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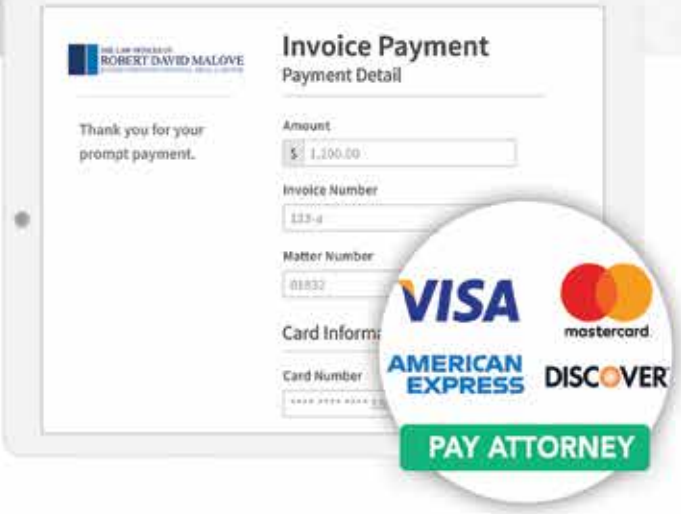

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Major Legislative Changes in Store for 2019

By Charles W. Chesnut

THE OKLAHOMA LEGISLATURE CONVENED on Feb. 4. This legislative session should be interesting. We have a new governor and lieutenant governor, 46 new members of the 101-member House of Representatives and 11 new members of the 48-member Senate.

During last year's legislative session, 21 lawmakers practiced law. There were five in the Senate and 16 in the House of Representatives. For the 2019 session, our profession's ranks dwindled to 14 (four in the Senate and 10 in the House). Some of the attorneys were termed out, others left to run for positions in the judicial branch or other elective positions, others didn't win re-election and at least one just chose not to run again. The consensus on the causes for the erosion in the percentage of lawyers appears to be too little money and too much time.

Half a century ago, the notion lawyers wrote most of the laws was pretty accurate. That began to change in the 1960s and 1970s. Legislative sessions became longer, making it difficult for attorneys to keep up with their practices while they served in office. Legislative pay fell further and further behind the amount lawyers could earn on the private side. Lawyers gained permission to advertise for clients, challenging the traditional idea that serving in office was the best way to promote one's name and attract new business.

Also, it became common to campaign for fewer lawyers in the Legislature. The argument normally advanced was that lawyers somehow or another had too much influence in affecting the legislative process. Actually, having lawyers in the Legislature is a plus. Legal training provides a better understanding of how passing or changing a law can affect people. It affords an opportunity to do some careful tweaking of language that has the major advantage of fixing unanticipated consequences. Legal training gives a lawyer more confidence in expressing oneself on controversial issues. Finally, the most important benefit – it gives one the opportunity to shape the state's laws.

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With respect to new incoming legislators, I've always thought being a new legislator would be like trying to drink from a fire hose. With all the other things going on, there is no way a new legislator, and maybe even an experienced one, could begin to keep up with all the bills introduced each session. (Last year according to LegiScan, 4,572 new pieces of legislation were introduced.) In addition, they may have little to no knowledge about many of the bills introduced. The OBA is trying to do its part in impacting that in a positive way.

One of the jewels of the Oklahoma Bar Association is the 300-member Legislative Monitoring Committee chaired by Angela Ailles Bahm. The OBA held the OBA Reading Day on Feb. 2. At Reading Day, attorneys presented about 90 bills in various areas of the law. Following the presentation of the bills, Administrator of the Courts Director Jari Askins presented a brief talk on the funding of the judiciary. At noon, during a pizza lunch, members of the Legislature held a panel discussion on what they thought would be important during the 2019 session. The free event provided attorneys with two hours of MCLE credit.

This year we invited all of our state legislators to come to Legislative Reading Day. We thought it was a great opportunity for them, as well as our OBA members, to obtain information on the legal and practical effect of some of the proposed legislation. I believe it would be helpful for the OBA to become known as a resource from which legislators could get an explanation on the effects of bills. We could make that happen.

I think it is a primary responsibility of our bar association to serve our members. By helping our members become more aware of pending legislation and its potential impact, it helps us become better informed both as citizens and lawyers.

If you have any ideas for your bar association that would help improve its service to its membership, send me an email. I'd be glad to hear from you.

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Issues in Unplanned and Poorly Planned Estates

By Cody B. Jones and Ashley Ray

THE TERM "ESTATE PLANNING" IMPLIES THAT A PLAN for the administration of an estate exists, which, of course, most estate planning attorneys would prefer. However, those same estate planning attorneys likely spend much of their time administering estates of decedents who did not have a plan in place at their death or who had a plan in place that was poorly prepared or never updated. This article addresses some common issues attorneys might encounter in unplanned or poorly planned estates.

IMMEDIATE NEEDS UPON DECEDENT'S DEATH

Disposition of Remains

When a loved one dies, addressing the immediate needs of the individual's estate can be chaotic for the family. One of the first decisions the family must make is determining the manner of the disposition of the decedent's remains. If family members all get along, this may not be a contentious decision. When emotions run high and family members do not see eye to eye, this decision may become volatile. If the decedent had exercised thoughtful foresight while alive, he or she could have executed an assignment of right regarding disposition of remains pursuant to 21 Okla. Stat. §1151 (2011), which would have delegated to someone the right to control the decisions regarding the decedent's remains. If no such assignment exists, the individual with priority to control the decisions is determined pursuant to 21 Okla. Stat. §1158 (2011), which is similar to the statute determining those individuals who will have priority to serve as administrator of an intestate estate.[1] The Oklahoma Court of Civil Appeals has previously found it is "highly impractical" to obligate a funeral home to determine all persons who are in the same degree of kinship to the decedent and obtain consent from all of them.[2] Thus, in poorly planned estates, the decisions regarding disposition may be decided on a first-come-first serve basis. In order to avoid such disputes among children, for instance, an assignment of right regarding disposition of remains is advisable.

Pets

The welfare of pets is also an immediate concern upon someone's death. If it is not desired for pets to be surrendered to the local shelter, an individual should have a discussion with friends and family to identify who would be willing to care for the pets – perhaps even including provisions within the individual's estate planning documents to provide accordingly. A pet owner might consider creating a "pet trust" for the benefit of his or her domestic animals.[3] Without such planning in place, what happens when the care for pets has not been considered in advance? By statute, dogs are considered the personal property of the owner, and by analogy other domesticated pets may also be considered personal property.[4] Thus, the provisions for personal property under a will and the provisions for exempt property allowed the family likely control pursuant to 58 Okla. Stat. §12 (2011). The greater concern, however, is the immediate welfare of the animals. If law enforcement has reason to believe an animal has been abandoned or neglected by the owner and no one is coming forward to care for the animal, the officer may obtain a warrant and the animal will be impounded.[5] The owner (or the deceased owner's representative) will receive notice of a hearing to

determine if the animal was in fact abandoned, and if the court determines a violation has occurred, the animal will be surrendered to a shelter or euthanized, depending on the circumstances, and costs will be allocated to the owner or the owner's estate.[6] Thus, it is in the best interests of the estate for the personal representative or immediate family members to care for the pets of the decedent or locate someone who can until further disposition can be made.

Social Media Accounts

Another issue that may be an immediate concern after death is an issue that has arisen with the growth of social media. What should the family do with the decedent's social media accounts, especially when the unfortunate news about the decedent's death is spreading? Being aware of the options for management of a deceased person's account for each networking website can prevent additional, unnecessary anxiety for the family. Although thoughts, prayers and fond memories may be publicly expressed and appreciated on social media sites, awkward or inappropriate messages may also be posted to the decedent's page, in which case they may linger indefinitely if no one is appointed personal representative. Upon appointment as executor or administrator of the estate, the personal representative is given the power by statute to control the decedent's social networking, blogging and emailing service websites.[7] However, each website has its own policy and procedures. For example, Facebook allows users to appoint a "legacy contact" to manage the decedent's page, which can be memorialized or deleted following the decedent's death.[8] Most other social networking websites require an immediate family member or personal representative to contact the company to either memorialize, deactivate or delete the user's account.[9] Memorializing an account, which prevents others from making changes to the account, is an immediate action on most networking websites. Deleting the account, however, may take several months. Thus, it is in an individual's best interests to explore relevant social media website policies in advance in order to control the account management soon after death.

Original Documents

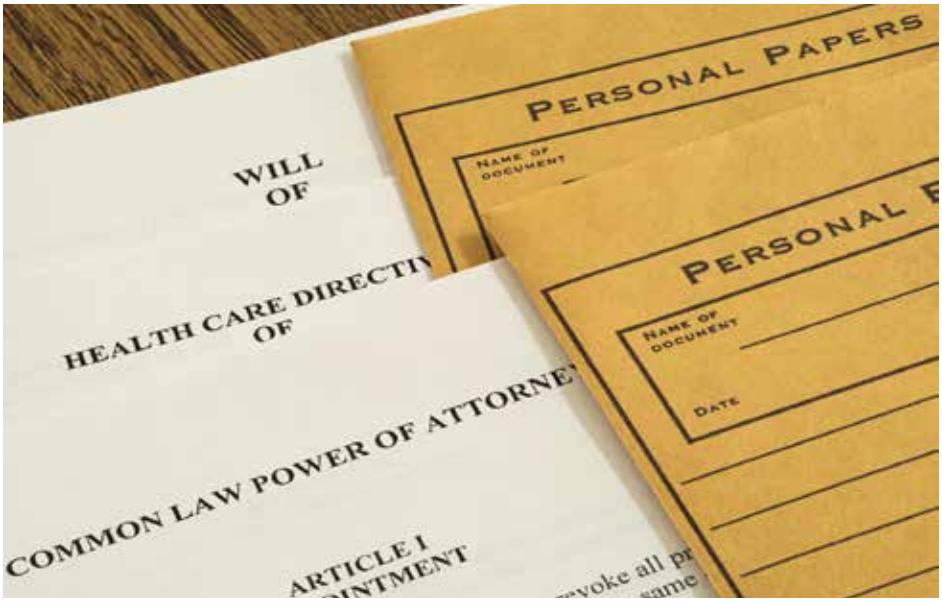
Lastly, another immediate concern upon death is locating the decedent's original estate planning documents, if any, and safely securing them for as long as necessary because documents can and do go missing if not properly secured. If an individual has a planned estate, yet the plan cannot easily be located, then even the best laid plan can go awry quickly. The original documents may identify the nominated personal representative, which will give the personal representative assumed authority to make decisions regarding the safety of the decedent's pets, the security of the decedent's home and the security of the decedent's accounts. The original will should be delivered to the named executor in the will or otherwise filed with the district court, if possible, pursuant to 58 Okla. Stat. §21 (2011). While determining if a probate of the will is necessary, the named executor should secure the document in order to avoid proceedings to prove a lost will under 58 Okla. Stat. §81 (2011), if a probate is ultimately deemed warranted. Practitioners should make a habit of noting in their clients' files where their client intends to store their original documents, hopefully ensuring someone other than the client will have access to them when needed. Although the practice cannot prevent the loss of all documents, this file note may be invaluable when the family contacts the decedent's attorney upon the decedent's death.

Although thoughts, prayers and fond memories may be publicly expressed and appreciated on social media sites, awkward or inappropriate messages may also be posted to the decedent's page, in which case they may linger indefinitely if no one is appointed personal representative.

ISSUES DISCOVERED AFTER IMMEDIATE NEEDS ARE ADDRESSED

The Effect of Divorce on Beneficiary Designations

After the obvious concerns are addressed in the first few days after a death, issues in the decedent's estate tend to surface. Discovering the decedent failed to update beneficiary designations before death is one of the most common issues estate attorneys must face. Although property division is a significant issue dealt with during a divorce, updating the beneficiary designations on such property postdivorce can often be overlooked. By statute, all provisions in a will in favor of a decedent's ex-spouse are revoked.[10] Likewise, all provisions in a trust created by a decedent in favor of the decedent's ex-spouse, which are to take effect upon the death of the decedent, are also revoked.[11] What happens to assets naming the ex-spouse as primary beneficiary if a property owner fails to update the beneficiary designations on assets passing by contract outside of the decedent's probate or trust estate? For instance, are the provisions of a payable-on-death designation on a financial account enforceable upon the decedent's death? Under 15 Okla. Stat. §178 (2011), "all provisions in the contract in favor of the decedent's former spouse are thereby revoked" upon divorce, subject to a few exceptions. This statute applies to life insurance, annuities, compensation agreements, retirement arrangements and other contracts executed on or after Nov. 1, 1987, and to depository agreements and security registrations executed on or after Sept. 1, 1994. This begs the question, is a transfer-on-death deed naming an ex-spouse still enforceable at death if it was never revoked by the grantor-owner? Although similar to a will, a transfer-on-death deed is expressly not a testamentary disposition, so 84 Okla. Stat. §114 (2011) is seemingly inapplicable to a transfer-on-death deed.[12] The transfer-on-death deed is also not a bargained for contract in which consideration is exchanged, so 15 Okla. Stat. §178 (2011) is also seemingly inapplicable. Thus, arguably, a transfer-on-death deed designation may survive a divorce, which is something family law practitioners should be mindful of in addressing a property division.



One other exception to the revocation of a beneficiary designation upon divorce involves the ex-spouse's interest in ERISA benefit plans.[13] In *Egelhoff v. Egelhoff ex rel. Breiner*, the United States Supreme Court held that a Washington statute revoking the beneficiary designation of an ex-spouse was pre-empted as it applied to ERISA benefit plans.[14] Given this decision, Oklahoma's version of the Washington statute, 15 Okla. Stat. §178 (2011), would be ineffective in terminating an ex-spouse's interest in a decedent's ERISA plan. Therefore, a divorced decedent must have updated the ERISA plan's beneficiary designation to someone other than the ex-spouse, or the ex-spouse must subsequently waive such interest, otherwise the plan will be administered with benefits being paid to the named ex-spouse, which may or may not be part of the divorce settlement.

The Effect of the Beneficiary Predeceasing the Decedent

Perhaps more commonly than after divorce, owners fail to update beneficiary designations after a named beneficiary dies. This may be due to the owner's neglect or due to the owner's incapacity and inability to change beneficiary designations. Upon the owner's death in such situations, the language of the document will typically control if the asset passes 1) to the estate of the deceased beneficiary, 2) to a contingent beneficiary or 3) to the decedent's estate. If a contingent beneficiary is not named, most assets will default to the estate of the decedent.

However, if a contingent beneficiary is not named on a bank account, the share of the deceased primary beneficiary shall be paid to the deceased beneficiary's estate rather than the decedent's estate.[15] This runs contrary to most expectations that a gift to a deceased beneficiary will lapse.[16]

In the case of real property under the Nontestamentary Transfer of Property Act, a gift of real property pursuant to a transfer-on-death deed will lapse if the grantee beneficiary does not survive the owner.[17] If no contingent beneficiary is named, the real property will be trapped in the name of the deceased owner and default to the deceased owner's estate.

Failure to update beneficiary designations on individual retirement accounts can trigger unwanted estate administration as well as unwanted tax consequences. When there is no living beneficiary designated for an IRA, upon the accountholder's death, the IRA passes according to the terms of the associated financial institution's plan. If an account holder fails to name a designated beneficiary, then oftentimes the IRA benefits are distributed based on who the financial institution states is the default beneficiary. The institution may have a few layers of default beneficiary designations for the account – such as passing to the decedent's spouse, then children and then to the estate.[18] These default designations may result in negative tax consequences that could have been avoided if the account holder had updated the beneficiary designations.

When an IRA is made payable to a decedent's estate there is a unique scheme for distributions because the IRS does not consider an estate to be an individual.[19] Logically, a nonindividual, such as an estate, does not have a life expectancy over which to stretch out required minimum distributions. Whether there ends up being a more or less favorable outcome for the eventual takers of the estate depends on if the original account holder survived to the age of taking mandatory distributions.[20] If the account holder did not reach such age, then the eventual takers of the IRA must distribute the balance of the account by the end of five years.[21] If the original account holder did survive past the age of taking mandatory distributions, then the eventual takers may stretch the IRA distributions over a period calculated by "[u]sing the life expectancy listed next to the owner's age as of his or her birthday in the year of death" and "[r]educ[ing] the life expectancy by one for each year after the year of death."[22] While the second option does not allow the individuals to stretch the IRA over their own lifetimes, it will allow some benefit from delaying distribution, and the resulting tax, of the entire amount.

To qualify for inherited IRA treatment, 26 U.S.C. §408(3)(C)(ii) (2018) requires that the "individual for whose benefit the account or annuity is maintained acquired such account by reason of the death of another" and that they were not the "surviving spouse."

Failure to update beneficiary designations on individual retirement accounts can trigger unwanted estate administration as well as unwanted tax consequences.

Although not binding authority, in a private letter ruling (PLR) the IRS discussed the issue of whether the ultimate beneficiaries of an estate can qualify for inherited IRA treatment.[23] In that PLR, an estate was the designated IRA beneficiary, received the IRA and conveyed it to a trust. The trust was to terminate and distribute all assets to the deceased's four children. The IRS allowed the four children to each establish an inherited IRA for each respective share. Thus, failed designations may not have negative tax consequences, but this is by no means guaranteed.

The Backfiring of Joint Tenancy Ownership

Oftentimes, the death of a named beneficiary triggers issues when individuals exercised self-help to avoid probate. One of the more common options for avoiding probate is titling assets in joint tenancy with rights of survivorship. This can be dangerous planning for individuals, particularly the original owner, because it exposes the asset to the creditors of all the joint tenants. Additionally, if the joint tenants do not die in the expected order, the use of joint tenancy may backfire. For example, if the oldest owner, typically the one who was trying to avoid probate, is the sole surviving owner, the owner may no longer be able to make alternative arrangements due to incapacity. Joint tenancy may also create confusion if utilized only for convenience prior to the decedent's death, in which case the use of joint tenancy on a bank account may result in a constructive trust argument.[24] Self-help through joint ownership might also create

inequitable results. Many times, joint tenancy is utilized by the decedent subject to the mutual understanding between the owners that the survivor will manage and distribute the assets according to the decedent's wishes. However, the surviving joint owner may decide not to fulfill the decedent's wishes, in which case the surviving owner may reap a windfall. Additionally, the surviving joint owner may lack capacity or have new creditor issues, in which case even if the surviving joint owner was well-intentioned, the decedent's wishes for the property will remain unfulfilled.

Tasking the surviving joint owner to fulfill the decedent's wishes may also trigger gift tax consequences for the surviving owner's estate. For a surviving owner to fulfill a decedent's wishes for others to benefit from the asset now wholly owned by the survivor, the survivor must give the assets to other individuals. In doing this, the survivor must keep in mind that these transactions may have gift tax consequences. Each individual has a lifetime gift tax exclusion representing the total amount they can give away over their entire lifetime without gift tax consequences. With the passage of the Tax Cuts and Jobs Act (TCJA) in 2017, the basic exclusion amount increased significantly. After being indexed for inflation, the thresholds for 2019 are now $11,400,000 for an individual and $22,800,000 for a couple.[25] Additionally, each year an individual may gift a certain amount without cutting into their lifetime basic exclusion amount.[26] The individual may give up to $15,000 annually to any person as of 2019 without utilizing his or her lifetime exclusion amount. In order to avoid any gift tax consequences while honoring the decedent's wishes, a surviving joint owner must avoid giving more than $15,000, or potentially $30,000 for a donor couple, in a taxable year.[27] If the surviving owner decides to gift more than this in the taxable year, the sum over the annual gift tax exclusion will reduce the survivor's lifetime gift tax exclusion amount, creating potential problems if the surviving owner already has a substantial estate.

CONCLUSION

As is evident, the road to avoid conflicts and cost after death is often paved with good intentions. Practitioners clearly cannot follow their clients throughout their lifetimes making sure fiduciary powers are adequately assigned, assets are appropriately titled and beneficiary designations are frequently reviewed. Perhaps it would be useful to give an estate information handbook to clients to review and complete independently on an annual basis, providing them a convenient resource for all their beneficiary designations, funeral wishes, fiduciary appointments, online information and any other relevant asset information. Such handbook would not prevent the consequences of an unplanned estate, but it might prevent what was once a well-planned estate from turning into a poorly planned estate due to circumstances beyond the estate attorney's control.

ABOUT THE AUTHOR

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ENDNOTES

1. *See* 58 O.S. §122 (2011).
2. *Brady v. Criswell Funeral Home, Inc.*, 1996 OK CIV APP 1, ¶9, 916 P.2d 269, 271.
3. 60 O.S. §199 (2011) (stating trusts for the "care of domestic or pet animals is valid" and such instrument shall be liberally construed).
4. *See* 21 O.S. §1717 (2011).
5. 4 O.S. §512(A) (2011).
6. *Id.* §512(C).
7. 58 O.S. §269 (2011) (stating the personal representative has power "to take control of, conduct, continue, or terminate any accounts of a deceased person").
8. *See* "Managing a Deceased Person's Account," *Facebook* www.facebook.com/help/275013292838654 (last visited Oct. 3, 2018) (select "Facebook Help Center"; then follow "Polices and Reporting"; then follow "Managing a Deceased Person's Account").
9. Practitioners and clients should explore policies for addressing decedent's accounts on Twitter, Instagram, LinkedIn, Facebook and Pinterest and discuss such matters with their clients.
10. 84 O.S. §114 (2011).
11. 60 O.S. §175 (2011). Note §175(B)(6) permits the trustor to name the ex-spouse as a beneficiary in an amendment executed after the divorce or annulment.
12. 58 O.S. §1258 (2008), stating a transfer-on-death deed "shall not be considered a testamentary disposition."
13. *See Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001).
14. *Id.* at 147-51 ("The [state] statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status . . . [I]t runs counter to ERISA's commands that a plan shall 'specify the basis on which payments are made to and from the plan,' §1102(b)(4), and that the fiduciary shall administer the plan 'in accordance with the documents and instruments governing the plan,' §1104(a)(1)(D), making payments to a 'beneficiary' who is 'designated by a participants, or by the terms of [the] plan.' §1002(8).").
15. 6 O.S. §2025(A)(2) (2011).
16. 84 O.S. §142 (2011).
17. 58 O.S. §1255(B) (2011).
18. *See, e.g.*, Morgan Stanley Funds Designation of Beneficiary Form, Morgan Stanley Investment Group (March 2017) www.morganstanley.com/im/publication/forms/msf/designationofbeneficiaryform_msf.pdf.
19. I.R.S., Dep't of the Treasury, *Publication 590-B, Distributions from Individual Retirement Arrangements (IRAs)* 9, 10 (Feb. 6, 2018).
20. *See* I.R.S., Dep't of the Treasury, *Publication 590-B, Distributions from Individual Retirement Arrangements (IRAs)* 10 (Feb. 6, 2018).
21. *Id.*
22. *Id.*
23. *See* I.R.S. Priv. Ltr. Rul. 2012-08-039 (Nov. 17, 2011).
24. *See Isenhower v. Duncan*, 1981 OK CIV APP 31, 635 P.2d 33 ("The proper basis for impressing a constructive trust is to prevent unjust enrichment."). *See also* 60 O.S. §74 (2011) (discussing joint tenancy); 60 O.S. §137 (2011) (explaining when a trust is presumed).
25. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, §11061, 131 Stat. 2054, 2091 (2017).
26. *See* 26 U.S.C. §2503 (2017).
27. *See* 26 U.S.C. §2513 (2017).

Guide to Organ and Tissue Donation in Oklahoma

By Jennifer L. Wright

THE ESTATE PLANNING CONVERSATION SHOULD INCLUDE a discussion about organ and tissue donation. Clients may have questions related to organ and tissue donation or may have reached a decision based on misinformation. Attorneys should be prepared to provide information and resources to the client so an informed decision can be made.

Typically, the primary focus of the estate planning process is on the client's assets. Planning for incapacity and end-of-life care is just as important as planning for the distribution of assets; however, these topics usually do not receive as much attention in the estate planning conversation. In particular, the topic of organ and tissue donation can be overlooked. Clients may not know how to approach the subject or what questions to ask. Lawyers may shy away from this conversation because they are uncomfortable with the topic or lack the knowledge and information to provide meaningful advice to the client. Discussions about end-of-life care, including organ and tissue donation, are difficult because these hard choices can be emotional and involve medical, legal, religious and social aspects.[1]

The Oklahoma Rules of Professional Conduct permit lawyers to refer to these other aspects in advising clients. Rule 2.1 states, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[2] Comment 2 to Rule 2.1 states, "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."[3] The decision to become an organ and tissue donor is certainly a personal decision; however, lawyers have a duty to competently advise their clients in these difficult decisions. This article is intended to provide an overview of organ and tissue donation in Oklahoma and answer related questions that arise in the estate planning practice.

APPLICABLE LAWS

The United States has adopted an opt-in organ donation system, meaning an individual must opt into organ donation by making the decision to be an organ and tissue donor. Some countries have adopted laws which make organ donation the default option at the time of death, and an individual would have to opt out of organ donation if they do not want to be an organ donor.[4]

The Uniform Anatomical Gift Act (UAGA) was first drafted in 1968 and has been adopted in some form in all 50 states.[5] Oklahoma's version of the UAGA can be found at 63 O.S. §2200.1A, *et seq*. The UAGA provides a legal framework for organ and tissue donation and transplantation processes. The latest revision of the UAGA added language to increase the focus on personal autonomy in the donation process. An individual's decision to become an organ and tissue donor is a legally binding gift and is referred to as "first person authorization." First person authorization cannot be amended or revoked by anyone other than the donor.[6] Even if the donor's family objects to donation, the donor's decision is final and medical providers have an obligation to respect the wishes of the donor.

In 1984, Congress passed the National Organ Transplant Act which established the Organ Procurement and Transplantation Network (OPTN). The United Network for Organ Sharing is a private, nonprofit organization that administers the OPTN under federal contract. The OPTN maintains a national registry for organ

matching and created a system of organ procurement organizations (OPOs) throughout the United States. OPOs are nonprofit organizations designated under federal law as the only organizations that can provide organ and tissue donation services.[7] Oklahoma's OPO is LifeShare Transplant Donor Services of Oklahoma. LifeShare works closely with transplant centers and health care organizations across the state of Oklahoma in performing the recovery of organs and tissue for transplantation. LifeShare also provides resources and education to help raise awareness for organ, eye and tissue donation.[8]

The donation and transplantation processes are heavily regulated by state and federal statutes and regulations.[9] In addition, numerous federal agencies under the U.S. Department of Health and Human Services provide oversight of the processes.[10] While this article is intended to provide resources and assist the estate planning attorney in guiding clients, it is not an exhaustive review of all applicable laws and regulations related to organ and tissue donation and transplantation.

HOW TO BECOME AN ORGAN DONOR

In Oklahoma, a competent individual can become an organ and tissue donor during the individual's lifetime if the individual is over the age of 18, is over the age of 16 if eligible to obtain an Oklahoma driver's license or is an emancipated minor.[11] An authorized person can make an anatomical gift on behalf of someone else. The statute defines "authorized person" as the parent of an unemancipated minor donor, the guardian of the donor or the agent of the donor, so long as the power of attorney or other document does not prohibit the agent from making an anatomical gift.[12]

Becoming an organ and tissue donor can be as simple as authorizing the organ donation symbol be placed on the donor's Oklahoma state driver's license.[13] An expired, suspended or revoked driver's license will not invalidate the anatomical gift.[14] A donor can also make an anatomical gift in a will.[15] The gift designated in the will is effective upon death and without the necessity of a probate.[16] A finding that the will is invalid after the donor's death will not invalidate the gift.[17] A donor who has a terminal illness or injury may make an anatomical gift by any means of communication if addressed to two adults, so long as one of them is a disinterested party.[18] A donor may

authorize an anatomical gift by signing an organ donation card or other record.[19] If the donor is unable to sign, another individual may sign at the direction of the donor if the signature is witnessed by two adults, one of whom must be a disinterested party.[20] A donor may also make an anatomical gift in the Advance Directive for Health Care form, which is discussed below.

A donor or authorized person can execute an amendment or revocation of an anatomical gift.[21] If the individual is unable to sign, another individual may sign the amendment or revocation at the individual's direction with the signature being witnessed by two adults, one of whom must be a disinterested party.[22] An anatomical gift may be revoked if the donor or authorized person destroys the document making the gift with the intent of revocation.[23] If the gift is made by will, the same methods allowed by law for revoking or amending wills are effective. In addition, a donor making an anatomical gift by will can amend or revoke the gift by signing a document to that effect.[24]

An anatomical gift of a donor will be honored at the time of death unless there is an express, contrary indication by the donor.[25] At the time of death or removal of life support, if an individual has not made an anatomical gift and no express refusal to make an anatomical gift exists, the organ recovery team will approach the family or other authorized person and seek consent for organ and tissue donation. The following individuals, in the order named, may authorize organ and tissue donation of an individual at the time of death:

1) Agent of decedent so long as the power of attorney or other document does not prohibit the agent from making an anatomical gift;
2) Spouse;
3) Adult child;
4) Parent;
5) Adult sibling;
6) Adult grandchildren;
7) Grandparents;
8) Adult who exhibited special care and concern for decedent;
9) Guardian of the person; or
10) Any other person having authority to dispose of the body.[26]

Making a time-sensitive decision about organ donation immediately following a loved one's death can be extremely burdensome and emotional, especially if the decedent's wishes are not known by the decision maker. As part of the estate planning process, attorneys should discuss the significance of these decisions with clients as well as the importance of communicating wishes to loved ones to help relieve some of this burden.

ADVANCE DIRECTIVE FOR HEALTH CARE

In the estate planning practice, the discussion of anatomical gifting occurs most frequently when clients are executing the Oklahoma Advance Directive for Health Care form. The advance directive is a statutory form set forth in the Oklahoma Advance Directive Act.[27] Clients completing the form can appoint a health care proxy and make advance decisions concerning the administration of life-sustaining treatment and artificially administered nutrition and hydration. The advance directive also includes a section for the client to complete if the client wishes to make an anatomical gift. While this article focuses on how the advance directive relates to organ and tissue donation, estate planners may wish to also refer to W. Thomas Coffman's article "Advance Planning for End-of-Life Care in Oklahoma" for a broader overview of the advance directive as well as other end-of-life planning practices.[28]

In the anatomical gifting section of the advance directive, individuals may select the purpose or purposes for which the gift is being made from the following choices: 1) transplantation; 2) therapy; 3) medical science, research or education; and 4) dental science, research or education.[29] These terms are not defined in the Oklahoma Advance Directive Act, nor are they defined in the UAGA, but comments to Section 4 of the Revised Uniform Anatomical Gift Act (2006) provide some guidance:

> The terms "transplantation", "therapy", "research" and "education" are not defined in this [act]. Rather, they are defined

The remaining portion of the anatomical gifts section of the advance directive asks individuals to choose what specifically they wish to donate, either the entire body or selected organs or parts.

by their common usage in the communities to which they apply. In general terms, transplantation refers to the removal and grafting of one individual's body part into the body of another individual. Research is a process of testing and observing, the goal of which is to obtain generalizable knowledge, while therapy involves the processing and use of a donated part to develop and provide amelioration or treatment for a disease or condition. Education posits the use of the whole body or parts to teach medical professionals and others about human anatomy and its characteristics.[30]

The remaining portion of the anatomical gifts section of the advance directive asks individuals to choose what specifically they wish to donate, either the entire body or selected organs or parts.

If the donor selects more than one purpose on the form, the organ or part would first be used for transplantation or therapy, if found to be suitable.[31] If the gift is not suitable for transplantation or therapy, it would then be used for research or education.[32] If the gift is not suitable for transplantation, therapy research or education, the body or part passes to the person responsible for the disposition of the decedent's remains.[33]

For an individual who is at or near death, the use of life support systems or other measures may be necessary to ensure the suitability of organs and tissue for transplantation. This presents a conflict if the donor completed an advance directive and selected that life-sustaining treatment and/or artificial nutrition and hydration not be administered to the donor. Under Section 14 of the UAGA, when a prospective donor who is at or near death is referred to an OPO, the OPO will conduct an examination to determine the suitability of the prospective donor's organs or parts.[34] During this examination, life support systems that ensure the viability of the organs or parts may not be withdrawn regardless of the prospective donor's selection on the advance directive that life-sustaining measures not be administered.[35] If the hospital knows the prospective donor has made an expression of intent to the contrary then the life-sustaining measures may be withdrawn.[36] The statement in an advance directive or health care power of attorney that the individual does not wish to receive life-sustaining treatment and/or artificial nutrition and hydration is not considered an expression of contrary intent.[37]

Another potential conflict exists with the Oklahoma Physician Orders for Life-Sustaining Treatment (POLST). The POLST form is not an estate planning form, but rather a medical order that must be completed by a medical professional to address the patient's current medical condition.[38] The POLST form includes directions on the use of life-sustaining treatment.[39] It is not clear if the execution of a POLST form directing physicians to withhold or withdraw life-sustaining measures would constitute an "expression of contrary intent" for purposes of continuing life support systems to ensure viability of organs or parts of a prospective donor. Estate planners should inform clients of the existence of the POLST and how it relates to the client's estate planning documents.

Some feel that the requirement under Section 14 of the UAGA that life support systems be initiated or continued for the sole purpose of determining suitability for donation infringes on the individual's right of autonomy, while others

feel the requirement supports the individual's decision to donate.[40] It is clear a conflict exists within the UAGA, which is acknowledged in Section 21 of the UAGA. Section 21 provides that where such conflict exists, the physician shall attempt to resolve the conflict expeditiously by conferring with the donor, or if the donor is unable to confer, the donor's agent or other person authorized by law to make medical decisions for the donor.[41] This conflict can be avoided with advance planning if the attorney includes carefully drafted language in the client's advance directive to more clearly state the client's intent, such as stating that an exception to the withholding of life-sustaining treatment and/or artificial nutrition and hydration be made to allow for organ and tissue donation.

ensure the documents reflect the client's intent to avoid any conflicts at the time of death. Clients should be encouraged to communicate their decisions about end-of-life care and organ and tissue donation to their loved ones. Assisting clients in making informed decisions about organ and tissue donation and memorializing those decisions in the client's estate planning documents will give the client peace of mind and provide clarity to the client's loved ones and medical providers.

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CONCLUSION

In advising clients about estate planning and end-of-life care, attorneys should include a discussion about organ and tissue donation and provide clients with information and resources to assist them in making an informed decision. In drafting estate planning documents, attorneys should

Common Myths

- *I am too old to be an organ donor.* There is no age limit on organ donation. The oldest organ donor in the United States was 92 years old and donated his liver.[42]
- *It is against my religion.* None of the major religions forbid the receipt or donation of organs or are against transplantation.[43]
- *The doctors or emergency medical personnel will not try as hard to save me if I am an organ donor.* The first priority of medical professionals is to save the patient's life. Organ and tissue donation can only occur after death has occurred.[44] The organ and tissue recovery team is separate from the treating physician and the treating physician's team.[45]
- *I can't be an organ donor because of a past illness.* Very few medical conditions or illnesses will prevent someone from being an organ or tissue donor. Active cancer or some types of infection would prevent donation.[46] Physicians will make a determination about whether organs or tissue can be used at the time of death.
- *I don't want my family to be responsible for the cost of organ donation.* The donor is not responsible for the cost of donation and neither is the donor's family. The donor is responsible for all medical care up until the time of legal death and the costs associated with funeral, cremation and/or burial expenses.[47]
- *I don't want to have my funeral delayed.* Organ and tissue donation should not cause a delay in the funeral or memorial services. The organ procurement team works as quickly as possible and will return the body to the family. Organ donation will not prevent an open casket funeral.[48]

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ENDNOTES

1. Hank Dunn, *Hard Choices for Loving People*, at p. 10 (5 ed.) (2009).
2. Rule 2.1, ORPC.
3. Rule 2.1, ORPC, cmt 2.
4. *See* S. Davidai, T. Gilovich, & L. Ross, "The meaning of default options for potential organ donors," *Proceedings of the National Academy of Sciences*, 15201-15205 (2012) (Psychologists examined beliefs of participants in opt-in and opt-out countries and determined that changing policies and laws in the United States to become an opt-out country would change individuals' beliefs about organ donation from being a significant action to an insignificant action, which would result in an increase in donations.); *see also* L. Shepherd, R. E. O'Carroll and E. Ferguson, "An International Comparison of Deceased and Living Organ Donation/Transplant Rates in Opt-in and Opt-out Systems: A Panel Study," *BMC Medicine*, 12:131 (2014) (Opt-out countries have a higher number of deceased donors, but a reduced number of living donors.).
5. *See* National Conference of Commissioners on Uniform State Laws, Revised Uniform Anatomical Gift Act (2006, last revised or amended in 2009), tinyurl.com/yasgbauo.
6. 63 O.S. §2200.8A (2009) (In the case of an unemancipated minor who dies, a parent may revoke or amend the minor's gift or refusal.).
7. List of OPOs for each state, www.aopo.org/find-your-opo.
8. LifeShare's website provides helpful resources and information, including the Donor Family Resource Guide, www.lifeshareoklahoma.org/family-services.html.
9. *See* organdonationalliance.org/organ-donation-toolbox-legal for a list of federal and state statutes and regulations; s*ee also* www.organdonor.gov/about-dot/laws/history.html for Statutory and Regulatory History of Organ Transplantation.
10. Federal agencies involved in the organ and tissue donation and/or transplantation processes include the Centers for Medicare and Medicaid Services, Centers for Disease Control and Prevention, National Institutes of Health, Agency for Healthcare Research and Quality and the Food and Drug Administration.
11. 63 O.S. §2200.4A (2009).
12. *Id.*
13. 63 O.S. §2200.5A(A)(1) (2009) and 63 O.S. §2211 (2004).
14. 63 O.S. §2200.5A(C) (2009).
15. 63 O.S. §2200.5A(A)(2) (2009).
16. 63 O.S. §2200.5A(D) (2009).
17. *Id.*
18. 63 O.S. §2200.5A(A)(3) (2009).
19. 63 O.S. §2200.5A(B) (2009) (To request an organ donation card, contact LifeShare at 800-826-LIFE (5433). A donor may also register online at www.lifeshareregistry.org/register.).
20. 63 O.S. §2200.5A(B) (2009).
21. 63 O.S. §2200.6A (2009).
22. *Id.*
23. *Id.*
24. *Id.*
25. 63 O.S. §2200.8A (2009).
26. 63 O.S. §2200.9A (2009).
27. 63 O.S. §3101.4 (2006).
28. W. Thomas Coffman, "Advance Planning for End-of-Life Care in Oklahoma," *Oklahoma Bar Journal*, Vol. 78, No. 15, 1285-1290 (May 12, 2007).
29. *Id.*
30. National Conference of Commissioners on Uniform State Laws, Revised Uniform Anatomical Gift Act (2006, last revised or amended in 2009), tinyurl.com/yasgbauo.
31. 63 O.S. §2200.11A (2009).
32. *Id.*
33. *Id.*
34. 63 O.S. §2200.14A(C) (2009).
35. *Id.*
36. *Id.*
37. National Conference of Commissioners on Uniform State Laws, Revised Uniform Anatomical Gift Act (2006, last revised or amended in 2009), Comments to Section 14, tinyurl.com/yasgbauo.
38. 63 O.S. §3105.4 (2016).
39. *Id.*
40. J. L. Verheijde, M.Y. Rady & J. L. McGregor, "The United States Revised Uniform Anatomical Gift Act (2006): New challenges to balancing patient rights and physician responsibilities," *Philosophy, Ethics, and Humanities in Medicine: PEHM*, 2:19 (2007), doi.org/10.1186/1747-5341-2-19.
41. 63 O.S. §2200.21A(B) (2009).
42. *See* www.organdonor.gov/about/donors/seniors.html.
43. P. Bruzzone, "Religious Aspects of Organ Donation," *Transplantation Proceedings*, Vol. 40, Issue 4, 1064-1067 (May 2008).
44. 63 O.S. §3122, Declaration of Death (1986).
45. 63 O.S. §2200.14A(I) (2009).
46. More information on who can be a donor can be found at www.organdonor.gov/about/donors.html.
47. *See* www.lifeshareoklahoma.org/frequently-asked-questions.html.
48. 63 O.S. §2200.14A(H) (2009). *See also* cloud.3dissue.com/144102/144275/168702/DonorFamilyResourceGuideBooklet/index.html.

Powers of Attorney With Gifting Powers: The Double-Edged Sword of Elder Law

By Tessa Baker and H. Terrell Monks

THREE YEARS AGO, BILLY BEGAN TO SUFFER SIGNS of dementia and it became apparent that he needed someone to assist in the management of his affairs. Great-nephew Zeke came to the rescue. Zeke's spouse, an educated and generally sharp individual, drafted a power of attorney for Billy to sign granting Zeke a general durable power of attorney that included gifting powers. Zeke, using that power of attorney, executed beneficiary designation forms, joint tenancy deeds, and other such documents to assure that he received Billy's worldly goods. Eventually, Billy succumbed to dementia. The heirs at law, which did not include Zeke, were furious. Litigation commenced and insults were exchanged.

On the other hand, consider Mary and William who have been married almost 58 years. Mary's health has deteriorated and she now needs long-term care. The only substantial asset remaining is the homestead, which is held in joint tenancy. Fortunately, William holds Mary's general durable power of attorney. Unfortunately, this power of attorney is the state statutory form,[1] which contains no gifting powers. Mary is receiving Medicaid assistance to pay the substantial cost of her care, and William has been advised that he has one year to remove Mary's name from the title to their homestead. The social worker has advised that if Mary's name is still in title at the end of the year, Mary will have too many assets to be eligible for Medicaid assistance. Such a loss of assistance would be devastating for Mary and her husband William.

William takes his power of attorney and visits his friend, attorney Mark, to inquire about the preparation of a quit-claim deed to be executed using the power of attorney. Attorney Mark has recently been involved in a case wherein the title attorney reviewed a deed that had been executed by an agent holding a general power of attorney without gifting powers. The title attorney declined to issue title insurance to the prospective buyer of the property because the power of attorney did not grant the agent the authority to gift property of the principal. Mark tells William this story and advises that under the circumstances, William does not have the authority to gift his wife's homestead interest to himself using the power of attorney he has brought. Even more unfortunate, Mary is fully incapacitated and can neither sign the deed nor grant a new power of attorney.

These two scenarios and thousands more like them, demonstrate both the need for gifting powers in a power of attorney as well as the danger of abuse that accompanies such power. There appears to be an important gap in Oklahoma law that deals with the use of gifting powers. There are, however, some Oklahoma cases that should be considered.

ESTATE OF ROLATER

First, consider *In re Estate of Rolater*, wherein an agent transferred certain stock belonging to the principal into his own name using a general durable power of attorney.[2] The court admitted that

it was difficult to read the copy of the power of attorney document, but from the language recited by the court, there appeared to be no gifting power in the document.[3] The court held that there was no presumption of the principal's intent to give and that the element of donative intent, the first essential element of a gift, must be proved by evidence that is "clear, satisfactory, and unmistakable…"[4] The court opined that the agent had acted under a misapprehension that his power of attorney gave him more or less "omnipotent control of his principal's property."[5] The court advised that such a notion was ill-founded.[6] The court held that "in exercising granted powers, the attorney is bound to act for the benefit of his principal avoiding where possible that which is detrimental unless expressly authorized."[7]

The concept of acting "for the benefit of his principal" appears to be the crux of an important question that remains unanswered in the current state of Oklahoma law. Although Oklahoma statutes do state that an attorney in fact, "whether acting pursuant to a durable or nondurable power of attorney or otherwise, is bound by standards of conduct and

liability applicable to other fiduciaries,"[8] it is not completely clear to what level the agent must act exclusively in the best interest of the principal when the language of the document includes gifting and self-dealing powers. I would state the question like this: Where the principal executes a power of attorney containing gifting powers, must those gifting powers be executed and applied only for the benefit and best interest of the principal, or may those gifting powers be used for the benefit of the agent or other person chosen by the agent? The secondary question that arises out of the *Rolater* case is whether a general gifting power contained within a general durable power of attorney is sufficient to demonstrate the principal's donative intent. The practitioner may find this particularly problematic where the gifting power is contained in a laundry list of other powers.

ESTATE OF ESTES

The Oklahoma Supreme Court has provided something of a primer on the issue of gifting and agency in the case of *In re Estate of Estes*.[9] In very abbreviated terms, the court cited with approval *In re Estate of Stinchcomb*[10] and held that the recipient of the principal's property must prove by clear, explicit and convincing evidence all the elements necessary to establish an *inter vivos* gift.[11] In *Estes*, the agent used a power of attorney to transfer almost all of the principal's assets into her name or into joint tenancy with rights of survivorship.[12] The agent argued that the principal intended her to take these actions but the court did not appear to give serious weight to this self-serving testimony of the agent.[13] The court also considered that the principal's name remained on title to some of the subject property.[14]

Unfortunately, for those of us practicing in the area of estate planning, the above cases do not appear to turn on power of attorney forms with gifting powers. Therefore, there remains a real chance that an appellate court could find that where such a power is found in a power of attorney form, the facts of the matter would fall outside of the existing case law in *Rolater*, *Stinchomb* and *Estes*. If that should occur, the court may look to the decisions of other states for guidance as there is not a developed body of Oklahoma law directly on point.

STEHLIK V. RAKOSNIK

Among cases that could be considered is the Nebraska case of *Stehlik v. Rakosnik*,[15] wherein the agent received a power of attorney that included the power to make gifts.[16] The agent utilized the power of attorney to make transfers of the principal's money and real estate to himself and others.[17] The agent used funds from the principal's checking account for his own personal purposes.[18] The Nebraska court considered a line of Nebraska cases, as well as cases from other jurisdictions, which were based upon policy concerns, to reach the conclusion that the broad power of gifting in a power of attorney is ineffective to empower the fiduciary to make a self-dealing gift without a specific statement allowing self-dealing.[19] The court, therefore, reached the conclusion that an agent only has authority to effectuate a self-interest transfer of the principal's assets where 1) expressly authorized by the power of attorney form or 2) when the act is in the best interest of the principal or consistent with the purpose and intent of principal.[20]

If an Oklahoma court were to find this case compelling, one might reasonably expect that the

The Nebraska court considered a line of Nebraska cases, as well as cases from other jurisdictions, which were based upon policy concerns, to reach the conclusion that the broad power of gifting in a power of attorney is ineffective to empower the fiduciary to make a self-dealing gift without a specific statement allowing self-dealing.

appellate court would set aside attempted transfers made by an agent under a broad gifting power. Such a decision may be of limited value in future cases because those agents who are sufficiently educated or lucky will simply add self-dealing powers to the general power of attorney that they prepare for the principal to execute in their favor and the abuse will continue unabated.

ESTATE OF FERRARA

Another informative case may be the New York case of *In re Estate of Ferrara*.[21] In *Ferrara*, the New York Court of Appeals found that attorneys-in-fact were required to act in the best interest of the principal when making gifts, even when the power of attorney document specifically allowed them to self-deal.[22] In *Ferrara*, the principal had executed a will bequeathing his estate to a charity.[23] While the principal's health was deteriorating, one of the attorneys-in-fact transferred nearly all of the principal's assets to himself.[24] Despite the existence of the will to the contrary, the attorneys-in-fact argued that the self-dealing was in the best interest of the principal because it furthered the decedent's wishes.[25] After examining legislative history, statutes and the general purpose of a power of attorney, the court determined that an attorney-in-fact has a duty to act in the best interest of the principal at all times, and that the attorney-in-fact here had not demonstrated that such self-dealing was in the principal's best interest.[26]

While the decision of this case goes directly to the question of whether an agent must exercise his duties in the principal's best interest even when the power of attorney contains a gifting power, the persuasiveness of the case may be questionable as the court's decision appears to turn largely on the legislative history of New York's power of attorney statute[27] and that statute is not replicated in Oklahoma law. Oklahoma courts may, however, still find the New York court's reasoning and focus on the general purpose of power of attorney persuasive.

In *Ferrara*, the New York Court of Appeals found that attorneys-in-fact were required to act in the best interest of the principal when making gifts, even when the power of attorney document specifically allowed them to self-deal.

UNIFORM POWER OF ATTORNEY ACT

Finally, in 2006 the Uniform Power of Attorney Act was promulgated and certain sections of that act speak directly to the issue of self-dealing under a power of attorney. This act has been adopted by a majority of the states, with still more considering adoption currently.[28] Although, Oklahoma has not yet adopted the act, the proposed revisions may still be persuasive to fill gaps in Oklahoma's Uniform Durable Power of Attorney Act[29] not yet addressed by Oklahoma courts or Legislature. Section 201 of the Uniform Power of Attorney Act discusses the types of authority that require specific grants: "(a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney **expressly grants** the agent the authority… (2) **make a gift**."[30]

Section 217 of the Uniform Power of Attorney Act specifically deals with gifts. This section states:

> (c) An agent may make a gift of the principal's property **only as the agent determines is consistent with the principal's objectives** if actually known by the agent and, if unknown, as the agent determines is **consistent with the principal's best interest** based on all relevant factors, including: (1) the value and nature of the principal's property; (2) the principal's foreseeable obligations and need for maintenance; (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; (4) eligibility for a benefit, a program, or assistance under a statute or regulation; and (5) the principal's personal history of making or joining in making gifts.[31]

Although Oklahoma does not currently have a statute requiring the attorney-in-fact to consider these factors when making a gift of the principal's property, Oklahoma courts have stated that the attorney-in-fact is required to act for the benefit of the principal.[32] These factors found in the Uniform Power of Attorney Act may provide persuasive avenues for determining what type of actions are for the "benefit of the principal."

Going back to the story of husband and wife, Mary and William, one can reasonably reach the conclusion that there will be instances, and probably increasingly common instances, that an agent will need to self-deal and gift assets of the principal. There may also be situations where the courts will find such gifting and self-dealing to be not only appropriate, but even necessary for the integrity of the aging family. This may occur even where there is a complete absence of evidence that there was the "donative intent," as required by the current case law.

In conclusion, there appears to be a growing need for a statutory update on the issue of powers of attorney that authorize gifting and self-dealing in Oklahoma. Our current statutory scheme leaves unprotected the most vulnerable members of our population, the elderly and infirm, and do not provide the courts strong tools to remedy abuses of power by those who take advantage of their principals by exploiting important tools used by thoughtful elder law attorneys.

ENDNOTES

1. Okla. Stat. Tit. 15, §1003.
2. *In re Estate of Rolater,*1975 OK CIV APP 60, ¶5, 542 P.2d 219.
3. *Id.* ¶4.
4. *Id.* ¶15.
5. *Id.* ¶20.
6. *Id.*
7. *Id.*
8. Okla. Stat. Tit. 58 O.S. §1081.
9. *In re Estate of Estes*, 1999 OK 59, ¶¶29-31, 983 P.2d 438.
10. 1983 OK 120, 674 P.2d 26.
11. *Id.* ¶29.
12. *Id.* ¶¶7-13.
13. *Id.* ¶31.
14. *Id.*
15. *Stehlik v. Rakosnik*, 24 Neb. App. 34, 881 N.W.2d 1(2016).
16. *Id.* at 36.
17. *Id.*
18. *Id.*
19. *Id.* at 41.
20. *Id.* at 45.
21. *In re Estate of Ferrera*, 852 N.E.2d 138, 7 N.Y.3d 244, 819 NYS2d 215 (N.Y., 2006).
22. *Id. at* 144.
23. *Id.*
24. *Id.* at 140-141.
25. *Id.* at 140.
26. *Id.* at 144.
27. *Id.*
28. Uniform Law Commission (2018), https://my.uniformlaws.org/committees/community-home?CommunityKey=b1975254-8370-4a7c-947f-e5af0d6cb07c (last visited Sept. 27, 2018).
29. Okla. Stat. Tit. 58 O.S. §1071.
30. Uniform Power of Attorney Act §201 (emphasis added).
31. Uniform Power of Attorney Act §217 (emphasis added).
32. *Rolater*, 542 P.2d at 223.

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Creditor's Rights in Revocable *Inter Vivos* Trusts After the Death of the Settlor

By Ashley A. Warshell and H. Terrell Monks

REVOCABLE *INTER VIVOS* TRUSTS HAVE BECOME a common estate planning tool in Oklahoma and elsewhere, often functioning as a "will substitute" for those who wish to avoid probate and maintain some control over assets after their death. Although estate planning attorneys may presume that similar legal analyses will apply to wills and these estate planning "substitutes," that is not always the case, even in circumstances this may seem to be warranted as a matter of public policy.[1] One of these circumstances, for example, involves the ability of a settlor's creditors to reach assets in a revocable *inter vivos* trust upon the death of the settlor.

Although the assets in such a trust are generally available to the settlor's creditors during his or her lifetime, the beneficiaries normally change upon the settlor's death, converting the trust into one that is no longer self-settled, and therefore is beyond the reach of the settlor's creditors. This article discusses the case law and policy considerations implicated in addressing this issue.

THOMAS V. BANK OF OKLAHOMA, N.A.

In *Thomas v. Bank of Oklahoma, N.A.*,[2] the Oklahoma Supreme Court held that a revocable *inter vivos* trust could not be used to defeat the forced share of a surviving spouse. Although the reasoning of the *Thomas* court could be extended to the claims of other creditors, no Oklahoma court has done so, leaving the issue unsettled under Oklahoma law.[3]

In *Thomas*, the wife funded a revocable living trust with separate inherited assets, appointing herself and Bank of Oklahoma as co-trustees and maintaining full dominion and control over the trust assets until the time of her death.[4] The trust agreement directed that, upon her death, the assets were to be distributed equally between her surviving husband and two children.[5] The husband elected to take a forced share and demanded that the trust assets be included in the wife's estate for that purpose.[6] Bank of Oklahoma, the remaining trustee, objected, arguing that since the wife did not have legal title to the trust property at the time of her death, it could not be included in her estate or be subject to the spousal share.[7] As noted, while the *Thomas* court rejected this argument on the facts of that case (in the context of a spousal forced-share claim), it is not clear the same decision would result in a case involving creditor claims.

Arguments similar to those in *Thomas* may be made in response to the claims of other creditors of an estate, *e.g.,* that since the assets were owned by the trustees as such, they pass pursuant to those terms, outside the jurisdiction of a probate court and are not subject to the procedure for paying debts of an estate set forth in 58 O.S. §§1, *et seq*. Creditors might argue that this should not be permitted, *e.g.*, because it would allow the settlor and trust beneficiaries to avoid the debts of the settlor. Similar to the holding in *Thomas*, the federal government does not permit this in the context of tax liability; the Internal Revenue Service (IRS) considers property in a revocable trust to be property of the estate for estate tax purposes.[8] Applying the reasoning in *Thomas*, an Oklahoma court

would not permit such avoidance in the context of a forced spousal share. But is there also an analytical basis for a contrary rule with regard to ordinary private creditors' claims? In other words, what policy would be served by distinguishing other types of creditors and excluding them from the same type of protection?

THE OKLAHOMA TRUST ACT

As long as the settlor is living and the trust is revocable, the applicable Oklahoma statute is clear that trust assets may be reached by the settlor's creditors:

> H. Nothing in this act shall authorize a person to create a spendthrift trust or other inalienable interest for his own benefit. The interest of the trustor as a beneficiary of any trust shall be freely alienable and subject to the claims of his creditors.[9]

In other words, a revocable living trust for the benefit of the settlor generally does not provide asset protection during the settlor's lifetime; however, what happens upon the death of the settlor is less certain. The aforementioned statutory provision is limited to settlors who are also beneficiaries – a condition that changes at the death of the settlor. As noted above, the interests of at least two other types of creditors – the spouse electing a forced share and the IRS – have been recognized and addressed in favor of a policy that prevents trustors from using a vehicle designed as a will substitute to avoid paying certain claims that would have otherwise been paid in a probate.[10] But are these (IRS and spousal) claims distinguishable on legal and policy grounds from the claims of ordinary creditors, so as to warrant disparate treatment?

BURFORD MANOR INC. V. DEEL

The Oklahoma Court of Civil Appeals addressed at least one variation of this issue in *Burford Manor Inc. v. Deel*.[11] In *Burford Manor*, the beneficiaries of a trust sought to avoid paying their deceased mother's nursing home expenses. During her lifetime, the mother (Lela) was the beneficiary of a trust established by her late husband (Homer), which directed the trustee to distribute trust assets for the "health, support in reasonable comfort, best interests and welfare" of Lela.[12] However, the trust ended upon Lela's death, with the trust property passing directly to the successor beneficiaries at that time. On these facts, the *Burford Manor* court found that, as a matter of equity, the trust assets passed to the successor beneficiaries subject to an implied equitable lien in favor of the nursing home. The court reasoned that:

> [A]t the death of Lela, title to the trust's real property passed to the legatees named in Homer's will encumbered, however, with an equitable lien for valid trust debts. These constituent circumstances give rise to a significant factor overshadowing the entire situation-one recognized by the trial court-that a cloud of conflicting interests hovered over both of the Lela trust trustees arising from the fact that they were to eventually receive whatever was not spent on Lela during her lifetime.
>
> … "Equitable liens grow out of a duty or obligation on the part of the owner of property to make it answerable for a debt." *Jones on Liens*, 3rd Ed., §28.[13]

Although *Burford Manor* may weigh in favor of creditors, it fails to provide the bright line rule necessary to settle this issue in the context of revocable *inter vivos* trusts generally. In *Burford Manor*, the contingent beneficiaries were also the trustees at the time the debt was incurred, creating some potentially conflicting interests on this issue that might not always be present. Moreover, the doctrine of equitable lien, relied on by the court, is inherently flexible and subject to subjective considerations. Thus, in most cases, reasonable arguments will remain on either side.

For example, the facts of a given case may easily be distinguished from those in *Burford Manor*, where the defendant successor beneficiaries had direct contact with the nursing home by leaving their incapacitated mother in the nursing home's round-the-clock care and allegedly promising to pay for its services.[14] This could also be viewed as creating a quasi-contractual obligation to pay, or at least as supporting an equitable claim for unjust enrichment. In addition, trust assets had been used to pay for at least some of Lela's nursing home care before the trustees discontinued payments, perhaps evidencing an implied contract based on a course of conduct.[15] In contrast, in many other cases involving a revocable living trust, the creditor and the successor beneficiaries will be strangers both to each other and to the estate plan and the factors relevant in *Burford Manor* will be absent. In such a case, the court will be left to weigh the equities based on other factors – a discretionary determination depending on the conduct of the parties, the type of debt and other various circumstances. This leaves the courts without a concise benchmark for the consistent resolution of these cases.

THE THIRD RESTATEMENT AND LEGISLATIVE TREATMENT

Outside of Oklahoma, this issue is commonly resolved in favor of the creditor. For example, the *Restatement Third of Trusts* recognizes a policy in favor of applying substantive restrictions on testation and the rules applicable to testamentary distributions to revocable *inter vivos* trusts:

> This result is not dependent on the trust being "illusory" or "testamentary," or on the transfer being a fraudulent conveyance, but is based on the sound public policy of **basing the rights of creditors on the substance rather than the form** of the debtor's property rights.[16]

Other states have gone a step further by enacting statutes expressly in favor of the creditor. For example, the applicable Florida statute states that:

> (3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e), either alone or in conjunction with any other person, is liable for the expenses of the administration and obligations of the decedent's estate to the extent the decedent's estate is insufficient to pay them as provided in §§733.607(2) and 736.05053.[17]

Additionally, upon the settlor's death, the trustee of the trust described above must, upon the settlor's death, file a notice of trust with the court in the county of the settlor's domicile and the court with jurisdiction of the settlor's estate, thereby providing public notice to creditors who could otherwise be unaware of the settlor's death or the existence of a trust.[18] Other states addressing such issues legislatively include Utah,[19] Wyoming,[20] New Mexico,[21] Colorado[22] and Kansas,[23] making Oklahoma the only state within the jurisdiction of the 10th Circuit United States Court of Appeals to leave the issue in the discretion of the courts.

THE STATUS OF OKLAHOMA LAW

Based on the relevant factors noted above, it is reasonable to surmise that an Oklahoma court would follow the rule of the Restatement (as noted

The counterpoint, that upon the death of the settlor the trust has become irrevocable, does not change the fact that the creditor claims in question (against the settlor) accrued before the settlor's death and therefore were enforceable against the trust corpus (and should be deducted from it) at the time it passed to the successor beneficiaries.

previously), consistent with the statutory approach of the other 10th Circuit states, and as applied in both *Thomas* and *Burford Manor*. The counterpoint, that upon the death of the settlor the trust has become irrevocable, does not change the fact that the creditor claims in question (against the settlor) accrued before the settlor's death and therefore were enforceable against the trust corpus (and should be deducted from it) at the time it passed to the successor beneficiaries. The trustee, as a fiduciary, has a duty to pay such claims and this is not changed by a subsequent death of the settlor or ultimate termination of the trust. This is a simple matter of debtor-creditor law and a duty of the trustee to pay claims against the trust corpus. Furthermore, courts have recognized that agreements contrary to public policy may not be enforceable;[24] and Oklahoma law otherwise recognizes a policy in favor of the claims of certain creditors after death.[25] Thus, the result in *Burford Manor* appears to be more broadly grounded in basic legal doctrine than the court's narrow reasoning would suggest, and the law on this point should be considered clearer than as indicated in the limited Oklahoma judicial authority.

Nonetheless, in the absence of a bright-line statutory or case law rule, neither debtors nor creditors can know for certain where they stand on these issues; and no apparent public policy is served by the current uncertainty in Oklahoma law. Clear guidance from the Legislature or the Oklahoma Supreme Court would be beneficial to the parties on both sides of these issues. The current state of the law presents an opportunity to articulate a more deliberate public policy, based on substance as opposed to form, for the treatment of living trusts now commonly utilized as will substitutes.

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ENDNOTES

1. *See Welch v. Crow*, 2009 OK 20, 206 P.3d 599 (holding that Oklahoma's pretermitted heir statute does not apply to revocable *inter vivos* trusts).
2. 1984 OK 41, 684 P.2d 553.
3. *See* Varley H. Taylor, Jr., 6A Vernon's Okla. Forms 2d, Estate Planning §7.2 ("Although the Oklahoma Supreme Court has held that a surviving spouse can include assets of a revocable living trust as a part of the estate which forms the basis for computing her "forced share"… in an opinion suggesting that it might apply to creditor claims as well, it is not clear whether that will ultimately be the case.").
4. *Thomas*, 684 P.2d at 553.
5. *Id*.
6. *Id*. *See* 84 Okla. Stat. §44, giving a surviving spouse the right to elect to take one-half of joint industry property in lieu of their share under the decedent's will.
7. *Id*.
8. 26 CFR 25.2511-2; *Sanford's Estate v. Comm'r of Internal Revenue*, 308 U.S. 39, 49, 60 S. Ct. 51, 58, 84 L. Ed. 20 (1939). Note that treatment differs for an irrevocable trust, which represents a fully vested gift but remains potentially avoidable by creditors as a fraudulent transfer. *See* Uniform Fraudulent Transfer Act, 24 O.S. §§112 *et seq*.
9. 60 O.S. §175.25 (referencing revocable trusts).
10. Note that although 58 O.S. §259 charges the personal representative of an estate with a duty to recover property conveyed by the decedent with an intent to defraud creditors, this by no means provides a straightforward or unequivocal means of collection and is especially ineffective when there is no probate or when the personal representative is also the successor trustee and/or beneficiary.
11. 1994 OK CIV APP 66, 877 P.2d 623.
12. *Id*. at 626.
13. *Id*.
14. *Id*. at 624.
15. *Id*. at 624-625.
16. Restatement (Third) of Trusts §25 (2003) (emphasis added).
17. Fla. Stat. §733.707.
18. *See* Fla. Stat. §736.05055.
19. *See* Utah Code Ann. §75-7-505, stating the following:
> (3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death, but not property received by the trust as a result of the death of the settlor which is otherwise exempt from the claims of the settlor's creditors, is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

20. *See* Wyo. Stat. Ann. §4-10-506, stating the following:
> (d) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the portion of a trust that was revocable at the settlor's death, and the property subject thereto, is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains to the extent the settlor's probate estate is inadequate to satisfy those claims, costs of administration and expenses.

21. *See* N.M. Stat. §46A-5-505, stating the following:
> (3) after the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses and allowances.

22. *See* Colo. Rev. Stat. §15-15-103, stating the following:
> …[A] transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against the decedent's probate estate and statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances.

23. *See* Kan. Stat. §58a-505, stating the following:
> …(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, the homestead, homestead allowance, the elective share rights of the surviving spouse pursuant to K.S.A. 59-6a209, and amendments thereto, and statutory allowance to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

24. *Eakle v. Grinnell Corp*., 272 F. Supp. 2d 1304 (E.D. Okla. 2003).
25. *See* 58 O.S. §594 (requiring a personal representative to pay funeral expenses, expenses of the last sickness and a family allowance as soon as funds are available).

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Deferred Sales Trust – What's All the Hype?

By Dawn D. Hallman

An emerging alternative to the §1031 exchange,[1] wherein the taxpayer has the opportunity to defer the gain on a sale, is a deferred sales trust (DST). Unlike a §1031 exchange, a DST does not require the taxpayer to reinvest in like-kind replacement property and is not subject to the timeline restrictions of a §1031 exchange.[2] In short, a DST is an irrevocable trust that utilizes the installment sale treatment under the Internal Revenue Code (IRC) §453 in order to defer the taxes due on the sale of a business, real estate or other taxable assets. The grantor sells the asset to the DST in exchange for a promissory note or deferred installment contract. The DST then owns and controls the asset until it is sold to another third-party for the full sales price. Then, the proceeds of the sale are used to pay the grantor under the promissory note or deferred installment contract.

The DST can, but is not required to, reinvest the sale proceeds into other investments; there is no timeline or like-kind reinvestment requirement. The grantor only pays capital gains tax on the principal payments received from the DST, thus deferring the taxes due by virtue of the installment sale.[3] Some of the main issues to be addressed in a DST are the use of an independent trustee, transfer of the asset ownership without retained interest, constructive receipt of the sale proceeds, trust distributions, trust restrictions and trust legitimacy. Before exploring the mechanics of how the DST works, it is important to understand why it works.

IRC §453 is used to afford deferred tax treatment on installment sales. Historically, this was designed to eliminate the hardship of immediately paying the tax due on a transaction since the sale did not produce immediate cash. Furthermore, if the purchaser defaulted on the installment note, the seller may have paid tax on money he never actually received. The Installment Sale Revision Act of 1980 (1980 act)[4] restructured the installment sales provisions of section 453 and attempted to simplify the provisions and increase the availability of installment reporting. The 1980 act also changed the definition of "related persons."[5] Congress has since made many changes in order to restrict the availability of installment sale reporting and deter abuse, most notably was the Tax Reform Act of 1986 (1986 act)[6] dealing with installment sale of marketable securities.

In summary, a taxpayer who does not receive all of the proceeds from a sale of property at once may pay tax only on the gain realized on the sale and only in proportion to the amount of installment payments received in such year.[7] The current law installment method applies only to sales of real estate, except sales in the ordinary course of business, and sales of personal property, which is not inventory property.[8] There are some other specific rules for the sale of farm property, residential lots and timeshare rights.[9] The eligibility rules come down to this: is the deferred payment on the sale of property that was held as a capital asset or as a §1231 asset? If yes, the sale can qualify for installment sale reporting.[10] Under IRC §453(i), the portion of the gain realized upon the sale of an asset that would be characterized as ordinary income under the depreciation recapture rules

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is not eligible for deferral under the installment method.[11] Installment sale reporting is mandatory unless the taxpayer elects not to use the installment method under section 453(d), and thus reports the entire gain in the year of the sale.[12]

THE NECESSITY OF AN INDEPENDENT TRUSTEE

The IRS successfully challenged installment sale treatment in *Lustgarten v. Comm'r.*[13] In *Lustgarten*, a father/taxpayer entered into the following agreements with family members for a stock sale in 1971:

- Installment sales contract – father sells stock to son
- Installment note – father paid in installments
- Escrow agreement – monthly payments made to father out of escrow fund, and escrow fund could be terminated if father and son jointly agreed
- Irrevocable trust – father as grantor, daughter as beneficiary, son and his uncle as co-trustees
- Joint venture agreement – between son and his uncle as trustees for irrevocable trust

The court held that the taxpayer did not qualify for installment sale treatment because he had "constructive receipt" of the entire proceeds immediately.[14] The court reasoned that the son was a little more than an agent for the father, the father retained control over decisions to reinvest escrowed funds and the son could not independently order the sale.[15] Section 453 does not apply if a taxpayer has entered into an arrangement which is in form but not in substance a true installment sale.[16]

This case provides the foundation for why an unrelated third-party trustee is necessary, and a true transfer of ownership and control of the asset is required when using a DST. A taxpayer is entitled to installment sale treatment, but only if she does not directly or indirectly have control over the proceeds from the sale or possess economic benefits therefrom.[17]

The definition of "related persons" is in IRC §1239(b). With respect to installment sales to related parties, IRC §453(e) provides:

> A) any person disposes of property to a related person (hereinafter in this subsection referred to as the "first disposition"), and
> B) before the person making the first disposition receives all payments with respect to such disposition, the related person disposes of the property (hereinafter in this subsection referred to as the "second disposition"), then, for purposes of this section, the amount realized with respect to such second disposition shall be treated as received at the time of the second disposition by the person making the first disposition.[18]

It is imperative to understand the importance of "related parties" within the meaning of the IRC. IRC §267 (b)(2) provides that related persons include an individual and corporation, where more than 50 percent of the value of the outstanding stock is owned directly, or indirectly, by or for such individual. IRC §267(c)(1) states that for the purposes of determining ownership of stock, in applying subsection (b), the ownership of stock owned directly or indirectly, by or for a corporation, partnership, estate or trust shall be considered as being owned proportionately by or for its shareholders, partners or beneficiaries.

Roberts v. Comm'r, even though it was decided before the 1980 act, is still used as precedent today and identifies the importance of an independent trustee.[19] In *Roberts*, the court held that an irrevocable trust established by the taxpayer for the benefit of his children was, in fact, an independent entity of real substance.[20] The court reasoned that the taxpayer's stock sale to an irrevocable trust in exchange for a promissory note was an actual sale, and thus entitled to installment sale reporting for the realized gain.[21] In *Roberts*, the taxpayer had no control over the trust or the trustees. Once the sale of stock was made to the trust, the taxpayer no longer had any personal interest or control regarding the sale; the sale by the trustee was not for the taxpayer's benefit, but for diversification of the trust corpus.[22]

A direct sale to a third party under section 453 possesses the inherent risk of the taxpayer/seller carrying the note for an unrelated third party. The seller is essentially assuming the traditional risk that a financial institution (bank) would incur when lending money to buyer for the purchase. While the deferred tax treatment of an installment sale may be preferred, the escalated risk to the seller of collecting the note may not. The seller/noteholder runs the risk of buyer default, reduction in value of the collateral, future delays due to litigation, bankruptcy, probate, etc. The DST is designed to utilize the tax benefits of the installment sale under IRC 453, without the risk of carrying the note, or essentially lending directly to the unknown buyer.

The DST is an irrevocable trust and, like all irrevocable trusts, the grantor (in this case, the taxpayer) cannot be the trustee. However, to maintain independence, the DST must go one step further and have an independent, unrelated third party serve as trustee. It is imperative for capital gains tax deferral that the DST must be considered a bona fide, third-party trust with an independent trustee.

ONCE THE DST IS ESTABLISHED

Once the DST is established, the next step is to transfer the asset into the DST, which must be done before the sale. The taxpayer must relinquish full ownership and control of the asset to the DST. If the DST does not actually own and control the asset, the taxpayer will be viewed as owning the asset at the time of the sale, and thus the IRS will disallow the installment sale treatment.

With respect to control and distributions from the DST, the IRS has been very clear that the taxpayer cannot have constructive receipt of the proceeds when disposing of the asset. *Lustagarten* is a perfect example of such constructive receipt, which disqualified the installment sale treatment.[23] The independent trustee should have full control over the asset sale and distributions, as seen in *Roberts*.[24]

CONCERNS AND CONSIDERATIONS

One of the primary concerns is that the DST is viewed as a legitimate trust and not a "sham trust." An entity without economic substance is considered a "sham" by the IRS, and hence is not recognized for federal tax law purposes.[25] In *Markosian v. Comm'r*, the tax court developed a four-factor test: 1) is the taxpayer's relationship to the transferred property differed materially before and after the trust's creation; 2) does the trust have an independent trustee; 3) is an economic interest passed to other trust beneficiaries; and 4) is the taxpayer respecting the restrictions placed on the trust's operation as set forth in the trust documents.[26]

If the DST does not actually own and control the asset, the taxpayer will be viewed as owning the asset at the time of the sale, and thus the IRS will disallow the installment sale treatment.

DSTs have also been used to rescue a taxpayer from a failed IRC §1031 or IRC §721 exchange. When an asset is sold under a §1031 or §721 exchange, the sale proceeds are required to be held by a qualified intermediary on behalf of the taxpayer in order to close on the replacement property within the requirements of the IRC. If this type of exchange fails, the taxpayer must pay depreciation recapture and capital gains taxes on the sale. The DST may provide an alternative solution, whereby the proceeds of the sale are paid directly from the qualified intermediary to the DST. It remains important that the taxpayer does not have constructive receipt of the proceeds; otherwise, the beneficial tax treatment is lost.

The *Sparkman* court applied this "sham trust" test and held that the trust organization lacked economic substance, and thus had to be disregarded for income tax purposes.[27] The court reasoned that the taxpayer was still empowered to "operate the company to the same extent as if he were the owner"; thus, installment treatment was not allowed.[28] The court further reasoned that the trustee was not independent because she "had no meaningful role," the trust did little to change the taxpayer's relationship to underlying business, and the taxpayer did not respect trust form.[29] Essentially, the *Markosian* test was not met, it was considered a "sham trust" and the installment treatment was disallowed.

Another consideration of the DST is that not all depreciation recapture taxes are deferred. There are two situations where the gain, all or part, cannot be deferred: 1) if the character of the gain realized from the sale is treated as ordinary income because of the depreciation recapture rules[30] and 2) if the seller pledges the installment obligation as collateral for a loan.[31] If the recapture of depreciation is not eligible for deferral under the installment sale, then the recapture portion of the gain must be reported at the time of the sale; however, the remaining portion of the gain (the §1231 portion of the gain) can be deferred.[32]

Of course, the DST is not without some disadvantages. Like most tax planning strategies, it is expensive and complex to set up, as there are many rules and regulations. However, the income that can be generated from investing the full sale proceeds, due to the tax deferred treatment of the capital gain, may far outweigh the administrative and legal costs of setting up the DST. The DST can be difficult to launch and manage, as compared to a Delaware Statutory Trust or a §1031 exchange.

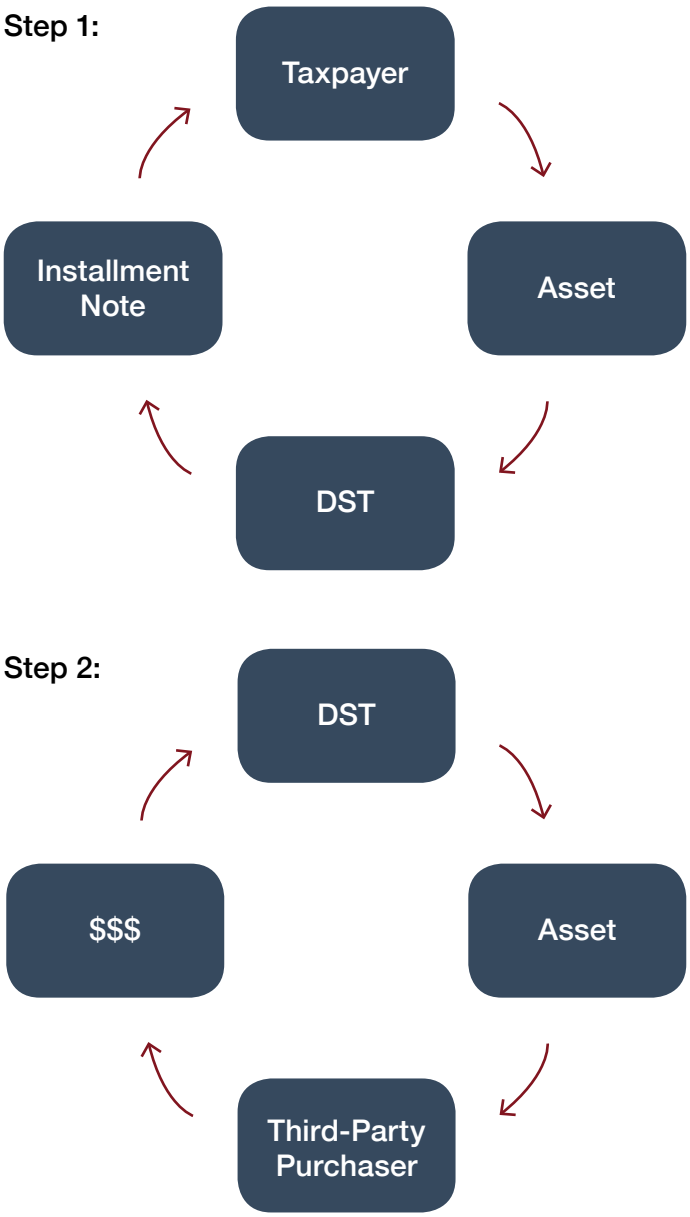
Remember, tax deferral does not mean the tax is eliminated. Under a DST, the capital gains tax exposure occurs when the taxpayer receives principal payments

from the trust. Depending on the timing of the corpus payments, the tax deferral could potentially outlast the taxpayer.

THE DST AT WORK

While the concept seems simple, the application is not. This is a very useful tool to share with clients; notwithstanding, careful selection of the drafting attorney and the third-party trustee is paramount to the success of the DST. Having a working knowledge of the DST allows you to identify potential users. There are many intricacies to make a DST work as planned. This is not a mere form that an attorney can "fill in the blank." An error or omission in creation of the DST, transfer of the asset, operation or management of the DST or the asset could ultimately be very costly to the taxpayer, especially if the installment sale treatment is successfully challenged.

A DIAGRAM OF THE DST AT WORK



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ENDNOTES

1. *See* IRC §1031.
2. *Id.*
3. *See* IRC §453.
4. *See* Installment Sales Revision Act of 1980, Pub. L. No. 96-471, 94 Stat. 2247.
5. *See* IRC §1239 (b).
6. Pub. L. No. 99-514, 100 Stat. 2085, 2365-2372 (1986).
7. *Lustgarten v. Comm'r*, 639 F.2d 1208 (5th Cir. 1981).
8. David F. Shores, "Closing the Open Transaction Loophole: Mandatory Installment Reporting," 10 *Va. Tax Rev.* 311, 320 (1990).
9. *See* IRC §453 (a).
10. Planning for the Principal Owner, SL054 ALI-ABA 633, 640-641.
11. *Id.* at 641.
12. *See* IRC §453 (d).
13. *Lustgarten v. Comm'r*, 639 F.2d 1208 (5th Cir. 1981).
14. *Id.* at 1211.
15. *Id.* at 1210.
16. *Id.*
17. *Id.* at 1211.
18. *See* IRC §453 (e).
19. *Roberts v. Comm'r*, 643 F.2d 654 (9th Cir. 1981).
20. *Id.* at 657.
21. *Id.* at 656.
22. *Id.* at 657.
23. *Lustgarten v. Comm'r*, 639 F.2d 1208 (5th Cir. 1981).
24. *Roberts v. Comm'r*, 643 F.2d 654 (9th Cir. 1981).
25. *Sparkman v. Comm'r*, 509 F.3d 1149 (9th Cir. 2007).
26. *Markosian v. Comm'r,* 73 T.C. 1235, 1243–44, 1980 WL 4562 (1980).
27. *Sparkman v. Comm'r*, 509 F.3d 1149 (9th Cir. 2007).
28. *Id.* at 1155.
29. *Id.*
30. IRC §453 (i).
31. IRC §453 (a) (1).
32. David F. Shores, "Closing the Open Transaction Loophole: Mandatory Installment Reporting," 10 *Va. Tax Rev.* 311, 320 (1990).

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Legislative Monitoring Committee Begins Its Work to Keep Members Informed

By Angela Ailles Bahm

HAPPY VALENTINE'S DAY from your OBA Legislative Monitoring Committee. Hopefully someone will be doing something sweet for you. Speaking of which, the committee continues to provide you *free* CLE – that's pretty sweet. Earlier this month, we presented the annual Reading Day and provided attendees with two hours of free MCLE credit, while educating them on new bills that might affect their business. I cannot thank the presenters enough for donating their time and energy – and doing such an excellent job. Sometimes they review hundreds of bills to whittle the list down to the top 10 and prepare their presentations. Thank you! Valentines are in the mail.

If you missed Reading Day and want to read the bills that were reviewed, log onto MyOKBar Communities, select Legislative Monitoring Committee and look for the information under the Latest Shared Files heading. Committee membership is required, but it's very easy to sign up at www.okbar.org/committees. The areas of law addressed were: family law, criminal law, estate planning/banking/general business, civil procedure/courts, natural resources/environmental, health law, schools, Indian/real estate law and marijuana law.

OBA DAY AT THE CAPITOL MARCH 12

On Tuesday, March 12, the committee will be hosting the annual Day at the Capitol. Mark your calendar now! Registration will begin at 9:30 a.m. Presentations will start at 10 a.m. We will have a variety of speakers, a legislative panel, lunch and then everyone will go to the Capitol to meet our legislators. Details for morning programming and online RSVP can be found at www.okbar.org/dayatthecapitol.

Do you have a new legislator you would like to meet? Odds are, you do. Forty-seven of the 101 members of the House and 11 of the 48 members of the Senate are new. This would be a great opportunity to schedule a meeting with your representative. *Please* encourage them to contact you with any questions. Even if the issue is out of your wheelhouse, I bet you know someone who could help provide some perspective on the issue.

NUMBER OF LAWYER LEGISLATORS DECREASES

While I am writing about the new Legislature, were you aware we lost many lawyer legislators in the House and Senate and now only have 14, TOTAL? This is all the more reason you need to know your legislator and be an active participant – they are passing *LAWS*.

Lawyer legislators are:

Sen. Michael Brooks (D-Oklahoma City)
Sen. Julie Daniels (R-Bartlesville)
Sen. Kay Floyd (D-Oklahoma City)
Sen. Brent Howard (R-Altus)
Rep. Jon Echols (R-Oklahoma City)
Rep. Chris Kannady (R-Oklahoma City)
Rep. Ben Loring (D-Miami)
Rep. Jason Lowe (D-Oklahoma City)
Rep. Terry O'Donnell (R-Catoosa)
Rep. Mike Osburn (R-Edmond)
Rep. David Perryman (D-Chickasha)
Rep. Emily Virgin (D-Norman)
Rep. Collin Walke (D-Oklahoma City)
Rep. Rande Worthen (R-Lawton)

After this session of the Legislature concludes, the committee anticipates having another Debrief Day as we did in 2018. We will review those bills that passed into law. I anticipate it will be in August again. More details to come later.

The view looking up into the Capitol dome.

JOIN THE COMMITTEE

I will continue and continue to urge you to become a member. Executive Director John Morris Williams tells me we are already the largest committee with more than 300 members. We invite more! If you are already a member, continue to sign on and use the Communities page on the OBA site to communicate with me and other members and to keep informed. And, if you have a bill that needs to be posted for others to see, please do so.

Our objective is to provide you with information and then YOU decide what to do with that information. We have meetings scheduled for the second Tuesday of every month, at noon at the bar center in Oklahoma City. If you cannot attend in person to enjoy lunch with us, you can attend by phone. Just the things I learn from members as we are discussing legislation, state and federal, is worth the investment of time. You can keep informed of what the committee is doing and upcoming events at www.okbar.org/legislative. As usual, if you have any suggestions, do not hesitate to email me through LMC Communities.

Ms. Ailles Bahm is the managing attorney of State Farm's in-house office and also serves as the Legislative Monitoring Committee chairperson.

Two New OBA Member Benefits Added

By Julie A. Bays

AS LAWYERS LOOK FOR more efficient ways to serve their clients, companies are developing new and innovative ways to meet this demand. OBA members can now take advantage of discounts on two additional services.

Casetext is a legal research tool that uses artificial intelligence technology to search for cases faster. Their database includes all federal and 50-state cases, statutes and regulations. It includes articles by attorneys, briefs and summaries of black letter law. CARA, Casetext's artificial intelligence technology, finds cases and other matters by dragging and dropping in a brief or complaint that the user has downloaded or is working on. OBA members will receive a 15 percent discount for life with the cost starting at $55.25 a month ($663 a year) for a single-user subscription.

Kurent is a cloud-based billing service that tracks time, creates and sends invoices, manages trust accounts and receives payments. This product integrates with LawPay and QuickBooks. Kurent is designed to get bills out fast. It was developed for solo and small firms and is less expensive than other full practice management products. The cost starts at $26 a month per user. OBA members subscribing for the first time receive a 10 percent discount for the monthly or yearly subscription for the first year.

HOW TO FIND THESE BENEFITS

More details about these two new OBA member benefits and the discounts and features they provide are available online. To access them, log in to your MyOKBar account through www.okbar.org and click the "Practice Management Software Benefits" link in the box under your profile information.

Ms. Bays is practice management advisor in the OBA Management Assistance Program Department.

HEY!

Checked out your OBA member benefits lately?

What are you waiting for? Visit www.okbar.org/memberbenefits.

Applicants for February 2019 Oklahoma Bar Exam

THE OKLAHOMA RULES of Professional Conduct impose on each member of the bar the duty to aid in guarding against the admission of candidates unfit or unqualified because of deficiency in either moral character or education. To aid in that duty, the following is a list of applicants for the bar examination to be given Feb. 26-27, 2019.

The Board of Bar Examiners requests that members examine this list and bring to the board's attention in a signed letter any information which might influence the board in considering the moral character and fitness to practice of any applicant for admission. Send correspondence to Cheryl Beatty, Administrative Director, Oklahoma Board of Bar Examiners, P.O. Box 53036, Oklahoma City, OK 73152.

EDMOND

Erika Louiez Artinger
Logan Ashton Blackburn
Brian Gary Bond
Charles Ellis Hart
Carrie L Kincade
Tamara Webster Kinyanjui
Jonathan Lance Kurz
Erin Lalani Monroe
Matthew Carson Porter
Valerie Marie Salem
Andrew Lawrence Junk Winningham
Charles Martin Woner

NORMAN

Ryan Paul Caron
Erin Nicole Fuller
Amos Teah Kofa
Nathan Alan Lobaugh
Margaret Spence Moon
Jaron Tyler Moore
Ashton Nichole Paschal-Wilson
Raymond Dale Rieger
Jacob Marland Sargent
Christine Suzanne Schem
Alina Ruth Carlile Sorrell
Jose Alberto Villarreal
Bailey Malone Warren

OKLAHOMA CITY

Joshua Wayne Anderson
Jason Craig Bollinger
Jessica Lyn Brown
Farrah Yong Burgess
Jeffrey Taylor Cummings
Allison Jane Daugherty
David Anthony Davis
Joseph Lee DeGiusti
Anthony Bruce Dickenson
Anja du Toit
Joseph Albert Griffin
Rilee Dean Harrison
Javier Giovanny Hernandez
Taylor Nathan Kincanon
Lisa Leigh Lopez
Brittany Faithe McMillin
Taylor Anthony Moult
Bryan Ashton Don Muse
Hunter Christian Musser
Christie Ann Porter
Kristen Annette Prater
Marjon Jacqueline Creel Stephens
Brandt Steven Sterling
Jonathan Kyle Tully
Carson Quay Turner

TULSA

Jessica Christine Allen
Erik Sven Anderson
Aisosa Arhunmwunde
Jeffrey Douglas Bacon Jr.
Zackary Austin Brown
James Linden Curtis
Rodney Gavin Fouts
Jose Valentin Gonzalez
Logan Andrew Harrison
Christopher James Hollingsworth
Priscilla Jean Jones
Ronald Cecil Jones II
Henry Herman Klaus
Mary Estelle Leavell
Michael Vincent Martin
Ashley Swindell Nix
Colton Loy Richardson
Hope Elizabeth Sheppard-Mahaffey
Paul Alan Sims
Keaton Anthony Michael Taylor
Natalie Anne Tupta
Nicholas Charles Williams
Emily Kathleen Wilson
John Paul Yeager
Jazmin Guadalupe Zaragoza

OTHER OKLAHOMA CITIES AND TOWNS

Misbauddin Ahmed, Moore
Jacob William Allison, Nichols Hills
Wriley Kenneth Anderson, Moore
Scott Thomas Beyea, Lawton
Allison Nicole Biscoe, Weatherford
Krystal Brooke Browning, Duncan
Shondra Beth Brumbelow-Neal, Moore
Isaiah Nathaniel Brydie, Owasso
Darrell Leon Buck, Yukon
Whitney J. Dockrey Miller, Shawnee

Donald Martin Fahrny, Depew
Mollie Miranda Jo Fields, Blanchard
William Richard Frank, Moore
Stacy Nichole Fuller, Owasso
Paige Nicole Green, Yukon
Lindsay Nicole Hearn, Broken Arrow
Lindon Thomas Hogner, Bixby
James Derick Hopper, Broken Arrow
Nekanapeshe Peta James, Wagoner
Brayden Micah Jennings, Moore
Leslie Lanay Jones, Piedmont
Zachariah Ahmad Kanaa, Moore
William Ray Keene, Pawhuska
Tiffany Amber Lueck, Broken Arrow
Kelby Winson Luna, Sulphur
Daniel Patrick McClure Jr., McLoud
Jacob Alan McDonald, Dewey
Amity Eileen Ritze, Broken Arrow
Dalton Bryant Rudd, Davis
Colton Grant Scott, Claremore
Brent Allen Smith, Tahlequah
Kelly Rae Sweeney, Oologah
Spencer Byron Torbett, Okmulgee
Miroslava I. Vezirska-Gabrovski, Bethany

OUT OF STATE

James Edward Blaise, Tomball, TX
Candace Lee Carter, Shady Shores, TX
Jason Lee Cotton, Sherman Oaks, CA
Emilee Noelle Crowther, Odessa, TX
Robert Evan Davis, Montrose, CO
Edward Fonseca, Littleton, CO
Lauren Ashley Fournier, Manhattan, KS
Colin Wade Holthaus, Topeka, KS
John Marshall Homra, Jackson, TN
Dallas Myrl Howell, Parks, AZ
Brian Edward Jackson, Waldorf, MD
Joshua Welch Jackson, Fort Smith, AR
Francisco Jasso Jr., Amarillo, TX
Thomas Richard Jones III, Pasadena, MD
Michelle Kruse, Rowlett, TX
Andrea Lynne Mills, Derby, KS
Garrad Duane Mitchell, Marietta, GA
Andrew Edward Polchinski, Dallas, TX
Morgan Taylor Lee Smith, Terrell, TX
James Arthur Trummell, Henderson, NV
Gentry Carlin Wahlmeier, Alma, AR
Nicholas Weeks, Elkins, AR
Brandon Jacob Williamson, Perryton, TX
Dakota James Wrinkle, Abilene, TX

Not Feeling the Love

By John Morris Williams

IT'S FEBRUARY, AND I immediately thought of Valentine's Day. Then I realized I don't know anything about St. Valentine. I Googled it and found that the records are not so clear, and there may have been more than one St. Valentine. It appears that perhaps even the concept of our modern-day celebration of the day may have come from 15th century literature. The record is certainly cloudy, and between church history and folklore there is enough to conclude we really don't know the complete facts about St. Valentine and the total origins of the day in which sweethearts lay out some serious claim.

It is reported that more than $30.3 billion will be spent on Valentine's Day in the United States. Total average per-person spending will equal $200.50. The total number is greater than the budget for the state of Oklahoma. The per-person average is greater than dues for a bar member with less than three years of practice and only $74.50 less than dues for OBA members with more than three years of practice.

I recently received a resignation letter that was critical of the OBA. The letter complained of dues continuing to go up, and the OBA was "acting more like a governmental agency with a continuing request for budget increases while increasing personnel but not providing better service." Obviously, I did not feel the love.

I did respond to that correspondence and do want to set the record straight for any others who may be under the incorrect assumptions stated in the above referenced letter. Our record is not cloudy, and I can assure you I know the complete facts about the OBA and how its finances work.

- The OBA has not had a dues increase since 2004, and none is anticipated at this time. Although the cost of living has increased over the years, the OBA has held the line and every year operated with a budget surplus due to our very conservative operations. Given all the functions we perform, the OBA is the cheapest state bar association in the country. You may find some that publish cheaper dues; however, you will also find license fees, client security fund add-ons, etc. that increase the actual cost of practicing. In Oklahoma, we have a one-stop, one-fee set up that offers great member value for the lowest price.
- The OBA has decreased staff and has not cut any member benefits. In the last five years, the OBA has decreased staff and no member benefits or services have been curtailed. Like everyone else these days we are learning to do more with less.

OBA Facts

Last dues increase
2004
none expected

Cheapest state bar in U.S.

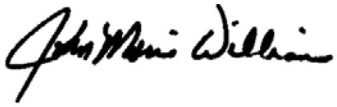
Number of staff **decreased**

Consistently **balanced** budget

Agency of the Supreme Court

- The OBA budget requests to the Oklahoma Supreme Court have been fairly level for the past several years. Although we have seen a decrease in dues collections because of an aging membership and less new members, we have consistently submitted budgets that are balanced. On occasion we will draw upon reserves for capital expenditure. However, we consistently operate in the black on the operations side and do not ask for budgets that go beyond our means.
- We did have changes to MCLE and senior member status. These changes reflect that people are living longer and practicing longer. More than 60 percent of OBA members are over age 50. The rules now provide that regardless of age, if you are practicing, you will pay dues and get MCLE. If you don't practice in Oklahoma, regardless of age, you are exempt from MCLE requirements. At age 70, if you don't practice, you can take retired status and be exempt from dues.
- The OBA is a governmental agency. It is an agency of the Oklahoma Supreme Court. The OBA makes no rules, and all decisions of the OBA are subject to Supreme Court superintending control. All rules relating to practicing law in Oklahoma are Supreme Court rules. The OBA is an administrative agency created to assist in regulating and enforcing of Supreme Court rules. The OBA does nothing without Supreme Court permission.

Rest assured the OBA loves its members every month, and we are very clear on our role and responsibilities. Please feel free to contact me at any time if you have concerns or have suggestions on how we can give greater value to your membership.



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

Eliminating the Terror of Lost Client Files

By Jim Calloway

TO ERR IS HUMAN, as the saying goes.

We human beings make mistakes. We forget. We don't follow through on carefully crafted plans sometimes; but the legal profession is an exacting undertaking, requiring attention to detail, and the legal system is sometimes very unforgiving of errors.

Several years ago, as those of us who advise lawyers were focused on trying to get lawyers to use practice management software to manage digital client files, there were a lot of statistics floating around about how many hours per week law firms wasted looking for lost files or lost documents. It was an impressive number of hours. The cost was eye-catching, the hours were multiplied by the hourly rate of the lawyer and legal assistants who were looking for the lost file.

In my Law Practice Tips column last month, "Cloud Computing for Lawyers – 2019," I reiterated my opinion that cloud-based practice management tools are important for many lawyers, including most lawyers in a small firm setting without IT staff. One reason was that if all documents in the client files are digitized and properly stored in the cloud, it is extremely unlikely (near impossible) they will become lost.

Many lawyers still use traditional client files with physical client documents contained in file folders. This column is directed at lawyers who prefer to use traditional client files in folders.

I concluded the column noted above with a memory of a mistake that I made:

> I'm a lawyer who once drove off with my briefcase full of client files on the top of my vehicle's trunk instead of inside it. I saw the resulting disaster in my rear-view mirror. I recall thinking I needed to buy a new briefcase anyway and being quite grateful it was not a windy day. That illustrates that having critical client information stored only in physical client files is not risk-free either. In earlier times that was a lawyer's only choice. Today you need a backup of the data – and a way to keep your law practice operating in the face of any disaster.

That observation about risk still applies to lawyers who want to operate from traditional client files. The risk is that the lawyers may believe that they have a good backup of their traditional file when they don't.

This column is directed at lawyers who prefer to use traditional client files in folders.

WHAT'S IN A CLIENT FILE?

All lawyers who have been in private practice understand the nature of their files. The concept is simple.

- A client (or matter) file is a binder of all the documents associated with the matter.
- A client file traditionally did not contain everything about a matter. It generally did not contain bills or billing entries. Calendars contain important client information stored outside of a file.
- Many lawyers appearing in Oklahoma courts still want to carry a physical client file with them, even if they are

using digital files while in the office. Depending on the circumstances, this may include only documents relevant to the scheduled hearing.

- Simple matters that may only involve a dozen or so documents can still be managed quite well with a traditional physical client file in a file folder. Larger cases involving many boxes of documents are almost always digitized today as physically searching through hundreds of documents becomes too time consuming.

So, what happens if a file gets lost? Maybe it was someone's error. Maybe a lawyer's car was stolen and when it was recovered, the briefcase full of client files in the back seat was missing. Well, thankfully, almost all the lost files I referenced earlier were only mislaid and eventually found in the wrong file drawer or a lawyer's briefcase.

Of course, the initial concern is where the file might be and is there any chance that a client's confidences could be exposed. One soon begins hoping that the file was inadvertently sent to the shredding service or landfill.[1]

Do you have an obligation to notify the client of the lost file? That is a fact-dependent determination, but in many situations,

perhaps most, the lawyer will need to notify the client. For a "law school hypothetical," I would suggest if a box of closed files that had been untouched for years was accidently sent off to the shredding service a year earlier than planned, that may not require a notice to the client.

Generally, if you don't know where the file is located, you most likely have an obligation to inform the client of the possible compromise of the information in the file. Recently released ABA Formal Opinion 482 (September 19, 2018) Ethical Obligations Related to Disasters cites both Rule of Professional Conduct 1.15 (Safekeeping property) and Rule of Professional Conduct 1.4 (Communication with the client) in favor of disclosure.[2]

IMPACT ON THE CLIENT AND LAW FIRM

Needless to say, there will be many times that such a disclosure to the client will have a very negative impact on the attorney-client relationship. That depends on the nature of the attorney-client relationship and the nature of the matter. The client's confidence in you suffers when you tell them a file is lost or even temporarily misplaced.

Then there are situations where there is a negative impact on or prejudice to the client's matter. The lost file damaging the client's matter, while rare, is the nightmare scenario. A grievance or professional liability action may be the result.

So, the "primary paper file lawyer" and the "primary digital file lawyer" have the same goals. They want to be able to assure the client that nothing has really been lost in a way that impacts the client's matter negatively. A physical folder may be (hopefully temporarily) unavailable, but there's a copy of every document. Yes, a paper file lawyer still needs a backup. Making an additional photocopy of all documents a lawyer might receive into the client file is cost prohibitive and not something anyone is likely to do.

SIMPLE PROCEDURES

Today's paper file lawyer can create the backup in a few steps so there's always a complete copy of the client's file available.

1) Create folders on a computer on the network for each client matter. (You have probably already done this to organize the client documents the firm creates.) These folders or drives should be automatically backed up off-site.
2) Every time a document the firm creates is finalized and printed off for the physical client folder, also save a PDF version of the document to the folder.
3) All correspondence and deliveries received should be scanned and saved to the folder as they are placed into the physical client file. Email attachments that are filed in physical file should also be saved in the folder as PDF files and maybe in the original file format as well.
4) Any document that is executed or file-stamped should be scanned when a copy is placed in the physical client file.

Assuming your online backup works properly, you will now and "forever" have a complete copy of the client file.

The scanning piece is very important. Without the scanning, your computer system only has half of the client file – the documents you created. Scanning is to ensure you have a digital copy of the client file that includes correspondence and pleadings the lawyer has received from others. I still believe the scanned documents are better organized in a practice management solution than Windows folders; but however you organize them, it is the best practice today to scan every paper document you receive as well as any handwritten notes you take.

If you don't have a good scanner, I recommend the Fujitsu ScanSnap. In October 2018, the company announced a new desktop scanner model the Fujitsu ScanSnap IX1500 at roughly the same price point as its popular IX500 model. I'm certain we will be seeing many of those appearing in law offices this year.

Hopefully you will never personally have to deal with losing a client file, but having a complete backup of every client file is a good insurance policy. And when (or if) you decide to convert to a practice management solution, you will be ahead.

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, 800-522-8060, jimc@okbar.org. It's a free member benefit!

ENDNOTES

1. It is not recommended that closed client files be sent to a landfill without first being shredded.
2. www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_482.pdf

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Attorney Discipline Decisions

By Gina Hendryx

THE FOLLOWING IS A summary of several attorney discipline matters recently issued by the Oklahoma Supreme Court. The court has exclusive, original jurisdiction over the licensure and discipline of Oklahoma attorneys.

***STATE EX REL. OKLA. BAR ASS'N V. DUNIVAN*, 2018 OK 101**

On Dec. 4, 2017, attorney John D. Dunivan entered an *Alford* plea in Blaine County District Court to one misdemeanor count of violating a victim protective order stemming from his sending of harassing and inappropriate text messages to his former spouse. Pursuant to Rule 7 of the Rules Governing Disciplinary Proceedings, the Oklahoma Supreme Court found that Dunivan's disobedience of a valid judicial order was a direct reflection of his unfitness to practice law. Dunivan was suspended from the practice of law for one year retroactive to Dec. 18, 2017, the date on which his interim suspension was imposed.

***STATE EX REL. OKLA. BAR ASS'N V. SMALLEY*, 2018 OK 97**

The Oklahoma Supreme Court suspended Norman attorney Richard E. Smalley III from the practice of law for six months for having an inappropriate sexual relationship with a client and for having a personal conflict of interest while acting as guardian *ad litem* in a different matter. Smalley admitted to engaging in a sex act with his client on three separate evenings when he was preparing for the pretrial in the client's child custody case. Furthermore, Smalley was charged with attorney misconduct and conflict of interest when he attempted to engage in a personal relationship with one of the parties in a divorce case wherein he was the court appointed guardian *ad litem*. The mother testified that she feared losing her children and that Smalley repeatedly told her that he and the judge on her case were good friends. The court held that Smalley violated Oklahoma Rules of Professional Conduct 1.7 (Conflict of Interest); 1.8(j) (lawyer prohibited from having sexual relations with a client); and 8.4(d) (professional misconduct to engage in conduct that is prejudicial to the administration of justice).

***STATE EX REL. OKLA. BAR ASS'N V. OLIVER*, 2018 OK 95**

The Oklahoma Supreme Court approved J. Edward Oliver's resignation from membership in the Oklahoma Bar Association. Oliver submitted his resignation during the pendency of disciplinary proceedings wherein he acknowledged that the Office of General Counsel was investigating two separate grievances that alleged he had failed to report certain assets on his personal bankruptcy petition, he had been accused of defrauding creditors and he had made a false oath. The second grievance, submitted by a client, alleged that Oliver accepted a fee to file a motion to modify custody and visitation, failed to do so and failed to return the unearned fee. The court accepted his resignation which is tantamount to disbarment. Oliver cannot apply for reinstatement for a period of five years and will be required to reimburse any funds paid by the Clients' Security Fund on claims received from his former clients as a condition precedent to reinstatement.

***STATE EX REL. OKLA. BAR ASS'N V. MINKS*, 2018 OK 92**

LeFlore County attorney Steven P. Minks was disbarred by the Oklahoma Supreme Court in December 2018. Multiple counts of criminal convictions and mishandling of client cases and funds were alleged. Minks failed to appear at his disciplinary hearing or respond to any of the allegations against him. The court found that Minks violated numerous provisions of the Oklahoma Rules of Professional Conduct including neglect of client matters, failure to communicate with his clients, failure to earn fees and properly safekeep same. Minks cannot apply for reinstatement for a period of five years and must show that he has reimbursed unearned fees to his clients.

***IN THE MATTER OF THE REINSTATEMENT OF TAYLOR*, 2018 OK 78**

Michael C. Taylor applied for reinstatement to the practice of law in Oklahoma after resigning his bar membership in 2011 pending disciplinary proceedings. Following an evidentiary hearing, the three-person trial panel recommended denial of reinstatement. The Oklahoma Supreme Court agreed that Taylor had not met his burden and denied reinstatement. Taylor was admitted to practice in 1982. He had been previously disciplined in 2000 and 2003 for mishandling client trust funds. In 2011, Taylor was interim suspended while facing discipline charges that he misappropriated approximately $80,000 in client settlement funds. The OBA had alleged that Taylor used the money to gamble at casinos. Taylor resigned his bar membership pending disciplinary proceedings on these allegations.

The court approved his resignation and removed his name from the roll of attorneys. Following the requisite five year waiting period, Taylor applied for reinstatement to the Roll of Attorneys in August 2017. In denying his bid for reinstatement, the court found that Taylor had engaged in the unauthorized practice of law while under suspension and that his ongoing addiction, significant debt and failure to accept responsibility indicate "the potential for greater malfeasance, harm to clients, and disrespect upon all who practice law in Oklahoma." Taylor must wait at least one year from the denial before applying again for reinstatement.

Ms. Hendryx is OBA general counsel.

Meeting Summary

The Oklahoma Bar Association Board of Governors met on Friday, Dec. 7, 2018, at the Oklahoma Bar Center in Oklahoma City.

REPORT OF THE PRESIDENT

President Hays reported at the Annual Meeting she attended OBA CLE Wednesday and Thursday, OBA President's Reception, Kim and Alan's House Party, Delegates Breakfast and House of Delegates. She presided over the Annual Luncheon and General Assembly, presenting President's Awards at both events. She assisted the OBA Family Law Section with 2019 planning and attended a meeting with COLAP about the Lawyers Helping Lawyers program review.

REPORT OF THE VICE PRESIDENT

Vice President Stevens reported he attended the OBA Annual Meeting.

REPORT OF THE PRESIDENT-ELECT

President-Elect Chesnut reported he attended the Oklahoma Bar Foundation meeting and Annual Meeting events including the OBA President's Reception, Annual Luncheon, Kim and Alan's House Party, Delegates Breakfast, General Assembly and House of Delegates meeting, at which he presided. He also attended the hearing on the OBA budget at the Supreme Court, consulted with Executive Director Williams regarding 2019 planning and committee appointments and worked on his first president's message.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended OBA Annual Meeting events, including the Past Presidents Dinner, General Assembly and House of Delegates, in addition to the Legislative Monitoring Committee meeting, monthly staff celebration, Bar Center Facilities Committee meeting and hearing at the Supreme Court on the OBA budget. He participated in the Lawyers Helping Lawyers interview for the program audit and consultations with President-Elect Chesnut on planning for 2019.

REPORT OF THE PAST PRESIDENT

Past President Thomas reported she attended the Oklahoma Fellows of American Bar Foundation reception, Washington County Bar Association monthly meeting, Oklahoma County Bar Association holiday event, Oklahoma Criminal Defense Lawyers Association Christmas party and the OBA Annual Meeting attending the OBA President's Reception, Past Presidents Dinner, Annual Luncheon, Kim and Alan's House Party, Delegates Breakfast, General Assembly and House of Delegates.

BOARD MEMBER REPORTS

Governor Beese reported he attended numerous Annual Meeting events in addition to the Muskogee County Bar Association monthly meeting and annual banquet. **Governor Coyle** reported he attended the OBA Annual Meeting and Oklahoma County Bar Association meeting. He also hosted the Oklahoma Criminal Defense Lawyers Association Christmas party. **Governor Fields** reported he attended various OBA Annual Meeting events and the Pittsburg County Bar Association meeting. **Governor Hermanson**, unable to attend the meeting, reported via email he attended the OBA Annual Meeting, District Attorneys Council Fall Conference, DAC board meeting, ODAA board meeting, Justice Assistance Grant Board meeting, Kay-Noble County Community Sentencing Planning Council meeting, Judge Ross' retirement dinner and Elected District Attorneys Conference. He also served as master of ceremonies at the Tree of Honor and Remembrance Ceremony at the Cox Convention Center. **Governor Hicks** reported he attended the TU College of Law awards luncheon, OBA Annual Meeting, including the Annual Luncheon and House of Delegates and Tulsa County Bar Association Christmas party. **Governor Hutter** reported she attended numerous OBA Annual Meeting events and the Board of Governors holiday party in addition to the Cleveland County Bar Association executive meeting and regular meeting. **Governor Kee** reported he contacted the nine county bar association presidents in his district and complimented them on serving as president. He said seven of the counties do not have regular bar meetings. He encouraged them to meet more

often and advised them the OBA could help with speakers and possible CLE for their meetings. **Governor Morton** reported he attended the OBA Annual Meeting and Legislative Monitoring Committee meeting. **Governor Oliver** reported he attended the OBA Annual Meeting and Payne County Bar Association Christmas party. **Governor Will** reported he attended the OBA Bar Center Facilities Committee meeting and OBA Annual Meeting, including the Annual Luncheon and House of Delegates. **Governor Williams** reported he attended the TU College of Law alumni luncheon, OBA Annual Meeting, Tulsa County Bar Association November Board of Directors meeting, American Inn of Court Pupilage Group VI meeting and Board of Governors holiday party.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Richter reported he attended the OBA Annual Meeting, YLD Wills for Heroes event, Canadian County Bar Association meeting, Robert J. Turner Inn of Court meeting and YLD Executive Committee 2019 planning meeting.

BOARD LIAISON REPORTS

Governor Morton reported the **Legislative Monitoring Committee** is gearing up for Legislative Reading Day on Saturday, Feb. 2. They are working on narrowing down the topics. OBA Day at the Capitol has been set for March 12. Governor Williams reported the **Diversity Committee** is starting to plan for 2019. Governor Morton reported the **Member Services Committee** approved two new practice management member benefits – Casetext and Kurrent. Governor Will reported the **Bar Center Facilities Committee** has $50,000 budgeted for 2019 to improve the exterior of the Oklahoma Bar Center. A portion of Phase 1 will be started early in the year to improve the sprinkler system and update the landscaping on the east side of the building.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported the Professional Responsibility Tribunal has begun holding disciplinary hearings in counties other than Oklahoma County. These alternative venues are to accommodate the schedules of judges, attorneys and witnesses in the individual cases. She further reported that the OBA remains a defendant in one state court civil matter and provided board members with the details.

General Counsel Hendryx reported the Professional Responsibility Tribunal has begun holding disciplinary hearings in counties other than Oklahoma County. These alternative venues are to accommodate the schedules of judges, attorneys and witnesses in the individual cases.

CLIENTS' SECURITY FUND RECOMMENDATIONS

Chairperson Micheal Salem reviewed the recommendation of the committee to reimburse seven clients for a total of $120,350.41 for the misdeeds of four former or deceased attorneys. The board approved the claims and authorized the distribution of a news release approved by the president and the Clients' Security Fund chair.

PROPOSED MEDICAL MARIJUANA POLICY

Executive Director Williams reviewed the proposed OBA medical marijuana employee policy. He said the policy has been shared with staff and discussed at an employee meeting. The board approved the policy.

PROPOSED SEAT BELT POLICY

Executive Director Williams said the OBA has received a $100,000 National Highway Training Safety Act federal grant through the Oklahoma Highway Safety Office that requires employees to use a seatbelt when driving while performing duties for the OBA. The board approved the new seat belt use policy.

OKLAHOMA BAR JOURNAL CONTRACTS

Communications Director Manning reported the transition of the bar journal to a full-color magazine and totally electronic delivery of court issues has gone well. Magazine quality is excellent. She said with approval from Executive Director Williams, contracts were renewed for 2019 with Walsworth, magazine printer, and Steve Wallace, court issue artist, at the same rates as last year. She noted Walsworth has also printed the CLE Department's fall magazine for the past several years, and the company prints several other bar association magazines.

YLD LIAISON APPOINTMENTS

YLD Chair-Elect Nowakowski reported she has appointed a YLD liaison to each OBA standing committee.

APPOINTMENTS

President-Elect Chesnut announced he has made the following appointments:

Board of Medicolegal Investigations – reappoint Glenn D. Huff, Oklahoma City, to a one-year term expiring 12/31/2019.

Audit Committee – appoint Jimmy D. Oliver, Stillwater, chairperson, term ends 12/31/2019; appointment of members James R. Hicks, Tulsa, and Mark E. Fields, McAlester, terms expire 12/31/2019; Matthew C. Beese, Muskogee, term expires 12/31/2020; Miles Pringle, Oklahoma City, term expires 12/31/2021.

Investment Committee – reappoint M. Joe Crosthwait, Midwest City, chairperson; and Kendra Robben, Oklahoma City, vice chairperson, terms expire 12/31/2019; and reappoint member Renee DeMoss, Tulsa; and appoint Adam W. Christensen, Oklahoma City; and David A. Poarch, Norman, terms expire 12/31/2021.

Legal Ethics Advisory Panel – reappoint Steven Balman, Tulsa, as panel coordinator, term expires 12/31/2019. Oklahoma City panel: reappoint Susan Bussey, Norman; Rex Travis, Oklahoma City; and appoint Paige A. Masters, Oklahoma City; Tulsa Panel: reappoint Leonard Pataki, Tulsa; appoint James R. Hicks, Tulsa; and Mbilike Mwafulirwa, Tulsa; terms expire 12/31/2021.

NEXT MEETING

The Board of Governors met in January. A summary of those actions will be published in the *Oklahoma Bar Journal* once the minutes are approved. The next board meeting will be at 10 a.m. Friday, Feb. 22, at the Oklahoma Bar Center in Oklahoma City.

Get to Know 2019 President Jennifer Castillo

Jennifer Castillo

Law School:	OCU School of Law
Graduation Year:	2002
Current Employer:	Oklahoma Gas & Energy Company
Location:	Oklahoma City

Why did you decide to be a lawyer?

I was finishing a master's degree in communication at OU and took a First Amendment and communication class. It was so interesting I decided to apply to law school instead of a Ph.D. program. The rest, as they say, is history.

Explain the leadership roles you hold, whether professional or in the community, and why these responsibilities are important to you.

I have served in a variety of leadership roles within the Oklahoma Bar Association and the Oklahoma Bar Foundation. In fact, it was my pleasure to serve as OBA President Linda Thomas' vice president in 2017. I have also volunteered and served on the boards of several non-legal organizations including the Oklahoma Academy for State Goals and the deadCenter Film Festival, as well as the PTA at my sons' elementary school. I was also appointed by Gov. Fallin to the Oklahoma Water Resources Board in 2018.

What would you tell current law students and young associates about the importance of professional and civic responsibility?

I take my professional and civic responsibilities very seriously. I am responsible for making my part of the world better, and, because of my legal education, have the knowledge and experience to help the less fortunate access justice. Additionally, getting involved as a law student or young associate brings opportunities to meet judges and more experienced lawyers who can serve as mentors.

What is your biggest pet peeve with modern technology?

I hate that people communicate more via text and email than face to face. I fear the art of conversation is losing the battle against the convenience of other forms of communicating.

What is on your bucket list?

My bucket list includes lots of travel with my family.

What are your goals as 2019 OBF board president?

As 2019 OBF board president, I want to continue educating lawyers and others in the state about the important work done by OBF grantees and to bring in more dollars to support the work of those grantees. Additionally, I am working with OBF Communications Director Candice Pace to plan a fun event for lawyers and OBF grantees in 2019. Check this column in the coming months for more information!

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WAYS TO SUPPORT THE OKLAHOMA BAR FOUNDATION

Fellows Program

An annual giving program for individuals

Community Fellows Program

An annual giving program for law firms, businesses and organizations

Memorials & Tributes

Make a gift in honor of someone — OBF will send a handwritten card to the honoree or their family

Unclaimed Trust Funds

Direct funds to the OBF by mailing a check with the following information on company letterhead: client name, case number and any other important information

Cy Pres Awards

Leftover monies from class action cases and other proceedings can be designated to the OBF's Court Grant Fund or General Fund as specified

Interest on Lawyer Trust Accounts

Prime Partner Banks give higher interest rates creating more funding for OBF Grantees. Choose from the following Prime Partners for your IOLTA:

BancFirst · Bank of Oklahoma · Bank of Cherokee County · Blue Sky Citizens Bank of Ada · City National · First Oklahoma Bank · First State Anadarko First State Noble · Grand Savings Bank · Great Plains Bank · Herring Bank Altus McClain Bank · McCurtain County National Bank · Security Bank Stockmans Bank · The First State Bank · Valliance

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Law. Education. Justice.

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www.okbarfoundation.org • foundation@okbar.org

A Great Start and Looking Forward

By Brandi Nowakowski

THE YLD IS OFF TO A great start in 2019! In January, we held an orientation for our newly elected board members, followed by our first board meeting of the year. After the meetings, current and outgoing board members joined together to celebrate our YLD Immediate Past Chair Nathan Richter and recognize him for his time and dedication to the YLD and the OBA at large. His leadership has ensured the YLD would continue to be a successful and integral part of the OBA it is today. The dinner and festivities allowed us to say thank you and also provided a wonderful opportunity for new and existing board members to get to know each other. I am excited and confident looking forward to the year to come!

YLD Executive Committee members also recently returned from the American Bar Association's Young Lawyers Division Midyear Meeting in Las Vegas. This meeting, and other ABA YLD meetings we attend throughout the year, serve as a valuable opportunity to collaborate with young lawyers from around the country, hear and discuss national trends in the legal

From left Tessa Hager, Margaret Cook, T. Chase McBride, Dylan Erwin, Brandi Nowakowski, Rhiannon Baker, Bevan Graybill Stockdell and Alyssa King attend the orientation for newly elected YLD board members.

YLD members celebrate the leadership of Immediate Past Chair Nathan Richter at an event honoring him at TopGolf in Oklahoma City.

profession and make recommendations for policy changes affecting the legal profession. These meetings are our platform to voice concerns over trends that may negatively impact the state of the legal profession in Oklahoma, as well as to praise and possibly adopt those that may positively influence our careers. It further provides a venue to share ideas, projects, programs and network with young lawyers from across the nation.

After reading about our recent events, many of you might be wondering what all the YLD does and how you too can get involved. The first thing to know is you may already be a YLD member and not even realize it! All members of the Oklahoma Bar Association in good standing and admitted to practice law (for the first time) within the past 10 years are automatically YLD members. Second, the YLD provides an avenue for Oklahoma's young lawyers to network and serve others through work on both bar-related and public service-related projects. Additionally, the YLD provides an opportunity for involvement and leadership in the bar association as a whole. The YLD serves as the link connecting young lawyers with active experienced bar leaders through various committees, projects and initiatives. There are so many areas in which to be of service within the OBA that everyone can find something they are passionate about. Moreover, the YLD provides leadership training, networking, business development and an opportunity to have a voice to impact our association.

Looking forward, the YLD will soon be assembling and handing out bar exam survival kits for those taking the February exam. Many of you will remember receiving these handy bags filled with pens, pencils, stress balls and other goodies intended to make the bar exam just a little bit easier. We will meet at 10 a.m. Saturday, Feb. 23, at the Oklahoma Bar Center in Oklahoma City to assemble the kits and conduct our regular monthly meeting. We would be thrilled if you could join us!

If you are interested in getting involved, go to www.okbar.org/yld/committees to see all the ways to participate, and watch the bar journal for upcoming YLD events. We welcome your participation and greatly appreciate your service.

Ms. Nowakowski practices in Shawnee and serves as the YLD chairperson. She may be contacted at brandi@stuartclover.com. Keep up with the YLD at www.facebook.com/yld.

For Your Information

NEW BOARD MEMBERS TAKE OATH

Nine new members of the OBA Board of Governors were sworn in to their positions Jan. 18 in the Supreme Court Hearing Room at the Oklahoma Judicial Center.

Officers taking the oath were Chuck Chesnut, Miami, president; Susan B. Shields, Oklahoma City, president-elect; and Lane Neal, Oklahoma City, vice president. Sworn in to the Board of Governors to represent their judicial districts for three-year terms were David T. McKenzie, Oklahoma City; Timothy E. DeClerck, Enid; Andrew E. Hutter, Norman; and Miles T. Pringle, at large, Oklahoma City. Sworn in to one-year terms on the board were Kimberly Hays, Tulsa, immediate past president and Brandi Nowakowski, Shawnee, Young Lawyers Division chairperson.

Oklahoma Supreme Court justices congratulate 2019 OBA President-Elect Susan Shields and OBA President Chuck Chesnut (center) on being sworn in.

IMPORTANT UPCOMING DATES

Don't forget the Oklahoma Bar Center will be closed Monday, Feb. 18, in observance of Presidents Day. Also, be sure to docket the 2019 Solo & Small Firm Conference in Tulsa June 20-22 and the OBA Annual Meeting in Oklahoma City Nov. 6-8.

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/OKBarAssociation and be sure to follow @OklahomaBar on Twitter and @OKBarAssociation on Instagram.

10 YEARS OF A WARM TRADITION

The West Law Firm celebrated the 10th anniversary of the firm's annual coat donation program with the Salvation Army in Shawnee. Since the program began in 2009, West Law Firm has contributed more than 2,600 new winter coats to children and adults, along with assorted hats and gloves. This year the firm donated 284 coats, which were distributed by the Salvation Army of Shawnee during the month of December.

"The coat donation program is one of our favorite charitable activities each year," said law firm partner Bradley West. "As we celebrate the 10th anniversary of this program, we are especially pleased to partner with the Salvation Army in helping those in need in Shawnee and Pottawatomie County."

Salvation Army Captains Jamie Clay and Russell Clay (left and right) pick up the 2018 coat donations from Bradley West (center) at the West Law Firm.

OBA MEMBER RESIGNATIONS

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

David Randall Christian
OBA No. 1671
32810 Edgewater Dr.
Magnolia, TX 77354

Robert Wesley Clark
OBA No. 1710
1259 Springwater Dr.
Mandeville, LA 70471

Frederick William Cullins
OBA No. 16207
1361 Cnty. Rd. 1600
Caney, KS 67333

Jennifer Wolfe Davalos
OBA No. 20398
1900 Preston Rd., #267-233
Plano, TX 75093

Samuel James Glover
OBA No. 20400
3201 Center St.
The Village, OK 73120

Roger Alan Grove
OBA No. 3641
11816 Lorenta Circle
Edmond, OK 73013

Tiffany Beth Kieffer
OBA No. 31337
4111 E. 37th St., N.
T6L
Wichita, KS 67220

Debra Lynn Weinberg Kurzban
OBA No. 16910
7228 N. Pinebrook Rd.
Park City, UT 84098

David Alan Kutik
OBA No. 20446
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190

Diann McMahan
OBA No. 6054
12952 W. 61st Circle
Arvada, CO 80004

Gary Wayne Pilgrim
OBA No. 17121
2818 E. 85th Street
Tulsa, OK 74137

Scott W. Putney
OBA No. 19276
9512 Bay Front Dr.
P.O. Box 14075
Norfolk, VA 23518

Deanna Holt Sinclair
OBA No. 22594
7550 E. 53rd Ave.
P.O. Box 5423
Denver, CO 80217

Beverly Joyce Trew
OBA No. 9087
1452 Laurel Drive
Sewickley, PA 15143

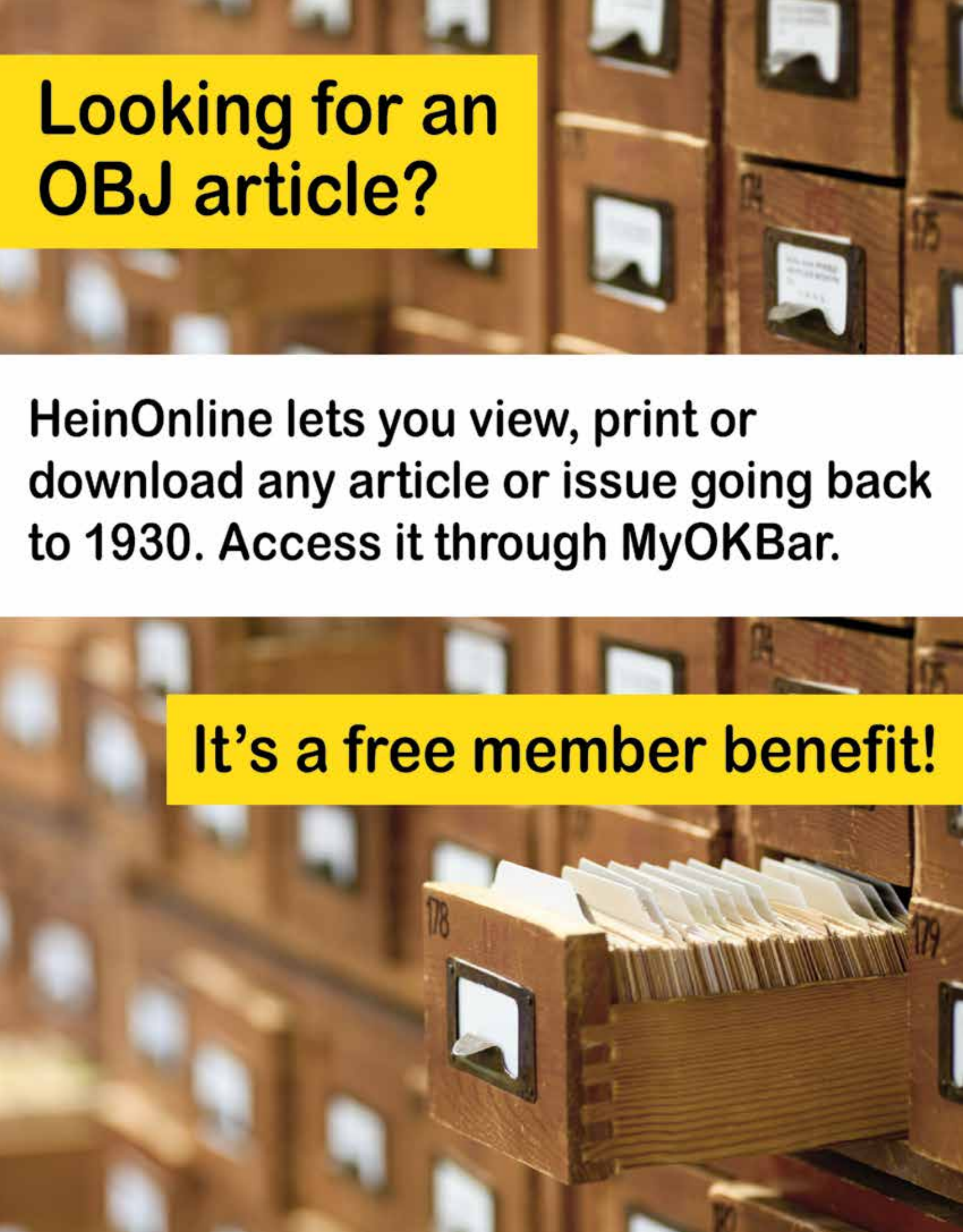
Kimberly S. Edwards Welty
OBA No. 2643
11007 Caloden St.
Oakland, CA 94605-5548

David Ernest Zelnick
OBA No. 21875
150 Lincoln St., #4
Worcester, MA 01605

Anne M. Zimmerman
OBA No. 20900
367 Novara Drive
Ballwin, MO 63021

LHL DISCUSSION GROUP HOSTS MARCH MEETING

"Finances and the Practice of Law" will be the topic of the March 7 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 onelife@plexisgroupe.com are encouraged to ensure there is food for all.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Bench and Bar Briefs

ON THE MOVE

Kyle Killam and **Andrea Brown** joined the Tulsa-based firm Berlin Law Firm as associates. Mr. Killam practices criminal defense with his primary focus on domestic assault and battery. Ms. Brown practices defense of persons charged with sex crimes, crimes against children and domestic assault and battery.

Deric McClellan and **Alexander Sokolosky** joined the Tulsa office of Crowe & Dunlevy. **Lauren K. Clifton**, **Kelly S. Kinser**, **Aimee Majoue** and **William O. Moon** joined the firm as associates in its Oklahoma City office. Mr. McClellan handles general litigation matters in the Appellate, Energy, Environment & Natural Resources and Indian Law & Gaming practice groups. Mr. Sokolosky is a member of the firm's Bankruptcy & Creditor's Rights, Indian Law & Gaming and Litigation & Trial practice groups. Ms. Clifton practices general litigation and serves in the Litigation & Trial practice group. Ms. Kinser is a member of the firm's Banking & Financial Institutions, Bankruptcy & Creditor's Rights, Real Estate and Wind & Renewable Energy Practice Groups. Ms. Majoue practices commercial litigation and complex litigation matters in the Administrative & Regulatory, Criminal Defense, Compliance & Investigations, Energy, Environment & Natural Resources and Litigation & Trial practice groups. Mr. Moon is a member of the Cannabis Industry and Intellectual Property practice groups.

AT THE PODIUM

Lorrie Corbin Bamford was a featured moderator at the Global Gaming Expo in Las Vegas, presenting "The Power of Tech II: A Casino Operators' Perspective on How to Capture, Maintain and Grow Revenue While Maintaining Data Integrity."

John Lieber of Tulsa presented a three-hour CLE at the Tulsa County Bar Association titled "Stress Management Workshop for Attorneys." Through audience participation, brainstorming and lecture, workshop attendees learned skills and strategies to deal with the unique stresses faced by lawyers.

KUDOS

Lloyd T. Hardin Jr. of Oklahoma City has been selected as a Fellow of the Construction Lawyers Society of America (CLSA). The CLSA is an honorary association of lawyers practicing in construction law and related fields.

Lorrie Corbin Bamford of Newcastle was named a Rising Star at the Global Gaming Women's Annual Women of Gaming Awards 2018 in Las Vegas. She serves as the chief compliance officer and general counsel for Gaming Capital Group LLC.

The Garfield County Bar Association presented awards to: **Elizabeth W. Beam**, Lifetime Achievement Award; **Linda McKnight Pickens**, Lifetime Achievement Award; **Karig P. Culver**, Professionalism Award; **Benjamin J. Barker**, Oustanding Young Lawyer Award and; **Richard M. Perry**, President's Award.

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 to:

Lacey Plaudis
Communications Dept.
Oklahoma Bar Association
405-416-7017
barbriefs@okbar.org

Articles for the April issue must be received by March 1.


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MOUNTAIN
FREE 24-HOUR CONFIDENTIAL ASSISTANCE
800-364-7886 | www.okbar.org/LHL
Get help addressing stress, depression, anxiety, substance abuse, relationships, burnout, health and other personal issues through counseling, monthly support groups and mentoring or peer support.
Oklahoma Bar Association
Lawyers Helping Lawyers
Assistance Committee

In Memoriam

John Curtis Branch of Oklahoma City died Dec. 6, 2018. He was born Oct. 1, 1934, in Buffalo. **While attending Northwestern Oklahoma State University, he joined the U.S. Army National Guard and served with the 7th U.S. Army 35th Field Artillery during the Korean War.** After graduating from Northwestern University with a Bachelor of Science in biology and chemistry, he went on to complete his master's degree in preventive medicine and public health from the OU Medical Center in 1963. He then accepted a research position with focus on parasitology at OU Health Sciences Center, graduating with a Doctor of Philosophy in preventive medicine. On completion of his doctorate degree in 1964, Mr. Branch accepted the professorship of biology with OCU, serving for a time as head of the department. He attended the OCU School of Law, earning his J.D. in 1980. He became a founding partner at the Branch & Hurtt Law Firm PC. Memorial donations may be made to the local Regional Food Bank, 3355 S. Purdue St., Oklahoma City, 73179.

William M. Brumbaugh of Tulsa died June 16, 2018. He was born Jan. 27, 1930. He graduated from Will Rogers High School and the TU College of Law. Mr. Brumbaugh worked in mortgage banking, property development and property management. In 1975, he purchased Mager Mortgage Co., the oldest mortgage banking company in Oklahoma. It was renamed to Brumbaugh & Fulton Co. He also founded Tallasi Land & Development Co. and Prestige Management Ltd. He served his alma mater as the president of the TU Alumni Association. Mr. Brumbaugh served his industry as the president of the Oklahoma Mortgage Bankers Association. He also volunteered regularly at the Food for Kids program in Okmulgee County. He loved to travel, golf and entertain friends and family.

Theodore Q. Eliot of Tulsa died Nov. 30, 2018. He was born March 18, 1954. He was a graduate of Drake University in Des Moines, Iowa, and the OU College of Law (1979) where he was on the *Oklahoma Law Review*. He was a shareholder at Gable & Gotwals for 28 years and retired as a shareholder at Hall Estill in 2015. Mr. Eliot practiced litigation in the oil and gas industry. He also served on the Board of Directors of the Summit Club and was a member of the Nature Conservancy of Oklahoma and Ducks Unlimited. He loved waterfowl hunting, fishing, traveling, good food, practicing law, the state of Oklahoma and reading a well-written book. Memorial donations may be made to Ducks Unlimited at www.ducks.org.

Linda M. Harris of Oklahoma City died Dec. 12, 2018. She was born July 16, 1937, in Ponca City. She graduated from Ponca City High School in 1955. She received a bachelor's degree in English from OCU. In 1979, she received a J.D. from the OCU School of Law. Ms. Harris taught school for five years, obtained a master's degree in library science from OU and practiced oil and gas law and business law for 20 years. She loved cats, dogs, music, art, reading, travel, needlework and spending time with friends and family. Memorial donations in her honor may be made to the Oklahoma Medical Research Foundation or the Central Humane Society of Oklahoma City.

R. Michael Lang of Sand Springs died Dec. 1, 2018. He was born Oct. 1, 1939, in Tulsa. He attended Central High School and Georgetown University. He received his J.D. from the TU College of Law in 1963. Before going into private practice, Mr. Lang was a claims adjuster for USF&G as well as being a public defender for the city of Tulsa. He was in private practice for 46 years. He was president and lieutenant governor of the Tulsa County Bar Association. Mr. Lang joined Windycrest Sailing Club in 1974, helping junior sailors and sitting on the Windycrest board. He was founder and chairman of the Windycrest Charity Regatta (1980-2012), which raised over a million dollars for multiple sclerosis. He also served on the board of the Gull Bay Homeowners Association. He loved to sail and travel. Memorial donations may be made to Porta Caeli House, P.O. Box 580460, Tulsa, 74158 or to the American Cancer Society, 4110 S. 100th E. Ave, Tulsa, 74146.

Maria Evelyn Robles Meyers died Nov. 5, 2018. She was born May 3, 1955, in El Salvador. She received a degree in accounting from the University of San Francisco. Ms. Meyers practiced as a CPA prior to earning her J.D. at the OU College of Law and establishing her own law firm. She practiced health care and employment law. Donations in her honor may be made to Infant Crisis Services Inc.

In Memoriam

Kenneth A. Nash of Oklahoma City died Nov. 2, 2018. He was born Aug. 23, 1930, in Oklahoma City. He graduated with a Bachelor of Arts from OU, Master of Public Administration from OU and a J.D. from the OCU School of Law (1956). Mr. Nash was a member of the Oklahoma City Police Department from 1952 to 1972. He was the director of the Oklahoma City/County Criminal Justice Coordinating Council from 1972 to 1985. He was assistant municipal attorney from 1985 to 1999 and retired as chief prosecutor for the city of Oklahoma City. He served under four governors on the Oklahoma Crime Commission. Mr. Nash was a founding member of the Oklahoma City Police Association. He was president of the Council on Law Enforcement Education and Training, Oklahoma County Mental Health Association, Fraternal Order of Police Lodge 123 and Board of Directors of Municipal Employees Credit Union. He was an adjunct professor at OSU-OKC and OCU. Mr. Nash was chairman of the Oklahoma Police Retirement Board. He also served on the board of Sunbeam Family Services for many years. Donations in his name may be made to the Special Olympics, Catholic Charities or Our Lady's Cathedral.

Thomas Albert Ryan of Oklahoma City died Dec. 7, 2018. He was born July 4, 1975, in Oklahoma City. He was a 1994 graduate of John Marshall High School. He earned three degrees from OU, a bachelor's degree in letters, a J.D. (2004) and a MBA. Mr. Ryan enjoyed his career as an attorney, serving his clients and producing his legal writings. He was proud to have his works as the subject of two published opinions held by the Court of Civil Appeals of the State of Oklahoma. He enjoyed acting both on stage and on screen, standup comedy and screenwriting. He was also an avid pool player, ballroom dancer and Dungeons and Dragons player. Donations in his honor may be to The Oklahoma Medical Research Foundation, 825 NE 13th St., Oklahoma City, 73104.

Carl Lee Yeary of Oklahoma City died Dec. 10, 2018. He was born April 19, 1956, in Oklahoma City. He graduated from Southeast High School in 1973. Mr. Yeary received a Bachelor of Arts from OU in 1979 and a J.D. from the OU College of Law in 1987. After being in private practice at Holliman, Langholz, Runnels & Dorwart PC., he began a 28-year career in public service at the Oklahoma Department of Securities. He was an avid sports fan and won numerous fantasy league championships.

Oklahoma Bar Journal Editorial Calendar

2019 ISSUES

MARCH
Criminal Law
Editor: Aaron Bundy

APRIL
Law Day
Editor: Carol Manning

MAY
Technology
Editor: C. Scott Jones

AUGUST
Access to Justice
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: May 1, 2019

SEPTEMBER
Bar Convention
Editor: Carol Manning

OCTOBER
Appellate Law
Editor: Luke Adams
ladams@tisdalohara.com
Deadline: May 1, 2019

NOVEMBER
Indian Law
Editor: Leslie Taylor
leslietaylorlaw@gmail.com
Deadline: Aug. 1, 2019

DECEMBER
Starting a Law Practice
Editor: Patricia Flanagan
patriciaaflanaganlawoffice@cox.net
Deadline: Aug. 1, 2019

2020 ISSUES

JAUNARY
Meet Your Bar Association
Editor: Carol Manning

FEBRUARY
Family Law
Editor: Virginia Henson
virginia@phmlaw.net
Deadline: Oct. 1, 2019

MARCH
Constitutional Law
Editor: Clayton Baker
clayton@davisandthompson.net
Deadline: Oct. 1, 2019

APRIL
Law Day
Editor: Carol Manning

MAY
Diversity and the Law
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Jan. 1, 2020

AUGUST
Children and the Law
Editor: Luke Adams
ladams@tisdalohara.com
Deadline: May 1, 2020

SEPTEMBER
Bar Convention
Editor: Carol Manning

OCTOBER
Mental Health
Editor: C. Scott Jones
sjones@piercecouch.com
Deadline: May 1, 2020

NOVEMBER
Alternative Dispute Resolution
Editor: Aaron Bundy
aaron@bundylawoffice.com
Deadline: Aug. 1, 2020

DECEMBER
Ethics & Professional Responsibility
Editor: Amanda Grant
amanda@spiro-law.com
Deadline: Aug. 1, 2020

If you would like to write an article on these topics, contact the editor.

follow the oba

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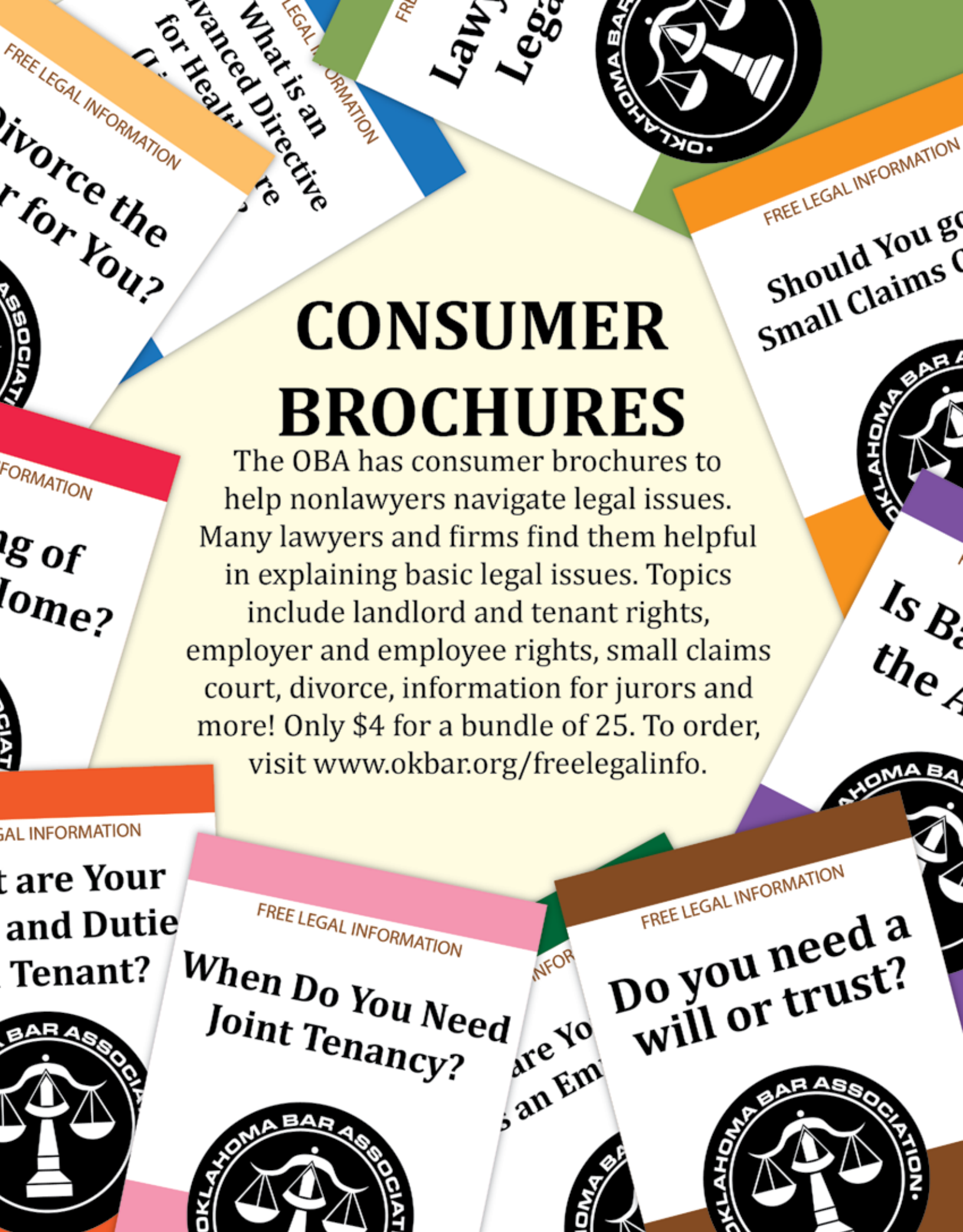
@oklahomabar



CONSUMER BROCHURES

The OBA has consumer brochures to help nonlawyers navigate legal issues. Many lawyers and firms find them helpful in explaining basic legal issues. Topics include landlord and tenant rights, employer and employee rights, small claims court, divorce, information for jurors and more! Only $4 for a bundle of 25. To order, visit www.okbar.org/freelegalinfo.

What's Online

Nine Ways to Overcome Burnout

Have you lost your passion and joy? Have you become negative and even aggressive? Has your job become a burden rather than an opportunity to help others? If you're feeling like this, here are nine ways to help you overcome burnout and live a happier, healthier life.

Goo.gl/b7arRj

Spice Up Your Valentine's Day

If you're stuck in the same dinner and a movie rut, this article is for you! Try out these ideas for dating by the decades in Oklahoma.

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Accomplish Your Resolutions Through Travel

According to a Marist Poll, the most common resolutions are exercising more, stopping smoking, losing weight, eating healthier, being a better person, spending less or saving more, improving one's health, personal growth and enjoying life more. Hotels across the globe can help you accomplish your resolutions – check out how!

Goo.gl/mCg1uy

Almost Silent Meetings

We've all been there – sitting in a conference room, watching the clock on the wall and wondering when this pointless meeting would be over. Here are strategies to maximize meeting efficiencies and eliminate the pain that comes with them.

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Digging Pro Bono

By Jimmy K. Goodman

SOME PEOPLE ASK why I "dig" public service work. Professionally, we use pro bono as short for pro bono publico, which loosely translates to "for the public good." So pro bono is then service "for good." This story is about digging for good. It is shared with the hope it will renew or inspire an urge to do more pro bono by all OBA lawyers, but especially the young ones who have sharper minds – and stronger backs.

Recently – well, in May 2017 – Margaret Travis referred to me a pro bono matter for an Oklahoma veteran under the OBA's veteran assistance project, Oklahoma Lawyers for America's Heroes Program. We are assisting him in seeking redress from his neighbor due to a water flooding problem he is having – that he claims is due to the actions of his neighbor. It has been quite a long process in trying to work this out for him.

From left Crowe & Dunlevy attorneys Jimmy Goodman, Ryan Wilson, Tim Sowecke and William Moon pitched in to help a heroes client with more than free legal advice.

In the course of looking for an out-of-court resolution, the neighbor had an engineer draw up plans to correct the problem, but the contractor would not bid for the work without "eyeballing" a storm sewer junction box on our client's property that had been covered up with soil. So three young associates at our firm, Ryan Wilson, Will Moon and Tim Sowecke, and I went out to do just that. We began the dig thinking we were dealing with about 12-15 inches of soil over a 6 feet x 6 feet area. So, we anticipated digging up 45 cubic feet of dirt – but it turned out to be more like 90 cubic feet. We felt the "burn," (especially me), but when finished, we all felt the "good."

I am sure this is representative of the variety of non lawyer services that all Oklahoma attorneys wind up providing during the course of their work for veterans – albeit a unique one. You'll find more info about the program at www.okbarheroes.org, and please find your own way to go digging for good.

Mr. Goodman practices in Oklahoma City.

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