THE REPorTER

Published by the Kansas Bar Association • Real Estate, Probate, and Trust Law Section

Fall 2006

President's Message

Once again, summer seems to have flown by, but I hope each of you had a chance to find time for an enjoyable vacation. It is hard to believe, but fall is here and winter is quickly approaching. As we know, this means that it is time for the Annual Plaza Lights Seminar. Please mark you calendar now and plan to attend Plaza Lights, which will be held Dec. 8, 2006, at the Marriott Hotel on the Country Club Plaza in Kansas City, Mo.

Section President

Robert M. Hughes
Bever Dye L.C., Wichita

Plaza Lights is co-sponsored by the REPT Section, in conjunction with the Tax Law Section and the Corporation, Banking, and Business Law Section. Historically, this seminar has provided a broad range of topics that are of interest of members of these sections. At the same time, it has traditionally been held on the Country Club Plaza for those that bring a spouse or friend so that time may be spent shopping or visiting the Plaza during the holiday season.

A significant amount of work went into selecting speakers and topics for this years seminar and they are as follows:

- Medicaid, including the new Deficit Reduction Act of 2005.
- Bankruptcy, including new cases.
- Retirement plan selection alternatives.
- Kansas Augmented Estate – 10 years later.
- Legislative update.
- Ethics.

As the population in the state of Kansas ages, and the costs of long-term care increase, practitioners are receiving more questions regarding Medicaid, what benefits it provides, and what are the requirements to qualify, and most important to our clients – what can they keep and still qualify. There are few practitioners that will not have a client inquire about Medicaid. The rules have significantly changed with the new federal legislation, and this topic should prove to be timely and informative.

There is also a new Bankruptcy Act that recently passed, which left many questions. This topic will look at the Act and report on some of the recent cases that are now being reported. Even those lawyers that do not have an extensive bankruptcy practice will benefit from being able to at least discuss the new law with their clients.

There are significant changes in the retirement plan area, and this topic is geared toward those that do not practice in the area, but will serve as a "primer" to give your client advice on the options that are available, including the advantages of each. In addition, it will provide pertinent information on the new Pension Reform Act.

When Kansas adopted the augmented estate legislation 10 years ago it was met with some controversy and confusion. If you still find this area somewhat daunting, this topic is a great review in addition to looking at the cases that have addressed the augmented estate and their impact.

Finally, the Kansas Legislature was busy last year, and this topic will bring all of us up to date on new legislation, in addition to topics that the Legislature will be facing in the upcoming session. Last, but not least, those that attend have a chance to receive one hour of ethics, which will review the ethical pitfalls of estate planning.

Pension Reform Bill

Although we generally do not cover "tax" topics, the Pension Reform Bill has a number of important provisions that you may find of interest, and may want to mention to your clients, particularly if helping them plan there estate.

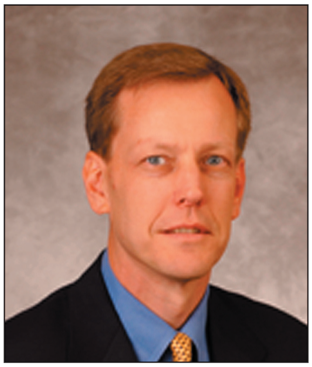
First, taxpayers will be able to make tax-free distributions from a traditional and Roth IRA for charitable purposes through Dec. 21, 2007. The maximum annual amount is $100,000.

Second, a major change is that no deduction will be allowed for any contribution of cash, check, or other monetary gift unless the donor can show a bank record or a written communication from the charity stating the amount of the contribution, the date the contribution was made, and the name of the charity. Cash donations, regardless of amount, must be substantiated either by a canceled check or a bank record.

Watch for a mailing on the Plaza Lights from the KBA, but please mark your calendar now and plan to attend. See you at the seminar on Dec. 8! ■

In This Issue ...

About the Author



***Dan C. Peare**, Wichita, is an attorney with Hinkle Elkouri Law Firm LLC.*

He received his J.D. from the University of Kansas School of Law and his MBA and BBA in finance from Wichita State University (WSU).

He is a member of the KBA Executive Committee of the REPT Section and serves as the committee's liaison to the KBA Continuing Legal Education Committee. He is a member and past director of the Wichita Estate Planning Council and the Wichita Estate Planning Forum. He is on the WSU Foundation Board of Directors, where he serves as chairman of the Foundation's Giving Committee, and is a member of the National Advisory Council for WSU. Peare is also a member and past chairman of WSU Foundation's Planned Giving Professional Advisory Committee.

He provides a regular report on selected estate planning topics for the segment "Eye on Your Money," for KWCH-TV Channel 12, Wichita. Peare can be reached via e-mail at dpeare@hinklaw.com.

Estate Tax Notes:
Tax Cases and Rules Affecting the Estate and Business Succession Planner

VALUATION

1. ***Huber v. Comm.*, T.C. Memo 2006-96 (5/19/06) – Value of gift of privately held company stock established by transactions of the same stock using annual appraisals.**

J.M. Huber Corp. (Huber) was founded in 1883 and headquartered in New Jersey. Its annual sales exceeded $500 million during the years 1997 through 2000. During such years, Huber had approximately 250 shareholders, who were generally Huber family members, as permitted by Huber's bylaws. There were also 3,000 to 5,000 employees, most of whom were not related to the Huber family. Huber was governed by its board of directors, the majority of whom were not related to the Huber family.

Between the years 1997 and 2000, several Huber family members gifted shares of stock in Huber. For purposes of their Forms 709, they valued their gifts on the basis of the prices Huber used for shareholder stock transactions. These prices were determined by an independent appraiser, which valued Huber shares by comparing Huber to comparable publicly traded companies and applying a 50 percent lack of marketability discount from the freely traded value of the shares. The valuations were used in various transactions involving Huber stock, including valuing gifts of Huber shares made to nonprofit organizations, valuing both the grant and exercise of stock options issued to Huber's CEO (an individual not related to the Huber family), fixing the compensation of Huber's board members, evaluating the performance of Huber as a whole, and valuing shares bought back by Huber from its shareholders. At issue in the case was whether such transactions constituted arm's length transactions.

The U.S. Tax Court noted that the parties based their conclusions about the arm's length nature of the sales on their view of the Huber family relationships, the presence or lack of compulsion to sell on the part of the seller, the reasonableness of the shareholders' reliance on the independent appraiser's value, and the intent of the parties with respect to the sales. The court also noted that between the years 1994 and 2000, there were more than 90 transactions that took place by Huber shareholders involving a variety of relationships: between immediate relatives, between more distant relatives, and between shareholders of Huber and independent nonprofit organizations. Each such transaction took place at the independent appraiser's value. Therefore, the court concluded that the existence of close family relationships between parties of some of the 90 sales transactions was neutralized by the fact that many of the transactions took place between parties that were hardly related or unrelated and who had fiduciary obligations to obtain the best price. Therefore, the variety of relationships among the shareholders was a positive indicator of the existence of arm's length sales.

The Internal Revenue Service (IRS) argued that the independent appraiser's reports were outdated at the time of two of the transactions at issue in this case because they were eight months old and 11 months old at the time of the respective gifts. However, the court held that the time lapse was not unreasonable. Accordingly, the court concluded that the sales of Huber stock were arm's length sales that demonstrated the best reference for the valuation of Huber shares on the petitioners' gift tax returns.

2. ***Kohler v. Comm.*, T.C. Memo 2006-152 (7/25/06) – Kohler stock properly valued on estate tax return.**

The decedent died on March 4, 1998, owning approximately 12.85 percent of all outstanding capital stock of Kohler Co. The IRS determined deficiencies in the decedent's estate tax return and assessed accuracy-related penalties. At issue in the case was the fair market value of the stock of the Kohler Co. owned by the decedent's estate on the alternate valuation date. The estate reported on the estate tax return that the Kohler stock it owned was worth just more than $47 million on the alternate valuation date.

Kohler had always been a privately held family business, which Kohler management had no intention of changing. Accordingly, Kohler had never registered its stock with the U.S. Securities and Exchange Commission and had never publicly sold its stock. In addition, Kohler stock had never traded on any organized securities exchange. Small lots, usually one or two shares, were sold periodically in private transactions. Bid and ask prices for shares of Kohler stock were listed in the National Quotations Bureau's pink sheets. About 36 trades in Kohler stock were listed in the pink sheets from December 1993 through March 31, 1998.

In early 1998, Kohler family members, various charities established by Kohler family members, and trusts for the benefit of Kohler family members held most of the shares of Kohler stock. However, outside shareholders held about 4 percent of the Kohler stock in March 1998.

Company management decided to reorganize Kohler to eliminate the outside shareholders, facilitate estate planning, resolve control and ownership issues, and ensure that Kohler was ready for future generations of the family to take control. The reorganization, which was tax-free under Code Section 368(a), was effective on May 11, 1998. Pursuant to the reorganization, family shareholders had the right to receive either $52,700 in cash or one share of voting common stock, 244 shares of series A nonvoting common stock, and five shares of series B nonvoting common stock (which carried the right to an additional cumulative cash dividend of $15 per share for each of 20 years following the reorganization) in exchange for each old share of Kohler stock. Nonfamily shareholders could receive only $52,700 in cash for each old share of Kohler stock. Certain of the nonfamily shareholders exercised their dissenters' rights in the reorganization and litigated with Kohler to achieve a higher price for their shares, claiming that Kohler management breached their fiduciary duties. Kohler settled with these shareholders for varying prices, up to $135,000 per share in some cases. A portion of the settlement price was attributable to settling the dissenters' claims for breach of fiduciary duty. All of the new shares of Kohler stock were subject to transfer restrictions and a purchase option to ensure that family shareholders would continue to own all shares.

The estate, which owned 12.85 percent of the voting stock in Kohler before the reorganization, could not have blocked or approved the reorganization on its own. The estate opted to receive new Kohler shares in the reorganization rather than accept cash, and after the reorganization, the estate owned 14.45 percent of the outstanding shares of Kohler stock. Such block of stock was not sufficient by itself to vest the estate with the power to change management, change the board of directors, or amend the articles of incorporation.

Following the reorganization, Willamette Management Associates was retained to value the Kohler stock owned by the estate. It was selected for a variety of reasons, including that it had periodically appraised the company in the past and already knew the company and its business, and its national reputation. Based on the appraisal, the estate tax return valued the decedent's Kohler stock at more than $47 million on the alternate valuation date. The IRS sought to increase the value to $144.5 million, arguing that the pre-reorganization stock should be valued, or alternatively, that the transfer restrictions and the purchase option should be ignored in valuing the post-reorganization stock.

Code Section 2032 allows the executor of an estate to choose to value the estate's property as of the date six months after the decedent's death. This election may be made only if it has the effect of decreasing the value of the gross estate and the sum of the estate tax and the generation-skipping transfer tax imposed with respect to the decedent's property. If an executor chooses the alternate valuation date, property distributed, sold, exchanged, or otherwise disposed of within such six-month time period is valued as of the date of the distribution, sale, exchange, or other disposition. There is an exception for tax-free reorganizations under Code Section 368(a). Stock exchanged for stock in the same corporation under a tax-free reorganization is not treated as distributed, exchanged, sold, or otherwise disposed of. Accordingly, the Kohler stock is not valued as of the reorganization date, but rather the alternate valuation date.

The U.S. Tax Court rejected the argument that the pre-reorganization stock should be valued, stating that nothing in the regulations required disregarding a tax-free reorganization when valuing the property. It also rejected the argument of ignoring the transfer restrictions and purchase option in valuing the post-reorganization stock. The court stated that the regulations specified that "otherwise disposed of" did not include transactions under Code Section 368(a) where no gain or loss was recognizable. Such transactions did not constitute dispositions because of the strict requirements in the corporate reorganization provisions. Accordingly, the post-reorganization stock was properly valued by taking into consideration the transfer restrictions and the purchase option.

In analyzing the expert opinions regarding the proper value of the Kohler stock, the court placed no weight on the IRS' expert, stating that (i) the expert was not a member of the American Society of Appraisers nor the Appraisal Foundation; (ii) his report was not submitted in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP); (iii) he did not provide the customary USPAP certification, which assures readers that the appraiser has no bias regarding the parties, no other persons besides those listed provided professional assistance, and that the conclusions in the report were developed in conformity with USPAP; and (iv) it was convinced that the expert did not understand Kohler's business. Because the court held that the IRS did not meet its burden of proof in the case, it determined that the value of the stock was correctly reported on the estate tax return and held that the estate was not liable for the accuracy-related penalty.

3. *Estate of Amlie v. Comm.*, T.C. Memo 2006-76 (4/17/06) – Restrictive agreement met requirements to control value of bank stocks for federal estate tax purposes.

The decedent's last will and testament contained a specific bequest of farm land equally to her daughter and son and a portion of certain bank stock to another son, Rod. Such portion of the bank stock was designed to be equal in amount to one-half of the value of the farm land. The residue of the decedent's estate was to go to her three children in equal shares. By subsequent codicil, all bequests to the decedent's son, Rod, were to be made to a spendthrift trust for his benefit (Rod Amlie Trust). In 1988, at the time the decedent filed a voluntary petition for appointment of a conservator, the decedent owned 9,046 shares of Agri-Bank Corp. (Agri-Bank) common stock and 13,377 shares of Agri-Bank preferred stock.

In 1991, the decedent's 9,046 shares of common stock represented 13.6 percent of the common stock of Agri-Bank. David Hill (Hill) was the controlling shareholder and president of Agri-Bank. In 1991, Hill formed a new holding company called Agri Bancorporation (Agri). Agri offered to exchange one share of Agri common stock and one share of Agri preferred stock for each share of common stock held by Agri-Bank shareholders other than Hill. In August of that year, the decedent's conservator obtained approval from an Iowa district court to make such an exchange of the decedent's common stock. In addition, the conservator entered into an agreement (1991 Agreement) with Agri and Hill with respect to the decedent's Agri stock and Agri-Bank preferred stock. The 1991 Agreement prohibited the decedent from transferring her Agri stock without (i) having obtained the consent of Agri and Hill or (ii) having offered to sell the stock to Agri at the price contained in any bona fide third-party offer. In addition, the conservator received put options whereby it could require Agri to purchase all of the decedent's Agri common stock for book value and all of the decedent's Agri preferred stock for par plus unpaid dividends. Similarly, Agri received call options, exercisable during the one-year period following the decedent's death, to purchase all of the decedent's Agri stock at the same prices. Finally, the 1991 Agreement prohibited Hill from selling his controlling interest in Agri to a third party unless the decedent were offered the opportunity to sell her Agri stock to the same third party for the same consideration per share (Hill Rights) with "consideration," including the value of any noncompete, consulting, or similar arrangements or payments providing financial benefit to Hill.

In 1994, Hill agreed to sell his controlling interest in Agri and two other banks to First American Bank Group Ltd. (First American). Hill received book value for his Agri shares, book value for the shares of the other two banks, a five-year employment contract at $218,000 per year, a $314,000 signing bonus, retirement of certain capital notes held by one of his other banks ($1.6 million), and an option (FACC option) to exchange his First American stock for all of the stock in First American Credit Corp. (FACC), an operating loan subsidiary of First American. First American's initial capital funding of FACC exceeded $10.5 million, and Hill's FACC option agreement required that it be funded with qualified assets worth a fair market value of $18.1 million by the time the option was exercisable. As part of the merger agreement, the decedent's conservator exchanged the decedent's Agri common stock at the offered ratio reflecting the banks' respective book values, or 6,657 shares of First American common stock. The conservator also negotiated an agreement (1994 Agreement) for the post-death sale of the decedent's First American stock to First American for 1.25 times book value, or $118.23 per share plus 6 percent compounded annually until the decedent's date of death (collectively, the $118 price). The $118 price was intended to compensate for the value of the stock as augmented by the Hill Rights. The 1994 Agreement prohibited the transfer of the decedent's First American stock without First American's consent and granted reciprocal put and call options to the decedent's estate and First American, respectively, to sell or purchase the decedent's First American stock within 60 days after notice of her death for the $118 price.

In accordance with its fiduciary duties, the decedent's conservator obtained advice from a valuation specialist that the $118 price constituted a fair price for the decedent's First American stock, including the Hill Rights. However, the valuation specialist determined that the FACC option given to Hill had no value because of the multiple variables that might affect relative values of the First American and FACC shares in the five years prior to the option exercise date. The conservator believed the 1994 Agreement was in the decedent's best interest because it was imprudent for such a substantial portion of the decedent's net worth to be held in the form of a minority interest in a closely held bank, which concern was exacerbated by the merger of Agri into First American, which transformed the decedent's holdings into an even smaller minority interest in a venture with unfamiliar management. The guarantees under the 1994 Agreement, in the conservator's view, established a hedge against the decedent's downside risks of holding a minority interest. It also secured a right to defer sale of the shares until after death to avoid capital gains taxes and to ensure liquidity for the decedent's estate to pay estate taxes. Upon seeking district court approval to enter into the 1994 Agreement, the decedent's son, Rod, filed formal objections in which he claimed that the $118 price failed to adequately compensate for the Hill Rights, namely the FACC option, and could result in a potential loss to the decedent's estate of more than $500,000. The district court agreed and refused to approve the 1994 Agreement.

Subsequently, the conservator initiated negotiations among the decedent's prospective heirs to reach an agreement under which a secure price for the First American stock could be obtained for the decedent's estate. In September 1995, the prospective heirs executed a family settlement agreement (1995 FSA), under which the decedent and her conservator were prohibited from transferring the First American stock without the consent of Rod, his wife, their children, and the Rod Amlie Trust (collectively, the Rod Amlie Family). The 1995 FSA further provided that all bequests to the Rod Amlie Trust were to be satisfied in kind with First American stock, valued for this purpose at the $118 price. Any remaining First American stock would be subject to reciprocal put and call options for a designated post-death period under which the decedent's personal representative could require the Rod Amlie Family to purchase, and the Rod Amlie Family could require the decedent's personal representative to sell, the remaining First American shares at the $118 price. Finally, all rights of the conservator under the 1991 Agreement with respect to the decedent's First American stock were assigned to the Rod Amlie Family, with all expenses and benefits arising therefrom to inure to the Rod Amlie Family.

In August 1997, the Rod Amlie Family reached an agreement (1997 Agreement) with First American regarding the consideration they would accept for the decedent's First American stock, including the Hill Rights, that the Family would receive through bequest or purchase after her death pursuant to the 1995 FSA. The price to be paid to the Rod Amlie Family was $217.50 per share plus 4 percent per year after Feb. 28, 1998, compounded semiannually. The principal reason First American agreed to pay more for the decedent's stock in 1997 than it offered to pay in connection with the 1994 Agreement was the higher value it assigned to the Hill Rights in 1997. Under the 1997 Agreement, the parties mutually released each other from any liability arising under the 1991 Agreement, which conferred the Hill Rights.

Following the decedent's death on Oct. 18, 1998, the Rod Amlie Trust exercised its call option to purchase all of the First American stock remaining in the decedent's estate after satisfaction of the bequests of such stock to the Trust. Subsequently, the First American stock was sold to First American for nearly $1.5 million, the price derived under the formula in the 1997 Agreement. Of such amount, more than $993,000 was payable to the estate as the price for the First American stock under the formula set forth in the 1995 FSA. This was the value reported on the decedent's estate tax return as the value of her First American stock on the alternate valuation date. The remaining $496,000 was reported as capital gain on the 1998 Form 1041 for the Rod Amlie Trust. The value of the decedent's five parcels of farm land was reported on the estate tax return at their appraised value of just more than $750,000. The IRS issued a notice of deficiency, asserting that the value of the decedent's First American stock on the alternate valuation date was the nearly $1.5 million that First American paid for it, and that the value of the farm land was just more than $930,000.

The U.S. Tax Court noted that for a restrictive agreement to control value for federal estate tax purposes, the offering price must be fixed and determinable under the agreement, the agreement must be binding on the parties both during life and after death, the agreement must have been entered into for a bona fide business reason and must not be a substitute for a testamentary disposition, and the terms of the agreement must be comparable to those of similar arrangements entered into at arm's length.

The IRS first argued that the 1995 FSA did not contain a fixed and determinable price for the decedent's First American stock because it did not give the Rod Amlie Trust the right to buy any fixed amount of the stock for the price set therein. Rather, the actual amount of the stock the Rod Amlie Trust would acquire by purchase was unknown until after the decedent died and her farm land was valued because the Rod Amlie Trust was bequeathed stock as would equal one-half of the value of the farm land plus one-third of the residue. The estate argued that it was irrelevant what portion of the stock was subject to sale under the put/call options in the 1995 FSA because any portion passing by bequest was also subject to the price restrictions of the 1995 FSA. That was due to the 1995 FSA requiring satisfaction of all bequests to the Rod Amlie Trust in kind with First American stock valued at the $118 price. The court agreed that the 1995 FSA operated to restrict the value of all the decedent's First American stock.

The IRS next argued that the 1995 FSA was not enforceable because the decedent's conservator did not sign it. However, the court dismissed the argument, noting that the conservator sought district court approval of the 1995 FSA, and such court ordered that the conservator perform such acts as necessary to effectuate the terms of the 1995 FSA. Therefore, the court held that the agreement was legally binding during life and after death.

The court next held that an agreement could further a business purpose even where the subject of the agreement was not an actively managed business interest but merely an investment asset and noted specifically that the 1995 FSA furthered the following business purposes: (i) prudent management of the decedent's assets by mitigating the risks of holding a minority interest in a closely held bank and (ii) planning for future liquidity needs of the decedent's estate.

The IRS also argued that the 1995 FSA, which contained the $118 price, was a testamentary device because Rod was able to secure an agreement two years later for the purchase of the First American stock at $217.50 per share, plus 4 percent per year until the decedent's death, compounded semiannually. However, the court stated that the conservator, in an effort to fulfill fiduciary obligations, and the other heirs, in furtherance of their own interests, accepted a price they believed was fair at the time. Therefore, the 1995 FSA was not a testamentary device to benefit the decedent's family members.

With respect to the comparable arm's length terms requirement, the estate's expert opined that the 1995 FSA was comparable to arrangements entered into by persons in arm's length transactions because the price and structure for the sale of the First American stock into the 1995 FSA was virtually identical to the terms of the 1994 Agreement, which had been reached in arm's length negotiations between the conservator and First American. The IRS argued that the expert's opinion was insufficient because it relied on an isolated comparable. The court disagreed, stating that the price terms reached in the 1994 Agreement and incorporated in the 1995 FSA were based on a survey of comparables, and that the conservator had sought professional advice and was advised that the $118 price was a fair price for the decedent's First American stock and Hill Rights, when coupled with the deferred sale feature of the 1994 Agreement. Further, the agreements were not entered into between the decedent and a member of her family. Rather, they were entered into by the conservator, who had a fiduciary duty to safeguard the decedent's interests. Therefore, the court held that the 1995 FSA price terms were arm's length. Accordingly, the court held that all requirements had been satisfied for the 1995 FSA to control the value of the First American stock for federal estate tax purposes and held that the value of the stock was correctly reported on the estate tax return.

Also at issue in the case was whether fractional interest discounts applied to interests in the decedent's farm land. Specifically, the decedent held seven-twelfths and one-half interests in two different parcels of land. Because the IRS offered no evidence from which the court could conclude that no discount was appropriate, the court allowed a 15 percent discount on the two parcels to reflect the lack of control, limited marketability, unavailability of financing, and costs to partition relating to partial undivided ownership interests.

4. **McCord v. Comm., 98 AFTR 2d 2006-6147 (5th Cir.) – Commissioner failed to meet its burden of proof and defined value gifts approved.**

Effective June 30, 1995, the taxpayers joined with their four sons and an existing ordinary partnership (McCord Bros.) to create McCord Interests Ltd. LLP, a Texas limited partnership (Partnership). In creating the Partnership, each taxpayer had contributed $10,000 for which each had received one-half of all the Class A limited partnership interests; each son had contributed $40,000 for which he had received one-fourth of all the general partnership interests; each taxpayer had contributed identical interests in substantial business and investment assets (valued at more than $6.1 million per taxpayer) for which each taxpayer received equal portions, but less than all, of the Class B limited partnership interests; and McCord Bros. had contributed interests in similar business and investment assets (valued at more than $2.4 million) for which it received the remaining Class B limited partnership interests.

Later in 1995, the taxpayers transferred their Class A limited partnership interests to the Southfield School Foundation (Foundation), a Code Section 501(c)(3) tax exempt organization, leaving the taxpayers only with their Class B limited partnership interests. In 1996, the taxpayers irrevocably disposed of all their Class B limited partnership interests, retaining no interest whatsoever in the Partnership. They did so by joining with their four sons and two charities in the execution of an Assignment Agreement. In it, the taxpayers transferred all their Class B limited partnership interests to the exempt and nonexempt donees in varying portions, expressly relinquishing all dominion and control over the Partnership interests thus assigned and transferred. The Assignment Agreement divested the taxpayers of such interests in terms of dollar amounts of the net fair market value of the Partnership according to the following sequentially structured defined value clause: (i) first, to the generation-skipping tax trusts (GST trusts), over which the sons were trustees, a dollar amount of fair market value in interest of the Partnership equal to the dollar amount of the taxpayers' net remaining generation-skipping tax exemption, reduced by the dollar value of any transfer tax obligation owed by these trusts by virtue of their assumption thereof; (ii) second, to the four sons, $6,910,932.52 worth of fair market value in interest of the Partnership, reduced by the dollar value of (1) the interests in the Partnership given to the GST trusts and (2) any transfer tax obligation owed by the sons by virtue of their assumption thereof; (iii) to the Shreveport Symphony Inc. (Symphony), $134,000 worth of such interest; and (iv) to the Community Foundation of Texas Inc. (CFT), the dollar amount of the taxpayers' interests remaining after satisfying the three previous gifts. An appraisal the month following the gifts concluded that the value as of the date of the gifts had been $89,505 for each 1 percent of Class B limited partnership interest in the hands of a donee immediately following completion of the gifts. Accordingly, in March 1996, the donees entered into a Confirmation Agreement based on the appraisal, which translated the dollar value of each gift under the Assignment Agreement's defined value formula into percentages of the Partnership as follows: (i) GST trusts – 8.24977954 percent each; (ii) the four sons – 11.05342285 percent each; (iii) the Symphony – 1.49712307 percent; and (iv) CFT – 3.62376573 percent, for a total of 82.33369836 percent. Each donee was represented by independent counsel and had the right to review the appraisal report prior to entering the Confirmation Agreement. Further, any exempt donee had the right to retain its own appraiser and resolve questions of value and allocation of interests through binding arbitration. CFT elected to retain outside counsel who, in consultation with CFT's president and director of development, each of whom were lawyers with extensive experience in reviewing appraisals of closely held interests, independently analyzed the appraisal in light of the then-current circumstances. CFT subsequently accepted the appraisal but did not retain an independent appraiser.

The taxpayers, on their federal gift tax returns for 1996, reported the aggregate values of their gifts as just more than $2.4 million each, which were determined on the basis of the appraisal reduced by (i) the total federal gift taxes payable by the taxpayers on their gifts to the nonexempt donees, payment of which was assumed by these donees;

and (ii) the actuarially determined present value of the nonexempt donees' contractual assumption of liability for the additional estate taxes that would be incurred pursuant to Code Section 2035 should either taxpayer fail to survive for three years after the date of the gifts. The IRS issued deficiency notices, increasing the gifts to more than $3.7 million per taxpayer. It asserted that the taxpayers understated the fair market value of the donated interests in the Partnership and that they erred in discounting the fair market value of those interests by the mortality-based, actuarially calculated present value of the nonexempt donees' assumed obligations for additional estate taxes under Code Section 2035. The IRS determined a value for the Partnership of $171,749 per 1 percent, almost double the taxpayers' figure of $89,505 per 1 percent.

The taxpayers filed a petition in the U.S. Tax Court contesting the proposed deficiencies. The case was tried before Judge Foley, largely on a joint stipulation of facts filed on the day of trial. In their joint stipulations, the parties agreed that the Commissioner had the burden of proof under Code Section 7491. The Commissioner's attack was grounded in the equitable doctrines of form over substance and violation of public policy. It did not advance an argument about the way the Assignment Agreement should be interpreted or about the role of the Confirmation Agreement, if any, in determining fair market value. Rather, it asked the court to disregard the plain wording of the Assignment Agreement and decide the case on one or both of the equitable doctrines. Foley determined that the Commissioner failed to meet its burden of proof on any contested issue of fact or law and therefore could not prevail.

In a reviewed opinion of the Tax Court, an eight-judge majority reversed Foley and held for the Commissioner. The majority crafted its own interpretation of the Assignment Agreement and gave controlling effect to the post-gift Confirmation Agreement, all based entirely on a theory that the Commissioner had never raised. The majority suspended the valuation date of the property the taxpayers donated in January until the date in March when the donees acted to agree among themselves on the percentages that each would accept as equivalents of the dollar values irrevocably and unconditionally given by the taxpayers.

On appeal, the court noted that the Commissioner relied on several theories before the Tax Court, including doctrines of form over substance and violation of public policy, but that it did not advance any such theories on appeal and, accordingly, waived them. Instead, the Commissioner focused its efforts on appeal solely to supporting the methodology and holdings of the Tax Court majority, summarized as follows: (i) the interests transferred by the Assignment Agreement were assignee interests in the Partnership; (ii) the Tax Court majority was not required to follow the terms of the Assignment Agreement in determining the fair market value of the interests in the Partnership transferred by the taxpayers; (iii) the fair market value of the total interests transferred was $120,046 per 1 percent interest; (iv) the value of the interests transferred should be based on the value determined by the majority on a per unit basis times the percentage interests determined by the donees in the Confirmation Agreement; and (v) the value of the nonexempt donees' contractual obligation to pay estate tax liability could not be deducted in determining the value of the taxpayers' gifts.

In its analysis, the appeals court first noted that the Commissioner waived its objection to the discount contained in the taxpayers' appraisal because it failed to advance the argument at trial. The appeals court next stated that the Tax Court majority independently appraising the donated property and arriving at a value precisely halfway between the taxpayers' expert and the Commissioners' expert constituted legal error. Therefore, the results of the majority's independent appraisal were irrelevant to the amount of gift taxes owed by the taxpayers. The appeals court noted that the core flaw of the majority's methodology was its violation of the long-prohibited practice of relying on post-gift events by using the Confirmation Agreement to translate the Assignment Agreement's dollar-value gifts into percentage interests in the Partnership. The court stated that regardless of how the transferred interest was described, it had an ascertainable value on the date of the gift, and that the value could not be varied by subsequent acts of the donees in executing the Confirmation Agreement. Further, the court held that the majority erred in basing its holding on an interpretation of the Assignment Agreement and an application of the Confirmation Agreement that the Commissioner never raised. Accordingly, by process of elimination, the court held that the taxable values used by the taxpayers in preparing their gift tax returns must stand, subject only to the question of their having been arrived at, in part, by applying the actuarially determined present value of the nonexempt donees' assumed responsibility for payment of estate taxes, if any, under Code Section 2035.

With respect to the Code Section 2035 issue, the court noted that the taxpayers employed a variation on the net gift theme for reducing the taxable value of their gifts by the mortality-driven discount that a willing buyer would require to account for additional estate taxes the taxpayers would have to pay under Code Section 2035 if either of them died within three years following the gifts. The Commissioner and Tax Court majority contended that it was too speculative to be recognized in calculating the net gift in this case. However, the appeals court held that there was nothing speculative about the date-of-gift fact that if either or both of the taxpayers were to die within three years following the gift, the nonexempt donees would have been legally bound to pay the additional estate tax that could result from the provisions of Code Section 2035. Accordingly, the court reversed the Tax Court majority and held that the taxable values of the interests gifted were as the taxpayers reported on their gift tax returns.

CHARITABLE GIVING

5. P.L.R. 200617026 – Modification of charitable remainder trust to permit early distributions of principal to charitable beneficiary allowed.

The taxpayer created a charitable remainder annuity trust (Trust) naming the charitable remainder beneficiary as trustee. Under the terms of the Trust, the taxpayer was to receive an annual annuity during his lifetime, and at his death, his son was to receive the annuity amount. Following the deaths of both the taxpayer and his son, the Trust provided for distribution of all remaining income and principal to the charitable remainder beneficiary. The taxpayer died, and his son was the current annuity recipient. The net fair market value of the assets of the Trust had increased substantially since creation of the Trust.

To better fund its scholarship program, the trustee, with the son's consent, proposed to reform the terms of the Trust to permit annual distributions of principal to itself as the charitable beneficiary. Such distributions would be made only in years when the net fair market value of the Trust exceed a certain dollar amount, so as to not jeopardize the son's interest as the current annuity recipient. A court-approved the modification of the Trust to allow the limited distributions to the charitable beneficiary, effective upon the receipt of a private letter ruling from the IRS that the modification would not disqualify the Trust as a charitable remainder annuity trust (CRAT). The IRS held that the modification would not jeopardize the Trust's status as a CRAT, noting that a valid CRAT may provide for current charitable distributions, though it may not provide for additional current noncharitable distributions.

MARITAL DEDUCTION

6. P.L.R. 200626002 – Marital deduction allowed with respect to assets passing to surviving spouse due to qualified disclaimers.

The decedent died testate, survived by his spouse, three adult children, eight adult grandchildren, and two minor grandchildren. The decedent's will contained a bequest of all tangible personal property to the spouse, and provided for the disposition of all other property to an inter vivos trust created by the decedent during his lifetime that became irrevocable at his death. The residue of the trust was to be divided into two shares, the Marital Trust share and the Family Share. The Marital Trust was to be funded with a specified pecuniary amount and was intended to qualify for the marital deduction. The Family Share was to be funded with the balance of the trust assets and was to be distributed outright to the decedent's lineal descendants who survived the decedent, per stirpes, or if none, then outright to the decedent's spouse.

The three adult children and eight adult grandchildren proposed to disclaim their entire beneficial interest in the Family Share, and a court-appointed guardian similarly proposed to disclaim the entire beneficial interest in the Family Share on behalf of the two minor grandchildren. A court granted approval of the proposed disclaimers conditioned on the issuance of a favorable ruling from the IRS that the disclaimers would be qualified disclaimers under Code Section 2518. As a result of the disclaimers, the interests disclaimed would pass to the spouse under the decedent's trust.

The IRS held that the disclaimers were qualified because they were irrevocable, in writing, delivered to the executors and trustees within nine months of the decedent's death, and none of the disclaimants had received any benefit by reason of the interests proposed to be disclaimed. Further, the disclaimers satisfied all additional requirements under state law. The IRS further concluded that the property passing to the spouse as a result of the disclaimers would be treated as passing directly from the decedent to the spouse, thereby qualifying for the estate tax marital deduction.

7. P.L.R. 200628007 – Renunciation of portion of marital trust does not affect qualified terminal interest property status of remaining marital trust property.

The decedent died, survived by his wife and three sons. During his lifetime, the decedent created a revocable trust. The terms of the trust agreement directed for two trusts to be established at the decedent's death: the Marital Trust and the Family Trust. The Marital Trust required the distribution of all income to the wife at least quarterly and allowed for distributions of as much principal as the trustee deemed necessary for the wife's health, support, care, and comfort. At the wife's death, the assets remaining in the Marital Trust would pass outright to the decedent's descendants. The wife and a bank became the co-trustees of the decedent's trust following his death. By court order, the trust agreement was modified to divide the Marital Trust on a fractional basis into two separate trusts designated as the GST Exempt Marital Trust and the Marital Trust. On the decedent's timely filed estate tax return, an election was made to treat the GST Exempt Marital Trust and the Marital Trust as qualified terminable interest property under Code Section 2056(b)(7).

The trustees subsequently filed a petition with the court requesting an order, contingent upon receipt of a favorable ruling from the IRS, modifying the Marital Trust by authorizing the trustees to divide it into Marital Trust A, consisting of 75 percent of the Marital Trust assets, and Marital Trust B, consisting of the balance of the Marital Trust assets. Both trusts are to be funded, to the extent possible, on a pro rata basis. In addition, the wife, three sons, and trustees propose to execute and file with the court an agreement concerning net gifts and payment of gift taxes under which the sons agree that if the wife renounces all of her interests in Marital Trust B, the sons will pay all resulting gift taxes, whether attributable to a remainder or a qualifying income interest, such that the resulting transfers by the wife will be treated as net gifts. Further, the wife will have no responsibility for payment of gift taxes, or interest thereon, as a result of the renunciation. After the two trusts are funded, the wife proposes to execute and file with the court a renunciation of all her right, title, and interest in Marital Trust B, which would not be a qualified disclaimer under Code Section 2518. The trustees have further requested that the court find that upon the wife's renunciation, the assets in Marital Trust B will pass as if the wife had died on the date of her renunciation, such that the assets will be distributed outright to the three sons, in equal shares.

The IRS first held that the proposed division of the Marital Trust into Marital Trust A and Marital Trust B and the funding of such trusts would not affect the status of the Marital Trust, the GST Exempt Marital Trust, Marital Trust A, or Marital Trust B as qualified terminable interest property. The IRS next ruled that under Code Section 2519, the wife's renunciation of her qualifying income interest in Marital Trust B would be treated as a transfer by the wife of all interests in Marital Trust B other than her qualifying income interest, and that the amount of the gift would equal the fair market value of Marital Trust B on the date of disposition, less the value of the wife's qualifying income interest in the property on such date, less the gift tax attributable to the transferred property. Upon renouncing her qualifying income interest in Marital Trust B, the wife would be treated as making a gift under Code Section 2511, and the amount of the gift would equal the fair market value of the qualifying income interest on the date of disposition, less the gift tax attributable to such interest and actually paid by the three sons. Finally, the IRS held that no part of the value of the property in Marital Trust B deemed transferred under Code Section 2519 would be included in the wife's gross estate under Code Section 2044(b)(2), and that the renunciation would not result in a transfer under Code Section 2519 of any assets in Marital Trust A or the GST Exempt Marital Trust.

PARTNERSHIPS

8. *Estate of Rosen v. Comm.*, T.C. Memo 2006-115 (6/1/06) – Assets of family limited partnership includible in decedent's gross estate.

The decedent died on July 14, 2000, at the age of 92. She had two children, who were each married, and numerous grandchildren and great-grandchildren. The decedent's son-in-law had practiced as an attorney for more than 50 years and had regularly attended seminars on estate planning. In 1974, the decedent formed a revocable trust into which she transferred her assets, and in 1979, the decedent began a formal gift-giving plan at the advice of her son-in-law. In 1994, the son-in-law attended a seminar on family limited partnerships (FLP) and concluded that the decedent's assets should be transferred into a FLP in order to reduce the value of her estate for federal estate tax purposes. He contacted the decedent's long-time estate planning attorney, who prepared the paperwork to form the Lillie Rosen Family Limited Partnership (Partnership).

During the process of forming the Partnership, the decedent's attorney never spoke with the decedent on her view of the transaction, and as of the date the Partnership was created, the decedent was suffering from Alzheimer's disease. The decedent's son and daughter signed the Partnership agreement as limited partners in their capacities as co-trustees of the decedent's revocable trust. The Partnership agreement stated the principal place of business as the residence of the decedent's son, and its purposes included the following: investing in any type of security, providing financing, entering into joint ventures, and any other lawful purpose. The relevant terms of the Partnership agreement were set by the decedent's attorney, and none of the partners were involved in negotiating them. In October 1996, the decedent's daughter, as attorney in fact for the decedent and as co-trustee of her revocable trust, transferred $2.4 million in cash and marketable securities to the Partnership in exchange for the decedent's 99 percent limited partnership interest. Before the general partners (0.5 percent each for the decedent's son and daughter) made their initial contributions to the Partnership, the daughter transferred a 16.4672 percent limited partnership interest to each of the decedent's daughter and son. Subsequently, the daughter and son each contributed $12,145 as consideration for their initial 0.5 percent general partnership interests.

The Partnership conducted no business activity and had no business purpose for its existence. No books were maintained as to any activity of the Partnership, and the primary records were the Merrill Lynch account records, the checkbook, and the bank and brokerage statements for the various Partnership accounts. No formal or documented meetings were held between the general partners. As of the decedent's death, the assets of the Partnership totaled more than $3.2 million and consisted of stocks, mutual funds, money market funds, certificates of deposit, and bonds.

The assets retained by the decedent outside of the Partnership were insufficient to pay her living expenses and the cost of her formal gift-giving program. At the time the Partnership was formed, eight of the decedent's 17 descendants depended on an annual cash gift from the decedent of at least $10,000, and the eight individuals did not want to receive a portion of the decedent's limited partnership interest in lieu of cash. The decedent's daughter withdrew $80,000 from the Partnership to make gifts to the descendants in 1997 and informed the attorney that she would have to withdraw additional funds to pay the decedent's living expenses. The attorney told the daughter to treat any such withdrawal as a loan to the decedent from the Partnership. The daughter did not discuss the making of any such loans with the decedent's son, and they never discussed how the decedent would pay the amounts back. Two demand notes were prepared in connection with the use of funds of the Partnership to benefit the decedent. During her life, the decedent never repaid any of the principal or interest reflected in the notes nor did she have the ability to repay the amounts without selling or redeeming her interest in the Partnership. After her death, the decedent's remaining 34.9988 percent limited partnership interest was redeemed and her estate paid all of the amounts shown as due in the notes.

The IRS determined that the assets of the decedent transferred to the Partnership were includible in her gross estate under Code Section 2036(a)(1). It argued that the assets were transferred in other than a bona fide sale for full and adequate consideration, and the decedent retained until her death the possession or enjoyment of, or the right to income from, the assets. The U.S. Tax Court first held that the decedent's assets were not transferred in a bona fide sale for full and adequate consideration. To meet such test, the court noted that the Partnership had to be formed for a legitimate and significant nontax reason, and each transferor had to receive a partnership interest proportionate to the fair market value of the property transferred. The estate argued the following legitimate and significant nontax purposes: (i) to protect the decedent's assets during her lifetime and to provide limited liability protection to the donees of the limited partnership interests, (ii) to create giftable assets that preserved value and could not be easily liquidated in the short term, (iii) to facilitate the decedent's annual gifting program to her family, and (iv) to provide for the common management of the Partnership assets during her lifetime and after her death. The court disagreed, stating that the legitimate and significant nontax reason must have actually motivated the formation of the Partnership, not just be a theoretical justification for it. It found that the overwhelming reason for forming the Partnership was to avoid federal estate and gift taxes and that neither the decedent nor her children were involved in the structure of the Partnership. Further, the Partnership was not engaged in a valid, functioning business operation, the decedent's daughter stood on all sides of the transaction, the reported contributions by the decedent's children were de minimis in relation to the assets contributed by the decedent, the decedent was unable to meet her financial obligations with the assets she retained outside the Partnership, the assets contributed consisted solely of marketable securities and cash, and the decedent was in poor health at time of formation of the Partnership. Therefore, the court concluded that transfer of the decedent's assets was not a bona fide sale within the meaning of Code Section 2036(a)(1).

The court also agreed that the decedent retained the possession or enjoyment of, or the right to income from, the assets during her life pursuant to express or implied understandings and agreements. It found that the Partnership was not a business operated for profit, but rather a testamentary device, the decedent's relationship to her assets did not change following transfer to the Partnership, and the assets were transferred to the Partnership on the advice of counsel in order to minimize the estate tax. It also found that the notes did not constitute bona fide debt because of (among other factors) the absence of a fixed maturity date and a fixed obligation to repay, the parties did not intend for the decedent during her lifetime to actually pay any interest, and there was no expectation of repayment of principal from the decedent during her lifetime. Accordingly, the court concluded that the assets of the decedent transferred to the Partnership were includible in the decedent's gross estate.

OTHER

9. Rev. Rul. 2006-34, 2006-26 IRB 1171 (6/22/06) – "Active" requirements discusses for purposes of extension of time for payment of estate tax pursuant to Code Section 6166.

The IRS discussed whether the interests described in five different situations constituted interests in a closely held business for purposes of Code Section 6166. In each situation, the real property interests were included in the decedent's gross estate and aggregated more than 35 percent of the decedent's gross estate within the meaning of Code Section 6166(b)(6). Further, in each situation, the eligibility requirements of Code Section 6166(b) regarding the number of partners, members, or shareholders, or the percentage of capital interest or voting stock were satisfied.

In situation 1, the decedent died on Jan. 1, 2005, owning a 10-store strip mall titled in his name. The decedent personally handled the day-to-day operation, management, and maintenance of the strip mall, as well as most repairs. When the decedent was unable to perform a repair, he hired a third party independent contractor who was selected by the decedent and whose work was reviewed and approved by the decedent.

In situation 2, the decedent died on Feb. 2, 2005, owning a small office park titled in his name. The office park consisted of five separate two-story buildings, each of which had multiple tenants. The decedent hired a property management company in which he had no ownership interest to lease, manage, and maintain the office park, and the decedent relied entirely on the management company to provide all necessary services. The primary duties of the management company's employees consisted of advertising to attract new tenants, showing the property to prospective tenants, negotiating and administering leases, collecting the monthly rent, and arranging for independent contractors to provide all necessary services to maintain the buildings and grounds of the office park, including snow removal, security, and janitorial services. The management company provided a monthly accounting to the decedent, along with a check for the rental income, net of expenses, and fees.

Situation 3 was identical to situation 2, except that the decedent owned 20 percent in value of the stock of the management company.

In situation 4, the decedent died on April 1, 2005, owning a one percent general partnership interest and a 20 percent limited partnership interest in a limited partnership. The limited partnership owned three strip malls that, collectively, constituted 85 percent of the value of its assets. The partnership agreement required the decedent, as general partner, to provide the daily maintenance and repairs to the strip malls. From 1992 until his death, the decedent received an annual salary from the limited partnership for his services as general partner. In performance of his obligations under the limited partnership agreement, the decedent (either personally, or with the assistance of employees or agents) performed substantial management functions, including collecting rental payments and negotiating leases, performing daily maintenance and repairs (or hiring, reviewing, and approving the work of third party independent contractors for such work), and making decisions regarding periodic renovations of the three strip malls.

Finally, in situation 5, the decedent died on May 1, 2005, owning 100 percent of the stock in a dealership in the business of selling automobiles, automotive parts and related supplies, and repair services. The decedent made all decisions regarding the corporation, including the approval of all advertising and marketing promotions, management and acquisition of inventory, and matters relating to dealership personnel. The decedent also supervised all employees of the corporation. In addition to the stock of the corporation, the decedent directly owned the real property that was constructed for the corporation and contained unique features tailored to an automobile dealership, including a showroom and office space and areas for servicing automobiles and storing inventory. The decedent leased the real property to the corporation under a net lease, and the corporation's employees performed all maintenance of and repairs to the real property.

Under Code Section 6166(a)(1), an executor may elect to pay part or all of the estate tax in two or more (but not exceeding 10) equal installments if a decedent was a citizen or resident of the United States on the date of death, and if the value of an interest in a closely held business included in the decedent's gross estate exceeds 35 percent of the adjusted gross estate. An interest in a closely held business is defined in Code Section 6166(b)(1) to mean (i) an interest as a proprietor in a trade or business carried on as a proprietorship; (ii) an interest as a partner in a partnership carrying on a trade or business if 20 percent or more of the total capital interest in such partnership is included in determining the gross estate of the decedent, or such partnership had 45 or fewer partners; and (iii) stock in a corporation carrying on a trade or business if 20 percent or more in value of the voting stock of such corporation is included in determining the gross estate of the decedent, or the corporation had 45 or fewer shareholders. Under Code Section 6166(b)(9)(A), for purposes of determining the closely held business amount, the value of an interest in a business does not include the value of that portion of the interest attributable to passive assets held by the business.

The IRS provided the following nonexclusive list of factors to consider in determining whether a decedent's interest in real property was an interest in an asset used in an active trade or business: (i) the amount of time the decedent devoted to the trade or business; (ii) whether an office was maintained from which the activities of the decedent or entity were conducted or coordinated, and whether the decedent maintained regular business hours for that purpose; (iii) the extent to which the decedent was actively involved in finding new tenants and negotiating and executing leases; (iv) the extent to which the decedent provided landscaping, grounds care, or other services beyond the mere furnishing of leased premises; (v) the extent to which the decedent personally made, arranged for, performed, or supervised repairs and maintenance to the property (whether performed by independent contractors), including without limitation painting, carpentry, and plumbing; and (vi) the extent to which the decedent handled tenant repair requests and complaints. The above factors apply not only with respect to the decedent, but also with respect to agents and employees of the decedent or entity.

Based on the above factors, the IRS held that the interests described in situations 1, 3, 4, and 5 constituted interests in closely held businesses for purposes of Code Section 6166. However, the interest described in situation 2 did not so qualify.

10. In re Estate of Hjersted, No. 94,711 (Kan. Ct. App. 6/2/06) – Federal gift tax reduces probate estate purposes of calculating spouse's elective share.

In January 2005, the IRS assessed a gift tax against the decedent's estate of more than $500,000 based upon a district court's valuation of a nonprobate transaction that occurred prior to the decedent's death. The decedent's executor petitioned the district court to deduct the unpaid gift tax assessment in determining the value of the surviving spouse's unsatisfied elective share. The district court denied the petition, holding that the gift tax should not be included in the value of the probate estate to the extent that it was a transfer made within two years of the decedent's death. It concluded that the tax was more akin to a death tax than a gift tax because the spouse's elective share petition was the only event that triggered a revaluation of the gift and, thus, post-death actions created the increased value, which then created the gift tax. Accordingly, the district court held that it should not be included in the value of the probate estate.

The estate appealed, arguing that the IRS' gift tax assessment was the decedent's debt at the time of the gift and was, therefore, deductible from the probate estate as an enforceable demand under Kansas law. The surviving spouse argued that Kansas law does not include a decedent's unpaid gift tax liabilities in defining "demands" for elective share purposes. She equated the decedent's gift taxes with estate taxes, referring to them generally as "transfer taxes" and argued that the Kansas estate tax apportionment statute, by virtue of the federal marital deduction, generally prohibited a surviving spouse from being charged with estate taxes on property transferred to him or her at a decedent's death. The Kansas Court of Appeals noted that a gift tax imposed under Code Section 2501 is deductible from the probate estate under Kansas law. The court reasoned that the federal gift tax is a liability of the donor and that an unpaid gift tax assessment becomes a debt of the decedent's estate. Accordingly, an unpaid gift tax liability is an enforceable demand, which is deductible from the probate estate under Kansas law.

11. *In re Chase Manhattan Bank*, 809 N.Y.S.2d 360 (2/3/06), *Reversing In Re Will of Dumont*, 791 N.Y.S.2d 868 (2004) – Judgment against trustee for failing to diversify reversed on procedural grounds.

In 1951, the decedent executed his will and created a trust to provide income to his daughter, Blanche, during her lifetime and to provide for discretionary distributions of income to Blanche's descendants. After Blanche's death, which occurred in 1972, the income was to go to Blanche's daughter, Margaret. Upon Margaret's death, the trust was to terminate and the principal was to be paid over to Margaret's issue, or if none, then equally to three remainder beneficiaries. The trust was funded with a concentration of Kodak stock. The decedent's will stated his desire that the Kodak stock be held to be distributed to the ultimate beneficiaries of the will. The will also stated that the stock could not be disposed of for the purpose of diversification of investment and that the executor and trustee would not be liable for any diminution in the value of such stock. However, the will continued that the executor and trustee would not be prevented from disposing of all or part of the Kodak stock in case there was some compelling reason other than diversification of investment for doing so.

In 1998, Margaret and one of her daughters sought an accounting of the trust for the period between December 1972 and December 1998. Margaret and her daughter objected to the accounting on the grounds that the trustee failed to exercise reasonable diligence and care and failed to afford adequate consideration to the interests of the income beneficiaries of the trust. Following the filing of a superseding accounting, Margaret and the remainder beneficiaries filed objections and sought a refund of legal fees and commissions paid to the trustee. They asserted that there were two compelling reasons other than diversification to sell 95 percent of the stock at the end of January 1973, theorizing that the concentration of Kodak stock, combined with its miniscule income yield, constituted the requisite compelling reason to sell the Kodak stock on Jan. 31, 1973. The trustee argued that the only compelling reasons to sell stock at that time were if Margaret needed additional income or if Kodak was headed for significant financial problems. It stated that there was no compelling reason to sell the stock until the period between the late 1990s and 2001, when Kodak's fundamentals changed from film to digital technology. Accordingly, beginning in December 2001, the trustee began to sell the stock over a period of nine months.

At trial, the court determined that a compelling reason was any factor that should indicate to the trustee that the interest of any beneficiary was not being reasonably maintained or protected by the trust, or that the interest of any beneficiary would not continue to be reasonably maintained or protected by the trust if the stock was retained. The court further determined that the trustee had breached its fiduciary duties by (i) failing to explore the meaning and intent of the language in the decedent's will, and instead adopting a default meaning for the trust that was the least work-intensive and yet the most profitable; (ii) failing to perform the frequent content-relevant communications with the beneficiaries to ensure that the trust was fulfilling its purpose; and (iii) adopting a definition of "compelling reason" that addressed only the needs of the life income beneficiary. However, the court concluded that the breaches could not result in liability without a determination that a compelling reason other than diversification existed for sale of the stock. Nonetheless, the court concluded that by Jan. 31, 1974, a compelling reason to sell the stock existed because of its actual, substantial loss, lack of viable hope of long-term gain, and low income yield. The court calculated damages beginning from Jan. 31, 1974, with a hypothetical sale of 95 percent of the stock, the subtraction of capital gains taxes, the addition of statutory interest compounded, and the subtraction of dividends received and sales proceeds, to arrive at a value of more than $24 million.

On appeal, the court determined that the trial court properly rejected the contention of the trust beneficiaries that a compelling reason to sell the stock existed as of Jan. 31, 1973, based on low income yield combined with the risk to remainder beneficiaries caused by the concentration itself. The court further held, however, that once the trial court made such a determination, it was error to look beyond the objections to determine that compelling reasons to sell the stock existed on Jan. 31, 1974. It stated that the petition for an accounting and the objections thereto were pleadings similar to a complaint and an answer, and they defined the issues and limited the relief. A surcharge could not be predicated on a ground neither alleged nor proved. Accordingly, the court reversed the judgment, dismissed the objections to the superseding accounting, and refused to address the issue concerning the calculation of damages, compound interest, and commissions.

12. *Janis v. Comm.*, 98 AFTR 2d 2006-6075 (9th Cir.) – Estate tax value binding to determine income tax basis under duty of consistency.

The taxpayer's father (Sidney) owned and operated, as a sole proprietorship, an art gallery in New York. Upon Sidney's death in 1988, all assets passed in equal shares to his two children. Following Sidney's death, the estate hired Sotheby's to value the collection, which consisted of more than 500 works of art. Sotheby's valued the works on an item-by-item basis and did not account for any diminution in value that might occur in the event the entire holdings were placed in the market at one time. However, the estate calculated a blockage discount to account for the number of pieces in the collection, the nature of the works, and other factors that would affect the actual realized price as a consequence of putting such a large number of works on the market. The estate and the IRS eventually agreed on a valuation for the collection, which included a blockage discount.

For income tax purposes, Sidney's children reported the undiscounted value of the works to generate a higher income tax net operating loss for the art gallery. The IRS determined that the collection's blockage discounted value should have been reported, resulting in additional income tax liabilities for the years at issue because of the decreased net operating loss. At trial, the U.S. Tax Court held that the estate tax value was binding to determine the new income tax basis at death under the duty of consistency.

On appeal, the children argued that the duty of consistency should not apply because it is a suspect doctrine. However, the 9th U.S. Circuit Court of Appeals stated that it was well established in the circuit that the duty of consistency applied to prevent inequitable shifting of positions by taxpayers. For the duty of consistency to apply, the court noted that the following elements must be present: (i) a representation or report by the taxpayer, (ii) on which the Commissioner relied, and (iii) an attempt by the taxpayer after the statute of limitations has run to change the previous representation or to recharacterize the situation in such a way as to harm the Commissioner. The Tax Court had held that the first element was satisfied because of the children's agreement with the IRS as to the value of the collection. It further found that the other two elements were present, and the appeals court agreed. Accordingly, the children were estopped under the duty of consistency from reporting the undiscounted value of the collection as the income tax basis in the works. ■

2006-2007 Section Officers

President
Robert M. Hughes
rmhughes@beverdye.com
(316) 263-8294

President-elect
Vernon L. Jarboe
vjarboe@sloanlawfirm.com
(785) 357-6311

Secretary/Treasurer
Kevin M. Conley
Kevin.Conley@umb.com
(816) 860-7738

CLE Liaison
Dan C. Peare
dpeare@hinklaw.com
(316) 267-2000

Legislative Liaison
Scott D. Jensen
sjensen@beverdye.com
(316) 263-8294

Section Editor
Calvin J. Karlin
ckarlin@barberemerson.com
(785) 843-6600

Past President
Frederick B. Farmer
ffarmer@lfbrlaw.com
(913) 782-0422

KBA Section Liaison
Beth A. Warrington
bwarrington@ksbar.org
(785) 234-5696

Newsletter

To be successful and informative, a section newsletter needs articles or ideas that reflect the needs of its membership. If you would like to contribute to the newsletter, contact Calvin J. Karlin at ckarlin@barberemerson.com.

If you would like to receive a hard copy of the newsletter, contact Beth A. Warrington at bwarrington@ksbar.org.

About the Author

__Mark A. Andersen__, Lawrence, is a member of Barber Emerson L.C. He received his B.A. from Bethany College and his J.D. from the University of Kansas School of Law, where he was a member of the Kansas Law Review.

Andersen is admitted to the bar in Kansas and Missouri. Andersen is a fellow of the American College of Real Estate Lawyers and a member of the Kansas Society of Farm Managers and Rural Appraisers. His practice includes real estate, like-kind exchanges, and construction. Andersen can be reached via e-mail at mandersen@barberemerson.com.

Real Estate Update

KANSAS SUPREME COURT

SALL ET AL. V. T'S, INC. D/B/A SMILEY'S GOLF COMPLEX
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 93,013 – JUNE 23, 2006
Torts, Duty to Warn, and Lightning Strikes

ATTORNEYS: Bryson R. Cloon, Cloon Law Firm, Leawood, for appellants. Steve R. Fabert and Patrick G. Copley, Fisher, Patterson, Sayler & Smith LLP, Topeka, and Richard T. Merker, Wallace, Saunders, Austin, Brown & Enochs Chtd., Overland Park, for appellee.

FACTS: Sall was hit by lightning on a golf course (SGC) on his return to the clubhouse after a warning sounded and he putted through the hole. Sall's guardians filed lawsuit alleging SGC staff had duty to warn Sall of danger it knew or should have known about, and claiming negligence in failing to properly monitor weather and sound timely warning, and in failing to utilize lightning detection equipment. Defendants filed motion for summary judgment, claiming no breach of duty, and claiming any duty owed to Sall was satisfied with timely warning to leave golf course. Based on lack of foreseeability of lightning strike, and finding facts insufficient to invoke Restatement (Second) of Torts § 323, district court granted defendants' motion. In a split decision, the Court of Appeals affirmed the district court concluding that SGC owed no duty to protect its patrons from lightning strikes.

ISSUES: (1) Duty to warn of lightning strikes and (2) Restatement (Second) of Torts § 323.

HELD: Court reversed and remanded for trial. Court held the Court of Appeals sits not as a fact-finder but as an appellate court. In this case, the conclusion of the majority of the Court of Appeals that if a duty existed under Restatement (Second) of Torts § 323 (1964) it was not breached was based upon its own fact finding; therefore, is inconsistent with its function as an appellate court. Moreover, its conclusion was erroneous since it did just the opposite of what an appellate court must do in reviewing the grant of summary judgment: resolve all facts and inferences, which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. Court stated the question to be asked in regard to an analysis under Restatement (Second) of Torts § 323 is not one concerning whether the facts of the case establish or fail to establish negligence, but rather whether there are facts in the record to warrant application of Restatement (Second) of Torts § 323. Court concluded that under the facts of this case, material factual issues remain on the issue of whether SGC negligently performed the duty it assumed under Restatement (Second) of Torts § 323 to monitor weather conditions and warn its patrons to come in off the golf course when the manager on duty deemed it prudent.

STATUTES: K.S.A. 60-258a(b)

ALLIANCE MORTGAGE CO. V. PASTINE ET AL.
GEARY DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 91,929 – JUNE 16, 2006
Foreclosure and Redemption

ATTORNEYS: S. Mark Edwards, Hoover, Schermerhorn, Edwards, Pinaire & Rombold, Junction City, for appellants. Mark L. Mellor, of Mellor & Miller P.A., Wichita, for appellee, Beneficial Mortgage Co. of Kansas Inc., and Linda S. Mock, Shapiro and Reed, Overland Park, for appellee, Alliance Mortgage Co.

FACTS: Alliance sued to foreclose its first mortgage on property in Junction City. Alliance requested a money judgment against Leighty who had assumed and agreed to pay the debt owed to Alliance. Beneficial Mortgage, the second mortgagee, was named as a party defendant and claimed an interest in the property. Beneficial asked for proper relief, but did not cross-petition against the owner to foreclose its mortgage and failed to seek relief on its note and to set out the amount that was due under the note. The trial court foreclosed Alliance's mortgage and granted judgment for approximately $30,000 and determined that Beneficial had a valid lien on the property second in line to Alliance. The court ordered a sheriff's sale and granted a right of redemption from three months of the sheriff's sale. At a properly noticed sheriff's sale, 166 bids were received. The Coxes were the highest bidders and paid $85,001 for the property. Alliance was paid $43,290.73, leaving excess proceeds of $41,710.27. Beneficial claimed it had no notice of the sale otherwise it would have bid $117,500 for the property and moved to set aside the sale or allow a substitute bid. The trial court denied the motion finding proper notice was given, Beneficial had participated in the foreclosure proceedings, that Beneficial could have secured its interest by a money judgment, that the property had been sold for fair market value in a legitimate transaction, and the sheriff's sale was conducted according to law in all respects. On a motion for rehearing, the trial court found Beneficial, by not receiving notice of the sheriff's sale, had been denied the right to bid at the sale and denied a protected property right. Court granted Beneficial 10 days to redeem the property and Beneficial paid $117,500 into court for redemption. Trial court confirmed the redemption and repaid the Coxes the sale price and all costs, interest and expenses. The Court of Appeals reversed the trial court holding that the trial court had abused its discretion in allowing Beneficial to redeem out of time and remanded to confirm the sale to the Coxes.

ISSUE: Does Kansas law allow a trial court to refuse confirmation of a sheriff's sale that is for an adequate purchase price for reasons not supported by law and for reasons not in conformity with equity?

HELD: Court affirmed in part and reversed in part the Court of Appeals decision and the district court decision. Court rejected an acquiescence argument by Beneficial applying the protective measure exception. Court agreed with Beneficial and the dissenting opinion in the Court of Appeals that the plain language of K.S.A. 60-2410(a) requires a public notice before the sale of real property under a writ of execution and it is specific to the public. The plain language of K.S.A. 60-205 requires actual notice to parties in civil actions and it is specific to parties and consequently notice by publication is inadequate. Court held the public was due notice under K.S.A. 60-2410(a), and Beneficial was due notice under K.S.A. 60-205, because it had appeared as a party defendant in the foreclosure proceedings. Court held that if Beneficial had a right of redemption, there was no dispute that any such right had expired by the time the district court attempted to "extend" it. Court held the correct remedy for the denial of Beneficial's statutory and due process notice of the sheriff's sale was not a revived right of redemption but a set-aside of the sale, provision of adequate notice, and a new sale with all parties and the public free to participate or not participate as they see fit.

STATUTES: K.S.A. 60-2410(a), -2414(b), (c), (m), -2415(a), (b); K.S.A. 60-205(a), (b)

FIDELITY BANK V. KING ET AL.
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 92,410 – JUNE 16, 2006
Foreclosure Rights and Junior Mortgagee

ATTORNEYS: Bradley S. Anderson, South & Associates P.C., Kansas City, Mo., for appellant. Karl R. Swartz, Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita, for appellee.

FACTS: Defendants James and Carolyn King assumed the debt on certain real property in Wichita in 1997. Fidelity Bank was the mortgage holder. In 2000, the Kings executed a second mortgage on the property with U.S. Bank for $32,000. The Kings defaulted and Fidelity sued to foreclose its mortgage on the property. Although properly served, U.S. Bank did not appear or file an answer or otherwise participate in the foreclosure. The district court foreclosed and ruled that Fidelity held a first and prior lien to the property for $65,321.25. The court did not recognize an interest in any other party and set a three-month redemption period. The sheriff's sale netted $93,500 for the property. The district court paid Fidelity $73,092.71 in full satisfaction and held the remaining proceeds of $20,407.29. River City filed a motion for distribution of sale proceeds, claiming they had acquired all right, title, and interest of the King's prior to the sheriff's sale. U.S. Bank objected and requested the proceeds as well. The trial court held that by failing to respond to the petition and assert its lien rights in the property, U.S. Bank waived its redemption rights as junior lien holder, had no rights in and to the subject property, including redemption rights, and had no claim to the excess sale proceeds. Court of Appeals affirmed the district court.

ISSUE: Did the Court of Appeals and trial court err in holding that River City, as owner, was entitled to the surplus proceeds from the foreclosure sale of the King's property and not U.S. Bank as a junior lien holder?

HELD: Court affirmed. Court held that the proceeds resulting from a sheriff's sale under an order of foreclosure are not cash separate from the land, and a court does not have unfettered equitable power to distribute surplus proceeds to any party it deems deserving regardless of whether any party attempted to protect its rights. Court held that a junior mortgagee who fails to appear and assert its position in a senior mortgagee's foreclosure action waives any payment priority it might otherwise have had to surplus proceeds from a sheriff's sale. Neither law nor equity requires otherwise. Court agreed with the trial court and the Court of Appeals that River City as holder of the owner's rights of redemption and right to excess proceeds is entitled to the surplus proceeds as compared to U.S. Bank and its note against the Kings.

STATUTES: No statutes cited.

KAU KAU TAKE HOME NO. 1 ET AL. V. CITY OF WICHITA
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 94,869 – JUNE 9, 2006
Inverse Condemnation and Summary Judgment

ATTORNEYS: Joseph R. Borich III and James B. Jackson for the appellants. Douglas J. Moshier, senior city attorney, and Gary E. Rebenstorf, city attorney, for the appellee.

FACTS: Kau Kau Take Home No. 1 Inc. operated a Kentucky Fried Chicken (KFC) restaurant located on West Irving Street southwest of the intersection of Tyler Road and Kellogg (U.S. Highway 54) in Wichita. The city began a construction project to reconfigure and reconstruct the Tyler and Kellogg intersection that drastically changed access to the KFC. The appellants filed a petition for inverse condemnation seeking compensation for the temporary and permanent restriction of access to their property. The district court granted summary judgment in favor of the city.

ISSUE: Did the district court err in granting summary judgment to the city?

HELD: Court affirmed. Court held that appellants' claim for inverse condemnation due to a loss of access involves only the regulation of traffic flow. The city's road construction project has not changed the appellants' direct access to an abutting street. Because the city's regulation of traffic flow near appellants' property is a reasonable exercise of the city's police power, appellants failed to demonstrate a compensable taking.

STATUTES: K.S.A. 12-105b and K.S.A. 26-504

LEE BUILDERS, INC. V. FARM BUREAU
SEDGWICK DISTRICT COURT − AFFIRMED IN PART AND REVERSED IN PART
COURT OF APPEALS − AFFIRMED
NO. 90,944 – JUNE 9, 2006
Insurance

ATTORNEYS: Paul Hasty Jr., Patrick E. McGrath, and Burke D. Robinson, Wallace, Saunders, Austin, Brown & Enochs Chtd., Overland Park, for appellant/cross-appellee. Jacob S. Graybill and N. Russell Hazlewood, Graybill & Hazlewood LLC, Wichita, and John Terry Moore, Moore Martin L.C., Wichita, for appellee/crossappellant. Mark D. Hinderks, Stinson Morrison Hecker LLP, Overland Park, brief for amicus curiae National Association of Home Builders.

FACTS: Lee Builders Inc. (Builders), general contractor for construction of a custom home, was insured under commercial general liability policy issued by Farm Bureau. Homeowner sued Builders over damage caused by water seepage. Builders notified Farm Bureau of the claim, but Farm Bureau denied coverage. Builders then joined with subcontractors to negotiate settlement with homeowner. Builders filed suit against Farm Bureau seeking recovery of settlement plus interest and attorney fees. Trial court granted judgment to Builders and awarded attorney fees under K.S.A. 40-908, but denied attorney fees under K.S.A. 40-256. Builders and Farm Bureau both appealed. The Court of Appeals affirmed in part and reversed in part, holding that general liability policy provided coverage for part of Builders' claims but remanded for further proceedings to determine the amount of the covered claim. The Court of Appeals also vacated the award of prejudgment interest, but affirmed the award of attorney fees. Farm Bureau filed a petition for review, but Builders filed no cross-petition.

ISSUES: Did the district court and Court of Appeals err in determining that moisture leakage over time caused by defective materials or workmanship, which led to structural damage within a constructed home, was an "occurrence" in commercial general liability policy? Did the district court err in awarding attorney fees?

HELD: Court affirmed the Court of Appeals decision. Court held the district court did not err in concluding indemnity provisions of policy were triggered. Property damage to surrounding structural components caused by moisture seepage resulting from faulty work constitutes an "occurrence" under general contractor's commercial general liability policy because (1) policy definition of "accident" includes the continuous or repeated exposure to substantially the same general harmful conditions; (2) Supreme Court has indicated that "occurrence" is avoided only when act results in intentional injury; (3) to construe "occurrence" more narrowly would render other policy provisions and exclusions meaningless; and (4) to extent policy definition or precise phrase is ambiguous, policy is construed against insurer. District court's judgment for entire settlement is reversed. Where insurer wrongfully fails to indemnify its insured, insurer has not forfeited its rights to contend that some or all of the amount paid by the insured to settle the claim was not within policy's coverage. Remanded for factual determination of amount resulting from the occurrence. Court held district court did not err in finding Builders was entitled to attorney fees under K.S.A. 40-908. Statute applies in cases in which judgment is rendered on a policy that insures against loss by fire, tornado, lightning, or hail. Type of policy controls application without regard to actual type of loss incurred.

STATUTES: K.S.A. 16-201 and K.S.A. 60-2101(b); K.S.A. 40-256, -908

KANSAS COURT OF APPEALS

SHEETS V. SIMS
REPUBLIC DISTRICT COURT – AFFIRMED
NO. 94,704 – JULY 28, 2006
Partition

ATTORNEYS: Darrell E. Miller, Miller and Ludwig, Mankato, for appellants. Frank G. Spurney Jr., Spurney & Spurney, Belleville, for appellees.

FACTS: Grandchildren filed partition action to receive value of their one-third interest in jointly owned 480 acres. Court-appointed partition commission inspected the property, concluded partition in kind was not practicable, and determined fair market value of the real estate. Relatives holding the remaining two-third's interest wanted 80-acre irrigable tract be set aside as grandchildren's interest, and to allow cattle operation to continue on remaining acreage. Court declined to modify the commission's report. Relatives appealed.

ISSUE: Partition of joint interests in property.

HELD: Record demonstrates no error in refraining from ordering partition in kind. Court correctly concluded the commissioners properly performed their duties. No abuse of discretion by trial court in not modifying the report.

STATUTES: K.S.A. 60-252(a), -1003, -1003(c)(1)-(3), -1003(d)

SEITZ AND THE ESTATE OF BECK V. THE LAWRENCE BANK
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 95,051 – JULY 21, 2006
Negligence and Trespass

ATTORNEYS: James L. Wisler, Wisler Law Offices, Lawrence, for appellants. Steven F. Coronado and Richard D. Fry, Sherman Taff Bangert Thomas & Coronado P.C., Kansas City, Mo., for appellee.

FACTS: Beck, an 81-year-old man, was found lying in the drive-through area of The Lawrence Bank at one of the busiest intersections in Lawrence. The bank's video surveillance showed Beck walking up to and standing near the top of a retaining wall on the bank's property and then the next image is Beck lying in the drive-through. The retaining wall was 30-38 inches high and Beck was found five to six feet from the wall. Beck was not a customer of the bank. Seitz speculated that Beck was on his way to Hy-Vee to purchase cigarettes. Beck was taken to the hospital for head and hip injuries. After one month in the hospital, he was transferred to a nursing home and he died several days later from pneumonia. Seitz sued the bank on theories of negligence, negligence per se, nuisance, and strict liability. The district court granted summary judgment to the bank concluding that Beck was a trespasser on the bank's property.

ISSUE: Trespasser, licensee, or invitee.

HELD: Court affirmed. Court held that because Seitz did not bring forth evidence, which could establish the purpose of Beck's visit to the property, it failed to create a genuine dispute as to whether Beck was a licensee or an invitee on the bank's property. Seitz needed to present evidence that would show Beck's purpose on the land. Court held the only evidence offered by Seitz as to Beck's purpose on the bank's property was speculative testimony, which would not support a reasonable inference that Beck was an invitee or licensee on the property. Court held that because Seitz failed to bring forth probative evidence, which could establish that Beck was a licensee or an invitee, the only option left is that Beck was a trespasser. Consequently, court held the trial court was correct in deciding that Beck's status on the bank's property was that of a trespasser.

STATUTES: K.S.A. 60-256(e)

CRANDALL V. GRBIC
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 94,846 – JULY 14, 2006
Brokers

ATTORNEYS: Todd E. Shadid and Chasity M. Helm, Klenda, Mitchell, Austerman & Zuercher LLC, Wichita, for appellants. Teresa L. Sittenauer, Fisher, Patterson, Sayler & Smith LLP, Topeka, for appellee.

FACTS: California residents (Crandalls) purchased Kings's home in Wichita through buyer's agent (Grbic). Inspection noted possible problem with patio roof. After purchase, Crandalls discovered leaking patio roof, and sued Grbic for breach of fiduciary duty, fraud, misrepresentation, and violation of Kansas Consumer Protection Act (KCPA). District court granted summary judgment to Grbic, finding Grbic's fiduciary duty was defined by Buyer's Agreement, other documents and K.S.A. 2004 Supp. 58-30,107 of Brokerage Relationships in Real Estate Transactions Act, and that Grbic performed all said duties. Summary judgment also based on Crandalls' failure to attempt mediation prior to filing suit. Crandalls appealed.

ISSUES: (1) Duty and breach; (2) causation, fraud by silence, fraudulent concealment, justifiable reliance, and negligent misrepresentation; (3) KCPA; and (4) mediation.

HELD: District court correctly interpreted Grbic's duties as defined by the documents and statute, and correctly found Grbic properly executed same. Grbic advised Crandalls to get professional inspections, which they did. Under K.S.A. 58-30,107(b), this absolved Grbic of any liability as to matters covered in the inspection. Summary judgment to Grbic on this issue is affirmed. Crandalls' case fails on element of causation as well. No accounting for $26,400 sought in excess of a $900 repair job. Crandalls unable to show that they relied on anything Grbic said or did not say, or that Grbic concealed a material fact. Purchase Contract defeats claims of justifiable reliance on alleged fraudulent concealment of condition of patio roof, or negligent misrepresentation. No KCPA violation. K.S.A. 50-627(b)(1) is construed and applied. No evidence of deceptive conduct, and no support in record for argument that Crandalls were taken advantage of. Under facts, summary judgment correctly granted based on Crandalls' failure to timely seek mediation.

STATUTES: K.S.A. 2004 Supp. 58-30,107 sections (b) and (d)(5) and K.S.A. 50-623, -626, -626(b) subsections (1)-(3), -627, -627(b)(1), 58-3034 *et seq.*, -3050(a)(1)

MCLELLAN V. RAINES
JOHNSON DISTRICT COURT – AFFIRMED
NO. 94,115 – MARCH 31, 2006
PUBLISHED VERSION FILED JULY 11, 2006
Brokers

ATTORNEYS: James D. Griffin and Jason R. Scheiderer, Blackwell Sanders Peper Martin LLP, Kansas City, Mo., for appellant. H. Reed Walker, Law Offices of H. Reed Walker, Mission, and William C. Partin and Matthew K. Partin, Partin & Partin P.C., Kansas City, Mo., for appellees, Donald and Carole Raines. Robert S. Caldwell, Caldwell & Moll L.C., Overland Park, for appellees, Reece & Nichols Realtors, Sue Bockelman, and Mary Fate.

FACTS: After purchasing house from Raines and discovering basement water damage, McLellan sued sellers, real estate agents, and real estate agency under theories of breach of contract, negligent misrepresentation, fraud by omission, and Kansas Consumer Protection Act (KCPA). District court granted summary judgment to all defendants. McLellan appealed.

ISSUES: (1) Breach of contract, (2) fraud by omission and duty to disclose, and (3) KCPA.

HELD: Given clear directive in disclosure statement that buyer was to indicate which representations she was relying on or agree to rely on none of them, her failure to do so waived right to rely on seller's representations in the disclosure statement. Buyer could not prove damages resulting from any alleged breach of contract by sellers because buyer's acknowledgment did not impose any obligation on the sellers. District court correctly found that buyer failed to provide evidence of justifiable reliance on seller's communication, or that buyer's agent and sellers had a duty to disclose. Buyer's agent's duty to disclose under K.S.A. 58-30,107(a)(2)(B) of Brokerage Relationships in Real Estate Transactions Act (BRRETA) was not triggered because buyer's agent had no actual knowledge of water leakage in basement. Buyer's fraud claim against real estate agency and realtors fails because buyer agreed not to rely on their representations. Under facts, K.S.A. 58-30,107(b) of BRRETA clearly prohibits any cause of action by buyer against her real estate agent pertaining to inspection of the purchased residence. As to seller's agent and real estate agency, buyer was not "aggrieved" for purposes of KCPA.

STATUTES: K.S.A. 50-634(a) and (b), 58-30,107(a)(2)(B) and (C), -30,107(b)

IN RE TAX APPEAL OF YELLOW FREIGHT SYSTEM, INC.
JOHNSON DISTRICT COURT – REVERSED
NO. 94,927 – JULY 14, 2006
Taxation

ATTORNEYS: Kathryn D. Myers, assistant county counselor, for appellant. Linda Terrill, Neill, Terrill & Embree L.C., Leawood, for appellees.

FACTS: Yellow Freight System Inc. (YFS) objected to the valuation of its corporate headquarters from 1999 to 2002. Board of Tax Appeals (BOTA) found in favor of Johnson County. In YFS appeal for judicial review, district court found BOTA's decision was not supported by substantial evidence, and reduced YFS' property values. The county appealed, claiming district court erred in (1) finding evidence was insufficient to support BOTA's valuation, (2) holding that the county failed to determine highest and best use of the property, and (3) applying YFS' proffered value for 2000 as value of the property for 2001 and 2002.

ISSUES: (1) Sufficiency of evidence, (2) highest and best use, and (3) property value for 2001 and 2002.

HELD: BOTA's decision supported by substantial evidence. Uniform Standards of Professional Appraisal Practice and the county's computer assisted mass appraisal (CAMA) are discussed. The CAMA appraisal that was produced and introduced by the county fits within definition of written appraisal specified in K.S.A. 79-504(b). District court erred in finding the county presented no evidence on highest and best use of the property. BOTA weighed testimony from the county and YFS witnesses and chose to rely on the county's witnesses. District court erred in adopting YFS' proffered value for 2000 as value for 2001 and 2002. The county's figures for 2001 and 2002 were the only evidence and should have been accepted by district court.

STATUTES: K.S.A. 2005 Supp. 79-503a; K.S.A. 77-601 *et seq.*, -621(a)(1), -621(c) subsections (4), (5), (7) and (8), 79-501 *et seq.*, -504, -504(b)

CITY OF ARKANSAS CITY V. BRUTON
COWLEY DISTRICT COURT – REVERSED
AND REMANDED WITH DIRECTIONS
NO. 94,893 – JULY 7, 2006
Real Property and Easement

ATTORNEYS: Robert D. Wilson, Law Offices of Wilson & Brewer, Arkansas City, for appellants. Alvin D. Herrington and Edward Keeley, McDonald, Tinker, Skaer, Quinn & Herrington P.A., Wichita, and Otis W. Morrow, Arkansas City, for appellee.

FACTS: In 1935, the Brutons' predecessors in interest granted the city certain rights to construct and maintain a dike across their 5.4-acre tract of realty adjacent to the Arkansas River. The instrument of conveyance gave a right of way and easement. In 2000, the city and the U.S. Army Corps of Engineers sought to make improvements to the dike and brought an action against the Brutons, who had purchased the realty in 1994, alleging that the Brutons "hindered and obstructed" the planned improvements and seeking declaratory and injunctive relief together with damages for delay. The Brutons counterclaimed, alleging a trespass and an unlawful taking of their land and seeking declaratory and injunctive relief together with damages. The district court granted summary judgment in favor of the city finding the main purpose of the easement is to protect the city and its inhabitants from flood waters and that is it reasonable to assume that the grantors of the 1935 easement reasonably foresaw that the size and configuration of the levee might change and the scope of the easement would encompass that potential change. District court found the change in the levee making it higher and wider was within the easement's stated purpose.

ISSUES: Did the district court err in concluding that the 1935 easement granted the city the authority to construct the 2000 improvements? Did the district court err in concluding there were no genuine issues of material fact precluding summary judgment?

HELD: Court reversed and remanded with directions. Court held the district court erred in finding the instrument ambiguous, focused exclusively on the stated purpose and ignored the specific express restrictions imposed on the scope and location of the easement, and failed to recognize that a genuine issue of material fact precluded summary judgment. Court stated deviations, changes, alterations, or modifications thereafter in the dike must be examined for consistency with the 1935 plans and specifications and with the expressed purpose that the dike protect the inhabitants of the city from flood damage. Court held summary judgment was improper because whether the improvements of 2000 were within the express scope of the subject easement is a question of fact to be addressed by the court after a trial on the merits.

STATUTES: K.S.A. 2005 Supp. 12-105b(d), K.S.A. 60-256, and K.S.A. 75-6101 *et seq.*

JEREMIAH 29:11, INC. V. SEIFERT
MONTGOMERY DISTRICT COURT – REVERSED AND REMANDED WITH INSTRUCTIONS
NO. 94,224 – JUNE 30, 2006
Real Property and Restrictive Covenants

ATTORNEYS: Daryl Ahlquist, Hines & Ahlquist P.A., Erie, for the appellants. Kenneth G. Gale, Adams & Jones Chtd., Wichita, and Jeffrey A. Chubb, Scovel, Emert, Heasty & Chubb, Independence, for the appellee.

FACTS: The Jordans sold property to the Dallingas in 1978 for $25,000. The warranty deed had a restrictive covenant that no commercial enterprise was allowed on the property. The Jordans signed the warranty deed, but the Dallingas did not. Several transfers of the property occurred. Jeremiah 29:11 purchased the property in question by general warranty deed in 1999. The Seiferts now own the property surrounding the property in question as previously owned by the Jordans. The case started as a boundary line dispute, but then turned into one to enforce the restrictive covenant against Jeremiah's use of the property as a leadership-training center for pastors and leaders of nonprofit corporations and a boy scout camp. Jeremiah claimed the restrictive covenant was void and unenforceable; because, the Dallingas had not signed the warranty deed in 1978. The trial court agreed with Jeremiah and held the 1978 transfer was a mutual or indentured deed requiring both signatures and since the Dallingas did not sign the deed, then they did not accept the restrictive covenants.

ISSUE: Are the restrictive covenants in the 1978 deed enforceable against Jeremiah?

HELD: Court reversed and remanded. Court agreed with the trial court that the 1978 deed between the Jordans and the Dallingas was intended to be an indentured deed, not a deed poll, and correctly conveyed title. The 1978 deed met all the requirements for a valid warranty deed. Court stated that the lack of a signature by the Dallingas did not void the restrictive covenants and that acceptance of the deed is presumed unless proven to the contrary. Court stated there was no evidence that the 1978 deed was not properly filed. Consequently, court stated the Kansas courts charge parties with constructive notice of public records and held that the restrictive covenants were enforceable against Jeremiah. Court found no implication of the statute of frauds. Court remanded for the trial court's consideration of the effect of the "Release of Covenants" signed by the Jordans to release the restrictive covenant after Jeremiah had purchased the property.

STATUTES: K.S.A. 33-106 and K.S.A. 58-2203, -2222

MIDWEST LAND INVESTMENT CO. LLC V. VEACH AND FRANCIS
JOHNSON DISTRICT COURT – AFFIRMED
NO. 94,350 – JUNE 16, 2006
Contract and Participation Agreement

ATTORNEYS: Michael S. Martin, Westwood, for appellants. Jennifer M. Hannah and R. Scott Beeler, Lathrop & Gage L.C., Overland Park, for appellee.

FACTS: Joel and Lynn Shafton were in bankruptcy. The assets included two parcels of real estate in Johnson County. The bankruptcy trustee entered into a real estate contract for the sale of these parcels to Dan Quigley for $155,000. Quigley was a member of Midwest Land Investment Co. LLC. Quigley assigned his interest in the real estate to Veach and Francis (Veach) for $10,000, the amount of earnest money Quigley paid under the contract. Midwest and Veach entered into a participation agreement for development of the real estate. However, the bankruptcy trustee advised that objections to the real estate sale had been filed and Veach was the highest bidder at an auction with a bid of $275,000 and the court confirmed the sale. Veach advised Midwest that the participation agreement was void because they acquired the property not through Quigley, but through the auction. The trial court granted summary judgment in favor of Midwest finding the participation agreement was valid.

ISSUE: Was the participation agreement valid?

HELD: Court affirmed. Court stated that there was sufficient consideration for the agreement as it was entered into as an inducement for Quigley to assign to Veach the real estate sales contract and thus eliminated Quigley as a competing potential buyer of the property. Court also found there was no mutual mistake in the language of the agreement concerning consummation of the sale at $155,000. Court held the participation agreement was valid.

STATUTES: No statutes cited.

OFFICE OF THE ATTORNEY GENERAL
STATE OF KANSAS

OPINION 2006-17

Counties and County Officers – County Commissioners; Powers and Duties – Powers of Board of Commissioners; Road Maintenance Agreements with Quarry Owners or Operators.

Counties and County Officers – General Provisions – Home Rule Powers; Limitations, Restrictions and Prohibitions; Procedure; Impact Fees Charged to Quarry Owners or Operators.

Counties and County Officers – Planning and Zoning in Counties Designated as Urban Areas – Zoning Regulations; Altering Terms of Conditional Use Permits.

AUGUST 3, 2006

SYNOPSIS: K.S.A. 2005 Supp. 19-101a(a)(28), as amended, prohibits counties from using home rule authority to impose any "excise, severance or any other tax in the nature of an excise tax upon the physical severance and production of any mineral or other material from the earth or water." K.S.A. 2005 Supp. 19-101a(a)(28), as amended, does not prohibit charging drivers on public roads an impact fee. Whether a particular charge is actually an excise tax on production of the rock, or whether it is an impact fee for wear and tear of county roads depends on how the assessment is structured and upon whom it is imposed. Any assessment imposed solely on one type of user of county roads calls into question whether it is in reality an impact fee. New agreements or conditional permits may include fees to help defray road maintenance costs, however any attempt to unilaterally revoke, change or limit rights already granted in a conditional use permit, absent a violation of the permit terms by its holder, may give rise to claims against the county.

STATUTES: K.S.A. 2005 Supp. 19-101a, as amended by L. 2006, Ch. 207, § 4 and Ch. 192, § 4; K.S.A. 68-151g; 68-559a; 68-5,100; 68-5,101; K.S.A. 2005 Supp. 79-4217

UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

IN RE GLEN GEORGE HAMBLETON
CASE NO. 04-42174
JUNE 1, 2006
Homestead Exemption and Intent to Reinvest

FACTS: Debtor sold his Lenexa, Kan., home on July 22, 2004, and received $31,112.74 in net proceeds from the sale. Debtor was unemployed at the time of sale and his only source of funds to live on were from the proceeds of the sale. Debtor did not purchase another homestead, but instead moved into a home owned by his then girlfriend, K. Crawford (Crawford). At the time, Debtor sold his house, Crawford never agreed to put Debtor's name on the deed to her home at any point in the future. At one point, Crawford indicated an intent to bequeath one-third of the proceeds of her house to Debtor upon her death, but never formally executed a will. Nine weeks later Debtor filed for bankruptcy under Chapter 13. On Jan. 13, 2005, Debtor converted his Chapter 13 case to a Chapter 7 proceeding, at which point the Chapter 7 Trustee timely objected to Debtor's exemption of the proceeds from the sale of the homestead. When Debtor moved in with Crawford, he intended to use at least part of the proceeds from the sale of his house to make improvements on Crawford's house. He also intended to use a portion of the money to pay one-half of her mortgage payments and one-half of her utilities. Debtor did use a portion of the money to make improvements to the house and to help pay utility bills and mortgage payments. Debtor also used a large portion of the money to pay for items unrelated to the house.

ISSUE: Whether using proceeds from a sale of a homestead to make improvements to a third-party residence falls under the judicially created extension to the Kansas homestead exemption.

HELD: The court denied the Debtor's claimed exemption in its entirety finding that Debtor's intent to reinvest proceeds from the sale of his homestead in Crawford's residence does not fall within the judicially created extension to the Kansas homestead exemption. The court noted the intention to use proceeds in procuring another homestead should be formed at or before the time of sale, and the intention should be to procure another homestead with the proceeds immediately. Accordingly, Debtor's intent to obtain some ownership interest in this real estate by bequest from a live person who could change her will at any time is insufficient.

MULTI-STATE ISSUES

Unauthorized Practice of Law: Nevada recently adopted new rules for out-of-state lawyers who provide legal services to Nevada clients, or perform Nevada transactional legal work. Effective May 1, 2006, Rule 5.5A of the Nevada Rules of Professional Conduct went into effect governing the practice and presence by out-of-state lawyers on matters touching upon Nevada clients and Nevada law. These rules are relatively permissive for transactional lawyers, who have no equivalent of the pro hac vice admission used by litigators. But lawyers doing transactional and extrajudicial work must file an annual report about what they did and pay an annual reporting fee, or the work will be deemed the unauthorized practice of law, which is grounds for attorney discipline and a monetary fine.

Another recent development by the state of Nevada is the concept of Qualified Intermediary (QI) registration. The state of Nevada, Department of Business and Industry Real Estate Division, is the first such State to enact legislation requiring the registration of QIs. *See* NRS 645.606 *et seq.* The state of Nevada has adopted a requirement for annual registration (as opposed to licensing) of QI's. The registration process imposed on QIs by Nevada requires the completion of a registration form, payment of a registration fee, bonding, finger printing, and a requirement that all complaints will be handled through the Nevada court system. ■

About the Author

Calvin J. Karlin, Lawrence, is a member of Barber Emerson L.C. His practice includes estate and trust planning and litigation.

He received his B.A. and J.D. from the University of Kansas, where he was Phi Beta Kappa, Order of the Coif, and Kansas Law Review *note and comment editor.*

He is a member of the American College of Trust and Estate Counsel.

Karlin is a member of the KBA Executive Committee of the Real Estate, Probate, and Trust Law Section and serves as section editor. Karlin can be reached via e-mail at ckarlin@barberemerson.com.

Probate and Trust Cases

KANSAS COURT OF APPEALS

IN RE NORMAN HJERSTED
(Appeal Nos. 93,470, 94,072, and 94,711)
6-2-06

ATTORNEYS: Byron E. Springer, William N. Fleming and Terrence J. Campbell, Lawrence, for executor and trustee, Lawrence Hjersted; and Michael R. Ong and Michelle M. Burge, Leawood, for surviving spouse, Maryam Hjersted.

Three separate appeals, plus cross-appeals, raised a multitude of issues involving the effect of a spousal election and valuation of the augmented estate.

Discounted Value for Missouri Real Estate. The executor's appraiser did not consider the effect of a long-term lease (to an entity personally controlled by the executor in his individual capacity). The district court was held to have properly rejected the executor's appraisal, but was held to have erred in accepting the widow's suggestion that the real estate should be valued by capitalizing the income at the IRC Section 7520 rate (6 percent at the time). The Court of Appeals, thus, concluded that neither party provided substantial competent evidence of the Missouri realty's value and remanded to determine the value with due regard given to the lease terms. Factors to be considered in determining an appropriate capitalization rate under the income approach include "the nature of the property, the positive and negative physical attributes of the property, the term of any lease, the market rate for rent for similar properties, and any risk factors that could affect receipt of payments under existing leases."

Nebraska Life Estate Valuation. Nebraska real estate was sold before Norman's death under threat of condemnation. Norman had the life estate and Lawrence the remainder interest. The proceeds were deposited into Lawrence's bank account. Lawrence contributed the proceeds toward the purchase of a Florida orange grove as a like-kind investment. Norman wrote to Lawrence that he would like some of the profits, but not to exceed 5 percent per year of the funds received from the condemnation. The district court was upheld in rejecting Norman's handwritten memo as an enforceable agreement (especially since no payments were ever made to Norman). The value of the life estate was determined from actuarial tables using Norman's age at the time of the transfer (and an appropriate interest rate) to be $137,393.55. This value was used in determining the augmented estate, rather than the $23,478 of unpaid profits as argued by the executor.

Family Limited Partnership. The decedent transferred all shares of his company, Midland Resources, Inc. (MRI) to the Hjersted Family Limited Partnership (HFLP) in 1997 when the decedent owned a 2 percent general partnership interest and a 96 percent limited partnership interest and his son, Lawrence, owned a 1 percent general partnership interest and a 1 percent limited partnership interest. Before death, decedent transferred his 96 percent limited partnership interest to Lawrence by a part sale/part gift transaction. The court held that the value of the 96 percent limited partnership interest could not be discounted for lack of control and lack of marketability for the purpose of calculating the augmented estate.

$10,000 Reduction of Nonprobate Transfer. The district court was affirmed in reducing the value of the HFLP transfer by $10,000 pursuant to the K.S.A. 59-6a205(c)(3) indication that transfers to a donee within two years of death are only included to the extent they exceed $10,000.

Gift Tax Deducted from Probate Estate Value. Based upon district court orders, the IRS assessed a $509,818 gift tax on the HFLP transaction. The executor argued that this was deductible from the probate estate like a claim. The widow argued that the gift tax was a transfer tax akin to an estate tax that should not reduce the augmented estate or her elected marital share. The court held that the gift tax assessment is against the donor (and therefore the donor's estate) and like any other demand reduces the augmented estate.

Spouse Election Bars Transfers to Spouse or Her Son. Decedent's trust stated that if his wife elected against the will or trust under K.S.A. 59-403, she and her son, Timothy (who is decedent's only child by Maryam), would take nothing else. Maryam argued that her spousal election did not constitute an election under K.S.A. 59-403 (the family allowance provision). The district court found the K.S.A. 59-403 reference to be ambiguous and thus considered extrinsic evidence regarding Norman's intentions. Norman's attorney testified that the family allowance was never discussed and that Norman intended to refer to the spousal election statutes (K.S.A. 59-6a201 *et seq.*). The court adopted this interpretation and noted that K.S.A. 59-403 is an "allowance" (subject to court discretion), not an "election," nor does it involve solely "marital rights," since it also benefits minor children. The court also rejected Maryam's estoppel claim on the basis that she did not reasonably rely on the trust provision since she was immediately notified of the trustee's position as to the scrivener's error and she, nevertheless, pursued the elective share instead of dismissing her petition before an order was issued.

Executor and Attorney Fees. Although the executor did not keep time records, he was allowed $100,000. The district court found the requested fee (which amounted to about $33,000 per year) was "justified not by any percentage, not by any hourly rate, but just by the overall complexity, time spent, and responsibility level." The Court of Appeals noted that in contrast the "attorney fee" request was supported by a 57-page detailed billing, reflecting date of service, timekeeper hours spent, and detailed description of services provided." The district court denied Maryam's request to reduce the fee and allowed attorney fees of $233,602, costs of $18,935, and expenses of $31,792. The court held that it could not conclude that the fees were unreasonable and that the district court, therefore, did not abuse its discretion in allowing the fees. The court also rejected the widow's argument that the fees should be prorated based upon the amount and source of assets included in the augmented estate taking into account that some of the efforts were more beneficial to Lawrence or the trust than to the estate. The court found this argument "troubling" because of its apparent "disregard [of] the inherent overlap in duties imposed upon Lawrence." The court found there was no support in the record for casting a "negative shadow over Lawrence's decision, as executor, to defend the estate against her spousal election claim …"

ORVEY R. COUSATTE, ADMINISTRATOR OF IMOGENE COLLIER ESTATE V. VIOLA LUCAS
(Appeal No. 94150)
6-9-06

ATTORNEYS: Richard V. Foote, Wichita, for appellant, Cousatte; and Russell W. Davisson, Wichita, for appellee, Lucas.

After Imogene Collier's husband and sister died, her neighbor, Viola Lucas, helped to care for her. Collier made Lucas the beneficiary of her estate. Imogene's half-brother, Orvey, sought to have Collier's will and trust set aside. Orvey lost in the district court and appealed, but did not seek a supersedeas bond or a stay pending appeal. While the appeal was pending, Lucas sold Collier's home and, with the proceeds of her own home, purchased a new residence. Lucas filed bankruptcy and exempted the new residence. The bankruptcy court rejected Orvey's objection to Lucas' discharge, but suggested that he might have an *in rem* action against the exempt residence (over which the bankruptcy court had no jurisdiction). Orvey brought such an action, but was thwarted by the fact that Lucas had transferred the assets pursuant to the initial district court determination that there was no undue influence (although on remand there was a finding of presumed undue influence from suspicious circumstances). The Court of Appeals agreed with the district court that Orvey had failed to establish either actual or constructive fraud, which is a prerequisite to imposing a constructive trust. The mere fact that the proceeds could be traced from Collier's home to Lucas' new home, and that there were "suspicious circumstances" in the execution of Collier's will and trust, did not prove fraud.

The court also addressed the statute of limitations for fraud actions, although it was not addressed by the district court nor asserted on appeal in briefs or at argument.

IN RE TRACY
Kansas Court of Appeals
(Appeal No. 94,593)
8-18-06

ATTORNEYS: Martin J. Peck, Hyndman & Peck LLP, Wellington, for executor; and Troy Dierking, Caldwell, guardian ad litem for unknown heirs

Tracy died Aug. 21, 2003. Administration was sought and co-administrators appointed. Tracy's will was discovered among the deceased scrivener's old canceled checks and bank statements a few days after the six-month deadline to file a will. Neither the executor or primary beneficiary (a church) under the will had received notice of administration, as they were not heirs. The executor sought probate of the will pursuant to K.S.A. 59-618, indicating that she had access to the will for less than the 90-day period referenced in that statute. The coadministrators also petitioned for late admission of the will to probate.

The guardian ad litem filed a general denial. The district court held that the will was filed too late pursuant to the six-month deadline of K.S.A. 59-617. The district court found that 59-618 did not apply because that statute refers to the person having possession knowingly withholding the will and that did not occur.

According to the Court of Appeals, the public policy of admitting wills trumps the district court's technical reading of the statute. The court went to great lengths to describe how a late filed probate claim deprives the court of jurisdiction as to that claim, but concludes that admitting the will out of time in this case is different. The court stated, "We find that the language of K.S.A. 59-617 does not absolutely prohibit an action to probate a will beyond the 6 month time limit. Under the facts of this case, it establishes a time limitation in which a will may be filed for probate, but it does not deprive a court of jurisdiction."

The court recognized that the probate code does not specifically incorporate any part of the civil procedure code, but refers to several cases where interpretive guidance came from the civil procedure code. It then stated that the code of civil procedure precludes a court from raising statute of limitations on its own. The court indicated that the statute of limitations is an affirmative defense that must be raised by motion, since it is not a jurisdictional issue. It held that the guardian ad litem's general denial did not specifically provide notice of the defense; and the district court could not therefore raise the six-month bar of K.S.A. 59-617 *sua sponte*. Even had this been raised by the guardian ad litem, however, it does not appear that it would have changed the court's interpretation of K.S.A. 59-618 as overriding K.S.A. 59-617 under the facts of this case. ■

CLE Docket 2006

NOVEMBER

			1	2	**3**	4
5	6	**7**	**8**	9	10	11
12	13	14	**15**	**16**	**17**	**18**
19	20	21	22	23	24	25
26	27	28	29	30		

DECEMBER

					1	2
3	4	5	6	7	**8**	9
10	11	**12**	**13**	14	15	16
17	18	**19**	**20**	21	22	23
24	25	26	27	28	29	30
31						

KANSAS BAR ASSOCIATION

KBA Continuing Legal Education: Your partner in practice!

For more information, or to register online, visit:

www.ksbar.org

or call (785) 234-5696

These Kansas Bar Association CLE seminars have been submitted for accreditation to the Kansas CLE Commission. Potential walk-in participants should call the KBA office at (785) 234-5696 prior to the seminar to check for possible schedule changes.

NOVEMBER

3 **Orientation to Kansas Practice**
DoubleTree
Overland Park

7 **A Crash Course Part 1**
Telephone CLE

8 **A Crash Course Part 2**
Telephone CLE

15 **The ADA & The Law I**
Telephone CLE

16 **The ADA & The Law II**
Telephone CLE

17 **Alternative Dispute Resolution**
Holiday Inn West
Topeka

Featured Seminar

18 **The Tailgater – Kickin' It with the KBA**
KU Law School & Memorial Stadium
Lawrence

DECEMBER

Featured Seminar

8 **Plaza Lights Institute**
Country Club Plaza Marriott
Kansas City, Mo.

12 **Juvenile Offender Code**
Donald W. Hymer Jr.
Telephone CLE

13 **Child in Need of Care**
Donald W. Hymer Jr.
Telephone CLE

19 **Building an Appeal from the Ground Up**
Hon. G. Joseph Pierron Jr.
Telephone CLE

20 **Trial Preparation & Tactics**
Hon. Linda S. Trigg
Telephone CLE

For updates on CLE credit approval, check our Web site at http://www.ksbar.org/public/cle.shtml.