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Portraits in Justice: A Pictoral History of the Leavenworth Judiciary

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The Kansas Bar Association is responsible for the selection and editing of all substantive legal articles that appear in The Journal of the Kansas Bar Association. The board reviews all article submissions during its quarterly meetings (January, April, July, and October). If an attorney would like to submit an article for consideration, please send a draft or outline to Patti Van Slyke, Journal Editor at pvanslyke@ksbar.org.

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Eight law students benefit from scholarship endowments established by attorneys

The world lost a boxer, activist and philanthropist in 2016. Known primarily for his accomplishments in the boxing ring and his views against the Vietnam War, Mohammad Ali was also a motivator and a giver. He died on June 3, 2016, after a battle with Parkinson’s. During his retirement, he raised funds to establish the Muhammed Ali Parkinson Center in Phoenix, Arizona. He also gave to Special Olympics and Make-A-Wish Foundation. He believed in pursuing what looked like the impossible.

Several KBA members and firms have established scholarships to recognize law students for their determination, academic achievement, community service and desire to practice law in Kansas. Their service is through their commitment to supporting the educational pursuits of individuals who are willing to take risks and reach for what at times seems impossible.

“Impossible is just a big word thrown around by small men who find it easier to live in a world they've been given than to explore the power they have to change it. Impossible is not a fact. It's an opinion. Impossible is not a declaration. It's a dare. Impossible is potential. Impossible is temporary. Impossible is nothing.”

-Muhammad Ali-

Congratulations to these outstanding students who exemplify what is possible.

**Case Moses & Zimmerman P.A. Law Student Scholarship $1,000**

This scholarship is intended to go to a future Kansas lawyer including both Kansas law schools, Creighton University School of Law, or Oklahoma City University School of Law. This award is specifically given to a second-year student who intends to practice law in the state of Kansas.

**Mackenzie Maki/Washburn University School of Law**

A Wichita native, Maki received her Bachelors of Science in biology in 2014 from Wichita State prior to attending Washburn School of Law. She is currently a legal extern for the Kansas Bureau of Investigation, and will intern at Hite, Fanning, and Honeyman LLC and the Shawnee County District Attorney's Office this year. As a single mother, Maki values the legal system and public safety, and plans to practice in Kansas in the near future.

“I sincerely thank the Kansas Bar Foundation for choosing me as the recipient of Case, Moses & Zimmerman, P.A. Law Student Scholarship. This financial aid helps me prioritize my legal studies and gain experience and understanding in a variety of law-related positions. The Kansas Bar Foundation’s generosity and commitment to the education of legal scholars in the state empowers me and students similarly situated to excel and serve the community, proudly.”- Mackenzie Maki

**The Justice Alex M. Fromme Memorial Scholarship Award $850**

The award shall be provided to a law student attending the University of Kansas School of Law or Washburn University Law School who is committed to practicing law in Kansas.

**Francis M. Schneider/Washburn University School of Law**

As a Wichita native, Schneider attended Wichita State University and earned a B.A. in Accounting, Economics, and Finance. Prior to law school, he was a financial analyst and corporate accountant at Walmart Home Office and Koch Industries Inc. Schneider is currently a teaching assistant to Professor Emily Grant for the Legal Analysis, Research, and Writing II program and a staff editor with the Washburn Law Journal. This summer, Schneider will return to Wichita as a summer associate with Lewis Brisbois Bisgaard & Smith LLP.

“I am tremendously grateful for the Kansas Bar Foundation. Words cannot convey my appreciation for the honor to receive the Justice Alex M. Fromme Memorial Scholarship. As a life-long Kansan, I look forward to practicing law in the Kansas legal community and to actively participating in the Kansas Bar Association. I hope to embody the same dedication and principles held by Justice Alex M. Frommes in his practice of law in Kansas.”

-Muhammad Ali-

Service to others is the rent you pay for your room here on earth.

-Muhammad Ali-
The Frank M. Rice Scholarship $3,500

The Frank M. Rice Scholarship promotes the practice of law in the state of Kansas by annually awarding funds to a student attending the University of Kansas School of Law or Washburn University School of Law to assist with the costs of tuition. The scholarship is intended to help law students become lawyers in the mold of Frank M. Rice who was “among the finest...in the Bar. He was at the top of his class...and always applied the highest level of legal scholarship to any legal matter in which he was involved.” The recipient must have been admitted to law school and must be a Kansas resident.

Maxwell C. McGraw/University of Kansas School of Law

A native of Shawnee, McGraw attended the University of Kansas and earned a Bachelor of Science in Civil Engineering. As a certified Engineer-in-Training, he was an assistant traffic engineer at Olsson Associates in Overland Park before returning to KU for law school. McGraw is currently the managing editor of the Kansas Law Review, and plans to use his engineering background in pursuit of a career in intellectual property law.

“I am humbled and honored to be selected as the recipient of the Frank M. Rice Scholarship, and would like to thank the Kansas Bar Foundation for providing such a generous award. This scholarship is indicative of the support the Kansas Bar Foundation gives to Kansas law students, and I look forward to giving back in the same manner as a member of the Kansas legal community.”

Maxine S. Thompson Memorial Scholarship $850

This scholarship promotes the practice of law in the state of Kansas by awarding a law student, originally from Kansas and attending the University of Kansas School of Law or Washburn University School of Law, an annual scholarship. The award recipient must have completed no less than 60 hours toward a law degree and must plan to practice in a rural Kansas area, preferably western Kansas.

Lisa L. Martin/Washburn University School of Law

Lisa Martin is a resident of Prairie Village and grew up in the Kansas City area. She has a strong regard for the state of Kansas and looks forward to beginning her legal career with Triplett Woolf Garretson, LLC in Wichita.

“I would like to thank the benefactors of the Maxine S. Thompson Memorial Scholarship award. I would also like to extend a hearty thank you to the Kansas Bar Foundation and the faculty and staff of Washburn University School of Law. I am humbled to be selected for this award and promise to continue representing the Kansas legal profession with the utmost level of competence and sincerity.”

Hinkle Law Firm Student Scholarship $2,000

This scholarship shall be given to a law student at the University of Kansas School of Law or Washburn University School of Law. Applicants should demonstrate a bona fide intention to practice law in Kansas. Because community service is extremely important to the Hinkle Law firm, applicants must also demonstrate a history of community involvement to be considered.

Erica McCabe/University of Kansas School of Law

Growing up in the Flint Hills, McCabe developed a deep-rooted love for her home state. Before attending law school, she earned undergraduate degrees in political science and global studies and a Master of Education in special education. McCabe also served as a Teach for America Corp member in Kansas City where she taught middle and high school Special Education. After law school, McCabe plans to become an active member of the Kansas bar.

“I am beyond grateful to be this year’s recipient of the Hinkle Law Firm’s Student Scholarship. I am also continually impressed by all of the support the Kansas Bar Foundation provides to local law students. I look forward to discovering all the ways I can use my law degree to continue serving my community.”
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Lathrop & Gage Scholarship Award $1,750
This scholarship shall be given to a law student at the University of Kansas School of Law or Washburn University School of Law. Applicants should demonstrate a bona fide intention to practice law in Kansas. Applicants must demonstrate a history of community involvement to be considered.

Luis M. Solorio/ Washburn University School of Law

Solorio graduated from Emporia High school and earned his B.S. in economics from Emporia State University. He moved to Kansas in 1994 from California. He worked for the Kansas Corporation Commission for over three years as a research economist helping advise the commission in the utility rates process. Solorio served in the U.S Army in Operation Iraqi Freedom in 2003. His greatest accomplishment is raising his three children as a single parent while pursuing his educational goals. Solorio believes that kindness is one of the most important human qualities and that giving back to your community is an effective way to show kindness. He would like to help the Spanish-English bilingual communities in Kansas.

“I intend to practice law in Emporia or in southwestern Kansas. This scholarship will help me reach my goal of becoming an attorney and to serve the people of Kansas. I am eternally grateful for the kindness of the Kansas Bar Foundation. Thank you.”

Frank C. and Jeanne M. Norton Scholarship Award $1,250
This scholarship is available exclusively to Washburn University School of Law students in their second or third year of study who are not receiving any other scholarship support.

Abigail L. Hoelting/Washburn University School of Law

Hoelting is a second-year student at Washburn University School of Law and a current intern at the Kansas Bankers Association. She grew up in Shawnee, Kansas, and intends to live and practice law in Kansas. She graduated from Kansas State University in May 2015 with a degree in Political Science and minors in Business and German. Prior to law school, Hoelting spent a summer as an intern in the International Relations Department at the Municipality of Erfurt, Germany.

“I would like to thank the Kansas Bar Foundation and the generous donors for the scholarship opportunities offered this year. I am especially honored to receive the Frank C. and Jeanne M. Norton Scholarship, and I hope to practice estate planning and business law, similar to Mr. Norton. This scholarship serves as a reminder to serve my community and continue paying it forward any chance I can.”

The John E. Shamberg Memorial Law Student Scholarship $1,250
This scholarship will be given to any law student attending the Washburn University School of Law. Preferred candidates will have an interest in plaintiff’s work as well as a bona fide intention to practice law in Kansas, exhibit professionalism and high character in their academic and personal lives and demonstrate participation in school and community activities. Applicants must submit an application, a letter of intention, and two letters of recommendation. An award will be based in large part upon a student’s financial need. Students of culturally diverse backgrounds are encouraged to apply.

Jennifer Salva/Washburn University School of Law

Originally from Sugar Creek, Missouri, Salva and her family moved to Olathe, Kansas, in 1999 so her sister who has profound disabilities and deafness could have better educational resources and attend Kansas School for the Deaf. Salva became an advocate for her sister’s social, educational and employment needs, and plans to share those skills of advocacy with those of all ability levels in her career as an attorney. Salva is a graduate of the University of Kansas, a 1L at Washburn University School of Law, and former editor of the Kansas Bar Association Journal.

“John Shamberg led a life of service to the disadvantaged, to our Bar Association, to our State and to our Country in the armed forces during World War II,” Salva said. “Selection for this scholarship has given me a special opportunity to reflect on those values that make an admirable Kansan and lawyer, and focus on building my own legal career deeply rooted in service.”
The Books We Read

When I was a fledgling English major, I encountered Ralph Waldo Emerson’s quote, “I hate quotation. Tell me what you know.” Emerson penned the phrase in his journal while critiquing how people address the subject of immortality, and the quote hit me at a formative time. Emerson’s admonition suppressed any previous tendencies toward using quotations in speech or writing during my college years.

The heavy emphasis on proper citations and quotations in law school fortunately taught me a better balance in using other writers’ words. So with a touch of irony, I will use another Emerson quote as the foundation of this column: “If we encounter a man of rare intellect, we should ask him what books he reads.”

I am most certainly not a man of rare intellect, but I enjoy speaking with individuals who are. When possible, I want to hear what they are reading and how they interact with the ideas in the books they read. In recent months, I have had friends and family—individuals far wiser than me—steer me toward the following:

- Quiet: The Power of Introverts in a World That Can’t Stop Talking
- Hillbilly Elegy: A Memoir of a Family and Culture in Crisis
- The Narrative of Arthur Gordon Pym of Nantucket
- The Singer
- Ten Restaurants That Changed America
- The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism

The list is diverse, but I enjoyed each one. Just as much, I enjoyed discussing the books with those who gave the recommendations. Digging into a good book may seem like a frivolity, but non-work reading is both a joy and a value in a profession that demands excellence in communication.

My first mentor after law school, Jared Maag, sent me to an all-day training by Bryan Garner during my first year of practice. We worked through “The Winning Brief,” and it was a revelation. Garner offered point-by-point instructions on writing effectively and persuasively. I still strive to improve my writing by returning often to his books. But one of the primary recommendations Garner gave was to consume quality reading material and do so often.

Garner and Justice Antonin Scalia summarized this idea in “Making Your Case:” “Cultivate precise, grammatically accurate English; develop an appealing prose style; acquire a broad vocabulary...[These] are lifelong projects, and you may as well begin them at once. You’ll find that it’s a pleasant set of tasks because the first and principal step is to read lots of good prose.”

Even if there isn’t time to read a lengthy book, it is still possible to find good prose in shorter form. Publications like “The Atlantic,” “The Economist” and “The Wall Street Journal” hold their writers to a high standard of communicating complex ideas in an accessible manner. Any lawyer who can accomplish this is in a strong position to succeed with the courts and clients.

Often when I encounter quality writing, it reveals the void between my own prose and the precise elegance so characteristic of the best writers. Fortunately, our profession gives ample opportunity to practice and improve. And if we supplement the opportunity with an intentional pursuit of quality writing, we can find ourselves with a fusion of Emerson’s quotes: when you encounter writers of rare talent, read the works they produce. You, in turn, will more likely become a writer that others can’t help but quote.

The modern practice of law requires dexterity with the written word. Not only does clarity increase the likelihood of success, but it also increases accessibility and understanding. Clear writing that a client can understand is an element of justice, and improving our craft is subsequently a worthwhile pursuit. While this can be a challenge, reading for pleasure at least adds a degree of joy to the practice.

About the YLS President

Nathan P. Eberline serves as the Associate Legislative Director and Legal Counsel for the Kansas Association of Counties. His practice focuses on public policy, legal aspects of management, and KOMA/KORA. Nathan holds a J.D. from the University of Iowa College of Law and a B.A. from Wartburg College in Waverly, Iowa.

eberline@kansascounties.org
Upcoming CLE Schedule

Live:

**Brown Bag Ethics:**
Wrapping It Up
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**Brown Bag Ethics:**
Nobody is Immune from Ethics Complaints
March 29, 2017
Kansas Law Center, Topeka

**Lunch and Learn:**
You Are What You Write! Ethical Implications of Everyday Legal Writing
April 6, 2017
Kansas Law Center, Topeka

**2017 Bankruptcy & Insolvency CLE**
April 7, 2017
DoubleTree by Hilton, Lawrence

**2017 Family Law CLE**
April 21, 2017
DoubleTree by Hilton, Lawrence

**2017 Litigation CLE**
April 28, 2017
Kansas Law Center, Topeka

Webinars:

**KBA Webinar:**
Retaliation Update
March 9, 2017 (Noon-1:00 PM)

**Mesa CLE Webinar:**
Yelp, I’ve Fallen for Social Media and I Can’t Linkedout: The Ethical Pitfalls of Social Media
March 13, 2017 (5:00-6:00 PM)

**KBA Webinar:**
Two Worlds Collide—Social Media Meets the First Amendment
March 14, 2017 (Noon-1:00 PM)

**KBA Webinar:**
Background Checks and Other Pre-Employment Issues
March 16, 2017 (Noon-1:00 PM)

**Mesa CLE Webinar:**
It’s Not the Fruit, It’s the Root:
Getting to the Bottom of Our Ethical Ills
March 17, 2017 (10:00-11:00 AM)

**Mesa CLE Webinar:**
Sue Unto Others As You Would Have Them Sue Unto You
March 23, 2017 (11:00 AM-12:00 PM)

**Internet for Lawyers Webinar:**
Internet Legal Research on a Budget
March 24, 2017 (Noon-1:00 PM)

**KBA Webinar:**
Non-Profits – How to Start and Maintain a Tax Exempt Organization
April 5, 2017 (Noon-1:00 PM)

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The Punch List

Starting things always goes better than finishing. Planting the garden is a joy; weeding it – not so much. Pruning shrubs gives the sense of being a sculptor; it is almost an art form. Raking the sculpted debris, though, will suck the life out of any artist. And my construction projects around the house almost always have a half-dozen things unfinished when the excitement of the big-picture results cause me to cease working and start enjoying the fruits of my labor.

I tolerate those unfinished items for quite some time. After all, a few small pieces of unpainted baseboard and a loose hinge don’t truly detract from the quality of one’s life.

My wife is less tolerant. Eventually she will sprinkle our conversations with consistent references to the unfinished tasks. (Please note that I did not use the words “incessant,” “harp,” or “ride.”) If verbal hints fail to achieve the desired results, she resorts to generating a Punch List. And the Punch List ultimately finds its way to the table, next to my empty plate. “It’s not that much,” she will say. “You can do it in no time at all, and you’ll feel so much better once it’s done.”

And she’s correct. Once I set my mind to it and tackle the items on the Punch List, I inevitably find a great deal of satisfaction in finishing the project – truly finishing it.

The Kansas Bar Foundation has an unfinished project. Back in 2005 the Foundation undertook to expand and enhance our building in Topeka to provide better meeting space, sufficient parking, and technology upgrades. Kansas lawyers and law firms rose to the occasion. They stepped up and contributed more than $900,000 to make the larger and enhanced facility a reality. We have been enjoying the benefits of that project for over a decade now.

But there’s an unfinished task on the punch list. Although the generosity of the members of the bar got the Foundation close to raising the necessary funds, the Foundation did have to take out a loan to complete the project. That loan remains unpaid, and a mortgage remains on our building. We need to finish the project. We need to cross that item off the Punch List. We need to burn the mortgage.

The amount remaining due is approximately $270,000. To paraphrase my wife: “It’s not that much. We can do it in no time at all, and we will feel so much better once it’s done.” So, by Executive Order, I’m initiating the Foundation’s MBF – Mortgage Burning Fund. And if we can pay off the mortgage loan before my term as President of the Foundation concludes at the end of June, I will invite everyone who donates to the MBF to attend a party* where we will have an actual burning.

So please grab your checkbook, or, contribute digitally:

http://www.ksbar.org/BurnTheMortgage, and we will start attacking the Punch List.

* Details about the mortgage burning party will follow. (As I said—it’s always easier to start these things than it is to finish them.) But we know this: There will be some adult beverages, some food, and plenty of happiness and joy for everyone. Don’t be left out.

About the KBF President

Todd N Thompson is the senior attorney at Thompson Ramsdell Qualseth & Warner, PA in Lawrence. He graduated from the University of Kansas School of Law in 1982, and is a Fellow of the American Bar Foundation, the Kansas Bar Foundation, and the American College of Trial Lawyers.

todd.thompson@trqlaw.com
Net Neutrality: The Sequel

The moment President Trump appointed Ajit Pai to head the Federal Communications Commission, the Internet erupted in a fury about the imminent threat to “net neutrality.” Stripped to fundamentals, the principle of net neutrality is that all data on the Internet should be treated the same with no discrimination based on user, content, or platform. You get your data from Netflix as fast, as reliably, and at the same cost as another user gets her data from Hulu; Internet Service Providers should not manipulate networks to slow one type of use or favor another. The most common example cited as a violation of net neutrality principles was Comcast’s secret efforts to slow file-sharing application data.

The arguments are dense and complex ranging broadly from philosophical appeals to democratic ideals to deeply “wonkish” conversations about data packets and networks. As an extreme generality, proponents of net neutrality tend to align with consumer advocates, application providers (e.g. Amazon, Netflix, Twitter), and civil rights groups while opponents often hail from the service provider side (e.g. Verizon, Comcast, AT&T) and deregulation interest groups.

Ultimately, the conflict may be more about how principles of net neutrality can be preserved. The model at the center of the debate would treat the Internet as a public utility. This is, essentially, what the United States did when reclassifying broadband access as a telecommunications service in 2015. Opponents to that model suggest reclassification and regulation is being used to defeat neutrality and stifle the very free market innovations which would encourage neutrality. Instead of a dispute about the principles of net neutrality, the argument is about the policies necessary to ensure it. That debate puts lawyer Ajit Pai front and center.

Chairman Ajit Pai

Pai was born in Buffalo, N.Y. but raised in Parsons, Kansas where he was a top debater in the National Forensics League. (High school debate geeks recognize that Parsons High School was a formidable powerhouse for decades, represented in national championships annually for more than 30 years.) He continued in competitive debate at Harvard, where he graduated in 1994, and returned to the Midwest earning his J.D. at the University of Chicago. Pai has spent his professional life with telecommunications issues both in the private sector and government. In 2012, he was appointed by Barack Obama to fill a Republican position on the FCC and was confirmed unanimously by the Senate.

Those lauding Pai’s appointment as head of the FCC note that he has never been opposed to the principles of net neutrality. In a public statement from 2014, Pai said, “In 2004, then-FCC Chairman Michael Powell outlined four principles of Internet freedom: The freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information…I support the four Internet freedoms, and I am committed to protecting them going forward.” That has provided little comfort to proponents of net neutrality who note his strenuous objections to changes in 2014-2015 that provided little comfort to proponents of net neutrality who note his strenuous objections to changes in 2014-2015 that provided a regulatory framework for net neutrality. They point to his dissent to the FCC’s decision which comprised 67 of its nearly 400 pages.

Opposing Forces Settle In

The new fight over how to preserve the principles of net neutrality is expected to be fierce. The debate in 2014 and 2015 prompted over four million comments to the FCC. At one point, its ability to accept comments was overwhelmed after HBO’s “Last Week Tonight” host, John Oliver, posted a 13-minute segment wherein Oliver said trusting telecommunications lobbyist, Tom Wheeler, as Chairman of the FCC “…was the equivalent of needing a babysitter and hiring a dingo.” (Wheeler later clarified, “I would like to state for the record that I am not a dingo.”)

Proponents of regulations to preserve net neutrality regulations hope they can “get the band together” again. Netflix confidently waded into the renewed discussion noting that they have grown to the point they have little fear of providers throttling its content. Instead, its appeal is for innovation writing, “No one wants ISPs to decide what new and potentially disruptive services can operate over their networks, or to favor one service over another. We hope the new U.S. administration and Congress will recognize that keeping the network neutral drives job growth and innovation.”

President Trump has not said much about his intentions outside of a tweet in 2014 comparing net neutrality to the Fairness Doctrine, but he has named several advisors opposed to regulations ensuring net neutrality. One of the more notable opponents on Trump’s team is Peter Thiel who supported the candidate with $1.25 million. He said on a Reddit AMA “I don’t like government regulation.” That mirrors the general policy position of the GOP majorities in the House and Senate. In fact, then-Senator Mike Pence co-sponsored a bill specifically aimed at stripping FCC authority to govern Internet access services. As presently constituted, it seems more likely going forward that congressional Republicans and the Trump administration will aim to preserve FCC authority providing Chairman Pai room to “…fire up the weed whacker and remove those rules that are holding back investment, innovation, and job creation.”

About the Author

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Reflections on Gordon Lowry and a Place Called Valley Falls

When I read in the November issue of the KBA Journal that Gordon Lowry had passed away at age 98, in an instant my mind returned to the evening in November five years earlier when he welcomed me into his living room. I was there to capture on video just a small portion of his life story. This undertaking was part of a larger project for the Johnson County Bar luncheon which was scheduled a couple of weeks later for the first Wednesday in December—a day that happened to fall on Dec. 7, 2011.

On that day the local bar association had agreed to honor four Kansas attorneys who saw combat in World War II. Those in attendance were Lowry, Charles Svoboda, Taylor Hess and Bill Mullins. A brief video clip of each of them was part of the presentation.

That event required considerable advance work, including gaining an audience with Gordon. My interest in sharing the stories of the Greatest Generation had its genesis in a questionnaire I sent in 2009 to every living Kansas lawyer aged 80 or older. One of the questions asked, “Are you a veteran? If so, explain.”

But to make the meeting happen, I had to first arrange a date and time and then navigate to a part of Kansas I had never before visited—Valley Falls. The Falls, in case you’ve never left I-70, is 28 miles north of Topeka, along Hwy. 4 in Jefferson County. It’s southeast of Holton, southwest of Atchison, directly south of Effingham, and northwest of the county seat, Oskaloosa. Its name comes from the Delaware River which runs through it.

But this Falls is not to be confused with Bedford Falls, the fictional town in ‘It’s a Wonderful Life.’ In the Hollywood version, George Bailey saved Bedford. It would be only a modest exaggeration to say Gordon saved the other Falls. You see, in 1946, Valley Falls had a high school, a pharmacy, a couple of physicians and 1,200 residents. It lacked one thing to declare its legitimacy: an attorney. On Sept. 1, 1947, all that changed.

“Dad walked downtown to the office to work every morning, home for lunch, back to the office after and then home again that night for about fifty years” his son Stuart told me. “When I was a kid, we always knew that when the phone would ring at 5:30. Dad would be calling to ask Mom what she was making for dinner and whether he needed to pick up anything at the store.”

But that’s getting ahead of our story just a bit.

The night I made the drive, it was a crisp November evening with a starlit sky. When I arrived at his house, he welcomed me in. His wife Margaret was milling about the kitchen. Gordon and I sat in the living room. He was dressed in a tan tweed jacket, light beige shirt and a patterned brown tie. Their home was warm and inviting. We sat on the couch, and I held my camera with my legal pad resting on my knee. And his reflections were as fresh as if they happened that week.

“I had just graduated from college, got married and then had a year of law school. I was called to active duty in the fall of ’42. I went in as an enlisted man because they weren’t accepting married men in the officers’ program,” he told me. A short time later the Navy changed that policy. “Just about the time we were to leave Florida, they moved me up to a boat group commander.”

The focus for the Navy was obviously the Pacific, and Gordon’s first task was facilitating the invasion of the island of Saipan. Saipan was an enormous asset to the Japanese. They knew that losing the island of Saipan would represent a monumental advancement for the allied forces. The battle lasted twenty-four days—from June 15 through July 9, 1944. Fifteen battleships bombed the island before the invasion began.

This battle is rich with historical detail. Harold Goldberg’s book “D-Day in the Pacific: the Battle for Saipan” quotes this official history of the 2nd Marine Division:

“Take all the Pacific battles that had gone before, from the fall of Corregidor to Eniwetok. Take Tulagi and Guadalcanal, and Tarawa and Attu, and Los Negros and Buna and Gona. Still them all together, and add a little European seasoning—perhaps from Sicily—and pour them out on a flat blue sea
under a blue bowl of sky, and you’ll have something that looks and smells and feels like Saipan. For Saipan had everything: caves like Tulagi, mountains and ridges like the ‘Canal, a reef nearly as treacherous as Betio’s; a swamp like Buna; a city to be conquered, like those on Sicily; and death-minded Japs like the defenders of Attu. A lot, for so small an island.”

That was Saipan.

True historical buffs know there was another aspect to Naval/Marine invasion of this island. Among the Japanese holed up there was one Admiral Nagumo, Commander of the Japanese Central Pacific Fleet. It was Nagumo who directed the air raids on the U.S. Navy ships at Pearl Harbor and Midway. Some might say this battle had a personal aspect to it. And they would be correct.

“We invaded the west coast of Saipan and took the marines in there” Gordon told me. “And then overnight of the first night, my boat spent the night unloading Army personnel all night long. As a result of that work, and the fact that we did good there as officers on the beach during that invasion, I was awarded the Bronze Star along with another officer and a couple of the enlisted men.”

On July 6, the Marines found Nagumo in one of the many caves. He was felled by a self-inflicted gunshot wound.

But Lowry’s mission in the Pacific wasn’t finished. Two months later he was part of the invasion of Angaur in the Palau islands. Angaur’s size – 3 miles long – is not a reflection of its military significance; it was a perfect site for a landing strip.

“My injury was the result of the next invasion of Angaur-Palau islands. Marines on that invasion went to Palau and our ships took the Army to Angaur, and I had already landed all the troops. During the course of the night, some of the Japanese re-invaded our beach and got in the trees. They sprayed our boats in the harbor where we were working and hit several of us.”

“After the invasion of Palau, I stayed aboard until the invasion was finished, and then because of having been injured, they sent me back home. They sent me to San Francisco for additional training and sent me back two months later on another a ship, a brand new ship.”

The war ended a year later, in September 1945. He rose to the rank of First Lieutenant. In addition to his Bronze Star, Gordon was awarded a Purple Heart for Palau.

Lowry returned to Kansas, graduated from Washburn University and started in Valley Falls in 1947. Twenty-nine years later—in 1976—he gained a new partner, Rick Johnson. “Gordon was a wonderful mentor” Rick told me. “My dad was a lawyer in Council Grove, and I wanted to have a small town practice like he did. I wanted to learn the craft from someone who was like my dad—someone of integrity. Gordon was that and more. He was personable, caring and outgoing; I just tried to emulate that.”

In 1985, Gordon’s son Stuart joined the practice, and there was plenty of business for the three of them. One of their best clients was an electrical cooperative. Eventually that client hired Stuart away, and now he serves as President and CEO of the Sunflower Electric Power Cooperative in Hays, Kan.

Today the law firm of Lowry & Johnson continues to flourish with Rick Johnson carrying the legacy started 70 years earlier.

Gordon and Margaret enjoyed 73 years of marriage until her death Aug. 31, 2014. The two of them raised five children in the Falls—daughters Susan and Lynne, and three sons—Kem, James and Stuart.

Susan recalled, “As a young girl, I was always aware of how hard Dad worked at the office. It was normal for him to work all day, come home for lunch (when he wasn’t in court) or dinner, go out in the evening for other meetings, and to work on Saturday mornings.”

His work didn’t stop him from traditions. “Mom and Dad were a team and worked together to establish many traditions for our young family. For example, there was always popcorn every Thursday night after Rotary, dad prepared the hamburgers every Saturday night, and on Sunday nights he would make his special malts. Sunday school and church were part of every Sunday morning, and sitting together watching whatever game was on TV on Sunday afternoon was just what we did together. I always enjoy remembering the day Dad closed the law office to visit my 1st grade class. My teacher later told my mother she had never had a father visit her class.”

“Dad wanted a town like Meade, where he grew up, and both he and Mom wanted to be close to their parents,” Stuart shared. “Dad’s brother Jim was already practicing in Atchison, so that may have played a role. He said the town seemed prosperous, and the local businessmen who recruited him kept him busy. He started with no secretary and would often leave the office to make the rounds downtown. Sometimes he’d return to the office to find all of his office furniture stacked on his library table as a prank by someone who had come to the office to find he wasn’t there. The phone company took care of him as he’d tell the operator where he was going to be, and she’d forward his calls.”

“I was lucky enough to practice law with Dad,” Stuart shared with me recently. “He really wanted me to take on the ‘night meetings,’ and there were lots of them. I know he felt privileged to be a member of the bar and to be entrusted with the worries and problems of his clients. Dad saw nobility in the hard work of our clients. He saw purpose behind our work for those clients.”

Tom Brokaw’s book “The Greatest Generation” aptly describes the life of Gordon Kemmery Lowry and so many of the men and women who grew up with him in the 20’s and 30’s. “The WWII generation shares so many common values: duty, honor, country, personal responsibility and the marriage vow. ‘For better or for worse’ —it was the last generation in which, broadly speaking, marriage was a commitment and divorce was not an option.”

About the Author

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As I wrote this column, Kansas and Kansas State had not yet played their upcoming February 6th Big Monday contest. The two Kansas teams have played 285 times, and Kansas has come out on top 192 times. Kansas won the first 2017 matchup in Lawrence when the officials correctly applied the Ukrainian traveling rule to Kansas’ Svi Mykhailiuk’s last-second drive. Who won the second contest? Anyone’s guess.

What I do know is that the Kansas Bar Association’s Annual Meeting will be “travelling” to Manhattan for the first time in my memory. The KBA Annual Meeting will be June 7-9. The KBA has put together a terrific agenda of education and social events that is not to be missed. If you attended KSU at any point, a return visit will be a homecoming. If you have KU or WSU blood, seeing all the exciting development and activity in Manhattan will expand your provincial views. Or if you just have a pair of bib overalls and a straw hat that you have been itchin’ to get out of the closet — now is the time. 1

Governor Brownback moved the Department of Agriculture to Manhattan several years ago, and as far as I know, Kansas farmers are still hitting it out of the park, so that worked out. The KBA may explore other venues in the future (do I hear a chant of Lawrence, Lawrence . . .?) so stay tuned.

Keeping with the basketball-themed column this month, one of my favorite judges was the late great Scott O. Wright of the Western District of Missouri. Basketball fans may recall that the University of Missouri used to have a team. 2 Well, as I recall, in the early 1990s, Jamal Coleman, one of its star players, got involved in a bookstore refund theft that violated the law and the school code. After admitting the theft and stipulating to the code violation Mr. Coleman would likely have seen his last days at Paige Sports Arena, denying Coach Norm Stewart access to his sweet jumper. But wait, demonstrating the use we would all like to put our law degrees to on behalf of our schools, Mr. Coleman’s attorney filed a federal §1983 action alleging violations of various constitutional rights and seeking Coleman’s reinstatement to the team.

I don’t want to say that out of 2700 federal district court judges that Mr. Coleman’s only hope to get back on the court rested with having his case land in Missouri alum Judge Wright’s courtroom—but let’s just say it did not hurt his chances. Following a one-day hearing, Judge Wright determined it was a “damn outrage” that “stuck in his craw” and made permanent his earlier temporary injunction that allowed Mr. Coleman to play. Acting like sore losers, the University appealed. In a particularly terse opinion, the Eighth Circuit reversed, finding no “it sticks in my craw” test in the Constitution. But by then, justice had prevailed, and Mr. Coleman’s return allowed Missouri to fight on to its customary early round exit from the NCCA Tournament.

1. After posting an 85-88 record in six seasons, KSU basketball coach Tom Asbury was fired. Firing a parting shot at KSU fans on his way out he explained away his unpopularity saying “I didn’t wear bib overalls and a straw hat too often, so maybe I didn’t connect well enough.”
2. Lighten up Missouri fans, your team is 5-13 and 0-6 in the SEC, I repeat the SEC.

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DEATH CAN BRING OUT THE WORST

The Evolving Landscape of Will Contest Litigation in Kansas

By Jeffery L. Carmichael
Will B. Wohlford
Sarah G. Briley
and Grant A. Brazill
In 1995, the Kansas Bar Journal published an article entitled “Will Contests in Kansas,” co-authored by Dennis Feeney, a great friend and an even better law partner, who has since passed away. Since then, the law and reported decisions relating to will contest matters reflect the continued conflict that death can bring. In 1988, the elderly population of the United States of America numbered 30,000,000. In 2011, the number reached 40,000,000, and it is predicted to reach 50,000,000 by 2019. With the baby boom generation’s slide into retirement and inevitable passing, significant assets will be transferred to their heirs and others. These transfers are rife with opportunities for disputes over wills and estate plans. Kansas attorneys should expect to be contacted by the disinherited and disenfranchised parties from those estate plans, and asked to evaluate the potential success of a challenge to the deceased’s will or estate plan.

This article will discuss investigating claims concerning a will contest, evaluate the risks of pursuing one, and review the substantive and procedural aspects of these actions. We will examine potential claims that may be raised in a will contest, including undue influence, lack of testamentary capacity, constructive fraud, and the ancillary tort claim of tortious interference with inheritance. Finally, this article will provide practical tips for advising clients preparing estate planning documents on how to avoid probate disputes.

I. Considering a Will Contest: Investigation

The focus of any action to contest a will from the initial consultation to the court’s final decision is on the testator’s intent. A variety of factual circumstances may engender a will contest dispute. At-risk circumstances include:

i. Blended families;
ii. Changes in an estate plan close to the death of the testator;
iii. Omissions of family members from an estate plan;
iv. Unequal treatment of children within an estate plan for any reason;
v. Significant non family devises;
vi. Change in attorney and a corresponding change in an estate plan late in life;
vi. The attorney’s services paid for by a beneficiary in the estate;
viii. An elderly or disabled testator;
ix. Change in an estate plan to favor a late in life caregiver;
x. Unrealistic entitlement expectations.

While the circumstances that may give rise to the will contest dispute are endless, this list contains common and recurring issues which provide fertile ground for the seeds of discontent.

A. Preliminary Investigation

Consider what documents comprise the decedent’s final declaration of intent. Once the documents that comprise the last statement of the decedent’s disposition of their estate are assembled, the documents must be evaluated for expressions of the intent of the testator at the time of execution. The key inquiry in any will contest dispute is the determination of the intent of the decedent at the time the document or documents were signed. A preliminary list of important documents might include previous wills, drafts of wills, codicils, worksheets, decedents’ letters, communications with counsel or other professionals, and correspondence with family members.

Once all documents are assembled, the attorney should assess whether those documents appropriately express the intent of the decedent. Unfortunately, the testator, the one person who could easily answer this question, will no longer be available to assist in the process. Instead, the decedent’s intent must be determined by inquiring of those who know, or think they know, what the decedent wanted to do with his or her estate. Useful witnesses might include family members, friends, ministers, executors, the drafter of the will under scrutiny or of prior wills if they have differing dispositions of assets. Other potential witnesses include those present during the preparation or signing of the estate documents, accountants, tax planners, attorneys, health care providers, care providers, or anyone with a reason to know about the estate plans of the decedent. From this universe of possible witnesses, the attorney can begin to sketch a picture of the individual’s intent.
and compare it to the most recently executed documents.

Of course, before filing either written defenses or a separate petition, counsel should undertake an evaluation that is more substantive than procedural—analyze the potential effect of successfully challenging the validity of the will on the distribution of the decedent's estate. A will that is invalidated due to the decedent's lack of testamentary capacity is void in its entirety. In contrast, even if an undue influence challenge succeeds, the parts of the will unaffected by the undue influence may still be valid. Kansas courts have recognized the partial invalidity doctrine, and have held that parts of a will may still be valid if those clauses found to be the result of undue influence are severable. The will must remain intelligible after the invalid portions are removed. But if the will is found to be wholly invalid, counsel must evaluate the potential effect of a prior will being revived or the heirs taking the estate by intestate succession.

Once the attorney has reached a conclusion about the prospects for a successful will challenge, they should be prepared to discuss the advisability of proceeding with claims, risks, and the potential costs and benefits of proceeding. As it should, trying to set aside a signed document purporting to be the declaration of the decedent's intent presents significant factual and legal challenges. To meet and overcome a written document's presumed validity, the challenger must present evidence of sufficient weight to convince a court that the written documents do not represent the decedent's true, final intent.

B. Formal Discovery: Potential Documents and Witnesses

If the attorney believes that a basis exists for a dispute in an estate plan or is asked to defend the latest form of that plan, filing written defenses to the admission of the will to probate or filing a separate petition to contest the will is necessary. Then formal discovery can proceed. Using either formal or informal discovery methods, the attorney will want to request the production of or subpoena those documents which comprise the estate plan at issue, including the notes and files of the attorney who prepared the estate plan, any documents regarding prior estate plans, revisions or additions to that estate plan after it was prepared, and any documents that relate to any other attorneys involved in proposed estate plans for the individual. In addition, the attorney should seek correspondence from the testator and the beneficiaries, family members or any other party that might shed light on the testator's intent or discuss or describe a proposed estate plan. Any other letters, notes, cards, or other items bearing on the testator and his or her relationship with the beneficiaries or intent regarding the disposition of the estate may help to explain what the testator intended and whether the will in question reflects that intent.

Another set of important documents to discover are those relating to the decedent's health, finances, and other relationships. The attorney might discover medical records from health care providers and hospitals, nursing home records, including nursing records; banking records; accounting records; investment account records; and any records regarding the relationship between the testator and the proposed beneficiaries or family members. In addition, evidence of how the testator disposed of assets not passing under the will or trust is important to provide context for the testator's intentions concerning the disposition of other assets.

Once the documents are gathered and a list of potential witnesses is prepared, prepare a deposition plan. Which witnesses should be deposed and about what? The focus points here are the time period during which the estate planning documents were signed, and whose testimony could assist in determining the intent of the decedent. Focus on the events at the signing of the documents at issue, and whether at the time of their preparation and signing, those documents reflected what the testator wanted to accomplish. While evidence of what the testator's intentions may have been in the weeks or months before or after signing may be important, a court should focus on the decedent's intentions at the time contemporaneous with preparing and signing the will and whether the documents reflect that intent as of that time.

Persons with credible information about the decedent's intent are key fact witnesses. If possible, start with the attorney who prepared the estate planning documents. He or she should have met with the decedent and discussed both the extent of the assets and what the decedent intended to do with them. Determine which parties the deceased wanted to include in the estate plan and why. Conversely, if the drafting attorney lacks some or all of this type of information, finding out why is also a critical area of inquiry.

Observing the discovery rules requires that you make an early decision about the need to employ expert witnesses. Useful medical expert opinions may relate to whether the decedent was sick or infirm and the potential impact those conditions had on the decision-making ability of the deceased. In addition to the testator's medical condition, a psychiatrist who works with elderly patients may be helpful on issues of susceptibility to undue influence, cognitive limitations or deficits, and in explaining how certain health events such as strokes, dementia, or Alzheimer's could have affected the individual's ability to understand and participate in the estate planning process. A psychiatrist's ability to perform such an analysis after the decedent's death depends on the quality and content of medical records and testimony available, but such a report can be extremely helpful in illuminating the picture of the decedent's cognitive and communication abilities. Other non-medical experts to be considered might include forensic accountants or certified fraud investigators when missing assets are involved, or typewriting or handwriting forensic evidence experts if the challengers suspect forgery or tampering with original documents.

The discovery plan should be tailored to the specific legal theories at issue. Every case is different, and only after the attorney has an understanding of the potential legal and factual issues that may come before the court, can an appropriate and effective plan be formulated.

II. Admission to Probate and Defenses

The Kansas Probate Code provides that “any person interested in the estate, after the death of the testator or intestate, may petition for the probate of his or her will or for adminis-
An heir with standing may challenge the validity of the will on several grounds. The challenge must be made before the hearing to admit the will to probate, and may be raised either in the form of the filing of “written defenses” to the petition or by filing a separate petition to probate an earlier or later executed will or codicil. Typical defenses to admission include failure to follow testamentary formalities in the execution of the will, lack of testamentary capacity, undue influence (both under common law and K.S.A. 59-605), and constructive fraud.

There are a variety of written defenses that may be raised by a will contestant based upon the failure to follow statutorily mandated testamentary formalities. To be presumed valid, a Kansas will must be in writing, and must be signed at the end thereof by the maker, or by someone else at the maker’s direction. The will must have been signed in the presence of two competent witnesses. Both witnesses must have signed the will and their signatures must have been properly acknowledged. Wills can be challenged on the basis of the witnesses’ lack of competency, and any devises or bequests to witnesses are void unless there were two additional competent subscribing witnesses.

Probate litigation is similar to other civil litigation under Chapter 60 of the Kansas Code of Civil Procedure, but with two important exceptions: there is no right to a jury trial for a will contest in Kansas, and there are fee-shifting provisions. The prevailing party in a will contest (whether proponent or contestant), as well as the executor, may recover both court costs and attorneys’ fees from the decedent’s estate in certain circumstances. The provisions of the Kansas Code of Civil Procedure, including the discovery rules, K.S.A. §§ 60-226 through 60-237 apply, as do the Kansas Rules of Evidence when he was examined days before executing his will. The court relied on expert testimony that the testator lacked capacity due to a very low IQ and impaired hearing observed when he was examined days before executing his will. The court of appeals reversed, finding that the trial court’s opinion was unsupported by substantial competent evidence. The court noted that “[e]ven if, for the sake of argument, a conclusion were reached by [the expert] that [the testator] was not competent on the day he examined him, that [examination] was eight days before the will was executed,” and would therefore be given less weight in determining the issue of capacity.

The relevant time frame for determining whether undue influence has occurred is the time of the will’s execution. The primary inquiry is whether at the time the will was executed, the testator was free from any restraint or undue influence.

### III. Alleging Undue Influence and Lack of Capacity; General Concepts

#### A. Burden of Persuasion

When a will is offered into probate, the initial burden is on the proponent to establish a prima facie case that the “testator or testatrix had testamentary capacity and that the execution of the will complied with the requisite statutory formalities.” K.S.A. § 59-601 provides that “[a]ny person of sound mind, and possessing the rights of majority, may dispose of any or all of his or her property by will, subject to the provisions of this act.” K.S.A. 59-606 sets out the requisite statutory formalities which include (i) a writing signed at the end by the maker of the will; and (ii) that the will be attested to in the presence of two witnesses who were in the presence of the testator at the time that the will was made. The Kansas Supreme Court has long held that “substantial compliance with statutory requirements is enough…[s]light or trifling departures from technical requirements will not operate to defeat a will.” If the proponent establishes that prima facie case, then the will is presumed to be valid, shifting the burden of persuasion to the challenger of the will to establish a defense. To demonstrate undue influence, the challenger must “show the requisite relationship and suspicious circumstances to create the presumption of undue influence” by clear and convincing evidence. Similarly, when a challenger alleges the decedent lacked testamentary capacity, it must be established by “clear, satisfactory, and convincing evidence.” If the challenger makes that proof, the burden to rebut the challenge shifts back to the proponent.

#### B. Presumption of Validity of Will and Controlling Intent

In Kansas, “the primary, the supreme, test in the construction of a will is the intent of the testator” which must be discerned “not from any single or isolated provision but from all provisions…within the four corners of the instrument and from circumstances surrounding its execution.” If after examining the document and relevant circumstances a court is able to ascertain the intent of the testator, effectuating that intent will be upheld unless doing so would violate the law or public policy.

#### C. Establishing Time of Incapacity or Undue Influence

An incapacity-based challenge must be predicated on the testator’s mental state or capacity at the time the will was made. Evidence concerning the mental state of the testator before or after execution is “only an aid in deciding the issue.” The Kansas Court of Appeals’ decision in In re Estate of Bolinder demonstrates the importance of the time frame for evidence of testamentary capacity. Bolinder, the trial court relied on expert testimony that the testator lacked capacity due to a very low IQ and impaired hearing observed when he was examined days before executing his will. The court of appeals reversed, finding that the trial court’s opinion was unsupported by substantial competent evidence. The court noted that “[e]ven if, for the sake of argument, a conclusion were reached by [the expert] that [the testator] was not competent on the day he examined him, that [examination] was eight days before the will was executed,” and would therefore be given less weight in determining the issue of capacity.

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### IV. Defense of Undue Influence

#### A. Relationship with Testator

Once a will has been shown to be executed in accordance with the formalities required by law, the burden shifts to the will contestant to produce clear and convincing evidence. The Kansas Supreme Court has defined undue influence as “such coercion, compulsion or constraint that the testator’s free agency is destroyed, and by overcoming his power of re-
sistance, the testator is obliged to adopt the will of another rather than exercise his own."46 In other words, the testator becomes

the tutored instrument of a dominating mind, which dictates to him what he shall do, compels him to adopt its will instead of exercising his own, and by overcoming his power of resistance impels him to do what he would not have done had he been free from its control.47

Not all influence is undue, however. Influence obtained by kindness and affection will not be regarded as undue.48 The presumption of undue influence does not ordinarily apply to spouses.49

“[H]uman desire, motive, and an opportunity to exercise influence will not, standing alone, sanction the inference that undue influence was, in fact, exercised.”50 Instead, “there must be evidence that the person accused of undue influence did exert it and did so control the actions of the testator that the instrument is not really the will of the testator.”51

“[T]he very nature of a person exerting undue influence in a confidential relationship makes proving that situation with direct evidence a rarity; it is more commonly proved by circumstantial evidence.”52 “The necessity of establishing undue influence through circumstantial evidence gave rise to the ‘suspicious circumstances doctrine’ in a common-law claim of undue influence.”53

The Kansas Supreme Court has adopted a two-pronged test for determining whether undue influence was exercised. First, the will contestant must show that the alleged influencer stood in a confidential and fiduciary relationship with the testator. Second, the contestant must show that “suspicious circumstances” surrounding the making of the will were present.54 To vitiate the will of a decedent, the alleged undue influence must directly affect the testamentary act itself.55 If the contestant can demonstrate a confidential relationship and suspicious circumstances by clear, satisfactory and convincing evidence, a presumption of undue influence arises that shifts the burden back to the will’s proponent.56

B. Suspicious Circumstances

The Kansas Supreme Court first discussed the suspicious circumstances doctrine as a method of creating a presumption of undue influence in Sellards v. Kirby, when it stated, [p]erhaps an unnecessary difficulty is created by an effort to say at just what point the union of a number of suspicious circumstances, no one of which is enough in itself to defeat probate, shall be deemed to give rise to an actual presumption that a will was the result of undue influence. The real question in each case is whether all the circumstances so far as shown are such as to lead the court to believe that in fact the will does not actually express the voluntary purpose of the testator.57

The court later clarified the doctrine, stating, ‘a presumption of undue influence is not raised and the burden of proof is not shifted by the mere fact that a beneficiary occupies, with respect to the testator, a confidential or fiduciary relation…’ Such a presum-

C. Breach of Confidence; Constructive Fraud

The Kansas Supreme Court has defined constructive fraud as “a breach of a legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others or violate a confidence, and neither actual dishonesty nor purpose or intent to deceive is necessary.”60 The two elements of this claim are the existence of a confidential relationship, and a betrayal of a confidence or a breach of the duty imposed by the relationship.61 These requirements are markedly similar to the evaluation of suspicious circumstances discussed above. In fact, some jurisdictions use the terms “undue influence” and “constructive fraud” interchangeably.62

In Kansas, a finding of constructive fraud in the estate context can be the basis for the imposition of a constructive trust.63 “A ‘confidential relationship’ refers to any relationship of blood, business, friendship, or association in which one of the parties reposes special trust and confidence in the other who is in a position to have and exercise influence over the first party.”64 “For purposes of constructive fraud, the mere relationship between parent and child or between spouses does not raise a presumption of a confidential and fiduciary relationship.”65 “However, a confidential relationship can be based on an agreement between the owner of property and another who will distribute the owner’s property in a specified manner upon the owner’s death.”66

“Kansas has repeatedly recognized a confidential relationship when spouses agree to leave property by will.”67 The violation of such an agreement justifies the imposition of a constructive trust for the benefit of the parties damaged by the breach of the agreement.68 “With uniformity courts have recognized the duty of good faith to be implicit in agreements to devise property in a certain way, whether that agreement is reached in an antenuptial agreement or a different type of
contract, and under this duty it is generally recognized that the promisor may not thwart the expectation of the promisee by squandering his assets irresponsibly or by making gifts of them to other persons. The promisor maintains his power to dispose of his assets, but he has no right to do so in a manner which will frustrate the purposes of his contract.”

Though the elements of constructive fraud are very similar to those for suspicious circumstances, they are less onerous. The relationship must only be confidential—it is not necessary to establish a fiduciary relationship. Furthermore, there is no need to establish dishonesty, or purpose or intent to deceive. Though the remedy for a successful constructive fraud claim is the imposition of a constructive trust on the devised assets for the benefit of the promise instead of the revocation of a will or invalidating part of it, the result is effectively the same.

D. Statutory Claim of Undue Influence by Drafter, K.S.A. § 59-605

K.S.A. 59-605 provides a statutory basis for a claim that undue influence corrupted the preparation of a will.

Any provision in a will, written or prepared for another person, that gives the writer or preparer or the writer’s or preparer’s parent, children, issue, sibling or spouse any devise or bequest is invalid unless:

(a) The writer or preparer is related to the testator by blood, marriage or adoption and the devise or bequest is not more than the writer or preparer or the writer’s or preparer’s parent, children, issue, sibling or spouse would receive under the laws of intestate succession, if the property passed in that manner; or

(b) it affirmatively appears that the testator had read or knew the contents of the will and had independent legal advice with reference thereto.72

K.S.A. 59-605 was most recently revised in 2004, and no substantive amendments have occurred since that revision.73 The 2004 revision simplified the analysis under K.S.A. 59-605. Instead of requiring that the writer or preparer of the will be its sole or principal beneficiary, a will challenger need only establish that a devise or bequest has been made to the preparer. After that, whether statutory undue influence has occurred turns on whether the preparer is related to the testator and will receive more than he or she would under the laws of intestate succession, or whether the testator knew of the preparer. After that, whether statutory undue influence has occurred turns on whether the preparer is related to the testator and will receive more than he or she would under the laws of intestate succession, or whether the testator knew of the preparer instead of the revocation of a will or invalidating part of it, the result is effectively the same.

V. Defense of Lack of Testamentary Capacity

A. General Rule

The elements for testamentary capacity are well-established. At the time of execution, the testator must:

(1) “know and understand the nature and extent of his or her property and have an intelligent understanding of the disposition he or she desires to make of it”;

(2) “realize who his or her relatives are and who the natural objects of his or her bounty are”; and

(3) “comprehend the nature of the claims of those he or she desires to include and exclude from participation in the property distribution.”74

The requirement does not mean that the testator must have capacity to undertake a “complex contract or to engage in intricate business transactions nor is absolute soundness of mind the real test for such capacity.”75 The testator’s mere acknowledgment of the nature and extent of his or her property may be sufficient to meet this first requirement.76 The appellate courts review a finding of testamentary capacity for clear error by determining whether “substantial competent evidence exists to support the trial court’s findings.”77

B. Effects of Disease or Senility

A testator does not lack testamentary capacity merely because he or she requires assistance due to a physical impairment.78 Nor does a mental deficiency necessarily impair testamentary capacity; more specifically, a testator who suffers from senility or dementia is not, by virtue of that diagnosis alone, deemed incapable of having testamentary capacity as long as the testator is capable of having general discussions concerning the desired disposition of his or her estate.79 In In re Estate of Oliver, challengers of the will argued that the testator lacked testamentary capacity because of her degenerative dementia and because she did not know the exact balance of various bank accounts.80 The court rejected both factual bases for the challenger’s argument, noting that although the testator did not know an exact balance of her accounts, the evidence at trial indicated that she was capable of conducting substantial discussions regarding assets generally and her desired disposition of those assets.81

In In re Estate of Farr, the will contestants used the testimony of the attending physician at an assisted living facility to assert that their grandfather lacked capacity when he executed his will because of dementia.82 According to the physician, the testator was in a “moderate to even a severe demented state.”83 That opinion was based in part on the doctor’s periodic visits with the testator, occurring approximately once every sixty days.84 The doctor also provided testimony that individuals with dementia might attempt to hide their disease, and he testified that the testator had successfully done so.85 However, there was contrary evidence that, at the time of execution, the testator was able to describe “the majority of his property” and acknowledged his two surviving sons, even though the testator did not mention any other heirs at law and did not mention another son who had predeceased him.86 Ultimately, the trial court held that the testator possessed the requisite capacity.87

On appeal, the challengers argued that the court failed to give their expert’s testimony proper weight. In rejecting that argument, the appellate court primarily noted that under cross-examination, the physician conceded that those who saw the testator daily would be in the best position to judge competency, and that it would be possible for the testator to have a lucid interval on the day of execution such that he would have the proper capacity to execute his will.88 Ultimately, the court declined to reassess the credibility of witnesses, since the trial court’s conclusion was based on substantial, competent evidence.89
C. Applying the Test for Capacity; Cases

The exclusion of a particular individual or heirs, standing alone, is not a basis for finding a lack of testamentary capacity.90 In In re Estate of Bryan, the Kansas Court of Appeals considered the capacity of a testator who had chosen to exclude his adoptive grandchildren from his will.91 There, the grandchildren argued that their exclusion was proof that their grandfather was unaware of his heirs at the time he executed his will in May 2008.92 The challengers of the will offered the testimony of a doctor who had treated the testator during a hospitalization less than a year prior to the will’s execution. The doctor noted that during his time in the hospital, the testator seemed “alert, responsive, and communicative.”93 Ultimately, the appellate court reversed the trial court.102

In response, the testator’s regular physician testified that the testator had never been diagnosed with dementia or any other mental condition, nor had she noted any symptoms of being mentally disoriented.94 The witnesses to the will also testified that the testator seemed “alert, responsive, and communicative.”95 In addition to the testimony regarding the testator’s mental state, there was also evidence that the testator did not consider his adoptive grandchildren to be his heirs, and that they had similarly been excluded from a previous version of the testator’s will.96 The court concluded that the testator had the requisite testamentary capacity, noting that “[t]here simply is no reason to believe that [the testator]… no longer realized that he also had adoptive grandchildren” in May 2008.97

As discussed above, in In re Estate of Farr, the Kansas Supreme Court found that a prima facie case for testamentary incapacity was met when evidence demonstrated that the eighty-two year old testator was alert, appeared to understand what was happening at the time of signing, and had acknowledged the extent of his assets, as well as his intent to leave those assets to his sons after his death.98

D. Expert Opinions and Capacity

Kansas courts have long recognized that “the testimony of expert witnesses is important in cases involving mental capacity and should always receive proper consideration.”99 However, they have similarly recognized that “[b]oth expert and lay testimony is competent on the question of mental capacity…[t]he trier of fact is not obligated to adopt the views and opinions of a physician, no matter how qualified, and to reject non-expert testimony.”100

An expert is not permitted to provide testimony based on conclusions of a prior expert’s analysis. In In re Bernatzki’s Estate, two physicians testified that an incarcerated testator lacked capacity at the time he executed his will in 1964. Their opinions were based in part on a report prepared by a psychiatrist dated in April 1965, which was after the will’s execution but before trial.101 Those two doctors were the only two witnesses, of twenty-two total, who testified that they believed the testator was incompetent. The supreme court held that when the two doctors based their opinion on the report of an additional expert “the opinions … invaded the province of the trial court.”102 Ultimately, the appellate court reversed the trial court’s finding of incapacity, noting that the trial court had erroneously admitted the medical doctors’ opinions.103

In In re Millar’s Estate, the trial court balanced the testimony of a psychiatrist against the testimony of a number of lay witnesses and non-specialized attending physicians.104 Testifying for two granddaughters challenging the will, a psychiatrist testified that the testatrix had intense feelings of paranoia towards her granddaughters based on a desire to control people that was exacerbated by her son’s marriage.105 The psychiatrist believed the granddaughters were excluded from the will as a rejection of her son’s marriage and the threat to her control.106

According to the psychiatrist, the testatrix lacked testamentary capacity since she “had no conception of that judgment of what to do with [her estate] because there was this paranoid feeling towards” her granddaughters.107 That expert testimony for incompetency was countered by the testimony of fourteen other witnesses, including two physicians who were not psychologists.108 All of the fourteen witnesses had known the testatrix for years.109 The trial judge admitted the will to probate. The supreme court affirmed, reasoning that the testimony of the psychiatrist had been weighed against the testimony of fourteen other witnesses and stating “[w]here the trial court … holds under conflicting testimony that the testatrix was mentally competent to make the will, and such finding is sustained by substantial evidence, the finding is conclusive on appeal.”110 In reaching its conclusion, the court also provided guidance on the admission and weighting of specialist versus non-specialist expert testimony:

the opinions of medical men, who have only normal school training in psychiatry without being specialists in the field, are admissible in evidence as to the mental capacity of a person at a particular time, because they are supposed to have become, by study and experience, familiar with symptoms of mental disease, and therefore qualified to assist the court or jury in reaching a correct conclusion… [w]hile the physicians in the instant case who attended the testatrix during her lifetime and testified for the appellee were not specialized in psychiatry and neurology, as was [the psychiatrist], they were none the less in the category of expert witnesses.111

VI. Tort of Intentional Interference with Inheritance or Gift

A. Elements of the Tort

The United States Supreme Court has characterized tortious interference with an inheritance as a “widely recognized” tort, but a sizable number of jurisdictions do not recognize the claim when another will contest remedy is available.112 In Peffer v. Bennett, the Tenth Circuit Court of Appeals articulated the elements for a claim of tortious interference with inheritance or gift.113 Specifically, the plaintiff must establish (i) that defendant intentionally interfered with the giving or leaving of property to the plaintiff; (ii) that defendant used unlawful means to accomplish the interference; and (iii) that the plaintiff was damaged by these acts.114

To demonstrate intent, the plaintiff must show that the defendant acted purposely and knowingly.115 Fraud, duress, and
undue influence are all “unlawful means” for purposes of the second element. In addition to the three Peffer elements, a plaintiff must also establish that he or she has a prospective inheritance. A mere expectancy is insufficient. Courts have found tortious interference in cases involving “wrongful procurement, frustration of testamentary execution, inducing revocation or alteration of a will, and suppression and destruction of a will.”

B. Recognition of the Tort in Kansas

Claims for tortious interference are the least favored method for dealing with fraud or undue influence regarding wills. The Tenth Circuit has even noted that a tortious interference claim should be wholly disallowed if “the remedy of the will contest is adequate and available.” This principle dates back to the Kansas Supreme Court’s first opportunity to consider a claim for tortious interference in 1939 in Axe v. Wilson. In Axe, the court explained the fundamental reason for disfavoring a tort action in cases where a will contest would provide adequate relief, specifically, that a damages claim for tortious interference is not:

an action to recover damages of any character, other than the loss of [the beneficiary’s] alleged part of the corpus of the estate which [the] plaintiff could recover in a successful action to contest the will... This is an action to recover the value of the identical property which [the] plaintiff claims she would have received and which she will receive if she succeeds in her action to contest the will.

However, the Axe court seemed to carve out two sets of circumstances when a will contest may not be an adequate remedy. First, an action for tortious interference may be permissible in cases where “the alleged fraud, in the exercise of diligence, is not and could not have been discovered by the heir until it was too late to contest the will.” Second, such an action may be permissible if the plaintiff can demonstrate damages “other than the loss of her alleged part of the corpus of the estate which plaintiff could recover in a successful action to contest the will, which actually might have been suffered by reason of the tortious act.”

Years later, in McKibben v. Chubb, the district of Kansas rejected a claim for tortious interference with inheritance, noting that a will contest was an available remedy; in fact, the plaintiff had previously attempted to contest the will. Because a successful will contest would have provided the plaintiff “all the relief he could have received in damages,” the district court dismissed the tortious interference claim. On appeal, the Tenth Circuit affirmed, noting that an action “charging undue influence or fraud in the execution of a will ... is ancillary to the challenge of the will and belongs in the Kansas probate proceedings, not in federal court.” These cases generally stand for the proposition that if the potential plaintiff cannot provide reasons that a will contest would be inadequate, his or her claim will almost certainly be dismissed.

Unfortunately, neither state nor federal courts in Kansas have had a recent opportunity to explicitly recognize or deny a claim for tortious interference, though two decisions obliquely addressed such a cause of action. In O’Keefe v. Merrill Lynch & Co., the grandchildren of a wealthy testatrix brought three separate actions to challenge both the drafting and implementation of their grandmother’s estate plan. After settling their first action, the grandchildren brought a second action alleging breach of fiduciary duty, negligence, and intentional interference with expectation of inheritance. The second action was subsequently referred to arbitration. During the arbitration, the grandchildren filed their third action, alleging claims of negligence and intentional interference with an inheritance. After the grandchildren received an award of $100,000 from the defendants in the arbitration of the second action, the same defendants moved for summary judgment in the third action asserting claim and issue preclusion as a result of the arbitration. Even though the arbitration award did not specify which of the claims it resolved, the trial court granted summary judgment. The Kansas Court of Appeals affirmed without reaching the merits of the intentional interference claim, explaining that “the same transactions and financial advice by [the defendant] were the basis for both arbitration and this case... [t]he grandchildren’s new cause of action raised in this case was determined by the arbitration panel.”

In Advance Ins. Co. of Kansas v. Topeka Rescue Mission, an appellant argued that the district court erred by not recognizing the tort of intentional interference with an insurance benefit. On appeal, the Kansas Court of Appeals discussed the elements of that cause of action as set out in the Restatement (Second) of Torts. The Restatement notes that:

[o]ne who by fraud, duress, or other tortious means intentionally prevents another from being designated by a third person as a beneficiary under an insurance policy, when he would otherwise have been so designated, is subject to liability to the other for loss of the insurance proceeds.

The trial court found no evidence of any fraud, duress, or any other tortious means of interference. Because of the lack of evidence, the court of appeals concluded that “[t]here is no merit in [appellant’s] argument that the district court failed to recognize the existence of the tort of intentional interference with an insurance benefit or expectancy in Kansas.” Because the requisite elements of tortious interference were not specifically shown in that case, the court of appeals did not reach the issue of whether that cause of action is viable in Kansas.

VII. Avoiding Challenges at the Execution Stage; Practical Advice to Counsel

Attorneys who prepare estate planning documents should always consider the possibility of a future will contest action when they are drafting and presiding over the execution of a will. Look for and flag the at-risk situations discussed supra that might form the basis for a will contest. If such a factual situation is detected, the drafting attorney should take steps to address issues that might later spur a post mortem dispute, and take preventative action before and during the execution stage.

Preventing a claim of failure to follow testamentary formal-
ties is as easy as complying with all statutory requirements. However, preventing future claims of undue influence, constructive fraud, and lack of testamentary capacity is more complicated. The best way to avoid a will contest is to have the testator meet with the beneficiaries in the presence of counsel to explain the estate plan and the testator’s reasons for what is planned. Thus, even if a disposition of assets other than in equal shares is planned, the beneficiaries will have the opportunity to hear and be fully apprised of the testator’s intent before the testator dies.

Witnesses to the will could sign memoranda about the executor’s mental condition at signing. This is particularly helpful to office staff who routinely witness wills because it will help them recall the particular event so that they can specifically refer to details of the signing without relying on memory alone. An attorney could also videotape the signing to establish the mental capacity of the testator and preserve his or her comments about the estate planning documents. An estate planner could also suggest that a physician evaluate the mental condition and state of the executor. However, unless the estate planner uniformly uses these practices, taking what appear to be special measures could suggest that the attorney had questions about the executor’s mental capacity. Nothing can prevent a disgruntled heir from filing suit or claiming that the will or estate plan does not reflect the testator’s intentions. Each client and each situation will require careful evaluation of the risks and benefits of action or non-action.

VIII. Conclusion
Will contests are an evolving area of the law, and in these troubled economic times, they are an increasingly attractive avenue for disappointed would-be heirs. The long history of will contests in Kansas has led to a rich profusion of precedent. Though the making of a will is well governed by statutory rules, determining a testator’s intent after the will has been challenged comes down to evaluating and presenting the unique factual situation in each case. Substantive challenges to the validity of a will can be based on a variety of theories, and those examined here—failure to follow testamentary formalities, undue influence, constructive fraud, and lack of testamentary capacity—do not constitute an exhaustive list.

The increase in the frequency of these actions has not eased the weighty burden of proof required to overcome the presumption of validity of a properly executed will. As concluded in the 1995 article, counsel needs strong and compelling evidence to prevail in a will contest. That remains the case to this day.

About the Authors

Jeffery Carmichael graduated from the University of Kansas School of Law in 1981. Since graduation, Mr. Carmichael has been associated with the Morris Laing firm in their Wichita, Kansas, office. Mr. Carmichael has spent the last 35 years of law practice involved in civil litigation in a variety of practice areas. A portion of Mr. Carmichael’s practice for the past 20 years has included will contest matters, where he has served as lead trial counsel on a variety of will contest cases and advised clients throughout the State on litigated probate matters. Mr. Carmichael is a member of the Kansas Bar Association, Wichita Bar Association and Kansas Trial Lawyers Association, of which he is past president.

Will Wohlford, a graduate of the University of Kansas School of Law, practices in the areas of civil litigation, complex commercial litigation, oil and gas and other energy-related litigation, eminent domain and real estate litigation, antitrust and labor and employment law. He appears in the federal and state district courts in Kansas and in other jurisdictions. Will was named the 2016 Leukemia and Lymphoma Society Man of the Year in Wichita. Will and his wife, Kat, have one daughter, Cecilia.

Sarah G. Briley is an associate at Morris Laing Evans Brock and Kennedy, Chtd. where her practice focuses on general civil litigation and employment law. She is a 2012 graduate of the University of Kansas School of Law, and currently serves as a member of the Board of Editors of The Journal of the Kansas Bar Association.

Grant Brazill is a 2015 graduate of the University of Kansas School of Law. During law school, Grant served on the Kansas Law Review and competed in the National Native American Law Students Ass’n Moot Court Competition. Since graduation, his practice focuses primarily on family and domestic issues, juvenile law, and general civil litigation. In his free time, he enjoys spending time with family, playing golf, and running.
For convenience, references to the terms “testator” or “executor” are deemed to refer to both genders.

5. In re Caisid’s Estate, 156 Kan. 73 (1942) (affirming trial court’s decision that a will was void upon the ground of decedent’s lack of testamentary capacity, undue influence of the principal beneficiaries, and the lack of independent advice).


9. Id.

10. See Sec. II, infra.


14. Will contests may only be raised by an heir of the decedent who would inherit the decedent’s property by intestate succession in the event the will is invalidated totally or partially, or by devisee or legatee from a prior will of the decedent claimed to be the decedent’s true last will and testament, K.S.A. 59-2224. Any others who contend that they would have been in the decedent’s will had the decedent been permitted to revoke the last will in favor of a new will prior to death, are limited to tort claims for tortious interference with inheritance. See discussion at Part VI, infra.


18. While this article does not discuss these defenses in depth, the reader is referred to Feeney and Carmichael, Will Contests in Kansas, 64 J.K.B.A. 22, 27 (September 1995).


20. Id.

21. Id.


26. 2012 Kan. Ct. R. Annot. 144. However, these procedures are available only if the probate proceedings are pending before a district judge or associate district judge, and issues of fact have been raised by “written defenses.” Thus, these procedures are arguably unavailable in probate proceedings before a district magistrate judge, and a careful litigant is advised to file a “written defenses” pleading in addition to any petition to probate a previous or late will pursuant to K.S.A. 59-2225 or 59-2226.

27. K.S.A. 59-2212.


37. Id.

154, 170 (1993)).

64. Mazza v. Fleet Bank, 16 A.D.3d 761 (N.Y. App. Div. 3 2005); Johnson v. Keener, 370 So. 2d 265 (Ala. 1979) (undue influence is a species of constructive fraud); Peffer v. Bennett, 523 F.2d 1323, (10th Cir. 1975) (though "undue influence and fraud are not synonymous, but are separate and distinct grounds of will contest" undue influence assumed to be a species of fraud under Colorado law).

65. See Nelson v. Nelson, 288 Kan. 570, 581–86, 205 P.3d 715 (2009); Wittmer v. Estate of Brosius, 184 Kan. 273, 279, 336 P.2d 455 (1959) ("It is frequently said that a constructive trust is imposed as a remedy for fraud. 'But there are numerous situations in which a constructive trust is imposed in the absence of fraud...' 4 Scott on Trusts, [2d ed.] § 46, p. 3102."))


69. Draper, 288 Kan. at 521.

72. K.S.A. 59-605.
73. For a more in-depth evaluation of the law concerning preparation of the will by a beneficiary under a prior iteration of K.S.A. 59-605, the reader is referred to Feeney and Carmichael, Will Contests in Kansas, 64 J.K.B.A. 22, 27 (September 1995). The cases discussed in the section entitled "Will Must Be Written or Prepared By Beneficiary" remain the controlling authority in this evaluation. The remaining sections entitled "The Sole or Principal Beneficiary," "Confidential or Fiduciary Relationship," and "Independent Advise" are now moot as a result of revisions to the statute.

77. Id., 274 Kan. at Syl. ¶ 8.
78. Culver, 2014 WL 5347287, at *7 (testator had requisite capacity; despite severe macular degeneration, because she could engage in discussions about her finances).
80. Oliver, 23 Kan. App. 2d at 516.
81. Id. at 516–17.
82. Farr, 274 Kan. at 57.
83. Id.
84. Id.
85. Id. at 68.
86. Id.
87. Id. at 58.
88. Id. at 57–58.
89. Id. at 68 (citing In re Perkins’ Estate, 210 Kan. 619, 626 (1972)).

90. In re Estate of Hubbard, 2011 WL 588493, at *4 (Kan. Ct. App. 2011) (finding that a testator still knows "the natural objects of his bounty" and has testamentary capacity if he makes a conscious decision to exclude them from his will).
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Members in the News

Changing Positions

Judge Karen Arnold-Burger was chosen by the Kansas Supreme Court to serve as chief judge of the 14-member Kansas Court of Appeals. Her term began January 9th. Burger follows former chief judge Thomas J. Malone who continues to serve on the Court of Appeals.

Aaron R. Bailey has been accepted as a Member of the law firm of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, LLC. Bailey engages in a general practice of law, including civil litigation, business transactions and litigation, estate planning and probate, and real estate matters. He is admitted to practice law before the State Courts of Kansas, the U.S. District Court for the District of Kansas and the U.S. Court of Appeals for the Tenth Circuit.

The Kansas Supreme Court appointed District Judge Kevin Berens as the chief judge of the 15th judicial district, which includes Cheyenne, Logan, Rawlins, Sheridan, Thomas and Wallace counties. Berens was succeeded to succeed Judge Glenn Schiffler who retired after 24 years as district judge, eight of which Schiffler was chief justice.

Jason Bock has been promoted from associate to a member at Flees, Gooing, Coulson & Kitch.

Brynn Brown joined Van Osdol PC as an associate attorney. Ms. Brown’s practice focuses primarily on estate planning, business and tax. She received her J.D. from the University of Missouri – Kansas City School of Law in May 2016 and is currently pursuing her LL.M. in Tax.

Shawn R. DeJarnett was named Wellington City Attorney by the city council, to a term that runs through the end of 2017 and can be renewed annually.

Former Assistant Wyandotte Attorney Mollie Hill was hired as county counselor by the Leavenworth County Commission.

Joseph, Hollander & Craft LLC has elected Jess Hoeme as a Member of the firm. Hoeme, a former Mitchell County Attorney and Shawnee County Assistant District Attorney, joined the firm in 2011 as a criminal defense attorney.

Kip Johnson and Colton Eikenberry announced that they have combined their solo law practices to form the firm Johnson|Eikenberry, in Hays, Kansas. Both are graduates of Washburn Law School, ’96, and Kansas State University ’93.

Hampton & Royce of Salina announced Lee Legleiter’s elevation from associate status to a member of the firm. Legleiter practices in the areas of tax and estate planning, probate and trust administration and real estate.

Melissa Mangan joined Hinkle Law Firm’s Waterfront office (Wichita) as an associate attorney.

Assistant Ellis County Attorney Crystalyn M. Oswald left her position in Hays to join new Wyandotte County Attorney Mark Dupree’s team as a sex crimes prosecutor.

Van Osdol PC announced Elizabeth E. Patterson as the firm’s newest partner. Patterson joined the firm in 2012. Her practice focuses on business formation, not-for-profit formation, tax policy and estate planning.

Abagail L. Pierpoint has been named partner at Wiedner & McGuiliffe, Ltd. with offices in Kansas City, Chicago, Rockford and St. Louis. Ms. Pierpoint joined the firm in 2014.

Cheyenne County Attorney Nicole Romine took the oath of office in January from newly sworn in magistrate judge Paula Keller.

Kyle B. Russell has been promoted to principal with the Jackson Lewis Kansas City Regional office in Overland Park.

Matthew T. Schippers of Tripplett, Woolf & Garretson was sworn in as an attorney in Dec. 2016, is completing his final semester of post-graduate work at New York University and will officially join the firm in June.

Joseph Schremmer is now a partner at Depew Gillen Rathbun & McLintock.

In January, Larry Schwartz was sworn in as the new Cowley Co. Attorney and Christopher Smith was sworn in as a judge with Kansas’ 19th Judicial District.

Coleman Younger joined the law firm of Galloway, Wiegers and Brinegar, PA, and will work out of both their Marysville office and their Seneca office. Coleman maintains a general law practice and is licensed in both Kansas and Wyoming. He is a member of the Agricultural Law Section in Kansas.

Miscellaneous

Kiowa County District Magistrate Judge Ann Dixson has retired after 21 years of service. Appointed to the bench in 1995, Dixson said her proudest moment was being named the Lee Nusser Outstanding District Magistrate Judge of the Year in 2013.

Retired Derby attorney Alvin D. “Al” Herrington passed away Dec. 23, 2016, after suffering critical injuries in a November house fire.

Recently elected Comanche County Attorney Allison D. Kuhns has a part-time private practice in Ashland and is also the Clark County Attorney/Counselor.

Martin Pringle Attorneys at Law 100 N. Broadway, Ste. 500 in Wichita was highlighted in the Wichita Business Journal under the headline, “Staff longevity a testament to Martin Pringle’s atmosphere, culture.” The article gave an overview of the firm’s recruitment and retention strategies, including benefits and diversity.

Angela Meyer has been named a Pittsburg Area Chamber of Commerce 2017 Woman of Distinction for her work as an attorney, business owner and volunteer.

In January, Kansas Supreme Court Justice Caleb Stegall had the opportunity to return to his native Jefferson County—where he served as county attorney at one time—to administer the oath of office to county officials and judges.

Patrick Whalen was elected by his partners to another four-year term as managing partner of Kansas City-based law firm Spencer Fane. Spencer Fane operates in Kansas City and Overland Park, but has broadened its reach with offices in Dallas, Oklahoma City, and Denver.

Recently re-elected county attorney David Yoder was profiled in a January article in the “Newton Kansan.” In the profile, Yoder noted that while the number of cases filed by his office was down, they are prosecuting a much greater number of high-profile, labor-intensive serious crimes including murder, child abuse, and torture.

Changing Locations

Shane Adamson has opened a law office at 1906 Main, Suite 111 in Parsons. He will continue his busy civil and criminal law practice in Kansas’ 11th Judicial District.

Shawna K. Corcoran, Regina M. Goff and Jennifer L. Lautz opened Corcoran, Goff and Lautz, StrongPoint Law, on Feb. 1, 2017 at 10 South Main Ste. B, South Hutchinson, KS 67505.

McNeil|Pappas PC partners, Gregory J. Pappas and James M. McNeile, announced that effective Feb. 6, 2017, their offices relocated to 7500 West 110th Street, Suite 110, Overland Park, Kansas 66210. Additional information at www.cmplaw.net.

Danielle N. Muir, sworn in as Rooks County Attorney in January, also opened a law office at 410 Main St. in Stockton. Her practice involves family law, real estate, real estate closings, estate planning and probate.
Karl Vincent Cozad

"The life given us, by nature is short; but the memory of a well spent life is eternal." Cicero, 10643 B.C.

Karl Vincent "Vin" Cozad, loving husband, devoted father and father-in-law, doting grandfather, brother, uncle, and faithful friend, passed away peacefully at his home Friday, January 13, 2017. The Mass of the Resurrection was celebrated Saturday, January 21, 2017 at St. Therese Catholic Church in Kansas City, Mo. The family received friends from Friday at the church, where the Rosary was prayed. Vin was laid to rest in Arlington National Cemetery. The Meyers Northland chapel in Parkville was entrusted with the final arrangements. Memorial contributions may be made to St. Therese Catholic Church, the American Diabetes Association, or the American Heart Association. Memories of Vin and condolences may be left at www.meyersfuneralchapel.com.

Vin was born August 8, 1945 in Wichita, Kan. to June and Charles Cozad. He graduated from Campus High School in 1963 and enlisted in the U.S. Navy, attaining the rank of Chief Petty Officer. He married Janet Kay O'Brien in July 1967. He commenced his university education while on active duty with the Navy and graduated magna cum laude from Washburn University in 1974 with a B.A. double major in Criminal Justice and Corrections, simultaneously serving as a Shawnee Co., Kan., Sheriff's Deputy. He then entered flight school at Naval Air Station, Pensacola, Fla., and became a Naval Flight Officer, serving as an A6 B/N (bombardier/navigator) out of NAS Whidbey Island, Wash. He was medically retired from the Navy and graduated from Washburn University School of Law in 1980. He was engaged in the private practice of law for several years prior to commencing work as Chief Attorney and Executive Secretary for the Kans. Board of Tax Appeals. From 1984 to 1988, he served as a special assistant attorney general specializing in labor law for the Kansas Department of Human Resources. In 1988 he returned to federal service as an agent attorney with U.S. Immigration and Naturalization Service (later Department of Homeland Security, or DHS). He retired from DHS in 2007 as Deputy Chief Counsel for Kansas and Missouri.

He was preceded in death by his parents, grandparents, and baby daughter Anna Kristina. He is survived by his wife of nearly 50 years, Janet, daughter Erin, son-in-law Maj Spencer Curtis, and granddaughter Lucy. Also surviving are his sister Candi Cheney and brothers Dean Cozad and Mike Cozad (wife Kathleen), as well as numerous dear friends and family members.

Throughout his life, he remained active with numerous organizations and groups such as the Heart of America Corvair Owners Association and especially KC's CORSA Chapter 640. He was a "long-hauler" on the Hot Rod Power Tour for nearly ten years. He enjoyed regular exercise and socializing at the Parkville YMCA. Vin will be remembered for his abiding faith in God, his devotion to family and friends, his integrity and strength of character even in the face of setbacks or illness, his sharp intellect, and his "Fr. Dad" advice. He was an inspiration to all who knew him, and he will be deeply missed.

Alvin D. "Al" Herrington

Alvin D. "Al" Herrington, 86, attorney, passed away Friday, Dec. 23, 2016. A funeral service was held Friday, Dec. 30 at First United Methodist Church in Wichita. Burial at Prairie Lawn Cemetery in Wellington. Alvin was born Sept. 23, 1930, in Wellington, Kan., to Ethel (Britt) and Joseph Herrington. He graduated from Wellington High School in 1948, received his Bachelor's degree from the University of Kansas in 1955 and graduated from the University of Kansas Law School in 1957 as a member of the Order of the Coif. Al served three years in the United States Army in the Counterintelligence Corps, Mr. Herrington practiced law with the law firm of McDonald, Tinker, Skaer, Quinn and Herrington from 1957 to 2011. He enjoyed a distinguished career and was an accomplished trial and appellate attorney. He was a member of the American, Kansas and Wichita Bar Associations. Al was very active with the Boy Scouts of America, receiving the Silver Beaver Award. He served in many positions for the Quivira Council and was a longserving member of the Board of Directors. Al enjoyed spending time with his family, his animals, and smoking his pipe. He was proud of his lifelong pursuit of learning and was currently attending classes at WSU. Al was preceded in death by his parents; son, Mark; brothers, Maurice Lee and Merlin Herrington. Survivors: children, Tracy (Anthony) Profita, Dan (Kathy) Taylor all of Wichita; brother, Donald of Wellington; grandchildren, Zachary Herrington, Nicole Howerton, Jordan DonJuan and Joseph Profita; 4 greatgrandchildren. Memorial established with Boys Scouts of America, 3247 N. Oliver, Wichita, KS 67220. Downing & Lahey West. www.dlwichita.com.
Working for Kansas

Beginning in July 1942, when we provided coverage to our first eight members, our goal has always been to offer access to a better quality of life – for our members and all Kansans.

We’re committed to providing a wide choice of benefit plans, tailored to our members’ changing needs. We offer programs to promote everyday health and wellness. Our leadership and employees play an active role in the betterment of the communities we serve.

For 75 years – we are Kansans serving Kansans.
What is LOMAP?

The Law Office Management Assistance Program (LOMAP) is a resource for all KBA members and was created to help Kansas attorneys better organize and operate their practices. We offer no-cost and confidential assistance with practice management issues for attorneys and soon to be attorneys. We provide an array of information on topics, such as starting and running a law firm, closing a law firm, marketing, client relationships and communication, technology, and more.

What type of assistance does LOMAP offer?

LOMAP assists with consultations, recommendations, information to members on most aspects of managing their practice.

For example, information and resources are available in the following practice areas:

- Financial Management
  - Budgeting, Time-keeping, Billing & Trust Accounts
- Business Planning
- Office Technology
- Risk Management
- Disaster Preparedness & Professional Liability Insurance
- Document Management
  - File Maintenance & Paperless Office
- Office Systems and Procedures

What type of assistance is LOMAP unable to provide?

LOMAP does not provide assistance on substantive legal issues.

Is the service confidential?

Yes. All questions and consultations are confidential.

How much does this service cost?

LOMAP consultation services are offered at no cost for KBA members.

What if I am not a KBA member?

LOMAP consultation services are offered only to KBA members as a member benefit. If you wish to take advantage of these services, we encourage you to join the Association. You may join online at www.ksbar.org/JoinRenew
KBA LOMAP Services

Our services include...

**Quick Questions.** Sara Rust-Martin, Sections & Law Practice Management Attorney, will answer brief questions about management and technology issues. Questions can be taken by phone by calling (785) 234-5696 or by emailing srustmartin@ksbar.org. Often, we can provide access to detailed information to answer your questions.

**Free Consultations.** Any member who is setting up a new practice, or is currently in practice, is welcome to visit with the Sections & Law Practice Management Attorney. These consultations can take place at the Kansas Law Center or in the attorney’s office. A wide variety of topics can be covered during these confidential consultations. To schedule a consultation, call the KBA.

**Lending Library.** Law practice management books are available for members to check out and review. Checking materials out of the LOMAP library is easy as a phone call or email. Additionally, a request can be made online.

- Materials can be sent through the mail or picked up at the Kansas Law Center.
- If there is an item currently checked out, you may be put on a waiting list, and we will contact you when the item is ready for check out once returned to the Lending Library.
- No more than two items may be checked out at a time.
- All materials that are checked out may be kept for 30 days.
- Checked out materials maybe renewed for an additional two weeks unless there is a waiting list for the material.
- Users take responsibility for all materials checked out from the LOMAP Lending Library and explicitly agree to replace materials which are damaged or lost.

**LOMAP Resource Page.** We regularly post law practice management tips and useful links to information. www.ksbar.org/lomap_resources.

*This page will be going through a remodel over the next few months, so STAY TUNED!*
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2017 Midwest Intellectual Property Institute

Friday, May 5

Sprint Corporation
6050 Sprint Pkwy
Overland Park, Kan.
(Sprint Campus)

www.ksbar.org/event/2017IPIInstitute
Warning: Contents May Settle

Anyone who has ever been dished a ladle of hearty soup from a stock pot knows all servings are not equal. While the pot may be a rich steaming blend of meats, vegetables, broth, and spices, if it remains unstirred it becomes distasteful, non-homogenous, and stratified. A shallow dip of the ladle produces a broth bearing the flavor of the lighter ingredients but fails to deliver on the complexity of the whole—omitting the colors, textures, and nutrients the soup has to offer. In many ways, our court system resembles that unsatisfying partial taste of the more complex whole.

According to the most recent U.S. Census data, the population of the U.S. can be broadly broken down as approximately 77 percent white alone. However, our current 23 percent non-white population is rapidly expanding. For example, the U.S. Census Bureau estimates that by 2060 one third of the U.S. population will be Hispanic. The U.S. Census Bureau projects America will find itself a “majority-minority” nation as soon as 2043 with no racial group making up a majority. While less diverse than the nation, Kansas’ minority population stands at 13.3 percent of its nearly three million residents.

Despite this current and growing diversity, the state and federal court systems lag far behind. The Kansas Office of Judicial Administration reports that racial minorities make up a mere three percent of the 287 sitting judges at the supreme, appellate, and district court level. Numbers in Missouri are similarly disproportionate where a 2010 American Bar Association report showed only five percent of the Missouri judges were racial or ethnic minorities. While the diversity of the federal bench has increased with appointments by President Obama, African-American and Latino judges comprise only 18 percent of federal judges.

The event served as an excellent starting point to address the lack of diversity in our courts. Yet more must be done if we are to create a bench and bar ready to serve a more diverse population. The KBA’s Diversity Committee has a group of dedicated lawyers looking to nominate qualified lawyers of color to judicial vacancies, to ensure that nominating commissions represent diverse populations, and to encourage diverse candidates to run for judicial office in districts with direct election of judges. Individual lawyers can mentor young minority lawyers and encourage them to seek judicial roles. Kansas’ law schools can also play a critical role in addressing the need for a more diverse judiciary by recruiting and preparing more diverse graduating classes. Finally, Kansas’ political leaders can help by nominating more diverse judges and by creating appointment systems more likely to result in the successful selection of diverse candidates.

Only by working together as a profession can we hope to diversify the bench. This may be the rare case where many cooks may improve, rather than spoil, the brew.

About the Authors

Lanna Allen is a first-year student at the Washburn University School of Law and serves on the KBA Diversity Committee.

Joe Mastrosimone is an Associate Professor of Law at Washburn University School of Law. He serves as the chair of the KBA Diversity Committee and teaches in Washburn Law’s nationally ranked Legal Analysis, Research, and Writing program.

Endnotes:
3. Id.
WHAT IS ABA FREE LEGAL ANSWERS?
ABA Free Legal Answers allows users to pose legal questions to be answered by volunteer attorneys:
• Users will need to meet income eligibility guidelines
• Questions must be regarding civil legal matters
• Answers will be provided by volunteer attorneys in the users’ respective states
• Links will be provided to lawyer referral and other legal services projects for those not eligible or who need more in-depth legal representation

ABA Free Legal Answers increases services to low-income populations:
• Allows users in rural areas to access legal resources from across the state
• Provision of brief advice allows legal services staff attorneys to focus on full representation
• Provision of brief advice can prevent larger legal crises from developing
• OnlineTNjustice.org—the Tennessee model for ABA Free Legal Answers—has, in its few years of service, received over 10,000 legal questions

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• Malpractice insurance for all volunteer attorneys will be provided
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If your state is not already participating and you are interested in learning more, contact Tali Albukerk at 312.988.5704 or abafreelegalanswers@americanbar.org.
A public display
of the newly-acquired Judicial Portraits
Friday, June 23rd
Leavenworth Justice Center
601 S. Third St.
Leavenworth
from
2:00 pm to 4:00 pm

The following are stories of several jurists featured in the district court’s portrait collection who called Leavenworth home:

**DAVID BREWER (1837-1910)**

Of all the lawyers and jurists who have served the Leavenworth community during the past 150 years, arguably none achieved greater glory than David Josiah Brewer. Born to an American missionary in what is now Turkey, Brewer was raised in Connecticut and found his way to Kansas in the late 1850s after graduating from Yale College and Albany Law School. Upon his arrival in Leavenworth, Brewer wasted no time making a name for himself in the local legal community; by age 30, he had served as U.S. commissioner, superintendent of public schools, president of the Kansas Teachers Association, probate judge, and state district judge. His fast track eventually led him to the Kansas Supreme Court in 1870, where he served for 14 years. Brewer’s work on the Kansas Supreme Court got him noticed in Washington, and in 1884 he received appointment as a federal circuit judge. Five years later, President Benjamin Harrison nominated Brewer as an associate justice of the U.S. Supreme Court, and in two weeks the U.S. Senate confirmed the appointment.

Once described as having the “true judicial instinct,” Brewer authored more than 500 majority opinions during his twenty-one years on the high court. With a judicial philosophy described as “moderate conservative,” Brewer frequently sided with corporations against state powers regarding regulation of wages and working conditions for employees, as in the notorious case of *Lochner v. New York.* However, Brewer supported granting states broad powers to enforce social regulation. Brewer was also a prominent advocate of minority rights and individual freedom. He was one of the rare supreme court justices of that era to openly express his opinion on public issues of the day. Brewer remained a popular figure in Leavenworth long after his departure for Washington, D.C., and frequently revisited the community he had called home for three decades. One local merchant went so far as to name a cigar after him. Brewer is recognized with three portraits in the Leavenworth Co. District Court collection, as a state district judge, Kansas Supreme Court justice, and U.S. Supreme Court justice. He remains the only judge appointed to the U.S. Supreme Court from the state of Kansas.
SAMUEL LECOMPTÉ (1814-1888)

A Maryland native and unabashed pro-slavery sympathizer, Lecompte came to Kansas in late 1854 after President Franklin Pierce appointed him as the first chief justice of the Territorial Kansas Supreme Court. He also served concurrently as district judge for the First Judicial District of Kansas. Lecompte’s court has been described as “the first outpost of justice in a frontier settlement beset by sectarian strife.” During a turbulent four-year term, Lecompte became embroiled in the slavery conflict that enveloped Kansas after passage of the 1854 Kansas-Nebraska Act. Within a year of his arrival, Lecompte recognized a pro-slavery territorial legislature chosen in an allegedly fraudulent election. Thereafter, Lecompte was frequently accused of using his office to encourage civil unrest between Kansas pro-slavery and free-state factions, and his name became associated with the expansion of slavery and legal corruption in territorial Kansas. However, he was never convicted of judicial misconduct.

After retiring from office in 1859, Lecompte practiced law in Leavenworth and also served as probate judge. He was also elected a state representative from Leavenworth and, in addition to his lawmakers duties, also served as the “Poet Laureate” of the Kansas Legislature. Late in life, Lecompte vigorously disavowed wrongdoing committed by others in his name during his years on the territorial court, and insisted his political beliefs never interfered with his judicial decisions. Whatever his historical reputation, Lecompte is also seen as “instrumental in establishing the Kansas legal system.” The town of Lecompton, named for Lecompte, served as the Kansas territorial capital from 1855 to statehood in 1861.

THOMAS EWING JR. (1829-1896)

Thomas Ewing Jr. was the first chief justice of the Kansas Supreme Court. The son of a former U.S. senator from Ohio, Ewing brought his own outsized ambitions to Leavenworth in 1856 and entered law practice with his brother-in-law William Tecumseh Sherman. During the following six years, Ewing’s ascent of the Kansas political ladder was rapid. He joined the Free-State Party, and in 1858, served as a delegate to the Leavenworth Convention, which adopted a free-state constitution. That document served as a model for the later Wyandotte Constitution that secured Kansas’s admission to the Union in 1861. During that period, Ewing became a stockholder and leading advocate of the Leavenworth, Pawnee and Western Railroad, which eventually became part of the Kansas Pacific Railroad and later the Union Pacific Railroad. Ewing hoped to become one of Kansas’s first U.S. senators, but had to settle for election as chief justice.

After the Civil War broke out, Ewing helped organize the 11th Kansas Infantry despite having no pre-war military experience. After only a year as chief justice, Ewing resigned to undertake full-time military duties. As a Union brigadier general, Ewing was responsible for the notorious General Order No. 11, which forced the evacuation of 20,000 residents from several Missouri border counties in an effort to curb guerilla warfare in the region. At war’s end, Ewing left Kansas for Washington, D.C., where he served as defense counsel for several defendants alleged to have participated in the conspiracy to assassinate President Abraham Lincoln. Ewing eventually returned to Ohio and served two terms as a U.S. congressman. After losing a close race for governor of Ohio in 1880, Ewing practiced law in New York City until his death.

ROBERT CROZIER (1827-1895)

Robert Crozier arrived in Leavenworth from Ohio in the mid-1850s and established what is known today as the Leavenworth Times, claimed to be the oldest daily newspaper in Kansas. President Lincoln appointed Crozier as U.S. Attorney for the District of Kansas in 1861. Crozier resigned in 1864 upon his appointment as Chief Justice of the Kansas Supreme Court, the second chief justice to serve from Leavenworth. Crozier later served as a state district judge in Leavenworth from 1876 to 1892. He also served as a U.S. senator from Kansas between November 1873 and February 1874, after his appointment to fill an unexpired term.

DANIEL VALENTINE (1830-1907)

Daniel Valentine was yet another native Ohioan who made his name in Kansas judicial circles. After receiving his education in law and surveying, Valentine practiced law in southwestern Iowa for several years before moving to Leavenworth in July 1859. Valentine stayed in Leavenworth only a year before moving to Franklin County, where he served as a district judge of the Fourth Judicial District from 1865 to 1869. He was also a member of the Kansas Legislature during the early days of statehood. Valentine was elected to the Kansas Supreme Court in November 1868 and served twenty-four years as one of three justices, writing more than 1,500 opinions. David Brewer, who served with Valentine on the Kansas Supreme Court, considered his colleague “one of the most painstaking and thoughtful judges I know.” Valentine may be best remembered for his majority opinion in *Bd. of Educ. of Ottawa v. Tinnon* in which the Kansas Supreme Court upheld a lower court order requiring a school district to permit a black child to attend a whites-only school. Declaring that the city of Ottawa lacked authority to establish separate schools based on race, Valentine referred to the Fourteenth Amendment as a possible basis for future legal challenges to state-sanctioned racial discrimination. Although Valentine’s days in Leavenworth were brief, he recorded many of his personal impressions of that period in a diary that has been described as having “immense value for the legal history of Kansas Territory.”

THEODORE HURD (1819-1899)

Theodore Hurd (portrait on pg. 38) was once described as a lawyer and jurist who “combined intelligence, logical reasoning and self-possession with a tenacity of purpose which made him a successful attorney and astute judge.” Hurd arrived in Kansas from New York state in the mid-1850s, and by 1859, had established a law practice in Leavenworth. During the next twenty-five years, Hurd focused his legal efforts in railroad and insurance litigation and became a recognized authority in constitutional and corporation law. In April 1884, Hurd was appointed to the Kansas Supreme Court to
serve out the unexpired term of fellow Leavenworthian David Brewer, who had departed for the federal bench. Hurd remained only eight months in office.67

**ARTHUR STANLEY JR. (1901-2001)**

During a lifetime that began in rural Kansas and encompassed the entire 20th century, Art Stanley served the nation as a soldier, lawyer, and jurist. At age 16, Stanley ran away from home to enlist in the Canadian Army.48 By 24, he had served as a horse soldier in Mexico with the U.S. Seventh Cavalry (on one occasion taking part in a horse-mounted charge against forces led by Pancho Villa49) and on a minesweeper in China with the U.S. Navy.50 Upon completing military service, Stanley attended the Kansas City School of Law, receiving his LL.B degree in 1928.51 That same year, Stanley joined the state bar and entered law practice with his father in Kansas City, Kan.52 Stanley served three terms as Wyandotte Co. Attorney during the late 1930s, and was elected to the Kansas Senate in 1940.53 In the spring of 1941, Stanley was recalled to active military duty and resigned his Senate seat after the attack on Pearl Harbor.54 During his subsequent service as an officer in World War II, Stanley served in France with the Ninth Tactical Air Command, which provided ground support for the Normandy invasion force.55 Stanley walked ashore on Omaha Beach on D-Day plus two.56 After the war, Stanley returned to his law practice, and in June 1958 was nominated by President Dwight Eisenhower to a judicial vacancy on the Kansas federal bench.57 Eight days after his nomination, the U.S. Senate confirmed Stanley as the 11th U.S. District Judge for the District of Kansas.58 Stanley spent thirteen years in active service on the Kansas federal bench, including ten years as chief judge, and served many years thereafter as a senior federal judge.59 He was also a busy historical author; his works included histories of Leavenworth, Fort Leavenworth and the Tenth Circuit Court of Appeals.60 Stanley maintained close ties to Fort Leavenworth, lecturing regularly at the Command and General Staff College and helping to establish the Frontier Army Museum and Fort Leavenworth Hall of Fame, into which he was posthumously inducted in 2013.61

Stanley died two months shy of his 100th birthday. Despite his many accomplishments, Stanley's personal philosophy was a modest one: “My goal in life has been to have and deserve the affection of my family and the respect of my professional colleagues.”62

**ROBERT DAVIS (1939-2010)**

Bob Davis was the first Leavenworth resident in 140 years to serve as Chief Justice of the Kansas Supreme Court. Davis graduated from Creighton University and Georgetown University Law School, and served in the U.S. Army Judge Advocate General Corps before joining his father’s law firm in Leavenworth. Davis practiced law in Leavenworth for seventeen years, during which he also served a term as Leavenworth Co. Attorney and seven years as magistrate judge. In 1984, Davis was appointed as a district judge of the First Judicial District in Leavenworth. Two years later, Davis was called to serve with the state court of appeals, where he remained until 1993, when he was named to the state high court. In January 2009, he was elevated to chief justice upon the retirement of Chief Justice Kay McFarland.

During his twenty-four years on the Kansas Supreme Court and Court of Appeals, Davis participated in thousands of appellate rulings.63 During his tenure on the Supreme Court alone, Davis wrote more than 350 majority opinions. Davis was described as having “an innate ability to cut to the chase of the legal issues before him, and . . . the knowledge and skills to write flowing and well-reasoned opinions.”64

Though Davis’ service as chief justice was too brief, he made his mark as a vocal and tireless advocate for the fair and efficient administration of justice in Kansas. His influence was felt in many areas of Kansas court reform, including alternative dispute resolution, lawyer specialization, and adoption reform.65 At the time of Davis’s passing, Kansas Gov. Mark Parkinson commented, “Chief Justice Davis was much more than a great judge. He made every person he encountered, regardless of their relative stature in the world, feel like they were the most important person he had ever met. Kansas didn’t just lose a brilliant justice . . . we lost a great man and a true Kansan.”66

**1890 UNITED STATES SUPREME COURT**

While conducting research into his family history, Leavenworth Co. Attorney Todd Thompson learned of the existence of an 1890 photographic portrait of the nine U.S. Supreme Court justices, which included David Brewer of Leavenworth. The portrait was created by Napoleon Sarony, a New York celebrity photographer.67 Upon further research, Thompson discovered that Brewer had given the Sarony portrait to the Leavenworth Co. Bar Association, and that U.S. District Judge Arthur Stanley had displayed it in his courtroom located above the U.S. Post Office building in Leavenworth. In 2001, Stanley bequeathed the portrait to the Leavenworth Co. Historical Society, where it was displayed in the library of the society’s museum for several years.68

Thompson thought the Sarony portrait would make a fine addition to the Leavenworth Co. District Court’s portraiture collection, and he contacted the Historical Society about acquiring it for the county bar association.71 The Society, in consultation with the National Archives, determined that the historical value of the portrait required immediate action to secure and preserve its condition.72 The Society later provided the district court with a digitized copy of the Sarony portrait for display in the Leavenworth Justice Center.

The Sarony portrait is unique in two significant respects. First, it bears the signatures of all nine justices. Second, the
Portraits in Justice

Robed justices are photographed amidst a tousled rug and draperies flung over hay bales, a far cry from the dignified surroundings that usually accompanied judicial portraiture. Why Sarony chose to photograph the justices in this fashion, and why the justices agreed to it, is unclear. Whatever his motivation, Sarony and his camera undoubtedly represented the U.S. Supreme Court as humble servants of the American people, with no concern for the trappings of power and prestige. The result was a portrait unlike any other in the two-plus centuries the United States Supreme Court has been in existence.

About the Author

Steven Crossland is the court administrator for the First Judicial District, which includes the district courts in Leavenworth and Atchison counties. He has served the Kansas judicial branch for 28 years. Crossland received an M.S. in journalism from the University of Kansas in 1998 and a J.D. from Washburn University School of Law in 2004, where he also served as a staff member on the Washburn Law Journal.

Endnotes:
2. Id. at 569-70; Wayne Delavan, The Political Philosophy of Supreme Court Justice David J. Brewer, Arkansas Academy of Science Proceedings, Vol. 18 (1964), at 66.
8. 198 U.S. 45 (1905) (holding that a state maximum work-hour labor law for bakers violated the Fourteenth Amendment). See also J. Gordon Hylton, David Josiah Brewer and the Christian Constitution, 81 Marq. L. Rev. 417, 423 (1998). However, Brewer later wrote the majority opinion in Muller v. Oregon, 208 U.S. 412 (1908) (holding that state maximum work-hour law for women was not unconstitutional; states permitted to recognize physical differences between men and women in applying such laws).
18. Spurgeon, supra note 16.
20. Id. at 1180.
21. Id.
22. Id. at 1169.
23. Thomas Ewing, Jr., Papers, (microfilm edition), manuscript divi-
sion, Kansas Historical Society, available online at www.kshs.org.
27. Id. at 163.
28. Id. at 177.
29. Id. at 201-02; Keating, “Ewing, Thomas Jr.” supra note 24.
31. Thomas Ewing, Jr., Papers, supra note 23.
34. Letter, Robert Crozier to Abraham Lincoln, supra note 33.
36. Id.
38. Id.
39. Id.
40. Id.
42. 26 Kan. 1 (1881)
46. Id.
47. Kansas Judicial Branch website, History of the Kansas Supreme Court Justices, available online at www.kscourts.org.
49. Article (author unknown), “Two to be inducted into Hall of Fame.” Leavenworth Times, April 25, 2013, at A3.
52. Id. at 1; Templar, Arthur J. Stanley Jr., at 32.
53. Templar, Arthur J. Stanley Jr., at 32; Article, “Two to be inducted into Hall of Fame,” Leavenworth Times, supra note 49.
54. Duncan, Arthur J. Stanley, Jr., at 3; Templar, Arthur J. Stanley Jr., at 32.
55. Templar, Arthur J. Stanley Jr., at 32.
56. Article, “Two to be inducted into Hall of Fame,” Leavenworth Times, supra note 49.
58. Id.
60. Duncan, Arthur J. Stanley, Jr., at 6; Article, “Two to be inducted into Hall of Fame,” Leavenworth Times, supra note 49.
61. Article, “Two to be inducted into Hall of Fame,” Leavenworth Times, supra note 49.
63. Ron Keefover, news release, Chief Justice Davis Dies, Aug. 5, 2010, Office of Judicial Administration, Topeka, Kansas. 64. Id.
65. Id.
68. Barbara Schmidt, Special Feature, Mark Twain, Napoleon Sarony and “The damned old libel,” available online at www.twainquotes.com.
69. Todd Thompson, e-mail to author, July 10, 2016; Mary Ann Brown, Leavenworth County Historical Society, phone interview with author, Dec. 6, 2016.
70. Brown interview, supra note 69.
71. Thompson e-mail, supra note 69.
72. Brown interview, supra note 69.
74. Id.
I. Introduction.

Other than criminals, it is a safe bet that everyone agrees bad guys should not get to keep the profits of illegal activities or use property in such a way that it damages our society. But at the same time, we would all agree that property rights are important and that innocent property rights should be protected. So, how do we constitutionally accomplish both of those very legitimate policy goals? Well, for more than 200 years Americans have found no better way than to target such ill-gotten gains and criminal assets through the use of civil asset forfeiture, a legal mechanism that removes bad property from bad uses, and redirects it to victims and community safety programs.

The current debate over civil asset forfeiture is the fourth of its kind in Kansas since 1970. Each time, we stop to examine and evaluate the need for, and the scope of, our state’s forfeiture laws. Each time, the debaters change but the myths surrounding civil forfeiture creep back in, “...for the great enemy of the truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive, and unrealistic.”

II. The Current Debate.

The Kansas Supreme Court reminded us fifty years ago that “[t]he police power is an inherent power of the Sovereign and is essential to protect members of the community from injury. It rests upon the fundamental principle that all property is owned subject to the limitation that its use may be regulated for the safety, health, morals, and general welfare of the community in which it is located.”

Grounded in that police power, civil asset forfeiture is an in rem (against the property itself) proceeding in civil court that legally severs ownership rights in certain property because that property represents the “proceeds” from crime, or that property was used or intended to be used in an illegal exchange—such as to purchase controlled substances—or that property was used or intended to be used to make committing
a crime easier (known as facilitation). Many of the civil forfeiture court case names are strange, but they quickly identify that each is a proceeding against property and not a person: State v. $551,985.00 in U.S. Currency or State v. One 2006 Grey Lexus SC430.5

Civil forfeiture has been public policy in America since colonial times. In 1789, our First Congress passed customs acts containing in rem forfeiture procedures for the enforcement of the laws of the newly born nation. Kansas has had civil forfeiture laws or public nuisance statutes since it was a western territory.6 The use of civil forfeiture has repeatedly been held constitutional by both Kansas state courts and the United States Supreme Court.7

In 1994, the Kansas Legislature passed, almost unanimously, the current civil forfeiture reform act known as the Kansas Asset Seizure and Forfeiture Act (KSASFA).8 The Kansas Bar Association praised KSASFA, calling civil forfeiture a “legitimate tool for law enforcement.”9 There have been approximately twenty Kansas appellate court cases interpreting KSASFA. No appellate case has found a single issue with its due process provisions.10

In 2000, an audit was undertaken by the Legislative Division of Post Audit to determine “whether the laws governing the sale of [forfeited] property are being followed, and how the proceeds are spent.” That audit found no misuse of funds, but did find that some agencies mixed drug tax and state forfeiture monies into one fund and failed to submit annual reports on forfeitures to their governing bodies.11

Although civil forfeiture was under recent national media scrutiny,12 the current Kansas debate started in the 2015 legislature with the introduction of a bill that would have required a criminal conviction before civil forfeiture was authorized.13 That bill was followed in 2016 by two more: the first required that each is a proceeding against property and not a person involved in the seizure and forfeiture of the property to be heard, and a decision by a neutral fact-finder:

a. Law enforcement may only seize property upon probable cause to believe that property is then subject to forfeiture; probable cause is the same level of constitutional suspicion required to take a person into custody for an alleged crime.16
b. Law enforcement is required to provide written notice to the person from whom property is seized. Among other things, the notice contains information about the property, the law enforcement agency involved, and a contact person able to respond to questions.17

c. Constitutional notice of a forfeiture proceeding is required to be given to all known and unknown potential claimants, innocent owners, lienholders, etc. that may have an ownership interest in the seized property.18

d. Claimants may request a probable cause hearing before a district judge.19

e. Similar to persons arrested of crimes, seized property can be released upon the posting of an appropriate bond.20

f. Seizures are reviewed by the county or district attorney or other forfeiture prosecutor before the case is filed in court.21

g. There are no filing fees to file a claim in a civil forfeiture case.22

h. The state is required to file the civil forfeiture case in court within 90 days of the seizure for forfeiture, or the property is subject to a conditional release by the court.23

i. A civil forfeiture case may be stayed pending the resolution of a parallel criminal case involving a claimant to protect that claimant’s Fifth Amendment rights.24

j. No civil forfeiture case may be conditioned upon a plea bargain of a parallel criminal case; and no criminal case may be conditioned upon a settlement of a parallel civil forfeiture case.25

k. A claimant may request that a court dismiss an improper forfeiture complaint; may request the suppression of evidence illegally obtained by the state; has the right to all discovery materials in the state’s possession; and, may depose the state’s witnesses before trial and may cross-examine them at trial.26

l. KSASFA provides for settlement between the parties at any time during the seizure and forfeiture process. Settlements must be in writing and approved by a district court judge.27

m. Civil forfeiture trials are heard and decided by a judge of the district court.28

n. At trial, the state has the initial burden to prove by a preponderance of the evidence that the seized property is subject to forfeiture. The “preponderance of the evidence” standard is the same as in most other civil court disputes. Upon a showing of forfeitability, a claimant is then and only then required to put up a defense. Should the state not carry its burden of proof, the claimant has no requirement to put on any evidence; the claimant wins and the property is ordered released.29

o. Although innocent ownership of property is not a constitutional right, Kansas has an absolute statutory innocent owner defense to forfeiture. Owners who did not know and could not have reasonably known that their property was going to be used illegally, or who acted reasonably to prevent the illegal use, are fully protected from forfeiture.30

p. A court is required to review and prevent a forfeiture from being grossly disproportionate to the crime involved in the civil forfeiture. In other words, small crimes cannot result in very large forfeitures.31

q. Should the claimant be unsuccessful at trial, the claimant has the right to appeal the case to the Kansas Court of Appeals.32

r. In any subsequent public sale of forfeited property, no person involved in the seizure and forfeiture of the property
Civil Asset Forfeiture Debate

(i.e. law enforcement, attorneys, judges, or staff) may bid on or purchase the property.33

Myth #2. Most claimants walk away from seizures because it is so hard and expensive to fight a civil forfeiture.

It costs absolutely nothing to file a claim in a civil forfeiture case in Kansas.34 Unrepresented claimants regularly file claims and win their cases in Kansas courts.35 Most claimants who hire attorneys do so under a contingent fee agreement, meaning the attorney receives no fee unless the case settles or the claimant prevails at trial.

Stefan Cassella, a leading federal asset forfeiture treatise author and practitioner, recently remarked on why potential claimants refuse to file a claim saying,

…it has been suggested that the reason that eighty percent of civil forfeiture cases are uncontested is that there is no right to counsel. That is not true. Before CAFRA [the federal Civil Asset Forfeiture Reform Act] was enacted in 2000, it was similarly argued that the reason a similar fraction of cases was uncontested was the burden of proof was on the claimant, there was no innocent owner defense, and claimants were required to post a cost bond before they could get in the courthouse door. Yet when reforms addressed to those issues were enacted by CAFRA, the fraction of contested cases remained virtually unchanged…[t]he real reason is that in most civil forfeiture cases, there is no defense to the forfeiture, or the property owner does not see it as being in his interest to raise one. If the government seizes $60,000 in cash, a loaded handgun and a kilo of cocaine, potential claimants to the money may—and almost always do—walk away without filing a claim, even if represented by counsel…36

Since property seizures by law enforcement typically involve a parallel criminal investigation, many potential claimants choose not to be connected with the event.

Myth #3. Law enforcement is incentivized to violate civil rights because forfeiture law directs forfeited property to law enforcement trust funds, and there are no controls on law enforcement’s use of forfeited property.

For over 30 years, the United States Congress and the Kansas Legislature have directed forfeited property to law enforcement and community safety programs to help fund those activities at a lower cost to the taxpayer, and encourage federal, state and local law enforcement agencies to work together more closely.37

Unlike a few other states, in the 22-year history of KSASFA, there has not been one documented abusive seizure of property in Kansas. That is not to say the incentive to abuse does not exist, but the record certainly suggests that KSASFA has had sufficient checks, balances, and protections to have prevented improper seizures from seeing a courtroom since its inception.38 “The protection against improper police activity that may be motivated by a need to enhance law enforcement resources has always been to ensure due process in the forfeiture proceeding. There is nothing wrong with providing law enforcement agencies with an incentive to combat criminal activity by focusing on the economic foundations of the illegal enterprise if the protections guaranteed by the Fourth and Fifth Amendments are preserved.”39

Admittedly, there have been agency administrators who have been justifiably questioned by the media about “unusual” purchases with forfeited funds.40 However, there has not been one Kansas case of criminally misappropriated funds.

State law requires forfeited funds to be placed into an agency’s law enforcement trust fund.41 It requires that the fund go through the regular audit process and all expenditures go through the normal local authorization process. The funds may only be used for “special, additional law enforcement purposes.” The funds must supplement and not supplant a law enforcement agency’s budget, and all deposits and expenditures from the trust fund must be publicly reported to the agency’s governing board. It is illegal to forecast into the budgeting process future forfeiture receipts.42

Myth #4. Property owners should be convicted of a crime before property is forfeited.

At first blush, that sounds like a really great idea to most people. The only problem is that for decades it has been found not to work…ever, at all. First, criminals die. When that happens, there can never be a conviction. Second, some criminals simply abscond before they are convicted and are never heard from again. In fact, at the time of seizure, a significant percentage of criminals give invalid contact information, addresses, and telephone numbers because they want nothing to do with the bad property. Third, some criminals are not prosecuted for valid reasons such as insufficient evidence in the parallel criminal case, age, poor health, lack of mental capacity, cooperation in other and more important investigations, agreements with prosecutors to testify against co-defendants, or a simple lack of prosecutorial resources. Fourth, for decades courts have recognized that smart and experienced bad guys put their assets into the names of relatives, friends, and sham companies to protect them from the prying eyes of other criminals, law enforcement investigators, and from civil forfeiture.43

[N]o one can seriously argue that a person who knowingly allows his gun to be used to commit a murder should be allowed to recover the gun. Nor should the donee of fraud proceeds be allowed to retain the victim’s money because the perpetrator is at large and cannot be prosecuted…[c]ivil forfeiture provides an alternative, noncriminal remedy for wrongdoing committed by a person who, in the interests of justice, needs not be subjected to criminal prosecution, but nevertheless should be sanctioned for his or her participation in a serious criminal offense.44

As a practical matter, requiring a criminal conviction to later forfeit criminal assets would essentially raise the burden of proof for the forfeiture action to “beyond a reasonable doubt” (the requirement for the criminal conviction). Nowhere else in property and tort law is there such a stringent requirement. An analogy to that proposal would be requiring a criminal
A federal court in Wichita forfeited it.46

Evidence. When no one came forward to claim the cash, DEA pursued a money to a large drug organization, no criminal charges were

Lengthy parallel criminal investigation and tentatively tied the

Tied the investigation, twelve suitcases were located that none of the

Aircraft's occupants would claim. The twelve suitcases containing the investigation, twelve suitcases were located that none of the

Jet traveling across the country. When the aircraft stopped for

Suspicious aircraft flight plan of a small, commercially chartered

A court in Colorado forfeited the other five million dollars. Because of his death, Golding was neither charged nor convicted.45

2. $5,535,870.00 in U.S. Currency.

In January 2000, while traveling in a rented car through Colby, Kan., Justin Erik DeBusk committed a traffic offense. DeBusk and his passenger, Robert Henry Golding, were stopped by a Colby police officer. During the event, when he thought he was going back to prison, Golding killed himself at the scene of the traffic stop.

Inside the trunk of the rental car was Golding’s $3,770,000.00 in cash. Elsewhere, inside of a storage locker in Colorado, Golding had stashed another five million. All of the money was derived from Golding’s longstanding illegal interstate and international marijuana business. The state of Kansas filed a civil forfeiture action against the money seized in Kansas, and it was later forfeited. A federal court in Colorado forfeited the other five million dollars. Because of his death, Golding was neither charged nor convicted.45

2. $5,535,870.00 in U.S. Currency.

In October 2010, Wichita DEA agents were notified of a suspicious aircraft flight plan of a small, commercially chartered jet traveling across the country. When the aircraft stopped for fuel in Salina, agents contacted the crew and passengers. During the investigation, twelve suitcases were located that none of the aircraft’s occupants would claim. The twelve suitcases contained $5,535,870.00 in currency. Although DEA pursued a lengthy parallel criminal investigation and tentatively tied the money to a large drug organization, no criminal charges were ever brought against anyone due to an insufficient amount of evidence. When no one came forward to claim the cash, a federal court in Wichita forfeited it.46


In November 2014, the Federal Bureau of Investigation searched certain financial records at the district headquarters of Unified School District No. 266 in Maize, Kansas. Ramon Mosate, the district’s technology director, was under investigation for defrauding the district of over one million dollars. Later, but before he was charged with a crime, Mosate killed himself in Irving, Texas. Because of his self-inflicted death, no criminal charges could ever be filed against him.

During the criminal investigation, the United States had filed a civil forfeiture complaint against Mosate’s house and bank accounts where he had placed some of the criminal proceeds. In a September 2016 settlement of the civil forfeiture case, almost $490,000 was recovered and returned to the school district.47

Civil forfeiture, without the need of a criminal conviction, prevented the estates of Golding and Mosate from keeping the proceeds of their crimes. Civil forfeiture, without the need of a criminal conviction, forfeited the millions in drug proceeds on the Salina airplane when no one would come forward. These are only three examples of the kinds of cases that happen every day in Kansas. Without civil forfeiture, criminals will simply keep what they gain from their crimes. Requiring a criminal conviction prior to forfeiture will allow bad assets to be kept by bad guys smart enough or experienced enough to change the name on the bank account, or the title, or the deed.

The last word on criminal convictions: although not one person nor one record supports the proposition that there has been a detrimental incentive to law enforcement when forfeited assets are directed to public safety programs, proponents of requiring a criminal conviction may actually be creating an unintentional incentive themselves. If a conviction is required before civil forfeiture, that would then require law enforcement officers to arrest persons who in the past might not have been arrested because of their cooperation, or their age, or their health, or their relatively low-level participation in the parallel crime.

IV. Summary.

Civil asset forfeiture is a boogyman only to bad guys. Since 1994, KSASFA has proven to be lawful and reasonable, with strong due process protections. It has withstood numerous attacks under judicial review, legislative reforms, and media stories. The record reflects that, except for a few minor reporting mistakes that are correctable with training, Kansas law enforcement continues to appropriately seize, manage, forfeit, and expend criminal assets, all to the benefit of Kansas citizens and taxpayers.

As for the idea that comes around every five to ten years of requiring a criminal conviction before a civil forfeiture proceeding, history and common sense have shown that it simply will not work. A criminal who commits suicide, flees, hides his unlawful assets, or willfully fails to make himself known will be victorious…and all to the detriment of those same Kansas citizens and taxpayers. ■

About the Authors

Colin Wood is a retired KBI senior special agent and assistant attorney general. Currently a federal contract attorney cross-designated a Special Assistant United States Attorney he teaches extensively on law enforcement topics. He is a graduate of Wichita State University and Washburn University School of Law, and during his 43 years of public service he has held office as sheriff, mayor, and city commissioner. Colin has authored previous Journal articles on asset forfeiture procedure, reasonable suspicion analysis, and Kansas consent law.

Gaten T. Wood became Barber Co. Attorney in Medicine Lodge, Kansas in October 2013. He is a graduate of Kansas State University and the Oklahoma City University School of Law. After law school, he worked as an Assistant County Attorney in Pratt Co. He was a member of a recent Attorney General’s committee reviewing KSASFA improvements. In private practice, he teaches constitutional law, instructs officers and agents in search and seizure, car stops, roadside detentions, drug interdiction, and litigates state civil asset forfeiture cases for many Kansas law enforcement agencies.
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1. John F. Kennedy, 35th President of the United States, Commencement Address at Yale University, June 11, 1962.
5. 2013 WL 2991143 (Kan. Ct. App.).
6. Statutes of the Territory of Kansas, 1855, Ch. 3, Sec. 26, requiring the public burning of gaming tables.
9. Ron Smith, former KBA General Counsel, “Legislative Information for the Kansas Legislature” memo dated February 17, 1993 concerning KSASFA, HB 2423 and directed to members of the House Judiciary Committee.
10. “Report of Attorney General Robert T. Stephan’s Task Force on Asset Forfeiture,” 1993. Kyle Smith, Assistant Attorney General, Chairperson; Debra Vermillion, Assistant Johnson County District Attorney; Vice Chairperson; Colin Wood, KBI Special Agent, Secretary; Clifford Hacker, Lyon County Sheriff; Douglas Roth, Assistant Sedgwick County District Attorney; Tom Smith, Attorney, Liberal; Jack Blow, Kansas Highway Patrol; Kevin Fletcher, Assistant Reno County District Attorney. Two of these members have since become state district court judges.
13. 2015 Kansas Legislature, House Bill 2771.
16. K.S.A. 60-4107(a), (b).
17. K.S.A. 60-4107(d).
19. K.S.A. 60-4112(e).
20. K.S.A. 60-4108(b).
21. K.S.A. 60-4107(b), (l).
22. K.S.A. 60-4111.
23. K.S.A. 60-4109(a).
24. K.S.A. 60-4113(p).
25. K.S.A. 60-4107(m).
27. K.S.A. 60-4107(f).
28. K.S.A. 60-4113(g).
29. K.S.A. 60-4113(g), (h).
32. K.S.A. 60-2102.
34. K.S.A. 60-4111.
35. Author Colin Wood, having lost only one civil forfeiture trial in his career, lost it to an unrepresented claimant.
38. See supra, notes 11 & 15.
39. See supra, note 35, quoting Stefan Cassella.
41. K.S.A. 60-4117(a).
42. K.S.A. 60-4117(d).
44. See supra, note 35, quoting Stefan Cassella.
46. United States v. $5,535,870.00 in U.S. Currency, District of Kansas Case No. 10-1393-JTM.

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Supreme Court

ATTORNEY DISCIPLINE

ORDER OF REINSTATEMENT
IN THE MATTER OF TROY D. RENKEMEYER
REINSTATED

NO. 113,367—FRIDAY, JANUARY 20, 2017


HELD: The court, after carefully considering the record, granted the respondent’s petition for reinstatement of his license to practice law in Kansas.

Civil

KANSAS CONSTITUTION—LEGISLATION
RIPENESS—STANDING
KNEA V. STATE OF KANSAS
SHAWNEE DISTRICT COURT—AFFIRMED

NO. 114,135—JANUARY 20, 2017

FACTS: 2014 Senate Substitute for House Bill No. 2506 was enacted in response to the court’s decision declaring unconstitutional part of the state’s public school finance law. HB 2506 covered a wide range of topics, including appropriations to various agencies and substantive and technical changes to the state’s public school financing statutes. Also, at issue here, SB 2506 amended the Teacher Due Process Act to remove elementary and secondary public school teachers from statutory protections that had been afforded to them regarding termination or nonrenewal of their employment contracts. KNEA filed suit, claiming that HB 2506 was invalid under the Kansas constitutional provision limiting legislation to one subject. The district court found that the legislation was valid, and KNEA appealed.

ISSUES: (1) Does KNEA have standing to challenge the legislation’s constitutionality; (2) Is this issue ripe for decision, since the revised due process procedure has not yet been used; and (3) Does HB 2506 violate the one-subject rule?

HELD: Judicial power is limited to actual cases and controversies. Because KNEA has no personal injury, standing exists only if KNEA is allowed to bring suit on behalf of a member who could have filed suit individually. HB 2506 excludes all primary and secondary public school teachers from the due process protections that are given in the TDPA. Because this due process is a valuable employment right, and because there are KNEA members who lost this access to due process when HB 2506 became effective, KNEA has standing to bring this action. And because the challenged legislation is now active law, KNEA’s claim is ripe for decision. KNEA claims that HB 2506 contains both appropriations and general legislation. Under the constitutional one-subject provision, the “subject” can be as comprehensive as the legislature chooses. The one-subject rule does not expressly forbid comingling appropriations and general legislation into a single bill, and such combinations are allowable as long as the provisions address a single subject. In this case, the only subject covered by HB 2506 was education.

STATUTES: Kansas Constitution Article 2, § 16; K.S.A. 2015 Supp. 60-212(b)(1), 72-5436(a), -212(b)(6); K.S.A. 2013 Supp. 72-5436(a), -5438(a), -5439, -5443, -5445(a)(1)

Criminal

CRIMINAL PROCEDURE—EVIDENCE—JURY INSTRUCTIONS
STATE V. BELTZ
SEDGWICK DISTRICT COURT—AFFIRMED

NO. 111,785—JANUARY 27, 2017

FACTS: Beltz was convicted of attempted possession of marijuana with intent to distribute, and first-degree felony murder of Betts during botched attempt to sell marijuana. On appeal Beltz claimed the district court erroneously: (1) allowed State to present evidence of Beltz growing marijuana in his basement, and of prior sales by Betts at or near Beltz’s house; (2) denied Beltz’s motion for acquittal in which Beltz argued there was no direct causal connection between the attempted sale of marijuana and Betts’ death; and (3) denied Beltz’s request for a self-defense instruction that relied on the retreat “safe harbor” exceptions in K.S.A. 2015 Supp. 21-5226(c); and (4) failed to give a unanimity instruction when State argued multiple acts supported the charge of aiding and abetting the attempted sale of marijuana.

ISSUES: (1) Trial evidence, (2) motion for acquittal, (3) self-defense instruction, (4) unanimity instruction

HELD: Beltz waived or abandoned his K.S.A. 60-455 challenges to the admission of evidence. He did not object to the admission of evidence of the marijuana grow, and abandoned his initial objection to evidence of prior marijuana sales at or near Beltz’s house. Facts in case established a sufficient causal relationship between Betts’ death and the attempted sale of marijuana. Betts’ death occurred within the requisite of the underlying crime, and criminal violence that erupts during a drug sale is not an extraordinary intervening event.

Beltz was not entitled to a self-defense instruction. There was no argument in this case that the attempted sale of marijuana was not a forcible felony for which a self-defense instruction was disallowed by K.S.A. 2015 Supp. 21-5226(a). The “safe harbor” exceptions in
PUBLIC NOTICE FOR
REAPPOINTMENT OF INCUMBENT BANKRUPTCY JUDGE

The current 14-year term of office of Dale L. Somers, United States Bankruptcy Judge for the District of Kansas at Topeka, Kansas, is due to expire on September 18, 2017. The United States Court of Appeals for the Tenth Circuit is presently considering whether to reappoint Judge Somers to a new 14-year term of office.

Upon reappointment, Judge Somers would continue to exercise the jurisdiction of a bankruptcy judge, as specified in Titles 11 and 28 of the United States Code.

Members of the bar and the public are invited to submit comments for consideration by the Tenth Circuit Court of Appeals. All comments will be kept confidential and should be directed to:

David Tighe
Circuit Executive
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

Comments must be received not later than Tuesday, April 18, 2017.
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4525 Oak St.
Kansas City, Mo.
Parking: $8 museum non-member parking fee; carpooling encouraged

Friday, June 30, 2017, 2:30 – 4:10 p.m.*
Polsky Theatre, JCCC Carlsen Center
12345 College Blvd. (College & Quivira)
Overland Park, Kan.
*Reception afterward sponsored by the JCCC Foundation

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K.S.A. 2015 Supp. 21-5226(c)(1) and (2) are only available pursuant to subsection (c). There were no exceptions applicable to subsections (a) and (b).

No unanimity instruction was required because there was no showing of multiple acts in this case. Beltz may have made multiple overt acts in support of the single attempted sale, but those facts could not have supported another conviction of the charged crime.


CRIMES AND PUNISHMENT—FIFTH AMENDMENT—RIGHT TO COUNSEL
STATE V. BROWN
SALINE DISTRICT COURT—AFFIRMED
NO. 111,166—JANUARY 20, 2017

FACTS: Brown was convicted of felony murder, two counts of child abuse, and interference with a law enforcement officer. On appeal he claimed: (1) his inculpatory statements to police should have been suppressed because officers failed to honor his request for counsel, his statements were not voluntary, and no Miranda warnings were given after each break in questioning; (2) district court failed to instruct jury on lesser included offenses of felony murder; (3) insufficient evidence supported his conviction for obstruction of a law enforcement officer; and (4) upward departure sentences were not justified by substantial and compelling reasons because age of victim was element of the child abuse offense.

ISSUES: (1) Statements to police, (2) jury instructions on lesser included offenses, (3) evidence supporting obstruction of law enforcement officer conviction, (4) evidence supporting departure sentences

HELD: Brown made unequivocal request for attorney, but after unsuccessful attempt to contact a lawyer he knowingly and intelligently waived his previously invoked right when he reinitiated interview with police. Under totality of the circumstances, Brown's statements were voluntary, and length of time between initial Miranda warnings and end of interview did not make renewed warnings necessary.

For reasons stated in State v. Love (decided this same date), district court properly refused to give lesser included offense instructions for the felony-murder charge.

Given standard of review and purpose underlying interference with law enforcement statute, sufficient evidence supports Brown's conviction for obstruction of a law enforcement officer where Brown failed to come out from hiding in basement when instructed to do by police.

Under facts in case, jury's finding that 14-month old child abuse victim was particularly vulnerable because of age was a substantial and compelling reason to impose upward departure sentences for child abuse convictions. Reasoning of Minnesota state case was persuasive. Also, departure sentence for one of the child abuse convictions was independently supported by excessive brutality of the crime.

STATUTES: K.S.A. 2015 Supp. 21-5109(b)(1), -5402(d), -5402(e), -5904(a)(3), 22-3601(b)(3), -3601(b)(4); K.S.A. 2013 Supp. 21-5402(d), -5402(e)

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—EVIDENCE—JURY TRIAL
STATE V. DEWEES
SALINE DISTRICT COURT—AFFIRMED
NO. 112,372—JANUARY 20, 2017

FACTS: DeWeese was convicted of first-degree murder and conspiracy to commit first-degree murder. Three days post-verdict, State disclosed a police investigator's report. DeWeese filed motion for new trial, arguing violation of Brady v. Maryland, 373 U.S. 83 (1963). District court found most information in the report had been disclosed to the defense by other means, and the undisclosed statement in the report was not material. DeWeese appealed.

ISSUE: Brady compliance

HELD: No Brady violation in this case. The report contained impeachment evidence inadvertently suppressed by the State, but comparing evidence in the undisclosed report to impeachment evidence presented to the jury, the new evidence was cumulative and not material. No reasonable probability this trial result would have been different had State timely disclosed the report for possible defense use at trial.


CRIMES AND PUNISHMENT—CRIMINAL PROCEDURE—EVIDENCE—PROSECUTORS
STATE V. LOVE
SALINE DISTRICT COURT—AFFIRMED
NO. 112,611—JANUARY 20, 2017

FACTS: Love was convicted of felony murder and child abuse. On appeal he claimed: (1) district court erred by admitting cumulative and unduly prejudicial autopsy photographs; (2) district court erred in excluding evidence of medical malpractice lawsuit filed by child-victim's mother against doctor who treated victim several days prior to events on the date of the victim's death; (3) prosecutor improperly bolstered mother's credibility during opening remarks and examination of other witnesses; (4) district court violated federal right to due process, Kansas Ex Post Facto statute and Kansas constitutional right to jury trial by failing to instruct jury on lesser included offenses of felony murder; and (5) cumulative error denied Love a fair trial.

ISSUES: (1) Autopsy photographs, (2) medical malpractice lawsuit, (3) vouching for credibility, (4) lesser included offenses for felony murder, (5) cumulative error

HELD: District court's admission of 14 autopsy photographs in this case was upheld. It is not an abuse of discretion to admit autopsy photographs showing multiple views of internal physical injuries and assist explaining medical conclusions on the nature of trauma suffered by the victim and the cause of death, even if photographs are gruesome and medical testimony already described injuries to the jury.

Appellate review was limited by Love's insufficient proffer of how medical malpractice lawsuit would be used at trial. District court did not abuse its discretion in concluding the fact of the medical malpractice lawsuit's existence lacked any tendency in reason to establish cause of death, and was irrelevant to the criminal proceedings.

Prosecutor's opening statement made no improper witness comment on mother's credibility. Appellate review of Love's remaining claim of prosecutorial error was precluded by Love's failure to object to prosecutor's questioning of witnesses during trial.

Love's Ex Post Facto claim was rejected based on holding in State v. Todd, 299 Kan. 263 (2014). There was no federal constitutional requirement that the jury be instructed on offenses not recognized by state law as lesser included offenses. Legislature's statutory elimination of lesser included offenses of felony murder did not implicate Love's right under Kansas Constitution to a jury trial.

The absence of any identified error defeats the cumulative error claim.

CIVIL

PROPERTY—RULE AGAINST PERPETUITIES—STATUTE OF FRAUDS—WRITTEN INSTRUMENTS
TREAR V. CHAMBERLAIN
LYON DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, REMANDED
NO. 115,819—JANUARY 13, 2017

FACTS: Trear bought real estate from the Chamberlains in 1986, under a contract drafted by the Chamberlains’ attorney. The contract contained a right of first refusal provision covering a parcel of land adjoining the tract purchased by Trear. The provision required that, in the event the parcel was put up for sale, the Chamberlains had to first offer the parcel to Trear. And when she was ready to sell Chamberlain did so, offering Trear the property. Trear neither accepted the offer nor made a counteroffer. After the entire parcel failed to sell, Chamberlain sold a portion of the tract to a third party for a much lower price than what was offered to Trear. Trear filed suit, claiming that the sale violated his right of first refusal. After a summary judgment motion was filed, the district court ruled that the right of first refusal provision violated the rule against perpetuities but did not violate the statute of frauds. Both sides appealed.

ISSUES: (1) Does the right of first refusal provision violate the rule against perpetuities; (2) does the right of first refusal provision violate the statute of frauds?

HELD: The contract at issue here was created before Kansas adopted the Uniform Statutory Rule Against Perpetuities, so only the common-law rule applies. Under that rule, any interest which does not vest within 21 years after the termination of a life in being is void. This rule exists to prevent land from being wasted by ancient encumbrances. Relevant case law shows a growing reluctance to void real estate contracts under the rule against perpetuities. When evaluated under this framework, the right of first refusal in this contract is personal to Trear, and it expires with his death. Viewed this way, the contract does not violate the rule against perpetuities. The right of first refusal provision is subject to the statute of frauds, and the statute of frauds is satisfied by the terms of the contract. The Chamberlains are the party to be bound, and they signed the contract. Because the record does not contain enough evidence about Chamberlain’s good faith, the case must be remanded to the district court for further findings of fact.

STATUTE: K.S.A. 33-106, 59-3405(a)

JURISDICTION—STANDING—TRUSTS—WRITTEN INSTRUMENTS
IN RE TRUST OF HILDEBRANDT
MARSHALL DISTRICT COURT—AFFIRMED
NO. 115,530—JANUARY 13, 2016

FACTS: Clarence and Wayne Hildebrandt executed identical trusts in 2002, with each man named as co-trustee of Clarence’s trust. Clarence’s attorney was successor trustee; in his absence, two senior attorneys from the same or a successor law firm were meant to fill that role. After Clarence’s death, Wayne petitioned, without objection from the other beneficiaries, to appoint a niece (and a trust beneficiary) as successor trustee because the attorney Clarence named in the trust was deceased. An attorney from the successor law firm objected, arguing that there was a successor trustee already in place. The district court allowed the niece to be substituted as successor trustee, and the successor law firm appealed.

ISSUES: (1) Does the law firm have standing to contest the appointment of a different successor trustee; (2) does the appointment of an independent, third-party trustee affect a material purpose of the trust?

HELD: Standing is a matter of jurisdiction and may be reviewed at any time. Because the trust contemplated that attorneys from a successor law firm would serve as a successor trustee, the law firm has standing to challenge the proposed modification to the trust. Under the terms of the trust as written, the modification of a successor trustee does not violate a material purpose of the trust. Accordingly, the district court’s modification was not erroneous.

STATUTE: K.S.A. 2015 Supp. 58a-103(19), -411(b); K.S.A. 58a-410(b)

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

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FACTS: Hudson was employed as a police officer, working child sex abuse cases. This difficult work negatively affected his mental and emotional health. After Hudson’s performance suffered he became the subject of an internal affairs investigation, and he was asked to retire. At the time of his retirement, Hudson did not realize that his symptoms were attributable to PTSD. After receiving a diagnosis, Hudson applied for disability through the Kansas Police and Firemen’s Retirement System (KP&F), which is a division of the Kansas Public Employees Retirement System (KPERS). Hudson’s application was evaluated by KPERS’ medical expert, Dr. Ibarra, who concluded that Hudson’s PTSD was not caused by his work for the police department. KPERS denied Hudson’s claim. Hudson asked for reconsideration and provided additional documentation from his treating medical providers. The application was again denied. An ALJ affirmed the denial, as did the Board. Hudson appealed to district court, which reversed the Board’s finding as unsupported by substantial evidence. KPERS appealed.

ISSUES: (1) Did the Board err by relying solely on Dr. Ibarra’s deposition testimony while discounting deposition testimony from Hudson’s experts; (2) was it reversible error to ignore a sworn affidavit?

HELD: The Board did not hear live testimony from any of the experts, meaning there was no opportunity to observe demeanor or truly assess credibility. Personal testimony is important because it allows for actual observation of the witness when credibility determinations are made. In this case, Dr. Ibarra’s credibility findings about Hudson were made without speaking to Hudson or any of his physicians. And generally, a treating physician’s testimony is entitled to more weight than a physician who forms an opinion based solely on medical records. The record contained an affidavit from one of Hudson’s direct supervisors indicating that Hudson was totally and permanently unable to perform the duties of a police officer. The Board erred when it ignored this undisputed, relevant evidence.

STATUTE: K.S.A. 2015 Supp. 77-621(c), -621(d), 74-4960a(2)

ANNULMENT—DIVORCE
IN RE MARRIAGE OF KIDANE AND ARAYA
JOHNSON DISTRICT COURT—AFFIRMED
NO. 114,986—JANUARY 13, 2017

FACTS: Araya filed for an annulment from Kidane in Nevada. The pair married after Kidane courted Araya, but after the marriage Kidane allegedly claimed that he wanted to get married only to obtain a green card. The suit was dismissed for inconvenient forum, and Kidane filed for divorce in Kansas on the basis of incompatibility. Araya countered with a petition for annulment, claiming that Kidane had been married to someone else at the time of their marriage, rendering it void. After finding many issues with both parties’ credibility, the district court granted Araya’s counter-petition for annulment. Kidane appealed.

ISSUES: (1) Which party bears the burden of proving that a marriage was void or induced by fraud; (2) is an annulment a proper remedy when the requesting party has unclean hands?

HELD: Annulment sets aside a marriage which was invalid at its inception or that was initially invalid but remains in effect unless terminated by court order. A court must grant a decree of annulment if it finds that a marriage was induced by fraud. But there are other statutory avenues for an annulment, and in this case the district court clearly relied on the fact that the marriage was a sham from the beginning. There was sufficient competent evidence to conclude that the parties entered a sham marriage. Sham marriages are not void in Kansas, but they are voidable. Because the marriage between Kidane and Araya was entered for an illegal purpose, it is subject to rescission on that ground. Annulment is governed by statute, not by equity. Although the district court could have chosen to allow an equitable defense, the parties jointly engaged in fraud, and the district court’s failure to allow an equitable defense was reasonable.

STATUTES: 8 U.S.C. § 1325(c) (2012); K.S.A. 2015 Supp. 23-2501, -2502, -2503, -2702, -2702(a), -2702(b)

STATUTORY INTERPRETATION—WORKERS COMPENSATION
CLAYTON V. UNIVERSITY OF KANSAS HOSPITAL AUTHORITY
WORKERS COMPENSATION BOARD OF APPEALS—REVERSED AND REMANDED
NO. 115,674—JANUARY 13, 2017

FACTS: Clayton injured her knee while working for the hospital. She settled her claim for a lump sum payment, with future medical treatment and review left open. At the settlement hearing, there was evidence from Dr. Shah that Clayton would likely need future treatment for her injuries. Two years after the settlement, the hospital filed an application for post-award medical termination and a motion to terminate future medical benefits. It was undisputed that Clayton had not sought additional medical treatment in the 2 years following the settlement hearing, and the hospital believed it was entitled to a statutory presumption that no further medical care would be needed. Clayton objected, claiming that Dr. Shah’s letter was sufficient evidence to overcome the statutory presumption. An ALJ agreed, even though Dr. Shah never testified in this case. The Board affirmed, and the hospital appealed.

ISSUE: Did the Board properly interpret K.S.A. 2015 Supp. 44-510k(a)(3)?

HELD: Because the doctrine of operative construction has been abrogated in Kansas, the Board is not entitled to any deference on its interpretation of the law. The statute which allows an employer to terminate future medical benefits of an injured worker was added to the Kansas Workers Compensation Act in 2011. Amendments to the Act show that the legislature intended to allow an employer to apply for the permanent termination of future medical benefits even if there was sufficient evidence presented at the time of the original award that future treatment might be necessary. This statutory scheme contemplates a shifting burden of proof. Initially, the employer has the burden to come forward with proof that the employee has not accessed medical treatment for 2 years. After meeting that threshold, the burden shifts to the employee to establish by competent medical evidence that further medical care is needed as a result of the underlying injury. The question of what evidence is sufficient to meet that burden must be decided on a case-by-case basis. In this case, Clayton’s lack of treatment is undisputed. Dr. Shah’s letter was not sworn to under oath and was based on a physical exam performed 5 years before these proceedings. Because Dr. Shah’s letter, by itself, does not constitute competent medical evidence, the case must be remanded for further findings of fact.

STATUTE: K.S.A.2015 Supp. 44-510k(a)(3), -525(a), -556(a), 77-621(c)(4)

IMMUNITY—PLEADINGS—TORTS
T.H. AND C.C. V. UNIVERSITY OF KANSAS HOSPITAL AUTHORITY
WYANDOTTE DISTRICT COURT—AFFIRMED
NO. 114,285—JANUARY 6, 2013

FACTS: T.H. and C.C. took their 9-month-old daughter, R.N.C., to see Dr. Perez-Marques because she was suffering from a respira-
tory infection. After examining the child, Dr. Perez-Marques became concerned that R.N.C. had been the victim of severe, chronic sexual abuse. Medical staff alerted the police and tested R.N.C. for HIV and STDs. The parents responded by filing suit against both Dr. Perez-Marques and KU. Both KU and Dr. Perez-Marques asked that the petition be dismissed for failure to state a claim upon which relief can be granted. The parents declined to amend their pleading, claiming it contained sufficient facts to infer malice. After a hearing, the district court ruled that the parents failed to sufficiently allege that Dr. Perez-Marques acted with malice, entitling both the doctor and KU to immunity. The parents appealed.

ISSUES: Did the pleading in this case have enough specificity to allow a finding of malice that would allow this lawsuit to survive statutory immunity?

HELD: As a mandated reporter, Dr. Perez-Marques had statutory immunity for her report of R.N.C.’s suspected abuse as long as she acted without malice. This immunity is conferred even if the misdiagnosed abuse amounts to medical malpractice. Because there is a strong public interest in encouraging physicians to report suspected abuse, the legislature provided immunity so that doctors could act without concerns about litigation. The parents are correct that Kansas only requires notice pleading. But malice requires proof of specific intent, and the parents failed to set forth any facts that would allow an inference that Dr. Perez-Marques acted maliciously.

STATUTE: K.S.A. 2015 Supp. 38-2201, -2201(b)(5), -2201(b)(7), -2223, -2223(a)(1)(A), -2223(e), -2223(f), 60-212(b)(6)

CRIMINAL

APPEALS—CRIMINAL PROCEDURE—EVIDENCE—JURY INSTRUCTIONS
STATE V. COTTRELL
SEDGWICK DISTRICT COURT—AFFIRMED NO.114,635—JANUARY 27, 2017

FACTS: Cottrell was convicted of unlawful distribution of controlled substances and conspiracy to distribute controlled substances. On appeal he claimed the district court should have given jury a unanimity instruction on the conspiracy charge where State alleged five overt acts to support the conspiracy but failed to elect a specific action before submitting case to jury, or alternatively, the State presented insufficient evidence to prove each of the alternative means. Next, he claimed the district court erred in instructing jury that the mens rea for a multiple acts instruction would not have been proper because facts in case support Cottrell’s request for a unanimity instruction. A multiple acts instruction included “knowingly” as the mental state of the distributions charges, and at the jury instruction conference he affirmatively asked district court to issue that instruction.

STATUTE: K.S.A. 2015 Supp. 21-5202(d), -5302(a), -5705, 22-3414(3)

MIRANDA WARNINGS—SEARCH AND SEIZURE—WARRANTS
STATE V. GUEIN, JR.
JOHNSON DISTRICT COURT—REVERSED AND REMANDED NO. 115,426—JANUARY 20, 2017

FACTS: Late one evening, Officers Weber and Larson noticed two cars parked in a lot in what they described as a high-crime area. Believing that a drug deal was taking place, Officer Weber approached one of the vehicles, where he immediately smelled marijuana. The driver of that car gave permission for a search of his person, and nothing illicit was located. Guein gave permission for a pat-down search to check for weapons as well as consent to search inside his pockets. After noting that Guein smelled strongly of marijuana, Officer Larson asked him if he had marijuana on him. Guein initially denied having any, but admitted that he had a bag hidden in his underwear. Guein complied with a request to provide the bag. At that point, he was handcuffed and placed in a police car. A search of Guein’s car revealed a handgun, some loose marijuana, and drug paraphernalia. After he was Mirandized, Guein admitted that he was in the parking lot to sell marijuana. The district court denied Guein’s pretrial motion to suppress on grounds that the officer made an implicit threat when attempting to obtain a confession. The motion was denied, Guein was convicted, and this appeal followed.

ISSUES: (1) What legal protections are due at various stages of a stop and frisk; (2) whether strong language from a police officer rendered a defendant’s statements involuntary

HELD: The facts of this case show that the initial encounter between Guein and law enforcement did not amount to a custodial interrogation. The events were in a public place, Guein was not physically restrained, and the interaction was brief. Guein’s admission that he had marijuana on his person, coupled with the strong smell of marijuana, provided probable cause for a search. The possibility that the drugs could have been hidden or destroyed provided the exigent circumstances that render the search constitutionally permissible. Once Guein was Mirandized, though, an officer made statements that Guein should not "f--- around with” him so that he would not "f--- around with” Guein. When these statements are taken in context, they show that a reasonable person would conclude that the officer made an implied threat of physical violence that was connected to Guein agreeing to answer questions. Guein’s statements made post-Miranda were not voluntary, and the district court erred by denying Guein’s motion to suppress this particular evidence. The matter had to be remanded for a new trial.

DISSENT: (Gardner, J.) Disagreed that the post-Miranda statements were involuntary. After examining all circumstances and considering the appropriate factors, she believes that Guein’s statements were voluntary and should have been admitted at trial.

STATUTES: Kansas Constitution Bill of Rights, Section 15
Appellate Decisions

CRIMES AND PUNISHMENT—PROBATION—RESTITUTION—SENTENCING—STATUTES
STATE V. HAMBRIGHT
SEDGWICK DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, REMANDED
NO. 115,259 - JANUARY 13, 2017

FACTS: Hambright was convicted of criminal damage to property. Plea agreement recommended 24 months probation and full payment of $60,000 in damages. District court ordered a 36-month probation period and full restitution with monthly $500 payment plan. Hambright appealed on two issues. First, that K.S.A. 2012 Supp. 21-6608(c)(5), cited in the journal entry of sentencing as the basis for extended probation, did not apply. Alternatively, district court had no substantial and compelling reasons to depart from the recommended probation term, and erred by failing to provide notice of intent to make a sua sponte departure as required by K.S.A. 2015 Supp. 21-6817(a)(3). Second, Hambright claimed the restitution ordered was unworkable and an abuse of discretion.

ISSUES: (1) Sentencing - probation, (2) restitution

HELD: District court did not impose an illegal sentence. K.S.A. 2015 Supp. 21-6608(c)(5) does not apply to Hambright's severity level-7 felony, but district court's pronouncement of sentence from the bench did not cite that statute. And decision to increase probation term to 36 months was not a departure sentence. In light of significant changes in the statute and case law since State v. Whitesell, 270 Kan. 259 (2000), a district judge at time of sentencing has discretion to increase or decrease the recommended probation terms in K.S.A. 2015 Supp. 21-6608(c)(1) and (c)(2) up to a maximum of 60 months. Such modification in the probation term does not constitute a departure sentence as contemplated in K.S.A. 2015 Supp. 21-6815. Based on facts of this case, there was no abuse of district court's discretion to extend probation period to 36 months.

Based on precedent set in State v. Herron, 50 Kan. App. 2d 1058 (2014), rev. denied (2015), and an unpublished court of appeals opinion, district court abused its discretion in ordering restitution plan that requires Hambright to forego over half his monthly income. Case was remanded to district court to develop a workable restitution plan.


CRIMINAL LAW – PROSECUTORS – STATUTES
STATE V. SINZOGAN
RENO DISTRICT COURT – AFFIRMED
NO. 113,901 – JANUARY 6, 2017

FACTS: Sinzogan was convicted of stalking his ex-wife and violating a protective order. He appealed, claiming his convictions were multiplicitous, but argued only that violation of a protective order is a lesser included offense of stalking. He also claimed the prosecutor's closing argument improperly attacked the role of the defense in a criminal trial.

ISSUES: (1) Stalking and violation of a protective order, (2) prosecutorial misconduct

HELD: Violation of a protective order is not a lesser-included offense of stalking. A crime requiring a higher culpable mental state, such as the “knowing” requirement for proving the violation of a protective order, cannot be a lesser included crime of a crime that requires proof of a lower culpable mental state, such as the requirement for stalking that a defendant “recklessly” violated a protective order. Similarity to State v. Frieson, 298 Kan. 1005 (2014), on this issue was noted. The multiplicity claim was not briefed, and was deemed abandoned.

Prosecutor's statements in this case were not outside the wide latitude granted for discussing the evidence. Although prosecutor’s words were unfortunate, prosecutor was clearly commenting on defense counsel’s trial tactics and closing argument, and not trying to diminish the role of defense attorneys.

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