**Pay Invoice**

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Ryan Purcell, graphic designer, rpurcell@ksbar.org

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This past month I, along with Mira Mdivani (KBA Vice President), the Honorable Evelyn Wilson (KBF President) and Jordan Yochim (KBA/KBF Executive Director), had the privilege of attending the annual meetings of the National Conference of Bar Presidents and National Conference of Bar Foundations which were held jointly in conjunction with the ABA’s annual meeting in New York City. It is always interesting to meet with attorneys from other states and jurisdictions and gain insight into the issues being faced by bar associations across the country. Among the numerous topics and issues addressed was the role of bar associations in advocating on behalf of the profession and the judiciary in order to educate the public on the important role that lawyers and judges play in our society and government. Cultivating and maintaining a positive public perception of the legal profession is not a new concern for the KBA. Nor is the need to overcome the unfortunately all too common negative view of the legal profession and the judicial system held by many members of the public unique to the state of Kansas.

The public relationship to and perception of the legal profession is complex. The general consensus of most studies and articles on the subject appears to be that those individuals who are in need of, or who have used the services of a lawyer, tend to view the profession favorably and consider those lawyers with whom they have interacted as honest and trustworthy. The general public, however, holds a cultural disdain for and mistrust of those who practice law for a living.

This rather skeptical view of the profession was made abundantly clear to me during a recent deposition where the deponent responded to a rather innocuous question I posed as follows:

A: I don’t have an answer for you.
Q: Why?
A: Because I think you got some trickery up your sleeve.

While I certainly did not have any “trickery up my sleeve,” the cautious reluctance of the witness to simply answer my question betrays an underlying suspicion held by many mem-
bers of the public that lawyers are up to no good and are not to be trusted.

As lawyers, we are often charged as part of the adversarial process to zealously advocate on behalf of our clients and to present arguments and evidence which portray our clients’ position in the best possible light and the position of their adversaries in the worst possible light. Thus, as lawyers, we can sometimes be viewed as crafty and less than forthright as we pursue what is in the best interests of our clients. To combat against this, we clothe ourselves in oaths, rules of procedure, codes of ethics and pillars of professionalism designed to assure the public, our peers, the courts and even ourselves of our trustworthiness.

Public image of the bar and the legal profession is important. It impacts our ability to provide access to justice, provide meaningful and effective service to our clients, and obtain appropriate funding for the judiciary. It allows us to speak in a meaningful way on issues that are of importance to the laws and regulations that govern our society. As part of our sojourn to New York City, our delegation made the almost obligatory decision of every tourist to attend a Broadway play and, of course being from Kansas, selected “Wicked” as the appropriate performance to see. One of the main lessons from “Wicked”—that the truth is not an absolute—seems particularly poignant in connection with the broader issue of how and why the cultural perception of lawyers is less than it should be. For this reason, it is critical that, as part of our daily mission, we strive to present to the public a positive image of the legal profession and remind them of the many positive contributions to society made by lawyers. The KBA plays a pivotal role in supporting a positive image of the legal profession through its many outreach programs and services. This is a significant and often overlooked aspect of the KBA.

Sometime ago, my children gave me a tee-shirt with the words “Trust me I’m a Lawyer” on it. It was intended as a humorous gift as the catchphrase is subject to multiple meanings. The phrase can be viewed with irony or sarcasm. However, while I can, and do, appreciate the other more humorous interpretations, I choose to read it as a message of assurance to my clients, my peers, the judiciary and society as a whole. Clients come to us in times of need and often in distress. Trust me, I can help you with your legal problem. Peers and judges need to know they can rely on our word. Society needs to know our profession can be trusted to stand for and support the rule of law. Being a lawyer is something to be proud of, and the legal profession is worthy of our society’s respect. Trust me, I’m a lawyer and, my word, as a lawyer and president of your KBA, means something.

Gregory P. Goheen is a shareholder at McAnany, Van Cleave & Phillips, P.A., where he has practiced since graduating from Southern Methodist University’s Dedman School of Law in 1993. He received his bachelor’s degree in 1990 from the University of Kansas. Greg is past President of the Kansas Association of School Attorneys and Fellow and past Trustee of the Kansas Bar Foundation.

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Attorney with the Disciplinary Administrator’s Office
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KBA Director of Member and Communication Services
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2017 Legislative Summary
by Joseph N. Molina III

The 2017 Legislative Session came to a merciful end on June 26th when both chambers adjourned sine die. This was a record year for a couple of reasons: first, legislators met for 114 days, tying for the longest session in Kansas history; and second, for passing the largest tax increase in Kansas history. Neither is a record anyone really wanted to set. Both records are directly related to state budget and school finance issues. Coming into 2017, the state was facing a significant budget shortfall. Some blamed the difficult times on a sluggish economy in which oil and gas were hit hard, and farm commodities failed to garner higher prices. Others placed the blame on an ill-advised economic policy which rolled back incomes taxes on all Kansans and eliminated income taxes on many businesses. Whatever the reason, the state was in financial distress and legislators needed to balance the budget—but HOW?

A core group of legislators wanted to cut the state’s way out of the red, and use future revenue streams to help buoy the budget for the next year or so. The key component of this proposal was using tobacco settlement funds Kansas receives through the Master Settlement Agreement. The state’s annual payments from the MSA are directed to children’s initiatives. The strategy was to sell off those annual payments for a one-time lump sum amount which would be used to help fund the budget and to shore up KPERS. That plan was ultimately defeated by moderate Republicans and vocal Democrats. The coalition of moderate Rs and Ds had a very different idea on balancing the budget: it called for increasing taxes, closing the LLC loophole and restoring tax policy to pre-2012 status. Moderates ran on those issues last November and were honoring the campaign promises that got them elected.

Tax Policy
The Tax Plan (CCR for SB 30) was passed in the House Chamber first on a not-close-to-veto-proof majority of 69-52 while the Senate adopted the bill 26-14. The tax bill will raise almost $1.2 billion (that’s with a “B”) over the next two years but will run into some issues four years out. Moments after the Senate passed the tax plan, Gov. Brownback issued a press release stating he would veto the entire bill. This forced both chambers to override his veto, which they did.

Among other provisions, the tax package:

- Establishes three tiers of income tax: 3.1%, 5.25% & 5.7%
- Eliminates the statutory trigger to reduce income tax if revenues are above CPI
- Eliminates the business pass-through exemption (LLC Exemption)
- Extends STAR Bond authority for 3 years; 1-year moratorium on new projects
- Reinstates medical, mortgage interest and property tax deductibility (3-year phase in)
- Reinstates the child care tax credit
- Reinstates the loss carry-forward
- Modifies tax rates for this year, retroactive to January 1, 2017: 2.9%, 4.9% & 5.2%

The bill is anticipated to raise $591 million in FY 2018 and $633 million in FY 2019. The State operates on a 2-year budget cycle.

The new income brackets starting on January 1, 2018 are:

- $0 to $30,000  3.10%
- $30,000 to $60,000  5.25%
- $60,000 and over  5.70%

State Budget
Passing tax policy was certainly the most difficult task of the 2017 session, but figuring out how to spend all that money was no walk in the park, either. For their part, Kansas Legislators agreed on a budget that will fund FY 2017, FY 2018 and FY 2019, supplemental expenditures for most state agencies,
School Finance

School finance funding changes were not included in the budget bill. That was left for a separate bill which meant a separate debate and more days in the Capitol. The new school finance bill (SB 19) resembles the old formula and rescinds the block grant format used the past two years.

SB 19 makes appropriations for the Kansas Department of Education (KSDE) for FY 2018 and FY 2019; enacts the Kansas School Equity and Enhancement Act; adds a section requiring KSDE to produce a report concerning school district revenues, expenditures and demographics; and amends the Tax Credit for Low Income Students Scholarship Program, the Virtual School Act, and statutes related to Capital Improvement State Aid and capital outlay. The basics of the new formula include:

- Base Aid for Student Excellence (BASE) per pupil spending of $4,006 for school year 2017–2018, $4,128 for school year 2018–2019, and an annual adjustment thereafter to be determined by the average percentage increase in the Consumer Price Index (CPI) for all urban consumers for the Midwest region during the immediately preceding three school years.
- A 33 percent cap on the Local Option Budget (LOB) by a resolution of the school board when the BASE is less than $4,490.

The Kansas Supreme Court stayed the order, calling for school closures to allow them to hear oral argument on July 18th. How the court reacts to this new formula and influx of new money remains to be seen, but many believe they will not react favorably, which would require the legislature to return to Topeka for a special session on school finance.

Judicial Branch Budget

The Kansas Judicial Branch fared much better this year than in the past. We all remember several years ago, the courts had to close for mandatory furloughs to help offset a budget shortfall. This year, courts did not come close to closing the doors, and in fact, were able to garner a raise for judicial branch employees.

The Judicial Branch initially requested a $20 million increase to its budget to pay for salary adjustments for all employees and judges. This was met with resistance since funding is tight, and some legislators were uneasy with giving district judges a raise when they make more than $100,000 per year. The focus shifted to nonjudicial employees and how best to bring them up to levels comparable to those in neighboring states. The house proposed a $6.0 million increase, while the senate proposed a 2.0 percent increase across the board. In the end, the budget conference committee agreed to a 2.5 percent raise for all state employees, including judicial staff.

The only other budget issue facing the courts was whether to extend the judicial branch surcharge fee (HB 2041). This fee automatically sunsets every two years, so legislation is needed to extend the fee fund to avoid a revenue shortfall. Had the surcharge not been extended, the courts would have taken a negative $8.5 million hit.

Included in HB 2041 was a smaller fee derived from a penalty for failure to pay traffic citations. The bill, originally described as the DUI reinstatement fee, increases from $41 to $100 the penalty for failure to pay a traffic ticket. The resulting revenue will be directed to the courts.

Practice of Law

Unauthorized Practice of Law & Advisory Committee membership, SB 50, better defines the unauthorized practice of law in Kansas and includes provisions to deal with the lack of a licensed attorney being elected to or serving in the Kansas Senate.

Persons will be guilty of an unconscionable act under the KCPA if they (1) commit any act or omission prohibited by the Kansas Supreme Court, by court rule, or by common law, as being the unauthorized practice of law; (2) hold out to the public or otherwise represent, expressly or by implication, that such person is admitted to practice law in Kansas, (3) solicit payment or other consideration, whether in case or in-kind, for services that would constitute the unauthorized practice of law in Kansas if performed at or about the time of such solicitation; or (4) offer or attempt to do any act prohibited by the above provisions. These new provisions DO NOT apply to a licensed Kansas attorney.

SB 50 also amends the law concerning the members of the Advisory Committee to the Kansas Commission on Interstate Cooperation (Commission) and the Joint Committee on Spe-
cial Claims Against the State. The bill specifies the Commission is composed of the chairpersons of the House and Senate Committees on Judiciary, if such chairpersons are members of the Kansas Bar.

If the chairperson of the House Committee on Judiciary or the chairperson of the Senate Committee on Judiciary is not a member of the Kansas Bar and there is not another member of the respective committee on judiciary who is a member of the Kansas Bar (who could fill this position under current law), the bill allows the Speaker of the House (for the house committee) or the President of the Senate (for the senate committee) to designate the Revisor of Statutes to serve on the commission in lieu of a house or senate member, respectively, for the speaker’s or president’s then-current legislative term. The Revisor could designate an assistant revisor to serve in lieu of the Revisor.

Business Association

Public Benefit Corporation, HB 2153, proposed by the KBA, creates the business model of Public Benefit Corporations. This new business model type was passed thru SB 2153 which creates new sections of law which apply only to PBCs and do not affect a statute or rule of law applicable to non-PBCs, except for those provisions regarding conversion to or from a PBC. Existing provisions of the GCC apply to PBCs, except to the extent the new sections impose additional or different requirements.

The bill defines “public benefit corporation” as a for-profit corporation organized under and subject to the requirements of the GCC that is intended to produce a public benefit or benefits and to operate in a responsible and sustainable manner. A PBC is managed in a manner balancing the stockholders’ pecuniary interests, the best interests of those materially affected by the PBC’s conduct, and the public benefit or benefits identified in its articles of incorporation. The PBC must identify specific public benefit or benefits and state it is a PBC within its articles of incorporation, and these provisions constitute “public benefit provisions.” The bill defines “public benefit” to mean a positive effect, or reduction of negative effects, on one or more categories of persons, entities, communities, or interests (other than stockholders in their capacities as stockholders), including various exemplary effects listed in the bill. Think Ben and Jerry's Ice Cream or Patagonia.

Civil Procedure

The following bills concerning civil procedure issues were passed into law.

Revised Uniform Fiduciary Access to Digital Assets Act, SB 63, comes from the Uniform Law Commission and defines “digital asset” as an electronic record in which an individual has a right or interest, not including an underlying asset or liability unless the asset or liability itself an electronic re-cord. Electronic assets can be accessed by (1) a fiduciary acting under a will or power of attorney executed before, on, or after July 1, 2017; (2) a personal representative acting for a decedent who died before, on, or after July 1, 2017; (3) a guardian or conservatorship proceeding commenced before, on, or after July 1, 2017; and (4) a trustee acting under a trust created before, on, or after July 1, 2017.

Kansas Code of Civil procedure updates, SB 120, comes from the Kansas Judicial Council and amends Service of Process rules, case management requirements, discovery rules and default judgment proceedings. The bill states the Code shall be employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. Previously existing law required the Code to be liberally construed and administered for the same purpose.

Conceal Carry

Exemption to Conceal Carry implementation, HB 2278, was passed by both chambers, exempting some state hospitals from the July 1st mandate to either have security in place or allow concealed carry users to enter the premises. The bill exempts (1) state- or municipal-owned medical care facilities and adult care homes, (2) community mental health centers, (3) indigent health care clinics, and (4) the University of Kansas Medical Center.

Criminal Law

Human Trafficking, House sub for SB 40, amends the law concerning human trafficking and creates the new crime of “communication facility” which is defined as “all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes telephone, wire, radio, computer, computer networks, beepers, pagers, and all other means of communication” when used in human trafficking.

The bill also creates the crime of “Internet trading in child pornography,” which is defined by incorporating certain elements of the crime of sexual exploitation of a child when the offender is 18 years of age or older and knowingly causes or permits the images of child pornography to be viewed by use of any electronic device connected to the Internet by any person other than the offender or a person depicted in the performance.

Both new offenses are considered sex crimes and sexually violent crimes.

Protective Orders for Sexual Assault, Parental Notification and Crime Victim Compensation, House sub for SB 101, amends current law as follows:

The bill amends existing law by applying the provisions of the Protection from Abuse Act (PFAA) and Protection from Stalking Act (PFS) to victims of sexual assault. Specifically, the bill amends the definition of “abuse” in the PFAA to
include “engaging in any sexual contact or attempted sexual contact with another person without consent or when such person is incapable of giving consent.”

The bill adds “sexual assault” throughout the PFAA and allows the court to issue an order restraining the defendant from committing or attempting to commit a sexual assault upon the victim. The bill specifies the court may issue a protection from stalking or sexual assault order granting any one or more of the orders allowed by the PFAA, including orders restraining a defendant from harassing, abusing, or sexually assaulting a victim. The bill requires the order to include a statement that, if such order is violated, the violation will constitute a “violation of a protective order” and a “sex offense” as defined by the Kansas Criminal Code, and the accused can be prosecuted for, convicted of, and punished for such a sex offense.

The bill adds exceptions to the requirement under previously existing law that mandates a medical facility give a parent or guardian written notice when a sexual assault examination of a minor child has taken place. The exceptions apply when a medical facility has information that a parent, guardian, or family or household member is the subject of a related criminal investigation, or when the physician, licensed physician assistant, or registered professional nurse, after consultation with law enforcement, reasonably believes the child will be harmed if such notice is given.

The bill amends a statute regarding infectious disease testing of certain alleged offenders or persons arrested and charged with a crime to require such testing occur within 48 hours after the alleged offender appears before a magistrate following arrest. The bill also requires the court to order the arrested person to submit to follow-up tests for infectious diseases as medically appropriate. Finally, the bill clarifies that the results of such tests are to be disclosed to the victim and parent or legal guardian of the victim.

The bill allows a claimant, or victim on whose behalf the claim is made, to be compensated for mental health counseling through the Crime Victims Compensation Board when a claim is filed within two years of notification to the claimant that DNA testing has revealed a suspected offender or when a claim is filed within two years of notification to the claimant the identification of a suspected offender.

Crisis Intervention Act, Senate sub for HB 2053, amends laws related to mental health facilities by creating “crisis intervention centers” which are entities licensed by the Kansas Department for Aging and Disability Services that are open 24 hours a day, 365 days a year, equipped to serve voluntary and involuntary individuals in crisis due to mental illness, substance abuse, or a co-occurring condition, and that uses certified peer specialists.

DUI, Interlock devices, HB 2085, amends laws regarding ignition interlock devices to require every person who has an ignition interlock device installed to complete the ignition interlock device program pursuant to rules and regulations adopted by the Secretary of Revenue. An approved service provider must provide proof of completion to the Division of Vehicles before the person’s driving privileges are fully reinstated. The bill also amends statutes governing expungements in municipal and district courts to state that provisions regarding expungement of violations of driving under the influence (DUI) or test refusal apply to all violations committed on or after July 1, 2006, except that the district court expungement provision for a second or subsequent violation does not apply to violations committed on or after July 1, 2014, but prior to July 1, 2015.

Family Law

Child Welfare System Task Force, House sub for SB 126, requires the Department of Children and Families to create a taskforce to study child welfare systems and procedures in the state of Kansas. The task force includes six members of the legislature, five appointments from the courts and the Judicial Council and six additional members from various legal and/or law enforcement entities.

The task force will study: (1) the level of oversight and supervision by the DCF over each entity that contracts with DCF to provide reintegration, foster care, and adoption services; (2) the duties, responsibilities, and contributions of state agencies, non-governmental entities, and service providers that provide child welfare services in Kansas; (3) the level of access to child welfare services, including health and mental health services and community-based services, in the state of Kansas; (4) the increasing number of children in the child welfare system and contributing factors; and (5) the licensing standards for case managers working in the child welfare system.

The task force is required to submit preliminary progress reports to the legislature on or before January 8, 2018 and a final report on January 14, 2019.

Factors for determining child custody and CINC proceedings, SB 124 amends the law governing determination of legal custody, residency, and parenting time. The bill replaces the requirement for a court to consider, among other relevant factors, evidence of spousal abuse, either emotional or physical, with a requirement to consider evidence of domestic abuse, including, but not limited to, a pattern or history of physically or emotionally abusive behavior, or threat thereof, used by one person to gain or maintain domination and control over an intimate partner or household member or an act of domestic violence, stalking, or sexual assault.

The bill also amends the law to require courts to determine parenting time in accordance with the best interests of the child and specify “custody” in that statute refers to “legal custody.” The bill also amends the law governing child-in-need-
of care proceedings to allow reports concerning the results and analysis of a court-ordered drug or alcohol test to be admissible in evidence if the report is prepared and attested to by the person conducting the test or an authorized employee of the facility that conducted the test. Such person must prepare a certificate that includes an attestation as to the result and analysis of the test, and sign the certificate under oath. The bill states this provision shall not prevent a party from calling such person as a witness.

Simon’s Law concerning certain Physicians Orders for Minors, Sub for SB 85, creates a new requirement for do-not-resuscitate orders or similar orders from doctors concerning a minor. The bill provides that a DNR or similar physician’s order cannot be instituted for an unemancipated minor unless at least one parent or legal guardian of the minor has been informed, orally and in writing, of the intent to institute the order. A reasonable attempt to inform the other parent must be made if the other parent is reasonably available and has custodial or visitation rights. The information does not need to be provided in writing if, in reasonable medical judgment, the urgency of the decision requires reliance on providing the information orally.

The minor’s medical record must include: (1) by whom and to whom the information was given; (2) date and time that information was given; (3) whether the information was provided in writing; (4) the nature of attempts to inform the other parent or the reason for not attempting to notify the other parent if only one parent has been informed; and (5) any refusal of consent to a DNR or similar order by parents or legal guardians.

Should there be a disagreement between parents about the course of action, either parent can petition the district court of the county in which the patient resides or is receiving treatment for an order enjoining violation of this act. If the parents of a minor patient disagree on whether to institute or revoke a DNR or similar order, the district court must resolve the conflict based on a presumption in favor of providing cardio-pulmonary resuscitation. Additionally, in the event the parents of a minor patient disagree, a DNR or similar order cannot be implemented until there is a final determination of the court proceedings, including any appeals.

Portions of the above summaries were drafted by the Kansas Legislative Research Department. Visit links below to view complete summaries:


ONLINE RESOURCES

- Kansas Bar Association
  KBA Legislative homepage at: http://www.ksbar.org/?legislative
- Kansas Legislature
  Official state website for the Kansas Legislature is: http://www.kslegislature.org
- Governor Sam Brownback
  Official website for Governor and Lt. Governor is: http://www.kansas.gov/
- Attorney General Derek Schmidt
  Official website for Attorney General is: http://ag.ks.gov/

SPECIAL NOTICE

While it may be difficult to think about the 2018 Legislative Session when the 2017 Legislature has just completed its work, perseverance is necessary. Individual members, local bar associations, committees, and sections may all submit proposals. Each proposal will be reviewed by the appropriate section or committee before consideration. Therefore, it is imperative that you begin drafting your proposal now and submitting it to the appropriate section.

The KBA Legislative Committee will meet this November to consider all legislative proposals for the 2018 session.

All proposals should be mailed to:
Kansas Bar Association
1200 SW Harrison Street
Topeka, KS 66612
or emailed to Joseph N. Molina @ jmolina@ksbar.org
I recently returned from the annual conference in Lindsayborg for the Kansas Women Attorneys Association. The theme this year was Refresh, Refocus, and Renew with a goal of helping attendees take “…a step back and think about the profession as a whole…” and a “…focus on ourselves as whole people with needs for work/life balance and self-care rather than attorneys who need 12 annual hours of CLE.” Instead of technology and management tools to tweak office processes, many sessions and activities were “lifehacks” for the lawyer – tools to increase our personal performance and satisfaction.

There are so many studies now regarding the current mental state of attorneys that our frailties are clichés relied on by writers and directors in entertainment media. Almost one third of our profession experiences issues with substance abuse within the first ten years of practice and almost one third of attorneys suffer depression. This contrasts with the general population in which fewer than 7% experience either. (The shocker is that we enter law school healthier than the general population, both physically and mentally, suggesting to many that how we create lawyers is deeply flawed.)

Because fixing the law schools, the practice, our colleagues or adversaries, and judges is outside any one lawyer’s short-term capabilities, any lawyer hoping to retain personal health and sanity must look inward. We must figure out how to adapt and overcome threats to our own well-being by learning, “What is mine to do?” The following resources to help lawyers get their own physical and mental houses in order were collected by Whitney Casement of Goodell, Stratton, Edmonds & Palmer in Topeka:

Books

The Anxious Lawyer by Jeena Cho and Karen Gifford. The Anxious Lawyer provides an introductory, 8-week program on meditation created by lawyers, for lawyers. Specific exercises
designed to give practical experience in mindfulness combine with the authors’ practical examples from experience to relate specifically to the stress and demands of practice. (theanxiouslylawyer.com)

The Happiness Trap by Dr. Russ Harris. Another 8-week course based on behavioral psychology research to assist in clarifying what we are working for and how to be more mindful in our efforts. This program is not lawyer specific but the website (thehappinesstrap.com) provides a variety of free resources including video, audio, and text files.

The Depression Cure by Stephen S. Ilardi, Ph.D. Dr. Ilardi is a clinical psychologist and researcher focused on depressive illness and disorders. The book is a distillation of his clinical and academic research into a program designed to assist those facing clinical depression. The thesis of the book (and a description of a lawyer’s life) is that “…human beings were never designed for the sedentary, indoor, socially isolated, sleep-deprived, fast-food laden, frenzied pace of 21st-century American life.”

Buddha’s Brain by Rick Hanson, Ph.D. By combining research in neuroscience with ancient contemplative practices, Buddha’s Brain seeks to explore and explain how patterns of thought mold and form the brain. The combination produces tools and techniques lawyers can use to gradually change our mental states for the better.

Tech

Calm.com – This subscription service supplements the Calm app (iPhone and Android) and the book, Calm, by Michael Achton Smith. There are a variety of guided meditations, sound files for sleep and focus, and general tips and techniques for meditation. The aim of the founder is not so much to remove us from the world but to provide the conditioning to allow us to return to it recharged and ready for more.

Insighttimer.com – Similar to Calm.com but free. Over 5,000 guided meditations, music, talks, and courses. Also provides an app for iPhone and Android to time meditations, breathing, and exercise complete with tracking to assist in habit creation.

Human

Do-it-yourself mindfulness and meditation can seem a bit daunting for many. After all, if you could do it yourself, would you not have done so already? Interaction with others attempting to accomplish the same goals can boost learning and reward achievement. Rebecca D. Martin from McDowell, Rice, Smith & Buchanan in the Kansas City area was another speaker at the Kansas Women Attorney Association conference who addressed the need for meditation and mindfulness. Martin is a certified meditation facilitator and assists with weekly Serenity Pause meditation sessions open to the public at Unity Temple on the Plaza.

Finally, Kansas lawyers have an excellent resource in Anne McDonald of the Kansas Lawyers Assistance Program (kalap.com). McDonald has spent time finding, testing, and sharing a variety of resources – including meditation and mindfulness – to assist lawyers in confronting physical and mental health issues before they cause professional and personal problems. One tool of KALAP is the Resiliency Group meetings held monthly in Topeka, Overland Park, and Lawrence (free of charge). The meetings are guided by Dr. Rae Sedgwick (J.D. and Ph.D.) to assist lawyers confronting or bouncing back from stressful situations or events.

Meditation Works

It would be easy for the cynical, clinical me to dismiss the sort of “touchy-feely” vibe that can emanate from discussions of meditation and mindfulness. However, I have been mindful of a brook trout in a mountain stream and meditated on the careful cast of the fly for hours thinking only a minute had passed. I can recall coming back into town feeling relaxed in a way that heightened every sense and left me feeling ready for practice weeks after the trip ended. I would load up a meditation app if it could provide even another five minutes like that. Time to give it a try.

About the Author

Larry N. Zimmerman is a partner at Zimmerman & Zimmerman P.A. in Topeka and former adjunct professor, teaching law and technology at Washburn University School of Law. He is one of the founding members of the KBA Law Practice Management Committee.

kslpm@larryzimmerman.com
Recently, we have come to associate “crossing a red line” with then-President Obama’s promise that if President Assad of Syria used chemical weapons, it would cross a red line and result in military intervention by the United States.¹ I want you to be aware of a red line in our profession. That is the red line of giving legal advice as a member of a board instead of as the attorney for the board. With permission, this article is based on a May 11, 2017, CLE presented by Shawn Leisinger, J.D., the Executive Director of the Centers for Excellence, CLE Director and Externship Director all at Washburn University School of Law. Shawn gives excellent, practical ethics CLEs, and I encourage you to attend one in your area.

As a young lawyer, often we will be asked to serve on a local board. Local organizations, especially in rural Kansas, are always in search of board members. Who better to ask than a young, energetic lawyer? While serving in our communities should be a priority of all members of the bar, there are a number of ethical considerations to be mindful of when serving on a board.

If you are going to volunteer your time serving on a board, the first thing you should do is be a productive board member by actively participating in the business of the board. Every board member has duties they are bound by in order to be a competent board member.

- Duty of Care: this requires each board member to actively participate in organizational planning and decision-making, so that decisions made are informed ones.
- Duty of Loyalty: the member must put the interests of the organization ahead of any personal or professional gain.
- Duty of Obedience: members should ensure the organization is compliant with local, state and federal laws and regulations. This also means the members are making decisions in line with the mission of the organization.
- Fiduciary Duty: an active board member will provide appropriate financial oversight of the organization.
- Duty of Truthfulness: an attorney board member must be cognizant of a duty to make truthful statements to others.² The default position of an attorney board member should be to disclose and be honest with others when their organization is wading into a questionable course
of action. Further, an attorney board member may have a duty to advise an unrepresented person with whom the organization is at odds, that the person should consult an attorney.\(^3\)

Still interested in serving? Great.

Now that we have established what it takes to be a competent board member, what is the red line that we are not to cross? The red line in this situation is to not allow an attorney-client relationship to form between the attorney board member and the organization. If an attorney board member provides an opinion on a legal matter, and the organization acts on such opinion—even if the attorney did not intend for it to be attorney-client advice—an attorney-client relationship may have been formed.

An attorney board member must be extremely cautious when weighing in on an issue involving a legal matter, because if an attorney-client relationship is formed, the attorney must provide competent representation with the necessary legal knowledge, skill, thoroughness and preparation.\(^4\) The best course of action for an attorney board member is to encourage the board to hire outside counsel to resolve any legal matter. Additionally, the attorney board member should repeatedly make it clear they are a board member and do not represent the organization.\(^5\)

What is the alternative to casually weighing in on legal issues? Under KRPC 1.2 and Kansas Supreme Court Rule 115A, an attorney can enter into a “limited scope representation” with the organization.

An additional scenario that will undoubtedly confront the attorney board member is when a member of the community peppers the attorney for information about what is going on with the organization. Even though the organization is not a client, the attorney should be extra cautious when discussing the happenings on a message board or at the co-op café because of the high expectation of maintaining confidentiality that is placed on attorneys.\(^6\) An attorney board member who violates the duty of confidentiality may be subject to a disciplinary case.

One final alternative is to provide pro bono legal advice to the organization as opposed to sitting on the board.\(^7\)

Still interested? Hopefully, this has not discouraged you from wanting to serve worthy causes in your local community.

This is not a comprehensive article about all the potential pitfalls associated with board service, it is intended as a cautionary tale so attorneys can most effectively serve their local communities while protecting their licenses.

About the Author

Clayton Kerbs currently practices in his hometown of Dodge City, with his father, Glenn. Clayton’s practice consists of domestic and municipal law cases. He attended Creighton University and Washburn University School of Law. Prior to practicing law, Clayton worked for U.S. Senator Jerry Moran. Clayton is married to Leah; they have two sons, Porter and Chandler.

2. KRPC 4.1.
3. KRPC 4.3.
4. KRPC 1.1.
5. KRPC 1.4.
6. KRPC 1.6.
7. KRPC 6.1.

Congratulations to **The Kansas Bar Foundation** and **Todd N Thompson** who, as Immediate Past President of the KBF, accepted the **Dean's Club Medallion** from **The University of Kansas School of Law** given in recognition of the Foundation's generous support of the law school.
In 2017, Kansas Legal Services (KLS) received a $25,000 IOLTA grant. This qualified KLS to receive additional matching funds to provide legal services to crime victims, including those who experience domestic violence.

Kansas Legal Services provides civil legal assistance to victims of crime under the Victims of Crime Act (VOCA) grant with matching funds from IOLTA. Funding from VOCA/IOLTA allows KLS to serve victims of domestic violence, sexual assault, stalking and other crimes by providing the victims with access to experienced attorneys. That is the first step in assisting victims and their families as they move toward safety and stability. In addition, victims of crime often need legal assistance to address needs that go beyond protection for crime victims, such as taking measures to ensure victims’ safety in the aftermath of an assault.

During the first five months of Calendar Year 2017, IOLTA funds helped 947 victims of abuse with advice and representation to help end their abuse. Outcomes in these cases include 328 clients obtaining a final order of protection from domestic violence, 54 persons obtaining an order for protection from stalking, 86 obtained custody/visitation orders to enhance safety, and 127 received assistance with safety planning. Many other outcomes were achieved for our clients.

KLS surveys those served under the VOCA/IOLTA grants regarding their satisfaction with services, areas for improvement, and the status of violence in their lives. Survey results indicate, of the persons served in Fiscal Year 2017, 98 percent of persons completing the survey were satisfied with the services provided by KLS staff and 97 percent were satisfied with the services provided by KLS attorneys. Overall, 98 percent of clients indicated they would recommend KLS services to others. Most importantly, 79 percent indicated that KLS services prevented further violence in their lives.

Below are some direct comments received from surveys:

- Thank you for making your services available to victims like myself. Having Ms. Zafar at court to represent me, helped give me the courage and strength to continue moving forward with my life and to protect my 2 sons and self. Thank you again!
- Thanks to [a] KLS attorney, a 10-month old boy will no longer be abused or in a hostile living environment. Thank you.
- Without this service, I wouldn’t have any protection for persons like me.
- Thank you so much—saved me and my children from a situation that felt like no hope. Very much appreciated.
- I loved your services! Thank you! I don’t know how I would have done this without you!
- Excellent angels that you all are, have walked me through each step to protect myself, educating me along the way of my rights, and the courage to push forward to see the end.
- Thank you Sherry, Jane, Marlow for your courage, guidance and your time, most of all for your compassion. You all are wonderful and I appreciate you all.
- Gives victims hope and encouragement to continue and stay away from harm.
- I liked having someone help represent me. She did a very good job, having her here also helped with the anxiety I was having because the defendant was here.
- I appreciate how my attorney took my fears into consideration during PFA hearings and court and did all within her power to make me comfortable and relaxed.
Whatif Monsters

Jonathan James and the Whatif Monster, by Michelle Nelson-Schmidt is a book I bought for my niece but ultimately kept for myself. The book starts like this:

“Some Whatif Monsters like to hang out and fill up our heads with worry and doubt. They are sneaky and quiet and quick as a blink, the words that they whisper can change how we think. Jonathan James heard those words full of dread and all those ‘what ifs’ got stuck in his head.”

The book goes on with the Whatif Monster describing to Jonathan all his worst case scenarios such as: “What if you lose? What if you’re last? What if you’re slow and never get fast? What if she laughs? What if she runs? What if she thinks you’re not any fun?”

Until suddenly Jonathan stops and says “Now wait a minute! I have something to say, after hearing ‘whatifs’ all through the day. I hear all your worries; I hear all your claims. But what if you’re wrong?” He then goes through all of his worst case scenarios and changes the question from a negative to a positive. From what if I fall to “[w]hat if I climb to the top of the tree, and I never slip or skin up a knee?” From what if I lose to “what if I run in a really big race, and have a great time no matter what place?”

Personally, I know I am really bad about playing the “Whatif Game” but more than just me, women in general often fall victim to the Whatifs. What if I’m not qualified? What if I fail? What if I try to negotiate a higher salary and they say no? Linda Babcock in her book Women Don’t Ask found that only about 7% of the women she studied even attempted to negotiate their starting salary while 57% of men did.1 A Hewlett Packard internal report found that “men tend to apply for a job when they meet only 60% of the qualifications, but women apply only if they meet 100% of them.”2

When Tara Sophia Mohr dug into that statistic for her article “Why Women Don’t Apply for Jobs Unless They’re 100% Qualified” she found that out of the women she surveyed, 41% indicated their top reason for not applying for a job was “I didn’t think they would hire me since I didn’t meet the qualifications, and I didn’t want to waste my time and energy” and another 22% responded their top reason was “I didn’t think they would hire me since I didn’t meet the qualifications and I didn’t want to put myself out there if I was likely to fail” Only 13% of men listed fear of failure as a top reason.3

These kinds of statistics are a big reason why I think it is so important for female attorneys to attend the Kansas Women Attorneys Association Annual Conference in Lindsborg. For a few days, in addition to truly top notch CLEs, I get to surround myself with fellow attorneys who inspire me, challenge me, and motivate me to be more than a statistic.

This year the keynote speaker was Paulette Brown, Immediate Past President of the American Bar Association. During her speech, one line really spoke to me, “You have to be in the room to effectuate change.” During a CLE on “The Gender Pay Gap and Tips for Negotiating a Way Out” given by Gaye Tibbets and Jill Miller, a study by the American Association of University Women was discussed that found that even after accounting for all the explainable variables such as time off for family, working different hours, etc. there is still a 16% unexplainable pay gap between male and female attorney salaries. To effectuate change, women not only need to be in the room, we need to recognize our weaknesses.

Whatif Monsters are pervasive and tend to hold you back from achieving your full potential. Events like the annual KWAA Conference help me change my internal narrative from “What if I'm not qualified to but what if I am?” Another conference attendee told me one of the most valuable parts of the conference for her was the willingness of fellow colleagues to discuss salary and hours because it allowed her to better evaluate whether she had sufficiently negotiated her salary. So, if you have never been, I would highly recommend putting next year’s conference on your calendar now. At the conference, you are guaranteed to make friends, leave inspired, and maybe kill a few Whatif Monsters of your own. ■

About the Author

Amanda Stanley Amanda Stanley is a member of the KBA Diversity Committee. Stanley received her juris doctorate from the University of Kansas School of Law in 2014 and her Bachelor of Science in Biology from Newman University in 2008. After law school Stanley clerked for Judge Kim Schroeder of the Kansas Court of Appeals. She currently serves as Legal Counsel for the League of Kansas Municipalities.

астanley@lkm.org

Deena Bailey received the Jennie Mitchell Kellogg Attorney of Achievement Award—KWAA’s highest honor—for her work advancing opportunities for women in the legal profession.

During the presentation, Joni Franklin Brietenbach recalled that during a 9th grade civics project, Deena committed to becoming an attorney. Since that time, Deena has given countless hours back to society by helping victims of domestic violence, pro bono, and working to promote KWAA. The KWAA annual conference brings together women attorneys from around the state for networking, continuing education and fun!

This year’s annual conference was held in Lindsborg. Members of the KBA staff (Deana Mead, Sara Rust-Martin and Meg Wickham) attended, representing the association with a booth that offered information on the many benefits of membership, made available some of the KBA’s excellent publications and provided some of the best swag of the conference—including the wildly popular fidget spinners and i-Phone fans (especially useful on one of the hottest days of the summer!)
I. INTRODUCTION AND BACKGROUND

Consistent with past practice, the Kansas Legislature has adopted most of the 2015 and 2016 amendments to the Federal Rules of Civil Procedure, and those changes are made applicable to the courts of this state in 2017. The major change implemented by these amendments is the express adoption of the concept of “proportionality” in the defined scope of discovery. While “proportionality” is not a new concept, the express statement of this concept as a part of the scope of discovery should have an impact upon the breadth, and therefore the cost, of discovery in civil cases in Kansas going forward.

Effective on December 1, 2015 and December 1, 2016, the Federal Rules of Civil Procedure were amended. As usually occurs, these amendments were considered by the Civil Code Advisory Committee of the Kansas Judicial Council, and then a bill incorporating the amendments was proposed by the council to the Kansas Legislature.

It was then signed by the governor on May 24, 2017, and made effective on the date of publication in the statute book, which is July 1, 2017.

The purpose of this article is to review the changes brought about by these amendments, and to look particularly at the concept of proportionality as adopted by the amended rules.
However, to a large extent the Kansas rules of civil procedure very closely mirror the federal rules, and maintaining that consistency—when suitable for the citizens, litigants, and courts of this state—is beneficial. As the Kansas Supreme Court has stated:

Kansas courts often look to the case law on the federal rules as guidance for interpretation of our own rules, as the Kansas rules of civil procedure were patterned after the federal rules. See *Stock v. Nordhus*, 216 Kan. 779, 782, 533 P.2d 1324 (1975) (noting that the Kansas courts have traditionally followed the interpretation of federal procedural rules and that the federal case law is highly persuasive.)

To that end, the 2015 and 2016 amendments to the Federal Rules of Civil Procedure were generally proposed by the judicial council, and were included in the Bill 120. And, as noted above, all recommended amendments were then approved and codified by the Kansas Legislature through that bill, and then signed by the governor.

**III. A SUMMARY OF THE 2017 CHANGES (OTHER THAN “PROPORTIONALITY”)**

**A. Construction.**
K.S.A. 60-102 was amended to read:

60-102. Construction. The provisions of this act shall be liberally construed, administered and employed by the court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding.

This amendment emphasizes that all parties—along with the court—share the responsibility to employ the rules to secure the just, speedy and inexpensive determination of every action.18

Federal Rule of Civil Procedure 1 states that the rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The committee notes on the 2015 Amendment to Rule 1 explain that just as the rule applies to the court “so the parties share the responsibility to employ the rules in the same way.”19

Frankly, it is usually the parties who press to make litigation faster and less expensive.

**B. Time.**
K.S.A. 60-206(d), as amended, now reads:

60-206. Time, computation and extension; accessibility of court; definitions. . . .

(d) Additional time after certain kinds of service. When a party may or must act within a specified time after being served and service is made under K.S.A. 60-205(b)(2)(C) (mail), or (D) (leaving with the clerk), and amendments thereto, three days are added after the period would otherwise expire under subsection (a).

The import of the amendments to this rule is that three days are no longer added for responding to pleadings served by telefacsimile and electronic means, e.g. e-mail. K.S.A. 60-205(b) is different from federal rule 5(b), in that the federal rule does not list service by telefacsimile and instead has a subsection for service by “other means consented to,” which perforce would include service by fax if agreed by the parties.

To emphasize this point, with electronic filing and service, as with service by e-mail, the three-day mail rule has now been deleted. This will likely cause problems, at least initially, for attorneys (and their paralegals or secretaries) who attempt to calculate the correct response time. K.S.A. 60-206 not only applies to discovery, but also to substantive motions served by e-filing or e-mail20 (including motions for summary judgment).21

Originally, there were concerns of potential delays in service by electronic means, and that incompatible systems might make the opening of attachments difficult or impossible, thus justifying an additional three days to respond to pleadings served via e-mail or fax. Time and technological progress have alleviated those outdated concerns.

**C. Case Management Conference.**
K.S.A. 60-216(b) was amended to provide for consideration of the preservation of electronically stored information, recognizing that a duty to preserve discoverable information may arise before an action is filed. This section was also amended to provide for agreements incorporated in a court order under K.S.A. 60-426a, to control the effects of disclosure of information covered by attorney-client privilege, such as a “claw-back” agreement22 or a “quick-peek agreement.”23

Courts have adopted both types of agreements on privilege issues and have incorporated such provisions in orders to avoid any finding of future waiver. *Hopson v. The Mayor and City Council of Baltimore*, 232 F.R.D. 228, 246 (D.Md.2005) (“claw back” agreement was incorporated into court order to avoid any assertion of waiver of a privilege); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 WL 246439 at *8 (E.D.La. Feb. 19, 2002) (reciting various options for a “quick peek” agreement).24

**D. Production of documents and things.**
K.S.A. 60-234(b)(2)(B) was amended to require that objections to requests under the statute be stated with specificity. This provision adopts the language of K.S.A. 60-233(b)(4), eliminating reliance upon general and less specific objections. This section was further amended to reflect the common practice of producing copies of documents or electronically stored
information rather than simply permitting “inspection.”

K.S.A. 60-234(b)(2)(C) was also amended to provide that an objection to a request for production must state whether anything is being withheld on the basis of the objection. This eliminates the confusion arising when a party asserts conditional objections and still produces documents, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objection.

[Conditional objections] “preserve nothing and serve only to waste the time and resources of both the Parties and the Court.” . . . There is either a sustainable objection to a question or a request, or there is not.25

This is consistent with Kansas precedent, which has long imposed on parties objecting to discovery a “heavy burden” to support a burdensomeness objection specifically with “factual data” and not merely “unsupported conclusions.”26

E. Motions and Orders to Compel.

In federal courts, various (and conflicting) standards have been developed for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. This has caused litigants to expend extensive effort on preservation of such information to avoid the risk of severe sanctions if a court finds their efforts insufficient.

The new language in K.S.A. 60-237(e) authorizes specific measures that a court may employ if lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. A court may impose sanctions under subsection (e)(1), but only upon a finding of prejudice to another party from loss of the information. Once a finding of prejudice is made, the court is authorized to employ measures “no greater than necessary to cure the prejudice.”27

Subdivision (e)(2) authorizes jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party who lost it. In addition, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and the likely relevance of lost information, and instructing the jury that it may consider such evidence, along with all the other evidence in the case, in making its decision. Of course, under subdivision (e)(2), the court would always have the discretion to give traditional missing-evidence adverse-inference instructions based on a party’s failure to present evidence in its possession at the time of trial.28

F. Default Judgment.

K.S.A. 60-255(b) has been amended to clarify the relationship among K.S.A. 60-254(b) [judgment on multiple claims or involving multiple parties], 60-255(b) [setting aside default judgment], and 60-260(b) [relief from judgment or order]. A default judgment that does not dispose of all claims among all parties is not a final judgment, unless the court directs entry of final judgment under K.S.A. 60-254(b). Until a final judgment is entered, K.S.A. 60-254(b) allows revision of the default judgment at any time. The rigorous standards established by K.S.A. 60-260(b)29 apply only when a party seeks relief from a final judgment.

G. Forms.

K.S.A. 60-268 previously provided that forms provided by the Kansas Judicial Council would suffice, and that those forms illustrated the simplicity and brevity contemplated by the Kansas code. However, this statute was deleted by Bill 120 to conform with the 2016 deletion of Federal Rule 84 (also relating to forms). As noted in the comments to the federal rules, the purpose of forms providing illustrations for the rules, while useful when the rules were adopted, has been fulfilled, and the comments further recognize the prevalence of a number of alternative sources for forms. The deletion of this statute is not intended to imply that judicial council forms are deficient or that forms should not be used. The amendment is again consistent with the historic philosophy that the Kansas code should conform with the federal rules unless there is something unique to Kansas law or practice that warrants deviation from the federal rules.

IV. KANSAS CHANGES ON PROPORTIONALITY

A. Overview.

As noted above, an overarching theme in the 2015 amendments to the Federal Rules of Civil Procedure is the express imposition throughout the rules of the concept of “proportionality,” likely recognizing the increased cost of civil discovery, particularly compounded by the ubiquity of electronic communication and the prevalence of electronically-stored information. Thus, a number of amendments to the Federal Rules of Civil Procedure, and therefore the 2017 amendments to the Kansas code, incorporate the rule of ensuring that discovery efforts (and costs) are truly proportional to the nature and size of the case.

B. Scope of Discovery.

K.S.A. 60-226(b)(1), establishing general provisions governing discovery, is amended to provide that

[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. (Emphasis added.)

Subsection (2)(A) also permits courts to limit the frequency or extent of discovery, and it must so limit discovery if the burden or expense of the proposed discovery outweighs its
likely benefit, considering the same six factors.

Information is discoverable under revised K.S.A. 60-226(b) (1) if it is relevant to any party’s claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are not new, but were moved from the former subsection (b)(2)(A)(iii) because they more accurately state parameters for determining the scope of discovery at the outset. This does not authorize the producing party to refuse discovery simply by asserting a boilerplate objection that the requested discovery is not proportional. Instead, under the revision to K.S.A. 60-201, the parties and the court have a collective responsibility to consider the proportionality of all discovery and consider proportionality in resolving discovery disputes.

The former provision for discovery of relevant but inadmissible information which appears “reasonably calculated to lead to the discovery of admissible evidence” was also deleted, and was replaced by a more direct statement: discovery of nonprivileged information remains available so long as it is otherwise within the scope of discovery, even though it is not admissible in evidence.

K.S.A. 60-226(b)(2)(A)(3) was amended to authorize the court to limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by subsection (b)(1).

C. Protective Orders.

K.S.A. 60-226(c)(1)(B) was amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present statute, and courts already exercise this authority. Explicit recognition of the authority should discipline arguments to the contrary. Recognizing the court’s authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the cost of responding to discovery.

K.S.A. 60-226(d) was amended to recognize that the parties may stipulate to case-specific sequences of discovery.

D. Depositions.

K.S.A. 60-230 and 60-231 were amended to reflect the recognition of the concept of proportionality set out in K.S.A. 60-226(b)(1).

V. WHAT IS “PROPORTIONALITY?”

As noted above, the concept of “proportionality” is defined by six specific parameters: (a) importance of the issues at stake; (b) amount in controversy; (c) parties’ relative access to relevant information; (d) parties’ resources; (e) importance of the discovery in resolving the issues; and (f) whether the burden or expense outweighs the likely benefit of the requested discovery. Litigating over the breadth, scope and cost of discovery will now involve a consideration of these issues.

A. Importance of the issues.

The requesting party must explain the issues in the case and their importance to the court, demonstrating that the issues presented go beyond a finite dispute between two contending parties. The objecting party must explain that the case is a simple dispute between two parties, with no issues beyond those between the two parties.

B. Amount in controversy.

This is perhaps easier to explain, though a plaintiff is likely to inflate the amount in controversy, while the defendant is likely to downplay it. Where the amount in controversy does not justify the expenditure of significant costs and efforts to respond to discovery, the court should find the discovery is not proportional.

C. Relative access to information.

The court will analyze whether the responding party needs to undertake extraordinary efforts to locate, retrieve and produce the requested information, and will require the responding party to produce facts on which to base its argument. The requesting party, on the other hand, will claim that the information essential to support its claim or defense is available nowhere, and through no other means and methods, than from the responding party.

D. The parties’ resources.

Of course, each party will argue its relative lack of resources, again considering the cost of producing the requested information. Where the producing party clearly has greater relative resources and a financial ability to locate and produce the requested information, the discovery should be required.

E. Importance of the discovery in resolving issues in the case.

Again, this will require the court to examine the actual requests and compare those requests to the important issues in the case. This often leads to the posing of “what if” questions, i.e. the documents may support a particular point or position, but the requesting party will not know unless and until the documents are produced. This will, of course, entail further argument to the court.

F. The relative burden and expense or production compared to the likely benefit of the requested information.

To support this argument, the objecting party must provide actual evidence, and not just a conclusory argument, that the production will be overly burdensome. This evidence includes testimony and an explanation of the number of documents to be searched; the cost of gathering, reviewing, culling, filtering documents; the number of users; the number of servers and/or computers; and the number of subjects requested. [An affidavit or other evidentiary proof is the best way for a party to demonstrate undue burden under Rule 26(c), but, “at a minimum,” the party must “provide a detailed explanation as to the nature and extent of the claimed burden or expense.”]
Where the benefit of the requested discovery is “speculative at best” and would involve unreasonable burden and expense, the discovery should be considered disproportionate.40

VI. CONCLUSION.

In an effort to make litigation more just, speedy and inexpensive, the changes in the Federal Rules of Civil Procedure and their parallel in the Kansas code might result in the opposite. One may expect litigation and motion practice over proportionality, including argument over each of the six factors to be considered by courts.44 This entails a certain amount of difficulty and cost to the parties.45 Once the courts and attorneys work through these issues, and impose upon the parties the appropriate level of specificity in their arguments and proofs, the end result should be less expensive litigation in general—a goal to be desired by all courts, parties and attorneys.

About the Author

J. Nick Badgerow is a partner with Spencer Fane LLP in Overland Park, Kan. A member of the Kansas Judicial Council and Chairman of the Judicial Council’s Civil Code Advisory Committee, he was also a member of the Kansas Board of Discipline for Attorneys for 16 years. He also serves as Chairman of the KBA Ethics Advisory Committee, and for thirty years, he has served as Chairman of the Johnson County Bar Association Ethics & Grievance Committee. He is the editor and a co-author of the KBA Ethics Handbook (2015).

1. See infra Section V.
7. For a complete version of the enrolled bill, see http://kslegislature.org/li/b2017_18/measures/documents/sb120_enrolled.pdf.
16. See, e.g., K.S.A. 60-204, 60-205, 60-211, 60-217, and 60-225.
20. Kansas Supreme Court Rule 133(b)(“the response must be filed not later than 7 days after service of the motion or as otherwise provided by the court” (emphasis added)).
21. K.S.A. 60-256(o)(1)(B) and (C)(“must file a response within 21 days after the motion is served” and “may file a reply within 14 days after the response is served” (emphasis added)).
22. This agreement allows the producing party to produce everything without a privilege review, but to “claw back” produced documents that turn out to be privileged, thereby saving the extensive cost of reviewing everything in the first instance. Rajala v. McGuire Woods, LLP, No. 08-2638-CMD-JMJ, 2010 WL 2949582, at *3 (D. Kan. July 22, 2010) (quoting Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 280 (S.D.N.Y. 2003)).
23. John B. v. Goetz, 879 F.Supp.2d 787, 891 (M.D. Tenn. 2010) (“Under this [quick-peek] agreement, the parties can dramatically reduce the scope and cost of privilege review, and the scope and cost of discovery itself. The parties agree to an ‘open file’ review of each other’s data collections prior to formal discovery, reserving all rights to assert privilege when responding to the actual document request. After the review, the parties designate the files or data sources that they believe are most relevant to their case, and submit a formal Rule 34 request listing those items. The producing party then has a much narrower task of privilege review, focusing on just those files or data sources before responding to the request.”) (Citing Kenneth J. Withers, Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure, 7 SEDONA CONE J. 1, 23 (2006)).
24. Id. at 892.
27. Adcox v. United States Postal Serv., No. 15-9258-JWL-GEB, 2016 WL 6905707, *3 n. 6 (D. Kan. Nov. 22, 2016) (“See the 2015 amendments to Fed.R.Civ.P. 37(e) and the corresponding comments. As stated supra, page 6–7, the amended rule permits the court, ‘upon finding prejudice to another party from loss of the information . . . to order measures no greater than necessary to cure the prejudice’ (emphasis added). The Advisory Committee’s notes make clear the Court should ‘exercise caution’ to ensure the remedies imposed by the Court ‘fit the wrong’ committed by a non-producing party.”)
documents within a party’s control raises a presumption that the evidence which would be disclosed by those records is unfavorable to that party.”); State v. Romero, No. 89,899, 2004 WL 1086967, at *4 (Kan.App. May 14, 2004) (unpublished opinion) ("Kansas courts have the authority to give a ‘spoliation’ instruction to the jury when the State has destroyed evidence in bad faith.")

29. K.S.A. 60-260(b) provides:

(b) Grounds for relief from a final judgment, order or proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under subsection (b) of K.S.A. 60-259, and amendments thereto; (3) fraud, whether previously called intrinsic or extrinsic, misrepresentation or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.


40. Koch v. Koch Indus., Inc., 203 F.3d 1202, 1238 (10th Cir. 2000) (affirming district court decision limiting discovery because the expected benefit of the requested discovery was “speculative at best” and because the requested discovery would impose “serious burden and expense”).


42. Olivia Gerroll, Rule 1, 16, 26, 34, 37: FRCP Amendments Pertaining to eDiscovery (Mar. 9, 2016), http://dl4discovery.com/discover-more/2016/3/the-2015-amendments-to-the-frcp-that-pertain-to-ediscovery#sthash.by1cEWfN.dpbs (“Be prepared for motion practice over ‘proportionality’ and ‘reasonable steps to preserve.’”).
A student’s perspective on the mock trial experience....

By Alece Stancin, The Independent School, Wichita

This year, I had the privilege of competing at the National High School Mock Trial competition with my school’s team. Over the three days of the event, we faced teams from nearly every place imaginable, while also meeting new people and bonding as a team. The memories we made both in and out of court that weekend made it one of the best of my life.

The experience of competing at Nationals was unlike anything I’d ever done before. We conducted our trials in federal courtrooms with heavy wooden doors, vaulted ceilings, and elevated benches; they looked like the courtrooms from law shows on TV. After our rounds, both the presiding and scoring judges gave us invaluable feedback we can now apply in all future competitions. For example, because the presiding judges were real sitting judges, their rulings helped the student lawyers understand how rulings in a real courtroom would work, and the lawyers were forced to adapt to the style of a particular judge which was a useful skill to have in every round. For witnesses, just being in the courtrooms was an experience of its own—portraying our roles with the formality of a federal court made all the hard work worth it.

Another incredible part of Nationals was all the other high schoolers we met. We competed against teams from Utah, Pennsylvania, South Korea, and more. We were not only able to compete against many different teams, but we also got to know the people involved. At the pin exchange, we talked to people from all over the country and world, and at the awards ceremony, we were able to socialize with the same people we had opposed in the courtroom just hours earlier. Nationals was a great opportunity to meet students who have passions similar to our own—from mock trial to forensics and beyond—and if we had more time, I’m sure we would have become close friends with many of the people we met.

Mock Trial is an opportunity for dedicated high schoolers to come together and prepare a case where they play a part as either a lawyer or witness. No matter the role, Mock Trial teaches students to think on their feet and work creatively to solve issues, and it does so in a real courtroom setting. It is a great introduction for aspiring lawyers and a fantastic experience for everyone who participates, whether at the regional, state, or national level. I look forward to applying everything I learned at Nationals to future competitions.

The kids were just awesome all weekend, in and out of court. The team went 2-2 and finished 21 out of 46 teams. That’s the second best that a Kansas team has ever done, and was particularly impressive given that this team had less experience than any Independent School team I’ve taken to Nationals in the last 8 years. As always, this is a very difficult tournament since some of the state champions compete all year, have Mock Trial class, and come from states with large programs. We are deeply appreciative of all of the support the bar gives to the Mock Trial program.

-John Steere-
Mock Trial Coach,
The Independent School, Wichita, KS

Counsel table front row (L to R): Ethan Chandler, Reid McConnaughey, and Will Rowley; back row: Eliana Jacobsen, Chase Farha and Alece Stancin.
my team learned from our experience at Nationals to our regional case next year, and hopefully, we’ll be able to make a trip to Nationals once more.

My team and I enthusiastically thank all of those in the state bar association who made this experience possible and who support Mock Trial in Kansas.

Mock Trial Program Management

The KBA Mock Trial Program is managed by the KBA Young Lawyer Section. The 2017 competition was primarily managed by Mitch E. Biebighauser, Bath & Edmonds PA and William S. Walberg, Evans & Mullinix PA. The program would not be possible without the support of attorneys and judges who volunteer their time to judge regional and state competitions.

KBA staffers Anne Woods, Ken Waugh, Ryan Purcell and Jamey Metzger provide ongoing support and assist with travel, marketing and accounting matters.

Funding for Mock Trial

This year, the Kansas Bar Foundation provided a total of $5,670 for the team to travel to nationals in Hartford, Connecticut. The program is also sponsored by Shook, Hardy & Bacon, LLP and receives local support from the Wichita Bar Association and the Johnson County Bar Association.


Future Funding

Kansas attorneys can continue to support the program by volunteering and providing donations to the KBA YLS Mock Trial Program. Each year, travel expenses vary depending on where the national competition takes place. The State Bar of Nevada and the Nevada Bar Foundation will host the 2018 National Championship in Reno, Nevada. The 2018 National Championship will take place May 10-13, 2018. You can make donations for the 2018 Kansas competition at:

http://www.ksbar.org/mpage/kbf_donate. Please indicate that the donation is for mock trial.
Two Kids, Two Degrees & Two Words: “No Regrets”

If you had to choose one of the following circumstances to happen in your 1L first semester, which would you choose? Would you rather: (a) add a master’s degree on top of your JD; (b) relocate to an area over 750 miles away from the nearest family member; (c) have your first child in the second week of law school; or (d) all of the above. If you chose (a), (b), or (c), you likely enjoy plain vanilla ice cream and drive ten miles per hour below the speed limit. However, if you chose (d)—all of the above—then hold on tight, it is going to be a bumpy one! Trust me, I know this from experience.

My wife and I are from out West. We had spent our entire married life living in Salt Lake City, Utah and Boise, Idaho. Life was good. We both had our degrees. We each had jobs. No debt. We knew our communities; we fit in. With the exception of one sibling, we lived within five hours of all of our immediate family. Life was . . . safe. Why would we ever shake up the status quo? And then, like a tornado swirling across the prairie, our life got flipped upside down.

We didn’t have grandmas, sisters, or long-time friends on hand, ready to zip on over to help care for my wife and son. In a lot of ways, we felt as if life threw us into the deep end of the pool with a shark swimming in it . . . the shark being law school, of course. In time, we learned to swim with the sharks, so we decided to up the stakes, and I applied for KU’s Master in Public Administration (MPA) just to make things a little more interesting.

Once our trusty ’97 Chevy Suburban came to a halt in Lawrence, we were worried as much as we were excited. I was soon to hit the books in Green Hall, and my wife, 8½ months pregnant, was soon to hit the delivery room. In due time, barely two weeks into law school, Jackson came into our lives. Now, not only did I have no clue on how to be law student, I also was trying to understand how to be a father (and supportive husband) with our new infant. For the record, Amazon.com does not have any Emanuel “Crunch Time” or “Examples & Explanations” on this subject. Study aids just don’t pack the same punch within the context of fatherhood.

Once our trusty ’97 Chevy Suburban came to a halt in Law-
Despite those challenging circumstances, I would not have it any other way. That time was like a refiner’s fire in which we forged our character, grit, and identity. We are changed people because we chased our dreams. I cannot imagine my life without Jackson and our soon-to-be-born baby daughter. My wife is my rock and lighthouse. Without them, I would have no purpose.

Furthermore, we have made so many new associations and friendships in the law school, MPA school, our church, and the community, all of whom have collectively made our successes possible. In a real way, these beloved friends sacrificed so my family and I might succeed. Sure, life was safe before, but we needed Kansas to help make us into the man, woman, and family that we can eventually become. Life has a way of becoming intimidating in a hurry, especially if we let it. But if you choose faith and hope over fear and doubt, any worthwhile pursuit or dream will happen.

And for my dream—two kids, two degrees—I only have these two words: “No regrets.”

About the Author

Preston Rutter is a 3L from Salt Lake City, Utah. He majored in International Relations at Brigham Young University, worked as a finance analyst after graduation, and has interned with a U.S. Senator, a state senator, and a federal judge. He is currently working on his law degree and Master of Public Administration with hopes of becoming a city manager or employed in municipal law.
DRAFTING HEALTH CARE ADVANCE DIRECTIVES IN A RAPIDLY CHANGING LEGAL AND SOCIOLOGICAL ENVIRONMENT

by Timothy P. O'Sullivan

Original photo by Lyndee Trost
An advance directive is a legal document, executed by a declarant pursuant to state law, authorizing or instructing others to make health care decisions on the declarant’s behalf in the event the declarant possesses insufficient capacity to make such decisions. Subject to constitutionally permissible statutory or common law limitations, by executing an advance directive, a declarant can make his or her wishes known and authorize a third party to make decisions regarding any aspect of the declarant’s health care, including whether to withhold or withdraw life-sustaining procedures (LSPs).

There are three popular types of advance directives in the United States today: instruction directives, proxy directives, and directives that combine aspects of both instruction and proxy directives. An instruction directive is one in which a declarant leaves instructions for future care without appointing an agent to carry out those instructions. A living will is an example of an instruction directive. A proxy directive is one in which the declarant is silent, or nearly silent, about the declarant’s wishes, instead designating an individual to make all or a portion of the declarant’s health care decisions. A durable power of attorney for health care decisions is an example of a proxy directive. In most states, a declarant can execute a third type of directive, a hybrid directive combining in one instrument the functions of both instruction and proxy directives, appointing a decision maker while also providing guidance or direction to the decision maker with respect to certain health care decisions.

Kansas was one of the early states to enact advance directive statutes. Those statutes, discussed below, provide for health care powers of attorney, living wills, and do-not-resuscitate directives (DNRs). Although separate and distinct statutes apply to the initial two types of advance directives, there appears to be no legal impediment to combining such advance directives into a hybrid directive, the third type of advance directive, provided each separate type of advance directive combined therein, if considered separately, is in compliance with the applicable Kansas statute. However, as the types of advance directives serve separate and distinct purposes, as well as being applicable in different situations, they are typically not combined in one instrument by estate planning and elder law practitioners.

Kansas advance directive statutes are two to four decades removed from their enactment. Consequently, they have become, to use a colloquial phrase, a little “long in the tooth.” They simply are not reflective of subsequent societal and medical trends in many respects, fail to embody the comprehensive, cohesive and advanced provisions in more progressive statutes subsequently enacted in other states, and are—at least in one important respect discussed in this article with regard to living wills—not consonant with later judicial decisions imposing constitutional limitations on their import.

The purpose of this article is to alert practitioners of such trends and subsequent legal developments, as well as provide practical tips to draft legally viable advance directives that more fully address and implement their clients’ health and personal care desires at a time they are no longer competent to self-direct their personal and medical care. As a preface, it should be noted that due to recently issued federal regulations, medical costs occasioned by individuals who discuss advance directives with their personal physicians are covered under Medicare, effective January 1, 2016.
A. HEALTH CARE DURABLE POWER OF ATTORNEY

The Kansas Durable Power of Attorney for Health Care Act ("the Act") authorizes a person to appoint an attorney-in-fact (hereinafter "agent") to make health care decisions on such person's behalf. This directive is effectuated under the provisions of an instrument known as a "durable power of attorney for health care decisions." Pursuant to the Act, an agent has a duty to act consistent with the principal's expressed desires. As is the case with an agent under a financial durable power of attorney, the health care agent has a fiduciary duty to act solely in the principal's best interests. Further, an agent under such power of attorney cannot revoke or invalidate a living will nor act in a manner inconsistent therewith.

The health care agent can be authorized to determine all aspects of the principal's personal and medical care should the principal incur a legal disability rendering the principal incapable of making such decisions. To be fully efficacious, the advance directive should authorize the agent, on behalf of the principal, to comprehensively make all medical and psychiatric decisions, as well as additional personal and medical care which can be statutorily authorized and delegated to an agent. What is important for subsequent discussion on living wills is that there is no statutory limitation on the principal's ability to authorize the health care agent to proscribe life-sustaining medical care conditioned upon the principal's remaining life expectancy, such as being limited to a terminal condition of the principal, as there is with respect to a declarant under Kansas' living will statutes.

Such medical authorization normally avoids the need for the judicial appointment of a legal guardian who otherwise would be required to make personal and medical care decisions for a disabled individual. However, in the event the principal nonetheless refuses or otherwise fails to comply with the agent's directions regarding such care, thereby posing a significant threat to the principal's health or well-being, the appointment of a guardian able to legally impose measures or restrictions conducive to such individual's health or well-being may nonetheless prove necessary.

A durable power of attorney for health care decisions may also authorize the agent following the death of the principal to determine burial and funeral arrangements, consent to autopsies, and make organ donations (although organ donations can also be authorized in a separate document, as well as on the back of a driver's license).

As under a financial durable power of attorney, a durable power of attorney for health care decisions may be made either "springing" or "non-springing," i.e., either effective only upon the principal's subsequent disability, or effective immediately and remaining continuously effective notwithstanding a subsequent disability of the principal, respectively. Although authority granted immediately to an agent under a "non-springing" power of attorney would not be expected to be exercised until such time as there occurred a subsequent disability of the principal, it is nonetheless typically desirable to make such instruments "non-springing" in nature.

One rationale for reposing such immediate authority in the agent to make health care decisions on the principal's behalf is to avoid the undesirable "Catch-22" situation of a health care agent not yet being possessed of the authority to procure the medical information necessary to establish the disability of the principal that is the triggering event for such authority. Such possibility could be avoided in an otherwise "springing" health care power of attorney by reposing immediate limited authority of a "non-springing" nature in the agent related strictly to the procurement of such medical information on the principal.

In addition, providing for the immediate efficacy of such authority has the often salutary aspect of permitting the agent, provided such authority is properly authorized in the instrument, to be able to procure medical information concerning the principal at any time from a physician, irrespective of any lack of capacity of the principal, and to discuss the principal's medical situation with medical personnel, without the principal having to have separately executed a HIPPA authorization. Further, health care decisions, as contrasted with financial management decisions, are typically far more time-sensitive. Thus, a delay in securing a "springing" determination of a disability prior to being able to make a health care decision could be hazardous to the principal's health.

Finally, making the power of attorney "non-springing" provides for a seamless transition, without need of a medical determination of the disability of the principal, in devolving desired health care authority in the agent while posing no detriment to the principal's ability to make medical decisions. No medical provider would be expected to request an agent to make health care decisions on behalf of the principal in circumstances where the principal appeared to the health care provider to be sufficiently competent to be able to make such decisions on his or her own behalf. Even in the quite unlikely circumstance that a medical practitioner would bypass a competent principal in securing a medical decision from the principal's health care agent, the execution of the power of attorney does not diminish the principal's authority to make his or her own health care decisions. A competent principal remains able to not only revoke such power of attorney, but in those circumstances also to be able to simply refuse any medical decision of the agent contrary to the principal's wishes.

Quite understandably, an agent under a durable power of attorney for health care decisions is frequently not the same person or party named by the principal to serve as trustee of a revocable trust, executor under a will, or agent under a financial durable power of attorney. The typical attributes desired of a financial agent, e.g., financial acumen and good financial
judgment, are separate and distinct from those desired of a health care agent, e.g., an empathetic desire to provide the best personal care for the principal by a person the principal knows well and who preferably resides in relatively close proximity to the principal.

Thus, a third party, such as a CPA or corporate trustee, is often named, typically after a spouse, as financial agent not only to avail the principal of his or her financial expertise and experience, but also to avoid placing the burden of financial decisions on a family member and limit the significant risk of family disharmony, which frequently arises when a child or children is authorized to manage the financial resources of a disabled parent. Even if an individual who is not a family member or corporate fiduciary named to serve as executor, trustee of a revocable trust, or financial agent would otherwise agree to assume the role of health care agent (an unlikely prospect with respect to a CPA or corporate fiduciary), such disparate attributes desired of a health care fiduciary normally result in clients typically preferring a child or children, or in the absence thereof, possibly a friend or other relative, to serve as his or her health care agent.

However, in making such choice, clients should be advised that naming a child or children as health care agent can create family disharmony regarding medical decisions when there is more than one adult child, as well as present an obvious financial conflict of interest when a child or other beneficiary of the principal’s estate is named to serve as agent. This financial conflict presents itself when uncompensated medical expenditures are in need of authorization, most prominently with regard to uninsured long-term care not covered by short-term Medicare benefits or long-term care insurance, which expenditures ineluctably reduce the agent’s share of the principal’s estate. Unfortunately, it is not a totally isolated occurrence when a child resolves such conflict in favor of providing a less-than-preferable level of the principal’s uncompensated medical care. However, despite the significant risks of such disharmony or decisions of the agent regarding the level of the principal’s health care being motivated disproportionately by his or her health care agent, e.g., an empathetic desire to provide the best personal care for the principal by a person the principal knows well and who preferably resides in relatively close proximity to the principal, the agent or monitor has determined the agent is not properly complying either with information requests or improperly discharging the agent’s authority and responsibilities, whether intentionally, as a result of negligence, or due to the agent’s diminished capacity not yet being severe enough to trigger the appointment of a successor agent under the disability criteria in the instrument.

For the same reason a financial power of attorney should normally appoint the financial agent as conservator in any subsequent conservatorship proceeding, a durable power of attorney for health care typically appoints the health care agent as the principal’s legal guardian should such an appointment become necessary or otherwise desirable. An appointment of a legal guardian under a health care power of attorney is statutorily given preference by the courts except for good cause or disqualification. In the event the appointment of a guardian should become necessary due to the authority in the instrument not proving legally sufficient for the agent to be able to satisfactorily manage and ensure the principal’s personal and health care needs, such naming should preclude the possibility of someone other than the agent being appointed to serve as guardian, thereby normally superseding the erstwhile health care decision-making authority of the agent, and the guardian being in possession of authority to revoke the health care power of attorney.

Further, as also is the case with financial durable powers of attorney, provisions in the instrument should normally specify successor agents in the event the initial agent is unwilling or unable to serve or continue to serve, as well as the manner in which the failure of an agent to serve or continue to serve due to a lack of requisite legal capacity is to be determined in order that a successor agent may appropriately and, as seamlessly and quickly as possible, assume such fiduciary responsibility. If such failure to serve is to be determined by a physician, allowing for the possibility that the subject health care agent has not executed a medical power of attorney permitting access to necessary medical information confirming the agent’s disability, the health care power of attorney could provide that the agent, by agreeing to serve, is also authorizing access to such medical information by the successor agent for such limited purpose. Alternative approaches would be to: (a) include a provision in the health care power of attorney providing for the disability of an agent to be established by an affidavit of the successor agent asserting the legal disability of the agent to the best of the affiant’s knowledge and which includes an additional assertion that the circumstances precluded the successor agent from otherwise confirming such disability; or (b)
providing for an independent “special agent” or “monitor” in the instrument, possessed with the authority to confirm such circumstance, as well as fill a vacancy in the agent not able to be filled by a named successor agent.

Although multiple health care agents can be appointed to serve simultaneously, this can be quite problematic. If more than one agent is required to concur in any action, the time sensitivity of medical decisions could pose a serious problem. If co-agents can act independently to ensure the availability of an agent on a time-sensitive basis, co-agents may nonetheless reach different determinations, posing a serious conundrum for medical practitioners faced with inconsistent directions as to the principal’s care. Alternatively, the health care power of attorney can provide that, in the event the medical care professional is unable to timely contact the current agent for any reason, such medical professional may contact the named successor agent to procure any desirable or necessary medical consent or authorization in the event the medical professional deems such consent, due to the health circumstances of the principal, to be time-sensitive so as to merit procurement of such authorization by the successor agent as opposed to awaiting the subsequent availability of the current agent.

Another normally desirable provision is to require the agent, with the exception of a circumstance constituting a medical emergency under a “springing” power of attorney, to have accepted such appointment in writing in order for the agent’s authority to be effective, in a similar manner as a financial agent is not required to act on behalf of the principal unless so agreed in writing. This not only provides a “bright-line” standard as to when and whether such authority has been accepted, but if such acceptance is under a “non-springing” health care power of attorney, the agent would be expected to have executed concurrently with the principal, there will be assurance that the agent is willing to serve, is immediately aware of such appointment, is likely to be in possession of a copy of the instrument when such authority is in need of being exercised, and there will have been an enhanced opportunity at the outset for discussions between the principal and agent as to both its import and the principal’s intent regarding the coordination of the provisions of each instrument with the other.

With respect to authority reposed in the agent, as previously noted, such authority should normally be comprehensive to ensure both its completeness and acceptance by medical professionals in carrying out the desires of the principal. This includes not only authorization of all aspects of medical care, but also changes in the domicile or residency of the principal to another state (as is sometimes necessary to receive more favorable Medicaid benefits), home health care, appropriate religious and recreational arrangements, authority to withdraw certain medical procedures consistent with provisions of the living will of the principal, and a HIPAA (Health Insurance Portability Authorization and Accountability Act) authorization to clearly provide for the health care agent to have access to the medical records of the principal. It is further desirable to generally provide the agent with all authority legally exercisable by a court-appointed guardian that also may be reposed in a health care agent. Finally, regarding the authority exercisable by the agent, most clients deem it preferable for the instrument to provide that the agent is exonerated from liability for any good-faith decision regarding the exercise of the agent’s authority.

Unlike some states which have statutory provisions automatically revoking the authority of a spouse named as health care agent upon a subsequent divorce, legal separation, annulment or other decree of marital dissolution, Kansas does not. Thus, it is important to include such a provision in the instrument in the vast majority of circumstances in which the principal would desire such result. It also might be desirable to extend such denial or revocation of a spouse’s authority as agent during any period in which there is a pending proceeding involving such a marital dissolution or legal separation of the couple.

In addition, as Kansas statutory authority is silent on the issue, a health care durable power of attorney should specify whether a health care agent is entitled to compensation and the manner in which such compensation is to be determined, e.g., in the same manner as a court-appointed guardian providing a similar level of services or care, subject possibly to the approval of a “special agent” or “monitor” possessed with such approval authority under the instrument.

Health care power of attorney provisions also should resolve potential conflicts between the health care agent and financial agent or trustee of the principal’s revocable trust as to the financial aspects of the principal’s medical care. For example, assume a separate financial fiduciary is unwilling to authorize expenditures for the individual’s health care that the health care agent desires, due to such fiduciary having concluded that the expenditures for long-term care of the principal authorized by the health care agent are unduly expensive in comparison with other available attendant care. Such a conflict should be resolved by including a specific provision in the instrument. Either the financial agent must concur by authorizing expenditure of assets for health care authorized by the agent (in which case third-party medical providers may require the consent of the financial agent) or the health care agent’s decision binds the principal’s estate (including trustees of the principal’s revocable trust and agents under the principal’s financial durable power of attorney).

Preferably, the instrument should make it clear that the latter approach governs so as to avoid the issue even presenting itself. Not only does such result probably comport with contractual law, as the principal, if not otherwise financially bound by the agent’s authorization of specific health care, would be unjustly enriched if such medical authorization by an agent was not concomitant with a financial obligation of
the principal’s estate to pay for such care, but it also gives proper deference to the efficacy of the decision of the health care agent entrusted by the principal with such determination, relieves the financial agent or trustee (who also may have a financial conflict of interest) from the pressures of having to make such a decision on a financial basis, and avoids the obvious problem that would otherwise have been presented in time-sensitive circumstances if the exercise of the agent’s authority had a condition subsequent to the approval of the financial agent or trustee.

A health care power of attorney form is provided in the Kansas statutes, the provisions of which state that a living will form must substantially be in compliance with such form to be deemed acceptable. Although certainly far better than having no health care power of attorney at all, the statutory form is far from comprehensive. Other than generally authorizing medical decisions and the withholding thereof, it is benefit of most of the aforementioned provisions desirable for inclusion in health care powers of attorney. It is even lacking in a provision naming a successor agent or providing that the then-serving agent should be appointed guardian of the principal should a guardianship be required. Consequently, although often distributed by health care providers and other third parties, and frequently used by attorneys, the statutory form should be eschewed by estate planning and elder law practitioners in favor of more comprehensive forms practitioners have personally crafted having numerous options desirable of consideration by their clients.

Finally, assuming the provisions of the living will have been well thought out and addressed with a client, it is worthy of serious consideration for a health care durable power of attorney to specifically prohibit the health care agent from exercising such authority in a manner that would withhold otherwise desirable health care of the principal at a time the living will did not call for such proscription. This not only ensures such authority is not exercisable in a manner refusing life-sustaining or otherwise advisable health-enhancing medical treatment in situations the principal would not have desired, but recognizes that there is scant legal authority extant as to whether such authority could be exercised at a time not forbidden under the provisions of a living will, the efficacy of which is statutorily limited to terminal conditions.

Although the more-than-a-quarter-century-old Act is certainly in need of an update in the same manner the Kansas Power of Attorney Act was substantially revised by the Kansas legislature in 2003, most of the issues it fails to address can nonetheless be remedied by a comprehensively drafted health care power of attorney. However, the Act nonetheless needs to address default issues in numerous situations which may not be covered in an advance directive, most particularly with respect to principals who have not received comprehensive legal advice on the subject or who secured a basic form off the Internet. Such potential default provisions addressing issues not found under current statutory provisions would include whether an agent is entitled to compensation sans any provision in the instrument so authorizing, whether spouses are automatically excluded as agents in the event of a legal separation, divorce or other marital dissolution, whether individual agents are liable for good-faith decisions in the absence of a non-exoneration provision in the instrument, and possibly providing a resolution procedure in the event a medical practitioner deems the exercise of the agent’s authority to be unethical, in excess of that reposed in the instrument or permissible under the law.

In addition to addressing such default issues, it would be helpful if such revisions also considered designating a hierarchy for statutory surrogates in the event there is no presently designated health care agent or court-appointed guardian, e.g., a surrogate verbally designated by the patient to the physician, or in lieu thereof, a spouse, followed by an adult child, adult brother or sister, and parent. Further, absent a provision in a health care power of attorney to the contrary, such statutory revisions should make it clear whether an agent can withhold life-sustaining medical care from a principal in circumstances beyond that addressed in a living will or when there is no living will and the principal is in a non-terminal health situation, and if so, whether the instrument must specifically so provide.

**Legislative Consideration of Kansas Uniform Health Care Decisions Act**

In 2009, HB 2109 was introduced in the Kansas legislature, which proposed enactment of the Kansas Uniform Health Care Decisions Act. As proposed and modified by the Probate Advisory Committee to the Judicial Council, it would have combined Kansas health care and living will health care directives in one statutory form and format. It also would have addressed many of foregoing issues not presently addressed in the Act, including a default hierarchy of surrogates, and provided for a much more extensive statutory form than is currently provided. It failed to pass, which the author understands was due at least in part to a feeling by legislators that such an extensive rewrite of existing statutory provisions was unnecessary. Nonetheless, although a total overhaul of current advance directive statutes may not be deemed necessary, the current statutory health care power of attorney provisions nonetheless remain in need of significant refinement and expansion in addressing the foregoing issues.

**B. LIVING WILLS**

In addition to Kansas statutorily authorizing health care powers of attorney, the Kansas Natural Death Act (hereinafter “the Act”) authorizes competent individuals to personally express their health care desires with respect to withholding life-sustaining procedures. Kansas was one of the initial states to pass such a statute. The Act limits a declarant’s ability to direct
health care advance directives

the withholding or withdrawal of life-sustaining procedures (“LSPs”) through an advance directive to situations when the declarant is in a “terminal condition.”41 The Act does permit individuals to dictate, under what is commonly termed a “living will,” the proscription of life-sustaining procedures when in such a “terminal condition.”42

In medical parlance, the term “terminal condition” is normally construed as a condition caused by disease, injury or illness in which there is a reasonable medical probability that the patient’s death is imminent, or in some circumstances when the patient is in a “persistent vegetative state.”43 However, it is almost always tied to a short survival period in the absence of life-sustaining procedures. A “terminal condition” has been medically defined as “an irreversible or incurable condition caused by injury, disease or illness that would cause death within a reasonable period of time in accordance with medically accepted standards, and where the application of life-sustaining treatment would serve only to prolong the process of dying.”44

In practical terms, a reference to a “terminal condition” usually means that the patient’s life expectancy is less than six months, which is the typical standard for hospice care.55 Consequently, most physicians would not likely be expected to consider an Alzheimer’s or other dementia patient, irrespective of the lack of significant cognitive capacity and lack of a cure, to be terminal prior to the final stage of the disease, when the patient’s body functions begin to cease and the patient is close to death. The same would be expected to be true of an individual in a permanent coma or persistent vegetative state (PVS), as the afflicted individual typically can have an extended life expectancy, perhaps even decades, absent an intervening death from another medical malady or failure of bodily function.

The Act provides that a living will executed substantially in conformity with the form statutorily provided in the Act will go into effect.54 The most prevalent “triggering conditions” before the declarant’s advance directive may be expected due to such “terminal condition” requirement, does it provide for any other activation circumstance outside of a terminal condition, when the individual nonetheless may have no acceptable quality of life from the declarant’s standpoint.52 Suffice it to say, a high percentage of practitioners rightly consider such form inadequate, thereby necessitating the development of their own forms which not only express with much greater specificity or extended circumstances their clients’ desire that life-sustaining or maintenance health care no longer be administered when they are no longer able to do so, but also that adequately communicate to their families and loved ones their personal reasons therefor.

Based primarily on the recognized interests of the state to protect and preserve life, many states have passed similar laws limiting the ability of a third party, acting pursuant to an advance directive, to withhold or withdraw LSPs.53 A common limitation in advance-directive statutes, as in Kansas, is the presence of “triggering conditions,” which generally require the declarant to be diagnosed as being in one or more “physical conditions” before the declarant’s advance directive goes into effect.54 The most prevalent “triggering conditions” found in advance-directive statutes require the declarant be in a “terminal condition,” “permanently unconscious,” or have some other end-stage medical condition that is incurable, irreversible, and, absent LSPs, would result in death in a relatively short time.55 Typically, this means that the direction of a declarant in a living will to remove LSPs has no legal effect if the declarant is not in a terminal condition or permanently unconscious.56

As of late 2015, 35 states had some form of triggering condition in their advance directive statutes.57 Further, some courts in states without triggering conditions have imposed such limitations despite their absence.58

Additionally, as of 2016, seven states have enacted some ver-
sion of the Uniform Health-Care Decisions Act (hereinafter “the UHCDA”). The UHCDA is intentionally silent regarding triggering conditions on the withholding of LSPs, and instead states that an individual may “give specific instructions about any aspect of your health care.” As evidenced by Wendland, discussed in more detail below, one court has interpreted this to mean “a person may direct that life-sustaining treatment be withheld or withdrawn under conditions specified by the person and not limited to terminal illness, permanent coma, or persistent vegetative state.” Despite the expansive language adopted by the Supreme Court of California, no other state has addressed this portion of the Act. Moreover, of importance is that no legislature to date has expressly adopted an advance-directive statute with the specific intent of allowing the removal of LSPs from individuals who are neither terminal nor permanently unconscious.

Such limiting triggering conditions understandably can frustrate the express intent of declaroants who, after executing a relevant advance directive, have lost the capacity to refuse unwanted medical treatment but do not meet the definition of being terminal or permanently unconscious. For example, persons suffering from advanced Alzheimer’s disease or other neurological conditions may continue to live for an indeterminate period of time in a conscious state, but are otherwise unable to move, communicate, or appreciate their surroundings. An individual contemplating such a situation may desire to have LSPs withheld and execute an advance directive to that effect; however, because the individual is conscious at times and likely to live for an indeterminate period of time, such triggering conditions are not met and the advance directive will not statutorily take effect. Thus, strict construction and adherence to a statute containing triggering conditions tied to a terminal condition or permanent lack of conscious activity would prevent a third party from withholding LSPs in a non-triggering situation, regardless of the prognosis.

To that end, the Supreme Court’s holding in Cruzan, that a competent person has a federally constitutionally protected liberty interest in refusing unwanted medical treatment under the Fourteenth Amendment, has raised serious questions regarding the ability of state laws to trammel the enforceability of advance directives not in conformity with state law, most particularly when they extend their import beyond situations which are statutorily authorized.

The Court in Cruzan specifically declared that: “[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.” In Cruzan, petitioner had suffered a massive brain injury, lost cognitive functioning, and required feeding tubes after being diagnosed as being in a persistent vegetative state (PVS). Petitioner had no living will, but her parents sought to have her feeding and hydration tubes removed. Even while ultimately concluding that petitioner’s oral and nutritional tubes were to remain in place, the Court acknowledged the constitutional right of competent individuals to refuse medical treatment. However, the Court reasoned that an incompetent’s right to refuse medical treatment was precluded by the individual’s incompetence. Therefore, due to such differential in refusal rights, the state’s interest in preserving the life of an incompetent person permits it to establish restrictions which err on the side of life. The dissenters in the decision posited that a state’s assertion of a general interest in preserving life that was distinguishable from protecting the individual’s own interest in preserving life, was lacking in legitimacy.

As petitioner did not have a living will, although affirming that petitioner had the right to refuse medical care, the Court ruled that her feeding tubes should be kept in place due to there being no “clear and convincing evidence” that it was petitioner’s wish to terminate her life support in that circumstance. The petitioner’s family in a later judicial decision subsequently established such evidence to the satisfaction of the court and petitioner’s life support was then terminated.

Justice Sandra Day O’Connor, in a concurring opinion in the Cruzan decision, adopts the majority’s holding that “A competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment,” citing the Fourteenth Amendment to the United States Constitution. Additionally, Justice O’Connor expanded on such right by concluding “forced treatment may burden that individual’s liberty interests as much as any state coercion.” Justice O’Connor’s concurrence in Cruzan confirmed the rights of individuals with non-terminal illnesses to direct their medical care, but she did not specify which health care decisions, if any, in an advance directive such as a living will would exceed federal constitutional protection so as to be subject to protection by the state.

Thus, although Justice O’Connor recognized that individuals could specify the type of medical care they desired in a living will, neither she nor the majority of the Court addressed whether a provision to withhold life-sustaining medical care in a living will would be subject to federal constitutional protection in non-terminal cases in which the individual, unlike the petitioner in that decision, was conscious. Justice O’Connor did speak favorably of advance directives, and the role oral and written instructions may have in protecting an incompetent person’s liberty interest. However, albeit generally recognizing that individuals could specify the type of medical care they desired in a living will, she went on to conclude that finding the best solution for balancing the competing interests of states and individuals should be left to the states.

Since Cruzan, the Supreme Court has not directly addressed end-of-life decision-making in the context of advance directives or triggering conditions. However, the Court reaffirmed the right of an individual to refuse lifesaving hydration and nutrition, stating this right is protected by the constitution and grounded in the long legal tradition protecting an individual’s right to refuse unwanted medical treatment. Such
decision involved whether the fundamental rights to liberty guaranteed by the Fourteenth Amendment extended to physician-assisted suicide for terminally ill patients. The district court and Ninth Circuit Court of Appeals, the Court found that it did not. The Glucksberg decision and additional case law has all but ended any debate regarding the legal limits of an individual’s decision to forego medically supplied nutrition and hydration.

Despite much mass debate surrounding end-of-life decision making, relatively few other courts have addressed the authority of competent individuals to direct the removal of LSPs through advance directives that contradict state law, most particularly in the circumstance not addressed by Cruzan or Glucksberg, i.e., when a person is not in a terminal condition or permanently unconscious. However, the courts have long recognized the fundamental right of individuals to determine their own health care. In the century-old case of Schloendorff v. Society of New York Hospital, Justice Benjamin Cardoza of the New York Court of Appeals, grounding his position in common law, stated that “Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault for which he is liable in damages.” Moreover, as discussed above, the Supreme Court in Cruzan determined that the Fourteenth Amendment grants competent individuals the right to make personal decisions about their health care, including unwanted medical treatment. This right has been determined to include the right to deny unwanted medical care, even when necessary to sustain life.

In short, the clear weight of authority is that states cannot take away an individual’s federal constitutional right to refuse medical care. States can, however, reasonably restrict the right by requiring individuals to demonstrate by clear and convincing evidence their intent to make a particular health care decision. Those who are unable to communicate their intent because they are unconscious or incompetent do not lose their right to refuse medical care; however, they must have previously clearly communicated their intent while conscious and competent.

This leaves at least partially open for resolution the overarching issue as to whether an individual’s decision to preemptively direct his or her health care also extends to directing the withholding of life-sustaining medical measures in a situation in which the individual fails to have sufficient capacity to direct his or her own medical care, is not permanently unconscious, and yet fails to meet the definition of “terminal” under a governing statute in which such diagnosis is the applicable triggering mechanism. In short, does an individual have a constitutional right to predetermine in a living will specific life-sustaining or life-enhancing medical care that the individual does not desire in circumstances where the individual is unable to competently make such determination and is then possessed of a medical or psychological condition with respect to which there is no reasonable possibility of having even a modicum of quality of life, e.g., having the ability to recognize family or have a sense of place and environment?

Alzheimer’s is a debilitating mental disease which is the highest contributor to the incidence of individuals lacking the aforementioned quality of life. It is the most common form of dementia, gradually robbing memories, intelligent thoughts, and even one’s personality. Approximately five to ten percent of individuals afflicted with Alzheimer’s even become violent.

An estimated 5.5 million Americans have Alzheimer’s and one in ten individuals over the age of 65 have contracted the disease, now the sixth-leading cause of death in America and the third most common cause of death among older Americans, behind heart problems and cancer. The total cost of caring for those with Alzheimer’s is estimated to be $259 billion in 2017. It is the only leading cause of death that cannot be cured or prevented and its progression is only subject to being slowed to a limited extent.

A Cambridge University study indicates that the average duration of life following a diagnosis of Alzheimer’s, which normally occurs long after there are symptoms, is four and half years when the condition is diagnosed after age 70 and seven to ten years from the onset of symptoms. When diagnosed prior to age 70, such life expectancy can be a decade or more. A substantial portion of such remaining life expectancy will be met with severe cognitive decline. Obviously, there can be intervening causes of death before Alzheimer’s eventually exacts its lethal toll, with chronic immobility perhaps being at the top of the list, thus shortening such life expectancy further from what it would be in circumstances limited to where Alzheimer’s alone was the cause of death.

Other less common forms of dementia, vascular dementia, dementia with Lewy bodies, and frontotemporal dementia, are equally degenerative and presently incurable, some tending to have faster progression phases. Although more prone to the disease, people with Parkinson’s disease do not necessarily incur accompanying dementia problems. While some individuals with Alzheimer’s and other dementias may continue to enjoy their lives at least to a limited extent and for a limited duration during its progressive phases, in the later stages of such dementias, they normally possess little to no
quality of life. Given the option, their former competent selves may well have preferred not to be given most medical procedures or treatments when they no longer are able to enjoy or appreciate the benefits of life, although they would not be medically considered to be in a terminal condition.

While living wills may express a direction to have physicians withhold medical care and procedures when an individual is not in a terminal condition and not permanently unconscious, such as in advanced Alzheimer's, there are both legal obstacles to their efficacy and practical impediments to their articulation. For one, Alzheimer's, like other dementias robbing cognitive function, is substantively different from PVS. Even when Alzheimer's and other dementias have progressed to the point that the individual has little to no short-term memory, the individual may still be able, at least ostensibly, to enjoy his or her life to a limited extent, e.g., experience some memories, appear to take pleasure in watching television or listening to music, and perhaps even engage in laughter. Thus, triggering provisions in living wills predicated on the cessation of enjoyment-of-life aspects can be highly subjective, non-analytical, and quite arbitrary due to focusing on only limited facets of the human experience.

A more measurable “bright-line” standard would appear desirable as the triggering event, such as a persistent inability to recognize family or friends beyond just a simple recognition of those who are familiar and those who are not, as well as not having a sense of place in one's surrounding environment. The lack of such cognitive ability would be expected to be coincident with a substantial loss in short-term memory and an inability to communicate intelligibly with others and understand the world around them. In short, it would be a life devoid of the elements which make us human and that most persons would consider essential to a meaningful and enjoyable existence. This would be an individual who is essentially experiencing life in the same manner as a person who is at Stage 6 Alzheimer's (moderately severe Alzheimer's) when the individual also has other deleterious facets of living, such as lacking a modicum of functionality and tending to have major personality changes, bowel-control problems, paranoia experiences, shadowing (constantly keeping his or her caregiver in sight) due to fear of being alone, and extreme anxiety, all of which in and of themselves greatly interfere with having any semblance of what one would expect most individuals would consider an acceptable quality of life.

In addition to being a much more objective standard, such a triggering event could be relatively soon after the individual has lost the cognitive ability to make his or her own medical decisions. Thus, there may not be an extended hiatus between the time an individual has the capacity to direct his or her own medical care and execute a living will, and a triggering event after which the individual may desire the cessation of medical care considered to be unduly delaying the dying process.

This approach to a triggering event would also appear to render both superfluous and errant living will provisions in which the individual proscribes specific medical procedures upon a triggering event. That is to say, if the individual no longer has an acceptable quality of life upon such foregoing triggering event, with no reasonable medical possibility for its future reoccurrence, one would expect a very high percentage of individuals would conclude all medical procedures, sans any need for specificity, other than those that are palliative in nature and which provide comfort care, would be the subject of such proscription.

Although such a “bright-line” standard may solve the practical problem of articulating a triggering mechanism, there remains the issue of its legal enforceability as more fully discussed below.

1. Cruzan and Prior Case Law Recognize an Individual’s Fundamental Right to Direct His or Her Own Health Care Notwithstanding the State’s Interest in Preserving Life.

As noted above, Alzheimer’s and other dementias are typically long-lasting diseases and eventually terminal, with no current cure. All of those diseases, as well as brain injuries, can rob individuals of their personalities, their uniqueness, their humanity and being possessed of an acceptable quality of life. In such conditions, otherwise appropriate medical procedures and treatments may be contrary to the individual’s wishes, yet such individual no longer possesses sufficient capacity to intervene in medical decision making.

Although Cruzan did not expressly address such situation involving conscious individuals, one could reasonably conclude that a court is not likely to force someone with a valid living will to undergo medical care prohibited by a living will based on the protection afforded under the Fourteenth Amendment reposing in individuals a right to self-determination regarding their own medical care.

That conclusion is supported in principle tangentially by a number of prior state decisions. One’s competency has no bearing on the exercise of the right to refuse medical treatment because the “right... extends not only to the competent but also to the incompetent, ‘because the value of human dignity extends to both.’” Thus, a state cannot deprive citizens of their constitutional rights simply because they lack the ability to personally exercise them. New York emphasized this point when it determined that a comatose man had the right to stop artificial means of prolonging life even when he physically could not express his wishes. The explicit wishes of an incompetent patient regarding artificial measures of prolonging life should be respected if expressed while the person was competent. “Wishes expressed in a written document, i.e., a living will, provide the clearest evidence of a person’s desires.”

Enforcement of a valid living will expressing an individual’s medical and health care wishes is subject to challenge based on
health care advance directives

a state’s interest in preserving life. Ending life-sustaining or normally recommended medical care undoubtedly may contribute to a faster death. Thus, as noted above, in the interest of preserving life, a state may require that the Alzheimer’s provision clearly and specifically declare the individual’s intent as to what medical care the individual desires.

Moreover, the state’s interest in preserving life is not absolute. The individual’s interest grows as the degree of bodily invasion increases, and the state’s interest weakens until “ultimately there comes a point which the individual’s rights overcome the state interest.” In Matter of Quinlan, the court determined that the personal interest of the female in a PVS in terminating her life support outweighed the state’s interest because she required 24-hour intensive nursing care, antibiotics, the assistance of a respirator, a catheter, and a feeding tube, all of which the court determined represented an invasion of her privacy.

While individuals with advanced Alzheimer’s and similar brain diseases are different from those with PVS in that they have brain function, they still typically require medical care, usually of a quite intensive nature. This may mean 24-hour nursing care and also require a gastrointestinal tube to deliver nutrition. Even if the level of nursing care is not of such an intense nature, such care typically will require antibiotics or medications, both proactive and reactive in nature, to treat a number of maladies that may be present, all of which such individuals unquestionably would have been able to legally decline when competent.

Thus, any legal distinction attempted to be made between the rights of individuals to determine medical care in terminal versus non-terminal situations would appear to be a distinction without any substantive difference. Moreover, any existential philosophical distinction, that there are in essence two individuals involved, i.e., the individual prior to the medical or psychological circumstance and the individual afflicted with such circumstance, is also likely to be deemed too abstruse to be sufficiently persuasive to justify any state intrusion. If an individual has the right to direct whether certain medical procedures are to be applied, e.g., precluding the administering of antibiotics even though they might be needed to sustain life, then such right should be all-inclusive if made while competent, irrespective of whether it might have been made under a living will. Even under Kansas’ law authorizing do not resuscitate (DNR) directives, medical resuscitation can be legally proscribed, thereby causing death, even if the individual does not have a “terminal condition” at the time the proscribed resuscitation would otherwise have been administered.

Based strictly on Cruzan and foregoing prior case law alone, a provision in a living will proscribing medical care and treatment when such individual has no recognition of family or sense of place or environment should be judicially determined to be a proper exercise of an individual’s fundamental right to refuse medical care in circumstances where such individual has determined any meaningful quality of life is absent and there is no realistic possibility that such quality of life will ever return. Such proscription does not solicit one’s physician to hasten death through unnatural means. Rather, it is a decision “to be let alone” and let natural events take their course. It is reasonable to conclude that courts should uphold such provisions in a living will so long as the individual has clearly demonstrated that he or she does not desire medical care to be provided in such circumstances.

As discussed below, such conclusion finds more direct support in post-Cruzan state and territorial judicial decisions which have fetttered the legal import of statutory “triggering provisions” limiting an individual’s right to make their own medical decisions in proscribing life-sustaining medical procedures through advance direction or advance directives when such individual no longer possesses the capacity to contemporaneously do so. The proclivity of the courts’ balancing of the constitutional rights of individuals to make advanced health care decisions governing their medical care when incompetent against state statutory triggering provisions which otherwise fetter such decision is becoming quite clear.

2. Various Jurisdictions Have Dismissed or Limited the Legal Efficacy of State Law “Triggering Devices”

One of the judicial assaults on the legal viability of such state-triggering conditions has been from the Supreme Court of Puerto Rico. The Tirado decision was centered on Hernandez Laboy. Laboy was a practicing Jehovah’s Witness who, in 2004, duly executed an advance statement of living will declaring, because of his religious beliefs and the potential medical risks, his refusal to consent to any blood transfusion regardless of his medical condition. Laboy also designated Roberto Tirado Flecha as his health care executor to make any decision on the acceptance or refusal of medical treatment should he become incompetent.

In 2005, Laboy was injured in a car wreck and taken to a hospital for treatment. At the hospital, doctors determined Laboy’s injuries required a blood transfusion. Laboy’s wife obtained an ex parte order requiring the hospital to perform the transfusion; however, the hospital ultimately disregarded the order once Flecha presented Laboy’s advance directives and refused the transfusion on Laboy’s behalf. Laboy’s wife contested the validity of the advance directives, leading to the court’s decision.

During his treatment, Laboy was never diagnosed as being in a terminal condition or PVS, which were the two triggering conditions found in the relevant statute. Thus, to determine if Laboy’s advance directives were valid, the court had to determine if advance directives were enforceable in circumstances not specifically allowed by law. The statute governing advance directives specifically stated that “any person of legal age and sound mind may state, in advance and at any time, his or her will to be or to not be submitted to a specific

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medical treatment in the event of suffering a terminal health condition or a persistent vegetative state.\textsuperscript{129} Relevant law also allowed declarants to appoint a person to make health care decisions on their behalf when necessary.\textsuperscript{130}

The court ultimately found the statute unconstitutional under the Constitution of the Commonwealth of Puerto Rico and the United States Constitution insofar as the statute was only effective for individuals meeting at least one of the triggering conditions.\textsuperscript{131} In reaching its conclusion, the court relied heavily on Cruzan, and an individual's right to refuse treatment under the Fourteenth Amendment.\textsuperscript{132} Based on the liberty interest, the court found triggering conditions violated a person's right to make decisions over their own bodies.\textsuperscript{133} Thus, any advance directive must be available to all competent adults who wish to state their refusal to receive medical treatment.\textsuperscript{134} The court recognized that an individual's right to refuse treatment must be balanced against the competing interests of the state, but found the right of the individual was nearly absolute when supported by clear and convincing evidence, such as in an executed living will.\textsuperscript{135}

In closing, the court emphasized that the United States Constitution protects an individual's right to refuse medical treatment, even when the decision may be fatal, and the right to express such will in advance.\textsuperscript{136} The origin of these rights is found in the right to privacy and the due process liberty right found in the Fourteenth Amendment.\textsuperscript{137} Despite Laboy's executing his advance directives for religious purposes, the court believed the constitution protected his rights without implicating freedom of religion.

Other courts have reached similar conclusions, albeit often not so directly by finding fettering statutes to be unconstitutional, but also by either seemingly ignoring statutory requirements or through a convoluted analysis finding such statutory requirements to have been satisfied albeit in the face of seemingly inapposite facts. Such decisions are discussed below.

\begin{enumerate}
\item Florida courts have concluded that advance directives may be effective despite statutory triggering conditions not being satisfied, based on the right to privacy found in the Florida Constitution.

The Supreme Court of Florida allowed the guardian of an 86-year-old woman to remove the woman's gastric tube, despite state triggering conditions potentially not being met.\textsuperscript{138} When Browning was decided one year after the Cruzan decision, Florida law authorized a person to execute a living will directing the withdrawal of LSPs in the event such person should have a terminal condition, which interestingly specifically excluded sustenance from being an LSP.\textsuperscript{139} Mrs. Browning executed a document expressing her desire to have LSPs, including medically supplied nutrition and hydration, withheld or withdrawn should she be diagnosed as "terminal" and incompetent to make such decisions, death was "imminent," and there was no hope of recovery from the condition.\textsuperscript{140}

Shortly after executing her advance directive, Mrs. Browning suffered a stroke.\textsuperscript{141} She was admitted to the hospital where doctors inserted a feeding tube into her stomach due to her inability to swallow.\textsuperscript{142} A medical evaluation determined that Mrs. Browning had no chance of recovery, and although incommunicative, was at least conscious to some extent, appearing to follow movement with her eyes.\textsuperscript{143} Further, it was determined Mrs. Browning could live for an indeterminate amount of time with a feeding tube.\textsuperscript{144} By all accounts of the medical professionals, Mrs. Browning was neither terminal nor permanently unconscious.\textsuperscript{145}

Nearly two years after Mrs. Browning's stroke, her guardian filed a petition to have the feeding tube removed.\textsuperscript{146} The guardian presented Mrs. Browning's living will, along with other evidence, to the court as proof of Mrs. Browning's wishes to have her feeding tube removed.\textsuperscript{147} The State of Florida opposed removal of the feeding tube, asserting that because Mrs. Browning was not in a terminal condition, her living will was not effective, and thus removal of the feeding tube was not permitted under state law.\textsuperscript{148}

The court, affirming the Second District Court of Appeals which had reversed the finding of the trial court (the Circuit Court) that Mrs. Browning's condition was not terminal within the meaning of the Florida statute, made several findings before ultimately deciding the removal of the feeding tube was proper. First, under the right to privacy found in the Florida Constitution, similar to, but somewhat more broadly construed than the federal constitutional right to liberty under the Fourteenth Amendment addressed in Cruzan, a competent individual has the constitutional right to refuse medical treatment, regardless of his or her medical condition.\textsuperscript{149} Second, an incompetent person has the same right as a competent person to determine his or her medical care, such right not being lost or diminished due to incompetence.\textsuperscript{150} Third, the state has a duty to ensure that a person's wishes regarding medical treatment are respected.\textsuperscript{151} Fourth, Florida has adopted a "substituted judgment" standard when assessing medical decision-making by a surrogate attempting to effectuate the wishes of an incompetent person.\textsuperscript{152} Fifth, states
have an interest in preserving life, but this interest is limited where the life may only be extended briefly, rather than cured of any affliction. The court went on to confirm the inherent right of individuals to make choices with respect to their medical treatment encompassing all medical choices, irrespective of their medical condition. Further, such right includes all of such relevant choices, there being no rational basis in differentiating between the types of medical procedures, whether they be life-maintaining, life-prolonging, or life-sustaining.

The court quoted a passage in the case of Bouvia v. Superior Court, noting that when an individual has determined that his or her existence has lost all meaning, the state has no right to question such decision to withdraw medical procedures simply due to an arbitrary determination that such condition must persist for a relatively short period of time prior to one’s death for such determination to be given legal credence. In deciding on an individual’s medical choices, the court quoted an additional passage from Bouvia, reasoning that an individual’s perception of the quality of his or her life overrides any physician’s estimate as to the remaining quantity of such life.

In its analysis, the court held that “when the patient has taken the time and the trouble to specifically express his or her wishes for future health care in the event of later incapacity, the surrogate need not obtain prior judicial approval to carry out those wishes.” The court stated “[t]his applies whether the patient has expressed his or her desires in a ‘living will,’ through oral declarations, or by the written designation of a proxy to make all health care decisions in these circumstances.”

The court described the privacy right under the Florida constitution as a fundamental liberty interest, akin to autonomy, whereby such right of self-determination was subject only to a state’s compelling and overriding interest. In contrast to Cruzan, which found the aforementioned fundamental difference in the right of competent versus incompetent persons to a fundamental constitutional right to direct their own medical care, the latter being subject to a state’s interest in preserving life by creating procedures to the exercise of such right erring on the side of life, the court in Browning concluded that not extending the same right to incompetent persons would render such right illusory.

Following that analysis, the court ultimately allowed the feeding tube to be removed. Because Mrs. Browning would die within approximately a week after the feeding tube’s removal, and the medical testimony indicated that she had no hope of recovering from her stroke, the court found her death was “imminent” and she was in a “terminal condition” as required by her living will. In so doing, the court did not specifically address whether her condition was “terminal” as defined under Florida statutory law regarding advance directives.

The somewhat dissembling aspects of the court’s conclusion were that it appeared to ignore both the Florida statutory definition of a “terminal condition” as applied by the district court (which did not find that Mrs. Browning was in a terminal condition despite the medical evidence concluding she was in a persistent vegetative state), as well as statutory provisions at that time not permitting the withdrawal of nutrition or hydration (as providing sustenance was precluded from being a LSP, subject to withdrawal). It nonetheless concluded she was in a terminal condition within her intended meaning under her living will due to her having no reasonable possibility of recovery, and that her death was “imminent” based on her life expectancy if the medically assisted nutrition and hydration were removed. However, if the imminence of death is to be determined to be solely based on the withdrawal of life support procedures and not the underlying condition itself, such term would have little meaning, for death would be imminent in all such situations where such life-sustaining procedures were removed, irrespective of the prospect of recovery or duration of life with the continuance of such procedures.

In essence, the court simply found that, despite the fact that the terminology utilized by Mrs. Browning under the provisions of her living will might not literally apply to her condition, her overarching intent was that she abjured life-sustaining procedures from being employed in her condition. Consequently, in finding that any statutory proscription was inapplicable under the facts presented, the essence of the court’s finding was that Mrs. Browning had a constitutional right to self-determination regarding her health care wishes, as gleaned from the provisions of her living will, to be fulfilled in her condition untrammeled by any otherwise applicable statutory triggering conditions that might otherwise be judicially construed to negate them.

b. Delaware courts have expressed that advance directives may be given effect, despite triggering conditions not being satisfied.

In In re Gordy, the Delaware Court of Chancery addressed whether a living will expressing a desire to forego a gastric feeding tube is enforceable when the declarant was arguably not in a terminal condition. The court ultimately determined the declarant was competent to refuse insertion of the gastric feeding tube herself, but specifically authorized her guardian to refuse surgical implantation of a feeding tube in the event she was unable to do so herself pursuant to the living will.

Mrs. Gordy was a 96-year-old who permanently resided in a hospital. By all accounts, she was in good physical health for a person her age; however, her mental condition had begun to deteriorate. Mrs. Gordy was alert and able to engage in conversation, but medical staff believed that she suffered from Alzheimer’s disease. As a result of her withering mental state, she experienced difficulty chewing and swallowing, and had virtually no appetite. Her inability or unwillingness to eat was beginning to severely affect her physical condition,
and it was the opinion of the medical staff that she would die within a few weeks if a gastric feeding tube was not surgically implanted. The medical team also believed that Mrs. Gordy could live for an indeterminate amount of time with the aid of a gastric feeding tube.

Because of Mrs. Gordy’s nutritional deficiencies, the hospital sought to implant a gastric feeding tube. Her son, Jim Davis, petitioned the court to be appointed as her guardian, so that he could legally deny the hospital consent to insert the gastric feeding tube on his mother’s behalf. Mr. Davis’ objection to the gastric feeding tube was based on a living will executed by Mrs. Gordy in which she expressly rejected “the use of a feeding tube in the event that she had a terminal illness as diagnosed by two physicians.” She had also repeatedly stated her desire not to be sustained through a gastric feeding tube. The State Attorney General contested Mr. Davis’ petition, asserting that Mrs. Gordy was not competent to refuse treatment herself, and that under the circumstances it was in her best interest to have the feeding tube inserted. Further, the state argued that Mrs. Gordy’s living will was not operative because state law requires the declarant be diagnosed as terminal, and that she had not been sufficiently diagnosed.

At an evidentiary hearing, conflicting reports regarding Mrs. Gordy’s prognosis were presented. Two doctors testified that Mrs. Gordy was not competent to refuse treatment because she suffered from depression, and Alzheimer’s had deprived her of the requisite level of cognition needed to refuse treatment. Conversely, another doctor found Mrs. Gordy “demonstrated that she understood the consequences of her refusal not only of the procedure but of her limited food intake” and that she ‘has made an informed decision when she refuses tube placement.’ Additionally, as the court noted, the medical director of Mrs. Gordy’s hospital opined that he believed she was terminally ill due to her neurological disease, and that she was ill-suited for a gastric feeding tube.

Based on the evidence above, the court held that no party had demonstrated Mrs. Gordy was incompetent to refuse insertion of the gastric feeding tube herself. Thus, Mrs. Gordy’s repeated objections to the insertion of the tube, including those in her living will, were a valid exercise of her right to refuse consent to medical treatment.

After concluding that Mrs. Gordy was competent to refuse insertion of the medical tube, the court then addressed Mr. Davis’ petition to be appointed guardian and his rights regarding medical decision-making going forward, given that Mrs. Gordy would likely become incompetent in the near future. The court granted Mr. Davis’ petition to be named guardian based on Mrs. Gordy’s physical incapacity, which rendered her unable to properly manage or care for herself. In appointing Mr. Davis as guardian, the court stressed that Mrs. Gordy was still competent and the guardianship was only granted because of her physical condition.

Addressing Mr. Davis’ rights as guardian, the court stated it was clear that due to the degenerative nature of Alzheimer’s disease, Mrs. Gordy would soon no longer have sufficient mental capacity to make decisions regarding her health care. The court ordered that Mr. Davis was to assume the role of health-care decision-maker once Mrs. Gordy was no longer competent, and that he would be bound to advance her best interest by attempting to replicate the decisions she would make if she were able. Because Mr. Davis would have the right to refuse insertion of a gastric tube once Mrs. Gordy was incompetent, the court balanced the competing interests of the state and individuals. The court stated the interest of sustaining life was of great value, but courts must consider that humans value dignity and the “ability to experience the joys and benefits of living,” as opposed to valuing purely biological life.

Based on the above analysis, the court closed by stating Mr. Davis would have the right to make medical decisions for Mrs. Gordy from this point forward, subject to her competent refusal. The court then stated that once Mrs. Gordy is no longer competent, Mr. Davis “will be specifically authorized to follow his mother’s expressed direction to decline the surgical implantation of a gastric feeding tube and to make such other health care decisions as are, in his good-faith judgment,” in Mrs. Gordy’s best interest.

Perhaps the most significant element in the court’s determination was that Mrs. Gordy’s express wish and advance directive that she not be on life support as a result of medically assisted feeding maintained its legal efficacy, apparently untrammeled by any statutory restrictions in the nature of “triggering devices,” irrespective of any subsequent diminution in her legal capacity to make her own contemporaneous health care decisions. The court so concluded even though it noted that unless another medical condition intervened, Mrs. Gordy could have lived for a quite extended period, even a number of years, with such medical assistance prior to devolving into “end stage” Alzheimer’s when her most basic body functioning mechanisms, including the swallowing reflex, would have eventually brought about her death.

Although the court cited the testimony of the hospital medical director that her Alzheimer’s condition, in and of itself, made her condition “terminal” in the face of the state’s position that Mrs. Gordy’s condition did not satisfy the statutory standard, the court made no specific finding as to whether she was in a terminal condition. Indeed, the court, although noting such testimony, went on to conclude that, “more importantly, all of the evidence reflects a complete resistance to the idea of artificial feeding to prolong life.” In short, it was reasonably clear that a finding of a “terminal condition” as statutorily required to give legal effect to a living will was not a sine qua non to the court’s determination that her wishes as to medically assisted feeding and nutrition were to be honored.

Thus, the court in essence gave legal effect to the provisions
health care advance directives

of Mrs. Gordy’s living will and her other expressed directions, irrespective of whether such direction was apposite with applicable state law. It is also important to note that the court reached its conclusion without expressly relying on any constitutional supercession.

c. California recognizes a right to refuse treatment that survives incapacity and has adopted advance directives laws not containing triggering conditions.

The Supreme Court of California has held a conservator may withhold or withdraw artificial nutrition and hydration from a conscious conservatee who is not terminally ill, comatose, or in a persistent vegetative state, and who has not left formal instructions for health care or appointed an agent for health care decision-making.

In Wendland, Robert Wendland rolled his truck at a high speed, leaving him conscious yet severely disabled, both mentally and physically, and dependent on artificial nutrition and hydration. Two years after the accident, Mr. Wendland’s wife and conservator sought to direct the physicians to remove the feeding tube and allow Mr. Wendland to die. At the time of this request, Mr. Wendland suffered severe cognitive impairment, could not eat or communicate without assistance, and had a deteriorated physical condition due to recurrent battles with multiple medical issues.

Because Mr. Wendland had not executed any advance directives, the hospital’s ethics committee was required to consider the request to remove artificial nutrition and hydration. The committee unanimously approved the request, which was appealed by Mr. Wendland’s mother and sister, giving rise to the court’s decision.

The court ultimately held that a conservator may remove life-sustaining artificial nutrition and hydration from an individual who is not terminally ill and who did not execute an advance directive, if the conservator can prove by clear and convincing evidence that under such circumstances the conservatee would wish to forego such treatment. In reaching this conclusion, the court held that competent adults have the right to refuse medical treatment, even if treatment is necessary to sustain life. This right is embodied in the United States Constitution and the right to privacy found in California’s Constitution. Further, the court found that the right to refuse treatment survives incapacity “if exercised while competent pursuant to a law giving that act lasting effect.”

After establishing these constitutional and common law rights, the court turned to state law regarding advance directives. In 2000, California adopted the Uniform Health Care Decisions Act (“the UHCDPA”), which allows a person to give specific instructions regarding “any aspect” of an individual’s health care through an advance directive. The court interpreted this provision to allow an individual to “direct that life-sustaining treatment be withheld or withdrawn under conditions specified by the person and not limited to terminal illness, permanent coma, or persistent vegetative state.”

It was also noted that a competent person could appoint an agent who is authorized to make such decisions. Based on these statutory grants of authority, the court stated that had Mr. Wendland executed such a document, an agent or surrogate would be required to make health care decisions in accordance with his instruction, given his present condition. Though California’s advance directive laws did not contain the triggering conditions found in many other states, the court implicitly authorized removal of LSPs from conscious individuals pursuant to an executed advance directive.

Despite such analysis, the court nonetheless ultimately denied the conservator’s request to remove the gastric feeding tube. Due to the competing interests of the state and individuals, the conservator was required to prove Mr. Wendland would want LSPs removed by clear and convincing evidence. The conservator could not meet this burden and the gastric feeding tube was ordered to remain in place. In closing, the court emphasized the narrowness of its decision, stating the clear and convincing evidence standard only applied to “conscious conservatees who have not left formal directions for health care and whose conservators propose to withhold life-sustaining treatment for the purpose of causing their conservates’ deaths.” In short, and as noted above in this article, the court concluded that under its interpretation of the UHCDPA, its provisions authorized individuals to execute living wills withholding LSPs that have efficacy, despite the declarant not having been diagnosed as terminally ill or permanently unconscious.


The legal efficacy of an individual going beyond medical care proscriptions in an advance directive, and extending such proscription to nutrition and hydration which can be ingested by swallowing, is more problematic. An individual clearly has the right to voluntarily stop eating and drinking (VSED), typically implemented only when the individual is faced with a progressive, incurable disease the individual deems undurable. Medical studies have even indicated that VSED can even be a comfortable way to die with the right palliative care.

However, whether a proscription as to nutrition and hydration which can be naturally ingested will be legally sanctioned, let alone honored by the medical profession, is open to question. Proscribing nutrition and hydration which can be naturally ingested has a decidedly different import and invites much greater potential medical questioning than the proscription of medically assisted nutrition and hydration. The word “starvation” tends to immediately come to mind. Medical personnel would be expected to have a tendency, due to such perceived difference and emotional elements involved,
to not accept such proscription either from a religious or ethical perspective, or simply due to liability concerns.

If naturally ingestible nutrition and hydration are prescribed in a condition where quality of life has eroded to the point that the individual specifically directs their withholding in a living will, there should be little legal differentiation between prescribing normally ingested nutrition and hydration and proscribing medically assisted nutrition and hydration. Nonetheless, there is no legal certainty as to the efficacy of such provisions when judicially tested. For example, demonstrating the sensitivity of this issue, Canadian courts have ruled that nutrition and hydration which could be voluntarily ingested had to be provided to Margo Bentley, an individual with dementia, notwithstanding her expression in her living will of a desire not to have a lingering death, under the rationale that her ability to swallow indicated her consent to being so provided.218

**Summary and Drafting Considerations**

Although a judicial affirmation of the efficacy of provisions in living wills addressing the circumstance of lack of cognitive capacity to recognize family and the surrounding environment, irrespective of whether the individual was in a terminal condition, would represent an expansion of what would appear to be currently statutorily permitted in living wills in Kansas, a court would likely do so. In *Cruzan*, the United States Supreme Court found that the United States Constitution’s Fourteenth Amendment grants competent adults the fundamental right to refuse medical care and to be able to direct such care through advance directives.219 The progeny of lower court judicial decisions since *Cruzan* discussed above lead to the conclusion that such directives cannot be constitutionally fettered by states’ artificially and incongruously grafting “triggering devices” denying their efficacy simply due to an individual’s subsequent loss of capacity to make a contemporaneous decision unless that individual currently has an arbitrarily short survival period.220 If an individual currently lacking the ability to make his or her own medical decisions has made the decision in an advance directive that he or she has no quality of life when in an irreversible and incurable condition and thus desires the cessation of all medical procedures save that of providing comfort care, for the state to deny the efficacy of such directive and require a prolonging of the period the disabled individual must continue to suffer until the individual’s remaining life expectancy is within an artificial statutory life expectancy period considered to be “terminal,” all the while such condition is getting progressively worse leading inexorably to death, would appear to be cruel indignity, not in furtherance of the interest of the state in any regard in preserving life, and an affront to an individual’s self-worth and right to self-determination.

In sum, notwithstanding the interest of the state in preserving life, the state’s interest in such situation must be balanced against an individual’s fundamental right to refuse medical care. When such care becomes too invasive, the individual’s right to refuse medical care will be deemed to outweigh the state’s interest in preserving life. Not following the wishes of the individual in the foregoing circumstance as directed in the individual’s living will would mean that the state would be forcing unwanted medical procedures and treatment upon the patient serving no legitimate state purpose. Thus, courts would be expected to find such level of intrusion to be severe enough for the individual’s interest in such circumstance to outweigh any interest of the state in requiring the continuance of medical care. Indeed, that has been the very tenor of the foregoing decisions to date on the issue wherein the courts have sided with the right of an individual to self-determination of his or her medical care decisions, unfettered by statutorily imposed “triggering devices” when the individual no longer possesses sufficient capacity to make a contemporaneous medical care decision.

In addition to specifically including language addressing a persistent vegetative state or permanent coma, given the problematic nature of such conditions meeting the definition of a “terminal condition” under the Kansas living will statutes, including specific language in a living will as to what medical treatment or procedures an individual desires in the event of any injury or disease resulting in the loss of the ability to recognize family members and have a sense of place or environment, albeit also not being a condition likely to satisfy the definition of “terminal” under Kansas statutory provisions absent the individual being in a near death “end stage” when body functioning begins to cease, is likely to be desirable and appealing to many individuals.

Unfortunately, in the author’s experience, the vast majority of living wills fail to expand beyond the traditional “terminal condition” triggering event. The majority of the minority that do, tend to use an ambiguous and often inappropriate form which has triggering devices tied to a failure to have a self-described reasonable “quality of life” in situations in which individuals may still possess the capacity to make their own medical decisions or otherwise might not have intended to prescribe medical care in the absence thereof, as well as arbitrarily limiting the proscription of medical procedures to only certain “check-the-box” life-sustaining procedures in non-terminal situations.

This is most unfortunate, for practitioners who do not have appropriate expanded forms in their data base are not likely to appropriately explain such foregoing options to their clients, let alone be able to provide such option in an unambiguous “bright-line” format. It would be one thing if only a few clients who were informed of such options desired such provisions. However, in the author’s experience, most clients prefer such an expanded living will form to appropriately address and carry out their desires as to medical procedures in what
has become an all too commonplace medical condition reap-
ing destruction on mental cognition.

When fully advising clients of their medical refusal options as they relate to Alzheimer’s and other dementias, and deter-
mining options they might desire to be included in a living will when their mental and physical condition degrades to an unacceptable quality of life, it should be brought to their atten-
tion that although in the later stages of such diseases, indi-
viduals having such dementias will cease to recognize family members or even have a sense of place, they still may respond to affection and being talked to in a calm, soothing voice, as well as enjoy to varying degrees scents and interaction with their environment, such as with pets and music. Although explaining this facet is not likely to sway a determination to cease medical procedures in such situation, nonetheless it is an important point for their consideration.

Consistent with the aforementioned desirability of having an objective and analytical “bright-line” standard relating directly to a meaningful quality of life, one that normally would not be temporally substantially distant from the time individuals previously possessed sufficient capacity to have contemporaneously determined their own medical procedures, a high percentage of clients are likely to consider the inclusion of such a provision in their living wills. Such self-designated “triggering event” could accelerate medical proscription years ahead of when it might otherwise have been activated, i.e., only at the very last or “end stages” of such dementias, when body functions cease to the point that the individual would likely be considered to be in a terminal condition.

Once such “bright-line” test is met, almost all medical pro-
cedures, whether proactive or reactive, would be proscribed, excepting those necessary to provide comfort care. As noted above in the Browning decision, no purpose is served by sepa-
rately addressing or categorizing the type of medical pro-
deuce involved, be it life-maintaining, life-sustaining or life-
prolonging. This means the individual would no longer be given medicine to address any medical conditions of any na-
ture, such as blood pressure or cholesterol reducing medicine, and even insulin. The “bright-line” test should be specific as to how recognition of family members or friends and sense of place or environment is to be measured. Only certain limited exceptions might be imposed, such as treatments for external bleeding (e.g., a laceration), a condition that does not signific-
antly reduce life expectancy which, if treated, would likely reduce the need for pain medication, substantially increase mobility (e.g., a broken bone or back or muscle condition) or meaningfully enhance one’s ability to intelligibly commu-
nicate with attending medical personnel (e.g., medications which improve lucidity).

Because it might be construed otherwise as ambiguous whether “life-sustaining medical care” within the meaning of the Kansas statutory provision or “medical procedures or treatments” within the meaning of the foregoing provision would encompass artificially ingested nutrition and hydration, the instrument should also specify whether medically assisted nutrition and/or hydration is desired in such circum-
stance. Interestingly, in the past, a number of states statutor-
ily prohibited any advance direction that would preclude medically assisted nutrition and hydration, though only one does so today. Obviously, such state prohibitions have federal constitutionality problems. Declarants may proscribe both medically assisted nutrition and hydration, mandate its continuance, or select only medically assisted hydration.

In the author’s experience, some individuals in a small mini-
ory of situations mandate the continuance of hydration in all events in their living will provisions despite such continu-
ance extending their life. Those that do usually do so under the rationale that given the slight chance physicians may have misdiagnosed their condition, such continuance will allow some additional time prior to the absence of nutrition leading to their death for a possible reversal of their condition. Other situations have involved clients who desired additional time to ensure children who live distantly have the opportunity to visit them while they are still living. Another minority of indi-
viduals desires the continuance of both medically assisted nutrition and hydration typically for religious reasons, view-
ing the discontinuance of nutrition and hydration as being tantamount to suicide. Those otherwise desiring the continu-
ance of hydration to extend life should nonetheless specifically preclude its continuance in circumstances where it would ac-
celerate death, e.g., the declarant is unable to assimilate fluids due to edema.

It may also be advisable to include an additional provision in a living will that it is the declarant’s intent that any time the declarant has an incurable condition likely to result in death, irrespective of the declarant’s life expectancy, and the declarant is no longer possessed insufficient capacity to make the de-
clarant’s own medical care decisions, any medical procedures that the declarant had declined to be administered prior to losing such capacity would continue to be proscribed unless and until there was either a change in the declarant’s medical condition so that such condition was no longer likely to result in the declarant’s death or the declarant has regained the ca-
pacity to make medical decisions. For example, notwithstanding a declarant suffering from Alzheimer’s was still recognizing family members or had a sense of place so as to not yet trigger the provisions of the living will, in the event the individual was then declining all medications while possessed of suffi-
cient capacity to do so, such declination would continue during any period the declarant lacked the capacity to make such decisions even if the triggering provisions of the living will had not yet been satisfied. This should not only ensure the de-
clarant’s decisions in that regard would continue to be carried out by attending physicians absent a substantial change in the declarant’s medical condition and the regaining of sufficient
An expanded living will form created by the author that addresses not only terminal conditions, but PVS, permanent comas, and mental injuries or diseases such as Alzheimer’s resulting in the loss of recognition of family members, friends, and a sense of place, is included in the Appendix to this article.

mental capacity to make the principal’s medical decisions, but also that they would not be subsequently overridden by a health care agent.

By virtue of individuals specifying in a living will what medical procedures or treatments they wish to proscribe under certain conditions should they later find themselves in medical and psychological circumstances in which they have insufficient capacity to do so, they should legally ensure that their desires with respect to medical care will be honored. For reasons more fully addressed below, however, the author believes it is usually much more desirable to so provide under a living will rather than relegate that decision to a health care agent.

An expanded living will form created by the author that addresses not only terminal conditions, but PVS, permanent comas, and mental injuries or diseases such as Alzheimer’s resulting in the loss of recognition of family members, friends, and a sense of place, is included in the Appendix to this article. The form requires two witnesses in addition to an acknowledgement. Although the Act only requires an acknowledgement or two witnesses, both are included in the form to ensure both compliance with the clear and convincing constitutional aspect of the declarant’s desires to discontinue LSPs and other medical procedures, and enhance its acceptance by medical professionals, most of whom would not be expected to have a familiarity with a form not predicated upon a traditional terminal situation as a triggering event. It includes medically assisted nutrition and hydration options and invokes the individual’s constitutional right to determine health care options through advance directives in the event such direction would otherwise exceed state statutory authority, as would be the case in Kansas. It also includes a personal element stating the individual’s reasons for proscribing medical procedures when the individual permanently fails to have an acceptable quality of life.

Although there are options in the form related to requiring either notice or consent to such withholding of medical treatment by a health care agent, the author suggests that for reasons discussed below relating to the disadvantages of reposing authority to terminate LSPs in children in health care powers of attorney, it is normally desirable that such consent requirement only be reposed in a surviving spouse. The author has found that a substantial majority of the author’s clients, including physicians, have preferred such living will form over forms limited strictly to terminal conditions.

The author believes that the Kansas Natural Death Act, in the face of sociological and medical trends, as well as judicial decisions recognizing a constitutional right of individuals to execute advance directives effective in situations which may not be considered terminal in the legal or medical sense, should be amended to not only specifically authorize the direction of medical care in PVS and permanent coma situations, but also in all non-terminal conditions as well in recognition of the almost-certain federal constitutional right of individuals to do so. Florida has done just that by broadly defining terminal conditions so as to not link them to a defined period, as well as including “end stage” medical conditions, PVS and permanent coma situations which may be addressed under the provisions of a living will.

As an agent under a durable power of attorney for health care can be authorized to withhold medical treatment in any situation, such authority could extend to withholding medical treatment in the very circumstances which could be otherwise covered in a living will. Although a health care agent cannot exercise his or her judgment in contravention of living will provisions, it nonetheless raises the question of how far the declarant in a living will should go with respect to directing the withholding of medical procedures that would or could prolong life in specific situations the declarant would not want, and how much of such authority should be left instead to the health care agent.

There are several downsides to reposing such broad authority in the health care agent. First, it places a substantial emotional burden on the agent to have to determine the proper medical direction for the principal in any circumstance in which the principal has not specifically directed medical providers to act under the provisions of a living will. Second, irrespective of the nature of the principal’s condition, but most particularly in not-yet-terminal situations that are nonetheless permanent or incurable, the health care agent may not be able to bring himself or herself to make a decision which the agent would otherwise make, knowing that such decision would or could bring the principal closer to expiration. Third, even assuming there have been prior communications between the principal and currently serving health care agent as to withholding medical treatment in certain circumstances not delineated in a living will, there almost inevitably will be gaps and gray areas in such directions, possibly leaving the agent ambivalent or even unable to decide or act. Fourth, whatever decision the health care agent makes beyond circumstances specifically delineated in a living will, other family members are typically prone to criticize and second-guess decisions made by the agent, particularly a family member serving as agent, thereby
resulting in emotional strife and the potential loss of what most clients believe is the most valuable asset they possess, i.e., family harmony. Even such statements of other family members as “[Mom or Dad] would not have wanted you to withdraw [a specific medical procedure]” or vitriolic accusations such as “You killed Dad” when a child serving as agent withdraws life-sustaining procedures of a parent can occur. Fifth, there is a serious question as to whether broad authority with regard to health care decisions reposed in an agent legally authorizes a health care agent to proscribe life-sustaining medical procedures in a not-yet-terminal situation involving a principal afflicted with an incurable disease. Sixth, there is the proposition that medical personnel in that situation may not honor such proscription in the absence of a living will provision so directing.

In addition to the foregoing reasons, one can’t help but posit that it might be less than propitious for principals to leave open-ended the circumstances in which a health care agent could withdraw otherwise appropriate medical procedures that would extend one’s life in a non-terminal situation that is permanent or incurable beyond that specifically provided in a living will or directly communicated by the principal to the agent. This would mean the agent’s decision in such non-specified circumstance would be based solely upon the agent’s perception of what the principal would have wanted in such circumstance, when economics related to preserving assets for the benefit of the beneficiaries of the principal’s estate unfortunately might be injected in the decision-making process.

Finally, there are efficacy reasons not to leave such decisions to an agent under a health care power of attorney. Absent specific statutory authority extending to non-terminal situations, there is the issue as to whether the courts would permit an agent under a health care power of attorney to proscribe life-sustaining procedures in a non-terminal situation, let alone whether medical personnel would honor such a direction. With state statutory authority regarding living wills being limited to terminal conditions, there is a question as to whether a court would legally permit a health care agent to proscribe medical care the agent is authorized to proscribe under a health care power of attorney that the principal would have been statutorily prohibited from proscribing under a living will. To reach a contrary conclusion, the court would have to conclude that such inconsistency in the two advance-directive statutes has no bearing on the construction of the health care power of attorney statutes which do not preclude their exercise in non-terminal situations. If given such statutory construction, one would expect the court to acknowledge that such otherwise plenary authority would nonetheless need to be subject to reasonable limitations (e.g., the principal had no reasonable expectation of recovery).

Alternatively, the court could conclude that even if existing health care power of attorney statutes would otherwise be construed to impose the “terminal situation” restriction on an agent’s authority to terminate life-sustaining procedures, any restriction on such authority would be trumped by the individual’s constitutional right to direct medical care through a surrogate. Nonetheless, the issue would still remain as to whether a court would permit an agent to proscribe the health care of the principal in a non-terminal situation where the principal’s living will specifically limited such proscription to a terminal condition. In any event, a high percentage of medical practitioners would be expected to take a jaundiced view of any health care agent’s proscription of the principal’s medical care in a non-terminal situation.

In the more-desired circumstance where a declarant has a living will which has been well thought out, particularly if done in consultation with the declarant’s physician, and it thoroughly articulates the specific circumstances when otherwise appropriate medical care should be withheld in both terminal and non-terminal situations, there should be a consideration of including provisions in the health care power of attorney prohibiting the agent from exercising any authority reposed in the agent in a manner proscribing life-sustaining medical care beyond that which has been proscribed in that same circumstance under the provisions of the principal/declarant’s living will. The health care agent would remain an enforcer of provisions of the living will that meet with resistance by medical personnel due to addressing non terminal situations.

On the other hand, some clients may be nonetheless concerned that provisions in their living wills may be too broadly interpreted by attending medical personnel or, due to being too specific, may have unintended consequences if given effect. Thus, they sometimes desire either: (a) being conservative in the provisions of their living wills in specifying the circumstances which require the non-application or withdrawal of medical treatment or procedures, thereby intending to rely on the health care agent to make the appropriate decision in other circumstances (assuming such exercise to have legal and practical efficacy); or (b) at least requiring the health care agent’s prior consent to a withdrawal or non-application of medical procedures pursuant to such provisions prior to acting. Obviously, the required participation of the health care agent in such decisions presents the same foregoing drawbacks of the agent ultimately making the decision. Although the author has not found such reticence in clients when dealing specifically with dementia situations under the provisions of a living will, a small minority nonetheless desire the concurrence of a health care agent. However, due to the above-discussed drawbacks of a health care agent’s participation in the termination of life-sustaining procedures, the author has seen such consent normally only be required of a spouse serving as health care agent.
D. DO NOT RESUSCITATE DIRECTIVES

The same constitutional and common law rights to self-determination which authorize one to execute a living will prohibiting the use of heroic measures in the event of a terminal illness and incapacity also allow individuals to self-determine whether resuscitative measures be utilized in the event breathing or heart functioning ceases. Typically, individuals who are severely and permanently physically or mentally disabled so as to have no perceived quality of life, are in a severely declining or terminal physical or mental condition, or who are in an intolerably painful health condition, do not wish to be resuscitated in the event they should suffer from a cessation of heart functioning or breathing. Those individuals may so direct under an instrument authorized by the 1994 Kansas legislature known as the "Do Not Resuscitate" Directives Act. In short, in the same manner the Kansas legislature has statutorily recognized such right of self-determination in living wills, Kansas statutory law recognizes such right in Do Not Resuscitate Directives (DNRs).

Prior to the 1994 Kansas legislation, many Kansans were already including DNRs in their living wills, along with a general prohibition against the use of other heroic measures. Thus, due to the inherent constitutional right of self-determination empowering individuals to execute DNRs, this legislation did not provide for an entirely new right. What it did do was provide for an instrument which specifically addresses resuscitation measures alone. Contrary to the belief of a high percentage of individuals, unlike a living will, a DNR does not require, as a condition precedent to its effectiveness, a specific determination of one’s general health, e.g., a terminal condition.

Due to its limited application, the Act does not provide for a comprehensive approach to the issue of heroic measures to preserve life. There is a consequent danger in DNRs being executed by uninformed individuals so as to become effective in a medical emergency at a time such persons were otherwise competent and possessed of a good quality of life, a situation in which withholding resuscitation measures would typically be antithetical to such individuals’ wishes. The author has seen numerous situations in which clients had an erroneous misconception that DNRs should be a staple in an estate plan. Consequently, a DNR should be executed with caution and preferably only after consultation with an attorney and the individual’s personal physician.

In short, a DNR is normally only executed by individuals who have determined that their quality of life has ebbed to the point, or is inexorably heading to the point, that no positive purpose would be served from the individuals’ quality-of-life standpoint by resuscitating them, irrespective of the individual’s then-medical circumstances. Examples of such circumstances include individuals suffering from ALS, Huntington’s disease, terminal cancer, Parkinson’s disease, advancing terminal dementias or being in constant pain due to other medical conditions.

At a basic level, a DNR is a living will proscribing a medical resuscitation in a singular medical condition, the need for resuscitation to continue living. As DNRs do not require an underlying terminal condition, the fact that there has been little question as to their legal efficacy buttresses the legal perspective that the same legal import should be given living wills proscribing medical procedures in non-terminal situations.

E. CURRENT SOCIETAL, MEDICAL AND LEGAL TRENDS

In addition to the foregoing noted need to update Kansas’ health care power of attorney and living will statutes, there are other societal, medical and legal trends in other advance-directive-related medical areas of which practitioners should be made aware.

POLSTs

One of those trends is the Physician Orders for Life Sustaining Treatment movement, or POLST for short. A POLST delineates specific orders that an individual with serious health problems (i.e., typically, although not necessarily, an elderly individual having a significant chance of dying within an ensuing twelve-month period), can fill in and request his or her doctor to sign. It typically addresses CPR and mechanical intervention for breathing/ventilation along with other life-sustaining treatments. The POLST is kept on the person and is implemented in different health care settings. Because it is an order of the individual’s personal physician, emergency personnel—be they EMTs, paramedics or physicians in emergency rooms—are required to follow the orders in the POLST. In the absence thereof, emergency medical personnel would normally be required to effectuate every medical procedure necessary to sustain life. It also guides current inpatient medical treatment when made available.

A POLST is to be used in conjunction with a living will. Since the POLST is a physician order, it carries significantly more import than a living will in guiding the actions of emergency medical personnel. It also is viewed as having been executed with far less likelihood of coercion or misunderstanding, as it is the culmination of a conversation with the person’s physician. Typically a POLST, like a living will, should be placed by the individual on the back of the front door or in the refrigerator, where emergency personnel are instructed to look for such types of instruments. Unlike a DNR, a POLST can direct medical care beyond just denying resuscitation.

Only states which have demonstrated to the National Paradigm POLST Task Force (NPPTF) that their forms meet NPPTF standards receive its endorsement. States are designated by NPPTF as having no program, a developing program, an endorsed program and a mature program. Three states have the highest level, a mature program. Twenty-two
states, including Kansas, currently have a NPPTF-endorsed POLST program. Twenty-four states have a program in development. Two states have not initiated any program.

The Kansas POLST program is being developed by the Kansas-Missouri Transportable Physician Orders for Patient Preference (TPOPP) coalition located at the Center for Practical Bioethics in Kansas City, Missouri. A pilot program in Topeka has been tested. A Wichita-Sedgwick County Steering Committee was formed in 2012 to foster a TPOPP program in the Wichita metropolitan area.

The full implementation of such a program in Kansas will help ensure one’s wishes would be honored with respect to life-sustaining procedures in emergency situations in a non-inpatient setting. Having aspects of living wills proscribing medical care in not-yet-terminal situations confirmed in a TPOPP would be highly desirable, not only in enhancing the legal efficacy of such provisions, but also in its acceptance by the medical personnel who must implement it.

**Five Wishes Program**

Another recent program gaining considerable ground is the Five Wishes program. Rather than implementing medical care by physician directive in concert with a patient as with the POLST program, Five Wishes is a living will proposed by the Aging with Dignity organization. It is intended to be understandable by the vast majority of the population and is legal and effective in 42 states and the District of Columbia. The other eight states, including Kansas, per the organization’s website, require a separate living will instrument. This is the organization’s conclusion because Kansas statutes require a living will form to be in substantially the same form as that provided in the statute. However, although certainly desirable to also have a separate living will irrespective of medical directions under the POLST program, such Kansas statutory provisions providing that a form in substantial compliance with the statutorily provided form will satisfy the statutory criteria, should probably not be construed as precluding medical directions solely under the Five Wishes form.

Due to its foregoing construction of the governing Kansas statutory provisions, the organization’s website suggests that users in those eight states also execute an additional living will form in compliance with state statutes. Even if the Kansas statute was intended to be read on a restrictive basis both as to format and content, such restrictions should be of no legal effect to the extent they violated federal constitutional rights to self-determined medical direction under the Fourteenth Amendment. Nonetheless, state statutory witness or notary provisions in living wills should be complied with to ensure such direction, to the extent it might possibly be construed to be satisfied by execution of the Five Wishes form alone, and satisfies the state’s interest in providing for “clear and convincing” evidence of the declarant’s intent as to his or her medical care.

The Five Wishes form has a lot of personal elements included in its directions beyond just medical care dictates. It also does not address Alzheimer’s types of situations other than leaving open-ended additional directions for non-terminal situations. Beyond such omission, the author is not particularly enamored with its rather basic format, informality, somewhat treacly expressions of sentiment, and inclusion of provisions which many individuals would likely deem inappropriate for inclusion in their living wills, more appropriately placed in health care powers of attorney, or simply left to the discretion of the health care agent.

Although the living will format of the Five Wishes Program allows for customization by providing options under a “check-the-box” approach, it would appear only appropriate for individuals who get such forms off the Internet and who otherwise would not seek legal advice in the preparation of a living will. Individuals who more properly seek legal consultation as to their living wills have the benefit of not only having their living wills individually customized under a more appropriate format, but also the advantage of having the attorney provide additional options not provided in the Five Wishes form, having explained to them their legal import, and, particularly in conjunction with the consultation of a physician, their practical import as well.

Nonetheless, Five Wishes is a laudable effort in aiding individuals who might not otherwise have a living will. The form itself also may be of some use to estate planning and elder law practitioners in being able to cull some of its provisions where appropriate for insertion in a living will or health care power of attorney for a particular client.

**Death-with-Dignity Movement**

In a nationwide poll taken in 2014, 74% of Americans felt that terminally ill persons in great pain should have the right to end their lives. Only 14% were in opposition. Strong majorities, i.e., 72%, in what is termed the “death-with-dignity” movement, also favored physician-assisted suicides, while only 15% were opposed. Both solid majorities in favor are up from polls taken in prior years. A Gallup poll in 2015 showed similar results, with 68% of Americans favoring physician-assisted suicide.

Living wills that proscribe certain medical treatment or procedures in certain circumstances where the individual has insufficient capacity to make his or her own medical decisions normally require passivity on the part of medical personnel, unless medical personnel are required pursuant to its provisions to withdraw proscribed life support that has already been improperly administered. Physician-assisted suicide puts medical personnel in a more active posture, albeit in response to the request of a patient to provide medication that will end his or her life. Although it is the physician who supplies the life-ending medication, it is the patient who has to be able to initiate and follow through on the process of ingesting or tak-
ing such medication. This is different from physician euthanasia, when it is the physician who administers such medication, albeit only at the specific direction of the patient or pursuant to an advance directive.

Seven jurisdictions now permit physician-assisted suicides, i.e., California, Colorado, District of Columbia, Montana, Oregon, Vermont and Washington. Montana allows it pursuant to a judicial decision. The other five states permit it through legislation and require a terminal illness with less than six months to live, at least two oral and one written request for such physician assistance, and certain physician protocols that must be followed. In recent years, Kansas has had two legislative bills which, had they been enacted into law, would have permitted physician-assisted suicides in circumstances similar to the law in Oregon. In 2013, H.B. 2068 was introduced. In 2015, H.B. 2150 was introduced. Both died in committee. No states currently permit physician euthanasia, i.e., a physician directly administering lethal drugs at the direction of a patient, whether contemporaneously or pursuant to an advance directive.

Based on the general tenor and strength of the incipient phases of the trend toward legally permitting physician-assisted suicides, the high degree of current public support this movement has obtained, and the demographic fact that the younger the person the more likely that person is to support the movement, the number of states adopting such legislation would be expected to continue to increase significantly in the coming years. That trend and public support may ultimately result in pressure to pass federal legislation authorizing physician-assisted suicide.

Conclusion

It is probably a relatively safe deduction that a high percentage of the discussions estate planning and elder law practitioners have with their clients regarding advance directives are far too abbreviated. It is likely also safe to conclude that many of us who so practice tend to rely on basic generic forms, particularly as they relate to living wills. Consequently, those often fail to fully address the needs and wishes of clients who have been fully informed of the numerous options they might have otherwise chosen to include thereunder. The author was certainly not immune from being in that same category for a good part of his career.

As an ineluctable consequence, provisions in health care powers of attorney often fail to provide comprehensive authorization, properly coordinate with provisions in the living will, address such issues as whether the agent is to be compensated or the potential liability of the agent for good faith decisions, or sometimes even provide for the proper succession of agents and the determination of the disability of an agent. All too often, many important health care determinations the client could have made in advance directives are by default undesirably relegated to health care agents who may make a decision based at least partially on an economic conflict of interest or who would otherwise not make the decision the principal would have desired. The result is not only uncertainty in decision-making, but an imposition of unnecessary emotional anxiety on the part of the health care agent upon whom the burden is placed and the frequent creation of significant family disharmony regarding those issues.

Due to the inherent limitations of the Kansas statutes on health care directives and their accompanying statutory forms, as well as the vast changes in the social and medical milieu that have occurred since their enactment, it is incumbent upon the Kansas estate planning and elder law practitioner to be aware of such changes, have a thorough and comprehensive discussion with their clients as to the vast range of important decisions it may be advisable for them to make ahead of time regarding their health care, including situations such as advanced dementia, and be possessed of advance directive forms that are capable of legally addressing and precisely encapsulating such decisions in a comprehensive manner which ensures their legal efficacy.

Note: The author wishes to acknowledge the valuable assistance of David Ferguson, an associate at Foulston Siefkin LLP, as well as Anne Harrison, Corey Moomaw, and Dylan Felt, past summer associates at Foulston Siefkin LLP, in both the research and preparation phases of this article. The author also wishes to acknowledge the valuable advice in the preparation of the living wills included in the Appendix rendered by Craig Reaves, a Kansas City elder law attorney and former president of the National Academy of Elder Law Attorneys (NAELA), Father Tom Welk, Director of Professional Education and Pastoral Care at Harry Hines Memorial Hospice in Wichita, and physicians the author consulted in the process.

About the Author

Timothy O’Sullivan is a partner in Foulston Siefkin LLP in Wichita. He graduated from Washburn University School of Law in 1975 and received an L.L.M. in Taxation degree from the University of Missouri-Kansas City School of Law in 1982. Tim is a Past President of the KBA Real Property, Probate and Trust Section, the KBA Tax Section, and the Kansas Chapter of the National Academy of Elder Law Attorneys. He has also served as an adjunct professor in estate planning at the University of Miami School of Law and the University of Missouri-Kansas City School of Law, and at Washburn University School of Law for the past 25 years.
APPENDIX
(page 1 of 4)

Living Will

DECLARANT

This Living Will Declaration made this __________ day of ____________________, 20___, shall be considered a health care directive by me *[(outside the provisions of the Kansas Natural Death Act)] **[outside the provisions of any other applicable state law)] exercising my federal Constitutional right to direct my own health care to the extent the provisions of this Declaration exceed the authority reposed in me under *[such Act] **[any such law], and shall revoke any prior Declaration executed by me. *[Options marked with ** are for out-of-state clients.]

I, DECLARANT, an adult resident of _______________, _______________ County, Kansas, being of sound mind, willfully and voluntarily declare as follows:

If at any time I am unable to make or communicate responsible decisions regarding my medical care as certified or diagnosed by two physicians (one of whom shall be an attending physician) and such physicians have further certified or diagnosed that I have an injury, disease, or illness which results in one or more of the following three conditions:

(1) A terminal condition in which my death will occur whether or not life-sustaining procedures are utilized and such procedures would only serve to artificially prolong the dying process; or

(2) An unconscious state, such as a persistent vegetative state or permanent coma, in which there is no reasonable possibility of regaining a conscious state, irrespective of any medical procedures or treatments currently or realistically available that I might receive, such that I would be aware of self in relation to my environment; or

(3) A condition of substantial brain damage or brain disease (e.g., Alzheimer’s, dementia or Parkinson’s), such that I fail, for an entire period of at least thirty (30) days, both at the beginning and end of such period, as well as on at least two occasions in the interim, to have sufficient mental capacity to: (i) recognize family members (a failure to recognize a family member to be indicated by my inability to speak, name, write or otherwise indicate the name of, or speak, write, or otherwise indicate the relationship in my presence of, my spouse or any descendant of mine, or possess similar recognition capacity with respect to any sibling or close friend of mine in the event I have no then-living spouse or descendant); and (ii) be aware of myself in relation to my environment (such unawareness being indicated by my failure to be able to name, write or otherwise indicate the facility or residence in which I then reside or the city or state in which I am then located), *[or insert any desired additional optional requirement], and there is no reasonable possibility that I will regain such capacity other than potentially only on an occasional or isolated basis, irrespective of any medical procedures or treatments currently or realistically available that I might receive, the provisions below shall be applicable with respect to my medical care and providing me with nutrition and hydration.

Medical Care

With respect to my medical care, should I be in any of the foregoing three (3) conditions, I direct that any such otherwise-applicable medical procedures and treatments (including but not limited to surgery, drugs, dialysis, transfusions, CPR, respirators, ventilators and preventive medicine procedures such as vaccinations to prevent diseases), whether life-sustaining or not, and irrespective of whatever medical afflictions or conditions, however serious or detrimental to my health they may be, that I might have at the time (e.g., a condition such as hypertension or high cholesterol, a disease such as diabetes or cancer, or a heart, liver, kidney, gastrointestinal or respiratory condition), be withheld or withdrawn following such diagnosis or certifications, excepting only medications and medical procedures my attending physician has deemed necessary or desirable to:
(1) Provide me with comfort care, including maintaining my hygiene and mobility to the extent reasonably possible to maximize comfort and to prevent complications of immobility, incontinence and other consequences (e.g., pressure ulcers, uncomfortable skin conditions, or complications of poor dental hygiene), as well as medications or medical procedures (in doses and frequency necessary to maximize comfort) which alleviate pain irrespective of potential side effects (e.g., such medications may be habit forming, make me sleepy, suppress my appetite, reduce breathing efficiency, or otherwise may adversely affect my general health or mental attentiveness);

(2) Treat external bleeding (e.g., a laceration); and

(3) Treat me effectively when I am suffering from the first and third conditions above for any other medical condition that does not significantly reduce my life expectancy if not so treated, provided my attending physician additionally has determined that the treatment of such medical condition is likely to markedly reduce my need for pain medication (e.g., a non-serious illness which I am likely to recover from in the absence of such medical treatment), substantially increase my mobility (e.g., a broken bone or back or muscle condition) or meaningfully enhance my ability to intelligibly communicate my condition with attending personnel (e.g., medications which improve my lucidity).

In addition, at any time I have otherwise proscribed, either verbally or in writing, specific drugs or medical procedures with my attending physician while being in a condition that is likely to result in my death and I should subsequently possess insufficient capacity to make my own medical decisions without my condition having satisfied any of the foregoing three (3) conditions that would otherwise trigger and implement proscriptions of drugs and medical procedures hereunder, I would expect my attending physician to continue such proscriptions unless and until I have either regained sufficient capacity to make such health care decisions or my condition has improved such that my condition is no longer likely to result in my death.

**Nutrition and Hydration**

With respect to providing me with nutrition and hydration should I be in any of the foregoing three (3) conditions, it is my express intent that my following initialed directions govern medically assisted means of providing me with nutrition and hydration (i.e., nutrition and hydration which cannot be orally ingested by natural means), unless necessary to provide me with comfort care in any of such foregoing three conditions (initial one of the following options):

____ Discontinue medically assisted nutrition and hydration; or

____ Discontinue medically assisted nutrition but not hydration, unless its continuance would hasten my death; or

____ Discontinue neither medically assisted nutrition nor hydration, unless their continuance would hasten my death.

*Required Notice*

*[Further, prior to giving effect to the foregoing provisions of this Living Will in terms of withholding medical care in any of the three conditions above, that would otherwise be provided to me in the absence of such provisions, my treating physician(s) shall ensure that my spouse, if then serving as my health care agent to the knowledge of my physician(s), has been given at least forty-eight (48) hours’ notice with respect thereto, and such health care agent has consented to the withholding of such care.]*

**Required Notice**

*[Further, prior to giving effect to the foregoing provisions of this Living Will in terms of withholding medical care in any of the three conditions above, that would otherwise be provided to me in the absence of such provisions, my treating physician(s) shall ensure that my health care agent with respect to whom my physician has knowledge, has been given at least forty-eight (48) hours’ notice with respect thereto, and such health care agent has consented to the withholding of such care.]*
health care advance directives

***[Further, prior to giving effect to the foregoing provisions of this Living Will in terms of withholding medical care in any of the three conditions above, that would otherwise be provided to me in the absence of such provisions, my treating physician(s) shall ensure that my health care agent with respect to whom my physician has knowledge, has been given at least forty-eight (48) hours’ notice with respect thereto; provided, however, the consent of such health care agent shall not be a condition precedent or otherwise required as to the efficacy of any provision herein.]

Declaration to be Honored

I fully understand the full import of this Declaration and totally accept the consequences of my refusal of specified medical procedures and treatments, as well as my direction as to medically assisted means of providing me with nutrition and hydration in such foregoing conditions. Thus, I intend that this Declaration be honored by my family, physician(s) and any health care agent(s) I may have appointed as the final expression of my legal and personal right to both refuse medical procedures or treatments under any of the three conditions provided herein and to direct my intent with respect to medically assisted means of providing me with nutrition and hydration in such conditions, such that my attending medical personnel act consistently with the provisions herein.

Should I be suffering from any of such conditions, I not only will no longer have a quality of life that is acceptable to me, but there will be no reasonable or realistic prospect of my being relieved of any such condition by medical intervention or procedures so as to enable me to regain an acceptable quality of life. I am thus proscribing medical intervention or procedures as provided herein in any of such three conditions due to my personal perspective and values being such that medical intervention or procedures would only serve to maintain my physiological functions at a time I no longer have a cognitive and effective ability to relate at any meaningful level in the foregoing circumstances, thereby unduly extending my life or the dying process and imposing undesirable prolonged emotional and financial tolls on my family and estate as a consequence.

*[Notwithstanding the foregoing provisions, this Declaration shall be of no effect during the course of any pregnancy of mine as diagnosed by my attending physician.]

_______________________________________
DECLARANT

WITNESSES:

________________________________
________________________________
Print Name

________________________________
________________________________
Print Name
ACKNOWLEDGMENT

STATE OF KANSAS )

) SS

COUNTY OF ____________

This instrument was acknowledged before me on this _____ day of ____________________, 20___, by DECLAR-
ANT, as Declarant, and ___________________________ and ____________________________, as witnesses at the re-
quest of the Declarant, who also declared to me that they are of the age of majority, not related to Declarant by blood or mar-
riage, are not entitled to a portion of the Declarant’s estate under the laws of intestate succession of the State of Kansas, nor
under any provision of the Declarant’s Revocable Trust, Will or any amendment or codicil thereto of which they are aware, and
are not financially responsible for any of Declarant’s support, maintenance, or health needs.

________________________________________

Notary Public

My Appointment Expires:
health care advance directives

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
8. Cerminara, supra note 1, at 616.
11. Id.
18. K.S.A. 58-629(a)(1), (f); 59-843(b).
20. See Jordan, supra note 7, at § 3:40.
22. See Jordan, supra note 7, at § 3:40.
23. Id.
24. See Restatement (Third) of Agency § 1.01 cmt. f (Am. Law Inst 2006); id. at § 8:09; K.S.A. 58-629(c) (2002).
27. K.S.A. 58-625(a).
29. See 46 C.F.R. § 165.502(g) (2016).
30. See Jordan, supra note 7, at § 10.33.
34. Id.
38. Id. § 2(a).
39. Id. § 6(a), (b), (f).
41. K.S.A. 65-28,103(a).
42. K.S.A. 65-28,101; see also K.S.A. 65-28,103.
47. K.S.A. 65-28,103(a).
49. Id.
50. Id.
51. Id.
52. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. See Gary A. Magnarini, Withholding a Feeding Tube from a Nonvegetative Dementia Patient, 83-Max Wis. Law 6, 7 (2010) (stating that despite the absence of triggering conditions in state law, Wisconsin appellate courts have never permitted a feeding tube to be withheld from a person who was not in a persistent vegetative state).
62. Right to Die, supra note 53, at § 7.06.
63. Cerminara, supra note 1, at 617.
64. Id. at 607.
65. Id. at 617.
66. Id.
68. 497 U.S. at 278.
69. Id. at 265-66.
70. Id. at 267-69.
71. See id. at 278, 289 (declaring that "[r]equiring a competent adult to endure such procedures against her will burdens the patient’s liberty, dignity, and freedom to determine the course of her own treatment").
72. Id. at 280.
73. Id.
74. Id. at 313 (Brennan, Marshall, and Blackman, JJ., dissenting).
75. Id. at 284.
77. Cruzan, 497 U.S. at 287 (O’Connor, J., concurring).
78. Id. at 288.
79. Id. at 289-90.
80. Id.
81. Id. at 289-92.
82. Id. at 292.
86. Right to Die, supra note 43, at § 7.07[B].
87. 211 N.Y. 125, 129-30 (1914), abrogated on other grounds by Bing v. Thunig, 2 N.Y.2d 656 (1957).
90. Cruzan, 497 U.S. at 284.
91. Woods, 142 S.W.3d at 32-33.
94. Id. at 18, 27.
95. Id. at 46.
96. Id. at 27.
98. Id.
99. Alzheimer’s Ass’n, supra note 92, at 8.
100. Id. at 27.
101. Id. at 6-7.
102. Id. at 7.
103. Id. at 14.
107. Id.
109. Woods, 142 S.W.3d at 33.
110. Id.
112. Id.
113. Woods, 142 S.W.3d at 42.
115. Id.
116. Alzheimer’s Ass’n, supra note 92, at 48.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id.
127. Id. (citing P.R. Laws Ann. tit. 24, §§ 3652, 3653, 3655 (2001)).
128. Id.
129. Id. (citing P.R. Laws Ann. tit. 24, § 3652)
130. Id. (citing P.R. Laws Ann. tit. 24, § 3652)
131. Id.
132. Id.
133. Id.
134. Id.
135. Id.
136. Id.
137. Id.
139. Id. (citing Fla. Stat. §§ 765.01-15 (repealed 1992)). In addition to being applicable in a terminal condition with no duration limitation, subsequent Florida statutory provisions also included an “end stage” condition and a “persistent vegetative state.” Fla. Stat. §§ 765.301–309.
140. Browning, 58 So.2d at 8.
141. Id.
142. Id.
143. Id. at 9.
144. Id.
145. Id.
146. Id. at 8.
147. Id.
148. Id. at 13-14.
149. Id. at 10 (citing Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 279 (1990)).
150. Id. at 12 (citing John F. Kennedy Mem. Hosp., Inc. v. Bludworth, 452 So.2d 921, 923 (Fla. 1984)).
151. Id. at 13 (citing Cruzan, 497 U.S. at 330 (Stevens, J., dissenting)).
152. Id. at 13 (citing In re Guardianship of Barry, 445 So.2d 365, 370-71 (Fla. Dist. Ct. App. 1984)).
153. Id. at 14 (citing Satz v. Perlmuter, 362 So.2d 160, 162 (Fla. Dist. Ct. App. 1978)).
154. Id. at 10.
155. Id. at 11 n. 6.
156. Id. at 10-11 (citing Bouvia v. Superior Court, 179 Cal.App.3d 1127, 1142-43 (Cal. Ct. App. 1986)).
157. Id.
158. Id. at 15 (citing Cruzan, 497 U.S. at 289–31 (O’Connor, J., concurring)).
159. Id.
160. Id. at 9-12.
161. Id. at 17.
162. Id. at 17.
163. Id.
164. See id.
165. Id.
167. Id. at 619
168. Id. at 614.
169. Id. at 615.
170. Id.
171. Id.
172. Id.
See generally supra Part B.1, 2.


220. See generally supra Part B.1, 2.

221. See Compassion in Dying v. State of Wash., 79 F.3d 790, 816 n. 70 (9th Cir. 1996).


227. id. at 355.

228. id. at 354.

229. id.

230. id.

231. id. at 355.


233. id. at 354.

234. id. at 356.

235. id. at 357.

236. id. at 358.

237. State Programs, supra note 238.


241. id.

242. id.


244. About TPOPP, supra note 238.

245. id.


247. id.

248. id.


251. See Baxter v. State, 224 P.3d 1211 (Mont. 2009).


DO YOU WANT TO TALK TO THE BOSS, OR TO THE ONES WHO REALLY KNOW WHAT’S GOING ON?
The unsung heroes of lawyer assistance programs

KALAP recently mourned the loss of our board chair, Billy Rork, who died May 31st. Billy had been active in recovery and lawyer assistance efforts for many years. He leaves a legacy of service, and I doubt that any of us know the full reach and effect of his work. As I reflected on that, I realized that KALAP is lucky to have had not only Billy, but also our many other board members and volunteers, and dedicated staff and many others who give of themselves generously. So let me tell you a little about those people, and how boards work here in Kansas.

Most board members have been LAP volunteers for a while before they are appointed to the board. Early on, everyone assumed, for the most part correctly, that volunteers were themselves in recovery from substance use disorder (FKA alcoholism), but that is not the case any longer. This is, I think, partly because most LAPs now help lawyers dealing with a myriad of issues, and because as LAPs have grown, more lawyers from all areas of the profession have become willing to volunteer. WE CAN ALWAYS USE MORE VOLUNTEERS, SO CALL US TODAY: 785-368-8275. Operators are standing by, as they say on TV.

Volunteers and clients are the ones who are in the trenches doing the gritty work of helping to turn a life and a practice around, and regain health and wellbeing. They are the ones coaching, encouraging, listening, suggesting, meeting, and sometimes yes, holding accountable, the individual lawyers working with KALAP. Most volunteers find the experience to be rewarding and discover that they end up getting as much as they give. “A bit of fragrance always clings to the hand that gives roses”. – Chinese proverb

We do not always appreciate just how many lawyers and judges volunteer for a wide variety of jobs that benefit the public and the profession. Bar associations are one example, and the many boards and committees that assist the Kansas Supreme Court are another—KALAP’s board being one of the latter. Rule 206 provides that appointees should be lawyers, active or retired, with diverse experience and knowledge, and have demonstrated an understanding of and ability to assist lawyers in the problems of physical or mental disabilities that result from disease, addiction, disorder, trauma or age. Recently revised term limits now provide for six year terms, with a limit of 18 continuous years. The Court added or revised term limits for many boards a few years ago, attempting, I think, to strike a balance between maintaining experience and creating opportunities for new faces, ideas and inclusiveness.

The three other boards with which KALAP works most often that are also undergoing term limit changes are the Board
of Discipline, The CLE Commission and the Board of Law Examiners. The Kansas Supreme Court appoints the members of all these boards, and though lawyers are reimbursed for their travel expense, they basically serve for free. In some instances, extended or multiple hearings can take them away from their own firms and practices for days at a time. But all three of these boards, along with many other boards and committees overseen by the Court, are vital to maintain the legal profession in Kansas, and ensure that it remains able to self-regulate and function at an optimum level.

At KALAP, we aim for inclusiveness on many levels: age, gender, type of practice, knowledge of 12-step recovery, familiarity with mental health issues, experience with disabilities, geographic, LGBT, ethnic and cultural groups. Currently we skew towards urban, older and white. Some regions of the state do not have much of a KALAP presence, particularly rural, Western and the Southeast corner of Kansas. We are painfully aware of our need for more ethnic and cultural diversity. Due to confidentiality and anonymity, we can’t publish all the "skill sets" of our current board but we can tell you who they are – and tell you that individually and collectively, they bring a wealth of enthusiasm, expertise, and effort to KALAP and thus to our legal profession in Kansas.

I list the names and locations of the individual board members here because sometimes a person with a concern is more comfortable contacting one of them directly than calling the Topeka office. And that’s fine. The new chair is Sue Dickey, Chief Prosecutor for the City of Olathe. Vice chair is Steve Smith with Gates, Shields, Ferguson, Swall, Hammond, P.A. in Overland Park. Secretary is Lauren Reinhold, who is with the Social Security Administration office in Topeka; her residence is Lawrence. Carol Ruth Bonebrake is with Simpson, Logback, Lynch, Norris, P.A., in Topeka; she and Sue Dickey are now the longest serving board members. Lara Blake Bors is in solo practice in Garden City. Judge Ben Burgess is from Wichita; he also chairs the state-wide Judges’ Assistance Committee. Our newest member is Amy Elliott, a solo in Overland Park. Sarah McKinnon heads the Public Defenders’ Office in Hutchinson. Mike Studtmann is a solo in Wichita, and Cal Williams recently retired and moved from Colby to Salina.

Kudos and much gratitude to them—and all the unsung heroes in KALAP and the entire legal profession here in Kansas.

About the Author

Anne McDonald was appointed to the Lawyers Assistance Program Commission at its inception in 2001 and has served as the Executive Director of KALAP since 2009. She graduated from the University of Kansas School of Law in 1982.

mcdonalda@kscourts.org
It is a pleasure to announce that Nicolas Shump has been hired by the KBA to serve as the editor for Law Wise, our newsletter for educators and their students in elementary through high school. This is a perfect fit for Shump who sees his new role with Law Wise as a logical extension of his work as a columnist for the Topeka Capital-Journal and a scholar from the Talk About Literature in Kansas (TALK) program. Nicolas recognizes the importance of public education for students and for the general public. He is excited about providing resources on the law for fellow teachers and students.

Law Wise is produced throughout the school year. It includes discussion points and lesson plans on significant legal issues of interest to students, features on notable people and programs and tips on helpful technology for the classroom. It is provided as a public service by the KBA, through a grant from the Kansas Bar Foundation.

Shump is a lifelong Kansan, born in Topeka. He graduated with a BA in Comparative Literature from the University of Kansas, where he later earned an MA in American Studies. He hopes to one day finish his doctoral program in American Studies at KU.

After a decade working as a graduate instructor and staff member at KU, Nicolas took a position as a member of the History faculty at The Barstow School in Kansas City, MO. He begins his 7th year at The Barstow School having taught courses in Ancient and Modern World History, Creative Writing, English, Film, Sport in American Culture, World Philosophy, and A.P. courses in Comparative Government and Politics, European History, and U.S. History and Government.

Teaching history and politics courses to high school students made Nicolas aware of how important a foundational knowledge of our history and laws are to students and Americans in general.

Nicolas lives in Lawrence, Kansas and is the father of two sons Nicolas, 24; and Joshua, 23, and a daughter, Bella, age 11.

To view current and past issues of Law Wise, visit: www.ksbar.org/lawwise
I feel like I can relax a little, after the fight we had last year. We had five Supreme Court Justices up for retention, and there were some powerful groups determined to wipe the slate clean. And, of course, there were other groups just as determined to make sure it didn’t happen. Most of us saw the role of the Kansas Bar Foundation as one that would educate, so that the decisions made by the voters, whatever those decisions might be, could be informed ones.

In my last column, I mentioned that I believe the KBA and the KBF are, and should be, lawyers’ organizations. After all, we judges have our own organizations. Less obviously, lawyers will be more candid with lawyers than with judges because of the whole “deference thing.” Judges receive deference in the courtroom, and we also are accorded deference, sometimes, outside the courtroom. While I have to say it’s nice when people are nice to me, I know people aren’t always glad to see me, and my jokes aren’t always funny.

As one of the very few judges on the KBF Board of Trustees, I’ve told people to call me Evelyn, but they usually don’t. I’m “Judge.” (At least they sit by me at lunch, and don’t make me sit at the “judges’ table.”) This “separation” has become less obvious as we’ve all gotten to know each other, but it is something judges and attorneys deal with. I dealt with it myself, when I was an attorney and chair of the KBA Bench/Bar Committee. I remember well the day when I felt I couldn’t be the one to wake up a snoring judge, hoping one of the judges would help me out. Ugh.

There has to be an upside to this.

I think I’m onto something. Lawyers, please do not hesitate to contact me with any question or comment. Let me know what is on your mind. What do judges need to fix? Maybe I can help. In my capacity as president of the KBF, I can’t raise money, but I hope I can help better the foundation by doing something else. Hopefully, I can combine my roles as foundation president and judge to pay it forward in ways that might not be feasible for a president and lawyer. You and I could brainstorm on how to accomplish that. Send an email to me – ewilson@shawneecourt.org. I’ll call you back. Maybe I’m just the intermediary you need in order to send a message to someone—maybe a judge—who needs to hear that message.

About the Author

Hon. Evelyn Wilson is Chief Judge of Kansas’ Third Judicial District (Shawnee County). Before taking the bench in 2004, she practiced law for 19 years—seven years in northwest Kansas and 12 years in Topeka. Judge Wilson graduated from Bethany College and Washburn Law School.
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Members in the News

New Positions

Leslie Beims, St. Francis, was chosen to succeed Nicole Romine as Cheyenne County Attorney. Beims is a lifelong resident of Cheyenne Co., and is the Northwest Director of the Kansas Municipal Judges Association.

Whitney L. Casement has joined Goodell Stratton where her practice will focus on employment law and workers’ compensation defense, administrative actions and civil litigation. Casement is also president-elect of the Women Attorneys Association of Topeka and very involved with KWAA.

Ethan Corson has been hired by the Kansas Democratic Party as its new executive director. Corson previously served as chief of staff for the International Trade Administration and as a lawyer in Washington, D.C. where he performed pro bono legal work challenging Wisconsin’s strict voter ID law.

Adam Dees, Hays, has joined Clinkscales Elder Law Practice as an associate, focusing on estate planning and elder law. Dees brings a broad range of experience from law practice in Goodland.

Sam Foreman of Fleeson, Gooing, Coulson & Kitch was credited as a mentor of two Wichita East High School students—Aftab Shaikh and Cristian Silva—who have developed an app called SOCRATION to ease interactions between students and teachers in large group settings.

Paul F. Good has joined Depew Gillen Rathbun & McInteer LC in Wichita as Of Counsel.

David C. Graham was sworn in as Harper County Attorney by Judge Richard Biles. Graham replaced Michael Grimmett who resigned.

Lee Hendricks has been selected as city attorney for Edgerton. Hendricks also serves that function for Perry, Meriden, Oskaloosa, Winchester, Ozawakie, Hoyt, Easton and Belvue.

Allison L. Koehn has joined Newbery, Ungerer & Hickert LLP, Topeka.

Michael R. Munson now serves as Senior Vice President & Legal Counsel for Central National Bank. His office is in Topeka.

James T. Wicks has joined Saint Francis Community Services as General Counsel. Wicks’ areas of focus include regulatory, employment and contract law, as well as compliance matters.

Thomas Witherspoon has joined the law firm of Stinson, Lasswell & Wilson, L.C. as an associate attorney.

Notables

Diane L. Bellquist, Topeka, has been elected as president of the Topeka Bar Association.

Austin Bork, Topeka, who will complete his JD at Washburn University School of Law in the spring, was profiled in the Rawlins Co. Square Deal newspaper for his two-month internship with the Atwood law office of Brown, Creighton and Peckham.

Judge Robert J. Frederick was elected president of the Kansas District Judges Association. Frederick is a judge in the 25th Judicial District, composed of Finney, Greeley, Hamilton, Kearny, Scott and Wichita counties.

Douglas County District Judge Amy Hanley, Wyandotte Co. District Judge Jennifer Myers, Hamilton Co. District Magistrate Judge Meghan Houtsma and Allen Co. District Magistrate Judge Tod Davis were appointed by Chief Justice Lawton R. Nuss of the Kansas Supreme Court to serve on the District Judges Manual Committee. The Committee composes and updates the manual for Kansas district judges and district magistrates.

Carey Hipp of Ellsworth saw her contract to serve as Barton County legal counselor extended through the end of the year.

Steve Hirsch, Oberlin, testified before the House Science and Technology Committee of Congress regarding the need to continue the Fire Act grant program through the U.S. Fire Administration. Hirsch testified on behalf of the National Volunteer Fire Council, of which he is vice-chairman.

Four attorneys from Joseph, Hollander & Craft LLC have been honored by the highly regarded Best Lawyers in America—2018 Edition:

Ross A. Hollander was recognized for his expertise in three legal sectors: Employment Law—Management, Labor Law—Management, and Litigation—Labor and Employment. Hollander is a founding member of the firm and chair of its Civil Litigation and Employment Law Division.

Christopher M. Joseph was honored in the Criminal Defense: General Practice sector.

Michelle Moe Witte was recognized for her work in the sector of Employment Law—Individuals.

M. Kristine Savage was honored in two sectors: Criminal Defense: General Practice and Criminal Defense: White Collar. Additionally, Ross A. Hollander and Michelle Moe Witte have been ranked among the state’s top Labor & Employment lawyers by Chambers USA 2017.

Scott James, a Greensburg attorney who resides in Spearville, was featured in the Kiowa County Signal for his use of his knowledge of legal research concepts to hone his ability to trace his geneology.

Barton County District Judge Mike Keeley of Great Bend has been appointed to the Kansas Judicial Council. He will serve out the remainder of the term of retired Judge Robert J.
Fleming of Parsons, which will expire in 2019. Kristen Clarke is president and executive director of The Lawyers Committee for Civil Rights Under Law. The group has filed a federal complaint against Kansas Secretary of State Kris Kobach for what they assert is his violation of the Hatch Act by promoting his work on the Trump Election Integrity Commission in ways associated with his run for governor.

Jeffrey N. Lowe of the law firm Stinson, Lasswell & Wilson, L.C. is now a member of the International Academy of Family Lawyers.

The Marion County Bar Association held its annual CLE, lunch, “Cheap Bastards Cup” golf tournament, and dinner on the last Friday of July. CLE topics were on advising clients on matters involving social media postings (presented by David Harger of McPherson), and recent changes in expert testimony rules (delivered by Ann Parkins of McPherson.)

Roseanna Mathis, Kingman County District Magistrate Judge, was reelected treasurer of the Kansas District Magistrate Judges Association, with her new term beginning July 1. Judge Richard McVey was elected to the Board of Directors of the Kansas District Magistrate Judges Association.

Kevin L. Phillips was selected by the 12th Judicial District Nominating Commission to fill a magistrate judge vacancy in Jewell Co. Phillips, of Mankato, is a lawyer in private practice.

Judge Michael Powers discussed in the Peabody Gazette-Bulletin the challenges of finding legal representation for those who cannot afford a lawyer. In smaller communities and rural areas, few are available or interested in accepting the lower rates and difficult situations involved in serving as a court appointed attorney.

Derek Schmidt, Kansas Attorney General, was unanimously elected by his peers to serve as president of the National Association of Attorneys General. The non-partisan association is comprised of 56 state and territorial attorneys general. It serves as a forum for attorneys general to discuss and collaborate on issues in common, and provides training and instruction to build and maintain professional staff.

Sarah "Sally" Shattuck was reappointed to the Kansas Judicial Council in a term that will run until June 30, 2021. Isaac Wright served a two-month internship under Sheridan and Decatur County Attorney Steven Hirsch. A grant from the Dane G. Hansen Foundation allowed several law students from the Washburn University School of Law to serve internships in northwest Kansas over the summer.

Chief Judge Larry T. Solomon who served the 30th Judicial District since 1989—as chief judge since 1991—retired Aug. 31st. Solomon received the KBA’s Courageous Judge Award in 2016 for successfully challenging the 2014 law that changed the way chief judges were selected.
LA VONE A. DAILY, a long-time resident of the Mission, KS and a devout parishioner of Queen of the Holy Rosary Catholic Church, passed away Tuesday, July 18, 2017 at Brookdale Rosehill Care Center.

Vonnie (as most of the young nieces and nephews affectionately called her) was the fifth of eight children born to Francis Vernon and Mary Elizabeth (nee Henry) Daily on March 25 1929. She graduated from Bishop Ward High School in Kansas City KS followed by a BS degree, majoring in bacteriology and biochemistry from the University of Kansas in 1952. She continued her education and received her Juris Doctorate from University of Missouri-Kansas City School of Law in 1957. She was the first female prosecutor in Wyandotte County and in the state of Kansas. She was a member of the Johnson County and Wyandotte County Bar Associations and the Kansas Association for Justice. She also served as a Mission Municipal Judge pro tem. LaVone was recognized and honored for 50 years in her profession and as a member by The Kansas Bar Association in 2008. Additionally, she was a member of the American Legion and a lifetime member of the Sports Car Club of America.

During the 1960s, LaVone loved racing sports cars and was playfully nicknamed "Raccoon" by some colleagues because of the sunburned imprint around her eyes from racing goggles. Later, she enjoyed traveling, especially to Ireland, spending time at her vacation home at Lake Pomme de Terre, and grilling rack of lamb or steaks in the backyard. She generously supported the once a year Bishop Miege High School auction by unselfishly donating her vacation home for a week of fun on Pomme de Terre Lake.

LaVone was preceded in death by her devoted husband, friend and law partner, William E. Scott. Her parents and siblings also preceded her in death. She is survived by many nieces and nephews, great-nieces and nephews, and great-great nieces and nephews.

A Mass of Christian Burial was held at Queen of the Holy Rosary Catholic Church at 7023 W. 71st St., Mission, Kan. 66204 on Thursday July 27, 2017. Mass was followed immediately by burial at Mount Moriah Cemetery at 10507 Holmes Rd, Kansas City, MO 64131.

RONALD DWAYNE DEES, 47, of Topeka, Kansas, went to be with his Lord and Savior, Jesus Christ on August 2, 2017 at Midland Hospice House. Ronald was born on January 25, 1970 in Port Charlotte, Florida, to Donald Dees and Cynthia Howze Dees. Ronald served as a Sergeant in the U.S. Marines from 1988-1996, and served in the Persian Gulf War. He graduated from Charlotte High School in 1988 and later graduated from Edison State College, Florida Gulf Coast University, and Washburn University with his Doctorate in Law in 2010. He was a Law Professor at Washburn University from 2011-2017. He was a member of the National Rifle Association, Plumber and Pipe Fitter's UA Local 630 in West Palm Beach, Florida, and the Kansas Bar Association.

He met his wife Stacey in Punta Gorda, Florida and they later married on October 19, 1996. They had 4 children together. Ron was a member of Northland Christian Church and was an instructor for youth gun safety and hunter's education. He was an avid fisherman and hunter and loved sporting clays. His biggest enjoyment in life was spending time with his children and family.

Ronald is survived by both of his parents, Donald and Cynthia; his wife Stacey; three daughters, Madison Dees, Allegra Dees, Astra Dees; a son, Aslan Dees; and a sister Melissa (Chris) Jericka.

Funeral Services were Saturday, August 5, 2017 at Northland Christian Church at 2:00 p.m. A gathering was held after the service, at Northland, with friends and family. Memorial contributions can be made to the Dees' Children's College Fund and sent in the care of Davidson Funeral Home.

Ronald's final internment was planned in Punta Gorda, Florida, at a later date.

MATTHEW BARNETT LANDON

Matthew Barnett Landon of Fairfax, VA, passed away peacefully August 1, 2017, at Duke Medical Center in Durham, NC, with his family at his side. Matt was born in Kansas City, MO, graduated from Shawnee Mission East, received a BA from Northern Illinois University, and a law degree from Cornell University. He was a member of the bar of the District of Columbia Court of Appeals. He worked for the Baker and McKenzie Law Firm, the U.S. Securities and Exchange Commission (SEC), and the Public Company Accounting Oversight Board (PCAOB). With his beloved wife Eed, he was the owner of the ‘Thai By Thai restaurants in Northern Virginia.

Matthew was the proud father of sons Kenny and Nate. He is survived by his wife and sons of the Fairfax home. He is celebrated and missed by his parents, Richard Landon of Olathe and Lucia Amsden of Albuquerque, NM; his brother, Timothy Landon and family of Albuquerque; stepfather, Tim Amsden; his stepbrother Joseph Frey and family of Denver, CO; and his Thai family and numerous friends around the world.

As a young person Matt was naturally athletic. He swam like a fish, played youth soccer and football, tried martial arts, had a respectable golf swing, skied any terrain, and lettered as a high jumper for SME. His adult interests were many and varied. He traveled globally, was an outstanding photographer, loved fast cars, and was proud of the organic herbs he grew at their retreat in Round Hill, VA. He embraced cutting-edge technology and had a deep and eclectic love and knowledge of music. He remained a loyal fan of the Chiefs, Royals, and Kansas City BBQ.

He was a dreamer and throughout his life, Matt eagerly sought out life’s adventures. A friendship made in grade school grew
into a love of the people and languages of Southeast Asia. He became fluent in Thai, met his wife Eed at college, and worked and married Eed in Thailand before returning with his family to the U.S. to further his education. He was a lifelong learner, buying and reading the great books, and he studied ancient philosophies and Buddhism. He had a gift for languages, and he held a dream of translating Western philosophies into Thai.

Most of all Matt was a great husband, father, son, brother, step brother, uncle, cousin, and friend. He believed that love is an action verb, and that is how he lived his life. Services were conducted in Fairfax, VA. Friends may leave messages for the family at Fairfax Memorial Funeral Home, Fairfax, VA.

A service celebrating Matt’s life was held Tuesday, Sept. 12, at the Village Presbyterian Church in Prairie Village, Kan. In lieu of flowers, the family suggested contributions to Johns Hopkins Medicine by one of two ways. On the John Hopkins website, click research, neurosurgery, and include in the drop downs, support of Glioblastoma Research and in memory of Matthew B. Landon. If by check, John Hopkins Medicine, Department of Neurosurgery, 550 North Broadway, Suite 727, Baltimore, MD 21205 noting support of Glioblastoma Research and in memory of Matthew B. Landon.

JOHN CHRISTIAN YODER, 66, of Harpers Ferry, W. Va., died June 9, 2017, following complications from heart surgery. He was born Jan. 9, 1951, and grew up in Hesston, the son of Gideon and Stella (Hostetler) Yoder.

John graduated from Hutchinson High School in 1969 and attended one semester at Hesston College, where his dad taught. By mutual agreement, it was decided that he should leave home and learn to be independent. He ended up at Chapman College, Orange, Calif., where he graduated Magna Cum Laude in 1972 with a double major in government and economics. There, he participated in World Campus Afloat, a study abroad program on a traveling ship.

John earned a law degree from the University of Kansas in 1975 and a graduate degree in Business Administration from the University of Chicago in 1976, where he studied under Nobel Prize winner, Milton Friedman. Helping to finance his education, John was an assistant professor of business at Goshen College, Goshen, Indiana, from 1975 to 1976, and also taught U.S. Government at Bethel College from 1976 to 1978.

John successfully ousted the 70-year-old incumbent in the August 1976 primary in Harvey County, and was unopposed in the general election, becoming the youngest District Court Judge in the U.S. at the age of 25. Upon completion of his term, he was selected in a national competition to serve on the U.S. Supreme Court from 1980 to 1983 as a Supreme Court Fellow and special assistant to Chief Justice Warren Burger.

With the focus on the war on drugs by the Reagan Administration, John was appointed from 1983 to 1985 to become the first director of the Asset Forfeiture Office for the U.S. Department of Justice. Following this, he practiced law in Washington D.C. and Harpers Ferry for 23 years, concentrating on complex civil litigation, constitutional law, civil RICO, appellate law, land use and employment discrimination.

John was always interested in the political arena and was elected to two terms in the West Virginia Senate, in 1992 and 2004, where he served on a number of influential committees.

John was elected to the bench as a District Judge in 2008 in the 23rd Judicial Circuit of West Virginia, serving Berkeley, Jefferson and Morgan counties. Just last year he was elected to a second eight-year term. He was a passionate advocate for the Jefferson County Drug Court and believed he was making a difference by giving participants the support and incentives they needed to turn their lives around and become productive citizens.

West Virginia Senator Craig Blair gave the following tribute: “West Virginia has lost one of its most distinguished and dedicated public servants and I have lost a dear friend. As a legislator, John relentlessly fought to give residents of the eastern panhandle the voice they so desperately needed. As a respected judge, John had a reputation of fairness, honesty and integrity”.

John is survived by four siblings: Russel Yoder of Kansas City, Kansas, ImoJeanne Johnson of Michigan City, Indiana, Galen Yoder of Chevy Chase, Maryland, and Bonita Yoder of Lawrence; and former spouse and friend, Irene Sanders of Harpers Ferry.

A Memorial Service celebrating John’s life was held at Asbury Methodist Church in Charles Town, West Virginia, on July 7. A reception followed at the historic courthouse where John presided and where John Brown was tried and convicted of treason in 1859.
Outstanding Speakers
Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars from April through August 2017. Your commitment and invaluable contribution are truly appreciated.

Jana Deines Abbott, Law Clerk, U.S. Bankruptcy Judge Robert E. Nugent, Wichita
Kris Ailslieger, Kansas Attorney General’s Office, Topeka
Anton C. Andersen, Travelers Insurance Co., Overland Park
Daralyn Gordon Arata, Kansas State University, Manhattan
Cole Bailey, Student, Washburn University School of Law, Topeka
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Stephen Young, Student, Washburn University School of Law, Topeka
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Justan R. Shinkle, Wichita
Alex W. Schulte, Kansas City
Hon. Dale L. Somers, Topeka
Sabrina K. Standifer, Wichita
Charles Steincamp, Wichita
Adam Stolte, Overland Park
Matthew Stromberg, Overland Park
Eric Turner, Wichita
Terry L. Unruh, Wichita
T. Lynn Ward, Wichita
Hon. Elizabeth A. Kronk Warner, Lawrence
Amy D. Westbrook, Topeka
Jeffrey A. Wietharn, Topeka
Amanda M. Wilwert, Topeka
James D. Young, Wichita
The goal of any statutory interpretation argument is to convince the court the interpretation gives effect to the will of the legislature. The basic rules of statutory interpretation have us look to the words of the statutory provision first and figure out their plain or ordinary meaning. If the words provide a clear answer to the issue, the inquiry ends. If the words do not provide a clear answer, we look to a variety of interpretive tools to figure out what the legislature intended. If you are making a statutory interpretation argument before a court, the statutory provision likely has no clear meaning in the context of your issue; if the meaning were clear your case probably would have settled. So when you have a real issue about a statute's meaning, what kinds of arguments are persuasive?

Here are my tips as to the kinds of arguments you should make, backed up by some empirical data about the tools the United States Supreme Court has employed in the last decade or so (data from the Roberts Court). If these types of arguments have persuaded the Justices, then perhaps they will be useful to you in your next big (or small) statutory interpretation case.

**Show your interpretation is consistent with the larger whole.** Argue the interpretation is consistent with the entire statute as a whole. Show the court your interpretation makes sense in the context of other statutory sub-sections, when all parts are read together. Show that you are interpreting your provision in a way that gives effect to other provisions and doesn’t render them superfluous, or that your interpretation treats the same or similar terms in the statute the same way. In a three-year sampling of the Roberts Court’s statutory interpretation cases, the Court used this sort of reasoning more than 40 percent of the time.

**Show your interpretation is consistent with the statute’s purpose.** The Roberts Court also relied on evidence of the statute’s purpose more than 40 percent of the time. Arguing that your interpretation supports the statute’s underlying objective is persuasive because it is a statute-specific interpretive argument. The argument is strongest when the evidence comes from the statute itself – usually the preamble, but the evidence can also come from external sources specific to the statute, such as legislative history created during the statute’s drafting process.
Use a dictionary, statutory or otherwise. It’s become popular to argue the ordinary meaning of words using dictionary definitions as supporting evidence. This is so despite the obvious weakness in this approach: You can often strategically choose between multiple dictionary definitions. You should use Black’s Law Dictionary before a non-legal dictionary. More than half the Roberts Court’s references to dictionary definitions between 2005 and 2008 were to Black’s Law Dictionary. Using Black’s seems to give greater weight to the meaning as legally customary. Even when they use other dictionaries, the Justices seem to invoke them as evidence of customary or conventional meaning. But don’t jump too fast to Black’s or other dictionaries. First look to see if you can find statutory definitions for the terms at issue.

Remember first to check the definition section of the statute you are interpreting. If you don’t find a statutory definition within the same statute then look to statutes whose primary purpose is to provide definitions. Thus, when interpreting a federal law provision, check the federal Dictionary Act. The Dictionary Act sets out certain rules of construction and definitions that apply generally to federal statutes.

When interpreting a Kansas provision, look for a statutory definition in K.S.A. 77-201. Section 77-201 defines over forty terms including “highway,” “incompetent person,” “residence,” and “mobile home.” And the Kansas Legislature keeps adding to the list. In its 2017 term, the legislature amended 77-201’s definition of personal property to include digital assets.

Section 77-201 will trump a dictionary definition, including Black’s. The Kansas Supreme Court rejected a Black’s Law Dictionary definition in favor of the definition in 77-201 when it interpreted the meaning of the term “residence” in the Kansas Offender Registration Act. It overturned the appellate court’s decision, which had relied on Black’s without recognizing the statutory definition already in place.

As a last resort, argue for a definition similar to one in another statute as a means of applying my next tip, drawing connections to other precedents.

Draw connections to other precedents. Try to draw connections between your interpretation and judicial interpretations of older laws, other similar laws, etc. Intuitively we know if you can show that another court reasoned in a similar way, a court will be more inclined to agree with your position. In addition, you may appeal to the court’s desire for consistency. The Roberts Court seems inclined to reference these sorts of connections to promote continuity and consistency across what has become an impossibly large and complex legal system.

Show the court your interpretation isn’t “messy” — or the other side’s is. Empirical evidence supports the theory that the Roberts Court doesn’t want to interpret statutes in a manner that will prove “messy” for implementing courts to administer. The Court tries to avoid statutory interpretations that lower courts will have difficulty administering because they require cumbersome, complicated, or disorderly fact inquiries or factual line drawing.

I admit I like this messiness rule because it is an academic theory that actually seems helpful in the real world. Forget textualism, intentionalism, purposivism, and other isms: If your interpretation — or your adversary’s — is “messy,” the court won’t like it.

Legislative history isn’t dead; it’s still an important tool to employ. Despite criticism of legislative history as a valid interpretive tool, empirical data confirms the Roberts Court still uses it to infer congressional intent (about 16 percent of the time in majority opinions but 38 percent when counting dissenting opinions as well). The Court relied most often on committee reports and a statute’s evolution over time, but it has also drawn conclusions from a conspicuous absence of legislative history.

Do use language canons, but don’t rely on substantive canons unless they support an argument already supported by a different interpretive tool. I have put canons last because empirical data suggests this is where the Justices put them, especially general canons derived from the Constitution, common-law practices, or policy preferences. Canons that specifically target language are better. I’ll make a few comments about each in turn.

Don’t begin an argument with, for example, the rule of leniency (which advises to resolve ambiguities in criminal statutes in favor of the defendant) or by arguing your interpretation is best because the opposite interpretation raises constitutional concerns. The Supreme Court doesn’t significantly rely on these more general conventions other than as supporting rationale, so you shouldn’t either. Interestingly, contrary to what some have argued, empirical evidence suggests the conservative justices do not use these canons to support their own policy preferences. Conservative justices invoked these canons to support liberal outcomes nearly as often — and in some cases more often — than they invoked canons to support conservative outcomes.

Canons that focus on language conventions are more useful. These are canons like noscitur a sociis – a word is known to the statute at issue, they are less persuasive. But when combined with an argument about the text of the statute as a whole, language canons appear in a significant number of the Roberts Court’s majority opinions.

In the end, the more tools you can use to support your textual interpretation the better off you are. No one tool will be dispositive.
1. It is a constitutional truism that judicial will must bend to the legislative command. Judges’ own personal experience confirms that the “nearly universal view” among judges is that “legislators’ collective intention, however discerned, trumps the will of the court.” Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process (Aspen 1997).

2. Id. at 7-9.


4. Id. at 236-37.

5. Id. at 236-37 (analyzing three-year data set).

6. Id. at 242.

7. Id. at 239.

8. Id.


10. Id.

11. K.S.A. 77-201.


15. See Krishnakumar, supra note 3, at 240.


17. Id. at 1466, 1472.

18. Id. at 1475.

19. See Krishnakumar, supra n. 3 at 236, 238.

20. See Krishnakumar, supra note 3, at 240.


23. Krishnakumar, supra note 19, at 830.

24. Krishnakumar, supra note 3, at 240-41.

25. Id. at 241.

26. Krishnakumar, supra note 19, at 894 (justices cited language canons along with the whole act rule in more than 32.5 percent of statutory interpretation cases in a six-and-a-half-year period).
ATTORNEY DISCIPLINE

ORDER OF DISBARMENT
IN THE MATTER OF MARGO E. BURSON
NO. 10,805—JULY 19, 2017

FACTS: In a letter signed July 18, 2017, Margo E. Burson voluntarily surrendered her license to practice law in Kansas. At the time the respondent surrendered her license, a complaint was pending with the Office of the Disciplinary Administrator. The complaint alleged violations of various rules of professional conduct relating to competence, communication, and candor toward the tribunal.

HELD: The court examined the files of the Office of the Disciplinary Administrator and found that the surrender of Burson’s license should be accepted and that she should be disbarred.

CIVIL

EVIDENCE—JURIES—TORTS
BULLOCK V. BNSF RAILWAY COMPANY
WYANDOTTE DISTRICT COURT— COURT IS APPEALS IS AFFIRMED—DISTRICT COURT IS REVERSED—CASE REMANDED
NO. 111,599—AUGUST 4, 2017

FACTS: While working for BNSF, Bullock slipped and was injured after stepping in diesel fuel. It was later determined that the fuel was spilled by one of Bullock’s co-workers. Bullock sued BNSF and BNSF claimed the affirmative defense that Bullock was contributorily negligent for failing to appreciate the danger posed by the diesel fuel. Evidence at trial showed that Bullock was not disciplined for his conduct but that the employee who caused the spill was disciplined. The jury found BNSF 100 percent at fault. After BNSF appealed, the Court of Appeals found that evidence of the other employee’s discipline was a subsequent remedial measure barred by K.S.A. 60-451, and that court ordered the matter remanded for a new trial. Bullock’s petition for review was granted.

ISSUES: (1) Use of post-accident employee discipline as evidence; (2) counsel’s statements during closing argument

HELD: The post-accident discipline of another employee constitutes a subsequent remedial measure and is barred from introduction by K.S.A. 60-451. This is true even if a party attempts to use evidence of subsequent remedial measures to prove causation or defeat a claim of contributory negligence. But evidence of an employer’s post-event investigation is admissible under that same statute. A jury should not be instructed to act on their feelings about what is fair or to be concerned with community standards or community conscience. Counsel’s remarks during closing argument were inappropriate.

STATUTE: K.S.A. 60-451, 3701(d)(1)

ADMINISTRATIVE—STATUTORY INTERPRETATION
MIDWEST CRANE & RIGGING V. KANSAS CORPORATION COMMISSION
SHAWNEE DISTRICT COURT—COURT OF APPEALS IS REVERSED—DISTRICT COURT IS REVERSED
NO. 114,168—JULY 21, 2017

FACTS: Midwest Crane & Rigging (Midwest) is a contractor that provides a crane service. One of Midwest’s trucks was stopped by law enforcement; during the stop, the trooper noticed that the truck did not have a license plate. In addition to a violation for failing to display a license plate, the trooper identified a possible issue with Midwest’s failure to pay the federal Unified Carrier Registration Act (UCR) fee. The truck had a crane permanently attached to the chassis, and the truck only carried the tools that were necessary to operate the crane. The KCC fined Midwest $300 for failing to register and pay the UCR fee. The fine was upheld after the KCC determined that the truck was a “commercial motor vehicle.” The district court affirmed the KCC, as did a majority of the Court of Appeals’ panel. The Supreme Court granted review.

ISSUE: Is the crane truck a commercial motor vehicle that is principally used to transport cargo

HELD: In order to qualify as a commercial motor vehicle, the truck in question must be used principally to transport cargo. In this case, the crane and its associated tools are not cargo. Because the crane is not cargo, the truck is not a commercial motor vehicle and Midwest need not pay a fee.

STATUTES: 49 U.S.C. § 14504a(a)(1)(A)(ii), § 31101(1), § 13102(14), § 31132(1), § 14504a(a)(8), § 14504a(a)(9), § 14504(c), § 14504(e); K.S.A. 2016 Supp. 8-128(b), 66-1,115, -1,139a, 77-621(c)(4)

INDIGENTS’ DEFENSE—MANDAMUS
LANDRUM V. GOERING
ORIGINAL ACTION—WRIT OF MANDAMUS GRANTED IN PART
NO. 116,447—JULY 21, 2017

FACTS: This original action in mandamus questions whether a partially indigent defendant who has retained counsel may receive funding for certain services through the State Board of Indigents’ Defense Services (BIDS). Landrum has privately retained counsel, but he moved to be declared partially indigent. The district court made that declaration and provided Landrum with a copy of the
CRIMINAL

CRIMINAL LAW AND PROCEDURE—EVIDENCE—PROSECUTOR

STATE V. BANKS

SEDGWICK DISTRICT COURT—AFFIRMED

NO. 114,614—JULY 21, 2017

FACTS: Flores was convicted of premiediated first-degree murder. On appeal he claimed: (1) insufficient evidence supported the conviction because state’s evidence of premediation was based upon impermissible inference stacking; (2) prosecutorial error by encouraging jury to decide case based on unreasonable inferences rather than on direct or circumstantial evidence; and (3) district court’s exclusion of photographs that depicted handwritten notes found in Flores’ car violated Banks’ right to present evidence critical to his defense.

ISSUES: (1) Sufficiency of the evidence, (2) prosecutorial error, (3) admission of evidence

HELD: Flores mistakenly equates inference stacking with state’s reliance on multiple circumstances. Impermissible inference stacking is not present where different circumstances are used to support separate inferences or where multiple pieces of circumstantial evidence separately support a single inference. Under facts in this case, the state provided sufficient evidence that the killing of the victim was premiediated.

No error was found in prosecutor’s closing argument. Prosecutor may have come close to scripting the crime for the jury in more detail than the evidence justified, but the relevant inferences asserted by the prosecutor were supported by the evidence and were reasonable.

District court correctly refused to admit the unauthenticated writings. Banks made no effort to comply with authentication requirements of K.S.A. 60-464; there was no evidence as to whose handwriting appears in the photographed writings; and nothing in the content of the writings gives a clue as to who might have authored them.

STATUTES: K.S.A. 2013 Supp. 21-6302(a)(4); K.S.A. 22-2402

CONSTITUTIONAL LAW—CRIMINAL LAW—SEARCH AND SEIZURE—STATUTES

STATE V. BANNON

SEDGWICK DISTRICT COURT

COURT OF APPEALS REVERSED AND REMANDED TO COURT OF APPEALS FOR RECONSIDERATION

NO. 112,212—JULY 28, 2017

FACTS: Wichita State University officers were told that Bannon always carried a handgun and had other guns and ammunition in his university apartment. Officers entered the restricted access apartment building, approached Bannon in a common area, and found a concealed handgun in his waistband. Bannon was charged with criminal carry of a firearm, K.S.A. 2012 Supp. 21-6302(a)(4). He filed a motion to dismiss, arguing he could not be convicted for possessing a concealed gun in his abode or within its curtilage. District court denied the motion. Bannon then filed motion to suppress the gun, arguing the warrantless patdown search was presumptively unreasonable, the stop-and-frisk exception under Terry v. Ohio, 392 U.S. 1 (1968), did not apply, and no probable cause supported his arrest. District judge denied the motion, finding in part the patdown was within the scope of Terry because officers had reasonable suspicion that Bannon was carrying a gun, and they were entitled to search to ensure officer safety. Bannon appealed the denial of both motions. Court of Appeals reversed in unpublished opinion. Panel assumed the officers had a reasonable suspicion that Bannon was violating the law, but Terry’s second prong was not met because there was no evidence the officers were actually subjectively concerned for their safety or the safety of others. Panel did not address Bannon’s second issue regarding the motion to dismiss. Petition for review granted.

ISSUE: Terry Stop - subjective vs. objective belief of officer

HELD: Terry stops were examined, identifying conflicting federal and state cases regarding whether Terry’s second prong is a subjective or an objective test. Court holds the test is objective: whether an officer would reasonably suspect that the person stopped is armed and presently dangerous. Any testimony on the officer’s actual subjective belief or suspicion on that point is just one factor to consider in the totality of the circumstances. Panel incorrectly treated the lack of officer testimony as a dispositive negative determinant on the constitutionality of the Terry frisk. Court of Appeals is reversed and case is remanded for consideration under the correct test. If it determines on remand that the gun did not require suppression, then it must consider and decide Bannon’s second appellate issue.

STATUTES: K.S.A. 2013 Supp. 21-6302(a)(4); K.S.A. 22-2402
HELD: As set forth in State v. Meredith, 306 Kan. __ (2017), non-sex offenders seeking to avoid retroactive application of KORA provisions must, in order to satisfy the “effects” prong of test in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), produce a record that distinguishes - by the “clearest proof” - KORA’s effect on those classes of offenders from the Act’s effects on sex offenders as a class. Record in Burdick’s case is not sufficiently developed to satisfy the “clearest proof” standard.

DISSENT (Beier, J., joined by Rosen and Johnson, JJ.): Consistent with votes in State v. Petersen-Beard, 304 Kan. 192 (2016), State v. Reed, 306 Kan. __ (2017), and Meredith, finds the current KORA registration requirement is punishment in effect if not intent, whether claim is raised under Ex Post Facto Clause or Eighth Amendment. And it is no less so for a drug offender than a sex offender.


CRIMINAL PROCEDURE—EVIDENCE—STATUTES
STATE V. DAVEY
JOHNSON DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED
NO. 111,774—JULY 21, 2017

FACTS: Davey was convicted of attempted first-degree murder and conspiracy to commit first-degree murder of her husband. At trial, state introduced hearsay statements that were made among the conspirators. Davey appealed, claiming this evidence did not fit the co-conspirator exception in K.S.A. 2016 Supp. 60-460(i)(2). Court of Appeals affirmed in an unpublished opinion. Sole issue in Davey’s petition for review was whether the co-conspirator exception to the hearsay rule is applicable where the state offers the hearsay through a co-conspirator.

ISSUES: Co-conspirator exception to the hearsay rule

HELD: The co-conspirator exception to the hearsay rule, based upon K.S.A. 60-2016 Supp. 60-460(i)(2), does not require that the co-conspirator’s statement be offered to the court by a third person who is not a participant in the conspiracy. The third person requirement for application of the co-conspirator exception, as declared in the five-part test in State v. Bird, 238 Kan. 160 (1985), and its progeny, is disapproved and overruled. K.S.A. 2016 Supp. 60-460(i)(2) sets up just three requirements for the co-conspirator exception to the hearsay rule to apply: (1) the out-of-court statement must have been made by one of the co-conspirators; (2) the statement of the co-conspirator must have been made while the conspiracy was in progress; and (3) the statement must be relevant to the plan or its subject matter. Substantial competent evidence supports the factual requirements for application of K.S.A. 2016 Supp. 60-460(i)(2) in this case. Trial court did not err in admitting the evidence.

STATUTES: K.S.A. 2016 Supp. 60-460(i), -460(i)(2); K.S.A. 60-404

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—SENTENCING—STATUTES
STATE V. DONALDSON
SEDGWICK DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED
NO. 108,801—JULY 28, 2017

FACTS: Donaldson filed motion to challenge the retroactive application of the Kansas Offender Registration Act as violating the Ex Post Facto Clause. District court dismissed the action for lack of jurisdiction. Court of Appeals agreed in unpublished opinion. Petition for review granted.

ISSUE: Jurisdiction - motion to correct illegal sentence

HELD: Following holdings in State v. Wood, 306 Kan. 283 (2017), and State v. Reese, 306 Kan. 279 (2017), the lower courts had jurisdiction to consider Donaldson’s motion as a motion to correct an illegal sentence. But no meritorious claim was presented because the definition of an illegal sentence does not include a sentence that allegedly violates a constitutional provision. Outcome of the lower courts is affirmed as right for the wrong reason.

STATUTE: K.S.A. 22-3504, -4901 et seq.

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—SENTENCES—STATUTES
STATE V. DAVEY
SEDGWICK DISTRICT COURT—AFFIRMED—COURT OF APPEALS—AFFIRMED
NO. 109,671—AUGUST 11, 2017

FACTS: On appeal Donaldson alleges in part his lifetime offender registration under Kansas Offender Registration Act (KORA) violates the Ex Post Facto Clause because at the time he committed the crimes, he would have been subject to charge was under the age of 18. Court of Appeals affirmed in unpublished opinion. Review granted.

ISSUE: Kansas Offender Registration Act - Ex Post Facto Claim

HELD: As set forth in State v. Meredith, 306 Kan. __ (2017), non-sex offenders seeking to avoid retroactive application of KORA provisions must, in order to satisfy “effects” prong of test in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), produce a record that distinguishes - by the “clearest proof” - KORA’s effect on those classes of offenders from the Act’s effects on sex offenders as a class. Record in Donaldson’s case is not sufficiently developed to satisfy the “clearest proof” standard.

DISSENT (Beier, J., joined by Rosen and Johnson, JJ.): Consistent with votes in State v. Petersen-Beard, 304 Kan. 192 (2016), State v. Reed, 306 Kan. __ (2017), and Meredith, finds the current KORA registration requirement is punishment in effect if not intent, whether claim is raised under Ex Post Facto Clause or Eighth Amendment. And it is no less so for a drug offender than a sex offender.


CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—SENTENCES—STATUTES
STATE V. HILL
CRAWFORD DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED
NO. 111,226—AUGUST 11, 2017

FACTS: Hill was convicted of two drug offenses. District court required her to register as a violent offender, pursuant to the Kansas Offender Registration Act (KORA) as amended prior to Hill’s sentencing. On appeal Hill claimed the retroactive application of the registration requirement violated the Ex Post Facto Clause. Court of Appeals affirmed in an unpublished opinion. Review granted.

ISSUE: Kansas Offender Registration Act—Ex Post Facto Claim

HELD: As set forth in State v. Meredith, 306 Kan. __ (2017), non-sex offenders seeking to avoid retroactive application of KORA provisions must, in order to satisfy “effects” prong of test in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), produce a record that distinguishes - by the “clearest proof” - KORA’s effect on those classes of offenders from the Act’s effects on sex offenders as a class. Record in Hill’s case is not sufficiently developed to satisfy the “clearest proof” standard.
appellate decisions

Dissent (Beier, J., joined by Rosen and Johnson, JJ.): Consistent with votes in State v. Peterson-Beard, 304 Kan. 192 (2016), State v. Reed, 306 Kan. __ (2017), and Meredith, finds the current KORA registration requirement is punishment in effect if not intended, whether claim is raised under Ex Post Facto Clause or Eighth Amendment. And it is no less so for a drug offender than a sex offender.


CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—
SENTENCES—STATUTES
STATE V. HIRSCHBERG
SHAWNEE DISTRICT COURT—
AFFIRMED; COURT OF APPEALS—AFFIRMED
NO. 109,689—AUGUST 11, 2017

FACTS: Hirschberg was convicted of a drug offense and was required under the Kansas Offender Registration Act (KORA) to register as a violent offender for 15 years instead of 10 years, pursuant to KORA as amended prior to his sentencing. On appeal Hirschberg claimed the retroactive application of the longer registration requirement violated the Ex Post Facto Clause. Court of Appeals affirmed in an unpublished opinion. Review granted.

ISSUE: Kansas Offender Registration Act - Ex Post Facto Claim

HELD: As set forth in State v. Meredith, 306 Kan. __ (2017), non-sex offenders seeking to avoid retroactive application of KORA provisions must, in order to satisfy “effects” prong of test in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), produce a record that distinguishes - by the “clearest proof”- KORA’s effect on those classes of offenders from the Act’s effects on sex offenders as a class. Record in Hirschberg’s case is not sufficiently developed to satisfy the “clearest proof” standard.

Dissent (Beier, J., joined by Rosen and Johnson, JJ.): Consistent with votes in State v. Peterson-Beard, 304 Kan. 192 (2016), State v. Reed, 306 Kan. __ (2017), and Meredith, finds the current KORA registration requirement is punishment in effect if not intended, whether claim is raised under Ex Post Facto Clause or Eighth Amendment. And it is no less so for a drug offender than a sex offender.


CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—
SENTENCES—STATUTES
STATE V. HUEY
SHAWNEE DISTRICT COURT—AFFIRMED AS TO ISSUES SUBJECT TO REVIEW
COURT OF APPEALS—AFFIRMED AS TO ISSUES SUBJECT TO REVIEW
NO. 109,690—AUGUST 11, 2017

FACTS: Huey was convicted of robbery and aggravated burglary, and was ordered to register as a violent offender under Kansas Offender Registration Act (KORA) after district judge found Huey used a deadly weapon to commit those offenses. On appeal, Huey claimed for first time that the KORA registration requirement violated Bookert/Apprendi because jury did not find he had used a deadly weapon.

ISSUES: Kansas Offender Registration Act—Apprendi

HELD: State v. Peterson-Beard, 304 Kan. 192, cert. denied (2016), held that KORA registration for sex offenders was not cruel and unusual punishment under Eighth Amendment. This overturned caselaw that supported State v. Charles, 304 Kan. 158 (2016), thus Charles is not viable authority for Huey or other violent offenders as to whether KORA is punitive. That issue may be resolved only upon an evidentiary record supplying the clearest proof to overcome the legislature’s intent that KORA be a regulatory scheme that is civil and nonpunitive. Huey did not establish such a record in this case. District court’s offender registration order is affirmed.

Dissent (Beier, J., joined by Rose and Johnson, JJ.): Would not explicitly or implicitly overrule Charles. Huey met any burden of proof he bears on whether the imposition of the registration requirement qualifies as punishment. Under Apprendi and its progeny, Huey’s registration requirement should be vacated because he cannot be subjected to that requirement on the basis of a judge-made fact finding that he used a deadly weapon.

STATUTES: K.S.A. 20-3018(b), 22-4901 et seq., 60-2101(b)

CONFRONTATION CLAUSE—EVIDENCE—FINDINGS OF FACT
STATE V. JONES
SEDGWICK DISTRICT COURT—AFFIRMED
NO. 113,409—AUGUST 4, 2017

FACTS: Jones and a co-defendant were convicted of killing a man by injecting him with a lethal amount of methamphetamine. Jones appealed two issues to the Kansas Supreme Court.

ISSUES: (1) Admission of forensic test results; (2) admission of out-of-court statements

HELD: The lab’s chief toxicologist interpreted data to determine that there were high levels of methamphetamine present in the decedent’s blood. From that information, the coroner determined that the victim died from methamphetamine toxicity. The coroner testified at trial about the toxicology results and what they meant, and the toxicologist testified about the results of the laboratory tests. Even if the person who actually performed the testing did not testify, any error stemming from that fact is harmless. The issue of whether evidence was properly admitted under the co-conspirator exception to the hearsay rule was not preserved for appeal.

STATUTE: K.S.A. 2016 Supp. 60-460, -460(i)(2)

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—
SENTENCES—STATUTES
STATE V. KILPATRICK
RENO DISTRICT COURT—AFFIRMED;
COURT OF APPEALS—AFFIRMED
NO. 111,054—JULY 28, 2017

FACTS: Kilpatrick filed motion to challenge the retroactive application of the Kansas Offender Registration Act as violating the Ex Post Facto Clause. District court dismissed the action for lack of jurisdiction. Court of Appeals agreed in unpublished opinion. Petition for review granted.

ISSUE: Jurisdiction - motion to correct illegal sentence

HELD: Following holdings in State v. Wood, 306 Kan. 283 (2017), and State v. Reese, 306 Kan. 279 (2017), the lower courts had jurisdiction to consider Kilpatrick’s motion as a motion to correct an illegal sentence. But no meritorious claim was presented because the definition of an illegal sentence does not include a sentence that allegedly violates a constitutional provision. Outcome of the lower courts is affirmed as right for the wrong reason.

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—SENTENCES—STATUTES
STATE V. KILPATRICK
RENO DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 111,055—AUGUST 11, 2017
FACTS: Kilpatrick filed motion to correct an illegal sentence, arguing the retroactive imposition of registration requirements under the Kansas Offender Registration Requirements (KORA) violated the Ex Post Facto Clause. District court denied the motion, agreeing with State’s arguments that KORA’s provisions are not punishment, and that Kilpatrick waived jurisdictional attacks on his sentence by not raising them in his case. Court of Appeals affirmed in unpublished opinion. Petition for review of the registration requirement granted.

ISSUE: Motion to Correct Illegal Sentence - Ex Post Facto Claim
HELD: District court’s decision is affirmed for a different reason. Following State v. Wood, 306 Kan. 283 (2017), and State v. Reese, 306 Kan. 279 (2017), district court had jurisdiction to hear and consider Kilpatrick’s motion to correct an illegal sentence, but his ex post facto claim has no merit because definition of an illegal sentence does not include a claim the sentence violates a constitutional provision.


CONSTITUTIONAL LAW—STATUTES
STATE V. MEREDITH
RILEY DISTRICT COURT—COURT OF APPEALS IS AFFIRMED—DISTRICT COURT IS AFFIRMED
NO. 110,520—AUGUST 4, 2017
FACTS: Meredith pled no contest to a drug crime in 2009. At the time he committed the offense, the Kansas Offender Registration Act (KORA) required Meredith to register as an offender for 10 years. But mistakes in both the sentencing procedure and the journal entry made it unclear how long Meredith’s registration period was to run. After Meredith’s probation was revoked, the district court noted that the current statute required a 15-year registration period and that sentence was imposed. Meredith appealed and the Court of Appeals affirmed, finding that KORA does not violate the Ex Post Facto Clause. Meredith’s petition for review was granted.

ISSUE: Retroactive application of KORA
HELD: The legislature intended KORA to be a non-punitive civil regulatory scheme for all offenders. The record on appeal does not show any evidence that registration is punitive for drug offenders. Since the registration requirement is not a punishment, it cannot be an Ex Post Facto violation.

DISSENT: (Beier, J., joined by Rosen and Johnson, JJ.) KORA constitutes punishment even if that was not the legislature’s intent.


DISTRICT COURTS—CRIMINAL LAW AND PROCEDURE—DISCOVERY—EVIDENCE
STATE V. POLLARD
SEDGWICK DISTRICT COURT—AFFIRMED
NO. 114,005—JULY 21, 2017
FACTS: Jury convicted Pollard of first-degree felony murder and aggravated robbery. Prior to trial, Pollard filed pro se motion seeking to compel state’s production of certain evidence. County clerk’s response stated that no hearings were scheduled and no further action would be taken absent further direction from Pollard’s appointed defense counsel as to how to proceed. During trial, district court ruled that Pollard’s gang status was admissible to enable state to explain how Pollard became a suspect. On appeal, Pollard claimed the prosecutor erred by introducing gang affiliation evidence. He also claimed the Sedgwick County clerk’s method of dealing with pro se motions in criminal cases violated his due process rights.

ISSUES: (1) Prosecutorial error, (2) pro se motion for discovery
HELD: Prosecutor did not mislead the trial judge about the grounds for admitting gang affiliation evidence. Pollard’s identity was a central issue in the case, and law enforcement used the department’s gang database in the process of connecting Pollard to the crimes. No merit was found in any of Pollard’s related claims of error by the prosecutor and trial court.

Pollard’s challenge as to how the county clerk’s office handles pro se motions in other cases cannot be brought in Pollard’s direct appeal, and there is no support in the record for Pollard’s challenge to the clerk’s handling of his motion. Pollard also failed to establish that he was in any way prejudiced by having his motion referred to appointed defense counsel rather than heard on its own. Under facts in this case, Pollard was not denied meaningful access to the court.

STATUTES: K.S.A. 2016 Supp. 60-455; K.S.A. 60-402(b)

CONSTITUTIONAL LAW—STATUTES
STATE V. REED
SEDGWICK DISTRICT COURT—COURT OF APPEALS IS AFFIRMED, DISTRICT COURT IS AFFIRMED
NO. 110,277—AUGUST 4, 2017
FACTS: Reed was convicted of a sex crime and, as a result, was required to register as a sex offender for 10 years. Reed stipulated that for a period of time during that 10 years, he did not comply with registration requirements. Before Reed’s registration period expired, the legislature amended the Kansas Offender Registration Act (KORA) and added a tolling period for periods of registrant noncompliance or incarceration. When he was convicted for registration violations, Reed claimed that he could not be convicted because his registration period had expired prior to being charged. After his conviction, Reed appealed, claiming that the tolling provision added by the legislature could not be applied to him without violating the Ex Post Facto Clause of the United States Constitution. The Court of Appeals affirmed the district court, finding that the amendments to KORA were not punitive. Reed’s petition for review was granted.

ISSUE: Retroactive application of KORA amendments
HELD: The court has jurisdiction to hear this statutory argument even though it was not raised below. Registration under KORA for sex offenders is not punishment, so retroactive application of any provision cannot violate the Ex Post Facto Clause.

DISSENT: (Johnson, J., joined by Beier and Rosen, JJ.) KORA is punitive in effect rendering this an Ex Post Facto Violation.


CONSTITUTIONAL LAW—CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE—INSTRUCTIONS—JURIES—SPEEDY TRIAL—STATUTES
STATE V. ROBINSON
WYANDOTTE DISTRICT COURT—AFFIRMED;
COURT OF APPEALS—AFFIRMED
NO. 110,040—AUGUST 11, 2017
FACTS: A jury convicted Robinson of aggravated burglary, aggravated battery, and criminal damage to property. Robinson appealed, claiming in part: (1) a violation of his statutory rights to a speedy trial because continuance granted to State for a material witness was not supported by a sufficient showing of unavailability; (2) insuffi-

cient evidence supported his aggravated burglary conviction because he was a cohabitant; (3) the jury instruction on “bodily harm” was erroneous because it directed jury that certain circumstances are bodily harm as a matter of law, and thereby precluded jury from finding that element beyond a reasonable doubt; (4) district court erred in refusing to redact victim’s statement to a doctor; (5) district court erred in admitting K.S.A. 60-455 evidence without providing a limiting instruction; (6) the written format of district court’s answer to jury’s deliberation questions violated Robinson’s rights to be present, to have a public trial, and to have an impartial judge; and (7) cumulative error denied him a fair trial. Court of Appeals affirmed in unpublished opinion. Review granted.

ISSUES: (1) Speedy Trial, (2) Sufficiency of the Evidence - Aggrava-
ted Battery, (3) “Bodily Harm” Instruction, (4) Motion to Redact, (5) Limiting Instruction, (6) Written Response to Jury’s Questions, (7) Cumulative Error

HELD: Robinson’s statutory speedy trial rights were not violated. While a slim record substantiates State’s claim that the witness was unavailable, and better practice would be to present evidence in support of a request for such a continuance, Robinson’s claim in this case is unpreserved.

Sufficient evidence supported Robinson’s conviction of aggravated burglary. Under conflicting facts viewed in light most favorable to the State, a reasonable juror could conclude that Robinson lacked authority to enter the home. Robinson’s constitutional challenge to the aggravated battery statute, raised for first time on appeal, is not reviewed. District court’s instruction on “bodily harm” was legally and factually appropriate. Under facts in this case, Robinson’s objection to the doctor’s testimony was not properly preserved for appellate review.

District court failed to provide a limiting instruction regarding the admission of K.S.A. 60-455 evidence, but this was harmless error under facts in the case. Robinson abandoned his arguments regarding rights to a public trial and an impartial judge. Even assuming a violation of Robinson’s right to be present, the error was harmless in this case. Robinson’s cumulative error claim fails because evidence against him was strong, and the two assumed errors in this case were harmless.


EVIDENCE—JURY INSTRUCTIONS—PROSECUTORIAL MISCONDUCT STATE V. SEAN

SEDGWICK DISTRICT COURT—AFFIRMED

NO. 108,275—AUGUST 11, 2017

FACTS: Sean was convicted of first-degree premeditated murder and other serious felonies after he allegedly killed a man by injecting him with a lethal amount of methamphetamine. Most of the state’s evidence was provided by codefendants. Sean appealed.

ISSUES: (1) Suppression of interrogation statements; (2) prosecutorial misconduct; (3) erroneous admission of bad acts evidence; (4) erroneous admission of hearsay statements; (5) motion for mistrial; (6) limitation on cross-examination; (7) improper sympathy evidence; (8) cumulative error

HELD: The court cannot and will not reach the merits of Sean’s argument about his custodial statements because his attorney did not properly preserve this issue for appeal. The introduction of evidence about drugs did not violate the order in limine. Comments about Sean’s retention of an attorney were beyond the latitude afforded to prosecutors, but the error was not so prejudicial as to require reversal. The prosecutor’s comment on a witness’ testimony was a fair comment on facts in evidence and not inappropriate commentary on that witness’ credibility. The issue of prior bad acts evidence is not properly before the court due to the lack of a contemporaneous objection. Several of the statements about which Sean now complains are not hearsay. The other statements might have been hearsay, but their admission was harmless. Testimony about gang affiliation was a passing comment by a witness and not a deliberate violation of a pretrial order. And while that testimony was a fundamental failure of the proceedings, the district court did not abuse its discretion by deciding that any resulting prejudice could be mitigated. The subject matter that was excluded during cross-examination offered no substantive or exculpatory evidence and was consequently not wrongly excluded. The court will not review any claim of error regarding testimony of the victim’s mother because the issue was not preserved for appeal by a contemporaneous objection. Sean was not prejudiced by cumulative error.

STATUTES: K.S.A. 2016 Supp. 60-261, -455, -460, -460(j); K.S.A. 22-3423(1)(c), 60-404, -2105

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—SENTENCES—STATUTES

STATE V. WINGO

CRAWFORD DISTRICT COURT—AFFIRMED

COURT OF APPEALS—AFFIRMED

NO. 108,275—AUGUST 11, 2017

FACTS: Wingo convicted of second-degree intentional murder and was required under the Kansas Offender Registration Act (KORA) to register as a violent offender for 15 years instead of 10 years, pursuant to KORA as amended prior to her sentencing. On appeal Wingo claimed the retroactive application of the longer registration requirement violated the Ex Post Facto Clause. Court of Appeals affirmed in unpublished opinion. Review granted.

ISSUE: Kansas Offender Registration Act - Ex Post Facto Claim

HELD: As set forth in State v. Meredith, 306 Kan. ___ (2017), non-sex offenders seeking to avoid retroactive application of KORA provisions must, in order to satisfy “effects” prong of test in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), produce a record that distinguishes - by the “clearest proof” - KORA’s effect on those classes of offenders from the Act’s effects on sex offenders as a class. Record in Wingo’s case is not sufficiently developed to satisfy the “clearest proof” standard.

DISSENT (Beier, J., joined by Rosen and Johnson, JJ.): Consistent with votes in State v. Petersen-Beard, 304 Kan. 192 (2016), State v. Reed, 306 Kan. ___ (2017), and Meredith, finds the current KORA registration requirement is punishment in effect if not intent, whether claim is raised under Ex Post Facto Clause or Eighth Amendment. And it is no less so for a drug offender than a sex offender.

ADMINISTRATIVE LAW—JURISDICTION
WALL V. DEPARTMENT OF REVENUE
RUSSELL DISTRICT COURT—AFFIRMED
NO. 116,779—AUGUST 11, 2017

FACTS: Wall was arrested for driving under the influence of alcohol. The arresting officer completed a DC-27 form showing that Wall failed a breath test. But the actual test results show that no breath sample was given. The officer also failed to mark several boxes on the form that must be completed in the event that a test subject fails a breath test. Wall appealed, arguing lack of reasonable grounds to request the test and that his due process rights were violated. After the suspension of Wall’s driver’s license was upheld, he filed a petition for judicial review. At that proceeding Wall argued for the first time that the suspension should be dismissed because of the irregularities with the DC-27 form. The district court granted Wall’s motion for summary judgment and the Department of Revenue appealed.

ISSUE: Jurisdiction to suspend Wall’s driver’s license

HELD: Because subject matter jurisdiction may be raised at any time there was no error in considering Wall’s argument even though he failed to raise it at the administrative proceeding. And the Department of Revenue had an independent, statutory duty to verify the validity of the DC-27 form. Because the form was not properly completed the Department of Revenue lacked subject matter jurisdiction to suspend Wall’s license and the district court correctly overturned the suspension.

STATUTE: K.S.A. 2016 Supp. 8-1002(a), -1002(a)(1), -1002

DEFAULT JUDGMENT—GARNISHMENT
MAINLAND INVESTMENT GROUP V. DIVERSICARE
LYON DISTRICT COURT—REVERSED AND VACATED
NO. 116,921—AUGUST 4, 2017

FACTS: Mainland filed a petition against Tonya Smith after she allegedly wrote a bad check. Smith did not respond to the petition and Mainland received a default judgment. Mainland tried to collect on that judgment for 10 years but was apparently unable to locate Smith. After finally tracking her down, Mainland received an order of garnishment and served Diversicare, who Mainland believed was Smith’s employer. Diversicare did not answer the order of garnishment and Mainland sought judgment against Diversicare for lack of compliance. At this point Diversicare sought permission to file an out-of-time answer, claiming that it never received the original garnishment order and that it had never employed Smith. The district court ultimately denied this motion and ordered Diversicare to pay the judgment plus costs.

ISSUE: Ability to garnish

HELD: Diversicare failed to answer the order of garnishment, but it is undisputed that Mainland released Diversicare from the order of garnishment. In the absence of any garnishment order there is nothing upon which to enter default judgment against Diversicare, and the district court erred by entering judgment against Diversicare.

STATUTES: K.S.A. 2016 Supp. 61-3003(g), -3504(a), -3504(b), -3507, -3507(a), -3507(b), -3508, -3510; K.S.A. 61-3502, -3514

ICWA—PARENTAL RIGHTS
IN RE D.H., JR.
MEADE DISTRICT COURT—AFFIRMED IN PART, REMANDED WITH DIRECTIONS
NO. 116,422—AUGUST 4, 2017

FACTS: D.H., Jr. caught the attention of state officials shortly after his birth, when it was suggested that Mother used methamphetamine during her pregnancy. As the child’s life progressed, there was a series of contacts with the police over drug use and domestic violence, and the family had no stability in housing or employment. D.J., Jr. finally came in to custody after both parents were incarcerated. After their parental rights were terminated, both parents appealed.

ISSUES: (1) Sufficient evidence to terminate father’s rights; (2) sufficient evidence to terminate mother’s rights; (3) ineffective assistance of counsel; (4) compliance with ICWA requirements

HELD: Father did not make sufficient efforts to regain custody of his child. His continued positive drug tests were a primary cause of this. There was sufficient evidence that Father’s rights should have been terminated. Mother was similarly situated. She had a long history of drug abuse and instability. In addition, mother was subject to statutory presumptions of unfitness. Mother’s first attorney has been disbarred, and the record shows that his representation of mother fell below minimum standards. But that representation came early in the case, and the two other lawyers who were appointed for mother ably represented her. Providing information to a tribe is mandatory under ICWA. When the tribe requested more information the state had an obligation to provide it. The case must be remanded so that an attempt can be made to provide missing information to the tribe.

STATUTES: 25 U.S.C. § 1903(4); K.S.A. 2016 Supp. 38-2269(a), -2269(b), -2269(c), -2269(f), -2269(g)(1), -2271(a)(1), -2271(a)(3), -2271(b)

ATTORNEY FEES—CONTRACTS—DAMAGES
HARDER V. FOSTER
LEAVENWORTH DISTRICT COURT—AFFIRMED IN PART—REVERSED IN PART—REMANDED
NO. 116,117—JULY 28, 2017

FACTS: Harder purchased a house from Foster. The house sat on land and had a lake and a dam. After the purchase concluded, Harder learned that the dam was illegal because it was constructed without a permit, and that obtaining a permit would require extensive repairs. Harder filed suit against Foster in 2013 alleging negligent misrepresentation and other claims related to the house purchase. A jury eventually found in Harder’s favor. Citing language in the real estate purchase contract, the district court granted Harder’s motion for attorney fees. There was a protracted process after that decision while the district court decided Foster’s motion to alter or amend. Because of the delay, Harder filed a second motion for attorney fees to recoup funds spent litigating the attorney fee issue. That motion was denied, as the court found that the second set of attorney fees
were not related to the real estate purchase contract. Harder filed a second suit against Foster in 2015, claiming that he fraudulently conveyed the proceeds of the purchase to his children so that he was insolvent after the judgment was issued. Foster passed away, but his estate paid to the district court funds sufficient to satisfy the judgment and attorney fees awarded to Harder. The district court believed that Harder had been satisfied and dismissed the 2015 action as moot.

ISSUES: (1) Error in denying the second motion for attorney fees from the 2013 case; (2) error to dismiss the 2015 case

HELD: Harder’s first motion for attorney fees compensated her for expenses incurred through December 16, 2014. But Harder incurred costs far beyond that as the parties worked through the post-trial motions filed by Foster. All of those fees were related to Foster’s default under the contract; as such, Harder should have been compensated. The merger doctrine does not deny Harder’s second request for attorney fees, and she did not waive any of those fees. The 2015 action was not moot because Harder potentially had a cause of action under the Uniform Fraudulent Transfer Act and, under that Act, potentially had a right to attorney fees to any act related to the third-party claim. Harder was not entitled to punitive damages because punitive damages can only be collected from a wrong-doer, and Foster is now deceased.

STATUTE: K.S.A. 33-102, -201(c), -201(d), -201(g), -204, -204(a), -204(b), -207, -210

COMITY—DIVORCE—JURISDICTION

WARD V. HAHN
OSBORNE DISTRICT COURT—REVERSED
NO. 116,654—JULY 28, 2017

FACTS: During divorce proceedings, a Nebraska court awarded Ward Hahn one-half interest in land in Osborne County. Ward subsequently petitioned a Kansas court to enforce the Nebraska order and to partition the land between herself and Hahn’s parents. The district court noted that the Nebraska court did not have subject matter jurisdiction to directly transfer legal title of the Kansas land to Ward, but it partitioned the land anyway under the principle of comity. The Hahns appealed.

ISSUE: Did the Nebraska court have jurisdiction to direct a land transfer in Kansas

HELD: Courts of one state generally cannot directly affect the legal title to land situated in another state. The Nebraska court could have ordered Hahn, over whom it did have personal jurisdiction, to transfer ownership of the land to Ward. But that did not happen here. The Kansas district court’s application of the principle of comity was an abuse of discretion because the Nebraska decree was a violation of Kansas public policy.

STATUTE: [No statutes cited.]

CRIMINAL

ATTORNEY AND CLIENT—CRIMINAL LAW—EVIDENCE—STATUTES
STATE V. BOATRIGHT
SEDGWICK DISTRICT COURT—REVERSED AND REMANDED
NO. 115,075—JULY 28, 2017

FACTS: During meeting with attorney to discuss State’s plea offer in criminal cases charging Boatwright with violating a protective order and stalking, Boatwright threatened to kill his ex-fiancé. After checking with supervisor and obtaining clearance from the disciplinary administrator, attorney disclosed Boatwright’s communication to sheriff’s office. Boatwright was acquitted on the protective order and stalking charges, but then was charged with criminal threat. At trial, the attorney and the detective to whom she reported the communication testified about Boatwright’s threats. Based on the disciplinary rule relating to client-lawyer relationship and confidentiality of information, KRPC 1.6, the district court admitted the statements over Boatwright’s repeated objections. Jury convicted Boatwright. He appealed, arguing his statement to his attorney was protected by the attorney-client privilege.

ISSUE: Attorney-client privilege

HELD: In determining the admissibility of Boatwright’s statement to his attorney, parties and district court failed to argue or address the statutory rule of evidence prescribing the attorney-client privilege, K.S.A. 2016 Supp. 60-426, which is different from the concept of client confidentiality under KRPC 1.6. District court erred in admitting Boatwright’s threat under KRPC 1.6(b), as it is not a rule of evidence and does not govern the admissibility of evidence at trial. Here, K.S.A. 2016 Supp. 60-426 barred the admission of Boatwright’s statement to his attorney. State’s argument for the crime-fraud exception is rejected because Boatwright’s meeting with his attorney was for the specific purpose of discussing State’s plea offer and not for seeking legal advice in order to enable or aid the commission or planning of a crime.

District court’s error was not harmless under facts in this case. Boatwright’s conviction is reversed.

STATUTE: K.S.A. 2016 Supp. 60-426, -426(a), -426(b)(1)

CONSTITUTIONAL LAW—CRIMINAL LAW—JURY INSTRUCTIONS—PROSECUTORS—STATUTES
STATE V. TAYLOR
JOHNSON DISTRICT COURT—REVERSED, SENTENCES VACATED
NO. 114,779—JULY 21, 2017

FACTS: Taylor was arrested for driving on a suspended license. Search of car discovered a gun stolen more than a year earlier. Marijuana found in Taylor’s shoe during his booking at the county jail. Jury convicted Taylor of theft, possession of marijuana, trafficking contraband in a correctional facility, and driving with a suspended license. Taylor appealed, arguing prosecutor and court erred in telling jury that the theft statute made possession of a stolen gun enough for a theft conviction, and that insufficient evidence supported his conviction on this charge. He also argued he was unconstitutionally denied notice that marijuana was contraband such that he could be separately convicted on the trafficking charge, and that insufficient evidence supported that conviction.

ISSUES: (1) Theft statute, (2) prosecutorial error, (3) sufficiency of the evidence of theft, (4) constitutional application of trafficking in contraband statute

HELD: Nothing within the plain language of the theft statute provides that persons found to be in possession of stolen firearms are guilty of theft regardless of whether they had knowledge the firearms they possessed were stolen. Under no circumstances is the state relieved of its duty of establishing the defendant acted with the intent to commit theft.

By telling the jury that it is the legislature’s desire to convict persons who possess stolen firearms of theft regardless of whether those persons had knowledge the firearms were stolen, the prosecutor seriously misstated the law and erroneously conveyed to the jury that the prosecutor is the final arbiter of the legislature’s intent. Under facts in this case, the prosecutor’s error was prejudicial.
There was insufficient evidence that Taylor intended to perma-
nently deprive the owner of the handgun. A theft conviction based
solely upon possession of stolen property must be supported by
sufficient evidence that the person provided unsatisfactory explana-
tions for possessing the stolen property, and that the property they
possessed had been recently stolen. Here, the gun found in Taylor’s
possession some 14 to 20 months after it was reported stolen was
too remote in time to be considered recently stolen. Taylor’s theft
conviction was reversed and sentence was vacated without possibil-
ity of retrial.

The trafficking in contraband statute was unconstitutionally ap-
that the statute can prohibit the introduction or attempted in-
troduction of contraband only if the correctional institution’s ad-
ministrator has given notice of what items constitute contraband.
Controlled substances are not per se contraband under the statute.
Under facts in this case, the jail administrator had not identified
marijuana as contraband, thus Taylor was denied the notice to
which he was entitled. Accordingly, insufficient evidence supported
his trafficking in contraband conviction which was reversed and the
sentence vacated. Error in trial court’s instructions were also noted.

STATUTES: K.S.A. 2016 Supp. 21-5202, -5203, -5701,
-5801(a), -5801(a)(1)-(a)(4), -5801(b)(1), -5801(b)(7), -5801(h),
-5904, -5904(a), -5904(b), -5904(b)(2)(A)-(D), -5914(d)(1),
-5914(d)(2), -5914(d)(16), 50-1201 et seq., 65-4105(d)(16), 75-7c01 et seq.;
K.S.A. 2014 Supp. 8-262, 21-5706(b)(3), -5801(a), -5914; K.S.A.
2001 Supp. 21-3826; K.S.A. 21-3826(c)(1), -5801

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