communityfoundation of Southeast Kansas

2022 Estate Planning Forum

June 23, 2022

presented by

The Community Foundation of Southeast Kansas

in partnership with

Tim O'Sullivan, JD, LLM
Corey Moomaw, JD, LLM
Foulston Siefkin, LLP

Kathleen J. Selzler Lippert, JD
Office of the Disciplinary Administrator

Today's agenda:

communityfoundation of SOUTHEAST KANSAS

Welcome to the 2022 Estate Planning Forum hosted by the Community Foundation of Southeast Kansas (CFSEK) in partnership with Foulston Siefkin LLP. We appreciate you taking the opportunity to join us today to hear about recent changes to the law, hone your skills, and learn more about how CFSEK can help you serve your clients.

The Community Foundation is committed to being a good steward of charitable dollars, and through our partnerships with professional advisors like you, we are helping to build a successful and sustainable future for the Southeast Kansas area. Thank you for your commitment and focus on helping your clients explore charitable giving and estate-planning opportunities that include CFSEK or one of our affiliates, the Fort Scott Area Community Foundation and the Girard Area Community Foundation.

Over the past 21 years, CFSEK has been fortunate to receive tremendous support from generous givers in our area. We currently host over 175 funds, with assets of $55 million. This growth has allowed us to successfully pursue our mission of improving the quality of life in Southeast Kansas communities through scholarships for students and grants to nonprofit organizations.

A list of our current funds is included in this booklet, but we are always eager to explore new opportunities. If building a lasting legacy is important to your clients, please contact CFSEK to see how we can help accomplish their goals and wishes.

Sincerely,

Devin Gorman
Executive Director

Joshua McCloud
Community Outreach & Donor Services

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It Hurts When I Do That!

Presented by Kathleen J. Selzler Lippert, JD

Summary

The vast majority of lawyers practice appropriately and abide by the professional rules of conduct. For such lawyers, ethics CLEs are like preventive medicine: They help keep us healthy.

Common complaints can be very broad and cover every rule imaginable. Rules that are commonly violated may surprise lawyers. In fiscal year 2022, Rule 8.4(d) (conduct prejudicial to the administration of justice) was violated more often than Rule 1.1 (competence). This CLE looks at commonly violated rules and invites the audience to consider fact patterns that may implicate these rules.

About Kathleen J. Selzler Lippert

Kathleen J. Selzler Lippert, JD, is a graduate of Drake Law School. She joined the Office of the Disciplinary Administrator (ODA) in December 2019 as a Deputy Disciplinary Administrator. She has practiced law for over two decades in public service. As a prosecutor for over a decade, her work involved general criminal cases, drug task force, and felony domestic violence including homicide cases. She practiced in administrative law and medical license regulation for over a decade by serving in a variety of roles for the Kansas State Board of Healing Arts. She is a wife, mother of three young men–two in college and one in high school–and serves on the local school board.

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Presentation Title:

Office of the Disciplinary Administrator: 2022 It Hurts When I Do That!

Presentation Outline:

Office of the Disciplinary Administrator: 2022 It Hurts When I Do That!

1. Common complaints v. Common rule violations, the difference
    a. Stop digging rule #1
    b. Stop digging rule #2
2. Common rules violated, how attorneys get hurt
    a. Stats and risks
    b. Conduct you may not have considered
3. How it happened to others; don't let it be you
    a. Rules commonly involved in discipline
    b. Scenarios to consider whether and what rules are implicated in a situation

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Office of the Disciplinary Administrator: 2022 It Hurts When I Do That! Materials:

Know where to find the rules of professional conduct:
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Common complaints can be very broad and cover every rule imaginable. Rules that are commonly violated may surprise lawyers. In FY 2022, Rule 8.4(d) (conduct prejudicial to the administration of justice) was violated more often than Rule 1.1 (competence).

This CLE looks at commonly violated rules and invites the audience to consider fact patterns / scenarios that may implicate these rules.

Rules commonly violated and scenarios to consider:

Rule 8.4(d) Conduct prejudicial to the administration of justice

Rule 8.4(d) often leads an attorney to think about conduct involving false information, intentional delay, failure to comply with discovery, or asserting frivolous claims. Yes, this conduct does implicate Rule 8.4(d).

This rule is also implicated if a lawyer responds to a complaint by conditioning an action on withdrawing a disciplinary complaint or threatening to file a disciplinary complaint if another does not take a specified action.

In re Kenny, 289 Kan. 851 (2009) The respondent's letters to opposing counsel had no substantial purpose other than to burden opposing counsel and coerce a refund of the attorney fee. Conduct was prejudicial to the administration of justice and had no substantial purpose other than to embarrass, delay, or burden a third person. Rules 8.4(d), 4.4(a), 8.3(a), 8.4(g)

In re Pyle, 278 Kan. 230 (2004) Attorney violated Rule 4.4 and 8.4(d) by sending letter to opposing counsel that said if he did not settle the case within 20 days, the attorney would take various actions, including filing a disciplinary complaint.

In re Comfort, 284 Kan. 183 (2007) Attorney violated Rules 4.4(a) and 8.3(d) for threatening to file a disciplinary complaint if opposing counsel did not retract a KORA request. "A lawyer may not employ such a threat to obtain a legal advantage for his or her client; we have specifically disapproved of such extortion attempts."

An excellent discussion of the duty to report and the prohibition against using the disciplinary process as a negotiating tool, see Nick Badgerow's article, The Beam

and the Mote: A Review of the Lawyer's Duty to Report, J. Kan. B. Ass'n, February 2013.

Often, zealous advocacy is considered a cornerstone of the practice of law; however, it has limits. Zealous advocacy does not include berating, belittling, or bullying; such conduct violates established norms of practice. For example, prosecutor closing that comments on credibility of witnesses or defense counsel exceeds recognized bounds of zealous advocacy. See *State v. Williams*, 303 Kan. 585 (2016), *State v. Knox*, 301 Kan. 671 (2015).

State v. Turner, 217 Kan. 574 (1975), an original proceeding in discipline, by directing improper and abusive language toward opposing counsel.

In re Romious, 291 Kan. 300 (2010) Attorney engaged in discourteous conduct which exceeded bounds of zealous advocacy.

In re Gamble, 301 Kan. 13 (2014) Attorney sent social media message to unrepresented opposing party using emotionally manipulative language to urge her to sign a document.

An excellent discussion of civility and limitations of zealous advocacy, see Joseph P. Mastrosimone's article, Mind Your Manners, J. Kan. B. Ass'n, Ocober 2014.

Rule 1.3 Diligence

Diligence extends to the business of practicing law, such as departing a law practice. See ABA Formal Opinion No. 99-414, "[a] lawyer who is departing one law firm for another has an ethical obligation, along with responsible members of the law firm who remain, to assure that those clients [in whose cases that attorney played a principal role] are informed that she is leaving the firm."

Additionally, the duty of diligence encompasses knowing when to withdrawal from representation. For example, when Rule 1.16 requires withdrawal. (Rule 1.16(a)(1)).

Rule 1.1 Competence

Competence, like diligence, extends to the business of practicing law. The pandemic affected the practice of law dramatically. An attorney needs to know how to practice law 'virtually' for procedural and substantive hearings and be competent in other areas of technology utilized in the practice of law.

Technology impacts client confidentiality if malware corrupts or steals electronic client files. Technology impacts fees and safekeeping rules. If an attorney accepts Venmo, PayPal, Bitcoin, or Cryptocurrency are funds of others at risk? See South Carolina Bar's Opinion 18-05, considering the question of an attorney who wants to accept money deposits from a client through PayPal. An attorney should consider that a client "PayPal" payment directly into the lawyer's IOLTA

account may give a person access to the funds of others. The Florida Bar Professional Ethics Committee approved Advisory Opinion 21-2 discussing ethical considerations in accepting web-based payments. Additionally, new technology brings new scams that target lawyers.

Rule 8.4(g) Conduct adversely reflects on fitness to practice

The business of practicing law can implicate other professional rules. How a lawyer practices law may adversely reflect on their fitness to practice. Failure to pay for the services of a court interpreter engaged for a case adversely reflected on the fitness to practice law. *In re Sachse*, 281 Kan. 1197 (2006). Entering a business transaction with a client may violate both Rule 1.8(a) and Rule 8.4(g). *In re Wiechman*, 290 Kan. 70 (2010).

Rule 3.2 Expediting litigation

A deeper look behind Rule 3.2, which requires a lawyer to make reasonable efforts to expedite litigation consistent with the interests of the client, may point to reasons that contribute to delay. Delay may be the product of a benefit to a client or a consequence of the lawyer's large complex case load, stress, or burnout. Avoiding rule violations sometimes requires looking at root cause and tools to prevent a violation.

Few recognize all that KALAP has to offer. Many recognize KALAP for their work with attorneys who have substance abuse issues. Did you know – and you do now – that KALAP has tools to help with law practice management, stress, burnout, succession planning, closing a practice, and over-functioning which adversely impact the ability to practice law appropriately?

Do you have contact information for KALAP? kalap@kscourts.org and 785-368-8275

Rule 1.4 Communication

Rule 1.4, client communication, often creates a discussion related to when and what to tell a client. It is also prudent to consider how a conversation (communication) with a Facebook friend or neighbor may implicate professional rules. Does a neighbor or Facebook friend that wants to pick your brain about their legal issues implicate Rule 1.18 creating duties to a prospective client? Can you provide help, such as ghostwriting a legal document for the friend that doesn't want counsel but asks for help?

Yes and yes – maybe. A conversation on social media or with a neighbor may implicate Rule 1.18, creating duties to a prospective client and ghostwriting may be permissible – as always, the ultimate answer is fact dependent.

In this type of scenario, Rule 1.2(c) allows a lawyer to limit the scope of representation. The attorney's duty to communicate under Rule 1.4 compels the attorney to make adequate disclosure, to ensure the client's understanding of the

limited scope of the representation, as well as the risks and available alternatives to the limited representation. KBA Legal Ethic Opinion No. 90-01 provides seven guidelines to follow when aiding pro se litigants with ghostwriting.

Rule 1.15 Safekeeping

A lawyer must keep complete trust account records and preserve them for a period of five years after termination of the representation. Rule 1.15(a). A flat fee is an advanced payment for future services and must be deposited into an attorney trust account (IOLTA) and cannot be withdrawn until it is earned. *In re Thurston*, 304 Kan. 146 (2016).

Clients often like the idea of a flat fee, it eliminates the worry of unforeseen costs and seems simple. The simplicity fades if the flat fee agreement fails to denote milestones, that when reached, allow portions to be earned. The alternative is that it is only earned at the conclusion of the work. If the client or lawyer fires the other, must the whole flat fee be returned if milestones are not delineated?

Attorneys are specifically targeted by scammers. Lawyers have money and information; thieves want it and lawyers have a duty to protect it. Excellent articles on discussing scams that target lawyers include: Mark J. Fucile's article, Lawyers, Staff Play Critical Role in Fighting Tech-enabled scams, Oregon State Bar Bulletin, April 2020. A Lawyer's Professional Responsibility in Identifying and Avoiding Counterfeit Checks, NC State Bar, Formal Ethics Opinion 2021-2.

Rule 5.3 Supervision nonlawyer

A lawyer should have a routine to conduct conflict checks; to identify and avoid conflicts between current and prospective clients. Whether a conflict is imputed when a lawyer moves from one firm to another is governed by Rule 1.10(b). It is important to recognize conflict rules apply to nonlawyers. See Zimmerman v. Mahaska Bottling Co., 270 Kan. 810 (2001) (held Rule 1.10 and Rule 5.3 read together require nonlawyers to be treated in the same manner as lawyers when considering imputed disqualification issues.)

Additionally, work done by nonlawyers is done as agents of the lawyer employing them. The lawyer has a duty to supervise their work and be responsible for their work product or the lack of it. *In re Caenen*, 235 Kan. 451 (1984).

Rule 8.1 False statement, fail to disclose fact to correct misapprehension, or fail to respond

Rule 8.1 (integrity of the profession) is relatively short and includes several important provisions: prohibition against making a false statement of material fact, duty to disclose a fact necessary to correct a misapprehension, and a requirement to respond to a lawful demand for information (except as otherwise protected by Rule 1.6).

Rule 213 was added in January 2021, which provides good cause exists for a temporary suspension where a respondent fails to file an answer to the formal complaint in a disciplinary proceeding; or the respondent poses a substantial threat of harm to clients, the public, or the administration of justice. Which brings the presentation, full circle, back to the opening statement.

Know where to find the rules of professional conduct:
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Estate Planning for Healthcare & Disabilities

Presented by Tim O'Sullivan, JD, LLM

Summary

In this segment, Tim will discuss planning for healthcare decisions through advance directives (healthcare powers of attorney), living wills, and do-not-resuscitate directives (DNRs). He will review drafting such documents, including desirable provisions, and their practical aspects.

About Tim O'Sullivan

Mr. O'Sullivan is a partner with Foulston & Siefkin practicing in the areas of estate planning, probate, trust law, and elder law. He has a broad range of experience in developing and implementing both simple and complex estate planning techniques. He represents both individual and institutional fiduciaries in the administration of trusts and estates.

Mr. O'Sullivan's practice also involves advising clients on strategies and provisions which enhance the preservation of family harmony in the estate planning process. Over his career, Mr. O'Sullivan has made presentations on estate planning topics at approximately one hundred professional seminars.

He received a JD from the Washburn University School of Law and a LLM in taxation from the University of Missouri-Kansas City School of Law. He is a fellow in the American College of Trust and Estate Counsel.

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Estate Planning for Healthcare/Disabilities

Timothy P. O'Sullivan

FOULSTON

1

I. Types of Advance Directives

A. Financial Powers of Attorney
B. Health Care Powers of Attorney
C. Living Wills
D. Do Not Resuscitate Directives (DNRs)

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2

II. Health Care Power of Attorney

A. Authorizations
   1. Pre-Death
   2. Post-Death
B. Types
   1. Springing
   2. Non-Springing
C. Selection of Agent
D. Appointment of Legal Guardians
E. Agent Discharger or Monitor
F. Compensation
G. Exoneration of Liability for Good Faith Decisions

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3

III. Kansas Uniform Health Care Decisions Act

A. Consider by 2009 Kansas Legislature

B. HCPOA and Living Will combined in one format

C. Expansive

D. Failed to Pass

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4

IV. Living Wills

A. Kansas Natural Death Act
   1. Necessity of "Terminal Condition"
   2. Kansas Form
   3. Triggering Condition Problem

B. Federal Constitutional Right
   1. Seminal Cruzan Decision
   2. Glucksberg Decision

C. State Court Decisions

D. Constitutional Protection may not extend to VSED provisions

E. Drafting Considerations

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5

V. Coordination Between DPAHC and Living Will

A. Including Withholding of Medical Treatment in Living Will v. Authorizing DPAHC Agent

B. Consideration of Provisions in DPAHC not to Withhold Medical Treatment beyond that Authorized in Living Will

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6

V. Do No Resuscitate Directives (DNRs)

VI. Current Trends

A. POLSTS

B. Five Wishes Program

C. Death with Dignity Movement

VII. Conclusion

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7

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Drafting Health Care Advance Directives in a Rapidly Changing Legal and Sociological Environment

An advance directive is a legal document, executed by a declarant pursuant to state law, authorizing or instructing others to make health care decisions on the declarant's behalf in the event the declarant possesses insufficient capacity to make such decisions.[1] Subject to constitutionally permissible statutory or common law limitations, by executing an advance directive a declarant can make his or her wishes known and authorize a third party to make decisions regarding any aspect of his or her health care, including the withholding or withdrawal of life-sustaining procedures ("LSPs").[2]

There are three popular types of advance directives in the United States today: instruction directives, proxy directives, and directives that combine aspects of both instruction and proxy directives.[3] An instruction directive is one in which a declarant leaves instructions for his or her future care without appointing an agent to carry out these instructions.[4] A living will is an example of an instruction directive.[5] A proxy directive is one in which the declarant is silent, or nearly silent, about the declarant's wishes, instead designating an individual to make all or a portion of the declarant's health care decisions.[6] A durable power of attorney for health care decisions is an example of a proxy directive.[7] In most states, a declarant can execute a third type of directive, a hybrid directive combining in one instrument the functions of both instruction and proxy directives, appointing a decision maker while also providing guidance or direction to the decision maker with respect to certain health care decisions.[8]

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

Such Kansas advance directive statutes are two to four decades removed from their enactment. Consequently, they have become, to use a colloquial phrase, a little "long in the tooth." They simply are not reflective of subsequent societal and medical trends in many

[1] Kathy L. Cerminara, *Law, Perception, and Cultural Cognition Near the End of Life*, 55 WASHBURN L.J. 597, 616 (2015).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] MICHAEL L.M. JORDAN, 1 DURABLE POWERS OF ATTORNEY & HEALTH CARE DIRECTIVES § 3:33 (4th ed. 2016).
[8] Cerminara, *supra* note 1, at 616.

respects, fail to embody the comprehensive, cohesive and advanced provisions in more progressive statutes subsequently enacted in other states, and are at least in one important respect discussed in this article with regard to living wills, not consonant with later judicial decisions imposing constitutional limitations on their import.

The purpose of this article is to alert practitioners of such trends and subsequent legal developments, as well as provide practical tips in drafting legally viable advance directives that more fully address and implement their clients' health and personal care desires at a time they are no longer competent to self-direct their personal and medical care. As a preface to such discussion, it should be noted that due to recently issued federal regulations, medical costs occasioned by individuals who have discussions with their personal physicians regarding advance directives are covered under Medicare, effective January 1, 2016.[9]

A. HEALTH CARE DURABLE POWERS OF ATTORNEY

The Kansas Durable Power of Attorney for Health Care Act ("the Act") authorizes a person to appoint an attorney-in-fact (hereinafter "agent") to make health care decisions on such person's behalf.[10] This directive is effectuated under the provisions of an instrument known as a "durable power of attorney for health care decisions."[11] Pursuant to the Act, an agent has a duty to act consistent with the principal's expressed desires.[12] As is the case with an agent under a financial durable power of attorney, the health care agent has a fiduciary duty to act solely in the principal's best interests.[13] Further, an agent under such power of attorney cannot revoke or invalidate a living will nor act in a manner inconsistent therewith.[14]

The health care agent can be authorized to determine all aspects of the principal's personal and medical care should the principal incur a legal disability rendering the principal incapable of making such decisions.[15] To be fully efficacious, such advance directive should authorize the agent, on behalf of the principal, to comprehensively make all medical and psychiatric decisions, as well as additional personal and medical care which can be statutorily authorized and delegated to an agent.[16] What is important for subsequent discussion on living wills is that there is no statutory limitation on the principal's ability to authorize the health care agent to proscribe life-sustaining medical care conditioned upon the principal's remaining life expectancy, such as being limited to a terminal condition of the principal, as there is with respect to a declarant under Kansas' living will statutes.

Such medical authorization normally avoids the need for the judicial appointment of a legal guardian that otherwise would be required to make personal and medical care decisions for a disabled individual. However, in the event the principal nonetheless refuses or otherwise fails to comply with the agent's directions regarding such care, thereby posing a significant threat to the

[9] 42 C.F.R. § 410.15(a)(x) (2016).
[10] K.S.A. 58-625 to 58-649 (1989).
[11] *Id.*
[12] K.S.A. 58-629(c) (2002).
[13] K.S.A. 58-625 (1989).
[14] K.S.A. 58-629(b).
[15] K.S.A. 58-626 (1989); K.S.A. 58-629(a).
[16] K.S.A. 58-629(a).

principal's health or well-being, the appointment of a guardian able to legally impose measures or restrictions conducive to such individual's health or well-being may nonetheless prove necessary.[17]

A durable power of attorney for health care decisions may also authorize the agent following the death of the principal to determine burial and funeral arrangements, consent to autopsies, and make organ donations (although organ donations can also be authorized in a separate document, as well as on the back of a driver's license).[18]

As under a financial durable power of attorney, a durable power of attorney for health care decisions may be made either "springing" or "non-springing," i.e., either effective only upon the principal's subsequent disability or effective immediately and remaining continuously effective notwithstanding a subsequent disability of the principal, respectively.[19] Although authority granted immediately to an agent under a "non-springing" power of attorney would not be expected to be exercised until such time as there occurred a subsequent disability of the principal, it is nonetheless typically desirable to make such instruments "non-springing" in nature.

One rationale for reposing such immediate authority in the agent to make health care decisions on the principal's behalf is to avoid the undesirable "Catch-22" situation of a health care agent not yet being possessed of the authority to procure the necessary medical information needed to establish the disability of the principal that is the triggering event for such authority.[20] Such possibility could be avoided in an otherwise "springing" health care power of attorney by reposing immediate limited authority of a "non-springing" nature in the agent related strictly to the procurement of such medical information of the principal.

In addition, providing for the immediate efficacy of such authority has the often salutary aspect of permitting the agent, provided such authority is properly authorized in the instrument, to be able to procure medical information concerning the principal at any time from a physician, irrespective of any lack of capacity of the principal, and to discuss the principal's medical situation with medical personnel, without the principal having to have separately executed a HIPPA authorization.[21] Further, health care decisions, as contrasted with financial management decisions, are typically far more time-sensitive. Thus, a delay in securing a "springing" determination of a disability prior to being able to make a health care decision could be hazardous to the principal's health.[22]

Finally, making the power of attorney "non-springing" provides for a seamless transition, without need of a medical determination of the disability of the principal, in devolving desired health care authority in the agent while posing no detrimental aspects to the principal's ability to make his or her own medical decisions.[23] No medical provider would be expected to request an agent to make health care decisions on behalf of the principal in circumstances where the principal

[17] K.S.A. 58-627 (1989); 59-3075(2007).
[18] K.S.A. 58-629(a)(1), (f); 59-843(b).
[19] *See* JORDAN, *supra* note 7, at § 3:40; Matthew H. Hoy, *Powerful Powers Under the Kansas Power of Attorney Act*, 74-JUN J. KAN. B. ASS'N. 20, 21 (2005).
[20] *See* JORDAN, *supra* note 7, at § 3:40.
[21] 46 C.F.R. § 165.502(g) (2016).
[22] *See* JORDAN, *supra* note 7, at § 3:40.
[23] *Id.*

appeared to the health care provider to be sufficiently competent to be able to make such decisions on his or her own behalf. Even in the quite unlikely circumstance that a medical practitioner would bypass a competent principal in securing a medical decision from the principal's health care agent, the execution of the power of attorney does not diminish the principal's authority to make his or her own health care decisions.[24] A competent principal remains able to not only revoke such power of attorney, but in such circumstances also to be able to simply refuse any medical decision of the agent contrary to the principal's wishes.[25]

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

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

However, in making such choice, clients should be advised that naming a child or children as health care agent can create family disharmony regarding medical decisions when there is more than one adult child, as well as present an obvious financial conflict of interest when a child or other beneficiary of the principal's estate is named to serve as agent. This financial conflict presents itself when uncompensated medical expenditures are in need of authorization, most prominently with regard to uninsured long-term care not covered by short-term Medicare benefits or long-term care insurance, which expenditures ineluctably reduce the agent's share of the principal's estate. Unfortunately, it is not a totally isolated occurrence when a child resolves such conflict in favor of providing a less-than-preferable level of the principal's uncompensated medical care. However, despite the significant risks of such disharmony or decisions of the agent regarding the level of the principal's health care being motivated disproportionately by the agent's beneficial interest in the principal's estate, clients are understandably reluctant to be deterred from their initial familial predilections regarding the selection of their health care agent.

A desirable ameliorative provision in the instrument to enhance the prospects that an agent is properly discharging the agent's authority is the appointment thereunder of an independent "Agent Discharger" or "Monitor," possessed with the authority in the instrument to not only procure

[24] *See* Restatement (Third) of Agency § 1.01 cmt. f (AM. LAW INST 2006); *id.* at § 8.09; K.S.A. 58-629(c) (2002).
[25] K.S.A. 58-654(g)(3) (2017).

all relevant personal and medical information of the principal from the agent and medical personnel, but also having the authority to discharge with personal impunity the agent and appoint a successor agent (in the event there is no successor named in the instrument willing and able to so serve), preferably precluding such discharging party or related party as a permissible appointee to ensure the Agent Discharger's or Monitor's independence. To avoid a potentially contentious and costly debate as to whether such discharge is for cause, it is normally preferable for such authority to be exercisable for any reason in the sole discretion of the Special Agent or Monitor. Nonetheless, such authority normally would only be expected to be exercised in the event the Agent Discharger or Monitor has determined the agent is not properly complying either with information requests or improperly discharging the agent's authority and responsibilities, whether intentionally, as a result of negligence, or due to the agent's diminished capacity not yet being severe enough to trigger the appointment of a successor agent under the disability criteria in the instrument.

For the same reason a financial power of attorney should normally appoint the financial agent as conservator in any subsequent conservatorship proceeding, a durable power of attorney for health care typically appoints the health care agent as the principal's legal guardian should such an appointment become necessary or otherwise desirable. An appointment of a legal guardian under a health care power of attorney is statutorily given preference by the courts except for good cause or disqualification.[26] In the event the appointment of a guardian should become necessary due to the authority in the instrument not proving legally sufficient for the agent to be able to satisfactorily manage and ensure the principal's personal and health care needs, such naming should preclude the possibility of someone other than the agent being appointed to serve as guardian, thereby normally superseding the erstwhile health care decision-making authority of the agent, and the guardian being in possession of authority to revoke the health care power of attorney.[27]

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

[26] K.S.A. 58-625(b) (1989).
[27] K.S.A. 58-625(a).

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

Another normally desirable provision is to require the agent, with the exception of a circumstance constituting a medical emergency under a "springing" power of attorney, to have accepted such appointment in writing in order for the agent's authority to be effective, in a similar manner as a financial agent is not required to act on behalf of the principal unless so agreed in writing.[28] This not only provides a "bright-line" standard as to when and whether such authority has been accepted, but if such acceptance is under a "non-springing" health care power of attorney the agent would be expected to have executed concurrently with the principal, there will be assurance that the agent is willing to serve, is immediately aware of such appointment, is likely to be in possession of a copy of the instrument when such authority is in need of being exercised, and there will have been an enhanced opportunity at the outset for discussions between the principal and agent as to both its import and the principal's intent regarding the coordination of the provisions of each instrument with the other.

With respect to authority reposed in the agent, as previously noted, such authority should normally be comprehensive to ensure both its completeness and acceptance by medical professionals in carrying out the desires of the principal. This includes not only authorization of all aspects of medical care, but also changes in the domicile or residency of the principal to another state (as sometimes necessary to benefit from more favorable Medicaid benefits), home health care, appropriate religious and recreational arrangements, authority to withdraw certain medical procedures consistent with provisions of the living will of the principal, and a HIPAA (Health Insurance Portability Authorization and Accountability Act) authorization to clearly provide for the health care agent to have access to the medical records of the principal.[29] It is further desirable to generally provide the agent with all authority legally exercisable by a court-appointed guardian that also may be reposed in a health care agent. Finally, regarding the authority exercisable by the agent, most clients deem it preferable for the instrument to provide that the agent is exonerated from liability for any good-faith decision regarding the exercise of the agent's authority.[30]

Unlike some states which have statutory provisions automatically revoking the authority of a spouse named as health care agent upon a subsequent divorce, legal separation, annulment or other

[28] K.S.A. 58-652(d) (2009).
[29] *See* 46 C.F.R. § 165.502(g) (2016).
[30] *See* JORDAN, *supra* note 7, at § 10.33.

decree of marital dissolution, Kansas does not.[31] Thus, it is important to include such a provision in the instrument in the vast majority of circumstances in which the principal would desire such result. It also might be desirable to extend such denial or revocation of a spouse's authority as agent during any period in which there is a pending proceeding involving such a marital dissolution or legal separation of the couple.

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

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

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

A health care power of attorney form is provided in the Kansas statutes, the provisions of which state that a living will form must substantially be in compliance with such form to be deemed acceptable.[32] Although certainly far better than having no health care power of attorney at all, the statutory form is far from comprehensive. Other than generally authorizing medical decisions and the withholding thereof, it is bereft of most of the aforementioned provisions desirable for inclusion in health care powers of attorney.[33] It is even lacking in a provision naming a successor agent or

[31] *See, e.g.,* N.C. GEN. STAT. § 32A-20(c) (2012); WIS. STAT. § 155.40(2) (2009).
[32] K.S.A. 58-632 (1989).
[33] *See* K.S.A. 58-632 (1989).

providing that the then-serving agent should be appointed guardian of the principal should a guardianship be required.[34] Consequently, although often distributed by health care providers and other third parties, and frequently used by attorneys, the statutory form should be eschewed by estate planning and elder law practitioners in favor of more comprehensive forms practitioners have personally crafted having numerous options desirable of consideration by their clients.

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

Although the more-than-a-quarter-century-old Act is certainly in need of an update in the same manner the Kansas Power of Attorney Act was substantially revised by the Kansas legislature in 2003,[35] most of the issues it fails to address can nonetheless be remedied by a comprehensively drafted health care power of attorney. However, the Act nonetheless remains in need of addressing default issues in numerous situations which may not be covered in an advance directive, most particularly with respect to principals who have not received comprehensive legal advice on the subject or secured a basic form off the Internet. Such potential default provisions addressing issues not found under current statutory provisions would include whether an agent is entitled to compensation sans any provision in the instrument so authorizing, whether spouses are automatically excluded as agents in the event of a legal separation, divorce or other marital dissolution, whether individual agents are liable for good-faith decisions in the absence of a non-exoneration provision in the instrument, and possibly providing a resolution procedure in the event a medical practitioner deems the exercise of the agent's authority to be unethical, in excess of that reposed in the instrument, or permissible under the law.[36]

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

[34] *Id.*
[35] *See* H.B. 2034, 2003 Leg., Reg. Sess. (Kan. 2003) (codified at K.S.A. 58-650 (2012)).
[36] *See* Fla. Stat. §§ 765.105 and 765.109.

Legislative Consideration of Kansas Uniform Health Care Decisions Act

In 2009, HB 2109 was introduced in the Kansas legislature, which proposed enactment of the Kansas Uniform Health Care Decisions Act.[37] As proposed and modified by the Probate Advisory Committee to the Judicial Council, it would have combined Kansas health care and living will health care directives in one statutory form and format.[38] It also would have addressed many of foregoing issues not presently addressed in the Act, including a default hierarchy of surrogates, and provided for a much more extensive statutory form than is currently provided.[39] It failed to pass, which the author understands was due at least in part to a feeling by legislators that such an extensive rewrite of existing statutory provisions was unnecessary. Nonetheless, although a total overhaul of current advance directive statutes may not be deemed necessary, the current statutory health care power of attorney provisions nonetheless remain in need of significant refinement and expansion in addressing the foregoing issues.

B. LIVING WILLS

In addition to Kansas statutorily authorizing health care powers of attorney, the Kansas Natural Death Act (hereinafter "the Act") authorizes competent individuals to personally express their health care desires with respect to withholding life-sustaining procedures.[40] Kansas was one of the initial states to pass such a statute. The Act limits a declarant's ability to direct the withholding or withdrawal of life-sustaining procedures ("LSPs") through an advance directive to situations when the declarant is in a "terminal condition."[41] The Act does permit individuals to dictate, under what is commonly termed a "living will," the proscription of life-sustaining procedures when in such a "terminal condition."[42]

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

In practical terms, a reference to a "terminal condition" usually means that the patient's life expectancy is less than six months, which is the typical standard for hospice care.[45] Consequently, most physicians would not likely be expected to consider an Alzheimer's or other

[37] H.B. 2109, 2009 Leg., Reg. Sess. (Kan. 2009) (not enacted).
[38] *Id.* § 2(a).
[39] *Id.* § 6(a), (b), (f).
[40] K.S.A. 65-28,101 to 65-28,120 (1979).
[41] K.S.A. 65-28,103(a).
[42] K.S.A. 65-28,101; *see also* K.S.A. 65-28,103.
[43] *See* JOSEPH C. SEGEN, CONCISE DICTIONARY OF MODERN MEDICINE (1st ed. 2006).
[44] *Terminal Condition Definition*, DUHAIME.ORG, www.duhaime.org/LegalDictionary/T/TerminalCondition.aspx. (last visited Aug. 15, 2017, 10:26 AM).
[45] *See* 42 U.S.C. §§ 1395x(dd)(1), (dd)(3)(A).

dementia patient, irrespective of the lack of significant cognitive capacity and lack of a cure, to be terminal prior to the final stage of the disease, when the patient's body functions begin to cease and the patient is close to death. The same would be expected to be true of an individual in a permanent coma or persistent vegetative state (PVS), as the afflicted individual typically can have an extended life expectancy, perhaps even decades, absent an intervening death from another medical malady or failure of bodily function.

The Act provides that a living will executed substantially in conformity with the form statutorily provided in the Act will be deemed an acceptable compliance with the statutory provisions.[46] Elaborating upon the statutory lack of the manner in which the "terminal condition" of the declarant is to be determined in order to satisfy such definition, the form requires the terminal condition to be determined by two physicians, one of whom is the declarant's attending physician, who have examined the declarant.[47] The form provided in the Act also requires that in addition to the requirement of the "terminal condition" of the declarant, the declarant must be in a condition in which the death of the declarant will occur irrespective of the medical procedures that could be provided and the administration of such medical procedures would only artificially prolong the declarant's dying process.[48]

The statutory form does not specify the mechanism for determining when an individual has insufficient capacity, i.e., is "unable," to make such medical direction.[49] Nor does it address whether artificial means, also termed "medically assisted," of providing nutrition or hydration, such as through intravenous or tube feeding, is to be administered in such circumstances.[50] Although such artificial means of providing nutrition and hydration, being "medically assisted," would be expected to be considered a medical procedure, the author has found in practice that not all physicians are in concurrence with that viewpoint. Moreover, as more fully discussed below, a plenary recognition of such terminology, in the absence of specific provisions in the living will to the contrary, would not be in recognition of the fact that many declarants do not desire withholding nutrition and hydration in such circumstances, whether on religious grounds or otherwise, and that some declarants desire that only nutrition be withheld.

The statutory form is also devoid of human sentiment regarding the individual's reasons for withholding medical care in defined circumstances under provisions of the living will, e.g., not having an acceptable quality of life and being desirous of the individual's family not having to endure both the emotional pain and financial drain that an extended continuance of such condition would engender.[51] Nor, as one would expect due to such "terminal condition" requirement, does it provide for any other activation circumstance outside of a terminal condition, when the individual nonetheless may have no acceptable quality of life from the declarant's standpoint.[52] Suffice it to say, a high percentage of practitioners rightly consider such form inadequate, thereby necessitating the development of their own forms which not only express with much greater specificity or extended circumstances their clients' desire that life-

[46] K.S.A. 65-28,103(c) (1994).
[47] K.S.A. 65-28,103(a).
[48] K.S.A. 65-28,103.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

sustaining or maintenance health care no longer be administered when they are no longer able to do so, but also that adequately communicate to their families and loved ones their personal reasons therefor.

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

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

Additionally, as of 2016, seven states have enacted some version of the Uniform Health-Care Decisions Act (hereinafter "the UHCDA").[59] The UHCDA is intentionally silent regarding triggering conditions on the withholding of LSPs, and instead states that an individual may "give specific instructions about any aspect of your health care."[60] As evidenced by *Wendland*, discussed in more detail below, one court has interpreted this to mean "a person may direct that life-sustaining treatment be withheld or withdrawn under conditions specified by the person and not limited to terminal illness, permanent coma, or persistent vegetative state."[61] Despite the expansive view adopted by the Supreme Court of California, no other state has addressed this portion of the Act. Moreover, of importance is that no legislature to date has expressly adopted an advance-directive statute with the specific intent of allowing the removal of LSPs from individuals who are neither terminal nor permanently unconscious.[62]

Such limiting triggering conditions understandably can frustrate the express intent of declarants who, after executing a relevant advance directive, have lost the capacity to refuse

[53] ALAN MEISEL & KATHY L. CERMINARA, THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISION MAKING § 7.06[A][2] (3d ed. 2015) [hereinafter RIGHT TO DIE].
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *See* Gary A. Magnarini, *Withholding a Feeding Tube from a Nonvegetative Dementia Patient*, 83-MAY WIS. LAW 6, 7 (2010) (stating that despite the absence of triggering conditions in state law, Wisconsin appellate courts have never permitted a feeding tube to be withheld from a person who was not in a persistent vegetative state).
[59] *Health-Care Decisions Act*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Act.aspx?title=Health-Care%20Decisions%20Act (last visited June 27, 2017).
[60] UNIF. HEALTH-CARE DECISIONS ACT § 4 (UNIF. LAW COMM'N 1993).
[61] *Conservatorship of Wendland*, 28 P.3d 151, 160-61 (Cal. 2001).
[62] RIGHT TO DIE, *supra* note 53, at § 7.06.

unwanted medical treatment but do not meet the definition of being terminal or permanently unconscious.[63] For example, persons suffering from advanced Alzheimer's disease or other neurological conditions may continue to live for an indeterminate period of time in a conscious state, but are otherwise unable to move, communicate, or appreciate their surroundings.[64] An individual contemplating such a situation may desire to have LSPs withheld and execute an advance directive to that effect; however, because the individual is conscious at times and likely to live for an indeterminate period of time, such triggering conditions are not met and the advance directive will not statutorily take effect.[65] Thus, strict construction and adherence to a statute containing triggering conditions tied to a terminal condition or permanent lack of conscious activity would prevent a third party from withholding LSPs in a non-triggering situation, regardless of the prognosis.[66]

To that end, the Supreme Court's holding in *Cruzan*, that a competent person has a federally constitutionally protected liberty interest in refusing unwanted medical treatment under the Fourteenth Amendment, has raised serious questions regarding the ability of state laws to trammel the enforceability of advance directives not in conformity with state law, most particularly when they extend their import beyond situations which are statutorily authorized.[67]

The Court in *Cruzan* specifically declared that: "[A]competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."[68] In *Cruzan*, Petitioner had suffered a massive brain injury, lost cognitive functioning, and required feeding tubes after being diagnosed as being in a persistent vegetative state (PVS).[69] Petitioner had no living will, but her parents sought to have her feeding and hydration tubes removed.[70] Even while ultimately concluding that Petitioner's oral and nutritional tubes were to remain in place, the Court acknowledged the constitutional right of competent individuals to refuse medical treatment.[71] However, the Court reasoned that an incompetent's right to refuse medical treatment was precluded by the individual's incompetence.[72] Therefore, due to such differential in refusal rights, the state's interest in preserving the life of an incompetent person permits it to establish restrictions which err on the side of life.[73] The dissenters in the decision posited that a state's assertion of a general interest in preserving life that was distinguishable from protecting the individual's own interest in preserving life, was lacking in legitimacy.[74]

As Petitioner did not have a living will, although affirming that Petitioner had the right to refuse medical care, the Court ruled that her feeding tubes should be kept in place due to there being no "clear and convincing evidence" that it was Petitioner's wish to terminate her life

[63] Cerminara, *supra* note 1, at 617.
[64] *Id.* at 607.
[65] *Id.* at 617.
[66] *Id.*
[67] RIGHT TO DIE, *supra* note 53, at § 7.02[A] (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990)).
[68] 497 U.S. at 278.
[69] *Id*. at 265-66.
[70] *Id.* at 267-69.
[71] *See id.* at 278, 289 (declaring that "[r]equiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment").
[72] *Id.* at 280.
[73] *Id.*
[74] *Id.* at 313 (Brennan, Marshall, and Blackman, JJ., dissenting).

support in that circumstance.[75] The Petitioner's family in a later judicial decision subsequently established such evidence to the satisfaction of the court and Petitioner's life support was then terminated.[76]

Justice Sandra Day O'Connor, in a concurring opinion in the *Cruzan* decision, adopts the majority's holding that "A competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment," citing the Fourteenth Amendment to the United States Constitution.[77] Additionally, Justice O'Connor expanded on such right by concluding "forced treatment may burden that individual's liberty interests as much as any state coercion."[78] Justice O'Connor's concurrence in *Cruzan* confirmed the rights of individuals with non-terminal illnesses to direct their medical care, but she did not specify which health care decisions, if any, in an advance directive such as a living will would exceed federal constitutional protection so as to be subject to protection by the state.[79]

Thus, although Justice O'Connor recognized that individuals could specify the type of medical care they desired in a living will, neither she nor the majority of the Court addressed whether a provision to withhold life-sustaining medical care in a living will would be subject to federal constitutional protection in non-terminal cases in which the individual, unlike the Petitioner in that decision, was conscious.[80] Justice O'Connor did speak favorably of advance directives, and the role oral and written instructions may have in protecting an incompetent person's liberty interest.[81] However, albeit generally recognizing that individuals could specify the type of medical care they desired in a living will, she went on to conclude that finding the best solution for balancing the competing interests of states and individuals should be left to the states.[82]

Since *Cruzan*, the Supreme Court has not directly addressed end-of-life decision-making in the context of advance directives or triggering conditions. However, the Court reaffirmed the right of an individual to refuse lifesaving hydration and nutrition, stating this right is protected by the constitution and grounded in the long legal tradition protecting an individual's right to refuse unwanted medical treatment.[83] Such decision involved whether the fundamental rights to liberty guaranteed by the Fourteenth Amendment extended to physician-assisted suicide for terminally ill patients.[84] Reversing the district court and Ninth Circuit Court of Appeals, the Court found that it did not.[85] The *Glucksberg* decision and additional case law has all but ended any debate regarding the legal limits of an individual's decision to forego medically supplied nutrition and hydration.[86]

[75] *Id.* at 284.
[76] Tamar Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. TIMES (Dec. 27, 1990), http://www.nytimes.com/1990/12/27/us/nancy-cruzan-dies-outlived-by-a-debate-over-the-right-to-die.html.
[77] *Cruzan*, 497 U.S. at 287 (O'Connor, J., concurring).
[78] *Id.* at 288.
[79] *Id.* at 289-90.
[80] *Id.*
[81] *Id.* at 289-92.
[82] *Id.* at 292.
[83] *See Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).
[84] *Id.* at 728.
[85] *Id.*
[86] RIGHT TO DIE, *supra* note 43, at § 7.07[B].

Despite much mass debate surrounding end-of-life decision making, relatively few other courts have addressed the authority of competent individuals to direct the removal of LSPs through advance directives that contradict state law, most particularly in the circumstance not addressed by *Cruzan* or *Glucksberg*, i.e., when a person is not in a terminal condition or permanently unconscious. However, the Courts have long recognized the fundamental right of individuals to determine their own health care. In the century-old case of *Schloendorff v. Society of New York Hospital*, Justice Benjamin Cardoza of the New York Court of Appeals, grounding his position in common law, stated that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages."[87] Moreover, as discussed above, the Supreme Court in *Cruzan* determined that the Fourteenth Amendment grants competent individuals the right to make personal decisions about their health care, including unwanted medical treatment.[88] This right has been determined to include the right to deny unwanted medical care, even when necessary to sustain life.[89]

In short, the clear weight of authority is that states cannot take away an individual's federal constitutional right to refuse medical care. States can, however, reasonably restrict the right by requiring individuals to demonstrate by clear and convincing evidence their intent to make a particular health care decision.[90] Those who are unable to communicate their intent because they are unconscious or incompetent do not lose their right to refuse medical care; however, they must have previously clearly communicated their intent while conscious and competent.[91]

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

Alzheimer's is a debilitating mental disease which is the highest contributor to the incidence of individuals lacking the aforementioned quality of life. It is the most common form of dementia, gradually robbing memories, intelligent thoughts, and even one's personality.[92]

[87] 211 N.Y. 125, 129-30 (1914), *abrogated on other grounds by* Bing v. Thunig, 2 N.Y.2d 656 (1957).
[88] *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).
[89] *Woods v. Kentucky*, 142 S.W.3d 24, 33 (Ky. 2004).
[90] *Cruzan*, 497 U.S. at 284.
[91] *Woods*, 142 S.W.3d at 32-33.
[92] ALZHEIMER'S ASS'N, 2017 ALZHEIMER'S DISEASE FACTS AND FIGURES 6 (2017), http://www.alz.org/documents_custom/2017-facts-and-figures.pdf.

Approximately five to ten percent of individuals afflicted with Alzheimer's even become violent.[93]

An estimated 5.5 million Americans have Alzheimer's and one in ten individuals over the age of 65 have contracted the disease, now the sixth-leading cause of death in America and the third most common cause of death among older Americans, behind heart problems and cancer.[94] The total cost of caring for those with Alzheimer's is estimated to be $259 billion in 2017.[95] It is the only leading cause of death that cannot be cured or prevented and its progression is only subject to being slowed to a limited extent.[96]

A Cambridge University study indicates that the average duration of life following a diagnosis of Alzheimer's, which normally occurs long after there are symptoms, is four and half years when the condition is diagnosed after age 70 and seven to ten years from the onset of symptoms.[97] When diagnosed prior to age 70, such life expectancy can be a decade or more.[98] A substantial portion of such remaining life expectancy will be met with severe cognitive decline.[99] Obviously, there can be intervening causes of death before Alzheimer's eventually exacts its lethal toll, with chronic immobility perhaps being at the top of the list, thus shortening such life expectancy further from what it would be in circumstances limited to where Alzheimer's alone was the cause of death.[100]

Other less common forms of dementia, vascular dementia, dementia with Luby bodies, and frontotemporal dementia, are equally degenerative and presently incurable, some tending to have faster progression phases.[101] Although more prone to the disease, people with Parkinson's disease do not necessarily incur accompanying dementia problems.[102] While some individuals with Alzheimer's and other dementias may continue to enjoy their lives at least to a limited extent and for a limited duration during its progressive phases, in the later stages of such dementias they normally possess little to no quality of life.[103] Given the option, their former competent selves may well have preferred not to be given most medical procedures or treatments when they no longer are able to enjoy or appreciate the benefits of life, although they would not be medically considered to be in a terminal condition.

While living will provisions may express a direction to have physicians withhold medical care and procedures when an individual is not in a terminal condition and not permanently unconscious, such as in advanced Alzheimer's, there are both legal obstacles to their efficacy and practical impediments to their articulation. For one, Alzheimer's, like other dementias robbing

[93] Madison Park, *When Alzheimer's Turns Violent*, CNN (March 30, 2011, 12:13 PM), http://www.cnn.com/2011/HEALTH/03/30/alzheimers.violence.caregiving/index.html.
[94] *Id.* at 18, 27.
[95] *Id.* at 46.
[96] *Id.* at 27.
[97] Jing Xie, Carol Brayne & Fiona E. Matthews, *Survival Times in People with Dementia: Analysis from Population Based Cohort Study with 14 Year Follow-Up*, 336 BRITISH MED. J. 258, 258 (2008).
[98] *Id.*
[99] ALZHEIMER'S ASS'N, *supra* note 92, at 8.
[100] *Id.* at 27.
[101] *Id.* at 6-7.
[102] *Id.* at 7.
[103] *Id.* at 14.

cognitive functioning, is substantively different from PVS. Even when Alzheimer's and other dementias have progressed to the point that the individual has little to no short-term memory, the individual may still be able, at least ostensibly, to enjoy his or her life to a limited extent, e.g., experience some memories, appear to take pleasure in watching television or listening to music, and perhaps even engage in laughter. Thus, triggering provisions in living wills predicated on the cessation of enjoyment-of-life aspects can be highly subjective, non-analytical, and quite arbitrary due to focusing on only limited facets of the human experience.

A more measurable "bright-line" standard would appear desirable as the triggering event, such as a persistent inability to recognize family or friends beyond just a simple recognition of those who are familiar and those who are not, as well as not having a sense of place in one's surrounding environment. The lack of such cognitive ability would be expected to be coincident with a substantial loss in short-term memory and an inability to communicate intelligibly with others and understand the world around them. In short, it would be a life devoid of the elements which make us human and that most persons would consider essential to a meaningful and enjoyable existence. This would be an individual who is essentially experiencing life in the same manner as a person who is at Stage 6 Alzheimer's (moderately severe Alzheimer's) when the individual also has other deleterious facets of living, such as lacking a modicum of functionality and tending to have major personality changes, bowel-control problems, paranoia experiences, shadowing (constantly keeping his or her caregiver in sight) due to fear of being alone, and extreme anxiety, all of which in and of themselves greatly interfere with having any semblance of what one would expect most individuals would consider an acceptable quality of life.[104]

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

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

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

[104] Alzheimer's Ass'n, *Seven Stages of Alzheimer's*, ALZ.ORG., http://m.alz.org/stages-of-alzheimers.asp?sp=true (last visited Aug. 17, 2017).

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

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

Although *Cruzan* did not expressly address such situation involving conscious individuals, one could reasonably conclude that a court is not likely to force someone with a valid living will to undergo medical care prohibited by a living will based on the protection afforded under the Fourteenth Amendment reposing in individuals a right to self-determination regarding their own medical care.[105]

Such conclusion is supported in principle tangentially by a number of prior state decisions. One's competency has no bearing on the exercise of the right to refuse medical treatment because the "right . . . extends not only to the competent but also to the incompetent, 'because the value of human dignity extends to both.'"[106] Thus, a state cannot deprive citizens of their constitutional rights simply because they lack the ability to personally exercise them.[107] New York emphasized this point when it determined that a comatose man had the right to stop artificial means of prolonging life even when he physically could not express his wishes.[108] The explicit wishes of an incompetent patient regarding artificial measures of prolonging life should be respected if expressed while the person was competent.[109] "Wishes expressed in a written document, i.e., a living will, provide the clearest evidence of a person's desires."[110]

Enforcement of a valid living will expressing an individual's medical and health care wishes is subject to challenge based on a state's interest in preserving life.[111] Ending life-sustaining or normally recommended medical care undoubtedly may contribute to a faster death. Thus, as noted above, in the interest of preserving life, a state may require that the Alzheimer's provision clearly and specifically declare the individual's intent as to what medical care the individual desires.[112]

[105] *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).
[106] *Woods v. Kentucky*, 142 S.W.3d 24, 33 (Ky. 2004) (quoting *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 427 (Mass. 1977)).
[107] *Id.*
[108] *Eichner v. Dillon*, 426 N.Y.S.2d 517, 546-47 (N.Y. App. Div. 1980), *modified sub nom. Matter of Storar*, 52 N.Y.2d 363 (N.Y. 1981).
[109] Woods, 142 S.W.3d at 33.
[110] *Id.*
[111] *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280 (1990).
[112] *Id.*

Moreover, the state's interest in preserving life is not absolute.[113] The individual's interest grows as the degree of bodily invasion increases, and the state's interest weakens until "ultimately there comes a point which the individual's rights overcome the state interest."[114] In *Matter of Quinlan*, the court determined that the personal interest of the female in a PVS in terminating her life support outweighed the state's interest because she required 24-hour intensive nursing care, antibiotics, the assistance of a respirator, a catheter, and a feeding tube, all of which the court determined represented an invasion of her privacy.[115]

While individuals with advanced Alzheimer's and similar brain diseases are different from those with PVS in that they have brain function, they still typically require medical care, usually of a quite intensive nature.[116] This may mean 24-hour nursing care and also require a gastrointestinal tube to deliver nutrition. Even if the level of nursing care is not of such an intense nature, such care typically will require antibiotics or medications, both proactive and reactive in nature, to treat a number of maladies that may be present, all of which such individuals unquestionably would have been able to legally decline when competent.

Thus, any legal distinction attempted to be made between the rights of individuals to determine medical care in terminal versus non-terminal situations would appear to be a distinction without any substantive difference. Moreover, any existential philosophical distinction, that there are in essence two individuals involved, i.e., the individual prior to the medical or psychological circumstance and the individual afflicted with such circumstance, is also likely to be deemed too abstruse to be sufficiently persuasive to justify any state intrusion. If an individual has the right to direct whether certain medical procedures are to be applied, e.g., precluding the administering of antibiotics even though they might be needed to sustain life, then such right should be all-inclusive if made while competent, irrespective of whether it might have been made under a living will. Even under Kansas' law authorizing do-not-resuscitate (DNR) directives, medical resuscitation can be legally proscribed, thereby causing death, even if the individual does not have a "terminal condition" at the time the proscribed resuscitation would otherwise have been administered.[117]

Based strictly on *Cruzan* and foregoing prior case law alone, a provision in a living will proscribing medical care and treatment when such individual has no recognition of family or sense of place or environment should be judicially determined to be a proper exercise of an individual's fundamental right to refuse medical care in circumstances where such individual has determined any meaningful quality of life is absent and there is no realistic possibility that such quality of life will ever return.[118] Such proscription does not solicit one's physician to hasten death through unnatural means. Rather, it is a decision "to be let alone" and let natural events take their course. It is reasonable to conclude that courts should uphold such provisions in a living will so long as the individual has clearly demonstrated that he or she does not desire medical care to be provided in such circumstances.

[113] *Woods*, 142 S.W.3d at 42.
[114] *Matter of Quinlan*, 355 A.2d 647, 664 (N.J. 1976), *receded from on other grounds by Matter of Conroy*, 486 A.2d 1209 (N.J. 1985).
[115] *Id.*
[116] ALZHEIMER'S ASS'N, *supra* note 92, at 48.
[117] K.S.A. 65-4941(b) (2015); K.S.A. 65-4943 (1994).
[118] *See generally Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

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

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

One of the judicial assaults on the legal viability of such state-triggering conditions has been from the Supreme Court of Puerto Rico.[119] The *Tirado* decision was centered on Hernandez Laboy.[120] Laboy was a practicing Jehovah's Witness who, in 2004, duly executed an advance statement of living will declaring, because of his religious beliefs and the potential medical risks, his refusal to consent to any blood transfusion regardless of his medical condition.[121] Laboy also designated Roberto Tirado Flecha as his health care executor to make any decision on the acceptance or refusal of medical treatment should he become incompetent.[122]

In 2005, Laboy was injured in a car wreck and taken to a hospital for treatment.[123] At the hospital, doctors determined Laboy's injuries required a blood transfusion.[124] Laboy's wife obtained an *ex parte* order requiring the hospital to perform the transfusion; however, the hospital ultimately disregarded the order once Flecha presented Laboy's advance directives and refused the transfusion on Laboy's behalf.[125] Laboy's wife contested the validity of the advance directives, leading to the court's decision.[126]

During his treatment, Laboy was never diagnosed as being in a terminal condition or PVS, which were the two triggering conditions found in the relevant statute.[127] Thus, to determine if Laboy's advance directives were valid, the court had to determine if advance directives were enforceable in circumstances not specifically allowed by law.[128] The statute governing advance directives specifically stated that "any person of legal age and sound mind may state, in advance and at any time, his or her will to be or to not be submitted to a specific medical treatment in the event of suffering a terminal health condition or a persistent vegetative

[119] *Lozada Tirado v. Testigos Jehova*, 177 P.R. Dec. 893 (P.R. 2010).
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* (citing P.R. LAWS ANN. tit. 24, §§ 3652, 3653, 3655 (2001)).
[128] *Id.*

state."[129] Relevant law also allowed declarants to appoint a person to make health care decisions on their behalf when necessary.[130]

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

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

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

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

The Supreme Court of Florida allowed the guardian of an 86-year-old woman to remove the woman's gastric tube, despite state triggering conditions potentially not being met.[138] When *Browning* was decided one year after the *Cruzan* decision, Florida law authorized a person to execute a living will directing the withdrawal of LSPs in the event such person should have a

[129] *Id.* (citing P.R. LAWS ANN. tit. 24, § 3652)
[130] *Id.* (citing P.R. LAWS ANN. tit. 24, § 3652)
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *In re Guardianship of Browning*, 568 So.2d 4, 9 (Fla. 1990).

terminal condition, which interestingly specifically excluded sustenance from being an LSP.[139] Mrs. Browning executed a document expressing her desire to have LSPs, including medically supplied nutrition and hydration, withheld or withdrawn should she be diagnosed as "terminal" and incompetent to make such decisions, death was "imminent," and there was no hope of recovery from the condition.[140]

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

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

The court, affirming the Second District Court of Appeals which had reversed the finding of the trial court (the Circuit Court) that Mrs. Browning's condition was not terminal within the meaning of the Florida statute, made several findings before ultimately deciding the removal of the feeding tube was proper. First, under the right to privacy found in the Florida Constitution, similar to, but somewhat more broadly construed than the federal constitutional right to liberty under the Fourteenth Amendment addressed in *Cruzan*, a competent individual has the constitutional right to refuse medical treatment, regardless of his or her medical condition.[149] Second, an incompetent person has the same right as a competent person to determine his or her medical care, such right not being lost or diminished due to an incompetence.[150] Third, the state has a duty to ensure that a person's wishes regarding medical treatment are respected.[151] Fourth, Florida has adopted a "substituted judgment" standard when assessing medical decision-making by a surrogate attempting to effectuate the wishes of an incompetent person.[152] Fifth, states have

[139] *Id.* (citing Fla. Stat. §§ 765.01-.15 (repealed 1992)). In addition to being applicable in a terminal condition with no duration limitation, subsequent Florida statutory provisions also included an "end stage" condition and a "persistent vegetative state." Fla. Stat. §§ 765.301-.309.
[140] *Browning*, 58 So.2d at 8.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 9.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 8.
[147] *Id.*
[148] *Id.* at 13-14.
[149] *Id.* at 10 (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990)).
[150] *Id.* at 12 (citing *John F. Kennedy Mem. Hosp., Inc. v. Bludworth*, 452 So.2d 921, 923 (Fla. 1984)).
[151] *Id.* at 13 (citing *Cruzan*, 497 U.S. at 330 (Stevens, J., dissenting)).
[152] *Id.* at 13 (citing *In re Guardianship of Barry*, 445 So.2d 365, 370-71 (Fla. Dist. Ct. App. 1984)).

an interest in preserving life, but this interest is limited where the life may only be extended briefly, rather than cured of any affliction.[153] The court went on to confirm the inherent right of individuals to make choices with respect to their medical treatment encompassing all medical choices, irrespective of their medical condition.[154] Further, such right includes all of such relevant choices, there being no rational basis in differentiating between the types of medical procedures, whether they be life-maintaining, life-prolonging, or life-sustaining.[155]

The court quoted a passage in the case of *Bouvia v. Superior Court*, noting that when an individual has determined that his or her existence has lost all meaning, the state has no right to question such decision to withdraw medical procedures simply due to an arbitrary determination that such condition must persist for a relatively short period of time prior to one's death for such determination to be given legal credence.[156] In deciding on an individual's medical choices, the court quoted an additional passage from *Bouvia*, reasoning that an individual's perception of the quality of his or her life overrides any physician's estimate as to the remaining quantity of such life.[157]

In its analysis, the court held that "when the patient has taken the time and the trouble to specifically express his or her wishes for future health care in the event of later incapacity, the surrogate need not obtain prior judicial approval to carry out those wishes."[158] The court stated "[t]his applies whether the patient has expressed his or her desires in a 'living will,' through oral declarations, or by the written designation of a proxy to make all health care decisions in these circumstances."[159]

The court described the privacy right under the Florida constitution as a fundamental liberty interest, akin to autonomy, whereby such right of self-determination was subject only to a state's compelling and overriding interest.[160] In contrast to *Cruzan,* which found the aforementioned fundamental difference in the right of competent versus incompetent persons to a fundamental constitutional right to direct their own medical care, the latter being subject to a state's interest in preserving life by creating procedures to the exercise of such right erring on the side of life, the court in *Browning* concluded that not extending the same right to incompetent persons would render such right illusory.[161]

Following such analysis, the court ultimately allowed the feeding tube to be removed.[162] Because Mrs. Browning would die within approximately a week after the feeding tube's removal, and the medical testimony indicated that she had no hope of recovering from her stroke, the court found her death was "imminent" and she was in a "terminal condition" as required by

[153] *Id.* at 14 (citing *Satz v. Perlmutter*, 362 So.2d 160, 162 (Fla. Dist. Ct. App. 1978)).
[154] *Id.* at 10.
[155] *Id.* at 11 n. 6.
[156] *Id.* at 10-11 (citing *Bouvia v. Superior Court*, 179 Cal.App.3d 1127, 1142-43 (Cal. Ct. App. 1986)).
[157] *Id.*
[158] *Id.* at 15 (citing *Cruzan*, 497 U.S. at 289–31 (O'Connor, J., concurring)).
[159] *Id.*
[160] *Id.* at 9-12.
[161] *Id.* at 17.
[162] *Id.* at 17.

her living will.[163] In so doing, the court did not specifically address whether her condition was "terminal" as defined under Florida statutory law regarding advance directives.[164]

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

In essence, the court simply found that, despite the fact that the terminology utilized by Mrs. Browning under the provisions of her living will might not literally apply to her condition, her overarching intent was that she abjured life-sustaining procedures from being employed in her condition. Consequently, in finding that any statutory proscription was inapplicable under the facts presented, the essence of the court's finding was that Mrs. Browning had a constitutional right to self-determination regarding her health care wishes, as gleaned from the provisions of her living will, to be fulfilled in her condition untrammeled by any otherwise applicable statutory triggering conditions that might otherwise be judicially construed to negate them.[165]

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

In *In re Gordy*, the Delaware Court of Chancery addressed whether a living will expressing a desire to forego a gastric feeding tube is enforceable when the declarant was arguably not in a terminal condition.[166] The court ultimately determined the declarant was competent to refuse insertion of the gastric feeding tube herself, but specifically authorized her guardian to refuse surgical implantation of a feeding tube in the event she was unable to do so herself pursuant to the living will.[167]

Mrs. Gordy was a 96-year-old who permanently resided in a hospital.[168] By all accounts, she was in good physical health for a person her age; however, her mental condition had begun

[163] *Id.*
[164] *See id.*
[165] *Id.*
[166] *In re Gordy*, 658 A.2d 613, 617 (Del. Ch. 1994).
[167] *Id.* at 619
[168] *Id.* at 614.

to deteriorate.[169] Mrs. Gordy was alert and able to engage in conversation, but medical staff believed that she suffered from Alzheimer's disease.[170] As a result of her withering mental state, she experienced difficulty chewing and swallowing, and had virtually no appetite.[171] Her inability or unwillingness to eat was beginning to severely affect her physical condition, and it was the opinion of the medical staff that she would die within a few weeks if a gastric feeding tube was not surgically implanted.[172] The medical team also believed that Mrs. Gordy could live for an indeterminate amount of time with the aid of a gastric feeding tube.[173]

Because of Mrs. Gordy's nutritional deficiencies, the hospital sought to implant a gastric feeding tube.[174] Her son, Jim Davis, petitioned the court to be appointed as her guardian, so that he could legally deny the hospital consent to insert the gastric feeding tube on his mother's behalf.[175] Mr. Davis' objection to the gastric feeding tube was based on a living will executed by Mrs. Gordy in which she expressly rejected "the use of a feeding tube in the event that she had a terminal illness as diagnosed by two physicians."[176] She had also repeatedly stated her desire not to be sustained through a gastric feeding tube.[177] The State Attorney General contested Mr. Davis' petition, asserting that Mrs. Gordy was not competent to refuse treatment herself, and that under the circumstances it was in her best interest to have the feeding tube inserted.[178] Further, the state argued that Mrs. Gordy's living will was not operative because state law requires the declarant be diagnosed as terminal and that she had not been sufficiently diagnosed.[179]

At an evidentiary hearing, conflicting reports regarding Mrs. Gordy's prognosis were presented.[180] Two doctors testified that Mrs. Gordy was not competent to refuse treatment because she suffered from depression, and Alzheimer's had deprived her of the requisite level of cognition needed to refuse treatment.[181] Conversely, another doctor found Mrs. Gordy "'demonstrated that she understood the consequences of her refusal not only of the procedure but of her limited food intake' and that she 'has made an informed decision when she refuses tube placement.'"[182] Additionally, as the court noted, the medical director of Mrs. Gordy's hospital opined that he believed she was terminally ill due to her neurological disease, and that she was ill-suited for a gastric feeding tube.[183]

[169] *Id.* at 615.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.* at 614, 616.
[175] *Id.* at 614.
[176] *Id.* at 615.
[177] *Id.*
[178] *Id.* at 614.
[179] *Id.*
[180] *Id.* at 616.
[181] *Id.*
[182] *Id.*
[183] *Id.*

Based on the evidence above, the court held that no party had demonstrated Mrs. Gordy was incompetent to refuse insertion of the gastric feeding tube herself.[184] Thus, Mrs. Gordy's repeated objections to the insertion of the tube, including those in her living will, were a valid exercise of her right to refuse consent to medical treatment.[185]

After concluding that Mrs. Gordy was competent to refuse insertion of the medical tube, the court then addressed Mr. Davis' petition to be appointed guardian and his rights regarding medical decision-making going forward, given that Mrs. Gordy would likely become incompetent in the near future.[186] The court granted Mr. Davis' petition to be named guardian based on Mrs. Gordy's physical incapacity, which rendered her unable to properly manage or care for herself.[187] In appointing Mr. Davis as guardian, the court stressed that Mrs. Gordy was still competent and the guardianship was only granted because of her physical condition.[188]

Addressing Mr. Davis' rights as guardian, the court stated it was clear that due to the degenerative nature of Alzheimer's disease, Mrs. Gordy would soon no longer have sufficient mental capacity to make decisions regarding her health care.[189] The court ordered that Mr. Davis was to assume the role of health-care decision-maker once Mrs. Gordy was no longer competent, and that he would be bound to advance her best interest by attempting to replicate the decisions she would make if she were able to.[190] Because Mr. Davis would have the right to refuse insertion of a gastric tube once Mrs. Gordy was incompetent, the court balanced the competing interests of the state and individuals.[191] The court stated the interest of sustaining life was of great value, but courts must consider that humans value dignity and the "ability to experience the joys and benefits of living," as opposed to valuing purely biological life.[192]

Based on the above analysis, the court closed by stating Mr. Davis would have the right to make medical decisions for Mrs. Gordy from this point forward, subject to her competent refusal.[193] The court then stated that once Mrs. Gordy is no longer competent, Mr. Davis "will be specifically authorized to follow his mother's expressed direction to decline the surgical implantation of a gastric feeding tube and to make such other health care decisions as are, in his good-faith judgment," in Mrs. Gordy's best interest.[194]

Perhaps the most important element in the court's determination was that Mrs. Gordy's express wish and advance directive that she not be on life support as a result of medically assisted feeding maintained its legal efficacy, apparently untrammeled by any statutory restrictions in the nature of "triggering devices," irrespective of any subsequent diminution in her legal capacity to make her own contemporaneous health care decisions. The court so concluded

[184] *Id.* at 617.
[185] *Id.*
[186] *Id.* at 618.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.* at 619.
[194] *Id.*

even though it noted that unless another medical condition intervened, Mrs. Gordy could have lived for a quite extended period, even a number of years, with such medical assistance prior to devolving into "end stage" Alzheimer's when her most basic body functioning mechanisms, including the swallowing reflex, would have eventually brought about her death.

Although the court cited the testimony of the hospital medical director that her Alzheimer's condition, in and of itself, made her condition "terminal" in the face of the state's position that Mrs. Gordy's condition did not satisfy the statutory standard, the court made no specific finding as to whether she was in a terminal condition. Indeed, the court, although noting such testimony, went on to conclude that, "more importantly, all of the evidence reflects a complete resistance to the idea of artificial feeding to prolong life."[195] In short, it was reasonably clear that a finding of a "terminal condition" as statutorily required to give legal effect to a living will was not a sine qua non to the court's determination that her wishes as to medically assisted feeding and nutrition were to be honored.

Thus, the court in essence gave legal effect to the provisions of Mrs. Gordy's living will and her other expressed directions, irrespective of whether such direction was apposite with applicable state law.[196] It is also important to note that the court reached its conclusion without expressly relying on any constitutional supercession.

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

The Supreme Court of California has held a conservator may withhold or withdraw artificial nutrition and hydration from a conscious conservatee who is not terminally ill, comatose, or in a persistent vegetative state, and who has not left formal instructions for health care or appointed an agent for health care decision-making.[197]

In *Wendland*, Robert Wendland rolled his truck at a high speed, leaving him conscious yet severely disabled, both mentally and physically, and dependent on artificial nutrition and hydration.[198] Two years after the accident, Mr. Wendland's wife and conservator sought to direct the physicians to remove the feeding tube and allow Mr. Wendland to die.[199] At the time of this request, Mr. Wendland suffered severe cognitive impairment, could not eat or communicate without assistance, and had a deteriorated physical condition due to recurrent battles with multiple medical issues.[200]

Because Mr. Wendland had not executed any advance directives, the hospital's ethics committee was required to consider the request to remove artificial nutrition and hydration.[201]

[195] *Id.* at 617 n. 6.
[196] *Id.* at 619.
[197] *Conservatorship of Wendland*, 28 P.3d 151, 153-54 (Cal. 2001).
[198] *Id.* at 154.
[199] *Id.*
[200] *Id.* at 155.
[201] *Id.*

The committee unanimously approved the request, which was appealed by Mr. Wendland's mother and sister, giving rise to the court's decision.[202]

The court ultimately held that a conservator may remove life-sustaining artificial nutrition and hydration from an individual who is not terminally ill and who did not execute an advance directive, if the conservator can prove by clear and convincing evidence that under such circumstances the conservatee would wish to forego such treatment.[203] In reaching this conclusion, the court held that competent adults have the right to refuse medical treatment, even if treatment is necessary to sustain life.[204] This right is embodied in the United States Constitution and the right to privacy found in California's Constitution.[205] Further, the court found the right to refuse treatment survives incapacity "if exercised while competent pursuant to a law giving that act lasting effect."[206]

After establishing these constitutional and common law rights, the court turned to state law regarding advance directives.[207] In 2000, California adopted the Uniform Health Care Decisions Act ("the UHCDA"), which allows a person to give specific instructions regarding "any aspect" of an individual's health care through an advance directive.[208] The court interpreted this provision to allow an individual to "direct that life-sustaining treatment be withheld or withdrawn under conditions specified by the person and not limited to terminal illness, permanent coma, or persistent vegetative state."[209] It was also noted that a competent person could appoint an agent who is authorized to make such decisions.[210] Based on these statutory grants of authority, the court stated that had Mr. Wendland executed such a document, an agent or surrogate would be required to make health care decisions in accordance with his instruction, given his present condition.[211] Though California's advance directive laws did not contain the triggering conditions found in many other states, the court implicitly authorized removal of LSPs from conscious individuals pursuant to an executed advance directive.[212]

Despite such analysis, the court nonetheless ultimately denied the conservator's request to remove the gastric feeding tube.[213] Due to the competing interests of the state and individuals, the conservator was required to prove Mr. Wendland would want LSPs removed by clear and convincing evidence.[214] The conservator could not meet this burden and the gastric feeding tube was ordered to remain in place.[215] In closing, the court emphasized the narrowness of its decision, stating the clear and convincing evidence standard only applied to "conscious conservatees who have not left formal directions for health care and whose conservators propose

[202] *Id.*
[203] *Id.* at 175.
[204] *Id.* at 158.
[205] *Id.* at 159-60.
[206] *Id.* at 160.
[207] *Id.* at 160–62.
[208] *Id.* at 160.
[209] *Id.* at 160-61.
[210] *Id.* at 161.
[211] *Id.* at 160-61.
[212] *Id.*
[213] *Id.* at 175.
[214] *Id.*
[215] *Id.*

to withhold life-sustaining treatment for the purpose of causing their conservatees' deaths."[216] In short, and as noted above in this article, the court concluded that under its interpretation of the UHCDA, its provisions authorized individuals to execute living wills withholding LSPs that have efficacy, despite the declarant not having been diagnosed as terminally ill or permanently unconscious.

3. Constitutional Protection Favoring an Individual's Interest in Managing Health Care Decisions Through a Living Will May Not Extend to VSED Provisions.

The legal efficacy of an individual going beyond medical care proscriptions in an advance directive, and extending such proscription to nutrition and hydration which can be ingested by swallowing, is more problematic. An individual clearly has the right to voluntarily stop eating and drinking (VSED), typically implemented only when the individual is faced with a progressive, incurable disease the individual deems unendurable. Medical studies have even indicated that VSED can even be a comfortable way to die with the right palliative care.[217]

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

If naturally ingestible nutrition and hydration are proscribed in a condition where quality of life has eroded to the point that the individual specifically directs their withholding in a living will, there should be little legal differentiation between proscribing normally ingested nutrition and hydration and proscribing medically assisted nutrition and hydration. Nonetheless, there is no legal certainty as to the efficacy of such provisions when judicially tested. For example, demonstrating the sensitivity of this issue, Canadian courts have ruled that nutrition and hydration which could be voluntarily ingested had to be provided to Margo Bentley, 83 years of age, a resident of British Columbia and afflicted with dementia, notwithstanding her expression in her living will of a desire not to have a lingering death, under the rationale that her ability to swallow indicated her consent to being so provided.[218]

Summary and Drafting Considerations

Although a judicial affirmation of the efficacy of provisions in living wills addressing the circumstance of lack of cognitive capacity to recognize family and the surrounding environment, irrespective of whether the individual was in a terminal condition, would represent an expansion

[216] *Id.*
[217] Eva E. Bolt et al., *Primary Care Patients Hastening Death by Voluntarily Stopping Eating and Drinking*, 13 ANNALS FAM. MED. 421, 428 (2015).
[218] *See generally* Paula Span, *Complexities of Choosing an End Game for Dementia*, N.Y. TIMES, Jan.19, 2015, https://www.nytimes.com/2015/01/20/health/complexities-of-choosing-an-end-game-for-dementia.html.

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

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

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

[219] *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).
[220] *See generally supra* Part B.1, 2.

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

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

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

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

Once such "bright-line" test is met, almost all medical procedures, whether proactive or reactive, would be proscribed, excepting those necessary to provide comfort care. As noted above in the *Browning* decision, no purpose is served by separately addressing or categorizing the type of medical procedure involved, be it life-maintaining, life-sustaining or life-prolonging. This means the individual would no longer be given medicine to address any medical conditions of any nature, such as blood pressure or cholesterol reducing medicine, and even insulin. The "bright-line" test should be specific as to how recognition of family members or friends and sense of place or environment is to be measured. Only certain limited exceptions might be imposed, such as treatments for external bleeding (e.g., a laceration), a condition that does not

significantly reduce life expectancy which, if treated, would likely reduce the need for pain medication, substantially increase mobility (e.g., a broken bone or back or muscle condition) or meaningfully enhance one's ability to intelligibly communicate with attending medical personnel (e.g., medications which improve lucidity).

Because it might be construed otherwise as ambiguous whether "life-sustaining medical care" within the meaning of the Kansas statutory provision or "medical procedures or treatments" within the meaning of the foregoing provision would encompass artificially ingested nutrition and hydration, the instrument should also specify whether it is intended that medically assisted nutrition and/or hydration is desired in such circumstance. Interestingly, in the past a number of states statutorily prohibited any advance direction that would preclude medically assisted nutrition and hydration,[221] though only one does so today.[222] Obviously, such state prohibitions have federal constitutionality problems. Declarants may proscribe both medically assisted nutrition and hydration, mandate its continuance, or select only medically assisted hydration.

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

Additionally, it may also be advisable to include an additional provision in a living will that it is the declarant's intent that any time the declarant has an incurable condition likely to result in death, irrespective of the declarant's life expectancy, and the declarant is no longer possessed insufficient capacity to make the declarant's own medical care decisions, any medical procedures that the declarant had declined to be administered prior losing such capacity would continue to be proscribed unless and until there was either a change in the declarant's medical condition so that such condition was no longer likely to result in the declarant's death or the declarant has regained the capacity to make the declarant's medical decisions. For example, notwithstanding a declarant suffering from Alzheimer's was still recognizing family members or had a sense of place so as to not yet trigger the provisions of the living will, in the event the individual was then declining all medications while possessed of sufficient capacity to do so, such declination would continue during any period the declarant lacked the capacity to make such decisions even if the triggering provisions of the living will had not yet been satisfied. This should not only ensure the declarant's decisions in that regard would continue to be carried out

[221] *See Compassion in Dying v. State of Wash.*, 79 F.3d 790, 816 n. 70 (9th Cir. 1996).
[222] Mo. Rev. Stat. § 459.055 (2016); *see also* Alan Meisel, *Barrier to Foregoing Nutrition and Hydration in Nursing Homes*, 21 AM J.L. & MED. 335, 365 (1995).

by attending physicians absent a substantial change in the declarant's medical condition and the regaining of sufficient mental capacity to make the principal's medical decisions, but also that they would not be subsequently overridden by a health care agent.

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

An expanded living will form created by the author that addresses not only terminal conditions, but PVS, permanent comas, and mental injuries or diseases such as Alzheimer's resulting in the loss of recognition of family members, friends, and a sense of place, is included in the Appendix to this article. The form requires two witnesses in addition to an acknowledgement. Although the Act only requires an acknowledgement or two witnesses,[223] both are included in the form to ensure both compliance with the clear and convincing constitutional aspect of the declarant's desires to discontinue LSPs and other medical procedures, and enhance its acceptance by medical professionals, most of whom would not be expected to have a familiarity with a form not predicated upon a traditional terminal situation as a triggering event. It includes medically assisted nutrition and hydration options and invokes the individual's constitutional right to determine health care options through advance directives in the event such direction would otherwise exceed state statutory authority, as would be the case in Kansas. It also includes a personal element stating the individual's reasons for proscribing medical procedures when the individual permanently fails to have an acceptable quality of life.

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

The author believes that the Kansas Natural Death Act, in the face of sociological and medical trends, as well as judicial decisions recognizing a constitution right of individuals to execute advance directives effective in situations which may not be considered terminal in the legal or medical sense, should be amended to not only specifically authorize the direction of medical care in PVS and permanent coma situations, but also in all non-terminal conditions as well in recognition of the almost-certain federal constitutional right of individuals to do so. Florida has done just that by broadly defining terminal conditions so as to not link them to a defined period, as well as including "end stage" medical conditions, PVS and permanent coma situations which may be addressed under the provisions of a living will.[224]

[223] K.S.A. 65-28,103(a) (1994).
[224] *See* Fla. Stat. §§ 765.302-.304 (2015).

C. Coordination Between DPAHC and Living Will

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

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

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

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

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

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

On the other hand, some clients, nonetheless concerned that provisions in their living wills may be too broadly interpreted by attending medical personnel or, due to being too specific, may have unintended consequences if given effect. Thus, they sometimes are desirous of either: (a) being conservative in the provisions of their living wills in specifying the circumstances which require the non-application or withdrawal of medical treatment or procedures, thereby intending to rely on the health care agent to make the appropriate decision in other circumstances (assuming such exercise to have legal and practical efficacy); or (b) at least requiring the health care agent's prior consent to a withdrawal or non-application of medical procedures pursuant to such provisions prior to acting. Obviously, the required participation of the health care agent in such decisions presents the same foregoing drawbacks of the agent ultimately making the

decision. Although the author has not found such reticence in clients when dealing specifically with dementia situations under the provisions of a living will, a small minority nonetheless desire the concurrence of a health care agent. However, due to the above-discussed drawbacks of a health care agent's participation in the termination of life-sustaining procedures, the author has seen such consent normally only be required of a spouse serving as health care agent.

D. DO NOT RESUSCITATE DIRECTIVES

The same constitutional and common law rights to self-determination which authorize one to execute a living will prohibiting the use of heroic measures in the event of a terminal illness and incapacity also allow individuals to self-determine whether resuscitative measures be utilized in the event breathing or heart functioning ceases. Typically, individuals who are severely and permanently physically or mentally disabled so as to have no perceived quality of life, are in a severely declining or terminal physical or mental condition, or who are in an intolerably painful health condition, do not wish to be resuscitated in the event they should suffer from a cessation of heart functioning or breathing. Those individuals may so direct under an instrument authorized by the 1994 Kansas legislature known as the "Do Not Resuscitate" Directives Act.[225] In short, in the same manner the Kansas legislature has statutorily recognized such right of self-determination in living wills, Kansas statutory law recognizes such right in Do Not Resuscitate Directives (DNRs).

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

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

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

[225] K.S.A. 65-4941 to 65-4954 (2015).

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

E. CURRENT SOCIETAL, MEDICAL AND LEGAL TRENDS

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

POLSTs

One of these trends is the Physician Orders for Life Sustaining Treatment movement, or POLST for short.[226] A POLST delineates specific orders that an individual with serious health problems (i.e., typically, although not necessarily, an elderly individual having a significant chance of dying within an ensuing twelve-month period), can fill in and request his or her doctor to sign. It typically addresses CPR and mechanical intervention for breathing/ventilation along with other life-sustaining treatments.[227] The POLST is kept on the person and is implemented in different health care settings.[228] Because it is an order of the individual's personal physician, emergency personnel, be they EMTs, paramedics or physicians in emergency rooms, are required to follow the orders in the POLST.[229] In the absence thereof, emergency medical personnel would normally be required to effectuate every medical procedure necessary to sustain life. It also guides current inpatient medical treatment when made available.

A POLST is to be used in conjunction with a living will.[230] Since the POLST is a physician order, it carries significantly more import than a living will in guiding the actions of emergency medical personnel. It also is viewed as having been executed with far less likelihood of coercion or misunderstanding, due to its being the culmination of a conversation with the person's physician. Typically a POLST, like a living will, should be placed by the individual on the back of the front door or in the refrigerator, where emergency personnel are instructed to look for such types of instruments. Unlike a DNR, a POLST can direct medical care beyond just denying resuscitation.[231]

Only states which have demonstrated to the National Paradigm POLST Task Force (NPPTF) that their forms meet NPPTF standards receive its endorsement.[232] States are designated by NPPTF as having no program, a developing program, an endorsed program and a mature program.[233] Three states have the highest level, a mature program. Twenty-two states, including

[226] Thaddeus Mason Pope & Melinda Hexum, *Legal Briefing: POLST: Physician Orders for Life-Sustaining Treatment*, 23(4) J OF CLINICAL ETHICS 353, 353(2012).
[227] *Id.* at 355.
[228] *Id.* at 354.
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.* at 355.
[233] *State Programs*, NAT'L POLST PARADIGM, http://polst.org/programs-in-your-state/ (last visited June 29, 2017).

Kansas, currently have a NPPTF-endorsed POLST program.[234] Twenty-four states have a program in development.[235] Two states have not initiated any program.[236]

The Kansas POLST program is being developed by the Kansas-Missouri Transportable Physician Orders for Patient Preference (TPOPP) coalition located at the Center for Practical Bioethics in Kansas City, Missouri.[237] A pilot program in Topeka has been tested.[238] A Wichita-Sedgwick County Steering Committee was formed in 2012 to foster a TPOPP program in the Wichita metropolitan area.[239]

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

Five Wishes Program

Another recent program gaining considerable ground is the Five Wishes program. Rather than being the implementation of medical care by physician directive in concert with a patient such as with the foregoing POLST program, Five Wishes is a living will proposed by the Aging with Dignity organization.[240] It is intended to be understandable by the vast majority of the population and is legal and effective in 42 states and the District of Columbia.[241] The other eight states, including Kansas, per the organization's website, require a separate living will instrument.[242] This is the organization's conclusion because Kansas statutes require a living will form to be in substantially the same form as that provided in the statute.[243] However, although certainly desirable to also have a separate living will irrespective of medical directions under the POLST program, such Kansas statutory provisions providing that a form in substantial compliance with the statutorily provided form will satisfy the statutory criteria, should probably not be construed as precluding medical directions solely under the Five Wishes form.

Due to its foregoing construction of the governing Kansas statutory provisions, the organization's website suggests that users in such eight states also execute an additional living will form in compliance with state statutes.[244] Even if the Kansas statute was intended to be read on a restrictive basis both as to format and content, such restrictions should be of no legal effect to the

[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *TPOPP Transportable Physician Orders for Patient Preferences*, CTR. PRAC. BIOETHICS, https://www.practicalbioethics.org/programs/transportable-physician-orders-for-patient-preferences (last visited June 29, 2017).
[239] *About TPOPP*, TPOPP WICHITA, http://tpoppwichita.com/?page_id=37 (last visited June 29, 2017).
[240] *Five Wishes*, AGING WITH DIGNITY, https://www.agingwithdignity.org/five-wishes (last visited June 29, 2017).
[241] *Id.*
[242] *Id.*
[243] K.S.A. 65-28,103(c).
[244] *About TPOPP*, *supra* note 238.

extent they violated federal constitutional rights to self-determined medical direction under the Fourteenth Amendment. Nonetheless, state statutory witness or notary provisions in living wills should be complied with to ensure such direction, to the extent it might possibly be construed to be satisfied by execution of the Five Wishes form alone, and satisfies the state's interest in providing for "clear and convincing" evidence of such declarant's intent as to his or her medical care.

The Five Wishes form has a lot of personal elements included in its directions beyond just medical care dictates.[245] It also does not address Alzheimer's types of situations other than leaving open-ended additional directions for non-terminal situations. Beyond such omission, the author is not particularly enamored with its rather basic format, informality, somewhat treacly expressions of sentiment, and inclusion of provisions which many individuals would likely deem inappropriate for inclusion in their living wills, more appropriately placed in health care powers of attorney, or simply left to the discretion of the health care agent.

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

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

Death-with-Dignity Movement

In a nationwide poll taken in 2014, 74% of Americans felt that terminally ill persons in great pain should have the right to end their lives.[246] Only 14% were in opposition.[247] Strong majorities, i.e., 72%, in what is termed the "death-with-dignity" movement, also favored physician-assisted suicides, while only 15% were opposed.[248] Both solid majorities in favor are up from polls taken in prior years. A Gallup poll in 2015 showed similar results, with 68% of Americans favoring physician-assisted suicide. [249]

Living wills that proscribe certain medical treatment or procedures in certain circumstances where the individual has insufficient capacity to make his or her own medical decisions normally require passivity on the part of medical personnel, unless medical personnel are required pursuant to

[245] *Id.*
[246] Dennis Thompson, *Most Americans Agree with Right-to-Die Movement*, HARRIS POLL (Dec. 5, 2014), http://www.theharrispoll.com/health-and-life/Most_Americans_Agree_With_Right-to-Die_Movement.html.
[247] *Id.*
[248] *Id.*
[249] Andrew Dugan, *In U.S., Support Up for Doctor-Assisted Suicide*, GALLUP (May 27, 2015), http://www.gallup.com/poll/183425/support-doctor-assisted-suicide.aspx.

its provisions to withdraw proscribed life support that has already been improperly administered. Physician-assisted suicide puts medical personnel in a more active posture, albeit in response to the request of a patient to provide medication that will end his or her life. Although it is the physician who supplies the life-ending medication, it is the patient who has to be able to initiate and follow through on the process of ingesting or taking such medication. This is different from physician euthanasia, when it is the physician who administers such medication, albeit only at the specific direction of the patient or pursuant to an advance directive.

Seven jurisdictions now permit physician-assisted suicides, i.e., California, Colorado, District of Columbia, Montana, Oregon, Vermont and Washington.[250] Montana allows it pursuant to a judicial decision.[251] The other five states permit it through legislation and require a terminal illness with less than six months to live, at least two oral and one written request for such physician assistance, and certain physician protocols that are required to be followed.[252] In recent years, Kansas has had two legislative bills which, had they been enacted into law, would have permitted physician-assisted suicides in circumstances similar to the law in Oregon.[253] In 2013, H.B. 2068 was introduced.[254] In 2015, H.B. 2150 was introduced.[255] Both died in Committee. No states currently permit physician euthanasia, i.e., a physician directly administering lethal drugs at the direction of a patient, whether contemporaneously or pursuant to an advance directive.

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

Conclusion

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

As an ineluctable consequence, provisions in health care powers of attorney often fail to provide comprehensive authorization, properly coordinate with provisions in the living will, address such issues as whether the agent is to be compensated or the potential liability of the agent for

[250] Bradford Richardson, *D.C. Physician-Assisted Suicide Law Goes into Effect*, WASH. TIMES (Feb. 18, 2017), http://www.washingtontimes.com/news/2017/feb/18/dc-physician-assisted-suicide-law-goes-effect/.
[251] *See Baxter v. State*, 224 P.3d 1211 (Mont. 2009).
[252] *See e.g.,* OR. REV. STAT. § 127.815 to 127.880 (1995).
[253] H.B. 2068, 2013 Leg., Reg. Sess. (Kan. 2013) (not enacted); H.B. 2150, 2015 Leg., Reg. Sess. (Kan. 2015) (not enacted).
[254] H.B. 2068, 2013 Leg., Reg. Sess. (Kan. 2013) (not enacted).
[255] H.B. 2150, 2015 Leg., Reg. Sess. (Kan. 2015) (not enacted).

good-faith decisions, or sometimes even provide for the proper succession of agents and the determination of the disability of an agent. All too often, many important health care determinations the client could have made in advance directives are by default undesirably relegated to health care agents who may make a decision based at least partially on an economic conflict of interest or who would otherwise not make the decision the principal would have desired. The result is not only uncertainty as to such decision-making, but an imposition of unnecessary emotional anxiety on the part of the health care agent upon whom such burden is placed and the frequent creation of significant family disharmony regarding such issues in the process.

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

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

APPENDIX

Living Will
(DECLARANT)

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

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

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

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

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

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

Medical Care

With respect to my medical care, should I be in any of the foregoing three (3) conditions, I direct that any such otherwise-applicable medical procedures and treatments (including but not limited to surgery, drugs, dialysis, transfusions, CPR, respirators, ventilators and preventive medicine procedures such as vaccinations to prevent diseases), whether life-sustaining or not, and irrespective of whatever medical afflictions or conditions, however serious or detrimental to my health they may be, that I might have at the time (e.g., a condition such as hypertension or high cholesterol, a disease such as diabetes or cancer, or a heart, liver, kidney, gastrointestinal or respiratory condition), be withheld or withdrawn following such diagnosis or certifications, excepting only medications and medical procedures my attending physician has deemed necessary or desirable to:

(1) Provide me with comfort care, including maintaining my hygiene and mobility to the extent reasonably possible to maximize comfort and to prevent complications of immobility, incontinence and other consequences (e.g., pressure ulcers, uncomfortable skin conditions, or complications of poor dental hygiene), as well as medications or medical procedures (in doses and frequency necessary to maximize comfort) which alleviate pain irrespective of potential side effects (e.g., such medications may be habit forming, make me sleepy, suppress my appetite, reduce breathing efficiency, or otherwise may adversely affect my general health or mental attentiveness);

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

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

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

Nutrition and Hydration

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

____ Discontinue medically assisted nutrition and hydration; or

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

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

***[Required Notice]**

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

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

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

Declaration to be Honored

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

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

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

_____
DECLARANT

WITNESSES:

_____

_____
Print Name

_____

_____
Print Name

ACKNOWLEDGMENT

STATE OF KANSAS)
) SS
COUNTY OF _____)

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

_____
Notary Public

My Appointment Expires:

Estate Planning for Asset Protection

Presented by Tim O'Sullivan, JD, LLM

Summary

In this presentation, Tim will address estate-planning techniques that maximize asset protection for clients and their family members, including a discussion of what assets are exempt from creditors, the ownership of property by a client and his or her spouse, the role of "umbrella" policies, the use of LLCs, lifetime or "generation-skipping" trusts for family members, and how reciprocal irrevocable trusts between spouses can afford significant asset protection while achieving estate-planning goals. Tim will also cover ethical and substantive "traps" for attorneys who do not conduct proper due diligence.

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Estate Planning for Asset Protection

Timothy P. O'Sullivan

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What Asset Protection Objectives can be Attained Through Estate Planning?

- Asset Protection Sought
  - Creditors
  - Tort Claims
  - Spousal Claims, Estate Taxes, and Medicaid Eligibility
- Methods of Achieving Creditor Protection
  - Insurance
  - Conversion of Non-Exempt to Exempt Assets
  - LLCs and Limited Partnerships
  - Third Party Trusts
  - GSTs for Trust Beneficiaries

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What Asset Protection Objectives can be Attained Through Estate Planning?

- Purchasing an "Umbrella Policy"
- Conversion of Non-Exempt Assets to Exempt Assets
- Transfer of Assets to a Spouse during Lifetime
- Use of FLPs and LLCs
- Minimizing Exposure to "Doctrine of Necessaries"
- Use of "Delaware Business Trust"
- Avoiding "Fraudulent Conveyances"

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What Asset Protection Objectives can be Attained Through Estate Planning? Cont'd.

- Creation of Irrevocable Self-Settled Trust for Grantor's Benefit
  - Other States, e.g., Alaska, South Dakota, Nevada
  - "Offshore" Trusts, e.g., Cayman Islands, Isle of Man
- Creation of Irrevocable Trust for the Benefit of a Spouse or other Third Party
  - Framework of Spousal Limited Access Trusts (SLATs)
  - Creating Non-Reciprocal Spousal SLATs
  - GSTs for Trust Beneficiaries
- Avoiding Creditor Claims at Death
  - Avoiding Probate Essential
  - Revocable Trusts and Estates Subject to Claims
  - Structuring Beneficiary Designations to Irrevocable Trusts

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Estate Planning for Asset Protection

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WHAT ASSET PROTECTION OBJECTIVES CAN BE ATTAINED THROUGH ESTATE PLANNING?

Among the current palpable trends in estate planning is the desire for asset protection. This trend has been driven by computerization, which has greatly enhanced the sophistication and comprehensiveness of provisions which can be economically incorporated in trust documents. It has also been driven by external forces, such as the increasingly litigious nature of our society, a high divorce rate, a trend toward increasing spousal forced inheritance rights at death, a high estate tax rate, and over the last several decades, an enhanced ability for the elderly and disabled to qualify for governmental resource benefits with proper estate planning. However, this trend is far from a bandwagon. Even today, a high percentage of estate plans still give only a modicum of attention to this issue. Estate planners should not view asset protection as just a facet of an expanded practice, but as an important goal for a high percentage of their estate planning clients.

Although the discussion below addresses in summary form asset protection strategies not involving trusts, the principal thrust is the manner in which asset protection can be achieved through the careful crafting of trust documents. Throughout the discussion is the common thread of achieving flexibility in trust provisions. This flexibility is achieved by giving the trustee broad authority to make discretionary distributions to multiple beneficiaries, giving the trustee broad investment authority, giving family members who are beneficiaries limited powers of appointment to alter the disposition of trust assets upon trust termination at their death, allowing the trust situs to be changed when advantageous to beneficiaries, and in providing for the proper altering of trust provisions by authorizing a Special Trustee to make appropriate trust amendments upon changed circumstances or in any other instance when outside or family circumstances impede the carrying out of the grantor's specific intent. The overall goal is to minimize, as much as possible, the substantive differences between outright ownership versus a beneficial interest in trust assets, without significantly compromising important asset protection objectives.

Asset Protection Sought

In the absence of the appropriate use of sophisticated estate planning techniques, there can be a substantial unintended diversion of estate assets to third parties, thereby reducing the amount of assets available for the support, maintenance and health needs of adversely affected beneficiaries and the amount of assets they are able to pass to other family members or other intended beneficiaries by gift or under their estate plans following their deaths.

One type of diversion that can quickly erode the value of an estate is a creditor claim. There are three main subcategories of creditor claims. One such subcategory is tort claims, such as a negligence claim. Annual litigation costs in the United States are estimated at $500 billion. Although estimates vary, the average American can expect to be sued approximately 2-3 times during his/her lifetime. Some of these risks either may not be insurable or insurance may not be sufficient to cover many of the large judgments which are being rendered. Moreover, there have been recent concerns about the stability of insurance companies. In addition, many view large liability policies as being a "magnet" for litigation.

Another subcategory of creditor claims is contract claims. Contract liabilities can arise in various contexts, including the commercial area, consumer debt, vicarious partnership liabilities, or from personal guarantees. However, the biggest cause of bankruptcy are medical bills either not covered by insurance or which are in excess of coverage.

A third type of creditor claim is a governmental claim. For example, in the labyrinth which is the Internal Revenue Code, many income tax liabilities may not only be unforeseen, but substantial in nature. Depending upon the circumstances, substantial understatement, failure to pay or negligence penalties may also be applicable. Substantial liability risk also is present under the myriad of governmental regulations designed to achieve social policy or environmental goals. For example, the Occupational Safety and Health Act ("OSHA") and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") allow the government to impose substantial fines and environmental "clean up" costs, respectively. In the case of "CERCLA," liability can be imposed irrespective of fault; insurance may be unavailable and clean-up costs can be enormous. Resource availability may also cause the erosion of assets due to denial of governmental benefits, such as Medicaid or Supplemental Security Income ("SSI"), thereby causing what might otherwise be an avoidable required “spend down” of the assets of an applicant prior to qualifying for such benefits. Further, federal law, under the OBRA 1993 provisions, mandates each state enact a claim law against at least the probate assets of a Medicaid recipient. For example, Kansas law allows the administering state agency, KDHE (formerly “SRS”) to file a claim against the estate (whether a probate estate or a non-probate estate passing under the provisions of a revocable trust or through joint tenancy or a beneficiary designation) of an unmarried recipient of Medicaid benefits and the estate of a recipient's surviving spouse to recoup all Medicaid benefits paid to the recipient.

Significant asset diversion may also result from a spousal claim. This can occur at death through a forced inheritance claim of a surviving spouse. Kansas law, as is the case with many other states, permits a spouse to file a “spousal elective share” claim for certain amounts and portions of a predeceased spouse’s estate in the absence of a waiver of such claim under a premarital agreement or the surviving spouse’s consent to the predeceased spouse’s estate plan.

Spousal claims may also result from a claim incident to a divorce or separate maintenance proceeding. Premarital agreements, depending upon applicable state law, may afford substantial asset protection in some states (which they do with regard to Kansas residents under the Kansas Uniform Premarital Agreement Act), but in other states may be able to be set aside if a court determines its provisions to be inequitable. In all jurisdictions, they must be comprehensively drafted to afford protection and are subject to litigation with regard to any ambiguities. They also normally present undesirable emotional elements and an accord may not be reached.

Estate taxes may also extract a substantial portion of one’s estate at death. Unless a state in which the decedent died or the decedent has property having a situs in another state having an estate or

inheritance tax, which Kansas presently does not, this extraction is primarily in the form of federal estate taxes at a high marginal rate (40%) on estates over the $11.4 million applicable exclusion amount for 2019.

Methods of Achieving Creditor Protection

The manner in which such protection is achieved with respect to creditor claims is principally through one of seven techniques: 1) purchasing an "umbrella" liability policy; (2) maximizing the assets which are exempt from the claims of creditors; 3) transferring assets not exempt from creditor claims to a spouse; 4) transferring assets to entities such as limited liability companies (LLCs) or family limited partnerships (FLPs); 5) creating a trust for the benefit of the settlor (the person creating the trust); 6) creating a lifetime or testamentary trust for the benefit of a spouse, children or other beneficiaries; and 7) creating an irrevocable trust to be the recipient of the Grantor's assets upon the Grantor's death by virtue of a beneficiary designation.

Purchasing an "Umbrella Policy"

A consideration with respect to asset protection for tort claims is the purchase of an "umbrella policy" to cover liability exposure with respect to large claims either in excess of that provided by other insurance the individual has or to cover situations in which the individual has no coverage. Such coverage is typically inexpensive due to the fact that large claims are relatively uncommon. It is too often overlooked and should be the first consideration prior to considering the other asset protection techniques discussed below.

Conversion of Non-Exempt Assets to Exempt Assets

Kansas laws which exempt certain assets from the claims of creditors are some of the most liberal in the nation. Kansas is only one of seven states which provide a total exemption on the value of a home from the claims of creditors (and up to 160 contiguous acres if the residence is in the county outside the city limits). In addition, Kansas exempts the value of a car, qualified retirement plans (also exempt under federal bankruptcy laws), IRAs (both regular and Roth) and most life insurance.

By converting non-exempt assets, such as cash, into exempt assets, additional assets can be protected from the claims of creditors. However, although Kansas creditor exemptions are also applicable in a federal bankruptcy proceeding, the Kansas exemptions do not apply to federal tax claims, which have much more limited exemptions. Nor do they apply to debt secured by exempt property which the debtor has voluntarily encumbered, e.g., a residence secured by a mortgage. It is also important to note that the 2005 federal bankruptcy law changes extend from 30 days to 1215 days the time period prior to bankruptcy in which an individual may purchase a home and still protect it from creditors in a bankruptcy proceeding.

Transfer of Assets to a Spouse during Lifetime

As a second approach to asset protection, it is important to consider that spouses are not normally liable for the debts of their spouses, unless agreed to in writing, e.g., under a promissory note co-signed by both spouses. An exception is what is called the "doctrine of necessaries," in which a spouse can be held

liable for the basic living needs of a spouse in the event a debt arises with regard to such "necessaries" (normally uninsured health needs), and the creditor has been unable to satisfy the debt through litigation and attaching the assets of the debtor spouse.

Consequently, absent a creditor claim which could cause the transfer to be deemed a fraudulent conveyance under the Kansas Uniform Fraudulent Conveyance Act, non-exempt assets normally can be transferred as part of the estate planning process to a spouse and thus gain protection from the creditor claims of the transferring spouse.

However, such transfers under certain circumstances may have an adverse effect upon a property division should the couple later divorce (e.g., one spouse transfers property that was inherited by such spouse or brought into the marriage to the other spouse). Under Kansas law, all property accumulated by spouses do due their separate or joint efforts during the marriage is normally evenly divided by the court in a divorce or under a separate maintenance decree, irrespective of which spouse owns it. Although property brought into the marriage or inherited during the marriage is normally given special consideration by Kansas courts in favor of the inheriting party or the party who brought the property into the marriage under a property division in a subsequent divorce, this benefit could be lost if the spouse who brought the property into the marriage or who received it by gift or inheritance during the marriage transfers it in whole or in part to his or her spouse notwithstanding it was only for asset protection purposes.

Use of FLPs and LLCs

A third method of asset protection is to transfer assets to an entity affording protection under statutory law from the claims of creditors. For example, transferring assets to a corporation or limited liability company (LLC) can afford protection from personal liability for what is termed vicarious liability, i.e., the actions or negligence of other employees or members of the corporation of LLC. It is important to remember, however, that a member nonetheless remains personally liable for the member's own actions. Thus, a physician operating under a professional corporation would remain liable for his or her own negligence. Moreover, a sole member LLC having no employees other than the sole member affords no creditor protection for tort claims against the sole member. If there are employees of a corporation or LLC other than the stockholder or member, protection against vicarious liability is afforded. In any case, all corporate or LLC assets normally will remain subject to liability claims for the actions of personnel in the furtherance of the business purpose of the entity.

Creating an entity such as an LLC or family limited partnership (FLP) thus limits the availability of assets to satisfy an "outside claim" against an LLC member or partner in the FLP, i.e., a claim personal in nature unrelated to the member's or partner's activities with the LLC or FLP. Normally, creditors who attach an LLC or FLP interest to satisfy a personal liability claim of a member or partner can only receive what is termed a "charging order", i.e., the right to receive distributions if and when the other members of the LLC or general partners of the FLP decide to make distributions. Such creditors normally cannot compel a distribution of LLC or FLP assets to the member or partner, nor force a liquidation of the LLC or FLP. Further, following the attachment of an LLC or FLP interest to satisfy a claim or judgment of a member or partner, creditors will

"step into the shoes" of the member or partner for income tax purposes. This normally results in the creditor being taxed upon the member's or partner's share of income of the LLC or FLP, even if such income is not distributed and retained in the LLC or FLP for business purposes. This is what has been termed the "KO" by the K-1. Consequently, a creditor is normally quite reluctant to attach or execute upon a member's or partner's interest in an LLC or FLP to satisfy a personal liability of the member or partner.

Use of "Delaware Business Trust"

The laws of Delaware also permit the creation of an entity similar to an FLP or LLC in its structure called a "Delaware business trust." A "Delaware business trust," like an FLP or LLC, can be favorably taxed as a partnership. Moreover, the beneficial interest of its beneficiaries who contributed property to the trust may be transferred. However, unlike an interest in an FLP or LLC, a creditor of a trust beneficiary cannot attach the interest and get the benefit of a "charging order" in the event later distributions are made out of the trust. However, these entities must be set up under the laws of the state of Delaware.

The benefits of creating an LLC or FLP, or a "Delaware business trust" for the purpose of limiting the ability of a creditor to satisfy a claim against a member or partner must be balanced against its attendant costs, any taxation issues, and organizational complexities.

Creation of Irrevocable Trust for Grantor's Benefit

The fourth strategy is to transfer assets into an irrevocable trust for the benefit of a trust beneficiary or beneficiaries. However, with respect to a settlor transferring assets to an irrevocable trust for the benefit of the settlor (the person creating the trust), the laws of most states are quite unfavorable to this technique. Such trusts are termed "self-settled" trusts, as they are created by the settlor (also sometimes referred to as the "grantor") for the benefit of the settlor. Due to public policy considerations incorporated into common law or under state statutes, most states, including Kansas, proscribe the ability of a settlor to transfer assets owned by the settlor, which were subject to the claims of a spouse or creditor of a settlor prior to the transfer, into an irrevocable trust which protects the trust assets from creditor claims while the settlor continues to enjoy a beneficial interest in the trust assets. Assets in these trusts normally remain subject to most claims of the creditors of the Grantor to the extent that the assets of the trust are distributable, even in the trustee's discretion, to the Grantor.

An exception is for "offshore" trusts not governed by U.S. law, such as in the Isle of Wright or Cayman Islands, the laws of which exempt self-settled trust assets from being subject to the claims of the Grantor's creditors. However, "offshore" trusts not only have an element of risk to uncertain laws, as they have a situs outside the United States, they can be quite expensive to create and maintain and there is no guarantee they will be effective due to the "full faith and credit" clause of the United States Constitution.

In recent decades, however, laws have been enacted in some states (e.g., Alaska, Rhode Island, Nevada and Delaware) to provide significant creditor protection to settlors of certain types of "Grantor Trusts" created and maintained (by requiring a local trustee) in their states. The potential drawbacks are exceptions from creditor protection in the laws of these states with respect to certain claims against the

settlor, additional expenses incurred in creating such "out of state" trusts, and the degree of creditor protection truly afforded by creating a trust which has a more favorable creditor protection situs than under the laws of the state of the Grantor (such as an Alaskan trust created by a Kansas domiciliary) is not yet well settled.

Moreover, the 2005 federal changes in bankruptcy laws ("The Bankruptcy Abuse and Consumer Protection Act of 2005) will have a negative effect on the use of these self-settled trusts set up in the foregoing states as an asset protection technique. Normally, federal law has a two year "look back" for fraudulent conveyances designed to avoid creditor claims. The 2005 bankruptcy laws changed this "look back" to ten years with respect to self-settled trusts. This extended "look back" period conceivably may not only apply to transfers to avoid an existing creditor claim, but perhaps also transfers designed to avoid future creditor claims as well.

Consequently, as a result of the foregoing costs and uncertainties, whether such "self-settled" trusts are created "offshore" or under the law of a state sanctioning them, irrevocable trusts created for the benefit of the Grantor normally should be viewed as an asset protection technique of last resort.

Creation of Irrevocable Trust for the Benefit of a Spouse or other Third Party

The laws of all states are much more favorable with regard to creditor protection for claims against a trust beneficiary if the trust beneficiary did not create the trust for his or her benefit. These so-called "third party" trusts are created when an individual transfers assets to an irrevocable trust which is either created during lifetime or at death under a testamentary trust (created under a will or revocable trust) for the benefit of a person or persons other than the grantor who created it. Properly drafted, such "third party" trusts can provide for the needs of the trust beneficiaries, while at the same time substantially protecting assets from the claims of the beneficiaries' creditors or a spouse of a beneficiary.

The reason these types of trusts are treated much more favorably than "self-settled" trusts with respect to claims of the creditor of trust beneficiaries is that the assets in the trust were not owned by the beneficiaries and subject to the claims of their creditors prior to the transfer. Thus, the public policy of almost all jurisdictions as reflected in common law or state statutes is to permit a settlor to leave assets in trust (either during lifetime or following death under a testamentary instrument such as a revocable trust) for beneficiaries other than the settlor with whatever restrictions the settlor wishes to provide in the trust instrument with regard to such matters as to who is entitled to a trust distribution and under what circumstances distributions of trust assets are authorized while still affording substantial asset protection against third party claims against the beneficiary.

Protection from creditor claims in "third party" trusts is achieved through the inclusion of what is termed a "spendthrift clause" in the trust instrument. "Spendthrift clauses" preclude a creditor of beneficiary from attaching trust assets to satisfy a claim a creditor may have against a beneficiary (e.g., a tort or contract claim), including a claim of a spouse of a beneficiary (including that of a subsequent spouse of a surviving spouse of the person creating the trust), such as otherwise might result from a divorce or forced inheritance

claim following the beneficiary's death. Although spendthrift clauses are generally recognized by courts interpreting governing state law across the country, some states have carved out exceptions to the validity of "spendthrift clauses" regarding certain types of creditor claims, e.g., support obligations owing to a spouse or children, either by statute or under common law.

Although Kansas courts had not previously recognized any common law exceptions to the validity of spendthrift clauses (perhaps due to such issues not being raised), spendthrift clauses were given further efficacy under legislation enacted this past decade. The 2002 Kansas legislature passed, and Governor Graves signed into law, the Uniform Trust Code (the UTC), effective January 1, 2003. The UTC, as modified and enacted in Kansas, has no exceptions to the protection afforded by a spendthrift clause from the claims of creditors of beneficiaries, including spouses, with respect to discretionary distributions in which the debtor/beneficiary was not the sole trustee, including their spouses. The exceptions that were in the UTC were deleted when Kansas enacted the UTC. Moreover, such statute provides that a spendthrift provision, which restrains involuntary or voluntary transfers of the beneficiary's interest, may be created simply stating that the assets are being held in a "spendthrift trust." With regard to discretionary distributions, such clauses are valid even if the trustee has abused the trustee's authority in not making a required distribution. However, if the beneficiary is serving as sole trustee, discretionary distributions to the beneficiary must be limited to the beneficiary's health, education, maintenance and support needs for the trust estate to be afforded asset protection against the beneficiary's creditors. The only exception to such asset protection is for mandatory distributions of income or principal if such distributions have not been made within a reasonable amount of time. As such, Kansas has one of the strongest statutes in the country giving effect to spendthrift clauses. This statute should preclude a Kansas court from creating any common law exceptions.

If the principal beneficiary is not financially responsible or suffers some disability or undesirable spousal influence, a third party could be named as trustee of a trust created for such beneficiary's benefit to ensure the trust assets are responsibly managed. However, if the principal beneficiary has legal capacity and is mature and responsible, under a carefully crafted trust such beneficiary normally may be named to serve as his or her own trustee without compromising the asset protection objectives of the trust. For example, as above noted, the trust may provide for discretionary distributions for the beneficiary's health, education, support and maintenance, with distributions being authorized to be made by the trustee indirectly for such purposes to third parties for the benefit of the beneficiary to minimize exposure to creditor claims. In addition, the beneficiary may be given what is termed a "limited power of appointment" (exercisable under the provisions of the beneficiary's will or revocable trust) which authorizes the trust beneficiary to determine the amounts and manner in which the trust assets are to be distributed upon the beneficiary death, e.g., to the beneficiary's spouse or children, other descendants of the person creating the trust, or charities. With this technique, assets can be left in a trust having the foregoing attributes which give the principal beneficiary property rights almost akin to outright ownership, while still affording substantial protection of the trust estate from the claims of the principal beneficiary's spouse and creditors.

In order to maximize the benefits of this technique regarding assets left in trust for a spouse, as it normally cannot be ascertained with any reasonable degree of certainty which spouse will predecease the other, as noted elsewhere in this Guide, each spouse may give the other what is termed a "reciprocal general power of appointment" under the provisions of their wills or revocable trusts. This appointment right would permit each spouse, should they predecease the other spouse, to "appoint" the assets of the surviving spouse so as to be distributed under the provisions of the predeceased spouse's will or revocable trust. By virtue of this technique, all of the assets owned by both spouses at the time of the predeceased spouse's death (other than assets in tax deferred annuities, qualified retirement plans and IRAs which would occur immediate income taxation if they could be appointed under this technique) normally can pass at the time of the first spouse's death under the provisions of the predeceased spouse's will or revocable trust and thus be left in an asset protection trust for the benefit of the surviving spouse. This will not only protect the assets of the predeceased spouse left in trust for the benefit of the surviving spouse from the claims of the surviving spouse's creditors, but, although the issue is subject to some uncertainty, quite possibly the assets of the surviving spouse appointed under the provisions of the predeceased spouse's will or revocable trust in trust for the benefit of the surviving spouse as well. In addition, it also should afford significant asset protection of assets so left in trust for the surviving spouse from a divorce or inheritance claim of a "new spouse" should the surviving spouse remarry as well as legally preclude the surviving spouse from voluntarily transferring (perhaps as a result of pressure from the "new spouse") any of such trust assets to a "new spouse."

Although not strictly under the umbrella of "asset protection," such as that provided with respect to creditor and spousal claims, tax savings and increased governmental resource benefits obtainable through the creation of properly drafted "third party" trusts (i.e., not a "self-settled" trust, but a trust created for a third party either during lifetime or at death) should also be considered. Assets left in such "third party" trusts having the foregoing provisions can be excluded from a beneficiary's estate for federal and state death tax purposes (although trust assets may be subject to the possibility of a "generation-skipping tax" in larger estates). In addition, as trust income is normally taxable to the beneficiary receiving a distribution of trust income, the trustee may be authorized to distribute trust income to beneficiaries other than the primary beneficiary, e.g., the children of the primary beneficiary, in circumstances where the needs of the primary beneficiary are otherwise satisfied. This has the potential for taxing the trust income at income tax brackets lower than that of the primary beneficiary (subject to some exceptions, including taxing the income of minor beneficiaries at the income tax brackets of their parents).

Finally, the assets of a properly drafted "third party" trust normally should not be considered a resource to trust beneficiaries so as to disqualify such beneficiaries from Medicaid, SSI, or other types of otherwise available government benefits, provided the trust distributions are discretionary, such as for health, education, maintenance and support needs and are additionally specifically made specifically supplemental to Medicaid or governmental resources in general. However, due to a Kansas Supreme Court decision a few years ago, to the extent the surviving spouse had survivorship rights to the predeceased spouse's estate (e.g., spousal allowance, homestead and elective share to the augmented estate), even if waived, such spousal rights portion of such assets left in trust for a surviving spouse will still have to be "spent down" under Kansas law prior to a surviving spouse qualifying for SSI or Medicaid benefits.

The foregoing high level of asset protection afforded by "third party trusts" cannot be obtained by leaving property outright to beneficiaries or providing for mandatory distributions of trust income or principal to trust beneficiaries (e.g., trust income or outright distributions of trust principal at certain ages). Once property is distributed outright to a beneficiary, options to protect assets from creditor claims of the beneficiary become much more restrictive. Normally, such options are limited to those listed above, i.e., converting non-exempt assets into assets exempt from the claims of creditors, transferring assets to a spouse, creating an entity such as an FLP or LLC, or creating a "self-settled" trust. Even should a "self-settled" trust be able to achieve some measure of asset protection (albeit usually at significant additional cost), unlike "third party" trusts, normally the income of the trust would be taxable to the beneficiary creating the trust irrespective of whether it was accumulated in the trust or distributed to the settlor or other beneficiary of the trust, the assets in any such "self-settled" trust would still be includible (as a "retained interest") in the settlor's estate for federal estate and state death tax purposes, and the trust assets would still be considered available to the settlor so as to disqualify the settlor from otherwise available governmental benefits subject to a resource test, such as SSI or Medicaid.

Avoiding Creditor Claims at Death

As almost all Kansas attorneys are aware, Kansas probate law provides that the probate estate of a debtor is subject to creditor claims. The same is true under the Kansas Uniform Trust Code with respect to the assets in a debtor's revocable trust estate following the death of the debtor. However, there is no provision under Kansas law for a decedent's creditor to make a claim against the assets of a decedent which pass under the laws of joint tenancy or through a beneficiary designation, including payable on death ("POD") and transfer on death ("TOD") beneficiary designations.

Thus, individuals who desire a cohesive estate plan which avoids probate, provide for a fiduciary to administer their assets, and perhaps leave assets in trust for family members for asset protection reasons, and it is additionally desired that the assets not be subject to creditor claims upon the owner's death, instead of using a will or revocable trust as the primary estate planning device, an individual could create an irrevocable trust which is minimally funded during lifetime, say with ten dollars. The trust would not provide for the payment of any debts or taxes as would a will or revocable trust. The provisions of the irrevocable trust would only include provisions addressing the disposition of their assets following death. Following the death of the Grantor, the irrevocable trust would become fully funded with the vast majority of the individual's assets having a beneficiary designation naming the trust as primary beneficiary on such assets. Should the individual desire to subsequently change the trust provisions, same could be done through a Special Trustee or perhaps better, by simply creating a new irrevocable trust with the more desirable provisions and change all beneficiary designations to the trustee of the subsequent trust.

It is also desirable for such individual to also create a second revocable trust having a very modest amount of assets. Following the grantor's death, such trust could provide for the payment of the decedent's debts, taxes and post-death administration expenses, and perhaps provide for the distribution of tangible

personal property items. The remainder would be distributed in the same manner as assets in the irrevocable trust, with provisions allowing such remainder of the trust estate held in trust to be merged with similar trusts created under the irrevocable trust for the same beneficiaries. Having an additional revocable trust, in addition to the irrevocable trust, should diminish any argument, however weak, that the irrevocable trust was simply a substitute revocable trust and thus should remain subject to the claims of the decedent's creditors. Limiting the amount of assets in the revocable trust should limit the exposure to third party claims of the decedent's assets to the assets held in the revocable trust.

Summary

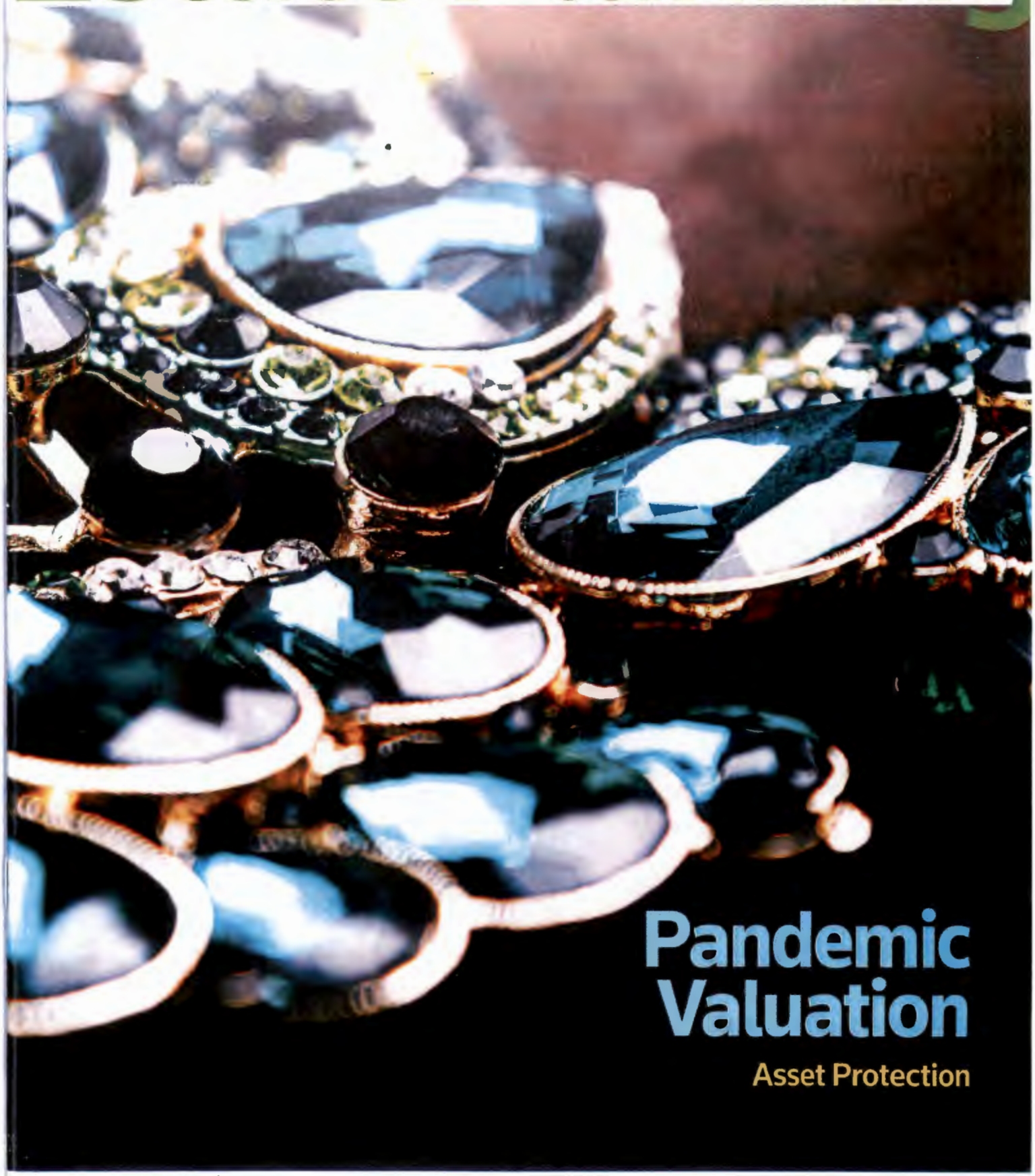
A substantial amount of asset protection can be obtained through comprehensive estate planning using sophisticated techniques. There is a significant exposure in today's litigious environment to creditor claims, including the claims of spouses. When a married couple is dividing assets in the estate planning process, asset protection objectives and strategies should be taken into consideration. In addition, the use of trusts, rather than outright distributions, should also be considered to afford beneficiaries to whom property would otherwise be given outright a substantial measure of asset protection from third party claims. In situations where assets are already owned outright and the owner is in need of asset protection, an LLC or FLP should be considered in order to convert assets into an LLC or FLP interest which is far less desirable to creditors. In more egregious circumstances where potential claims are severe and greater immunity from creditor claims is desired, an "offshore" trust in a foreign jurisdiction, or a domestic "out of state" trust in a state jurisdiction having protective laws with respect to "self-settled" trusts may be considered. Finally, in all situations when there are asset transfers during lifetime (as opposed to under the provisions of a will or revocable trust) designed to afford asset protection, the opinion of knowledgeable legal counsel should be obtained to ensure that any transfers or conveyances under the circumstances do not constitute "fraudulent conveyances" which are violative of state or federal law and therefore not only voidable, but which could deny relief from creditors in a bankruptcy proceeding.

The foregoing techniques are vastly underutilized in most estate plans. A very high percentage of informed clients concerned about asset protection will not only normally employ at least some of the lifetime techniques discussed above, but will also leave their assets in trust, rather than outright, for the benefit of family members following their deaths for the express purpose of gaining such asset protection benefits for the beneficiaries of such trusts.

Important Note: In all situations when there are asset transfers during lifetime designed to afford asset protection, the opinion of knowledgeable legal counsel should be obtained to ensure that any such transfers or conveyances do not constitute "fraudulent conveyances" which violate applicable state or federal law and are therefore not only legally voidable by creditors and bankruptcy trustees, but also which could preclude the debts of the transferor from being discharged in bankruptcy.

*See Attached Appendix – Thomson Reuters, Estate Planning to Protect Assets from Creditors – Dancing on the Line Between Legitimacy and Fraud.

Estate Planning



Pandemic Valuation

Asset Protection

Estate Planning to Protect Assets From Creditors – Dancing On the Line Between Legitimacy and Fraud

Practitioners should be thoughtful of this useful but tricky area of planning.

ROGER A. MCEOWEN, SHAWN S. LEISINGER, AND TIMOTHY P. O'SULLIVAN

According to the U.S. Financial Education Foundation, it is estimated that over 40 million lawsuits are filed annually.[1] Thus, for some persons, including farmers and ranchers, an important aspect of estate and business planning is asset protection. The goal of asset protection planning is to protect property from claims of creditors by restructuring asset ownership to limit liability risk in the event of a lawsuit. Done correctly the restructuring creates a degree of separation between the assets and their owner to properly shelter them from creditors.

A significant key to asset protection planning is timing. Once a lawsuit has been filed or there is a substantial certainty it will to be filed with an anticipated adverse outcome for a client, it is too late to start utilizing legal strategies to shelter assets from potential creditors. Civil and criminal liability is possible for all parties involved as well as malpractice liability for related ethical violations.

The Attempt To Shield an Iowa Farm From Creditors – Recent Case

Facts of the case. A recent federal court case from Iowa illustrates the serious problems that can result for parties and their professional counsel that engage in asset protection if not done properly. Kruse v. Repp involves three interrelated lawsuits.[2] The plaintiff was injured in an automobile accident which left her in need of 24-hour care, likely for the rest of her life. The accident was Weller's fault and, due to his experience as an insurance agent, he knew he would face a large claim for the plaintiff's injuries. Weller told family members he feared losing the family farm as a result of the impending lawsuit. After determining his liability exposure exceeded his insurance coverage, he sought legal counsel to help him shelter the assets from a potential claim. Based on the initial legal advice he received, less than two months after the accident Weller transferred the farm and other assets into a revocable trust and made several cash transfers to family members exceeding $100,000. He notified the defendant bank that he had recently been found at-fault in a major motor vehicle accident and that he faced liability exposure that exceeded his insurance coverage. The bank began working with him to weaken the appearance of his financial condition.

After leaving his previous attorney when settlement negotiations broke down, Weller met the defendant attorney (Repp) two months before the personal injury trial was set to begin. Repp holds himself out having a practice focusing on estate planning and that he "counsels and advises clients with respect to the management of their wealth to min-

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imize estate and inheritance taxes through the use of asset protection trusts." Weller later testified at trial that he told Repp of his previous attempts to shield himself from judgment by transferring his assets to a revocable trust and making cash "gifts." To this end, Weller testified he went to Repp specifically because Repp holds himself out as an "asset protection attorney." Repp told Weller that his previous attorney had given bad legal advice and that the cash gifts were inappropriate transfers of wealth. Repp then created an LLC and had Weller transfer the farm to the LLC by quitclaim deed to protect it from the anticipated personal injury judgment. The deed was accompanied with a trustee's affidavit that Repp prepared and notarized stating that the Trust was conveying the real estate "free and clear of any adverse claim." This transaction was completed approximately one month before trial in the personal injury case was schedule to begin.

State court judgment. The plaintiff was awarded approximately $2,557,100 million in damages in the personal injury lawsuit. Judgment was entered on May 1, 2015. In early 2016, Repp helped Weller prepare a financial statement reporting the value of the farmland as an LLC asset. The bank helped Weller refinance mortgages on the farm, which listed the farm as Weller's personal asset, and issued promissory notes that were secured by the mortgage. This led to the plaintiff suing Weller on March 3,2016, for fraudulent transfers intended to shield Weller's assets from the personal injury judgment. The state trial court determined that the LLC was formed with the intent to shield Weller's assets from the plaintiff levying her judgment lien against his real estate. The state trial court, on March 13, 2018, found in the plaintiff's favor and held that all assets of the LLC remained available to the plaintiff for satisfaction of the judgment.

For liability to arise from a RICO conspiracy, the plaintiff only needs to establish a tacit understanding between the defendants for conspirators to be liable for the acts of their co-conspirators.

Claims for personal liability and removal to federal court. The plaintiff sued the bank and Repp in early 2019, alleging that they both knowingly participated in Weller's fraudulent attempts to shield his assets from the plaintiff's judgment. Specifically, the plaintiff claimed that fraudulent transfers had been made under state law; that the defendants conducted or otherwise participated in the conduct of a racketeering enterprise with the purpose of defrauding the plaintiff; and that the defendants tortiously interfered with her ability to collect the personal injury award. The defendants removed the case to federal court and claimed that the undisputed facts entitled them to judgment as a matter of law on various claims. The federal court largely denied the defendants' claims in early 2020, and the case proceeded.[3]

Under the fraudulent transfer state law claim, the defendants argued that the plaintiff could not prove that they knew of Weller's fraudulent intent or that they helped in his scheme to shield his assets from the plaintiff's judgment. The court strongly disagreed pointing to Weller's disclosures to the bank that he was at fault in a major motor vehicle accident and the bank's subsequent dealings. The trial court also noted that the bank allowed Weller to inconsistently classify the farm as both a personal and LLC asset. The court determined a factfinder could reasonably infer that the bank had knowledge of Weller's intent to defraud the plaintiff. The bank argued that the plaintiff did not show prejudice by reason of priority in interest. The court noted that the bank's argument was based on a false premise, and that prejudice may be shown if a debtor encumbers property to create the *appearance* of over-securitization. Thus, the court determined that because critical questions existed concerning the effect of Weller's refinancing with the bank, summary judgment under the fraudulent transfer claim was precluded.

RICO Claim. The Racketeering Influenced and Corrupt Organizations Act (RICO) provides for criminal penalties and a civil cause of action for acts performed as part of an ongoing criminal organization.[4] Under RICO, a person who has committed "at least two acts of racketeering activity" within a 10-year period can be charged with "racketeering" if the acts are related in a specified manner to an "enterprise." Those found guilty of racketeering can be fined up to $25,000 and sentenced to 20 years in prison per racketeering count.[5] In addition, the racketeer must forfeit all ill-gotten gains and interest in any business gained

1 http://www.ogdenpage.com/frivolous_lawsuits.htm

2 No. 4:19-cv-00106-SMR-SBJ, 2021 WL 2451230 (S.D. Iowa Jun. 15, 2021).

3 Kruse v. Repp, 4:19-cv-00106-SMR-SBJ, 2020 WL 1317479 (S.D. Iowa Mar. 20, 2020).

4 18 U.S.C. sections 1861-1868.

through a pattern of "racketeering activity."

RICO also permits a private individual "damaged in his business or property" by a "racketeer" to file a civil suit. The plaintiff must prove the existence of an "enterprise." There must be one of four specified relationships between the defendant(s) and the enterprise: (1) either the defendant(s) invested the proceeds of the pattern of racketeering activity into the enterprise; (2) the defendant(s) acquired or maintained an interest in, or control of, the enterprise through the pattern of racketeering activity; (3) the defendant(s) conducted or participated in the affairs of the enterprise "through" the pattern of racketeering activity; or (4) the defendant(s) conspired to do one of the first three.[6] In essence, the enterprise is either the 'prize,' 'instrument,' 'victim,' or 'perpetrator' of the racketeers.[7] RICO also allows for the recovery of damages that are triple the amount of the actual or compensatory damages.

Repp claimed that there was no common purpose among himself and Weller to constitute an associated in-fact enterprise, and if there was, that the enterprise required a common purpose that is fraudulent, illicit, or unlawful. He asserted that these elements did not exist. The court disagreed, expressing disbelief at the assertions, and noted that RICO liability is extended to those who play some role in directing the group to further its shared goals, unlawful or not, so long as those goals are carried out through a pattern of criminal behavior.

The court stated:

> They nevertheless prepared legal documents transferring his [Weller's] property to a corporate form that posed significant barriers to any recovery by Kruse, assisted Weller in the creation of financial statements that painted an inaccurate picture of Weller's finances, and defended the legality of the conveyances in court. In both cases, the facts are sufficient for a reasonable jury to find Defendants tacitly agreed to participate in Weller's scheme to defraud Kruse and conspired to further the purpose of a RICO enterprise.

Thus, the court determined that sufficient evidence existed for a fact-finder to possibly infer that Weller, Repp, and the bank shared an unlawful purpose to shield Weller's assets from the plaintiff's looming judgment.

The court further stated:

> ...Repp changed the course of the effort to defraud Kruse and "joined in a collaborative undertaking with the objective of releasing [Weller] from the financial encumbrance visited upon him by [Kruse]'s judgment."... Reversing the mechanisms put in place by Weller's prior attorney, Repp organized Weller Farms, filed a trustee's affidavit that ignored Kruse's unliquidated tort claim, directed Weller to execute a quit claim deed conveying his real estate to the entity, and assisted Weller in preparing financial statements that embedded multiple "ambiguities" that devalued Weller's financial picture during settlement negotiations. [Repp] then defended the transactions in the fraudulent transfer action, devising a legal strategy in an attempt to persuade the state court to validate the transactions. In essence, Repp agreed Weller's previous efforts were inappropriate. All of his advice that followed was consistent with the expertise in asset protection that Repp, not Weller, possessed.

The defendants also claimed that there was no pattern of racketeering activity and that they had not directed the conduct of the enterprise's affairs. The court disagreed, noting that the evidence of three years' worth of communications led to a reasonable inference that a pattern of racketeering existed. Repp also asserted that he provided nothing more than ordinary legal services such that his conduct played no part in directing the affairs of Weller or the LLC. The court again disagreed and determined that factual issues remained concerning whether Repp played some part in directing the affairs of Weller's fraudulent scheme.

The court lastly noted that for liability to arise from a RICO conspiracy, the plaintiff only needs to establish a tacit understanding between the defendants for conspirators to be liable for the acts of their co-conspirators. The defendants argued they did not know the full extent of Weller's fraudulent scheme and were mere scriveners of information provided by him. The court disagreed, stating as follows:

> They claim he was a mere scrivener of information provided by Weller and intended only to assist Weller in setting up a farming entity by which to bring his son into the family business. That characterization, in light of the circumstances surrounding his [Repp's] relationship with Weller, present genuine factual issues and credibility determinations on whether Repp played "some part" in directing the affairs of Weller's fraudulent scheme and require a jury to resolve.

The trial court determined there was a genuine issue of material fact as to whether the defendants knew of or were willfully blind to the scope of the RICO enterprise. Therefore, the trial court denied summary judgment on the RICO charges and determined the defendants' position was a question for the jury.

Tortious interference with economic expectancy. On the common law tortious interference claim, the defen-

5 18 U.S.C. sections 924 and 1963.

6 18 U.S.C. section 1962(a)-(d).

7 See *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994).

dants argued that the Iowa Supreme Court had not yet recognized tortious interference with an economic expectancy as a cause of action. The Second Restatement of Torts describes this action as "one who intentionally deprives another of his legally protected property interest or causes injury to the interest."[8] A party that does this is subject to liability if the party's conduct is generally culpable and not justifiable under the circumstances. The court determined that although the Iowa Supreme Court had not yet considered this issue, it would likely recognize this tort as a prima facie tort in the context of fraudulent financial practices.

Repp argued that the plaintiff failed to show that his predominant intent in forming the LLC was to injure the plaintiff's property interest. However, the court noted that the majority rule governing a prima facie tort does not require that the defendant be motivated predominantly to injure the plaintiff. The court pointed out that the facts led to a reasonable inference that Repp knew the transfer of Weller's assets to the LLC would interfere with the plaintiff's collection efforts. The bank made a similar argument, which the court rejected, resulting in summary judgment on the tortious interference claim being denied. Thus, the jury will need to determine whether the defendants were more than mere scriveners, and thus subject to tort liability.

Note:

Remember that the case was positioned on a motion for summary judgment. That is a fairly low hurdle for the plaintiff to clear, especially when the evidence on such a motion is viewed in the light most favorably to the non-moving party (the plaintiff in this case).

Ethical Considerations

It is fairly well settled that attorneys generally, and certainly attorneys who specialize in taxation may advise clients in the area of "tax avoidance" but must not have that same advice go over the line into "tax evasion." This concept frames the ethical guidelines that attorneys must consider when they work with their clients on asset ownership structuring, whether for tax or liability purposes. In the Iowa case, a fairly common business entity formation asset protection tactic stepped over the line that falls in that gray area between avoidance and evasion.

While each state has its own version of ethical rules that the attorneys licensed there must follow, which generally incorporate or adapt the Model Rules of Professional Conduct promulgated by the American Bar Association. In the case at hand a number of these rules would warrant consideration; this article touches on a few of those that apply most directly.

MRPC Rule 2.1: Advisor. Under this rule, attorneys are deemed to be counselors who are advised, "In representing a client, a lawyer shall exercise professional judgment and render candid advice. In 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." This rule is arguably permissive and would suggest that Repp should have had a candid conversation with the client about the steps being taken to protect the client's assets and the risks and realities of those steps. The private conversations that occurred in this case are unknown.

MRPC Rule 8.4: Misconduct. This rule sets forth the specific definitions of attorney misconduct that in turn warrant and could support attorney discipline under the rules. The rule provides, "It is professional misconduct for a lawyer to: ... (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; ..."

While the "criminal act" under (b) might seem a higher bar to hit in the asset planning realm, as one reads the facts of the Iowa case it is fairly easy to conclude that the multiple steps taken by, and with, multiple parties to try to shelter the assets noted, and the continuing interaction with the bankers and others involved in the property transfers, hit either the disjunctive "dishonesty" or "misrepresentation" standards in section (c). It is worth noting section (d) as well due to the fact that in many of these kinds of cases a court may well conclude that the catch-all of "acts prejudicial to the administration of justice" could define the actions if one might argue the other provisions do not fit.

From an ethical perspective one should also note the obligation to report unethical conduct of other attorneys under the rules. Rule 8.3 provides, "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

Attorneys engaging in asset protection planning, whether for liability protection or estate planning purposes, should also always carefully determine who the client is.

In *Kruse v. Repp*, without knowing the content of personal conversations between Weller and his heirs, it is fair to assume that they may well have mutually spoken with Repp about the steps to be taken. In the real world of family farms, and family farm corporations, the mixture of family property and assets that move into and out of the farm operation make it so that these asset planning decisions may well involve discussions with multiple potential "clients" who may rely on the advice given. While simplistic, the general rule for the formation of an attorney client relationship is that the attorney provides "advice" and the "client" relies upon it. From a practice standpoint, attorneys in these situations should be very clear in conversations who they represent and supplement these clarifications with written correspondence to the actual client and family members when possible.

The attorney/client relationship here is crucial for determining the application of the ethical rules regarding conflict issues, especially in the realm of family farms that regularly feel that they have their "family attorney" to advise them as a group. MRPC Rule 1.7 deals with conflicts of interest with current clients and provides, "... a lawyer shall not represent a client if ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or third person ...". MRPC Rule 1.8 provides specific rules with current clients and MRPC Rule 1.9 covers those obligations to former clients. Note as well MRPC Rule 1.10 that explains imputation of those conflicts especially to lawyers in the same firm.

Practitioners are encouraged to reread the rules as adopted in the applicable jurisdiction(s) along with the associated comments to keep a fresh perspective in these types of cases when that line becomes blurred. The *Kruse v. Repp* decision has immediate repercussions to the family farming operation since, in many cases, such planning strategically shifts substantial tax obligations to the heirs. In normal practice those heirs who may fail to follow the legal guidance provided, and start to look at substantial tax or other liability, may often be inclined to look to their "family lawyer" for fault and recompense.

It is an important point to remember that the ethical perspective for attorneys in these cases is largely fact-specific and subject to argument and interpretation of when and how that gray line of "tax avoidance" to "tax evasion" may have been crossed. With that said, however, it is plausible to take the position that an estate planning attorney could have a client duty to incorporate asset protection advice in standard estate planning for wealthy clients. Query whether the failure to provide such advice could give rise to a plausible malpractice claim if the client is later unnecessarily exposed to a liability event. But, the point remains, asset protection planning that is done upfront before the hint of an event that could give rise to a liability claim is prudent planning. Those, however, are not the facts of *Kruse v. Repp*.

Asset Protection Planning – Practice Protocols

The potential for professional liability. The Iowa decision puts into stark relief the personal and professional exposure asset protection attorneys may have when advising clients of estate planning techniques to protect their assets from creditor claims. Most estate planning attorneys whose practice extends into this area have given thought, but often not enough, to the possibility that they can be held in violation of attorney professional conduct rules by participating in or structuring a transaction that is a fraudulent conveyance by their clients, as well as risk possible personal liability for damages by an aggrieved creditor. Although there does not appear to be more than possibly a modicum of cases to date imposing such liability against assisting third parties, such exposure is nonetheless present. Such exposure could derive from a state's version of the Uniform Fraudulent Transfer Act, which has been enacted in the vast majority of states, which otherwise would not have included a remedy against a third party involved in the transaction.

As noted in the Iowa decision, other potential legal authority for imposing personal liability rests more solidly and broadly under the federal RICO Act as an alleged "civil conspiracy," or (as the court also noted) an actionable tort by an aggrieved creditor under the Second Restatement of Torts for assisting in the fraudulent act. These principles extend well beyond applicable state law focusing on the fraudulent conveyance itself.

The potential liability of estate planning professionals generally requires not only that the creditor incur damages as a result, but also actual knowledge as to the purpose of the estate planning device used (which need not be predominant), and that the client had a debt (which need not be liquidated) the satisfaction of which would be avoided, delayed, or hindered by the implementation of a specific asset protection plan. The plan could be as simple as gifting assets away or a plan to make the claim more arduous or unlikely to be satisfied, such as putting exposed non-exempt assets in an LLC or restructuring debt to the detriment of a claim by a creditor. All three of these strategies were present in the Iowa case. As noted by the court, there is no "mere scrivener" defense against the personal liability of an attorney if the attorney is assisting in implementing a strategy that the attorney knows to be fraudulent.

For professionals engaging in asset protection strategies, there is no more important prophylactic measure against professional liability or third-party exposure than "knowing your client."

For professionals engaging in asset protection strategies, there is no more important prophylactic measure against professional liability or third-party exposure than "knowing your client" by gaining knowledge of the client's assets and liabilities and determining *ab initio* whether the client is seeking advice as protection against a specific currently existing or problematic potential creditor. This can start with the initial intake questionnaire, which most estate planning attorneys already employ, requesting the client list assets and approximate values in general categories, along with the potential client's income, debts, and liabilities, including mortgages. The questionnaire would also normally ask the client to list annual income. If the client has a recent financial statement, ask that it be included. It would also be helpful to ask the client on the questionnaire to briefly list the client's estate planning goals. Should such goal list asset protection as a goal, most particularly if as a priority, this would warrant further inquiry into the nature of such goal. Perhaps the client is simply desiring to protect against potential future creditors in general due to the nature of the client's assets or personal, business or professional activities. If so, asset protection planning is normally entirely appropriate. But determining the client's purposes up-front is a must. If it does not relate to a specific claim or claims, it should be noted in the client's records.

Nonetheless, if specific asset protection techniques are to be implemented attendant to the estate plan to protect against possible future claims (such as transfers to a spouse or irrevocable trusts or LLCs, or any other transfers detrimental to the interests of potential creditors), before doing so an additional questionnaire in the form of a client affidavit would be desirable to protect the attorney. The client affidavit informs the client it is incident to the attorney's ethical responsibilities. The affidavit should require the client to list any current or anticipated judgments, any current, ending, threatened, or potential claims of which the client has knowledge, and any contemplated or past bankruptcies of the client.

8 Second Restatement of Torts section 871.

Confirmation of such information in the affidavit by checking pertinent judicial records and noting same in the files of the client would also be beneficial.

The use of such salient client questionnaires, client questioning, affidavits, financial statements, and independent checking of relevant legal and financial information from clients is of paramount importance in this perilous planning area. Further, checking clients' references with the client's consent and otherwise gleaning as much knowledge of a client's background and litigation involvement as possible without violating client confidentiality, e.g., through public records, can serve as valuable indicia in determining a client's honesty and intent in seeking asset protection advice. In all events, the attorney's engagement letter (there was none used in the Iowa case) should make it clear that the attorney is relying on the accuracy of the client's representations, disclosures, and submitted information in recommending or implementing any asset protection component of the client's estate plan and further clearly stating that the attorney will not countenance, participate, or continue to represent the client in any plan that might constitute a fraudulent conveyance.

Although the Iowa case involved a decision that denied summary judgment to the defendants, the court's analysis of the legal underpinnings make it quite evident as to the third-party liability exposure of the defendants, including not only the debtor's attorneys involved in setting up the LLC, but also the debtor's bank in favorably restructuring the debtor's debt to the creditors' disadvantage, should the factual assertions of the plaintiffs be proven at trial.

Note:

The Iowa case did not proceed to trial. A settlement for an undisclosed amount was reached between the plaintiff and Repp's law firm. While the law firm's insurer initially refused to provide coverage on the basis that Repp's conduct was intentional, the insurer ultimately did provide coverage. Ultimately, Weller's entire farm was liquidated to help pay the settlement amount. Not even the homestead was preserved.

Conclusion

Asset protection is an important part of the estate planning practice. As wealth increases, a client's desire to protect assets from creditors also increases. As noted above, attorneys have unique duties and responsibilities when counseling clients on asset protection strategies. As with other types of estate planning situations, an attorney has a duty to educate the client on available alternatives and the legal implications that flow from those planning options – the benefits and the limitations. In the asset protection realm, as with other aspects of estate planning, there is no "one-size-fits-all solution.

However, the stakes are high in asset protection planning and the risk of liability exposure to the practitioner are equally high. Thoroughly investigating why a client is seeking asset protection is a must, as is staying within the "guardrails" of acceptable, non-fraudulent planning techniques. In all events, a practitioner must get client communications in writing, beginning with the client engagement letter. In addition, timing is essential. Asset protection planning should be engaged in before a potential liability event for the client occurs. If the asset protection plan is put in place after the fact, as in *Kruse v. Repp*, a cascading waterfall of serious liability issues could inundate the practitioner. ■

Estate Planning to Minimize Income Taxation

Presented by Tim O'Sullivan, JD, LLM

Summary

In light of Congress' failure to pass portions of President Biden's legislative agenda that would have had a detrimental effect on many estate planning techniques, and with estate- and gift-tax-reduction techniques likely to remain of significant relevance to only a small minority of the population for the foreseeable future, income-tax-reduction techniques should continue as the major tax focus of the estate planner's regimen.

Toward that end, Tim will cover a range of estate-planning techniques that can substantially reduce the income-tax burden on beneficiaries while remaining consistent with a grantor's or testator's other important estate-planning goals, including asset protection, maintaining plan integrity, flexibility, and charitable giving.

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Estate Planning to Minimize Income Taxation

Timothy P. O'Sullivan

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1

Income Tax Basis

- How Achieved in the Code "Step-Up"
- Do Assets in Grantor Trusts Receive a Step-Up in Tax Basis at the Grantor's Death?
  - Arguments in Support of Receiving of a Step-Up in Basis
  - Arguments in Opposition to a Step-Up in Basis
  - Potential Accuracy Related Tax Penalties Resulting from an Adverse Income Tax Decision when taking a Step-Up in Basis Position Regarding Assets in Grantor Trust
  - Exposure to Penalties
    - Adequate Disclosure Exception
    - Substantial Authority Exception
    - Permissible Authorities
    - Potential Application of Common Law First Impression Exception

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2

- Spousal Joint Tenancies
- Dividing Assets Between Spouses
- Reciprocal Spousal General Powers of Appointment
- Reposing GPofA in Trust Beneficiary
- Considerations in Making Gifts to Family Members for Donative Purposes
- Considerations in Making Gifts/Transfers for Medicaid Purposes
- Preserving Exclusion of Gain on Sale of Personal Residence by Surviving Spouse

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3

- Estate Planning to Minimize Distributions from Qualified Retirement Plans and IRAs
- Obtaining Charitable Income Tax Deduction for Bequests under Will or Revocable Trust
- Naming Charities as Outright Beneficiaries on IRAs and Qualified Retirement Plans
- Income Taxation of Trusts and Estates
- Conclusion
- Appendix A

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4

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Estate Planning to Minimize Income Taxation

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TABLE OF CONTENTS

Introduction

In addition to minimizing transfer taxes (i.e., estate, inheritance, and generation-skipping taxes), a good estate plan should minimize the income taxation of property both during lifetime and following death. This is of an ascending importance as the number of individuals subject to transfer taxation has been reduced to less than 1 in 500. This outline discusses income tax estate planning strategies which are of paramount consideration in achieving this goal.

Income Tax Basis

Under Section 1014 of the Internal Revenue Code, property which is included in a decedent's estate normally receives a new basis equal to the fair market value of such property at the time of the decedent's death. This is true irrespective of whether the estate was large enough to file a federal estate tax return. If an actual federal estate tax return is filed and the Executor of the decedent's estate elects the alternate use value for property in the decedent's estate, i.e., the value of such property in the decedent's estate on the date six months following the date of the decedent's death, the alternate use value for estate tax purposes will also control the income tax basis of the property in the decedent's estate. Although this rule is frequently referred to as receiving a "step up" in basis upon a decedent's death, in the event the estate tax value of the decedent's property is less than the basis of the decedent in any given property, such property would receive a "step down" in income tax basis to its fair market value for federal estate tax purposes.

This statutory rule does not apply to property which is termed "income in respect of a decedent" under Section 691 of the Code. Generally speaking, "income in respect of a decedent" (IRD) property is property consisting of income which has been earned by the decedent during the decedent's lifetime, and with respect to which has not been yet recognized by the decedent as of the time of the decedent's death. IRD includes unpaid wages of the decedent; unpaid dividends on stock which had been declared at the time of the decedent's death; deferred interest income on U.S. Savings bonds; untaxed income in qualified retirement plans and individual retirement accounts; and unrecognized gain on installment sale obligations.

The major opportunities to use this rule in the estate planning process essentially occur in four respects: division of property between married couples; drafting of reciprocal general powers of appointment in Revocable Trusts for married clients; including an estate planning mechanism in property which has been transferred to other family members to ensure its inclusion in the transferor's taxable estate; and providing for a Special Trustee/Trust Protector to repose a general power of appointment in a trust beneficiary. Subject to certain limited exceptions ("income in respect to a decedent" items, such as qualified retirement plans or IRA assets having tax-deferred income), appreciated property upon the death of the owner normally receives a new tax basis under the Internal Revenue Code equal to its then fair market value to the extent of the decedent's ownership in the property in the event it is included in the decedent's taxable estate, irrespective of whether the estate is large enough to be subject to federal estate tax. As mentioned above, although this normally results in a "step-up" in basis from that of the decedent, as most property subject to this rule appreciates over time, it must be kept in mind that in circumstances where the property at death is worth less than the decedent's tax basis, an actual "step down" in basis will occur.

Do Assets in Grantor Trusts Receive a Step-Up in Tax Basis at the Grantor's Death?

Main Issue: Do assets in an intentionally defective grantor trust receive a step-up basis at the grantor's death?

Sub-Issue: If the position is taken that the assets in a grantor trust receive a step-up in basis at the grantor's death on an income tax return and upon audit such position is not upheld as finally determined for tax purposes, what is the risk taken in terms of potential tax penalties resulting from such position?

Introduction

The discussion that follows initially outlines in a "bullet point" format the position of proponents that would be in the affirmative on this issue and rebut some contrary positions. The following section discusses substantive arguments to the contrary. The penultimate section then addresses the sub-issue relating to potential statutory penalties if a tax position is taken on a return in favor of a step-up in basis which is finally determined to not be valid, resulting in a substantial increase in income taxation beyond the position taken on the subject return. The final section prior to the Conclusion relates to a potential non-statutory common law exception to any imposition of an accuracy related penalty for an understatement of tax should that be the case.

Arguments in Support of Receiving of a Step-Up in Basis

- Bernie Sanders, a champion of tax reform, introduced the "For the 99.5 Percent Act" that explicitly provides that assets in a grantor trust would not receive a step-up basis. This suggests that the status quo needs reforming or "fixing," i.e., that the status quo presently allows for a step-up basis. *See* For the 99.5 Percent Act, S. _____, 117th Cong. (2021).

    - Similarly, Senators Chris Van Hollen, Cory Booker, Bernie Sanders, Sheldon Whitehouse and Elizabeth Warren introduced the Sensible Taxation and Equity Promotion (STEP) Act would tax transfers to an intentionally defective grantor trust. *See* Paul Nieffer, *What the STEP Act Might Mean to You*, METROWEST DAILY NEWS (May 17, 2021), https://www.metrowestdailynews.com/story/business/2021/05/17/explaining-the-step-act/5041810001/.

  Although neither proposal has passed and is unlikely to pass this year, some commentators have taken the position that such proposed rectifying legislation would at least indicate, if not confirm, the rationality of taking such a position under current law. Other arguments in support of an affirmative response on this issue are thoroughly outlined in the Journal of Taxation article as outlined below, the principal proponent of which is the well-known and nationally respected tax authority, Jonathan Blattmachr.

- "In Private Letter Ruling 201245006 (Nov. 15, 2012), assets that were not included in a decedent's gross estate were still entitled to a basis adjustment under Section 1014. The taxpayer in the ruling was a nonresident alien, who proposed to transfer assets to Trust, an

irrevocable foreign trust. The assets of Trust would include cash and stock in two companies that are publicly traded in Taxpayer's country of origin and on the New York Stock Exchange. Taxpayer and X, an unrelated party, would be Trustees of Trust. Trust directs that all income will be paid to Taxpayer during life, and that the Trustees may distribute principal to Taxpayer in their discretion. Upon the death of Taxpayer, the assets of Trust are to be paid or transferred to or in trust for one or more of Taxpayer's issue as Taxpayer may appoint by deed or will. The IRS stated that, following Taxpayer's death, the basis of the property held in Trust at Taxpayer's death will be the fair market value of the property at the date of death under Section 1014(a). The IRS noted that Section 1014(b)(1) provides that property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent is considered to have been acquired from or to have passed from the decedent for purposes of Section 1014(a). Section 1014(b)(9) states that the date-of-death value of property included in the decedent's gross estate will also become the basis of that property under Section 1014(a). Under Section 2104, shares of stock owned and held by a nonresident alien are deemed to be property within the United States only if issued by a domestic corporation. Regulations Section 1.1014-2(b)(2) states that Section 1014(b)(9) does not apply to property that is not includible in the decedent's gross estate, such as property not situated in the United States acquired from a nonresident alien. In this case, the IRS stated, Taxpayer's issue will acquire, by bequest, devise, or inheritance, assets from Trust at Taxpayer's death. The assets acquired from Trust are not included in Taxpayer's gross estate, because they are foreign assets of a nonresident alien.35.24d Therefore, the IRS concluded that even though the stock would not be included in the deceased Taxpayer's gross estate, it was received by the Taxpayer's family members by bequest, devise, or inheritance and thus would be eligible for a basis adjustment at death. This would suggest an argument that assets received on account of the decedent's death, even if not included in the decedent's gross estate, are eligible for a date-of-death basis adjustment. This could be used to bolster the argument that assets in an irrevocable grantor trust might be eligible for a basis adjustment. If assets passing under this irrevocable inter vivos trust are deemed to constitute a bequest, as they appear to have been in this ruling, then perhaps the basis of the assets in any irrevocable grantor trust should be adjusted to date-of-death value. On the other hand, because Taxpayer's retained right to income and power to direct the corpus at death in Private Letter Ruling 201245006 would certainly cause the value of the trust assets to be included in Taxpayer's gross estate if the Taxpayer were a U.S. citizen or resident and received a "step up" in basis this analogy may be limited." 12.02 ESTATE PLANNING WITH INTRAFAMILY SALES, 1999 WL 1031578, 52-53

- "It may also be argued that the assets of an intentional grantor trust do receive a date-of-death value basis adjustment under Section 1014(b)(1), as property "in the hands of a person [the trust] acquiring the property from a decedent or to whom the property passed from a decedent." This would be the analysis most consistent with Revenue Ruling 85-13, which says that the grantor is deemed to own the trust assets for all income tax purposes, which at least arguably includes the determination of basis." 12.02 ESTATE PLANNING WITH INTRAFAMILY SALES, 1999 WL 1031578, 53

- "A potential exception as to the step-up is created for what is termed "income in respect of a decedent (IRD) described in Section 691, An item that constitutes IRD does not qualify for a step-up in basis under Section 1014. IRD as income to which the decedent was entitled at death and which is not properly reportable for a period prior to the decedent's death (such as accrued interest, current unpaid wages, or IRAs). When a sale is reported on the installment method, gain attributable to the collection of the note constitutes IRD and would be taxable to the estate (or the beneficiary who receives the note). INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 153-54, 2002 WL 2017758, 7; See Reg. 1.691(a)-2(b). "The Regulations under Section 691, however, strongly suggest that an installment sale to a grantor trust does not produce IRD. They provide that, where the decedent enters into an agreement providing for a sale that is to occur at the time of death, the sale proceeds do not constitute IRD." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 153-54, 2002 WL 2017758, 7; See Reg. 1.691(a)-2(b). In short, because the payments on the obligation would not be taxed as income the grantor during the grantor's lifetime under the grantor trust rules, they should be precluded from being considered IRD following the Grantor's death.

    - "The Tax Court has stated that a sale does not result in IRD where 'the sale is only effective upon the decedent's death. Because a sale to a grantor trust is ignored for income tax purposes, the earliest moment at which a sale might conceivably be viewed as having occurred is immediately after the grantor's death. And because, as indicated as noted above, sales occurring at the moment of death are not within the scope of the IRD concept, there is no justification for subjecting such an installment sale to the IRD rules under Section 691." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 154, 2002 WL 2017758, 7

- "Bequest/devise to trustee. With respect to Section 1014, a step-up in basis might, at first, seem inapplicable if the terms of the instrument, as is typical, preclude the grantor trust from being included in the grantor's gross estate for federal estate tax purposes. Indeed, the section is commonly understood as applying only where the asset is included in the decedent's gross estate. A careful reading of the provision, however, suggests the answer if more complex. Although Section 1014(b)(9) does explicitly depend on estate-tax inclusion, Section 1014(b)(1) does not. It simply requires that the asset be acquired by bequest, devise, or inheritance (or by the decedent's estate from the decedent). To be sure, in interpreting subsection (b)(1), Reg. 1.1014-2(a)(1) appears to contemplate (as does the 1954 legislative history) that it will apply to property passing under the decedent's will or under the laws of intestacy. Nevertheless, the Regulation, its legislative history, and the statutory language do not affirmatively preclude transfers made under a lifetime trust from qualifying as a bequest or devise." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 154, 2002 WL 2017758, 7

- "Concededly, one does not typically think of a lifetime trust as effecting a bequest or devise. Nevertheless, because a grantor trust's assets are deemed to be owned by the grantor for income tax purposes, a good argument can be made that assets held in such a trust should be viewed as passing as a bequest or devise when the trust ceases to be a grantor trust at the moment of death. Ignoring the lifetime character of the transaction under state law in favor of its tax-determined status is not without precedent. After all, the grantor trust example in the Section 1001 Regulations adopts the tax fiction that the grantor owns a partnership interest that, in fact, is owned for all non-income tax purposes by the trust. And, based on this fiction, the example subjects the grantor to the Subchapter K income tax rules that apply only to taxpayers who actually own a partnership interest. Also, as indicated, in DiMarco, the Tax Court treated the grantor of a lifetime trust as having made a testamentary transfer for tax purposes, even though it clearly would have been viewed as lifetime in character for all other purposes." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 154-55, 2002 WL 2017758, 8

- "In Rev. Rul. 85-13, in adopting the approach that all transactions between the grantor and a grantor trust should be disregarded for all income tax purposes, the IRS expressly rejected a then-recent decision of the Second Circuit. In short, given this history, it would be difficult to infer that, in drafting Section 1014(b)(1), Congress contemplated that it would not apply to assets in a trust that remained a grantor trust until the grantor's death." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 155, 2002 WL 2017758, 8

- "As a matter of policy, the argument that subsection 1014(b)(1) applies to all grantor trusts that terminate at the time of the grantor's death is attractive. Were the rule otherwise, taxpayers would be able to circumvent it easily, provided they had access to competent counsel and did not die precipitously. For, as the rationale of Rev. Rul. 85-13 suggests, a taxpayer deemed to own the assets of a grantor trust having a basis less than value could, if properly advised and assuming death were not completely unexpected, purchase the assets for cash from the trustee without triggering a gain and thereby make the basis of the assets equal to their value under Section 1014. Because it makes no sense--and, indeed, would be inequitable--to create an advantage for taxpayers who have more competent counsel or who have an advance indication of the time of their death, it is preferable to read Section 1014(b)(1) as applicable to all trusts that remain grantor trusts until the grantor's death." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 155, 2002 WL 2017758, 9

- "Finally, some might argue that the presence of an encumbering liability makes it inappropriate to apply Section 1014. In other words, in situations where the trustee gives a

note to the grantor as consideration for acquiring assets, it arguably makes more sense to view the transaction as a purchase than as a bequest or devise. This strand of analysis, however, was rejected in Crane, where the Court applied Section 1014 even though the asset acquired by the legatee was encumbered by a liability equal to its value. Consequently, the fact that the trustee undertakes the liability in connection with the acquisition does not inexorably render Section 1014 inapplicable. One might argue in reply that Crane involved a devise and the transaction under inquiry has more of a lifetime flavor. But since, as indicated, the trust must be ignored for income tax purposes until the grantor's death, it may be more appropriate to view the trustee's acquisition as a bequest or devise and to apply, therefore, Crane' s analysis." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 158, 2002 WL 2017758, 9

- "None of the various subsections in Section 1014 was enacted after the IRS issued Rev. Rul. 85-13, 1985-1 CB 184. Hence, at the time of enactment, it was not at all clear that grantor trusts should be disregarded for all income tax purposes. Indeed, in Rev. Rul. 85-13, in adopting the approach that all transactions between the grantor and a grantor trust should be disregarded for all income tax purposes, the IRS expressly rejected a then-recent decision of the Second Circuit. In short, given this history, it would be difficult to infer that, in drafting Section 1014(b)(1), Congress contemplated that it would not apply to assets in a trust that remained a grantor trust until the grantor's death." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 155, 2002 WL 2017758, 8.

- The authors of the foregoing Journal of Taxation article positing a step-up in grantor trust assets, however, also made the following acknowledgements: "Although we think that, remaining faithful to the rule that the transaction is to be ignored for income tax purposes, the trustee's basis should be governed by Section 1014, we acknowledge that there are other plausible methods for determining basis. We also acknowledge that permitting the trustee to determine basis under Section 1014 is contrary to the conventional understanding of the section that it should apply only where the asset is included in the gross estate. Finally, we wish to emphasize that our conclusions are based on current law. We believe that Congress will eventually be required to address these issues." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 159, 2002 WL 2017758, 11

<u>Analysis of Impact of Blattmachr's Position</u>

Whether the assets in an IDGT receive a step-up basis at the time of the grantor's death depends on the Trustee's basis in the assets. Some of the analysis follows involves also a sale of assets to a grantor trust.

1. If the Trustee acquires the assets by gift or devise, as Blattmachr proposes, then Section 1014 would apply, and the resulting basis in the trust assets otherwise eligible for a step-up in basis would equal their estate tax value.
    a. Section 1014 may apply because subsection 1014(b)(1) does not explicitly depend on estate-tax inclusion. Rather, "it simply requires that the asset be acquired by bequest, devise, or inheritance (or by the decedent's estate from the decedent)." Further, "to be sure, in interpreting subsection (b)(1), Reg. 1.1014-2(a)(1) appears to contemplate (as does the 1954 legislative history) that it will apply to property passing under the decedent's will or under the laws of intestacy." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 154, 2002 WL 2017758, 7. Ultimately, as Section 1041 does not provide any clear position on this issue, it can only be couched as an unanswered question.
    b. Because assets in a grantor trust are deemed to be owned by the grantor, then upon the grantor's passing, it should be viewed as a bequest or a devise to the trustee.
    c. Counterargument: a lifetime trust is not the type of transfer that's has not been traditionally typically thought of as a devise or bequest.

2. If the Trustee acquires the assets by purchase, then Section 1012 applies, and the trustee's basis would be the value of the note.
    a. Counterargument: There would be a disconnect if this was the case because the Trustee is deemed to have made a purchase, but the estate is not deemed to have made a sale at the time of death.

3. If the Trustee acquires the assets by gift, then the Section 1015 carry over basis rule would apply, and there are three rules that may apply depending on the specific situation.
    a. Pure Gift: If the assets are deemed to be acquired without any consideration, then Section 1015(a)could arguably apply, and the trustee's basis is equal to the grantor's basis.
    b. Section 1015(b) may apply because if the trustee undertakes some liability and there is at least some consideration present. The trustee's basis would be the sum of the donor's basis and the gain recognized by the donor on the transfer (or the donor's basis reduced by any recognized loss).
        i. Some believe 1015(b) is the correct answer: "Section 1015(b) provides an answer to the vexed question of how the basis of grantor trust assets is determined after death. Specifically, under section 1015(b), the assets of a grantor trust after death have the same basis, once grantor trust status is turned off, as they had before death. In other words, consistent with the IRS view that grantor trusts do not qualify for a step-up in basis at death, section 1015(b) imposes a carryover basis. *See* Austin Bramwell and Stephanie Vara, *Basis of Grantor Trust Assets at Death: What Treasury Should Do*, TAX NOTES (Aug. 6, 2018). However, the problem of this position is that there has been no such

position taken on this issue under case law or a ruling or regulation of the Service.

c. Sale/Part Sale: If it is deemed to be a sale or part sale, then Reg. 1.1015-4 might apply to make the trustee's basis the greater of (1) the grantor's basis or (2) the amount paid by the trustee. However, that would be inconsistent with Rev. Rul. 85-13.

Arguments in Opposition to a Step-Up in Basis

- Although the "For the 99.5 Percent Act" introduced by Bernie Sanders and the STEP Act does not concede merit in the step-up position argument. It tacitly acknowledges that there is ambiguity in the statute and in the regulations. Thus, it could be argued that it is an attempt to clarify and align the statute with presumed, but not explicit Congressional intent under existing statutes on the issue, i.d., original Congressional intent being assets in a grantor trust to *not* receive a step-up basis. See For the 99.5 Percent Act, S. _____, 117th Cong. (2021).

    - Additionally, materials released by Senator Chris Van Hollen state the STEP Act is an attempt to close the step-up basis loophole for inheritances, not for grantor trust arrangements. *See Van Hollen Leads Colleagues In Announcing New Legislation To Close The Stepped-Up Basis Loophole*, CHRIS VAN HOLLEN U.S. SENATOR FOR MD (Mar. 29, 2021), https://www.vanhollen.senate.gov/news/press-releases/van-hollen-leads-colleagues-in-announcing-new-legislation-to-close-the-stepped-up-basis-loophole. Presumably, if grantor trusts received a step-up basis, then Senator Van Hollen and others would want to close that loophole as well.

- "Quoting from section 1.1014-1(a) of the Regulations: "The purpose of section 1014 is, in general, to provide a basis for property acquired from a decedent which is equal to the value placed upon such property for purposes of the federal estate tax. Accordingly, the general rule is that the basis of property acquired from a decedent is the fair market value of such property at the date of the decedent's death…. Property acquired from the decedent includes, principally, . . . property required to be included in determining the value of the decedent's gross estate under any provision of the [Internal Revenue Code.]"

- "The most likely reply to this argument would be based on subsections (b)(2) and (b)(3) of Section 1014. They make the section applicable to certain lifetime trusts, both of which would constitute grantor trusts. As a result, one might find in these subsections the negative implication that the assets in a grantor trust cannot be viewed as having been transferred by bequest or devise simply because they are deemed to be owned until death by the grantor as concluded in Rev. Proc. 85-13. (for if that were the case, there would have been no need to include these subsections in Section 1014, given subsection (b)(1)). This presumably was the view that the Treasury took of the section when it drafted the Regulations under Section 684. These Regulations provide that where a grantor trust ceases to be such on the grantor's death, a sale is deemed to occur immediately before death unless Section 1014 determines the trustee's basis in the assets. Thus, the Section 684 Regulations reflect the impression that

Section 1014 does not contemplate that it will apply in every instance in which the assets are held in a grantor trust at the grantor's death." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 155, 2002 WL 2017758, 8

- "In the alternative, it is possible to view the trustee's acquisition as a purchase. Under this view, given the requirement that the transaction be ignored during the grantor's life, the trustee would be treated as having acquired the assets in exchange for the note at the moment of the grantor's death. The trustee's basis would, as a result, be equal to cost under Section 1012, which would be the amount of the note (assuming the post-death interest rate on the note is sufficient or the note is immediately payable). This, of course, would have the asymmetrical effect of treating the trustee as having made a purchase while treating neither the decedent nor the estate as having made a sale. But, as indicated above, there is no justification under current law for treating the decedent or the estate as having made a sale where grantor trust status terminates by reason of the grantor's death." INCOME TAX EFFECTS OF TERMINATION OF GRANTOR TRUST STATUS BY REASON OF THE GRANTOR'S DEATH, 97 J. Tax'n 149, 158, 2002 WL 2017758, 10

- "The IRS has yet to affirmatively rule on the resulting tax basis of property in a grantor trust (specifically, an IDGT, whose assets generally will not be includable in the grantor's estate) when grantor trust status is terminated, particularly if the termination event is the death of the grantor. Some notable commentators believe that the assets qualify for a step-up in basis under section 1014. Most practitioners and commentators take the position that whatever assets happen to be in the IDGT at the time of the grantor's death carry their historical tax basis (carryover basis), because the assets are treated as if they had been transferred by gift under section 1015(a) (or section 1015(b), as proposed in the aforementioned recent article). The IRS has implied this result already. For example, it has ruled that when property transferred to a grantor trust is transferred to the grantor under the terms of the trust instrument at the termination of the trust, its basis is the same as basis of the property in the hands of the grantor upon the original contribution." Rev. Rul. 72-406, 1972-2 C.B. 462. See also Du Pont v. Commissioner, 18 B.T.A. 1028 (1930). Paul S. Lee, L. Joseph Comeau, Julie Miraglia Kwon, and Syida C. Long, Qualified Small Business Stock: Quest for Quantum Exclusions,Part,https://www.andersen.com/uploads/article_pdfs/Qualified_Small_Business_Stock__Quest_for_Quantum_Exclusions_%28Part_3%29.pdf

- "At the same time, the IRS has vehemently rejected the theory that grantor trust assets receive a basis step-up at death. The guidance project apparently aims to establish that grantor trusts do not receive tax-free step-up in basis when the grantor dies." *See* Austin Bramwell and Stephanie Vara, *Basis of Grantor Trust Assets at Death: What Treasury Should Do*, TAX NOTES (Aug. 6, 2018) (citing ECC 200937028).

- ECC 200937028 (in full):
  "We strongly disagree with taxpayer's contention. In this case, the taxpayer transferred assets into a trust and reserved the power to substitute assets.

Section 1014(b)(1)-(10) describes the circumstances under which property is treated as having been acquired from the decedent for purposes of the section 1014 step-up basis rule. Since the decedent transferred the property into trust, section 1014(b)(1) does not apply. Sections 1014(b)(2) and (b)(3) apply to transfers in trust, but do not apply here, because the decedent did not reserve the right to revoke or amend the trust. None of the other provisions appear to apply at all in this case.

Quoting from section 1.1014-1(a) of the Regulations the opinion of the General Counsel of the IRS stated: "The purpose of section 1014 is, in general, to provide a basis for property acquired from a decedent which is equal to the value placed upon such property for purposes of the Federal estate tax. Accordingly, the general rule is that the basis of property acquired from a decedent is the fair market value of such property at the date of the decedent's death. . . . Property acquired from the decedent includes, principally, . . property required to be included in determining the value of the decedent's gross estate under any provision of the [Internal Revenue Code.]"

Based on the General Counsel's reading of the statute and the regulations, it was thus concluded by the IRS that the general rule would seem to be that property transferred prior to death, even to a grantor trust, would not be subject to section 1014, unless the property is included in the gross estate for federal estate tax purposes as per section 1014(b)(9)." https://www.irs.gov/pub/irs-wd/0937028.pdf

- (property transferred to a grantor trust before death is not eligible for a basis step-up under I.R.C. Sec. 1014 unless the property is included in the decedent's gross estate for federal estate tax purposes). https://www.calt.iastate.edu/annotation/ecc-200937028-nov-18-2008

Nonetheless, the General Counsel's opinion does not constitute "substantial authority" for the Service's position nor have the import of a revenue ruling of the Service on this issue.

Potential Accuracy Related Tax Penalties Resulting from an Adverse Income Tax Decision when taking a Step-up in Basis Position Regarding Assets in a Grantor Trust

If there is a substantial understatement of income tax liability on an income tax return due to an adverse decision on taking a "step-up" in basis position on an income tax return, a taxpayer is subject to accuracy-related penalties under Section 6662 of the Internal Revenue Code. There are two basic categories of such penalties, "behavior based" and "mechanical." The first understatement penalty trigger under such section, 6662(b((1) is for "negligence or disregard of rules or regulations." In this context, "disregard" would be the possible operative word a relates to taxpayer behavior. The second basic trigger under (b)(2) is purely "mechanical," i.e., for it involves merely a "substantial understatement of income tax. The term "negligence" includes any "failure to make a reasonable attempt to comply with the Code." As such, it can apply to return positions. However, the regulations recognize that a return position that has a reasonable basis is not attributable to negligence. Although the term "reasonable basis" is not defined, the regulations indicate that it describes a position that is less robust than one supported by "substantial authority" but more robust than one that is merely arguable or colorable. Regs. Sec. 1.6662-3(b)(3). The regulations provide a

taxpayer may not avoid the negligence penalty by disclosing the position on Form 8275. Regs. Sec. 1.6662-7(b). The more mechanical trigger under 6662 for penalties for any substantial understatement of income tax under Reg. 1.6662-2 are automatically imposed when they don't fall within any exception under 1.6662-4. The amount of any such penalty is 20% of the portion of income tax owing resulting from such underpayment. The requirements for "substantial authority" are discussed below in conjunction with the exceptions to the imposition of the 20% penalty.

Adequate Disclosure Exception

Under 1.6662-4, any such penalty is reduced by the portion of the underpayment for which there is "substantial authority, or with respect to which there is adequate disclosure." For there to be an adequate disclosure under such mechanical penalty, the position on the return must have a reasonable basis as defined in 1.6662-3(b)(3) and the disclosure is made on a properly completed Form 8275 attached to the return as defined in 1.6664-2(c)(3). A potential impediment to this exception is that to have a reasonable basis, the regulations provide it has to be much more than simply a colorable argument and must be based on at least one of the acceptable authorities discussed below with respect to the substantial authority exception, of which treatises and articles are not included.

Substantial Authority Exception

- **General Rule:** "The substantial authority exception to the imposition of an understatement of tax penalty for the tax treatment of an item applies "only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment. All authorities relevant to the tax treatment of an item, including the authorities contrary to the treatment, are taken into account in determining whether substantial authority exists. The weight of authorities is determined in light of the pertinent facts and circumstances in the manner prescribed by paragraph (d)(3)(ii) of this section. There may be substantial authority for more than one position with respect to the same item. Because the substantial authority standard is an objective standard, the taxpayer's belief that there is substantial authority for the tax treatment of an item is not relevant in determining whether there is substantial authority for that treatment." Regs. Sec. 1.6662-4(d)(3)(i). Thus, if the position was disclosed, the exception would not literally comply with the exception requirement if not also supported by substantial authority.

Permissible Authorities

Regs. Sec. 1.6662-4(d)(3)(iii) indicates that only the following are acceptable authorities to determine whether there is substantial authority for the tax treatment of an item:

- Internal Revenue Code and other statutory provisions;
  - *IRC does not address step up basis issue*
- Proposed, temporary, and final regulations;
  - *None*
- Revenue rulings and revenue procedures;

    - *IRS has declared it will not issue revenue rulings on the issue*
- Tax treaties and regulations thereunder and Treasury and other official explanations of such treaties;
- Court cases;
- Congressional intent as reflected in committee reports;
    - *Intent from Congress above is largely derived from reading between the lines (ex: new legislation passed, fact that Section 1014 was enacted before the IRS issued Rev. Rul. 85-13, 1985-1 CB 184.)*
- General explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book);
- Private letter rulings and technical advice memoranda issued after October 31, 1976;
    - *No PLRs*
- Actions on decisions and general counsel memoranda issued after March 12, 1981;
- IRS information or press releases; and
- Notices, announcements, and other administrative pronouncements published by the Service in the Internal Revenue Bulletin.

Under the foregoing regulation, as noted above conclusions reached in treatises, legal periodicals or opinions rendered by tax professionals are specifically excluded from constituting substantial authority. In short, the very same problem in falling within the "reasonable basis" exception under this issue similarly precludes the application of the "substantial authority" exception as well. However, in a 2018 IRS Nationwide Forum, the Service acknowledged that "A taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision." Moreover, that conclusion is also found in in Treas. Reg. 1.6662-4(d)(3)(ii). Arguably, this standard would not be met given the erudite position of learned commentators espousing that such statutes allow for a step-up in basis of assets in grantor trusts.

<u>Potential Application of Common Law First Impression Exception</u>

Although not falling within any specific statutory exception to the foregoing accuracy penalties in the Code, there nonetheless remains a long-accepted separate judicially imposed exception to such imposition in the U. S. Tax Court. That exception is a tax situation involving what is termed an issue of "first impression." That is an issue that is one for which there is no clear decision from the courts the Tax Court would be bound to follow. In such situations, the Tax Court has consistently applied the doctrine. For example, in Hitchens v. Commissioner, 103 T.C. 711 (1994) the Court stated "[w]e have specifically refused to impose additions to tax for negligence, etc., where it appeared that the issue was one not previously considered by the Court and the statutory language was not clear." *See also* Williams v. Commissioner, 123 T.C. 144 (2004); Wofford v. Commissioner, 5 T.C. 1152 (1945) Such position is a recognition of-and consideration given to- the plight of a taxpayer having to take a position in an uncertain tax environment as to the tax position taken. This would appear to be the very tax scenario should this issue be presented to the Tax Court for a determination for the first time, as noted tax professionals have conceded, as well as the Service

in refusing to issue rulings on the issue, that the statutory language is unclear and does not specifically address this issue.

Before closing this discussion, it is worth mentioning that there is an additional potential waiver of understatement penalties under Section 6664(c)(4) for reasonable cause and in which the taxpayer acted in good faith. However, this subsection does not appear to apply to penalties related to positions resulting in an understatement of tax liability beyond which there is no substantial authority and thus subject to the aforementioned accuracy related penalties. They relate mainly to reliance on advice of tax practitioners or perhaps reliance on facts that that turned out to be in error. If based solely on the taxpayer's belief as to such tax treatment, the regulations thereunder provide that such position must be adequately disclosed, the belief must be in favor of a likelihood of success on the merits of such treatment, not taking into account the possibility that the return will not be audited, such treatment will not be raised on audit, or such treatment will be resolved through settlement with the Service if raised. The burden would thus be high on the taxpayer in this regard. Even then, there must be substantial authority for such treatment, in the same manner as the above-discussed exception to accuracy-related penalties. In short, this separate statute does not appear to provide relief for any tax position that would not also fall within the exceptions under Section 6662.

Summary

Although the opinions on this issue by commentators and the General Counsel of the IRS would tend to favor a judicial determination that assets in a grantor trust do not receive a step-up in basis upon the death of the grantor, it is generally acknowledged that the answer certainly is far from clear based upon the statutory language, particularly in light of Rev. Rul. 85-13, which has not been clarified by any tax decisions or prior revenue rulings or Regulations of the Service. Consequently, this would appear toc clearly be a case of first impression in the courts when litigated. Thus, should the Service audit the return, additionally impose a tax deficiency plus a further accuracy related understatement penalty, and the Tax Court conclude that the position of the Service on such deficiency should be affirmed, based on the foregoing analysis, it nonetheless appears that there is a reasonable expectation that the Tax Court, even in such situation, would deny any penalty imposition by the Service due to the issue being one of first impression, for there is a clear consensus among commentators that the governing statutes and existing Regulations do not provide anything near a clear resolution on this issue. This would in and of itself present a strong argument upon such audit for a settlement based upon the Service agreeing to waive such accuracy related penalty on that basis. In that event, only additional tax and understatement interest penalties would be owing on such assessment, not any aforementioned accuracy related penalty as well. Although disclosure on the income tax return of such position would strongly militate against the imposition of a penalty in the first instance, it may not be necessary given the issue of first impression argument and the Service's stated acknowledgment that a well-reasoned construction of the statutory provisions in the light of Rev. Rul. 85-13 may in of itself constitute "substantial authority.

Conclusion

In sum, the governing statute, Section 1014, is unclear on this issue. Noted and well-respected commentators have made substantive well-reasoned arguments for the issue being answered in the affirmative, albeit the majority of commentators are pessimistic on the ultimate

outcome of this issue. The Service has issued no revenue rulings or regulations that clarify the answer, nor have there been any Tax Court or other federal court decisions addressing the issue. Nonetheless, one could reasonably expect that a court could well come down on the traditional understanding of grantor trusts not falling within the meaning of devises and bequests so as to preclude their assets receiving a step up in basis upon the grantor's death, particularly since an affirmative decision would escape all taxation on the "built-in" gain of trust assets in the trust estate upon a later sale. In the interim, the Service could, as some commentators have espoused, issue a Revenue Ruling outlining its position on the issue, which is likely to be against the step-up position by concluding that Section 1015(b) of the Code applies, providing for a carry- over basis in transactions that are not by gift, devise or bequest. If it did so and clarified Rev. Rul. 85-13 in that singular respect it would arguably remove the rationale thereunder that undergirds the arguments for a step- up in basis in assets in grantor trusts upon the grantor's death, i.e., the grantor trust is ignored until the grantor's death for all income tax purposes under such ruling, such that all assets should still be deemed owned by the grantor until the grantor's date of death for all income tax purposes. In the interim and in the absence thereof or any governing statutory changes, the arguments in favor of a step up are certainly not without merit.

With regard to potential taxpayer penalties on a return position in favor of a step up in basis, based on the foregoing authorities and analysis discussion, disclosing such position on the return from at least a practical perspective should make it less likely that the penalty would be imposed by the Service, albeit conceivably increasing the chance of an audit. An audit is not automatic as a result and commentators have stated that most returns filed with a Form 8275 are not picked up for audit. For example, Jack Surgent of Surgent CPE has stated that in polling large audiences of practitioners he has addressed on this issue, he has come to the unscientific conclusion that less than 5% of such returns are audited when filed with such form. His conclusion was to not be afraid in filing the form. In addition, filing the Form gives taxpayers a "leg up" by demonstrating "good faith" in disclosing the subject position on the return, which along with reasonable cause, is a component of the 6664(c) exception. Consequently, this is the least risky strategy in situations that would otherwise put taxpayers at a high risk of tax penalties should there be an audit due to the precarious nature of having an applicable exception. Nonetheless, if picked up for audit, even if such Form is filed, it still would be "on paper" subject to the imposition of the penalty unless: a) it fell within the reasonable basis exception due to being a "well-reasoned" argument constituting substantial authority," which appears to have more than a reasonable possibility of being applicable given in our situation given the cogent arguments espoused by well-recognized proponents of that position; or b) there then remained the Tax Court "first impression" exception discussed above. It is somewhat unclear whether the latter test would be applied at the time of filing the return or at a later date when the return was audited. Should there be an adverse Tax Court decision in the interim, it would appear that filing the Form on an amended return with such disclosure prior to an audit of the return if such audit was still a significant potential risk and was not previously enclosed, should still militate against the loss of an otherwise potentially applicable exception (e.g., a well- reasoned construction of the applicable statute) predicated upon its filing.

Spousal Joint Tenancies

In a spousal joint tenancy, the first spouse to die is deemed to own only a one-half interest in the

property. IRC 2040. Consequently, spousal joint tenancy property receives only a one-half "step-up" in income tax basis upon the death of the first spouse, instead of the full "step-up" it would have received had the property been owned outright by the predeceased spouse or in the predeceased spouse's Revocable Trust. This factor can be significant in estates having a significant amount of appreciated capital gain assets, such as farmland, investment real property such as rental properties, stock portfolios, and collectibles such as artwork and coin collections.

Example: Assume a married couple owns a rental property with a tax basis (initial cost-plus capital improvements less tax depreciation) of $20,000 and a fair market value of $100,000. Assume further that the husband is managing the property and his wife would inherit such stock and sell it if she survived him. As a final assumption, the husband predeceases his wife. If the property is solely owned by the husband, property would receive a full “step up” in income tax basis at the husband’s death to its fair market value of $100,000. Thus, there would be no capital gain if such stock was subsequently sold by his wife. On the other hand, if the property was owned one-half by the husband and one-half by his wife at the time of his death (e.g., the property was owned by both in joint tenancy), only one-half of the property, i.e., the husband's ownership share, would receive a "step-up" in tax basis at his death. Thus, his surviving spouse's tax basis in the property would be the "stepped up" value of $50,000 on the husband’s joint tenancy interest plus the old tax basis in her one-half, $10,000, for a new total tax basis of $60,000. Should his surviving spouse then sell the property for $100,000, she would still have a $40,000 capital gain. The capital gain was reduced only by one-half upon the husband’s death. Also, if the wife had owned the stock in sole ownership at the time of her husband’s death, there would have been no “step up” in basis in the stock at the time of the husband’s death.

Dividing Assets Between Spouses

Consequently, the ownership of capital gain property between spouses is an important income tax consideration in the estate planning process. Husbands tend to predecease their wives 60% of the time if they are the same age. Thus, it is frequently desirable that the husband own more of the appreciated capital gain property in such circumstance. Similarly, it is often best to divide a joint tenancy ownership interest in appreciated stock portfolios so that both husbands and wives own stock interests either individually or in a Revocable Trust. In that situation, no matter which spouse predeceases the other, the stock owned by the predeceased spouse will receive a full “step- up” in basis rather than the one-half “step up” demonstrated in the above example. Should each spouse desire to leave the capital gain asset outright to the other, as Kansas permits almost all types of property to have a beneficiary designation, each could simply name the other as primary beneficiary.

Note: Congress imposed limits on the availability of the “step-up” in basis in the past, briefly from 1977 to 1980 and in 2010. Fortunately, the effect of such legislation was repealed retroactively by subsequent legislation in 1980. Nonetheless, given such history, and particularly proposed legislation in 2021 which failed to pass, and which would have deleted such benefit, Congress conceivably may enact similar legislation in the future as a means of gaining additional revenue in the face of looming severe budget crises, not only due to large federal budget deficits, but also similarly with respect to Medicaid (est.2026) and social security benefits (est. 2034).

However, spouses who are dividing property for the foregoing income tax purposes must be

mindful of the effect of such division should they later become divorced or become subject to a decree of separate maintenance initiated by either spouse. Normally, under Kansas law, it is unimportant in circumstance which spouse is the owner of property with respect to property accumulated by the spouses do their separate or joint efforts during the marriage. Such property is normally divided evenly by the Court. However, with respect to property brought into the marriage or property received by gift or inheritance from others during the marriage, adverse results may ensue if such property is transferred to the other spouse for income tax purposes. Under Kansas law, a judge may consider such factor and permit the spouse who brought such property into the marriage or inherited such property to retain much, if not all, of such property in the event of a divorce or separate maintenance decree. This benefit will probably be lost should the spouse who brought such property into the marriage or inherited such property makes a gift of property to his or her spouse for income tax purposes.

Reciprocal Spousal General Powers of Appointment

Spouses who desire to achieve a "step up" in income tax basis in all of their eligible property upon the death of the first spouse irrespective of the order of their deaths should consider the technique termed "reciprocal general powers of appointment." Such technique works best when each spouse has a revocable trust and gives the other spouse, should he or she predecease him, under the provisions of their revocable trusts, a general power of appointment pursuant to which the predeceased spouse, in common terms, can convey assets in the surviving spouse's revocable trust (excluding only certain categories of assets mainly which would cause adverse tax consequences if transferred to the predeceased spouse's trust), to the Trustee of the predeceased spouse's revocable trust. In that manner, all of such trust assets owned by both spouses at the time of the first spouse's death pass under the provisions of the predeceased spouse's Will or Revocable Trust (which normally leave all such assets in trust for the benefit of the surviving spouse) in order to preclude the trust assets from going to a new spouse who is not a beneficiary of the trust or an eligible appointee under a limited power of appointment while achieving a measure of protection from any creditor claims (provided the surviving spouse is not deemed thereby go be the settlor of such trust) and maximizing the benefits of utilizing the predeceased spouse's remaining exemption equivalent in keeping such assets out of the taxable estate of the surviving spouse. Should such assets thereby exceed the predeceased spouse's remaining exemption equivalent, the excess would pass to a marital trust deductible for federal estate tax purposes.

Although the issue is not entirely free from doubt, there is a good chance that using such technique will not only achieve a "step up" in basis with respect to all assets owned by the predeceased spouse at the time of the predeceased spouse's death, but also with respect to the assets of the surviving spouse (which are appointed under the provisions of the predeceased spouse's Will or Revocable Trust) which are otherwise eligible for a "step up" in basis as well. This is because such "power of appointment" causes the assets of the surviving spouse to thereby become includible in the taxable estate of the predeceased spouse. Although the IRS has taken a contrary position in a few private letter rulings addressed to taxpayers, there are no specific IRS regulations or Revenue Rulings which resolve such issue. The IRS position in such private letter rulings is based upon what the author believes is an illogical reading of the governing provisions of the Internal Revenue Code in coming to such conclusion in private letter rulings having no legal import.

That provision is Section 1014(e) of the Internal Revenue Code, enacted by the Economic

Recovery Tax Act (ERTA) of 1981. Such provision provides that if appreciated assets are gifted to a donee within one year of the donor's death and by virtue of the donee's death, the property passes back to the donor, such property is ineligible for a "step up" in basis. The problem with such position is that the property is not technically gifted to a donee by virtue of the power holder's exercise of a general power of appointment. Second, the property does not pass back to the surviving spouse who granted the power by virtue of the property over which the power is exercised if it passes instead in trust for the benefit of the predeceased spouse (e.g., a Family Trust for the benefit of the grantee of the power and such grantee's descendants with distributions being limited to a health, education, maintenance, and support standard). The rights of an outright owner are far different than that of a beneficiary of trust holding the power subject to restrictions on distribution (HEMS), fiduciary standards and multiple beneficiaries. Third, if the Service's position was correct, the property would not receive a "step up" in basis on the death of the surviving spouse as well in the typical circumstance where the trust assets are not includible in the surviving spouse's taxable estate upon the surviving spouse's death. That obviously would be an illogical result. Fourth, such technique simply permits both spouses to achieve the same "step up" in basis that occurs with property owners in community property states due to community property receiving a full "step up" in basis on the death of the first spouse to pass away. Finally, not only are there no Treasury Regulations or Revenue Rulings (applicable to all taxpayers) addressing the issue, there is an utter dearth of judicial decisions addressing such issue since the enactment of such provisions some forty- one years ago in 1981.

Reposing GPofA in Trust Beneficiary

In a very high percentage of situations, it is desirable to leave any significant amount of assets upon one's passing in trust for lifetime for the benefit of the beneficiaries of one's estate. Properly drafted, such trusts can preclude the trust estate from being includible in the beneficiaries' estates for federal estate tax purposes, from being a resource for Medicaid and SSI purposes, from being subject to the claims of creditors and spouses of beneficiaries, and as discussed more fully below, permit the income of the trust to be carried out to the secondary beneficiaries of the trust who may be in lower income tax brackets than the primary beneficiary under the income tax conduit rules. Normally, if asset management is not an issue, as it would be with minor or young child or a disabled or spendthrift beneficiary, the primary beneficiary can be named to serve as Trustee of the beneficiary's trust without compromising such benefits. However, the same provisions which, in addition to the inclusion of a spendthrift clause, provide maximum asset protection for the beneficiary serving as Trustee, i.e., limiting trust distributions to those necessary or advisable for the primary beneficiary's health, education, maintenance and support, also preclude the inclusion of the trust estate in the beneficiary's taxable estate. IRC 2041.

Consequently, the cost for such asset protection in such circumstance is normally the loss of any benefit of achieving a "step up" in basis of assets of the trust estate in the beneficiary's estate. However, there is a method of achieving such "step up" in basis at a later time without losing such asset protection and income tax benefits of such generation-skipping trusts. This can be done by reposing in the priority beneficiary directly, or in an independent Special Trustee/Trust Protector the discretionary authority to grant, a general power of appointment over the trust estate, or any portion or assets thereof, any portion or assets thereof, to the extent the resulting inclusion in the beneficiary's estate for federal estate tax purposes of the portion of the estate subject to such power

would not result in such beneficiary having to file a federal estate tax return due to the beneficiary's remaining applicable exclusion amount. This utilizes the high current estate and gift tax exemption equivalent to the benefit of trust beneficiary's by normally achieving a step up in basis at death in all eligible assets without exposing such assets to creditors or other third-party exposure which would be the case if assets were owned outright. A general power of appointment under Section 2041 of the Code is the power to appoint assets to the power holder, the creditors of the power holder, the estate of the power holder or the creditors of the power holder's estate.

This situation has presented itself frequently in recent years, most notably with regard to "bypass trusts" set up by a predeceased spouse to exclude property equal to the federal estate tax applicable exclusion amount at the predeceased spouse's death from includability in the surviving spouse's taxable estate. Such trusts have often become subsequently unnecessary for estate tax purposes due to the greatly increased applicable exclusion amounts but remain desirable for asset protection and plan integrity purposes.

Should it be desired to repose such power in a priority beneficiary, the proper implementation of this strategy either directly or by a Special Trustee/Trust Protector amendment would not be to create a presently exercisable general power of appointment in favor of the primary beneficiary. Such a power would jeopardize asset protection (as such powers are exercisable by a Trustee in bankruptcy), spousal protection (as such exercise could be ordered by a divorce court judge in a marital dissolution proceeding), cause all income of the trust to be taxable to the primary beneficiary outside of the "conduit rules" discussed below whether distributed to the primary beneficiary or not (due to the right to demand the property and income attributable thereto which is the subject of the power under Section 678(a)(1) of the Code), and governmental resource availability (as such right would make the trust estate to the extent of the assets over which the power is exercisable a resource for SSI and Medicaid qualification purposes).

Obviously, hardly any power holder would choose to appoint the assets in the trust to the creditors of their estate. Nonetheless, such power alone, whether nor not exercised, would result in the inclusion of the trust estate in the power holder's estate without permitting the power holder to appoint the trust estate to parties the grantor did not desire by otherwise having strictly a limited power of appointment, e.g., in favor of the grantor's descendants, surviving spouses of such descendants and charities. Moreover, under the Kansas Uniform Trust Code, such power should not be exercisable by any party other than the power holder, thus excluding the power holder's creditors while maintaining during the term of the trust the desired level of asset protection, income tax benefits and governmental resource availability through exclusion of the trust estate from being a resource. Moreover, although lapses of general power of appointment can result in property previously subject to the power being includible in the former power holder's estate under Section 2041 of the Code (to the extent the lapse is in excess of the so-called "5 and 5" power), arguably any subsequent withdrawal of such power by the Special Trustee/Trust Protector during the lifetime of the primary beneficiary for any reason should not be considered a lapse, as it would have been withdrawn prior to the primary beneficiary actually being able to exercise the power upon such beneficiary's death.

Such general power of appointment is often best drawn to cause such resultant inclusion of

trust assets in the power holder's estate to an amount that would not cause the value of the power holder's estate to exceed that amount which would require the power holder's estate to file a federal estate tax return. This avoids issues of post-death deductions altering this amount, which might affect the efficacy and practicality of such general power, as such amount may not be discernible at the time of the beneficiary's death. Such power in favor of the creditors of the power holder's estate would best be designed to maximize benefits so as to be limited to only appreciated assets which would receive a "step up" in basis by virtue of such general power of appointment, and would be exercisable only incrementally, starting with those assets which have the greatest amount of differential between their fair market value and income tax basis, and proceeding through other remaining assets with the next greatest differential, etc., until such available power is cumulatively exercisable over such maximum amount which would not cause the power holder to have to file a federal estate tax return.

Considerations in Making Gifts to Family Members for Donative Purposes

There are also income tax consequences when gifts are made outright or in trust to children or grandchildren to either reduce the size of the donor's taxable estate or to confer economic benefits on the donees. Although these gifts are not subject to income tax under the Internal Revenue Code, the Code provides that the donee of a gift normally takes the donor's income tax basis in the gifted property, unless the fair market value of the property at the time of the gift is less than the donor's basis, in which event the donee's basis is the fair market value of the property at the time of the gift.

Example: If a donor paid $10 for a share of stock and gave it to his son at a time it was worth one hundred dollars, his son would have a $10 tax basis in the stock. The son thus would recognize a taxable gain of $90 if he later sold it for $100. However, had such stock been retained by the decedent until death, the decedent's heirs would have received a "step up" in basis to the fair market value of $100 at the time of the parent's death. Thus, if gifts to descendants are to be made, the loss of the "step up" in basis can be minimized by gifting assets having a high ratio of income tax basis to fair market value at the time of the gift (e.g., cash, bonds or low appreciation stock). On the other hand, if the stock was only worth $5 at the time of the gift, the donee's basis would be limited to $5 per share.

Considerations in Making Gifts/Transfers for Medicaid Purposes

Moreover, the same consideration should be given when gifts are being made in order to qualify for Medicaid eligibility (subject to the "five-year look back rule" and possible disqualification for a period). If the gifts are made in trust with special provisions whereby the grantor of the trust retains certain rights under IRC 674 without being a beneficiary that nonetheless cause the trust estate to remain includible in the grantor's taxable estate (e.g., the right through a limited power of appointment exercisable during lifetime and at death) to appoint the trust assets among family members), the trust estate should not be a resource to the grantor for Medicaid purposes(after the expiration of such "look back" or disqualification period), as the grantor is not a beneficiary, but nonetheless eligible for a "step up" in income tax basis at the grantor's death.

In addition to allowing flexibility in the grantor to change the ultimate beneficiaries of the trust and receive a "step up" in basis in the trust estate to fair market value for otherwise eligible assets at the

grantor's death, such "grantor trust" right that would cause estate tax inclusion would also cause the trust to be a "grantor trust" during the grantor's lifetime, such that the income of the trust would be taxable back to the grantor during the grantor's lifetime. This not only avoids having to file a separate income tax return for the trust, but it also typically results in less income taxation, as most residents of long-term care facilities or other eligible recipients are in lower income tax brackets than family members and such income would be largely offset by the medical deduction applicable to long-term care. It would also permit the sale of the grantor's personal residence in the trust otherwise meeting the requirements of Section 121 of the Code noted below to avoid income taxation on its sale subject to the limits of such statute, for the Grantor would thereby remain the owner for income tax purposes.

Preserving Exclusion of Gain on Sale of Personal Residence by Surviving Spouse

Special consideration should be given to the ownership of the personal residence due to it being subject to preferential income tax treatment upon sale. Under Section 121 of the Code the gain upon the sale of a personal residence is eligible for exclusion for income tax purposes up to $500,000 for married taxpayers and $250,000 for single taxpayers. To qualify, the residence must have been owned and used by the taxpayer as his or her personal residence two out of the last five years prior to the sale.

Although these benefits are available while the personal residence is titled in a Revocable Trust (as the trust is ignored as a "grantor trust" for income tax purposes), they are not available if it is owned following the grantor's death by an irrevocable subtrust (because the trust is a separate taxpayer and not an individual) created under the grantor's revocable trust. Thus, if the predeceased spouse dies owning the residence in his or her Revocable Trust, and under the provisions of such trust the personal residence passes to an irrevocable trust (such as a Marital a Family Trust), instead of passing to the surviving spouse (either outright or to the surviving spouse's Revocable Trust), such exclusion is unavailable upon a later sale of the residence by the Trustee of the irrevocable sub-trust. Of course, the amount of the gain would be reduced by any "step up" in basis the personal residence received at the first spouse's death. Consequently, if the personal residence is to stay in an irrevocable trust at the first spouse's death for the benefit of the surviving spouse, the best odds of preserving this income tax benefit following the first spouse's death is normally achieved by changing the ownership of the residence to the trust of the spouse having the longer life expectancy.

Thus, unless it is desirable to leave the personal residence in trust for the benefit of the surviving spouse for estate or asset protection purposes (creditor protection, minimizing spend down requirements or estate recovery for Medicaid purposes for the surviving spouse, protecting against claims of a new spouse upon remarriage of the surviving spouse or preventing the diversion of the personal residence to a new spouse or unintended beneficiaries, etc.), the better strategy would typically be to place the house in joint tenancy between the spouses and for each spouse to execute a "transfer on death" or TOD deed to such spouse's trust. Under Kansas law, such TOD deed would only be effective upon the death of the surviving spouse, thereby transferring the residence to the surviving spouse's Revocable Trust. Should both spouses die simultaneously (within 60 hours of each other under the Kansas Simultaneous Death Act), an undivided one-half interest in the residence would pass outside of probate to each spouse's Revocable Trust. This would preserve the exclusion upon the sale of the residence by the surviving spouse, with the residence having received

a "step up" in basis as to one-half of its value upon the death of the predeceased spouse.

Estate Planning to Minimize Distributions from Qualified Retirement Plans and IRAs

Qualified retirement plans (QRPs) for employees and individual retirement accounts (IRAs) normally substantially consist of untaxed income which will be taxable to beneficiaries who receive such plan benefits or IRA accounts upon the death of the qualified plan participant or IRA owner. The timing of such income taxation is dependent upon federal laws which necessitate certain annual required minimum distributions (RMDs) following the death of the qualified plan participant or IRA owner. The amount of such RMDs under these laws is in turn dependent upon the named beneficiary of the plan or IRA upon the participant's or owner's death. Mistakes can be made by either naming an improperly drafted trust. In such situation, due to the QRP or IRA not having what is termed a "designated beneficiary," there can be a resultant greater amount of RMDs, resulting in substantial premature income taxation, thereby negating the income tax benefits that would otherwise have been achieved by leaving such assets in the qualified retirement plan or IRA account for a more extended period. With proper drafting of a trust which is the beneficiary of the QRP or IRA, under prior law the oldest beneficiary of the trust could be the "designated beneficiary," in the same manner as would have been the case had the beneficiary been named the outright beneficiary, thereby preserving the asset protection benefits of the trust (protection from marital dissolutions and marital claims at death, maximizing Medicaid benefits and minimizing estate recovery of Medicaid benefits paid, protection from creditors, etc.) while not jeopardizing the income tax benefits by accelerating RMDs. The requirements for such a trust are: (1) that it be a valid trust under state law; (2) that it becomes irrevocable at the grantor's death; (3) that the beneficiaries (who must be individuals) be identifiable; and (4) that a copy of the trust documents are provided to the IRA custodian by October 31 of the year immediately following the year in which the IRA owner died. Such requirements are still extant after passage of the SECURE ACT with respect to such benefits payable in trust, with respect which determining the oldest beneficiary is no longer a requisite. If the trust fails to qualify as a designated beneficiary, the IRA in all events will either be paid out as RMDs either under the five-year rule if the IRA owner dies before his or her required beginning date (RBD), generally April 1 after the year they turned age 72, or over the remaining single-life expectancy (term-certain) of the IRA owner. If the beneficiary is a "qualified trust," the RMDs may be paid out on a more extended basis under the Act.

Although appearing relatively simple, complex problems arise primarily with respect to item (3), the extent nature of which is beyond the content of these materials. That is why proper drafting is essential. Although a qualified trust can be alternatively constructed as a "conduit trust" as opposed to an "accumulation trust,' to meet the minimum distribution standard to which such trust is entitled, requiring any such distributions be distributed outright to a current beneficiary of the trust, such approach foregoes asset protection benefits by subjecting all RMDs to the claims of creditors and spouses of the beneficiary, as well as potentially adversely affecting Medicaid benefits. There also could be adverse estate tax implications if the beneficiary receiving the RMDs has a taxable estate.

Obviously, with the recent passage of the SECURE ACT, requiring, with certain quite limited exceptions, the distribution of all QRP and IRA assets to beneficiaries within ten years of death, including with respect to trusts as beneficiaries, the ability to "stretch" distributions over the lifetime of a beneficiary, including a trust beneficiary, is mostly unavailable. Spousal rollovers will remain

unaffected, for they are not inherited IRAs, but considered the IRA of the surviving spouse. Qualified marital trusts will also permit sole spousal beneficiaries to "stretch" distributions over their lifetimes as designated beneficiaries. Conduit trusts and accumulation trusts will also still remain viable as a means of asset protection for other beneficiaries until distributions are actually received by beneficiaries under the RMDs of the Secure Act, as inherited IRAs, as result of the US Supreme Court and other federal court decisions, are unprotected from creditors under either federal and most state laws, including Kansas. For charitably minded beneficiaries, charitable remainder trusts will also remain a consideration for indirectly "stretching" IRA distributions, albeit at the detriment of exposing mandatory distributions to the creditors of current beneficiaries.

Obtaining Charitable Income Tax Deduction for Bequests under Will or Revocable Trust

Section 642(c) of the Code allows estates an unlimited charitable deduction for any amount of the estate's gross income that is paid or permanently set aside for the specified charitable purposes. With respect to trusts, such statutory provision provides the same rule with regard to amounts paid for charitable purposes. However, there is no deduction for amounts of a trust permanently set aside for charitable purposes. This deduction is in lieu of the deduction allowed to individuals. While the statute states that the amount of the deduction is unlimited, it also provides that the contribution deduction is restricted to amounts of the estates or trust's gross income, which, pursuant to the terms of the governing instrument, is so paid or permanently set aside (with respect to estates) during the taxable year. See also Riggs Nat'l Bank of Washington, D.C. v. United States, 352 F.2d 812 (Ct. Cl. 1965). However, it has been held that the "pursuant to the terms of the governing instrument" requirement may also be satisfied if the income of the trust or estate belongs to the charitable beneficiary pursuant to local law. See Bowers v. Slocum, 20 F.2d 350 (2d Cir. 1927); Rev. Rul. 78-24, 1978-1 C.B. 196; Pvt. Ltr. Ruls. 8318042 (Feb. 2, 1983), 8031023 (May 6, 1988). This result occurs with respect to a bequest of all or a portion of the residuary estate or trust estate, as the charitable beneficiary would normally be entitled to its proportionate share of the income earned during administration upon distribution of its proportionate share of the residuary estate. See K.S.A. § 58-9-202(a). Thus, regarding estates- but not trusts- which require actual payment, even if such share of the income earned during administration is not currently paid to such charity, it will still qualify as a charitable deduction under Section 642(c) as having been permanently set aside for the charity.

Although local law will normally qualify a residuary charitable bequest for a charitable deduction under Section 642(c) with respect to its proportionate share of estate income, whether paid or not, and if actually paid regarding trust income, such is not the case with respect to specific charitable bequests. Even if local law would otherwise give the Executor or Trustee discretion to satisfy charitable bequests from estate income, the Executor would not normally be required to do so, and thus the "pursuant to" requirement is not satisfied. See PLR. 8031023 (May 6, 1980).

Finally, for maximum tax planning for charitable deductions qualifying under the provisions of Section 642(c), the fiduciary is allowed to elect to treat a contribution paid during any subsequent taxable year as having been paid in the immediate prior year. See Section 642(c)(1) of the Code; Treas. Reg. § 1.642(c)-1(b) (2002).

Despite the charitable income tax deductions limitations imposed by Section 642(c), there would remain the issue of whether the estate may take an otherwise available distributions deduction (under Section 661) for charitable bequests, even though the estate or trust does not qualify under Section 642(c). For example, let us assume an estate makes a charitable distribution of $10,000 in a given fiscal year, that the estate's income for such fiscal year is fully taxable income of $10,000, that no other distributions are made by the estate in such fiscal year, and that the will or local law does not require such charitable distribution to be paid or to be set aside out of estate income (so as to be allowed a charitable deduction under Section 642(c)). If the estate is not allowed a distributions deduction under Section 661(a)(2) for amounts paid or distributed during the tax year, the entire $10,000 of taxable income will be taxable to the estate. If such deduction is allowable, the estate's taxable income will be zero, as the distributions deduction will be deemed to carry out its income. A tax-exempt charity will in such event pay no tax on the distributed income, and the estate will have indirectly received a charitable deduction by effectively sheltering its taxable income from taxation. Treas. Reg. § 1.663(a)-2, however, without specific statutory authority, disallows a distributions deduction for charitable distributions not qualifying under Section 642(c). In judicial challenges to such regulatory authority to date, the Court of Claims and Tax Court have upheld its validity. Mott v. United States, 482 F.2d 512 (Ct. Cl. 1972), cert. denied 409 U.S. 1108 (1972); Estate of O'Connor v. Commissioner, 69 T.C. 165 (1977). Further, a decision of a Mississippi federal district court which had adopted the view of the dissent in Mott, in finding the regulation invalid as inconsistent with Section 661(a)(2), was subsequently reversed by the Fifth Circuit. United States Trust Company v. United States, 803 F.2d 1363 (5th Cir. 1986).

Indeed, Treas. Reg. §1.663-a(2) specifically provides that "[a]mounts paid, permanently set aside, or to be used for charitable purposes are deductible by estates or trusts only as provided under §642(c)." It is also important to note that a distribution deduction for a specific charitable bequest in specified property or a specific dollar amount paid in not more than three installments would be precluded in any event under another provision of the Code, such a distribution being a specific exception to the rule that distributions are deemed to carry out estate income under Section 661. Thus, based on the foregoing authority, although the issue is not totally settled, it appears to be unlikely that an estate may time charitable bequests so as to achieve the maximum possible Section 661(a)(2) distribution deduction, except possibly for termination distributions to a residuary charitable beneficiary. Such termination distributions should carry out the residuary charitable beneficiary's separate share of the income to the charitable beneficiary in the same manner it would carry out all remaining income of the trust to all residuary beneficiaries under the distribution rules discussed below, as the estate or trust would be retaining no assets after such distribution. Further, under the Taxpayer Relief Act of 1997, the separate share rule, previously applicable only to trusts, is now under Section 663(c) equally applicable to estates. Consequently, even if the distribution to a charity would otherwise carry out income, the timing of distributions will no longer permit income allocable to separate economic interests, e.g., separate shares of a residuary bequest, to be a component of distributable net income (DNI) of any other share. It is also important to keep in mind that, unlike Section 642(c), which allows a deduction for amounts irrevocably set aside for a charitable beneficiary, Section 661(a)(2), even if it would otherwise be applicable, requires actual payment in order to be deductible.

In short, due to foregoing arcane requirements, in order to buttress the consequence of a

specific bequest to a charity being deductible for income tax purposes, the governing instrument, be it a Will or Revocable Trust, should provide that the bequest be satisfied first out of estate or trust income to meet the statutory and regulatory requirements for such deduction. Because it is unlikely that the same bequest will be eligible both for an estate tax and an income tax deduction, such directive should not be included in taxable estates where a charitable estate tax deduction is needed, as the current estate tax bracket greatly exceeds the top income tax bracket of both trusts and individuals. Nonetheless, due to a fairly recent announcement by the Service that such direction will not be honored unless such direction as substantial economic effect, i.e., it would be limited to such income and not be made in full if such income was insufficient, the ability to do so and achieve a full charitable deduction by carrying out such income to a charitable beneficiary when any deficit would be satisfied by a distribution of principal is problematic. There have been no definitive cases addressing such issue.

Nonetheless, by including a carefully crafted "spray clause" in discretionary trusts allowing the Trustee who is the priority beneficiary to make distributions not only possibly to the descendants of the Grantor, but also to charities, the requirements of 642(c) would appear to be met, permitting a charitable income tax deduction for any such distributions. Due to the current indirect substantial limitation on individuals to receive an individual deduction for charitable contributions, for they must be eligible to itemize deductions to do so due to not exceeding their minimal amount, one should consider including such a provision in the vast majority of lifetime trusts, such as "Family Trusts" and "generation-skipping trusts" in which the priority beneficiary is serving as Trustee. This permits the priority beneficiary to indirectly receive the income tax benefit that would otherwise be precluded by such beneficiary due to an inability to itemize. See Appendix.

Such provision would provide as follows: "In addition, in the event the Priority Beneficiary is either serving as a sole Trustee or otherwise expresses such Priority Beneficiary's concurrence with such distribution, the Trustee shall possess the discretion to distribute any amounts of trust income to a charity or charities. Should the amount of any such distribution inadvertently exceed the trust income, it shall be deemed to be out of principal, but nonetheless authorized." Such provision would further provide that "Should there be any such authorized discretionary distribution of trust income to charities, the non-exempt taxable income of the trust shall first be utilized to satisfy such distribution such that such distribution shall be deductible to the trust under the provisions of Section 642(c) of the Code prior to being an otherwise deductible distribution of trust income to other beneficiaries under Sections 651 or 662 of the Code."

Naming Charities as Outright Beneficiaries on IRAs and Qualified Retirement Plans

Due to the difficulty and issues involved in achieving a charitable deduction when a distribution is made to satisfy a charitable bequest from an estate or revocable trust, as well as for logistical reasons, it is usually desirable to make a charity the direct beneficiary of an IRA or QRP to satisfy such bequest. However, as often the amount that is in such account at death is not totally predictable due to investment vacillations and required minimum distributions, for individuals who desire to ensure such full amount is satisfied from their estate, it is equally desirable to also provide for such bequest under the governing instrument, but specifically provide that any payments passing outside the governing instrument to such charity are to be an advancement against such charity's

bequest under the instrument.

Income Taxation of Trusts and Estates

Property passing under the provisions of a Will or Revocable Trust will be subject to income tax in the probate estate or to the trust during the period of its administration until it is distributed to the beneficiaries of the estate or trust. Estates and trusts are basically treated as "conduits" under the Internal Revenue Code. That is, undistributed income is taxed to the estate or trust and estate or trust income that is distributed to beneficiaries is deducted by the estate or trust and becomes taxable to the beneficiaries who received it.

Capital gain taxation to an estate or trust which occurs upon the sale of a capital asset (e.g., appreciated stock) by the fiduciary of the estate or trust is subject to capital gain taxation as it is to individuals. Ordinary income (i.e., interest, dividends, rents and royalties) also is subject to the same maximum approximate 40% federal tax rate as individuals, as well as Kansas income taxation for a Kansas situs trust. However, estates and trusts hit the maximum income tax rate at approximately $13,000, as adjusted for inflation. In addition to the other benefits of such long- term trusts, such trusts can permit distributions of trust income to multiple trust beneficiaries, e.g., the beneficiary and the beneficiary's descendants, thereby maximizing such income tax benefit by authorizing the Trustee to distribute income to beneficiaries who are in lower income tax brackets. thus "carrying out such DNI income to beneficiaries under Section 662 of the Code. This benefit would be lost if income (or principal deemed to be part of DNI) was required to be distributed outright to the beneficiary. In such circumstance, the DNI income would be taxable to the beneficiary. It would similarly be lost if the trust only authorized income distributions to such beneficiary or required trust income to be distributed to the beneficiary.

Although this strategy is perhaps most frequently applied with respect to assets left in trust for surviving spouse, the same strategy can be employed by leaving assets in trust for the lifetime of children (which normally occurs with respect to a married couple only upon the death of the surviving spouse). The Trustee (frequently the child if the child is mature, financially responsible and of sufficient age) can make distributions of ordinary income not needed for the child's health, education, maintenance or support needs to the priority child's adult children or grandchildren not subject to the "kiddie tax," thus avoiding the compressed tax brackets of a trust. This is accomplished by distributing such income either outright to or for the benefit of such beneficiary (e.g., paying a bill of the beneficiary). In circumstances where the beneficiary is under age 21 and it is not desirable to distribute trust income directly to or for the benefit of a beneficiary, the trust income can be distributed to a custodial account (Uniform Transfers to Minors Act) to be held by a custodian named by the Trustee (frequently the Trustee) for the benefit of such minor until attaining the age of 21 subject to the "kiddie tax." provisions. In circumstances where the primary beneficiary of the trust is not in need of such income and the trust provisions authorize income distributions also for the benefit of the beneficiary's descendants, such income can be alternatively distributed to the eligible descendants of such beneficiary who frequently are in much lower income tax brackets than the primary beneficiary.

This technique of distributing income to beneficiaries in lower income tax brackets than the principal beneficiary can save substantial amounts of income taxation over the lifetime of the principal beneficiary. For example, if a trust for a spouse had assets of $1,500,000 and earned just a 3% income

return annually ($45,000) with distributions to the spouse and descendants resulting in even a conservative cumulative 10% reduction in the combined effective federal and state tax rate of the spouse versus other beneficiaries, this would save $4,500 in income taxation every year it was applicable. However, as alluded to above, this benefit is curtailed under the so-called "kiddie tax" for beneficiaries receiving distributions who are under the age of 21 or are full time in college up to age 24 and being supported by their parents. In those situations, unearned income of such children over a small threshold amount (approximately $2,200) is taxed at the same brackets as the marginal income tax bracket of the child's parent (the so-called "kiddie tax").

Conclusion

With the very high current estate tax equivalent exemption of $12.06 million (annually adjusted for inflation) and the prospect under the of such exemption remaining quite high despite being slated under current law to be reduced to half of what it would have otherwise been in four years (estimated to be $6.4 million), it remains incumbent upon estate and planners to maintaining a focus on embedding potential income tax reduction estate planning techniques in their estate plans and documents.

APPENDIX

Distribution of Income. The Trustee shall pay to or use and apply for the benefit of my spouse such amounts of the net income of such trust estate as the Trustee, in the Trustee's discretion, determines to be necessary or advisable to provide for my spouse's health, education, maintenance and support needs. In addition, provided the foregoing provision has been satisfied, the Trustee may, in the Trustee's sole and absolute discretion, make distributions of income to my descendants for the same purposes; provided, however, if my spouse is not then serving as a Trustee, such distributions of income to my descendants must be made equally among each class of such beneficiaries (but not necessarily equally among the members of each such class), a class of beneficiaries to consist of a child of mine and such child's descendants. In the event the Priority Beneficiary is either serving as a sole Trustee or otherwise expresses such Priority Beneficiary's concurrence with such distribution, the Trustee shall possess the discretion to distribute any amounts of trust income to a charity or charities. Should the amount of any such distribution inadvertently exceed the trust income, it shall be deemed to be out of principal, but nonetheless authorized. Any net income not so distributed shall be added to the principal of the trust estate, at least annually.

Distribution to Charitable Organization. Any distribution hereunder to a charitable organization in satisfaction of a specific bequest or residuary bequest shall be first paid out of trust income (including "income in respect of a decedent" under Section 691 of the Code) in satisfaction thereof prior to using any other trust assets to satisfy any such bequest in the event that such payment out of trust income would satisfy the "permanently set aside for a purpose specified in Section 170(c)" of the Code requirement so that the satisfaction of any such charitable organization bequest qualify for an income tax deduction under Section 642(c) of the Code with regard to any taxable income of the trust utilized to satisfy such bequest. Notwithstanding the foregoing provisions of this Paragraph, such provisions shall be of no force and effect to the extent that they would cause the trust estate to lose a charitable estate tax deduction which would otherwise have resulted in a reduction of federal estate tax due at my death. In addition, if there is any authorized discretionary distribution of trust income to charities, the non-exempt taxable income of the trust shall first be utilized to satisfy such distribution such that such distribution shall be deductible to the trust under the provisions of Section 642(c) of the Code prior to being an otherwise deductible distribution of trust income to other beneficiaries under Sections 651 or 662 of the Code.

Current Developments in Estate Planning

Presented by Corey Moomaw, JD, LLM, and Tim O'Sullivan, JD, LLM

Summary

Corey and Tim will review recent state and federal legislative, judicial, and regulatory developments affecting estate planners, including the Kansas Directed Trust Act and proposed "claw back" regulations issued by the IRS. They will also review changes proposed by the KBA that will be re-submitted in the next Kansas legislative session.

About Corey Moomaw

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CFSEK's Family of Funds

The Community Foundation of Southeast Kansas (CFSEK) and its affiliates, the Fort Scott Area Community Foundation (FSACF) and Girard Area Community Foundation (GACF), are home to more than 175 charitable funds addressing a wide range of needs. These funds provide donors an easy way to help the charitable causes they care about.

Donors are free to give to any of the funds currently held by CFSEK, FSACF, or GACF. Or they can establish a new fund and customize it to fit their charitable vision. In either case, we're always more than happy to work with donors and their professional advisors to make sure their philanthropic goals are met.

In the list that follows, **bolded fund names** represent endowed funds, permanent funds that allow donors to support their charitable purpose in perpetuity. A non-endowed fund is a non-permanent fund that allows for all available funds to be used for charitable granting immediately.

Animals & Environment

- Marjorie Lee Weast Memorial Fund
- **SEK Humane Society Endowment**
- **SEK Humane Society – Tisot Endowed Fund**
- **Shirley Yeager's Animal Friends**

Arts, Culture, & Humanities

- **Baxter Springs Historical Society Endowment Fund**
- **Big Brutus Inc., Endowment**
- Cato School Historical Preservation Association
- Crawford County Historical Museum
- Friends of the Southeast Kansas Symphony
- **Friends of the Southeast Kansas Symphony Endowment Fund**
- Miners Hall Museum
- **Miners Hall Museum Endowment**
- **Pittsburg Area Arts and Culture Endowment**
- **Stilwell Heritage & Educational Foundation**
- **William J. Sollner Memorial Endowment Fund**

CF Operational Support

- CFSEK Non-Endowed Operating Fund
- **CFSEK Operating Endowment**
- GACF Operating Fund
- **Kansas Health Foundation Operating Fund (Fort Scott)**

Donor-Advised Funds

In addition to the funds listed here, the Community Foundation is home to three dozen donor-advised funds. Donor-advised funds enable donors to contribute to the Community Foundation, invest that contributed money, and then distribute it to other charities over time.

Learn more at SoutheastKansas.org/dafs101.

Education

- **Albright Scholarship Fund – Healthcare & Human Services**
- **Albright Scholarship Fund – Southeast High School/Pittsburg High School**
- Bill House Hereford Foundation Charitable Fund
- Bill House Hereford Foundation Scholarship Fund
- **Commerce Bank Endowed Scholarship**
- **Craig Crespino Scholarship**
- **Dr. Daniel & Mrs. Jeannette Minnis Oral Health Scholarship Fund**
- Dylan Meier Get Busy Livin' Scholarship Fund
- **Frank Blazic Endowed Scholarship**
- **Frontenac Education Foundation Endowment**
- Gabriel John Ison Memorial Scholarship Fund
- **Haberbosch Family Scholarship Fund Endowment**
- **Joe & Margarita Sauer Endowed Scholarship Fund**
- Larry & Regina Weaver Scholarship Fund
- **M. Lee and Noretta Caldwell Education Fund**
- **Nancy Evans Community Health Nursing Scholarship**
- **Northeast USD 246 Education Foundation Endowed**
- **Pat Forbes Endowed Scholarship**
- Pittsburg State University Enactus

- **PSU Foundation Endowment Fund**
- **Short Fine Arts Scholarship**
- **Southeast Kansas Interlocal #637 Endowment Fund**
- Southeast Kansas Interlocal #637 Non-Endowed Fund
- **St. Mary's Colgan Catholic Schools Endowment Fund**
- Stacy Goedeke Scholarship Fund
- Tyler Jeck Scholarship Fund
- **USD 250 Educational Foundation**
- **Vinylplex, Inc. Endowment**
- **William F. Lehman American History Scholarship**
- **William J. Sollner Family Scholarship Fund**

Health & Wellness

- Crawford County Health & Wellness
- Dylan Meier Get Busy Livin'
- **Girard Medical Center Foundation Endowed Fund**
- Girard Medical Center Foundation Fund
- **Healthcare Access for All**
- Hope for MS Foundation
- **Kansas Health Foundation Children's Fund**
- **Kansas Health Foundation Operating Fund (Girard)**
- **Kansas Health Foundation Operating Fund (SEK)**
- **Kansas Health Foundation Public Health Fund (Fort Scott)**
- **Kansas Health Foundation Public Health Fund (Girard)**
- **Kansas Health Foundation Public Health Fund (SEK)**
- Mercy Health Care Non-Endowed Fund
- Mount Carmel Foundation
- **Mount Carmel Foundation Endowment**
- **Nightingale Endowment of the Rita J. Bicknell Women's Health Fund**
- **Pittsburg YMCA Jack Bache Fund for Scholarships (Endowment Fund)**
- Rita J. Bicknell Circle of Friends
- **Rita J. Bicknell Women's Health Endowment**
- Rita J. Bicknell Women's Health Non-Endowed Fund

Public, Societal Benefit

- Angels Among Us
- **Angels Among Us Endowment**
- **Anna Faye Steele Memorial Fund**
- **Robert Gordon Steele Memorial Fund**
- **Big Brothers Big Sisters Endowment**
- **Caring for Kids Endowment**
- **Catholic Charities Endowed Fund**
- Chicopee Foundation Inc
- **Chicopee Foundation Inc., Endowment**
- **Children's Advocacy Center, Inc.**
- Crawford County Fair Board Capital Campaign
- Disaster Relief Fund
- **Dr. Pratt and Pauline Irby Endowment Fund**
- **Elm Acres Foundation Inc., Endowment**
- **Europe Park Endowment**
- Everybody Plays Playground Project
- Family Resource Center
- **Family Resource Center Endowment**
- **Floyd G. & Dorothy L. Allan Endowment Fund**
- **Food Security Fund Endowment (Wesley House)**
- **Fort Scott Area Public Parks Endowment Fund**
- Foundation for CLASS, Inc.
- **Franklin Community Park Endowment**
- Friends of Crawford State Park Fund
- Friends of the McCune Memorial Park
- Girard Public Library
- **Girard Public Library Endowment**
- **Glenda K. Sanderson Mays and Robert L. Mays Memorial Endowment Fund**
- Gutteridge Foundation
- Habitat for Humanity of Crawford County
- Hearts & Hammers of Pittsburg
- Homer Cole Community Center
- **Homer Cole Community Center Endowment**

- Imagine Pittsburg 2030
- Immigrant Park
- **J.L. Hutchinson League Endowed**
- J.L. Hutchinson League Non-Endowed
- **Knights of Columbus Endowment Fund**
- Miner's Memorial
- Operation Round Up
- Orthopaedic Specialists of the Four States Blessings Foundation Fund
- **Pittsburg Area Chamber Foundation Leadership Endowment Fund**
- Pittsburg Beautiful
- **Pittsburg Beautiful Endowment**
- Pittsburg Bi-Centennial
- Pittsburg Community Development Fund
- Pittsburg Homeless Solutions Fund
- **Pittsburg Mother to Mother Ministry**
- Pittsburg Public Library
- **Pittsburg Public Library Foundation Endowment**
- **Raymond Community Home Endowed Fund**
- **Robert Lyerla Memorial Christmas Decorations**
- **Safehouse Crisis Center Endowment**
- SE Kansas Women Helping Women A Fairy Godmother's Fund (Non-Endowed)
- **SE Kansas Women Helping Women: A Fairy Godmother's Endowment Fund**
- **The Lord's Diner Endowment Fund**
- **The Salvation Army – Sr. Citizens Program Endowment**
- **Tisot Frontenac City Cemetery Fund Endowment**
- **Tyler Jeck Memorial**
- **United Way of SW MO & SE KS Endowment**

Religion

- **Frontenac United Methodist Church Endowment**
- **McCune United Methodist Church**
- **United Methodist Church of Girard**

Unrestricted

- **CFSEK General Endowment**
- **First Christian Church (Disciples of Christ) of Fort Scott Charitable Endowment Fund**
- **Fort Scott Area Community Foundation Endowment Fund**
- Fort Scott Area Community Foundation Non-Permanent Fund
- **Future Fund Endowment**
- **Girard Area Community Foundation Endowment Fund**
- **Herman & Ailene and Terry & Marian Parsons Family Legacy Fund**
- **James and Eleanora Belew Endowment Fund**
- **Rosalie Manley Endowment**