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# The Probate Process
## From Start to Finish

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# Probate Disputes and Litigation

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## IX. PROBATE DISPUTES AND LITIGATION

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## IX. PROBATE DISPUTES AND LITIGATION

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Probate litigation is a growing niche of probate and estate planning practice, and involves a mix of probate law and civil litigation.[2] As trillions of dollars pass from the Greatest Generation to Baby Boomers to millennials, fertile litigation fields may be sown.[3]

Liability arises where an interested party has a duty to act and commits an error, or omits an action she should have done. Liability can attach to a beneficiary or to a fiduciary.

### A. Beneficiary Liability

A beneficiary "receive[s] something" from a "legal arrangement or instrument," or someone "to whom another" owes a fiduciary duty.[4] A beneficiary can be liable for attorney's fees or withholding a will from probate.

*Attorney's Fees*

Attorney fees must be authorized by statute. A fiduciary is allowed "just and reasonable" attorney's fees.[5] Kansas allows "just and proper" attorney's fees to a Will's proponent so long as the "proceedings" are "in good faith and with just cause," whether the Will's proponent is "successful or not," but are only allowed for a will contestant who "successfully opposes" the Will's admission to probate.[6] And an "heir at law or beneficiary" who "in good faith and for good cause" "successfully prosecutes" an action "for the benefit of the ultimate recipients of the estate" is allowed "necessary expenses" in the Court's "discretion," including "reasonable" attorney's fees.[7] The court can tax costs to heirs as deemed "just and equitable."[8] Missouri law allows a fiduciary's attorney's fees to be paid from the estate.[9]

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[2] Probate sources: Kansas probate law: K.S.A. §§59-101 et seq., Andres, *Probate & Trust Administration* (2008) ("Kansas Probate"), and Bartlett, *Kansas Probate Law and Practice* (1953) ("Bartlett"). Bartlett, §362 et seq.; Taylor, *The Iola Register* (1939) (newspapers.com/newspage/4817341/). Missouri probate law: V.A.M.S. §§472.005 et seq., and Missouri Practice Series, Vols. 3-5D. See prior NBI CLEs: Nations, "Litigation and Probate"(2005); Nystrom, "Litigation and Probate" (2009) and "Litigating the Case in Probate Court"(2008); Crandall, "Litigating the Case in Probate Court (2014); and Burge, "Litigation in Probate Court" (2007). Murphy, "Anatomy of a Will Contest" (2010) (MoBar CLE). Ross & Reed, *Will Contests* (2015) ("Will Contests"); Garner, *Black's Law Dictionary* (2014) ("Black's Law Dictionary"); Price & Donaldson, *Price on Contemporary Estate Planning* (2016) ("Estate Planning"); McGovern et al., *Wills, Trusts & Estates* (2004) ("Wills"); Broun et al., *McCormick on Evidence* (2006) ("McCormick").

[3] Badkar, "Greatest Transfer Of Wealth In The History Of The World, *Business Insider*, 12 June 2014.

[4] Black's Law Dictionary, 186.

[5] K.S.A. §59-1717; Bartlett, §1000.

[6] K.S.A. §59-1504; Will Contests, §16:5.

[7] K.S.A. §59-1504; Bartlett, §877.

[8] K.S.A. §59-2214.

[9] V.A.M.S. §473.153.

*Withholding a Will from Probate*

Timing is everything, and the timely probate of a decedent's Will is vital. Ten years ago in *Tracy*, a beneficiary's liability for late submission of a Will was at stake, but the court allowed an innocent beneficiary to probate a Will after the 6 month probate deadline had passed, due to another party's "knowing withholding" of the will from probate.[10] A Missouri case involved tolling the probate deadline for a military member.[11] Thus possession or knowledge of a decedent's Will imposes affirmative duties to offer the Will for probate, and suppressing a will sounds in tort if someone keeps a Will from probate.[12]

**B. Fiduciary Liability**

Fiduciary liability is a growing litigation trend. A fiduciary is someone who "act[s] for another person" within various areas in the other person's best interest, and "owes" duties of "good faith, loyalty, due care, and disclosure."[13] Fiduciary relationships include a personal representative, executor, administrator, guardian, conservator, or a trustee.[14] Giving bond is a pledge of the fiduciary's call to duty, but wills often waive bond.[15]

Fiduciary liability is triggered by violating a fiduciary duty. A fiduciary "is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is … the standard of behavior… the level of conduct for fiduciaries [is] …. kept at a level higher than that trodden by the crowd."[16] A fiduciary relationship involves "trust and vulnerability."[17] Fiduciary relationships have "discretionary authority and dependency: A person depends on … the fiduciary to serve his interests … Because the fiduciary [holds] … property to serve the … fiduciary relationship, he [is] duty-bound not to appropriate the property for his own use."[18]

The trust law lists out fiduciary duties to be performed with "reasonable care, skill, and caution" that also apply in probate: (1) good faith administration, (2) loyalty "solely" to the beneficiaries' interests, (3) impartiality, (4) prudent administration, and (5) to "reasonably inform" and report.[19] A fiduciary must take "reasonable steps" to "control" and "protect" property - collecting property from a prior fiduciary and reasonably "enforcing" and "defending" claims.[20]

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[10] K.S.A. §59-618; *Estate of Tracy*, 36 Kan. App. 2d 401 (2006).
[11] V.A.M.S. §473.050; *Estate of Perry*, 168 S.W.3d 577 (Mo. Ct. App. W.D. 2005).
[12] K.S.A. §§59-618; 59-621; *Estate of Tracy,* 36 Kan. App. 2d 401 (2006); *Estate of Croom v. Bailey*, 107 S.W.3d 457 (Mo. Ct. App. S.D. 2003); Will Contests, §8:27.
[13] K.S.A. §59-102(3); Black's Law Dictionary, 743.
[14] K.S.A. §§59-102(2), (3), -701, -705, -3051(d), -3051(e), 58a-103(19); V.A.M.S. §§472.010(13), (26), 473.110.1.1, .3.
[15] K.S.A. §§58a-702; 59-1101 ("Every fiduciary … shall execute and file a bond"); V.A.M.S. §473.157.1 ("every personal representative … shall execute and file a bond").
[16] *Meinhard v. Salmon*, 249 N.Y. 458 (N.Y. 1928) (Cardozo, J.).
[17] Bainbridge, "The Parable of the Talents," p.7, 31 May 2016 (http://ssrn.com/abstract=2787452).
[18] *Id.*, quoting *U.S. v. Chestman*, 947 F.2d 551 (2nd Cir. 1991).
[19] K.S.A. §§58a-801, -802, -803, -804, -813; V.A.M.S. §§456.8-801, -802, -803, -804, -809, -811, -812, -813; *Chestnut's Estate*, 4 Kan.App.2d 694 (1980).
[20] K.S.A. §§58a-809, -811, -812.

*Taxes*
A fiduciary may have a duty to file the decedent or estate's tax returns. Form 56 alerts the IRS to a fiduciary's status.

Along with fiduciary duties, the law recognizes higher standards for fiduciaries with greater expertise and experience. Punitive damages (twice the amount taken) apply if a fiduciary embezzles money or converts property for his own use.[21] Probate courts have jurisdiction over claims and cases against fiduciaries.[22] Venue is proper where the fiduciary lives or was appointed.[23] If the executor has a claim against the estate, her claim is included in the probate claims process.[24] A fiduciary is liable if she violates the fiduciary relationship, neglects to offer a decedent's Will for probate or suppresses legal documents, or loses or misplaces legal documents. And a beneficiary named as executor of the will "has the right to procure the probate of the will."[25]

After exploring beneficiary and fiduciary liability, we now arrive at testamentary intent, the locus of probate litigation.

### C. Interpreting Testamentary Intent - Burdens of Proof, Presumptions, Evidence Rules

**Testamentary Intent**
Testamentary intent is the "heart of the will."[26] Kansas and Missouri enshrine testamentary intent in their will execution requirements. An adult of sound mind makes a will, witnessed by two people, disposing of the testator's bounty as the testator so declares.[27] Testamentary intent is a person's desire that "a particular instrument" be her Last Will and Testament and makes her Will "valid."[28]

Probate law honors "freedom of disposition."[29] Testamentary intent looks to the Will's face for intrinsic evidence, then its lens pans out to related extrinsic evidence of the testator's circumstances and interactions with other parties.[30] A will is the "historic keystone of the arch" of a client's estate plan, and "every person needs" a will.[31]

Probate is the crucible where a Will is proven.[32] Probate is required for a Will to be

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[21] K.S.A. §59-1704; *Bolton v. Souter*, 19 Kan.App.2d 384 (1993); *Bartlett*, §973; V.A.M.S. §473.340.3 ("damages sustained"); *Estate of Williams v. Williams*, 12 S.W.3d 302, 307 (Mo. banc 2000).
[22] K.S.A. §59-1703; *Quinlan v. Leech*, 5 Kan. App. 2d 706 (1981); V.A.M.S. §472.020.
[23] K.S.A. §§59-2203, -2207.
[24] K.S.A. §59-1205.
[25] Bartlett, §878.
[26] Guzman, "Intents and Purposes," 60 Kan. L. Rev. 306 (2011).
[27] K.S.A. §§59-401, -601.
[28] Black's Law Dictionary, 931, 1703; Garner, *Dictionary of Legal Usage* (2011), 885.
[29] Sitkoff, "Trusts & Estates: Implementing Freedom of Disposition," 58 SLU L. J. 643 (2014).
[30] Black's Law Dictionary, 675-676; Wills, §4.2, Ch. 6.
[31] Estate Planning, §4.1; *Will Contests*, § 5:2.
[32] Wills, §12.1. Probate is Latin for "proof." Black's Law Dictionary, 1395-1396; Bartlett, §25.

effective.[33] Indeed, "[w]ithout probate, no determination of testamentary capacity, freedom from undue influence, or due execution" has occurred.[34]

*Will Execution*

Wills must be duly executed: An adult testator with capacity freely signs in the presence of witnesses and a notary public.[35] Most will executions have four parts - (1) the testator's signature, (2) witnesses' signatures, (3) notarization, and (4) a self proving affidavit – which we explore in turn. A will must be executed by (1) an adult (2) of sound mind (3) with testamentary capacity (4) who knows the objects of their bounty and (5) communicates in writing who is to receive the objects of their bounty upon death and (6) signs the document (7) in the witnesses' and notary's physical presence.[36] A will should (1) identify the testator and her family, (2) dispose of the testator's property, (3) appoint fiduciaries including guardians and executors, (4) specify the fiduciary's powers and duties including paying debts and taxes, and (5) be executed by the testator, witnesses and/or notary.[37]

*Witnesses*

A valid Kansas or Missouri will requires two or more adult witnesses.[38] Any competent adult may witness a Will. Missouri's witness rules discuss interested witnesses.[39] An interested witness is limited to an intestate share.[40] A devisee's friends may witness a will.[41] Witness timing has changed through history: At common law, the witnesses had to "all see the testator sign" or "acknowledge the signing" even at "different times."[42] The Wills Act (1837) tightened the timing to physical presence of the testator and witnesses "at the same time."[43] Often the "most common ground for voiding a will," is its "improper execution," but a Kansas case allowed a quirky execution: the testator did not sign the will in the witnesses' presence, but the witnesses watched through a glass window, so the will was duly executed.[44] In Kansas, witnesses must sign the Will, not just initial pages.[45]

The best practice is for the attorney to ask the testator questions before the witnesses and notary to prove clear testamentary intent.[46] But the attorney need not read the Will aloud to the testator, only meet with the testator alone to review the Will's provisions, and ensure the testator is satisfied with the Will and competent to sign.[47]

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[33] K.S.A. §§59-616, -617; V.A.M.S. §473.065.1.
[34] *Guardianship & Conservatorship of Slemp*, 11 Kan. App. 2d 156 (1986); Wills, §12.1.
[35] Will Contests, §5:1.
[36] K.S.A. §§59-601, -606; V.A.M.S. §474.320; Will Contests §5:2.
[37] Estate Planning, §4.8.
[38] K.S.A. §§59-604, 60-417; V.A.M.S. §§473.053, 474.320; Wills, §4.3; Will Contests, §5:4.
[39] V.A.M.S. §474.330. A creditor or executor is only interested if the Will gives her an interest. *Id*.
[40] K.S.A. §59-604; V.A.M.S. §474.330.2.
[41] *Estate of Farr*, 274 Kan. 51 (2002).
[42] 2 Blackstone, *Commentaries* 377; Wills, §4.3.
[43] Wills Act, 1 Vict. c. 26, §9 (1837); Wills, §4.3.
[44] *Weber's Estate*, 192 Kan. 258 (1963); Will Contests §5:1.
[45] *Estate of Leavey*, 41 Kan. App. 2d 423 (2009); Will Contests §5:4.
[46] Wills, §4.3.
[47] *Id*.

*Notary*
A notary public helps make a will valid, but a notarize cannot notarize her own signature as a witness.[48] Physical presence is required to notarize a document.[49] A Missouri notary must keep an official notary journal, while Kansas recommends the practice.[50] An invalid notarization voids a will and exposes the notary to liability.[51] A Missouri notary must change seals every 4 years, which makes a notarization a probate litigation route.[52]

*Signature*
Kansas and Missouri make the testator sign his Will, tracing back to English law.[53] Wills may be signed by the testator's proxy, or "authorize" her " assisted signature" and "ratif[y] it."[54] Kansas allows the testator to acknowledge her signature to witnesses in lieu of signing in the witnesses' presence, but using letterhead or electronic signatures fails.[55]

Where does the testator sign her Will? The Statute of Frauds was silent, Blackstone said at the beginning, and the Wills Act said at the end.[56] A Kansas Will is "subscribed" or signed at the end, below the Will's substantive provisions.[57] A testator only has to sign a Will once, but the best practice is to have the testator also initial each page of the Will to ensure no pages are switched out.[58] Signing below the attestation clause, though technically outside the Will's text, works.[59] Thus an "authentic and volitional" Will "is entitled to probate."[60]

*Self Proving Will*
A self proved Will allows the Will's admission to probate without the witnesses' testimony.[61] But if a will contest hinges on a self proving affidavit, the affidavit is disregarded.[62] If the self proving affidavit is disregarded or was not included in the will, the attesting witnesses must testify to the will in they are "alive and competent to testify and otherwise available."[63] The self proving affidavit statute makes probating a Will more convenient since the witnesses need not testify. A self proving will is prima facie

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[48] K.S.A. §59-606.
[49] K.S.A. §53-503.
[50] KS Notary Handbook, p. 16; V.A.M.S. §486.260.
[51] K.S.A. §§53-106, -109, -113, -119; V.A.M.S. §§486.355, -.365, -.370, -.385.
[52] V.A.M.S. §§486.215, -.230, -.280, -.285.
[53] K.S.A. §59-606; V.A.M.S. §473.060; Wills, §4.2.
[54] K.S.A. §59-606; V.A.M.S. §474.320; *Ahnert v. Ahnert*, 98 Kan. 768 (1916); Will Contests, § 5:3
[55] K.S.A. §59-606; Will Contests, §5:3; *Reed's Estate*, 229 Kan. 431 (1981); Wills, §4.2.
[56] 2 Blackstone, *Commentaries* 376; 1 Vict. c. 26, §9 (1837); Wills, §4.2.
[57] K.S.A. §59-606; *Matter of Reed's Estate*, 236 Kan. 531 (Kan. 1981); *Estate of Leavey* (2009).
[58] Restatement (Second) of Property (Donative Transfers) §33.1, comm. c (1990); Wills, §4.2.
[59] *Estate of Milward*, 31 Kan.App.2d 786 (Kan. App. 2003); Wills, §4.2.
[60] Sitkoff, "Trusts & Estates: Implementing Freedom of Disposition," 58 SLU L. J. 643, 650 (2014).
[61] K.S.A. §59-606; Kansas Probate, §3.3.6; V.A.M.S. §474.337; *Stroup v. Leipard*, 981 S.W.2d 600 (Mo.App. 1998); *Milum v. Marsh ex. rel. Lacey*, 53 S.W.3d 234 (Mo.App. 2001); 3 *Mo. Practice*, §3.93.
[62] *Id.*; *Estate of Farr*, 274 Kan 51, 59-60 (2002); *Milum*, at 236.
[63] V.A.M.S. §473.053; 5 *Mo. Practice*, §3.94.

evidence of due execution and testamentary capacity.[64] In Kansas and Missouri, all self proving wills must be acknowledged before a notary public.[65]

**Burden of Proof, Presumptions, and Evidence Rules**

*Burden of Proof*

A Will's proponent bears the burden of proof to show the Will's due execution and so admit the will to probate.[66] The Will's proponent must prove testamentary capacity by presumption (via a self proving will) or prove the Will's due execution *prima facie*. In a will contest, the burden of proof rests on the will's proponent to prove capacity and due execution – its signing and witnesses before a notary public. The contestant must offer substantial evidence to prove the will's invalidity by taint of undue influence, fraud, mistake, improper execution, lack of capacity, forgery, duress, revocation, insane delusion, or another disqualifying ground.[67]

Kansas and Missouri expound the burden of proof: Once the will proponent makes her *prima facie* proof, the burden shifts to the contestant.[68] A Kansas will contestant must prove undue influence by "clear, satisfactory, and convincing evidence."[69] Where a fiduciary or confidential relationship exists, showing "suspicious circumstances" shifts the burden to the Will's proponent to show the Will's valid execution.[70]

*Presumptions*

The law presumes a testator's sanity and testamentary capacity.[71]This presumption undergirds the law's favor for probating a decedent's will and honoring the decedent's expressed testamentary intent. In Kansas, a duly executed will shifts the burden to the contestant to show incapacity.[72] A valid self proving will meets the proponent's capacity burden of proof.[73]

In a Missouri will contest, the proponent offers a *prima facie* case of due execution and testamentary capacity. After the proponent's *prima face* case, the burden shifts and the contestant must show substantial evidence for a jury trial on due execution or testamentary capacity.[74] A Missouri gift or asset transfer to a fiduciary is presumed by

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[64] *Milum v. Marsh*, 53 S.W.3d 234 (Mo.App.S.D. 2001).
[65] K.S.A. §59-606; V.A.M.S. §474.337; Will Contests, §5:3.
[66] K.S.A. §§60-413 et seq.
[67] Will Contests, §§8:9-8:15.
[68] *Estate of Oliver*, 23 Kan. App. 2d 510 (1997); *Estate of Farr*, 274 Kan. 51 (2002). V.A.M.S. 474.337; *Stemmler v. Crutcher*, 677 S.W.2d 916 (Mo. Ct. App. E.D. 1984); *Rhoades v. Chambers*, 759 S.W.2d 398 (Mo. Ct. App. S.D. 1988); *Milum v. Marsh ex rel. Lacey*, 53 S.W.3d 234 (Mo. Ct. App. S.D. 2001); McCormick, §342.
[69] *Estate of Perkins*, 210 Kan. 619, 624 (1972); Kansas Probate, §3.3.6.
[70] *Estate of Bennett*, 19 Kan.App.2d 154 (1993).
[71] *Lewis v. McCullough*, 413 S.W.2d 499 (Mo. 1967); *Allee v. Ruby Scott Sigears Estate*, 182 S.W.3d 772 (Mo.Ct.App.W.D. 2006); Will Contests, §6:13.
[72] *Matter of Barnes' Estate*, 218 Kan. 275 (1975); Will Contests, §6:13.
[73] *Milum v. Marsh ex rel. Lacey*, 53 S.W.3d 234 (Mo. Ct. App. S.D. 2001); Will Contests, §6:13.
[74] *Lewis v. McCullough*, 413 S.W.2d 499 (Mo. 1967); *Hugenel v. Estate of Keller*, 867 S.W.2d 298 (Mo. Ct.App.S.D. 1993); Will Contests, §6:14. *Morrow v. Board of Trustees of Park College*, 353 Mo. 21

undue influence if the beneficiary was actively causing or assisting the will execution, putting the burden on the beneficiary to show the gift was fair and equitable.[75]

*Evidence in Probate Litigation*
Probate courts apply evidence and civil procedure rules, viewed through the probate procedure lens: the rules of evidence apply to all will contests.[76] Relevant evidence is admissible and has a "tendency" to "prove any material fact."[77] Evidence of the testator's acts and conduct is relevant and admissible.[78] If undue influence lurks, evidence of an influencer or third party's acts and conduct is admissible.[79]

Evidence law and the burden of proof drive probate litigation forward: Proof comes of evidentiary "conviction or persuasion."[80] The burden of proof is two fold: one, giving evidence of a fact in issue, and two, "persuading" the judge or jury the evidence is true.[81] If a party fails the first step, the judge may decide the case without the jury.[82] Persuasion comes if both parties have met their burdens and all relevant evidence has been heard.[83]

Probating a Will is authenticating a written will using the best evidence rule.[84] Since the original Will must be probated, the best practice is for a testator to execute one Will, and make copies; if multiple originals exist, each original has to be probated. If the Will proponent fails the burden of proof, the court will refuse "the purported signature" on the will, "as [in]sufficient proof of authenticity" exists to admit the Will to probate.[85]

Probate law is not often adversarial, but a will contest is an "adversarial proceeding."[86] Usually the party who is pleading a fact bears the burden of proving the evidence, and persuading the judge or jury.[87] Having explored testamentary intent, let's move to the question or revoked, multiple, and contested wills.

### D. Revoked, Multiple, Contested Wills

In the realm of revoked, multiple, and contested wills, we want to win for our client in the will contest trenches *and* avoid the no man's land of intestacy.

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(1944); *George v. Moulder*, 257 S.W.2d 380, 382–83 (Mo. Ct. App. 1953); *Allee v. Ruby Scott Sigears Estate*, 182 S.W.3d 772 (Mo. Ct. App. W.D. 2006); Will Contests, §6:14
[75] *Patterson's Estate*, 383 S.W.2d 735 (Mo. 1964); *Simmons v. Inman*, 471 S.W.2d 203 (Mo. 1971); *Allee v. Ruby Scott Sigears Estate*, 182 S.W.3d 772 (Mo. Ct. App. W.D. 2006); Will Contests, §7:10.
[76] K.S.A. §59-2212, -2201 et seq; Will Contests, Ch. 15, §15:26.
[77] K.S.A. §60-401(b). Hearsay exceptions apply in probate litigation. Will Contests, §§15:6-15:25.
[78] *Will Contests*, §15:3.
[79] *Will Contests*, §§15:4-15:5.
[80] Will Contests, Ch. 14; McCormick, §336
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84]Will Contests, §§15:22-15:23.
[85] McCormick, §221.
[86] Black's Law Dictionary, 236-237; Will Contests, §3:1.
[87] McCormick, §337. The civil proof is "by a preponderance of the evidence." *Id.,* §339.

**Revoked Wills**

A client must revoke their will correctly.[88] A Will can be revoked by: (1) physical destruction, (2) marriage and a child's birth, (3) adoption, or (4) divorce.[89] A Will can be physically destroyed and revoked by (1) burning, (2) tearing, (3) cancelling, (4) obliterating, or (5) destroying the Will with intent and for the purpose of revoking the Will.[90] Revocation requires destructive action *and* intent.[91] Once revoked, a Will can be revived if the client so chooses.[92] A Will can be revived by republication: If a testator makes a second will and later revokes it, revocation does not "revive [his] first will," unless he "republish[es]" the first will "in the presence of two or more competent witnesses who "subscribe the same" in his presence.[93]

*Lost Wills*

What if the decedent executed a valid Will, but the Will is unavailable? Maybe the decedent lost the original, but copies exist, or a fire or *force majeure* or other disaster destroyed the original, but copies still exist in other locations. Hope lingers for a lost Will: A lost Will can be probated if its provisions are proven clearly and distinctly.[94] The party must prove the will's terms, it cannot be located, was properly executed, and was not revoked. If the decedent had the Will, it is presumed destroyed and intentionally revoked. All interested parties must be given notice. Heirs named under a prior Will are interested parties. But if an heir has not been given notice, the statute of limitations bar lifts. Missouri presumes a lost will was physically revoked and places the burden on the will proponent to show the will was not intentionally destroyed.[95]

**Multiple Wills**

When someone has executed multiple wills, the last in time controls.[96] When two or more Missouri wills are in play, the judge or jury can determine which will controls.[97] Suppose a Will is admitted to probate, but within the probate deadline (6 months in Kansas; 1 year in Missouri), another Will claiming to be later in time surfaces and is offered to the Court. A later Will could overrule the prior Will.[98]

Multiple wills exist if a decedent frequently changed their mind about who was to inherit their estate, or wanted to clearly demonstrate their intent over time (and avoid potential

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[88] Sitkoff, "Trusts & Estates," 58 SLU L. J. 643, 648 (2014); Wills, Ch. 5; Will Contests §§5:1, 5:15

[89] K.S.A. §§59-610, 59-611. Wills, §5.4. V.A.M.S. 474.400; §474.420; *Crist v. Nesbit,* 352 S.W.2d 53 (Mo. Ct. App. 1961); Will Contests, §5:17.

[90] K.S.A. §59-611; Will Contests, §5:16.

[91] Wills, §5.2.

[92] *Id.*, §5.3.

[93] K.S.A. §59-612.

[94] K.S.A. §59-2228; V.A.M.S. §§472.140.2, 473.071, -.1(5); *Estate of Kasper*, 20 Kan. App.2d 308 (1994); *Estate of Guest*, 182 Kan. 760, 324 P.2d 184 (1958); 3 Mo. Practice, §3.98.

[95] *Board of Trustees of Methodist Church of Nevada v. Welpton*, 284 S.W.2d 580 (Mo. 1955); *McClellan v.* Owens, 335 Mo. 884 (Mo. 1934); cf. MO Rule 54.17; Will Contests §§5:6, 5:19.

[96] Wills, §5.1.

[97] V.A.M.S. §473.083.7; 5 Mo. Practice, §288.

[98] K.S.A. §§59-707, -2225, -2226.

will contests) by a similar disposition across several wills. If multiple wills are offered for probate, the Court "shall determine" which will, if any, "should be allowed."[99]

Some people execute one Will during their life, which is is proven to the Court as a valid legal document by showing testamentary intent. But what if testamentary intent was a stumbling block to probating the Will? What if there are multiple wills? When multiple wills appear in court, a will contest ensues.

**Contested Wills**

Courts favor admitting every legally executed Will to probate.[100] But in potential tension with honoring the decedent's testamentary intent, Kansas and Missouri courts allow will contests to challenge a Will's admission to probate. Will contests can be statutory and any interested party can contest a Will.[101] A will contest decides if a will gets probated.[102] Will contests "rarely occur" - in about 1% of probate cases - so "most" will contests fail, given "the uncertainty of legal proceedings."[103] Will contest grounds include: capacity, improper execution, undue influence, fraud, and duress. Contestants include: (1) intestate heirs, (2) a prior will's devisees, heirs, legatees, assignees, or fiduciaries, (3) a surviving spouse whose rights would grow, (4) persons under contrary contract with the decedent, (5) creditors, (6) the state (under escheat) if the decedent had no heirs, or (7) fiduciaries of the will under attack.[104]

*Kansas and Missouri Will Contests*

Kansas allows an interested party to launch a will contest, but does not have a will contest statute. Missouri will contests are statutory - an *in rem* proceeding, limited to "interested" parties with a financial benefit who would be "affected adversely," including a fiduciary, "heir, devisee, trustee or trust beneficiary."[105] Kansas and Missouri differ on will contest jury trials: A Kansas case can go to the jury, but in Missouri any party can demand a jury trial.[106] Kansas and Missouri have probate statutes of limitation, deadlines for filing the will.[107]

The Missouri probate court can appoint an administrator *pendente lite* (while the action is pending) if the named executor is an "interested person."[108] Missouri law can sever controversial will clauses (for fraud, duress, undue influence, mistake, ignorance of the

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[99] K.S.A. §59-2225.
[100] *Harper's Estate*, 202 Kan. 150 (1968); *Estate of Strader*, 301 Kan. 50 (2014).
[101] K.S.A. §59-102; V.A.M.S. §§472.010(15), 473.083.1; Sitkoff, "Trusts & Estates," 58 SLU L. J. 643, 648ff (2014); 3 Mo. Practice §3.111.
[102] Simes, *The Function of Will Contests*, 44 Mich. L. Rev. 503, 512 (1946); Wills, §12.1.
[103] Wills, §12.1; Will Contests, §6:15; 3 Blackstone, *Commentaries*, 325.
[104] Will Contests, § 3:2; *Estate of Reed v. Indiana Univ. Foundation*, 223 Kan. 531 (1983).
[105] V.A.M.S. §§473.083, -.340; *Brunig v. Humburg*, 957 S.W.2d 345 (Mo. App. E.D. 1997); *Lambert v. Crone*, 621 S.W.2d 59, 61 (Mo. App. 1981); *Gillman v. Mercantile Trust Co.*, 629 S.W. 2d 441, 445 (Mo. App. 1981). V.A.M.S. 473.083.3; *Miller v. Wilcox*, 604 S.W.2d 726 (Mo.App. W.D. 1980).
[106] Kans. Const. Bill of Rights §5; K.S.A. §§59-2212, -2408; *Matter of Suesz' Estate*, 228 Kan. 275 (1980); V.A.M.S. §473.083(7); Will Contests, §4:9.
[107] K.S.A. §59-617; VAMS §§473.083.1, 473.050.3(1), 473.050.
[108] V.A.M.S. §473.137.

testator of its content, partial revocation, or other cause) – the severed part is denied probate, while the remaining will is "admitted to probate."[109]

A Missouri will contest must be filed within the latter of 6 months after (a) the "probate or rejection" date of the Will or (b) "the first publication of notice" of letters granted.[110] If another will is found or offered for probate, it must be filed with the will contest petition within 20 days *after* (1) the final settlement and petition for distribution is filed and *before* (2) the latter of (a) one year after the testator's death or (b) 30 days after the will probate or contest begins.[111]

Let's explore a few will contest grounds: capacity, undue influence, fraud, and duress.

*Capacity*
The testator's capacity is a major issue. Discovering medical records may clarify testamentary capacity. Witnesses can be examined through depositions and interrogatories to shed light on the testator's capacity and relationship dynamics. The testator's financial advisors may have helpful insight too.

*Testamentary Capacity*
Testamentary capacity is the hallmark of intent for signing a valid Will.[112] English roots infuse Kansas and Missouri testamentary capacity law.[113] Testamentary intent means "recogniz[ing] the [1] natural object of one's bounty, the [2] nature and extent of one's estate," and "that [3] one is making a plan to dispose of the estate after death."[114] Common terms for invoking testamentary capacity are "of legal age and sound mind," "disposing capacity," disposing mind," "sound mind," or "sound disposing mind."[115] The law presumes the testator's sanity and testamentary capacity, and courts favor testamentary capacity to honor the testator's Will.[116]

A Kansan has testamentary capacity if she (1) knows and understands her property's nature and extent, (2) understands her desired disposition, (3) knows the natural objects of her bounty, and (4) comprehends her desired heirs.[117] A Missourian has testamentary capacity if she (1) was of sound mind, (2) understood her life's ordinary affairs, (3) knew

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[109] V.A.M.S. §473.081; *Burke v. Kehr* (App.E.D. 1992).
[110] V.A.M.S. §473.081.1. Within 90 days of filing the will contest, all parties must be named and served. V.A.M.S. §473.083.6; *Doran v. Wurth*, 475 S.W.2d 49 (Mo. 1971).
[111] V.A.M.S. §§473.070, 473.050.
[112] Will Contests, §6:1.
[113] *Greenwood v. Greenwood*, 163 Eng. Rep. 930 (K.B. 1790); *Harwood v. Baker*, 162 Eng. Rep. 410 (Prerog. 1826); *Will Contests*, §§6:1-6:2, Ch. 2; *Estate of Farr*, 274 Kan. 51 (2002), *Estate of Brodbeck*, 22 Kan. App. 2d 229; *Lewis v. McCullough*, 413 S.W.2d 499 (Mo. 1967); *Gene Wild Revocable Trust*, 299 S.W.3d 767 (Mo. Ct. App. S.D. 2009).
[114] Black's Law Dictionary, 249.
[115] *Id*.
[116] Will Contests, §6:13; *Estate of Farr,* 274 Kan. 51 (2002); *Stroup v. Leipard*, 981 S.W.2d 600 (Mo. Ct. App. W.D. 1998). Business or contracts take less capacity. *Estate of Farr*; *Estate of Hague*, 894 S.W.2d 684 (Mo.Ct.App.W.D. 1995).
[117] *Estate of Farr*, 274 Kan. 51 (2002); *Estate of Raney*, 247 Kan. 359 (1990); *Ziegelmeier's Estate*, 224 Kan. 617 (1978).

her property's nature and extent, (4) knew who were the natural objects of her bounty, and (5) appreciated her obligations to those people.[118] Witnesses help show a testator's testamentary capacity.[119]

*Lack of Testamentary Capacity*
A person lacks testamentary capacity if she does not understand: (1) her property's nature and extent, (2) her bounty's natural objects, and (3) her will's legal nature and scope.[120]

*Defenses*
A lack of testamentary capacity will not be established if the will contestant fails to establish: (1) the testator lacked mental capacity, (2) a presumption of lack of testamentary capacity, or (3) the testator suffered from an insane delusion.[121] But the Will's proponent can rebut the contestant's lack of testamentary capacity evidence by showing a lucid testator executed the Will.[122]

*Remedies*
The will contestant proves lack of testamentary capacity and wins. What are her remedies? She has two remedies: one, to invalidate the entire will, or two, to invalidate part of the will.[123]

*Diminished Capacity*
Diminished capacity is "an impaired mental condition" often caused by age or "disease" which "prevents a person from having the mental state necessary" to execute legal documents.[124] "Memory loss, regressive behavior, personal untidiness, or peculiar behavior" can show diminished capacity.[125] Diminished capacity often arises with elderly, ill, or disabled clients.[126] A client with diminished capacity may not always have testamentary capacity, but the client's capacity may ebb and flow by day or hour.[127] Diminished capacity gives the will contestant a rebuttable presumption of lack of testamentary capacity.[128] Or he can invalidate a will by proving the testator suffered from an insane delusion or otherwise lacked capacity.[129]

Senility is a growing issue in the law of diminished capacity.[130] Age and illness can show lack of testamentary capacity, but an aged client can make a valid will.[131] A client could

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[118] K.S.A. §59-601; V.A.M.S. §474.310; *Lewis v. McCullough*, 413 S.W.2d 499 (Mo. 1967); *Hugenel v. Estate of Keller*, 867 S.W.2d 298 (Mo. Ct.App.S.D. 1993); *Will Contests*, §§6:2, 6:14.
[119] K.S.A. §59-601; *Estate of Farr*, 274 Kan. 51 (2002); *Fountain v. Schlanker*, 651 S.W.2d 594 (Mo. Ct. App. E.D. 1983).
[120] Will Contests, §§6:3-6:5, 6:14; *Estate of Farr*, 274 Kan. 51 (2002).
[121] Boggess, "Testamentary Capacity," §§20, 21, 26.
[122] *Id.*, §27.
[123] *Burke v. Kehr*, 826 S.W.2d 855 (Mo.Ct.App. 1992); *Holmes v. Campbell College*, 87 Kan. 597 (1912).
[124] Black's Law Dictionary, 249; Akers, Heckerling Musings, pp. 104-112 & ACTEC Musings, pp. 19-22.
[125] Will Contests, §6:8.
[126] K.R.P.C. 1.14; *Kansas Ethics Handbook* (2015), §2.3.3; ACTEC commentary, 131-139.
[127] Will Contests, §13:17 (medical checklist).
[128] Boggess, "Testamentary Capacity," §11.
[129] *Id.*, §18.
[130] Will Contests, §6:8.

be alert and have testamentary capacity in the morning, but not in the afternoon, or in the evening, but not during the day. A client's vision, hearing, or speech issues may be more pronounced at various times. The attorney and client must actively communicate about the client's goals and the documents to ensure the client has testamentary capacity to understand and execute legal documents, and is not falling under a family member or friend's undue influence sway.[132]

*Insane Delusion*

An insane delusion erodes testamentary capacity and can void the testator's will.[133] An insane delusion is a false belief caused by a mental disorder which people of the same age, class, and education would not believe.[134] But if a testator has *any* facts that make her belief rational or a mistaken belief or attitude that *could* be rational, she harbors no insane delusion.[135] Kansas has some case law on a testator's insane delusion.[136] Insane delusions are not delusions of grandeur, but involve an irrational belief that someone is out to harm her by taking her property or physically harming her, leading her to disinherit this person.[137]

The testator's world can change in a moment. Testamentary intent can be an instant of light in the cruel darkness of dementia or senility. The testator can execute a valid will during a moment of lucidity, even if the rest of her life passes by in a fog of diminished capacity.[138] But the will proponent must demonstrate (1) the testator was capable of lucid moments and (2) the will was executed in a lucid moment.[139]

We can expect much litigation about elderly clients and diminished capacity in the future: The Census Bureau estimates America has 323 million people, including many millions who are (or will become) elderly.[140] To protect our clients and our firms, attorneys should use best practices to establish and document testamentary capacity: document client interactions and write a memo to the file when you meet with a client or execute a document. In exceptional cases, extra witnesses, photos, or video of meetings or document executions are helpful.[141]

*Testamentary Capacity and Undue Influence*

Lack of testamentary capacity and undue influence are distinct.[142] Lacking testamentary capacity means the testator does not understand making a Will.[143] Undue influence means

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[131] *Hannah v. Hannah*, 461 S.W.2d 852 (Mo. 1971); *Farnsworth v. Farnsworth*, 728 S.W.2d 223 (Mo. Ct. App. W.D. 1986); *Will Contests*, §6:8.
[132] *In re Brantley*, 260 Kan. 605 (1996); Will Contests, Ch. 7.
[133] Will Contests, §§6:11-6:12.
[134] Boggess, "Testamentary Capacity," §18
[135] *Id.*
[136] *Estate of Raney*, 247 Kan. 359 (1990), *Estate of Brodbeck*, 22 Kan. App. 2d 229 (1996).
[137] *Id.*
[138] Boggess, "Testamentary Capacity," §27.
[139] *Id.*
[140] http://www.census.gov/popclock/.
[141] Akers, 2016 ACTEC Musings, pp. 6-8.
[142] Missouri allows one trial for both issues arise. *Hammonds v. Hammonds*, 263 S.W.2d 348 (Mo. 1954).
[143] Boggess, "Testamentary Capacity," §5.

the testator has testamentary capacity, but was under another's control. For both, the testator's diminished capacity voids the Will for failing testamentary intent.

*Undue influence*

Undue influence is the "most common" will contest route and "a creature of the common law."[144] Undue influence is "unfair persuasion of a party" by "coercion" destroying or "overmaster[ing]" the party's free will and "free agency" for the influencer's "objectives."[145] A person wields undue influence when she has a confidential or fiduciary relationship with the testator "so powerful and overwhelming" that it forces the testator "to adopt" the influencer's choice.[146] A beneficiary in a confidential relationship who "actively procures" the testator's Will raises an undue influence presumption, especially if the Will gives the beneficiary a substantial bequest.[147] Indeed if "any will was written or prepared" by the "beneficiary … who … was the [testator's] confidential agent or legal advisor," the will is invalid "unless it shall affirmatively appear" the testator "read or knew" the will's contents and "had independent advice" to sign.[148] A confidential relationship involves one person "trust[ing] in and rel[ying] on the other" for property, business, or financial affairs.[149] A lack of testamentary capacity can be proven by undue influence if the testator was susceptible to influence, another person had means and opportunity to influence, and undue influence resulted.

Kansas and Missouri make the will contestant prove undue influence by clear and convincing evidence.[150] In Kansas, undue influence must rise to coercion, compulsion and restraint which destroys the testator's free agency, and by overcoming his power of resistance, obliges or causes him to adopt another's choice, including a suspicious will execution.[151] In Missouri, undue influence can "break" a will if it was "present," "in active exercise," and "sufficient to destroy" the testator's "free agency" and free choice.[152] But undue influence "cannot rest upon speculation and conjecture": mere "motive and opportunity alone" fail.[153] Missouri undue influence factors include: (1) an

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[144] Spivack, "Testamentary Doctrine of Undue Influence," 58 U.Kan.L.Rev. 245, 286 (2010); *Will Contests*, 2:11. Trial strategy, Undue Influence, 36 Am. Jur. 2d 109.

[145] Glazier, "Undue Influence," KCEPS; Wills, Ch. 7; Black's Law Dictionary, 1760; Will Contests, §7:1ff.

[146] *Estate of Bennett*, 19 Kan.App.2d 154 (1993); *Estate of Farr*, 274 Kan. 51 (2002); *Sweeney v. Eaton*, 486 S.W.2d 453 (Mo. 1972); *State ex rel. Smith v. Hughes*, 356 Mo. 1 (1947); *Beckmann v. Beckmann*, 331 Mo. 133 (1932).

[147] Black's Law Dictionary, 1760; *Blumer v. Manes*, 234 S.W.3d 591 (Mo. Ct. App. E.D. 2007); *Loehr v. Starke*, 332 Mo. 131 (1933).

[148] Will Contests, §7:10.

[149] *Hedrick v. Hedrick*, 350 Mo. 716; *Moyer v. Walker*, 771 S.W.2d 363 (Mo. Ct. App. S.D. 1989); *Estate of Brown v. Fulp*, 718 S.W.2d 588 (Mo. Ct. App. S.D. 1986). *Ruestman v. Ruestman*, 111 S.W.3d 464 (Mo. Ct. App. S.D. 2003); Will Contests, §7:4.

[150] *Eyman's Estate*, 181 Kan. 90 (1957); *Estate of Farr*, 274 Kan. 51 (2002); *Estate of Bennett*, 19 Kan. App. 2d 154 (1993); *Bell v. Pedigo*, 364 S.W.2d 613 (Mo. 1963); *Gay v. Gillilan*, 92 Mo. 250 (1887); *Malone v. Sheets*, 571 S.W.2d 756 (Mo. Ct. App. 1978); Will Contests, §7:11.

[151] K.S.A. §59-306; *Estate of Farr*, 274 Kan. 51 (2002); *Estate of Kern*, 239 Kan. 8 (1986); *Logan v. Logan*, 23 Kan. App. 2d 920 (1997); Will Contests, §7:2.

[152] *Sweeney v. Eaton*, 486 S.W.2d 453 (Mo. 1972); *State ex rel. Smith v. Hughes*, 356 Mo. 1; *Beckmann v. Beckmann*, 331 Mo. 133; *Sehr v. Lindemann*, 153 Mo. 276, 54 S.W. 537 (1899); Vancil v. Carpenter, 935 S.W.2d 42 (Mo. Ct. App. W.D. 1996); Will Contests, §7:2.

[153] *State ex rel. Smith v. Hughes*, 356 Mo. 1 (1947).

unnatural disposition, (2) the influencer asking for favors, (3) a change in testamentary intent, (4) an unusual will execution, (5) beneficiary's hostility toward family or expected recipients, (6) beneficiary's derogatory remarks to testator about contestant, (7) testator's finances makes distribution to beneficiary unlikely, and (8) will recitals showing undue influence.[154]

*Fraud*
Fraud is a will challenge ground. Fraud means (1) false representations were knowingly made to the testator (2) which were intended to (and did) deceive the testator and (3) the testator relied on these false representations to sign a will the testator would not have signed *but for* the false representations.[155]

*Fraud and Undue Influence*
Two distinctions exist between fraud and undue influence: the testator's free agency and false statements made to the testator. Undue influence requires the testator's free agency be overwhelmed; but in fraud, the testator keeps her free agency, but was misled. Undue influence may occur with true statements, but fraud rests on false statements.[156]

*Duress*
English legal giant William Blackstone (1723-1780) wrote duress hinges on a testator's "free and voluntary intent," which is eroded by duress if the testator faces physical compulsion or threats and fear.[157]

**Probate Litigation: When Probate Law & Civil Litigation Meet**
Probate law and civil litigation are different worlds, but they share common ground. Let's review the outline of a probate case, and use that spring board to explore how the civil trials shape probate litigation. When probate law and civil litigation meet in a will contest, an elegant design emerges from the chaos.[158] Civil trial rules apply in a will contest or other probate litigation case.[159]

A probate attorney files a series of probate petitions and sets the petitions for hearing. Each petition set for hearing is a probate proceeding.[160] The petition will allege the decedent died owning certain property which beneficiaries should receive after paying bills and settling the decedent's final affairs. Civil litigation is more formal and adversarial, as parties seek to prove facts and argue law in motions to the court. Indeed, Blackstone teaches us "pleadings are the mutual altercations between the plaintiff and defendant."[161] Probate law is less formal and non-adversarial, as the facts and the law are often clear.

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[154] *Ruestman v. Ruestman*, 111 S.W.3d 464 (Mo. Ct. App. S.D. 2003); Will Contests, §7:2.
[155] Will Contests, §8:10.
[156] Boggess V, "Testamentary Capacity," 28 Causes of Action 2d 99 (2008), §5
[157] Will Contests, §§8:16-8:18.
[158] *Id.*, §12:18.
[159] *Id.,* Ch. 14.
[160] K.S.A. §59-2204.
[161] 3 Blackstone, *Commentaries*, 293.

*Anatomy of Probate Litigation*

Pretrial planning is vital in probate litigation.[162] A verified probate pleading is called a petition; a (non-verified) civil pleading is called a motion.[163] A probate proceeding starts by filing a verified pleading; a civil case start by filing a motion.[164] The petitioner bears the burden of proving her allegations to the court.[165] Court costs are owed in probate, as in a civil case.[166] Sometimes a probate case may be revived, where a civil case would be moot.[167] Probate allows attorney's fees for a successful contesting party.[168]

How do civil procedure and evidence rules apply in probate litigation? Civil discovery is helpful in will contests.[169]

Civil discovery and civil procedure rules may apply in probate litigation.[170] Probate litigation may involve depositions, interrogatories, document production, physical and mental examinations, and requests for admission.[171] Discovery should be used as helpful, but not abused, as abuse may yield sanctions: e-discovery of email, blogs, texts, and social media is allowed in probate litigation.[172]

Written interrogatories should explore: (1) every person's name and address had significant contact with the testator, (2) the location of relevant documents, (3) the nature and kinds of the decedent's property, and (4) opposing expert witnesses' names and qualifications.[173] As a "courtesy and good drafting style," interrogatories have (1) a preamble, (2) a series of instructions, and (3) and definitions.[174] Requests for admission seek to establish "genuineness of documents" and "major facts" when preparing a will contest.[175]

A deposition should seek to: (1) get the contestant to admit the will's authenticity, (2) see what the contestant knows about the testator's physical and mental condition when the will was executed, (3) discover the contestant's motive for will challenge, (4) see what

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[162] Will Contests, Ch. 14.
[163] K.S.A. §59-2201.
[164] K.S.A. §59-2204
[165] K.S.A. §§59-2212, -2213, -2232; *In re Johnson's Estate*, 180 Kan. 740 (1957); *Malone v. Sheets*, 571 S.W.2d 756 (Mo.App.St.L. 1978); *Teckenbrock v. McLaughlin*, 209 Mo. 533 (1908). The Will proponent has the burden through the trial. 5 Mo. Practice, §131; *Brug v. Manufacturer's Bank & Trust Co.*, 461 S.W.2d 269, 276 (Mo. banc 1970). A default does not shift the burden. K.S.A. §59-2213; *Estate of Murdock*, 20 Kan. App. 2d 170 (1994).
[166] K.S.A. §§59-104(d), -2214.
[167] K.S.A. §59-2238.
[168] K.S.A. §59-1504.
[169] K.S.A. §60-226; Will Contests, Ch. 13, Apps. 2-3.
[170] K.S.A. §§59-2501, 60-265(3); KS Rule 144 (discovery applies in probate), Mo Rules 41.01, 56.01; Will Contests, §13:7.
[171] V.A.M.S. §472.141; K.S.A. §§60-227-60-232 (deposition) (FRCP 30, KS Rule 138, MO Rule 57), 60-233 (interrogatories) (FRCP 33, KS Rule 135(a), MO Rule 57), 60-234 (document production) (FRCP 34, 36, MO Rule 58), 60-235 (examination) (MO Rule 60), 60-236 (requests for admission) (MO Rule 59); Will Contests, §§13:7, 13:10, 13:18, 13:11, 13:14.
[172] Will Contests, §§13:19, 13:21, Ch. 13 *passim*.
[173] *Id.,* §13:10.
[174] *Id.*
[175] *Id.,* §13:18.

the contestant knows about the testator's dispositive plans, and (5) show the party is not "intimidated by a lawsuit."[176]

Civil motions *in limine* are available in probate litigation.[177] Motions for summary judgment, a staple of the trial lawyer's repertoire, and other pre-trial motions can be used.[178] Civil procedure and evidence rules control service of process upon parties.[179] Process is the "means of compelling the defendant to appear in court."[180] Missouri requires service within 90 days of filing the petition unless good cause exists.[181] A summons lasts for 30 days unless an extension is granted.[182] A pre-trial conference may be held in probate litigation.[183]

Courts hear relevant evidence in a will contest.[184] The will "under attack" is the testator's "most important statement" and "highly relevant," illuminating her "mental or physical condition," the will's "internal consistency," the will's consistency with prior wills or codicils showing the "plan for disposition" over time, "exclusion of potential beneficiaries," and may show lack of capacity, undue influence, fraud or duress.[185]

*Preparing the Will Contest*

Attorneys must prepare a will contest well – "no stone should remain unturned" – and apply trial practice axioms."[186] The attorney should take written statements on the: (1) testator's mental condition, (2) testator's physical condition, (3) testator's statements on her will or towards interested parties, (4) testator's unusual incidents or conduct, (5) witnesses' recall about testator's testamentary capacity.[187]

Probate litigation often involves contests over the decedent's assets, the decedent's debts, or the fiduciary's estate administration. Evidentiary persuasiveness in probate litigation comes down to the "ocular proof."[188]

The contours of due process grant a court jurisdiction over a person and a subject matter.[189] Going to court is a two way street: The law limits which parties can be heard in court, and which cases or controversies a court can hear.

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[176] *Id.*, §13:14.
[177] Will Contests, §14:2. "*In limine"* is Latin for "at the outset": a motion *in limine* is filed before trial to stop admission of prejudicial evidence. Black's Law Dictionary, 907.
[178] K.S.A. §60-256; KS Rule 141; Will Contests, §12:20.
[179] V.A.M.S. §§473.083.5, Chs. 506-507.
[180] 3 Blackstone, *Commentaries*, 279.
[181] V.A.M.S. §473.083.6; *Root v. England*, 291 S.W.3d 834 (Mo.App. 2009). Service is strictly construed.
[182] MO Rule 54.21.
[183] K.S.A. §60-216; KS Rule 140.
[184] *Barnes v. Marshall*, 467 S.W.2d 70 (Mo. 1971); *Evans v. Stirewalt*, 158 S.W.3d 910 (Mo. Ct. App. S.D. 2005); Will Contests, §15:2.
[185] Will Contests, §15:2.
[186] Will Contests, §§11:11, Ch. 15.
[187] *Id.,* Chs. 11-12, Apps. 1, 3-4.
[188] "Be sure of it. Give me the ocular proof." Shakespeare, Othello, III, iii, 370.
[189] Black's Law Dictionary, 980.

*Standing*

Standing is about who can sue, a "party's right" to make a "claim," or enforce "a duty or a right."[190] Will contest standing arises from "statute."[191] The probate law allows an "interested party" standing to sue: any person with an interest in the decedent's estate – any interested party can contest the Will, but the named executor under a prior will cannot contest the will contest.[192] An interested party starting a will contest "must have something economic to gain or lose."[193] Civil procedure has liberal joinder rules: Interested parties include "any heir, devisee, or legatee" who "prosecute[s] or oppose[s] the [1] probate of any will" or [2] "the determination" that the spouse's "consent" "to the will is a valid and binding consent."[194] An heir who takes equally regardless of the Will cannot contest the will.[195]

*Who Can a Will Contest Be Brought Against?*

A will contest can be brought against an interested party, like the Will's executor or beneficiaries.[196] When the will contest begins, the contestant must identify the necessary parties.[197] A party's chances of winning vary by the party's relationship to the decedent. A spouse contestant has not consented to the Will, or who married the decedent after the decedent signed the Will has marital and statutory rights and may prevail in a will contest. A child has no right to inherit from a deceased parent if Will disinherited the child. Adopted children can inherit from a deceased parent.[198] Stepchildren do not inherit unless the Will names them as beneficiaries.[199]

*Jurisdiction: The Probate Court Hears a Case*

*Personal Jurisdiction*

Personal jurisdiction is a court's power to bring a person under its authority.[200] Providing notice to interested parties ensures the probate court honors personal jurisdiction.[201] Probate courts arose from equity jurisdiction so the court can look at "legal title" or "equitable claims."[202] A court has jurisdiction over the estate when the estate is open and has the power to (1) allocate assets, (2) decide claims on assets, and (3) distribute assets to heirs. The court's *in rem* jurisdiction "springs from the court's control over [estate] assets."[203]

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[190] Black's Law Dictionary, 1625; Will Contests, Ch. 3; *Estate of Milward*, 31 Kan. App. 2d 786 (2003).
[191] Will Contests, §§3:25, 4:14.
[192] K.S.A. §59-2224; V.A.M.S. §473.340; *Clair v. Whittaker*, 557 S.W.2d 236 (Mo. banc 1977); Will Contests, §3:25.
[193] Will Contests, §3:25.
[194] K.S.A. §59-2224; *Rodriguez-Tocker v. Estate of Tocker*, 35 Kan.App.2d 15 (2006); cf. F.R.C.P. 18.
[195] Will Contests, §3:25.
[196] Will Contests, 3:1.

[198] K.S.A. §59-501(b).
[199] K.S.A. §59-514.
[200] Black's Law Dictionary, 982; Will Contests, §4:11; *Anderson v. Wittmeyer*, 834 S.W.2d 780 (Mo. Ct. App. W.D. 1992).
[201] Will Contests, §4:12.
[202] *Boatright*, 506; *Ryan*, 64 S.W.3d 306.
[203] Will Contests, §4:10.

*Subject Matter Jurisdiction*

Subject matter jurisdiction is a court's power to hear cases in a particular realm of law, so state courts hear hears probate cases.[204] Federal courts rarely hear probate cases: Probate cases are barred under diversity jurisdiction and cannot be removed from state court, since probate cases were not at "law" in Article III's "suits at law" power.[205] Probate courts' subject matter jurisdiction has "always" been statutory.[206] Kansas law gives the probate court subject matter jurisdiction over nine realms, including will contests.[207] Missouri courts have subject matter jurisdiction over any written defenses filed in a will contest.[208]

*Venue*

Venue is the "proper" court to hear a case and its "connection" to the case's events, the plaintiff, or defendant.[209] Jurisdiction is the court's power to "hear and dispose" of a case and can affect a person's fundamental legal rights. Venue is "distinctly" less important than jurisdiction, a "statutory device" to "facilitate and balance" the parties and witnesses' "convenience" with "efficient" judicial resolution.[210] *Forum non conviens*, Latin for "an unsuitable court," allows a court to hand a case to another court if the transfer is more convenient for the parties.[211]

*Resolving the Will Contest*

Kansas and Missouri have ways to resolve a will contest and will contest alternatives: Kansas has valid settlement agreements and Missouri has compromise agreements. [212] A Kansas valid settlement agreement is entered into and binding upon all interested parties.[213] While Kansas law favors valid settlement agreements, they cannot be used to (1) avoid probating the decedent's Will, (2) defeat distribution rules in the decedent's Will, or (3) defeat creditors or other parties' rights.[214] A Missouri compromise agreement must be in writing, binding on all interested parties, and be approved by the probate court as being a "just and reasonable" compromise from a "good faith contest."[215] A Missouri compromise agreement can distribution property differently than a Will or intestate succession would.[216]

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[204] Black's Law Dictionary, 983.
[205] Will Contests, §4:10; 28 U.S.C. §§1332(a), 1441; U.S. Const., Art. III.
[206] Will Contests, §§4:1-4:2.
[207] K.S.A. §59-2224; *In re Grindrod's Estate*, 158 Kan. 345 (1948); V.A.M.S. 473.083; *Davis v. Davis*, 252 S.W.2d 521 (Sup. 1952); K.S.A. 59-103(a); 20-301; V.A.M.S. §472.020; *Estate of Pritchard*, 37 Kan.App.2d 260 (2007); *Matter of Suesz' Estate*, 228 Kan. 275 (1980); Will Contests, §4:1.
[208] V.A.M.S. §473.083; Will Contests, §4:1.
[209] K.S.A. §59-2971; V.A.M.S. §473.010; Black's Law Dictionary, 1790.
[210] Black's Law Dictionary, 1790.
[211] Black's Law Dictionary, 770.
[212] K.S.A. §§59-102, -2249; V.A.M.S. §473.084. When the will contest deadline expires, all parties can consent to dismiss the case. §473.083.8. 5; Mo. Practice, §295; Will Contests, §§8:25, 12:21.
[213] K.S.A. §§59-102(8), -2251.
[214] *Estate of Thompson*, 226 Kan. 437 (1979); *Estate of Petty*, 227 Kan. 697 (1980); *Estate of Harper*, 202 Kan. 150 (1968); *Estate of Sowers*, 1 Kan. App.2d 675 (Kan. App. 1977).
[215] V.A.M.S. §§473.074, -.084, -.085(3).
[216] *Estate of Webster*, 920 S.W.2d 600 (Mo.App. W.D. 1996).

Having examined issues with revoked, multiple, or contested wills, let's look at will construction issues.

### E. Common Will Construction Problems

When someone reads another person's work or writing or intent, interpretative issues arise.[217] This issue reaches an apex when interpreting the decedent's Will – the person who made the Will has died and may not have anticipated questions about how to handle their final affairs. Interpretation is harder when the Will's execution is unusual or quirky. The best practice is to document everything in each will execution, including anything a will contestant might seize upon to void the Will.

*In Terrorem*/No Contest Clauses

An *in terrorem* clause is a will provision "to frighten" or "threaten" to a beneficiary who challenges the Will.[218] Courts honor a decedent's intent as expressed in her Will, but disfavor *in terrorem* clauses. A Will may include an *in terrorem* clause or trigger a will contest.[219] Courts "narrowly construe" *in terrorem* clauses, but a "broadly drafted" clause is "given effect."[220] An *in terrorem* clause which protects a fiduciary's role is enforceable unless the beneficiary has probable cause for a will contest.[221]

Probable cause voids a Kansas *in terrorem* clause.[222] Probable cause exists if a party has a "reasonable belief" ("not merely a good faith belief") that (1) facts exist on which a claim is based and (2) the legal claim is valid.[223]

*Scrivener's Error*

A scrivener's error is a mistake of "omission or commission," where the will does not accurately reflect the testator's intent.[224] If due execution of the will is proven, the will contest has the burden to prove a mistake.[225] To avoid a scrivener's error, carefully draft a will "without flaws in integrity," complying with "testamentary formalities" and "the law of future interests."[226] Will contests are adversary proceedings, so think about "likely avenues" of attack on the will, and "avoid" making the will "vulnerable."[227]

*Vague and Ambiguous*

Words matter: If a will specifies an unmet condition, the wording can void part or all of the Will.[228] A Will may have a vague or ambiguous provision. Vague is "imprecise or unclear" due to "abstractness," "not sharply outlined," "indistinct," "uncertain," "broadly

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[217] Scalia, *A Matter of Interpretation* (1997); Scalia & Garner, *Reading Law* (2012).
[218] Also called a no-contest, noncontest, terrorem, anticontest, or forfeiture clause. Black's Law Dictionary, 947, 1209; *Estate of Mary Koch*, 18 Kan.App.2d 188 (1993).
[219] Estate Planning, §4.30. Enforceability and scope varies. Wills, §12.1.
[220] Wills, §12.1.
[221] Restatement (Second) of Property (Donative transfers), §9.2, (1983); Wills, §12.1.
[222] *Estate of Campbell*, 19 Kan. App.2d 795 (Kan. Ct. App. 1994); Wills, §12.1.
[223] Black's Law Dictionary, 1395; Wills, §12.1.
[224] Will Contets, §§8:2-8:7.
[225] *Id.*, §8:8.
[226] *Id.*, §5:20.
[227] *Id.,* §5:20.
[228] *Albright v. Albright*, 901 S.W.2d 144 (Mo. Ct. App. W.D. 1995); Will Contests, §5:6.

indefinite," "not clearly or concretely expressed," or "characterized by haziness of thought."[229] A document might say "within a reasonable time," without defining "reasonable."

Ambiguity is related to vague, but less precise: "doubtfulness or uncertainty of meaning or intention," or an "indistinctness of signification" where multiple interpretations are possible.[230] If a will has a vague or ambiguous term, the Court explores the four corners of the Will's textual landscape to divine the testator's intent. A will opponent must show the Will's terms are written unclearly or incapable of being followed. A will must be an integrated document: signed, witnessed, and notarized at one place and one time.[231]

### F. Objections to Accounts and Petitions

**Objecting to Accounts**

A fiduciary has a duty to submit timely and accurate receipts and accounts, showing income received and expenses paid. If a fiduciary does not submit a proper accounting, the Court may compel the fiduciary to do so, as the fiduciary serves under the Court's authority. The Court must approve the fiduciary's accounting: An accounting is due 30 days after the fiduciary's appointment. If the accounting will take more time, the fiduciary should request a time extension and file a proper accounting by the new deadline. The first extension is routinely granted if there have been no citations for missing a deadline, but more extensions may test the Court's patience.

Beware commingling objections to an accounting with objections to the fiduciary's appointment or continued service. Courts often defer to the decedent's family, estate's creditors, attorneys or other professional advisors, and other parties in appointing a fiduciary. A person's fitness to be a fiduciary depends on the case's facts: Sometimes a family member or close friend is fine, other times complex family dynamics or large or complicated assets or business structures counsel using a corporate or professional fiduciary. While attorneys have often appointed themselves as fiduciary (executor, trustee, etc) in clients' documents, this may not always be wise.[232] In Missouri, the Probate Court's Clerk must publish notice when the estate's personal representative is appointed.[233] In Kansas, the Court only weighs if the nominated or acting executor can effectively and efficiently administer the estate.

*Asset Discovery & Disclosure Hearings*

While discovery, interrogatories, depositions, and other civil court tools are often allowed in probate court, probate has its own tools: Each party has a duty to disclose.[234] An estate may involve complex and geographically far-flung assets or business interests. The decedent may have been private or secretive about their financial affairs so that the heirs do not know the extent of estate assets. A will contest could hinge on whether an asset is

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[229] Black's Law Dictionary, 1783.
[230] Black's Law Dictionary, 97.
[231] Will Contests, §5:5.
[232] Estate Planning, §4.27.1.
[233] V.A.M.S. §473.033.
[234] Running in parallel to F.R.C.P. 26. Will Contests, §13:8.

included in the estate, has a non probate beneficiary designation, or is part of a trust or other non probate transfer. Probate courts can hold disclosure proceedings.[235] Kansas disclosure hearings and Missouri discovery of assets proceedings help in the estate asset search.[236]

In a Missouri discovery of assets hearing, the court's role is seeing if "property has been adversely withheld or claimed."[237] But a discovery of assets hearing is a "search for assets," not to litigate fiduciary conduct, improper estate administration, or for "disputes among heirs."[238] Discovery of asset hearings extend "to all specifies of property, including real estate."[239] A personal representative, administrator, creditor, beneficiary, or other person claiming a property interest can request a discovery of assets hearing.[240] A discovery of assets hearing is adversarial, governed by the Missouri Rules of Civil Procedure, and "any party" "may demand a jury trial."[241]

**Objecting to Petitions**

Objections to petitions can be procedural or substantive. A procedural objection could be deadline based, attack a non-verified petition, dismiss a petition not set for hearing, or question related procedural issues. A substantive objection might seek a different fiduciary's appointment, demand a jury trial, require bond, request discovery, request a different fiduciary be appointed, offer a later will, object to simplified or independent administration, require estate supervision, attack defective notice or summons, question reasonableness of attorney's fees, question jurisdiction, venue, or *forum non conveins*, or other substantive matters. The Court is the final arbiter of substantive objections, but has considerable discretion to approve a party's motion on its face, to question the party to confirm or flesh out the party's reasoning, or to modify and approve a party's motion *sua sponte* as the Court deems proper.

When objecting to petitions, an attorney should practice good probate law: enter an appearance, serve notice on interested parties, set petitions for hearing, and zealously advocate for and serve the client's best interest.

Objections in a probate case, or a "defense to a petition," are written defenses.[242] Written defenses must be filed before the Probate Court's hearing on the issue or to appeal a will's admission to probate.[243] Raising "factual" issues in written defenses triggers civil discovery.[244] A defense is "an opposing or denial" of the complaint's "truth or

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[235] K.S.A. §§59-2216, -2217a.
[236] K.S.A. §59-2216.
[237] V.A.M.S. §473.340; *Estate of Boatright*, 88 S.W.3d 500, 505 (Mo. App.S.D. 2002); *Estate of Williams*, 12 S.W.3d 302, 305 (Mo. banc 2000).
[238] *Boatright*, 505; *State ex rel. Knight v. Harman*, 961 S.W. 2d 951, 954 (Mo. App. 1998).
[239] *Boatright*, 505; *Ryan*, 64 S.W.3d at 306.
[240] V.A.M.S. §473.340.
[241] V.A.M.S. §472.141; MO Rules 42-81; V.A.M.S. §473.340.2; 5 Mo. Practice, §292.
[242] K.S.A. §59-2213; KS Rule 143.
[243] KS Rule 143; K.S.A. §§59-2224, -2201, -2225; *Grindrod's Estate*, 158 Kan. 345 (1944).
[244] KS Rule 144; K.S.A. §§60-226 – 60-237 (discovery allowed in probate).

validity."[245] Filing written defenses also triggers a 15 day continuance for hearing the underlying probate petition unless the judge determines compelling reasons exist to hear the petition immediately or continue the hearing for less than 15 days.[246] Notice of the new hearing date and a copy of the "filed defense" "must be given."[247] Civil litigation evidence objections apply.

Kansas requires written defenses to be filed for the will contestant to appeal a will's admission to probate. In Missouri a will contest is only allowed *after* the will's admission to probate.[248] By contrast, Kansas does not allow a will contest *after* probate, but a later discovered will can be offered for probate without time limit upon discovery.[249]

**Probate Appeals**

JNOV (a judgment for one party when the jury found for the other party) or new trial motions can be used.[250] Substantial care must be given to probate pleadings and the brief – they alone could win or lose the case. A party's "main theme" must "shine through the argument undiluted by a welter of details, distinctions, quotations and citations."[251]An adverse probate decision can be appealed timely with notice of appeal and must be perfected: "The record … on appeal is of prime importance. The appellate court will hear no new evidence … its duty is to review what went on below … [and] only facts presented below"[252]

*Kansas*

In Kansas, the losing party can ask the Court to (1) to rehear or modify the case (Rule 7.05), (2) to hear the case *en banc* (Rule 7.02(a)(1), (b)), or (3) petition the Kansas Supreme Court review (Rule 8.03(e)(2)).[253] Kansas law allows appeals from many orders.[254] A magistrate's decision is appealable within 30 days to the district court and the case is heard *de novo*.[255] A probate case may be transferred from the magistrate judge to the district judge.[256]

Kansas probate and civil courts are now on equal footing.[257] A Kansas party has 30 days to petition a Court to reconsider an order, as the Court "control[s]" orders for 30 days.[258]

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[245] 3 Blackstone, *Commentaries*, 297.
[246] KS Rule 143.
[247] KS Rule 143; K.S.A. §59-2208.
[248] V.A.M.S. §473.083.1; Will Contests, §4:2.
[249] K.S.A. §§59-2224, -2226; *Estate of Tracy*, 36 Kan. App. 2d 401 (2006); Will Contests, §4:7.
[250] Will Contests, §§16:3-16:4; Black's Law Dictionary, 972.
[251] Will Contests, §16:12
[252] *Id.*, 16:5-16:8.
[253] https://kcestateplan.com/2015/11/24/brenner-a-kansas-probate-loophole/.
[254] K.S.A. §59-2401.
[255] K.S.A. §§59-2401, -2408. Before Kansas unified the probate and district courts, a party had 30 days to appeal a (magistrate) probate court's decision to the district court. *Bertrand's Estate*, 188 Kan. 531 (1961); *Lillibridge's Estate,* 161 Kan. 93 (1946).
[256] K.S.A. §59-2402a.
[257] Before the 1977 unification, the probate courts were under the civil courts. *McKibben v. Chubb*, 840 F.2d 1525 (10th Cir., 1988) ("exclusive probate jurisdiction"); *Quinlan v. Leech*, 5 Kan. App.2d 706 (1981)

After the 30 day window has closed, a probate order, judgment, or decree "may be vacated or modified."[259]

Probate courts value finality. A probate court's final judgment cannot be collaterally attacked.[260] Where a court has personal and subject matter jurisdiction and delivers a judgment on the pleadings and in the ambit of its judicial competency, the court's judgment is final and conclusive.[261] But an otherwise final judgment can be set aside due to fraud, excusable neglect, or "any other reason justifying relief."[262] The 30 day appeal deadline is from the district court to the court of appeals.[263] The court of appeals has jurisdiction to "hear all appeals" in probate cases.[264]

Various probate orders are appealable.[265] When a Will's admission is being appealed, the order admitting the Will remains in effect, but no distributions are allowed while the appeal is pending. Bond may be required on appeal.[266]

*Missouri*

Missouri civil procedure rules apply to probate appeals, but not for an order rejecting the will's admission to probate.[267] Missouri allows probate appeals from an "interested person" "aggrieved" for a variety of reasons.[268] Missouri allows an appeal to be stayed or consolidated in some cases.[269] Missouri civil procedure rules govern an "adversary probate proceeding."[270] The Missouri rules of evidence apply to all Missouri probate cases.[271] Missouri allows some deadline liberty if there is "substantial compliance."[272]

A Missouri probate court's order may be vacated or modified for "good cause."[273] A Missouri notice of appeal must be filed with the trial court clerk within 10 days after the judgment or order becomes final.[274] And the probate court's judgment or order is final 30 days after entry, if no timely trial motion is filed.[275] Where timely (and authorized after

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(upon unification "probate records" were transferred to the district courts, which handle "probate proceedings," and have subject matter jurisdiction).

[258] K.S.A. §§59-2213, -2401 -2403, -2408.

[259] K.S.A. §§59-2213, 60-260(b); *In re Latshaw's Estate*, 194 Kan. 747 (1965); *In re Burling's Estate*, 179 Kan. 687 (1956); *In re Bowman's Estate*, 172 Kan. 17 (1951); *In re Oliver's Estate*, 162 Kan. 407 (1947).

[260] *In re Bertrand's Estate*, 188 Kan. 531 (1961); *In re Burling's Estate*, 179 Kan. 687 (1956).

[261] K.S.A. §§59-2213, 60-212(3); *In re Rothrock's Estate*, 173 Kan. 717 (1953).

[262] K.S.A. §§59-2213, 60-260; *Estate of Hessenflow*, 21 Kan.App.2d 761 (1995).

[263] K.S.A. §59-2401(b). Kansas civil procedure rules (§§60-201 et seq) apply when appealing a case.

[264] K.S.A. §60-2101(a); *Kansas Appellate Handbook*, 5.17.

[265] K.S.A. §60-2102(a)(4), -2103(h); *Kansas Appellate Handbook*, 5.18.

[266] K.S.A. §§60-2103; 59-2401, -2401a.

[267] V.A.M.S. §472.180; *Estate of Bridges*, 710 S.W.2d 237 (Mo. App. 1986); *Kinder v. Brune*, 754 S.W.2d 946 (Mo. App. 1988); 3 Mo. Practice, §3.97.

[268] V.A.M.S. §472.160.

[269] V.A.M.S. §472.190.

[270] V.A.M.S. §472.141. Local rules may vary civil procedure rules. V.A.M.S. §472.141.3.

[271] V.A.M.S. §472.290.

[272] *Freeman v. De Hart*, 303 S.W.2d 217 (Mo. Ct. App. 1957); Will Contests,§16:7

[273] V.A.M.S. §472.150.

[274] MO Rule 81.04.

[275] MO Rule 81.05.

trial motions are filed), the probate court's judgment or order becomes final at the earlier of: (1) 90 days after the last filed motion or (2) latter of the (a) last motion ruling date's or (b) 30 days after the entry of judgment or order.

*Conclusion*

When we serve clients in probate litigation, may it be said of us, as the *Trial by Jury* chorus declares of the Judge, that we are attorneys and "good [attorneys] too!"[276]

[276] Gilbert & Sullivan*, Trial by Jury*.