. At a son's death, the revocable trust would get back its premium or the cash surrender value. Meanwhile, at the matriarch's death, the three sons' trusts received her revocable trust's split-dollar rights.[12]

The *Estate of Morrissette* court discussed *Estate of Cahill v. Commissioner* in its analysis. *Estate of Cahill* held that the rights to terminate and recover "at least the cash surrender value were clearly rights, held in conjunction with another person … both to designate the persons who would possess or enjoy the transferred property under section 2036(a)(2) and to alter, amend, revoke, or terminate the transfer under section 2038(a)(1)."[13] But the *Estate of Morrissette* court distinguished the facts of this case. It held that the split-dollar agreements qualified for the bona fide sale exceptions of §§ 2036 and 2038. This determination turns in part on whether the decedent had a legitimate and significant nontax motive for entering into the split-dollar agreement. In the context of transfers with respect to business entities, efficient, active management of the business and management succession may be legitimate, nontax purposes.[14] So here, the succession planning (together with the adequate and full consideration) was sufficient to bring the plan within the safe harbor.

Estate of Morrissette also considered a § 2703 question. Section 2703 requires that the value of any property shall be determined without regard to any option, agreement, or other right to acquire or use the property at a price less than the fair market value.[15] The exception is, again, a bona fide business arrangement comparable to similar arrangements entered into by persons in an arms' length transaction. The court held that "the special valuation rules of section 2703(a) would not require the inclusion of the cash surrender values of the six life insurance policies in the gross estate on the basis of the terms of the split-dollar agreements and the section 2703(b) exception."[16]

Thus a key takeaway is that the legitimate imperative of business succession planning might save the taxpayer from inclusion of certain assets in the gross estate. However, the news was not all good for Morrissette's family. The court further concluded that the appraisal was not reasonable, and the estate did not act reasonably or in good faith in the valuation of the split-dollar rights. The estate was found liable for a 40% penalty for a gross valuation misstatement. The moral here is that, if a family values their assets, they will attend to their appraisal.

Another recent case shed light on strategies for valuation and appraisal. The 271-page opinion of *Estate of Michael Jackson v. Commissioner* addressed several questions.[17] This article focuses on one: "tax-affecting." The *Estate of Jackson* court took notice of *Estate of Jones v. Commissioner*.[18] Tax-affecting here is the practice of discounting the value of an entity to account for a hypothetical entity-level income tax. The idea is that, absent an actual willing buyer and willing seller when the former is not under any compulsion to buy and the latter in not under any compulsion to sell, both parties having reasonable knowledge of relevant facts, an appraiser makes certain assumptions regarding a hypothetical buyer and seller. The taxpayers' appraisers in both *Estate of Jackson* and E*state of Jones* assumed the hypothetical buyers to be C corporations. Accordingly, they assumed that such buyers would discount their purchase price to account for the double-taxation that they might incur as shareholders at some time in the future. (This is because C corporations pay an entity-level income tax when they recognize their realized gain, and the shareholders additionally pay tax on the recognized gain in value of their shares when they sell or transfer them.)

At the American Bar Association's Fall 2019 Joint RPTE/Tax Meeting, this author presented on E*state of Jones.* At the time, a long line of decisions back to 1999 had supported the "conventional wisdom" among practitioners that tax-affecting would be dismissed by the courts. *Estate of Jones* was newsworthy in that it did allow the tax-affecting. This author theorized at the

time that, while the court was signaling its willingness to at least consider tax-affecting, the *Estate of Jones* holding should not be regarded as a new world order. Two years on, apparently the caution was warranted. In distinguishing the case, the court in *Estate of Jackson* relied on a difference in the facts. The court held:

We view this disagreement just as we have in the past, as one that is a dispute about fact. And we find, as we have done consistently in the past apart from *Estate of Jones*, that by a preponderance of the evidence tax affecting is not appropriate here because the Estate has failed to persuade us that a C corporation would be the hypothetical buyer of any of the three contested assets.[19]

Before closing the discussion of gross estate inclusion, a brief word on nonvoting shares. Although this issue deserves its own article, it is important to note that § 2036(b) bears not only on what is gifted or transferred, but also on what rights are retained. Estate planning that includes shares of controlled corporations, partnerships, and the like require careful analysis.

Pique Our Interest

All this discussion of tax and exemptions is important. At the same time, the signals from the Federal Reserve are that interest rates may likely soon rise.[20] Rates have been low for quite some time. A full exposition on planning strategies for a low interest rate environment is beyond the scope of this article. Nonetheless, the present discussion would be incomplete without an acknowledgement that decisions that contemplate rising interest rates will likely bear on actions taken to maximize use of estate and gift exemptions.

Conclusion

Living in historic times calls for cool heads. As we assist clients, full analysis of the clients' facts and circumstances is vital, as has always been the case. Keep calm and plan. ⚜

[1] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.
[2] 26 U.S.C. § 2503(b).
[3] 26 U.S.C. §§ 2503(c) and 2503(d)(2). Each is defined in the Internal Revenue Code.
[4] 26 U.S.C. § 2523(i)(2); Treas. Reg. 25.2503(f); Treas. Reg. 25.2523(i)-1(d) regarding limits on the marital deduction applied to gifts to non-citizens; 26 U.S.C. § 2056(d) regarding complete disallowance of amounts bequeathed to non-citizens, except for qualified domestic trusts.
[5] Rev. Proc. 2021-45, 2021-48 I.R.B. 764.
[6] 26 U.S.C. § 2010(c)(3)(A) unified credit against estate tax; 26 U.S.C. § 2505 (a)(1) unified credit against gift tax, which applies the § 2010(c) estate tax credit to the gift tax system.
[7] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2504 (2017).
[8] T.D. 9884, 84 F.R. 64995 (2019) and Treas. Reg. 20.2010-1.
[9] 26 U.S.C. §§ 2055(a) and 2522(a)(2).
[10] Coronavirus Aid, Relief, and Economic Security Act, 2020, Pub. L. No. 116-136, § 2205, 134 Stat. 281, 65 (2020). Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 213, 134 Stat. 1182, 1887 (2020) extended the CARES Act § 2205 provisions through 2021.
[11] 26 U.S.C. §§ 2036 and 2038. Section 2038 additionally comes with a three-year lookback.
[12] *Estate of Morrissette v. Commissioner*, 121 T.C.M. (CCH) 1447 (2021).
[13] *Estate of Cahill v. Commissioner*, 115 T.C.M. (CCH) 1483 (2018).
[14] *Morrissette, supra* note 12, at 74.
[15] 26 U.S.C. § 2703.
[16] *Morrissette, supra* note 12, at 3.
[17] *Estate of Jackson v. Commissioner*, 121 T.C.M. (CCH) 1320 (2021).
[18] *Estate of Jones v. Commissioner*, 118 T.C.M. (CCH) 143 (2019).
[19] *Estate of Jackson, supra* note 17, at 77.
[20] Federal Open Market Committee, *Summary of Economic Projections*, https://www.federalreserve.gov/monetarypolicy/files/fomcprojtabl20211215.pdf.

As Time Goes By: Options for Distribution of Assets after One Year from Date of Death

by Thomas G. Glick

Probate practitioners are extremely cognizant of the one-year-from-date-of-death deadline to open the estate,[1] and to present the will.[2] We record special reminders, write deadlines in large letters on the outside of folders, and use many other techniques to assure that we do not "blow" either of the one-year statutes of limitations. These techniques all work to protect our interest and those of our malpractice carriers, but there are clients who, unaware of the deadline, contact us for the first time after the first year from the decedent's date of death. Fortunately, despite the heavy emphasis we place on action during the first year from date of death, clients that miss this deadline are not left without options and can still transfer the decedent's assets in accordance with the law of intestacy.[3] The reliance of these methods on the laws of intestacy bears repeating because, although there are options for distribution after one year – despite failure to meet the deadline for issuance of Letters of Authority, within one year – there are few, if any, options to probate a will that has not been presented for probate with in the first year. As a result, the methods discussed result in distribution based upon intestacy.

1. "…A Hill of Beans In This World":[4] The Small Estate Affidavit: The Small Estate Affidavit procedure has proven to be an extremely popular alternative to administration.[5] This is due at least in part to the ability to admit a will – including a pour-over will – to probate, and to have it govern distribution as part of the Small Estate Affidavit.[6] Much of the recent case law involving Small Estates has addressed issues related to admission of will concurrently with a Small Estate Affidavit.[7] This article addresses Small Estate Affidavits because they can be employed in appropriate circumstances indefinitely after the death of the decedent. However, the Small Estate statute is clear that although it can be used with the admission of a will, it does not extend the one-year deadline for presentation of a will.[8] As a result, use of the Small Estate Affidavit after the one year from date of death

does not typically involve a will. (A will could be presented only during the first year and a Small Estate Affidavit filed subsequent to the first year.)

Since the amendments to the Small Estate statute adopted on May 23, 1996, the procedure could be used after one year from date of death. If that amendment is then viewed as procedural rather than a substantive change to the statute, then it would not be retroactive and a Small Estate Affidavit could only be used for decedents that died after May 24, 1995.[9]

The starting point for use of the Small Estate Affidavit is always the value of the estate against the $40,000.00 limit. Since the addition of the word "debt" to the statutory limiting language ("…value of the entire estate, less liens, debt, and encumbrances, does not exceed forty thousand dollars…") in 2004, most courts allow for *net* estates of $40,000, and the usefulness of the procedure has been greatly expanded.[10]

A form for the Small Estate Affidavit is often available

Thomas G. Glick received his J.D. from the University of Missouri and his B.A. in government from the University of Texas at Austin. He has his own practice in St. Louis, focusing on wills, trusts, powers of attorney, guardianship, probate, and estate litigation. He served as President of BAMSL for the 2010-11 bar year.

from the court. In fact, use of the court's form can be mandated by the court. In or attached to the Small Estate Affidavit, there must be documentation indicating the value of assets, and if being offset, debts.[11] For most financial accounts, a monthly or quarterly statement will adequately evidence value; for vehicles, a widely recognized Blue Book value attached should comply. For real estate, it is permissible to use the county tax assessor's value, but best practice dictates noting the assessor as the source of the valuation, in order to prevent purchasers from claiming it should be the sale value at a later date.

In addition to having adequate valuation, the property should also be adequately described to perfect transfer upon issuance of the Clerk's Certificate.[12] So, accounts must include a bank/brokerage house and account number. Vehicles should include the manufacturer, model year, model and Vehicle Identification Number (VIN). Real property must include a full legal description in addition to street address, if applicable, because once the Clerk's Certificate is granted, the Small Estate Affidavit with Clerk's Certificate attached will be recorded with the Recorder of Deeds to perfect the transfer to the heirs.

In the context of this article, the Small Estate Affidavit must also swear that no other probate process has been initiated for the decedent.[13] In addition, the small estate affiant must swear to the identities and addresses of the heirs, and the assets and the debts that are being offset.[14] For estates over $15,000, the affiant must also publish notice to creditors in the format specified in the statute.[15]

The statute also requires that the affiant post a bond, but allows substantial latitude for the local court to override this requirement.[16] Changes in the bonding policies have occurred recently in St. Louis City and County courts, so practitioners are advised to check on local rules for their particular situation.

As in any probate process, a Small Estate Affidavit must be accompanied by a death certificate. As with all filings on Missouri Case.net, the name, address, birth date, and Social Security Number should be entered for all parties. In many courts, this includes the affiant, the decedent and all the heirs.

Since the adoption of Section 473.398(6), RSMo., in 2018, some courts have required the filing of a waiver from the Department of Social Services consisting of a release from Missouri HealthNet "evidencing payment of All Missouri HealthNet benefits, premiums or other such costs due from the estate under law unless waived."[17] However, the statutory mandate is specifically applied to "the personal representative of the estate."[18] As a result, it is difficult to understand the basis for such a required filing in a Small Estate Affidavit where there is neither a personal representative nor an estate.

Local rules on Small Estate Affidavits can also impact the application in other ways, including requirements for consents from other heirs, and an additional commitment beyond the statute to pay claims that are being used to offset the total amount.

Although the Small Estate Affidavit offers many advantages it is not without its drawbacks. Indeed, many of the drawbacks associated with a small estate are common to other procedures that can be employed after one year from date of death. The most important issue regarding small estates is that it does not open the estate or appoint a personal representative. This means that a small estate affiant should not be able to sell real estate, divide assets unequally (e.g. give an automobile to one heir in exchange for an offset to the others), or even open a bank account to perfect distribution. Without a personal representative, no one should be able to speak on behalf of the estate in other court proceedings. While some of these issues can be overcome with consents, and others can be finessed within the legal system, the absence of an estate and personal representative certainly represents a potential downside to the procedure.

The procedure also lacks any mechanism for hearings to address adversarial matters.[19] Case law clearly tells us that there is no opportunity to have claims heard. However, in the context of this article, any claims would be filed out of time. There is also no ability to address any disagreement regarding the identity of heirs or the list of assets. Moreover, there appears to be no mechanism for a bank or other asset-holder who refuses to recognize the clerk's certificate and surrender assets.[20]

2. "Woman needs man, and man must have his mate…":[21] Refusal of Letters to a Surviving Spouse: A Refusal of Letters can be used to transfer assets of amounts even smaller than a Small Estate Affidavit. Refusals of Letters can be made by three classes of people based on their relationship to the decedent.[22] These include the decedent's creditors, surviving

spouse, and unmarried, minor children.[23] Because the creditor's refusal is based on the ability to make a claim, it can only be filed within the first year after date of death,[24] and is beyond the purview of this article.

As with many of the topics discussed in this article, we have limited guidance from appellate courts on these topics. Because they involve relatively low limits on the amounts of assets at stake, there is limited incentive to finance the appeal of matters relating to them, and we are left with bare interpretations of the statutes themselves.

Conceptually, the purpose of the spouse's Refusal of Letters is meant to permit a spouse to take possession of assets that are less than the amount that a spouse would be entitled to as a spousal allowance under § 474.260, RSMo. Many courts have a predetermined amount that can be increased with a showing of the factors used to set the spousal allowance; others have not set an amount but require an allegation, if not a showing, of what the proper amount of the allowance should be in order to allow the spouse's Refusal of Letters.

The determination of the amount for the Refusal of Letters flows from the spousal allowances.[25] Of course, the first of the allowances, exempt property, is not based on value at all, but instead on the nature of the property.[26] Exempt property consists of "[t]he family bible and other books, one automobile or other passenger motor vehicle, including a pickup truck, with its means of propulsion, all wearing apparel of the family, all household electrical appliances, all household musical and other amusement instruments and all household and kitchen furniture, appliances, utensils and implements."[27] Typically, the bulk of these assets transfer without incident or have so little value that no effort is made to seek approval of their transfer. Normally, the most important exempt property is the motor vehicle. The inclusion of the motor vehicle means that a very high value of property could be transferred by spouse's refusal. The exempt property, including the motor vehicle, can be transferred by a spousal Refusal of Letters. However, the Missouri Department of Revenue also allows the transfer of a single motor vehicle[28] such that court action is not always required for a single car unless there is other property also being transferred.

In most cases, the one-year support allowance forms the basis for the spouse's Refusal of Letters, even if exempt property is then included as well. The court may base the amount of the spousal allowance on "the previous standard of living of the applicant, the condition of the estate, the income and other assets available to the applicant and the applicant's expenses."[29] Frequently the court reviews prior tax returns for much of the information, though there is no prescribed way to evidence this amount.

Using a spouse's Refusal of Letters, the amount of the award can be taken in kind, including with Real Property.[30] While the value of the property is low, liens and encumbrances can be offset, so the value of the *equity* in the property becomes the determinative amount.[31] The ability to transfer property offers many more useful possibilities for practitioners.

Another aspect of the spouse's refusal that flows from the allowances is that the spouse must be alive to claim the refusal, and in turn to file for a Refusal of Letters.[32] The matters cannot be pursued by a personal representative or other representative of a spouse who survived the decedent but subsequently passed away.[33]

Also like the Small Estate Affidavit, many courts have forms posted online to use for the spouse's Refusal of Letter. Some courts mandate use of their form.

3. "Here's looking at you, kid.":[34] Refusal of Letters to Unmarried Minor Child: In most respects, the minor's Refusal of Letters tracks that of the surviving spouse and much of what was discussed above also applies to unmarried minors.[35] The starting point for a separate discussion of the unmarried minor's refusal is eligibility. The Refusal of Letters statute specifies "unmarried minor children under section 474.260."[36] However, that statute, governing the Family Allowance, is broader than "unmarried minor children" in that it permits a family allowance to be claimed by "minor children whom the decedent was obligated to support and the children who were in fact being supported by the decedent."[37] It should be noted the newer, broader definition under the family allowance statute does not expand the Refusal of Letters statute such that the refusal may be sought by married minors or non-minor children who were actually being supported by the decedent.[38]

The application must account for all the decedent's minor children and not just those in front of it.[39]

Several additional complications develop from minors

Continued on Page 22

Carry the Card of Distinction

Get Rewards, Benefits and Value

BAMSL Visa Signature® Rewards Card

Show your support for the Bar Association of Metropolitan St. Louis.

Apply today to receive the following benefits[1]:

- **Signature Rewards!** High reward point values and unlimited point earnings
- No annual fee!
- 24/7 Visa Concierge Service[2]
- Exclusive perks including special offers on travel, fine wine & food, sports & shopping, and entertainment
- Zero Liability Coverage[3]

Visit commercebank.com/bamsl to apply for the BAMSL Visa Signature® Rewards Card

We ask, listen and solve.

Commerce Bank
Member FDIC

commercebank.com / 800.645.2103

1 Benefits are subject to change without prior notice.
2 Certain terms, conditions, limitations, and exclusions apply. All costs for goods or services purchased are the responsibility of the cardholder.
3 Customer must notify Commerce Bank within 60 days of receiving statement with unauthorized account activity.

Our Winning Formula!

Happy Employees = Happy Customers

Assistance Home Care

Established 2011

Assistance Home Care

314-466-3227

Proudly Serving

Greater St. Louis with 5 neighborhood locations

BBB Torch Awards 2021 Winner

2022 Caring Star — Top Rated on Caring.com

Great Place To Work. Certified May 2021–May 2022 USA

Allen & Sally Serfas
Family Owned & Operated

AssistanceHomeCare.com

St. Louis Neutrals

Mediators. Arbitrators. Neutral Evaluators. *Problem Solvers.*

Hon. Douglas R. Beach (Ret.)

Hon. Lawrence E. Mooney (Ret.)

Hon. Michael J. Reagan (Ret.)

Hon. Deanell Reece Tacha (Ret.)

Hon. Donald Wilkerson (Ret.)

Bradley A. Winters, Esq.

To schedule an in-person, hybrid or virtual mediation or arbitration, visit jamsadr.com/stlouis or call 314.334.5267.

Local Solutions. Global Reach.®

obtaining property. If the amount obtained is less than $10,000.00, the court may require a dispense with conservatorship for the minor.[40] If it is more than $10,000.00, the court may require the opening of a minor's estate. If the minor does not reside in the same circuit as the decedent's final domicile, the dispense with minor estate or the full minor's estate is appropriate in another jurisdiction based on the minor's domicile rather than the decedents.

4. "Who are you really, and what were you before?":[41] Petition to Determine Heirs: Unlike all the other methods of distribution discussed to this point, there is a limit on the total amount of assets which can be transferred by the Petition to Determine Heirs.[42] In a Determination of Heirs, the court literally hears evidence to determine who the decedent's heirs are and what assets the decedent owned.[43] The court then issues an order stating its finding, which can be presented to entities which control assets so they can be transferred to the heirs in question.

Preparation of the petition involves many of the same requirements as the other procedures discussed above, not only to comply with court requirements but to assure smooth transfer upon presentation to the party in control of the asset.[44] For automobiles, this means inclusion of manufacturer, year, model and VIN, with valuation from a widely recognized source. The valuation should be attached. For bank and brokerage accounts, account number should be included and a statement attached. For real property, a full legal description should be included because the resulting order will be recorded to perfect the transfer. Again, the tax assessor's value is acceptable for valuation, but a notation on the petition that the value is from the tax assessor can help prevent a buyer from attempting to hold the heir(s) to that value.

The Petition to Determine Heirs may not be used sooner than one year from date of death; as a result there is no possibility that any questions regarding claims will be at issue.[45]

Once the court has set the matter for hearing, there are two separate notice requirements.[46] First the petitioner must provide notice of hearing to all heirs by registered or certified mail, and proof of notice must be presented to the court as an affidavit, not a mere certificate of service.[47] Notice by publication is also required,[48] but in many cases this is handled by the court, with costs passed through. Practitioners should verify if their court arranges the publication, or anticipate that that the counsel for the petitioner will address publication. If the petitioner must arrange for publication himself or herself, it must be arranged early to assure it can run for four consecutive weeks with the last insertion at least seven days before the hearing.[49]

At the hearing, once the petitioner has been sworn, counsel should normally proceed to question their client on the contents of the petition. Be certain to address all possible relatives, including half-siblings, to establish with certainty the heirs of the decedent.[50]

If all goes well at the hearing the court will issue an Order Determining Heirs and listing the property.[51] Descriptions of the property will be either copied from or adopted by reference to the petition. This order will permit transfer of assets by those in possession of them, and must be recorded if real property is included.

A Petition to Determine Heirs can be a convenient, express proceeding, but it suffers from many of the same drawbacks as other methods discussed. There is no appointment of a Personal Representative who can act on behalf of the estate. Indeed, there is also no estate as an entity that can take action. This means that no one has the authority to sell real estate, for example. So real estate may only be distributed in kind. As a result, if the heirs are not in agreement on the use or sale of real property, the conclusion of Petition to Determine Heirs matter might need to be followed immediately by a partition action.[52]

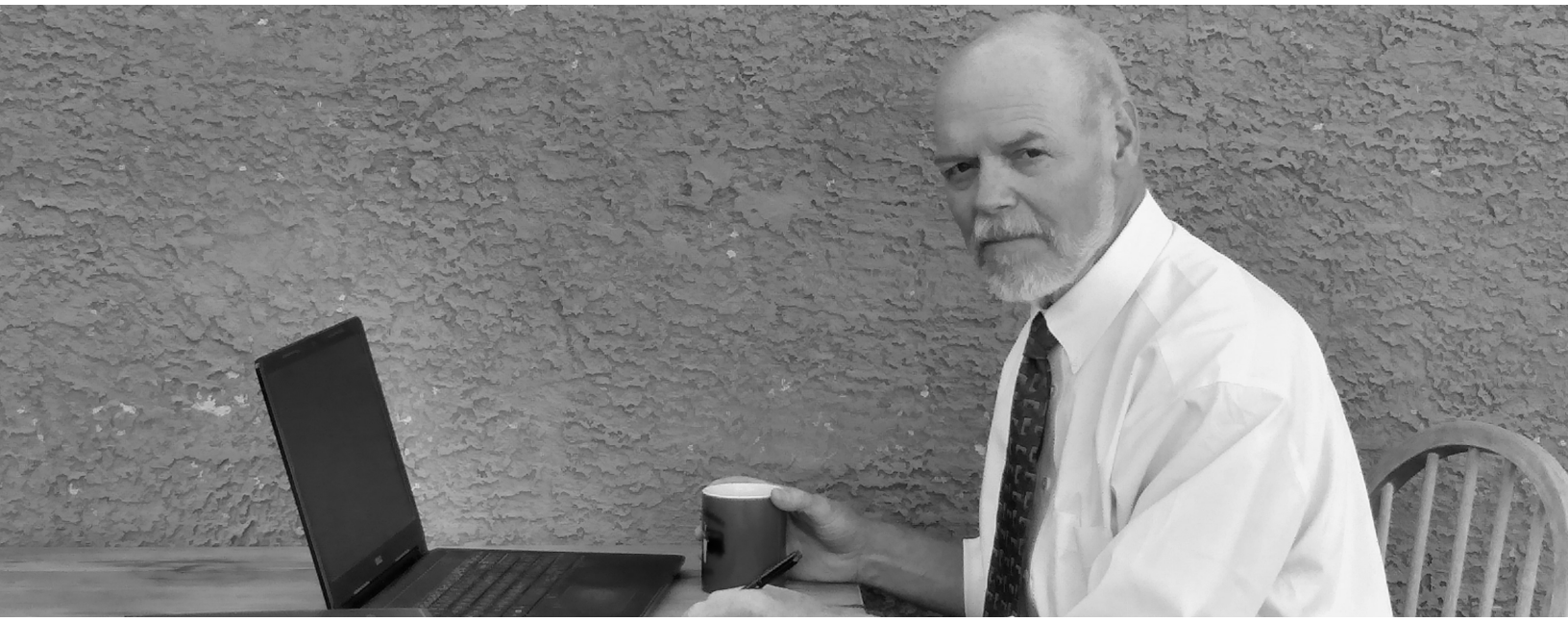
5. "Round up the usual suspects.":[53] Heirs Deed: The heirs deed is an option that does not involve the Probate Divisions at all.[54] Statutes make clear that ownership of the decedent's assets pass at time of death,[55] so based on this theory, many title companies will allow heirs to sign a deed transferring property after one year when the presentation of a will, or opening of an estate, would have divested them of their interest.[56] The deed is a relatively simple deed that must be signed by all heirs transferring the property to the grantee.

Because this method does not involve the probate division, oversight is largely by a title company, so use of their forms and procedures is crucial to their issuance of title insurance on the property.

[1] Section 473.020.2, RSMo.
[2] § 473.050, RSMo.
[3] § 474.010, RSMo.
[4] The title of this article is taken from the iconic song "As Time Goes By" (Herman Hupfeld, songwriter, 1931), most memorably featured in Casablanca (Warner Bros. 1942). Likewise, the titles of the subsections are taken either from dialogue in the film (as in this subsection) or from the song.
[5] I Missouri Estate Administration § 2.1 (5th ed. 2010).
[6] § 473.097.2, RSMo.
[7] See, e.g., *Harris v. Davis*, 587 S.W.3d 362 (Mo.App. S.D. 2019).
[8] § 473.097.2, RSMo.
[9] A.L. 1996 S.B. 494.
[10] § 473.097.1(1), RSMo.
[11] § 473.097.2(3), RSMo.
[12] § 473.097.2(3), RSMo.
[13] § 473.097.1(2), RSMo.
[14] § 473.097.2, RSMo.
[15] § 473.097.5, RSMo.
[16] § 473.097.1(3), RSMo.
[17] § 473.398(6), RSMo.
[18] § 473.398(6), RSMo.
[19] *Fowler v. Corn (In re Fowler)*, 400 S.W.3d 796, 801-02 (Mo.App. W.D. 2013).
[20] *Id*.
[21] "As Time Goes By," *supra* note 4.
[22] § 473.090.1(1), RSMo.
[23] § 473.090.1(2), RSMo.
[24] § 473.090.1(2), RSMo.
[25] § 474.260, RSMo.
[26] § 474.250, RSMo.
[27] § 474.250, RSMo.
[28] 12 C.S.R. 10-23.335
[29] § 474.260.1, RSMo.
[30] § 473.090.4, RSMo.
[31] § 473.090.4, RSMo.
[32] *Stamer v. Estate of Wright*, 701 S.W.2d 789, 790-91 (Mo.App. E.D. 1985).
[33] *Id*.
[34] Casablanca, *supra* note 4.
[35] § 473.090, RSMo.
[36] § 473.090.1(1), RSMo.
[37] § 474.260.1, RSMo.
[38] I Missouri Estate Administration , *supra* note 5, at § 2.3.
[39] § 473.090.2, RSMo.
[40] § 475.330, RSMo.
[41] Casablanca, *supra* note 4.
[42] § 473.663, RSMo.
[43] § 473.663, RSMo.
[44] § 473.663.1(1)-(4), RSMo.
[45] § 473.663.1, RSMo.
[46] § 473.663.3, RSMo.
[47] § 473.663.3, RSMo.
[48] § 473.663.3, RSMo.
[49] § 473.663.3, RSMo.
[50] § 473.663.2(1), RSMo.
[51] § 473.663.4, RSMo.
[52] § 528.030, RSMo.
[53] Casablanca, *supra* note 4.
[54] I Missouri Estate Administation, *supra* note 5, at § 2.7.
[55] § 473.260, RSMo.
[56] I Missouri Estate Administration, *supra* note 5, at §2.7.

Trigger Warning: the "Safe Harbor" at Section 420

by Russ Willis



In 2014, the Missouri legislature enacted a statute enabling a trust beneficiary to test the water before committing to a petition or motion that might trigger an *in terrorem* clause, forfeiting their interest in the trust.

The statute, Section 456.4-420.1, RSMo., says an "interested person" may petition the court for an "interlocutory determination" whether the proposed or alternative pleading would trigger a forfeiture "that is enforceable under applicable law and public policy."[2] Further subsections provide:

(a) that the petition is to be verified, and that the court is to consider no evidence apart from the verified allegations, the text of the trust instrument, and such extrinsic evidence as might be necessary to clarify any ambiguity in the clause itself,

(b) that the petitioner could bring this as a separate action, but if she joins with it her substantive claims, the court is to take up this question first, separately,

(c) that the order determining whether the clause would be triggered -- and whether the forfeiture would be enforceable -- may then be separately appealed, subject to the usual rules as to interlocutory appeals, and

(d) that proceedings on the substantive claims may or may not be stayed, but if the order determining the "applicability" of the in terrorem clause is vacated or reversed on appeal, "no interested person shall be prejudiced" by having relied on it in the interim.[3]

Subsection 7 gives a nonexclusive list of situations in which an *in terrorem* clause is "not enforceable." These do not expressly include a petition to remove or surcharge the trustee for breach of trust.[4]

Subsection 8 confirms the court's authority under section 456.10-1004, RSMo., to award costs, expenses, and lawyers' fees as equity might require.[5]

Why is This Necessary?

Absent this statute, beneficiaries might have sought to plead their case in the alternative, asking the court first to rule on the question whether counts two and three, etc., or a proposed amended petition, would trigger the clause, and if so whether the clause was enforceable, and then take up the substantive counts only after favorable rulings on these questions, from the trial court or on an interlocutory appeal.[6]

But this strategy is not without risk, and the statute was designed to alleviate that risk.

In particular, the drafting committee was concerned[7] that an *in terrorem* clause might purport to trigger a forfeiture if a beneficiary sought to enforce mandatory provisions of the

Russ Willis is a consultant to licensed professionals on a variety of tax and nontax issues relating to private wealth transfers, with a particular focus on charitable gift planning. He has an B.A. in English literature from Indiana University and an M.A. in English from the University of Chicago. He earned his J.D. at St. Louis University and his LL.M. in taxation at Washington University.

trust code, notably the trustee's duty "to act in good faith and in accordance with the purposes of the trust,"[8] and the duty to keep "qualified" beneficiaries "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."[9]

Eight years have passed, and this statute has been addressed by Missouri appellate courts five times. The following discussion is somewhat out of chronological sequence, reserving the March 2020 opinion of the *Missouri Supreme Court in Knopik v. Shelby Investments, LLC*[10] for last.

Finkle-Rowlett Trust

The petitioner in *Finkle-Rowlett Trust v. Steins*[11] sought an interlocutory judgment that the second and third counts of his petition would not trigger the *in terrorem* clause at issue.[12] The Nodaway County probate court ruled adversely on the question, but did not certify that ruling for an interlocutory appeal.[13]

The petitioner nonetheless moved for summary judgment on the remaining counts, for a declaratory judgment that the deceased settlor had lacked capacity to execute the second amendment to her revocable trust, and for a temporary restraining order to prevent distribution of the trust until that matter had been resolved.[14]

But the probate court ruled that the fact that the settlor had been adjudicated incapacitated shortly after executing the trust amendment did not foreclose the possibility that she had capacity to execute the instrument at the time, and denied the summary judgment motion.[15]

The court then granted the trustee's motion to dismiss the second and third counts of the petition on the ground that these violated the *in terrorem* clause, causing the petitioner to forfeit his interest in the trust and leaving him without standing to pursue those claims.[16]

The Missouri Court of Appeals, Western District, reversed, saying this result assumed without actually finding that the clause was enforceable, and remanded for a determination on that question.[17]

The trustee had filed a motion to dismiss the appeal as untimely, arguing that the proper time to an appeal was when the lower court ruled adversely on the threshold question. But the Court of Appeals said that order was not final and appealable until the trial court certified it as such, which it did only on the petitioner's later motion.[18]

On remand, the case was assigned to a different judge, who confirmed that the case could not be resolved by a motion for summary judgment, and there would have to be a trial on the question of the settlor's capacity at the time she executed the second amendment.[19]

The petitioner was unable to persuade the court to release a $30,000 bond the first judge had ordered him to post against the possibility that all this expensive lawyering might not deliver his anticipated result.[20]

His counsel withdrew, with the court's leave. Two months later, after some skirmishing over discovery, the parties announced a settlement, which the court approved. At least some portion of the petitioner's bond was released to him.[21]

Thomas v. H'Doubler

The Southern District ruled twice in the case of *Thomas v. H'Doubler*, first in December 2020[22] and again in June 2021.[23]

The first appeal was from an interlocutory order of the Probate Court of Greene County that mistakenly referred to a second amended petition, rather than to the third, which had been filed with leave in the face of a motion for summary judgment on the second, omitting the offending paragraphs.[24]

Ultimately the Court of Appeals court dismissed this appeal as premature,[25] but in the meantime the lower court had entered summary judgment against the petitioner on the substantive claims, again as pleaded in the second amended petition, not the third, and in a separate order directed him to pay almost $50,000 toward the trustee's lawyers' fees. The petitioner appealed both these orders as well.[26]

The Southern District, after rejecting the trustee's motion to dismiss on grounds of *res judicata*, since nothing was actually decided on the first appeal,[27] determined

> (a) that the probate court had erred by granting summary judgment on the second amended petition, as it had been abandoned by the filing of the third, and the petitioner's inaction for several months in the interim could not be construed as "proceeding further" with the second amended complaint within the meaning of section 456.4-420.2, RSMo.[28] And,
>
> (b) that the fee award, which was premised on the summary judgment, could not stand.[29]

On remand, the probate court entered an interlocutory judgment on the exploratory count of the third amended petition, determining that the substantive counts, for an accounting and to remove the trustee for breach of trust, as repleaded, did not violate the *in terrorem* clause.[30]

Hull v. Hull (In re Wooldridge)

In *Hull v. Hull*,[31] the Southern District ruled that the trustee, in his capacity as such, did not have standing to appeal an interlocutory order that the petitioner would not violate the in terrorem clause by pursuing her substantive

claims.[32]

The trustee had also appealed in his individual capacity as a beneficiary of the trust, but he had allowed that appeal to be dismissed for failure to prosecute. The appeals court said the trustee was not, in that capacity, aggrieved by the order, and he could not assert standing as a fiduciary on behalf of other beneficiaries, as he had a conflicting interest, being himself a beneficiary.[33]

On remand, the case was settled on the third day of a bench trial.[34]

In re Goldstein Trust

On cross appeals in *In re Goldstein Trust*,[35] the Eastern District affirmed the trial court's rulings that the proposed amended petition would violate the *in terrorem* clause at issue, but that the mere filing of the exploratory petition did not.

Unfortunately, we learn nothing from the one paragraph per *curiam* order[36] as to the scope of the subject clause or the allegations of the proposed amended petition.

The judgment from which the appeal was taken[37] says the proposed amended petition "seeks to impose liability on the Defendants for actions [already] taken in their roles as Trustees," and thereby "to invalidate or annul provisions of the Trust which set forth the duties of the Trustees" – evidently some kind of exculpatory language – but "fails to allege any gross neglect or fraudulent misconduct by the Defendants," nor to allege that the defendants "were dishonest, engaged in self-dealing[,] or misappropriated trust assets."[38]

While the appeal was pending, the trial court entered an order chastising the individual parties on both sides and requiring them to pay substantial portions of each other's lawyers' fees.[39]

On remand, apparently the petitioner decided not to press the matter further. But two of his lawyers turned up on opposite sides of a case filed a year later in Jackson County, which ended up in front of the Missouri Supreme Court and was, in my view, decided incorrectly there.

Knopik v. Shelby Investments, LLC

The trust instrument at issue in *Knopik* required distribution to the petitioner of $100 per month for a term of four years, after which the corpus was to revert to the settlor, a single-member LLC created just before the trust was funded.[40]

The trustee, itself an LLC created about a week before the trust was funded, had made exactly one payment and then told the petitioner it would make no further distributions. This was an obvious breach of trust, as the trustee readily admitted in its answer to the beneficiary's petition to remove it.[41]

Apparently none of this struck the trial court as contrived. The trustee counterclaimed that by filing this petition the beneficiary had triggered an *in terrorem* clause, thereby forfeiting his interest in the trust and stripping him of standing to pursue the claim.[42]

The clause at issue specifically forbade the beneficiary [to] make a claim against a trustee for maladministration or breach of trust[, or to] attempt to remove a trustee for any reason, with or without cause[,][43] as though maybe the settlor had anticipated this very scenario.

The petitioner chose not to seek the protection of the statute, nor to plead in the alternative, but to proceed directly on the substantive claims.

Possibly the idea was to force the question of whether a clause that purports to relieve the trustee entirely of its fiduciary responsibilities is unenforceable as against public policy. But neither the trial court,[44] nor the Western District,[45] nor the Supreme Court[46] took up that question on its merits.

The trial court ignored the question altogether, and both the Western District and the Supreme Court said the petitioner "should have" availed himself of the statutory "safe harbor," and that because he did not they need not consider whether the in terrorem clause might be unenforceable as a matter of public policy.[47]

In effect, the court held the clause operated as a condition subsequent to the beneficiary's interest in the trust, regardless of the merits of the claim. The result is that no one would have standing to question the trustee's actions.

In a concurring opinion, Judge Wilson said the court might dismiss an appeal on the ground that the case was "fictitious or collusive," but "only if the record before the court demonstrates this is so," which he said it did not here, adding that the court "decline[d] to inquire of the parties and their counsel further on this issue."[48]

Legislative Maneuvering

While *Knopik* was still pending in the trial court, someone brought a legislative proposal to the chair of the Missouri

Continued on Page 28

USA&M

United States Arbitration & Mediation

www.usam.com

314.231.4642

Welcome our newest mediators

Hon. Jon Cunningham
Cardina Johnson
CJ Larkin
Thomas Magee
Steven Schwartz
Ann Shields

Online Scheduling • In-Person or Zoom Mediations and Arbitrations

Martha Brown
Terry Brown
Hon. Joan Burger
Kenneth Chackes
Hon. Robert S. Cohen
Hon. William Corrigan Sr.
Hon. Jon Cunningham
Robert Danis
Kevin Dolley
George L. Fitzsimmons
Michael S. Geigerman
Hon. Richard Goldenhersh
Hon. John Grimm
Linda Hahn
Michael D. Hart
Richard Hunsaker
Rebecca R. Jackson
Joe D. Jacobson
Hon. Michael Jamison
Cardina Johnson
Colleen Jones
Andrew Kasnetz
Melvin Kennedy
Kim L. Kirn
Wesley T. Kozeny
James Kutten
CJ Larkin
Paul Lee
E. Thomas Liese
Hon. Stephen Limbaugh Sr.
Robert D. Litz
Thomas Magee
Mitchell A. Margo
George Marifian
John Michener
Joseph H. Mueller
Kevin O'Malley
Gerald Ortbals
Ted Perryman
Hon. Thomas J. Prebil
Keith Rabenberg
Kurtis Reeg
James W. Reeves
Richard Reuben
Hon. Patricia Riehl
Steven Schwartz
Russell K. Scott
Hon. Mark D. Seigel
Ann Shields
Laura Silver
Gary Snodgrass
Stephen M. Strum
Paul N. Venker
Robert E. Wallace Jr.
Kathleen M. Whitby
Lawrence "Bud" Wittels
Hon. Gael Wood
Mary Ann Wymore

Proven • Trusted • Results - Since 1985

House Judiciary Committee to add exceptions to the "laundry list" in subsection 7 of section 456.4-420 for any petition, motion, or other pleading for relief from a breach of trust, apparently regardless of merit.

The draft language was added on the House floor[49] to a bill that had already cleared committee, but it did not survive review by the Senate Judiciary Committee.

The organized bar had intervened with a counterproposal[50] that would have carved out situations in which the alleged conduct could be permitted by the trust instrument consistently with section 456.10-1008, RSMo.,[51] or had been ratified by the beneficiary per section 456.10-1009, RSMo. Apparently the parties were unable to agree on a compromise, and the language was simply stripped from the Senate substitute for the House bill.

Concluding Commentary

In the author's view, *Knopik* was decided incorrectly.

Analytically, the *in terrorem* clause is an affirmative defense to the petition to remove. Here it was also raised as a counterclaim for declaratory judgment. In either of these procedural contexts the question of whether the clause is unenforceable should be fair game. The question does not simply disappear because the legislature has created an alternative mechanism for resolving it.

Something like the 2018 legislative effort may yet be required. ⚜

Portions of this article appeared in a slightly different form in the author's newsletter, the Jack Straw Fortnightly, volume 3, number 4 (May 05, 2020). Back issues of the newsletter are archived at https://www.plannedgiftdesign.com/jack-straw-fortnightly.html

[1] The provisions under discussion here were included in H.B. 1231, merged with S.B. 500, merged with S.B. 621, enacted in the second regular session of the 97th General Assembly.
[2] The bill also included a parallel provision, codified at section 474.395 RSMo., but largely cross-referencing section 456.4-420, allowing an "interested person" to seek similar relief with respect to an in terrorem clause under a decedent's will.
[3] § 456.4-420, RSMo.
[4] § 456.4-420.7, RSMo.
[5] § 456.4-420.8, RSMo.
[6] *See, e.g.*, *Hunter v. Hunter*, 838 S.E.2d 721 (Va. 2020).
[7] E-mail dated April 22, 2013 to members of the state bar probate and trust law committee from David English, then chair of the committee, forwarding a copy of the drafting committee's report authored by Robert Selsor. Copy in author's possession.
[8] § 456.1-105.2(2), RSMo.
[9] § 456.8-813.1, RSMo.
[10] 597 S.W.3d 189 (Mo. banc 2020).
[11] 558 S.W.3d 95 (Mo.App. W.D. 2018).
[12] *Id*. at 97-98.
[13] *Id*. at 98.
[14] *Id.*
[15] *Id*.
[16] *Id*. at 98-99.
[17] *Id*. at 100.
[18] *Id*. at 99 n. 6.
[19] Nodaway County Circuit Court Cause No. 17ND-PR00021, available at www.courts.mo.gov/casenet.
[20] *Id*.
[21] *Id*.
[22] *Thomas v. H'Doubler* (Thomas I), 613 S.W.3d 905 (Mo.App.S.D. 2020).
[23] *Thomas v. H'Doubler* (Thomas II), 627 S.W.3d 449 (Mo.App.S.D. 2021).
[24] *Thomas* I, *supra* note 22, at 906.
[25] *Id*. at 908.
[26] *Thomas* II, *supra* note 23, at 453.
[27] *Id*. at 454.
[28] *Id*. at 456-57.
[29] *Id*. at 457-58.
[30] Greene County Circuit Court Cause No. 1631-PR00030, available at www.courts.mo.gov/casenet.
[31] *In re Romona Wooldridge Durable Power of Attorney*,604 S.W.3d 364 (Mo.App.S.D. 2020).
[32] *Id*. at 372.
[33] *Id*. at 371-72.
[34] Greene County Circuit Court Cause No. 1831-PR01039, available at www.courts.mo.gov/casenet.
[35] *Goldstein v. Bank of America N.A.,* 495 S.W.3d 199 (Mo.App. E.D. 2016).
[36] A memorandum opinion setting forth the court's reasoning was circulated only to counsel for the parties, per Missouri Supreme Court Rule 84.16(b).
[37] Order entered May 14, 2015, in Circuit Court of the City of St. Louis Cause no. 1322-PR00895, available at www.courts.mo.gov/casenet.
[38] It is unclear whether these criteria are meant to track § 456.10-1008, RSMo., which says language in a trust instrument purporting to relieve the trustee of liability for a breach of trust "committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries" is unenforceable.
[39] Order entered October 16, 2016, in Cause no. 1322-PR00895, *supra* note 37.
[40] *Knopik, supra* note 10, at 190-91.
[41] *Id*. at 191.
[42] *Id.*
[43] *Id.*
[44] Jackson County Circuit Court Cause No. 17P8-PR01016, available at www.courts.mo.gov/casenet.
[45] *Knopik v. Shelby Investments*, No. WD81931 (Mo.App.W.D. May 14, 2019).
[46] *Knopik, supra* note 10, at 189.
[47] *Id*. at 192-93.
In a footnote, the Court of Appeals made a point of saying it did not reach the question whether a challenge to the applicability and enforceability of the in terrorem clause, if properly made under section 456.4-420, would have been successful. Knopik, *supra* note 45, at p. 10 n.4.
That footnote, and similar text from the Supreme Court's opinion (*Knopik*, *supra* note 10, at 192-93), treats the statutory "safe harbor" mechanism as mandatory rather than discretionary with the petitioner.
[48] *Knopik, supra* note 10, at 195 (Wilson, J., concurring).
[49] House Amendment 1 to H.B. 1250, offered by Rep. Canejo on February 28, 2018, House Journal pages 928 ff., second regular session, 99th General Assembly.
[50] Copies of relevant e-mail correspondence are in the author's possession.
[51] See footnote 37, *supra*, and accompanying text.

Precedent: The Legal History of St. Louis

The Suffragists of St. Louis - *Part 1 of 3*

by Tayler Bertelsman

America recently marked the 100th anniversary of the ratification of the 19th Amendment, which gave women across the country the right to vote.[1] Many may be aware of the efforts of figures like Elizabeth Cady Stanton and Susan B. Anthony, but few are familiar with the activities of Missouri suffragists to push forward the cause of women's suffrage. This essay, the first of three, will explore the history of the women's suffrage movement in Missouri, addressing efforts made through the court system and otherwise.

The women of St. Louis took a restrained approach to sway public opinion on the issue of women's suffrage, at least by contrast to the more revolutionary approaches of the suffragettes of the United Kingdom.[2] Because the topic of women's votes was controversial, and because the culture of St. Louis mandated polite (if any) discussion on the matter, the suffrage movement in St. Louis was slow to grow.[3] The movement gained some traction in Missouri around 1867, with St. Louis serving as the stronghold of Missouri's women's suffrage movement.[4] However, public support for the suffrage movement ebbed and flowed from the 1840s to the 1880s, in part due to the Civil War and its aftermath, and in part due to the public's strong interest in the temperance movement.[5]

Nonetheless, through their work, the suffrage-supporting women and men of St. Louis made an important mark on the legal history of women's right to vote. One of the most prominent suffrage-era voting rights cases, *Minor v. Happersett*, began in the St. Louis Circuit Court in 1873, making its way to the Missouri Supreme Court and ultimately to the U.S. Supreme Court, where it became a landmark case in the history of the American suffrage movement.[6]

The plaintiff was Virginia Minor, who was denied the right to register to vote in 1872.[7] Minor, who was born to a family of prominent Virginia planters in 1824 and later moved to St. Louis with her husband, petitioned the Missouri House of Representatives to grant women the right to vote in 1867.[8] After the House of Representatives declined the petition by a vote of 89 to 5, Minor attempted to register to vote in the 1872 presidential election.[9] Reese Happersett, the registrar in St. Louis, declined her registration attempt.[10]

Because married women were denied standing to sue in Missouri at the time, Minor's husband Francis, a licensed attorney, filed suit on her behalf and represented her in the proceedings.[11]

In a 16-page brief to the St. Louis Circuit Court, Minor argued that the practice of allowing individual states to place limits on suffrage was a violation of the "supremacy" of the federal government.[12] Minor reasoned that women were full citizens of the United States and should receive all of the benefits of citizenship, including the right to vote.[13] Minor argued that she was denied a fundamental privilege of citizenship without due process of law, thereby violating the Privilege and Immunities clause of the Constitution. The Circuit Court disagreed and ruled in Happersett's favor. Minor appealed to the Missouri Supreme Court.

The Missouri Supreme Court affirmed the Circuit Court's judgment.[14] In doing so, the court looked to the history surrounding the enactment of the 14th Amendment. The court noted that, at the time the 14th Amendment was enacted, only white male citizens over the age of 21 were permitted the right to vote. The court then reasoned that the 14th Amendment only enfranchised black male citizens, not women. Because all women were prohibited from

voting before the enactment of the 14th Amendment, the court held that the 14th Amendment did not extend the right to vote to women.

Minor appealed to the U.S. Supreme Court, which agreed to hear the case in 1874.[15] Happersett did not file a brief or send an advocate to the oral arguments, a sad testament to how seriously women's suffrage was taken at the time.[16] The Supreme Court, nonetheless, affirmed the Missouri Supreme Court decision and resolved the issue of whether suffrage was one of the privileges and immunities of citizenship.[17]

First, the Court agreed with Minor that women were citizens of the United States. (Minor, by virtue of her birth in Virginia, was a natural-born citizen of the United States.) In examining the language of the 14th Amendment, however, the Court noted that it did not define the "privileges and immunities" of citizens, nor did it expressly confer any additional rights. Rather, the Court held, the Amendment merely created an additional guaranty for protections already possessed by citizens.

The Court then reviewed state practices. The Court emphasized that the states always had and exercised the ability to regulate the vote, and they almost universally denied that right to women.[18] As the Court described, as states were first being admitted to the Union, they were never denied admittance on the grounds that their constitutions barred certain citizens from voting. Throughout the 19th century, the practice of restricting suffrage continued. The Court reasoned that this history indicated that suffrage was not coextensive with being a citizen of the United States.

According to the Court, the 14th Amendment did not change this fact. The 14th Amendment only prohibited the states from abridging the privileges and immunities already granted to U.S. citizens. The Court looked to the 15th Amendment, which specifically forbade the denial of suffrage based on race. The Court questioned why, if suffrage was indeed a privilege of citizenship, Congress would have felt the need to pass the 15th Amendment.

In sum, the Court held that once a citizen has been conferred the right to vote, that right can only be deprived by due process of law. But, the Court said, unless an individual can first show she previously had the right to vote, she cannot claim to have been deprived of that right. Because it found that the Constitution "does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void," the Court affirmed the judgment.[19]

The Minor case was the last attempt the St. Louis suffragists took to secure the right to vote through the courts. From 1874 onward, suffragists attempted to win the vote by legislation. Finally, in 1920, they succeeded on a federal level when Congress passed the 19th Amendment. The fight for suffrage, however, did not end in 1920. Theoretically, the 15th and 19th Amendments allowed all adult citizens the right to vote. In practice, however, this right was often abridged, thus necessitating the passage of the Voting Rights Act in 1965.[20]

This series on the suffragists of St. Louis will continue to explore the suffragist movement in St. Louis throughout the 19th and 20th centuries. In the meantime, check out "Beyond the Ballot: St. Louis and Suffrage" at the Missouri History Museum through June 5, 2022. ⚜

Tayler Bertelsman *is an associate attorney at Gausnell, O'Keefe and Thomas.*

[1] U.S. Const. amend. XIX.
[2] The temperate approach taken by Missouri suffragists may have been a reaction to the bloody, violent Civil War that raged through Missouri from 1861 to 1865 Missouri was the site of over a thousand battles during the war, second only to Virginia. *See* Catherine Watson, *Missouri's Bloody Civil War Battles*, Los Angeles Times (Apr 10, 2011), https://www.latimes.com/travel/la-xpm-2011-apr-10-la-tr-missouriwar-20110410-story.html.
Contrary to the peaceful approach taken by Missouri suffragists, the suffragettes of Great Britain were violent. They broke windows, set of bombs, destroyed letterboxes with explosives and ink, and made an assassination attempt in the fight for suffrage. *See Suffragist Conspiracy Charge,* The Times, May 6, 1913.
[3] Mary Semple Scott, *History of the Woman Suffrage Movement in Missouri*, Missouri Historical Review 14, no. 3–4 (Apr.–July 1920) ("The word 'suffragette' was not even whispered in polite society at that time, and it was like throwing a bomb in conservative St. Louis to repeat the new slogan, 'Votes for Women!'").
[4] Monia Cook Morris, *The History of Woman Suffrage in Missouri*, 1867–1901, Missouri Historical Review 25, no. 1 (Oct. 1930).
[5] The temperance movement was a movement that took place from 1800 to about 1933. The movement, championed by women, promoted the idea that alcohol consumption was immoral and a threat to families and the nation. Ruth Bordin, Woman and Temperance: The Quest for Power and Liberty, 1873-1900, Temple University Press (1981).
[6] *Minor v. Happersett*, 53 Mo. 58 (1873).
[7] Cathy Briskie Teleky, *Minor v. Happersett*: A Cause Ahead of Its Time (1985) (unpublished paper) (on file with Georgetown University Law Library system), http://hdl.handle.net/10822/1051406 (last visited Jan 15, 2022).
[8] Women's History, *Person: Virginia Minor*, National Parks Service (July 19, 2019), https://www.nps.gov/people/virginia-minor.htm.
[9] Hannah Hall, *Minor V. Happersett*, Missouri Encyclopedia (Mar. 4, 2021), https://missouriencyclopedia.org/events/minor-v-happersett (noting that Minor attempted to register to vote on October 15, 1872 at the Registrar office, 2004 Market Street, St. Louis Missouri, near the site of the modern-day St. Louis City SC stadium).
[10] *Id.*
[11] § 451.290, RSMo. 1939.
[12] Brief and Petition, *Minor v. Happersett*, (1873).
[13] *Id.*
[14] *Minor v. Happersett*, 88 U.S. 162 (1874).
[15] *Id.*
[16] Briskie Teleky, *supra* note 7.
[17] *Minor v. Happersett, supra* note 14, at 177-78.
[18] The Court looked to the constitutions of New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Virginia, Maryland, North Carolina, South Carolina, and Georgia. Each had some limitation on the right to vote, with limits hinging on residency, gender, land ownership, payment of taxes, status as a freeman, and reputation. *Id.* at 176-77.
[19] *Id.* at 178.
[20] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

The Brief Case by Charles A. Weiss

SUPREME COURT FINDS EMPLOYEE WAS NOT ENTITLED TO WORKERS' COMPENSATION BENEFITS BECAUSE HIS INJURY DID NOT ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

Boothe v. DISH Network, Inc., 637 S.W.3d 45 (Mo. banc 2021).

The Missouri Supreme Court affirmed a decision of the Labor and Industrial Relations Commission that an injured employee failed to establish that his injury's risk source was related to his employment and that he was not equally exposed to that risk in nonemployment life.

Gary Boothe Jr. was a Field Service Specialist for DISH Network. In this position, he drove a company vehicle to provide services to customers in a large territory. He usually received an itinerary around 7:15 a.m. and had 15 minutes to load his vehicle. He was expected to begin driving by 7:30 a.m. to arrive at his first appointment on time. Company policy prohibited eating while driving, but he occasionally picked up breakfast while travelling. Although he admitted he could eat breakfast at home before work, he suggested he preferred to eat later while driving because, on some days, his schedule and a lack of restaurants in his territory made eating lunch difficult. On his days off, when he was not bound by a time schedule, he ate meals at home.

On one morning in July 2017, Boothe's first appointment was about a 30- to 45-minute drive from home. After loading his van and starting to travel, he stopped at a convenience store and bought, among other things, a breakfast sandwich. Within a mile, he choked on the sandwich, attempted to slow down, and blacked out. His vehicle collided with a pillar on the side of the road, and his body struck a pole located in the center of his van, and he suffered contusions to his chest and right flank. He also had back pain. A police report indicated road and weather conditions were unproblematic and found physical impairment and distractions were contributing factors to the accident.

Boothe filed a workers' compensation claim, and after a hearing, an administrative law judge determined the injury's risk source was traveling on a rural highway on a strict timeline, which did not occur in nonemployment life. The administrative law judge, however, also determined that the tight schedule did not cause Boothe to eat while driving, as he could have had breakfast prior to starting work, and he could have eaten during breaks provided throughout the day. However, Boothe was awarded benefits, but the amount was reduced due to a violation of the company policy prohibiting eating while driving.

DISH applied to the Labor and Industrial Relations Commission for review of the ALJ's decision. On review, the Commission denied compensation because Boothe failed to prove his injury arose out of his employment. The Commission found Boothe did not satisfy Section 287.020.3(2)(b), RSMo., (which defines an injury in the course of employment) and determined the injury's risk source was eating breakfast while driving, which created the risk of choking that led to the accident. The Commission found that under these particular circumstances, Boothe failed to establish a causal connection between his injury and his work. The Commission found nothing about Boothe's employment that required him to eat breakfast while driving, noting that, in fact, such conduct was prohibited by DISH.

On appeal, the Missouri Supreme Court affirmed the finding of the Commission. The Supreme Court explained that to be eligible for workers' compensation benefits, an injury must arise out of and in the course of employment. An injury will not be deemed to arise out of employment if it merely happened to occur while working but the work being performed was not a prevailing factor and the risk involved is one to which the worker would have been exposed equally in normal non-employment life. In short, a causal connection between an injury and a work activity, other than mere occurrence at work, must be shown.

The Supreme Court held that Boothe was not entitled to workers' compensation benefits because his injury resulted from a risk that was not caused by his employment. His work did not require him to eat breakfast after starting work for the day and, as Boothe acknowledged, he could have had breakfast beforehand. The Court explained that Boothe's arguments

that a tight schedule, limits on the ability to eat lunch and driving on certain roads played a role in the accident were unconvincing.

MISSOURI COURT OF APPEALS HOLDS THAT MISSOURI'S TWO-YEAR STATUTE OF LIMITATIONS IS NOT APPLICABLE TO TORT CLAIMS AGAINST A HOME HEALTH PROVIDER.

Noelke v. Heartland Independent Living Center, 637 S.W.3d (Mo.App. E.D. 2021).

Patricia Noelke, a paraplegic with no sensation from the waist down, was scalded by a home health aide while the aide was helping Noelke shower at her home, causing severe burns. The home health aide was employed by Heartland Independent Living Center, which provided in-home services including bathing, changing linens, meals and dishes, house cleaning, dressing and grooming, laundry, trash removal, and toileting.

On December 4, 2017, the home health aide employed by Heartland was helping Noelke take a shower. The aide did not test the water temperature before spraying Noelke's lower extremities with scalding hot water, which caused second and third-degree burns requiring skin grafting and debridement surgeries.

Just over two years later, on December 5, 2019, Noelke filed a petition for damages against Heartland in the Circuit Court of Franklin County under theories of respondeat superior negligence and negligence. Heartland asserted, as an affirmative defense, that Noelke's petition was barred by the two-year statute of limitations found in § 516.105, RSMo., which provides:

All actions against physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrist, pharmacists, chiropractors, professional physical therapists, mental health professionals licensed under chapter 337, and any other entity providing health care services and all employees of any of the foregoing acting in the course and scope of their employment, for damages for malpractice, negligence, error or mistake related to health care.

Heartland filed a motion for summary judgment, arguing that because (a) it was an entity that provided personal care services pursuant to a contract with the Missouri Department of Health and Senior Services (DHSS), (b) that it had been providing health care services to Noelke at the time of her injury, and (c) its DHSS contract contained provisions that mandated it to comply with certain state regulations. The trial court agreed and granted summary judgment to Heartland. Noelke appealed to the Missouri Court of Appeals, Eastern District, arguing that Heartland failed to establish that it was entitled to judgment as a matter of law under § 516.105 and that Heartland had not shown that it was an entity that provided healthcare services or that its employee was performing a healthcare-related service at the time of Noelke's injuries.

On appeal, the Court of Appeals agreed with Noelke and overturned the summary judgment below. The Court of Appeals explained that Chapter 516 does not include definitions for the terms "healthcare" or "provider of healthcare services" and, consequently, courts have previously looked to the definitions provided in Chapter 538, which regulates tort actions relating to healthcare. Section 538.205(6) defines a healthcare provider as follows:

> [A]ny physician, hospital, health maintenance organization, ambulatory surgical center, long-term care facility … , dentist, registered or licensed practical nurse, optometrist, podiatrist, pharmacist, chiropractor, professional physical therapist, psychologist, physician-in-training, and any other person or entity that provides health care services under the authority of a license or certificate. (Emphasis added.)

The court referred to two previous Eastern District cases when applying § 516.105's two-year statute of limitations. In Stalcup v. Orthotic & Prosthetic Lab, 989 S.W.2d 654 (Mo. App. E.D. 1999), the court found that plaintiff's claim for damages against Orthotic & Prosthetic Lab stemming from the negligent fitting and manufacture of a prosthetic limb was not barred by § 516.105's two-year statute of limitations because the lab did not meet the definition of a healthcare provider under § 538.205. The court in Stalcup concluded that because the lab did not provide its services under a license or certificate granted by the state or federal government, it was not a healthcare provider. The Noelke court also cited Payne v. Mudd, 126 S.W.3d 787 (Mo.App. E.D. 2004), where, by contrast, the Court of Appeals found that plaintiff's claim for damages against Mudd and his employer, stemming from the alleged negligent creation of a mold for a hearing device, was in fact barred by § 516.105's two-year statute of limitations, holding that Mudd met the definition of healthcare provider under § 538.205 because he was licensed by the State as a hearing-instrument specialist.

The court explained that, in Noelke's case, Heartland did not establish that it was an entity that provides healthcare services such as would require application of § 516.105's time limit. Heartland does not belong to one of the enumerated professions or provide its services under authority of a license or certificate for a healthcare worker. In-home personal care services is not one of the enumerated professions in § 538.205, and providers of in-home personal care services are not required to have a license or certificate to operate. While Heartland's contract with the State required it to comply with certain regulations, Heartland did not provide the types of

services that required a license from the State.

The Court of Appeals reversed the summary judgment of the trial court and remanded the case for further proceedings.

MISSOURI SUPREME COURT ISSUES WRIT OF PROHIBITION AGAINST DISCLOSURE OF MEDICAL RECORDS.

State ex rel. Lutman v. Hon. M. Brandon Baker, 635 S.W.3d 548 (Mo. banc 2021).

The Missouri Supreme Court found that a defendant in a personal injury case did not waive his privilege against the disclosure of his medical records and, accordingly, issued a writ of prohibition precluding the disclosure of such records to the plaintiff.

In September 2019, Darin Lutman was driving a vehicle which crossed the center line on a highway and struck a vehicle driven by Sondra Murrell. Murrell died as a result of the crash.

Immediately after the accident, Lutman told investigating officers he "blacked out," "fainted," or "had a heart attack" at the time of the incident. Later, Lutman also wrote a letter to Sondra Murrell's family, apologizing for the accident and attempting to explain what happened. He wrote, "I simply became [an] alcoholic and addicted to medication and lost control of my life." He went on, "I want you to know I felt like I was having a heart attack and was going to black out. I tried to turn into the gravel on the left and that is all I remember."

Sondra Murrell's children filed a wrongful death lawsuit against Lutman in the Circuit Court of Benton County. In that suit, they filed notices of depositions and subpoenas for Lutman's medical records with Compass Health Network and Missouri Psychiatric Center. In response, Lutman filed a motion to quash those depositions and subpoenas, arguing the requested information was protected by the physician-patient privilege. In his motion, Lutman emphasized he did not place his medical condition at issue in any pleading.

On May 20, 2021, the circuit court issued an order overruling Lutman's motion to quash and commanding Compass Health Network and Missouri Psychiatric Center to produce and disclose all medical records and files in their possession related to Lutman.

On May 21, 2021, Lutman filed a petition for writ of prohibition in the Missouri Court of Appeals, Western District, seeking to prevent the release of his medical records. On that same day, the Western District denied Lutman's petition. On May 25, 2021, Lutman filed a petition for writ of prohibition with the Missouri Supreme Court. On June 1, 2021, the Court issued a preliminary writ of prohibition commanding the circuit court take no further action, and later made the writ permanent.

The Supreme Court explained that § 491.060(5), RSMo., governs the physician-patient privilege in Missouri. It precludes a physician or chiropractor from testifying about any information which he or she may have acquired from any patient while attending the patient in a professional character and which information was necessary to enable him or her to prescribe and provide treatment for the patient.

The Court noted that while § 491.060(5) speaks in terms of competence to testify, it "is construed as a privilege statute." Any information a physician acquires from a patient while attending the patient and which is necessary to enable the physician to provide treatment is privileged. The privilege is for the benefit of the patient and belongs to the patient, not the physician. Therefore, even when medical records are directly relevant to a party's claims, if they are protected by the privilege, they are not discoverable. The purpose of the physician-patient privilege is to enable the patient to secure complete and appropriate medical treatment by encouraging candid communication between patient and physician, free from fear of the possible embarrassment and invasion of privacy engendered by an unauthorized disclosure of information.

However, the physician-patient privilege is not absolute, and the fact that documents fall within the scope of the physician-patient privilege does not end the inquiry. The patient can waive the privilege by either express or implied waiver. The most common waiver cases involve plaintiffs who voluntarily place a medical condition at issue by filing a petition alleging that they suffered physical or mental injuries. Further, a patient may also impliedly waive the privilege through an act showing a clear, unequivocal purpose to divulge the confidential information. To establish implied waiver there must be a clear, unequivocal and decisive act showing such purpose, or acts amounting to an estoppel.

In opposing the writ of prohibition, plaintiffs argued that Lutman waived the physician-patient privilege at the scene of the accident by telling investigating police officers that he "blacked out," "fainted," or "had a heart attack." The Court rejected this argument, finding that Lutman's statements to the investigating police officers, which did not contain privileged information, do not indicate a clear, unequivocal purpose to divulge his confidential medical information.

The plaintiffs also claimed that Lutman's apology letter constituted a waiver of the physician-patient privilege because Lutman stated to the Murrell family that he was an addict who felt like he was having a heart attack or blacking out right before the crash. The Court stated again that, without more, Lutman's statements in the letter do not clearly and unequivocally waive the physician-patient privilege. The mere

fact that the privileged medical records may be relevant does not mean that the medial records are discoverable.

For these reasons, the Court held, Lutman did not waive the physician-patient privilege and the circuit court erred in ordering the disclosure of his medical records.

MISSOURI SUPREME COURT HOLDS THAT DISCLOSURE OF CONFIDENTIAL RECORDING WAIVES THE ATTORNEY-CLIENT PRIVILEGE.

State ex rel. Garrabrant v. Hon. Calvin Holden, 633 S.W.3d 356 (Mo. banc 2021).

In September 2017, an Ozark County grand jury indicted Rebecca Ruud and her then-husband Robert Peat Jr., charging them with first-degree murder, felony abuse or neglect of a child resulting in death, and abandonment of a corpse, all related to the killing of Ruud's minor daughter.

Shortly before the charges were brought, Ruud obtained legal representations from the Missouri State Public Defender's Office. She met with an investigator and legal assistant, employed by the Public Defender's office, and unbeknownst to them, recorded the entirety of their conversation on a digital recording device.

Prior to her arrest on the charges, Ruud gave an unsealed box of personal belongings to Peat to store in preparation for an over-the-road truck-driving trip. One of the items in the box was a digital recording of Ruud's meeting with the Public Defender's investigator and legal assistant. Unaware of the recording, Peat placed the unsealed box in a bedroom closet in his parents' house where it remained for a couple of years.

In late 2019, Peat discovered the recording in the unsealed box. Peat's attorney contacted the State, and Peat spoke with a member of the Ozark County sheriff's office. He informed the sheriff's office that he discovered the digital recording and it included incriminating statements by Ruud. He surrendered the digital recording device to the sheriff's office that same day, and it remained in the sheriff's custody since.

Subsequently, the State filed a motion in limine seeking a ruling as to whether the recording was privileged and whether the State could use the recording as evidence against Ruud at trial. The circuit court found that the attorney-client privilege attached to the recording and excluded its use at trial for all purposes. After the State filed a petition for writ of mandamus with the Missouri Court of Appeals, Southern District, which denied the petition, the State then sought a writ of mandamus from the Missouri Supreme Court directing it to rescind the order excluding the recording's use at trial.

Initially, the Court held that the recording of the conversation between Ruud and the Public Defender's investigator and litigation assistant was a privileged communication. Even though these employees were not attorneys, in certain situations, the attorney-client privilege is extended to communications between the attorney or client and necessary agents of either party. Here, both the investigator and legal assistant acted as agents of an attorney, because the purpose of the meeting was to gather and collect information from Ruud for her attorney. Ruud disclosed information voluntarily, and the public defender staff informed her that the meeting was confidential.

Nevertheless, the Supreme Court issued its writ of mandamus, finding that although the recording was protected by the attorney-client privilege, Ruud waived the privilege by putting it in the unsealed box and giving it to her husband, which the Supreme Court found was a voluntary disclosure. The Court pointed out that no evidence in the record suggested, nor did Ruud assert, that she was forced or coerced into handing over the box with the recording to Peat, and there was no evidence to suggest that Ruud was unaware that the box contained the recording or that the disclosure of the recording to Peat was otherwise inadvertent. The Court found that under the circumstances here, Ruud's conduct of handing over the recording in this matter constituted a voluntary disclosure.

Ruud also argued that the common-interest doctrine prevents any waiver of her attorney-client privilege. The common-interest doctrine expands attorney-client privilege, allowing the privilege to remain intact "where the third party shares a common interest in the outcome of the litigation and where the communication in question was made in confidence." The doctrine exists to allow parties with a community of interests to preserve the privilege's protections where the parties had "joined forces for the purpose of obtaining more effective legal assistance." Here, Ruud gave the unsealed box containing the recording to Peat to store, not so that the two could use the recording to prepare a joint legal strategy. Nothing in the record supported a finding that Peat and Ruud shared a community of interest at the time of disclosure. The State had not yet charged them, and it was entirely unclear from the record whether their involvement and interests in the criminal matter were aligned. Therefore, the Court held, the common interest doctrine does not apply here.

The Court found that Ruud voluntarily disclosed a privileged communication to a third party when she handed Peat the unsealed box containing the digital recording. Ruud gave no direction or instruction to Peat containing the confidential nature of the items within the box. By giving the digital recording to Peat under these circumstances, Ruud undermined the confidentiality that the attorney-client privilege is intended to protect and, thus, waived her privilege.

Limitations on Statutes of Limitation

by Richard M. Wise, CPA, JD

Introduction

In the last edition of this column, we addressed a recent U.S. Tax Court memorandum decision[1] in which the taxpayer managed to escape the reach of an extended statute of limitations[2] for failure to indicate the foreign source of some of his income by persuading the court that his reliance on his longtime CPA to include the required information was reasonable, despite the fact that his own in-house accounting staff apparently knew the missing form was required.[3]

In this issue, we would like to mention another Tax Court memorandum decision,[4] involving the general three-year statute of limitations,[5] which the taxpayer's return preparer, acting under a Power of Attorney,[6] had repeatedly agreed to extend. The taxpayer argued that he should not be bound by these extensions because the return preparer had an inherent conflict of interest, in that he was a "promoter" of the failed tax strategy at issue.

Along the way, we will discuss why it might make sense to agree to extend the statute of limitations as part of a strategy for working out a settlement with the Internal Revenue Service on issues under audit.

The "integrated tax plan" (ITP)

We are not going to go very deep into the weeds with respect to the tax strategy at issue in this case. In brief, the individual taxpayer set up two entities: a limited partnership holding marketable securities, mostly tax-exempt municipal bonds, and a Subchapter C corporation to manage the partnership.

As a limited partner, the taxpayer reported passthrough items of income, deduction, and credit from the partnership, but these were net of management fees paid to the C corporation, which was on a different fiscal year. In fact, the fees generated net losses to the partnership, which turned up on the taxpayer's individual tax return. The taxpayer was paid a modest salary to manage the C corporation. The corporation also claimed substantial other expenses, which the IRS sought to recharacterize as constructive dividends.

Suffice it to say, the taxpayer lost on most of the substantive issues. But our concern today is the argument that some of these years should have been closed because the taxpayer's accountant had a conflict of interest in agreeing to extensions of the applicable statute of limitations.

One step back

As most readers of this column are likely aware, there is a three-year statute of limitations,[7] running from the later of the date a return is due or the date it is actually filed, within which the IRS must make any assessment of tax owed. And without a timely assessment, the agency cannot initiate collection action.

To be clear, by filing a tax return the taxpayer is making a self-assessment, and if some portion of the liability as reported on the return is not paid, the IRS need not make a further assessment in order to pursue collection. We are concerned here with a deficiency assessment made in the course of an audit. And even here, the formal assessment must be preceded by a Statutory Notice of Deficiency ("SNOD"), the so-called "90-day letter," since it provides a deadline of 90 days for the taxpayer to file a timely petition in the U.S. Tax Court.

As readers may be aware, the IRS is woefully understaffed at present and working through an almost unfathomable backlog of tax returns and correspondence. And the COVID-19 pandemic has only made matters worse. Even in the absence of these difficulties, however, it is not at all uncommon for the IRS to ask a taxpayer to agree to extend the limitations period in order to allow it time to complete an examination.[8] Internal agency policy states that the request should be made at least 180 days before the statute is set to expire.[9]

In the typical case, the taxpayer will be asked to agree to extend to a fixed date, using Form 872.[10] But this might happen repeatedly. Less commonly, the agreed extension will be "open-ended," using Form 872-A. An "open-ended" extension terminates 90 days after either party gives formal notice to the other, using Form 872-T, or 60 days after IRS issues a Notice of Deficiency.

The IRS might seek an "open-ended" extension where where there are multiple complex issues covering several tax years, or affecting several taxpayers, or where the taxpayer has entered bankruptcy.[11]

But why should you?

If the IRS thinks they have a case and the taxpayer does not consent to an extension, the agency will simply issue a Notice of Deficiency, perhaps throwing in the kitchen sink, including various penalties. The taxpayer will then have 90 days to file a petition with the Tax Court to contest the proposed deficiency. This would toll the statute until 60 days after the decision of the Tax Court, or an appeal from that decision, becomes final.

The deficiency notice is treated as *prima facie* correct,[12] meaning

that the taxpayer has the initial burden of production in the Tax Court.[13] In responding to the petition, the agency may make some concessions, but it may also raise new issues and assert additional deficiencies, again including penalties. While the Commissioner of the IRS will have the burden of proof on any new issues, they will also have an opportunity for pretrial discovery. In other words, in many instances, there may not be much to gain, strategically, by forcing the issue.

If the taxpayer does not timely petition the Tax Court, IRS will make the formal assessment, and the taxpayer might then pay the disputed amount and petition a federal District Court or the Court of Claims for a refund.

In any event, by rejecting the requested extension, the taxpayer may be forgoing an opportunity to make their case to the tax examiner, or to take their disagreements with the tax examiner to the Appeals Office, where they might be able to work out a settlement, although there is also a mechanism for engaging the Appeals Office after the Tax Court petition is docketed.

In many cases, it might be better to agree to a series of short extensions, each conditioned on the agency demonstrating concretely that the examination is moving forward.

In a very few cases, the IRS might accept a "restricted consent," extending only some issues and only for a specified interval. Often the tradeoff will be that the taxpayer concedes other issues and agrees to assessments on those items.[14] Internal agency policy is to discourage these arrangements, "if possible, until the examination is completed to the extent that all potential issues have been identified."[15]

Who is a "promoter"?

We now return to the case at hand. The taxpayer's argument was that the accountant who signed off on the Forms 872, on both the individual and the corporate returns, was himself a "promoter" of the "integrated tax plan" which was the subject of the audit, and therefore had a conflict of interest in agreeing to the extensions.

In support of this argument, the taxpayer cited what one might call the extreme case, *106 Ltd. v. Commissioner*,[16] which concerned whether the taxpayer's reliance on his tax advisors was "reasonable" for purposes of avoiding gross valuation misstatement penalties[17] arising from his participation in a tax shelter.

In that case, the court had said the taxpayer could not "reasonably" rely on the advice of a "promoter," which it defined, citing an earlier memorandum decision,[18] as an advisor who "participated in structuring the transaction or is otherwise related to, has an interest in, or profits from the transaction."

More specifically, because of course taxpayers will often engage an advisor who was paid to structure a transaction to represent them in an examination of the return on which the transaction was reported, the court suggested this definition is "workable" only "when the transaction involved is the same tax shelter offered to numerous parties."

On the other hand, in a 2009 reviewed decision[19] the Tax Court said an advisor is not a "promoter" if

(a) he has a long-term relationship with the client,
(b) he does not give unsolicited advice concerning the transaction,
(c) he gives advice only within his field of expertise, apart from his involvement in the transaction at issue,
(d) he follows his regular course of conduct in giving the advice, and
(e) he has no stake in the transaction apart from what he bills at his regular hourly rate.[20]

The court's finding in the present case, that the preparer was not a "promoter" under these definitions, was based in part on an apparent lack of evidence that the preparer had sold other clients on a similar transaction, and in part on the fact that the individual taxpayer had undertaken some of the implementation of the failed strategy himself.

This latter argument seems a bit thin. The implementation of any tax strategy will require at least some participation by the taxpayer. This does not in itself imply that the taxpayer was trying to evade the tax law. The so-called "integrated tax plan" at issue here is not something a layperson would have come up with on their own. And the preparer was, in fact, paid a separate fee for structuring and implementing the plan.

Takeaways

Be all that as it may, the takeaways here seem to be:

(a) that it may be advisable to seek a second, independent opinion before embarking on a strategy that purports to offer a tax benefit that is disconnected from economic realities, and

(b) that if the tax returns reporting the benefits of a questionable strategy come under audit, it would likely be a good idea to seek other, independent counsel in defending the reporting position or negotiating a settlement with the IRS.

[1] Kelly v. Commissioner, T.C.Memo. 2021-76 (06/28/21).
[2] 26 U.S.C. § 6501(e)(8)(A).
[3] *See Richard M. Wise, The Dog Ate My Homework, or What's Reasonable Cause for Avoiding Penalties?,* The St. Louis Bar Journal, Vol. 68, No. 3 (Winter 2022).
[4] *FAB Holdings, LLC v. Commissioner,* T.C.Memo. 2021-135 (11/30/21). The decision includes the consolidated case of the individual shareholder, *Berritto v. Commissioner*.
[5] 26 U.S.C. § 6501(a).
[6] Form 2848.
[7] 26 U.S.C. § 6501. Three years from the date of filing is also the limitation for a taxpayer requesting a refund of an overpayment, per 26 U.S.C. § 6511. The filing of an amended return does not extend the limitation.
[8] Since at least 1957, it has been the agency's stated policy that an extension should be sought only in "unusual" cases. Rev. Proc. 57-6, 1957-1 C.B. 729.
[9] Internal Revenue Manual § 25.6.23.5.1.1 (03-23-2015).
[10] Form 872-Consent to Extend the Time to Assess Tax.
[11] The agency's policies on "open-ended" extensions are set forth in Rev. Proc. 79-22, 1979-1 C.B. 563.
[12] Tax Court Rule Rule 142(a), *Welch v. Helvering,* 290 U.S. 111 (1933).
[13] 26 U.S.C. § 7491.
[14] Internal Revenue Manual § 25.6.22.8.2 (08-26-2011).
[15] *Id.*
[16] 136 T.C. 67 (2011), *aff'd*, 684 F.3d 84 (D.C. Cir. 2012).
[17] 26 U.S.C. § 6664(c)(3).
[18] *Tigers Eye Trading, LLC v. Commissioner*, T.C.Memo. 2009-121.
[19] *Countryside L.P. v. Commissioner,* 132 T.C. 347 (2009).
[20] *Id.* at 354.

Books in Brief

Reviewed by Hon. Arthur Litz

Profit and Punishment: How America Criminalizes the Poor in the Name of Justice
By Tony Messenger

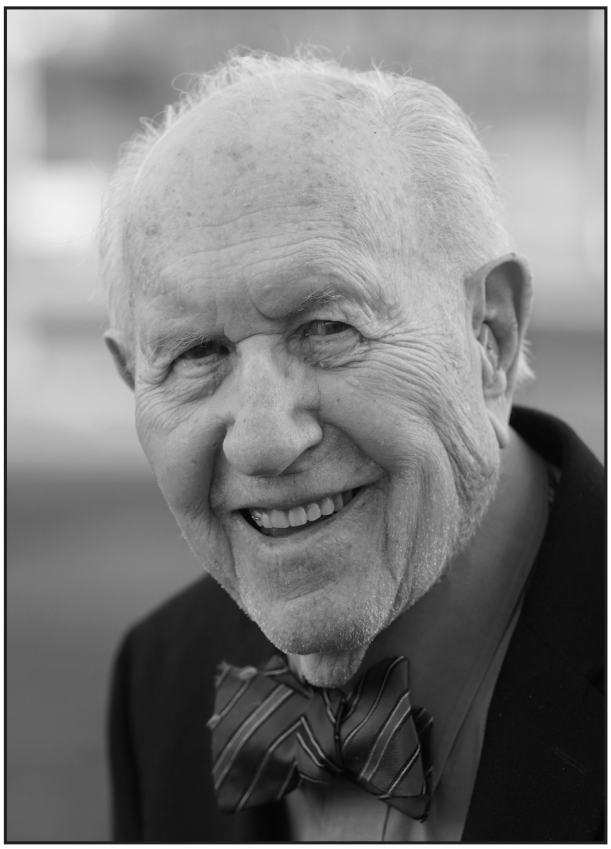
St. Martin's Press, 2021 – 196 pages plus 44 pages of notes

Tony Messenger, metro columnist for the *St. Louis Post-Dispatch*, won the 2019 Pulitzer Prize for commentary as a result of the many stories he wrote about the subject of this book. In it, he tells investigative stories, gathered in Missouri as well as other states, such as Oklahoma and South Carolina, relating what happened to poor people who came in contact with the criminal justice system, mostly in rural counties. They cannot post bond and usually plead guilty to a misdemeanor, either do time in jail or are put on probation, after which they are hit with bills for fees and costs, but mainly for room and board while confined. Because they are poor and cannot pay the high charges, they usually end up back in jail. It is called "pay to stay." The charges are used by the counties to run their governments, including the courts, funding million-dollar budgets on the backs of poor, mostly white, people outstate.

Messenger's poster case is of a woman who shoplifted an $8.00 tube of mascara. After her arrest and confinement, she incurred $15,000 in court debt, which of course she could not pay. She was in and out of jail, had numerous court appearances and additional jail time for being delinquent to keep up with payments mandated by the judge. She was among other similarly situated people who are punished over and over for the same crime. Felony crime convictions are paid for by the state, misdemeanors by the counties charging poor defendants.

Because the defendants are caught up in this vicious cycle, they often lose their driver's licenses, their cars, and their jobs, and their families become broken. Many courts use for-profit companies to monitor drug use, who then charge additional fees and increase the burden. In effect, the courts become the collector of revenue for the county and people are victims of being imprisoned for failure to pay debts, which is clearly unlawful.

Messenger reveals his own experience with poverty. He reviews the Missouri system of choosing judges going back to the Pendergast machine in Kansas City and



the beginnings of our Non-Partisan Plan of judicial selection in the late 1930's, through the efforts of lawyers throughout the state such as Rush Limbaugh, Sr. of Cape Girardeau and other dedicated Missouri lawyers. He mentions statutes and appellate cases from the Missouri Supreme Court and the U.S. Supreme Court that have tried to put an end to these procedures.

Messenger suggests various remedies, among them elimination of cash bonds and the removal of court fees and costs as a primary revenue source for local and state governments. He also suggests that poor people should not be charged for their jail time and that drivers' licenses should no longer be suspended for failure to pay court costs. He applauds the efforts of lawyers who have been trying to change the system outlined in the book. One of his conclusions is aptly stated: "There can be no sale of justice in a free America. Until the country returns to those basic values, Lady Justice isn't blind, and her scales are completely out of balance." Messenger's message about a broken legal system is well presented, and the Pulitzer Prize well deserved. ⚜

Oppenheimer & Co. Inc.
One North Brentwood Blvd.
Suite 600
St. Louis, MO 63105
(314) 746-2553 Phone
(314) 863-1809 Fax

THE PALUMBO GROUP
of Oppenheimer & Co. Inc.

Website: www.oppenheimer.com/palumbogroup

Kathleen Palumbo
Executive Director – Investments

Peter Palumbo, AIF®
Director – Investments

Jack Cantalin CRPC® AWMA®
Associate Financial Professional

The Palumbo Group of Oppenheimer supports high-net worth individuals, multiple generations of families, and successful women who need help with generational wealth planning by offering asset allocation expertise and meaningful financial guidance and personalized financial strategies and solutions in order to achieve what's most important to you and your family. This includes both trust and estate planning to effectively and efficiently manage your family's long-term needs.

OPPENHEIMER

NOW ACCEPTING REFERRALS

Necrotizing Enterocolitis (NEC) Diagnosis

Philips CPAP

Paraquat

SCAN HERE TO REFER A CASE.

The Simon Law Firm, P.C.
Attorneys and Counselors at Law

(314) 241-2929 | SIMONLAWPC.COM