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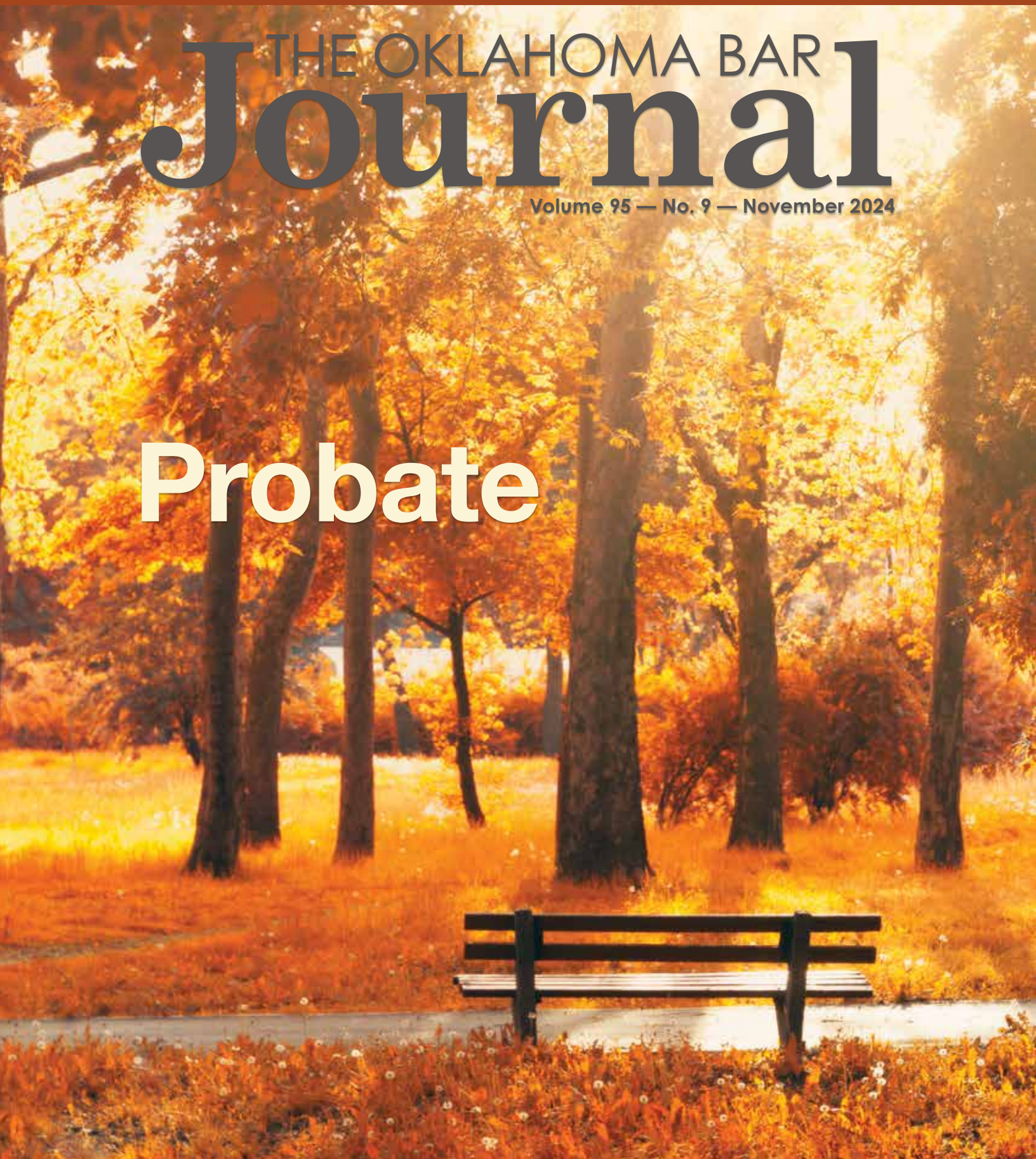

THE OKLAHOMA BAR Journal

Volume 95 — No. 9 — November 2024

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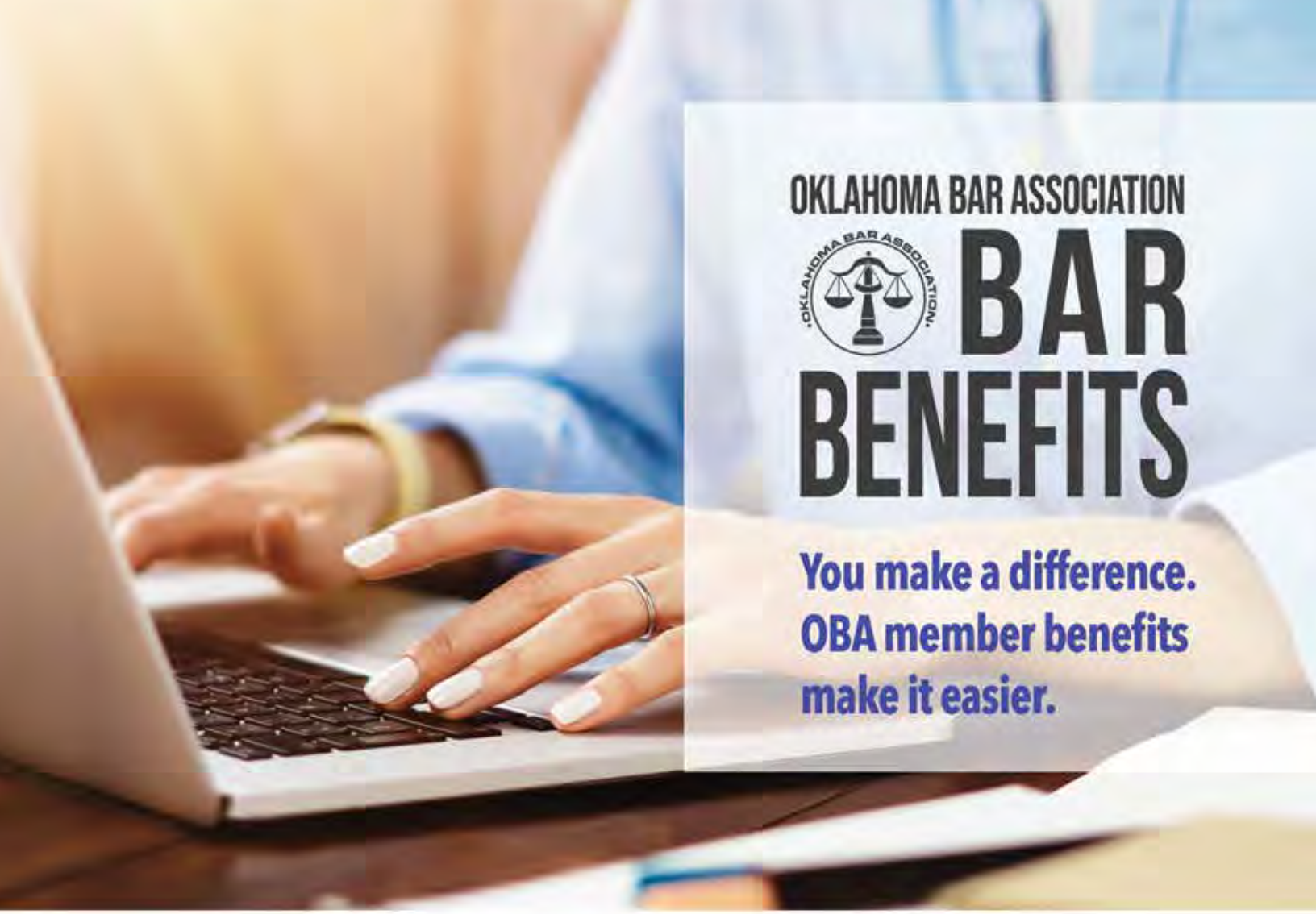

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THE OKLAHOMA BAR Journal

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The Value of OBA Membership

By Miles Pringle

EVERY SO OFTEN, IT IS NECESSARY TO STEP back and look at the bigger picture. As I pen my second-to-last "From the President" article, it feels appropriate to consider the significant role the OBA plays in the legal system and the benefits it conveys to its members. We can be forgiven that, in our daily grind of practicing law, we forget the broader view of how important the OBA is to our profession. The OBA is vital to supporting the administration of justice and improving attorneys' practices.

From time immemorial, attorneys have organized themselves into associations. For example, in the late Roman Empire, lawyers admitted to practice before the same court would form *schola* (or college of advocates), which exercised "[s]trict professional discipline was provided for every 'member of the bar,' and the disciplinary supervision was exercised by the court to which he was admitted."[1] In medieval England, Inns of Court were formed and empowered by the king to regulate the education and practice of law.[2]

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In the United States, "all the colonies had their own professional bar by 1750."[3] Our OBA was formed prior to statehood in 1904 by a merger of the Oklahoma Territory and Indian Territory bar associations. Initially subject to the Oklahoma Legislature, its current structure as a part of the judicial branch occurred in 1939.

The OBA enforces the Rules of Professional Conduct and is responsible for investigating and preventing the unauthorized practice of law. These duties benefit all Oklahomans by having qualified and ethical representation in their legal matters. The courts are benefitted by having competent and truthful advocates speak for the parties before them (or the attorney will be held accountable).

For members, once they have met the standards for admission, they benefit by practicing in a noble and possibly lucrative profession. It is a privilege and public trust to practice the law. No doubt, the fees charged for legal services would be greatly diminished if the barrier of entry was removed. Thus, the primary benefit that all members have is the right to practice the law.

This regulatory approach is a common model in the U.S. Like medical boards provide for medical professionals, banking regulators for banks and securities regulators for issuers, our society relies on bar associations to provide transparency and minimum standards of ethical conduct for lawyers.[4] Unfortunately, there are those who will take advantage of others. We need industry-specific enforcement bodies to hold rulebreakers accountable.

The OBA, however, is more than a regulator exercising its police powers. All states have a legal professional licensure regime. Most states, but not all, have a mandatory bar association whereby the regulating entity is also responsible for other endeavors, such as providing a forum for the discussion of subjects pertaining to the practice of law and encouraging practices that will advance and improve the honor and dignity of the legal profession. I would argue that this model better serves the mission to promote the administration of justice as the enforcement authority is also responsible for improving the quality of the profession – not just punishing infractions. It is a *holistic* approach to regulating that encompasses accountability, rehabilitation and improvement.

A prime illustration of this is the OBA's fantastic Ethics Counsel Richard Stevens. Mr. Stevens confidentially helps practitioners with tough practical issues. The role of ethics counsel is a recognition that it is not enough to

(continued on page 69)

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Last Will and Testament
I, John Smithson, an adult residing at 123/456 North Town Road, Santa Monica, Californi
of sound mind, declare this to be my Last Will and Testament. I revoke all wills and
previously made by me.
ARTICLE I
I appoint Johnson Smithson as my Personal Representative to administer this W
he/she be permitted to serve without Court supervision and without posting
Smithson is unwilling or unable to serve, then I appoint Paul Smithson to se
Representative, and ask that he/she be permitted to serve without Court sup
posting bond.
ARTICLE II
I direct my Personal Representative to pay out of my residuary estat
last illness, administration expenses, all legally enforceable credi
taxes, state inheritance taxes, and all other governmental charges
without seeking reimbursement from or charging any person
charges paid, and if necessary, reasonable funeral expenses,
market

PROBATE

Lost Wills and the Meaning of 'Existence'

By David M. Postic

EVERY SINGLE WILL YOU HAVE PREPARED COULD BE DENIED PROBATE. Let that sink in.

Even if the will was properly executed pursuant to statute. Even if the testator was competent and not subject to undue influence, fraud or duress. Even if the testator did not revoke the will after executing it. Even then, the will might be inadmissible.

This is not a rare phenomenon, an exception to the rule. It is the reality of a lost will.

With very limited exceptions, a will cannot be given effect unless the original instrument is produced for probate.[1] The law presumes that a testator destroyed their will if the original cannot be found after their death.[2] This presumption is a rebuttable one, but Oklahoma, even more than other jurisdictions, makes the presumption very difficult to overcome.

Under 58 O.S. §82 (Section 82), the terms of a will may be given effect, even when the original cannot be found, 1) if the will "is proved to have been in existence at the time of the death of the testator" or "is shown to have been fraudulently destroyed" during the testator's lifetime and 2) if the terms of the will "are clearly and distinctly proved by at least two credible witnesses."[3]

While this statute may seem uncomplicated on the surface, it leaves a lot in question. What does it mean for a will to be "in existence" at the death of the testator? What does it mean for a will to be "fraudulently destroyed"? Can the two witnesses who must "clearly and distinctly" prove the terms of the lost will refer to a photocopy of the executed will to refresh their recollection? Can the court rely on a photocopy of the lost will to prove its terms in lieu of one or both witnesses?[4]

It would take many more pages than I am allowed here to explore all those issues. (Besides, no one wants to read that much about probate procedure.) Instead, this article focuses on the crucial threshold question for probating lost wills: What does it take to prove that a lost will was "in existence" at the death of the testator?

WHAT IT MEANS FOR A WILL TO BE 'IN EXISTENCE'

Proving that a will was "in existence" at the testator's death requires proof of two facts: 1) that the will was *ever* in existence, *i.e.*, that it was properly executed by a person with the capacity to do so, and 2) that the will *remained* in existence until the testator's death. The first of those topics is ground well-trod. The second, much less so.

There are only a handful of published cases in which Oklahoma courts have discussed the probate of lost wills in any real substance.[5] None of those cases define what it means for a will to be "in existence" within the context of Section 82. And of the two cases decided on the basis of the will's existence or nonexistence, neither contains analysis that clarifies the meaning of the statutory language.[6] Even *Oklahoma Probate Law and Practice* – the gold standard in elucidating this area of state law – dedicates barely a sentence to the matter of a lost will's "existence."[7]

At first blush, whether a will "exists" seems simple. If a will

was duly executed and not been revoked prior to the testator's death, it remains *ipso facto* in existence. But consider the dilemma inherent in the probate lost wills: Without a physical document, how is a court to decide whether the will was revoked? Although a will must have a physical existence to be created,[8] the mere ending of its physical form is not sufficient to revoke it. A will is revoked by destruction or other physical act only if the act is performed on the instrument "with [the] intent and for the purpose of revoking the same."[9] If a will can be destroyed but not revoked for lack of revocatory intent, then its continued "existence" under the law is not contingent on the document's preservation. The *legal* existence of a will is distinct from its *physical* existence.[10] Accordingly, to prove that a lost will "existed," the proponent needs to show only that the will had a *legal* existence at the time of the testator's death – that the testator had not revoked it.[11]

But this does not resolve the dilemma. The court is still left with the task of determining whether the will was, in fact, revoked. And without the deceased testator available to say if they did, in fact, destroy the will and, if so, whether they did so with the intention to revoke it, making that determination with any degree of certainty can be nearly impossible. The law resolved this problem through the doctrine of presumed revocation.[12] As with many other legal presumptions, the doctrine is rooted in practicality:

> If a will is traced to the testator's possession and cannot be found after death, there are three plausible explanations for its absence: The testator destroyed it with the intent to revoke; the will was accidentally destroyed or lost; or the will was wrongfully destroyed or suppressed by someone dissatisfied with its terms. Of these plausible explanations, the law presumes that the testator destroyed the will with intent to revoke it.[13]

All three explanations for a lost will are plausible, and any of them could be true in a given case. Yet the law always presumes intentional revocation, provided the will was last known to be in the testator's possession. The requirements of Section 82 apply even if the will was last known to be in the possession of someone other than the testator. However, the fact that it was not in the testator's possession can support a finding that the will was "fraudulently destroyed."

HOW TO PROVE A WILL'S EXISTENCE

Having determined that Section 82 requires a lost will to have a legal, but not necessarily a physical, existence, there remains the more difficult question of how to prove that existence. The burden to do so falls on the proponent of the will.[14] To succeed in that endeavor, it is crucial to know not only the quantum of evidence required by statute but also the type of evidence that is probative of the issue.

Evidentiary Burden

Section 82 imposes a different evidentiary burden for proving a lost will's existence than for proving its terms. The plain language of the statute expresses that the terms of a lost will must be "clearly and distinctly proved" but its existence merely "proved." The absence of the modifiers "clearly" and "distinctly" implies a lower standard of proof than that imposed where those modifiers appear.[15] Likewise, only the terms of the will (its substantive provisions) must be proved "by at least two credible witnesses."[16] There is no such requirement for proving the will's due execution (except in the case of a will contest[17]) or its continued existence at the time of the testator's death,[18] which must simply be "proved."

Despite the relative clarity of the statute in this regard, courts over the years have interpreted the law as requiring the lost will's due execution, its existence at the testator's death or its fraudulent destruction, *and* its terms to *all* be "clearly and distinctly proved by two witnesses." This confusion seems to stem from the 1938 Oklahoma Supreme Court case of *Day v. Williams*.[19] In interpreting the requirements of Section 82, the court stated:

> Where a copy of a purported lost holographic will is offered for probate, the execution of the will exclusively in the handwriting of the testator, the existence of the will at the testator's death, and the provisions of the will *must all be clearly and distinctly proven* by at least two credible witnesses.[20]

Later in the same opinion, however, the court held:

> There is no provision in [Section 82] that requires proof by two witnesses of the execution of a lost will or of its existence at the time of the death of testator. *Sufficient testimony to convince the court of the fact is all that is required*. ... The requirement of the proof of at least two credible

Having determined that Section 82 requires a lost will to have a legal, but not necessarily a physical, existence, there remains the more difficult question of how to prove that existence. The burden to do so falls on the proponent of the will.[14]

> witnesses applies only to the provisions of the lost will, which must be clearly and distinctly proven.[21]

In both of these passages, the court addressed the evidentiary standard for proving the facts required by Section 82 to probate a lost will. But the rule it set forth in the first passage appears to conflict with the rule in the second. The first passage states in no uncertain terms that the will's execution, existence and terms "must *all* be clearly and distinctly proven" by at least two witnesses. Yet the second passage asserts in equally definitive language that the requirement of proof by two witnesses "applies *only* to the provisions of the lost will" and that "[s]ufficient testimony" of the will's execution and existence satisfies the evidentiary burden. This more relaxed standard squares with the well-settled proposition that the proponent of a will must establish its due execution by a preponderance of the evidence.[22]

Notwithstanding these ostensibly divergent statements of the law, the *Day* court went on to apply the more relaxed standard. It found that "the testimony was *sufficient* to establish the fact that [the testator] had prepared" a valid will.[23] It also found that "the testimony was *sufficient* to further show" that the instrument alleged to have been the testator's lost will (a copy of which was produced) was in existence when the testator died."[24] Although the court ultimately affirmed the denial of probate, it did so because the evidence not "sufficient" to show that the testator's will and the copy produced to the court were one and the same.[25] The court observed that there was:

> nothing in the judgment of the [trial] court to indicate what particular feature, if any, of the evidence required was held insufficient. That being true, error cannot be based upon the charge that the court required a greater and higher degree of proof as to the execution of the will and the existence of the will at the time of the death of the testator than is required by law, nor that the demurrer was sustained on the ground of the failure to prove these two facts by at least two credible witnesses.[26]

In other words, the *Day* court did not affirm the trial court ruling because the will's existence was not "clearly and distinctly proved" by two witnesses. It affirmed because it did not see any legal error committed by the trial court based on the record before it.

Nevertheless, Oklahoma courts have consistently cited *Day* for the proposition that the "evidence needed to establish the existence … of the will which is not produced must be *clear and convincing*."[27] "The evidence concerning both the existence and the contents of the will must be *clear and convincing*."[28] "In *Day v. Williams*, this court held that the existence of the will alleged to have been lost, must be clearly and convincingly proved to have been in existence."[29] Prevailing case law, therefore, places Oklahoma in the majority of states that require clear and convincing evidence to rebut the presumption that a lost will was revoked.[30]

Relevant Evidence of Existence

Knowing that the law requires clear and convincing evidence of a lost will's legal existence is one thing. Carrying that burden is another. To do so, the proponent of the will should look to both *direct* evidence and *circumstantial* evidence.[31] Although direct evidence will always be the easiest way to overcome the presumption of revocation, it is not always available.

The clearest direct evidence that the testator did not revoke their will is the testimony of witnesses who saw the original instrument – without any kind of revocatory act performed upon it – after the testator's death, before it was lost or destroyed. If the will had a physical existence at the testator's death and was not revoked by a later will made during the testator's lifetime, it also continued in legal existence. Slightly less powerful, but generally still sufficient, is evidence that the will was accidentally destroyed by the testator (*i.e.*, without revocatory intent) or that it was destroyed by another person without the testator's consent.[32]

Yet, even in the absence of direct evidence, the presumption that a lost will was revoked can be overcome with compelling circumstantial evidence. Oklahoma courts have noted several examples of circumstantial evidence that might show a will was "in existence" at the testator's death. Perhaps the most important evidence of this variety is proof that the will was not in the testator's possession and control at the time of death. Whereas "failure to produce or find a will known to have been in the possession of the testator or readily accessible thereto prior to his death" raises a presumption of revocation,[33] the same does not hold true if the will was not in the testator's possession.[34] Only the testator or another person "*in his presence* and by his direction" can revoke a will by physical act.[35] Accordingly, if the will was not in the testator's possession or control, it could not have been properly revoked.

Declarations of a testator after executing their will are also admissible as "corroborative evidence to prove [the will's] existence."[36] (Though declarations of the testator are *not* admissible to prove the terms of a lost will, which must be established by the personal knowledge of the two required witnesses.)[37] This variety of evidence is not limited to statements by the testator shortly before death affirming that they still have a valid will. Statements by the testator that they could not find their will, that they were looking for their will or that they wanted to make changes to their will can be probative of the will's existence.[38] Even the absence of statements by the testator indicating a desire to revoke the will can be relevant.[39]

Other courts have considered certain behaviors and actions of the testator as relevant. One court concluded that the presumption of revocation was rebutted where the testator, whose original will could not be found, retained a photocopy of the will together with an executed codicil in the same envelope until his death.[40] Another court took into account the fact that the testator "was a very old man" who "frequently took papers out of [his] trunk [where he kept his will] for the purpose of lighting his pipe," finding it "in no degree improbable" that he could have accidentally destroyed the will in this way.[41] Other circumstances courts have deemed relevant to determining the existence of a lost will include: the testator's relationships with the beneficiaries under the will; the habits of the testator in taking

care of personal effects; whether the testator, during their lifetime, made any dispositions of property that contradict the terms of the lost will; whether the testator understood the consequences of not having a will and the effects of intestacy; and whether the terms of the lost will are reasonable.[42]

One of the most famous English cases on lost wills, *Sugden v. Lord St. Leonards*, involved the will of Edward Burtenshaw Sugden, a renowned British lawyer and former lord chancellor of Great Britain.[43] In determining whether the probate court had properly ruled that the will remained in existence at Mr. Sugden's death, the Court of Appeals noted that "it would be difficult to find anyone who had a deeper sense of the importance of testamentary dispositions [than Mr. Sugden]."[44] The chief justice remarked, "It seems to me utterly impossible to suppose that, under these circumstances, such a man as [Mr. Sugden] would voluntarily have destroyed this will, whether for the purpose of revoking it, or making another, or for any other purpose that could be conceived."[45]

A more difficult question is what consideration, if any, should be given to evidence that someone other than the testator had an opportunity to destroy the will (where fraudulent destruction is not actually proven). On the one hand, fraud is never presumed,[46] so the fact that "persons injuriously affected by the will had opportunities to destroy it" is not, standing alone, sufficient to rebut the presumption that it was revoked by the testator.[47] On the other hand, the possibility that the will may have been destroyed by someone other than the testator is certainly relevant to the issue of the will's existence.[48]

The evidence needed to prove by clear and convincing evidence that a lost will was "in existence" at the testator's death depends on the facts of the case. Many attorneys focus solely on finding direct evidence of the will's *physical* existence. While such evidence, when available, is often the most straightforward way to satisfy the burden of proof, circumstantial evidence can be just as effective to rebut the presumption of revocation.

CONCLUSION

Courts rarely explain why, of the three plausible explanations for a missing will, the law presumes intentional revocation in every case. When they do, the answer usually echoes the same notes. "A will is universally recognized as a sacred document,"[49] and there is "a logical inference that a person of ordinary prudence would keep safe an original document as important as a will."[50] Accordingly, if the original "be not found in the repositories of the testator, ... the common sense of the matter, prima facie, is that he himself destroyed it, meaning to revoke it."[51]

However, there are clients who lose important legal papers, use them as grocery lists or otherwise treat them as something less than "sacred documents." In an age where some documents *never* exist in physical form, many people assume that a copy is just as effective as the original. That assumption is not unreasonable, considering the presumption of revocation has been largely reversed for nonprobate transfers.[52] Yet, as in many things, wills law is slow to adapt. In light of these changing norms and expectations, is it still rational to presume that a lost will was revoked? Is it acceptable to ignore the expressed testamentary intent of a decedent even when there is no direct evidence of revocation?

For now, it is up to attorneys to vindicate the wishes of those who can no longer speak for themselves. And when a will is lost, that means knowing how to prove, to the satisfaction of the law, that the will was "in existence" therefore should be given effect.

ABOUT THE AUTHOR

David M. Postic is a shareholder at Postic & Bates PC in Oklahoma City, practicing primarily in the areas of estate planning, probate and trust administration. He serves as an adjunct professor, teaching wills and trusts at the OU College of Law. He can be contacted at posticd@posticbates.com.

ENDNOTES

1. *See* 58 O.S. §82.
2. *In re Estate of Shaw*, 1977 OK 237, ¶18, 572 P.2d 229 ("[F]ailure to produce or find a will known to have been in the possession of the testator or readily accessible thereto prior to his death, raises a presumption of revocation of such instrument.").
3. 58 O.S. §82. *See also Day v. Williams*, 1938 OK 554, ¶35, 85 P.2d 306 (stating that "clearly and distinctly proved" is equivalent to the "clear and convincing" evidentiary standard).
4. The short answer to this last question is "no." While a photocopy of a signed will can be admitted into evidence, 58 O.S. §82, the statutory requirement of proving its terms by two witnesses is "mandatory and may not be disregarded." *Janzen v. Claybrook*, 1966 OK 200, ¶23, 420 P.2d 531. Admitting a copy is primarily useful for establishing that the lost will was properly executed or for resolving a dispute over the exact terms of the will.
5. *See Day v. Williams*, 1938 OK 554, 85 P.2d 306; *Johnson v. Bruner*, 1950 OK 139, 219 P.2d 211; *Nickell v. Nickell*, 1952 OK 446, 251 P.2d 787; *Janzen v. Claybrook*, 1966 OK 200, 420 P.2d 531; *Estate of Malloy v. Gillentine*, 1975 OK CIV APP 11, 529 P.2d 1400; *In re Estate of Robb*, 1978 OK CIV APP 31, 581 P.2d 1327; *In re Estate of Wilson*, 1994 OK CIV APP 31, 875 P.2d 1154; and *In re Estate of Goodwin*, 2000 OK CIV APP 147, 18 P.3d 373. I have not included *In re Estate of Shaw*, 1977 OK 237, 572 P.2d 229 (a case involving duplicate

original wills), in this list because, although the opinion touches on the topic of lost wills, it did not involve the probate of a lost will, and the court did not interpret Section 82 or rely on the statute in its holding. *See id.* at ¶17 ("In our opinion [58 O.S. §82] does not aid in determining the status of executed duplicate wills, particularly if each will is entitled to equal dignity and force.").

6. *See Janzen v. Claybrook*, 1966 OK 200, ¶29; *In re Estate of Goodwin*, 2000 OK CIV APP 147, ¶15.

7. 1 R. Robert Huff, *Oklahoma Probate Law and Practice* §8.8, at 124 (3d ed. 1995).

8. *See* 84 O.S. §55 (requiring that attested wills "must be in writing"). *See also* 84 O.S. §54 (providing that every holographic will must be "written").

9. 84 O.S. §101.

10. 79 Am Jur 2d *Wills* §1071, at 199 (1975) ("A will may continue to exist although the paper upon which it was written has been destroyed.") *See Betts v. Jackson*, 6 Wend. 173, 180 (N.Y. 1830) ("There can be no possible doubt as to the validity of a will or codicil duly executed, although it be destroyed in the lifetime of the testator, if so destroyed by fraud or mistake and without his consent.").

11. *See, e.g.*, *In re Estate of Moramarco*, 86 Cal. App. 2d 326, 194 P.2d 740 (Cal. Ct. App. 1948); 3 William J. Bowe and Douglas H. Parker, *Page on the Law of Wills* §29.156 (rev. ed. 1961). Although this interpretation of "existence" has not been expressly affirmed in Oklahoma, courts have had the opportunity to reject the argument and have not done so. *See, e.g.*, *Janzen v. Claybrook*, 1966 OK 200, ¶26 (noting that appellant had argued on appeal that there was evidence the lost will "was still in legal existence at the time of the testator's death"); *Estate of Malloy v. Gillentine*, 1975 OK CIV APP 11, ¶3 (mentioning appellees' argument that "the said Will had a legal existence and remained unrevoked at the time of the death of the said Testatrix").

12. The presumed revocation of a lost will has been a part of the Anglo-American legal tradition for centuries. *See, e.g.*, *Helyar v. Helyar*, [1754] 1 Lee 472, 5 Eng. Ecc. 416 ("It is a presumption of law that a will never out of the deceased's custody, and not appearing at his death, has been destroyed by the deceased.").

13. 1 *Restatement (Third) of Property: Wills and Other Donative Transfers* §4.1 cmt. j (Am. L. Inst. 1998).

14. *Janzen v. Claybrook*, 1966 OK 200, ¶11. *Cf. In re Estate of Speers*, 2008 OK 16, ¶9 (noting that the "burden of proof in the trial of a contest of the probate of a will is upon the proponents of the will").

15. *Cf. Broadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶18, 139 P.3d 873 (quoting *Black's Law Dictionary* 1087 (8th ed. 2004)) (citing *U.S. v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 422 (6th Cir. 2006)).

16. *Day v. Williams*, 1938 OK 554, ¶33 (emphasis added).

17. *See* 58 O.S. §43 (requiring proponent of will to produce and examine the subscribing witnesses, or explain their absence, in the event of a will contest).

18. Huff, *supra* note 7, §8.8, at 124 (noting that "no certain number of witnesses are required" to prove a will's existence).

19. 1938 OK 554.

20. *Day v. Williams*, 1938 OK 554, ¶26 (emphasis added).

21. *Day v. Williams*, 1938 OK 554, ¶33 (emphasis added).

22. *See, e.g.*, *In re Estate of Speers*, 2008 OK 16, ¶12 ("The burden of proof rests upon the proponent of the will to establish by preponderance of evidence that the will was executed and published according to law."); *In re Estate of Bogan*, 1975 OK 134, ¶14 (same).

23. *Day v. Williams*, 1938 OK 554, ¶20 (emphasis added).

24. *Day v. Williams*, 1938 OK 554, ¶20 (emphasis added).

25. *Day v. Williams*, 1938 OK 554, ¶21.

26. *Day v. Williams*, 1938 OK 554, ¶34.

27. *In re Estate of Wilson*, 1994 OK CIV APP 31, ¶8 (citing *Day v. Williams*) (emphasis added).

28. *Roberts v. McCrory*, 693 F. Supp. 998, 1000 (W.D. Okla. 1987) (emphasis added).

29. *Janzen v. Claybrook*, 1966 OK 200, ¶23 (internal citations omitted). *But see In re Estate of Modde*, 323 N.W.2d 895, 898 (S.D. 1982) ("The court [in *Day v. Williams*, interpreting a statute identical to one in South Dakota] concluded that sufficient testimony to convince the court of the fact of execution of the will or of its existence at the time of the testator's death is all that is required.").

30. *See, e.g.*, *Dan v. Dan*, 288 P.3d 480 (Alaska 2012); *In re Estate of Crozier*, 232 N.W.2d 554, 559 (Iowa 1975); *In re Estate of Richard*, 556 A.2d 1091 (Me. 1989); *In re Estate of Mecello*, 633 N.W.2d 892 (Neb. 2001); *In re Davis' Will*, 11 A.2d 233, 236 (N.J. 1940); *In re Will of McCauley*, 565 S.E.2d 88 (N.C. 2002); *Briscoe v. Schneider (In re Estate of Penne)*, 775 P.2d 925, 927 (Or. Ct. App. 1989). *But see In re Estate of Glover*, 744 S.W.2d 939 (Tex. 1988) (holding the presumption is rebuttable by a preponderance of the evidence); *In re Estate of King*, 817 A.2d 297 (N.H. 2003) (same); 1 *Restatement (Third) of Property: Wills and Other Donative Transfers* §4.1 cmt. j (Am. L. Inst. 1999) (same).

31. *Direct evidence* (often used interchangeably with *original evidence*) means "evidence that proves a fact without any inference or presumption." *See* Brian A. Garner, *Garner's Dictionary of Legal Usage,* 278-79 (3d ed. 2011). *Circumstantial evidence* (less commonly termed *indirect evidence)* is "evidence from which the fact-finder may infer the existence of a fact in issue, but that does not directly prove the existence of the fact." *Id*. at 157.

32. Note, "Rebutting the Presumption of Revocation of Lost or Destroyed Wills," 24 *Wash. U. L. Quart.* 105, 114-15 (1938) ("[C]lear proof of accidental destruction by the testator is a circumstance sufficient to rebut the presumption of revocation ... [as is] accidental destruction by a person other than the testator.").

33. *In re Estate of Shaw*, 1977 OK 237, ¶18.

34. *See, e.g.*, *In re Estate of Wilson*, 1994 OK CIV APP 31 (not questioning the existence of a lost will where testatrix had given the will to attorney and "never had it in her possession after that").

35. 84 O.S. §101 (emphasis added).

36. *Nickell v. Nickell*, 1952 OK 446, ¶14. *See also* 79 Am Jur 2d *Wills* §624, at 718 (1975) (noting the prevailing rule is that "declarations of the testator are admissible in evidence to rebut the presumption of revocation by destruction of the document, which arises from inability to find the will after the testator's death").

37. *Johnson v. Bruner*, 1950 OK 139, ¶18.

38. *See, e.g.*, *In re Estate of Rush*, 38 Misc. 2d 45 (Sur. Ct. N.Y. County 1962) (holding presumption of revocation is overcome where decedent acts in manner inconsistent with revocation, *i.e.*, searching for will just prior to death).

39. *See In re Estate of Modde*, 323 N.W.2d 895, 899 (S.D. 1982) (citing *In re Estate of Markofske*, 178 N.W.2d 9 (1970) ("We also find the absence of any statement by decedent of any intent or desire to revoke or change the will to be significant.").

40. *In re Estate of Herbert*, 89 Misc. 2d 340 (N.Y. Surr. Ct. 1977).

41. *Davis v. Davis & Davis*, [1823] 2 Add. Eccl. 223, 227.

42. *Levitz v. Hillel Lodge Long Term Care Foundation*, 2017 ONSC 6253, at para. 19 (CanLII).

43. 2 James Beresford Atlay, *The Victorian Chancellors* 26 (1908).

44. *Sugden v. Lord St. Leonards*, [1876] 1 P.D. 154, 218 (EWCA).

45. *Sugden v. Lord St. Leonards*, [1876] 1 P.D. 154, 219 (EWCA).

46. John E. Walsh Jr., "Lost Wills and the Register of Wills," 111 *U. Penn. L. Rev.* 450, 455 (1963) ("Courts will not ... presume fraudulent destruction; on the contrary, the innocence of third persons is assumed.").

47. 79 Am Jur 2d *Wills* §628, at 722 (1975).

48. *Davis v. Davis & Davis*, [1823] 2 Add. Eccl. 223, 227 ("It also appears, that the trunk was sometimes left open ... and was accessible to other persons in the house. The codicil therefore might have been taken out, accidentally, or otherwise, neither by, nor with the privity of, the deceased.").

49. *Feder v. Nation of Israel*, 830 S.W.2d 449, 452 (Mo. Ct. App. 1992).

50. *Morton v Christian*, 2014 BCSC 1303, para. 52 (Can.). *See also Welch v. Phillips*, [1836] 12 Eng. Rep. 828, 829 (stating that "it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety and would not be either lost or stolen").

51. *In re Estate of Hartman*, 563 P.2d 569, 571 (Mont. 1977) (quoting *Colvin v. Fraser*, [1829] 162 Eng. Rep. 856, 877).

52. *See generally* Barry Cushman, "The Decline of Revocation by Physical Act," 54 *Real Prop., Tr. & Est. L.J.* 243 (2019). *See also* Uniform Trust Code §602 cmt. (stating that while "a physical act ... might also demonstrate the necessary intent [to revoke a trust] ... [t]hese less formal methods, because they provide less reliable indicia of intent, will often be insufficient").

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PROBATE

Are You My Father?

Omitted Child Litigation in the Era of Genetic Testing

By Logan L. James

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OMITTED CHILD[1] CONCERNS HAVE THE POTENTIAL to upend client expectations in probate litigation. With the increased popularity of widely available genetic testing kits, such as 23andMe and Ancestry, these concerns will become all the more prevalent. After over a century of silence, recent Oklahoma case law endeavors to interpret critical statutes and questions in omitted child litigation. To prepare for the inevitable increase in omitted child litigation, it is critical to understand the underlying concepts and the impact of these recent decisions.

In Oklahoma, omitted child laws are a creature of statute. In appropriate circumstances, Oklahoma's omitted child statutes apply to modify the provisions of a will and grant the omitted child the proper intestate share of the decedent's estate.[2]

Section 132 of the Oklahoma Statutes on wills and succession provides:

> When any testator omits to provide in his will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section.[3]

This raises several questions. First, does the purported omitted child qualify as a "child"? Second, did the testator actually omit to provide for the child? Third, was the omission intentional? And fourth, if the will unintentionally omitted the child, what portion of the probate estate is the omitted child entitled to receive? To answer these questions, as with all questions of will construction, you must determine the testator's intent.[4] Intent is determined as of the date of execution of the will and not from information the testator subsequently acquired.[5]

DOES THE PURPORTED CHILD QUALIFY AS A 'CHILD' OF THE TESTATOR UNDER THE STATUTE?

Oklahoma's omitted child statute only applies when the testator fails to provide for any "children" or "child" in the will.[6] Similarly, Oklahoma's intestate succession laws also discuss inheritance by a decedent's "children" or "child."[7] In either case, the opening question is whether the purported child qualifies as a "child." With respect to Section 132, the word "child" denotes legal heir.[8] Importantly, in Oklahoma, genetic testing results from 23andMe and Ancestry alone do not establish paternity in a probate action. Instead, the purported child must seek to establish paternity pursuant to 84 O.S. §215. Typically, in genetic testing kit cases, the only applicable provision of Section 215 is Subsection (d), which states, "The father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction."[9] The existence of a parent-child

relationship in a "paternity proceeding" is governed by the Oklahoma Uniform Parentage Act (OUPA).[10] Thus, evaluate the OUPA to assess whether the purportedly omitted child can establish status as a "child" of a decedent under Oklahoma law. This is especially true in genetic testing kit cases where the facts will, more likely, support a defense based upon a preexisting "presumed father" of the purportedly omitted child.[11] Further, because genetic testing kit cases lend themselves to the possibility that the supposed father will not be discovered for some time, perhaps even after the probate is closed, practitioners should be aware of the Oklahoma Supreme Court's recent ruling in *Matter of Est. of Georges* regarding the limitations period to claim that a person qualifies as a "child."[12]

DID THE TESTATOR OMIT TO PROVIDE FOR THE CHILD IN THE WILL?

The omitted child statute only applies if the testator failed to provide for the child in the will.[13] The statute does not secure a child with a minimum statutory share of the estate upon the parent's death.[14] Recently, in *In re Estate of James*, the Oklahoma Supreme Court clarified that a child is not omitted where a testator intended to provide for the child in the will, but the bequest to the child fails or lapses.[15]

A child is not omitted simply because they are not specifically named in the will.[16] The testator can provide for children in the will by name or by class. This issue was addressed recently in *In the Matter of Estate of Shepherd*.[17] There, the testator's children argued that they were omitted because they were not provided for by name in the will, and they were also not provided for as a separate, designated class.[18] Instead, the will left the majority of the property to the testator's granddaughter and the residue of the estate to "all relatives."[19] *Shepherd* held that a provision in the will leaving the residue of the estate to "all relatives" was sufficient to provide for the testator's children by class, and therefore, the omitted child statutes did not apply.[20] The specificity of the described class should be analyzed when assessing omitted child issues.[21]

If the testator provides for the child through a testamentary trust created by the will or through a will naming the child but pouring all assets into an *inter vivos* trust incorporated into the will, then the child was not omitted, and Section 132 does not apply.[22] This is true even if the trust is subsequently amended to provide nothing for the child.[23] Presumably, transfers to a child outside of the will (and not addressed within, or otherwise incorporated into, the will), such as a transfer on death account, life insurance policy or separate trust, would not constitute provision for the child under the will.[24]

WAS THE OMISSION TO PROVIDE FOR THE CHILD IN THE WILL INTENTIONAL?

If the testator's omission to provide for a child was intentional, the child is not protected by Section 132.[25] Intent to disinherit the child must appear within the four corners of the will in strong and convincing language.[26] Extrinsic evidence is inadmissible unless the will is ambiguous on its face.[27] Even the disposition of the entire estate does not alone evince an intent to omit a child.[28]

In *James*, the Oklahoma Supreme Court freshly observed that there are many ways a person can express the intention to omit to provide for a child in their will, including:

> (1) expressly state that the named child is to receive nothing; (2) provide only a nominal amount for the child who claims to be pretermitted; (3) name a child, but then leave them nothing; (4) declare any child claiming to be pretermitted take nothing; or (5) specifically deny the existence of members of a class to which the claimant belongs coupled with a complete disposition of the estate.[29]

Notwithstanding the broad reference to category (5) in *James*, other Oklahoma cases have held this could be insufficient or give rise to an ambiguity in the will if the testator *falsely* denied in the will that he had any children or any other unidentified children.[30]

Still, Oklahoma case law contains potential inconsistencies regarding a will that devises classes of omitted persons nothing or some minimal sum as a means of disinheritance. For example, in *Bridgeford v. Chamberlin's Estate*, the Oklahoma Supreme Court held that a will limiting to $5 the share of any person who challenged the estate plan claiming to be a pretermitted "child" sufficiently evidenced the testator's intent to disinherit the omitted child, stressing that this was not a "'simple' no contest clause" provision, which would seemingly be invalid.[31] *Bridgeford* should be compared with the decision in *In re Estate of Massey*, where the court held that a "no contest" clause in a will capping at $1 the share of any person claiming

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to be entitled to receive from the estate other than those provided for in the will was inapplicable to an omitted child's statutory share.[32] Though the categories set forth in *James* are a useful starting point, Oklahoma law compels careful analysis before application.

IF OMISSION WAS UNINTENTIONAL, WHAT SHARE DOES THE OMITTED CHILD RECEIVE?

Courts must next decide the omitted child's share of the estate. Generally speaking, the omitted child will receive an intestate share.[33] Further, 84 O.S. §133[34] addresses the apportionment of the omitted child's share among the devisees and legatees of the estate. Although Section 133 was adopted in 1910, it took over a century for any case law to meaningfully discuss its application. The interpretive drought ended with two published Oklahoma appellate decisions addressing Section 133 in 2023, and more are likely to follow.

In the *Matter of Estate of Parker*,[35] the Oklahoma Supreme Court, in a 6-3 decision, directly addressed the application of Section 133 to the apportionment of an omitted child's share of the estate. There, the only bequest in the testator's will was: "I more than owe my bro Herman what I will recieve [*sic*] in my settlement from my workers comp upon my death wish it to be given to him," and the will did not address the disposition of the residue.[36] The workers' compensation settlement bequeathed to the testator's brother comprised virtually all of the estate.[37]

In an analysis of first impression, the Oklahoma Supreme Court held that Section 133 is intended to modify Section 132 and provide for the specific manner of allocating estate assets to satisfy an award to omitted children.[38] *Parker* held that Section 133's apportionment exemption applied because the will demonstrated the testator's obvious intention for his brother to receive the workers' compensation settlement, and such intent would be defeated if the entirety of this property were awarded to the omitted children.[39] However, the specific facts in *Parker* presented a problem regarding the application of Section 133 and the equitable apportionment of the estate. Specifically, the court observed that if the testator's brother received the entirety of his specific bequest under the apportionment exemption in Section 133, he would effectively receive the entire estate, thereby eviscerating the purpose of Section 132.[40]

As such, the Oklahoma Supreme Court remanded the case to the district court to apportion the estate among the testator's brother and omitted children. In doing so, the court seems to have diverged from the express provisions of Sections 132 and 133 regarding the portion of the estate to which the omitted children are entitled. With no statutory guidance, it is unclear how courts and practitioners should approach similar apportionment issues in the future. The only guidance available currently is that the district court seemingly has equitable discretion to apportion the estate among specific devisees and omitted children in some portion between 0% and 100% of the specific devise.

Further, in *Parker*, the entirety of the specific devise would have gone to the testator's omitted children if they received their statutory share, which caused the court to hold that the obvious intention of the testator would be defeated. Would the outcome be different if the portion of the specific devise needed to satisfy the omitted child's statutory share was less than 100% of the specific devise? If yes, how much of the specific devise can be used to satisfy the omitted child's statutory share before the testator's intent is *defeated*? *Parker* does not provide any guidance or framework for courts or practitioners to evaluate this issue down the line. All that is currently known is that taking 100% of the specific devise defeats the obvious intention of the testator.

Parker also did not clarify what language a will must contain to demonstrate the obvious intention of the testator that a specific devise or bequest go to a specific devisee. Although the application of the apportionment exemption in *Parker* was fairly apparent based upon the testator's express explanation of the specific devise in the will, it is less clear what language is required in other circumstances. The significance of this uncertainty is highlighted by the recent *Shepherd* decision.[41] The will in *Shepherd* merely devised specific items of property to the testator's granddaughter and, unlike *Parker*, did not explain why the granddaughter should receive the property.[42] Nonetheless, *Shepherd* suggested that if the testator's children were unintentionally omitted, the holding in *Parker* would apply such that the specific devise to the granddaughter would be exempt from the apportionment of the shares awarded to the daughters as omitted children pursuant to Section 133.[43] The foregoing observation in *Shepherd* raises more questions than it answers. Namely, is a mere specific devise of property without an accompanying explanation sufficient to trigger the apportionment exemption in Section 133? If it is, then *Shepherd* could have a profound impact on the application of Section 133 to the apportionment of an omitted child's statutory share. What is clear is that more guidance is still needed on the application of Section 133.

CONCLUSION

You can help your clients avoid the uncertain landscape of Oklahoma omitted child litigation. As with all probate litigation, the first line of defense to guard against omitted child concerns is a strong, tailored estate plan. Utilizing a trust offers the most protection since Oklahoma's omitted child statutes simply do not apply to trusts. When drafting a will, specificity is best. Include explanations for specific devises or special language disclaiming unknown children or otherwise providing for unknown children in a *de minimis* manner. In the era of genetic testing, it is more important than ever that we encourage clients to consider their estate plans carefully.

ABOUT THE AUTHOR

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ENDNOTES

1. Oklahoma courts use "omitted" child and "pretermitted" child interchangeably.
2. By definition, Oklahoma's omitted child laws apply to wills, they do not apply to revocable *inter vivos* trusts or directly to probates passing intestate. *See* 84 O.S. §132; *Estate of Jackson*, 2008 OK 83, 194 P.3d 1269; and *Welch v. Crow*, 2009 OK 20, 206 P.3d 599.
3. 84 O.S. §132. For convenience, this article discusses omitted children, but note that Section 132 also applies to the issue of any deceased child.
4. *Rogers v. Estate of Pratt*, 2020 OK 27, ¶18, 467 P.3d 651, 655.
5. *Brown v. Crawford*, 1984 OK CIV APP 59, ¶12, 699 P.2d 162, 164.
6. 84 O.S. §132.
7. 84 O.S. §213.
8. *Crawford*, 1984 OK CIV APP 59, at ¶10.
9. 84 O.S. §215(D).
10. *See* 10 O.S. §§7700-103(A) and 7700-103(B).
11. *See* 10 O.S. §§7700-204(A)-(B) and 7700-607. Although no Oklahoma appellate court has squarely addressed this issue in a published decision, this possible defense should at least be considered by counsel before any heir, devisee or legatee acquiesces to paternity proceedings. Further, it should be noted that the Oklahoma Supreme Court recently ruled that the statute in the OUPA setting forth the two-year statute of limitations related to an acknowledgment of paternity was a statute of limitations with exceptions, such as cases involving fraud, and not statute of repose. *Scott v. Foster*, 2023 OK 112, ¶22, 538 P.3d 1180, 1189.
12. Where a party challenges an already-closed probate based on fraud, the challenge is subject to the statutory three-month limitations period to contest the will, rather than the general law of limitations. 2023 OK 123, ¶9, – P.3d – as corrected (Feb. 12, 2024).
13. 84 O.S. §132.
14. *Jackson*, 2008 OK 83, at ¶22.
15. 2020 OK 7, ¶23, 472 P.3d 205, 212.
16. *In re Estate of Chester*, 2021 OK 12, ¶11, 497 P.3d 284, 287.
17. 2023 OK CIV APP 24, – P.3d –.
18. *Id.* at ¶11.
19. *Id.* at ¶3.
20. *Id.* at ¶13.
21. *See Matter of Est. of Woodward*, 1991 OK 25, ¶7, 807 P.2d 262, 264. (The Oklahoma Supreme Court held that a will provision stating that "all other persons are excluded" was insufficient to disinherit the testator's children because the term "persons" does not qualify as a class of heirs which the testator intended to omit.).
22. 84 O.S. §154; *Murano v. Jacobs*, 2016 OK CIV APP 50, ¶11, 377 P.3d 1258, 1261; *Matter of Est. of Eversole*, 1994 OK 114, ¶15, 885 P.2d 657, 664; and *Miller v. First Nat. Bank & Tr. Co.*, 1981 OK 133, ¶8, 637 P.2d 75, 77.
23. *Murano*, 2016 OK CIV APP 50, at ¶11.
24. The statute applies "[w]hen any testator omits to provide in his *will* for any of his children." 84 O.S. §132 (emphasis added). As such, Section 132 only applies to wills, not other estate planning vehicles completely outside of the will. *See* n. 2, *supra*.
25. 84 O.S. §132.
26. *Chester*, 2021 OK 12, at ¶19.
27. *Id.*
28. *Id.*
29. 2020 OK 7, at ¶20 (footnotes omitted).
30. *Pratt*, 2020 OK 27, at ¶24.
31. 1977 OK 206, ¶8-13, 573 P.2d 694, 695-96.
32. 1998 OK CIV APP 116, 964 P.2d 238.
33. 84 O.S. §§131 and 132.
34. 84 O.S. §133 reads: "When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in a will as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees, or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will, would thereby be defeated; in such case such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted."
35. 2023 OK 50, 529 P.3d 203.
36. *Id.* at ¶1.
37. *Id.*
38. *Id.* at ¶9.
39. *Id.* at ¶12.
40. *Id.*
41. Although the applicable portion of *Shepherd* is *dicta*, it may still be viewed as fairly persuasive by some courts given the absence of controlling authority on this point.
42. 2023 OK CIV APP 24, at ¶3.
43. *Id.* at n. 2.

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PROBATE

Navigating a Probate: A Primer for the Personal Representative

By A. Daniel Woska

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AFTER AN INDIVIDUAL'S DEATH, HIS OR HER ASSETS WILL BE GATHERED, business affairs settled, debts paid, necessary tax returns filed and assets distributed as the deceased individual (typically referred to as the "decedent") directed. These activities generally will be conducted on behalf of the decedent by a person acting in a fiduciary capacity, either as a personal representative or a trustee, depending upon how the decedent held his or her property.

As a first step, it is helpful to know the meaning of a few common terms:

- Fiduciary: An individual, bank or trust company that acts for the benefit of another. Trustees, executors and personal representatives are all fiduciaries.
- Grantor: (Also called "settlor" or "trustor.") An individual who transfers property to a trustee to hold or own subject to the terms of the trust agreement setting forth his or her wishes. For income tax purposes, the same term is used to mean the person who is taxed on the income from the trust. It is confusing, but they are different concepts.
- Testator: A person who has made a valid will. (A woman is sometimes called a "testatrix.")
- Beneficiary: A person for whose benefit a will or trust was made; the person who is to receive property, either outright or in trust, now or later.
- Trustee: An individual or bank or trust company that holds legal title to property for the benefit of another and acts according to the terms of the trust. This can be confusing in that you can sometimes be both a trustee and a beneficiary of the same lifetime (*inter vivos*) trust you established or a trust established by someone else for you at his or her death (testamentary trust).
- Executor: (Also called "personal representative" – a woman is sometimes called an "executrix.") An individual or bank or trust company that settles the estate of a testator according to the terms of the will or, if there is no will, in accordance with the laws of the decedent's estate (intestacy), although a person acting in intestacy may be called by a different name, such as administrator.
- Principal and Income: Respectively, the property or capital of an estate or trust and the returns from the property, such as interest, dividends, rents, etc. In some cases, gain resulting from appreciation in value may also be income.

As a general rule, the administration of an estate or trust after an individual has died requires the fiduciary to undertake certain routine issues and follow several standard steps to collect and then distribute the decedent's assets in accordance with his or her wishes. These guidelines focus on activities that occur in an estate or trust immediately after the individual has died.

UNDERSTANDING THE WILL OR TRUST

It is very important to read and understand the will or trust so that you will know who the beneficiaries are, what they are to receive and when, and who your co-fiduciaries are, if any. Does the will give everything outright, or does it create new trusts that may continue for several years? Does a trust mandate certain distributions (*i.e.*, "All income earned each year is to be paid to my wife, Nancy"), or does it leave this to the trustee's discretion (*i.e.*, "My trustee shall distribute such income as she believes is necessary for the education and support of my son, Alan, until he reaches age 25")? The document often imparts important directions to the fiduciary, such as which assets should be used to pay taxes and expenses. The document will usually list the fiduciary's powers in some detail.

Most fiduciaries retain an attorney who specializes in the area of trusts and estates to assist them in performing their duties properly. An attorney's advice is very helpful in ensuring that you understand what the will or trust and applicable state law provide. For example, at an initial meeting, it is common for the attorney to review, step by step, many of the key provisions of the will or trust (or both) so you will understand your role. Be mindful that if you accept the appointment to serve as an executor or trustee, you will be held responsible for understanding and implementing the terms of the trust or will.

MANAGING ESTATE ASSETS

It is the fiduciary's responsibility to locate and keep safe assets comprising an estate or trust. Especially when a fiduciary assumes office at the grantor's or testator's death, it is crucial to secure and value all assets as soon as possible. Some assets, such as brokerage accounts, may be accessed immediately once certain prerequisites are met. Typical prerequisites are an executor's obtaining formal authorization, sometimes referred to as letters testamentary, from the court and producing a death certificate. Other assets, such as insurance or retirement benefits, may have to be applied for by filing a claim.

You may need a professional appraiser to value the decedent's tangible personal property, like household furniture, automobiles, jewelry, artwork and collectibles. Depending on the nature and value of the property, this may be a routine activity; however, you may need the services of a specialist appraiser if, for example, the decedent had rare or unusual items or was a serious collector. Real estate, whether residential or commercial, and any business interests also must be valued. Besides providing a valuation for assets that may be reported on a court-required inventory or the state or federal estate tax return, the appraisal can help the fiduciary gauge whether the decedent's insurance coverage on the assets is sufficient.

Appropriate insurance should be maintained on the assets throughout the fiduciary's job. The fiduciary also must value financial assets, including bank and securities accounts. Bear in mind that for federal estate tax returns for estates that do not owe any federal estate tax, certain estimates are permitted. This might lessen the appraisal costs that must be incurred.

HANDLING DEBTS AND EXPENSES

It is the fiduciary's duty to determine what bills remain unpaid at death and what expenses to incur in the administration of the estate. In some cases, the estates may be harmed if certain expenses, such as property or casualty insurance bills or real estate taxes, are not paid promptly. Oklahoma requires a written notice to any known or reasonably ascertainable creditors. While most bills will present no problem, it is wise to consult an attorney in any unusual circumstances, as the fiduciary can be held personally liable for improperly spending estate or trust assets or for failing to protect the estate assets properly, such as by maintaining adequate insurance coverage.

The fiduciary may be responsible for filing a number of tax returns. These tax returns include the final income tax return for the year of the decedent's death, a gift or generation-skipping tax return for the current year if needed and any prior years' returns that may be on extension. It is not uncommon for a decedent who was ill for the last year or years of life to have missed filing returns. The only way to be certain is to investigate. In addition, if the value of the estate (whether under a will or trust) before deductions exceeds the amount sheltered by the estate tax exemption amount, a federal

estate tax return will need to be filed. Even if the value of the estate does not exceed the estate tax exemption amount, a federal estate tax return may still need to be filed. Under the concept of portability, if the decedent is survived by a spouse who intends to use any estate tax exemption the deceased spouse did not use, an estate tax return should be filed.

Since the estate or trust is a taxpayer in its own right, a federal tax identification number must be obtained, and a fiduciary income tax return must be filed for the estate or trust. A tax identification number can be obtained online from the IRS website. You cannot use the decedent's social security number for the estate or any trusts that exist following the decedent's death.

It is important to note for income tax planning that the estate or trust and its beneficiaries may not be in the same income tax brackets. Thus, the timing of certain distributions can save money for all concerned. Caution should also be exercised because trusts and estates are subject to different rules that can be quite complex and can reach the highest tax rates at very low levels of income. Some tax return preparers and accountants specialize in preparing such fiduciary income tax returns and can be very helpful. They are familiar with the filing deadlines, will be able to determine whether the estate or trust may pay estimated taxes quarterly and may be able to help you plan distributions or other steps to reduce tax costs.

Most expenses that a fiduciary incurs in the administration of the estate or trust are properly payable from the decedent's assets. These include funeral expenses, appraisal fees, attorney's and accountant's fees and insurance premiums. Careful records should be kept, and receipts should always be obtained. If any expenses are payable to you or someone related to you, consult with an attorney about any special precautions that should be taken.

FUNDING THE BEQUESTS

Wills and trusts often provide for specific gifts of cash (*i.e.*, "I give my niece $50,000 if she survives me") or property (*i.e.*, "I give my grandfather clock to my granddaughter, Nina") before the balance of the property, or residue, is distributed. The residue may be distributed outright or in further trust, such as a trust for a surviving spouse or a trust for minor children. Be sure that all debts, taxes and expenses are paid or provided for before distributing any property to beneficiaries because you may be held personally liable if insufficient assets do not remain available to meet estate expenses. Although it is usual to obtain a receipt and refunding agreement from a beneficiary that states they agree to refund any excess distribution made in error by the fiduciary, as a practical matter, it is often difficult to retrieve such funds. In Oklahoma, you need a court approval before most distributions may be made. Where distributions are made to ongoing trusts or according to a formula described in the will or trust, it is best to consult an attorney to be sure the funding is completed properly. Tax consequences of a distribution can sometimes be surprising, so careful planning is important.

TRUST ADMINISTRATION

Trusts are designed to distinguish between income and principal. Many trusts, especially older ones, provide for income to be distributed to one person at one time and principal to be distributed to that same person at a different time or to another person. For example, many trusts for a surviving spouse provide that all income must be paid to the spouse but provide for

Estates may be closed when the executor has filed the final account and has a court order on the payment of debts, expenses and taxes; has received tax clearances from the IRS (if necessary); and has distributed all assets on hand.

payments of principal to the spouse only in limited circumstances, such as a medical emergency. At the surviving spouse's death, the remaining principal may be paid to the decedent's children, charity or other beneficiaries. Income payments and principal distributions can be made in cash or at the trustee's discretion by distributing securities as well as cash. There is no such thing as a "standard" distribution provision – read these documents carefully.

Unless a fiduciary has financial investment experience, he or she should seek professional advice regarding the investment of trust assets. In addition to investing for good investment results, the fiduciary should invest within the applicable state's prudent investor rule that governs the trust or estate and with careful consideration of the terms of the will or trust, which may modify the otherwise applicable state law rules. A skilled investment advisor can help the fiduciary decide how to invest, what assets to sell to produce cash for expenses, taxes or outright gifts of cash and how to minimize income and capital gains taxes. Simply holding the investments the decedent owned will not be a defense if an heir claims you did not invest wisely or violated the law governing trust investments. It is important to have a written investment policy statement stating what investment goals are being pursued.

During the period of administration, the fiduciary must provide an annual income tax statement (called a Schedule K-1) to each beneficiary who is taxable on any income earned by the trust. The fiduciary also must file an income tax return for the trust annually. The fiduciary can be held personally liable for interest and penalties if the income tax return is not filed and the tax paid by the due date, generally April 15.

CLOSING THE ESTATE

Estates may be closed when the executor has filed the final account and has a court order on the payment of debts, expenses and taxes; has received tax clearances from the IRS (if necessary); and has distributed all assets on hand. Trusts terminate when an event described in the document, such as the death of a beneficiary, or a date described in the document, such as the date the beneficiary attains a stated age, occurs. The fiduciary is given a reasonable period of time thereafter to make the actual distributions. It is a good practice to require all beneficiaries to sign a document prepared by an attorney in which they approve of your actions as fiduciary and acknowledge receipt of assets due them. This document protects the fiduciary from later claims by a beneficiary. These formalities are recommended even when the other heirs are relatives, as that alone is never an assurance that one of them will not have an issue and pursue a legal claim against you. A final income tax return must be filed and a reserve kept available for any due but unpaid taxes or estate expenses.

COMMON QUESTIONS

How Do I Title (Own) Bank and Other Accounts?

Each bank, trust company or investment firm may have its own

format, but generally, you may use, for a trust, "Alice Carroll, Trustee, Lewis Carroll Trust dated Jan. 19, 1998," or, in a shorthand version, "Alice Carroll, Trustee under agreement dated Jan. 19, 1998." For an estate, you should use "Alice Carroll, Executor, Estate of Lewis Carroll, Deceased."

Where Do I Sign My Name in a Fiduciary Capacity?

An executor signs: "Alice Carroll, Executor (or Personal Representative) of the Estate of Lewis Carroll, Deceased." A trustee signs: "Alice Carroll, Trustee."

Where Do I Hold the Estate or Trust Assets?

You should open an investment account with a bank, trust company or brokerage company in the name of the estate or trust. All expenses and disbursements must be made from these accounts, and you should receive regular statements.

How (and How Much) Do I Get Paid?

Because being a fiduciary is time-consuming and often difficult, it is appropriate to be paid for your services. The will or trust may set forth the compensation to which you are entitled. If the documents do not, many states either provide a fixed schedule of fees or allow "reasonable" compensation, which usually takes into account the size of the estate, the complexity involved and the time spent by the fiduciary. Executor's or trustee's fees are taxable compensation to you. Several states do not permit you to pay your own compensation without a court order, so ask your attorney before you write yourself a check. Many fiduciaries in the same family as the decedent are quick to waive fees. Before doing this, however, consult with an attorney for the estate and be certain you understand the full scope of your duties and any ramifications of waiver.

What if a Beneficiary Complains?

Even professional fiduciaries, such as trust companies, receive complaints from beneficiaries from time to time. The best way to deal with them is to do your best to avoid them in the first place by consulting with an attorney experienced in estate administration. Many complaints arise because beneficiaries are not kept up to date about the administration of the trust or estate. Frequent communication with beneficiaries is a must. The best approach in all instances is to be proactive by communicating throughout the estate or trust administration process and handling all matters with appropriate formality. If a complaint involves more than routine issues, consult with an attorney who practices trust and estate matters.

Can I Be Sued or Held Personally Liable?

Your errors or mismanagement of a trust or estate can subject you to personal liability. Common pitfalls include not paying taxes or filing returns on time, improper investment choices (whether too conservative, too speculative or favoring one beneficiary over another), self-dealing (buying assets for yourself or a family member from the estate or trust, whether at market price) or allowing property or casualty insurance to lapse, resulting in a loss to the estate or trust. Your best protection is to get good professional advice as early as possible in the process, communicate regularly with the beneficiaries, treat everything with appropriate formalities as if you were not a related party (even if you are) and fully document your actions and decisions.

How Am I Discharged as Fiduciary at the End of the Administration? What if I Want to Resign?

Whether you stop acting as a fiduciary because the estate or trust has terminated or you wish to resign before the conclusion of your administration, you must be discharged either by the local court or the beneficiaries. In some states, discharge is a formal process that involves the preparation of an accounting. In other states, you can be discharged with the use of a relatively simple document signed by the beneficiaries. If you are resigning prior to the conclusion of your administration, check the will or trust document to see who succeeds you as fiduciary. If no successor is named, you may need a court proceeding to appoint a successor before you can be discharged.

ABOUT THE AUTHOR

A. Daniel Woska of Edmond has practiced law since 1978 with experience in many different areas, including probate, tribal law, securities, taxation, contracts, estate planning and litigation. He has participated in jury and nonjury trials, arbitrations and mediations for more than 45 years.

CHECKLIST/GUIDE FOR PERSONAL REPRESENTATIVES

For the Attorney and Client to Both Use

DEFINITIONS

- Decedent: The term used to identify the person who has died and whose estate is being managed.
- Estate Administration: The legal process whereby the final affairs of the deceased person are managed and the estate distributed according to the laws of intestate succession. The process can look very similar to the process for probate of a will.
- Personal Representative: The person who has been appointed by the court to administer (manage) the affairs of the decedent (with or without a will). This position was previously known as executor/executrix, and you will still hear those terms occasionally.
- Probate: The court process whereby the last will and testament is officially submitted to the court, and the statutory process for handling the estate is completed.

TASKS AND GUIDANCE

Here are some, but not all, of the issues/tasks you should consider and complete in your role as the court-appointed personal representative of an estate. (Initial and date each task as completed, and make notes.)

_____. As quickly as possible, research whether the decedent had a prepaid funeral plan and/or a prepaid funeral policy. Locate the policy documents, if possible, and contact the funeral home for a copy of the memorial planning if that is available. Such a plan is binding on the family and friends.

_____. Right after you are appointed personal representative of the estate, consider having the mail forwarded to you. This will allow you to identify lots of information you're going to need throughout the probate process. You can begin this task by going to usps.com, and in the search option at the top right of the screen, search for "mail addressed to the deceased," and you will find instructions. You may also go to the post office in person.

_____. Watch the mail for bills of every type. Make a copy of each different creditor for the probate attorney, as we (you) are obligated to send a notice to all the creditors that are either known or could have been reasonably identified had you given the search reasonable effort. You need not copy multiple statements from the same creditor as that wastes the attorney's time and your money.

_____. At the very beginning of the case (or as soon as reasonably possible), draw/write a family tree for the decedent. This is important, and some aspects may not seem necessary. You must include offspring of deceased children of the decedent if they left children or grandchildren of their own. Even more unexpected for some people is that you must also list the decedent's children who were adopted by other persons in the past. Some people find it even more surprising that children whose paternity was never actually legally established should be listed because those children have a right to inherit if they can prove they are the child of the deceased. Be very careful with this effort because the risk that accompanies you leaving someone out is rather substantial.

_____. Be sure to advise your probate attorney if there is anyone who is a surviving spouse or who might claim to be a surviving spouse of the deceased person. You must keep in mind that Oklahoma still recognizes common-law marriages. There does not have to be an official marriage license, and there doesn't even have to be an official marriage ceremony of any sort. Keep in mind that you are not the judge, and you should not be deciding whether someone is or is not a common-law spouse. If they claim to be one, list them and let the judge figure it out.

_____. Do your best to identify all the decedent's financial accounts of every type. Keep in mind that not all financial institutions continue to mail their statements through postal service mail. It is quite likely, and appears to be becoming much more common, that statements are only sent through email.

_____. One of your fairly early tasks will be the creation of the inventory and appraisement. This is essentially just a list of assets belonging to the estate and their corresponding values. The entries are usually quite simple. For example: 2015 Dodge Grand Caravan in good condition, $_____ (insert the value you research online or from someone quite knowledgeable in vehicle values); or checking account at First State Bank with account number *1234, $9,423.15.

_____. Occasionally, the personal representatives will use a report of an estate sale as part of the inventory and accounting if the company that conducts the sale keeps detailed records of items sold and the price received. (Whether to hold an estate sale is largely dependent on the personal property available if family members first receive items.)

_____. Consider carefully the wisdom of allowing the heirs and beneficiaries the first opportunity to shop at the estate sale. If little brother thinks the sofa was underpriced, maybe he will just buy it rather than cause a ruckus. It is also possible, with a little planning, to allow heirs/beneficiaries to bid at an estate auction using funds they have not yet inherited, but this does require some serious paperwork and coordination and usually calls for the heir to pay at least the sales tax due. (Yes, sales tax is due on an estate sale.)

_____. *Take great care in identifying all the names under which the deceased person has done business so that you will be able to assist your probate attorney in providing clear title and administering all assets*. This is sometimes more problematic with those who have been married more than once. It is also an issue for those of us who do not generally use our first name in our business affairs, and yet, the government and some businesses still insist that we do certain transactions using our first names. Therefore, it is important to list all the names used by the decedent during their lifetime unless it was so many years ago that there is no reasonable possibility that there are any business matters in that name. I recommend you default on the side of listing all the names, even if you're not confident they are useful.

_____. Be sure to investigate all contracts the decedent may have. Please keep in mind that some of these contracts might be just a few dollars a month for a cell phone, internet service, an alarm system and so forth. Be sure you provide all of these to the probate attorney as soon as reasonably possible.

_____. You will likely need to terminate some ongoing services the decedent had been paying for. For example, you may want to turn off the cell phone, but even if you do, I suggest you keep the cell phone and keep it charged, as there may be important personal information on the phone, and it may be information that cannot easily be found somewhere else. Please note that if the decedent had a house and household goods, it may be wise *not* to terminate the alarm system contract or the monitoring; however, you likely need to change the alarm codes to ensure that only the people authorized to represent the estate will have access to the house and the valuables therein.

_____. Identify all insurance held in the decedent's name. Life insurance is an obvious one to look for. You can often find insurance policies by looking backward over the previous years of bank transactions. If you find an insurance company notated there, you should investigate. Watch for automobile insurance. If the decedent owned an automobile, you will want to keep it insured until it is passed on to the beneficiary or sold. The same would apply to boats, vacation homes and many more such items. In fact, you may not even know to look for the watercraft until you find the policy that has been insuring it, so watch these issues very carefully.

_____. It is very important that you determine whether the house or houses of the decedent are insured. If they are insured, you probably need to notify the insurance company that the decedent has passed away and that you are the personal representative of the estate. This will probably require some changes in the policy. Unfortunately, it may also require some additional insurance premiums. But it's better to pay the premiums than to have a claim denied because you failed to keep the insurance company updated.

_____. Keep the house secured! You may need to change the locks and the alarm codes, and you may even need to have the windows and doors secured with plywood to stop burglars and others from entering the property and spoiling it. Another way you can help secure the property, especially if it is in an urban neighborhood, is by reaching out to the neighbors and asking them to watch for any activity – give them your telephone number so they can reach out to you if they see something that seems to call for intervention (after they call the police, perhaps).

_____. Be mindful of the weather and the effects it could have on assets. If it is fall or winter, be sure the house has enough heat to keep the water lines from freezing. Likewise, if it is a humid time of year, you may need to keep some air conditioning running to keep mold from growing inside the property. Such incidents can cause great financial damage, and someone may see you as the culprit because you are, in fact, responsible for taking care of estate property.

_____. The general rule, and it's a pretty reliable rule, is that you should not drive vehicles belonging to the decedent, and you should not allow others to do so either. If you have a wreck or if someone else has a wreck after you allowed them to drive the car, it is highly likely that the heirs and beneficiaries of the estate are going to be deeply unhappy with you, and it is entirely possible that you will have to write a big check.

_____. Please keep in mind that estate assets do not "belong to you." You are more like a manager and not an owner. You are not free to give away estate assets. Those estate assets do not belong to you! If they have cash value that could reasonably be received on behalf of the estate, you are generally not allowed to distribute those to anyone without a court order.

_____. Keep a separate notebook or ledger (list) of all the expenses you incur on behalf of the estate. If you drive to the courthouse and pay $4 for parking, write it in a notebook and keep track of it. Keep track of your mileage. Keep receipts for yard work, utilities, copies, stamps and other such costs. You will likely spend your money on behalf of the estate, and you will want to be reimbursed. That will be much easier if you have a log of expenses and receipts matching those expenses.

_____. You are not required to personally sweep the house. You are not required to operate the garage sale and so forth. You should treat your task as a management position. You are to identify the right people and businesses to do the work in an honorable and reasonably priced fashion, but you are not required to do all the work yourself. If, however, you are the only person inheriting, you might choose to ignore this piece of advice because you know that you are receiving 100% of the estate anyway. But please keep in mind that things don't always go the way we expect, and if a creditor appears to take the estate, you may wish you had not contributed large chunks of your time to the work.

_____. Be careful to keep the heirs and beneficiaries advised of what's going on in the probate matter. In my experience, one of the biggest causes of friction and wasted legal fees is family members becoming frustrated because the executor of the estate will not talk to them about what's going on.

_____. You, the personal representative (and your spouse), are generally not allowed to purchase anything from the estate! Not stock, not a house, not a car, not a used toaster. If you want to purchase anything from the estate, you need to talk to the attorney, and the attorney needs to either have someone else become the personal representative (at least for the sale of the thing you want to buy) or get a specific court order that can, in certain circumstances, allow you to purchase from the estate. But the general rule that must be followed almost 100% of the time is that personal representatives and their spouses cannot purchase from the estate, neither directly nor indirectly.

_____. Watch for retirement checks and retirement account statements. Often, such accounts either terminate on death or have beneficiary designations that keep them out of the probate, but it is important that the institutions where these accounts are held be notified of the death so the accounts may be distributed correctly. If you find that an account has a named beneficiary, you should advise the beneficiary how to identify the account to the institution and allow the beneficiary to retrieve the benefit left for them. But please keep in mind that many people do not have beneficiaries even on their retirement accounts, and many retirement accounts have cash value even after death.

_____. You're going to need a good bit of information concerning the deceased person, so we often try to have the death certificate in hand when we begin the application. Your tax preparation expert can also be a great help with this task.

_____. Keep your attorney informed. When you learn new information, such as there being another car, another child, an insurance claim or any other significant financial change in the estate, please notify the attorney quickly and with as much detail as you can provide. You likely don't need to give them a 50-minute speech about the incident; a two-paragraph email is often enough, and using efficient communication can keep your expenses under control.

_____. Inquire about the possibility of safe deposit boxes at the bank(s). Many times, a safe deposit box will have very important information, such as a last will and testament, marriage license, deeds, abstracts of title and, occasionally, even significant amounts of cash or jewelry. Therefore, it is good practice for you to inquire of every bank where you think the decedent may have done business as to whether they had a safe deposit box in their institution.

_____. Review the county land records or request that your attorney look at them, watching for evidence of liens, mortgages or lawsuits. Any of these can help you find assets or debts, as these must be identified to the probate court and handled appropriately.

_____. Be very mindful of tax returns! There are two really important reasons for this. First, you can be held personally liable by the IRS if you fail to file tax returns that are due. That's a big deal. Second, you are going to be obligated to swear upon your oath and under penalty of perjury that you have paid all the taxes that are due. If you've not even had the tax returns prepared, how can you possibly assert truthfully that you have paid all the taxes that are due? You can't. So get the taxes filed and get them paid.

_____. Make sure that you and the probate attorney know *where* the decedent passed away and where the decedent kept their home. Keep in mind that if they passed away in a hospital, that hospital is presumed to be a creditor of the estate, and it is an obligation under the law to provide the hospital a copy of the legally required notice to creditors. If you fail to provide this notice, the probate may not terminate the rights of the hospital to bring a lawsuit later. You can usually learn where the decedent passed away by reading the death certificate. The death certificate almost always identifies the place of death. If that's a hospital, that hospital must be listed on the affidavit at the mailing of the notice to creditors.

_____. Watch for real estate owned in a different state. Oklahoma courts cannot control the ownership of real estate in any other state, but you have an obligation to identify – to the best of your reasonable ability – all the assets of the decedent and to administer those appropriately. That will sometimes include the necessity of hiring a probate attorney in a sister state to handle real property located there. Among the ways you can locate such assets is by looking through past years of bank statements and watching for payments to county treasurers or the like in other states and other counties.

_____. It is usually a very good idea to look at more than one year of bank statements. If the decedent has been ill for a year, it is entirely possible that they have allowed some important matter to slip by. So if you go back to the year before, you may be able to identify payments that will lead you to creditors or assets. Therefore, carefully review at least a significant number of past bank statements. I would suggest that you go back a year prior to the decedent becoming seriously ill.

_____. Be careful to advise your probate attorney of the cause of death. There are a couple of good reasons for this. First, if the cause of death arose out of a car wreck, poor medical care, poor treatment in a long-term care facility or anything similar to these, it may be important that a wrongful death attorney be consulted. Next, and fortunately uncommon, is that if the decedent died at the hands of someone who was related to them, it is likely that person cannot inherit.

_____. Be very careful when you are selling assets that belong to the estate. You have a fiduciary duty to maximize the benefit to the estate. Therefore, you should not sell assets at bargain prices to your friends, children or other loved ones. That will likely be a breach of your fiduciary duty and may cause you great distress and financial loss when others, such as the judge, learn about the sale. Seek input on value, keep track of where you got the information and note the information you received. For example, if the decedent owned a house, seek out a couple of opinions of value. Two well-qualified opinions from different real estate agents may keep you out of trouble and assure that you maximize the benefit to the estate. If there is a vehicle, look online – kbb.com for example – and be careful to enter accurate information about the vehicle, use the correct year model, mileage, equipment and so forth. Print out the search results and allow those to guide you to ask the best value for the estate. Of course, you will also adjust the valuation for existing damage or increase it for an exceptionally nice vehicle.

_____. Do not list real estate for sale without a court order allowing you to do so unless your attorney advises that a "power of sale" in the will has been admitted to probate. There are at least two more ways to sell real estate during an Oklahoma probate, but both require court orders. Don't just jump out there and hire a real estate agent before you get that court order from the judge.

_____. Advise the heirs and beneficiaries to understand that they should contact you with updated addresses if they move, and you should provide those addresses to your attorney. Further, you should examine future court documents prepared by your attorney to make sure they have the most up-to-date address possible on those documents. A failure to provide notice to an heir or beneficiary, or even a creditor, can result in great discomfort and expense to you.

_____. Don't allow your friends, your family, the decedent's family or anyone else to use or abuse the decedent's "stuff." It is best to secure personal property with a new lock and key. You are doing a service to the estate, and you are entitled to be paid for your service, but as a result, you have an obligation to protect the assets of the estate. Protecting those assets requires that you maintain control of them and not risk wear and damage that can be avoided.

_____. Do not use money from accounts with a joint owner or a beneficiary without specific written permission from that owner or beneficiary. Let me give you an example: If I pass away and my child is the joint owner of my checking account, the executor is not at liberty to go to that account, withdraw money and use it to pay for the funeral. I know this might feel counterintuitive, but this is the law. Once the decedent passes away, their interest in accounts that have a beneficiary or a joint owner is almost always gone.

_____. Attorneys give more notice rather than less. If you think Grandpa might have owed Uncle Bill some money but Uncle Bill has not said anything to you about that, you should still identify Uncle Bill and that possible claim to your probate attorney. This generally applies to all sorts of notices you will be given. I have never known anyone who was sad that they had followed the law too carefully and correctly.

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How Free Is Testamentary Freedom?

Sanism, Ageism and Testamentary Intent

By Richard J. Goralewicz

THEORETICALLY, TESTAMENTARY FREEDOM serves as the hallmark of American law as it pertains to wills and estates.[1] When I say "theoretically," I mean as a matter of *praxis* (as in its denoting an accepted practice or custom) rather than a matter of law. As to the latter, there should be no real dispute as to the reality of testamentary freedom as a matter of black letter law. In fact, the United States Supreme Court has decried regulatory destruction of "one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others." Similarly, the regulation here amounts to the abrogation of the right to pass on a certain type of property – the small undivided interest – to one's heirs. In one form or another, the right to pass on property – to one's family in particular – has been part of the Anglo-American legal system since feudal times.[2]

Oklahoma also recognizes the concept of testamentary freedom, albeit subject to legislative regulation.[3] Indeed, Oklahoma statutorily limited testators' powers in a number of familiar ways, including spousal election, pretermitted heir provisions, formalities of form and execution, probate homestead and everyone's favorite, the rule against perpetuities. Yet, overall, Oklahoma's statutory inroads on complete testamentary freedom appear mild and benign in form and execution. For example, the Oklahoma Supreme Court in *Matter of Estate of Lahr* explained the policy behind requiring a ward to execute a will before a judge:

> Here we are presented with a specific provision restricting the exercise of the ward's right to devise property. The provision requires a testamentary instrument to be executed in the presence of a district judge. Just as the provision restricting the right of the ward to enter into contracts was clearly intended to protect the ward from situations where undue pressures could influence the ward because of the ward's decreased physical capacity, so too does the provision restricting testamentary devise exhibit an intent to protect the ward from another situation where the ward might be subject to undue influence because of her physical condition. The legislation exhibits no intent to restrict the expression of the ward's wishes as to how her property may be distributed. The only requirement clearly appears concerned with preventing an atmosphere of undue influence at the time the testamentary instrument is executed.[4]

This describes the appropriate role for courts faced with the prospect of overruling the testator's declared intent. Only in the clearest of cases should intervention occur. If intervention is necessary, we need to act to preserve the dignity of the elder and be cautious to not supplant the elder's wishes with our own values and opinions even if protection from financial abuse may be needed.

Given this tradition of testamentary freedom, it should come as no surprise that Oklahomans enjoy a "nearly unrestricted right to dispose of their property as they please."[5] The *Restatement (Third) of Property* further notes, "Law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."[6] So, too, with Oklahoma. "The intention of the testator is controlling; when the Court construes a will, it must ascertain and give effect to the testator's intent, unless the intent attempts to effect what the law forbids."[7] The Oklahoma Supreme Court has often stated that it is, in fact, the "cardinal rule" in the construction of wills to ascertain and give effect to the intention of the testator.[8] Our Supreme Court has also variously described this duty as the "primary objective,"[9] "paramount"[10] and the "object and prime purpose"[11] of will construction. It has also been held that "all rules of construction are designed for this purpose [to determine and give effect to the intent of the testator], and all rules and presumptions are subordinate to the intent of the testator where that has been ascertained."[12]

The recognition of the testator's intent as the "gold standard" for judicial inquiry dovetails with the uniquely American veneration of traits such as individualism and control of one's private property duly worked for and earned. Estate planning according to one's own wishes, carries with it respect for self-worth and autonomy. For many older Oklahomans, particularly those of modest means, self-worth and autonomy *are* their most prized and valuable assets.[13] There are those who regard the right of testamentary disposition as a human right. For example:

> The ability to make legally recognized decisions is fundamental to the exercise of human rights and is reflected in the core values of dignity, autonomy, participation and liberty. Respect for human rights requires that capacity be presumed absent evidence establishing incapacity. The process of capacity assessment also raises human rights issues as a determination of incapacity can have significant ramifications for the enjoyment of a person's human rights. This is particularly the case where the assessment is triggered by ageist assumptions or fails to respect the person's dignity or autonomy, or where it does not maximize their participation in the process as much as possible.[14]

INTRODUCTION TO SANISM

First, as to nomenclature, "sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry."[15] As Professor Michael Perlin, who is widely credited with importing the study of sanism from the realm of medical ethics into the field of law,[16] argues, sanism affects our jurisprudence and lawyering practices; it remains largely invisible and socially acceptable.[17] Sanism permeates all kinds of mental disability law, including involuntary civil commitment, the right to treatment, the right to refuse treatment, the right to sexual interaction, the Americans with Disabilities Act, the competence to plead guilty, the competence to waive counsel, the insanity defense and the federal sentencing guidelines, among others.[18]

To fully understand the impact of sanism on the law in general, we must also recognize sanism's sidekick and constant companion, "pretextuality." Professor Perlin explains:

> "Pretextuality" means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.[19]

The recognition of the testator's intent as the 'gold standard' for judicial inquiry dovetails with the uniquely American veneration of traits such as individualism and control of one's private property duly worked for and earned.

In further describing the impact sanist thinking has upon the judicial system, Professor Perlin notes:

> Judges reflect and project the conventional morality of the community, and judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes. Their language demonstrates bias against mentally disabled individuals and contempt for the mental health professions. Courts often appear impatient with mentally disabled litigants, ascribing their problems in the legal process to weak character or poor resolve. Thus, a popular sanist myth is that "[m]entally disabled individuals simply don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint." We assume that "[m]entally ill individuals are presumptively incompetent to participate in 'normal' activities [and] to make autonomous decisions about their lives (especially in the area of medical care)."[20]

In the elder law context, sanism can combine with an often-related ism – ageism. As for the definition:

> Ageism is the belief that the mental deterioration from age renders the elderly completely incompetent in all areas of their life. Out of a false sense of necessity, their wishes are transformed into our wishes or what we subjectively feel they would want. Too often we practice sympathy without empathy. The object of sympathy is the other person's well-being; the object of empathy is understanding.[21]

In *In re Citizens State Bank & Trust Co. of Hiawatha*,[22] Mr. Nolte agreed to provide care and services to Helen M. Reller until her death should her financial resources be depleted to the extent that she could not provide for herself. Mr. Nolte further agreed to pay the expenses of her last illness and funeral if her estate was insufficient. In consideration, Ms. Reller executed and delivered to Mr. Nolte a warranty deed conveying to him a remainder interest in 400 acres of farmland, reserving a life estate to herself. Certain relatives of Ms. Reller became concerned about her attachment to Mr. Nolte and took steps to prevent him from visiting her. Her conservator filed suit to set aside the conveyance. The trial court found Ms. Reller mentally competent and aware of legal procedures in executing the deed and contract. The court further found that there was adequate consideration for the deed and contract, and the defendant did not unduly influence her. The appellate court took up the issue of "whether the imposition of the voluntary conservatorship without a finding of incapacity, deprived Ms. Reller of her capacity to contract and convey away her real property by deed during the conservatorship." Reversing, the Kansas Supreme Court declared, "As all of us [grow] older, we gradually lose our faculties, both physical and mental. The longer we live and the older we become, the more we lose."

Similarly, in *In re LPS,* a Delaware appellate decision upholding a guardianship procured without notice to the intended ward. In justification of the court's decision, a judge opined:

> Quite understandably, Mrs. S. resented a guardian being appointed for her property. She particularly resented the manner in which it was accomplished in that she had no notice of it until after it had been accomplished. Mrs. S., being in remarkably good health and active, was resentful of the implication that she is unable to handle her affairs and like most people her age probably does not accept the fact that at her age she does not have the same memory that she had at an earlier age. ... After hearing all of the evidence, I am of the opinion that due to the infirmities of old age, particularly forgetfulness, Mrs. S. is in danger of losing or dissipating her property and it would be in the best interest of Mrs. S. that the guardianship of her property be continued.[23]

Did sanism, ageism or a combination of the two drive these decisions? Certainly, the biased rhetoric in the opinions raises their specter.[24] In fact, if these statements did not describe a part of the courts' reasoning for the outcomes, they would have no place in the opinion at all. Most significantly, for the purpose of this discussion, look at the myth that all types of cognitive abilities inevitably worsen with age. It is true that some cognitive skills, such as reaction times, tend to slow a bit over time. But other functions remain robust and even improve. One study of older adults, for instance, showed they were better than middle-aged adults at orienting their attention and ignoring distractions.[25] The decisions above prompt this

question: Would the decisions be the same if the testators or proposed wards were in their 40s?

SANISM'S SIGNIFICANCE IN THE ESTATE PLANNING CONTEXT

One can readily see that concerns for the influences of sanism readily lend themselves to certain fields of mental health law, such as civil commitments, guardianships and competency to stand trial in criminal cases. However, "the validity of an analysis extending the theoretical construct of sanism from the areas of civil commitment and criminal law, in which it was developed, to the law of wills, is not self-evident."[26] It is important not to lose sight of the distinction between estate planning and civil commitment and criminal laws. In the latter, the goal is to protect the subject of the suit or – in the criminal field – to determine whether, and to what extent, a person may be held culpable for their acts. In contrast, "the requirement of testamentary capacity ... serves to preclude certain individuals from exercising a choice that those deemed to possess the requisite capacity may and do enjoy, on the grounds that these individuals would not have chosen as they did if they possessed the necessary level of understanding."[27]

Sanism mostly affects the "outlier" will – one that deviates from the expected societal norm and/or the atypical client holding somewhat eccentric or whimsical intentions.[28] Under sanist reasoning, the primacy of "testator's intent" is subordinated to secondary consideration, such as "natural objects of a testator's bounty and anchored to legitimacy by resort to formalisms"[29] or concepts such as undue influence, duress or other *parens patriae* notions. The latter devolve into pretextual justifications for sanist outcomes. In this manner, sanism appears remarkably like the Texas Sharpshooter Fallacy, so-called because the protagonist shoots holes in the side of a barn and then paints targets around the bullet holes. It goes hand in hand with the related fallacy of confirmation bias – concluding first then reasoning afterward to support it. In our context, the resort to sanism may be both benign and unconscious, but that doesn't make it any less fallacious.

Oklahoma law does not provide for a "right to inherit" outside intestacy except in cases of spousal election and pretermitted heir statutes. In fact, many people seek estate planning to avoid the statutory regime. No legal requirement forbids a will containing an idiosyncratic, whimsical or objectively illogical disposition. In other respects, however, the law seeks orthodoxy and normalcy, for example, focusing on relatives and degrees of kindred.[30] In addition, "testators are presumed to intend to provide for the natural objects of their bounty."[31] The further removed from the family-oriented norm, the more likely a successful challenge. For example, in *Morris v. West's Estate*,[32] the testator left his entire estate to his ex-son-in-law to the exclusion of his daughter and grandchild. The court vacated the will on the basis that the witnesses were in different rooms when the testator brought his signed will to them for their signatures.[33]

Can It Happen in Oklahoma?

In re Maheras[34] holds, "A person who is not a beneficiary under a will's terms may be regarded as legally capable of overbearing the will maker's free agency." But did that occur in this case? The opinion leaves room for skepticism.

Ms. Maheras, age 96, left the bulk of her estate to her church, leaving little to her nephew, her sole heir. The opinion says nothing about the relationship between aunt and nephew. In the 1970s, Ms. Maheras battled alcoholism. The opinion says nothing further about her physical or mental health when she executed the will. In the early 80s, she became friends with the Rev. William Cook. Ultimately, she joined his church. In the words of the court, "By 1984 all of Maheras' friends were First Baptist church members." The Rev. Cook arranged for several church members to regularly assist Ms. Maheras by cleaning her house.

In 1983, Ms. Maheras attended some estate planning programs at the church. She missed the final session. The Rev. Cook brought her the booklet from that event. He then spent several hours "assisting Ms. Maheras in cataloging her assets." He also arranged for an attorney church member to draft the will. Both witnesses were also church members. The trial court found that Ms. Maheras had capacity, and she "understood the provisions of the will, appeared normal, and was aware of the nephew's existence." The trial court also found the witnesses disinterested. The Supreme Court, however, found Ms. Maheras' "testamentary capacity to be a moot issue."

Does *Maheras* represent a simple case of an appellate court affirming a trial court opinion not clearly at odds with the evidence? Or does it show how readily a case may fall prey to sanist bias? Here we have a testatrix with capacity,

albeit an older person who is recovering from alcoholism (an atypical client, though one whose disability may have been more historical than contemporaneous) choosing not to leave her estate to a natural heir (nonnormative disposition) and putative influence of an interested purpose (availability of a pretextual reason to reject the testatrix's decision in favor of a "natural object of her bounty"). In addition, based simply on the facts related in the opinion, the result seems at odds with, or at least less heedful of, the testator's intent than with cases such as *Canfield v. Canfield*.[35]

In *Canfield*, the court held that "the word 'undue' when used to qualify 'influence' has the legal meaning of wrongful ... but influence acquired through kindness is not wrongful."[36] More specifically:

- Suspicion, conjecture, possibility or guess that undue influence has induced a will is not alone sufficient to defeat the probate of a will.
- Power, motive or opportunity to exercise undue influence is not alone sufficient to authorize the inference that such influence has, in fact, been exercised.
- Undue influence that invalidates a will must be something that destroys the free agency of the testator when the instrument is made and executed and that in effect substitutes the will of another for that of the testator. It is not sufficient that the testator was influenced by the ordinary affairs of life or that he was surrounded by relatives and friends in confidential relations with him at the time of its execution.[37]

The Ethical Imperative

The ethical issues an attorney faces when dealing with estate plans cover a lot of ground and could serve as a topic for a separate article on their own. Issues of professional competence, zealousness and loyalty to clients come up repeatedly. In addition, the practice itself transcends all phases of a legal practice as set out in the preamble to the Code of Professional Responsibility. For example:

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.[38]

Rather than engaging in a scattershot discussion of multiple rules and issues, I limit my discussion to *Rule 1.14*, providing, in pertinent part:

> When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

When taking on an atypical client,[39] *Rule 1.14* requires an attorney to do a modified capacity assessment. Done correctly, this involves a two-pronged test. First is an assessment of whether the client has the capacity to enter an attorney-client relationship to begin with. Second, does the client have the capacity to engage in the transaction (estate planning) comprising the representation? This should be a broad-ranging, holistic inquiry with assumptions withheld until completion. For

example, a client may lack the capacity for certain transactions yet retain testamentary capacity.[40] Once satisfied with both prongs of the capacity assessment, we must then look to the reasons for the atypical disposition to determine the best way to achieve the client's goals. This exploration requires more than clinical professional skills. It demands emotional intelligence on the part of the lawyer as well. Making an adequate record is not just for litigators anymore.

CONCLUSION

The legal profession shoots itself in the foot when its thought process becomes burdened with a depreciative mythology to a subset of people, which tends to limit empathy, communication, compassion and creativity in the provision of quality legal services. The invisible nature and vague social acceptance of sanism make it difficult to appreciate in daily life and practice. Like many bad habits, once recognized, it becomes easier to suppress. This discussion is vital to the mission of both the bench and bar. From the bar's perspective, it should be remembered that courtroom advocacy sometimes takes the nature of adult education, including the disabusing both bench and bar of myths and replacing them with empirical and evidentiary-based facts. Cognitive research now shows that implicit biases (those subconsciously held and not controlled by the conscious mind) cannot simply be set aside.[41] Their impact on cognition, behavior and decision-making ought to be equally important to the legal profession and can lead to a subconscious prejudice, subconsciously predetermining outcomes of judicial decisions, policy choices and even advocative zeal and case acceptance.

Finally, while this article addresses these issues from the perspective of probate and elder law, sanism and ageism occur in other fields of practice. Thus, recognition and understanding become essential to the realization of our constitutional promise that "the *courts of justice of the State shall be open to every person*, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; *and right and justice shall be administered without sale, denial, delay, or prejudice*."[42] To do this effectively, we must acquire a thorough understanding of the subject matter. Hopefully, this article is a step in that direction.

ABOUT THE AUTHOR

Richard J. Goralewicz graduated from King's College and the OCU School of Law. After 21 years in private practice, he joined the Senior Law Project of Legal Aid Services of Oklahoma as a staff attorney in 2003. He has served multiple terms as chair of the OBA Appellate Practice Section and is a frequent speaker at state, national and international programs on elder law, appellate law and legal ethics.

ENDNOTES

1. *Restatement (Third) of Prop.: Trusts and Other Donative Transfers* §10.1cmt. a (2003); *See also* Robert H. Setoff, "Trusts, and Estates: Implementing Freedom of Disposition," 58 *St. Louis U. L. J.* 643, 643 (2014) ("The organizing principle of the American law of succession, both probate and non-probate, is freedom of disposition.").

2. *Hodel v. Irving*, 481 U.S. 704, 716 (1987). *CF United States v. Perkins, 163 U.S. 625, 629-30 (1898):* "The law in question is nothing more than an exercise of the power which every state and sovereignty possesses of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament or by inheritance, and of prescribing who shall and who shall not be capable of taking it. ... *If a state may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its not alone sufficient interests or policy."* (Emphasis supplied).

3. *Matter of Estate of Chester*, 2021 OK 12, 19, 497 P.3d 284; *Matter of James*, 2020 OK 7, 27, 472 P.3d 205.

4. 1987 OK 94, 7, 744 P.2d 1267.

5. *Restatement (Third) of Prop.: Trusts and Other Donative Transfers* §10.1cmt. a (2003).

6. *Id at* cut c.

7. *Matter of the Estates of McClean*, 2010 OK CIV APP 24,13, 231 P.3d 727; 84 O.S. 151 (2021).

8. *Lomon v. Citizen's National Bank & Trust of Muskogee*, 1984 OK 68, 3, 689 P.2d 306, 308.

9. *Shippy v. Elliot,* 1958 OK 126, 0, 327 P.2d 645.

10. *Matter of Kelsay,* 1978 OK CIV APP 5, 5 579 P.2d 838 (pub. per OK. Sup. Ct.).

11. *Dannenberg v. Dannenberg,* 1953 OK 201, 0, 271 P.2d 345.

12. *Arment v. Shriners Crippled Childrens Hospital*, 1956 OK 53, 298 P.2d 1048 (Syllabus by the Court No. 1); *Miller v. Hodges*, 1951 OK 141, 231 P.2d 678; *Panache v. Hawkins,* 1950 OK 75, 222 P.2d 362; *In re Adams' Estate*, 1950 OK 201, 222 P.2d 366.

13. For further reading, *see* S. K. Heide, "Autonomy, Identity And Health: Defining Quality Of Life In Older Age," *Journal of Medical Ethics* 2022; 48:353-356 and Tienke Abma and Elena Bendien, "Autonomy in Old Age," *Family and Law* (May 2004).

14. *See* generally: Bridget Lewis, Kelly Purser and Kirsty Mackie, *The Human Rights of Older Persons in Legal Capacity and Decision-Making*, pp.139-173 (Springer Link 2020).

15. Michael Perlin, *The Hidden Prejudice: Mental Disability on Trial*, (American Psychological Association, 2000).

16. *See* Michael L. Perlin, "On Sanism," 46 *SMU L. Rev.* 373 (1993); *See also* Morton Birnbaum, "The Right to Treatment: Some Comments on its Development," in *Medical, Moral and Legal Issues in Health Care*, 97, 106-07 (Frank Ayd, Jr. ed., 1974) regarded as the seminal work on sanism.

17. Perlin, n. 11 *supra.*

18. *Id., passim.*

19. Michael Perlin, "Half-Wracked Prejudice Leaped Forth: Sanism, Pretextuality, and Why and How Mental Disability Law Developed as it Did," 10 *Journal of Contemporary Legal Issues* 3, 5 (1999) (quoting, in part, Michael L. Perlin, "Morality and Pretextuality, Psychiatry and Law: Of 'Ordinary Common Sense,' Heuristic Reasoning, and Cognitive Dissonance," 19 *Bull. Am. Acad. Psychiatry & L.* 131, 133 (1991)).

20. Perlin, *supra.* at Note 14, "Half-Wracked Prejudice," at page 15.

21. Heather S. Ellis, "Strengthen the Things That Remain: The Sanist Will," 46 *N.Y.L. Sch. L. Rev.* 565, 568 (2002-2003).

22. 601 P.2d 1110, 1115 (KS. 1979).

23. *In the Matter of L.P.S.,* C.M. No. 3793,1981 WL 15481, at *2 (Del. Ch. March 26, 1981).

24. By way of further example, *see* Richard A. Posner, *Aging and Old Age* (1995) pp. 18-23 (arguing, *inter alia* advanced age heralds an "inexorable decline" both physically and mentally).

25. J. Veríssimo, P. Verhaegen, N. Goldman, *et al*, "Evidence That Ageing Yields Improvements As Well As Declines Across Attention And Executive Functions," *Nat Hum Behavior* 6, 97–110 (2022).

26. Pamela R. Champine, "A Sanist Will?" *19 N.Y.L. Sch. J. Hum. Rts. 177*, 179 (2003).

27. *Id.*

28. Exemplified in this author's experience by a will leaving all to the staff of a diner where the client ate breakfast and lunch every day for some 30 years, to the exclusion of out-of-state cousins who had no contact for the same period beyond an annual Christmas card.

29. Today, and particularly in this brave new post-*pandemic* world, many attorneys advocate for a relaxation or outright abolition of traditional formalities in the drafting and execution of wills. While many of these bear consideration, they lay beyond the scope of this article. *See* generally David Horton and Reid K. Weisbord, "COVID-19 and Formal Wills," 73 *Stan. L. Rev. Online* 18 (2020-2021); Crystal Collins, "The Future of Electronic Wills in Rhode Island After COVID-19," 27 *Roger Williams U. L. Rev.* 423 (2022).

30. *84 O.S. 44* (2021).

31. *Matter of Estate of Richardson,* 2002 OK CIV APP 69, 11, 50 P.3d 584.

32. 643 S.W.2d 204 (Tex. App. 1982).

33. Compare *Nichols v. Rowan,* 422 S.W.2d 21, 22-23 (Tex. Civ. App.-San Antonio 1967), essentially the same as *Morris, supra.* The *Morris* will was upheld notwithstanding defects and disabilities where beneficiary was an actual relative.

34. 1995 OK 40, 897 P.2d 268.

35. 1934 OK 43, 8, 31 P2d 152.

36. Syl 3.

37. *Id. at Pars 8-10.*

38. *Oklahoma Rules of Professional Responsibility, Preamble, Par. [2]. See also: "[6] As a public citizen, a lawyer* of the law beyond, and its use for clients, employ that knowledge in reform of the law and work to strengthen legal education." *Id. at Par. [6] should seek improvement of the law, access to the legal system*, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge.

39. *Rule 1.14* addresses the client suffering, or liable to be perceived as suffering, with diminished capacity. For purposes of this article, I am also including the client desiring an estate plan perceived as contrary to prevailing societal norms.

40. *See, e.g., Lee v. Lee*, 337 So.2d 713, 714 (MS 1976). The testator executed the will and deed on the same day. The court upheld the will but invalidated the deed.

41. Susan A. Bandes and Jeremy A. Blumenthal, "Emotion and the Law" (October 2012) *Annual Review of Law and Social Science*, 161 at 164; "Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships" (2015) 83 *Fordham Law Review* 2407.

42. Oklahoma Const, art II, Sec. 6 (emphasis supplied).

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PROBATE

Testamentary Charitable Planning: Supporting Your Clients and the Community

By Christa Evans Rogers

AS ATTORNEYS, MANY OF US REGARD PRO BONO WORK as the legal profession's preferred mechanism to give back and satisfy our obligation to render "public interest legal services."[1] While this is a much-needed and important method for lawyers to support our communities, there are a myriad of ways for us to be part of the fabric of philanthropy and use our specific talents for the public interest.[2] Frontline charitable organizations cannot achieve their missions without funding. Attorneys are uniquely positioned to bolster that critical fundraising endeavor within their paid practices by discussing testamentary charitable estate planning with their clients. With proper drafting, attorneys can simultaneously maximize philanthropic impact, advocate for clients, protect heirs' interests, as well as minimize – or even eliminate – income, gift and estate taxes. This article explores the benefits of helping clients pass along their values with their valuables.

THE ADVISOR'S ROLE IN UNDERSTANDING AND ADVOCATING FOR CLIENTS WITH TESTAMENTARY CHARITABLE INTENT

For clients with a pattern of giving, charitable estate planning provides an attractive extension of their philanthropic efforts. Often, a testamentary charitable gift is not only a client's last donation but also their largest. In 2022, Americans gave roughly $499 billion to charity, with 9% (roughly $45 billion) coming from testamentary charitable gifts.[3]

Donors have numerous motivations when considering testamentary charitable gifts. Many are spurred by preserving a personal legacy or honoring a loved one with a permanent tribute. Others have concerns about asset preservation during their lifetimes but would gladly make a gift upon their passing when longevity risks or end-of-life care costs are no longer a factor. Some have a heart for giving back and simultaneously a desire to reduce potential estate and income taxes for their heirs. Other clients may seek to distribute income over time in a controlled manner for their loved ones' lives or a term of years, with a benefit to charity upon termination of the income interest.

Charitable giving can be a critical component of tax-efficient estate planning.[4] Clients look to trusted advisors for guidance when considering their financial needs, later-in-life care and estate planning needs. As a part of those considerations, many clients expect attorneys to discuss charitable giving.[5] If we neglect to consider our clients' philanthropic

interests as a matter of course, we have not conducted a comprehensive assessment of their goals, which may inadvertently expose them to unwanted and unnecessary tax consequences, as well as ultimately reduce the impact of their potential gifts.

IDENTIFYING AND ASSISTING CLIENTS WITH A HEART FOR PHILANTHROPY

It is hard to uncover a client's interest in charitable planning without explicitly asking if they are amenable. Some advisors feel apprehensive posing questions about charitable giving, fearing it will spark an uncomfortable conversation or believing the onus instead falls on the client to raise the issue. In truth, incorporating charitable giving questions conveys concern for the client's best interest.

As attorneys, we routinely undertake incredibly private conversations, delving into intimate personal and financial subjects to which even our clients' closest family members and friends may not be privy. Astute attorneys raise these matters with respect and

A simple 'check the box if interested in making a charitable gift' may both spur a client to leave a gift and open the door for the conversation.

the appropriate level of gravitas, and clients typically anticipate these issues will be addressed within the confines of privileged conversations. In the same vein, when raised appropriately, clients expect and appreciate questions surrounding charitable giving to be broached by their trusted advisors.[6] Many attorneys find it a comfortable and natural part of the factfinding process.

Estate planning attorneys create custom intake forms to capture everything – from simple details, such as contact information, to the intricate specifics of their clients' assets and planning preferences. Incorporating charitable gift questions into these intake forms proves an excellent way to gauge client interest and delicately open the door to charitable conversations. A simple "check the box if interested in making a charitable gift" may both spur a client to leave a gift and open the door for the conversation.

KEEP IT SIMPLE: CLARITY COUNTS!

Effective practitioners have shifted away from complicated legal jargon and have instead embraced the simplicity of plain English and layperson's terms. Studies show a dramatic difference in charitable giving based solely on the phraseology of the questions posed.[7] The simplicity of asking "Do you wish to make a charitable gift in your will?" may increase the likelihood of giving versus the more complicated phrasing of "Do you want to leave a charitable bequest in your estate plan?"[8]

While the two questions feel synonymous and interchangeable to trained attorneys, the latter option can feel baffling to clients. It is a natural reaction to avoid what feels confounding rather than ask for clarification. A significant client segment who would perhaps respond affirmatively if asked in a more straightforward manner may instead forgo the gift based solely on the perplexing or unfamiliar language.[9]

DRAFTING CONSIDERATIONS FOR TESTAMENTARY CHARITABLE GIFTS: WHO, WHAT, WHEN, WHERE, WHY AND HOW

Drafting attorneys weigh many factors when crafting testamentary charitable gift language. To express it in journalistic standards, the attorney needs to ascertain the who, what, when, where, why and how of the gift. There are nuances that if not addressed in the drafting phase can obfuscate and frustrate the donor's true intent in the eventual distribution phase. Typically, donors harbor quite precise ideas of how they envision their charitable gift will bless others. This inclination varies dramatically from donor to donor. Obligingly, many charitable organizations publish or eagerly share their preferred testamentary charitable gift language, which can be accessed online or requested via email.

WHO BENEFITS?

Charitable Beneficiaries

Foremost, the bequest language details which charitable beneficiaries should receive distributions. If the client identifies more than one charitable beneficiary, the drafting attorney should list what percentages or amounts each charitable beneficiary should receive. In some cases, there are specific assets gifted to certain beneficiaries for particular purposes. If this is the case, a property description should also be included – for example, gifting a vacation property as a retreat or a ranch for nature conservancy.

Still, in other instances, the donor may nominate a loved one to make grants after their passing through a donor-advised fund.[10] This has become increasingly popular for those who want to incorporate generational philanthropy. Some clients will create an endowment that is distributed annually to a donor-advised fund with family members listed as the account advisors. This proves an economical and less administratively cumbersome alternative to private family foundations. In certain cases, the donor may limit the grants to enumerated fields of

interest as defined by the donor before death, such as distributions to the beautification of a geographic area, education, health research or a religious-related mission.

Ethical considerations may arise for charitable beneficiaries.[11] Attorneys should stay vigilant and verify no undue influence has been exerted by the organization. It is important to remember that although the charity may have a critical role in soliciting the gift or sharing recommendations on gift language, it should not have a representative present at the execution of the estate plan itself. If there has been active involvement of the charitable organization prior to execution, the attorney should ensure clients leave testamentary charitable gifts willingly and without duress.[12]

Noncharitable Beneficiaries

Charitable estate planning can include providing income interests that benefit noncharitable beneficiaries prior to the distribution to the charitable beneficiary. The drafting attorney should assess which giving solutions are preferable based on factors such as the amount of the charitable gift, the amount payable to noncharitable beneficiaries, tax goals, gift administration costs, the location of the charitable organization, the age of the noncharitable beneficiaries and the states in which the donor and noncharitable beneficiaries are domiciled. A testamentary charitable gift annuity, charitable remainder trust or other trust arrangement may satisfy the donor's overall intent. Charitable planned giving arrangements that include both charitable and noncharitable interests can quickly become complex. There are numerous local community foundations that are happy to serve as a resource for you as you advise your clients about charitable giving. These services include preparing tax illustrations and giving instruments such as charitable remainder trust agreements, donor-advised fund agreements and charitable gift annuity agreements.

WHAT TO GIVE?

Client preferences on what they give to charity run the gamut, with most settling on either a specific dollar amount, particular assets or a percentage of the overall estate value. In some circumstances, it is a combination of all three! One of the great attributes of charitable gift planning is that it is very flexible and customizable. Attorneys, financial advisors and clients can reach creative planning arrangements that support giving goals and achieve tax and income objectives at the same time.

While less than 10% of donors statistically report tax deductions as the primary motivator for charitable giving,[13] as an advisor, communicating the tax advantages of charitable planning reinforces the importance of tax-efficient planning. Tax-deferred assets, such as qualified retirement accounts and IRAs, are ideal assets to leave to charity because of the tax that would be paid by noncharitable beneficiaries.

Knowledgeable drafting attorneys often include a provision explicitly stating that charitable gifts should be paid first from taxable assets. Attorneys should collaborate with clients' financial and tax advisors to ensure assets are not overlooked in the planning process and that the advisor team has considered planning ramifications from both a tax and legal perspective.

WHEN TO GIVE?

Timing is yet another critical factor to weigh when drafting testamentary charitable gift language. There is a broad spectrum of when clients may intend funds to be distributed. Some clients desire the full amount of the gift to be put to work immediately and ask that the gift be distributed in its entirety to the charitable organization as soon as possible. Others fall into a separate camp with the unequivocal intent that their gift be dispersed over time and in increments of 3% to 5% a year, typically via an endowment. These gift instruments seem chiefly attractive to donors who crave assurance that the impact of their gift will extend into perpetuity. Endowment investment strategies under the Uniform Prudent Management of Institutional Funds Act[14] are conservative and focus on long-term horizons, with the goal that the value of the gift will continue to outpace inflation, providing equity among subsequent generations. Still others have a preferred distribution schedule including an immediate distribution and an amount held permanently in endowment.

WHERE TO GIVE?

Many clients relay specific thoughts on where they want their funds used within the organization or, conversely, place meticulous constraints on activities they want to avoid funding. In contrast, unrestricted gifts can be spent however organizational leadership deems appropriate. If the client is amenable, it can prove helpful to discuss gift restrictions with the charitable organization in advance of executing the documents to confirm the charity

is willing and able to honor the donor's intent. The drafting attorney should have an explicit provision for what should happen in the event the funds cannot be used for the donor's specific purpose, temporarily or permanently, or if the charity ceases operations. For example, the charity may conserve the unused funds in a separate rollover account for future distribution for a different purpose or reinvest the unused amount into the corpus so that future distributions are incrementally larger. An alternate charitable beneficiary may also be named if the charity ceases operations.

Motivations for restricted gifts vary and often derive from an emotive or personal prompt. Occasionally, restricted gifts stem from a distrust of current or future management. For example, the donor trusts the current leadership but is uncertain whether the same level of confidence would exist with future leadership. Other donors feel passion for a particular program or desire to benefit a particular geographic region, often their hometowns. Others have witnessed unrestricted gifts be deployed in what they interpret as an objectionable manner, and although nothing unethical or illegal transpired, the donors desire complete control over what their personal gift will and will not fund. Other donors fixate on the funds being directed purely to programming and feel adamant that not a penny be allocated to an administrative purpose. Scholarships are one of the most frequently restricted gift types, with donors often expressing a passion for a certain academic institution, particular student demographic or area of study. Another commonly restricted gift type is medical research, typically focusing on support for a specific condition battled by the donor personally or by a loved one.

WHY GIVE?

Donors typically have multiple rationales for making testamentary charitable gifts. The driving force for most donors, however, remains the desire to bolster a mission that matters to them or honor a moral conviction to give back. Many donors also feel compelled to give in the honor or memory of a loved one, marking the legacy of the individual or family. Some clients are partially motivated by the recognition of naming rights or membership in certain giving societies.

It is imperative attorneys understand if clients prefer to remain anonymous before and after their passing or if and when they would like the future charitable beneficiaries notified of the gift. It is also vital to identify whether the donor wants to disclose the intent to give only or to share the approximate anticipated size of the gift. Charitable organizations appreciate notification when allowed by the donor because they are better able to track gift expectancy calculations, as well as thank and steward the donor appropriately. If the clients would like the attorney to disclose this information, the attorney should have the clients sign a consent to the disclosure specifying the level of detail to be released.[15]

Charitable giving is also a great way to minimize or eliminate the federal estate tax. In 2017, the passage of the Tax Cuts and Jobs Act increased the gift and estate tax exemption to $11.18 million, which has since increased to $13.61 million per person for individuals dying in 2024.[16] This generous estate tax exemption is slated to sunset at year-end 2025.[17] On Jan. 1, 2026, unless Congress takes action to extend the current exemption, the exemptions will revert to the inflation-adjusted rates outlined in 2017, approximately $7 million per person ($14 million for married couples).

More clients will be subject to the estate tax at this reduced exemption amount, prompting forward-thinking estate planners to preemptively assess methods to reduce or eliminate the negative tax ramifications. For those limited clients facing potential gift and estate taxes, charitable giving offers an excellent alternative.[18] Making charitable gifts during life or at death will help clients minimize the payment of estate tax resulting from the lower gift and estate tax exemption amounts.

HOW TO GIVE AND RECEIVE FIDUCIARY SERVICES

A devoted charity may agree to serve as trustee, personal representative or agent under financial or health care power of attorney for clients with a substantial charitable estate. While childless clients most often find this an attractive option, some clients with children prefer a trusted charity to serve in lieu of family members because of relationship concerns, geographic proximity, addiction or other reasons. The Oklahoma Charitable Fiduciary Act (OCFA) imposed two primary requirements on a charitable organization's ability to serve as trustee, which impedes most donors from considering this option.[19] First, the charitable share must meet or exceed 25% of the total estate value.[20] Second, no single noncharitable beneficiary may receive a greater share than the overall share allotted to charity.[21]

If possible, proactive attorneys should consider nominating an alternative fiduciary in the event the charity declines to serve or cannot serve under the OCFA. Foreseeable circumstances include: the charity may be ill-equipped to serve, a trusted individual may change jobs or retire, future leadership may not feel comfortable serving or the charity may elect to serve in financial but not health care capacities. While the charity can collect a fee for serving as trustee, the demands of the client's care may outweigh the benefits of the amount gifted to the charity whose limited resources may need to be applied to the mission of the charitable organization instead of caring for the donor. For these reasons, a contingency plan is prudent.

CONCLUSION

If you are looking for a fulfilling complement to your practice that also accomplishes your clients' objectives, consider incorporating charitable giving conversations and strategies. Doing so fosters meaningful connections with your clients, encourages tax-efficient estate planning and funds lasting societal good.

ABOUT THE AUTHOR

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ENDNOTES

1. Rule 6.1, Oklahoma Rules of Professional Conduct, 5 O.S. § Rule 6.1 (OSCN 2023); Oklahoma Bar Association Standards of Professionalism, §1.5.
2. Oklahoma Bar Association Standards of Professionalism, §1.1.
3. Glenn Gamboa, "Charitable giving in 2022 drops for only the fourth time in 40 years: Giving USA report" (June 20, 2023), https://bit.ly/4eNg7L1.
4. 26 U.S.C. §§170, 2055.
5. For detailed research and findings, *see* BNY Mellon, "Charitable Giving Study," (March 2022), https://bit.ly/4gQQA5K, and U.S. Trust, "The U.S. Trust Study of the Philanthropic Conversation" (2015), https://bit.ly/3Y4ddMt.
6. Russell N. James, "Phrasing the Charitable Bequest Inquiry," *27 Voluntas 998* (2016).
7. *Id.*
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9. Cabinet Office Behavioral Insights Team, "Applying Behavioral Insights to Charitable Giving," https://bit.ly/3BCQQ7Y (last visited Dec. 6, 2023).
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13. BNY Mellon, "Charitable Giving Study," (March 2022), https://bit.ly/4gQQA5K.
14. 60 O.S. §300.11 *et seq.* (OSCN 2023).
15. Rule 1.6, Oklahoma Rules of Professional Conduct, 5 O.S. § Rule 1.6 (OSCN 2023).
16. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054, 2091 (2017).
17. *Id.*
18. I.R.C. §§2522 (gift tax), 2055 (estate tax).
19. 60 O.S. §301.1 *et seq.* (OSCN 2023).
20. *Id.*
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Pretermitted Heirs: A Basic Overview

By Hal Wm. Ellis[1]

THIS ARTICLE IS AN OVERVIEW OF THE BASIC OKLAHOMA LAW regarding pretermitted heirs. It hopefully will provide the practitioner with the current relevant statutes and recent case law governing the omission of an heir from a will.

INTRODUCTION

What is a pretermitted heir? A pretermitted heir is any child or descendant who has been omitted by a testator's will but is still entitled to a share of the testator's estate. This omission can occur either at the execution of the will or because the pretermitted child was not born before the will's execution.[2] Where it has been found that an heir has been omitted unintentionally, that heir is granted rights to an intestate share of the testator's estate by statute under 84 O.S. §132.[3] It should be noted that Oklahoma courts have ruled that §132 can only be applied to wills, not to trusts.[4]

STATUTORY AUTHORITY

Oklahoma statutory rights of pretermitted children are found in 84 O.S. §§131, 132. Section 132 provides:

> When any testator omits to provide in his will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section.

Section 131 provides identical rights to children born after the execution of a will.[5]

As with most matters involving the interpretation of wills, the key concept is the intent of the testator controlling.[6] When omission of an heir is the issue presented to the court, the testator's intent is paramount. However, §132 provides that an omission must be expressly intentional to prevent an omitted child from being considered pretermitted.[7] Thus, the testator's intent is only what is expressed in a will in instances of pretermitted heirs.

STATUTE OF LIMITATIONS

Also of importance to the pretermitted heir are the two statutes of limitations that apply to probate court decrees that could impact their ability to exercise their rights. A pretermitted heir who wishes to contest a will admitted to probate in an attempt to receive their intestate share of an estate must meet the elements of 58 O.S. §67, which affects those who wish to contest the admission of a will and provides the following:

> If no person, within three (3) months after the admission to probate of a will, contests the same or the validity thereof, the probate of the will is conclusive, saving to infants and persons of unsound mind, a period of one (1) year after their respective disabilities are removed.[8]

If a pretermitted heir seeks to challenge a final decree and was not a party to the proceedings, they must meet the elements of 58 O.S. §723, providing:

A person interested in the estate or funds affected by the decree or order, who was not a party to the special proceeding in which it was made, but who was entitled by law to be heard therein, upon his application, or who has acquired, since the decree or order was made, a right or interest which would have entitled him to be heard, if it had been previously acquired, may move to reopen the judgment within thirty (30) days from the date of the decree or order. The facts which entitle such person to vacate the judgment must be shown by an affidavit which must be filed with the motion to vacate. [9]

Title 12 O.S. §1031 provides for civil judgments to be corrected within 30 days after they have been entered, which would affect a pretermitted heir who intervenes or seeks to, in some way, make a claim in the probate.[10] If a claim is made outside of the confines of these statutes, it is unlikely that a pretermitted heir will find success in pursuing a decree that has already been entered as the time limitations set out by these statutes will have already passed, barring any action.

FACT-SPECIFIC SITUATIONS

Adopted children are treated no differently than biological children when considering the matter of pretermitted heirs. Oklahoma law holds that adopted children count as valid descendants for the purposes of inheritance, and as a result, adopted children are granted the same rights under §132 as biological children are.[11] Even when a parent has terminated all their parental rights to an adopted child, that child is still a valid beneficiary or devisee.[12] The termination of parental rights does not terminate the adopted child's rights to an inheritance if not omitted as "the termination of parental rights negates the parent's rights to inherit from the child … termination shall not 'in any way affect the right of the child to inherit from the parent.'"[13]

Children born out of wedlock present another situation for

consideration. Biological children born out of wedlock are generally treated the same as biological children born into wedlock, with an exception regarding the father of the child. Only when the father in some way acknowledges the child to be his own – by marrying the mother, receiving a court decree declaring he is the father or signing a document stating he is the father – is the child a valid heir.[14]

Another situation involves pretermitted children known about by courts or executors. Not only do pretermitted heirs have a right to an intestate share of an estate, but should a court and/or the executor of an estate know about the heir, courts and executors of estates are obligated to protect the interests of the pretermitted heir. Executors must alert courts to the existence of a pretermitted heir, and courts must protect the interest of this pretermitted heir by distributing their "statutorily entitled share" to them.[15]

A logical question arises if the testator has given the entire estate to a named beneficiary. Is such a gift sufficient evidence of the testator's intent to disinherit all others? Oklahoma courts have said no, there must be further evidence of the testator's intent to omit.[16] The default position, both in statute and the case law, appears to be that any child left out of a will is a pretermitted heir. The only way in which this is affirmatively contradicted is the presence of an intentional omission by the testator.[17] This can be in the form of expressly leaving nothing to an individual or leaving them a nominal amount, but it must be intentional and in the "four corners" of the will. This "four corners" doctrine disallows even clear parol evidence that would indicate the intent of a grantor, unless there are ambiguities on the face of the will created either by text or external facts.[18] In *Crump v. Freeman,* the court ignored the testatorial disposition of the entire estate. The will did not grant shares of the estate to certain heirs.[19] This is because if a legal heir is not expressly omitted, they are considered unintentionally omitted, and if a legal heir is unintentionally omitted, then they are considered pretermitted.[20]

With the rise of commercial DNA testing through companies such as 23andMe and Ancestry, practitioners have speculated that these relatively novel tests could have an impact on probate law in the discovery of pretermitted heirs. The Oklahoma Supreme Court held otherwise. The use of commercial DNA testing has become a method of discovering ancestors, relatives and descendants, and courts have held that it is just that, another tool for discovering pedigree. This has been made abundantly clear in a recent Oklahoma Supreme Court case, *Felts v. Massey*, in which James Felt, the appellant in the case, discovered himself to be the progeny of Basil Georges, the decedent in this case. The decedent had been dead for 15 years, his will already admitted to probate and a final decree already entered. The appellant discovered his connection to the decedent by complete accident when the results of a commercially available DNA test revealed that both he and someone known to be a child of the decedent shared the same father.[21] Based on the DNA results, the appellant petitioned to be declared a pretermitted heir in order to receive an intestate share of the estate.[22] However, the court ruled that the decedent's will was conclusive. Fifteen years after the decedent's death was far beyond

As with most subjects of law, the subject of pretermitted heirs has had to grapple with changing technology and how people learn information.

the statute of limitations set out by 58 O.S. §67, and there was no recourse for the appellant, enforcing §67 no matter the methods used to discover paternity.[23]

CONCLUSION

The pretermitted heir issue has been present since the inception of wills. Oklahoma adopted the applicable statutes from 1910. The starting point is determined if the will from its four corners can be said to omit the heir. The issue of how the heir was discovered is not controlling. Once the probate court has determined heirs and entered the final decree, the statute of limitations of 30 days will control whether a claim can be heard.[24]

The pretermitted heir can exist in a variety of forms, from adopted children to those born out of wedlock. As with most subjects of law, the subject of pretermitted heirs has had to grapple with changing technology and how people learn information. The courts in this instance have made one thing abundantly clear, however. No matter what the method, medium or basis of a claim made by a pretermitted heir, if it does not meet the statute of limitations, it is barred. The omission must be intentional and determined from the will.

ABOUT THE AUTHOR

Hal Wm. Ellis practices at the law firm of Ellis & Ellis in the areas of business organizations, tax-exempt organizations, trusts, estates, probate and tax planning. He received his BBA with a concentration in accounting and MBA degrees from the University of Central Oklahoma and J.D. from the OU College of Law. He is a member of the Payne County Bar Association and the OBA, an American Bar Foundation Fellow and a Fellow of the American College of Trust and Estate Counsel.

ENDNOTES

1. The author thanks Andy Frels, a second-year law student at the TU College of Law, for his assistance in research, editing and analysis related to this article.
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3. R. Robert Huff, *Oklahoma Probate Law and Practice with Forms*, 84-87 (3d ed., 1995); Okla. Stat. Ann. tit. 84, §132 (West, 2013).
4. *Welch v. Crow*, 2009 OK 20, 206 P.3d 599; *Benjamin v. Butler (In re: Estate of Jackson)*, 2008 OK 83, 194 P.3d 1269.
5. Okla. Stat. Ann. tit. 84, §132 (West, 2013); Okla. Stat. Ann. tit. 84, §131 (West, 2013).
6. Okla. Stat. Ann. tit. 84, §151 (West, 2013); *Dunnett v. First Nat'l Bank & Tr. Co.,* 1938 OK 608, 184 Okla. 82, 85 P.2d 281.
7. Okla. Stat. Ann. tit. 84, §132 (West, 2013).
8. Okla. Stat. Ann. tit. 58, §67 (West, 2013).
9. Okla. Stat. Ann. tit. 58, §723 (West, 2013).
10. Okla. Stat. tit. 12, §1031 (West, 2013).
11. Okla. Stat. Ann. tit. 10, §7505-6.5 (West, 2013).
12. *Id*.
13. *Hooper v. Clinkingbeard (In re: Estate of Flowers),* 1993 OK 19, 848 P.2d 1146.
14. Okla. Stat. Ann. tit. 84, §215 (West, 2013).
15. *Mark v. Dorn (In re: Dorn)*, 1989 OK CIV APP 49, 787 P.2d 1291.
16. *Crump v. Freeman (In re: Estate of Crump),* 1980 OK 80, 614 P.2d 1096.
17. *Id*.
18. *Hooper v. Clinkingbeard (In re: Estate of Flowers*), 1993 OK 19, 848 P.2d 1146; *Crump v. Freeman (In re Estate of Crump)*, 1980 OK 80, 614 P.2d 1096; Okla. Stat. Ann. tit. 84, §132 (West, 2013).
19. *Crump v. Freeman (In re: Estate of Crump)*, 1980 OK 80, 614 P.2d 1096.
20. *Id*.
21. *Felts v. Massey (In re: Estate of Georges)*, 2023 OK 123.
22. *Id*.
23. *Id*.
24. *Id*.

PROBATE

Basic Probate Procedures

By Sheila Southard

A CLIENT HAS COME TO YOU BECAUSE A FAMILY MEMBER, a resident of Oklahoma, has recently passed away owning real or personal property in Oklahoma that will require a probate proceeding to change ownership. What do you file, and when do you file it? To answer those questions, the following is a *basic* framework of a regular probate proceeding ("regular" meaning not an ancillary probate or special or summary administration), assuming the estate is solvent and there are no contests or other litigation involved.

PETITION

A probate proceeding begins with the filing of a petition that, generally, will:

- State the jurisdictional facts, including the identity of the decedent, the date of death and the residence of the decedent prior to death;
- State whether the decedent died testate (with a will) or intestate (without a will) and if intestate will state facts regarding the diligent search conducted for a will;
- State the probable value and character of the property of the estate;
- Identify the person asking to be named as the personal representative[1] (PR) of the estate and, if there is a will that names a PR, state whether that person consents or renounces his or her right to be appointed as PR;[2] and
- Provide the names, ages and addresses of the decedent's heirs, legatees and devisees[3] as far as known to the petitioner.

The determination of heirs, legatees and devisees at this point in the proceeding is only for the purpose of providing waivers and consents and does not establish the share of the estate to which any person may be entitled.[4] If the petition does not ask the court to determine the identity of heirs, legatees and devisees at the first hearing, the PR can file a petition to do so at a later date, which can be heard following at least 10 days' notice to the heirs, devisees and legatees.[5]

If the decedent died testate, the original will may be attached to the petition or filed separately.[6] The petition contains factual allegations usually only known to the petitioner rather than his or her attorney, such as the petitioner's diligent search for a will and addresses of heirs as known to the petitioner. For this reason, although not required,[7] the petition should be verified by the petitioner. There is no statute of limitation for filing a probate.

ORDER AND NOTICE OF HEARING

The court must set a petition to admit a will to probate for hearing not less than 10 and not more than 30 days from the date of filing the petition.[8] If there is no will, a hearing on a petition to administer the estate does not have this same minimum/maximum time frame, but notice of the hearing must be given to the heirs of the intestate decedent at least 10 days prior to the hearing.[9] The notice should contain the name of the decedent, the name of the person who is asking to be appointed as the PR of the estate, the date and time of the hearing and the location of the court.[10] An order setting hearing

and notice of hearing may be combined into a single document or filed as separate documents.[11] The order and notice must be signed by the judge.[12]

Notice must be given by mail to all heirs, legatees and devisees known to the petitioner, as set out in the petition, at their last-known place of residence not less than 10 days prior to the date of hearing.[13] An affidavit of mailing must be filed prior to the hearing, showing to whom notice was mailed and the date notice was mailed.[14]

If the address of any heir, legatee or devisee is not known to the petitioner, in addition to mailing to those whose addresses are known, the notice must also be published one time in a legal newspaper circulated within the county[15] at least 10 days before the day of the hearing.[16] Proof of the publication must be filed with the court prior to the hearing.[17] Although publication is not required if the petitioner knows who all of the heirs, legatees and devisees are and their addresses, it is often a good idea to publish anyway. Failure to provide proper notice in a probate proceeding is especially problematic when real property is involved, as it will cause title issues later.

ORDER ADMITTING WILL TO PROBATE OR ORDER OF ADMINISTRATION

At the hearing on the petition, the following must be established to the court's satisfaction and reflected in the court's order:

- Death of the decedent, including date and place;
- Residence of decedent at the time of death;
- Estate left by decedent;
- No other probate of the decedent's estate has been filed;[18]
- The identity of the heirs, devisees and legatees of the decedent, if requested in the initial petition;[19]
- The petitioner's right to appointment and competence to serve as personal representative or administrator;[20]
- Necessity or waiver of bond;[21]
- Notice of the hearing has been provided as required by law, whether by mail or publication or both;
- If the decedent died intestate, a diligent search was conducted by the petitioner for a will and none was found;[22] and
- If the decedent died testate, the will was executed as required by law, and the testator was of sound mind at the time of its execution.[23]

Most often, the decedent's will contains statutory language that makes it "self-proving," meaning that testimony of witnesses is not required to prove up the will.[24] However, if the will is not self-proving, the testimony or affidavit of at least one subscribing witness will be needed.[25] A holographic will is one that is entirely written, dated and signed by the testator's own hand; is subject to no other form; can be made in or out of this state; and does not require witnesses.[26]

The court's order will reflect that the above facts have been established and will admit the will to probate or, if intestate, will order the administration of the estate, identify the heirs, legatees and devisees of the decedent, issue letters testamentary or letters of administration to the person found to be entitled to same upon that person executing the oath of office[27] and set or waive bond. A person who is not a resident of Oklahoma may serve as the PR of an estate in Oklahoma but must first appoint an agent for service of process who resides in the county of the probate proceeding.[28] Such appointment must be filed with the court before letters can be issued to the PR.[29]

LETTERS

Upon entering its order admitting a will to probate, the court will issue letters testamentary to the person(s) named in the will to serve.[30] If no one is named in the will to serve as PR or if the person named fails to apply for letters, declines to serve or is incompetent, letters of administration with will annexed will be issued.[31] If the decedent died without a will, letters of administration will be issued. The statutes provide forms for each of these letters.[32] The PR is required to execute an oath, which may be signed in front of a notary public prior to the issuance of the letters or by the judge at the time the letters are issued.[33] Most often, the letters and oath are combined in one document.

GENERAL INVENTORY AND APPRAISEMENT

Within two months of the date of the order appointing the PR, the PR must file an inventory of the probate estate that has come into the PR's possession or knowledge, unless an inventory has been waived.[34] The PR may fulfill the appraisement requirement by stating his or her opinion of the value of the estate described in the inventory.[35] Although the valuation is not required to be supported by an official appraisement unless ordered by the court, because the values of estate assets, such as real property, stocks, etc., stated in the inventory, or later in the final accounting or order of distribution, may be used to establish a stepped-up tax basis in that asset (to the fair market value at date of death, rather than the value when the decedent purchased it) in order to eliminate or minimize capital gains taxes when that asset is later sold by the heir(s), it may be beneficial to have a reliable source and documentation of the valuation. Any probate estate property not mentioned in the inventory that later comes into the possession or knowledge of the PR must be reported to the court within two months of its discovery.[36] Assets that are owned by a decedent's trust or in joint tenancy with a surviving joint tenant, or which designate a transfer on death or payable on death beneficiary (that has not lapsed) are not part of the probate estate and should not be included in the inventory of the estate.

NOTICE TO CREDITORS AND ALLOWANCE OR REJECTION OF CLAIMS

Within two months after the issuance of letters, the PR must file notice to the creditors of the decedent stating that claims against the estate will be forever barred unless presented to the PR by the date stated in the notice.[37] A form for such notice is provided in Section 331 of the probate code. The presentment date must be a "date certain," meaning that it must be a specific date (*e.g.*, "Oct. 31, 2024," not "60 days from receipt of notice"), that is *at least* two months from the date said notice is filed.[38]

Within 10 days of filing the notice, a file-stamped copy of the notice must be mailed by first-class mail or personally delivered to "all known creditors" of the decedent at their last-known addresses.[39] This means notice must be mailed to those creditors who are "actually known" and "reasonably ascertainable" to the PR as of the date notice to creditors is filed.[40] "Reasonably ascertainable" means the PR must use "reasonably diligent efforts," including searching the decedent's personal effects after the decedent's death and prior to the filing of the notice to determine the identity of creditors and their addresses.[41] An affidavit of mailing must be filed stating that the PR, or the PR by and through the PR's attorney, mailed notice by first-class mail to all creditors of the decedent known to the PR as of the date the notice was filed, identifying said creditors and their last-known mailing addresses, and the date the notice was mailed or delivered.[42] Such an affidavit should be signed by the PR, rather than the attorney, because it contains affirmations of the PR's diligent effort to determine and identify creditors.[43] If notice to creditors was not mailed because the decedent had no known creditors or because one or more creditor's address was not known, an affidavit of nonmailing stating the reasons for not mailing must be filed.[44] Notice to creditors must also be published in a newspaper in the county where the probate is filed, once a week for two consecutive weeks,[45] with the first publication appearing within 10 days of filing the notice, and proof of such publication must be filed with the court.[46]

There is no prescribed form for a creditor's claim against an estate, but the claim must be signed by the claimant or the claimant's authorized representative; state the exact amount claimed; state the nature and source of the claim with reasonable particularity; describe the security interest, mortgage or lien, if any, that has been filed of record and the collateral covered; and, if the claim is not due when it is presented or is contingent, it must state the particulars of such claim.[47] The PR must allow or reject each claim within 30 days of the claim being presented to the PR. The PR must "endorse thereon" and date his or her allowance or rejection. If the PR allows a claim, it must be presented to the judge for allowance or rejection with the date of the presentment noted.[48] Every claim allowed by the PR and approved by the judge, must be filed with the court within 30 days after approval by the judge and "ranked among acknowledged debts" to be paid.[49]

Failure of either the PR or the judge to endorse an allowance or rejection of a claim within their respective 30 days results in the claim being "deemed" rejected after the 30th day from presentment to the PR or the judge, respectively.[50] If a claim is rejected, the PR must mail a notice of rejection by first-class mail to the claimant within five days of the rejection.[51] The claimant has 45 days from the date of rejection to bring suit on the claim if it is then due, or within two months after it becomes due, or the claim will be barred.[52] No suit can be brought on a claim unless the claim was first presented to the PR.[53]

APPLICATION TO SELL PROPERTY, IF NEEDED

It may be necessary for the PR to sell estate property to pay attorney fees and costs, allowed creditor claims or other estate expenses.[54] Personal property can be sold without notice if it is perishable, likely to depreciate in value or will incur loss or expense by being kept.[55] If property is sold under the authority of a will containing a power of sale, the sale must be confirmed by the court unless confirmation has been waived by all heirs, devisees and legatees.[56]

If there is no will or the will does not grant the PR authority to sell property, the PR can still sell property but must first obtain court permission. The PR can file a petition or application to sell property, accompanied by the written consents of all heirs, devisees and legatees as determined by court pursuant to 58 O.S. §240, including the PR's written consent if he or she is an heir, devisee or legatee.[57] The court may then enter an order authorizing the PR "to sell, grant, lease, mortgage or encumber any real or personal property including mineral interests, and to execute and issue deeds, leases, bills of sale, notes, mortgages, easements and other documents of conveyance, without further judicial authorization or a return of sale or confirmation of such sale or transaction."[58] The court may also, if consented to by all the heirs, devisees and legatees, waive the filing and necessity of court approval of any accountings.[59] If the PR is unable to obtain the consents of all heirs, devisees and legatees, the PR must follow the full sales procedure outlined in 58 O.S. §380 *et seq.*, which requires, among other things, appraisal, notices by mail and publication, account of sale(s) and confirmation of the sale(s) by the court.

FINAL ACCOUNT AND PETITION FOR DISTRIBUTION

In the final account and petition for distribution of the estate, the PR explains what he/she has done during the administration of the estate and asks the court to approve the accounting and distribute the remaining estate to those entitled. One of the main purposes of administering an estate is the payment of the decedent's debts, therefore the PR must show that notice to creditors was given, by mail and publication, and that all claims and expenses of administration have been paid, or provisions for payment have been made, before the final account is filed.[60] The PR, under oath, must account for all the money received and expended by him/her, state that the time to present claims has expired and the amount of all claims presented against the estate, by whom, and whether such claims have been paid or rejected (and if rejected that the time to litigate the claim has passed), and any other matters to show that the estate is ready to be distributed and closed.[61] If all persons entitled to a distribution have waived a final accounting or if the PR is the sole person entitled to distribution, no itemized account of income and expenses is required, and it is sufficient for the PR to file an affidavit stating that all income has been properly received and expenses lawfully made, all allowed and approved claims have been paid, all funeral expenses, taxes and costs of administrator have been paid, and the estate is ready for closing.[62] The petition should also set out and request that attorney fees and costs be approved and paid,[63] as well as any commission to which the PR may be entitled if same has not been waived.[64]

ORDER AND NOTICE OF HEARING

As with the order and notice of hearing on the initial petition, the date and time of the hearing upon the final account and petition must be set by the court. Hearing on the final account and petition must be set at least 20 days after filing.[65] Notice of the hearing, if not previously waived, must be mailed to all heirs, legatees and devisees whose addresses are known at least 10 days prior to the hearing. Notice must also be published in a newspaper published in the county, once per week for two consecutive weeks.[66] The notice must state the name of the decedent and of the PR, the date and time of the hearing and that the account is for the final settlement and distribution of the estate.[67] Proof of mailing and of publication must be filed with the court.[68]

ORDER ALLOWING FINAL ACCOUNT, DISTRIBUTION AND DISCHARGE OF PR

The court's final decree must include a finding that notice to creditors was given as required and that all claims not filed within the time permitted for presentment are nonsuited, void and forever barred.[69] The court must also specifically find that notice of the settlement of the final account and petition for distribution was given as required by law.[70] The court must name the persons entitled to share in the estate and the proportion or part of the estate to which

each is entitled.[71] The order should also authorize the payment of any allowed claims that have not already been paid, attorney fees and costs, and PR commission, if any. If requested in the petition, the court may order the PR to be discharged upon such final distributions being made. However, if the PR has several duties left to be performed, it may often be better to file a petition for discharge separately, once all distributions and other duties have been completed, and report to the court that such activities have been finished and ask to be discharged.[72] The PR should obtain receipts and releases from the heirs, devisees and legatees showing that the PR has delivered all the money or property to each beneficiary as ordered by the court. If real property is distributed by the estate, a certified copy of the final decree, providing the legal description and its distribution, must be recorded with the appropriate county clerk's office(s).

CONCLUSION

As stated at the outset, the foregoing is only a *basic* framework of the filings in a probate proceeding; therefore, it does not cover every aspect of probate or the potential issues that could arise. The Oklahoma Rules of Professional Conduct require an attorney to provide competent representation, which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[73] Thus, before handling a probate matter, the practitioner should become familiar with the probate procedures set forth in Title 58 of the Oklahoma Statutes and the legal requirements of a will and intestate succession found in Title 84. Practitioners new to this area of practice may also benefit from reviewing pleadings in probate cases available on OSCN that have been filed by attorneys in their area whose practices are known to be heavily focused in probate matters. The OBA Estate Planning, Probate and Trust Section is another useful resource that requires only a minimal annual membership fee. A lot can be learned, basics and beyond, by looking at what others have already done and asking questions of more experienced practitioners.

ABOUT THE AUTHOR

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ENDNOTES

1. The general term "personal representative" used in this article encompasses the more specific terms of "executor" (the legal representative of the estate of a testate decedent) and "administrator" (the legal representative of the estate of an intestate decedent). *See* 58 O.S. §11.
2. *Id.* §§23, 127.
3. Generally, as defined by *Black's Law Dictionary* (11th ed. 2019), "heir" or "heir at law" refers to someone entitled under the laws of intestacy to receive a share of the estate, "legatee" is a person named in a will to receive personal property, and "devisee" is one named to receive real property.
4. 58 O.S. §240.
5. *Id.* §240(B).
6. *See id.* §21. If a third party has possession of the will, the court can order that person to produce the will to the court under penalty of confinement for failure to do so. *Id.* §24. Special procedures exist for the probate of a lost or destroyed will. *See id.* §81, *et seq.*
7. *See id.* §§23, 127.
8. *Id.* §25.
9. *Id.* §128.
10. *Id.* §25.
11. *Id.* §716.
12. *Id.*
13. *Id.* §25.
14. *Id.* §§26, 34, 128(B).
15. *Id.* §33.
16. *Id. §§25, 128(C).*
17. *Id.* §§28, 130.
18. The first four facts establish jurisdiction and venue. *See id.* §§5, 6, 7, 23, and 127.
19. *Id.* §240; S*ee also* 84 O.S. §213(B).
20. 58 O.S. *§§101, 102, 122, 126.*
21. *Id.* §171.
22. *See id.* §133.
23. 58 O.S. §30; 84 O.S. § 55(7).
24. 84 O.S. *§55*.
25. 58 O.S. §30.
26. 84 O.S. §54. Proving a holographic may require evidence of the decedent's handwriting by comparison to acknowledged writings of the same person, by testimony of someone familiar with the decedent's handwriting or by testimony of a handwriting expert. *See Estate of Wilder*, 1976 OK 113, 554 P.2d 788; 58 O.S §31.
27. 58 O.S. §161.
28. *Id. §162.*
29. *Id.*
30. *Id.* §101.
31. *Id.* §103.
32. *Id.* §§110, 111, 121.
33. *Id.* §161.
34. *Id.* §281(A).
35. *Id.* §281(B).
36. *Id.* §289.
37. *Id.* §331.
38. *Id.*
39. *Id. §§331,* 331.2.
40. *Id.* §331.1.
41. *Id.*
42. *Id.* §332.
43. *Id.* §331.1.
44. *Id.*
45. *Id.* §32.
46. *Id.* §§331, 332.
47. *Id.* §334.
48. *Id.* §337(A).
49. *Id.* §338. *See also id.* §591 (priority of payment of debts) and §594 (expenses to be paid immediately).
50. *Id.* §337(C).
51. *Id.* §337(B).
52. *Id.* §339.
53. *Id.* §341.
54. *See id.* §411.
55. *Id.* §387.
56. *Id.* §462.
57. *Id.* §239 (consents of contingent devisees and legatees are not required).
58. *Id.* §239(A)(1).
59. *Id.* §239(A)(2).
60. 1 Okla. Prob. Law & Prac. §25.14 (3d ed.); 58 O.S. §632.3.
61. 58 O.S. §§541, 612.
62. *Id.* §541.
63. *See Burk v. City of Oklahoma City*, 1979 OK 115, ¶¶20-22, 598 P.2d 659; *Fleig v. Landmark Construction Group*, 2024 OK 25, ¶¶4-23, 549 P.3d 1208, 1210-12.
64. 58 O.S. §§525, 527; *Matter of Estate of Bartlett*, 680 P.2d 369, 380-81, 1984 OK 9, ¶29-30.
65. 58 O.S. §553.
66. *Id.*
67. *Id.*
68. *Id.* §§553, 557.
69. *Id.* §632.3.
70. *Id.* §557.
71. *Id.* §632.
72. *Id.* §691.
73. 5 O.S. §Rule 1.1.

New Attorneys Take Oath

BOARD OF BAR EXAMINERS Chairperson Bryan Morris announces that 298 applicants who took the Oklahoma Bar Examination on July 30-31 were admitted to the Oklahoma Bar Association on Tuesday, Oct. 8, or by proxy at a later date. Oklahoma Supreme Court Chief Justice M. John Kane IV administered the Oath of Attorney to the candidates at a swearing-in ceremony at the Oklahoma state Capitol in the Chambers of the House of Representatives in Oklahoma City. A total of 407 applicants took the examination.

Other members of the Oklahoma Board of Bar Examiners are Vice Chairperson J. Roger Rinehart, El Reno; Robert E. Black, Oklahoma City; Tommy R. Dyer Jr., Jay; Juan Garcia, Clinton; Micah Knight, Durant; Amanda Mullins, Chickasha; Joel Wohlgemuth, Tulsa; and Thomas M. Wright, Muskogee.

View the full photo gallery on the OBA's Facebook page at www.facebook.com/okbarassociation.

THE NEW ADMITTEES ARE:

Yahzmen Marai Abraham
Samuel Tecumseh Allison
Danny Clayton Anson
Carlee Marie Apel Reynolds
Benjamin Rey Aranda
Olutomi Olatide Aroso
Kathryn Lynn Bain
Kylie Morgan Balcerak
Bethany Martina Ball
Christopher James Ballard
Coleman Carlin Bandy
Abigail Lindsay Banks
John Dean Barnes
Benjamin Michael Barresi
Mason Scott Beasler
Joshua Leo Beekman
Adelaide Jane Bell
Skylar Ann Bell
Alexis Benitez
Nolan Reece Benn
Phillip James Berry
Robert John Berry
Kaden Isaiah Betsch
Brian Lee Bigelow
Tosha Wonte Birmingham
Mary Margaret Bishop
Meg Alexandria Bloom
Brandon Larry Boggs
Abigail Shannon Brickey
Cecelia Reva Brissenden
Brittany Nicole Brown
Jaycie Juanita Brown

New admittees were joined by friends and family in the fourth-floor rotunda at the state Capitol following their swearing-in.

Candidates take their Oath of Attorney.

Taylor Dawn Brown
Krystal Brooke Browning
Megan Kaylee Buchanan
Roselin Pearl Buckingham
Jacob Robert Burger
Madeline Mills Burget
Christopher Mathew Burr
Justin Rotor Cajindos
Katherine Anne Hansen Cale
Ryan Allen Callahan
Alexandra Elizabeth Calzaretta
Seth Robert Campbell
Lauren Taylor Canaan
Nicholas Jerome Candido
Hunter Scott Carlson
Dannye Nicole Carpenter
Macey Leanne Carper
Bradley William Lee Carr
Ellen Melton Carr
Sydney Layne Casebolt
Katie Elizabeth Cheap
Abbey Katherine Christensen
Tatum Marie Christiansen
Stefani Nicole Cillessen
Kaegan Thomas Clark
Camryn Alexandra Conroy
Hanna Nicole Cook
Jerrod Lawrence Cooper
Courtney King Coretz
Kathryn McKenzie Wilson Corley
Alex Brent Cox
Madeline Grace Craig
Niamh Creedon-Carey
Catherine Pierpont Crews
Tyler Jeffrey Crook
Brayden Alexander Croslin
Kyle Blair Cummings
Ashley Chelsea Cupryk
Nickolas Austin Curry
Gabriella Alessandra Cutruzzula
Annmarie Akerley Daniel
Jarvis Michael De Leon
Kaleigh Ann Dean
Jakob Franz Dodson
Cole Joseph Dotson
Emma Katherine Duncan
Madeline Elizabeth Dunn
Tanya Larissa Dutko
Andrew Landes Duvall
Margaret Ann East
Hannah Caitlin Edmondson
Connor William Ellis
Ethan Douglas Elrod
Nikki Lorenzo Erece
McKenna Jocelyn Estrada
Caleb James Evans
Kelsey Nicole Falvo
Alec Scott Faso
Sarah Elizabeth Faust
Thomas Glen Ferguson
Greta Lin Fiedler
Samuel Robert Fiorelli
Ashleigh Nicole Fixico
William Isaac Wall Flax

Following the swearing-in, new OBA members sign the roll of attorneys.

Emily Anne Fogg
Hunter Cole Foster
Karlie Bennett Galarza
Christopher Paul Garinger
Timothy Daniel Geary
Jackson Theo George
Kara Jeanne Givens
Cameron Joe Glass
Erin Glynn Gossett
Hunter Alyseea Gray
Micayla Elizabeth Green
Shea Tononi Green
Daniel Benet Gregory
Dylan Joseph Gros
Aaron Cole Grubb
Alexis Paige Guerrero
Makayla Rejoyce Gunter
Jessica Anne Guzman
Madeline Elizabeth Hagen
Madison Emily Hague
Benjamin Luke Hale
Thelma Grace Hall
Candace Michell Hamilton
Rilee Nicole Hanan
Michaela Raye Hansen
Stephanie Renee Hayes
Elizabeth Marie Hellman
Seth Sawyer Hernandez
Baleigh Lynn Herring
Kyler Wayne Herron
Ashley Victoria Hicks
Edgar Lee Kody Hicks
Jill Elizabeth Hilton
Kyle Dale Hinchey
Leticia Paes Hodde
Jacy Callan Holbrook
Gordon Everett Holleman
Samuel Charles Holzschuh
Sydney Clair Houston
Hayden Forrest Howell
Ridge Stanton Hughbanks
James Burl Hulin
Hillary Nicole Hurst
Rosekate Ibe
Faija Fahmida Islam
Joseph Ryan Jacobson
Nekanapeshe Peta James
Todd Alan Jamieson
BaiLee Marie Jarvis
Daniel Michael Jensen
Joseph Edward Johnston
Trace Sterling Justiss
Rebecca Marie Kamp
Raelynn Marie Keith
Samuel Rees Kiehl
Gentry Elizabeth Kincade
Trey Michael Kirby
Emilee Paullynn Kula
Michael Davis Lauderdale
Kelsey Rian Lauerman
Caroline Alise Lay
Dawn Christine Leemon
Victoria Sue LeftHand
Peyton Alyssa Lepp
Katherine Elise Himaya Lewis
Kellie Christine Lewis
Victoria Faith Lewis
Amanda Nicole Lin
Austin Ryan Little
LeeAnn Marie Littlejohn
Landen Kendell Logan
Brandon Paris Mun-Chung Loo
Brenda Cristela Lozano
Chloe Jaymes Lubbers
Candalyn Nicole Lyons
Rosemary Elizabeth Mahaffey
Siobhan Ann Mahnken
Ryan Scott Mansell
CyLeigh Morgan Maroney
Lauren Nichole Martin
Megan Lynn Maruyama
Maria Dominica Mattern
Kaylee Caroline Maxon
Jackson Michael Mayberry
Lauren Renee McAden
William Bradley McAntire
Patrick Shotwell McBride
Sean Wesley McCalip
Luke Cody McClain
Ian William McDonald
Reagan James McGuire
Abby Jayne McKee
Julieta Mendoza
Mackenzie Anne Merideth
Justin Michael Miller
Steven Foy Miller
Nathan Adam Miramontes

Christy Elizabeth Montenegro
Erick Emmanuel Morales Sartillo
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Ryan William Myers
Macullen Brian Nadurak
Remington Bleu Naputi
Jessamine Brooke Nazari
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William Riley Nester
Jack Alan Rockmore Newhouse-Velie
Laura Allison Niemiec
Steven Ray Northern
Briana Audrey Ochoa
Connor McLain Olson
Michael Dillon Orcutt
William Alexander Orr
Kale Davis Parker
Michaela Brooke Parks
Sheridan Hadley Patterson
Philip Louis Pippin
Emily MiRhanda Pirrong
Pearce James Pittman
Mingmei Elaine Pok
Shayla Breanna Powers
Eric Dale Ranney
Claire Katherine Raschen
Garrett Thomas Reynolds
Ronica Raquel Roberts
Daniela Dolores Rodriguez
Thalia Karina Rodriguez
Logan Elizabeth Roehm
Macy Lauren Rogers
Courtney Rene Schrater
Zachary James Scott
Bryan Javier Seaton
Jeffrey Robert Shafer
Jay Thomas Shank
Hunter Lyn Shedd
Kylie Noel Shelley
Alexis Danielle Shrum
Wesley Aaron Simmons
Halee McKinsey Simpson
Cameron Glenham Skinner
Bryce Michael Smith
Chad Preston Smith
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Hunter Blake White
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Joshua Jabulani Nthuthuko Whitley
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Montana Mathews Williams
Taylor Delayne Williams
Brandon Jacob Williamson
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Lauryn Jo Wilson
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Mariah Sarah Withington
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Sara Wray
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Harris Toy Youngblood
Daniel Patrick Zonas

Oklahoma Supreme Court Chief Justice M. John Kane IV administers the Oath of Attorney.

Major Upgrade Coming to Legal Research Member Benefit

WRITTEN BY: **ED WALTERS**

The OBA has contracted with Fastcase since 2006 to offer complimentary legal research to its membership. All OBA members have free access to Fastcase's nationwide legal research service, including cases, statutes, regulations, court rules and constitutions for all 50 states plus federal. The service includes reference attorney support by phone or chat, unlimited searching and printing. While this service normally costs $1,145 per year, Oklahoma attorneys can access it at no cost as a part of their existing bar membership.

A free legal research benefit may sound too good to be true, but Fastcase was founded in 1999 with the mission of democratizing the law and making the practice of law smarter. The service was founded by lawyers who wanted to make access to the law a cornerstone of practice, not a privilege reserved for the largest law firms. Working with bar associations in nearly every state, Fastcase has made legal research available to more than 1.1 million lawyers in the United States.

A Merger Of Strength On Strength

In 2023, Fastcase merged with vLex, which had been pushing in parallel to democratize the law in the rest of the world since 2000. The two companies share a common mission, and both are veterans of the legal profession. However, while Fastcase was building a deep library of legal materials in the United States, vLex was founded in Spain and worked to democratize the law in Europe, Latin America and Asia.

The combination was a perfect fit and formed one of the world's largest law libraries – it has more than 1 billion documents from over 110 countries and more than 3 million subscribers. Veteran legal journalist Bob Ambrogi said the merger would "reshape the legal research and legal technology landscape on a global basis."

This merger makes your OBA member benefit more valuable than ever. The merged company continues its mission to work with state bar associations to make legal research an included part of bar membership for lawyers. The Fastcase legal research service will be called vLex Fastcase in the United States, while the global corporate name will remain vLex. However, the mission for both companies is the same: to ensure that people win or lose cases based on who has the law on their side, not on who can afford to find out whether the law is on their side.

A Big Upgrade For OBA Members

The new version of the OBA member benefit from vLex Fastcase will offer some significant upgrades:

1) *Cert citator.* Is your case still good law? vLex Fastcase will include the robust Cert citator, a combination of AI and a human editorial review of more than 700,000 citations. The teams have been working on the citator for four years, researching, developing and testing. The result is a new citator that is more powerful than ever.

2) *Vincent AI.* vLex Fastcase will include some of the features of the Vincent AI platform from vLex. Vincent uses artificial intelligence to create headnotes for judicial opinions and find references. It also provides tools to translate research into other languages, which can be very helpful for advising clients whose native language is not English. In addition, some of the power tools from Vincent AI will be available for an additional monthly subscription, such as AI-powered research, draft memos, redlines, reviewing contracts, drafting briefs, mergers and acquisitions due diligence and much more.

3) *A sleek, new interface.* The new vLex Fastcase features a more streamlined, easier-to-read design to make research simpler and more accessible – for experts and beginners alike.

4) *The same member benefit but better.* vLex Fastcase still includes free access to up-to-date judicial opinions, statutes, regulations and more for Oklahoma and the other 49 states, as well as federal. If you subscribe to secondary publications or the briefs and pleadings database, those subscriptions will move with you to the new platform.

To use vLex Fastcase, go to your MyOKBar account and click the "vLex Fastcase" link in the box at the top of the page. That will log you in directly to your personalized start page in Fastcase.

The OBA has offered online legal research software as a free benefit to members for many years. The new release of vLex Fastcase will be an important step forward in continuing to improve this service. vLex Fastcase will make it easier for members to prepare work for clients, improving an already great legal research service.

vlex fastcase®

About the Author: Ed Walters serves as the chief strategy officer at vLex and is the co-founder of Fastcase.

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Turn 'Thankful' Into Action Through Commitment to Our Legal Community

By Janet Johnson

BEING A MEMBER OF THE Oklahoma Bar Association is a profound privilege, and every day, I am thankful for it. The legal field is not merely a profession; it is a calling that shapes the very fabric of society. It embodies values of justice, integrity and service, and being part of this community means participating in something far greater than oneself.

In October, I witnessed nearly 300 new OBA members, mostly recent law school graduates, take their Oath of Attorney. I was filled with pride and gratitude to see the next generation of lawyers heed the call to join our community, which I have seen to be a sanctuary for those who believe in justice. As lawyers, paralegals, judges and legal scholars, we are guardians of the rule of law. This commitment to justice fosters a sense of purpose that permeates our work. Every case we take on is an opportunity to make a difference, to advocate for those whose voices might otherwise go unheard. This sense of responsibility is both humbling and empowering.

Moreover, the legal profession is built on a foundation of camaraderie and mutual support. The relationships formed with colleagues – whether through law school, bar associations or networking events – are invaluable. These connections provide a support system, offering advice, sharing experiences and celebrating successes. The legal community thrives on collaboration; sharing insights and strategies leads to better outcomes for clients and fosters personal growth.

Another reason to be thankful is the intellectual rigor the legal profession demands. Engaging with complex legal theories, analyzing intricate cases and debating ethical dilemmas challenges us to think critically and creatively. This intellectual stimulation not only sharpens our skills but also promotes lifelong learning. Each case presents a unique set of facts and circumstances, pushing us to expand our knowledge and adapt to evolving laws and societal norms.

Being part of the legal community also grants access to a diverse array of experiences. From criminal defense to corporate law, environmental advocacy to family law, the breadth of practice areas allows individuals to find their niche. This enriches our profession and enhances our ability to understand and empathize with various perspectives, contributing to a more nuanced understanding of the world.

I would be remiss if I didn't take this opportunity to discuss one of the OBA's most critical member benefits: our sections and committees. These groups provide Oklahoma

However, the shared experiences of navigating these challenges create a sense of solidarity. We learn from each other, drawing strength from our collective determination to advocate for justice.

attorneys with the means to become involved with their bar association in a meaningful way. By helping our members stay on the leading edge of information and technology, these groups also help our members better serve the public. I am particularly thankful for our bar members who so generously give their time to serve in leadership roles within these groups.

On the topic of giving time, we must all be grateful for those legal professionals who dedicate their careers to pro bono work or advocacy for marginalized communities. This commitment to service reinforces the idea that the law can be a powerful tool for progress. The legal profession often serves as a platform for social change, and being part of a community that actively seeks to address inequalities and promote justice is a source of pride and gratitude.

The traditions and rituals of the legal community also instill a sense of belonging. From swearing-in ceremonies to bar association events, these moments create lasting memories and connections. They remind us that we are part of a lineage that values ethics, professionalism and service to others. Such traditions foster a sense of identity and responsibility, encouraging us to uphold the values of our profession.

Finally, being a part of the legal community encourages resilience. The challenges faced in legal practice can be daunting, from high-stakes cases to demanding workloads. However, the shared experiences of navigating these challenges create a sense of solidarity. We learn from each other, drawing strength from our collective determination to advocate for justice.

Being a member of the OBA is a privilege that I hope fills us all with gratitude. The commitment to justice, the bonds formed with colleagues, the intellectual challenges, the opportunities for social change and the traditions we uphold all contribute to a rich and rewarding experience. It is a community that not only shapes our professional lives but also enriches our personal journeys, making us better advocates, colleagues and citizens. For that, I am eternally grateful.

Janet

To contact Executive Director Johnson, email her at janetj@okbar.org.

Planning Ahead to Protect Your Clients in the Event of Your Death or Incapacity

By Jim Calloway

LAWYERS TAKE PRIDE IN their loyalty to their clients, representing them to the best of their abilities. But there are steps you can take to protect your clients even if you are not personally available to assist them.

For this estate planning-themed edition of the *Oklahoma Bar Journal*, we have chosen to discuss "estate planning" for a lawyer's law practice. Lawyers who do estate planning for clients know that there are often procrastination and delays caused by clients who know they need to have a plan but still hate thinking about their own demise. It is an easy thing to put off. But while clients who fail to execute wills and other estate planning documents may miss out on benefits, and their heirs may incur additional expenses, at least laws govern intestate succession in probate.

But a lawyer who dies or disappears, leaving no instructions about handling client matters, can generate hardships for clients and the lawyer's heirs. I hope that every lawyer will take the opportunity to download and review the OBA's *Planning Ahead Guide: Attorney Transition Planning in the Event of Death or Incapacity*. Instructions on downloading it are available at the end of this column.

Most lawyers will benefit from reading this detailed information or at least skimming through the document to make certain they have addressed everything. But while all lawyers have these ethical duties, the extent to which a lawyer in private practice must take affirmative actions often depends on the practice setting.

Scenario 1: You are a recent graduate who has taken a job as an associate with a 15-lawyer firm that has been in operation for many years. Here, unless something you observe gives you reason to be concerned, you can assume the existing law firm has this handled. Usually, making assumptions about something so important would be risky. But there's another important factor to consider: If something takes you out of action, either temporarily or permanently, there are lawyers available in the firm who can immediately step in. They will be motivated to do a good job – both to retain the client for future legal services and to prevent a professional liability claim from being filed. It is unlikely a new associate is even listed as an authorized signer on the law firm trust account, much less as the only one listed. This means that needed client funds in the trust account are going to be accessible. Your client information in the digital practice management solution used by the firm can be accessed. There should be no lost files or lost information.

In larger law firms, the law firm management team and the law office legal administrator typically take care of such business continuity planning without most lawyers being individually involved.

Scenario 2: Now, let's examine the other end of the spectrum. A hypothetical solo lawyer works with no other lawyers and has a habit of not keeping office staff longer than a year. The lawyer is unmarried and has no will. Much of the lawyer's practice is in a practice area that few in the lawyer's community handle. But the lawyer has just settled two rather sizeable personal injury matters on a contingency fee basis, and the clients are already asking when they will receive disbursement of their funds from the lawyer's trust account. The lawyer used paper-based client files exclusively. There is likely some useful information on the lawyer's computer about billing, but no one knows the password.

This sounds a bit like a law school exam hypothetical. But we all can see how this will become a complicated situation. No obvious

lawyer is available to take over ongoing matters mid-case. It will be hard to access the trust account funds without a court order or, in appropriate cases, intervention by the OBA General Counsel. Filing an intestate probate and getting a personal representative appointed will take time, especially if the lawyer has children. It gets more complicated if the children are located out of state at unknown addresses.

ACCESS TO THE TRUST ACCOUNT

The next few paragraphs are taken directly from the OBA *Planning Ahead Guide*:

> As mentioned above, when arranging to have someone take over or wind down your financial affairs, you should also consider whether you want someone to have access to your trust account. If you do not make arrangements to allow someone access to the trust account, your clients' money will remain in the trust account until a court orders access. For example, if you become physically, mentally, or emotionally unable to conduct your law practice and no access arrangements were made, your clients' money will most likely remain in your trust account until either a probate is opened and a personal representative is appointed or the OBA's General Counsel petitions the Court to appoint lawyers to notify clients and take any immediate action necessary to protect them. *Both of these approaches are far less desirable than making plans yourself.* (Emphasis added) In many instances, the client needs the money he or she has on deposit in the lawyer's trust account to hire a new lawyer, and a delay puts the client in a difficult position. This is likely to prompt ethics complaints, Client Security Fund claims, malpractice complaints, or other civil suits.
>
> On the other hand, as emphasized above, allowing access to your trust account is a serious matter. You must give careful consideration to whom you give access and under what circumstances. If someone has access to your trust account and that person misappropriates money, your clients will suffer damages. In addition, you or your estate may be held responsible.
>
> There are no easy solutions to this problem, and there is no way to know absolutely whether you are making the right choice. There are many important decisions to make. Each person must look at the

options available to him or her, weigh the relative risks, and make the best choices he or she can.

Adding an Assisting Attorney or Authorized Signer to your operating or lawyer trust account is permitted regardless of the form of entity you use for practicing law.

This is a challenging analysis.

THE ASSISTING ATTORNEY

Equally important to making proper trust accounting arrangements is designating an assisting attorney. This refers to the lawyer you have made arrangements with to close your practice or to maintain it temporarily while you recover from a disabling medical condition. It is important that the assisting attorney agrees to assume these duties and you designate what is allowed.

We have heard of situations where two solo practitioners in the same community each agree to serve as assisting attorney for the other. That can work very well, but it may require a brief role of a third attorney who removes any files from the appointing attorney's office where the assisting attorney was opposing counsel or otherwise has a conflict and sees to their disposition.

THE OBA PLANNING GUIDE

The *Planning Ahead Guide: Attorney Transition Planning in the Event of Death or Incapacity* is available at no cost to all OBA members. You can log in to your MyOKBar page and click the link for the guide from the list of links. Do not be intimated by the size of this publication, as a substantial part of the guide contains forms for you to modify and use in your planning. We encourage you to download the guide and start implementing it to benefit both your clients, those who will administer your estate and perhaps yourself in the event of a temporary disability.

Mr. Calloway is the OBA Management Assistance Program director. Need a quick answer to a tech problem or help solving a management dilemma? Contact him at 405-416-7008, 800-522-8060 or jimc@okbar.org. It's a free member benefit.

(continued from page 4)

enforce the rules, the OBA should be helping its members comply with them. I am sure an enforcement-only approach would not provide this type of support.

Members also benefit from the fellowship supported by the OBA. Take sections and committees for instance. They publish materials, put on seminars and recognize worthy practitioners with awards. I am sure that members of sections, like the Family Law Section, believe their practices (and practice areas) have greatly benefited from the section.

This has been my experience. I am a member of and previously chaired the Financial Institutions and Commercial Law Section. The materials and seminars were very valuable to my development and continue to help me as general counsel for a bank. More importantly, however, are the relationships I made. I have many friends and colleagues that I can call upon to provide advice.

There are a multitude of other benefits OBA members also receive. There are quality educational materials like the *Oklahoma Bar Journal* and CLE programs. Last year, the CLE Department provided more than 12,608 credit hours for free, valued at over $600,000. Partnerships with third parties deliver benefits, like Fastcase, that provide legal research to all OBA members. These types of products and services are more difficult to provide and costly for other organizations.

I would like to conclude with a counterfactual: What if the OBA didn't exist? If there was no legal licensure process, then the value of every member's law degree and bar passage accomplishment would evaporate, as anyone could practice law. Judges would be burdened to police courtrooms with untrained advocates, and clients would not be assured of a minimum level of competence. The public justice and efficiency of the judicial system would be greatly diminished.

If Oklahoma adopted another model where there is a state regulator but a separate association for everything else, members would lose much value. Members would lose critical resources like the Ethics Counsel, access to A Chance to Change (Lawyers Helping Lawyers services) and lower rates from vendors. More importantly, it would gut the regulatory model where the regulator actually seeks to improve the profession, not just enforce rules.

Additionally, the support for attorney collegiality would be greatly diminished. For example, OBA sections are comprised of 12,039 members. The OBA has a little more than 18,000 members, approximately 6,000 of which reside out of state. These sections are supported by OBA staff and infrastructure and would likely not exist or would cost a great deal more without the OBA's support.

Your OBA membership is more valuable than you may realize. In numerous ways, every attorney's practice of law is improved by the OBA. I hope everyone can see the big picture.

ENDNOTES

1. Anton-Hermann Chroust, "Legal Profession in Ancient Imperial Rome," 30 *Notre Dame L. Rev.* 521 (1955), at 578-579.

2. Philip J. Wickser, "Bar Associations," 15 *Cornell L. Rev.* 390 (1930), at Note 4 (p. 392) ("The Inns of Court are of great antiquity. They originated as companies or quasi corporations of lawyers who owned and resided in the four Inns of Court. They were patterned after the French College of Advocates and were part of the general mediaeval guild movement. Henry III in 1235 prohibited the study of law in any other place in London than the Inns of Court. They assumed somewhat their present form in the reign of Edward III in 1327.").

3. Friedman, Sarah, "The History of the U.S. Bar Exam, Part I – The Law's Gatekeeper," *Library of Congress Blogs*, Feb. 14, 2024 (available at https://bit.ly/4eQxsTP); citing Susan Katcher, "Legal Training in the United States: A Brief History," 24 *Wis. L. Rev.* 335, 339 (2006). "Each colony had its own standards for entry, usually requiring several years of experience in a law practice. Due to the expansion of the profession as the country grew, bar associations began to form in the 18th century as well and thus began to dictate the rules of legal education" (internal citations omitted).

4. It should also be noted that those who benefit from the existence of the regulating authority, like attorneys, often fund the regulator. For example, banks pay dues or assessments to the Federal Deposit Insurance Corporation (FDIC) and other regulators.

Meeting Summary

The Oklahoma Bar Association Board of Governors met Sept. 20.

REPORT OF THE PRESIDENT

President Pringle reported he participated in the strategic planning sessions in Ardmore and had follow-up meetings regarding strategic planning, including with facilitator Marcy Cottle. He attended the joint Annual Meeting of the Tulsa County Bar Association and Tulsa County Bar Foundation, the Legal Conference for the Southwest Association of Bank Counsel and the Boiling Springs Legal Institute. He taught at the Oklahoma Bankers Association Basic Banking School, reviewed the 2025 OBA budget and provided comments to President-Elect Williams and reviewed issues related to ongoing litigation. He worked on revitalizing the OBA Diversity Committee, including meeting with past chair and past OBA Governor Kara Smith and Executive Director Johnson. He attended the Bar Center Facilities Committee meeting and reviewed correspondence on a contract with the architect. He wrote his monthly column for the *Oklahoma Bar Journal*, met with OBA legislative liaison Clay Taylor and Executive Director Johnson to work on legislative issues and met with the immediate past president of the State Bar of Texas to discuss common problems and projects.

REPORT OF THE PRESIDENT-ELECT

President-Elect Williams reported by email he attended the joint reception of the Board of Governors and the Carter County Bar Association and participated in the strategic planning retreat in Ardmore and additional OBA strategic planning with Executive Director Johnson, Administration Director Brumit and facilitator Marcy Cottle. He worked on various appointments for 2025, attended the joint Annual Meeting of the Tulsa County Bar Association and Tulsa County Bar Foundation and virtually conferred with Judge Parsley, Judge Eilers and Executive Director Johnson regarding a remote OBA Board of Governors meeting in conjunction with the 2025 Boiling Springs Legal Institute. He virtually attended the Oklahoma Bar Foundation Development Committee meeting and the Board of Trustees September meeting. He conferred with Professionalism Committee Chair Richard D. White Jr. about the committee's activities and virtually attended meetings for the Professionalism Committee, the Membership Engagement Committee and the Oklahoma Attorneys Mutual Insurance Co. Underwriting Committee. He met with Executive Director Johnson and Administration Director Brumit regarding the 2025 OBA budget and chaired the Budget Committee meeting to review the budget. He attended the Boiling Springs Legal Institute in Woodward and the OAMIC Board of Directors retreat and Annual Meeting in Tulsa.

REPORT OF THE VICE PRESIDENT

Vice President Peckio reported she participated in the strategic planning session in Ardmore and both Lawyers Helping Lawyers discussion groups in Tulsa. She attended the Muskogee County Bar Association's end-of-summer cookout and the Pittsburg County Bar Association monthly meeting, where she presented a free 3-hour CLE program. She also reviewed issues related to ongoing litigation and attended the Women in Law Conference in Tulsa.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Johnson reported she attended the joint reception with Carter County Bar Association, participated in the strategic planning sessions in Ardmore, had multiple follow-up meetings with facilitator Marcy Cottle on the next steps and went to a hard hat tour at OKANA, the Oklahoma City resort that is currently under construction and being considered as a venue for upcoming association events. She met with OBA General Counsel and the Oklahoma Bar Foundation on IOLTA rules, attended a directors' meeting to discuss the budget and met with legislative liaison Clay Taylor and President Pringle

to discuss legislative issues. She attended the Tulsa County Bar Association and Tulsa County Bar Foundation joint Annual Meeting, attended two YLD monthly meetings and discussed 2025 meeting opportunities at Boiling Springs with President-Elect Williams, Judge Parsley and Judge Eilers. She worked on updates to the Lawyers Helping Lawyers Assistance Program contract and necessary website updates, filed applications for an MCLE rule change and dues increase and attended lunch with President Pringle and past OBA Governor Kara Smith to discuss the Diversity Committee. She attended a Bar Center Facilities Committee meeting and corresponded with architects on next steps and follow-up questions, met with Intellectual Property Section leaders about the *Oklahoma Bar Journal* publication agreement and met with a representative from Tulsa Club Hotel to discuss upcoming meetings. She met with representatives from the Skirvin Hilton Hotel to discuss November 2025 meeting needs, attended the Bench and Bar committee meeting and met with an HVAC group regarding upcoming necessary system upgrades. She met with counsel to discuss pending litigation, attended a webinar about national concerns surrounding legal deserts, met with cybersecurity group Arctic Wolf for OBA tech improvements and attended a meeting with President-Elect Williams about the OBA budget. She attended a Budget Committee meeting, a Membership Engagement Committee meeting and the Board of Editors retreat. She attended the Boiling Springs Legal Institute on Sept. 17, the CLE Movie Night at the Supreme Court on Thursday, Sept. 19, and the Women in Law Conference on Friday, Sept. 20.

REPORT OF THE IMMEDIATE PAST PRESIDENT

Past President Hermanson reported he participated in the strategic planning sessions in Ardmore, chaired the Oklahoma Justice Assistance Grant board meeting and reviewed and approved items regarding pending OBA litigation. He virtually attended the Membership Engagement Committee meeting and attended the Oklahoma District Attorneys Association Legislative Awards dinner and meetings for the District Attorneys Council Technology Committee and Board of Directors and the Oklahoma District Attorneys Association Board of Directors.

BOARD MEMBER REPORTS

Governor Ailles Bahm reported she attended the Budget Committee meeting, the Carter County Bar Association joint reception, the strategic planning retreat in Ardmore and the September Bench and Bar Committee meeting. **Governor Barbush** reported he attended the strategic planning retreat in Ardmore and the opening ceremony of the Choctaw Nation Labor Day Festival. **Governor Bracken** reported he attended the Oklahoma County Bar Association Raising the Bar event and a Mock Trial Committee meeting regarding new case details and a workshop for Oklahoma High School Mock Trial program students. **Governor Conner** reported he attended the Garfield County Bar Association meeting. **Governor Dow** reported she attended the Cleveland County Bar Association's happy hour event, the Oklahoma County Bar Association Family Law Section meeting, the OBA Family Law Section meeting, the Mary Abbott Children's House Board of Directors meeting and the OBA Disaster Response and Relief Committee meeting. **Governor Hixon** reported he participated in the strategic planning sessions in Ardmore, attended the joint Annual Meeting of the Tulsa County Bar Association and Tulsa County Bar Foundation and moderated the TCBA awards portion of the meeting. He participated in the OBA Law Day Committee meeting and the OBA Budget Committee meeting and attended the TCBA Board of Directors meeting. **Governor Knott** reported she attended the Budget Committee meeting, the retirement reception hosted by the Canadian County Bar Association for Judge Hatfield and the swearing-in ceremony for Canadian County Judge Lori Dewey. She attended the strategic planning sessions in Ardmore and the Oklahoma Municipal League

Conference, where she presented at a session on legal issues involving code enforcement. **Governor Locke** reported he attended the Muskogee County Bar Association's end-of-summer cookout and participated in the strategic planning sessions in Ardmore. **Governor Oldfield** reported he participated in the strategic planning sessions in Ardmore and reviewed emails concerning the Professionalism Committee meeting. **Governor Rogers** reported he attended the Clients' Security Fund Committee meeting. **Governor Thurman** reported he participated in the strategic planning sessions in Ardmore and the Coffee with a Cop event in Ada. He organized and attended the Pontotoc County Bar Association's social event with East Central University President Wendell Godwin. **Governor Trevillion** reported he attended the Oklahoma County Bar Association meeting and the Budget Committee meeting.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Talbert reported the YLD and the Animal Law Section co-hosted a pet adoption event and CLE at the Bar K dog park in Oklahoma City.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported on the status of pending litigation involving the OBA. A written report of PRC actions and OBA disciplinary matters for the month was submitted to the board for its review.

BOARD LIAISON REPORTS

Vice President Peckio reported the **Strategic Planning Committee** is looking forward to implementing the strategic plan discussed at the recent strategic planning retreat in Ardmore and noted that a more formalized version of the plan is expected in October. Governor Oldfield reported the **Legal Internship Committee** and **Professionalism Committee** have both recently met. Governor Barbush reported **the Lawyers Helping Lawyers Assistance Program Committee** has received a Bar Foundation grant to hire an executive director, and the hiring process for that role is being discussed. He also said the **Cannabis Law Committee** is developing a database of best practices and other materials for the group. Governor Bracken reported the **Military Assistance Committee** recently participated in the annual Sooner Stand Down event aimed at assisting veterans experiencing homelessness. Governor Dow reported the **Disaster Response and Relief Committee** continues to meet and respond to legal needs created by the spring 2024 severe weather events. Governor Hixon said the **Law Day Committee** met Aug. 26, and preparation for the 2025 student art and writing contests is underway. He said the committee is once again considering retaining Smirk New Media for online promotion, and the committee is also exploring retaining Spanish-language interpreters for the 2025 Ask A Lawyer event. Governor Locke said the **Membership Engagement/ Member Services Committee** met recently and reviewed the association's current member benefits policy. He said the committee is also reviewing proposed updates to the association's website policy, which will be discussed at the next meeting. Governor Knott reported the **Bar Center Facilities Committee** is moving forward on planned roof repairs, and the process to outline repair workflow is being determined. Governor Ailles Bahm said the **Bench and Bar Committee** reviewed a presentation related to the state's legal deserts recently prepared by Oklahoma Access to Justice Foundation Executive Director Katie Dilks. Governor Rogers said the **Clients' Security Fund Committee** met recently and reviewed claims.

OKLAHOMA COMMISSION ON CHILDREN AND YOUTH APPOINTMENT

The board approved a motion to submit the three names of Bryan Ross Lynch, Kalan Chapman Lloyd and Timothy Robert Michaels-Johnson to Gov. Stitt for his appointment to the commission.

COUNCIL ON JUDICIAL COMPLAINTS LEASE

The board approved a motion to approve the year-to-year lease renewal per the annual process using the standard Office of Management and Enterprise Services (OMES) lease agreement.

CHILD ABUSE TRAINING AND COORDINATION COUNCIL

President Pringle appoints Brittany Hunt-Jassey as candidate (primary) and Laura R. Talbert as designee (alternate) to the Child Abuse Training and Coordination Council.

UPCOMING OBA AND COUNTY BAR EVENTS – 2024

President Pringle reviewed upcoming bar-related events, including the joint receptions with the Canadian County Bar Association in October and the Garfield County Bar Association in November.

NEXT BOARD MEETING

The Board of Governors met in October, and a summary of those actions will be published in the *Oklahoma Bar Journal* once the minutes are approved. The next board meeting will be held Friday, Nov. 15, in Enid.

SHERWOOD & ROBERT WELCOMES KURSTON P. MCMURRAY TO THE FIRM!

After nearly a decade of successfully serving NGL Energy Partners LP (NGL), Kurston P. McMurray officially joined Sherwood & Robert on Oct. 7. The firm is excited to welcome Mr. McMurray aboard, as his extensive experience in both the public and private sectors will further strengthen the services offered to clients.

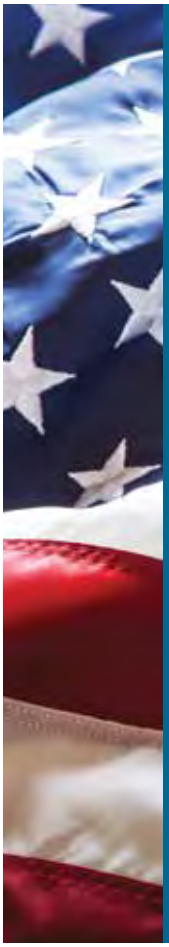
Mr. McMurray joined NGL in February 2015 and served as the company's Executive Vice President, General Counsel, and Corporate Secretary since October 2016. Mr. McMurray built the in-house legal functions essentially from scratch to include legal support and direct oversight for all business and commercial transactions for each of NGL's business units; Mr. McMurray also managed the entirety of NGL's legal functions as they relate to litigation and dispute resolution, real estate, all facets of regulatory compliance and applicability, corporate and board of directors governance, capital market transactions, contract management, public disclosures and employment.

Prior to joining NGL, Mr. McMurray practiced law in the Tulsa area for 17 years (since 1998) and was a partner in several firms and a founding shareholder of Wilkin/McMurray PLLC. Mr. McMurray's private practice focused on business transactions, real estate, healthcare, banking, corporate governance, corporate management, and commercial litigation. His professional plan has always been to return to his roots in private practice at the right time and for the right opportunity.

Mr. McMurray explains, "Joining Sherwood & Robert presented itself at that perfect time for me and the perfect time for the firm as well, given their recent growth and expansion of services for clients. The foremost reason I left the in-house position and joined the firm was the unique chance to help build upon what Ted Sherwood and Hugh Robert (together with the deep bench of talented lawyers and staff on the team) have already achieved. Sherwood & Robert's client-focused mission and team-oriented culture perfectly align with my vision of a firm that can provide fulfilling work for our employees and significant value to our clients. I also have a deep desire to help improve Alternative Dispute Resolution in this community having been involved in that process both as an advocate and a client; and look forward to helping Accord Mediation continue providing such an important service to the Tulsa legal community."

About Sherwood & Robert

Sherwood & Robert is a full-service law firm with a long history of providing exceptional and innovative legal services in Oklahoma and beyond. Trusted and respected, the firm addresses an array of complex legal issues for both businesses and individuals. Their attorneys bring a wealth of expertise through their experience in estate planning, nonprofit governance, mergers and acquisitions, intellectual property, real estate transactions, corporate litigation, business compliance, and more. For more information, please visit: www.smr-law.com.



NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office of Associate District Judge, Seminole County. This vacancy is created due to the appointment of the Honorable Brett William Butner to District Judge on October 4, 2024.

To be appointed an Associate District Judge of Seminole County, an individual must be a registered voter of Seminole County at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years' experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

Application forms may be obtained online at https://okjnc.com or by contacting Gina Antipov at (405) 556-9300. Applications must be submitted to the Chairman of the JNC no later than 5:00 p.m., Friday, November 22, 2024. Applications may be mailed, hand delivered or delivered by third party commercial carrier. If mailed or delivered by third party commercial carrier, they must be postmarked on or before November 22, 2024, to be deemed timely. Applications should be mailed/delivered to:

Jim Bland, Chairman
Oklahoma Judicial Nominating Commission
c/o Gina Antipov
Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3
Oklahoma City, OK 73105

Oklahoma Bar Foundation Announces 2025 IOLTA Grants

THE OKLAHOMA BAR Foundation has announced its grant allocations for 2025, awarding funding to more than 50 nonprofit programs across the state. These organizations are on the front lines, providing essential legal services to vulnerable populations, including abused children, victims of domestic violence, refugees and immigrants. The programs also provide pretrial and court-ordered diversion programs for mothers and at-risk youth. Through the OBF's partnership with these grantees, we are bringing justice to some of the most intimate spaces: the homes and lives of Oklahoma families.

ABOUT THE GRANTEES

The nonprofit programs receiving these grants address a wide spectrum of legal issues affecting Oklahoma families. By partnering with these organizations, the OBF is helping to break down barriers to justice and providing a lifeline to individuals and families who may otherwise face legal challenges without proper representation or guidance.

Several nonprofits among the recipients are focused on supporting *children and youth* in the legal system. These programs offer critical services to abused and neglected children, as well as juveniles who are navigating complex legal situations. For these young individuals, having access to legal assistance can make a significant difference in the outcomes of their cases and future opportunities.

Additionally, funding has been directed to organizations that provide legal services to *victims of domestic violence*, ensuring they have the necessary resources to escape abusive environments and seek safety. For survivors, navigating the legal system can be daunting, especially when dealing with the trauma of violence. The OBF's support enables these victims to have access to attorneys and advocates who can guide them through protective orders, custody battles and other legal processes.

In a time when immigration policies are constantly evolving, *refugees and immigrants* often face legal uncertainties and live with constant fear about their futures. Many of the grantees are dedicated to assisting these communities with legal services that help them secure documentation, understand their rights and find legal pathways to citizenship, as well as representing victims of crime in court proceedings. These programs serve as vital resources for refugees and immigrants to navigate the complex legal landscape on their own.

Several grantees are focused on *pretrial diversion programs*, which aim to provide alternatives to incarceration for individuals involved in the criminal justice system. These programs offer counseling, rehabilitation and legal support, helping individuals avoid conviction and redirect their lives in positive ways. The impact of such programs is profound, as they not only reduce the strain on the criminal justice system but also provide a second chance for individuals to rebuild their futures.

The 2025 OBF IOTLA grants will impact close to 100,000 lives across the state, from urban centers to rural areas. The grantees represent a diverse group of organizations that reach every corner of Oklahoma, ensuring that legal services are available to those who need them most. The OBF's ongoing support for these programs reflects its commitment to fostering a more equitable legal system. As these grants continue to fund life-changing services, they also contribute to the overall health and well-being of Oklahoma families.

2025 IOTLA GRANTEES

ORGANIZATION	PROGRAM/SERVICE	LIVES IMPACTED	AREA OF SERVICE	GRANT AMOUNT
Bill of Rights Institute	Civics for Kids	16,000	Statewide	$10,000
Canadian County CASA	Advocacy for Abused Children	106	Canadian County	$20,000
The CARE Center	Child Abuse Forensic Interviewing	934	Oklahoma County	$12,000
CASA of Southern Oklahoma	Advocacy for Abused Children	100	Carter, Johnston, Love, Murray and Marshall Counties	$15,000
CASA for Kids	Court Appointed Special Advocates Program	143	Kay, Logan and Payne Counties	$15,000
CASA of Northeast Oklahoma	Family Preservation Project	187	Craig, Delaware, Mayes, Ottawa and Washington Counties	$25,000
CASA of Oklahoma County	Advocacy for Abused Children	640	Oklahoma County	$20,000
CASA of Pawnee/Osage County	Advocacy for Abused Children	69	Creek, Kay, Osage, Pawnee and Payne Counties	$25,000
CASA of Western Oklahoma	Advocacy for Abused Children	215	Custer, Beckham, Dewey, Roger Mills and Washita Counties	$15,000
Catholic Charities of Eastern Oklahoma	Immigration Legal Services	420	Eastern Oklahoma	$25,000
Catholic Charities of the Archdiocese of Oklahoma City	Immigration Legal Services	747	Canadian, Cleveland and Oklahoma Counties	$50,000
Center for Children and Families	Divorce and Co-Parenting Services	625	Cleveland County	$20,000
Child Abuse Network	Multi-Disciplinary Child Abuse Team	1,620	Okmulgee, Tulsa and Wagoner Counties	$20,000
Citizens for Juvenile Justice	Connect to Redirect	1,600	Oklahoma County	$8,525
Citizens for Juvenile Justice	Oklahoma County Juvenile Bureau Literacy Initiative	80	Oklahoma County	$4,344.98
Community Action Agency	Community Legal Counsel Center	555	Canadian and Oklahoma Counties	$47,500
Community Crisis Center	Court Advocacy Program	850	Craig, Delaware and Ottawa Counties	$12,454
Domestic Violence Intervention Services	Domestic Violence Prevention Legal Program	3,836	Creek and Tulsa Counties	$25,000
Historical Society of the U.S. District Court	Civics Education Program	700	Statewide	$20,000
Latitude Legal Alliance	Immigration Legal Services	150	Statewide	$50,000
Lawyers Helping Lawyers Foundation	Mental Health and Addiction Support for Lawyers	16,288	Statewide	$200,000
Legal Aid Services of Oklahoma	Access to Civil Legal Services	25,000	Statewide	$130,000
Marie Detty Youth & Family Services	Domestic Violence and Sexual Assault Prevention Legal Services	1,427	Caddo, Comanche and Cotton Counties	$20,000
Mary Abbott Children's House	Child Abuse Forensic Interviewing	1,200	Canadian, Cleveland, Garvin, Grady and McClain Counties	$12,000
Mental Health Association Oklahoma	Municipal Special Services Docket	240	Tulsa County	$25,000
Oklahoma Access to Justice Foundation	Legal Education and Engagement	1,500	Statewide	$55,000
Oklahoma CASA Association	Court-Appointed Special Advocates Training	2,900	Statewide	$17,000

OCU School of Law	Restorative Justice Clinic	100	Cleveland, Logan, Oklahoma and Pottawatomie Counties	$47,000
OCU School of Law	American Indian Wills Clinic	100	Statewide	$35,000
Oklahoma Guardian Ad Litem Institute	GAL Services for Low-Income Families and Training for Court Experts	200	Statewide	$75,000
Oklahoma Bar Association	Oklahoma High School Mock Trial Program	800	Statewide	$75,000
Oklahoma Lawyers for Families and Children	Family Advocacy Model	2,046	Statewide	$130,000
Palomar	Family Justice Center	100	Oklahoma City Metro	$20,000
The Parent Child Center of Tulsa	Tulsa Safe Babies Court Team	75	Tulsa County	$20,000
Pittsburg County Child Abuse Response Effort	Training Initiative for Child Abuse Investigations	500	Atoka, Latimer, McIntosh and Pittsburg Counties	$20,000
ReMerge of Oklahoma County	Pretrial Diversion Program for Mothers	100	Canadian, Cleveland, Oklahoma and McClain Counties	$10,000
Safe Center	Legal Services and Domestic Violence Protection	558	Jefferson and Stephens Counties	$75,000
Safe Center	Advocacy for Child Survivors	558	Jefferson and Stephens Counties	$25,000
San Bois CASA	Advocacy for Abused Children	209	Atoka, Latimer, LeFlore, Haskell and Pittsburg Counties	$20,000
The Spero Project	Refugee Legal Services	400	Canadian, Cleveland and Oklahoma Counties	$130,000
The Spring	Supporting Survivors and Children Escaping Human Trafficking and Domestic Violence With Legal Services	2,200	Statewide	$15,000
Wings of Hope Family Crisis Services	Court Advocacy	1,156	Lincoln, Logan, Noble, Pawnee and Payne Counties	$5,000
Teen Court	Peer Court/Delinquency Prevention	130	Comanche County	$50,000
Trinity Legal Clinic of Oklahoma	Community Justice Initiative	325	Canadian, Cleveland and Oklahoma Counties	$65,000
Tulsa CASA	Advocacy for Abused Children	200	Tulsa County	$30,000
Project Commutation	Intern Funding	1,602	Statewide	$90,000
Tulsa Lawyers for Children	Legal Representation of Abused Children	250	Statewide	$60,000
Western Plains Youth & Family Services	Services for Juveniles in Court-Ordered Detention	100	Ellis, Harper and Woodward Counties	$45,000
YMCA of Greater Oklahoma City	Youth and Government Program	800	Statewide	$11,000
Youth and Family Resource Center	Advocacy for Abused Children	30	Lincoln and Pottawatomie Counties	$10,000
Youth Justice Alliance	Fellowship for Aspiring First-Generation Lawyers	40	Statewide	$20,000
Youth Services of Tulsa	Peer Youth Court	400	Tulsa County	$10,000
YWCA Tulsa	Immigration Legal Services	850	Rogers, Tulsa and Wagoner Counties	$30,000
YWCA Oklahoma City	Immigration Legal Services	6,676	Statewide	$50,000
		98,637		**$2,071,823.98**

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For Your Information

MEMBER DUES STATEMENTS ARE AVAILABLE ONLINE

In an effort to save money and cut down on the cost of printing and postage, the OBA Membership Department has posted member dues statements online in MyOKBar. As a follow-up, a paper statement will be mailed around the first of December to members who have not yet paid. Please help the OBA in this effort by paying your dues today!

Members can pay their dues by credit card online at MyOKBar or by mailing a check to the OBA Dues Lockbox, P.O. Box 960101, Oklahoma City, OK 73196. Dues are due Thursday, Jan. 2, 2025.

MCLE DEADLINE APPROACHING

Dec. 31 is the deadline to earn any remaining CLE credit for 2024 without having to pay a late fee. The deadline to report your 2024 credit is Feb. 15, 2025. As a reminder, the annual ethics requirement is now two credits per year. The 12 total annual credit requirement did not change.

Not sure how much credit you still need? You can view your MCLE transcript online at www.okmcle.org. Still need credit? Check out great CLE offerings at https://ok.webcredenza.com. If you have questions about your credit, email mcle@okbar.org.

LHL DISCUSSION GROUPS TO HOST DECEMBER MEETINGS

The Lawyers Helping Lawyers monthly discussion group will meet Thursday, Dec. 5, in Oklahoma City at the office of Tom Cummings, 701 NW 13th St. The group will also meet Thursday, Dec. 12, in Tulsa at the office of Scott Goode, 1437 S. Boulder Ave., Ste. 1200.

Each meeting is facilitated by committee members and a licensed mental health professional. The small group discussions are intended to give group leaders and participants the opportunity to ask questions, provide support and share information with fellow bar members to improve their lives – professionally and personally. Visit www.okbar.org/lhl for more information and keep an eye on the OBA events calendar at www.okbar.org/events for upcoming discussion group meeting dates.

NOW LIVE: MANAGE MCLE COMPLIANCE THROUGH MYOKBAR

OBA members can now check their MCLE compliance and report exemptions through one single sign-on to MyOKBar. This means Oklahoma lawyers will no longer need to log in with an additional password to a separate website for MCLE compliance. This simplified sign-on will be more convenient and result in increased time savings for our membership. Visit your MyOKBar page at ams.okbar.org.

IMPORTANT UPCOMING DATES

The Oklahoma Bar Center will be closed Monday, Nov. 11, in observance of Veterans Day. The bar center will also be closed Thursday and Friday, Nov. 28 and 29, in observance of the Thanksgiving holiday.

CONNECT WITH THE OBA THROUGH SOCIAL MEDIA

Are you following the OBA on social media? Keep up to date on future CLE, upcoming events and the latest information about the Oklahoma legal community. Connect with us on LinkedIn, Facebook and Instagram.

2024-25 MOCK TRIAL KICKS OFF

The 2024-25 Oklahoma High School Mock Trial season kicked off on Tuesday, Oct. 1, with the Mock Trial Clinic held at the Oklahoma Bar Center. Attorney volunteers spoke at the clinic, covering topics of interest for Mock Trial participants, such as the Mock Trial rules, impeachment procedures, direct and cross-examination and more. More than 200 students were in attendance. Learn more about the Oklahoma High School Mock Trial program at www.okbar.org/mocktrial.

LET US FEATURE YOUR WORK

We want to feature your work on "The Back Page" and the *Oklahoma Bar Journal* cover! Submit articles related to the practice of law, or send us something humorous, transforming or intriguing. Poetry, photography and artwork are options, too. Photographs and artwork relating to featured topics may also have the opportunity to be featured on our cover! Email submissions of about 500 words or high-resolution images to OBA Communications Director Lori Rasmussen, lorir@okbar.org.

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF GEORGE MISKOVSKY, III, SCBD # 7597 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., ch. 1, app. 1-A, that a hearing will be held to determine if George Miskovsky, III should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **JANUARY 16, 2025.** Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

ON THE MOVE

Nick J. Candido, **Camryn A. Conroy** and **Stassi M. Vullo** have joined the Oklahoma City office of Phillips Murrah. Prior to joining the firm as attorneys, they served as summer interns. Mr. Candido is a litigation attorney who represents individuals and both privately held and public companies in a wide range of civil litigation matters. He received his J.D. from the OU College of Law, graduating first in his class. He was a member of the *Oklahoma Law Review* and chair of the Judiciary Committee. Prior to law school, Mr. Candido was a manager at American Airlines in the Revenue Management Department. Ms. Conroy is a transactional attorney who represents clients in a wide range of commercial and business matters. She received her J.D. from the OU College of Law, where she was a Phi Delta Phi International Legal Honor Society member. Her note on tribal jurisdiction conflicts was published in the *American Indian Law Review*, and she also served as a research editor for the publication. Ms. Vullo is a litigation attorney who represents individuals and both privately held and public companies in a wide range of civil litigation matters. She received her J.D. with highest honors from the OU College of Law, where she served as assistant executive editor for the *American Indian Law Review*.

Max G. West has joined the Oklahoma City office of Phillips Murrah as an associate attorney. He has experience representing individuals, corporations and municipalities in various civil litigation matters. His practice includes first- and third-party insurance defense, breach of contract, insurance bad faith, property loss and complex commercial litigation in state and federal courts. Mr. West received his J.D. from the OCU School of Law, where he earned distinction as a Hatton W. Sumners Foundation Scholar and was named to the dean's list and the Order of Barristers. He was an active student member of the William J. Holloway Jr. American Inn of Court and represented his school on the ABA National Appellate Advocacy Team.

W.R. Moon Jr. has been named partner at the Oklahoma City law firm of Collins Zorn & Wagner PLLC. He has been with the firm since 2020 and has become heavily involved in the firm's defense of municipalities and counties in civil rights, tort claims and employment matters, as well as maintaining a robust appellate practice. Mr. Moon received his J.D. from the OU College of Law.

Chase Gordon has joined the Tulsa office of GableGotwals as an associate attorney. He focuses on commercial litigation, general insurance defense and health care law. His experience includes litigating complex high-stakes matters, such as construction defects, wrongful death, catastrophic incidents, bad faith and medical malpractice. Prior to joining the firm, Mr. Gordon was an associate at a local law firm in Tulsa, practicing insurance defense. He received his J.D. with honors from the TU College of Law.

Elizabeth E.L. Isaac has joined the Oklahoma City office of Spencer Fane LLP as of counsel in the Intellectual Property Practice Group. She helps businesses, entrepreneurs and artists assess and protect their inventions, creative works and ideas to leverage IP portfolios and enhance business opportunities. She counsels clients on due diligence, patents, trademarks, copyrights, entertainment law and internet law, as well as licensing, transactional and other litigation matters. Ms. Isaac's dispute experience comprises the full spectrum of IP resolution platforms, including district court litigation, the Trademark Trial and Appeal Board and the Patent Trial and Appeal Board. She serves as chair of the OBA Intellectual Property Section and as chair of the American Intellectual Property Law Association Pro Bono Committee. She received her J.D. *summa cum laude* from the OCU School of Law.

Judge Brett Butner has been appointed by Gov. Kevin Stitt as district judge of the 22nd Judicial District. He has 14 years of legal experience. He was previously an associate attorney at Colclazier & Associates, where he practiced civil litigation, criminal defense and family law. In 2018, he was elected as an associate district judge of Seminole County and was reelected in 2022. Judge Butner is actively involved in the Seminole County Bar Association and serves on its Executive Committee. He received his J.D. from the OCU School of Law.

Richard M. Cella has joined the law firm of GableGotwals as a shareholder. He has extensive experience in complex litigation and high-stakes government and corporate investigations. Mr. Cella previously served as senior litigation counsel at the Financial Industry Regulatory Authority (FINRA), the largest independent regulatory authority overseeing U.S. securities firms. He represented the Department of Enforcement in intricate proceedings involving violations of federal securities laws and FINRA and NASD rules. For five years, he served as a federal prosecutor in the Northern District of Oklahoma, where he focused on white-collar crime, including health care fraud, corporate misconduct and tax offenses. He also spent six years at an international law firm in Dallas, where he litigated complex commercial disputes in both federal and state courts, as well as arbitration proceedings. Mr. Cella received his J.D. with honors from the University of Texas at Austin School of Law.

AT THE PODIUM

Paul R. Foster of Paul Foster Law Offices PC in Norman was a featured speaker at the Community Bankers Association of Oklahoma Annual Convention, held in Oklahoma City Sept. 11-13. Mr. Foster presented a breakout session on community bank mergers and acquisitions and a bank capitalization primer. He also coordinated and moderated the presentation of the bank regulatory panel consisting of regulators from the Oklahoma Banking Department, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corp. and the Federal Reserve. It covered liquidity, recent interest rate risk, credit risk management, litigation impacting the regulatory landscape and other trending regulatory issues.

KUDOS

Jim Wyly of Wyly-Rommel PLLC was selected for the Commitment to Justice Award by the University of Arkansas School of Law and the Law Alumni Society.

Virginia L. Frank has been elected as a Fellow of the American Bar Foundation. The American Bar Fellows is a global honorary society that recognizes attorneys, judges, law faculty and legal scholars. Ms. Frank practices adoption and reproductive technology law, and she is also licensed in Colorado, New York and the Cherokee Nation tribal courts. She received her J.D. from the OCU School of Law in 1991.

HOW TO PLACE AN ANNOUNCEMENT:

The *Oklahoma Bar Journal* welcomes short articles or news items about OBA members and upcoming meetings. If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award or given a talk or speech with statewide or national stature, we'd like to hear from you. Sections, committees and county bar associations are encouraged to submit short stories about upcoming or recent activities. Honors bestowed by other publications (*e.g., Super Lawyers, Best Lawyers*, etc.) will not be accepted as announcements. (Oklahoma-based publications are the exception.) Information selected for publication is printed at no cost, subject to editing and printed as space permits.

Submit news items to:

Hailey Boyd
Communications Dept.
Oklahoma Bar Association
405-416-7018
barbriefs@okbar.org

Articles for the January issue must be received by Dec. 1.

In Memoriam

Douglas Frantz Collins of Tulsa died Sept. 19, 2023. He was born May 6, 1939. Mr. Collins graduated from Central High School in 1957 and lived in Tulsa his whole life. He graduated from TU with a bachelor's degree and received his J.D. from the TU College of Law. He had a successful career in real estate management and participated in several professional organizations, serving as president of many of them, including the Greater Tulsa Association of Realtors, the Institute of Real Estate Management, the Rotary Club of Tulsa and the Golden Hurricane Club. He was a founding member and president of Cedar Ridge Country Club. Memorial contributions may be made to St. Jude Children's Research Hospital.

Charles Thomas Kite of Edmond died Jan. 3. He was born July 26, 1945, in Kearney, Nebraska. He graduated from Mount St. Mary Catholic High School in Oklahoma City in 1963 and received a bachelor's degree from OCU in 1971. **He enlisted in the U.S. Army in 1966 and was stationed at Fort Leonard Wood, Fort Ord and Fort Knox before attending Jungle Warfare School in Panama. He deployed to Vietnam in 1967, where he was promoted to first lieutenant before returning to U.S. soil in 1969. He retired as a lieutenant colonel from the U.S. Army Reserve in 1993. Mr. Kite was awarded the Bronze Star Medal, the Combat Infantry Badge, seven Army Commendation Medals, the Meritorious Service Medal, the Meritorious Unit Citation, the Vietnam Service Ribbon, the Vietnam Cross of Gallantry, Good Conduct Medal, Jungle Expert and Qualified Expert with a rifle, machine gun and pistol.** Mr. Kite graduated from the OCU School of Law in 1975. He volunteered with Oklahoma Lawyers for Children and served on the Child Protective Committee during his tenure in the district attorney's office and as an Oklahoma Indigent Defense System contract attorney. He was also involved in the YWCA and the National Domestic Violence Seminar. Mr. Kite was appointed as an Oklahoma County special judge in 1996, and he was instrumental in employing parenting coordinators in divorce cases to lessen the impact of divorce on children. Memorial contributions may be made to the Parkinson's Foundation, the Lewy Body Dementia Association (LBDA), the Quilts of Valor Foundation or the Gary Sinise Foundation.

James Patrick Laurence of Oklahoma City died Sept. 14. He was born Oct. 15, 1947, in Kansas City, Missouri. He attended high school at St. Gregory's in Shawnee and graduated from Bishop McGuinness Catholic High School in Oklahoma City. He attended Eastern Oklahoma State College in Wilburton and graduated from OU. Mr. Laurence received his J.D. from the Southern Methodist University Dedman School of Law in 1974 and went to work for the Oklahoma County District Attorney's Office upon graduation. After a short time in private practice in Tulsa, he went to work for the U.S. attorney's office in Amarillo, Texas, and later transferred to Dallas, where he worked until retiring and returning to Oklahoma City. He was an OBA member for more than 50 years. **Mr. Laurence proudly served his country in the Oklahoma National Guard as a judge advocate general for many years.**

Robert Oscar O'Bannon of Edmond died Aug. 18. He was born May 3, 1954, in Des Moines, Iowa. He attended Putnam City schools and graduated with a bachelor's degree from OU in 1976, where he was a member of the Sigma Phi Epsilon fraternity. Mr. O'Bannon received his J.D. from the OCU School of Law in 1979 and his LL.M. in taxation from the Boston University School of Law in 1980. After working as a certified public accountant at the former Arthur Andersen LLP, he began his legal career. He was an esteemed tax attorney and worked under the mentorship of Ken Webster at McKinney, Stringer and Webster. In 1998, he joined Phillips Murrah PC, where he made significant contributions as a director and shareholder. He served on the firm's Executive Committee and chaired the Tax Department. Mr. O'Bannon played a pivotal role in shaping the firm's tax practice. His contributions to the field of tax law have been acknowledged through several honors and recognitions. He also sat on various nonprofit boards and contributed his expertise to fostering the growth and development of numerous organizations. He was a board member for many Oklahoma businesses, including his most recent roles at Dolese Bros. Co. and United Petroleum Transports Inc. In 2002, he was a founding charter member of the U.S. Marine Corps Coordinating Council of Oklahoma. Memorial contributions may be made to the All Souls' Episcopal Church.

Martin Keith Schnetzler of Oklahoma City died Sept. 26. He was born June 14, 1951. Mr. Schnetzler graduated from the University of Central Oklahoma and received his J.D. from the OCU School of Law.

Charles Albert Shadid of Oklahoma City died Aug. 22. He was born Sept. 23, 1929, in Snyder. He attended Putnam City High School and OCU, where he graduated with a bachelor's degree in business. He received his J.D. from the OU College of Law in 1952. **After graduating from law school, he honorably served in the U.S. Army. He joined the 13th Class of the Judge Advocate General's Corps. Stationed out of Fort Sill, his JAG assignment began with criminal defense. He was later assigned a role for the prosecution, where he stayed until he completed his duty in 1955.** He spent almost every day until his death in the Victoria Building in Oklahoma City, a former movie theater he bought and remodeled in 1972. Mr. Shadid was recently honored as a milestone OBA member, celebrating 70 years of membership. He was a lifelong member of St. Elijah Antiochian Orthodox Christian Church. From 1985 to 1997, he was the chairman of the Building Committee for the church's fourth and preeminent location on 150th and North May, where the church has remained and thrived. He also served as president of the Parish Council from 1983 to 1985 and remained a devout member of the church throughout his life. Memorial contributions may be made to the St. Elijah Antiochian Orthodox Christian Church's Flowers That Do Not Wither Fund.

Kirstine Leigh Simon of Ardmore died Oct. 6. She was born April 7, 1993, in Burlington, Iowa. She attended OU, where she was a member of Alpha Phi and participated in Sooner Scandals. She graduated from OU with a bachelor's degree in psychology and received her J.D. from the OCU School of Law in 2020. Ms. Simon's first job was with Legal Aid Services of Oklahoma before she found her passion in family law. She opened her private practice, Simon Law Firm, in 2023. Memorial contributions may be made to American Nation Bank, ATTN: Simon Children at 205 N. Commerce, Ardmore, OK 73401.

Michael Phelan Warwick of Shawnee died Sept. 24. He was born July 22, 1949, in Bartlesville. Mr. Warwick received a scholarship to West Point, where he played football and joined the choir. **He enlisted in the National Guard and eventually became a Judge Advocate General officer.** He graduated from the OU College of Law in 1974. In 1975, he began his law practice in Shawnee. He represented multiple Sonic locations in Oklahoma, Kansas and North Texas. He previously served as the city attorney for McLoud and was the current city attorney for Tecumseh. He also worked as chief justice of the Absentee Shawnee Tribal Court. Prior to that, he acted as a district court judge. He was recognized as a 50-year milestone member of the OBA in January. Over the years, he served on many boards, including the Mission Hill, Unity Health Center and St. Anthony hospitals, the REACT Ambulance board and, most recently, the Avedis Foundation. He was a founding member of the Avedis Foundation and served as the chairman of the board from March 2022 to June 2024. Memorial contributions may be made to the Avedis Foundation, Community Market or Legacy Parenting.

EDITORIAL CALENDAR

2024 ISSUES

DECEMBER
Ethics & Professional Responsibility
Editor: Martha Rupp Carter
mruppcarter@yahoo.com

2025 ISSUES

JANUARY
Military & Veterans
Editor: Roy Tucker
roy.tucker@oscn.net

FEBRUARY
Law Practice Basics
Editor: Melissa DeLacerda
melissde@aol.com

MARCH
Cannabis Law
Editor: Martha Rupp Carter
mruppcarter@yahoo.com

APRIL
Alternative Dispute Resolution
Editor: Evan Taylor
tayl1256@gmail.com

MAY
Constitutional Law
Editor: Melanie Wilson Rughani
melanie.rughani@crowedunlevy.com

JUNE
Labor & Employment
Editor: Sheila Southard
SheilaSouthard@bbsmlaw.com

SEPTEMBER
Torts
Editor: Magdalena Way
magda@basslaw.net

OCTOBER
Immigration Law
Editor: Norma Cossio
ngc@mdpllc.com

NOVEMBER
Trial by Jury
Editor: Roy Tucker
roy.tucker@oscn.net

DECEMBER
Ethics & Professional Responsibility
Editor: David Youngblood
david@youngbloodatoka.com

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

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MCLE 6/1

2024 BANKING AND COMMERCIAL LAW UPDATE

Co-sponsored by the OBA Financial Institutions and Commercial Law Section

SPEAKERS/TOPICS:

A Friend of a Friend Had a Data Breach: Lessons for Banks from MOVEit and Other Vendor Breaches
Anthony Hendricks, Shareholder/Director, Crowe & Dunlevy

The New UCC Article 12: Explained Through Illustrations & Examples
Professor Stephen Sepinuck, Vanderbilt Law School

Banking Law Updates
Professor Sally Henry, Texas Tech University School of Law

State Commercial Finance Disclosure Laws and New State Regulations
Lori E. Eropkin, Partner, Levinson Arshonsky Kurtz & Komsky, LLP

Bank Fraud and Other Deceptions: What Banks Need to Know
Jessica L. Perry, Deputy Criminal Chief, U.S. Attorney's Office, Western District of Oklahoma

Ethics, Addiction and More
Richard Stevens, OBA Ethics Counsel

CFPB Updates for the Banking Lawyer
Eric L. Johnson, Partner, Hudson Cook, LLP

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POSITIONS AVAILABLE

MID-SIZE TULSA AV, PRIMARILY DEFENSE LITIGATION, FIRM seeks 2-4 year lawyer (Associate position) for our Tulsa office. If interested, please send confidential resume, references, and writing sample to kanderson@tulsalawyer.com.

DISTRICT 27 (ADAIR, CHEROKEE, SEQUOYAH AND WAGONER) has immediate opening for a full-time Assistant District Attorney, Civil Division. Salary commensurate with experience and includes full state benefit package. Please send inquiries or resume to diana.baker@dac.state.ok.us.

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DOWNTOWN OKC FIRM IS LOOKING FOR ASSOCIATE to handle litigation cases. Looking for self-motivated individual who desires courtroom work. Ideal candidate has entrepreneurial spirit with desire to bring in clients. Salary is $67,500.00 a year, plus insurance. Firm has bonus structure for new business. Send replies to advertising@okbar.org with the subject line "Position OB."

MID-SIZE TULSA AV, PRIMARILY DEFENSE LITIGATION, FIRM seeks 3-5 year lawyer (Senior Associate) for our Tulsa office. If interested, please send confidential resume, references, and writing sample to kanderson@tulsalawyer.com.

A LONG-ESTABLISHED AV-RATED OIL AND GAS LITIGATION LAWYER seeks a secretary that can work from home using the OLYMPUS dictation system. Lawyer sends work via audio transmission to secretary's home computer. When completed secretary sends completed work to lawyer via email. To apply, email rsallusti@coxinet.net.

Southern Lady in the Queen of Three Valleys[1]

By Mark A. Morrison

RECENTLY, THE *Oklahoma Bar Journal* highlighted "Women in Law." I wish to remember Priscilla Wooten Utterback, who was a very prominent woman in the legal profession in early southern Oklahoma.

Priscilla Wooten Utterback was born Dec. 10, 1902, in Holly Springs, Mississippi; she was the daughter of William Elbert Utterback and Valerie Burton Utterback. Her parents brought her to Durant when she was 6 years old, and she lived in Durant all of her life. She graduated from the then-Southeastern Oklahoma State Teachers College in Durant in 1924 and was named a distinguished alumna.

Miss Utterback, as she preferred to be addressed, began law school but returned to Durant to care for her ailing mother. She "read for the law" in her father's office after the law books came in the mail. She passed the Oklahoma Bar Examination and was admitted to the Oklahoma bar in December 1929. She became associated with her father's firm of Utterback and Stinson in January 1930, which later became Utterback, Stinson and Utterback. In 1938, the firm became Utterback and Utterback and remained a partnership until Priscilla's father died in 1950. After her father's death, Miss Utterback continued to practice in Durant until her death in 1989.

She served as president of the Bryan County Bar Association and as vice president of the Oklahoma Association of Women Lawyers. In 1936, she became vice president of the League of Young Democrats for Oklahoma. She was a member of the Board of

Priscilla Wooten Utterback

Trustees for the Oklahoma Presbyterian College, the Robert Lee Williams Library board, the Oklahoma Heritage Association Board of Directors, the American College of Probate Counsel and Business and Professional Women, where she was woman of the year. She was a board member of the Highland Cemetery in Durant, a life member of the Oklahoma Historical Society and the American Judicature Society, a charter member of the American Legion Auxiliary and an honorary state member of Delta Kappa Gamma. In her early years, Miss Utterback took a great interest in Democratic politics. In 1936, she attended the Democratic Convention in Philadelphia, carrying the proxy of Sen. T. P. Gore. She was elected secretary of the Oklahoma delegation.

Miss Utterback was a trailblazer for women in law in southeastern Oklahoma. She recounted that in her earlier years, she was the only woman present in most of the convention meetings that she attended. She received the full attention of everyone, including the judge, at any hearing or meeting that she participated in. She possessed an impeccable wit and, with her signature Southern drawl, was unmatched in her oratory skills and legal knowledge. Miss Utterback had a front row seat as a young lady to the developing Oklahoma politics of the day. Judge Robert L. Williams, first chief justice of the Oklahoma Supreme Court, third governor of Oklahoma, U.S. district judge of the Eastern District of Oklahoma and judge of the U.S. Court of Appeals, was a close friend of the Utterback family and a frequent visitor to the Utterback home in Durant when he traveled to Bryan County to check on his ranch property.

Author's Note: The information presented herein was garnered from an obituary, various news articles published in the Durant Daily Democrat *and from my personal and professional knowledge.*

Mark A. Morrison is a district judge for the Choctaw Nation of Oklahoma, former special judge for Bryan County and a long-time general practitioner in Durant.

ENDNOTE

1. The Queen of Three Valleys has long been a moniker/nickname for the city of Durant, being geographically situated within the Red, Blue and Washita River valleys.

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