

# **PROBATE LAW: LEGISLATIVE AND CASE LAW UPDATE 2019-2020**

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## I. 2019 LEGISLATIVE UPDATE

### A. SB 230:

- **ABLE Accounts (209.625; 472.010(11))**
  - Assets in an ABLE account shall not be considered the property of a conservatorship estate established under chapter 475 unless such account is in the charge and custody of a public administrator.
- **Venue – Guardianships and Conservatorships (475.035)**
  - Domicile of a minor is the domicile of the custodial parent, custodial parents, or guardian. Placement by a court, fiduciary, or agency for evaluation, treatment, or residential care shall not constitute a choice of domicile by the minor or alleged incapacitated or disabled person; however, for the purpose of determining domicile, the court may consider the desire or intent of the alleged incapacitated or disabled person to the extent he or she has capacity.
  - If the minor or alleged incapacitated or disabled person has no domicile in the state, then venue is in the county in which they have a significant connection. In determining whether the minor or alleged incapacitated or disabled person has a significant connection, the court shall consider:
    - Whether a juvenile, criminal, or probate court in a county of this state has previously or currently assumed jurisdiction over the person under chapter 211 or 552;
    - The location of the person’s family and other persons required to be notified of the guardianship or conservatorship;
    - Whether the person has a residence or is physically present in the county and the duration of their presence or absence;
    - The location of the person’s property;
    - The extent of the person’s ties such as voting registration, local tax return filing, vehicle registration, driver’s license, social relationships, or receipt of services.
  - In the event venue for guardianship is in a different county than for conservatorship, venue shall be in the county of the guardianship.
  - The provision that if the alleged incapacitated or disabled person has resided in a county other than his or her domicile for one year the court could assume venue for the appointment of a guardianship or conservatorship has been repealed.
  - A public administrator may request transfer of venue to another county even if the other county does not have proper venue.

### B. HB 138

- **Simon’s Law (191.250)**
  - Family Court and Juvenile Court may enter orders regarding end-of-life medical decisions and appoint a guardian for that purpose.

### C. SB83

- **Partition of Heir’s Property (528.700 et. seq.)**
  - Special rules of been developed regarding the forced partition sale of certain real estate that is deemed “Heirs’ property,” including the right of one co-tenant to purchase the property at the appraised value.

- Heir's Property is defined to be a tenancy in common, with no agreement binding on the cotenants regarding partition, with one or more of the cotenants acquiring title from a relative, whether living or deceased, and one of the following: 1) 20 percent or more of the interests are held by cotenants who are relatives; 2) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or 3) 20 percent or more of the cotenants are relatives.

**D. SB 282 - VETOED BY GOVERNOR**

- ~~Right of Sepulcher (194.119)~~
  - ~~A surviving spouse no longer has preference if an action for the dissolution of the marriage has been filed and is pending in a court of competent jurisdiction.~~
  - ~~A next of kin of the deceased may delegate the control of disposition of the body either by a specific or general power of attorney pursuant to 404.710.~~
  - ~~A person with a superior claim must object within 48 hours after being notified by a person with an inferior claim to the right of sepulcher.~~

**II. 2020 LEGISLATIVE UPDATE**

- *Notary Public Orders and Statutory Change:*
  - *Executive Order 20-08 attached.* <https://www.sos.mo.gov/library/reference/orders/2020/eo8>
  - *Executive Order 20-14 attached.* <https://www.sos.mo.gov/library/reference/orders/2020/eo14>
  - *HB 1655. See* <https://house.mo.gov/billtracking/bills201/hlrbillspdf/3955H.02P.pdf>

**III. CASE LAW UPDATE<sup>1</sup>**

**A. GUARDIANSHIP/CONSERVATORSHIP**

**Removal as Guardian and Conservator**

*In re Estate of Schneider*, 570 S.W.3d 647 (Mo. App. W.D. 2019).

Father and Mother were co-guardians and co-conservators for Ward, a mentally disabled adult who lived at home with Mother and Father and received services from a supported living organization and the county social services. Sister, Ward's sister and the daughter of Mother and Father, was also involved with Ward's care and the family plan was for Sister to increase her involvement as Mother and Father got older; when they passed, Sister would care for Ward as his backup guardian and conservator. Mother died in August of 2015, and Father continued as sole guardian and conservator for Ward. At an annual meeting in early 2016, Ward's case manager noted that Ward was close to Sister and her family, that Ward attended church each Sunday, that Ward's family were the most important individuals in his life, and that it was important for Ward's routine to remain consistent. A few months later during the summer of 2016, Father met a woman ("Mary") through a dating website who claimed she was widowed but was actually married and who had recently filed for bankruptcy. Sister and her other brother ("Brother") became concerned about Ward when Mary and her fourteen-year-old son moved in with Father a few months after meeting Father. Father rapidly made a series of changes: he requested that the county involve

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<sup>1</sup> All statutory references are to RSMo 2000 as supplemented unless otherwise noted. The probate division of the circuit court of Missouri will at times be referenced as the "Probate Court."

Mary in Ward's decision-making and stated that he and Mary were going to "train" the Ward in the home. Father and Mary left Ward alone overnight with only Mary's fourteen-year-old son when they traveled out of state. The supportive living assistant reported that when their shift was over, Ward would be alone with the fourteen-year-old, who was in his room playing with technology with the door shut. In early 2017, Father married Mary and two days later added her as a joint tenant with right of survivorship to Father's bank account into which he deposited funds from Ward's conservatorship account, commingling funds without asking for prior court approval. After a week of marriage, Father retitled his real estate as joint with Mary and then asked the probate court to remove Sister as successor guardian for Ward and appoint Mary to that role. Father took Ward off of behavioral medicines without consulting Ward's physician, revoked authorization for social services to share information with Brother and Sister, stopped visits between Ward and Sister, changed Ward's doctor and case manager, and stopped taking Ward to the church at which he had worshipped since 1978. Ward's support individuals were concerned about Ward's increased anxiety, weight loss and regression.

Sister filed a petition to appoint guardian ad litem to investigate Father's conservatorship and guardianship of Ward. Sister also filed a motion to remove Father as guardian and conservator. Father moved to dismiss Sister's motion for removal, stating that Sister lacked standing to request removal of Father. The probate court held a hearing only to address sister's petition to appoint guardian ad litem and heard testimony from Sister and Father. The court declined to appoint guardian ad litem, and instead appointed an attorney to file a report. The attorney was later appointed as both attorney for Ward and guardian ad litem ("GAL") and filed several reports and supplements addressing Father's fitness as guardian and conservator, eventually recommending to the court that Sister serve in both roles. At a status hearing, the probate court determined on its own motion that there was reason to believe that Father as the court-appointed conservator was not performing his duties, and appointed Sister as emergency conservator ad litem to take control of Ward's finances. At that hearing one month later on Sister's petition to be appointed successor guardian and conservator, individuals from social services and the supported living agency testified that Father had failed to act in Ward's best interest in leaving Ward alone with the boy, taking Ward off his medications, and establishing new goals with Mary that were too advanced for Ward. They noted Ward's noncompliance, regression in skills and anxiety and confusion. Father blamed the GAL for his financial failures, did not see a problem leaving Ward with the boy, and did not want Sister and Brother to receive information about Ward because of how Father perceived that they were treating Father and Mary. The probate court found that Father was not effectively performing his duties as guardian, named Sister as emergency guardian, and directed Sister to continue as emergency conservator ad litem. The probate court directed the parties to transition Ward and his belongings from Father's house to Sister's house and directed Sister to inform the probate court in writing if she intended to file a petition to be appointed to and consent to serve as successor guardian and conservator. At the hearing on that petition, Father testified that he refused to have any communication with Sister and did not intend on seeing Ward again. The probate court entered its judgment removing Father and appointing Sister as successor guardian and conservator. Father appealed, arguing that the probate court erred when it removed him as guardian and conservator because Sister did not have standing to seek Father's removal, and that there was insufficient evidence to support the relevant statutory grounds for Father's removal.

**HOLDING:** Affirmed. The probate court did not remove Father in response to Sister's motion for his removal, which was never ruled upon by the probate court. Rather, the probate court removed Father based upon the recommendation by the GAL and the probate court's own review of Father's actions. The court subsequently granted Sister's petition for appointment of successor guardian and conservator. Thus, Father's arguments that Sister did not have standing are misplaced. Further, the record had sufficient evidence of Father failing to discharge his duties and failing to act in the Ward's best interest.

### **Removal of Guardian and Conservator**

#### ***In Re Williams*, 573 S.W.3d 106 (Mo. App. W.D. 2019).**

Ward was declared totally incapacitated and disabled as a result of dementia, alcohol abuse and poor memory. At that time, competing applications to serve as guardian and conservator were pending, filed by 1) the ward's Wife, requesting appointment of the public administrator; 2) the ward's son and daughter-in-law, requesting their own appointment, and 3) the ward's other son, requesting his own appointment. The court appointed the son and daughter-in-law. The son died a few months later and daughter-in-law placed the ward in a care facility. The ward's Daughter then filed a petition for the daughter-in-law's removal and a petition to be appointed as guardian and conservator. The family members arrived at a compromise where the ward was moved to a different nursing facility, the daughter-in-law was removed as guardian and conservator, and the Public Administrator was appointed as guardian and conservator. One year later, Wife filed a motion alleging that Public Administrator was placing unjust limitations on visits with Wife and Daughter and requested that the Public Administrator be removed as guardian and that Wife and Daughter be appointed as co-guardians. Wife also filed a separate motion to terminate the Public Administrator as conservator, alleging that the Public Administrator mismanaged assets. Evidence at trial showed that the Public Administrator did impose visitation limits, but that she also wrote letters to family members explaining that the ward's dementia prevented him from understanding or handling complaints of family members, and that such visits upset him and made him combative. The court found that there was insufficient evidence to remove the Public Administrator as guardian and conservator. Wife appealed, arguing that the circuit court erred in allowing Public Administrator to continue in her role because Wife and Daughter were competent to serve as guardians and conservators and thus that Public Administrator's service exceeded her statutory authority as public administrator, that failure to remove Public Administrator was against the weight of the evidence in that Public Administrator had failed to act in the ward's best interest, and that the court erred in allowing Public Administrator's attorneys' fees to be paid by the Estate.

**HOLDING:** Affirmed. The fact that Wife and Daughter may have been competent to serve as guardian and conservators did not mean that the service of Public Administrator exceeded her statutory authority. Wife's interpretation of RSMo. §§ 473.730 and 473.743 to state that the public administrator should continue to serve only when no one else is competent to take charge of such estate was incorrect. Preferences for relatives over unrelated third parties only exist on the original applications for appointment. Once an appointment has been made, the preference disappears. The standard for removal is statutory. The judgment declining to remove the Public Administrator was not against the weight of the evidence; Public Administrator did not fail to properly handle estate assets when she allowed a relative to possess a guitar that belonged to a trust because the Court found no damage to the Estate. Wife's argument that the Public Administrator was too slow in changing a life insurance beneficiary designation had no merit because the testimony showed

that the Public Administrator did in fact change the beneficiary and there was no damage to the Estate. Finally, visitation limitations placed on family were not overly restrictive when the Public Administrator was concerned that family members regularly upset the ward when they complained to the ward about his care, encouraged him to pack his belongings and told him that he was going to be going home soon. Further, the trial court did not abuse its discretion when it awarded attorneys' fees to the Public Administrator. Because there was no basis to remove Public Administrator as guardian and conservator, it was reasonable to expect Public Administrator to hire counsel to defend against motions seeking her removal.

### **Guardianship Appeal Moot by Death**

***In re Norton*, 590 S.W.3d 450 (Mo. App. W.D. 2020).**

Children filed guardianship action against their elderly mother. Mother filed a motion for summary judgment. After invoking all civil rules, the trial court granted summary judgment in favor of Mother. Children appealed. After the appeal was filed, Mother died. The issue then became whether her death mooted the appeal.

**HOLDING:** A guardian's and conservator's authority ends at the death of the ward/protectee except to wind up the affairs of the guardianship and conservatorship. § 475.083. Thus, even if Children won the appeal, they could not obtain what they sought in their petition, namely being appointed as guardian and conservator. Therefore, Mother's death mooted the issue that was raised by their petition. Children also claimed that the dismissal of the appeal could have adverse consequences to them in future litigation as to the factual issues decided in the summary judgment motion. The appellate court noted that there was no future litigation that was specifically identified by Children that would be applicable to their claim, and such harm is merely speculative. While not deciding the issue, the appellate court noted that it would be unlikely that collateral estoppel would apply to any future litigation when the appeal is dismissed for mootness. Appeal dismissed.

### **Guardian and Conservator Claim for fees – timeliness and amount**

***In re Washington*, - S.W.3d – (Mo. App. E.D. 2020)(ED108336, 6/16/20)**

***In re Washington*, - S.W.3d – (Mo. App. E.D. 2020)(ED108357, 6/16/20)**

These appeals concern the same guardianship and conservatorship estate. Brother, and accountant, served as guardian and conservator for his brother for a number of years. The Ward-Protectee died. Brother filed numerous fee requests for his services. The Court dismissed some of his fee requests pursuant to § 473.360 because Brother had not filed his claims within six months of the date of publication of closing the conservatorship estate. The Court allowed other claims but only in an amount approximating 5-8% of the total requested by Brother. Brother appealed these rulings.

**HOLDING:** The appellate court held that the time limits contained in § 473.360 only apply to decedent estates and do not apply to guardian and conservator claims, and therefore the dismissal of Brother's claims was reversed and remanded. In regard to the amount requested, the appellate court discussed various factors used to determine the appropriate amount of fees to be awarded to a guardian and conservator, including the size of the estate, the productiveness of the estate, the disbursements from the estate, the nature and difficulty of the services performed and what is a customary charge for similar services in the community. The court may consider ties of blood, marriage or adoption in making allowances for compensation. In this case, Brother did not

establish that the trial court abused its discretion in its award of fees. In regard to his claim that the trial court violated his due process rights by requiring him to have an attorney, there was nothing in the appellate record that would support his claim that the trial court did not provide him every opportunity to be heard. Case no. ED108336 reversed and remanded and Case no. ED108357 is affirmed.

## **B. WILLS AND DECEDENT ESTATES**

### ***Spicer v. Spicer*, 568 S.W.3d 480 (Mo. App. E.D. 2019).**

Husband and Wife owned real estate as tenants by the entirety. Husband and Wife separated, and Wife moved out of the property but they did not divorce before Husband's death. Husband transferred the real estate into his living trust prior to his death; Wife did not sign the deed. Husband's Children were beneficiaries of the living trust and one was the successor trustee. After Husband's death, Wife filed a quiet title action against the Trust ("Spicer I"), asserting that the property was a tenancy by the entirety, that she was the sole owner after Husband's death by operation of law and that the deed to the trust was a nullity because Wife did not sign it. The court found in favor of Wife on her motion for summary judgment and issued the 2008 Judgment declaring Wife fee simple owner of the property. Children moved to intervene, asking the court to set aside the 2008 Judgment because the circuit court lacked jurisdiction because the Trustee of the trust and the trust beneficiaries were indispensable parties. The court granted the intervention and withdrew the 2008 Judgment. Wife appealed from the judgment setting aside the 2008 Judgment. The Children argued that Husband unilaterally terminated the joint tenancy interest, that the Trust was not a legal entity and that the Trustee was the legal owner of the property. The Eastern District held that the only valid final judgment was the 2008 Judgment awarding summary judgment to Wife, and that although the trustee was the proper party to the action, the trust failed to argue to the circuit court that it lacked the legal capacity to be sued. The Eastern District further held that all interests related to the trust were represented in litigation through virtual representation. The Supreme Court then found that the initial grant of summary judgment to Wife was final, that the circuit court lost jurisdiction over the matter prior to the Trustee's post-judgment intervention, and accordingly all actions occurring after the 2008 Judgment lacked jurisdiction. The Supreme Court did not address virtual representation and instead dismissed the appeal as untimely.

Children, as Trustee and beneficiaries of the trust, then sued Wife seeking to void the 2008 Judgment ("Spicer II"). Wife did not file counterclaims but defended against Children's claims and pled affirmative defenses. Among the affirmative defenses Wife cited to the Eastern District's holding with respect to virtual representation binding the trust and its beneficiaries, and thus that Children were barred by the 2008 Judgment from raising their claim. The trial court found in favor of Wife. Children appealed, arguing that they were necessary and indispensable parties to Spicer I, and thus the 2008 Judgment was void because they were not served or identified in Spicer I. The Eastern District voided the 2008 Judgment, finding that Children were necessary parties to the prior litigation, and that their ruling essentially voided Wife's ownership of the property and the matter was treated as if Wife had not filed her first quiet-title petition in Spicer I.

Wife then filed the current quiet-title action (“Spicer III”), seeking the same relief as in Spicer I but now naming Children as defendants. Children argued that Wife was required to file compulsory counterclaims in Spicer II, and that her failure to do so barred her from bringing Spicer III. Children also raised defenses of equitable contribution, unjust enrichment and promissory estoppel. The circuit court granted judgment in favor of Wife, holding that it was the surviving spouse’s right to the property held in a tenancy by the entirety. Further, Children’s claims of unjust enrichment and equitable contribution were denied because they never had an interest in the property. Finally, claims for promissory estoppel were denied because the record did not have a written promise regarding the real estate, Children did not allege detrimental reliance on an oral promise, and Wife did not make a promise to Children. Children appealed, alleging error in awarding summary judgment to Wife in four points: the compulsory counterclaim rule barred Wife from bringing Spicer III because she failed to raise that claim in Spicer II; and the record included sufficient evidence to raise a genuine dispute of fact as to equitable contribution, unjust enrichment and promissory estoppel.

**HOLDING:** Affirmed. While the claims in Spicer I, Spicer II and Spicer III all involve a dispute over the same real property and unquestionably arise from the same transaction, the claim in Spicer III did not accrue for Wife until the 2008 Judgment was voided by the Eastern District in Spicer II. Thus, the claim was not capable of ascertainment at the time Wife was required to plead compulsory counterclaims in Spicer II. Children lack standing to pursue their equitable contribution and unjust enrichment claims because they are not Husband’s personal representatives and were not injured by Wife’s actions. Children argued that because Wife left the marriage prior to Husband’s death and did not pay for property upkeep, Husband experienced an injury; however, Children never applied to be Husband’s personal representative and lack authority to pursue claims that Husband may have had against Wife. Further, promissory estoppel does not apply because Wife’s alleged promise to Husband was not in writing as required by the Statute of Frauds with respect to real estate and because Children failed to present any evidence that they relied upon Wife’s promise to their detriment.

#### **Attorneys’ Fees**

***In Re: RSG, 565 S.W.3d 670 (Mo. 2019).***

Attorney was appointed as the Personal Representative of an Estate under supervised administration in 2014. In February of 2015, Attorney filed a motion requesting partial payment of fees, which was denied because the amount exceeded the statutorily authorized reimbursement amount and because the Court stated that it wanted to incentivize the Personal Representative to close the Estate and payment of partial fees would remove this incentive. Later that day, the Court issued an order authorizing Attorney to pay himself \$15,000, which was about half of the requested fee, which was to be deducted from the final calculation of fees due at the close of the Estate. Attorney paid himself the \$15,000. Approximately four months later, Attorney paid himself an additional \$15,466 on June 25th, which was the amount he would have been entitled once the estate was settled. Attorney did not file a final settlement or seek to close the estate at that time and did not file a motion asking for approval from the Court to pay this fee. Attorney testified that he took these actions for tax purposes thinking that he could close the Estate by the end of June; however, he became caught up in another matter and did not close the Estate by the end of June. Attorney realized that he needed to let the court know what happened, so he attempted to drop in on the judge but was not successful in seeing the judge. He then forgot about the fee issue and

filed the final settlement in September. He listed the correct total fees to himself, noted that \$15,000 of the fee had been previously paid, and did not note the June payment on the settlement. However, he attached bank records that showed the June payment to himself. After the Court reviewed the settlement, it issued a show cause order for Attorney to appear and show why he should not be held in contempt and removed as Personal Representative for the advance early payment without Court permission and in violation of the Court's order. Attorney went to the judge's office and spoke with him and the Court cancelled the show cause hearing. Attorney then filed a motion requesting approval to pay himself the fee. The court issued a contempt order and reduced the fee by \$2,138. The following month, the court set aside the contempt order and issued a revised order directing Attorney to restore the \$15,466 he paid himself, and to address his removal as Personal Representative. In March of 2017, the court appointed a different attorney as successor Personal Representative, who entered into a stipulation with Attorney for payment of personal representative fees that reduced Attorney's fee to \$15,105 from \$15,466, which the court approved. The judge later testified that Attorney had apologized, that he had no issue with Attorney's fees but rather with the time between the payment of the fee and the final settlement filing. The judge stated that generally when the attorney files the final settlement, the fee authorization paragraph is approved by the judge and the judge does not check to see when the fee check was cashed because it is usually close in time to the settlement; however, here there were several months in between and it caused the court concern. The judge also testified that he believed the fee reduction was fair and that Attorney was a good man who worked to make a difference in the community.

The OCDC filed an information alleging Attorney violated Rules 4-1.15 (safekeeping client property), 4-3.3 (false statement of fact to tribunal) 4-3.4(c) (fee without court authorization and in violation of court order) and 4-8.4(c) (deceitful conduct in taking fee without court authorization). Attorney testified that was his practice to file an application for court approval before taking fees and that he made a mistake in the final settlement spreadsheet when he failed to list the payment. Attorney testified that he prepared a draft of the final settlement prior to his discussion of tax liability with the accountant, and then did not revise that document prior to filing. He testified he believed that the court would see the payment on the bank records and did not intend to hide the payment. Both Attorney and a former associate circuit judge testified that they believed Attorney could lawfully pay himself a personal representative fee because it was a claim of the estate pursuant to RSMo. § 473.433. Attorney submitted affidavits from attorneys and judges testifying to Attorney's honesty, integrity and moral character. The disciplinary hearing panel found violations of each rule and recommended an order of suspension with no leave to apply for reinstatement for six months.

**HOLDING:** The Supreme Court imposed an indefinite suspension with no leave to apply for six months but stayed the suspension and placed Attorney on probation for one year. Attorney did not follow the statutory process to obtain fees in a supervised estate, which is to obtain court approval before payment of his fee. Personal Representatives are not creditors of an Estate and Attorney's belief that he could take the fee under the claim statute was incorrect. Section 473.153, the specific statute governing payment of personal representative fees, prevails over the general statute regarding payment of claims. Further, Attorney could not have paid himself his own personal representative fees from the Estate as a claim because RSMo. § 473.423 requires an administrator ad litem when there is only one personal representative to avoid a conflict of interest. Attorney's

actions violated the Rules of Professional Conduct. However, Attorney's actions did not involve self-dealing, misappropriation or cause any harm to the Estate. Attorney was not attempting to obtain a second fee or seek funds he had not earned. These were mitigating factors in the Court's decision to stay the suspension. Judge Powell wrote separately to dissent and would have imposed the suspension with no leave to apply for reinstatement for six months.

## **Claims**

### ***Blackwood, Langworthy & Tyson, LLC v. Knipp, 571 S.W.3d 108 (Mo. App. W.D. 2019).***

Protectee/Decedent had three adult children and was adjudicated an incapacitated and disabled person upon competing petitions filed by his son and one of his daughters for guardianship and conservatorship. Daughter was eventually appointed as guardian and conservator. Protectee/Decedent died two years later, and a probate estate was opened. Shortly before the Decedent's death, the family discovered additional assets that had not been included on the conservatorship inventory; many of these assets had pay on death designations or were titled jointly between the protectee and family members (the "discovered assets"). The conservator amended the conservatorship inventory to list the discovered assets, but they were never physically turned over to her. Law Firm represented daughter as guardian and filed a claim in the Decedent's estate for their professional services rendered in association with the guardianship and conservatorship. Law Firm later filed a demand pursuant to RSMo. § 461.300 that the personal representative recover for the estate and all creditors all revocable transfers of the Decedent's property to satisfy claims of creditors and administration expenses. The personal representative provided information to Law Firm but did not commence such an action, and Law Firm filed a petition for accounting in Decedent's estate against certain family members, alleging that these individuals possessed property owned by decedent prior to his death or were recipients of revocable transfers and requested those individuals deliver those assets to the estate. Two of the children filed answers denying Law Firm was entitled to relief, arguing primarily that Law Firm inadequately performed its duties as attorney in the conservatorship and that Law Firm sought unreasonable fees. Law Firm also filed an application for allowance of compensation in the conservatorship. Conservator filed a final settlement and revised inventory in the conservatorship, still showing the discovered assets as assets of the conservatorship and showing that causes of action against recipients of those assets were being pursued in the Decedent's estate. One child objected to the inclusion of those assets on the conservatorship inventory and objected to causes of action against the recipients of those assets. Those objections were dismissed because that child did not have standing to object to the settlement of the conservatorship estate because the decedent's will named his wife as the sole beneficiary of the decedent estate. The court noted that even if that child had standing to object to a conservatorship final settlement, the proper forum to litigate title to various assets on the inventory was through a discovery of assets action in the decedent estate, and such claims could not be adjudicated in objections to the final settlement. Law Firm filed an amended application for fees in the conservatorship, which was heard by the probate court with the Law Firm being awarded their requested total fees of \$20,578.43 as a class 2 claim. The conservator's subsequent amended final settlement showed that a proportionate amount of fees in the amount of \$3,912.04 was paid to Law Firm from the conservatorship, and again noted that causes of action were being pursued against recipients of the decedent's assets in the decedent estate. One child objected and his objections were again dismissed. The conservator's final settlement was approved, and the conservator was discharged. The defendants in the accounting action then filed a motion for judgment on the pleadings in the accounting case,

arguing that the remedy of accounting that Law Firm sought was not available under the statute, which only authorizes a money judgment, and that there was no basis to pursue recoverable transfers for the payment of administrative expenses. They further argued that Law Firm was not a creditor of the deceased, but that they were creditors of the conservator in her personal capacity or in her capacity as conservator, but that she had been discharged. The trial court granted defendants' motion for judgment on the pleadings, ruling that Law Firm was not a creditor of the estate of decedent and therefore could not bring an action for accounting under RSMo. § 461.300. The court further ruled that the judgment from the conservatorship estate in favor of Law Firm did not automatically carry over to the decedent estate; that the amounts due Law Firm were not debts of the decedent or his estate, or liabilities of decedent arising in contract, tort or otherwise; that the fees were incurred during the administration of the guardianship and conservatorship and not incurred by the decedent personally; that Law Firm was not a qualified claimant as required by the accounting statute and thus did not have standing to bring such action; that Law Firm should have filed objections to the final settlement in the conservatorship estate; and that Law Firm's failure to object in the conservatorship estate constituted waiver of its claim. Law Firm appealed.

**HOLDING:** Reversed and remanded. Services provided to the Conservatorship constituted a debt and/or liability of Father within the definition of RSMo. § 472.101(3) that survives final settlement of the conservatorship, rendering Law Firm a qualified claimant pursuant to RSMo. § 461.300 and granting Law Firm standing to file an accounting action. Section § 475.320, RSMo. (in conservatorship of protectee who dies intestate, court may order funeral and burial expenses, taxes, obligations of conservator and expenses of administration to be paid out of estate by conservator) and RSMo. § 475.290 (authority of conservator terminates upon death of protectee, subject to authority to wind up administration) do not require that all debts and claims in the conservatorship be paid out in a final settlement, only that an account be given. Further, there is no requirement under the claim's classification statute in RSMo. § 473.397 that "liabilities of a decedent" require payment from an existing conservatorship for expenses related to the conservatorship such as contracts lasting after the death of the protectee, or expenses related to a last sickness of the protectee authorized by the conservator. The failure of the Law Firm to object to the final settlement in the conservatorship and the acceptance of partial payment from the conservatorship did not constitute a waiver of its claim because there were indications that the personal representative had the responsibility to marshal additional assets and pursue claims. Finally, Law Firm's prayer in its petition for delivery of "all assets" necessary to discharge the claims of creditors instead of requesting a money judgment as contemplated by the statute did not destroy its request for relief; probate pleadings are not judged by the strict pleading rules of civil court and the petition gave sufficient notice to others of the relief sought by Law Firm for payment of its claim.

***Harris v. Edgar*, 583 S.W.3d 497 (Mo. App. S.D. 2019) (Harris II).**

Prior to his death, Husband executed a beneficiary deed transferring two parcels of real estate to his trust upon his death. After Husband's death, Husband's Sister filed an affidavit in the probate division of the circuit court for opening a small estate proceeding and presented Husband's last will and codicil. On February 5, 2016, Husband's Wife filed a motion in the probate court asking the court to convert the proceeding to a full estate instead of a small estate proceeding, and filed an election of surviving spouse, a homestead claim and a claim for exempt property allowance.

The probate court eventually converted the proceeding to a full estate and appointed Sister as personal representative. Wife filed a separate civil action in the circuit court against the heirs to Husband's estate petitioning the court to set aside the beneficiary deed conveyance because it was in fraud of her marital rights. The heirs moved to dismiss, arguing that the two parcels of real estate were part of the estate pending in the probate division and that the probate court had exclusive jurisdiction until the final distribution of Husband's estate took place. The circuit court granted the heirs' motion to dismiss and Wife appealed.

**HOLDING:** Affirmed. The doctrine of abatement applies when a claim involving the same subject matter and parties in a previously filed action; in such cases resolution must occur in the previously filed action. Here, the timing of the conversion from the small estate proceeding to the full probate proceeding involved the same parties and subject matter and thus the filing of the civil action prior to the conversion to the full probate estate did not change the application of the abatement doctrine. Wife's claims are still pending in the probate proceeding. The trial court did not abuse its discretion by dismissing the case instead of consolidating the cases because such decision is within the trial court's discretion.

***Harris v. Davis*, 587 S.W.3d 362 (Mo. App. S.D. 2019) (Harris III).**

See facts in Harris II above. In Harris I, the appellate court determined that Wife had filed a timely motion under § 473.020 to convert a small estate application to full estate administration and remanded for the probate division to open an estate and appoint an administrator. Upon remand, the probate division appointed Sister (and later her successor after Sister died, hereinafter both referred to as "Sister"), rather than Public Administrator as Wife requested, as the personal representative and Sister filed a final settlement showing that Wife received nothing. Wife objected to the final settlement claiming she was entitled to her elective share and spousal claims. Sister, or the beneficiaries, filed as a defense that Wife abandoned Decedent without reasonable cause and therefore forfeited her spousal rights under § 474.140. The probate division held a hearing on Wife's objections to the final settlement, at which time Wife presented no evidence. The Court overruled Wife's objections and approved Sister's final settlement. Wife appealed.

**HOLDING:** Wife first claimed the Probate Division erred because Sister's application for letters was filed more than one year after death. The Appellate Court rejected this argument because Harris I construed Wife's motion to convert as a timely application under § 473.020, and thus the Probate Division was appointing Sister under that statute. Wife's argument on appeal that the Public Administrator should have been appointed also failed because in Harris I the appellate court remanded for the Probate Division to appoint an administrator, and since Sister was entitled to letters and timely applied, her appointment was proper. Wife's Due Process arguments regarding the hearing on the objections were not properly preserved, and there was no showing that her rights were violated. Finally, Wife lacked standing to challenge any other portion of the distribution of the Estate as she had no interest in the Estate.

**Summary Judgment Standard – Undue Influence**

***Broughton v. Estate of Tyner*, -- S.W.3d --, 2020 WL 1921037 (Mo. App. E.D. 2020)(ED108125, 4/21/20).**

Mom died testate on May 19, 2016. Her husband had predeceased her. Her last will was executed on August 29, 2007 and left her estate in five equal shares to her five children, except that a son (“Son”) had the right to purchase all real estate owned by Mom, including her home, for \$400 per acre. Three daughters (“Daughters”) challenged the last will on various grounds, including that Son exerted undue influence on Mom. Son had always lived with Mom and Dad his entire life, and had helped take care of their farm and home both before and after they were not able to, helped pay bills, managed Mom’s finances and attended Mom’s medical appointments in the later years of her life. There was deposition testimony that Mom sometimes seemed confused and had suffered health problems around the time the Will was executed, and a doctor opined that Mom “possibly suffered from Alzheimer’s dementia as early as 2002-2006.” The drafting attorney testified that he had no concerns regarding Mom’s capacity or that she was subject to undue influence. Daughters admitted they had no direct evidence of undue influence. The trial court granted summary judgment in favor of Son on the basis that Daughters did not establish a genuine issue of material fact on the issue of whether Son unduly influenced Mom. Daughters appealed.

**HOLDING:** Reversed and Remanded. Summary judgment is only proper if moving party establishes there are no genuine issues as to the material facts and the movant is entitled to judgment as a matter of law. Once a movant makes a prima facie case that there are no genuine issues of material fact, the non-movant must show by affidavit or other discovery that there are one or more genuinely disputed facts. A presumption of undue influence arises if: 1) there exists a confidential or fiduciary relationship between the testator and defendant; 2) the fiduciary obtained a benefit; and 3) there is additional evidence to support an inference of undue influence. Once the first two elements are established, courts take a very liberal attitude toward the quantum of proof necessary to establish that the fiduciary was actively concerned in some way which caused or contributed to the execution of the will. Each case of purported undue influence present different facts and undue influence is often proven solely on circumstantial evidence. Other factors courts apply to determine if a testator was unduly influenced are:

- (1) The mental and physical condition of the testator;
- (2) evidence of power and opportunity to influence the testator by the beneficiary;
- (3) whether the will makes an unnatural disposition of property;
- (4) whether the bequest constitutes a change from a former will;
- (5) the hostile feelings of the beneficiary toward an expected recipient;
- (6) remarks of the beneficiary derogatory of the contestant and
- (7) actions of the beneficiary in discouraging others from visiting the testator.

Daughters established there were disputed facts such that they could make a prima facie case of undue influence because the Son did have a confidential relationship with Mom, benefited from the unnatural disposition of her estate, and there were sufficient other alleged facts, such as Mom’s diminished mental and physical capabilities, her alleged confusion, Son’s power and opportunity to influence her and the unnatural disposition of her property. Even though there was no direct evidence in the summary judgment record of undue influence, reasonable inferences drawn from the circumstances sufficiently establish there are genuine issues of material fact in dispute regarding the undue influence claim.

### **Appealable Interlocutory Orders**

***Estate of Rich v. Caskey*, -- S.W.3d --, 2020 WL 2631051 (Mo. App. W.D. 2020)(WD82884, 5/26/20).**

Wife died on April 6, 2015. Husband filed an application for letters of administration requesting that he be appointed personal representative of Wife's estate. The application for letters of administration and inventory and appraisal were prepared by Caskey, a sole practitioner. Caskey performed the legal work for Husband on an of counsel basis, at the request of her brother-in-law, Harold. Caskey, on behalf of Harold's law firm, electronically signed the application for letters as Rich's attorney. Harold's firm electronically filed the documents and paid the filing fee and the fee for publication of the notice of letters of administration granted. Over a year later, Rich contacted Caskey and asked her to withdraw as counsel because he planned to obtain other counsel. On June 30, 2016, Caskey filed a motion to withdraw and a petition for reimbursement of expenses and for attorney fees. During a hearing on the motion, Caskey testified that she made the request for reimbursement in her firm's name and not Harold's firm's name because Harold died in October 2015. Husband testified that when seeking counsel, he went to the place that used to be the law firm of Caskey, Hopkins and Wilhelmus, and asked if Bill Hopkins was there, who had represented him before. Kay told Husband no, then Husband "asked about representation." Husband and Kay filled out paperwork. Husband testified that no one explained to him that he was hiring Harold, he did not intend to hire Harold or Caskey, and he did not sign a contract with either or both of them. Husband had no issues with the quality of work. The trial court stated that it did not hear any evidence "that Ms. Caskey had any intent or was trying to deceive [Husband] in any way." The trial court ultimately concluded that it would grant the claim for reimbursement of expenses and for attorney fees because expenses and fees were reasonable but asked that it be re-characterized as a claim against the estate, instead of a petition.

**HOLDING:** Appeal dismissed for lack of jurisdiction. The right to appeal from a judgement of the probate division is purely statutory. The court's docket entry directed Caskey to submit her claim for approval by the court. The entry was not an order allowing a claim in excess of \$100.00 against Wife's estate, and therefore was not an immediately appealable interlocutory order under § 472.160.1(1).

### **C. TRUST ESTATES**

***Simon v. Myers, 570 S.W.3d 103 (Mo. App. W.D. 2018)(application for transfer to Supreme Court denied, SC97699 4/2/2019).***

Father and Mother executed revocable living trusts during their lifetimes, which provided that after the death of the surviving spouse, the balance would be held in a Family Trust for the benefit of their three children: Daughter #1, Son, and Daughter #2. The Family Trust provided that Daughter #1 had an option to purchase the family business at fair market value that must be exercised within one year of the death of the surviving spouse. The Family Trust further provided that upon the death of the surviving spouse, the balance of the Family Trust was to be divided into equal shares to create one share for each child who was then living, and that each share created for such living child should be immediately distributed, free and clear of trust, to such child. Father died in 2006 and Mother, the surviving spouse, died in September 2012. Daughter #1 and Son became Co-Trustees of the Trust, and Son later resigned leaving Daughter #1 as the sole Trustee. Daughter #1 made distributions to herself, Son and Daughter #2 in somewhat equal amounts. Son died intestate in June 2013, nine months after Mother died; at the time of his death the Family Trust value was between \$3.1 and 3.4 million dollars. Son was married to Wife and had no children.

Wife was appointed the Personal Representative for Son's estate and was his sole heir. Daughter #1 did not exercise her option to purchase the family business within one year. After Son's death, Daughter #1 continued to make distributions to Daughter #2, Son's Estate or Wife, and herself in somewhat equal amounts through 2014 and 2015. In the summer of 2015, Daughter #1 became angry at Wife after Daughter #1's attorney advised her to pay Son's share of the Family Trust to Wife. Daughter #1 reread the Family Trust agreement in May of 2016 specifically looking for a way that she would not have to pay Wife any money; Daughter #1 decided to interpret the Family Trust to exclude Wife from distributions under the theory that Son had died prior to the expiration of the one-year purchase option for the family business, which was before any distributions from the Family Trust were to have begun. Wife filed a petition in the probate court seeking removal of Daughter #1 as Trustee, imposing a constructive trust on trust assets, requesting an accounting, seeking reimbursement from Daughter #1 for money allegedly taken for personal use, and declaring that Son's estate was a proper 1/3 beneficiary of the Family Trust. Daughter #1 asserted as affirmative defenses that Wife lacked standing because the Family Trust was to be divided among the children that were then living at the time of the option expiration, and that Wife's filing invoked the Family Trust's in terrorem clause and Wife had thereby forfeited any share for Son's estate. Daughter #1 also filed counterclaims seeking a determination that only she and Daughter #2 were trust beneficiaries, and for repayment by Wife of the \$730,000 received by Wife. Daughter #2 entered the case and consented to judgment for Daughter #1. The parties agreed to bifurcate issues and have the court first hear the issues of whether the two Daughters were the only Family Trust beneficiaries, and whether Wife's lawsuit violated the in terrorem clause. The trial court found that Son's estate was a proper 1/3 beneficiary under the language in the trust document, finding that the plain meaning of the language created a vested interest in all children living at the time of Mother's death, which included Son. Further, only the operating assets of the family business were subject to the purchase option and that the date of vesting for all remaining trust assets was Mother's date of death. Wife had standing to bring the action, and further, Wife's actions did not violate the no-contest clause. Daughter #1 appealed.

**HOLDING:** Affirmed. The paramount rule in construing a trust is the settlor's intent, ascertained from the four corners of the document and not giving any particular clause undue preference. The trust created a remainder interest that was conditioned upon the beneficiary's survival because it used the words "then living" to describe who was entitled to a share – the question as to what point in time "then living" should apply was either at Mother's death in September 2012, or at the expiration of the purchase option period in September 2013. Daughter #1's argument that Son needed to be "then living" at the time of the expiration of the option was incorrect because the law favors vested estates and estates shall be held to vest at the earliest possible period, which was Mother's death and not the option expiration. The option clause only applied to the specific trust property in question, which was the family business. Further, there was no specific language indicating the settlor's intent that vesting should be delayed – instead, there was language requiring immediate distribution to each child.

### **Jurisdiction over Trustee and Trust Assets**

***North Carolina Dept. of Revenue v. Kaestner Family Trust*, - U.S. -, 139 S. Ct. 2213 (2019)(No. 18-457, 6/21/19).**

A settlor domiciled in New York established a trust in New York and appointed a New York Trustee. The trust agreement provided that the Trustee had absolute discretion to distribute the

trust's assets to the beneficiary. One beneficiary moved to North Carolina, and the Trustee subsequently divided the initial trust into three separate sub-trusts, one for the benefit of the North Carolina resident. North Carolina assessed a tax of more than \$1.3 million for tax years 2005-2008, even though the North Carolina resident received no distributions from the trust during those years. The trustee paid the tax under protest and then sued in state court arguing that the tax as applied to the Trust violates the Fourteenth Amendment's Due Process Clause. The state courts agreed with the Trustee, and the State appealed to the Supreme Court of the United States.

**HOLDING:** Affirmed. The Due Process Clause limits States to imposing taxes only if it "bea[r] fiscal relation to protection, opportunities and benefits given by the state." (citation omitted). When a state bases its tax on the in-state residence of a trust beneficiary, the Constitution requires an inquiry into what the beneficiary controls or possesses and how that interest relates to the object of the tax. In this case, the beneficiary did not receive any income from the trust during the years in question, had no right to demand trust income or otherwise control, possess, or enjoy the trust assets, and third, they could not count on receiving any specific amount of trust income in the future. North Carolina's attempt to tax the trust assets in such circumstances violates the Due Process Clause.

### **Venue for Trust Administration Disputes**

***State of Missouri ex rel. Board of Curators of the University of Missouri v. Green*, 576 S.W.3d 183 (2019)**

Testator bequeathed certain assets to Curators "as trustees, in trust..." A beneficiary of the Trust brought an action against Curators in St. Louis, County claiming the Curators breached their contractual duties, among other allegations, and therefore, the general venue statute applied which allowed it to bring the action where the Curators had a campus. Curators argued the action involved the administration of a Trust, and therefore, the specific venue statute of the Uniform Trust Code applied, and since the principal place of administration of the trust was in Boone County, venue should be transferred. Upon denial of the Curator's motion to transfer venue, Curators sought a writ of mandamus with the Supreme Court.

**HOLDING:** A specific venue statute supersedes a general venue statute. In this case, the lawsuit involves the administration of the trust. Therefore, Section 456.2-204.1 RSMo controls, which provides venue in the probate division of the circuit court where the trust is or could be properly registered. Where administration of the Trust is in Missouri, the registration of the Trust can occur where the principal place of administration is located. § 456.027.1. Unless otherwise designated in the trust instrument, the principal place of administration for a sole trustee is the trustee's usual place of business where the records pertaining to the trust are kept. §456.027.3. Writ granted.

### **Trust Claims**

***Whitmoor Realty, LLC v. Beckerle*, 588 S.W.3d 573 (Mo. App. E.D. 2019)**

The grantor/trustee executed, in her capacity as trustee, a promissory note to Claimant. After foreclosure, Claimant's counsel sent a letter detailing the remaining balance. After not receiving the funds, Claimant filed a lawsuit against Trustee and the Trust. While the action was pending Trustee died and her husband was appointed a successor trustee. Successor Trustee published notice to creditors allegedly pursuant to § 456.5-505 which requires creditors to present notice of their claims to the Trustee within six months of first publication. After Claimant did not present

notice of its claim within six months, Successor Trustee filed a motion to dismiss the lawsuit. The Court denied the Successor Trustee's motion to dismiss and granted judgment in favor of Claimant. Successor Trustee appealed.

**HOLDING:** Section 456.5-505 is silent with respect to creditors of a trust versus creditors of a settlor of a trust. The section specifically refers to "debts of a deceased settlor...". Interpreting the statute the Court of Appeals found that Section 456.5-505 does not apply to creditors of the trust. Therefore, since Claimant was a creditor of the Trust its claim was not barred. Affirmed.

**Trust Construction/Parental Representation of Minors/Removal/Attorneys' Fees**

***In the Matter of: T.R. Potter, Jr. Exempt Trust fbo John M. Potter, 593 S.W.3d 556 (Mo. App. E.D. 2019).***

Grantor created an irrevocable generation-skipping tax-exempt trust. There was a corporate (Corporate Trustee) and individual (Individual Trustee) of one sub-share created for the benefit of a certain beneficiary (Beneficiary). The Corporate Trustee paid certain income to Beneficiary for him to use as capital in his business, without asking for Beneficiary to provide financial information (although Corporate Trustee was aware of his financial holdings with its bank) and without the consent of Individual Trustee. Corporate Trustee sent bi-annual trust reports to Beneficiary and Individual Trustee, and Individual Trustee did not object. After a new trust officer became involved, Corporate Trustee began asking Individual Trustee for consent to make income distributions to Beneficiary. Individual Trustee demanded financial information from Beneficiary before he would respond to the request. Corporate Trustee and Beneficiary both took the position that his financial information was not required by the trust agreement prior to making the distribution of income. To resolve the dispute, Corporate Trustee filed a petition for instructions regarding the circumstances under which income could be distributed to Beneficiary. Individual Trustee filed a counterclaim alleging: 1) breach of fiduciary duty for Corporate Trustee unilaterally making income distributions; 2) requesting a declaration that Individual Trustee was not liable for the past income distributions; 3) and seeking compensation. Beneficiary filed a cross-claim seeking: 1) breach of fiduciary duty against Individual Trustee; 2) reformation of trust provision for authorizing Individual Trustee to request Corporate Trustee to resign; 3) requesting removal of Individual Trustee; and 4) seeking to modify trust agreement to allow Corporate Trustee sole authority to make income distributions. During the pendency of the lawsuit, Beneficiary's Wife filed a ratification and consent to the income distribution on behalf of her and Beneficiary's minor child, and a contingent remainder beneficiary filed his ratification and consent.

The Probate Division found as follows:

- 1) The Trust Agreement authorized income distribution without consideration of Beneficiary's financial circumstances;
- 2) No breach of fiduciary duty of Corporate Trustee;
- 3) Breach of fiduciary duty of Individual Trustee;
- 4) Granted request to remove Individual Trustee; and
- 5) Awarded attorneys' fees and costs against Individual Trustee.

Individual Trustee appealed.

## HOLDING:

- 1) Consideration of Beneficiary's financial circumstances – The Trust Agreement provided: “The Trustees shall use and apply so much of the net income of each descendant's share (separate trust) as they may deem necessary or advisable to or for the benefit of such descendant.” An analysis of the “necessary or advisable” standard turns on whether the trust constitutes an absolute gift or is dependent on the beneficiary's need. When the trust agreement indicates that the trustee “shall” pay such income, then normally it is interpreted to be an absolute gift and no reference to financial ability is necessary. When the trustee “may” pay such income, then normally financial resources of the beneficiary are considered by the trustee. In this case, the trust agreement is not an absolute gift and therefore the trial court incorrectly interpreted the trust agreement to be an absolute gift. The Trustees do have the authority to request financial information from Beneficiary. Beneficiary is not required to provide such information, but Trustees could consider that in making their discretionary determination.
- 2) Breach of Duty of Corporate Trustee – Corporate Trustee did breach its duty to consult with Individual Trustee. However, there was no showing of harm because Individual Trustee did not show that the income distributions would not have been made in any event.
- 3) Breach of Fiduciary Duty / Removal of Individual Trustee – Individual Trustee breached his duty by not reviewing the trust reports and not realizing that income had been paid to Beneficiary for a period of time. Additionally, the conflict between Individual Trustee and other interested persons, including the Beneficiary, supports the removal of Individual Trustee.
- 4) Attorneys' Fees – Awarding attorneys' fees of more than \$236,000, and additional costs, against Individual Trustee should be remanded in light of the appellate court ruling.
- 5) Mother (Wife) Ratification for Minor – A parent can represent their minor child when there is no conflict of interests. In this case, the Mother admitted that the business, of which the income distributions were to be used for, was part of the family financial plan. Therefore, her indirect interest in the income distributions to her husband created a conflict of interest and she could not represent their minor child in the litigation.

### **Section 456.4-420 Safe Harbor – No Contest Clause**

***Knopik v. Shelby Investments, LLC*, -- S.W.3d --, 2020 WL 1270754 (Mo. 2020)(SC97985, 3/17/20).**

Settlor created an irrevocable trust naming respondent as trustee (“Trustee”). Petitioner (“Beneficiary”) was to receive \$100 per month mandatory distribution for a specific period of time. The trust agreement contained a broad no contest clause which provided, in part, that Beneficiary would forfeit his interest in the trust if he sued Trustee for maladministration or sought to remove Trustee, with or without cause. After making one mandatory distribution to Beneficiary, Trustee ceased making the mandatory monthly distributions to Beneficiary and declared that it never would. Beneficiary then filed a petition alleging breach of trust and sought Trustee's removal. Beneficiary did not seek an interlocutory determination as to whether his petition would violate

the no-contest clause as allowed by § 456.4-420 (the “Safe Harbor”). Trustee counterclaimed asserting that Beneficiary violated the no contest clause and therefore his petition should be dismissed. The Court granted Trustee’s motion for summary judgment finding that Beneficiary did violate the no contest clause by filing his petition. Beneficiary appealed.

**HOLDING:** On appeal, Beneficiary alleged that summary judgment was improper because: 1) a no contest clause cannot apply to breach of trust or removal claims, as opposed to challenges to the validity of the trust instrument, as doing so is against public policy; and 2) there should be a good faith/probably cause exception to the enforceability of a no contest clause. The Supreme Court agreed that past cases in Missouri had concerned challenges to the validity of the trust instrument at issue, rather than breach of trust or removal actions, although those cases could be construed as potentially applicable to breach of trust or removal actions. However, the Safe Harbor provision provided Beneficiary with the procedure for seeking a court ruling on the applicability of the no contest clause, and because Beneficiary did not avail himself of this Safe Harbor protection, he is unable to complain on appeal that the no contest clause was enforced against him. Affirmed.

[Note: A concurring opinion raised the possibility that the entire case was manufactured in order to force the courts to provide an advisory opinion. The opinion noted a journal article that made this argument, and while the opinion stated there was insufficient information in the record to make that determination, the concurring judge pointed out the risks to attorneys who may be inclined to engage in subterfuge in order to obtain advisory opinions.]

**Burden of Production/Proof – Estate Planning Documents**  
***Netherton v. Netherton*, 593 S.W.3d 654 (Mo. App. W.D. 2019).**

In 2011 Ann and her husband executed various estate planning documents and beneficiary designations leaving their estates equally to their three children (“Children”). Her husband died in 2012. Beginning in 2015, Ann had a series of strokes and other medical issues. Beginning in February of 2017, Ann executed amendments to her Trust, executed a new will, and signed new beneficiary designation forms all favoring two grandchildren (“Grandchild”) and disfavoring Children. On July 24, 2017, an emergency guardianship and conservatorship order was entered. On July 28, 2017, Ann died. Children brought actions to contest the amendments to the trust instruments, the new Will, and the new beneficiary designations on the grounds that Ann lacked capacity and was unduly influenced by Grandchild. (The second grandchild who benefited from the estate planning revisions agreed with Children and was aligned as a respondent.). Children requested the Court to re-instate the original estate planning documents. The matters were consolidated for a jury trial. The Court instructed the jury that Grandchild had the burden to prove by clear and convincing evidence that Ann had the capacity to amend her Trust and to execute the new beneficiary designations, while the Children had the burden of proving undue influence. The jury found in favor of Children and against Grandchild on all estate planning documents. Grandchild appealed alleging as error the jury instruction which required him to prove by clear and convincing evidence that Ann had capacity to execute the documents. [Grandchild appealed on other grounds that are not discussed herein.]

**HOLDING: Trust Instrument.** The capacity to execute a trust instrument (“Trust”) is the same as for a Will. The proponent of a Trust or Will has the burden of making a prima facie case of due

execution and that the grantor or testator had the capacity to execute the Trust or Will. Once the proponent makes a prima facie showing of due execution and capacity, the burden of production of evidence shifts to the opponent who must adduce substantial evidence of lack of capacity. But the ultimate burden of proof always remains with the proponent of the Trust or Will. The evidence must be clear and convincing. Therefore, the jury instruction which required Grandchild to prove Ann's capacity to execute the trust amendments, together with the Will, by clear and convincing evidence was proper. **Beneficiary Designation.** A beneficiary designation is governed by principles of contract law. A party to a contract must have capacity to enter into a contract. The standard for capacity to contract is higher than testamentary capacity. But the burden to prove that the party to the contract had the capacity to contract is on the proponent of the contract, just as it is for estate planning documents. The burden to prove the capacity to contract is by clear and convincing evidence. There are shifting burdens of production of evidence, just as for estate planning documents, but the ultimate burden of proof of capacity remains with the proponent of the contract, in this case, a beneficiary designation. Therefore, the Court was correct in instructing the jury that the burden of proof in proving capacity of Ann in executing the beneficiary designations was upon Grandchild, by clear and convincing evidence, while the burden of proof to prove undue influence was upon Children. Affirmed.

### **Trust Interpretation and Distribution Standard**

***Arthaud v. Arthaud*, -- S.W.3d --, (Mo. App. E.D. 2020)(ED107988, 5/5/20).**

Two brothers, Paul and Dean, were the only children of their father Gordon. Paul had no children and Dean had one child, Gordon II. The brothers became Co-Trustees of their father's revocable trust after his death in 2008. The trust provided that upon the death of the father (if their mother predeceased him), the remaining generation-skipping transfer tax exemption (\$2,000,000 at the time of the father's death) would be allocated to a GST Exempt Trust and the balance would be allocated to a GST Non-Exempt Trust. The trust provided that those trust shares should be further divided into equal shares to create one share for each of the father's living children and one share for each deceased child who had living children. The Trustees were authorized to make discretionary distributions of income and/or principal for the support and maintenance of the primary beneficiary's comfort, health and education and were also authorized to either distribute any remaining net income to the beneficiary or add it to the principal of the trust share. The trust further provided that after attaining age 35, the primary beneficiary had the right to demand 5% of the aggregate value of his GST Exempt Trust annually and if such amount was less than \$5,000, the primary beneficiary could demand additional distributions so that the total amount distributed annually was \$5,000. Upon the death of the primary beneficiary, the balance was to be distributed, subject to a power of appointment, to the primary beneficiary's descendants, and if none, to the Grantor's living descendants. Each primary beneficiary over the age of 21 was to become the sole trustee of the GST Exempt Trust created for that descendant. In 2017, Paul filed an action against Dean demanding his 5% annual distribution from the GST Exempt Trust for years 2016 and 2017; requesting an order for an accounting; requesting a declaration of rights and duties of the parties as trustees and beneficiaries; and requesting an order removing Dean as co-trustee of the trust. Dean counterclaimed requesting a declaratory judgment that he and Paul were not entitled to the 5% annual distributions from the GST Exempt Trust and for Paul's removal as trustee. Testimony at trial showed that at the time of the death of their father, the total trust assets were under \$2,000,000. The trustees had not divided the trust into GST Exempt and Non-Exempt shares, nor had they further divided those trusts to create one share for each of themselves as their father's

living children. They were serving as co-trustees of the whole fund. The trust property comprised the family farmhouse and proceeds of sales of pieces of real estate; Paul lived on the farm and took care of the property and Dean managed the investible assets from the sales proceeds from the other properties. Paul had made demands for the annual distribution from the GST Exempt Trust and Paul and Dean had in fact received distributions in 2016 and 2017. The trial court found that Paul and Dean were the beneficiaries of the trust within the meaning of the trust document, that Paul had made proper demands for distribution in 2016 and 2017, that Paul and Dean were serving as co-trustees since 2008 but with delineated duties, and that they should have each been serving as sole trustees of separate shares. The trial court ordered payments to Paul of 5% of the aggregate value of the trust's assets for 2016 and 2017, a payment to Dean of 5% of the aggregate value of the trust's assets for 2017. The trial court further ordered that after such payments were made, the trustees must divide the balance of the trust to create two separate trusts, with each brother to serve as trustee of his own trust. The trial court amended its judgment to clarify that the payments were not to exceed 5% of the aggregate value of the trust under the formula (instead of 5% of the aggregate value of the trust). Dean and his son Gordon II (who was added as a joint defendant at trial) appealed, arguing 1) that the court misconstrued the definition of "primary beneficiary" and that the Grantor had intended for such term to refer to Gordon II, not Paul or Dean; 2) that the verdict was against the weight of the evidence because in ordering the 2016 and 2017 distributions to Paul the court did not take into account that Paul had already received some distributions for those years; and 3) that the judgment was against the weight of the evidence and included errors of law because Paul should be removed as trustee due to his lack of skills and experience and his refusal to cooperate with Dean in administering the trust.

**HOLDING:** Remanded for recalculation of the 2016 and 2017 distributions but affirmed in all other respects. The Grantor intended for the primary beneficiaries of the trust to be his children who were living at his death. Dean and Gordon II argued that the fact that the Grantor used certain ages in the trust agreement meant that he could not have intended for those provisions to apply to his children because they were over those ages at the time the Grantor signed the document (age 35 to create the standard for the annual GST Exempt distribution and age 21 to determine when a beneficiary would become sole trustee). The fact that Gordon II was the Grantor's only family member under those ages did not mean that the Grantor did not intend to provide for his living children as stated in the agreement and the trial court properly looked to the four corners of the trust document in determining the Grantor's intent. The court held that the trial court did err in ordering a 5% distribution of the aggregate value of the trust because it did not take into account the fact that Paul and Dean had already received some distributions under that standard in those years and remanded for a recalculation to take those distributions into account. The request to remove Paul as trustee was disposed of in the trial court's order to divide the shares and for Paul and Dean to each become sole trustees of their individual trusts.

### **Trust Administration Disputes**

***Lambley v. Diehl*, - S.W.3d – (Mo. App. W.D. 2020)(WD82645 consolidated with WD82652, 6/9/20).**

Brother served as trustee of parents' trusts. Parents were farmers and most of trust assets were farmland, cattle and machinery. After death of both parents, Sisters brought an action requesting Brother's removal as trustee, and accounting and financial restitution. Brother counter- and cross-claimed asserting counts of quantum meruit, unjust enrichment, and contribution, as well as

seeking a declaration of rights and instructions from the trial court. After trial, the court denied Sister's claims and found in favor of Kim on each of his claims. Sisters appealed.

**HOLDING:** Brother sought and received a judgment for reimbursement from Mom's Trust for custom farm work he performed. Sisters argued on appeal that there was insufficient evidence that Mom's Trust received and retained a benefit from the custom farm work because Dad, who was the income beneficiary of Mom's Trust, actually received and retained the benefit. The appellate court disagreed with this argument because both the Trust, and a beneficiary of the Trust (Dad) received and retained the benefit. Thus, that argument was rejected. However, Sisters raised an affirmative defense that services rendered to family members should be presumed to be gratuitous and Brother failed to overcome that presumption. The appellate court determined that the trial court incorrectly held as a matter of law that the presumption could not apply in trust matters finding that if the beneficiaries of the trust are family members, then the presumption could apply depending upon the specific facts. In this case, there were inconsistent findings by the trial court whether there was an agreement to compensate Brother for his services that would overcome the presumption, if it in fact applies. Therefore, this issue was reversed and remanded to the trial court for further hearing. It was also noted that the original judge that heard the case is retired and the appellate court noted that the new judge may need to rehear evidence or obtain a stipulation of the parties. Sisters also argued there was insufficient evidence to support Brother's claim for unjust enrichment regarding certain loans, which the appellate court denied. Sisters appealed a denial of prejudgment interest in regard to rent owed by Brother to Trust and a trust distribution. The appellate court found that prejudgment interest could be awarded in equitable actions, such as trust actions, even though no statute or contract authorized it. However, in the facts of this case Sisters did not establish that the trial court erred in denying prejudgment interest. Finally, Sisters claim that the trial court merely rubber-stamped the Brother's proposed judgment was not properly preserved. Affirmed in part and reversed and remanded in part.

**No-Contest Clause – Standing of Trustee to Appeal Interlocutory Ruling  
*Wooldridge v. Hull*, - S.W.3d – (Mo. App. S.D. 2020)(SD36218, 7/8/20).**

After death of Father, Daughter brought action alleging certain trust amendments to Mother and Father's Trusts were invalid because the lacked capacity and were subjected to undue influence. She sought an interlocutory determination pursuant to § 456.4-420 RSMo that her action did not violate the in terrorem clauses in the trust amendments. After the trial court found none of the counts in her petition violated the in terrorem clause, Trustee filed an interlocutory appeal pursuant to § 456.4-420 RSMo.

**HOLDING:** The appellate court brought up the issue of standing sua sponte by questioning whether the Trustee was an aggrieved party with standing to appeal. Trustee first argued that § 456.4-420 RSMo. is a special statute providing for an appeal which does not require the appellant to be aggrieved. The appellate court rejected this argument by construing subsection three of the statute to make the right to interlocutory appeal the same as for final judgments. As such, the appellant must be aggrieved. The Trustee argued in the alternative that he was aggrieved because

the order interfered with his right and duty to protect and defend the terms of the trust. The appellate court determined it does not interfere with his rights and duties as trustee because the court will ultimately determine who should receive the property and the trustee will be properly informed as to who to distribute. Finally, the appellate court rejected the argument that the Trustee represents the interests of the aggrieved beneficiaries finding that although in certain circumstances a Trustee can represent the interests of aggrieved beneficiaries, in this case the Trustee was also a beneficiary so it would present a conflict of interest for him to appeal on behalf of the aggrieved beneficiaries. Affirmed.

### **Registration of Trust – Effect of, Challenges to Registration of Trust**

***Brightwell v. Boesl (In re the Matter of: Annaliese Brightwell Trust)*, - S.W.3d - (Mo. App. W.D. 2020) (WD83296, July 21, 2020, corrected July 22, 2020).**

Grantor Annaliese A. Brightwell executed a revocable living trust which named her son, Raymond Brightwell, as successor trustee (the “Original Trust”). Grantor thereafter executed first and second amendments to the trust, which modified the successor trustee provisions to replace Grantor’s son as successor trustee with Grantor’s daughter-in-law, Beate Boesl (the “Amended Trust”). Upon Grantor’s death, son filed a Registration of Trust statement for the Original Trust pursuant to § 456.027 R.S.Mo. In response, daughter-in-law filed a Motion to Dismiss the registration of the Original Trust, arguing that the Amended Trust revoked the Original Trust and son’s designation as successor trustee. Daughter-in-law later abandoned her Motion to Dismiss in favor of a Motion for Summary Judgment on the same basis. In responsive pleadings thereto, son argued the Amended Trust was invalid for undue influence, that the trust registration process was an improper forum for determining contested issues regarding the validity of a trust, and that a proper judicial proceeding to determine the validity of a trust requires notice to all interested parties, including beneficiaries. At the hearing on daughter-in-law’s Motion for Summary Judgment, son again argued the registration of the Original Trust was an uncontested, administrative procedure, and thus an improper forum to determine the validity of the trust instruments, including the Original and Amended Trusts. Over son’s objection, however, the Court allowed testimony from two witnesses in support of daughter-in-law’s Motion for Summary Judgment and the validity of the Amended Trust. At the close of evidence, the Court entered Judgment in favor of daughter-in-law, finding the Original Trust was no longer in effect, the Amended Trust was in full force and effect, and Ordering the dismissal of son’s Registration of Trust statement, with prejudice. Son appealed, arguing *inter alia* the Court erred by determining the validity of the Original and Amended Trusts as part of the trust registration process, and by adjudicating the validity of the Original and Amended Trusts without notice to all interested parties.

**HOLDING:** Reversed. The plain language of § 456.027 R.S.Mo. describes an uncontested, administrative process whereby the registration of a trust is accomplished upon filing, and affords no discretion to a court clerk to accept or deny any such filing. Accordingly, son’s Registration of Trust statement had the “automatic effect” of registering the Original Trust at the moment the statement was filed, and established nothing more than (1) the location where interested persons can locate the registered trust, and (2) personal jurisdiction over the registering trustee and other interested persons in later filed judicial proceedings involving the internal affairs of the registered trust. The Appellate Court referenced the Comment to Article VII of the Uniform Probate Code in support of the Court’s reasoning, which describes the trust registration process as requiring “no judicial action or determination,” and a “simple act[] on the part of the trustee...[to]...place certain

information on file with the court.” Taken together, the Appellate Court determined son’s Registration of Trust statement was not susceptible to challenge by a Rule 55.27 motion to dismiss or Rule 74.04 motion for summary judgment: as an uncontested, administrative process requiring no judicial action or determination, son’s Registration of Trust statement was not a “pleading” setting forth claims under Rule 55.27, nor did the statement contain any “claims, counterclaims, cross-claims, or requests for declaratory judgment” against daughter-in-law under Rule 74.04. Instead, proceedings to determine the validity of a trust or to “release” a trust registration statement are properly raised in a duly initiated judicial proceeding with notice to all interested parties, not as part of the trust registration process pursuant to § 456.027 R.S.Mo. *et seq.* On this basis, the Court confirmed the right of daughter-in-law to challenge the validity of the Original Trust and to request the Court release the Registration of Trust statement for the Original Trust, but limited such right to the forum of a duly initiated judicial proceeding, not the trust registration process.

#### **D. MISCELLANEOUS**

##### **Right to Jury**

***Baxter v. Stidham, 557 S.W.3d 527 (Mo. App. S.D. 2019).***

Parents deeded their farm and store real estate to Children without consideration. Creditors of Parents filed an action against Parents and Children, alleging that such transfer was made to defraud Creditors and hinder or delay collection of money that Parents owed Creditors. The petition sought both damages and equitable relief. Before the fraudulent conveyance action came to trial, Parents declared bankruptcy, which prevented Creditors from pursuing damages. As the jury trial approached, the parties filed proposed jury instructions that all indicated that no damage instructions would be submitted to the jury. On the day of the trial, the potential jurors were at the courthouse and the court noted during pre-trial matters that the case was pled as a statutory fraudulent conveyance case and the relief requested was for the conveyance to be set aside. The Court stated its inclination to dismiss the jury and have the matter tried strictly to the Court. Counsel for Creditors requested that a jury find just one fact issue of fraudulent intent; counsel for Parents and counsel for Children both indicated that they were not prepared to waive their clients’ rights to a jury trial, “if one existed at that point.” The court discharged the jury, conducted a bench trial, and ordered the conveyance set aside. No damages or interest were sought or awarded. Parents appealed, arguing that a) Creditors did not have a money judgment against Parents that would entitle the court to award property held in tenancy by the entirety, and b) that the trial court erred in denying them a jury trial because Creditors’ petition prayed for both damages and equitable relief.

**HOLDING:** Affirmed. With respect to the money judgment argument, Parents raised the issue that the money judgment was not properly structured as joint and several liability too late; a judgment must be challenged by direct appeal and cannot be collaterally attacked in a subsequent proceeding. With respect to Parents’ right to a jury trial, Parents did not allege any error at trial or present the issue to the trial court for decision. Their declination to waive their right to a jury trial “if one exists” was not sufficient to assert or support that they indeed had that right or make it known to the court that they wanted the court to take any action with respect to the asserted right. The Creditors’ pleadings alone seeking damages are not enough to dictate the right to a jury trial, although had the Creditors not been forced to abandon damage claims due to Parents’ bankruptcy, Parents would have had a right to a jury. However, because there were only equitable claims pending, no prejudice occurred in proceeding with a bench trial.

### **Constructive Trust**

***Douglass v. Douglass*, 570 S.W.3d 130 (Mo. App. W.D. 2019).**

Brothers Michael and Phillip engaged in a series of real estate transactions between 1996 and 2016. Michael bought Residence 1 in 1996 so Phillip would have a place to live. In 1999, Michael conveyed Residence 1 to other family members when he had legal problems with the understanding they would hold title on Michael's behalf. In 2001, those family members conveyed Residence 1 to Phillip. In 2004, Phillip sold Residence 1. Michael claimed that the sales proceeds from Residence 1 were being held by Phillip for Michael's benefit. In 2005, Michael purchased another house for Phillip; he paid for Residence 2 with some of his own funds, with the sales proceeds from Residence 1 and with funds from a joint account owned by Michael and Phillip. Title to Residence 2 was conveyed to Michael and Phillip as joint tenants with right of survivorship. Phillip lived in Residence 2. In 2012, Phillip signed a quit claim deed conveying Residence 2 to a corporation on behalf of himself and as the purported agent under a power of attorney for Michael. The corporation then deeded Residence 2 back to Phillip. In 2016, Phillip borrowed money from a lender who recorded a deed of trust on Residence 2. Michael filed a petition seeking to quiet title in Residence 2, naming Phillip and the lender as parties. Two days before trial, Residence 2 burned down and Michael amended his petition to request that he share in the interest in the homeowners' insurance proceeds. Phillip stipulated at trial that his deed to the corporation was void and agreed that Michael should be restored to title. The trial court entered judgment for Michael and against Phillip, imposed a constructive trust in favor of Michael in the amount of 50% of the insurance proceeds, ordered that 50% of the insurance proceeds be payable to Michael and Phillip in equal shares, ordered Michael's name be restored to title of Residence 2, that Residence 2 be sold at a partition sale and that the proceeds be equally divided between Michael and Phillip. Phillip appealed only the constructive trust portion of the judgment, arguing that factual findings did not support the imposition of a constructive trust, specifically that three factual findings made in specific paragraphs were completely unsupported by the record.

**HOLDING:** Affirmed. Imposing a constructive trust is an appropriate equitable remedy in a multitude of situations to be employed to remedy different types of injustice. Here, Phillip needed to prove that the three challenged factual findings were not only completely unsupported by the record, but also that these three findings if erroneous were what caused the trial court to impose the constructive trust. The trial court properly found multiple facts that would lead it to impose a constructive trust as a remedy, such as facts tying the sales proceeds from Residence 1 to the purchase of Residence 2, Residence 2 being conveyed to Michael and Phillip as joint tenants, and Phillip's admission that upon partition the proceeds should be equally divided between the brothers. The specific facts challenged by Phillip are not essential to the trial court's judgment ordering a constructive trust.

### **Guardian ad litem – Rule 52.02(k)**

***Watkins v. Goose Creek Lake trustees, Inc.*, -- S.W.3d --, 2020 WL 1921053 (Mo. App. E.D. 2020)(ED107966, 4/21/20).**

Richard Watkins ("Richard") initiated litigation against his subdivision, which also filed counterclaims. The case progressed slowly, and eventually, during a hearing at which Richard struggled with memory issues, his counsel filed "suggestions of incapacity." After inquiring into Richard's mental condition, the trial court found it was proper to appoint a guardian ad litem for

Richard. While it was not specifically stated in the suggestions of incapacity upon what authority a guardian ad litem was to be appointed, the appellate court, by footnote, stated that since it was Richard's capacity to protect his own interests in the present litigation that was at issue before the Court, Rule 52.02(k) was the proper authority. Later, after interviewing Richard and reviewing his medical and mental health records, the GAL determined that Richard was not incompetent to represent his own interests and the GAL filed a motion to withdraw. After reviewing the GAL's report, the trial court allowed him to withdraw noting the GAL's opinion that Richard was not incompetent. Eventually, a final hearing was held, at which time Richard did not appear or participate, and judgment was entered against him. Richard's later appointed limited guardians and conservators appealed.

**HOLDING:** Rule 52.02(k) involves a two-step process. First, the Court must inquire into a person's mental condition if it affirmatively appears that a party is mentally ill or incompetent. Second, after inquiry, the Court decides as to whether to appoint a guardian ad litem. The Court does not have the authority to appoint a guardian ad litem to make that determination and cannot order the respondent to undergo a mental or medical evaluation. In this case, while the trial court did not appoint a GAL to make the determination of Richard's incapacity to represent himself, by granting the GAL's motion to withdraw, that is effectively what the GAL did. The GAL only has the authority to represent Richard in the litigation, not the authority to examine a party and determine the party's competency. Reversed and remanded.

#### **Fraud of Marital Rights in IRA (Sect. 474.150)**

***Carmack v. Carmack, et. al.*, -- S.W.3d -- (Mo. App. W.D. 2020)(WD83184, 6/23/20).**

Husband and Wife were married approximately 20 years. Husband had an IRA that named Wife as beneficiary. When Wife was placed in a long-term care facility, Husband named his siblings as the beneficiaries of the IRA. When Husband died, the IRA constituted approximately 80% of his assets. Wife brought a direct action against Siblings claiming the beneficiary designation was in fraud of her marital rights pursuant to § 474.150. After an adverse decision, Siblings appealed.

**HOLDING:** Siblings brought two points on appeal. First, Siblings argued § 474.150 did not apply since the IRA was a non-probate transfer and was not part of Husband's estate. In support, Siblings cited *Bishop v. Eckhard*, 607 S.W. 716 (Mo. App. E.D. 1980) which held this law did not apply to employer provided life insurance and retirement annuity. The appellate court distinguished *Bishop* by pointing out that life insurance and the annuity could never be part of the decedent's estate. "Thus, the question to be asked is whether property 'transferred' by a beneficiary designation is of a nature that it would have been a part of the decedent spouse's estate in the absence of a beneficiary designation." In this case, the IRA would have been part of Husband's Estate and therefore § 474.150 applies. Second, Siblings argued that the judgment was not supported by substantial evidence to show that Husband made the designation without consideration with the intent and purpose of defeating the marital rights of Wife. The appellate court examined certain factors identified in prior cases, which were: 1) whether the transfer lacked consideration; 2) whether Husband retained control over the asset; 3) whether the amount of transfer was disproportionate compared to the value of the total estate; and 4) whether Husband made the transfer openly and with frank disclosure. There was evidence in each of the factors which supported the trial court's finding that the transfer was in fraud of marital rights. Affirmed.

## **EXECUTIVE ORDER 20-08**

WHEREAS, on March 13, 2020, Executive Order 20-02 invoked the provisions of sections 44.100 and 44.110, RSMo, and declared a state of emergency that exists in the State of Missouri due to the spread of COVID-19; and

WHEREAS, I have been advised by the Missouri Department of Health and Senior Services and the State Emergency Management Agency that there have been confirmed cases of COVID-19 in this state; and

WHEREAS, COVID-19 can result in mild or severe symptoms, is highly contagious, and is spread through close contact between persons and respiratory transmission; and

WHEREAS, COVID-19 poses a serious health risk for Missouri residents and visitors; and

WHEREAS, the spread of COVID-19 and identification of additional cases in Missouri is likely to continue, and steps should be taken to prevent a substantial risk to public health and safety; and

WHEREAS, Secretary of State John R Ashcroft, pursuant to Executive Order 20-04 Section 10, has requested my office to issue an executive order on remote electronic notarization; and

WHEREAS, Missouri citizens and businesses require a secure and safe method by which to execute important legal documents; and

NOW, THEREFORE, I, MICHAEL L. PARSON, GOVERNOR OF THE STATE OF MISSOURI, by virtue of the authority vested in me by the Constitution and the Laws of the State of Missouri, including chapter 44, RSMo, hereby order that the requirement of personal appearance before a notary public under the laws of this state is suspended to the extent that any notarial act is authorized to be performed utilizing audio-video technology, provided that the following conditions are met:

1. Any notarial act performed through video conference in compliance with this order shall have the same force, effect, and validity as any other notarial act performed in compliance with Missouri law, and may be relied upon to the same extent as any other notarial act under Missouri law.
2. That the document must contain a notarial certificate, a jurat or acknowledgement, which states the principal appeared remotely pursuant to Executive Order 20-08.

3. Any person whose signature is to be notarized must display a valid photo ID to the notary during the video conference if the person is not personally or otherwise known to the notary.
4. That the person must affirmatively represent that he or she is physically situated in the State of Missouri.
5. The video conference is a live, interactive audio-visual communication between the principal, notary, and other necessary persons, which allows for observation, direct interaction, and communication at the time of signing.
6. That the notary shall record in their journal the exact time and software used to perform the notarial act along with all other required information, absent the signature of the principal.
7. That the notary must be physically located in the State of Missouri and state which county they are physically in for the jurisdiction on the notarial certificate.
8. For electronic documents:
  - a. That the Notary Public is registered as an electronic notary public;
  - b. That the document must be signed electronically with software approved by the secretary of state as an acceptable medium to conduct the transaction; which may include software requiring third party multifactor authentication; and
  - c. That the notary shall affix their electronic notary seal to the electronic document.
9. For paper documents:
  - a. A tangible or electronic copy of the signed document must be mailed or otherwise transmitted to the notary within five business days; and
  - b. To the extent that any Missouri state law requires the physical presence of any testator, settlor, principal, witness, notary, or other person, for the effective execution of any estate planning document, such as a Will, Trust or power of attorney, or a self-proving affidavit of the execution of such document, such provisions are temporarily suspended or waived, and satisfied if the necessary parties are present through a video conference as set forth in section 5.
10. That if the document needs to be presented in a paper medium, it shall satisfy the requirements of being an original document, and prima facie evidence, if the notary prints the document and affixes an attestation stating that is a true and correct copy of the electronic document, shall state it was performed pursuant to Executive Order 20-08 and the notary signs and affixes their rubber stamp notary seal.
11. That the fees allowed for notarization under this executive order shall be the same as those allowed for other notarial acts, except a fee charged for the use of

a Remote Online Notary platform or service shall not be considered a fee for a notarial act pursuant to section 486.350, RSMo.

12. That the Secretary of State shall retain the powers provided to him under the law to investigate and adjudicate any notary complaint related to the methods of notarization under this executive order.

This order shall terminate on May 15, 2020, unless extended in whole or in part.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson, on this 6<sup>th</sup> day of April, 2020.

[Michael L. Parson's signature]

MICHAEL L. PARSON  
GOVERNOR

ATTEST:

[Jay Ashcroft's signature]

JOHN R. ASHCROFT  
SECRETARY OF STATE

## **EXECUTIVE ORDER 20-14**

WHEREAS, on March 13, 2020, Executive Order 20-02 invoked the provisions of sections 44.100 and 44.110, RSMo, and declared a state of emergency that exists in the State of Missouri due to the presence and spread of COVID-19; and

WHEREAS, on April 6, 2020, I signed Executive Order 20-08 in order to allow for remote notary services in the State of Missouri; and

WHEREAS, due to the continued public health threat of COVID-19, I extended that state of emergency and the provision for remote notary services in Executive Order 20-12; and

WHEREAS, Chapter 474 requires physical appearance for the principal, notary and witnesses to execute legal documents; and

WHEREAS, physical appearance is required under Chapter 474 for principals and witnesses to execute legal documents; and

WHEREAS, Missouri citizens need to execute important legal documents under Chapter 474 as a result of the restrictions.

NOW, THEREFORE, I, MICHAEL L. PARSON, GOVERNOR OF THE STATE OF MISSOURI, by virtue of the authority vested in me by the Constitution and the Laws of the State of Missouri, including Chapter 44, RSMo, hereby order that, to the extent that any Missouri statute requires the physical presence of any testator, settlor, principal, witness, notary or other person for the effective execution of any estate planning document such as a will, trust or power of attorney, or a self-proving affidavit of the execution of such document, such provisions are suspended or waived, and satisfied if the following conditions are met:

1. The signor must affirmatively represent that he or she is physically situated in the State of Missouri.
2. The notary must be physically located in the State of Missouri and state which county they are physically in for the jurisdiction on the acknowledgement.
3. The notary must identify the signors to their satisfaction and current law.
4. Any person whose signature is required may appear via using video conference software where live, interactive audio-visual communication between the principal, notary, and other necessary person which allows for observation, direct interaction, and communication at the time of signing.

5. The notary shall record in their journal the exact time and means used to perform the notarial act along with all other required information, absent the wet signatures.

FURTHERMORE, the fees allowed for notarization under this executive order shall be the same as those allowed for other notarial acts, except a fee charged for the use of a remote online notary platform or service shall not be considered a fee for a notarial act pursuant to Section 486.685, RSMo; and

FURTHERMORE, any notarial act in compliance with this order shall have the same force, effect, and validity as any other notarial act performed in compliance with Missouri law, and may be relied upon to the same extent as any other notarial act under Missouri law; and

FURTHERMORE, the Secretary of State shall retain the powers provided to him under the law to investigate and adjudicate any notary complaint related to the methods of notarization under this executive order; and

FURTHERMORE, that if the document needs to be presented in a paper medium, it shall satisfy the requirements of being an original document, and prima facie evidence, if the notary prints the document and affixes an attestation stating that it is a true and correct copy of the electronic document, shall state it was performed pursuant to Executive Order 20-14 and the Notary signs and affixes their rubber stamp notary seal.

This order shall terminate on December 30, 2020, unless extended in whole or in part.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson, on this 3rd day of September, 2020.

[Michael L. Parson's signature]

MICHAEL L. PARSON  
GOVERNOR

ATTEST:

[Jay Ashcroft's signature]

JOHN R. ASHCROFT  
SECRETARY OF STATE