



Oklahoma Bar JOURNAL

Volume 87 ♦ No. 5 ♦ Feb. 13, 2016

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Zephyr Teachout
Associate Professor of Law, Fordham University

CITIZENS UNITED:

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Followed by a panel discussion moderated by
OBA President Garvin Isaacs

APRIL 1, 2016, 9 A.M. - NOON

Oklahoma City University School of Law, OKC



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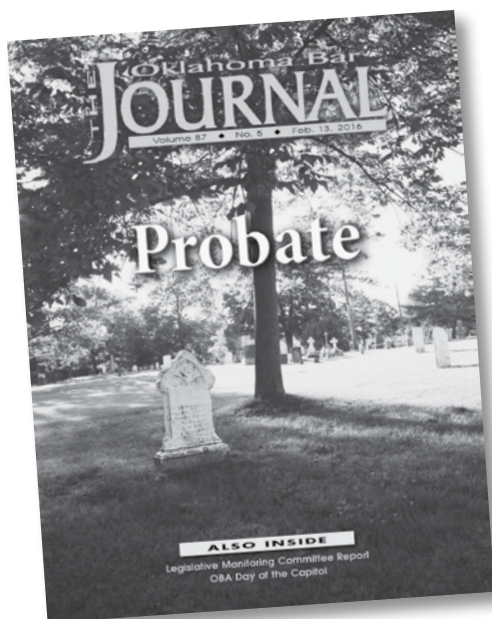
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THEME:
PROBATE
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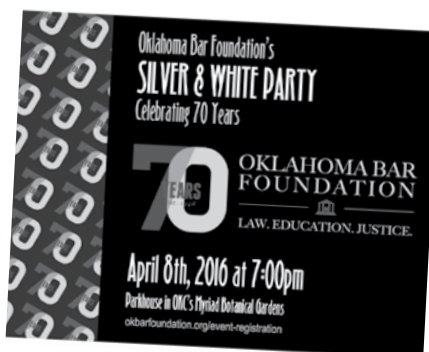
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Upcoming Events Deserve Your Attention

By Garvin A. Isaacs

On July 4, 1776, our Founding Fathers in the Declaration of Independence communicated that one of the reasons they were declaring independence was because the King of England was trying to take away the right to trial by jury. All 13 colonies had guaranteed the right to trial by jury in their Articles of Confederation in both civil and criminal cases.

Then in 1787 at the Constitutional Convention in Philadelphia, the convention adjourned without any agreement on a constitution because of disputes over the right to trial by jury in both civil and criminal cases.

The Constitution was ratified after James Madison went behind the scenes and was able to convince delegates that we needed a Bill of Rights that included the right to trial by jury in civil cases and in criminal cases. The Sixth Amendment to the Constitution of the United States guarantees the right to trial by jury in all criminal cases. The Seventh Amendment to the Constitution of the United States guarantees the right to trial by jury in all civil cases.

At the Oklahoma Constitutional Convention, which began in November 1906, the delegates agreed to follow the Founding Fathers and created Article 2 §19 of the Oklahoma Constitution that mandates the right to trial by jury in civil cases and Article 2 §20 which guarantees the right to trial by jury in criminal cases.



Garvin A. Isaacs

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*Let us recognize
jurors for their
contribution to
the Judicial
Branch of
government with
a Juror
Appreciation
Month.*

DEMOCRATIC IDEALS UNDER FIRE

These democratic ideals we hold dear in our country and state are increasingly under fire. The independence of our judiciary is under attack by lawmakers. The rise of “super PACs” and the corresponding potential for virtually unlimited campaign contributions threatens to corrupt the political process. It is time for all lawyers to stand up and honor our oaths to defend the Constitution.

Two activities will soon be held in our state that will encourage our association’s members to take action. On April 1, 2016, I have invited Fordham University Law Professor Zephyr Teachout to speak at the OCU School of Law. She will discuss “Citizens United: Are America’s Democratic Traditions at Risk of Corruption?” and participate in a panel discussion related to the troubling issues our nation is facing. It’s an OBA CLE seminar you don’t want to miss.

On April 28, 2016, Law Day will be celebrated in Oklahoma. Let us recognize jurors for their contribution to the Judicial Branch of government.

Let us as lawyers resolve that we will communicate to the public that all of us as officers of the court appreciate the time and effort jurors give to the Judicial Branch of the government, for without them there would be no trial by jury to protect justice in our country.

We must celebrate in Oklahoma on Law Day how lucky our country is and our state that we have trial by jury. Lincoln said it at the end of the Gettysburg Address that America is a “government of the people, by the people and for the people” — and we need to remember how valuable jurors are and their contribution to the judicial branch of the government.

Let us vow to thank the public and declare a month following Law Day as Juror Appreciation Month.

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Sometimes You Can't Take It With You

The Testamentary Exception to the Attorney-Client Privilege

By Michael W. Thom

The Oklahoma Evidence Code provides that there is no attorney-client privilege “[a]s to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transaction.”¹ This rule is often described as the “testamentary exception” to the attorney-client privilege. While the term is useful as a shorthand designation of the exception, it must be kept in mind that the exception is not limited to wills and testaments, but also applies to intestate succession and *inter vivos* transactions.

The statute is simple and straightforward, but as explained below, the practitioner considering it should address these questions:

- 1) Was the communication confidential in the first place? If not, there was no privilege, and therefore the exception need not be considered.
- 2) Is the claim as to which the communication is offered one that is relevant to an issue between parties who claim through the same deceased client, or is it instead a claim made against the estate by someone who is a “stranger” to the estate? If the answer is the latter, the exception in the statute will not apply. However, in that instance, the privilege can be waived.
- 3) Does the claim as to which the communication is offered relate to a document, and if so, was the document executed? If not, the exception in the statute may not apply, but there is a split of authority.

- 4) Is the claim subject to determination under Oklahoma law? If so, the statute will apply. If not, availability of a similar exception must be tested under the law controlling the claim.

Before considering the statute, consideration should first be given to whether a particular communication is privileged in the first place. Death of a client does not in and of itself result in loss of the privilege.² The presence of a third party at the time the communication was made may result in loss of the privilege,³ but the privilege is not lost by the presence of a “representative of a client” or a “representative of the attorney” as those terms are defined in the Oklahoma Evidence Code.⁴

While Rule 1.6 of the Oklahoma Rules of Professional Conduct generally precludes an attorney’s revealing a client’s confidential communication, Rule 1.6(b)(6) permits disclosure “as permitted or required to comply with these Rules, other law or a court order.” The reference to “other law” encompasses the Oklahoma Evi-

dence Code. Further, Rule 1.6(a) permits disclosure if the client gives informed consent or “the disclosure is impliedly authorized in order to carry out the representation.” As explained below, the “testamentary exception” is sometimes stated to be based on implied consent by the client to permit disclosure of the communication after the client’s death, in furtherance of the client’s wishes.

Dean Wigmore refers to estate planning communications as having “temporary” confidentiality, which applies during the client’s lifetime but ceases to apply after the client’s death, concluding that “after the testator’s death, the attorney is at liberty to disclose all that affects the execution and tenor of the will.”⁵

Wigmore further states that the facts relating to tenor and execution of the will “are the very facts which the testator expected and intended to be disclosed after his death,” and the “confidence is not apportionable by a reference to what the testator might have intended had he known or reflected on certain facts which now bear against the will.”⁶

If the communication relates to a document, some courts have required that for the exception to apply, the document must have actually been executed. If, for example, a client communicated with his attorney about making a will but did not actually execute a will, the communication may be viewed as privileged and not subject to the exception.⁷ Oklahoma courts have yet to decide whether the testamentary exception applies under such circumstances.

If a particular attorney-client communication is otherwise privileged, then as noted, the testamentary exception renders the privilege inoperative insofar as the communication is “relevant to an issue between parties who claim through the same deceased client.” The exception has been recognized under federal common law and also under the common law and, in many instances, statutory laws of the states, including Oklahoma.

The exception was recognized by the United States Supreme Court in *Glover v. Patton*, 165 U.S. 394 (1897), in which the testimony of an attorney consulted by a testatrix was held to be admissible in a contest after her death between her children with respect to disposition of her estate. The court cited its previous decision in *Blackburn v. Crawford*, 70 U.S. 165, 3 Wall. 175 (1865), in which it had cited with approval the English case of *Russell v. Jackson*,⁸ stating that

the reasons for protecting the attorney-client privilege do not apply in “cases of conflict between the rights of a client and parties claiming under him — and those of third persons — to cases of a testamentary disposition of a client.” The *Russell* Court held that “[t]he disclosure in such cases can affect no right or interest of the client, and the apprehension of it can present no impediment to a full statement to the solicitor, unless he were contemplating an illegal disposition . . . and the disclosure, when made, would expose the court to no greater difficulty than it has in all cases when the views and intentions of parties or the objects for which the disposition is made are unknown. In the case, then, of a testamentary disposition, the very foundations on which the rule proceeds seem to be wanting, and in the absence of any illegal purpose entertained by the testator, there does not seem to be any ground for applying the rule in such a case.” Thus, the court continued, the attorney’s testimony cannot be rejected on the basis that it is “for the protection of the client.”

The Supreme Court then stated in *Blackburn* that the reasoning in *Russell* applies to declarations of the testator in a dispute regarding disposition of his estate, asking: “How can it be said to be for his interest to exclude any testimony in support of what he solemnly proclaimed and put on record by his will?”⁹ The *Blackburn* Court, although quoting from *Russell* with approval, stated it preferred to place its decision determining that the attorney’s testimony was not privileged on another ground, namely *implied waiver by the client*.

The *Glover* Court quoted from *Blackburn* as follows: “But there is another ground upon which we prefer to place our decision. The client may waive the protection of the rule. The waiver may be express or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its object and in direct conflict with the reasons upon which it is founded.”¹⁰

Swidler & Berlin v. United States, 524 U.S. 399 (1998), decided upon federal common law and Federal Rule of Evidence 501, involved subpoenas issued by a federal grand jury to obtain

handwritten notes taken by an attorney during a meeting he had with Vincent W. Foster Jr., nine days before Foster committed suicide. The grand jury sought the notes in connection with its investigation into whether crimes were committed during a prior investigation into the 1993 firings of White House Travel Office employees. The attorney sought to quash the subpoenas, claiming the notes were privileged. The federal district court agreed, but the District of Columbia Court of Appeals reversed, holding the privilege between Foster and his attorney was not “absolute” and whether it applied after Foster’s death required a “balancing test.” The United States Supreme Court reversed the Court of Appeals. The Supreme Court noted that the Court of Appeals “recognized that most courts assume the privilege survives death, but noted that such references usually occur in the context of the well-recognized testamentary exception to the privilege allowing disclosure for disputes among the client’s heirs.”¹¹

The *Swidler & Berlin* Court held that the notes were protected by the attorney-client privilege. It found that independent counsel’s “interpretation — that the testamentary exception supports the privilege’s posthumous termination because in practice most cases have refused to apply the privilege posthumously; that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality; and that, by analogy, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the estate’s financial interests are not at stake — does not square with the case law’s implicit acceptance of the privilege’s survival and with its treatment of testamentary disclosure as an ‘exception’ or an implied ‘waiver.’ And his analogy’s premise is incorrect, since cases have consistently recognized that the testamentary exception furthers the client’s intent, whereas there is no reason to suppose the same is true with respect to grand jury testimony about confidential communications.”¹²

“The Supreme Court noted that in the ‘testamentary exception’ cases, it was consistently presumed that the privilege survives the death of the client...”

The Supreme Court noted that in the “testamentary exception” cases, it was consistently presumed that the privilege survives the death of the client, but a communication would not be considered privileged if “sought to be disclosed in litigation between the testator’s heirs.”¹³ The court stated: “The rationale for such disclosure is that it furthers the client’s intent.”¹⁴ The court referred to its previous decisions in *Glover v. Patten*, 165 U.S. 394 (1897), and *Blackburn v. Crawfords*, 70 U.S. 165, 3 Wall. 175 (1865), noting that it had explained in those cases, in recognizing the testamentary exception, that testamentary disclosure was permissible because the privilege, which normally protects the client’s interests, could be impliedly waived in order to fulfill the client’s testamentary intent.¹⁵ The court viewed established exceptions permitting disclosure after the client’s death, such as the crime-fraud exception and the testamentary exception, as “consistent with the purposes of the privilege,” but found that recognizing a new exception in criminal cases, as sought by independent counsel, “appears at odds with the goals of encouraging full and frank communication and of protecting the client’s interests.”¹⁶

As noted by Professor Imwinkelried, *Swidler & Berlin* controls in federal courts but does not control in state courts.¹⁷ This is true because, as noted below in this article, the Federal Rules of Evidence have always allowed state law to determine whether a privilege exists under state law. State laws are not uniform with respect to whether and, if so, to what extent the “testamentary exception” applies, apart from those 18 states (including Oklahoma) which have adopted Uniform Rule of Evidence 502(D)(2) intact.¹⁸

Notably, the current version of 12 Okla. Stat. §2502 includes both Uniform Rule of Evidence 502 sections (A) through (D) and two sections taken from Federal Rule of Evidence 502. When it was originally drafted, the Oklahoma Evidence Code was “based upon and [was] very similar to the Federal Rules of Evidence.”¹⁹ However, the sections dealing with judicial notice, presumptions and privilege were not

derived from the federal rules because the federal rules leave the determination as to whether a communication is privileged to state law.²⁰ Thus, the part of the Oklahoma Evidence Code relating to privileges, 12 Okla. Stat. §§2501-13, was derived not from the Federal Rules of Evidence, but rather from the Uniform Rules of Evidence. The original draft of the federal rules did include provisions relating to privilege, but they were not incorporated in the final version of the rules. One commentator noted: "These rules [as to privilege] were not incorporated into the Federal Rules of Evidence due to federalism concerns in the area of the substantive law of privilege. Because Oklahoma's privilege rules are substantially based on what would have been the Federal Rules, however, it is fair to say that the same policy that underlies the Federal Rules underlies the Oklahoma rules on privilege. That is, the rules adopted by Oklahoma were drafted substantially by the authors of the Federal Rules to be included among those rules, but were not included due to federalism concerns rather than any policy discrepancy."²¹

Oklahoma's §2502(D)(2) is virtually identical to Uniform Rule of Evidence 502(D)(2),²² which provides that "[t]here is no privilege under this rule: as to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction *inter vivos*."

When the Oklahoma Evidence Code was adopted in 1978, there was no corresponding Federal Rule of Evidence 502. Federal Rule 502 was adopted in 2008, but its scope is limited to issues relating to subject matter waiver and inadvertent disclosure.²³ The federal rule continues to leave to state law a determination whether a communication is privileged, as an initial matter.²⁴ In 2009, the Oklahoma Legislature amended §2502 by adding new subsections (E) and (F), derived from the new Federal Rule 502, but leaving intact subsections (A) through (D) as taken from the Uniform Rules of Evidence upon original adoption of the Oklahoma statute in 1978.²⁵ Thus, Oklahoma's §2502 is now a composite of Uniform Rule of Evidence 502 and Federal Rule of Evidence 502.

It is to be noted that §2502(D)(2) does not permit a decedent's successor in interest to maintain the privilege that previously existed and belonged to the decedent if the testamentary exception applies. The statute simply

states that the communication, if within the scope of the testamentary exception as defined by the statute, is not privileged at all. If, however, a particular communication is outside the scope of the statute (*see, e.g.*, endnote 7), it is privileged, and the privilege can be waived by certain designated persons.²⁶ Again, however, waiver is not required where by statute, the communication is not privileged.²⁷

For purposes of the attorney-client privilege, "communication" is defined broadly. It embraces not only oral or written statements but also actions, signs or other means of communicating information by a client to his attorney.²⁸ However, an attorney might be allowed to testify as to a former client's mental capacity, since that testimony is based upon the attorney's personal observations rather than a confidential communication.²⁹

As noted above,³⁰ some states adopting the Uniform Evidence Code did not adopt Uniform Rule of Evidence 502 intact, apparently because their legislatures did not wish to adopt the rule's broad recognition of the "testamentary exception." Oklahoma's adoption of the rule intact, however, was consistent with previous decisions of the Oklahoma Supreme Court based upon common law.

In *Gaines v. Gaines*, 1952 OK 451, 251 P.2d 1044, the decedent had assigned a partnership interest to his mother. After his death, his children alleged the assignment was subject to a verbal agreement between the decedent and his mother, whereby the mother would hold the interest for the decedent's benefit for life and then for the benefit of his children. Thus, the children sought the imposition of a constructive trust in their favor over the partnership interest. The trial court held for the mother. She offered the testimony of her son's attorney and the attorney's stenographer, who had prepared the assignment. Both testified the decedent had told them he had already provided for his children and wanted the assignment to be an absolute gift to his mother.

The Supreme Court first noted that under former 12 Okla. Stat. §385 (repealed upon adoption of the Oklahoma Evidence Code), an attorney was not competent to testify as a witness with respect to a communication made by his client, without the client's consent. The court apparently presumed the privilege survived the client's death. It then held, however, that the communication at issue in *Gaines* was

not privileged, stating: "The rule of privilege between attorney and client does not apply in litigation, after the client's death, between parties, all of whom claim under the same client."³¹ The court cited both C.J.S. and the United States Supreme Court's decision in *Glover v. Patten*, *supra*.³²

Similarly, the court recognized the "testamentary exception" in *McSpadden v. Mahoney*, 1967 OK 118, 431 P.2d 432, citing its earlier decision in *Gaines*. In *McSpadden*, the decedent had transferred land, a note and a mortgage to one John. After her death, her personal representative, also suing individually as one of her heirs, and joined by her other heirs, sought to have the transfers cancelled on various grounds, including alleged incapacity, undue influence and forgery. The trial court held for John. The plaintiffs claimed error in the admission of testimony of both the decedent's attorney who prepared the transfer documents and also the decedent's physician. The Supreme Court found no error, holding: "Here both parties are claiming under the deceased, the plaintiff as an heir and devisee and the defendant as a grantee and assignee." It then referred to the rule in *Gaines* as creating an "exception" to the attorney-client privilege and stated: "This exception has often been applied in cases in which heirs or devisees of the grantor sued the grantee of a deed for recovery of the property conveyed. [Internal cits. omitted.] While the cited cases involve the attorney-client privilege, we perceive no reason for applying a different standard to the physician-patient privilege."³³

Neither Oklahoma's §2502 nor Uniform Rule of Evidence 502 limits the purpose for which the communication is offered, except to require that it be related to an issue between parties who claim *through* the same deceased client. As long as that test is met, it does not matter whether the attorney's testimony is offered to support or defeat the instrument in question. It also is not required, for the exception to apply, that the attorney acted as a witness to the execution of the instrument, although in that instance, the attorney's testimony is not privileged pursuant to a separate exception.³⁴ All that is required is that the parties must be claiming through the same deceased client.

However, the exception does *not* render the attorney's testimony nonprivileged where the person seeking its admission has made a claim *against* the deceased client's estate. As noted in *McCormick*, "The distinction is taken that when

the contest is between a 'stranger' and the heirs or personal representatives of the deceased client, the heirs or representatives can claim privilege. . . . The cases encountered where the party is held to be a 'stranger' and hence not entitled to invoke this doctrine [the testamentary exception] are cases where the party asserts against the estate a claim of a promise by the deceased to pay, or make provision in his will for payment, for services rendered."³⁵ *McCormick* further states, "None of this authority would appear to be eroded by the *Swidler* case."³⁶

Mazoff, in discussing the "claiming through the same deceased client" rule, states that it has "been viewed broadly to include 'anyone in privity with the estate.' The rule prohibits third parties or strangers, including creditors, from waiving the privilege during a will contest. Additionally, strangers to the will, such as the decedent's former caretakers, cannot effectuate a waiver of the privilege."³⁷ The privilege also has been stated to survive (i.e., the exception does not apply) with respect to a claimant whose claim is "adverse to the interests of the client, his estate, or his successors."³⁸

Note, however, that in a case in which a claim is viewed as "adverse" to the estate, and thus the privilege exists, the privilege could be waived, pursuant to 12 Okla. Stat. §2502(C). Absent a waiver, however, the privilege will apply.

Since the statutory exception applies to parties claiming through the same deceased client by *inter vivos* transaction, it will apply to deeds and assignments executed by the decedent, as held in *Gaines* and *McSpadden*, *supra*, and also will apply to a life insurance policy held by a deceased client³⁹ and to trust created by a deceased client.⁴⁰

The exception will apply to all communications between the attorney and her deceased client relating to the claim at issue in the litigation. It may include the attorney's entire estate planning file for the client.⁴¹

While outside the scope of this article, the reader should be aware that in addition to the testamentary exception and the attesting witness exception, 12 Okla. Stat. §2502 also provides that there is no attorney-client privilege:

If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew

or reasonably should have known to be a crime or fraud;

As to a communication relevant to an issue of breach of duty by the attorney to the client or by the client to the attorney;

As to a communication necessary for an attorney to defend in a legal proceeding an accusation that the attorney assisted the client in criminal or fraudulent conduct;

As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients; or

As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

1. 12 Okla. Stat. (2011) §2502(D)(2).

2. Oklahoma Rules of Professional Conduct, Title 5, Okla. Stat. (2011), App. 3-A, Rule 1.9(c); *also see* Comment 18 to Rule 1.6, referring to Rule 1.9 and stating: “The duty of confidentiality continues after the client-lawyer relationship has terminated.” Further, 12 Okla. Stat. §2502(C) provides that a privilege may be claimed by a “personal representative of a deceased client” (*see fn. 25, infra*), thus implying the privilege survives the client’s death. *Also see Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (under federal law, the attorney-client privilege survives the death of the client but is subject to certain exceptions, including the testamentary exception; discussed further *infra*); Wigmore, Evidence (McNaughton rev. 1961) (hereinafter “Wigmore”), §2323; 1 J. Strong, McCormick on Evidence (4th ed. 1992) (hereinafter, “McCormick”), §94. In *Swidler & Berlin*, the United States Supreme Court held that under federal common law, the attorney-client privilege survives the client’s death. The Court rejected the contentions of Independent Counsel that a typical client is not “much concerned” about the risk of posthumous revelation of communications with counsel, that the American Law Institute had rejected the concept of a perpetual privilege in Restatement (Third) of the Law Governing Lawyers, and that Dean Wigmore had suggested the privilege might not survive forever. The Court noted that in his treatise, Dean Wigmore had assumed the privilege survived the client’s death, and held the privilege to be absolute but subject to exceptions, including the testamentary exception. *See Imwinkelried*, *The New Wigmore* (2d ed. 2010) (hereinafter “Imwinkelried”), “Evidentiary Privileges” §6.5.2 (b). As discussed *infra*, *Swidler & Berlin* controls for purposes of federal law, but does not govern in state courts.

3. *Chandler v. Denton*, 1987 OK 38. ¶23, 741 P.2d 855. *See* 12 Okla. Stat. (2011) §2502(A)(5), stating that a communication is “confidential” if it is “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”

4. 12 Okla. Stat. (2011) §2502(A)(3) and (A)(4); 12 Okla. Stat. §2502(B). *Also see* fn. 3, *supra*.

5. Wigmore, §2314.

6. *Id.*

7. Mazoff, Andrew B., “A Common Thread to Weave a Patchwork: Advocating for Testamentary Exception Rules,” 3 *Phoenix L.Rev.* [now

Arizona Summit L. Rev.] 729, 758 (2010) (hereinafter, “Mazoff”). *See, e.g., Gould, Larson, Bennet, Wells & McDonnell v. Panico*, 869 A.2d 653 (Conn. 2005) (will not executed); *McCaffrey v. Brennan*, 533 S.W.2d 264 (Mo. App. 1976) (will not executed); *In re Estate of Voelker*, 396 N.E.2d 398 (Ind. App. 1979) (unsigned will considered to be privileged); *Stegman v. Miller*, 515 N.W.2d 244 (Ky. 1974) (will discussed with attorney whose testimony was offered, but another attorney prepared will which was actually executed). *But see In re Graf’s Estate*, 119 N.W.2d 478 (N.D. 1963) (communications with attorney who was consulted about preparing will, but who did not prepare it, held to be not privileged); *Estate of Prickett v. Womersley*, 2008 WL 1922621 (Ind. App. 2008) (statement of distribution drafted by attorney pursuant to client’s instructions held not privileged); *Trustees of Baker University v. Trustees of Endowment Association of Kansas State College of Pittsburg*, 564 P.2d 472 (Ks. 1977) (will not executed, but statements to attorney held not privileged in also determining validity of inter vivos gift and whether legacy in earlier executed will was adeemed by satisfaction).

8. Hare 387, 68 Eng. Reports 558 (Ch. 1851)

9. 70 U.S. 165, 193-94.

10. 165 U.S. 394, 408, *citing Blackburn v. Crawford*, 70 U.S. 165, 194.

11. 524 U.S. 399, 402.

12. *Id.* at 399-400.

13. *Id.* at 404, citing and quoting from *United States v. Osborn*, 561 F.2d 1334, 1340 (9th Cir. 1977).

14. *Id.*

15. *Id.* at 405.

16. *Id.* at 409. In his brief at p. 9, Independent Counsel asserted that “the attorney-client privilege does not apply in federal criminal proceedings when the client is deceased.” The Supreme Court rejected that contention.

17. Imwinkelried, §6.5.2 (b).

18. Mazoff at 757. The author notes that 39 states have adopted the Uniform Rules of Evidence, but of those, only 18 states have adopted Rule 502(D)(2) intact. In addition to exploring the history and various aspects of the exception in depth, the author makes a strong case for a uniform “testamentary exception” law in all states. Imwinkelried notes that since the United States Supreme Court’s decision in *Swidler & Berlin* does not control for purposes of state law, a state court might determine it is more impressed by the rationale of the District of Columbia Court of Appeals in that case than the rationale followed by the United States Supreme Court, and adopt a different viewpoint with respect to survival of the privilege following the client’s death. Imwinkelried, §6.5.2 (b). This would not be a concern insofar as the “testamentary exception” is concerned in the states, including Oklahoma, which have adopted Uniform Rule of Evidence 502(D)(2), as the Rule states the communication is not privileged without regard to whether the privilege survived the client’s death under applicable state law. However, a problem could exist if the deceased client’s estate is subject to probate in more than one state and the testamentary exception rule differs in those states. *See* Mazoff at 735 (Part III).

19. Blakey, “An Introduction to the Oklahoma Evidence Code Relevancy, Competency, Privileges, Witnesses, Opinion, and Expert Witnesses,” 14 *Tulsa L.J.* 227, 233 (1978). [<http://digitalcommons.law.tulsa.edu/cgi/viewcontent.cgi?article=1462&context=tlr>]

20. *Id.* at 234-35.

21. Brown, Robert A., “The Amended Attorney-client Privilege in Oklahoma: A Misstep in the Right Direction,” 63 *Okla.L.Rev.* 279, 290 (2011).

22. Oklahoma’s §2502 omits the subsection headers contained in Uniform Rule of Evidence 502. The omitted headers are: (a) Definitions, (b) General rule of privilege, (c) Who may claim privilege and (d) Exceptions.

23. Federal Rule of Evidence 502 was “enacted to mitigate discovery costs related to disclosure of privileged material.” Brown, *supra*, fn. 20, 63 *Okla.L.Rev.* at 302.

24. Explanatory note prepared by the Judicial Conference Advisory Committee on Evidence Rules, revised Nov. 28, 2007, paragraph 2, states in part: “The rule [Federal Rule 502] makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.” In the case of *In re Estate of Covington*, 450 F.3d 917 (9th Cir. 2006), the court held that state law controlled in determining whether the “testamentary exception” applied in a Department of the Interior proceeding in which a will disposing of Indian trust allotments was contested.

25. Section 2502 was further amended in 2013 to broaden the scope of the definition of “representative of the client” in subsection (A)(4), adding new language in subsection (b) with the existing definition retained in newly designated subsection (a). In addition to portions of

§2502, waiver of privilege is also governed by 12 Okla. Stat. §§ 2511 (relating to voluntary disclosure) and 2512 (regarding disclosures that are erroneously compelled or made with no opportunity to claim a privilege).

26. 12 Okla. Stat. (2011) §2502(C) provides that a communication which is privileged “may be claimed by the client, the client’s guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence.” Since a designated person can claim the privilege, presumably the same person could waive the privilege. See also Wigmore, §2329 (stating the privilege, where it exists, is generally agreed to be divisible, meaning it may be waived by the personal representative, heir, next of kin or a beneficiary). The waiver can be implied by failure to object to the offered testimony of the attorney (*Lapan v. Lapan*, 217 A.2d 242 (R.I. 1966)). Waiver might not apply to attorney work product (*Estate of Hohler v. Hohler*, 924 N.E.2d 149 (Ohio App.2009)). Also, waiver might be limited to a situation where the waiver is beneficial to the interests of the client’s estate and is not damaging to his reputation (*United States v. Yielding*, 657 F.3d 688 (8th Cir. 2011)).

27. Wigmore, §2329 (Supp.) states, quoting with approval from *In re Graf’s Estate*, 119 N.W.2d 478, 481 (N.D. 1963): “In controversies between heirs at law, devisees, legatees, or next of kin of the client, such communications should not be held as privileged because in such case, the proceedings are not adverse to the estate. The interest of the estate as well as the interest of the deceased client demand that the truth be determined.”

28. Wigmore, §2306.

29. *Stegman v. Miller*, 515 N.W.2d 244 (Ky. 1974).

30. Fn. 17, *supra*.

31. 1952 OK 451, ¶0 (Syl. 1 by the court).

32. The Court also cited an earlier Oklahoma case stating that an attorney is allowed to testify after a client’s death in an action relating to the client’s will, where the attorney acts as a subscribing witness to the will. *Hewett v. Wilkins* (cited in the *Gaines* decision as *In re Wilkins’ Estate*), 1947 OK 234, ¶12, 185 P.2d 213, which also has been cited for the proposition that during the client’s lifetime, the attorney cannot be compelled to disclose her client’s will, its contents or communications with client about the will. 75 A.L.R.4th 1144, §3 (supplementing, in part, 66 A.L.R.2d 1302, which supplements 64 A.L.R. 184). See also 2 A.L.R.2d 664. The exception permitting an attorney to testify “concerning an attested document to which the attorney is an attesting witness” is now codified as 12 Okla. Stat. §2502(D)(5). The *Wilkins* case also refers to persons working for the attorney, now codified as 12 Okla. Stat. §2502(A)(3), which states that a “representative of an attorney” is “one employed by the attorney to assist the attorney in the rendition of professional legal services.”

33. 1967 OK 118, ¶27.

34. 12 Okla. Stat. §2505(D)(5). Courts in some states held in older cases that, under the common law of those states, the attorney’s testimony could be offered only in support of the instrument, not to defeat it, or where the attorney had acted as a subscribing witness to the instrument. See Braun, Leon, “Testimony of Attorney in Probate of Will,” St. John’s L.Rev. Vol. 9: Iss. 1, Article 43 (2014, republishing 1934 article). [<http://scholarship.law.stjohns.edu/lawreview/vol9/iss1/43>] Wigmore dismisses the first distinction, observing that while it “may be conceded that the testator would not wish the attorney to assist in any way the overthrow of the will,” the “answer is that such utterances were obviously not confidentially made with reference to the secrecy of the fact of insanity or undue influence, for the testator of course did not believe those facts to exist and therefore could not possibly be said to have communicated them.” Wigmore, §2314.

35. McCormick, §94 and cases cited in notes 11 and 16 therein; see also fn. 37, *infra*.

36. McCormick, §94.

37. Mazoff at 758 (internal cits. omitted). Mazoff continues by stating: “Furthermore, cases involving promises to make a will cannot effectuate a waiver of the privilege.” However, as to this point, there is a split of authority. See fn. 38, *infra*.

38. 66 A.L.R.2d 1302, §4(b). Courts are split as to whether a claim alleging breach of contract to make a will is “through” the decedent and thus subject to the exception or “against” the estate and thus subject to privilege. Compare *Eicholtz v. Grunewald*, 21 N.W.2d 914 (Mich. 1946), and *Clark v. Second Judicial District Court*, 692 P.2d 512 (Nev. 1985) (both holding attorney communications not privileged), with *Spence v. Hamm*, 487 S.E.2d 9 (Ga. 1997), and *In re Smith’s Estate*, 517 N.W.2d 727 (Wis. 1953) (both holding attorney communications privileged). In *Paley v. Superior Court*, 290 P.2d 617, 621 (Cal. App. 1956), the court noted this split of authority, also stating that determining whether a particular claimant falls within the category of “‘strangers’ or persons claiming adversely to the estate” is “involved in some obscurity, especially in California.” The court also noted that the testamentary exception is a “court made principle based upon considerations of public policy,” which is “limited to controversies between persons in privity with the testator’s estate.” *Id.*

39. *Herrig v. Herrig*, 648 P.2d 758 (Mont. 1982).

40. In *Zook v. Pesce*, 91 A.3d 1114 (Md. 2014), the court held the exception applicable in a dispute between putative takers under a will or trust, holding that the attorney-client privilege does not bar admission of testimony and evidence regarding communication between the decedent and any attorneys involved in the creation of the instrument, provided that evidence or testimony tends to help clarify the donative intent of the decedent.

41. See *In re Stompor*, 82 A.3d 1278 (N.H. 2013), and cases cited therein. In *Stompor*, the court held under New Hampshire’s Evidence Rule 502(d)(2), identical to Oklahoma’s §2502(D)(2), that where plaintiffs claimed that one child unduly influenced their parents in making their estate plan, the attorney’s file which related to the parents’ intentions regarding their estate plan was relevant to determining whether undue influence existed and to ascertain whether the executed documents reflected the parents’ true intent, and thus it was admissible under the “testamentary exception.” The court further held that the plaintiffs could discover communications between the attorney and the child alleged to have unduly influenced the parents. The court stated that the basis for the exception in Rule 502(d)(2) “is that ‘all reason for assertion of the privilege disappears’ when the privilege is being asserted not for the protection of the testator or his estate but for the protection of a claimant to his estate [internal cit. omitted]. This is so because the best way to protect the client’s intent lies in the admission of all relevant evidence that will aid in the determination of his true will.” The court then cited relevant language from the United States Supreme Court’s decision in *Swidler & Berlin*, *supra*.

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A Primer on Drafting and Applying the ‘HEMS’ Ascertainable Standard in Discretionary Trusts

By Cody B. Jones

Clients are forced to ponder their most feared what-happens-when scenarios when they begin planning the future distributions of their estates. Despite their inability to see into the future, clients often find themselves wanting to control all possibilities they can foresee. Discretionary trusts are perhaps the apparatus in the estate planning toolkit most commonly used to prepare for such anticipated circumstances.

Discretionary trusts also provide flexibility for situations not contemplated by the client. Discretionary trusts, both *inter vivos* and testamentary, may be used for a variety of reasons, such as 1) to control funds for beneficiaries who are ill-equipped to manage their finances, such as minors or spendthrifts, 2) to protect beneficiaries from their personal creditors or spousal claims, 3) to minimize negative transfer tax consequences, 4) to preserve family wealth, 5) or simply to govern from the grave. The successful administration of such trusts largely depends on a single determinative factor — the trustee’s discretion. Thus, the selection of a reasonable and responsible trustee is one of the most important decisions for the client.

The discretionary power to make distributions of income and principal is perhaps the most significant authority allocated to the trustee of a discretionary trust. The degree of a trustee’s discretionary distribution power ranges from making distributions subject to his or her sole, unlimited discretion to making distributions limited by the IRS-sanctioned ascertainable standard of distribution for health,

education, maintenance and support, or some combination thereof, otherwise known to estate-planning practitioners as the “HEMS” standard.¹ The HEMS standard provides more asset protection and beneficial transfer tax consequences than unlimited discretion.

Unlimited power to “consume, invade, or appropriate property,” such as trustee-beneficiary’s unlimited power to distribute trust assets to himself or a beneficiary’s power to appoint trust assets to the beneficiary’s estate, creditors or creditors of the beneficiary’s estate, is treated as a general power of appointment.² A beneficiary with a general power of appointment is treated as the deemed owner of his beneficial interest for tax purposes, making the assets taxable in the beneficiary’s gross estate and resulting in the loss of creditor protection.³ However, Section 2041 of the Internal Revenue Code (Code) provides the HEMS safe harbor — if the power to consume, invade or appropriate the trust assets is limited by the HEMS standard, the beneficiary shall not be the deemed owner of his beneficial interest.⁴

More often than not, practitioners include the HEMS standard in discretionary trusts.

However, for many trustees empowered to make distribution decisions, the HEMS ascertainable standard is not much of an “ascertainable” standard. For example, is a costly elective surgery an appropriate expense for health from a trust fund consisting of limited resources? Does it matter if the grantor desired to pay for the beneficiary’s college tuition? Must the trustee consider the beneficiary’s standard of living before making the distribution? Is providing start-up capital for a beneficiary’s business a legitimate distribution for support? This article focuses on the application of the HEMS standard in an effort to provide practitioners guidance when drafting discretionary trusts and counsel in advising trustees of trusts limited by the HEMS standard.

WHAT IS HEMS?

The IRS has determined that the discretion to make distributions or withdrawals for health, education, maintenance and support is sufficiently limited such that the beneficiary does not have enough control to be the deemed owner of the assets. The Treasury Regulations provide some guidance in defining what constitutes health, education, maintenance and support, but ultimately the trustee must exercise good faith in deciding what qualifies as a necessary distribution.

Health. Health expenditures include disbursements for “medical, dental, hospital and nursing expenses and expenses of invalidism.”⁵ The power to invade principal in the case of illness and routine medical care falls squarely within the statutory limitations.⁶ Health may include expenses for emergency medical treatment, mental illness, routine exams, dental care, eye care and prescription medicines above what insurance is paying for the beneficiary.⁷ The Treasury Regulations do not expressly address nontraditional treatments and services, such as in vitro fertilization, plastic surgery, expensive home health care and treatment for psychological or mental health problems. Before depleting trust assets by making such distributions, the trustee should review the trust document for express authorization and consider the overall trust purposes. If the grantor foresees such treat-

ments or services, the attorney should take care to include such express authorization or a contrary prohibition reflecting the grantor’s intent when drafting the discretionary trust.

Education. Education includes “college and professional education.”⁸ Ordinarily education is construed to encompass living expenses and other fees and costs. This may include private school expenses, tuition for studying abroad, home school expenses, trade school or technical training, and continuing education classes.⁹ More often than not, the reasonableness of discretionary distributions for education is determined on a case-by-case basis by interpreting the grantor’s intent and construing the language of the document. For instance, formal education beyond that which is sufficient to prepare a beneficiary to earn a successful living

and enrich a career may be considered excessive if the beneficiary already has a college degree.¹⁰ In some circumstances, graduate level education may not be considered necessary unless expressly allowed in the trust instrument.¹¹ Thus, if the grantor wishes to provide for certain levels of education or for extended periods of time, the drafting attorney should include language reflecting such intent.

Maintenance and Support. “Support” is synonymous with “maintenance,” so the mention of both standards is generally construed as redundant.¹² Sup-

port includes bare necessities such as housing, clothing and food, but the regulations expressly do not limit support to the bare necessities of life.¹³ Oftentimes the standard will reference the beneficiary’s customary lifestyle, which can help the trustee identify accustomed maintenance needs. The Third Restatement of Trusts suggests that support encompasses reasonable distributions for payment of property taxes, rent and mortgage payments, existing and suitable health, life and property insurance coverage, and perhaps even accustomed vacations.¹⁴ Support has also included payment of attorney’s fees for the criminal defense of a beneficiary.¹⁵ However, payment for retirement of debts, expenditures for luxury items, and extraordinary gifts to enhance the beneficiary’s happiness or estate have

“Support includes bare necessities such as housing, clothing and food, but the regulations expressly do not limit support to the bare necessities of life.”

been found unauthorized distributions for support.¹⁶ Thus, an outright distribution to provide start-up capital for the beneficiary's dream business is likely to be considered an unnecessary distribution.¹⁷ Instead, the trustee could consider making a secured loan to the beneficiary from the trust fund for such purposes.

WHAT HAPPENS WHEN HEMS IS EXPANDED?

Attorneys must be cautious in drafting modifications to the distribution standards beyond what the IRS recognizes as ascertainable. Expansion of the HEMS standard by even a single word can be a dangerous game. Such broadening of the distribution standard may result in the interest being included in the trustee-beneficiary's taxable estate. For example, the power to distribute property for the "comfort, welfare, or happiness" of the beneficiary is not limited to an ascertainable standard.¹⁸ Although courts tend to interpret distributions for "emergencies" as ascertainable, with few exceptions the IRS asserts that invasion of trust principal for "emergencies" is likewise not limited by an ascertainable standard.¹⁹

Whether or not distributions for "comfort" fall within an ascertainable standard depends on if the word is used as a modifier or an additional standard. More often than not, permitting distributions for the "comfort" of the beneficiary in addition to the HEMS standard will cause the trust assets to be includable in the beneficiary's gross estate.²⁰ However, in the 10th Circuit case *Estate of Vissering v. Commissioner*, the trust permitted distributions "required for the continued comfort, support, maintenance or education" of the beneficiary.²¹ Although, the court concluded that such standard did not cause inclusion of the trust assets in the beneficiary's gross estate, the court emphasized that the trust limited distributions to those "required" for "continued" comfort, which is more ascertainable than distributions for a level of comfort yet to be "determined" or "desired."²² As it is difficult to reconcile court decisions regarding the addition of comfort to the HEMS standard, prudent practitioners should avoid unnecessarily risking inclusion in the beneficiary's estate.

WHAT IS THE STANDARD OF REVIEW FOR TRUSTEE DISCRETION?

The cardinal rule of construction is the grantor's intent controls. One of the trustee's duties

is to discern the grantor's intent. The best indicator of the grantor's intent is the express language of the document. The trustee must then exercise discretion as articulated to effectuate the general intent and express instructions of the grantor.

Generally, courts are reluctant to substitute their discretion for the trustee's discretion in applying the HEMS standard.²³ The law requires the trustee to exercise discretion "honestly, fairly and reasonably" to accomplish the trust purpose.²⁴ The Second Restatement of Trusts states, "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion."²⁵ The trustee is subject to a standard of reasonableness and good faith in the absence of express standards in the trust document.²⁶ If the trust provides mandatory directions, the trustee must comply.²⁷

MUST THE TRUSTEE CONSIDER THE BENEFICIARY'S STANDARD OF LIVING AND INDEPENDENT RESOURCES?

Often the trust agreement will include distributions for HEMS "in the manner of the beneficiary's standard of living during grantor's lifetime" or some derivation thereof. Although this language helps the trustee gauge distributions for identifiable beneficiaries, it does not provide guidance for after-born beneficiaries. The trust fund may include a windfall payment such as life insurance proceeds or a settlement payment that may significantly raise the potential standard of living for beneficiaries beyond their circumstances existing during the grantor's lifetime. The Third Restatement of Trusts considers the productivity of the trust estate as a litmus test for adjusting to a higher standard of support for the beneficiary so long as such increase is consistent with the overall trust purpose.²⁸ Additionally, the restatement suggests the trustee consider the future needs of the beneficiaries and the size of the trust fund in making discretionary distributions.²⁹

Unless otherwise instructed in the trust agreement, the trustee must exercise impartiality in making discretionary distributions.³⁰ In exercising his discretion, the trustee may have difficulty being impartial when determining what is "necessary" for an independently affluent beneficiary as compared to a beneficiary living paycheck to paycheck. Thus, the trustee should first look to the trust instrument to

determine if he or she is required, prohibited, or allowed some discretion to consider the beneficiary's other resources.³¹ For this reason, the drafter should consider language directing whether or not the trustee must consider the beneficiary's independent resources and to what extent. Must the trustee consider all resources or only liquid resources of the beneficiary? Must the beneficiary deplete any of his assets before the trustee deems a distribution necessary? If the trust agreement is silent, courts differ as to whether the trustee has some discretion to consider the beneficiary's independent resources. Some courts find consideration of other resources implicit in the trustee's determination of what is "necessary" unless the trust's purposes may be better accomplished by not doing so.³² Others say if the grantor intended the trustee to consider other resources, the trust agreement would have directed as such.³³

WHAT IS THE EFFECT OF A STATEMENT OF INTENT AND EXCULPATION CLAUSE?

Including a statement of the grantor's intent may reduce contention between the trustee and beneficiaries. Such statement of intent should provide the trustee enough detail to decide what the grantor would have done in the trustee's position. Although a general statement of intent will not control distributions, it can guide the trustee and beneficiaries as to the grantor's primary purposes rather than force the trustee to rely on his sole interpretation of the ascertainable standard.³⁴ Since it is possible for a statement of intent to conflict with the HEMS standard, the drafting attorney should take care not to contradict the specific standards for distribution.

In addition to a statement of the grantor's intent, the drafting attorney should consider a provision setting forth how costs of litigation will be paid in case a beneficiary contests the trustee's distribution decisions. The drafting attorney might include a provision authorizing the trustee to use trust funds to cover legal fees in the event of such litigation. Including such provision will free the trustee to exercise legitimate discretion without fear of retribution by the beneficiaries.

WHAT ARE THE BEST PRACTICES FOR A TRUSTEE?

First and foremost, the trustee must know what the trust instrument directs with regard

to the grantor's intent and specific standards for exercise of discretion. The trustee should reference the document frequently to ensure compliance with the complete trust instrument. Maintaining documentation of distributions and noting the reasons for discretionary distributions will enable the trustee to self-monitor and ensure impartiality and compliance with the trust provisions. Similarly, the trustee should keep documentation of any declined requests for distributions. The trustee should maintain an open line of communication with the beneficiaries to avoid any unnecessary conflicts due to lack of transparency. Lastly, the trustee should seek legal and professional advice regularly to ensure compliance with changes in the law that might affect interpretation of the trust provisions. Estate planning practitioners would be wise to provide the trustee with guidance concerning the exercise of his or her discretion to minimize potential, yet avoidable errors in judgment.

1. See 26 U.S.C. §§2041, 2514, and 2511.
2. 26 U.S.C. §2041(a) & (b); See also Uday Shah, *Ascertainable Standards: 101 Outline*, 2013 ABATAX-CLE 0510148, May 10, 2013, at 3.
3. See 26 U.S.C. §2041(a).
4. See *id.* §2041(b)(1); see also Treas. Reg. §20.2041-1(b)(1).
5. Treas. Reg. §20.2041-1(c)(2).
6. See *Estate of Sowell v. Comm'r*, 74 T.C. 1001 (1980), *rev'd*, 708 F.2d 1564 (10th Cir. 1983); see also Rev. Rul. 78-398, 1978-2 C.B. 237.
7. See Shah, *supra* note 2, at 10.
8. Treas. Reg. §20.2041-1(c)(2).
9. Restatement (Third) of Trusts §50 (2003); see also Shah, *supra* note 2, at 10.
10. Compare *Estate of Kessler*, 120 Cal.App.2d 383, 387, 261 P.2d 27, 29 (1953) and, *In re Estate of Wolfe*, 164 Misc. 504, 299 N.Y. Supp. 99 (Sur. Ct. 1937), with *Lanston v. Children's Hosp.*, 148 F.2d 689 (D.C.Cir. 1945).
11. See Bogert on Trusts §182.
12. Treas. Reg. §20.2041-1(c)(2); see also Restatement (Third) of Trusts §50 (2003).
13. Treas. Reg. §20.2041-1(c)(2); see also *Hartford-Connecticut Trust Co. v. Eaton*, 36 F.2d 710 (2d Cir. 1929).
14. Restatement (Third) of Trusts §50 (2003); see also *Akers v. Fidelity & Columbia Trust Co.*, 192 Ky. 850, 234 S.W. 725 (1921).
15. *Citizens National Bank v. Orkin*, 223 Ga. 385, 156 S.E.2d 86(1967).
16. Restatement (Third) of Trusts §50 (2003); see also *Estate of Tretheway*, 32 Cal.App.2d 287, 89 P.2d 679 (1939) and *Dahl v. Akin*, 645 S.W.2d 506 (Tex. App. 1982); but see *In re Family Trust of Windus*, No. 97-2006, 2008 WL 3916438, at *2 (Iowa App. Aug. 27, 2008)(finding payment of credit card debt an authorized distribution for "support and maintenance" when beneficiary would not have had enough funds for her own support if she paid the debt from her individual assets).
17. See *Estate of Bell*, 66 T.C. 729, 735-736 (1976).
18. Treas. Reg. §20.2041-1(c)(2); See also Ltr. Rul 9030032 and *Forsee v. U.S.*, 76 F. Supp. 2d 1135, 2001-1 U.S. Tax Cas. (CCH) ¶60393.
19. See Ltr. Rul. 9012053.
20. John G. Steinkamp, "Estate and Gift Taxation of Powers of Appointment Limited by Ascertainable Standards," 79 *Marq. L. Rev.* 195, 255; See also *Miller v. United States*, 387 F.2d 866, 867 (3rd Cir. Pa. 1968), and Rev. Rul. 77-194, 1977-1 C.B. 283.
21. 990 F.2d 578 (10th Cir. 1993).
22. *Id.*; see also *Estate of Sieber v. Oklahoma Tax Comm'n*, 2002 OK CIV APP 25, 41 P.3d 1038.
23. Leslie Kiefer Amann, "Discretionary Distributions: Old Rules, New Perspectives," 6 *Est. Plan & Community Prop. L.J.* 181, 186 (Summer 2014).
24. *Cavett v. Buck*, 1964 OK 265, 397 P.2d 901, ¶12.
25. Restatement (Second) of Trusts §187 (1959).
26. See Restatement (Third) of Trusts §50 cmt. e (2003).

27. See *McPherson v. McPherson*, 307 Ga. App. 548, 705 S.E. 2d 314 (2011).
28. Restatement (Third) of Trusts §50 (2003).
29. *Id.*
30. *Id.*; see also *id.* at §79.
31. *Id.* at §50.
32. *Id.*; see also *Hertel v. Nationsbank, N.A.*, 37 S.W.3d 408 (Mo. 2001) and *NCNB National Bank v. Shanaberger*, 616 So.2d 96 (Fla.App. 1993).
33. Restatement (Second) of Trusts §128 cmt. e (1959); see also *Godfrey v. Chandley*, 248 Kan. 975 811 P.2d 1248 (1991) and *Hamilton National Bank v. Childers*, 233 Ga. 427, 211 S.E.2d 723 (1975).
34. See *Cavett* at ¶11.

ABOUT THE AUTHOR



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Conservatorships: So Useful, But So Rare

By Julie A. Evans

Are you missing out on an opportunity to better serve your clients? The Oklahoma Legislature has given us a tremendous tool to assist clients and their families. This tool is a conservatorship proceeding which is very useful, but greatly underutilized. Throughout the entire state of Oklahoma there have been only 51 conservatorship cases filed since 2005. Every attorney providing estate planning services and practicing guardianship law in Oklahoma would benefit from becoming familiar with our Conservatorship Act.

In Oklahoma, reference to a “conservator” is a term of art because it has a specialized meaning under our statutes. Many states, if not a majority, use the word “conservator” to define a guardian of property for a mentally incapacitated adult; and then the word “guardian” to define a guardian of the person for a mentally incapacitated adult.¹ The Uniform Probate Code provides for the appointment and supervision of conservators of the property and guardians of the person only after an adult has been adjudicated mentally incapacitated by the court.² Oklahoma law, however, is quite different.

The provisions of the Oklahoma Guardianship and Conservatorship Act that allow the establishment of a conservatorship were enacted by the Oklahoma Legislature in 1989. The Conservatorship Act is simple and straightforward. It is comprised of only 10 sections which are found in Title 30 Oklahoma Statutes §3-211 through §3-220.

The appointment of a conservator in Oklahoma is not based upon mental incapacity, but rather upon physical disability.³ The prospective ward seeking the assistance of a conserva-

tor must still possess her mental capacity and be legally competent. Her ailment must be a physical disability that renders her unable to manage assets and property.⁴ The Oklahoma Guardianship and Conservatorship Act does not define the term “physical disability,” so that determination would ultimately rest with the judge. Another distinguishing element of a conservatorship in Oklahoma is that it must be voluntary. The prospective ward must voluntarily consent to being under a conservatorship and to the appointment of her conservator.⁵

THE PROCEDURE

Procedurally, the attorney prepares a Petition for Appointment of Conservator setting forth the jurisdictional facts as well as the circumstances that led to the request for a conservatorship. Although the statute allows “any person, any relative, or friend” to sign the petition, it is best for the prospective ward to sign the petition as the petitioner, unless there is a good reason to the contrary.

While preparing the petition, it is wise to think ahead about the inventory and the plan for management of property because both of

these documents must be filed within two months after the appointment of the conservator just as in a guardianship proceeding.⁶ It generally saves time and expense if the inventory and plan are prepared at the same time as the petition so they may be presented to the judge for approval at the hearing. Plus, at the hearing, it will be necessary to present testimony or evidence to the judge as to the value of the conservatorship estate for the purpose of setting a conservator bond that is required “in like manner and with like conditions as provided for guardians of incapacitated and partially incapacitated persons.”⁷

The next pleadings needed are the Order Appointing Conservator and the Letters of Conservatorship. The proposed conservator must meet the same eligibility requirements as a proposed guardian that are set forth in 30 Okla. Stat. §4-105.⁸ If the proposed conservator cannot attend the hearing with the prospective ward, it will save time if the proposed conservator’s notarized signature is obtained on the Letters of Conservatorship so that the letters will be ready to present to the judge at the hearing if no bond is required (due to the size of the conservatorship estate) or after the bond has been set, obtained and approved by the judge. For his services, the conservator is entitled to the same compensation as a guardian of the property.⁹ The compensation formula is found in 30 Okla. Stat. §4-401 and provides for reimbursement of reasonable expenses and a fee not to exceed 7.5 percent of the income collected. All reimbursement and fees from the conservatorship estate must be approved by the court before they are paid.¹⁰ The conservator, of course, may waive his right to reimbursement of expenses and his right to the statutory fee.

If the petitioner is the prospective ward and she attends the hearing, then it is generally not necessary to prepare and serve an Order and Notice of Hearing. Setting the petition for hearing will depend upon how the judge sets his cases. Some judges allow the attorney to make an appointment for a day and time to appear in chambers with the petitioner-prospective ward, others handle it on their emergency/special guardianship docket, and others set it on their regular docket. The statute requires the prospective ward to attend the hearing if she is able to do so, which in all instances is the best case scenario.¹¹ The word “able” is not defined, but it in all likelihood means that if the

prospective ward is physically able to get to the courthouse, then she “must be produced before the court at the hearing.”¹²

If the prospective ward wishes to conduct any final business or engage in any final financial transactions herself, she should do so before the hearing because after the appointment of a conservator, she will no longer possess the power to enter into contracts except for necessities.¹³ Equally important, if the prospective ward has any estate planning that she wishes to do other than a Last Will and Testament, then her last chance to execute such documents would be before the hearing because when a person is under a conservatorship she may only dispose of her estate by Last Will and Testament that must be subscribed and acknowledged in the presence of a judge of the district court.¹⁴ There are no provisions allowing other types of estate planning for a person under a guardianship or conservatorship.

At the hearing of the Petition for Appointment of Conservator, the judge may ask for formal testimony from the petitioner/prospective ward or he may choose to ask the questions himself on a more informal basis since this is not an adversarial proceeding. The judge must determine that the petitioner/prospective ward has a physical disability which renders her unable to manage her assets and that she consents to the appointment of a conservator.¹⁵ If the judge finds that she has a physical disability and the capacity to consent to a conservator, then he will make the appointment and set the conservator bond based upon the value of the conservatorship estate. As with a guardianship, if the value of the ward’s personal property including one year of income is less than \$40,000, then the judge may waive the conservator bond.¹⁶ If the inventory and plan for management of property are presented to the judge at the hearing, he will also review and approve them as part of the Order Appointing Conservator. A first annual accounting and first annual report of the property will be due one year after the appointment of the conservator.¹⁷ Depending upon the county, some judges set a hearing to review and approve the conservator’s annual accounting and annual report each year, but other judges set a due date when the conservator must submit his annual accounting and annual report to the judge’s office for review. After the judge reviews the annual accounting and annual report, he will approve them by signing an order that also

includes approval of compensation for the conservator and the attorney, if requested. When the accounting and report are filed, they are mailed to the ward who will have 15 days to file a written objection if she sees something amiss.¹⁸

A conservatorship may be terminated if the ward no longer needs it because she has overcome her physical disability.¹⁹ Most often, though, the ward eventually becomes mentally incapacitated in addition to her physical disability. If this should happen, the conservatorship stays in place for the continued management of the ward's assets and property by the conservator.²⁰ If the ward has become mentally incapacitated and did not execute a Durable Power of Attorney for Healthcare before her conservatorship was established and healthcare providers are now looking for someone with the legal authority to make the ward's healthcare decisions, a separate guardianship case should be filed which is limited to care of the person so that the judge may appoint a guardian of the person for the now mentally incapacitated ward.²¹

If the ward dies while under a conservatorship, it must be terminated in the same manner as a guardianship of the property.²² This requires that the conservator prepare, file and set for hearing a final accounting and Petition to Terminate Conservatorship and Discharge Conservator.²³ At the hearing, the judge will approve the final accounting, discharge the conservator from further duties, vacate the letters of conservatorship, release the conservator bond, if any and order distribution of conservatorship assets to the personal representative of the deceased ward's probate estate.

WHY IS A CONSERVATORSHIP HELPFUL?

So why would a person ever want a conservator? Why would an attorney ever suggest a conservatorship to his client? There are some very good reasons that an attorney would suggest that his client establish a conservatorship. In many ways, a conservatorship is another estate planning tool available to clients.

Tug-of-War: Your client may be the subject of a tug-of-war between her children. The chil-

dren may have competing or successive financial Durable Powers of Attorney that cause great confusion as to who is actually the current attorney-in-fact with the power to act. It is not uncommon to see this situation develop with elderly clients who are still mentally competent, but have impaired physical capabilities. As clients age, we know they become more dependent upon assistance from their children and others. This dependence may cause them to be more agreeable to signing various estate planning documents presented to them by their children. Your client, an elderly mother, may need assistance in stopping dueling financial Durable Powers of Attorney that she now regrets signing when asked by her children who are antagonistic toward each other and are trying to push one another out of the picture. One child may even start telling people

that his mother is now mentally incapacitated and he is solely in charge. This allegation of mental incapacity compromises the mother's legal ability to make changes to her estate planning documents and transact business. She now seeks your assistance with this situation.

If your client meets the requirement of "by reason of physical disability only" that rendered her unable to manage her assets and property,²⁴ then a conservatorship could be a solution because once a conservator is appointed the conservator is in charge of managing

the mother's assets under the supervision of the court.²⁵ The conservator also has the power to revoke or amend financial Durable Powers of Attorney after he has been appointed.²⁶

If the mother still has business she needs to transact or wants to make changes to a trust or other estate planning document, then she could do these things shortly before she goes to court for the hearing on a Petition for Appointment of Conservator. The value of this sequence of events is that the mother can go ahead and make the changes to her estate plan that she wishes to make even though there are allegations of mental incapacity. Those changes should be valid because the judge would not be able to appoint a conservator at the hearing if the mother were mentally incapacitated.

“If the ward dies while under a conservatorship, it must be terminated in the same manner as a guardianship of the property.”

If the mother is hesitant about utilizing a conservatorship proceeding because she does not want anyone to know about it, she can be advised that the law only requires notice of the proceeding be given to her as the prospective ward.²⁷ Although the notice provision gives the court discretion to require notice be given to "such other persons and in such manner as the court directs,"²⁸ the court would take the prospective ward's wishes and circumstances into consideration before requiring additional notice. The mother should also be advised that conservatorship cases are confidential proceedings the details of which are not of public record.²⁹

The circumstances in which others might learn of her conservatorship would be when the conservator presents his Letters of Conservatorship to those persons and entities with whom the mother does business. If there was a financial Durable Power of Attorney that has been revoked by either the mother before the hearing or by the conservator after the hearing, the revocation should also be given to those persons and entities because they must be put on notice that they should now only be doing business with the conservator and not the attorney-in-fact. The revocation must also be given to the person who was serving as attorney-in-fact so he will know that his powers have been terminated and he must cease to act on behalf of the mother.³⁰

Not only does your client, the elderly mother, enjoy relief from the power of attorney tug-of-war, but any future financial or estate planning documents that someone might try to get her to sign would be voidable because upon the appointment of the conservator the mother no longer possesses the ability to contract, except for necessities, and her estate planning options are limited to making a Last Will and Testament if it is properly executed in the presence of a judge of the district court.

The Drain Game: What if your elderly client's son constantly asks her for financial assistance to fund his gambling habit or lavish lifestyle? This drain on her assets has gone on long enough and she is finally ready to do something about it. However, she does not want to be the "bad guy," so she seeks your assistance in finding a solution to this predicament. She is still mentally competent, but has a physical disability such as hearing loss, macular degeneration or rheumatoid arthritis that impairs her ability to take care of business like she used to

do. If the mother consents to the appointment of a conservator, then the conservator would be the person charged with the duty to preserve and protect her assets until legally discharged.³¹ The conservator could only expend the mother's funds "for the support of persons legally dependent on the ward and others who are members of the ward's household who are unable to support themselves, and who are in need of support."³² If the son did not meet these requirements, then the conservator would be the one to tell the son that he is not going to receive any additional financial assistance from his mother's assets.

Again, since notice of a conservatorship proceeding is only required by statute to be given to the mother as the prospective ward, (with discretion by the judge to require notice to others) and is classified as a confidential case the details of which are not of public record, the son need not necessarily know in advance about the proceeding nor the details after the proceeding until he has an encounter with the conservator who will not give him any more of his mother's money. In the interest of family harmony it would probably be best for the petitioner/prospective ward to tell her family about the conservatorship, but notice is not mandatory unless ordered by the judge.

No Family: The requirements of legal competency, physical disability and consent to the appointment of a conservator to establish a conservatorship are more akin to creating estate planning documents than an adversarial legal proceeding such as many guardianship cases. Therefore a conservatorship might be considered as another estate planning tool because, in a way, it is a beefed-up and fortified financial Durable Power of Attorney.

If a client has no close family to serve as attorney-in-fact under a financial Durable Power of Attorney or no one that she really trusts to take care of her finances and assets, then a conservatorship may be a great solution for this client because of the comfort of knowing that a judge will review the conservator's accounting and report of her assets each year. She would still have the decision to make of whom to select as conservator and if he would accept the appointment, but it would enable her to cast a wider net knowing that whomever she selected would be reporting to a judge at least annually. If the client cannot find a neighbor, church friend or other person to serve, then she might try contacting a bank or trust

company because some corporate institutions will accept appointments as conservator.

RARITY

Although conservatorships can be very useful proceedings and serve as lifetime estate planning tools, they are rarely utilized in Oklahoma. In the 77 counties in Oklahoma, since 2005 there have been only 51 conservatorship cases filed as compared to 55,419 guardianship cases. However, the reporting of the guardianship statistics includes both guardianships for adults and minor children because record keeping procedures do not segregate adult guardianship cases from minor children guardianship cases, which makes it impossible to

determine the exact number of adult guardianship cases filed each year. Even if the percentage of adult guardianship cases is only 10 percent of the total number of guardianship cases filed in Oklahoma over the last 11 years, it would exceed 5,500 cases versus 51 conservatorship cases.

The Administrative Office of the Courts, which services 13 counties through the OCIS case management system, and KellPro Inc., which services 64 counties through ODCR.com, reported the following number of guardianship cases and conservatorship cases that have been filed in each county in Oklahoma from 2005 through 2015:

Guardianship Cases

County	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Adair	21	36	30	41	28	25	37	38	34	40	32
Alfalfa	7	6	5	3	6	6	5	6	6	2	8
Atoka	18	19	13	10	18	14	13	13	16	15	18
Beaver	1	8	3	6	4	3	3	7	5	8	5
Beckham	30	29	20	37	55	30	32	37	29	27	31
Blaine	12	9	9	19	10	16	17	20	16	16	18
Bryan	47	46	39	60	46	64	71	79	74	73	51
Caddo	20	20	18	28	34	22	22	16	24	31	41
Canadian	68	82	76	82	89	96	113	147	183	144	135
Carter	35	39	37	47	33	50	37	65	74	57	76
Cherokee	98	80	85	77	69	77	73	75	77	72	83
Choctaw	19	20	31	16	24	18	20	12	14	28	30
Cimarron	0	1	0	2	0	2	2	3	2	0	0
Cleveland	307	308	363	392	376	321	375	409	379	332	381
Coal	10	12	11	7	9	6	3	12	7	7	11
Comanche	94	88	76	72	81	81	78	80	71	61	98
Cotton	8	7	5	8	7	8	3	13	8	6	5
Craig	35	37	22	32	26	27	25	27	26	20	21
Creek	84	91	98	97	93	128	129	142	144	141	148
Custer	15	24	28	36	26	22	41	22	22	30	24
Delaware	136	150	152	174	206	192	224	172	190	168	244
Dewey	6	1	2	3	9	6	5	9	10	5	6
Ellis	4	4	2	5	5	5	6	6	5	8	8
Garfield	119	74	67	83	77	83	74	78	70	58	72
Garvin	48	39	23	32	42	31	40	39	48	55	49
Grady	67	52	40	59	61	47	77	61	63	58	80

County	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Grant	2	3	5	3	5	3	6	2	6	15	6
Greer	5	6	7	7	10	4	6	1	6	4	2
Harmon	2	2	7	2	3	3	2	4	3	4	8
Harper	4	2	6	2	3	1	2	2	2	2	6
Haskell	31	35	23	28	23	22	22	23	26	25	32
Hughes	17	20	27	16	25	9	15	16	25	20	22
Jackson	15	11	26	13	11	16	16	12	15	9	11
Jefferson	9	13	6	5	4	5	15	5	6	8	10
Johnston	10	23	18	19	13	20	8	15	14	17	12
Kay	59	53	54	67	78	66	93	89	87	92	90
Kingfisher	13	17	12	19	19	20	13	16	18	21	15
Kiowa	11	6	12	14	5	5	5	8	14	3	7
Latimer	15	20	13	14	29	30	29	14	18	13	12
LeFlore	79	77	65	79	79	101	80	96	92	91	79
Lincoln	42	38	31	33	30	32	43	57	51	39	56
Logan	33	32	32	41	53	32	34	35	51	50	55
Love	10	12	2	9	6	14	12	5	6	6	8
Major	7	19	9	11	10	11	8	13	8	9	9
Marshall	31	25	14	19	18	22	8	16	20	19	18
Mayes	37	47	38	58	57	45	45	41	42	45	61
McClain	49	38	35	36	47	30	37	55	60	61	61
McCurtain	49	46	43	38	41	40	37	46	41	45	48
McIntosh	58	41	34	24	47	36	36	33	41	44	34
Murray	19	13	12	13	18	16	16	20	16	29	17
Muskogee	121	113	138	108	127	139	132	131	126	134	141
Noble	8	24	12	8	5	10	12	3	13	12	14
Nowata	29	14	12	29	21	17	21	21	19	25	31
Okfuskee	23	16	9	17	20	18	12	21	22	31	24
Oklahoma	811	855	927	870	908	859	884	988	998	1119	1147
Okmulgee	48	46	32	34	41	72	87	63	79	82	77
Osage	45	43	52	41	49	57	67	55	60	43	65
Ottawa	48	58	49	52	60	68	70	78	55	40	63
Pawnee	19	14	17	21	18	21	22	22	22	21	26
Payne	62	80	97	79	75	63	58	59	57	62	71
Pittsburg	61	76	66	75	77	80	74	96	79	91	81
Pontotoc	35	41	35	38	38	55	70	50	68	62	64
Pottawatomie	79	114	102	92	124	108	86	101	89	110	131
Pushmataha	32	21	10	22	15	19	14	19	17	23	27
Roger Mills	3	3	2	3	2	1	5	6	7	2	1
Rogers	109	104	126	124	129	119	99	134	128	134	188
Seminole	33	30	35	20	32	43	31	45	43	44	29

County	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Sequoyah	58	81	68	64	61	64	53	63	67	51	97
Stephens	45	63	58	57	67	65	54	52	44	59	40
Texas	5	6	6	12	5	13	7	8	4	6	13
Tillman	0	0	2	2	14	18	16	8	12	14	10
Tulsa	714	780	759	811	843	853	804	859	882	822	901
Wagoner	120	111	139	110	115	94	122	130	115	123	101
Washington	49	36	59	45	41	51	63	54	49	52	44
Washita	5	14	13	11	11	18	14	17	22	13	19
Woods	10	6	3	4	10	3	6	9	7	7	5
Woodward	28	27	36	26	27	32	26	36	35	36	36
Totals	4516	4657	4650	4773	5003	4923	5022	5340	5384	5351	5800

Conservatorship Cases

County	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Adair	0	0	0	0	0	0	0	0	0	0	0
Alfalfa	0	0	0	0	0	0	0	0	0	0	0
Atoka	0	0	0	0	0	0	0	0	0	0	0
Beaver	0	0	0	0	0	0	0	0	0	0	0
Beckham	0	0	0	0	0	0	0	0	0	0	0
Blaine	0	0	0	0	0	0	0	0	0	0	0
Bryan	0	0	0	0	0	0	1	0	0	1	0
Caddo	0	0	0	0	0	0	0	0	0	0	0
Canadian	0	0	0	0	0	0	1	0	0	0	0
Carter	0	0	0	0	0	0	0	0	0	0	0
Cherokee	0	0	0	0	0	0	0	0	0	0	0
Choctaw	0	0	0	0	0	0	0	0	0	0	0
Cimarron	0	0	0	0	0	0	0	0	0	0	0
Cleveland	0	1	0	0	1	1	0	0	0	0	0
Coal	0	0	0	0	0	0	0	0	0	0	0
Comanche	0	0	0	0	0	1	0	0	0	0	0
Cotton	0	0	0	0	0	0	0	0	0	0	0
Craig	0	0	0	0	0	0	0	0	0	0	0
Creek	0	0	0	0	1	0	0	0	0	0	0
Custer	0	0	0	0	0	0	0	1	0	0	0
Delaware	0	0	0	0	0	0	0	0	2	0	0
Dewey	0	0	0	0	0	0	0	0	0	0	0
Ellis	1	0	0	0	0	0	0	0	0	0	0
Garfield	0	4	1	0	0	0	1	1	1	0	0
Garvin	0	0	0	0	0	0	0	0	0	0	0
Grady	0	0	0	0	0	0	0	0	0	0	0

County	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Grant	0	0	0	0	0	0	0	0	0	0	0
Greer	0	0	0	0	0	0	0	0	0	0	0
Harmon	0	0	0	0	0	0	0	0	0	0	0
Harper	0	0	0	0	0	0	0	0	0	0	0
Haskell	0	0	0	0	0	0	0	0	0	0	0
Hughes	0	0	0	0	0	0	1	0	0	0	0
Jackson	0	0	0	0	0	0	0	0	0	0	0
Jefferson	0	0	0	0	0	1	0	0	0	0	0
Johnston	0	0	0	0	0	0	0	0	0	0	0
Kay	0	1	0	0	0	0	0	0	0	0	0
Kingfisher	0	0	0	0	0	0	0	0	0	0	0
Kiowa	0	0	0	0	0	0	0	0	0	0	0
Latimer	0	0	0	0	0	0	0	0	0	0	0
LeFlore	0	0	0	0	0	0	0	0	0	0	0
Lincoln	0	0	0	0	0	1	0	0	0	0	0
Logan	0	0	0	0	0	0	0	0	0	0	0
Love	0	0	0	0	0	0	0	0	0	0	0
Major	0	0	0	0	0	0	0	0	0	0	0
Marshall	0	0	0	0	0	0	0	0	0	0	0
Mayes	0	0	0	0	0	0	0	0	0	0	0
McClain	0	0	0	0	0	0	0	0	0	0	0
McCurtain	0	0	0	0	0	0	0	0	0	0	0
McIntosh	0	0	0	0	0	0	0	0	0	0	0
Murray	0	0	0	0	0	0	0	0	0	0	0
Muskogee	0	0	0	0	0	0	0	1	0	0	0
Noble	0	0	0	0	0	0	0	0	0	0	0
Nowata	0	0	0	0	0	0	0	0	0	0	0
Okfuskee	0	0	0	0	0	0	0	0	0	0	0
Oklahoma	0	1	0	0	0	0	1	0	0	0	2
Okmulgee	0	0	0	0	0	0	0	0	1	0	0
Osage	1	0	0	0	0	0	0	0	0	0	0
Ottawa	0	0	0	0	0	0	0	0	1	0	0
Pawnee	0	0	0	0	0	0	0	0	0	0	0
Payne	0	0	0	0	0	0	0	0	0	0	0
Pittsburg	0	0	0	0	0	0	0	0	0	0	0
Pontotoc	0	0	0	0	0	0	0	0	0	0	0
Pottawatomie	0	0	0	0	3	1	0	0	0	0	1
Pushmataha	0	0	0	0	0	0	0	0	0	0	0
Roger Mills	0	0	0	0	0	0	0	0	0	0	0
Rogers	0	0	0	0	0	0	0	0	0	0	0
Seminole	0	0	0	0	0	0	0	0	0	0	0

County	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Sequoyah	0	0	0	0	0	0	0	0	0	0	0
Stephens	0	0	0	0	0	0	0	0	0	0	0
Texas	0	0	0	1	0	0	0	0	0	0	0
Tillman	0	0	0	0	0	0	0	0	2	0	0
Tulsa	0	1	2	0	0	0	2	1	1	2	1
Wagoner	0	0	0	0	0	0	0	0	0	0	0
Washington	0	0	0	0	0	0	0	0	0	1	0
Washita	0	0	0	0	0	0	0	0	0	0	0
Woods	0	0	0	0	0	0	0	0	0	0	0
Woodward	0	0	0	0	0	0	0	0	0	0	0
Totals	2	8	3	1	5	5	7	4	8	4	4

It is probable that many of these adult guardianship cases seeking the appointment of a guardian of the property could have been filed as conservatorship cases because many times the ward really has a physical disability rather than a mental incapacity. In these instances, the filing of the case as a conservatorship lends more dignity to the prospective ward because she may serve as the petitioner and still feel as if she has a say in her financial affairs. Therefore, it might be worth adding conservatorships to your list of tools for discussion during conferences regarding the selection and appointment of financial fiduciaries during an elderly client's lifetime.

CONCLUSION

Conservatorships are usually a very positive experience because the client is getting to choose whom she wants to serve as her fiduciary, her choice has been authorized by the judge in a private confidential hearing, and each year the conservator reports all of his financial and accounting activities to the judge, which should give the ward peace of mind that the conservator is faithfully performing his job. The bonus is that a conservatorship case will make your judge's day because it is a nonadversarial proceeding, which is pleasant and has a happy outcome.

1. Uniform Law Commission, Adult Guardianship and Protective Proceedings Jurisdiction Act Summary, Key Terminology section.

2. Uniform Law Commission, Probate Code Summary, Guardianship and Protective Proceedings section which states:

The UPC 1991 provides for the appointment and supervision of guardians and conservators for minors and incapacitated adults. It provides for guardians of the person and conservators of the estate as separate and distinct offices. No adult can be subjected to a guardianship or conservatorship without a determination of incapacity by a court. All guardians and conservators are subject to the jurisdiction and the supervision of the court.

3. 30 Okla. Stat. §3-211.

4. *Id.*

5. *Id.*

6. 30 Okla. Stat. §3-215.

7. 30 Okla. Stat. §3-214.

8. 30 Okla. Stat. §3-213.

9. 30 Okla. Stat. §3-217.

10. 30 Okla. Stat. §4-401(C).

11. 30 Okla. Stat. §3-211(3).

12. *Id.*

13. 30 Okla. Stat. §3-219.

14. 84 Okla. Stat. §41(B). *Matter of Estate of Goodwin*, 1993 OK CIV APP 86, 854 P.2d 390.

15. 30 Okla. Stat. §3-212.

16. 30 Okla. Stat. §3-214 and 30 Okla. Stat. §4-201(B)(2).

17. 30 Okla. Stat. §3-215 and 30 Okla. Stat. §4-303(A) and (B).

18. 30 Okla. Stat. §4-307(A).

19. 30 Okla. Stat. §3-216.

20. 30 Okla. Stat. §3-218.

21. *Id.*

22. 30 Okla. Stat. §3-216.

23. 30 Okla. Stat. §4-803(D).

24. 30 Okla. Stat. §3-211(2).

25. 30 Okla. Stat. §3-214.

26. 58 Okla. Stat. §1074(A). *Russell v. Chase Investment Services Corp.*, 2009 OK 22, 212 P.3 1178.

27. 30 Okla. Stat. §3-211(3).

28. *Id.*

29. 30 Okla. Stat. §1-122.

30. 58 Okla. Stat. §1076.

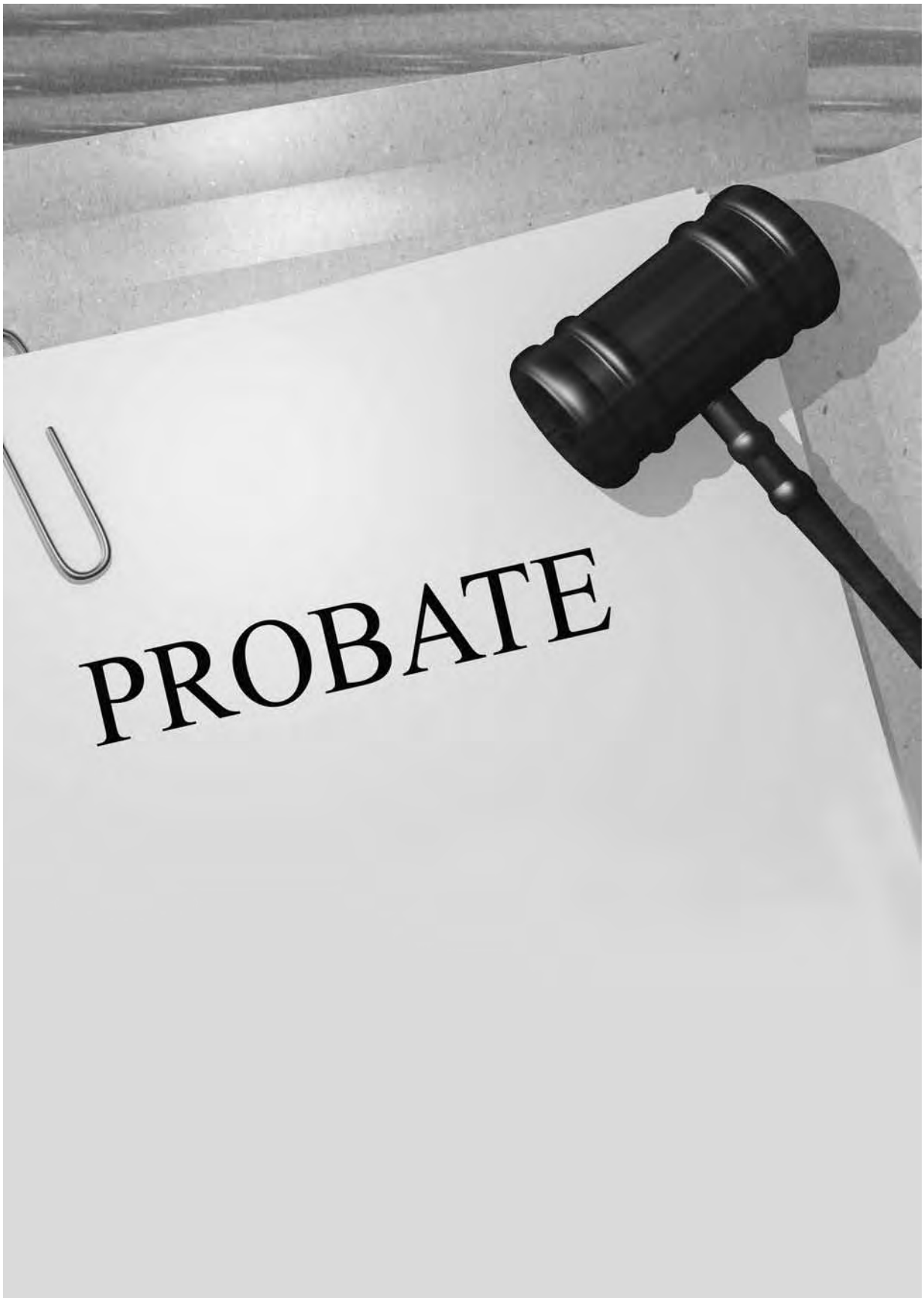
31. 30 Okla. Stat. §3-214 and 30 Okla. Stat. §3-215.

32. 30 Okla. Stat. §3-121(A)(2).

ABOUT THE AUTHOR



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Due Process and Best Practices in Oklahoma Probate

By Terrell Monks and Ashley Warshell

In *Tulsa Professional Collection Services v. Pope*,¹ the United States Supreme Court held that Oklahoma's statutory requirements to notify creditors in probate proceedings were insufficient to satisfy due process.² In an opinion intended to reach probate procedure nationwide, the court honed in on Oklahoma's nonclaim statute, 58 O.S. section 333, and the notice to creditors provision, 58 O.S. section 331.³ Together these sections set forth the form used to notify a decedent's creditors and established a limited timeframe within which creditors' claims must be filed.⁴ Under these Oklahoma statutes, notice was given to creditors by publication once per week for two consecutive weeks.⁵ After the first date of publication, creditors had two months to file any claims.⁶

'NOTICE REASONABLY CALCULATED'

To determine the process due to creditors, the court revisited cases beginning with *Mullane v. Central Hanover Bank & Trust*,⁷ which provide the basic standard for "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."⁸ The analysis involves weighing the interests of parties with the interests of the state in an effort to find a balance that is reasonable in light of all the facts.⁹

The court then considered the appellee's position that the nonclaim statute was at essence no more than a statute of limitations, and not a "state action" sufficient to implicate due process. However, statutes of limitations were distinguished by their self-executing quality — in other words, the state action component was the probate proceeding itself, the structure of which marks both the beginning and the end of the creditors' claim presentment period. This involvement, the court reasoned,

... is so pervasive and substantial that it must be considered state action. Where the legal proceedings themselves trigger the time bar... the time bar lacks the self-executing feature... necessary to remove any due process problem.¹⁰

The decision in *Pope* follows from this reasoning. *Mullane* itself, as well as the more recent *Logan v. Zimmerman Brush Co.*,¹¹ held that a cause of action is a property right protected by due process. Creditors' claims against a probate estate are constitutionally protected property rights, requiring the same notice afforded in *Mullane* and its progeny. This determination left one final issue to be resolved on remand: Was the creditor at issue in *Pope* reasonably ascertainable by the personal representative?

On remand the creditor's request for relief was denied again based on an implicit holding that the publication notice satisfied due process.¹² The creditor, a successor in interest to the hospital where the decedent spent the last four

months of his life, appealed a second time.¹³

The Oklahoma Supreme Court reconsidered the creditor's claim in *In re Pope*,¹⁴ this time focusing on the personal representative's knowledge of the hospital's status as a potential creditor. The court found that since *Mullane*, state notice requirements have evolved toward greater protection of property rights. For example, prior to *McCullough v. Safeway*,¹⁵ and the amendment to Oklahoma District Court Rule 27¹⁶ in 1985, defeated litigants were not entitled to actual notice of judgments rendered *in absentia* against them.¹⁷ Oklahoma litigants had to monitor court dockets throughout litigation in order to learn of adverse judgments.¹⁸ *McCullough* and Oklahoma District Court Rule 27 addressed this issue by requiring such orders to be mailed to parties by the court clerk.¹⁹

As to the hospital creditor in *Pope*, the court stated the following:

[A]n estate representative who knows of a decedent's last-illness hospital stay as a paying patient is put on notice... that the health care provider is likely to stand, vis-à-vis the decedent's estate, in the status of a creditor. It is then the estate representative's state-law duty to give actual notice....²⁰

Thus, the court held that hospitals where decedents stay during their last illnesses are entitled to actual notice. As a result, the court directed the personal representative to proceed with Probate Code procedure and treat the hospital's claim as timely received.²¹

Pope changed two important aspects of probate procedure. First, notice must be mailed to all reasonably ascertainable creditors of the estate, and an affidavit of mailing should be recorded to reflect compliance. Second, any healthcare facilities where decedents stay during their last illnesses are reasonably ascertainable creditors. Failure to meet these requirements may result in settlement delays, liability for the personal representative or a less than final settlement.²²

NOTICE OF REJECTION

In *In re Estate of Villines*,²³ the Oklahoma Supreme Court extended its due process jurisprudence to creditors' claims which were sub-

“Because the creditor in *Villines* did not receive actual notice of rejection, the claim was improperly disallowed.”

mitted prior to publication of the notice to creditors. The decision rested on the construction of 58 O.S. section 331, which can be separated into two basic parts. The first portion governs claims filed *after* the issuance of the notice and provides that these claims are deemed rejected if not acted upon within 30 days of presentation.²⁴ The second part addresses claims filed *before* the issuance of notice, providing that such claims shall “be considered validly presented... and the personal representative shall not be required to give notice to such creditor by mail, other than notice of rejection....”²⁵

Although this language does not expressly require notice of rejection, the court found that it implies a requirement that creditors receive actual notice when the personal representative rejects early-presented claims.²⁶ Because the creditor in *Villines* did not receive actual notice of rejection, the claim was improperly disallowed.²⁷ This result is consistent with principles of due process in giving notice to interested parties of a time structure to which they will be held accountable.²⁸ To hold otherwise would burden creditors with a duty to check the docket periodically for an extended period of time — the same burden the *Pope* Court sought to relieve.²⁹

NOTICE OF FINAL ACCOUNT

In *Booth v. McKnight*,³⁰ the court held that due process requires more than simply notifying an interested party of when and where a probate hearing will occur. An adverse party must be able to “intelligently...ascertain what issues the hearing will address, what rights are at stake, and what one stands to lose upon default through non-attendance.”³¹ In *Booth*, the personal representative and daughter of the decedent filed a final account of probate assets that included a mineral interest valued at \$400.³² The final account requested distribution in accordance with the terms of the will, which directed distribution of the mineral interest to each of three siblings equally, while noting that the personal representative's and attorney's fees had not yet been paid from estate assets.³³ The personal representative sent notice of the hearing to her brothers without a copy of the final account.³⁴ The brothers failed to attend the hearing, which resulted in an order distribut-

ing the entire mineral interest to the personal representative as her fee.³⁵ By the date of the hearing, the mineral interest had produced approximately \$40,000.³⁶ Thereafter, the brothers filed a quiet title suit seeking to divide the ownership among the siblings in conformance with the will.³⁷ The Oklahoma Supreme Court found that the notice to the brothers failed the constitutional standard, and that the probate decree was facially void to the extent that it distributed the mineral interest to the personal representative.

ATTORNEY FEES

In *State ex rel. Oklahoma Bar Association v. Mansfield*, 2015 OK 22, the court considered a professional misconduct complaint against a probate attorney who paid himself estate funds without judicial approval. The court emphasized that a personal representative lacks authority to bind the estate to payment of an attorney's fee; any such fee must be approved by the probate court prior to the transfer of funds.³⁸ Although the *Mansfield* Court's holding did not directly address the necessity of notice of the application for fees and hearing thereon, consistent rulings applying principles of due process to probate actions suggest that a due process objection by an heir or beneficiary would likely be found compelling in this context.

PRACTICAL APPLICATION OF DUE PROCESS IN PROBATE PRACTICE

A practitioner in probate court should conduct probate cases in a manner most likely to allow the case to be efficiently completed and never resurface for corrective action. With that goal in mind, as well as the knowledge that a cause of action is a protected property right, attorneys may wish to consider the following procedures in their probate practices and pleadings.

A careful reading of *Tulsa Professional Collection Services v. Pope*,³⁹ suggests that an estate may have potential creditors in addition to hospitals whose interests are protected by due process. Inquiry into the details of the time preceding a decedent's passing is warranted. For example, one may inquire whether an ambulance took the decedent to the hospital. If so, the ambulance service may be listed as a creditor, even if there is no actual notice of an invoice. Many Oklahoma probate and personal injury practitioners know that emergency room physicians often send bills separately from those of the hospital. Therefore, it may be

important to list the billing agency for your local emergency room physicians as a potential creditor. It might also be wise to inquire as to the cause of death and any additional medical treatment that he or she received. It is increasingly common that several physicians, clinics or laboratories treat an individual for a single illness or during a single hospital visit, and it is possible that all of these potential creditors have priority claims for treatment of decedent's final illness. A personal representative's failure to make reasonable efforts to identify such creditors could be the basis of a complaint that the attorney failed to properly advise the client.

DRAFTING THE PETITION FOR PROBATE

The principles of *Booth* and *Pope* may also guide the drafting of a petition for probate of will or a petition for estate administration. Since photocopies of documents such as wills are not generally admissible to probate, it might seem reasonable to exclude them from the probate petition or court documents. However, due process requires pleadings to include sufficient information to allow heirs and potential beneficiaries to determine the issues that the hearing will address and what rights are at stake. Therefore, every document that might be construed as a testamentary document should be specifically addressed in the petition. Identifying all possible testamentary documents and stating the personal representative's position on admissibility to probate serves to inform the heirs concerning the issues to be addressed at the hearing and whether their rights are implicated.

A properly drafted petition that satisfies the principles of due process is likely to be a valuable tool in defending claims asserted by an heir or beneficiary, but only if that petition has been provided to the claimant. Just as important as actually providing the petition is an accurate affidavit of mailing. Many affidavit of mailing forms specifically describe the notice of hearing but fail to mention that the petition was included in the mailing. Testimony that the petition was provided with the notice may be helpful, but including the petition in the text of the affidavit of mailing may eliminate any need for your later testimony.

DRAFTING THE FINAL ACCOUNT AND PETITION FOR DISTRIBUTION

The final account and petition to distribute are another potential source of conflict. Many such petitions recite that the estate should be

distributed according to law, but fail to describe specifically how that will be accomplished. It is good practice to attach a clear and simple exhibit to the petition describing what each heir or beneficiary will receive.

APPLICATION FOR ATTORNEY FEES

The Oklahoma Supreme Court has taken great pains to advise probate practitioners that the court must approve attorney fees before they are paid from the estate.⁴⁰ Unfortunately, some practitioners have obtained judicial orders approving fees without providing notice to the heirs and beneficiaries that such a request is pending. Provided that the attorney fees are being paid from the assets of the estate, thereby diminishing the distribution, the principles of due process likely require notice of the request and an opportunity to object. Such a request could be included in the final account and petition to distribute, and possibly even in the petition for probate of will. Practitioners who fail to provide notice of the request for fees, together with the relevant hearing information, risk loss of approval of their attorney fee, or worse, having to litigate the issue at a later time.

CLIENT ADVOCACY AND DUE PROCESS

Perhaps the simplest explanation of due process is that litigants should conduct themselves in a fair and honorable manner. It can seem that there is an inherent friction between due process and advocating for the outcome desired by clients. However, it does not diminish the role and place of advocacy to insist that due process of law be satisfied before client advocacy becomes a priority. Indeed, an important part of client advocacy is ensuring that clients' interests are protected, even after the representation has been concluded. A probate practitioner should conduct the representation with these due process principles in mind at each stage of the proceeding.

1. 485 U.S. 478 (1988).
2. *Id.*
3. Both statutes have been revised since the *Pope* opinion was issued.
4. *Id.* at 481.
5. *Id.*
6. *Id.*
7. 339 U.S. 1202 (1950).
8. *Pope*, 485 U.S. at 484.
9. *Id.*
10. *Id.* at 487.
11. 455 U.S. 422 (1982).

12. *In re Estate of Pope*, 1990 OK 125, ¶2.
13. *Id.* at ¶2, 13.
14. *Id.*
15. 626 P.2d 1332 (1981).
16. 12 O.S. Supp. 1985, Ch. 2, App.
17. *In re Estate of Pope*, 1990 OK 125, ¶6.
18. *Id.*
19. *Id.* at note 21.
20. *Id.* at ¶11.
21. *Id.* at 20.
22. See discussion of *Booth v. McKnight*, 2003 OK 49, 70 P.3d 855, *supra*.
23. 2005 OK 63.
24. *Id.* at ¶11, citing 58 O.S. §337.
25. *Id.* at ¶12, citing 58 O.S. §337 (emphasis added).
26. *Id.* at ¶14.
27. *Id.* at ¶15.
28. *Id.* at ¶14.
29. See *supra*.
30. 2003 OK 49, 70 P.3d 855.
31. *Id.* at ¶27.
32. *Id.* at ¶2.
33. *Id.* at ¶2, 3.
34. *Id.* at ¶4.
35. *Id.* at ¶5. The remainder of estate assets were paid to the probate attorney, and the brothers received nothing. *Id.* at ¶5.
36. *Id.* at n. 11.
37. *Id.* at ¶6.
38. *Id.* at ¶24.
39. 485 U.S. 478 (1988).
40. See *State ex rel. Oklahoma Bar Association v. Mansfield*, 2015 OK 22.

ABOUT THE AUTHORS



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A Well-Planned Death Empowering Your Clients in End-Of-Life Planning

By J. Nicci Unsicker

As estate planning attorneys we excel at helping people plan for their family's future, giving our clients peace of mind. However, advance directives can feel like an afterthought in a large estate planning package, a brief form that most clients (and practitioners) gloss over. But, having a well-planned advance directive and an informed healthcare proxy can mean the difference between the type of death a client desires and one controlled by the healthcare system or uninformed loved ones.

THE IMPORTANCE OF ADVANCE DIRECTIVES

People desire a quick death without suffering, but often feel like the only control they have over their death is to hope they die in their sleep. When surveyed, 80 percent of Americans desire to die at home, however only 25 percent of them actually do.¹ While no one can guarantee the type of death they will experience, clients can maintain self-determination even when they cannot speak for themselves. With a well thought out advance directive and proper client education, clients can maintain their dignity and autonomy when their ability to self-manage is gone. In the United States, people over the age of 64 number more than 43 million and are expected to exceed 72 million by the year 2030.² As such, the number of clients facing end-of-life decisions is increasing rapidly. Ensuring your clients have a well-planned advance directive and an informed healthcare proxy not only aids them as they transition from this life, it also helps to quash family drama that often comes with losing a loved one. Beyond giving heirs peace of mind at the end of life, people who have completed advance directives often accumulate fewer medical expenses, easing the burden on their family after they have passed.

Currently in the United States only 28 percent of adults have completed an advance directive,³ but what does that really mean for your clients? Would end-of-life care look much different if everyone had one? A successful campaign out of La Crosse, Wisconsin, emphasized and encouraged the discussion of how people want to die. Ninety-six percent of those who died in La Crosse have signed an advance directive specifying how they would like to die. This resulted in more personalized care from medical professionals as they know in advance what each patients' wishes are for their end-of-life care. Even when the wishes of the dying have been unclear within the directive, doctors in La Crosse have found family members and proxies to be far more receptive to discussing their family member's wishes and death because talking about death has lost the stigma.⁴ Families have benefited from more open conversations about death, knowing loved ones' wishes prior to incapacity has relieved families of debilitating emotional stress and prevented debate and division amongst families. Lastly, the pervasive adoption of advance directives has resulted in La Crosse having the lowest cost for end-of-life care. Nationally, the average cost for a patient's last two years of life is \$26,000, whereas the

average cost in La Crosse is \$18,000.⁵ Patients are not receiving subpar care, but rather are avoiding excessive services, surgeries and tests they do not wish to receive.

La Crosse demonstrates what the end of life process looks like when clients are educated and willing to discuss death. La Crosse accomplished their extreme results by creating a campaign to change how people felt discussing death. It became routine for all patients admitted to a medical facility or assisted living facility to discuss advance directives with someone experienced in the topic.⁶ As attorneys, we are able to aid our clients in these challenging conversations. Beyond helping our clients pass on their financial assets with ease at death, we can help them face the physical transition of death with autonomy, without strife and division.

HOW TO HELP YOUR CLIENT TALK ABOUT DEATH

When I begin asking my clients about the kind of care they would like to receive at the end of life, I often see a shift in body language. They avoid eye contact, talk quickly and certainly never say the “D” word. People often think that if they discuss death openly, the grim reaper will appear and take them away. If we want our clients to fill out meaningful advance directives, we have to help them work past their discomforts. We need to provide them with the tools to begin processing their thoughts on the end of life.

In the initial estate planning meeting when discussing estate planning options, prepare the client for discussing advance directives. After discussing their primary estate planning concerns, provide them an overview of what an advance directive can and cannot accomplish for them and their heirs. For your younger clientele, it is often helpful to explain how advance directives can help them and not merely the elderly. The media-grabbing cases often involve young people who lack advance directives and often suffer through months, sometimes years of unwanted care and life-prolonging procedures.

At this point, most clients do not have much to say except a few nervous jokes, or that they do not want to live as a vegetable. Before my clients leave I refer them to some useful websites to help them begin to process their thoughts on death. The first site is theconversation.org. This site has a printable packet of questions that can help the client discover their

desires by answering simple questions surrounding end of life.⁷ Another tool is from New Mexico; it is a “Value Statement History Form.” It was designed to supplement advance directives, but it is a very thorough group of questions that can get the client thinking about all types of issues at the end of life from medical treatment, living arrangements, independence and finances.⁸ Both of these can assist your clients in processing their feelings on end of life prior to completing an advance directive. Lastly, I send them home with a copy of the advance directive form along with a simple explanation of the form.

At the next appointment, after executing the estate planning document, it is time to transition onto the advance directive and find out what questions the client may have. Before diving into the form, asking the client general questions about what their goals are can be beneficial. While listening to the desires of the client, it is helpful to consider what they might need to add at the end of Section 1 of Oklahoma’s Advance Directive form. You can help them to form any needed additions into concise and legally relevant thoughts.

THE HEALTHCARE PROXY

While the advance directive itself is an important, possibly even more important is the designation of the healthcare proxy. Many clients name their spouse or partner by default and never have an actual conversation with that person about what they wish for the end of their life. Through simple education, we can help our clients to make a well thought out choice in their healthcare proxy.

The goal is to help our clients designate a single, well-informed individual who is willing to be the client’s advocate when the client is unable to speak for themselves. While the client should also name an alternate proxy, it is generally not advisable to name co-proxies as having power in several hands often results in conflict and the client’s wishes can get lost in a battle of “who knows best.” The qualities inherent in a good proxy include the ability and willingness to advocate firmly for the client’s wishes. The proxy needs to be able to stand up for the client even if a doctor suggests a different path or the family disagrees. The proxy also needs to be able to wade through stressful conversations and be willing to ask clarifying questions. This person is the client’s voice when they can no longer speak for themselves,

help them pick a “strong” one. The proxy also needs to be readily available or able to get to a bedside quickly. Although it is possible for the proxy to communicate via phone or email, the proxy’s presence is often necessary to communicate effectively with medical staff and to make informed decisions by physically seeing the status of the client as opposed to getting secondhand information.

Sometimes the most obvious choice is not the best choice in a healthcare proxy. A client may trust their spouse or adult child with all their heart, but will that person truly be able to make the hard decisions? Will that person be able to make a choice that lets the client pass, if that is the client’s wish? Family relations are not the most important factor in the equation of healthcare proxies. Choosing a strong advocate who is willing to make the tough calls and with whom the client is comfortable sharing their true desires for end-of-life is vitally important. It can be a gift to family members closest to the client to be relieved of making life-and-death choices.

DISCUSSION WITH HEALTHCARE PROXIES AND FAMILY

Clients have a tendency to walk out of their attorney’s office, put their documents in a safe place and get busy living life. Few clients actually communicate with their healthcare proxy about what their wishes are at the end of life. A well-thought-out advance directive is a far more powerful document in the hands of an informed healthcare proxy. Hopefully, once the client has completed their directive, they are much more familiar with their desires for the end of life, and therefore comfortable discussing them, but often times family members are not. Well-meaning healthcare proxies can end an earnest attempt to discuss the client’s wishes by insisting the information is not needed yet, or that the topic is too grim. Under-informed healthcare proxies can also lead to “loyalty signaling.” Loyalty signaling is a phenomenon wherein family members show their love by subjecting loved ones to every test, procedure and “life-preserving” means available. Advance directives and conversations about one’s desires at the end of life can help mitigate this often detrimental trend by empowering proxies to feel that they are providing the level of

care that their loved one wanted without having to guess or feel guilty for not having done enough.⁹

Thankfully we have access to numerous resources that can change the dynamic of the conversation. While you, as the attorney, will not be available to help direct a conversation about end of life, you can send your client on their way armed with useful information in starting a productive conversation. As previously mentioned, the Conversation Project located at www.theconversationproject.org is a great icebreaking tool. Through their conversation starter kit, clients are asked questions to help them discover their thoughts on the end of life. They are then encouraged to discuss their thoughts with their healthcare proxy and others to whom they are close. Possibly less conventional, but very helpful is “Let’s have dinner and talk about death,” found at www.deathoverdinner.org. This site encourages people to host a dinner with their proxy and loved ones to begin the conversation about end of life choices. The site emails the participants a sample invitation as well as homework for each guest to do prior to attending so that the conversation is not as hard to begin. Both of these sites do an excellent job encouraging people to put their desires into words and then to share their thoughts with loved ones. While it is vitally important for the healthcare proxy to understand the cli-

ent’s last wishes, bringing more loved ones into the conversation can allow families to peacefully navigate the emotional experience of saying goodbye to a loved one.

CONCLUSION

The desire to get financial matters into order generally brings people to estate planners, but we have the ability to affect their lives and possibly their deaths in a significant, positive manner. We can help people to pull death out of the shadows and plan for end of life care that reflects their values and needs. In La Crosse, Wisconsin, a change in medical policy shifted a town’s experience of death. Prior to the campaign to discuss end-of-life wishes and document them, just 2 percent of the residents had completed advanced directives.¹⁰ As attorneys, we can be that change in our towns, we can help our clients maintain self-determination

“Sometimes
the most obvious
choice is not the
best choice in a
healthcare
proxy.”

after their ability to advocate for themselves has passed. While walking away with a well-planned estate, our clients can also feel empowered with how they and their family will experience end-of-life care, no longer needing to just “hope for the best.”

1. Jo Kline Cebuhar, J.D., *The Practical Guide to Health Care Advance Directives*, 5 (Murphy Publishing, LLC 2015).

2. *Ibid*, 4.

3. *Ibid*, 8.

4. Atul Gawande, *Being Mortal*, 180 (Metropolitan Books Henry Hold and Company 2014).

5. Craig Hatkoff, Rabbi Irwin Kula and Zach Levine, “How to Die in America: Welcome to LaCrosse, Wisconsin,” *Forbes*, Sept. 23, 2014, (Available at www.forbes.com/sites/offwhitepapers/2014/09/23/how-to-die-in-america-welcome-to-la-crosse/).

6. Atul Gawande, *Being Mortal*, 178 (Metropolitan Books Henry Hold and Company 2014).

7. The conversation project located at theconversationproject.org.

8. New Mexico’s Value History Form located at <http://goo.gl/pkTvVn>

9. Salam Reihan, “How La Crosse, Wisconsin Slashed End-of-Life Medical Expenses,” *National Review*, March 4, 2014 (Available at www.nationalreview.com/agenda/372501/how-la-crosse-wisconsin-slashed-end-life-medical-expenditures-reihan-salam/).

10. Craig Hatkoff, Rabbi Irwin Kula and Zach Levine, “How to Die in America: Welcome to LaCrosse, Wisconsin,” *Forbes*, Sept. 23, 2014, (Available at www.forbes.com/sites/offwhitepapers/2014/09/23/how-to-die-in-america-welcome-to-la-crosse/).

ABOUT THE AUTHOR



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Oklahoma Slayer Statute Updated

By Hal Ellis and LeAnn Ellis

The Oklahoma Legislature has effective Nov. 1, 2015, amended Title 84 O.S. Section 231. This statute is commonly referred to as the Slayer Statute or Slayer Rule. Generally, this rule bars a person from claiming a share under the last will and testament, intestate estate or insurance policy of the person the claimant killed.¹ The latest amendment expands Oklahoma's Slayer Statute by adding language covering "abuse, neglect or exploitation of a vulnerable adult..." The revised statute specifically provides as follows:

No person who is convicted of murder in the first degree, murder in the second degree, manslaughter in the degree, as defined by the laws of this state, or the laws of any other state or foreign country, of having taken, caused or procured another to take the life of an individual, or who has been convicted of abuse, neglect, or exploitation of a vulnerable adult pursuant to Section 843.3 of Title 21 of the Oklahoma Statutes, shall inherit from the victim of the offense, or receive any interest in the estate of the victim, or take by devise or legacy, a designated beneficiary of an account or security which is a POD or TOD designation, or as a surviving joint tenant, or by descent or distribution, from the victim, any portion of the victim's estate; and no beneficiary of a policy of insurance or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who in like manner takes, causes, or procures to be taken, the life upon which the policy or certificate is issued, or who causes or procures a disability of such person, or who has been convicted of abuse, neglect or exploitation of a vulnerable adult pursuant to Section 843.3 or Title 21 of Oklahoma Statutes, where such deceased or disabled person was the victim, shall take the proceeds of such policy or certificate; but in every instance men-

tioned in this section all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken, or who is thus disabled, shall become subject to distribution among the other heirs of such deceased person according to the laws of descent and distribution, in the case of death, and in the case of disability, the benefits thereunder shall be paid to the disabled person; provided, however that an insurance company shall be discharged of all liability under a policy issued by it upon the payment of the proceeds in accordance with the terms thereof, unless before such payment the company shall have written notice by or in behalf of some claimant other than the beneficiary named in the policy that a claim to the proceeds of such policy will be made by heirs of such deceased under the provisions this section.²

Prior to the current amendment the statute had been amended to include provisions for assets controlled by payable on death (POD) and transfer on death (TOD) designations, and joint tenancy accounts. In Oklahoma, the Slayer Statute supplements the common law rather than abrogating it.³ Oklahoma incorporates the common law by statute.⁴ Oklahoma originally adopted the Slayer Statute in 1915. The statute had been amended three times prior to the

most recent amendment. Typically, there are several issues raised by a Slayer Statute. Who is a slayer? What is forfeited? Who takes the share of the slayer? Are insurance companies protected from wrongful payments?⁵

The obvious purpose of a Slayer Statute is to prohibit a person from benefiting from their wrongful act. This prohibition was a basic principle of common law.⁶ Forty-eight states have adopted the Slayer rule by statute. The remaining states implement the concept by case law.⁷

The recent amendment by the Oklahoma Legislature expands the definition of “slayer” to include an individual “...convicted of abuse, neglect or exploitation of a vulnerable adult pursuant to Title 21 O.S. Section 843.3.” Thus, a person convicted of elderly abuse is included in the list of persons who cannot benefit from their wrongful act. Title 21 O.S. Section 843.3 generally makes it a crime to abuse, sexually abuse or exploit a vulnerable adult.⁸

The extension of a bar to inheritance to other types of offenders seems to be a logical extension of the Slayer Statute. However, upon closer examination, it is apparent that the two types of “crimes” are significantly different. Killing a person to inherit is an extreme act which is abhorrent in our society. Abuse, sexual abuse and exploitation are clearly bad acts, but are not as extreme as murder. The perpetrator, if convicted under Section 843.3 is guilty of a felony. One commentator has stated “Nevertheless, equating intentional killing with financial abuse seems lopsided in theory, if not in statutory efficiency.”⁹

OKLAHOMA CASE LAW

The language of 84 O.S. Section 231 utilizes the word “conviction” several times. However, by case law our courts have held that the statute does not strictly restrict its application. Oklahoma Supreme Court Justice Marian Opala in his concurring opinion in *State Mutual Life Insurance v. Hampton*,¹⁰ explains that the statute clarifies conviction is conclusive if the slayer took the victim’s life. Thus, criminal conviction is not a prerequisite for the invocation of Section 231. Acquittal is also not conclusive to the issue. In an action to disinherit the slayer, the person’s standing to inherit can go

forward with evidence in a civil proceeding to show the slayer was guilty of a crime covered by Section 231.¹¹ However, *State Mutual Life Insurance* involved insurance proceeds, not inheritance issues.

The reasoning for allowing persons likely to inherit to go forward with a challenge to a slayer without conviction appears to be based on the different standards in criminal cases (beyond a reasonable doubt) and civil cases (based upon a preponderance of the evidence). Additionally, the persons likely to inherit or take are not parties to the criminal proceeding and therefore cannot affect the conviction.

In *In the Matter of the Estates of Katie Juanita Young, deceased and James Mansfield Young, deceased v. Edward L. Young*, the Oklahoma Court of Appeals relied on the *Hampton* case to extend its holding to inheritance as well as insurance proceeds. The facts of the Young case were that Edward Young murdered his parents. His brothers and sisters petitioned the court to determine Edward’s

heirship and entitlement to insurance proceeds. Edward was found not guilty by reason of insanity. Edward filed a motion for summary judgment as to the slayer statute based upon the premise that he was not capable of felonious murder or intentional murder as set out in 84 O.S. Section 231. The trial court granted summary judgment for Edward. The appellate court relying on *Hampton*, reversed, holding that the acquittal was not conclusive. The court held that Edward had the burden of proving the insurance policy, death of the insured and the beneficiary status. Once Edward established these facts, the other claimants would have the opportunity to litigate their affirmative defenses under Section 231 against Edward’s claim to inherit. Thus, under Section 231 Edward could be disinherited.¹²

CONCLUSION

As our society’s legal techniques for passing assets upon death have increased, the Slayer Statutes have been amended to prevent an offender from receiving the victim’s assets. In addition to traditional probate and intestate succession, the amendments expand applicable assets to include assets controlled by joint

“The extension of a bar to inheritance to other types of offenders seems to be a logical extension of the Slayer Statute.”

tenancy, transfer on death and payable on death designations and insurance proceeds. Oklahoma case law has addressed whether strict language construction is required. The Oklahoma Supreme Court has determined that it is not a requirement. The fact of acquittal is not a bar to challenging the right of an alleged slayer to take from a victim's estate.

In reviewing the recent amendment, it appears the newly enacted vulnerable adult abuse provisions may be subject to interpretation issues. There are several issues remaining under Oklahoma law.¹³ It appears that the Legislature did not address the existing case law that criminal conviction is not required as a bar to inheritance. It can be argued that by adding the adult abuse language and "conviction" it removes the possibility of the person who will take to be defeated because the alleged wrongdoer was not criminally convicted. The new legislation also did not address the consequences if a wrongdoer is convicted of elderly abuse in another state. The authors believe the better policy would be to follow the analysis in *Hampton*, which extended the common law rule that no person should benefit from his own wrongful conduct. It should be noted, however, that statutory language does not prohibit litigation in the civil proceeding of the establishment of the wrongful act, which if proven would disinherit the wrongdoer.

1. *Black's Law Dictionary*, 6th Ed.

2. 84 Okla. Stat. §231 (2015).

3. *State Mutual Life Assurance Company of America v. Tony F. Hampton, Jr. et al.*, 696 P.2d 1027 (Okla. 1985) citing *Duncan v. Vassaur*, 550 p. 929 (Okla. 1976).

4. 12 Okla. Stat. §2. (2015).

5. Blackwell, Gregory, "Comment, Property: Creating a Slayer Statute Oklahomans Can Live With", 57 *Okla. L. Review* 143 (2004).

6. *Smith v. Greenburg*, 121 Colo. 417, 218 P.2d 514 (1950).

7. Rhoads, Anne-Marie, "Consequences of Heir's Misconduct: Moving from Rules to Discretion," 33 *Ohio N. U.L. Rev.* 975 (2007).

8. 21 Okla. Stat. §843.3 references 22 O.S. §991a-15 which defines "elderly person as anyone 62 years or older and "incapacitated person" as a person who is disabled and lacks the capacity to protect themselves. Vulnerable adult is further defined by 43A O.S. Section 10-103 as an individual who is incapacitated and is unable to adequately

ly care for themselves, or is unable to manage their financial affairs, or is unable to protect himself from abuse, neglect or exploitation.

9. See Rhoads at p. 986.

10. 696 P.2d 1027 (Okla. 1985).

11. *Id.* at 1034-7.

12. 831 P.2d 1014 (Okla. Appl. 1992).

13. See Blackwell, Gregory, *Supra*. For example: what if the slayer murders his grandparent to inherit from his parent, who is an only child.

ABOUT THE AUTHORS



Hal Wm. Ellis is in the firm of Ellis & Ellis in Stillwater. His practice is limited to the areas of tax-deferred exchanges, business organizations, tax-exempt organizations, trust, and probate, estate and tax planning. He received his J.D. from the OU College of Law in 1974. He is an American College of Trust and

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LeAnn D. Ellis practices in Stillwater and serves of counsel to the law firm of Gable Gotwals, Tulsa and Oklahoma City. She received a Bachelor of Science in accounting, with highest honors, from Oklahoma State University, where she was honored as one of the 1987 OSU Top Ten Outstanding Seniors.

She graduated Order of the Coif with a J.D. from the OU College of Law. She was the former president of the Estate Planning, Trust and Probate Section of the bar association and has authored several papers and previously presented the "Recent Developments in Probate and Estate Planning" for the Oklahoma Bar Association. Ms. Ellis is a fellow of the American of Trust and Estate Counsel.



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Probate of American Indian Trust Property: The Lawyer's Role?

By Casey Ross

Oklahoma is home to 38 federally recognized tribes. Indian lands in Oklahoma are comprised of former existing reservations in Oklahoma, which were allotted in the late 1800s to individual tribal members.¹ When Oklahoma tribes' reservations were allotted, Congress passed distinct laws that applied to particular tribes. For instance, individual members of the Five Tribes (Cherokee, Chickasaw, Choctaw, Muscogee (Creek) and Seminole) were allotted property in fee status with restrictions on alienation. Osage allotments were made in a unique way, such that surface interests and mineral interests were allotted and administered separately. Non-Five Tribes interests and non-Osage interests were allotted in trust status, where the federal government was given title to the property as trustee for the benefit of the individual Indian allottee.²

All original allottees' interests descended according to Oklahoma state law for most of the last century. Intestate succession over several generations resulted in extremely fractionated undivided interests in original allotments. Exercising superintendence over these highly fractionated interests became burdensome and costly for the United States Department of Interior, and in response to calls for reform, Congress passed the American Indian Probate Reform Act (AIPRA) in 2004.³ AIPRA aimed to reduce allotment fractionation and consolidate existing undivided interests. To that end, AIPRA created a Uniform Probate Code for all American Indian trust property in the United States. AIPRA's intestate succession section applies a different schematic to those fractionated interests that represent less

than five percent of the original interest, allowing intestate descent only to the decedent's "oldest eligible heir," which is defined in the act's definitions as the oldest surviving child, grandchild or great-grandchild. AIPRA also created a federal administrative process for probating Indian trust lands. Oklahoma state law is no longer applicable to Indian trust property. It is important to note for Oklahoma practitioners that AIPRA is not applicable to Five Tribes restricted property interests or Osage property interests.

Wills drafted to dispose of Indian trust property will be probated through the AIPRA-created administrative process at the Department of Interior. It is important that attorneys drafting these wills understand the requirements for validity under AIPRA and AIPRA's related

regulations, which do not always mirror Oklahoma state law.

One complexity that arises is representing a client who owns both Indian trust property interests and fee simple property. A will drafted for that client will need to comply with AIPRA and the related regulations to validly dispose of the Indian trust property, and with Oklahoma state law to dispose of the fee simple property. That client's estate will be probated through the administrative process at the Department of Interior for disposition of the Indian trust property, and through Oklahoma district court for the fee simple property.

While AIPRA sets forth the general intestate succession schematic for Indian trust property, as well as basic information on wills and probate, the specifics of how the Department of Interior administers a probate action are found in federal regulation.⁴ A probate is initiated by the department when the department learns about a trust beneficiary's death. Any person can notify the department of a death. After receiving such notice, whether by formal or informal means, the department prepares a probate file. No petition is required.

The probate file must contain a certificate of death, originals or copies of wills, codicils and revocations, the decedent's Social Security number, tribal enrollment information for the decedent and any potential heirs or devisees, any sworn statements about the decedent's family, any renunciations of interest, a list of creditors and claims, and certified public records relating to the decedent. Additional Bureau of Indian Affairs forms will also be included in the probate file, including an inventory of all Indian trust property the decedent owned. The probate file is prepared by the Bureau of Indian Affairs agency where the decedent was an enrolled member. Within 30 days of completion of the probate file, the agency will send the probate file to the United States Department of Interior, Office of Hearings and Appeals. The Office of Hearings and Appeals assigns the probate file to an administrative judge or an attorney decision maker, who will issue a written decision and order.

Requests for rehearing must be made within 30 days, or the order becomes final and property transfers will be made to the decedent's heirs or devisees.

While the regulations implementing AIPRA specifically allow the probate of a copy of a will, the Interior Board of Indian Appeals has held that absence of an original requires a presumption that the original was destroyed by the testator with the intent to revoke. The most recent of these cases was decided after AIPRA was passed and implemented.⁵ Best practice would be to provide the original will to the agency, or to have sufficient evidence to overcome the presumption. Practitioners must be thoughtful about the sequencing of probate actions, since an original will may need to be produced to the Department of Interior for Indian trust property, and to an Oklahoma district court for fee simple property.

The administrative process at the Department of Interior has been designed to expedite the probate process for Indian trust property, but the backlog of probate administration sometimes means a probate will take years to finalize. Uncontested probates of testate estates typically are completed more quickly than probates of intestate estates. Interestingly, the process is designed to eliminate the need for representation by an attorney for the Indian trust property probate action.

Because the Indian trust property probate process is so slow, comprehensive estate planning is a much more attractive option. However, estate planning for Indian trust property is much more restricted than for fee simple property. For instance, Indian trust property cannot be placed in an *inter-vivos* or testamentary trust.⁶ While a fee simple property interest can become a nonprobate asset via a Transfer on Death Deed, there is no such mechanism for Indian trust property. A beneficiary of an Indian trust property interest can execute an *inter-vivos* transfer of the property interest to another person through a gift deed, but in Oklahoma, those must be initiated and completed by the Department of Interior. It is frequently advisable for an Indian trust beneficiary to grant a

“The probate file must contain a certificate of death, originals or copies of wills, codicils and revocations, the decedent's Social Security number, tribal enrollment information for the decedent...”

gift deed while reserving herself a life estate, which is the only way to effectuate a nonprobate transfer of the property. However, since the gift deed is irrevocable, that particular type of transfer is not always an attractive option. Will drafting remains the most flexible form of estate planning for Indian trust property interests, but does not meaningfully reduce the probate burden at the Department of Interior.

Although there is no role for an attorney in an uncontested Indian trust property probate, there are steps an attorney can take to expedite the process on behalf of a client. If you have drafted the will for the Indian trust beneficiary, providing a list to the testator of the documents that will be needed to complete the probate file for the Office of Hearings and Appeals can allow the testator to compile those documents and keep them with the will to be submitted at probate initiation. Another way to provide helpful service through the probate process is to monitor progression of the case throughout the probate. To ensure you receive notice of all probate action hearings and orders, sign the testator's will as an extra-numerary witness. If you receive notice of any contests or problems, you can facilitate resolution in the administrative process, and enter an administrative appearance if necessary.

This complex area of law requires that Oklahoma practitioners understand how applicable laws differ between Indian trust property interests and fee simple property interests. While intimidating, these cases are very important for

clearing property title in the state, and addressing problems that have been created as a result of allotment policy. For assistance with these types of cases, or to request training on estate planning for Indian lands in Oklahoma, please contact the American Indian Wills Clinic at Oklahoma City University School of Law.

1. 18 U.S.C. §1151. Also see General Allotment Act (25 U.S.C. 331).
2. For a full description of American Indian land interests in Oklahoma, see "Estate Planning for Indian Land in Oklahoma: A Practitioner's Guide," by Casey Ross-Petherick, *Oklahoma Bar Journal*, Volume 84, Number 14, 2013.
3. 25 U.S.C. §2201 *et. seq.*
4. 25 C.F.R. §15.
5. *Estate of Dennis Calf Looking*, IBIA 08-111, July 2, 2010.
6. 25 U.S.C. §392.

ABOUT THE AUTHOR



Casey Ross serves as university general counsel at Oklahoma City University, and directs the law school's American Indian Law and Sovereignty Center. She served as the clinical professor of the American Indian Wills Clinic from the clinic's inception through June 2015. Professor Ross teaches American Indian law, tribal law, advanced Indian law, Indian gaming law, wills, trusts and estates and legal analysis. She is a citizen of the Cherokee Nation.

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Legislative Monitoring Committee Gears Up for Second Session

By *Duchess Bartmess*

On Feb. 2, 2016, the Oklahoma Legislature convened the second session of the 55th Oklahoma Legislature. There are well over 1,000 measures, which include both bills and joint resolutions, held over from the first session considered still active. More than 1,700 new bills and joint resolutions were introduced for consideration in the 2016 session.

Obviously, all measures still considered active from a previous session and newly introduced measures cannot be effectively tracked by the Legislative Monitoring Committee. Therefore, each year the OBA sponsors a Saturday legislation review meeting. This year on Jan. 30 the annual meeting was held at the Oklahoma Bar Center. OBA members interested in the changes to current law or new laws came and participated in the review of the newly introduced legislation.

Out of the newly introduced measures reviewed and discussed, more than 1,000 were reviewed to determine which measures were of particular significance to the public and the OBA members in the private practice of law. Again, as in past years, information and progress on the status of these special measures will be frequently reported on throughout the legislative session.



Shanda McKenney leads the Business/Tax Law Group discussion during Legislative Reading Day.

In addition, also during the initial review process, approximately 50 of the final measures designated for review were classified as having a high interest level for the public and OBA members. Those measures were considered to be of such importance as to rate special mention and continuing reporting. Some of them will be reported on separately each month along with other significant measures being considered by the Legislature.

The following is a partial list of some special attention measures that will be tracked.

OPEN RECORDS ACT

HB 2281 Provides public body which makes the requested records available on the Internet

shall meet obligation of providing prompt, reasonable access to its records.

HB 2307 Increases copying fee for public records.

SB 986 Increases the fee an entity may charge for copying public records.

JUDGES AND THE JUDICIAL SYSTEM

HB 2339 Establishes criteria for mandatory retirement of justices and judges.

HB 2453 Requires quarterly reports from the Council on Judicial Complaints to speaker and president pro tempore regarding judicial complaints.

HB 2857 Creates Code of Judicial Conduct; states statutory requirements for contents of the code; provides penalty for noncompliance with the Code of Judicial Conduct.

HJR 1040 Constitutional amendment to limit time a person may serve as Supreme Court justice.

SJR 50 Constitutional amendment to repeal the Judicial Nominating Commission and provides for Senate confirmation of judicial appointments.

CIVIL LAW AND CIVIL PROCEDURE

HB 2696 Creates the Rational Use of a Product Act; exempts a seller from liability in civil action for harm caused by unreasonable misuse of its product.

HB 2798 Requires a panel of district judges to rule on any claim or challenge as to the constitutionality of a state statute.

HB 2936 Addresses Landowner's Bill of Rights; mandates award of costs and attorney fees; adds right to demand a jury trial in condemnation proceedings.

HB 3038 Allows state to recover attorney fees and costs from the plaintiff if the state prevails in action or proceeding against the state where the plaintiff is permitted to recover attorney fees and costs from the state.

ELECTIONS

HB 2592 Requires development of procedures for computerized finger imaging for voter registration.

HB 2656 Makes elections for county officers nonpartisan; modifies requirements for filing for office, vacancies, conditions for winning

election and removes references to runoff primary elections.

HEALTH AND FAMILY ISSUES

HB 3030 Permits alimony pursuant to specified factors; provides directives for court to consider in awarding support alimony.

HB 3031 Adds definition of "for best interests of the child" to Oklahoma Children's Code.

Bills requiring coverage for autistic disorders: **HB 2362, HB 2924, HB 2962**

FIREARMS

HB 2266 Provides procedures for carrying firearms on college, university and career tech property.

HB 2933 Addresses immunity provisions of the Oklahoma Self-Defense Act.

HB 3097 Addresses carrying firearms where liquor is consumed.

Bills regarding comprehensive amendments to Oklahoma Self-Defense Act regarding citations, violations, concealed and unconcealed firearms: **HB 3098, SB 1081, SB 1348**

BUSINESS AND COMMERCIAL MATTERS

SB 1189 Creates Personal Asset Protection Act.

HB 2778 Addresses exempt transactions referred to crowdfunding rule in relations to U.S. Securities and Exchange Commission.

SB 1389 Creates Oklahoma Interstate Crowdfunding Exemption.

SB 1251 Addresses levying of sales and use tax.

CONSTITUTIONAL AMENDMENTS

SJR 60 Removes one subject requirement for constitutional amendments.

SJR 72 and **SJR 73** repeal Section 5 of Article II, Bill of Rights of the Oklahoma Constitution.

OTHER BILLS OF PARTICULAR SIGNIFICANCE

HB 2349 Exempts veterans' disability compensation payments from being included in the gross household income relating to the homestead exemption.

SB 1522 Authorizes the Legislature to issue process, compel attendance of witnesses and

to administer oaths to any person appearing before the Legislature, house or committee.

HB 2439 Requiring existing tax credits to be submitted to vote of the people for continued authorization.

More of the measures chosen for tracking will be reported on in these articles as the session progresses.

CURRENT BILL STATUS?

To find the current status of a bill, scroll down to the bottom of the Oklahoma State Legislature's website at www.oklegislature.gov and look for "Track Bills." For more information about bills the OBA is watching, click on the "Legislative Report" link at www.okbar.org. The lists will be updated every Friday.

OBA DAY AT THE CAPITOL

Every OBA member is encouraged to attend the OBA Day at the Capitol, March 8, 2016. The agenda includes information on specific measures including a presentation on the use of the Oklahoma Legislative website. Lunch will be provided at the bar center, but an RSVP is required. If attending, email debbie@okbar.org or call Debbie Brink at 405-416-7014; 800-522-8065.

ABOUT THE AUTHOR



Ms. Bartmess practices in Oklahoma City and chairs the Legislative Monitoring Committee. She can be reached at duchessb@swbell.net.

NOTICE: DESTRUCTION OF RECORDS

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**Tuesday,
March 8,
2016**

OBA DAY at the CAPITOL

TIME	TOPIC/EVENT	SPEAKER/LOCATION
9:30 a.m.	Registration	Emerson Hall, 1901 N. Lincoln Blvd., Oklahoma Bar Center
10:00 a.m.	Introduce OBA President Garvin A. Isaacs	John Morris Williams, OBA Executive Director
10:05 a.m.	Welcome and Introduce Administrative Director of the Courts, Jari Askins	John Morris Williams
10:10 a.m.	Issues of Interest to the Judiciary	Jari Askins, Administrative Director of the Courts
10:40 a.m.	Bills of Interest Relating to the Practice of Law	Clay Taylor, Legislative Liaison
11:10 a.m.	Break	
11:20 a.m.	Important Changes and New Rules	Lee Slater, Executive Director, Oklahoma Ethics Commission
11:50 a.m.	Break for Lunch	Emerson Hall, Oklahoma Bar Center
12:10 p.m.	Demonstration of Court Facts Website	Cathy Christensen, OBA Past President
12:20 p.m.	Introduction to Use of Oklahoma Legislative Website	Jim Calloway, OBA Management Assistance Program Director
12:30 p.m.	How Bad It Was – How Good It Is: The Value of an Independent Oklahoma Judiciary	Bob Burke, Attorney/Author/Lecturer
1:00 p.m.	Instructions	John Morris Williams
1:05 p.m.	Visit with Legislators	State Capitol Building

Please RSVP if attending lunch to: debbieb@okbar.org or call 405-416-7014; 800-522-8065

2016 Legislative Session

By John Morris Williams

The bill filing deadline was Jan. 21, and our bill reading day was Jan. 30. My tense is false as I am writing this because both of those days are in the future as I punch this into the keyboard. I could use my imagination and predict how and what occurred. Of course, at this moment it would be fiction. I might guess right, but it would only be a correct prediction — not the “truth” at the moment.

Much of what will happen in the 2016 session of the Oklahoma Legislature is a prediction. The certainty of the session is the lack of funding for the operation of state government. Staff reductions, operations of agencies and even the courts may be curtailed. If you believe that less government is a good thing, you might like it. If you believe that a certain level of essential services must be performed by state government for us to maintain a modern society, you might not like what is happening. The final cuts, the ultimate decisions and how we end up running state government next year are all fiction right now. However, every citizen has the right and obligation to participate in the process.

Much of what will be before the Legislature will be reactionary. The most notorious piece of legislation at the moment is HJR 1037. This resolution calls for a vote of the people to amend the Oklahoma Constitution. The result would be to have the Supreme Court, Court of Criminal Appeals and Court of Civil Appeals members elected every

“Much of what will be before the Legislature will be reactionary. The most notorious piece of legislation at the moment is HJR 1037.”

four years in a nonpartisan election. The proposed amendment also states that the qualifications for candidacy for the positions are to be established by statute.

There is plenty of data demonstrating that elected judges have challenges in ruling when big donors have their cases before them. In 2014 the National Institute on Money in State Politics reported \$18 million in contribu-

tions went to state Supreme Court elections. Considering that many states do not elect Supreme Court justices and not all were on the ballot in 2014, you can see that big money is going into the campaigns.

More than \$5 million was spent on television ads. We have seen some ads in district court races that raise an eyebrow. Wait until outside money from special interest groups start paying for ads. One must remember that candidates for judicial office have rules to follow. Third parties are not under those constraints. The fiction lies in the claim that these “third party” ads are independent and not connected with any particular campaign. Their intent is to help one candidate and hurt another.

The Ten Commandments case is not surprisingly the fuel for the recent fury. However, let us remember that this issue has been brewing for years. The OBA has taken its role in educating elected officials and the public seriously. For several years we have had the CourtFacts.org website and have spoken out to keep the courts impartial and free from corruption. We have been vigilant in retelling the story of the 1960s court scandal

and how campaign donations were the cover for bribes.

Sadly, too many eyewitnesses to the 1960s scandal are no longer around. Even sadder is the reality that strong political forces wish to repeat the 1960s debacle. One conclusion that can be drawn is these folks think they can raise the money and have "their" candidate elected. It is not about our current judges. From the top to the bottom, they are all on a ballot. It is about scrapping a system that has worked well for years and bringing back a system where results can be obtained directly

or indirectly with campaign contributions.

While guessing at an outcome is just that, guessing. It is not guessing what happens when judges raise money for contested elections. The last poll taken of the people of the state of Oklahoma on whether they wanted their judges bought and paid for was in 1967. It was a constitutional amendment to stop the general election of judges on the high courts. The public said no more.

Here we are again, almost 50 years later trying to reverse the progress and allow big money,

special interest and single-issue forces to return the selection of our judges to a "bought and paid for" system. I guess if you have a lot of money and really don't care about integrity in the system, it would be a good deal. My guess is that if you seek truth, justice and the American way — this is not so good.



To contact Executive Director Williams, email him at johnw@okbar.org.

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Appellate Practice

Upcoming speakers:

- February 22nd Justice Reif
The year in review from the Chief's perspective. (1/0)
- March 21st Referee Greg Albert
"Make it short or we'll shorten it for you and you won't like it." (1/0)
- April 18th Referee Barbara Swimley
Procedural pitfalls in appellate practice. (1/0)
- May 16th D. Kent Meyers, Esq.
Regarding the Initiative Petition in 2016 OK 1 (1/0)
- June 6th Jim Calloway, Esq.
Digital legal research update. (1/0)

Our meetings are held in both Room 131 of the Bar Center, and in the Room 2205 of the Main Classroom Building, OSU/Tulsa, by simulcast.

Lunch provided to Section Members.
Non-members are charged \$10 for lunch.

RSVP

Mark T. Koss, chair
mark-okc@msn.com

The Grind

By Jim Calloway

An ancient bit of large law firm wisdom was that there were three types of lawyers: finders, minders and grinders.

The first term referred to those rainmakers who were great at new client development. The second term, minders, referred to the law firm leadership, including those who headed up practice groups. And finally there were the grinders — those who spent their days doing the legal work and producing billable hours.

The law is an honored profession. And yet the work of practicing law, like most other jobs, can from time to time be a grind. No matter how much you love your job or you love being a lawyer, there are times when the drive into the office is not filled with happy anticipation.

Life is sometimes a grind for everyone, I think. January and February can feel more like a grind, with colder, dreary weather. The excitement of the holidays is over and it can feel like you are back to the grind.

There is no doubt that there can be a lot of “the grind” in legal work. Proofreading the documents you have prepared is a necessary, but tedious, task.



“Life is sometimes a grind for everyone, I think. January and February can feel more like a grind, with colder, dreary weather.”

Reviewing a 40-page contract someone else has prepared is worse. (In fact, some sophisticated clients are starting to ask if a 40-page contract is ever required. But that is a conversation for a future time.)

Internet memes have been circulating recently with pictures about what others think you do versus what you actually do. For lawyers, “what I think I do” is usually a picture of Atticus Fitch or Captain America, while “what I actually

do” is always a picture of a lawyer buried in stacks of paper or research books. (Yes, books!)

Lawyering can be tough. It is often high-stakes. It requires making tough judgment calls.

The law can be a grind, but it can also include a lot of joy. Take adoption law, for example. It is hard to see how successfully completing an adoption would ever be a grind — especially if you find yourself in the role of personally picking up a baby at the hospital and delivering her to her new parents.

Juries are unpredictable. I have been told by many veteran trial lawyers that obtaining a favorable jury verdict is always a thrill, no matter how many jury trials you have done.

Any favorable or better-than-expected result for a client should be an occasion for joy.

I wish I could give you the secret formula for decreasing the grind and increasing the joy. I wish I could bottle it and sell it.

The feeling of being caught in a grind happens more with repetitive, nonchallenging work than with creative problem solving work or strategic planning. We hear a lot about work/life balance these days. So it's appropriate to discuss

work/work balance as well. Scheduling your day where you have time set aside for the repetitive but also time set aside for creative problem solving and planning is a good idea to keep up your mental energy during the day.

But feeling your work is less of a grind is also about how you react to your environment and your work. When you're feeling in a rut, give yourself a moment to reflect on some of the high points of the month, week or year.

This includes mentally pulling yourself out of the work environment for a moment. Jay Foonberg, author of many editions of the book *How to Start and Build a Law Practice* counsels that a lawyer should display photographs of family

members, positioned where you can see them, to remind you of the real reason for your work life. That is quite good advice.

Given how hard lawyers work, you also might look at when you last took some time off to relax. The holidays provide us with family time away from work but the holidays are often heavily scheduled. Take care of yourself. You and your staff are the most important tools in "your shop."

And if you ever have a chance to deliver a newborn baby to its adoptive parents, make sure and allow yourself plenty of time to visit with the family, enjoy the good feelings and appreciate what you've accomplished for your clients. You deserve it.

ADDITIONAL READING

As you probably know, I also write the Practice Management Advice column for *ABA Law Practice Magazine*. As a supplement to this column, I would encourage you to also read my other column "Toward a Less Stressful Workplace" in the January/February 2016 issue of *Law Practice Magazine*.¹

Mr. Calloway is OBA Management Assistance Program Director. Need a quick answer to a tech problem or help solving a management dilemma? Contact him at 405-416-7008, 1-800-522-8065 or jimc@okbar.org. It's a free member benefit!

1. www.mazdigital.com/webreader/34871?
page=74

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Be the Best Lawyer You Can Be

By Joe Balkenbush

“Set out to do great things today, because what you do today can create a different tomorrow.” – Author unknown

We all want to be the best lawyer we can be. To do that, it is imperative we act ethically. Implicit in acting ethically is our knowledge of the Oklahoma Rules of Professional Conduct (ORPC) and Rules Governing Disciplinary Proceedings (RGDP). Unless you are intimately familiar with the ORPC and RGDP, you don't know what to do or what not to do. We have all heard the saying, “you don't know what you don't know.” We can easily study the ORPC and RGDP and learn what we need to know. But knowledge is only a part of being an ethical lawyer.

The characteristics of honesty and integrity are essential to being an ethical lawyer. These same characteristics are inherent in being a good person as well. I would offer that it is not possible to be the best lawyer you can be without first being the best person you can be. The best man or woman, mother or father, brother or sister, aunt

or uncle, etc. I would also offer that it's not possible to be the best person you can be if you are not physically, mentally, emotionally and spiritually healthy.

Being a lawyer is not easy. There are so many responsibilities, so many tasks that must be coordinated to keep all of



the “balls” in the air regarding the practice of law. And that doesn't take into account our responsibilities at home, or what I believe is one of the most important parts of this whole equation, taking care of ourselves! We often hear we need to maintain a healthy

work life/personal life balance. But who has time for that?!

We all *must* make time to ensure we are physically, mentally, emotionally and spiritually healthy. These characteristics are basic to our personal health. Often it is a seemingly insignificant occurrence that sends us to the place we don't want to go. Before we know it, we can go over the edge and spiral into destructive behaviors. If you are stressed out or overwhelmed, if you are depressed, anxious, suffering from addiction, or are in need of help in any other way, the Oklahoma Bar Association provides you with a place to go

for help. You are not alone!

The OBA Lawyers Helping Lawyers Assistance Program Committee (LHL) was created decades ago. There are literally hundreds of OBA members who volunteer their time to help other lawyers in need. As

OBA ethics counsel, I am a member of the LHL Committee. It wasn't until I attended my first committee meeting that I came to understand what LHL really does. It is not just for alcoholics or drug addicts, although LHL does provide services to people suffering from addiction. LHL also provides services to any OBA member who is experiencing mental, emotional, psychological and/or financial issues. Per Oklahoma law, all contact with LHL is confidential and privileged.¹

FREE SERVICES

As an OBA member benefit, the services provided are free. The contact number for LHL is 800-364-7886. Additional information regarding LHL can be found at www.okbar.org/members/LawyersHelpingLawyers or by contacting the OBA Office of Ethics Counsel at 405-416-7055. Again, the services provided are free of charge and are by law confidential and privileged.

Late last year, in an attempt to become more educated regarding the necessity of members of the bar being physically, mentally, emotionally and spiritually healthy, three members of the LHL Committee (including myself) attended a program sponsored

by the ABA Commission on Lawyer Assistance Programs (CoLAP). One of the presentations was titled "Positive Psychology for Lawyers." All three of us agreed it was the best presentation we had ever heard regarding the connection between being the best lawyer we can be and our overall health. The speaker was Hallie Love, an attorney who has made it her personal mission to heighten awareness regarding physical, mental, emotional and spiritual health among lawyers. She will be presenting at the OBA Solo & Small Firm Conference in June 2016. If you would like more information regarding Ms. Love, check out her website at www.fitmindbodybrain.com.

We all want to be the best that we can be in both our business and personal lives. A friend recommended a book to me titled *The Four Agreements* by Don Miguel Ruiz. As is evident from the title, if you make four simple agreements with yourself, you will be on the path to being the best you can be. The four agreements are:

- 1 **Be impeccable with your word.** We are all impeccable with our word to others, but we must also be impeccable with our word to ourselves.

- 2 **Don't take anything personally.** Nothing anyone else does is about you. It is about them and where they are in their lives.

- 3 **Don't make assumptions.** How often do we assume that we understand what someone said, only to find out that we have miscommunicated? When you're unsure, ask a clarifying question. We're lawyers, we know how to do that!

- 4 **Always do your best.** Keep in mind, our "best" may vary from day to day or minute to minute. But no matter what, if we always do our best, we will have no regrets.

The bottom line is we must take care of ourselves if we want to be the best we can be, whether in our business or personal lives. No one else is going to do it for you. You are the only one who can control what you do. So take responsibility for every aspect of your life! You are worth it, you matter!

Mr. Balkenbush is OBA ethics counsel. Have an ethics question? It's a member benefit and all inquiries are confidential. Contact Mr. Balkenbush at joeb@okbar.org or 405-416-7055; 800-522-8065.

1. (Title 5, Chapter 1, Appendix 3A, Rule 8.3)

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Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Dec. 11, 2015.

REPORT OF THE PRESIDENT

President Poarch reported he attended many OBA Annual Meeting events including presiding over the General Assembly and president's breakfast, in addition to attending the House of Delegates. He also attended the budget hearing at the judicial center, Board of Governors holiday dinner and Oklahoma County Bar Association holiday gathering.

REPORT OF THE VICE PRESIDENT

Vice President Devoll reported he attended OBA Annual Meeting events including the General Assembly and House of Delegates, Garfield County Bar Association meeting and the county bar Christmas party.

REPORT OF THE PRESIDENT-ELECT

President-Elect Isaacs reported he served as ethics advisor and trial techniques presenter at the Barry Albert Memorial Mock Trial and presented "The History of Trial by Jury" as a CLE seminar for the Oklahoma County Bar Association. He attended the OBA Annual Meeting including the General Assembly and presided over the House of Delegates. He also attended a Supreme Court luncheon, panel on the Oklahoma Constitutional Convention and

OBA budget presentation to the Supreme Court.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended Annual Meeting activities including the president's breakfast, General Assembly and House of Delegates, monthly staff celebration, meeting with President-Elect Isaacs and others regarding the right to jury trial, Tulsa County Bar Association holiday event, Access to Justice Commission subcommittee meeting, Board of Governors holiday event and presentation of the OBA budget to the Oklahoma Supreme Court.

BOARD MEMBER REPORTS

Governor Gotwals reported he attended the OBA convention at which he participated in the CLE plenary session panel discussion on "Practical Problems in Professional Ethics," University of Oklahoma law school alumni luncheon, president's reception, annual luncheon and House of Delegates, Tulsa Central High School Foundation board meeting, diversity networking reception at TU College of Law, Tulsa County Bar Association Board of Directors meeting, TCBA/TCBF holiday party, TCBF board meeting, TCBA CLE seminar on ethics/professionalism and the OBA Board of Governors Christmas party. **Governor Hicks** reported he attended OBA Annual Meeting events including OBA House of

Delegates, president's reception, reception with keynote speaker Eric Liu, annual luncheon, Tulsa County Bar Association holiday party and Tulsa County Bar Foundation board meeting. **Governor Jackson**, unable to attend the meeting, reported via email he attended the December Garfield County Bar Association meeting and Christmas party. **Governor Knighton** reported he attended General Assembly and House of Delegates at the OBA Annual Meeting, Cleveland County Bar Association meeting and OBA Law-related Education Committee meeting. **Governor Marshall** reported he attended the Pottawatomie County Bar Association meeting and Board of Governors holiday function. **Governor Porter** reported she chaired the OBA General Practice/Solo & Small Firm Committee meeting and presented CLE for the Oklahoma County Bar Association. She attended the William J. Holloway Jr. Inn of Court November program, Women in Law Committee meeting and Board of Governors holiday social. At the OBA convention she attended the General Assembly and House of Delegates. **Governor Sain** reported he attended the president's reception and OBA House of Delegates at the Annual Meeting. He also attended the McCurtain County Bar Association meeting. **Governor Stevens** reported he attended the OBA Annual Meeting, including the OBA General Assembly and House of Delegates, December Cleve-

land County Bar Association meeting and Cleveland County Bar Association Christmas party. **Governor Tucker** reported he attended OBA Annual Meeting events including the OBA House of Delegates, president's reception, reception with Eric Liu and annual luncheon. He also attended the Muskogee County Bar Association meeting that included CLE presented by Ed Abel, Rules and Bylaws Committee meeting and Law Day Committee meeting. **Governor Weedn** reported he attended the bar convention including meetings for the Indian Law Section and Law Office Management and Technology Section, president's breakfast and House of Delegates. He accepted appointment to the Audit Committee.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor McGill reported she chaired her final YLD board meeting of the year including presentation of YLD awards and attended a planning meeting with Past President DeMoss regarding the board's has been dinner.

REPORT OF THE SUPREME COURT LIAISON

Justice Kauger reported the performance of *A Tuna Christmas* CLE presentation the previous evening was sold out. She said the CLE following the play was just as entertaining. Additional performances are scheduled at the judicial center, with the play's writer/actor Joe Sears to attend the following night. She reported the Supreme Court approved the OBA's 2016 budget.

BOARD LIAISON REPORTS

Governor Hicks reported the Access to Justice Committee will be meeting later in the day

and is looking at creating a family law pro bono panel. Governor Knighton reported the Lawyers Helping Lawyers Assistance Program Committee has finalized meeting dates and is planning a CLE seminar. Governor Porter reported the Women in Law Committee will have new leaders and said the committee is considering moving the conference to a different month. Governor Tucker reported the Law Day website has been updated with 2016 contest information. The theme will be Judges, Juries & Justice: The Constitution and the Rights of the Accused. The committee is working to increase county bar participation in Law Day. He shared topics for *Ask A Lawyer* TV show segments the committee is working on. President-Elect Isaacs said he has asked the committee to develop his idea for juror appreciation activities across the state.

REPORT OF THE GENERAL COUNSEL

A written report of Professional Responsibility Commission actions and OBA disciplinary matters for November was submitted to the board for its review.

PROPOSED AMENDMENT TO RULE 3 OF THE RULES GOVERNING DISCIPLINARY PROCEEDINGS

It was noted the proposed amendment was published in the *Oklahoma Bar Journal*, and only one comment was received. The board approved the proposed amendment.

PROFESSIONALISM COMMITTEE MISSION STATEMENT

As committee liaison, Governor Gotwals reported the Professionalism Committee has

spent a great deal of time developing a new mission statement and creating a professionalism pledge, which is proposed to accompany the oath of attorney at swearing-in ceremonies. The board approved the committee's new mission statement. The board decided to not take any action on the pledge. It was noted the oath is statutory.

CLIENTS' SECURITY FUND

Clients' Security Fund Committee Chair Micheal Salem noted the Supreme Court recently approved amendments to the Clients' Security Fund rules that were previously approved by the board that would allow the Board of Governors to increase the amount of funds available for reimbursements. He said the CSF Committee considered 47 claims and is recommending approval of 23 claims. The amount of the 23 claims exceeds \$100,000, which requires the claims to be prorated. The board approved the claims at a prorated amount of 43.6 percent. The board voted to authorize a news release as approved by the president, executive director and CSF chairperson be distributed to news media. The board requested to see media coverage from the news release.

BOARD OF EDITORS APPOINTMENTS

The board approved President-Elect Isaacs' recommendations to reappoint Melissa DeLacerda, Stillwater, as chairperson, term expires 12/31/16; reappoint P. Luke Adams, Clinton (District 4), Erin L. Means, Moore (District 5) and appoint Patricia A. Flanagan, Yukon (District 9), terms expire 12/31/2018.

CLIENTS' SECURITY FUND APPOINTMENTS

The board approved President-Elect Isaacs' recommendations to reappoint Micheal Salem, Norman, as chairperson; and appoint Dan Sprouse, Pauls Valley, as vice chairperson, terms expire 12/31/16; reappoint Dietmar Caudle, Lawton, and Dan Sprouse, Pauls Valley, terms expire 12/31/2018; appoint Ami Swank, Norman, and Catherine M. Burton, Oklahoma City, terms expire 12/31/2018. The board approved the appointment of Mary Pointer, Norman, as a layperson to the CSF Committee, term expires 12/21/2018.

MCLE COMMISSION APPOINTMENTS

The board approved the reappointments of Jack L. Brown, Tulsa, as chairperson, term expires 12/31/16; Vicki Limas, Tulsa; Jack Brown, Tulsa, and Margaret Hamlett, Tulsa, terms expire 12/31/2018.

OKLAHOMA INDIAN LEGAL SERVICES APPOINTMENTS

The board voted to reappoint Leslie Diane Taylor, Ada, and to appoint Gary S. Pitchlynn, Norman, to the Oklahoma Indian Legal Services board, terms expire 12/31/2018.

PROFESSIONAL RESPONSIBILITY COMMISSION APPOINTMENT

The board appointed David Swank, Norman, to the PRC, term expires 12/31/2018.

LITIGATION SECTION BYLAWS AMENDMENTS

The board approved the amendments to the section bylaws.

OBA 2015 STANDING COMMITTEE LEADERSHIP AND BOARD OF GOVERNORS LIAISONS

President-Elect Isaacs presented a list of bar members he has appointed as committee chairs and vice chairs in addition to board member assignments as liaisons.

YLD LIAISONS TO OBA STANDING COMMITTEES

YLD Chair-Elect Bryon Will submitted a list of YLD members he has appointed to serve as liaisons to OBA committees.

APPOINTMENTS

President-Elect Isaacs announced the appointments of:

Audit Committee – Jim Marshall, Shawnee, as chairperson, term expires 12/31/2016; as members John Weedn, Miami, term expires 12/31/2017; Linda Thomas, Bartlesville, and Kaleb Hennigh, Enid, terms expire 12/31/2018.

Board of Medicolegal Investigations - Glenn Huff, Oklaho-

ma City, term expires 12/31/2016.

Investment Committee – Reappoint M. Joe Crosthwait Jr., Midwest City, as chairperson and Kendra M. Robben, Oklahoma City, as vice chairperson, terms expire 12/31/2016; reappoint Renée DeMoss, Tulsa, David A. Poarch Jr., Norman, Cathy Christensen, Oklahoma City, terms expire 12/31/2018.

Committee on Judicial Elections – Bob Burke, Oklahoma City and reappoint Reta M. Strubhar, Yukon; appoint as layperson to the committee Venita Hoover, Oklahoma City, terms expire 12/31/2023.

Legal Ethics Advisory Panel – Reappoint Steven Balman, Tulsa, as panel coordinator, term expires 12/31/2016. Oklahoma City panel: reappoint as members Rex Travis, Oklahoma City, and appoint Susan Bussey, Norman, and Brecken Allyn Wagner, McAlester, terms expire 12/31/2018; Tulsa panel: reappoint Sharisse O'Carroll, Tulsa, Leonard I. Pataki, Tulsa, and Luke Gaither, Henryetta, terms expire 12/31/2018.

NEXT MEETING

The Board of Governors met Jan. 14, 2016, via telephone conference, and a summary of those actions will be published after the minutes are approved. The next board meeting will be 10 a.m. Friday, Feb. 19, 2016, at the Oklahoma Bar Center in Oklahoma City.

Celebrating 7 Decades of Law, Education & Justice

By Candice Jones

The Oklahoma Bar Foundation officially turns 70 this September, but the organization isn't being shy about celebrating such a milestone a little bit early! A commemorative event is in the works for April 8 at Parkhouse in the Myriad Botanical Gardens in Oklahoma City. The event will honor past presidents, thank donors, highlight grantees and simply be a celebration of the foundation's history and the new direction of the organization.

In September 1946, OBA Executive Secretary John G. Hervey announced the creation of the Oklahoma Bar Foundation with this statement:

"Our primary purpose is to improve the administration of justice, to advance the general welfare of the constituent members and to conserve the interest of clients and of the public. The Oklahoma Bar Foundation will, therefore, be devoted to these ends."

"Each lawyer is urged to give their support and cooperation. Announcement of initial plans will be made in the Journal in the near future. The glories of the possibilities are ours if we will but realize them."

The foundation has since lived up to the mission set forth by the founders of the organization. In 2015 the foundation exceeded \$12 million in grants

given to law-related charities, special court projects and law school scholarships.

"It is an honor to serve as OBF president during this historic year that marks seven decades of service and support to the statewide legal community and the Oklahoma citizens that benefit so greatly through the fine efforts of our grantees," said Judge Mille Otey, 2016 OBF board president.

"The glories of possibilities" took another leap last year as the foundation began instituting major changes including a new logo, tagline and more concerted fundraising and communications efforts.

"There will be a lot to celebrate at this event," said OBF Executive Director Renée DeMoss, "and we invite all the members of the foundation to join us."



The theme of the event is Silver & White representing both the history (silver) and the future (white) of the foundation. Guests will be encouraged to incorporate silver and white into their party clothes. The event will include dinner, drinks, live entertainment, a photo booth and exciting giveaways.

"This event is different than anything we have done in the past," said Event Chair Jennifer Castillo, "We want everyone who supports the foundation in attendance for a fun night!"

Tickets are on sale now! You can register and buy tickets for the event at www.okbarfoundation.org/event-registration.

Candice Jones is director of development and communications for the Oklahoma Bar Foundation.



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What's Going on with the YLD?

By Bryon J. Will

Awwww February. We are in the heart of winter. Football season is over, March Madness is just around the corner, and baseball is soon to begin.

So what's going on with the YLD?

BAR EXAM SURVIVAL KITS

Well, its Bar Exam Survival Kit time! Every year the YLD sponsors the Bar Exam Survival Kits (BESK) which are handed out prior to the first round of testing to those taking the bar exam. The kits include items such as stress balls (we all know how stressful the task is at hand), candy, water bottles, pencils, ear plugs, etc. Prior to our February and July meetings the YLD board members and those attending the meetings form an assembly line and we package items to deliver on bar exam day. This has been a hit with the examinees for years. I remember when I took the bar exam, walking into the Cox Center and seeing several young lawyers there wishing us good luck and giving us a bag of goodies. Even though we were stressed going in, I felt it was a nice gesture giving us a sense of ease before going in to face the beast. We have kept this tradition up year after year.

This year we are going to stuff the BESKs at our February meeting which will take place



Feb. 20, 2016, at the Oklahoma Bar Center. We will then hand them out at the bar exam sites in Tulsa and Oklahoma City the morning of Feb. 23, 2016. Please contact either myself or any of our YLD board members for more details on how you can volunteer to help.

OBA DAY AT THE CAPITOL

Looking forward to March. Mark your calendars for the OBA Day at the Capitol, which takes place March 8, 2016! Members of the OBA meet every March at the bar center to discuss upcoming legislation and take time to visit with their respective representatives and senators at the State Capitol. In recent years legislation has been proposed affecting both

our judiciary and how we practice law, and it is important that we work together voicing our beliefs and values to our legislative members. This is an opportunity for young lawyers to get involved in making an impact in preserving our profession. Check out the schedule in this *Oklahoma Bar Journal* for more details on this event.

Till next month....

ABOUT THE AUTHOR



Bryon Will practices in Oklahoma City and serves as the YLD chairperson. He may be contacted at bryon@bjwilllaw.com.

February

- 15 OBA Closed** - Presidents' Day
- 16 OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judge David B. Lewis 405-556-9611 or David Swank 405-325-5254
- OBA Women in Law Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Ann E. Keele 918-592-1144 or Reign Grace Sikes 405-419-2657
- 17 OBA Indian Law Section meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Deborah Reed 918-348-1789



- 18 OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Tiece Dempsey 405-609-5406
- OBA High School Mock Trial Committee meeting;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Judy Spencer 405-755-1066
- 19 OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

- 20 OBA Young Lawyers Division meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Bryon Will 405-308-4272
- 22 OBA Appellate Practice Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Mark Koss 405-720-6868
- 25 OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Patricia Podolec 405-760-3358
- 26 OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

March

- 1 OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Michael Mannes 405-473-0352
- 3 OBA Lawyers Helping Lawyers Discussion Group;** Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; Contact Jeanne M. Snider 405-366-5466 or Hugh E. Hood 918-747-4357
- 4 OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact John H. Graves 405-684-6735
- 11 OBA Access to Justice Committee meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Michael Speck 405-205-5840
- OBA Law-related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Professor Paul Clark 405-208-6303 or Brady Henderson 405-524-8511
- OBA Family Law Section meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Luke Barteaux 918-585-1107



15 OBA Bench and Bar Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judge David B. Lewis 405-556-9611 or David Swank 405-325-5254

OBA Women in Law Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Ann E. Keele 918-592-1144 or Reign Grace Sikes 405-419-2657

16 OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Deborah Reed 918-348-1789

17 OBA Diversity Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Tiece Dempsey 405-609-5406

18 OBA Lawyers Helping Lawyers Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Jeanne M. Snider 405-366-5466 or Hugh E. Hood 918-747-4357

21 OBA Appellate Practice Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Mark Koss 405-720-6868

23 OBA Financial Institutions and Commercial Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Eric L. Johnson 405-602-3812

24 OBA Professionalism Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Patricia Podolec 405-760-3358

25 OBA Professional Responsibility Commission meeting; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

30 OBA Communications Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact David A. Poarch Jr. 405-329-6600

April

1 OBA Alternative Dispute Resolution Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact John H. Graves 405-684-6735

5 OBA Government and Administrative Law Section meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Michael Mannes 405-473-0352

7 OBA Lawyers Helping Lawyers Discussion Group; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; Contact Jeanne M. Snider 405-366-5466 or Hugh E. Hood 918-747-4357

8 OBA Access to Justice Committee meeting; 11 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Michael Speck 405-205-5840

OBA Law-related Education Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Professor Paul Clark 405-208-6303 or Brady Henderson 405-524-8511

OBA Family Law Section meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Luke Barteaux 918-585-1107

18 OBA Appellate Practice Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Mark Koss 405-720-6868

19 OBA Bench and Bar Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judge David B. Lewis 405-556-9611 or David Swank 405-325-5254

OBA Women in Law Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Ann E. Keele 918-592-1144 or Reign Grace Sikes 405-419-2657

20 OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Deborah Reed 918-348-1789

Nine More District Courts Added to OSCN Case Search

The Oklahoma Supreme Court recently added nine additional district courts to its online case search at www.oscn.net/dockets/search. With this addition, visitors to the OSCN website now have the capability to search public records in 34 district courts and in the Appellate Court. This free service provides the public a convenient way to search for court records by case number, name, date of birth and other identifiers.



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LHL Discussion Group Hosts March Meeting

“Work/Life Balance” will be the topic of the March 3 meeting of the Lawyers Helping Lawyers monthly discussion group. Each meeting, always the first Thursday of the month, is facilitated by committee members and a licensed mental health professional. The group meets from 6 to 7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th St., Oklahoma City. There is no cost to attend and snacks will be provided. RSVPs to Kim Reber, kimreber@cabainc.com, are encouraged to ensure there is food for all.

OBA Member Resignations

The following members have resigned as members of the association and notice is hereby given of such resignation:

George Chiu
OBA No. 30041
84 Fairfield Circle
Norwood, MA 02062

Lonnie Jacobs Copps
OBA No. 19288
10373 Wager Road
Bentonville, AR 72712

Celia Ann Rooney
OBA No. 11981
Rooney & Rooney
1515 Market St., Ste. 1200
Philadelphia, PA 19102

Michael Thomas Rooney
OBA No. 7746
Rooney & Rooney
1515 Market St., Ste. 1200
Philadelphia, PA 19102

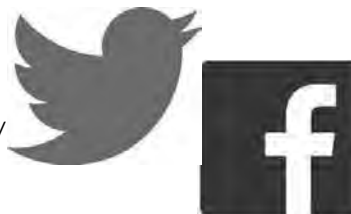
Thomas G. Smith Jr.
OBA No. 8417
708 W. Main Street
Purcell, OK 73080

James Scott Truax
OBA No. 12517
3421 Wellington Ridge Loop
Cary, NC 27518

Robert James Wonnell
OBA No. 31284
Johnson Co. Courthouse
100 N. Kansas Ave.
Olathe, KS 66061-3278

Connect With the OBA Through Social Media

Have you checked out the OBA Facebook page? It's a great way to get updates and information about upcoming events and the Oklahoma legal community. Like our page at www.facebook.com/OklahomaBarAssociation. And be sure to follow @OklahomaBar on Twitter!



Judge Goodman Sworn in as Civil Appeals Court Chief

Judge Jerry Goodman has been sworn in as chief judge for the Oklahoma Court of Civil Appeals, succeeding Judge Bill Hetherington, who was chief judge in 2015. Judge Kenneth Buettner took the oath of office as the court's vice chief judge.

Judge Goodman was appointed to the court in 1994. He is a member of the ABA, Tulsa County Bar Association, American Judicature Society and the Oklahoma Judicial Conference. He earned his J.D. from Georgetown University in 1964 and his bachelor's degree from TU in 1961.

Judge Buettner has served on the court since 1996. He received a bachelor's degree from Texas Christian University in 1972 and a J.D. from Southern Methodist University in 1975. He has completed additional graduate work at the University of Denver and the University of Central Oklahoma. He is a member of the Oklahoma County Bar Association as well as the Colorado Bar and State Bar of Texas. He is an Oklahoma Bar Foundation Fellow and a member of the ABA Appellate Judge Division, American Judges Association and Luther Bohanon American Inn of Court.



Chief Judge Jerry Goodman, Oklahoma Court of Civil Appeals



Vice Chief Judge Kenneth Buettner

OBA Legislative Monitoring Committee Begins Work

The Oklahoma Legislature has reconvened for its spring 2016 session, and that means the OBA Legislative Monitoring Committee is back to



work. More than 50 Oklahoma lawyers attended OBA Legislative Reading Day, held at the bar center on Saturday, Jan. 30, to go over proposed legislation and identify top bills of interest to bar members. OBA President Garvin Isaacs met with those attending the event to discuss the bills deemed likely to affect the practice of law and the administration of justice in the state.

Make Your Voices Heard! OBA Day at the Capitol March 8

Oklahoma lawyers, it is time for you to let your lawmakers know what you're thinking! OBA will host its annual Day at the Capitol on Tuesday, March 8. Registration begins at 9:30 a.m. at the Oklahoma Bar Center, 1901 N. Lincoln Blvd., and the agenda will feature speakers commenting on legislation affecting various practice areas. We also will have remarks from the judiciary and bar leaders, and lunch will be provided before we go over to the capitol for the afternoon. See page 293 for the schedule of events.



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Gov. Mary Fallin announced she is appointing **Andy Lester** to the Oklahoma State Regents for Higher Education. Mr. Lester, partner at Lester, Loving and Davies law firm in Edmond has served on the Board of Regents for Oklahoma Agricultural and Mechanical Colleges since 2007 and will continue to serve on the board until the Senate approves his appointment. He also has taught at the Oklahoma City University College of Law as an adjunct professor since 1988. He earned his J.D. from Georgetown University in 1981.

On The Move

GableGotwals announced the promotion of one associate attorney and three of counsel attorneys to shareholder status — **Sara Barry**, **Brandon Bickle** and **Philip Hixon** in Tulsa and **Leo Portman** in Oklahoma City. Ms. Barry's areas of focus include corporate and business organizations, commercial law, mergers and acquisitions,

securities and corporate finance, trusts and estates, employee benefits and real estate. She received her J.D. from Baylor Law School in 2000. Mr. Bickle's practice focuses broadly in the area of general commercial litigation, with an emphasis on collections, foreclosures and bankruptcy. He received his J.D. from the TU College of Law in 2008. Mr. Hixon represents the interests of clients in a variety of legal matters including construction, environment, insurance, health care, general litigation and appellate review. He earned his law degree from the OCU School of Law in 2001. Mr. Portman brings more than 30 years of experience to the firm and practices in the areas of corporate liquidation, wealth management for families and businesses and business management and asset transactions. He earned his law degree from the OU College of Law in 1980.

Haynes and Boone LLP is proud to announce **Todd Cubbage** as partner. Mr. Cubbage is a member of the finance practice in the Dallas office. His practice primarily focuses on assisting lenders arrange multi-jurisdictional, subscription-secured credit facilities with preeminent private equity and real estate funds. He received his J.D. from the TU College of Law and an LL.M. in financial ser-

vices law from Chicago-Kent College of Law.

Phillips Murrah Director **Dawn M. Rahme** has been elected to the firm's executive committee and Director **Joshua L. Edwards** has been named practice group leader of the transactional practice group. Ms. Rahme previously served as a practice group leader for the firm's transactional practice group. She represents individuals and businesses in an array of transactional matters focusing on assisting corporations, partnerships and individuals in general tax planning. She graduated from the OU College of Law in 2001. Mr. Edwards is a corporate attorney who represents clients in a broad range of commercial transactions, including private securities offerings and venture capital financings, mergers and acquisitions, real estate transactions and commercial finance. He graduated from the OU College of Law in 2007.

Doerner, Saunders, Daniel and Anderson in Tulsa has named **Tom Q. Ferguson** as its managing partner. In addition, the firm has named **Michael Linscott** to serve on its executive committee and **James R. Bullard** and **David J. Looby** as partners. Mr. Ferguson's practice focuses on complex commercial litigation covering diverse industries

and legal issues such as oil and gas exploration and production, midstream transportation, utility service, construction, environmental claims, intellectual property and protection of confidential information and trade secrets. He received his J.D. from the OU College of Law in 1987. Mr. Linscott focuses in the area of complex litigation, insurance coverage, contract and bad faith claims, securities arbitrations, construction cases, intellectual property matters and collection disputes. He earned his law degree from the TU College of Law in 1991. Mr. Looby is experienced in federal and state taxation, tax controversy and litigation, estates and trusts, family wealth and civil, commercial and employment litigation. He graduated from the TU College of Law in 2005. Mr. Bullard's practice is primarily in family law and civil litigation, particularly related to property division, support alimony, child custody and child support orders and modifications. He received his J.D. from the Washington & Lee School of Law in 2008.

Moricoli Kellogg and Gleason, formerly Moricoli and Schovanec, announces that **David R. Gleason** has become a shareholder and officer of the firm, and **John R. Arrowood** has joined the firm as an associate. The firm will continue to practice in the areas of oil and gas, energy, title examination, environmental, and state and federal regulation as it applies to oil and gas exploration and production. Mr. Gleason received his J.D. from the OU College of Law in 2012 and Mr. Arrowood graduated from the OU College of Law in 2015.

W. Casey Gray joined Andrews Davis in Oklahoma City. His practice areas include oil and gas law, real estate, energy and natural resources, environmental law, alternative dispute resolution and mediation. He received his J.D. from Vermont Law School in 2009.

Gov. Mary Fallin announced she is appointing **Kelly Morgan Greenough** to a district judge post serving Tulsa and Pawnee counties. Ms. Greenough currently serves as director of Tulsa County's domestic violence court and previously spent more than five years with the Tulsa County public defender's office. She earned her law degree from the TU College of Law in 1992.

Randal D. Homburg recently reestablished his independent private domestic patent practice, small business assistance and product liability consultation. His practice will focus on domestic patents and intellectual property in southern Oklahoma and northern Texas. His office is located at 9075 Harmony, Midwest City, 73110. He graduated from the OCU School of Law in 1988.

Hall Estill announces that **H.T.J. Mantooth** has been elected as a shareholder of the firm. Mr. Mantooth has an intellectual property practice focusing primarily on patent prosecution, including the drafting, enforcement and defense of patent rights. He received his J.D. from the OU College of Law in 2008.

Norman Wohlgemuth and Chandler Jeter Barnett and Ray has named **David R. Ross** a shareholder and director of the Tulsa-based firm.

His practice consists of litigation in state and federal courts. He earned his law degree from Washington University in St. Louis in 2003.

Schaffer Herring PLLC announces **Kimberly Biedler Schutz** and **Ryan Fulda** have joined the firm in Tulsa. Ms. Schutz will focus her practice on estate planning and administration and general litigation matters. She received her J.D. from the OU College of Law in 2000. Mr. Fulda is a trial attorney who has represented clients in state and federal courts throughout Oklahoma. His practice focuses on representing clients in business disputes, insurance disputes, personal injury claims and property damage claims. He earned his law degree from the OU College of Law in 2006.

At The Podium

Donna Marie De Simone recently presented "Legal Issues in Nursing" at the Oklahoma Nurses Association Annual Convention in Midwest City. She addressed social media, patient privacy and HIPAA, as well as medical malpractice and the electronic health record. She received her J.D. from the TU College of Law in 1998.

David W. Lee recently presented a teleconference lecture and paper, "Constitutional Law Disputes with Local Government," at a National Business Institute seminar that included attendees from 30 different states.

He graduated from the OU College of Law.

How to place an announcement: The *Oklahoma Bar Journal* welcomes short articles or news items about OBA members and upcoming meetings. If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award, or given a talk or speech with statewide

or national stature, we'd like to hear from you. Sections, committees, and county bar associations are encouraged to submit short stories about upcoming or recent activities. Honors bestowed by other publications (e.g., *Super Lawyers*, *Best Lawyers*, etc.) will not be accepted as announcements. (Oklahoma-based publications are the exception.) Information selected for publication is

printed at no cost, subject to editing, and printed as space permits.

Submit news items via email to:
Laura Stone
Communications Dept.
Oklahoma Bar Association
405-416-7018
barbriefs@okbar.org

Articles for the April 16 issue must be received by March 14.

IN MEMORIAM

Joel Wade Barr of Norman died Jan. 13. He was born June 17, 1944, in Blackwell. Mr. Barr grew up and graduated from high school in Ponca City. He enrolled in the OU College of Law in 1969 and worked as a jailer for the Cleveland County Courthouse while attending school. After graduating in 1972, he settled in Norman and entered private practice. He practiced criminal law until just a few weeks before his passing. He will be remembered for his generosity and story-telling. He was passionate about the law and defended his clients' innocence while also empathizing with their struggles. He loved being with family and friends. Memorial contributions may be sent to the National Pancreatic Cancer Foundation.

Frank Lee Bollinger of Oklahoma City died Jan. 7. He was born April 20, 1941, in Nichols Hills. He attended Casady School and later majored in English and history at OU. He attended OU law school. **Mr. Bollinger served in the Judge Advocate General Branch of the Army Reserves** and worked as a trust officer with the First

National Bank and Trust Company. He was a voracious reader, and in 1972 opened Bollinger's Books. An active member and participant of the American Booksellers Association, he served as the organization's executive director from 1989 to 1994. He also served the Oklahoma Booksellers Association director and president. Throughout his years, he was passionate about serving his community, serving on Oklahoma City Beautiful, for which he received the Morrison Tucker volunteer of the year award in 2014. He was a member of Northwest Oklahoma City Rotary and served as a Prevention of Blindness director, Oklahoma County Community Literacy Center and Shakespeare in the Park. He served as the Oklahoma Library Endowment Trust president and trustee and the board of visitors of the College of Arts and Sciences at OU. He was currently serving as a volunteer consultant to nonprofits for the Executive Service Corps of Oklahoma. He was an early member of Chapel Hill Methodist Church where he served as past chairman and member of the board of

trustees. Donations may be made to Chapel Hill Methodist Church, 2717 W. Hefner Rd., Oklahoma City, 73120, or the Oklahoma Alzheimer's Association, 2448 E. 81st St., Suite 3000, Tulsa, 74137.

Augustus C. "Chip" Edmunds III of Tulsa died Jan. 1. He was born Oct. 1, 1964. Mr. Edmunds was vice president and general counsel of Blue Cross Blue Shield of Oklahoma and was a graduate of OSU and the TU College of Law, where he received numerous awards. He was a graduate of Leadership Tulsa and Leadership Oklahoma. He was a Salvation Army board member and an enthusiastic bell-ringer at Christmas. During his college years, he worked on weekends as a cottage counselor at the Tulsa Boys Home where he quickly became a trusted mentor and friend to many teenage boys. Memorial contributions may be made to the Tulsa Boys Home or the Salvation Army.

Judge Tom A. Lucas of Norman died Jan. 20. He was born Feb. 22, 1934. He began his career in 1964 after graduating from the OU College of

Law and spent the next 50 years practicing law and presiding over court. He spent 30 years in private practice before being elected judge for Judicial District 21, which serves Cleveland, Garvin and McClain counties. He kept the seat for five four-year terms before retiring in 2013. He is credited with founding one of the first drug courts in the state, implementing it in Cleveland County. He is remembered by family and friends as a man who loved his job, his family and being a public servant.

William S. "Bill" Murphy Jr. of Oklahoma City died Jan. 18. He was born Dec. 30, 1939, in Dallas. Mr. Murphy was a 1957 graduate of Northwest Classen High School, received his bachelor's degree from OCU in 1963 and a J.D. from the OCU School of Law in 1969. He worked as an adjuster for Motors Insurance Company (GMAC Insurance) for seven years until opening his law practice in 1970. He had a general practice with focus on workers' compensation and social security. In 1989 he expanded his practice to include his daughter and it became Murphy and Murphy, representing injured and disabled Oklahomans. Playing the drums since childhood, he loved music and was a member of the American Fed-

eration of Musicians Local 375-703 since high school. He played music with great musicians and bands, including Webb Pierce, Leon McAuliffe, Bill Phillips at the Blue Note, Bell Hess at Huckins Hotel Hunt Club and many other local artists. Donations may be made to Hearts for Hearing, 3525 N. W. 56th, Suite A-150, Oklahoma City, 73112.

Frederick "Fred" Oliver Plater of Oklahoma City died Jan. 2. He was born April 1, 1949, in Oklahoma City. Mr. Plater graduated from OCU with a bachelor's degree in accounting and received his J.D. from the OU College of Law. He was a sole practitioner of tax law. He was a proud grandpa and loving dad, who enjoyed coaching his children's soccer teams. He loved to spend time with his family on the water and spent many weekends at Lake Tenkiller, where he was captain of his boat, "The New-man." He was an avid football fan and card player.

Gomer Griffith Smith Jr. of Oklahoma City died Jan. 8. He was born Aug. 31, 1919, in Kansas City, Missouri. He graduated from the OU College of Law in May 1942. **He also served in the U.S. Army and later transferred to the Air Force to the Counter Intelligence Corps. He was**

honorably discharged in 1946. He was a longtime Oklahoma City attorney focusing on tort law, domestic relations, criminal law, eminent domain and probate cases. He started his law career at Gomer Smith and Associates with his father and brother. Later, the firm name changed to Smith, Johns and Neuffer. In 1960, Smith and Smith was created and in 1980, he and his son-in-law started Smith and Murdock. Involved with many organizations throughout his life, he was a member of the Oklahoma County Bar, Oklahoma Trial Lawyers and Kiwanis Club. He was a loving father, grandfather, great-grandfather and friend. Donations may be sent to the Oklahoma Bar Foundation, Free to Live or to the charity of your choice.

Thomas Joseph "Tom" Wilcox of Seiling died Dec. 17. He was born Aug. 28, 1957, in Oklahoma City. He grew up in Seiling, graduating from Seiling High School in 1975. He attended OU where he pursued a degree in law, graduating with his J.D. in 1983. He then returned to Seiling where he was a practicing attorney for many years. He was baptized and confirmed in the St. Thomas Apostle Catholic Church of Seiling. He enjoyed going to the library and attended every city council meeting.



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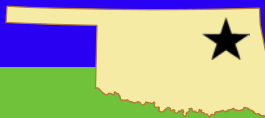
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OIL AND GAS FIRM LOCATED IN DEEP DEUCE/BRICKTOWN SEEKS LEGAL ASSISTANT/PARALEGAL to fill a position with our litigation group. The ideal candidate must have at least three years' experience in litigation, as well as excellent Microsoft Word and Office skills. Oil and gas experience a plus but not necessary. The starting salary is negotiable, based on experience. Generous benefits package. Please send resume, references, and salary requirements to resumes@mahaffeygore.com.

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FULL SERVICE, AV-RATED, DOWNTOWN TULSA LAW FIRM seeks associate attorney with 3 - 6 years' commercial litigation experience. Solid deposition and trial experience is a must. Our firm offers a competitive salary and benefits, with bonus opportunity. Submit résumé and references to "Box P," Oklahoma Bar Association; PO Box 53036; Oklahoma City, OK 73152.

THE OKLAHOMA BAR ASSOCIATION HEROES program is looking for several volunteer attorneys. The need for FAMILY LAW ATTORNEYS is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact Gisele Perryman, 405-416-7086 or heroes@okbar.org.

NORMAN LAW FIRM IS SEEKING sharp, motivated attorneys for fast-paced transactional work. Members of our growing firm enjoy a team atmosphere and an energetic environment. Attorneys will be part of a creative process in solving tax cases, handle an assigned caseload, and will be assisted by an experienced support staff. Our firm offers health insurance benefits, paid vacation, paid personal days, and a 401K matching program. Applicants need to be admitted to practice law in Oklahoma. No tax experience necessary. Submit cover letter and résumé to Justin@irshelpok.com.

FRANDEN, FARRIS, QUILLIN, GOODNIGHT AND ROBERTS a mid-size, Tulsa AV, primarily defense litigation firm seeks a lawyer with 5-10 YEARS' EXPERIENCE. If interested, please send confidential resume, references and writing samples to kanderson@tulsalawyer.com.

THE DEPARTMENT OF HUMAN SERVICES, Legal Services, is seeking qualified and experienced applicants for a senior assistant general counsel position housed in Oklahoma City. The ideal applicant will have at least five years of experience in employment law, the Merit Protection system and issues impacting human resources. The duties of this position require a strong litigation background as well as effective writing and communication skills to provide legal representation, advice, and training in employment matters affecting the largest state governmental agency. Salary is based on qualifications and experience. Excellent state benefits. Send resume, references, and a recent writing sample (less than 1 year old) to judi.abrams@okdhs.org or mailed to Judi Abrams, Operations Manager, Legal Services, Dept. of Human Services, PO Box 25352, Oklahoma City, OK 73125-0352.

ENID, OKLAHOMA LAW FIRM INVITES ASSOCIATES WITH 3+ YEARS' EXPERIENCE to join our team. We are looking for a candidate who is hard working, a self-starter, and is knowledgeable in multiple practice areas including litigation and family law. Candidates must have excellent research skills, analytical thinking skills and writing skills. Salary \$100,000+, benefits and 401k. If hired, must live in Enid or surrounding area. Send resume to "Box G," OBA, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

Make a Difference

Do you want a fulfilling career where you can really make a difference in the lives of people? Are you fervent about equal justice? Does a program with a purpose motivate you? *Legal Aid Services of Oklahoma, Inc. (LASO)* is searching for an Attorney for its Lawton Law Office.

We are a statewide, civil law firm providing legal services to the impoverished and senior population of Oklahoma. With more than twenty offices and a staff of 155+, we are committed to the mission of equal justice.

The successful individuals will have a passion for justice and empathy for impoverished individuals, computer literate and willingness to learn and contribute to a positive work environment. In return, the employee receives a great benefit package including paid health, dental, life insurance plan; a pension, and generous leave benefits. Additionally, LASO offers a great work environment and educational/career opportunities.

To start making a difference, complete our application and submit it to Legal Aid Services of Oklahoma.

The online application can be found:

<https://legalaidokemployment.wufoo.com/forms/z7x4z5/>

Print application

http://www.legalaidok.org/documents/388541_Employment_Application_Revised_10.2008.pdf

Legal Aid is an Equal Opportunity / Affirmative Action Employer.

OWASSO TITLE COMPANY SEEKS ATTORNEY WITH 1-5 YEARS' EXPERIENCE to read abstracts; prepare title curative documents, contracts, easements and related real estate documents; and advise customers on real estate matters. Applicants must submit resume, cover letter, references and salary history to "Box QQ", Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ESTABLISHED FIRM SEEKS ATTORNEY FOR WORK IN CIVIL LITIGATION. Two years' experience as attorney and/or equivalent internship. Strong organization, communication, research and writing skills. Ideal candidates will have experience in hearings, depositions, case evaluation and be highly motivated to manage a diverse case load. Federal court admission a plus. Send resume, cover letter, and writing sample by fax to 405-607-4358 or by email to okattorneyresume@gmail.com.

POSITIONS AVAILABLE

OKLAHOMA CITY LAW FIRM IS SEEKING AN ESTABLISHED ATTORNEY with significant experience with property and casualty insurance matters, including coverage litigation in state and federal court. Writing samples required. Send resume and writing samples to "Box X," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

WE ARE RECRUITING AN EXPERIENCED PARTNER-TRACK ASSOCIATE ATTORNEY to handle all phases of civil litigation within a strong team setting that focuses on client service and maximizing outcomes. Our practice includes challenging procedural and technical issues, and the successful candidate will possess strong analytical and advocacy skills. We use the latest technology to maximize efficiency. We are looking for the right attorney to join our team who will take pride in the service we deliver and fit within our friendly, low-key firm environment. Candidates must have at least 5 years' experience in civil litigation that reflects highly developed skill in legal research, drafting memoranda, briefs and discovery, taking depositions, managing document production and oral argument. Candidates must have graduated within the top 25 percent of their law school class, and law review experience is preferred. Candidates should submit a recent writing sample and CV to smcdaniel@ok-counsel.com.

FRANDEN, FARRIS, QUILLIN, GOODNIGHT AND ROBERTS a mid-size, Tulsa AV, primarily defense litigation firm seeks a lawyer with 1-5 YEARS' EXPERIENCE. If interested, please send confidential resume, references and writing samples to kanderson@tulsalawyer.com.

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Law and Religion

By Tom Hird

I lost my religious faith as an adolescent because I could not reconcile a loving God with the world I knew and the dogma I was taught. My lack of religion never hurt me in the law. Injecting religion into a legal case is seldom a good idea or even possible.

Advocating for a capital client in front of the pardon and parole board, however, is different. There is no judge, and no judgment. The normal legal rules are out the window, and talking about religion is not only allowed, it is advisable. Even the key buzzwords in clemency, mercy and grace have a religious tenor around the world.

I am always tempted to go right at the death penalty and do things like point out that Jesus was wrongfully executed, or



that he specifically took on legalism and eye for an eye justice in the Sermon on the Mount. We never go that route, though. There is always too much to talk about regarding mercy and grace and the unique, individual human being whose deeply troubled life the government has the power to end.

Mercy and grace stand in stark disregard to a legalism too often seen in both religion and in the law. Acting with mercy and grace means learning to replace hate with love, to put oneself in others' shoes and to give special care to the least among us. These are core values in the world's great religions — and profoundly meaningful in capital cases where broken people and broken lives are everywhere you look.

In participating in these proceedings focused so intently on mercy and grace, it occurred to me I believe in mercy and grace. It occurred to me I am a believer. It's funny in a way. In putting away legalism, the law brought me back to religion.

Mr. Hird practices in Oklahoma City.



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