

**The Kentucky Bar Association
Elder Law Section presents:**

**2023 Elder Law Section
CLE Seminar**



**This program has been approved in
Kentucky for 6 CLE credits including
1 Ethics credit.**

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The Kentucky Bar Association
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for
Kentucky Bar Association
Elder Law Section**

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2023 Elder Law Section CLE Seminar

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**2023 KBA Elder Law Section CLE Seminar
March 23, 2023
Louisville, Kentucky**

AGENDA

8:00-8:30 a.m.	Registration
8:30-9:30 a.m.	Time to Get Serious! Tips to Get Financial Institutions & Others to Accept Legal Instruments such as Power of Attorney, Trusts, and Court Orders (1 CLE credit) Shelley Golde Dowell & Sheldon L. Haden
9:30-9:35 a.m.	Sponsor Break
9:35-10:35 a.m.	Don't Leave it to Scammers: How Attorneys Can Address Financial Abuse (1 Ethics credit) Blaine P. Brockman, Special Agent Jeffery W. Ehringer, & Shari Polur
10:35-10:50 a.m.	Sponsor Break
10:50-11:50 a.m.	Elder Law Hot Topics – State and Federal (1 CLE credit) Melissa J. Crump & Shelly Ann Kamei
11:50-11:55 a.m.	Sponsor Break
11:55-12:55 p.m.	Lunch (provided)
12:55-1:00 p.m.	Sponsor Break
1:00-2:00 p.m.	Caregiver Agreements: Compensating Caregivers while Qualifying for VA and Medicaid Benefits (1 CLE credit) Jennifer Bailey Dalenberg & Jonathan C. Rouse
2:00-2:05 p.m.	Sponsor Break
2:05-3:05 p.m.	Let's Talk about KRS 389A.010 (1 CLE credit) Mark A. Maddox
3:05-3:15 p.m.	Break
3:15-4:15 p.m.	Fixing Trusts: Using Trust Provisions to Your Advantage, Modifying Trusts, Decanting, and Terminating Trusts (1.00 CLE credit) Mary Ellis Patton

PRESENTER BIOGRAPHIES

Shelley Golde Dowell
Kentucky ElderLaw, PLLC
Louisville, KY

Shelley Dowell practices with Kentucky ElderLaw, PLLC in Louisville, where she assists clients with nursing home, Medicaid, asset preservation, asset distribution, probate, guardianship, and other issues. In addition, she drafts legal documents such as wills, powers of attorney, trusts, and health care surrogates. Prior to and during law school, she owned and operated a medical opinion firm where she gained valuable business experience that she relies upon when assisting clients. She began her legal career as a real estate attorney where she assisted clients with closings, title opinions, contracts, and forcible detainers. Ms. Dowell then shifted her focus to wills and trusts, which eventually led her to elder law. She is licensed to practice in Kentucky and is a member of the Kentucky and Louisville Bar Associations. She received her B.S., *cum laude*, from the University of Louisville and her J.D. from University of Louisville Louis D. Brandeis School of Law. Ms. Dowell was named to the 2017 Louisville Business First Lawyers to Know, is a frequent speaker for CLE and community events, and an elder law adjunct professor at the University of Louisville Louis D. Brandeis School of Law.

Sheldon L. Haden
Kentucky ElderLaw, PLLC
Louisville, KY

Sheldon Haden is an attorney at Kentucky ElderLaw, PLLC in Louisville. She also volunteers as a supervising attorney at the Trager-Brandeis Elder Law Clinic. Prior to joining Kentucky ElderLaw, PLLC, Ms. Haden was a trial attorney with an emphasis on medical malpractice, nursing homes, and product liability. She worked on the defense side of that litigation for 10 years at Stites & Harbison, PLLC before spending the next five years on the plaintiff's side with Ann Oldfather at the Oldfather Law Firm. Afterward, she served as Chairperson of Medical Review Panels in Kentucky before joining the Kentucky Court of Appeals as a staff attorney. Ms. Haden earned her law degree from Louis D. Brandeis School of Law at the University of Louisville in 2001. Ms. Haden is a member of the Women Lawyers Association of Jefferson County, Kentucky Justice Association, and the Kentucky and Louisville Bar Associations.

Blaine P. Brockman
Darby Legal Assistance
West Jefferson, OH

Blaine Brockman is the Director of Darby Legal Assistance, an Ohio small not-for-profit corporation that provides public benefits advice to people in rural Ohio who cannot afford an attorney, and advocates for vulnerable elders and people with disabilities. He is also Of Counsel at Hickman Lowder Lidrbauch & Welch Co., L.P.A. Mr. Brockman is active with community organizations that support the elderly and people with disabilities. He is the Chair of the Board of the ARC Ohio and the Board of APSI (Advocacy and Protective Services, Inc.), a non-profit corporation providing guardianship services to people with developmental disabilities. He serves on the Federal Advocacy Committee and on the Special Need Law Section Steering Committee of the National Academy of Elder Law Attorneys. He is a member of the Board of Directors of the Ohio Coalition for Adult Protective Services. Mr. Brockman is retired from the State of Ohio. In that time, he was the Assistant Executive Director of the Ohio Housing Finance Agency for eight years, a human resource administrator for two medium size state agencies for 11 years and a law

enforcement officer with the Ohio Department of Natural Resources for 10 years. Mr. Brockman received the 2022 Member of the Year Award from the Ohio Chapter of the National Academy of Elder Law Attorneys. He received his B.S. in Natural Resources from The Ohio State University and his J.D., *cum laude*, from Capital University Law School.

Special Agent Jeffery W. Ehringer
U.S. Secret Service
Louisville, KY

Special Agent Jeffery Ehringer earned his Bachelor of Arts in Criminal Justice from Indiana University. He has been with the USSS since 1998 and was originally assigned to the Chicago Field Office. In 2003, he was re-assigned to the Presidential Protective Division in Washington D.C. After completing his assignment with the Presidential Protection Division, Special Agent Ehringer was re-assigned to the Criminal Investigative Division at Secret Service Headquarters where he was the program manager for the Network Intrusion Response Program and the Electronic Crimes Special Agent Program. In this role he was responsible for the training curriculums and equipment research. Special Agent Ehringer joined the USSS Louisville Field Office in 2009 and has since had an active part in investigating fraud, counterfeiting, network intrusions and data breaches in the Louisville Metro area. Currently he is the criminal supervisor for the Louisville Field Office.

Shari Polur
Polur Elder Law, PLLC
Louisville, KY

Shari Polur is the founder of Polur Elder Law, PLLC, a holistic elder law and special needs law firm in Louisville, Kentucky. She concentrates her practice exclusively in elder law and special needs law, with a holistic view toward long term planning. Ms. Polur received her B.A. from the University of Pennsylvania and her J.D. from Boston University School of Law. She is admitted to practice before the United States Supreme Court and has also been admitted to practice in Kentucky, Massachusetts, Florida, and Washington, D.C. Ms. Polur is honored to serve as the Chair for the University of Kentucky's Annual Elder Law Conference. She also helped found and has remained active in the Kentucky chapter of the National Academy of Elder Law Attorneys (current Board Chair), and she also serves as NAELA's Federal Advocacy Committee Co-Chair. She is also active in the KBA's Elder Law Section (past Chair). Ms. Polur is a Director for the Board of Louisville's JCL, and has served at the pleasure of three different governors on statewide boards to help serve those with disabilities.

Melissa J. Crump
Crump Spurlock
Paris, KY

Melissa Crump concentrates her practice in elder law, estate planning, and estate administration. Ms. Crump provides legal assistance to seniors and special needs persons in legal matters including powers of attorney, wills, and trusts. She focuses on estate plans that offer protection and minimize financial harm for seniors and special needs individuals who may need assistance paying for rehab and long-term nursing care. Ms. Crump values the relationships she makes with her clients while providing legal help and creating legal strategies specific to the clients' need. She obtained her law degree from Northern Kentucky University Salmon P. Chase College of Law and her undergraduate degree from the University of Kentucky with a degree in accounting. Ms. Crump has always centered her legal path around elder law. She clerked with Legal Aid of the

Bluegrass and aided seniors during her clerkship. Ms. Crump also clerked for the honorable Justice Mary Noble of the Kentucky Supreme Court. Ms. Crump is admitted to the bar in the Commonwealth of Kentucky and the U.S. Supreme Court. Her bar memberships include the Kentucky Bar Association (Elder Law Section, Probate & Trust Law Section, and Small Firm Practice & Management Section), the National Academy of Elder Law Attorneys, and the American Bar Association. She is the chair-elect of the KBA Elder Law Section and current president of the NAELA Kentucky Chapter. Ms. Crump is a member of the Paris-Bourbon County Chamber of Commerce where she serves as a Chamber Ambassador. She is a national speaker in areas relating to elder law, estate planning, and trust administration.

Shelly Ann Kamei
Bardstown, KY

Shelly Ann Kamei is a solo practitioner in Bardstown with a practice that serves clients across the Commonwealth. Her areas of focus are elder law, special needs planning, estate planning, and asset protection. She is the 2022-23 Chair of the Elder Law Section of the Kentucky Bar Association, having previously served in other positions for the section's Executive Committee. Ms. Kamei is a *cum laude* graduate of the University of San Diego School of Law. She is a patron and supporter of The Speed Art Museum of Louisville and a member of the Nelson County Rotary Club.

Jennifer Bailey Dalenberg
The Potter Law Firm
Ashland, KY

Jennifer Bailey Dalenberg is an attorney at the Potter Law Firm in Ashland, where she focuses her practice on estate planning, elder law, probate and trust administration. She graduated *cum laude* from Morehead State University and obtained her J.D. from Northern Kentucky University Salmon P. Chase College of Law. Ms. Dalenberg was admitted to the Kentucky Bar in 2016 and has a background in criminal defense, bankruptcy, and family law. She joined the Potter Law Firm in February 2020 and is passionate about helping families plan and care for loved ones. Ms. Dalenberg is a member of the Kentucky Bar Association and its Elder Law and Probate & Trust Law Sections. She is also a member of the American Academy of Estate Planning Attorneys and volunteers for the Alzheimer's Association as a public educator.

Jonathan C. Rouse
Rouse & Rouse Attorneys, PLLC
Versailles, KY

Jonathan Clay Rouse is a partner at Rouse & Rouse Attorneys, PLLC in Versailles, where he focuses his practice on guardianship law, elder law, estate planning, and probate and trust administration. He graduated from Centre College and later attended the University of Kentucky, where he received a master's degree in social work in 2003. He joined Rouse & Rouse Attorneys as a law clerk in 2008 before attending the evening program at Northern Kentucky University Salmon P. Chase College of Law. He obtained his J.D. and was admitted to the Kentucky Bar in 2016. Mr. Rouse is a member of the Kentucky Bar Association's Elder Law and Probate & Trust Law Sections, and he currently serves as a member of the Board of the Kentucky Guardianship Association and of the National Association of Elder Law Attorneys' Kentucky Chapter.

Mark A. Maddox
McClelland and Associates, PLLC
Lexington, KY

Mark Maddox is a partner in the firm McClelland & Associations, PLLC, and focuses his practice entirely on elder law. He earned his B.A. from the University of Iowa, his J.D. from Northern Kentucky University Salmon P. Chase College of Law, and became a member of the Kentucky Bar in 1981. He is a member of the Kentucky Bar Association and its Elder Law Section.

Mary Ellis Patton
Bluegrass Elder Law, PLLC
Lexington, KY

Mary Ellis Patton is a partner at Bluegrass Elderlaw, where she has practiced since 2014. She is licensed to practice law in both Kentucky and Ohio. Ms. Patton is a past-Chair of the Elder Law Section of the Kentucky Bar Association. She is a member of the National Academy of Elder Law Attorneys, Fayette County Bar Association, and the Kentucky Bar Association. Ms. Patton is the current president of the Kentucky Guardianship Association and serves on the board of directors for the Fayette County Bar Association. She earned her B.A. in Communication, *magna cum laude*, from the University of Kentucky in 2004. In 2007, she received her J.D. from the University of Dayton School of Law. In 2019, Ms. Patton was named the *pro bono* attorney of the year by Legal Aid of the Bluegrass. In 2021, she was named by the University of Kentucky as the Fraternity and Sorority Life Outstanding Chapter Advisor.

**TIME TO GET SERIOUS! TIPS TO GET FINANCIAL INSTITUTIONS AND OTHERS TO
ACCEPT LEGAL INSTRUMENTS SUCH AS POWER OF ATTORNEY, TRUSTS, AND
COURT ORDERS**

Misty Clark Vantrease

Attorney presents Power of Attorney Document to manager at Big Old Generic Bank. They refuse to accept it.

Attorney: You have to accept it. If you don't, we'll file suit and you'll be paying my attorney fees!

Big Old Generic Bank Branch Manager (to attorney): Surely you can't be serious!!

Attorney: I am serious – and stop calling me Shirley.¹

Any elder law attorney drafts thousands of powers of attorney documents, last will and testaments, and trusts during their time practicing. In addition, they will likely represent court-appointed guardians and conservators. As such, it is simply inevitable that they will get a panicked call from the client's representative saying that the bank (or insurance company, investment company, etc.) won't accept the document as presented. They may give a myriad of different reasons why they can't accept it. Just some examples:

"We require it to be recorded."

"We can only accept the original."

"We require the document to have a certain phrase/section."

"We only take the sample form that is in the statute."

"This document wasn't written in this state."

"This power of attorney is too old."

"We don't accept court orders."

"This says full guardian and I see that it has financial powers listed but it's not the new form that says conservator."

And so on and so on and so on and so on. The examples are endless. Delays in accepting or refusals to accept the documents leave the clients without access to needed funds to pay for care, pay basic living expenses, or to prepare for a Medicaid application. The rejection of these documents is unacceptable. While there are likely even more wonderful, creative ways to get these financial institutions and others in line, the hope is this writing can give a practitioner some places to start to get these documents enforced as quickly, painlessly, and profitably(!!!) as possible.

¹ This is a reference to the movie *Airplane!* If you haven't seen it, it's worth a watch.

I. POWER OF ATTORNEY

On July 14, 2018, Kentucky adopted the Uniform Power of Attorney Act. The Act is now codified in [KRS Chapter 457](#). Notable changes include, but are not limited to:

- A. [KRS 457.040](#) – Powers of attorney are durable unless the document says otherwise. There are banks that are still requiring express durability language – THEY ARE WRONG.
- B. [KRS 457.050](#) – To be valid, the document must be signed by the person executing or they can direct someone to sign on their behalf. Signature presumed to be genuine if notarized. TWO WITNESSES ARE NOT REQUIRED IF SIGNED AFTER JULY 2018.
- C. [KRS 457.060](#) – Execution had to be compliant with law as it existed when the document was signed. Keep in mind that there was a two-year period where two witnesses were required prior to 2018. A photocopy of the document is just as good as the original. THE ORIGINAL IS NOT REQUIRED.
- D. [KRS 457.080](#) – It is now clear that the appointment of a financial guardian/conservator terminates the power of attorney (unless the court says otherwise).
- E. [KRS 457.090](#) – All powers of attorney are presumed to be immediately effective unless the document says otherwise. This does not have to be expressly stated in the document.
- F. [KRS 457.100](#) – The power of attorney is effective and does not lapse no matter the amount of time between execution and when it is presented (Subsection (3)). A new power of attorney document does not automatically revoke an older/previous document unless the document expressly says so (Subsection (6)).
- G. [KRS 457.110](#) – If two agents are named, they are presumed to have independent authority to act, unless the document says otherwise. NO, MR. BANKER, BOTH SALLY AND BILLY DON'T HAVE TO BE HERE.
- H. [KRS 457.245](#) – The powers that require a specific grant of authority in the document (think gifting/gifting to the agent, trust creation, changing beneficiaries, etc.).
- I. [KRS 457.255](#) – A general grant of authority that cites to the [KRS Chapter 457](#) statutes/subsections gives the agent all the powers EXCEPT those that require grants of specific authority – ACTUALLY, MR. BANKER IT DOESN'T HAVE TO SPECIFICALLY SAY "SAFE DEPOSIT BOX."
- J. [KRS 457.265](#) – Outlines the construction of general authority and what all powers are included.
- K. [KRS 457.310](#) – Outlines the banking powers that are presumed with a general banking authority.

So what does an elder law attorney do if the bank, financial institution, or other entity just flat refuses to take the power of attorney presented? The new [KRS 457.190](#) and [KRS 457.200](#) are our guides.

[KRS 457.190](#) states:

[457.190](#) Acceptance of and reliance upon acknowledged power of attorney.

- (1) *For purposes of this section and [KRS 457.200](#), "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgements.*
- (2) *A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption under [KRS 457.050](#) that the signature is genuine.*
- (3) *A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid, and still in effect, the agent's authority were genuine, valid, and still in effect, and the agent had not exceeded and had properly exercised the authority.*
- (4) *A person that is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation:*
 - (a) *An agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;*
 - (b) *An English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and*
 - (c) *An opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.*
- (5) *An English translation or an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made more than seven (7) business days after the power of attorney is presented for acceptance.*
- (6) *For purposes of this section and [KRS 457.200](#), a person that conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.*

The financial institution that has been presented a notarized power of attorney document can request a certification from the named agent regarding any factual matter concerning the document. They can also request a translation to English if it is not in English. The third option is to request an opinion of counsel regarding any matter concerning the document if they make the request in writing and state the reason for the request. The client (Principal) is required to bear the burden of the expense of this certification IF the

request is made within seven days of the document being presented. If not, the expense must be paid by the requester.

Assuming that a certification was requested and provided OR the financial institution did not even make this request but continues to deny the acceptance of the document, what is the next step?

The answer is in [KRS 457.200](#).

457.200 Liability for refusal to accept acknowledged power of attorney.

- (1) *Except as otherwise provided in subsection (2) of this section:*
 - (a) *A person shall either accept an acknowledged power of attorney or request a certification, a translation, or an opinion of counsel under [KRS 457.190\(4\)](#) no later than seven (7) business days after presentation of the power of attorney for acceptance;*
 - (b) *If a person requests a certification, a translation, or an opinion of counsel under [KRS 457.190\(4\)](#), the person shall accept the power of attorney no later than five (5) business days after receipt of the certification, translation, or opinion of counsel; and*
 - (c) *A person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.*
- (2) *A person is not required to accept an acknowledged power of attorney if:*
 - (a) *The person is not otherwise required to engage in a transaction with the principal in the same circumstances;*
 - (b) *Engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;*
 - (c) *The person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;*
 - (d) *A request for a certification, a translation, or an opinion of counsel under [KRS 457.190\(4\)](#) is refused;*
 - (e) *The person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under [KRS 457.190\(4\)](#) has been requested or provided; or*
 - (f) *The person makes, or has actual knowledge that another person has made, a report to the Cabinet for Health and Family Services stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.*
- (3) *A person that refuses in violation of this section to accept an acknowledged power of attorney is subject to:*

- (a) *A court order mandating acceptance of the power of attorney; and*
- (b) *Liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.*
- (4) *A person that accepts a power of attorney pursuant to this section shall not be liable for his or her good faith reliance on the agent's representation of the scope of authority granted to the agent by the power of attorney. In addition, the person shall not be responsible to determine or ensure the proper application of funds or property by the agent.*

As stated previously, the financial institution has seven (7) days to request a certification. After the certification has been presented, they have five (5) days to accept the document. They are not permitted to ask for a different form of power of attorney – *i.e.*, we need you to sign our document. There are exceptions to this requirement, but they are very limited:

- The action requested is not one the principal could do;
- The action requested would be against federal law;
- The institution knows the document has been revoked or the authority terminated;
- The request for certification was refused;
- The institution in good faith believes the agent does not have the authority for the requested act; OR
- The institution suspects elder abuse/fraud or exploitation.

If the bank or financial institution continues to refuse the document, then it's time for action. At that point, they are subject to a court order mandating acceptance of the document AND liability for attorney's fees and costs for the court action required to get the document accepted. Cha-ching!! Just joking, but it is often a huge relief to the client to know they will not be responsible for that financial obligation. There is also an indemnification within the statute to protect those that accept the document, following the steps in this statute. The action to enforce the power of attorney document should be filed in district court. A sample pleading is provided here:

REST OF PAGE INTENTIONALLY LEFT BLANK

COMMONWEALTH OF KENTUCKY
JEFFERSON DISTRICT COURT
CIVIL BRANCH
_____ DIVISION
CASE NO. _____

CLIENT NAME, Agent under Power of Attorney for
POA NAME
11103 Generic St.
Louisville, KY 40207

PETITIONER

v.

J.P. MORGAN CHASE BANK, N.A.
1111 Polaris Parkway
Columbus, OH 43240

SERVE: C.T. CORPORATION SYSTEM
306 W. Main Street, Suite 512
Frankfort, KY 40601

RESPONDENT

PETITION

* * * * *

Petitioner, CLIENT NAME, the agent under the Durable Power of Attorney for her father, POA NAME, through counsel, pursuant to [KRS Chapter 457](#) and [KRS 457.200\(3\)](#), petitions this Court for Judgment against, and an Order to, Respondent, J. P. Morgan Chase Bank, N.A., to honor Mr. Client's Durable Power of Attorney. In support, Petitioner states as follows:

1. CLIENT NAME is an elderly citizen residing in Jefferson County, Kentucky.
2. POA NAME resides in Jefferson County, Kentucky, and is the daughter of CLIENT NAME and his agent under his Durable Power of Attorney.
3. J. P. Morgan Chase Bank, N.A., is a foreign corporation authorized to do business in Kentucky under the name of "Chase Bank" and known locally as "Chase." Chase Bank's registered agent for service of process in Kentucky is C.T. Corporation System, 306 W. Main Street, Suite 512, Frankfort, Kentucky 40601.
4. On or about November 15, 2021, Mr. CLIENT, recognizing the benefit of having assistance in financial matters and payment of bills and expenses should he

become unable or unwilling to personally perform certain business transactions involving his estate, executed a Durable Power of Attorney, which empowered his daughter, POA NAME, to act as his agent. See *Durable Power of Attorney of CLIENT NAME, attached as Exhibit A.*

5. Mr. Client's Durable Power of Attorney ("POA") was a legal POA under Kentucky law at the time of execution, remains legal, and has not been revoked.
6. On or about November 20, 2021, Ms. POA presented her copy of Mr. Client's POA to a Personal Banker at the Chase Bank branch located at 7335 Dixie Highway, Louisville, Jefferson County, Kentucky to access the account(s) of Mr. Client in order to pay Mr. Client's bills.
7. Mr. Client's POA was at the time and continues to be in full force and effect. The Personal Banker at Chase Bank, after consulting with the "Complex Accounts Team," advised that he could not accept the POA instrument because it did not "contain an executed 'Important Information to the Agent' section." See *December 23, 2021 email from Benjamin Ahmetagic, Chase Bank Private Client Banker, to CLIENT NAME, attached as Exhibit B.*
8. Chase Bank refused to honor Ms. POA's agency, as legally provided by Mr. Client's POA, and continues to refuse to honor that agency.
9. To date, despite the legal POA, Ms. POA has been denied access to the accounts of Mr. Client.
10. The undersigned attorney believes that Chase Bank's representatives reviewing this POA, which is a legal instrument, have no knowledge of the legal requirements for a valid POA in Kentucky and are not licensed to practice law in Kentucky. No certification or opinion of counsel has been requested of the client or client's counsel.

11. Under Kentucky law, as provided in [KRS 457.060\(1\)](#), “[a] power of attorney executed in this state after July 14, 2018, is valid if its execution complies with [KRS 457.050](#).” The requirements under [KRS 457.050](#) are:
 - (1) A power of attorney shall be signed by the principal or in the principal’s conscious presence by another individual directed by the principal to sign the principal’s name on the power of attorney. If signed in the principal’s conscious presence by another individual, the reason for this method of signing shall be stated in the power of attorney.
 - (2) A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.
12. Mr. Client signed the subject POA before a notary public, as well as two witnesses. See *Exhibit A*. Accordingly, pursuant to [KRS 457.060](#) and [KRS 457.050](#), Mr. Client’s POA was valid.
13. Moreover, [KRS 457.070](#) provides that “[t]he meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.” Mr. Client’s POA specifically states that Kentucky law governs. See *Exhibit A, at Section IV, page 7 of 9*. Furthermore, Mr. Client’s POA was executed in Kentucky. See *id.* Accordingly, under [KRS 457.070](#), the meaning and effect of Mr. Client’s POA is determined by Kentucky law.
14. Pursuant to [KRS 457.160](#), the principal or the agent “may petition a District Court to construe a power of attorney or review the agent’s conduct and grant appropriate relief...” Here, Ms. POA, as the agent for her father, petitions this Court for appropriate relief.
15. The liability for Chase Bank’s refusal to accept Mr. Client’s POA is outlined in [KRS 457.200](#). See [KRS 457.200](#), attached as *Exhibit C*. Under [KRS 457.200\(3\)](#), Chase

Bank is subject to a court order mandating acceptance of the POA and is liable for attorney fees and costs. This statute specifically states:

- (3) A person that refuses in violation of this section to accept an acknowledged power of attorney is subject to:
 - (a) A court order mandating acceptance of the power of attorney; and
 - (b) Liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

- 16. Due to Chase Bank's unlawful refusal to accept Mr. Client's POA, Petitioner has incurred fees and costs related to this refusal.
- 17. Although Kentucky enacted a statutory form power of attorney in 2020, which is outlined in [KRS 457.420](#), this is a **suggested** form for a power of attorney and is **not** mandatory. Specifically, [KRS 457.420](#) states "a document substantially in the following form *may be* used to create a statutory form power of attorney." (emphasis added). It is elementary that "may" is permissive and "shall" is mandatory in statutory language.
- 18. Because the statutory form power of attorney outlined in [KRS 457.420](#) is not the exclusive means by which powers of attorney may be granted, other powers of attorney forms may be used and are valid in Kentucky, including Mr. Client's POA.
- 19. Additionally, although the statutory form power of attorney in [KRS 457.420](#) contains an "Important Information for Agent" section, this is not a requirement of Kentucky law. This section merely recites the duties owed by an agent to the principal, as outlined in [KRS 457.140](#), and none of these duties are required to be explicitly included in a POA document governed by Kentucky law.

WHEREFORE, based on the foregoing, Mr. Client's POA, and Kentucky law, Petitioner requests:

- (1) a Judgment and Order be issued by this Court that the subject Power of Attorney is valid and that Respondent is forthwith to acknowledge its authenticity and effectiveness and the

authority of CLIENT NAME to access, to the full extent, the assets of POA NAME held by Respondent, including the full release and disbursement of same if so requested;

(2) in the future, Respondent only rely on legal opinions regarding interpretation of Kentucky law by attorneys licensed to practice law in the Commonwealth of Kentucky;

(3) pursuant to [KRS 457.200\(3\)](#), the Court order that Respondent pay the usual attorney fee charged by Petitioner's counsel acting for POA NAME in this action to enforce the said power and statute along with all expenses and late fees due because of Respondent's unreasonable failure to acknowledge the legitimacy of the subject Durable Power of Attorney; and

(4) Attorney fees, to date, in the amount of \$1,250.00, court costs associated with this matter, and any other relief to which Petitioner is or may be entitled.

Respectfully submitted,

/s/ Misty Clark Vantrease

Misty Clark Vantrease, Attorney at Law #88861
Kentucky ElderLaw, PLLC
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(502) 581-1111
COUNSEL FOR PETITIONER

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It is the author's experience that a filing of an action, such as above, results in a quick response from the financial institution. It is important to note that everything we've discussed is not limited to banks or insurance companies. This action is available for any entity that refuses to accept the document, including nursing homes.

II. TRUSTS

The rules regarding trusts are found in [KRS Chapter 386B](#). Kentucky adopted the Uniform Trust Code and so the provisions of that act apply. It is always important to read the trust document itself. [KRS 386B.10-120](#) allows a trustee to present a certification of trust as proof of their authority.

386B.10-120 Certification of trust.

- (1) *Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:*
 - (a) *That the trust exists and the date the trust instrument was signed;*
 - (b) *The identity of the settlor;*
 - (c) *The identity and address of the currently acting trustee;*
 - (d) *The powers of the trustee;*
 - (e) *The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;*
 - (f) *The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and*
 - (g) *The manner of taking title to trust property.*
- (2) *A certification of trust may be signed or otherwise authenticated by any trustee.*
- (3) *A certification of trust shall state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.*

The entity to which the certification is presented is then permitted to request additional parts of the trust document itself to show what powers the trustee has. If the requests for additional information are not made in good faith, then the entity requesting the additional information will be liable for damages. The jurisdiction for any actions under this statute is also district court. See [KRS 386B.10-120](#). The pleadings would be similar to those provided above for power of attorney. This could be in the form of a petition, declaratory action or writ. Registration of the trust itself is never required. Damages, including attorney's fees, can be requested.

III. ORDERS APPOINTING CONSERVATOR/GUARDIAN

A person would typically think that the one type of document that would never get refused is a court order. Think again. The author has experienced the refusals of the acceptance of a court's appointment by two different banks (in two different cases) and most recently, by an investment firm. The powers that a conservator has in Kentucky are found in [KRS 387.690](#) and [KRS 387.700](#), so make sure first that whatever the conservator seeks to do is within their power. To enforce a court order, this author had generally started with a

motion to compel and then when that order is not accepted, a motion for contempt. The court in Jefferson County, expressing a frustration with this recurring issue, has now requested that the motion for contempt be filed immediately. Here are some pleadings recently filed in a guardianship action:

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**COMMONWEALTH OF KENTUCKY
JEFFERSON DISTRICT COURT
CASE NO: _____**

IN RE: WARD, a disabled person

NOTICE-MOTION-ORDER

CONSERVATOR, Guardian/Conservator of WARD, by counsel, hereby provides notice that on Monday, December 5, 2022, at 9:00 a.m., or as soon as the Court is available, will bring the following Motion to Compel Acceptance of Guardianship Appointment or, in the alternative, Motion to Hold Edward Jones in Contempt for Failure to Honor Court Guardianship Appointment, on for hearing.

Respectfully Submitted,

Misty Clark Vantrease, Esq.
Sheldon L. Haden, Esq. (#88876)
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Louisville, KY 40207-4695
(502) 581-1111
misty@kyelderlaw.com
sheldon@kyelderlaw.com
COUNSEL FOR GUARDIAN/
CONSERVATOR, CONSERVATOR

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Notice-Motion-Order was served on the following by U.S. mail, first class, postage prepaid, on November 29, 2022.

Claudia Smith, Esq.
Jefferson County Attorney
600 W. Jefferson Street
Louisville, KY 40202

ATTORNEY FOR RESPONDENT

Sheldon L. Haden, Esq.

**COMMONWEALTH OF KENTUCKY
JEFFERSON DISTRICT COURT
CASE NO: _____**

IN RE: WARD, a disabled person

**MOTION TO COMPEL ACCEPTANCE OF
GUARDIANSHIP APPOINTMENT OR, IN THE ALTERNATIVE, MOTION TO HOLD EDWARD
JONES IN CONTEMPT FOR FAILURE TO HONOR COURT'S GUARDIANSHIP
APPOINTMENT**

CONSERVATOR, Guardian/Conservator of WARD, by counsel, hereby moves the Court to compel Edward Jones to accept the Court's Order of Appointment of Guardian for the above-named Ward or, in the alternative, to Hold Edward Jones in Contempt for Failure to Honor the Court's Guardianship Order. In support of this Motion, the movant states as follows:

1. CONSERVATOR was appointed Guardian of WARD by Court Order in 2016.
2. Recently, Ms. Conservator went to Edward Jones to access Mr. Ward's accounts. She presented Edward Jones with the Court's Order of Appointment of Guardian and Edward Jones refused to accept the Order of Appointment of Guardian because the Order does not specify that Ms. Conservator is also the Conservator of Mr. Ward.
3. Edward Jones indicated that Ms. Conservator would not be able to access Mr. Ward's accounts until she produced a Court Order proving that she is also the Conservator of Mr. Ward.
4. Ms. Conservator attempted to obtain such an Order indicating that she is also Mr. Ward's Conservator. The clerk indicated that a motion to hold Edward Jones in Contempt would be more appropriate.
5. As background, to provide uniformity to the states' guardianship laws, the Uniform Law Commission (ULC) approved the Uniform Guardianship and Protective Proceedings Act (UGPPA) in 1982. This was revised in 1997. Then, in July 2017, the ULC approved the new Uniform Guardianship, Conservatorship and Other Protective Arrangements Act. This newest

Act created new petition requirements, including a model petition form making it easier for petitioners to seek and courts to fashion limited orders of guardianship and conservatorship. When Kentucky adopted this Act, the AOC forms were revised. The prior AOC form did not clearly differentiate between guardian and conservator like the current, revised form. Thus, this may be the source of the misunderstanding on Edward Jones' part. Nonetheless, the Court Order in effect in this case clearly means that Ms. Conservator is *both guardian and conservator* of Mr. Ward. Yet, Edward Jones is not honoring that Order.

WHEREFORE, Ms. Conservator, by counsel, respectfully requests the Court to enter an Order compelling Edward Jones to accept her Order of Appointment or, in the alternative, to hold Edward Jones in contempt for failing to honor the Court's Order of Appointment.

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COUNSEL FOR GUARDIAN/
CONSERVATOR, CONSERVATOR

COMMONWEALTH OF KENTUCKY
JEFFERSON DISTRICT COURT
CASE NO: _____

IN RE: WARD a disabled person

**ORDER GRANTING MOTION TO COMPEL ACCEPTANCE OF
GUARDIANSHIP APPOINTMENT AND MOTION TO HOLD EDWARD JONES IN CONTEMPT**

Based on the motion of CONSERVATOR, Guardian/Conservator of WARD, by counsel,
and the Court being fully advised;

IT IS HEREBY ORDERED that Ms. Conservator's Motion to Compel Acceptance of
Guardianship Appointment is **GRANTED**. Edward Jones shall accept the Court's Order of
Appointment of Ms. Conservator as Guardian and Conservator of WARD. In addition, **IT IS
HEREBY ORDERED** that Ms. Conservator's Motion to Hold Edward Jones in Contempt is
GRANTED. A separate contempt proceeding shall be held at a later date.

JUDGE

DATE

Distribute to:

Claudia Smith, Esq.
Jefferson County Attorney
600 W. Jefferson Street
Louisville, KY 40202

ATTORNEY FOR RESPONDENT
920 Dupont Road, Suite 200
Louisville, KY 40207-4695

It is the author's experience that, in these matters, the court has little patience with any entity that refuses to accept their order. While there is no specific statutory order permitting attorney's fees, it is reasonable to request the court to award fees to the ward in this situation.

IV. CONCLUSION

The statutes, actions and pleadings discussed and provided here are intended to give you somewhere to start. The author has faith that the Elder Law Bar has creative and talented litigators that can give additional insight into more avenues of attack. The good news is every action the author has filed has resolved in favor of the movant. The biggest lesson learned to date is to spend less time arguing with a bank branch manager with an email from Pittsburgh and just go for it and let them know you're serious and mean business.

Also, let them know your hourly rate that they'll be paying. It's one of the most rewarding checks you'll ever cash.

DON'T LEAVE IT TO SCAMMERS: HOW ATTORNEYS CAN ADDRESS FINANCIAL ABUSE

Shari Polur and Blaine P. Brockman, Esq.

I. INTRODUCTION AND OBJECTIVES

Elder abuse can take on many forms: physical, emotional, verbal, sexual, psychological, financial, even negligence. It is increasing and has blossomed during the recent pandemic. There are both practical and ethical considerations for attorneys in reducing the risk of abuse for elderly clients or those with disabilities.¹ First in this article, we will focus on financial abuse. We will define what elder financial exploitation encompasses and its scope. Next, we will review specific federal and state laws designed to combat financial abuse of the elderly and then review the ethical obligations of an elder law attorney in reporting such abuse. Finally, we will provide resources for practitioners to support their clients directly and through referrals to other professionals.

Scenario 1: Meet June

Suppose you are enjoying a well-deserved lunch break in your office one afternoon when the phone rings. It is one of your long-term clients, June, a lively septuagenarian, who is calling to update her estate planning documents. June explains her husband, Ward, has passed away and she wants to create new power of attorney and health care documents naming her elder son, Wally, as her first agent with her younger son, Theo, as back-up. June is certain that her sons can work well together and will be able to agree on most issues, despite the history of Wally speaking down to Theo in their childhoods. June also shares that she is not enjoying “rattling around this big house” adding that she does not get out much now that she is a widow.

What advice do you offer? What concerns do you have?

II. WHAT IS ELDER ABUSE AND HOW PERVASIVE IS IT?

Elder abuse takes on many forms but is generally considered to be any intentional act or failure to act that causes or creates a risk of harm to an older adult. While the definition of “older” varies by context, it commonly refers to adults of at least age 60.² Most studies find that, in any given year, as many as one in 10 older adults may be a victim of some form of abuse, most of which goes unreported. This encompasses all types of abuse, including physical, emotional, neglect, and perhaps even abandonment. Adults may be abused in their own homes, in assisted living facilities, and in other congregant communities. One of the most dangerous forms of abuse is financial abuse. Fiscal exploitation can leave adults with few resources and fewer options. Fortunately, elder law and special needs attorneys can help reduce the risk of such financial exploitation through education and prevention.

¹ For simplicity, we will refer to “elderly clients” with the understanding that this generally also encompasses other vulnerable adults, including those with disabilities.

² See, generally, <https://www.cdc.gov/violenceprevention/elderabuse/fastfact.html>.

III. THE SCOPE OF FINANCIAL ABUSE

A. Fiscal Exploitation Defined

One category of elder abuse is financial abuse. In particular, fiscal exploitation of the elderly is generally defined as illegal or improper use of an older person's assets, property, or funds. This can encompass theft, misuse or misappropriation, failure to pay bills, and the like. The term is intentionally broad in scope and like much abuse, can take many forms.

There are numerous sources for reviewing statistics regarding financial crimes each with its own specific focus. One good source is the FBI's annual report collected from the FBI Internet Crime Complaint Center (IC3). Its *2021 Internet Crime Report* outlines information concerning the 847,376 complaints of suspected cybercrime, and related reported losses of \$6.9 billion, that the IC3 received throughout the year. According to the FBI, phishing scams, non-payment/non-delivery scams, and personal data breaches were the most common crimes reported in 2021. The age group hit hardest? Victims aged 60 and older. The most lucrative scams for perpetrators? Romance and confidence scams, business email compromise schemes, and investment fraud.³

Closer to home, the Kentucky Attorney General's Office indicated that crime skyrocketed during the pandemic and that financial exploitation of seniors was blossoming. The hardest hit were elderly who were swindled in online romance scams. Romance scams against older Kentuckians netted the criminals nearly \$900,000 from seniors in 2020 alone.⁴ In 2021, gift cards were the most common payment method used in scams.⁵

B. Who are the Victims?

Professionals who work with elderly or disabled populations can recognize "victims." However, there is some selection bias in this. That is, the practitioners can only account for those victims who are reported. There is not a great deal of data about the nature of the victims. But, the National Center on Law and Elder Rights reports that the prevalence of financial exploitation of older adult victims in the U.S., based on a 2011 survey by the Federal Trade Commission (FTC), was 7.3 percent of adults age 65-74 and 6.5 percent of adults age 75 and older.⁶ These numbers are likely to be under-representative of the true breadth of seniors who are financially abused.

³ <https://www.hsd1.org/c/2021-internet-crime-report/> (accessed January 13, 2023).

⁴ Kentucky Attorney General's Office for Senior Protection, see <https://www.ag.ky.gov/about/Office-Divisions/OSPM/Pages/default.aspx#:~:text=The%20Office%20of%20Senior%20Protection,fraud%2C%20scams%20and%20financial%20exploitation.>

⁵ <https://www.ag.ky.gov/Resources/Consumer-Resources/Consumers/Pages/Comsumer%20Alerts.aspx.>

⁶ https://ncler.acl.gov/pdf/Legal%20Basics-Elder_Financial_Exploitation_Chapter_Summary.pdf.

C. Growth in Financial Abuse

The problem is growing as is the awareness of who may be victims. A recent 10-year study, published in 2021, showed the prevalence of financial abuse to be about 8.5 percent of the older adult Americans.⁷ This validates a marked increase over what the FTC originally noted in 2011. Additionally, the results of this study show the following risk factors associated with financial exploitation:

- Poor health – physical challenges and/or failed cognitive ability.
- Racial status – *i.e.*, nonwhite.
- Living alone – social isolation, either by preference or lack of mobility.
- Having functional impairment.

Practitioners are familiar with many of these risk factors, but that does not necessarily lead to interventions. Understanding the risk factors may not be enough. Practitioners should be alert to situations that may create a heightened need to act. Common red flags for all types of elder abuse and exploitation include:⁸

- Victim experiencing social isolation.
- Victim experiencing bereavement.
- Victim's dependence on possible exploiter (for care, financial support, housing, companionship).
- Possible exploiter's dependence on victim (for care, financial support, housing, companionship).
- Alcohol or substance abuse of anyone involved.
- Depression or mental illness of any party.
- Entitlement mentality of potential perpetrator(s).
- Trusting nature increases with age.

When it comes specifically to financial exploitation, practitioner should be especially aware of factors marking potential financial exploitation. These include:

- Sudden or unexplainable financial actions.
- Unusual changes to or losses of financial documents.
- Atypical changes to legal documents or property ownership.
- Suspicious or questionable alterations to personal relationships.

⁷ Burnes D, Hancock DW, Eckenrode J, Lachs MS, Pillemer K. "Estimated Incidence and Factors Associated With Risk of Elder Mistreatment in New York State." *JAMA Netw Open*. 2021 Aug 2;4(8):e2117758. doi: 10.1001/jamanetworkopen.2021.17758. PMID: 34383062; PMCID: PMC9014652.

⁸ See for example, <https://www.maine.gov/pfr/securities/documents/Checklist%20for%20Lawyers.pdf>.

IV. MAJOR FEDERAL AND SPECIFIC STATE LAWS DESIGNED TO COMBAT ELDER ABUSE

There are several pieces of federal legislation and state laws, rules, and regulations that are designed to help combat elder abuse. A select few are examined below.

A. Older Americans Act/Reauthorization

The Older Americans Act Reauthorization Act of 2016 expanded certain protections of the Older American's Act of 1965 (OAA), notably against fiscal exploitation of the elderly. In particular, it expanded the term "abuse" to include "knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm." [42 U.S.C. §3002\(1\)](#). Further, the OAA Reauthorization Act expanded the term "exploitation" to include "financial exploitation." [42 U.S.C. §3002\(6\)](#). Finally, the legislation strengthened long-term care ombudsman services. The basis for these increased protections was research demonstrating a connection between elder abuse and increased societal costs for care, including nursing home care.

1. Long Term Care Ombudsman.

Each state has a Long-Term Care (LTC) Ombudsman program established under the OAA to address the concerns of residents in congregant long term care facilities, including nursing homes, assisted living facilities, and other residential care communities. These programs seek to resolve issues "related to the health, safety, welfare, and rights of individuals who live in LTC facilities, promote policies and consumer protections to improve long-term services and supports at the facility, local, state, and national levels."⁹ Ombudsmen are charged to:

- a. Identify, investigate, and resolve complaints made by or on behalf of residents;
- b. Provide information to residents about long-term systems and supports;
- c. Ensure that residents have regular and timely access to ombudsman services;
- d. Represent residents before governmental agencies;
- e. Seek administrative, legal, and other remedies to protect residents; and

⁹ See Older Americans Act (OAA), Title VII, Chapter 2, Sections 711/712 and <https://acl.gov/programs/Protecting-Rights-and-Preventing-Abuse/Long-term-Care-Ombudsman-Program>.

- f. Analyze, comment on, and recommend changes in laws and regulations pertaining to the health, safety, welfare, and rights of residents.¹⁰

2. Adult Protective Services.

Under the auspices of the Administration for Community Living, Adult Protective Services (APS) is a social services program of state and local governments that serves elderly adults and those with disabilities. APS helps those in need due to abuse, neglect, self-neglect, or financial exploitation. APS receives and investigates reports of adult maltreatment and works with clients and allied professionals to provide for client safety and independence.¹¹ While the LTC Ombudsman can help seniors in care facilities, APS focuses primarily on clients living independently. In most states, APS maintains an Adult Abuse Hotline.¹²

B. Elder Justice Act

The Elder Justice Act (EJA) was enacted in 2010 as the first piece of federal legislation to address elder abuse. EJA is intended to prevent elder abuse and provides early detection by coordinating response across federal and state agencies. The EJA seeks to promote elder justice, which it defines as efforts to "prevent, detect, treat, intervene in, and prosecute elder abuse, neglect, and exploitation [and] protect elders with diminished capacity while maximizing their autonomy." The EJA extended existing requirements to report elder abuse to any long-term care facility receiving at least \$10,000 in federal funds.

Under EJA, owners, operators, employees, managers, agents, or contractors of such facilities must report any reasonable suspicion of a crime against a resident or anyone receiving care from the facility within 24 hours after forming such reasonable suspicion. Reports are made to the Department of Health and Human Services and local law enforcement.

C. State Initiatives

Protecting the elderly and persons with disabilities has traditionally fallen to state and local government. Such protections are typically linked to the definitions of "abuse," "exploitation," and "neglect" as are set forth in state law. Below, we look at states' protections set forth in Kentucky statutes and for contrast, in a neighboring state, Ohio.

¹⁰ *Id.*

¹¹ <https://acl.gov/programs/elder-justice/national-adult-maltreatment-reporting-system-namrs>.

¹² See, e.g. [KRS 209.020\(7\), \(8\), and \(15\)](#).

1. Kentucky statutes, rules, and regulations.

a. Kentucky protection of adults.

One statute to which all Kentuckians are subject is the Protection of Adults law, [KRS Chapter 209](#). This law is designed to protect adult “victims of abuse, neglect, or exploitation inflicted by a person or caretaker.” The statute’s reporting requirements are intended to protect vulnerable adults who, “because of mental or physical dysfunctioning, are unable to carry out the activity of daily living, or protect themselves from neglect, exploitation or a hazardous or abusive situation without assistance from others, and who may be in need of protective services.”¹³ These reporting requirements are profound, “Any person . . . having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report . . .”¹⁴

The following definitions are contained within the statute:

- i. **Abuse:** the infliction of injury, sexual abuse, unreasonable confinement, intimidation, or punishment that results in physical pain or injury, including mental injury.
- ii. **Exploitation:** means obtaining or using another person's resources, including but not limited to funds, assets, or property, by deception, intimidation, or similar means, with the intent to deprive the person of those resources.
- iii. **Neglect:** A situation in which an adult is unable to perform or obtain for himself or herself the goods or services that are necessary to maintain his or her health or welfare, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult.¹⁵

b. Kentucky criminal statutes.

Kentucky law on protection of adults contains enhanced penalties for criminal exploitation of elderly or vulnerable adults.¹⁶ Penalties include, at a minimum, a Class A misdemeanor for wanton or reckless exploitation resulting in no more than \$300 damage.¹⁷ The worst perpetrators can be found guilty of a Class C felony for

¹³ [KRS 209.020](#).

¹⁴ [KRS 209.030\(2\)](#) (emphasis added).

¹⁵ [KRS 209.020](#).

¹⁶ [KRS 209.990](#).

¹⁷ *Id.* at [KRS 209.990\(7\)](#).

knowingly exploiting an adult resulting in losses of more than \$300 in financial or other resources.¹⁸

Most importantly, for criminals sentenced under [KRS 209.990\(5\), \(6\), or \(7\)](#), who then fail to return the victim's property promptly or are delinquent on a court-ordered payment schedule, the defendant “shall be civilly liable to the victim of the offense or the victim's estate for treble damages, plus reasonable attorney fees and court costs.”¹⁹

c. Kentucky Safe Harbor for Good Faith Reporting

What concerns some possible reporters of elder abuse is the risk of civil or criminal liability for making such reports. There is absolutely no concern, as the statute sets forth that anyone acting reasonably to make a report or investigate or file a petition “to obtain injunctive relief or emergency protective services for an adult” pursuant to [KRS Chapter 209](#) “shall have immunity from any civil or criminal liability that might otherwise be incurred or imposed.”²⁰

d. Caregiver Misconduct Registry

Kentucky's Cabinet for Health and Family Services maintains a central registry of caregivers for whom misconduct has been substantiated. Such misconduct encompasses “exploitation” which can include “obtaining or using another person's resources, including but not limited to funds, assets, or property, by deception, intimidation, or similar means, with the intent to deprive the person of those resources.”²¹ The caregiver misconduct registry contains the names of individuals employed or expecting to be compensated who abused, neglected or exploited an adult, and whose bad acts were substantiated.²² The Caregiver Misconduct Registry can be accessed online at: <https://prdweb.chfs.ky.gov/KACMR/Home.aspx>. It is a free, secure, and convenient tool for adult service providers and private home-based employers to screen out prospective perpetrators.

e. Kentucky Attorney General.

While not particularly active at this time, Kentucky's Attorney General (AG) maintains an Office of Senior Protection and

¹⁸ *Id.* at [KRS 209.990\(5\)](#).

¹⁹ *Id.* at [KRS 209.990\(8\)](#).

²⁰ [KRS 209.050](#).

²¹ [KRS 209.032\(5\)](#), [209.020\(9\)](#); See, also, [922 KAR 5:070 §2\(7\)\(c\)\(5\)](#).

²² *Id.*

Mediation.²³ Kentuckians can report scams to the AG's office by calling (888) 432-9257 or completing a scam complaint online at: <https://secure.kentucky.gov/formservices/AttorneyGeneral/ConsumerMediationForm>.

2. Ohio statutes, rules, and regulations.

a. Mandatory reporter law.

Ohio has a fairly broad-based mandatory reporting statute. Certain, statutorily defined people, “. . . having reasonable cause to believe that an adult is being abused, neglected, or exploited, or is in a condition which is the result of abuse, neglect, or exploitation shall immediately report such belief . . .”²⁴ The list provided by Ohio law includes many professionals including, specifically, attorneys, medical doctors, psychologists, hospital employees, police officers, coroners, clergy, financial institution employees, investment advisors, brokers and planners, notaries and certified public accountants, among many others.²⁵

Under Ohio law, “any person” is a permissible reporter of elder abuse. Unfortunately, many professionals believe that they are subject to civil liability in situations where they make good faith reports of elder abuse. However, Ohio statute makes clear that people “. . . shall be immune from civil or criminal liability . . . except liability for perjury, unless the person has acted in bad faith or with malicious purpose”. Thus, good faith reports of elder abuse cannot result in legal action against the reporter.²⁶

b. Ohio criminal statutes.

Ohio has enhanced criminal penalties for acts of theft against certain individuals and protected classes; these include an elderly person and a disabled adult.²⁷

In contrast to Kentucky, Ohio's protection statutes have more expansive definitions:

- i. **Abandonment:** means desertion of an adult by a caretaker without having made provision for transfer of the adult's care.

²³ <https://www.ag.ky.gov/about/Office-Divisions/OSPM/Pages/default.aspx>.

²⁴ [ORC 5101.63\(A\)](#).

²⁵ [ORC 5101.63\(B\)](#).

²⁶ [ORC 5101.63\(D\)](#).

²⁷ See [ORC 2913.02\(B\)\(3\)](#).

- ii. **Abuse:** The infliction upon an adult by self or others of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish.
- iii. **Exploitation:** The unlawful or improper act of a person using, in one or more transactions, an adult or an adult's resources for monetary or personal benefit, profit, or gain when the person obtained or exerted control over the adult or the adult's resources in any of the following ways: (1) without the adult's consent or the consent of the person authorized to give consent on the adult's behalf; (2) beyond the scope of the express or implied consent of the adult or the person authorized to give consent on the adult's behalf; (3) by deception; (4) by threat; (5) by intimidation.
- iv. **Neglect:** (1) The failure of an adult to provide for self the goods or services necessary to avoid physical harm, mental anguish, or mental illness; (2) the failure of a caretaker to provide such goods or services; (3) abandonment.

c. Ohio Attorney General – Elder Justice Unit.

Another difference between states is the authority given to, or otherwise exercised by, the state's attorney general. For example, Ohio administers an Elder Justice Unit²⁸ and a statutory Elder Abuse Commission.²⁹ These activities serve to inform people – including professionals – about issues related to elder abuse. Also, as in Kentucky, the AG is able to coordinate and take enforcement action in some cases.

Scenario 2: June's New Caregiver

June makes an appointment to sign her new documents. Once in your office, June admits that she is having some difficulty with mobility and is considering bringing in some private duty caregivers so as not to be a burden on her children. She would like you to draft a contract for a childhood friend of Wally's, Edwina, to provide some in-home care. Wally has suggested hiring Edwina because she will charge much less than using a service, and is willing to provide light housekeeping, supervise finances, and drive June to medical and social appointments. Theo is not fond of "Eddy" who teased him when they were kids. Further, Theo tells you Eddy has had some difficulty keeping steady employment and that is why she is available to help June.

What advice do you offer? What concerns do you have?

²⁸ See <https://www.ohioattorneygeneral.gov/Individuals-and-Families/Seniors/Elder-Abuse>.

²⁹ [ORC 5101.74](#).

V. ELDER LAWYER'S ROLE IN COMBATting AND REPORTING ABUSE

Despite all the legislation that has been enacted both federally and by states, elder abuse is generally considered to be grossly underreported. The best estimates indicate that one in 10 seniors are subjected to abuse, including financial abuse, in any year. The Kentucky Attorney General believes that only one in 44 financial crimes against seniors are ever reported.³⁰

A. Challenges of Self-Reporting

Self-reporting by seniors is particularly difficult. Many reasons underlie this failure to self-report: Older adults may not report that they have been victims of abuse – and particularly financial abuse – due to shame at having been swindled or fear of losing their dignity and agency. If an elderly victim is afraid that she will be deemed incompetent if family members discover she was victimized, she may elect not to reveal the abuse. Further, senior victims are frequently exploited by those closest to them and upon whom they rely. This results in victims who are too dependent to accuse their perpetrators for fear of being abandoned. Other elderly victims simply will not accuse close family members, friends, or caregivers of having perpetrated this crime. These insider relationships further complicate both detecting and stopping the abuse. A caregiver, close “friend” or relative may be able to cover up the financial exploitation for a long period of time and is also capable of isolating the elderly victim to further hide a scheme. As the baby boomers and other elderly people grow more comfortable with technology, there is an ever-widening population of older citizens subject to online scams.³¹ For these and many other reasons, senior victims are reluctant to report abuse.

B. Challenges for Mandatory Reporters³²

Inasmuch as seniors are reluctant for the aforementioned reasons to self-report, it becomes even more important for others to report on their behalves. These duties are laid out in the reporting statutes addressed, *supra*.³³ All states have mandatory reporting statutes; however, there is great variety in the strength, or weakness, of these statutes. The reason for this is typically the breadth of the persons required to report. Also, there are differences in who is a “mandatory” reporter (*i.e.* shall report) versus a “permissive” reporter (*i.e.* may report). The most common listed mandatory reporters include health care providers, human services providers, and law enforcement. As an example, Ohio has a relatively long list of professionals who are mandatory reporters (*see above*). Kentucky simply states that all persons are mandatory reporters of abuse of the elderly.

³⁰ <https://www.ag.ky.gov/AG%20Publications/Protecting%20Seniors%20From%20Scams.pdf>.

³¹ See, e.g., Lovett, K. and Mackey, T. “Online Threats and the Medical Marketplace,” *National Academy of Elder Law Attorneys Journal*, Vol. 9(1) Spring 2013 at p. 91.

³² See also https://ncea.acl.gov/NCEA/media/Publication/NCEA_NAPSA_MandatedReportBrief.pdf.

³³ See <https://www.stetson.edu/law/academics/elder/home/media/Mandatory-reporting-Statutes-for-elder-abuse-2016.pdf>.

Mandatory reporting under state law is typically linked to the definition of “abuse,” “exploitation,” and/or “neglect.” As with mandatory reporting requirements, those definitions vary state by state.³⁴ What is clearer are the ethic rules by which attorneys live their professional lives. These are set forth below in both Model Rules and by each state, and are the focus of the section below.

C. Reporting Abuse and Client Confidentiality

The first ethical rule at issue is that of client confidentiality.

1. American Bar Association Model Rules.

The American Bar Association (ABA) Model Rules of Professional Conduct (hereafter “Model Rules”) confirm what nearly all attorneys, and anyone who watches law shows know: lawyers must keep their clients’ secrets.³⁵ In general, the rule bars lawyers from revealing “information relating to the representation” without informed consent by the client or authorization implied as needed to represent the client.³⁶ Disclosure is permitted in the second part of [Model Rule 1.6](#) or if the attorney believes the disclosure is reasonably necessary for several reasons including:

- a. To prevent reasonably certain death or substantial bodily harm;
- b. To prevent, mitigate or rectify substantial injury to the financial interests or property of another; and
- c. To comply with other law or a court order.³⁷

[Model Rule 1.6](#) has helpful commentary explaining the few, limited exceptions to breaching client confidentiality. Comment 17 gives guidance clarifying that disclosures in the second part of [Model Rule 1.6](#) at paragraph (b) are permissive, not mandatory, advising that the lawyer “consider such factors as the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction and factors that may extenuate the conduct in question.”³⁸ Notably, an attorney’s determination not to disclose does not violate [Model Rule 1.6](#).

³⁴ https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-abuse-definitions.pdf.

³⁵ [ABA Model Rule 1.6\(a\)](#)(Confidentiality).

³⁶ *Id.*

³⁷ *Id.* at [ABA Model Rule 1.6\(b\)](#).

³⁸ *Id.* at [ABA Model Rule 1.6](#), Comment 17.

2. Kentucky Supreme Court Rules of Professional Conduct.

Pursuant to the Kentucky Rules of the Supreme Court (SCR), Kentucky lawyers are bound by a duty of confidentiality to clients.³⁹ It is virtually identical to [Model Rule 1.6\(a\)](#) permitting disclosure if the client gives informed consent, or if the disclosure is impliedly authorized.⁴⁰ Attorneys who believe that their client is being abused may, but are not obligated, to reveal information reasonably necessary to “prevent reasonably certain death or substantial bodily harm” or to “comply with other law or a court order.”⁴¹ Such an “other law” would be a reporting requirement or a protective action relating to a client with diminished capacity, *see infra*.

Note: The Kentucky Bar Association has an ethics opinion discussing issues involving elderly or special needs clients, including reporting and other issues involving abuse, neglect or exploitation.⁴²

D. Reporting and Clients with Diminished Capacity

Attorneys have a delicate balance when dealing with clients with diminished capacity. Lawyers must serve their clients, preserve their confidences and yet have obligations to protect them as well. In meeting this balance, there are clear ethical rules set by the ABA and by each state.

1. American Bar Association Model Rules.

[Model Rule 1.14](#) sets forth the ethical requirement for dealing with clients with diminished capacity. Generally, when a client lacks capacity “to make adequately considered decisions . . . whether because of minority, mental impairment or for some other reason” the lawyer “**shall**, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”⁴³ Nevertheless, if the lawyer reasonably believes that the client “is at risk of substantial physical, **financial** or other harm unless action is taken” and the client cannot protect themselves, the attorney is **permitted** to take reasonable protective action.”⁴⁴ (emphasis added)

[Model Rule 1.14](#) at Comment 5 addresses taking protective action to help a client with diminished capacity. Guidance for attorneys indicates that protective action in the context of financial abuse might include: consulting with family members, using voluntary surrogate decision-making tools such

³⁹ [SCR 3.130\(1.6\)](#).

⁴⁰ *Id.* at [Rule 1.6\(a\)](#).

⁴¹ *Id.* at [Rule 1.6\(b\)](#).

⁴² [KBA Ethics Opinion E-439](#) (2016).

⁴³ [ABA Model Rule 1.14](#).

⁴⁴ *Id.* at [Model Rule 1.14\(b\)](#).

as durable powers of attorney, adult-protective agencies or other individuals or entities that can protect the client.⁴⁵ Attorneys are also admonished in taking protective action, to consider the wishes and values of the client if known.⁴⁶

Note: [ABA Model Rule 1.2](#) directs lawyers to let the client decide the “objectives of the representation.” If a client understands what has happened and does not object, pursuant to this [Model Rule 1.2](#), a fully capable client should determine whether or not to report. After fully informing the client of the options, the attorney must then abide by the client’s decision – even a bad one.

2. Kentucky Supreme Court Rules of Professional Conduct for Attorneys.

Under Kentucky Supreme Court Rules (SCR), when an attorney reasonably believes that a client is suffering from diminished capacity, and is at risk of substantial physical, financial or other harm, the attorney is permitted to take protective action, if the client is unable to protect him or herself.⁴⁷ Such protective action might include consulting with individuals or entities that are able to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.⁴⁸

[SCR 3.130\(1.14\)\(b\)](#) has commentary that provides additional guidance. For example, if the client lacks sufficient capacity to engage in the representation, then the attorney may consult with family members, use substitute judgement tools such as durable powers of attorney or refer to other professionals who can protect the client.⁴⁹

Note: The Kentucky Bar Association has an ethics opinion addressing clients with diminished capacity. In this letter, attorneys are advised on the responsibilities and options when dealing with clients and non-clients with diminished capacity.⁵⁰

E. Changing the Paradigm from Reactive to Proactive

Attorneys should anticipate exploitation. This makes sense because if they were aware that exploitation was likely to occur, lawyers would go to much greater lengths to protect clients who are, or are likely to become, targets.

⁴⁵ *Id.* at [ABA Model Rule 1.14](#) at Comment 5.

⁴⁶ *Id.*

⁴⁷ [SCR 3.130\(1.14\)\(b\)](#).

⁴⁸ *Id.*

⁴⁹ [SCR 3.130\(1.14\)](#), Comment 5.

⁵⁰ [KBA E-440](#) (2016).

Attorneys should learn all acceptable means to avoid and mitigate harm to vulnerable adults. This entails both educating themselves and their clients, as well as learning the ethical timing and methods to report abuse. This encompasses both clients and those who are not clients, but are in need of protection, as set forth in the ethical rules of the state in which the attorney practices.

Attorneys can also use best practices in drafting documents for their clients to mitigate the risk of fiscal exploitation. This might include:

- Confirming that clients have been careful when selecting the agent(s) named in advance planning documents.
- Requiring accountability, additional checks and balances, and limited authority to agents.
- Authorizing revocation by third parties can help to limit the possible damage by named agents who start to abuse or exploit the client.⁵¹

Additionally, attorneys should encourage clients themselves to take preventive measures to mitigate the risk of financial exploitation. Such self-protective actions of clients include:

- Reviewing bank/credit card/brokerage statements regularly.
- Checking all data on credit reports at least annually (and separately from each credit bureau).
- Being wary of suspicious phone calls, texts, letters or emails requesting personal information or funds.
- Declining to share personal information including Social Security numbers, unless required by law.
- Shredding all financial and medical documents after reading.
- Regularly keeping abreast of current scams and fraudulent schemes.
- Avoiding isolation.
- Spotting the “red flags” of financial abuse.
- Connecting with local resources, including Ombudsman, APS, Area Agency on Aging, local support groups and senior centers, as necessary.

Scenario 3: June Falls Down the Rabbit Hole

Several months have passed since June last met with you, and you receive a call from Theo, June’s younger son. Theo is concerned about June. From what Theo can piece together, June recently went to the hospital after a fall in her home. Since Wally was out of town on vacation, Edwina was supposed to be staying with June; however, June’s neighbor actually contacted emergency services for help after hearing June cry out for help. June had been home alone for several days. Theo further shares that while in June’s home, he saw a pile of unpaid bills and several bank statements showing numerous checks to Edwina and to Wally as well as multiple large cash withdrawals. You have to decide who to discuss this matter with: June? Wally? Theo? The Bank?

What advice do you offer? What concerns do you have?

⁵¹ <https://ncler.acl.gov/pdf/Advance%20Care%20Planning%20Issue%20Brief.pdf>.

VI. ADDITIONAL RESOURCES

Attorneys can properly draft documents and make valiant efforts to educate their clients, including implementing checks and balances. Nevertheless, clients can still, eventually, succumb to fiscal exploitation. When that occurs, practitioners should be aware of the many professionals and organizations who can help. Among these are:

A. State Attorneys General

While the effort to support seniors varies with the political landscape in any given state and administration thereof, in Kentucky the Office of the Attorney General maintains a Consumer Protection Hotline at (888) 432-9257. Or visit: www.ag.ky.gov/about/Office-Divisions/OSPM/Pages/default.aspx.

B. Local Law Enforcement

Often, the town, city or metropolitan police, sheriffs, detectives and other local law enforcement are the first good line of defense for fighting predators. These professionals often work with Adult Protective Services. In smaller areas, local law enforcement may already have familiarity with the perpetrators or the typical scams being run.

C. Credit Reporting Agencies (Experian, Equifax, TransUnion)

Many adults are aware of past security breaches involving potential identity theft and sign up for monitoring. One proactive way to inhibit loss of identity and creditworthiness is to freeze one's credit with each of the three major credit reporting agencies.

D. Internal Revenue Service (IRS)

The IRS has its own tax fraud alert service, to share common scams and schemes with the public, including the "Dirty Dozen Tax Scams." The IRS also has a specific form for reporting tax fraud, and a reference page for reporting phishing, identity theft, and other abuses.⁵²

E. United States Postal Service Inspector

The U.S. Postal Service does much more than deliver mail. It is also a federal law enforcement agency over 20 years old. Postal inspectors investigate all mail-related crime including mail fraud and theft, identity theft, suspicious packages, fake USPS emails, certain cybercrimes and other illegal activity involving the post office. Refer to the United States Postal Inspection Service website to start a report or to find victim resources, www.uspis.gov.

⁵² <https://www.irs.gov/individuals/how-do-you-report-suspected-tax-fraud-activity>.

F. Department of Justice

The Department of Justice (DOJ) accepts and investigates fraud and attempted fraud reports from consumers through its Office for Victims of Crime. DOJ works together with law enforcement to investigate and prosecute schemes targeting adults age 60 or older. DOJ maintains a hotline, where staff assess victims' needs and identify next steps. More information about the Department's elder justice efforts can be found on the Department's Elder Justice website, <https://www.justice.gov/elderjustice>.

G. Local Financial Services Companies (Banks, Credit Unions, Brokers, Financial Advisors)

Enlist the help of local bankers, financial advisors and others to prevent, deter and mitigate crimes. Personal conversations can often lead to assistance in stopping losses and making reports.

H. Federal Bureau of Investigation's Internet Crime Complaint Center (IC3)

The FBI maintains an online reporting system for internet or cyber crimes. Visit ic3.gov to review the FBI's online crime reports or make a report.

I. United States Secret Service

The Secret Service may be best known for protecting certain public figures. However, the Secret Service also protects the U.S. financial system, in part by investigating possible cyber crimes. Local offices will help address cyber fraud.

J. American Bar Association Commission on Law and Aging

The ABA has a plethora of tools for combating fiscal exploitation. One good starting resource is the *Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers*, 2nd edition by the ABA Commission on Law and Aging and the American Psychological Association, americanbar.org/groups/law_aging/.

K. National Center on Law and Elder Rights

NCLER provides legal services to the aging and disability communities to serve older adults with the greatest economic and social needs. It can help both clients and counsel (ncler.acl.gov). In particular, NCLER has an Elder Justice Toolkit that sets out scenarios and both litigation and non-litigation alternatives for addressing elder abuse.⁵³

VII. CONCLUSION

Recovering stolen assets is rare, locating perpetrators of financial abuse is difficult, and prosecuting perpetrators even harder. Prevention and education are the best alternatives to fiscal exploitation.

⁵³ <https://ncler.acl.gov/ElderJustice-Toolkit/Litigation-Non-Litigation-Remedies.aspx>.

Elder Financial Exploitation

“The Grandparent Scam”



Task Force



The Scam

35



The Call



Investigation



10 DOJ Elder Justice Task Forces

- Northern District of California
- Northern District of Georgia
- District of Kansas
- Eastern & Western Districts of Kentucky
- Northern District of Iowa
- District of Maryland
- Southern District of Ohio
- Eastern District of Pennsylvania
- Middle District of Tennessee
- Western District of Washington





Why does this happen?

Vulnerable Targets

Vulnerable Targets

How does it occur?

Relatives/Caretakers

Relatives/Caretakers/Strangers

What is the scope?

More than 10% of 65+ yr

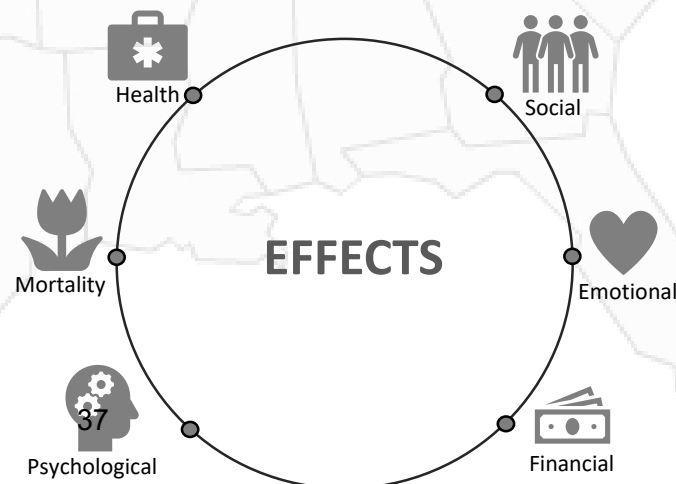
\$40,000,000,000+ yr

Financial role?

Secondary

Leadership

Consequences:

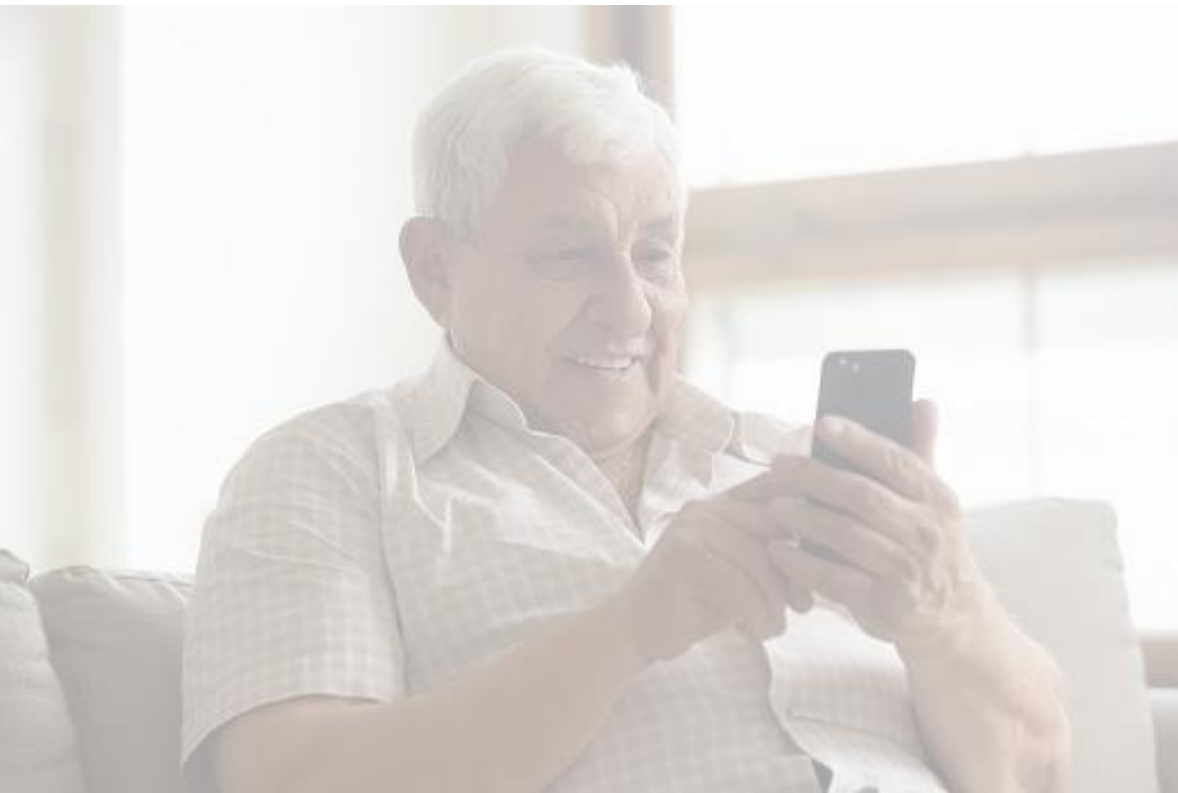




The elderly are disproportionately impacted by virtually *all* scams.

No scam directly targets the elderly quite like the *grandparent scam*.

Call is made to unsuspecting grandparent by an alleged grandchild in distress



Grandparent, fearing the worst, is told an attorney will be in touch and to please help in any way possible

Call is made to unsuspecting grandparent by an alleged grandchild in distress



Grandparent, fearing the worst, is told an attorney will be in touch and to please help in any way possible



Victim gathers funds and ships the package(s) of cash as directed

Follow-up call(s) are made by an attorney (closer) to get money from the grandparent



Victim gathers funds and ships the package(s) of cash as directed



Follow-up call(s) are made by an attorney (closer) to get money from the grandparent



Caller is eventually defeated
- by the elderly discovering
the fraud or them running
out of money



Victims are consoled by
loved ones and/or report to
police, and *always*
internalize their guilt

Caller is eventually defeated
- by the elderly discovering
the fraud or them running
out of money



Victims are consoled by
loved ones and/or report to
police, and *always*
internalize their guilt



USAO NOTICE

2/18/2021 10:43 am



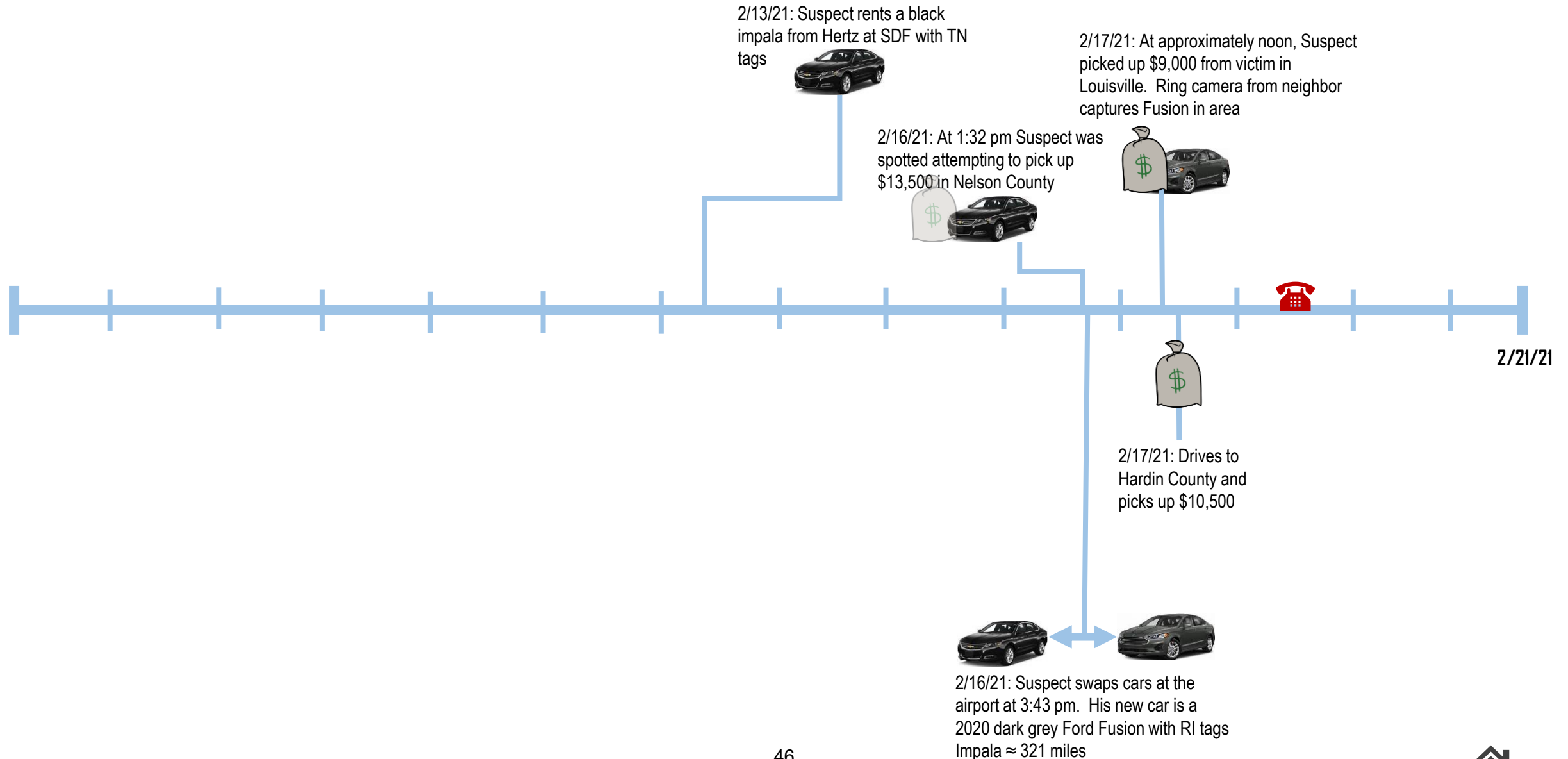
2/7/21



2/21/21

Approx. 10:50 am, contact with victim's family is made:
"Tall white male, approached the door, collected the cash."
(\$9,000)

SUSPECT MOVEMENT



Suspect MOVEMENT

2/7/21 - 2/21/21

2/7/21: At 9:24 am Suspect has breakfast at Tia Juanitas Pronto at ABQ Airport - BoA Debit \$13.47

2/8/21: At 10:54 am Suspect has lunch at Arby's in Norwood, PA - BoA Debit \$8.16

2/9/21: Based on spending, Suspect is in Glenolden, PA

2/10/21: Based on spending, Suspect is in Eddystone, PA

2/8/21: At 7:57 pm Suspect purchases various food items at ShopRite in Eddystone, PA - cash (\$50) \$22.89

2/7/21: At 1:59 pm Suspect has lunch Boar's Head kiosk at DFW Airport - BoA Debit \$23.14

2/13/21: At 10:22 am, Suspect is at Philadelphia airport set to fly to Chicago, IL as connection to SDF

2/13/21: Suspect rents a black impala from Hertz at SDF with TN tags

2/16/21: At 1:32 pm Suspect was spotted attempting to pick up \$13,500 in Nelson County

2/17/21: At approximately noon, Suspect picked up \$9,000 from victim in Louisville. Ring camera from neighbor captures Fusion in area

2/20/21: In the early hours of the 20th, Suspect was arrested by law enforcement - Ford Fusion seized Fusion ≈ 1,284 miles

2/13/21: Flight records show Suspect connect at ORD headed to SDF

2/13/21: Flight records show Suspect arrives at SDF at approximately 4:53 pm

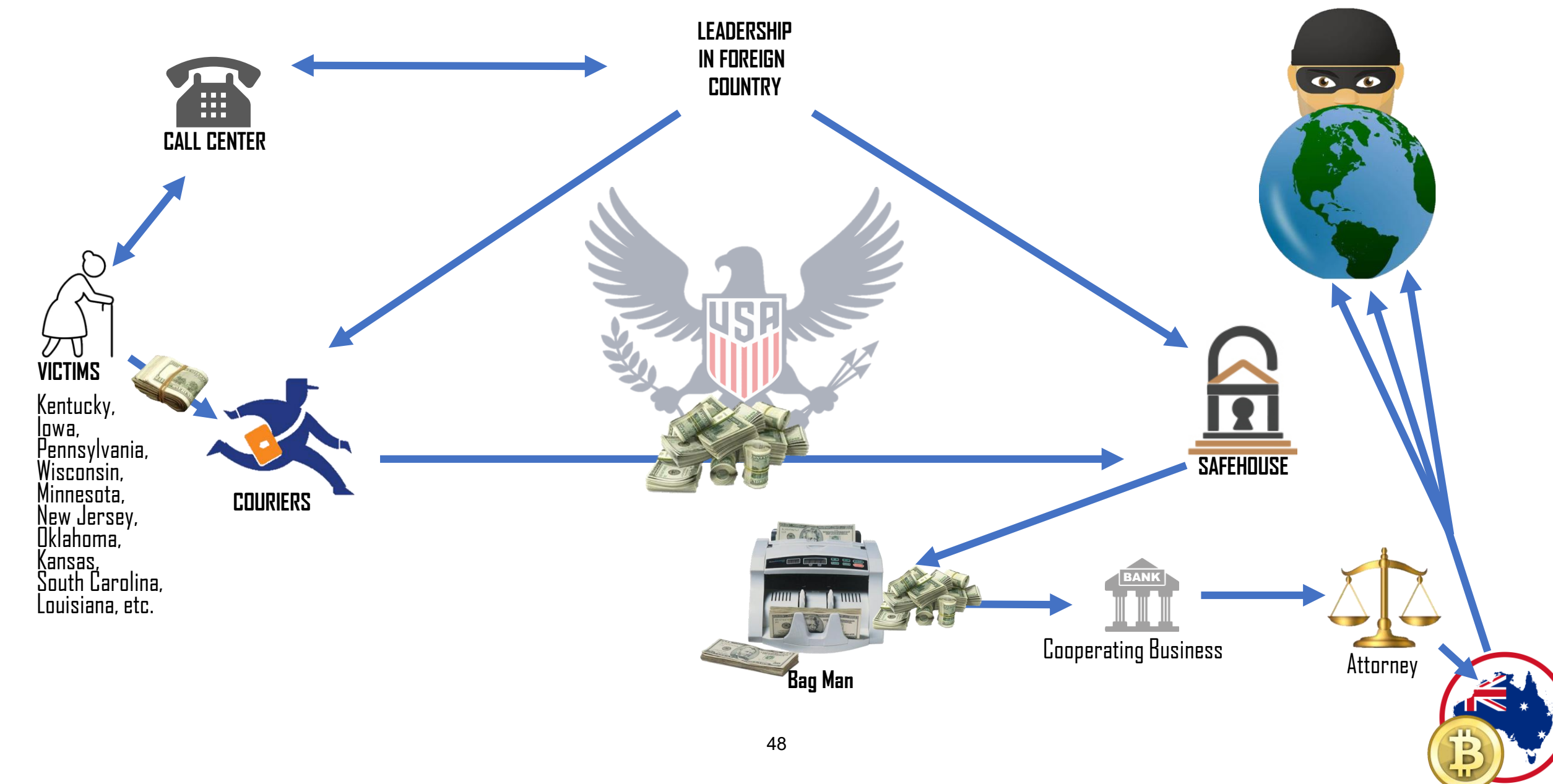
2/17/21: Drives to Hardin County and picks up \$10,500 - Post-It supports

2/20/21: Suspect was set to leave Louisville, KY

2/19/21: Covers ground from Louisville to NKY to Lexington, to Corbin. At approximately 4:00 pm victimizes St. Matthews couple of \$9,400

2/16/21: Suspect swaps cars at the airport at 3:43 pm. His new car is a 2020 dark grey Ford Fusion with RI tags Impala ≈ 321 miles

Grandparent Scam Hierarchy/Flow



Movement of Money



February 1-5, 2021 (Iowa)



2/6/2021: Bag Man deposits
\$200,000+ in cash into a Wells
Fargo bank located at 600 Army
Post Rd in Des Moines, IA

**WELLS
FARGO**

Cooperating Business



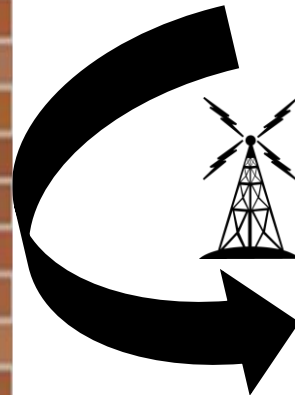
Bag Man

2/8/2021: Cooperating Business
wires nearly \$200,000 to Attorney
account at Signature Bank

BANK OF AMERICA



Cooperating Business



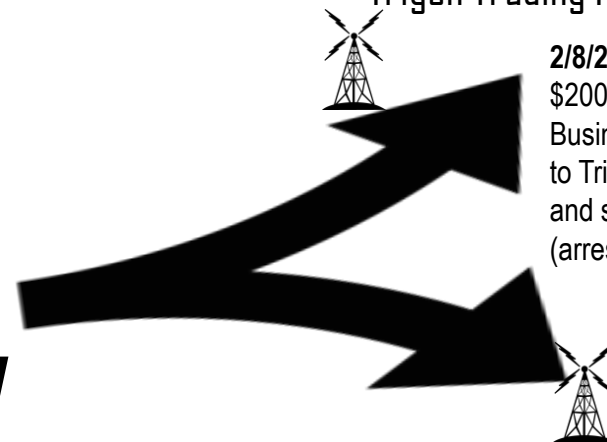
Attorney at Law

49



Trigon Trading PTY LTD

2/8/2021: Attorney takes the nearly
\$200,000 received from Cooperating
Business, and splits it by wiring nearly all
to Trigon Trading PTY LTD in Australia
and several thousand to Associate's LLC
(arrested months prior)



Associate's LLC

A special thanks to:

Jefferson County Sheriff's Office (KY)

Hardin County Sheriff's Office (KY)

Boone County Sheriff's Office (KY)

Louisville Metro Police Department (KY)

Indianapolis Police Department (IN)

Loudon County Sheriff's Office (VA)

Westlake Police Department (OH)

Ozaukee County Sheriff's Office (WI)

Mequon Police Department (WI)

Burlington Police Department (WI)

Racine County Sheriff's Department (WI)

Waukesha County Sheriff's Department (WI)

Muskego Police Department (WI)

Washington County Sheriff's Department (WI)

Warrenton Police Department (OR)

Trousdale County Sheriff's Department (TN)

Edison Police Department (New Jersey)

New York Police Department (NYPD)



A special thanks to:

United States Secret Service (Louisville, Kansas City, Milwaukee, Montreal, Central America, beyond)

FBI (Baltimore, Lexington, Miami, Hartford, Des Moines, beyond)

USPIS (Portland, Louisville)

SSA OIG (NJ)

DEA (KY, NY/NJ)

HSI (NY/NJ)

IRS-CI (Louisville, Rochester, Indianapolis)

IRS-CI Attachés in Canberra and Sydney Australia, Panama, and Canada

Indiana Attorney General's Office

New Hampshire Attorney General's Office

Iowa Department of Investigations

Louisiana Bureau of Investigations

Oregon Department of Justice

Oregon Attorney General's Office

Iowa Department of Public Safety

Kentucky Attorney General's Office

Royal Canadian Mounted Police (Montreal and Central/South America)

...and many, many more.



How does the
USSS and
Federal Task
Force get
Involved?

- **18 USC 1343 -
Fraud by Wire**



Questions?

- U.S. Secret Service
Louisville Field Office
- 502-582-5171



This presentation covers hot topics in recent elder law decisions and rulings. The presentation will include statutory changes at the state and federal level, significant court decisions, program changes, and policy initiatives. Many of the changes discussed are already in effect and those that take effect after this presentation are notated in the material.

I. STATE TOPICS – KENTUCKY

A. Guardianships

1. Emergency guardianships.

The statutory scheme governing emergency guardianship procedures has been overhauled. The amendments to [KRS 387.740](#) include the following provisions:

- a. Any person may file a petition for emergency appointment as a limited guardian or conservator.
- b. The court shall review all petitions filed without delay, but no more than one week after the petition was filed.
- c. The circuit clerk must accept all petitions. Commonwealth approval is not a condition for bringing the matter before the court. The Commonwealth cannot exclude petitions and prevent them from coming before the court.
- d. Notice must be given to the person named in the petition, the petitioner, and the Commonwealth.
- e. The Commonwealth must present evidence. The Petitioner has the right to be present and to cross-examine all witnesses.
- f. The standard of proof is clear and convincing evidence. The burden of proof is on both the Commonwealth and the petitioner.

2. Arbitration agreements entered into by guardians on behalf of wards.

In *Jackson v. Legacy Health Services, Inc.*, 640 S.W.3d 728 (Ky. 2022), a unanimous Kentucky Supreme Court held that while a guardian has the authority to bind their ward to contracts that may limit their civil rights and deprive them of remedies, it is only to the extent necessary to provide for needed care and services (see [KRS 387.660](#)).

The Court formulated a two-part test to determine if a contract is *voidable* because the guardian exceeded their authority. The court must determine if (1) there was a limitation or deprivation of the ward's civil rights; and (2) the limitation or deprivation of rights was only to the extent necessary to

provide needed care and services to the ward. If the contract exceeds the scope of what is needed to secure necessary care and services, the guardian did not have authority to enter into the contract, so the contract is void. Contracts must only deprive wards of their rights only to the extent necessary.

In *Jackson*, the arbitration agreement was not a condition of the ward's admission to the care home, so the agreement's arbitration provision exceeded the guardian's authority and was void.

For application of *Jackson*, see *Total Home Protection v. Scheumann*, No. 2021-CA-0532-MR, 2022 Ky. App. Unpub., LEXIS 375, 2022 WL 2380546 (Ky. App. July 1, 2022) and *Diversicaire Leasing Corp v. Brouthon*, No. 22-40-DLB, 2022 U.S. Dist. LEXIS 206004, 2022 WL 16927789 (E.D. Ky. Nov. 14, 2022).

B. MOST Form

The Kentucky Medical Order for Scope of Treatment (MOST) Form has been in use for several years. In response to the lessons gleaned from practical use of the document, the statutory scheme has been amended. These changes include the following provisions:

1. [KRS 311.6225](#) has been amended to allow an electronically fillable version of the MOST form. It also allows for electronic signature.
2. The MOST form may now be printed on any color of paper.
3. There is a Spanish-language version of the form available.

C. Reimbursement for Community Health Workers

Medicaid is now required to cover certain services provided by community health workers. [KRS 205.648](#) provides for reimbursement for such services.

D. Care Facilities

1. Essential caregiver access.

In response to the issues of accessing patients during the Covid crisis, the Kentucky legislature has evaluated access to residents in long term care facilities. Among the changes was establishing a right to designate an essential compassionate caregiver who is allowed to visit a resident in-person at long term care facilities, assisted-living communities, and state mental hospitals. [KRS 216.505](#).

The code revisions require the Cabinet for Health and Family Services to promulgate administrative regulations governing caregiver visitation. The new regulations were not available at the time of this writing.

2. Assisted living facilities.

The statutory provisions governing long term care facilities have been substantially revised. (See [KRS 194A.700](#)) Definitions, provisions for licensure, and required programs have been updated and expanded.

E. Mental Health

In a joint resolution ([SJR 72](#)), the Cabinet is directed to apply for a Medicaid waiver for individuals with severe mental illness. Mentally ill individuals are a target for supportive housing, respite care, and supported employment.

F. Estate Planning Cases

1. Circumventing dower.

In an appellate case, a decedent husband tried to circumvent dower by leaving assets to his sons from a previous marriage through various tactics including transferring assets to a joint tenancy with rights of survivorship designation. The court held that this was fraud on the dower. In evaluating the extent of the fraudulent transfers and deficiency in dower, the court did not include assets passed directly to surviving spouse outside the will as part of the dower calculation. Additionally, debts on the marital residence and vehicle which passed to the widow via survivorship would not be paid by the estate. The case gives an example of what assets will be included in a dower calculation and what assets will not be included. *Keith v. Cross*, 636 S.W.3d 842 (Ky. App. 2021).

2. Meaning of term “descendants.”

This case concerned adoption of testator’s descendant by another family member. The core question was whether this adoption meant that the individual was no longer a “descendant” for purposes of distributions. The court made a distinction between legal lineage, which is severed by adoption, and biological lineage, which is not. Adopted child remains a descendant. *Murphy v. Shehan*, 633 S.W.3d 350 (Ky. App. 2021).

3. Excluding adopted children.

A trust provision excluding all adopted descendants was held invalid for being discriminatory against the class. However, the court noted that if the grantor wanted to exclude specific adopted children and their descendants, they could do so through other means such as by naming the individuals to be disinherited. *Todd v. Hilliard Lyons Trust Company, LLC as Trustee under Will of Todd*, 633 S.W.3d 342 (Ky. App. 2021).

G. Domestic Violence

Animal abuse is now part of the definition of coercive conduct in [KRS 403.720](#). Judges may award possession of an animal to the petitioner in a DV case.

II. OTHER STATES – CASES OF NOTE

A. Nursing Home Cannot File Medicaid Application

This case held that the Medicaid application must be made on a state-prescribed form. The applicant must sign or authorize a representative who signs. Where there is no authority granted to a representative and the applicant does not have the capacity, the nursing home is not impliedly authorized to apply on behalf of the institutionalized individual. *NCRNC LLC v. Angona*, 209 A.D.3d 1199 (N.Y.A.D. 3 Dept. 2022).

B. Caregiver Contract

A personal care contract was paid after funds came into the estate (after an insurance policy was cashed in). The court ruled that this was acceptable because there were no other funds to pay prior to that point. Also, a log of hours worked, and services rendered is not required to be presented in order for the caregiver contract to be upheld. In this case, services and compensation were in line with fair market value for the type of services performed, so that was sufficient to approve the payout. *Matter of Boldt v. New York State Off. of Temporary & Disability Assistance*, 210 A.D.3d 1397 (N.Y.A.D. 4 Dept. 2022).

C. Agent under a Power of Attorney Cannot Create Trust unless Trust Power Expressly Granted

This case held that a general grant of authority does not give the attorney-in-fact the ability to create a trust on behalf of the grantor. The power must be express in the document. *Barbetti v. Stempniewicz*, 189 N.E.3d 264 (Mass. 2022).

D. Beneficiary of First Party SNT Terminates Trust

The beneficiary of a special needs trust (SNT) was no longer disabled. Her mother had established a first party SNT after the beneficiary had experienced a traumatic brain injury. The beneficiary's mother objected to termination of the trust. The court held that the material purpose of the trust was to supplement the beneficiary's quality of life. In this case, terminating the trust furthered that purpose and was, thus, allowed. *In re Special Needs Trust for Moss*, 2022 WL 2760235 (Mich. App. July 14, 2022).

E. Estate Recovery against Trust

A wife transferred home to her husband while she was in a nursing home receiving care. He then put the home in a Medicaid asset protection trust. When he died, the trust passed the property on to his children. The state sought estate recovery under Oregon's expansive estate recovery statutes. The Appeals Court deemed the transfer to husband void. *State by and through Department of Human Services v. Hobart*, 507 P.3d 299 (Or. App. 2022).

F. Trusts and Veteran's Administration Pension

A surviving spouse was denied pension for excess net worth. The Veteran's Administration counted assets in an irrevocable trust. Terms of the trust clearly indicated that the appellant did not have any rights or control of assets in the trust. Payment made out of the trust to the assisted living facility was against the terms of the trust but did not breach its protections. No. 19-35721 (BVA January 27, 2022).

G. States Reforming Medicaid

1. California increases asset limits – July 1, 2022.
 - a. Unmarried applicant limit at \$127,400.
 - b. Married applicant limit at \$267,000.
2. Massachusetts legislature pushes back on estate recovery.
 - a. Notice about estate recovery to any recipient when they turn 55.
 - b. No recovery for estates less than \$25,000.
 - c. Broadened waiver program.
 - d. Efforts by some limited only to recovery required by federal law.

III. FEDERAL UPDATES

A. New 2023 Figures SSI and Medicaid

Title	2022 Amount	2023 Amount
SSI Benefit Rate	\$841	\$914
Income Cap Limit	\$2,523	\$2,742
MMMNA	\$2,288.75-\$3,435	\$2,288-3715.50
CSRA	\$27,480-\$137,400	\$29,724-\$148,620
Home Equity Limit	\$636,000	\$668,000

B. Veteran's Administration

1. Veteran's net worth limit – \$150,538.
2. Penalty period rate – \$19,598.
3. Veteran with no dependents.
 - a. Basic – \$16,037.
 - b. Housebound – \$19,598.
 - c. Aid and Attendance – \$2,229.

C. Gift Tax Annual Exclusion

1. Per recipient – \$17,000.
2. Combined – \$34,000.
3. Combined gift and estate tax exemption.
 - a. Individual – \$12.92 million.
 - b. Married couple – \$25.84 million.

D. Program Changes

1. Over the counter hearing aids.

In August 2022, the Food and Drug Administration (FDA) authorized the sale of hearing aids over the counter. This ruling follows an Executive Order which directed the FDA to make hearing aids available without a prescription.

2. Social Security Administration cost of living adjustment (COLA).

The recent cost of living adjustment is the largest increase to benefits in 40 years. The increase will be nearly 9 percent. The average recipient will see an increase of \$140. This increase began for Social Security beneficiaries in January 2023. In addition, the Medicare Part B premium, typically deducted from the Social Security benefit, has decreased \$5.20. A Medicare Part B enrollee will pay \$164.90 per month instead of the 2022 amount of \$170.10. The annual deductible for all Medicare Part B beneficiaries decreased \$7 and is now \$226.

3. Medically necessary dental care.

In November 2022, the Centers for Medicare and Medicaid Services announced that Medicaid will begin covering medically necessary dental services. This is an enormous benefit for Medicaid recipients as typically Medicaid does not cover dental work. Coverage will include some life-saving care as well as health-saving treatment.

4. Medicare Part B enrollment.

Americans may now enroll in Medicare during the three months leading up to their 65th birthday and for three months after their 65th birthday. This window of time is called the “Medicare Initial Enrollment Period (IEP).” Prior to these changes, if an applicant waited until the last three months of their IEP to apply, they had to wait another two or three months before their coverage would begin. The new rules require coverage to begin on the first day of the month after they sign up.

If an individual misses their IEP, they must wait until the General Enrollment Period (GEP) or Special Enrollment Period to apply. The GEP runs from January 1 through March 31 of any given year.

<https://www.medicare.gov/basics/get-started-with-medicare/sign-up/when-does-medicare-coverage-start>

5. Social Security Portal (SSP) overhaul.

Social Security has updated the SSP by adding new features for individuals to manage their benefits more efficiently. The “My Social Security” Portal now allows users to complete tasks such as requesting a replacement social security card, setting up a direct deposit or changing a direct deposit, checking application for benefits status, accessing benefit and payment information, to name a few. Users may also monitor activity associated with their social security number. <https://www.ssa.gov/myaccount/what.html>

6. Adult Protective Services.

The National Adult Protective Services Association (NAPSA) received a staggering blow to the budget for 2023. The budget was cut 92 percent from the 2022 budget and the final budget amount was 30 percent less than what the President had requested for the 2023 budget. The NAPSA budget decreased from \$188 million to a paltry \$15 million.

E. Federal Courts

1. States may recover from personal injury settlements.

The Supreme Court ruled that states may use “clawback” statutes to get reimbursement for medical expenses (specifically Medicaid) from any settlement funds received from a personal injury litigation. The Court said reimbursement can be obtained from settlement proceeds regardless of whether the settlement is specifically structured to limit reimbursement for medical care – no distinction was made between past and future medical care. This ruling allows states to get reimbursement “for medical care furnished on behalf of a beneficiary not only from portions of the beneficiary’s settlement representing compensation for Medicaid-furnished care, but also from settlement funds that compensate the Medicaid beneficiary for future medical care for which Medicaid has not paid and might never pay.” This could have far reaching consequences including taking settlement proceeds that were awarded for pain and suffering, lost wages, etc., as those funds are also available for reimbursement under this ruling.

There is no way of knowing the long term impact of this ruling on personal injury litigation. Some question if higher awards will be requested from litigation and some ask if fewer persons will pursue litigation at all. Regardless of the future impact, at this time, all settlement proceeds from personal injury litigation are available to the state even if the settlement

was structured. *Gallardo by and through Vassallo v. Marstiller*, 142 S. Ct. 1751 (2022).

2. Right to appeal observation status.

There has been over a decade of litigation concerning the practice of hospitals admitting patients as observation status or switching status from inpatient to observation after admission. This practice arose in response to pressure from Medicare which wished to reduce the cost coverage it provided to patients transferred to nursing homes after inpatient stays. Patients discharged under observation status are not eligible for Medicare coverage for their subsequent nursing home stay.

In addition to the issues with payment for long term care, the status of a patient impacts the cost of their hospital care. Patients whose status is observation are also billed under Medicare Part B instead of Medicare Part A. There is no co-payment for Part A services but there is for Part B services.

In November, the Second Circuit upheld a ruling that Medicare must provide appeal rights to beneficiaries admitted to inpatient care who are later classified as “observation” status. *Barrows v. Becerra*, 24 F.4th 116 (2d. Cir. 2022).

The court notes that

[t]he decision to reclassify a hospital patient from an inpatient to one receiving observation services may have significant and detrimental impacts on plaintiffs’ financial, psychological, and physical well-being. Further, there is currently no recourse available to challenge that decision which also weighs heavily in favor of a finding that plaintiffs have not been afforded the process required by the Constitution.

Patients who are under observational status **now have a right to ask to be admitted as an inpatient**. They may request their primary care physician contact the hospital and request inpatient admission. If these are denied, the patient transferred to a nursing home under observational status can appeal after receiving their Medicare Summary Notice. The notice must now include an explanation of how to request an appeal. The patient can then appeal the denial of admitted status and the subsequent nursing home charges.

3. Prior occupancy of home not required for exclusion.

The Texas Medicaid agency should not require an applicant to establish “prior occupancy” in a specific home in order for that home to be considered an excluded resource. The Texas Court of Appeals affirmed a holding that prior occupancy of a home was not the determining factor for exclusion. The court referenced the Social Security manuals for definition of place of

residence and determined that “place of residence” is “the dwelling an individual *considers* his or her established or principal home and to which he or she intends to return.” (Italics added). In this case a married couple entered a facility and then purchased a one-half interest in a child’s home. They intended to leave the facility and move in with their child upon leaving. When they applied for Medicaid, they identified their child’s home as their place of residence. Medicaid said the house was a countable resource as they had not previously occupied the residence. *Texas Health and Human Services Commission v. Estate of Burt*, 644 S.W.3d 888 (Tex. Ct. App., 3rd Dist. 2022).

4. Medicaid cannot deny benefits if reasonable efforts to sell are evident.

Medicaid applicant was denied benefits because of excess resources, specifically real property that has been on the market in an attempt to sell. The applicant had been trying to sell the real property for approximately one year with no success. The Ohio appeals court ruled that Medicaid must apply the reasonable-efforts exclusion from Social Security law when determining benefits. The Ohio Court of Appeals, First District reversed the lower court denial holding that the reasonable-efforts exclusion applies to Medicaid applicants as it applies to SSI eligibility. The court stated, “the primary purpose of requiring the nine-month conditional-benefits period is to evaluate whether the efforts to sell have been reasonable and unsuccessful. SSI benefits paid because of the reasonable-efforts exclusion are not inherently conditional benefits.” *Gardner v. Ohio Department of Job and Family Services*, 2022 WL 3907765 (Ohio Ct. App., Aug. 31, 2022) – **HOWEVER** –

5. Medicaid denies benefits stating real property listed for sale as available resource.

The same court, Ohio Court of Appeals denied retroactive benefits to an applicant who owned real property that had been listed for sale. The court concluded that the property was an available and countable resource. Applicant had listed the property for sale in September 2016 and the property sold in September 2017. Applicant was denied benefits for that period of time. The court held that when a “statute is ambiguous and a text is ‘capable of bearing more than one meaning,’ interpretive rules guide our analysis.” Although a recent opinion, also in Ohio (*Gardner v. Ohio*, discussed above), ruled differently, this court stated that “[s]till more, Ohio courts ‘have squarely rejected the grafting of [20 C.F.R. 416.1201](#) onto Medicaid eligibility, which represents a state responsibility.’” This court also said there was no evidence of “reasonable efforts” in the record. **These two opinions are worth your read.** *Chamberlain v. Ohio Department of Job and Family Services*, 2022 WL 2388448 (Ohio Ct. App. Jul. 1, 2022).

F. Legislation

1. No Surprises Act (<https://www.cms.gov/nosurprises>).

The No Surprises Act went into effect in 2022. The Act protects people with group and individual health insurance from receiving surprise medical bills. This will apply to “emergency care, non-emergency care from out-of-network providers at in-network facilities, and air ambulance services from out-of-network providers.”

Prior to this Act when a person obtained medical services from a provider not in their network, there would be a much higher bill for the person to pay. The health insurance provider would not cover the entire cost for the services provided. The out-of-network provider would then bill the person for the difference between what the health coverage plan paid and what was charged. This type of charge was very common for persons who sought emergent medical care, where they believed their health insurance would pay, but they received services from an out-of-network provider.

2. BENES Act (Beneficiary Enrollment Notification and Eligibility Simplification).

The Beneficiary Enrollment Notification and Eligibility Simplification Act became law in 2020 but will go into effect in 2023. The Act is intended to reduce delays in Medicare coverage while applications are processed, and to prevent penalization for honest mistakes made during the application process while providing a path that allows for the mistake to be corrected.

3. Inflation Reduction Act of 2022.

This Act (in part) will improve prescription drug coverage and lower drug prices in Medicare. There will be caps set on the amount a senior will have to pay for prescription drugs they buy at a pharmacy, put caps on the amount seniors pay for insulin, provide access to additional free vaccines for Medicare beneficiaries, and “will further lower prescription drug costs for seniors by allowing Medicare to negotiate the price of high-cost drugs and requiring drug manufacturers to pay Medicare a rebate when they raise prices faster than inflation.”

G. Secure Act 2.0 (Omnibus Spending Package – H.R. 2617).

(<https://www.appropriations.senate.gov/imo/media/doc/JRQ121922.PDF>)

The original Secure Act was passed in 2019. For the past two years, Congress has been working on proposed changes now dubbed “Secure 2.0.” Secure 2.0 was approved just prior to the 2022 Christmas break. The full scope of changes contained in this Act are far broader than this presentation allows but some of the changes that are of note to elder law attorneys are outlined below.

1. Required minimum distributions (RMDs) (page #'s notated and refer to the link under this category).

- a. The age in which individuals must start taking RMDs will increase from 72 to 73 in 2023 and will increase to 75 starting in 2033. (Section 107) (page 2085).
- b. You must take your first required minimum distribution for the year in which you turn the RMD age.
- c. Penalties for failure to withdraw RMDs decreased so long as corrections are made during the “Correction Window.” (Section 302) (page 2226).
- d. No RMDs will be required for Roth 401(k)s. (Section 325) (page 2279).

2. Withdrawals.

Emergency 401(k) and IRA withdrawals may be made without penalty, there are limitations on the number of withdrawals per year, the amount that can be withdrawn, and there are “suggestions” as to what emergency actually constitutes (Section 115) (page 2105).

3. Annuities.

Annuities’ role in qualified retirement plans increased (Title II) and the annuity payout is factored into the amount of RMD that must be taken (Section 204) (page 2211).

4. 529 Funds.

Unused 529 funds may be rolled over to Roth IRAs (Section 126) (page 2161).

5. Disabled individuals.

- a. The age at which individuals must be deemed disabled to qualify for an ABLE account will increase from age 26 to age 46 – this new ruling will take effect for taxable years beginning after December 31, 2025 (Section 124) (page 2155).
- b. SNTs may have a charity as the remainder beneficiary – this will change the term “no individual” to “no beneficiary” and means any beneficiary which is an organization described in [§408\(d\)\(8\)\(B\)\(i\)](#) of the IRS Code identifying tax efficient charitable giving (Section 337) (page 2318).

6. Money follows the person.

This program has been extended through sometime during the year 2027. This will allow many to age at home or in the community rather than in a long term care facility. The program helps ease transition from a care

facility to a home. For example, it can be used to pay for groceries, security deposits, stair-lifts, ramps, etc. (Section 5114) (page 3832).

7. Older Adult Home Modification Program.

Funding for the Older Adult Home Modification Program was doubled to \$30 million. Those with limited income may apply for simple-low-cost home modifications (e.g., railings and ramps).

8. Provisions for community spouse.

Spousal impoverishment rules will remain in place until September 30, 2027.

9. Telehealth extended.

Telehealth services provided by Medicare have been extended for two more years.

10. Affordable housing for seniors.

The Housing for Elderly Program received a billion-dollar increase. This program provides housing assistance and supportive services to impoverished seniors.

H. Public Health Emergency (PHE) Set to End in 2023

1. As of the writing of this presentation, it is expected that the Covid Medicaid extensions will lapse on April 1, 2023. This date could change, and we should know about the change in early February 2023. With the anticipated April expiration, elder law attorneys should expect to receive annual renewal or redetermination notices for more or all clients immediately after the deadline. CMS has given state agencies up to 12 months to initiate all renewals.

2. Protecting Elder Rights and Preventing Abuse has an increase of \$15 million above the 2022 enacted level – this will provide support for APS grants.

3. People with Disabilities will see an increase of \$17 million above the 2022 enacted level.

I. On and Over the Horizon

The Biden administration is proposing comprehensive long term care facility reforms to address staffing and safety shortfalls. As part of the push to improve care, the Center for Medicaid Services announced a Special Focus Facilities Program which will provide oversight to the lowest performing term care facilities in the country. The Special Focus Facilities Program provides inspections, but the program will be expanded to increase penalties, increase safety standards, and aid the poorest long term care facilities.

To address the staffing shortfalls, the Department of Health and Human Services and the Department of Labor have earmarked funds to support training and educational programs. Several grants are available to support the training and education of nurses, health care workers, and other LTC facility staff.

LTC facilities are required to employ at least one on-site infection prevention specialist. The employee may be part-time.

In addition, the Centers for Medicare & Medicaid Services is studying staffing requirements in order to promulgate a rule on minimum staffing requirements. Long term care facilities are required to provide data on their staffing to use in this study. A proposed rule is expected in Spring 2023.

The Centers for Medicare & Medicaid Services is working with the Consumer Financial Protection Bureau to investigate long term care facilities which attempt to hold families responsible for loved one's care costs.

J. The Department of Health and Human Services 2022 National Strategy to Support Family Caregivers

The Department of Health and Human Services program works with the private sector to provide training, support, self-care, and respite to family caregivers. The program is intended to provide assistance to both family caregivers for the elderly, chronically ill, disabled, or otherwise functionally limited as well as for grandparents or other kin who care for children. A white paper on the program is available at https://acl.gov/sites/default/files/RAISE_SGRG/NatlStrategyToSupportFamilyCaregivers.pdf.

CAREGIVER AGREEMENTS: COMPENSATING CAREGIVERS WHILE QUALIFYING FOR VA AND MEDICAID BENEFITS

Jonathan C. Rouse and Jennifer Bailey Dalenberg

I. INTRODUCTION

The healthcare crisis of our nation's elderly becomes more urgent each year. As the elderly population swells¹ and its care needs significantly increase, residential care providers offer fewer placements as they struggle with staffing shortages.² Costs for residential care skyrocket as residential facilities struggle to cover unexpected costs from inflation and unexpected staffing costs.³ As elder law planners, we contribute to our seniors' care crisis if we continue to limit our services to planning for residential treatment options.

By over-relying on residential treatment, we ignore the largest provider of caregiving services in the U.S., which is family and friend caregivers. In 2015, an estimated 39.8 million Americans, 16.6 percent of the U.S. population, reported they provided unpaid care for adults, with 34.2 million caregivers providing care for recipients over 50.⁴ In 2020, the number of caregivers caring for adult friends or family grew by 8 million, primarily due to a significant increase in care recipients aged 50 or older.⁵ Of those caregivers, 33 percent received no help from paid or unpaid support in providing care to recipients, yet the caregivers addressed approximately four Activities of Daily Living⁶ for 4.9 years on average.⁷

II. CAREGIVER AGREEMENTS GENERALLY

Attorneys can provide a valuable service to clients and their families by preparing caregiver agreements that compensate in-home caregivers for their sacrifices in time,

¹ The number of Americans aged 65 reported in 2016 to be approximately 49 million is projected to grow to be 95 million in 2060. Individuals aged 85 and older is expected to double from 6.5 million in 2016 to 11.8 million by 2035 and then triple by 2060. Vespa, Jonathan, Lauren Medina, and David M. Armstrong, *Demographic Turning Points for the United States: Population Projections for 2020 to 2060*, Current Population Reports, P25-1144, U.S. Census Bureau, Washington, D.C. (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1144.pdf>.

² *State of the Nursing Home Industry: Survey of 759 nursing home providers show industry still facing major staffing and economic crisis*, American Health Care Association, June 2022. www.ahcancal.org/News-and-Communications/Fact-Sheets/FactSheets/SNF-Survey-June2022.pdf.

³ *Id.*

⁴ *Caregiving in the U.S. – 2020 Report*, National Alliance for Caregiving and AARP, May 2020 at 4.

⁵ *Id.*

⁶ "Activities of Daily Living" (ADLS), or normal daily activities "including but not limited to bathing, dressing, grooming, transferring, toileting, and eating." Those individuals primarily seek assistance from family and friends over professional caregivers or residential facilities.

⁷ *Id.* at 46.

energy, and resources. In addition to providing compensation for caregivers, these agreements offer these benefits:

- They allow caregivers who can't work due to the time they invest in providing care to claim earned income which may increase the caregiver's RSDI retirement benefit at age 65.
- They support payments for services rendered to a parent by a child if other family members allege the caregiver took loans, gifts, or testamentary advances from the parent.
- When the caregiver is also the recipient's agent under durable power of attorney, they support payment for services to the agent for those services to reduce allegations of inappropriate transfers that are a conflict of interest.
- They can qualify services as qualified long-term care services,⁸ which may be tax deductible if the recipient's medical expenses exceed the percentage of the recipient's income under [26 U.S.C. §213](#), currently 7.5 percent of the recipient's adjusted gross income.

Caregivers or recipients may resist using caregiving agreements because they may not want to be responsible for records to prove that caregivers provided services or to be responsible for payroll withholding and the tax reporting responsibilities of a household employer under [26 U.S.C. §3510](#). However, the recipient could delegate payroll and tax reporting to a professional accountant.

Caregivers may also be reluctant to record hours or report income if they are on disability. However, attorneys should caution their clients that large cash payments made to anyone "under the table" for caregiving services could have ramifications with the IRS and, for elder law planning, the Department for Medicaid Services or the Veterans Administration.

Alternatively, caregiver agreements allow transfers for value between caregivers and recipients and still preserve planning opportunities for Veterans' Administration (VA) Special Pension and Medicaid.⁹

III. CAREGIVER AGREEMENTS AND NON-MAGI MEDICAID

A person meeting technical and financial requirements for Medicaid can receive limited long-term care benefits in the recipient's home through Kentucky's 1915(c)¹⁰ Medicaid waiver program or more comprehensive Medicaid coverage in a skilled nursing facility. To be financially eligible for Medicaid, the care recipient must have no more than

⁸ See [26 U.S.C. §7702B](#).

⁹ Non-Modified Adjusted Gross Income Medicaid, also called Long-Term Care Medicaid, is distinguishable from Modified Adjusted Gross Income Medicaid, both commonly called "Medicaid." For the purpose of these materials references to "Medicaid" is specifically to Non-MAGI Medicaid.

¹⁰ For more on Medicaid waivers see [42 U.S.C. §1396n\(c\)](#).

\$2,000¹¹ in countable assets and less than \$2,742¹² in gross income. An applicant whose income exceeds the limit can still qualify for the benefit by using a qualified income trust under [42 U.S.C. §1396p\(d\)\(4\)\(B\)](#). However, an applicant with excess resources must either transfer away assets 60 months¹³ before applying, spend down before applying by purchasing goods and services for fair cash value before applying, or by more advanced elder law strategies such as “half-a-loaf” gift and return gifting, promissory note, or annuity planning.

Caregiver agreements which describe hourly services are useful tools to spend down before an application, but inside the 60-month lookback period, and allow compensation to family members for providing care *provided* they follow the requirements outlined in [907 KAR 20:30 §1\(7\)](#):

- (a) The caregiver agreement shall have:**
 - 1. Been notarized;**
 - 2. Identified and specified the cost of each caregiver service;**
 - 3. Specified that payment shall not have:**
 - a. Been made for a service not recognized in the agreement as a caregiver service; or**
 - b. Duplicated a service provided by another source; and**
 - 4. Included a provision that required payment to be made by the caregiver to the individual for the cost of each caregiver service not provided in accordance with the agreement.**
- (b) The cost of each caregiver service that was not provided in accordance with the agreement and not repaid by the caregiver shall be considered a transfer of resources.**

The most restrictive of these rules is the restriction on duplicative services set under (3)(b) and the repayment provision (4). Because the agreement prohibits duplicative service, the attorney must ascertain the benefits and paid services the client already receives. The agreement should not include services from the caregiver that Medicare, a long-term care insurance policy, or a professional care agency already provides.

¹¹ [907 KAR 20:025](#).

¹² Amount equal to 300 percent of SSI Federal Rate for 2023 pursuant to [42 C.F.R. §435.1005](#).

¹³ See [42 U.S.C. § 1396p\(c\)\(1\)\(b\)](#).

The repayment provision under [907 KAR 20:30 §1\(7\)\(4\)](#) is perhaps the most significant deterrent for using a caregiver agreement when an application for Medicaid is imminent.

Because of this limitation, many attorneys avoid using caregiver agreements because lump sum transfers can create irreparable challenges to application. For example, a caregiver who receives a lump sum in exchange for a commitment to provide services for a term of years may be unable to return payment for unrendered services.

However, caregiver agreements still offer great value to clients who may need to enter a skilled nursing facility within 60 months but who can have a better quality of life at home for years to come because of the support of family and friends. Instead of a lump-sum payment up front, the caregiver agreement is a “pay as you go” gradual and constructive spend down at the fair-market-value rate for services. And, though staffing shortages and inflation wreak havoc on the residential care industry, they also boost the power to transfer resources from the client to family and friend caregivers through an inflated fair-market-value hourly rate.

IV. CAREGIVER AGREEMENTS AND VETERANS’ ADMINISTRATION (VA) PENSION BENEFITS

Under [38 U.S.C. §1521](#), a veteran who served in active duty during a “Wartime period”¹⁴ and who has a disability may be eligible for a cash benefit named Improved Pension even if the disability isn’t related to the veteran’s service. The surviving spouse of a veteran who met the wartime period requirement may also be eligible for a reduced cash benefit from the Improved Death Pension under [38 U.S.C. §1541](#) if the surviving spouse has a disability.

A. Level of Pension Benefit

The amount of cash benefit provided for the applicant is based on the claimant’s disability and level of impairment:

1. **“Basic Pension”**: This level of disability is assessed by the VA unless the person is aged 65 or older, in which case the VA presumes the claimant is totally disabled.
2. **“Housebound”**: If the claimant is totally disabled and “is substantially confined to his or her dwelling and the immediate premises or, if institutionalized, to the ward or clinical area, and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his or her lifetime.”¹⁵ A person with Basic Pension who is housebound receives additional cash benefit over Basic Pension.
3. **“Aid and Attendance” (A&A)**: If the claimant is totally disabled and is blind or nearly blind, a patient in a nursing home because of incapacity, or satisfies the need for “aid and attendance under the criteria outlined in [38](#)

¹⁴ See [38 CFR §3.2](#) for applicable dates for Periods of War.

¹⁵ [38 CFR §3.351\(d\)\(2\)](#).

[CFR §3.352\(a\)](#),”¹⁶ the claimant is entitled to receive the highest VA Pension benefit. For a claimant to meet the aid and attendance level, the claimant must be:

- a. Bedridden, or
- b. Require assistance with at least two of the following:¹⁷
 - i. Dressing;
 - ii. Keeping clean and presentable;
 - iii. Adjusting prosthetic or orthopedic appliances which the claimant could not adjust without aid;
 - iv. Feeding;
 - v. Toileting; or
- c. “[I]ncapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his or her daily environment.”¹⁸

B. VA Pension Financial Eligibility Tests

After the VA assesses the benefit level of Basic Pension, Housebound, or A&A, the VA examines the income and net worth of the claimant.

C. VA Income Test: MAPR-IVAP

One part of the claim is determined by subtracting the claimant’s Income for VA Purposes (IVAP)¹⁹ from the Maximum Annual Pension Rate (MAPR)^{20,21}. For instance, in 2023, a veteran with one dependent²² who qualifies for Aid and Attendance Benefit has an MAPR of \$31,714 per year or \$2,642.83 per month. If

¹⁶ [38 CFR §3.351\(c\)\(3\)](#).

¹⁷ The amount of activities that the claimant requires assistance with is not specifically recognized under [38 CFR §3.352](#), but it is generally accepted that only two are required.

¹⁸ Typically, the criteria applied with a claimant with dementia does not meet other criteria or in addition to needing assistance with two other activities.

¹⁹ See [38 CFR §§3.262, 3.271](#).

²⁰ The MAPR is published annually by notice to reflect increase. See <https://www.va.gov/pension/veterans-pension-rates/>.

²¹ See [38 CFR §3.23\(b\)](#).

²² A spouse is considered a dependent.

the veteran's and the veteran's spouse's combined IVAP is more than \$2,642.83, the VA denies the veteran's claim. However, the veteran can reduce the veteran's IVAP by deducting "unreimbursed medical expenses" (UMEs) that are more than 5 percent of the veteran's reported annual income.²³

D. VA Net Worth Test

After determining the veteran's IVAP, the VA adds the claimant's countable assets and the claimant's IVAP to establish the claimant's net worth, which must not exceed the maximum net worth limit, currently \$150,538 until November 30, 2023.²⁴

A veteran can use a caregiver agreement to qualify for payment for in-home and assisted living care as UMEs. Those UMEs can lower the veteran's IVAP, indirectly lower the veteran's net worth, and make the veteran eligible for VA Pension.

To qualify caregiver services as UMEs, the caregiver must provide "health care or custodial care."²⁵ Generally, the VA only allows payments for health care to qualify as UMEs. A health care provider must be licensed or supervised by a licensed health care provider to provide "health care."

However, if the care recipient is an individual who needs A&A or is housebound, the recipient can deduct payments for "custodial care."²⁶ Custodial care does not have to be a licensed provider, or supervised by a licensed provider, as long as the caregiver provides:

- Assistance with two or more ADLs; or
- Supervision because an individual with a physical, mental, developmental, or cognitive disorder requires care or assistance on a regular basis to protect the individual from hazards or dangers incident to his or her daily environment."²⁷

For the VA, Activities of Daily Living consist "of bathing or showering, dressing, eating, toileting, transferring, and ambulating within the home or living area."²⁸ Additionally, if the veteran receives assistance with at least two ADLs, the veteran can deduct all assistance the caregiver provides with Instrumental Activities of Daily Living (IADLs) as in-home care.²⁹ IADLs include "independent living activities, such as shopping, food

²³ See [38 CFR § 3.262\(i\)](#).

²⁴ See <https://www.va.gov/pension/survivors-pension-rates/>.

²⁵ [38 CFR §3.278\(d\)\(2\)](#).

²⁶ *Id.*

²⁷ [38 CFR §3.278\(d\)\(1\)](#).

²⁸ [38 CFR §3.278\(b\)\(4\)](#).

²⁹ [38 CFR §3.278\(d\)\(2\)](#).

preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes.”³⁰

The ability to include the IADLs as deductible expenses to lower a veteran’s IVAP and net worth makes a caregiver agreement even more valuable for VA planning than Medicaid. While the caregiver agreement provided a safe way for a gradual spend-down for a future application for Medicaid, a caregiver agreement for a veteran that identifies assistance with two ADLs can create an immediate income stream for the veteran to pay for in-home support up to \$31,714 per year for both ADLs and IADLs.

Whether you are planning for Medicaid within a 60-month lookback period, trying to lower a veteran’s IVAP and net worth for VA Pension with Aid and Attendance, or simply trying to structure payment for previously uncompensated but generous caregiving of friends and family for your client, the benefit of caregiver agreements should not be overlooked.

³⁰ [38 CFR §3.278\(b\)\(3\)](#).

Sample Long-Term Caregiver Agreement

This Personal Services Agreement ("Agreement") is made effective as of _____, 20____, by and between Jane Doe on the one hand and Mary Smith on the other. In this Agreement, Jane Doe ("Doe") is the party who is contracting to receive services, and Mary Smith is the individual who will be providing services ("Service Provider").

WHEREAS, Doe is 75 years old and experiencing declining health that makes her unable to drive a car and creates considerable difficulty in caring for herself and managing her affairs without supervision;

WHEREAS, because of her declining health, Doe is unable to live alone and requires supervision throughout the day to protect her from the hazards of her daily environment;

WHEREAS, Doe desires to remain in the community and avoid entering a nursing home for as long as possible; and

WHEREAS, the Service Provider has agreed to provide accommodations in her home and to provide supervision and assistance for Doe that will enable her to remain in the community,

NOW, THEREFORE, Doe and the Service Provider enter into this Agreement on the terms set forth below:

I. DESCRIPTION OF SERVICES

Beginning on _____, 20____, the Service Provider will provide the following services (collectively, the "Services") until such time as this Agreement is terminated as provided in this Agreement:

1. Medical Assistance:

The Service Provider shall supervise Doe's medication, remind her about the medication prescribed for her, fill her medication prescriptions, take her to her doctor visits and assist her in communicating with her doctors regarding her medical care, and take her to all diagnostic tests ordered by her doctors. The Service Provider shall monitor Doe's health status and physical and emotional condition. No medical care of the type provided by licensed physicians or certified nurse personnel is contemplated by this Agreement to be provided by the Service Provider. The Service Provider shall attempt to secure qualified health care professionals, including doctors, nurses, nurse's aides, therapists, and other health-care providers to aid in such diagnosis, treatment, palliation, cure, and remedy as may be deemed necessary as a result of Doe's physical, mental, or emotional illness or discomfiture as it is found to exist from time to time. All such care provided by third-party providers shall be at the sole expense of Doe or her insurance carriers or governmental providers, if any. This provision is not intended nor shall it be construed to impose any guaranties, warranties, insurance, or additional obligations on the Service Provider with respect to the health and wellbeing of Doe, it being recognized that the Service Provider will make her best effort as an untrained individual who must and shall rely on the opinions of expert medical providers for the care of Doe.

2. Third-Party Assistance:

The Service Provider may arrange for a third party to provide assistance, as needed, one or more days per week. In that event, the Service Provider may designate that Doe pay the third party directly from the payments that would otherwise be due the Service Provider. Service Providers will provide the services listed in this Agreement during the times she is scheduled to work and will be paid only for hours actually worked in the provision of the services to Doe.

3. Personal Care:

The Service Provider shall assist Doe as needed in eating, bathing, dressing, and toileting; or hire and supervise an attendant to assist her with these activities. The Service Provider will take Doe shopping or do her shopping for her, as needed, to purchase her clothes and other personal items related to her personal care and hygiene. The Service Provider shall periodically assess the personal needs and desires of Doe as to social, physical, entertainment, and other personal factors and shall seek to provide such services, equipment, supplies, and goods as required to meet these needs and desires within reason.

4. Nutrition:

The Service Provider shall ensure that Doe receives two or more nutritionally balanced meals per day. The Service Provider shall monitor Doe's eating to make sure that she has balanced meals and shall supplement her meals whenever necessary.

5. Accommodations:

The Service Provider shall furnish Doe's living accommodations in a private bedroom in her home. Doe's right to accommodation in the Service Provider's home shall be terminated only as provided in this Agreement. While Doe resides in the Service Provider's home, she shall have access to the following common living areas: kitchen, living room, bathroom, family room, and dining room.

6. Housekeeping:

The Service Provider shall provide or arrange housekeeping services and/or hire and supervise a housekeeper, to insure that Doe's living space is always neat and clean. This shall include cleaning floors, dusting, emptying all waste containers, cleaning and supplying the bathroom, and maintaining Doe's bedroom in a neat and orderly condition. The Service Provider will furnish all labor, materials, and equipment necessary to perform the foregoing services. The Service Provider shall provide laundry services each week, or more frequently as needed, for all Doe's clothing, as well as bed and bath linens furnished by the Service Providers.

7. Management of Finances:

The Service Provider shall assist Doe in investments, bill paying, managing her checking and bank transactions, preparation of all federal and state income tax forms, and daily money management to the extent funds of Doe are available and to the extent the

Service Provider may have access to such funds to accomplish such services. This shall be done in coordination with Doe's attorney-in-fact.

8. Delegation:

The Service Provider may delegate to third parties any of her responsibilities to provide care, supervision, and assistance to Doe under this Agreement; but the Service Provider shall remain responsible for ensuring that Doe receives the agreed-upon care, supervision, and assistance.

9. Personal Expenditures:

Doe shall provide her own clothing and personal necessities at her own expense. The Service Provider shall not be responsible or liable for any expense incurred, or debt or obligation of any nature contracted by Doe on her own account for personal necessities. When Doe is absent from the home for purposes other than receiving medical attention as provided in this Agreement, Doe shall be responsible for all payments for her own costs of transport, lodging, meals, and incidentals.

10. Incapacity:

If Doe becomes unable to handle her personal or financial affairs, the Service Provider shall have the authority to act under any Durable Power of Attorney that has been executed by Doe naming the Service Provider to carry out the intentions and the instructions of Doe as Principal under said Durable Power of Attorney.

11. Damages:

Doe shall reimburse the Service Provider for any loss or damage suffered by the Service Provider as a result of her carelessness or negligence.

12. Payment for Services:

Doe will pay reimbursement for costs and compensation to the Service Provider for each service provided pursuant to this Agreement in the amount of \$_____ per hour. Payment will be made on or before the last day of each month for the services provided during that month. The Service Provider may increase this rate, effective January 1st of each year, by a percentage equal to the greater of (1) the percentage increase for the prior year in the Consumer Price Index, (2) the cost of living as calculated by the Social Security Administration, or (3) the maximum allowable Aid & Attendance benefit payable to a widow of a veteran by the Veterans Administration; the increases in the rate shall go into effect January 1st of each year. Reimbursements for expenses paid to third party caregivers by the Service Provider for the benefit of Doe shall be made out of the monthly payment first. The amount remaining after such reimbursements are made shall be compensation to the Service Provider. Doe and the Service Provider agree that the compensation that is earned income must be reported by the Service Provider to the Internal Revenue Service, and taxes paid thereon, if any are due.

13. Term of the Agreement:

This Agreement may be terminated upon mutual agreement of the parties. In addition, either party to this Agreement may terminate the Agreement with or without cause upon six months' notice to the other party. Each party to this Agreement may terminate the Agreement with cause upon one month's notice to the other party. Unless otherwise terminated by the parties, the term of this Agreement shall be for such time as Doe remains capable of living outside of a long-term care facility. If Doe's health deteriorates so that placement in a long-term care facility is required, the Service Provider agrees to assist Doe in such placement and to assist Doe in arranging for payment, through government benefits or otherwise, of the costs of the facility. The Service Provider shall not be responsible for payment of Doe's long-term care expenses. Once Doe has entered a long-term care facility, the Service Provider shall have no other obligation under this Agreement and no right under this Agreement to payment for services provided after Doe has entered the long-term care facility.

II. ENTIRE AGREEMENT, SEVERABILITY

This Agreement shall be governed by the laws of the Commonwealth of Kentucky. It constitutes the entire agreement of the parties, and there are no other promises or conditions in any other agreement whether oral or written. If any provision in this Agreement is held by any court to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force and effect.

III. ACKNOWLEDGEMENT OF CONSIDERATION

By signing this Personal Services Agreement, both Doe and the Service Provider acknowledge that they have read the terms, understand its content, expressly agree that it serves each of their purposes, have received sufficient consideration for their respective promises and commitments herein, and that it better secures the long term health, safety, and welfare of Doe.

KRS 389A.010(1)(a) – Any **fiduciary** – “trustee, guardian, conservator or personal representative . . . **not otherwise possessing a power of sale**, may **move** the District Court . . . **to sell or mortgage** any **real estate** or any interest therein **possessed by his ward, decedent or trust**...

I. STANDING

A. Trustee

1. If the trust instrument sets forth that the trustee has the power to sell or mortgage real estate, the trustee cannot file a [KRS 389A.010](#) motion.
2. If the trust instrument does not set forth that the trustee has the power to sell or mortgage real estate, [KRS 386B.8-150\(1\)\(b\)](#) grants the trustee all powers over the trust property which an unmarried competent owner has over individually owned property. The trustee cannot file a [KRS 389A.010](#) motion.
3. If the trust **instrument expressly limits the power** of a trustee to sell or mortgage real estate, the trustee must file a [KRS 389A.020](#) motion to have the circuit court alter or amend this restriction.
4. If the circuit court alters or amends the restriction so there is no restriction, [KRS 386.8-150\(1\)\(b\)](#) grants the trustee the power to sell and mortgage real estate. The trustee cannot file under [KRS 389A.010](#).
5. **Thus, it appears that there is no circumstance in which a trustee would have standing to file a [KRS 389A.010](#) motion.**

B. Personal Representative

1. The **executor** or **administrator** has no power to sell land belonging to his decedent without an order of court. *Strode v. Kramer*, 293 Ky. 354, 169 S.W.2d 29 (1943). See also [KRS 395.220](#) and [KRS 395.195\(6\)](#).
2. **Except:** if the power of an executor to sell or mortgage any real estate is **expressly limited by the will** such limitation may only be altered or amended by the **circuit court** under [KRS 389A.020](#).
3. **Except:** if the decedent's will **gives the authority** there's no necessity to obtain a court order for sale. *Weeks v. Briscoe*, 305 Ky. 410, 204 S.W.2d 584 (1947).¹ This power to sell real estate also passes to an administrator

¹ *Lucas v. Mannering*, 745 S.W.2d 654 (Ky. App.1987). A testamentary power of sale does not vest a personal representative with the unqualified right to sell estate realty. The power is subject to the personal representative's obligations as a fiduciary. It may be exercised only if the sale is in the best interest of the beneficiaries of the estate.

with will annexed.² But, pending an action or procedure to set aside or reject the will, there shall be no power to sell the land of the deceased, except under a judgment of court.³

4. **However, if you are the executor or administrator of an estate, why would you want to file a [KRS 389A.010](#) motion?**
5. The most logical reason would be to pay debts of the estate, but if a personal representative needs to sell real property to pay debts, [KRS 395.510](#) sets up a procedure in **circuit court**. It is also unlikely that a personal representative would want to mortgage any real property of the estate.
6. **Absent some testamentary power of sale which would restrict the sale such as a mandated distribution, the heirs or devisees are the proper persons to sell the real estate.** They just need to establish their chain of title to the property. If the decedent died intestate, an affidavit of descent under [KRS 382.120](#) should be filed. Or if the decedent died testate, the will is an instrument of title to prove ownership and [KRS 382.135\(4\)](#) requires the personal representative file an affidavit of transfer of title.
7. However, pursuant to [KRS 396.011](#), claims (excluding claims of the United States, the state of Kentucky and any subdivision thereof), which arose prior to the decedent's death, are barred against the estate, the personal representatives and the heirs and devisees of the decedent unless presented within six (6) months of the appointment of the personal representative, or where no personal representative has been appointed, within two (2) years after the decedent's death.
8. **WARNING:** If real property is sold by the heirs and/or beneficiaries prior to the six (6) month or two (2) year time frame, a creditor of the estate could come forward and make a claim against the real estate sold and/or those who sold.
9. If the new owners do not want to sign a deed which would subject them to a warranty of title, they should just sign a quit claim or special warranty and not a general warranty deed. If some of the heirs do not want to sell the real estate and others do, then the procedure under [KRS 389A.030](#) in **circuit court** is the proper forum for their dispute.
10. **Additionally, why would a buyer want to purchase real estate from a personal representative?**
11. A personal representative is not individually liable on a contract entered into in a fiduciary capacity in the course of administering the estate.⁴ If there

² The power "passes to an administrator with the will annexed, absent an expressed intention otherwise in the will. *Pitts v. Estate of Gilbert*, 672 S.W.2d 70, 73 (Ky. App. 1984).

³ [KRS 395.220\(2\)](#).

⁴ [KRS 396.185\(1\)](#).

later turns out to be a cloud on the title or the land is subject to unpaid debts and the estate is closed, there would be no one left to enforce the warranties under the deed.

12. **Thus, it is unlikely that a personal representative would use this statute.**

C. Guardian-Conservator

A **guardian-conservator** does not have the power to sell or mortgage real estate so **may always file a [KRS 389A.010](#) motion**. To sell any of the ward's real property, a guardian⁵ and a conservator⁶ shall comply with the provisions of [KRS Chapter 389A](#).⁷

II. JURISDICTION

Only the district court has jurisdiction to hear a [KRS 389A.010](#) motion, and only a district judge can conduct the hearing. No proceedings under this section shall be conducted by or before a commissioner of the district court. [KRS 389A.010\(5\)](#).

III. VENUE

Venue is in the county in which the fiduciary has qualified. A guardian, conservator, executor or administrator all received their appointment in district court. A new action is not filed with a separate case number. You simply must file your motion in the district court proceeding where the fiduciary was appointed.

IV. WHAT SHALL THE MOTION INCLUDE?

- A. **An adequate description of the property. Practical step:** Type in the description found in the deed – you are going to need it later when you cut and paste from the motion to the order to the deed or mortgage. You can then be sure that the description for each match.
- B. **A summary of the grounds for the motion. Practical step:** As for a guardian or conservator the grounds may be that the ward no longer lives in the home and wants to avoid the expense of the county taxes, insurance and necessary upkeep of the home.
- C. **A request that the bond of the fiduciary be increased in an adequate amount in accordance with [KRS 395.130](#). Practical step:** I always place this wording not only in my motion but also in the order in which the motion is granted. However, when doing Medicaid planning and I have filed this motion on behalf of a guardian/conservator it is often my goal to spend down the proceeds from the sale

⁵ [KRS 387.125\(3\)](#).

⁶ [KRS 387.700\(3\)](#).

⁷ [KRS 389A.030](#) allows another person who is a co-owner of the real estate to force the sale of a ward under guardianship. In this instance the interest of the ward is not sold by the guardian-conservator, **but by the court**.

so my client will qualify for Medicaid. In this case, nothing is actually done to increase the bond of the fiduciary. If the property is to be sold and the proceeds are to be held by the movant, you can either have the court in the final order state what is an adequate amount for the bond to be increased or, after the property is sold, return to the court to ask as to what amount the bond should be increased.

V. WAIVER FOR VESTED OR CONTINGENT INTERESTS

- A. Unless waived in writing, written notice of the hearing with a copy of the motion shall be served in a manner authorized by the Rules of Civil Procedure **for the initiation of a civil action** upon all persons who have a vested or contingent interest in the property interest sought to be sold.
- B. The strongest wording would be that the person holding an interest **entered their appearance in the action** and stated they have no objection to the sale of the property. The statute does not require that the waiver be notarized. If you are unable to get a waiver, then **for the initiation of a civil action** you must have a summons issued and served.
- C. An example of such a waiver might read:

I, Robert Redford, having a vested interest in the property interest sought to be sold, do hereby enter my appearance in Civil Action _____ and waive under [KRS 389A.010\(3\)](#) written notice of the hearing with a copy of the motion served upon him in a manner authorized by the Rules of Civil Procedure for the initiation of a civil action and do not object to the sale of the below described property:

Description of the property then follows with a place for the waiver to be signed.

VI. VESTED AND CONTINGENT INTEREST

- A. A motion by a guardian or conservator is simpler as to a vested or contingent interest because you are only trying to sell the interest of the ward. The vested interest is usually the ward themselves and maybe a spouse. If the spouse is not a co-owner, the spouse would still own a contingent interest in the property under their dower or curtesy right and should be named as a party.⁸
- B. A motion by a personal representative is usually more complicated as to a vested or contingent interest because there may be several people who inherited an interest in the property. These persons can present all kinds of issues as to proper service as they may be disabled, a minor, in the military, in jail or just unknown as to who they are and their marital status.
- C. **Practical step: Does a mortgage holder have a vested or contingent interest in the property so that they must either sign a waiver or be served with**

⁸ *White v. White*, 883 S.W.2d 502, 507 (Ky. App. 1994) "If Howard is married, he should have also named his wife as a party to the action."

process? It can be argued that a mortgagee does not have a vested or contingent interest in the property but only holds the estate mortgaged as a security only for the debt. It is a mere lien of the creditor. *Jones' Adm'r v. Jenkins*, 83 Ky. 391, 395 (1885).

- D. [KRS 389A.010](#) does not define a vested or contingent interest and does not specifically state that all lienholders be made a party. Since you are going to make sure that the mortgage holder, county and city taxes are paid so that you can pass good title is there a real reason to make them a party?
- E. In contrast, [Ohio statute 2127.13](#) **necessary parties in sale by guardian** requires not only all persons holding legal title to the real property or any part of the property, but also “**(D) All lienholders whose claims affect the real property or any part of the property.**”
- F. **WARNING:** Real property passes directly to a decedent's heirs-at-law or to beneficiaries under a testator's will.⁹ In the case of a testate death – did the will leave the real estate directly to a beneficiary or did the will direct the executor to sell all real property and distribute the proceeds? Judgment liens, IRS liens and state tax liens attach to any real property a person owns or later acquires after the filing of the lien.
- G. [KRS 389A.010](#) **motion does not “strip” liens from the real property.** Heirs, devisees, their spouses, and lien holders against them should be made parties to the motion or have them sign an appropriate waiver.

VII. WAIVER FOR NEXT OF KIN

- A. Where the subject of the action is the property interest of a person under legal disability, unless waived in writing, written notice by certified mail, return receipt requested shall be given to all known **adult** next of kin. Next of kin would be those who would have inherited the property should the ward die intestate. A summons is not required to be issued and served. The statute does not require that the waiver be notarized. By certified mail, I send a (1) cover letter with instructions on returning the waiver; (2) copy of the motion; (3) a waiver to be signed; and (4) a self-addressed stamped envelope back to me for the return of the waiver.

An example of such a waiver might read:

I, Kenny Redford, being a known adult next of kin of Robert Redford, do hereby under [KRS 389A.010\(3\)\(a\)](#) waive the thirty (30) day notice in writing by certified mail, return receipt requested, of (1) The nature and pendency of Civil Action No. _____ of the Commonwealth of Kentucky, _____ District Court; (2) the time, date, and location of the hearing on a Motion to sell the below described property; and (3) waive any objection to granting the Guardian/Conservator the power to sell the following described real estate:

⁹ *Slone v. Casey*, 194 S.W.3d 336 (Ky. App. 2006); *Wood v. Wingfield*, 816 S.W.2d 899 (Ky. 1991).

Description of property then follows with a place for the waiver to be signed.

B. If not waived in writing:

1. There is a thirty (30) day notice requirement before the motion can be heard. See [KRS 446.030](#) and [Civil Rule 6.01](#) which is substantially similar for the formula for the computation of time under any **applicable statutes**. Since you are required to give notice by certified mail, I would also add three (3) additional days to the prescribed time under [Civil Rule 6.05](#).
2. At or before the hearing, the fiduciary or his attorney shall file an affidavit on personal knowledge showing compliance with this paragraph and **attaching a copy of the notice given and the original of all receipts returned**. On the hearing date, I file with my affidavit (1) any waiver I have received; (2) a copy of any instruction letter I mailed, but did not receive a waiver back; and (3) the original of all receipts (green cards) returned.

VIII. CONSENT

Special care should be taken if the property sought to be sold is to be purchased by the fiduciary or their spouse. The waiver should contain a provision that not only is there no objection to the sale of the property but also that there is no objection to the property being sold to the fiduciary or their spouse. The sale of real property to a fiduciary is voidable.¹⁰

IX. GUARDIAN-CONSERVATOR: FOR PERSON UNDER LEGAL DISABILITY

[KRS 389A.010](#) states where the property interest sought to be sold belongs to a person under legal disability, service of notice and defense shall be governed by [Civil Rule 4.04\(3\)](#) and [Civil Rule 17.03](#). [Civil Rule 4.04\(1\)](#) **requires summons and complaint (or other initiating document) shall be served together.**

X. WHO TO SERVE WHEN ACTION BROUGHT AGAINST WARD

A. [Civil Rule 4.04\(3\)](#)

1. Service shall be made upon an unmarried infant or a person of unsound mind by serving his resident guardian or committee if there is one known to the plaintiff or, if none,
 - a. By serving either his father or mother within the state or, if none,
 - b. By serving the person within this state having control of such individual.
2. If there are no such persons enumerated above, the clerk shall appoint a practicing attorney as guardian *ad litem* who shall be served.

¹⁰ *West's Kentucky Practice*, Volume 2, Prob. Prac. & Proc. §1685. Purchase by the Fiduciary, pages 433-435.

3. **If any of the persons directed by this section to be served is a plaintiff, the person who stands first in the order named who is not a plaintiff shall be served.**
- B. Under [KRS 389A.010](#), the only person who can bring the action for the ward is a guardian or conservator. Usually, this is the same person, but not always. If the guardian and the conservator are two separate people – if the conservator brought the action, the guardian would need to be served. If the guardian brought the action, the father or mother would need to be served if one is within the state. Thus, while it is not required to be stated in the [KRS 389A.010](#) motion that the father or mother are not within the state, it is good practice to set forth whether they are deceased or not within the state.
- C. If the parents are deceased or not within the state, then the next person in line would be the person having control of such individual which would be the guardian (or the spouse might properly be the one having “control of such individual”). If the guardian is conflicted out and there is no spouse, or the spouse does not have control of the individual, then service falls on the guardian *ad litem*.
- D. “The purpose of directing service upon the father or mother, or person having control of such defendant (if he or she has no resident guardian or committee), is to afford additional protection to that party by having someone closely associated with the party be given notice of the proceeding”.¹¹

XI. GUARDIAN AD LITEM

- A. Only a guardian, committee or guardian *ad litem* is authorized to defend an unmarried infant or person of unsound mind.¹² When the ward was first determined to be disabled by the court a guardian *ad litem* was appointed.
- B. **Practical step:** Check to make sure this person who was originally appointed has not been relieved of his duties by the court. If relieved, request the district court clerk to appoint a new guardian *ad litem* for the ward.
- C. [Civil Rule 17.03\(3\)](#) – No judgment shall be rendered against an unmarried infant or person of unsound mind until the party’s guardian or committee or the guardian *ad litem* shall have made defense or filed a report stating that after careful examination of the case he is unable to make defense.
- D. **Practical step:** Prepare a proposed report for the guardian *ad litem* setting forth why he/she “after careful examination of the case is unable to make defense” and “that it would be in the best interest of the ward that the motion be granted.” Be sure to leave a blank space so that the guardian *ad litem* has only to write in the amount of the fee; sign his name; serve the report on the parties to the action; and file the report with the court.

¹¹ *West’s Kentucky Practice*, Volume 6, Rules of Civil Procedure, 6(4.04(3)), page 51.

¹² [CR 17.03](#).

- E. **Practical step:** There is no requirement when filing a motion under [KRS 389A.010](#) for a motion to be served on the county attorney. However, it would be good practice to serve the county attorney. The county attorney will be at the hearing and it is not unusual for the district judge to ask the county attorney if she/he has an objection.
- F. **Practical step:** Prior to filing my motion, I call the office of the guardian *ad litem* to make sure that the guardian does not have a conflict with the date for the hearing. Additionally, I will mail to the guardian a cover letter which includes a copy of the motion, a copy of the summons to be issued, a copy of the proposed order to be entered, and a proposed guardian *ad litem* report in a plastic sleeve to not only keep it clean but to also show its importance to be sign, served and filed. In the letter, I inform the guardian *ad litem* that I will be serving the summons and motion on him/her by certified mail from the district court clerk as required by [KRS 389A.010](#).

XII. WHAT SHOULD ALSO BE INCLUDED IN THE MOTION

- A. Name all persons who have a vested or contingent interest in the property interest sought to be sold, the interest that they hold, and the address of each individual. Attach to the motion as an exhibit any waiver signed by a vested or contingent interest.
- B. If there is no mortgage, set forth in the motion that there is not a mortgage against the property.
- C. Include in the motion a paragraph about the PVA fair cash value of the property and attach as an exhibit a copy of the PVA tax bill. If the property is to be sold for less than the PVA FCV, attach a copy of an appraisal by a licensed appraiser. If it is a private sale, attach a copy of the purchase contract. However, if it is a close family member seeking to purchase, there is often no purchase contract.
- D. In the case of a disabled person, include (a) the name and address of the guardian *ad litem* and request that he/she be paid a reasonable fee for their services; (b) although not required by statute, include in the certificate of service that a copy of the motion has been mailed to the county attorney; (c) state whether or not the parents of the disabled person are deceased; and (d) state the name of all persons who are an adult next of kin and the relationship of each person to the disabled person and their address. Also, attach as an exhibit any waiver signed by an adult heir.

XIII. CIVIL SUMMONS

- A. In a motion by a personal representative, a summons would not have to be issued if you can get waivers signed by each vested and contingent interest. However, in a guardianship action a summons **shall** and will always be required to be issued and served.
- B. **Practical step:** On the civil summons for example: Plaintiff: Robert Redford, guardian/conservator for name of ward and on the heading line state motion to grant the guardian/conservator the power to sell real estate. For the Defendant I

will type the name of the ward. For service of process, I will type the name of the guardian *ad litem*, his title as guardian *ad litem* and the address to where I want the summons and motion to be mailed by the district court clerk by certified mail.

XIV. **LIS PENDENS NOTICE**

- A. A *lis pendens* is a “notice, recorded in the chain of title to real property, ... to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome”. *Greene v. McFarland*, 43 S.W.3d 258, 260 (Ky. 2001). See [KRS 382.440](#), [KRS 382.450](#) and [KRS 382.460](#).
- B. The *lis pendens* gives constructive notice when it is filed with the county court clerk where the real property or the greater part thereof lies. If a lien is filed after the *lis pendens* notice is filed, the creditor must come forward in the civil matter to assert the lien or the lien will be lost against the property being sold. **Thus, a *lis pendens* notice can “strip” liens from the real property under a [KRS 389A.010](#) motion.**
- C. The notice is to include: (a) The number of the action, if it is numbered, and the style of such action or proceeding and the court in which it is commenced, or is pending; (b) The name of the person whose right, title, interest in, or claim to, real property is involved or affected; and (c) a description of the real property in the county thereby affected. [KRS 382.440](#).
- D. Additionally, [KRS 382.335\(1\)](#) requires that the *lis pendens* also contain a preparation statement just as in a deed that includes the name, address and signature of who prepared the *lis pendens* notice:
 - 1. **STEP 1:** Have the title to the property examined.
 - 2. **STEP 2:** Prepare your motion.
 - 3. **STEP 3:** Update your title examine to make sure a lien has not been filed since the initial exam.
 - 4. **STEP 4:** File your motion, re-check title, file your *lis pendens* notice.
- E. Failure to follow these four steps can result in a creditor holding a lien against the property that has been sold and maybe even a claim against the personal representative who distributed money arising from the sale to any person subject to the lien.

XV. **HEARING**

All persons having a vested or contingent interest in the property or who are next of kin of the disabled person **shall** have standing to present evidence and to be heard at the hearing.

XVI. FINAL ORDER

[KRS 389A.015\(1\)](#) requires that the order by the district court granting a motion under [KRS 389A.010](#) **shall** contain an adequate description of the property and shall recite that it is a final order. Good practice is to type on the order: **THIS IS A FINAL AND APPEALABLE ORDER FOR WHICH THERE IS NO JUST CAUSE FOR DELAY.**

XVII. RESTRICTIONS ON SALE OF PROPERTY

- A. Pending the entry of a final order and expiration of the time for an appeal (30 days) therefrom, **neither the fiduciary nor the owner of any vested interest** shall make any conveyance or mortgage of the real estate and any attempt to do so shall be null and void.
- B. **Unless the court order indicates** – the statute does not set forth any limitation on how quickly the property must be sold.

XVIII. APPEAL

- A. An aggrieved party may no later than thirty (30) days from the date of the order, institute an **adversary proceeding** in circuit court pursuant to [KRS 24A.120\(2\)](#) in respect to any order affecting the right of the fiduciary to sell or mortgage.
- B. Such **adversary proceeding** shall be filed in circuit court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an appeal. [KRS 24A.120\(2\)](#).

XIX. DEED OR MORTGAGE

[KRS 389A.015\(2\)](#) requires that the deed or mortgage from the fiduciary in exercise of the power granted **shall** recite in the source of title thereto the place where the order giving such authority may be found. A certified copy of the order **shall** be recorded with the deed but there is no requirement that a certified copy of the order be recorded with the mortgage.

XX. TYPE OF DEED

- A. General Warranty, Special Warranty or Quit Claim
- B. [KRS 389A.010](#) allows a fiduciary to sell the real estate but does not state what type of deed should be used to convey the property unless you specifically state the deed to be used in the order.

FIXING TRUSTS: USING TRUST PROVISIONS TO YOUR ADVANTAGE, MODIFYING TRUSTS, DECANTING, AND TERMINATING TRUSTS

Mary Ellis Patton

I. INTRODUCTION

Trusts are incredibly useful tools but they come with their own set of obstacles when circumstances (or tax laws) change. This creates an opportunity for the lawyer to become a real problem solver for the client. Thankfully, with the adoption of the Uniform Trust Code in Kentucky, the ability to adapt and change trusts has greatly expanded. This article provides an overview of the ways in which attorneys can address broken or troubled trusts. At times cases from other jurisdictions will be noted and used for illustrative purposes. The focus will be on Kentucky law and Kentucky trusts. Further, this author is not a CPA and does not provide any tax advice or considerations, herein.

II. FIXING TRUSTS

A. Trusts Terms

Read the trust - actually read the words. You may find something to help you out. Did the grantor specifically state his or her intent? Does the trust allow for decanting or include a trust protector? Look for powers given to the trustee or beneficiaries that would solve your problem.

For example, it is not uncommon for a trust to allow removal of the trustee by a majority of the beneficiaries. This could solve some issues if the trustee is misbehaving or simply not operating in a way that the beneficiaries desire.

If you are drafting the trust, include provisions for trust protectors. The trust protector can amend and change the trust in order to carry out the grantor's intent. The trust protector acts as "fireman" to put out any problems ("fires") with the trust. Specifically, state what your trust protector can do. This may include amending certain trust provisions and removing and replacing trustees. Consider naming someone other than yourself the trust protector or act as the dispatcher where you will name the trust protector when needed.

B. Uniform Trust Code

1. Non-judicial settlement agreement (NJSA) – [KRS 386B.1-090](#).

- a. Who: Interested parties.
- b. What: Any matter involving a trust except for material purposes.
- c. Where: Outside of the court (or maybe district court¹).

¹ District court has exclusive jurisdiction. [KRS 386B.1-090\(6\)](#).

- d. The Uniform Trust Code encourages resolution of trust problems through nonjudicial means.² Problems, inconsistencies, or construction issues can be resolved by the interested persons using a binding non-judicial settlement agreement (NJSA). An NJSA can be used to address “any matter involving the trust” as long as the NJSA does not violate a material purpose of the trust and includes conditions that could be properly approved by the court. [KRS 386B.1-090\(2\)-\(3\)](#).
- e. [KRS 386B.1-090\(4\)](#) contains a *nonexclusive*³ list of matters that may be resolved by a nonjudicial settlement agreement. These include:
 - i. The interpretation or construction of the terms of the trust;
 - ii. The approval of a trustee's report or accounting;
 - iii. Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
 - iv. The resignation or appointment of a trustee and the determination of a trustee's compensation;
 - v. Transfer of a trust's principal place of administration; and
 - vi. Liability of a trustee for an action relating to the trust.
- f. Interested persons is simply defined as “persons whose consent would be required to achieve a binding settlement were the settlement to be approved by the court”. [KRS 386B.1-090\(1\)](#). Thus, a review of the necessary parties for modification using consent in [KRS 386B.4-110 et seq.](#) is required.
- g. Any interested person may seek court approval of an NJSA. Both revocable or irrevocable or charitable or noncharitable trusts may be subject to an NJSA.
- h. In *In re Frank*, 910 N.E.2d 523 (Ohio Ct. App. 2009), the Ohio probate court refused to approve a nonjudicial settlement agreement between the beneficiaries and the trustee reducing the bond requirement. Local court rules required a bond in double the amount of the trust principal. The parties entered into a nonjudicial settlement agreement reducing the bond amount as the bond premium would have nearly depleted the trust income. The probate court’s decision was reversed by the appellate court.

² Uniform Law Commission, Uniform Trust Code with Preface and Comments, pg. 35, available from www.uniformlaws.org.

³ Some states use the list of examples as an exclusive list.

- i. In *In re McGregor*, 954 N.W.2d 612 (Neb. 2021), the parties to a Nebraska irrevocable trust entered into a settlement agreement which included, among other modifications, allowing for the outright distribution of trust assets upon the death of the grantor's surviving spouse.⁴ The trust originally required that the assets be held in trust for the remainder beneficiaries, grantor's two children. One of the beneficiaries revoked her agreement and the remaining child filed a motion with the court to enforce the agreement. The court found that a spendthrift provision in the trust was a material purpose. The court found that the agreement violated a material purpose of the trust. The Nebraska Supreme Court affirmed.⁵
 - j. Note that in Kentucky, [KRS 386B.4-110\(3\)](#) specifies that a spendthrift provision is not presumed to constitute a material purpose.
 - k. See a sample in Appendix 1.
2. Modification or termination by consent of grantor and beneficiaries – [KRS 386B.4-110\(1\)](#).
- a. Who: Grantor and all beneficiaries.
 - b. What: Any purpose regarding irrevocable, noncharitable trust.
 - c. Where: Outside of court (or not).
 - d. An irrevocable noncharitable trust can be modified or terminated by consent of the grantor and all beneficiaries, unless the trust terms provide otherwise. [KRS 386B.4-110\(1\)](#).
 - e. If the grantor and all beneficiaries agree, the trust can be terminated or modified. This modification or termination may even be inconsistent with a material purpose of the trust. Note that the consent of the trustee is not required, unless the trustee is a beneficiary or grantor.
 - f. The grantor's consent does not have to be personally executed by him. Unless the terms of the trust prohibit, the statutes allow for the consent to be made by an agent under a power of attorney (provided the power expressly authorizes this), by the grantor's conservator or guardian with approval by the court.

⁴ *In re McGregor*, 954 N.W.2d 612, 615-616 (Neb. 2021).

⁵ *In re McGregor*, 954 N.W.2d 612, 618-619 (Neb. 2021).

- g. Modification or termination by consent under [KRS 386B.4-110\(1\)](#) is not permitted for first- or third-party supplemental needs trusts, including those established by will.⁶
 - h. *Garland v. Miller*, 611 S.W.3d 275 (Ky. App. 2020). Becky Carr (formerly Becky Miller) inherited a one-third interest in her father's oil business. She placed her inheritance in an irrevocable *inter vivos* trust. Sometime later, she and all beneficiaries consented to the trust's termination, and Carr petitioned the court to terminate the trust. Garland (Carr's brother), the trustee, objected.⁷
 - i. The trust document stated that it was created for the management of Carr's assets to create ease of administration at her death. The trust document additionally stated "that Carr did not reserve the power nor had the right to terminate the Trust in the future".⁸ The court found that Carr had effectively waived her right to consent to a termination of the trust and denied the petition to terminate based upon [KRS 386B.4-110\(1\)](#).⁹ Carr alternatively petitioned to terminate the trust pursuant to [KRS 386B.4-110\(2\)](#). The court's decision on that petition will be discussed in the next section.
3. Modification or termination by consent of all beneficiaries – [KRS 386B.4-110\(2\)](#).
- a. Who: All beneficiaries (maybe).
 - b. What: Modification or termination of a trust with court approval.
 - c. Where: District court.¹⁰
 - d. In the event a grantor cannot or will not consent, the court can approve a *termination* if (1) all beneficiaries consent and (2) the court concludes that continuance of the trust is not necessary to achieve a material purpose. [KRS 386B.4-110\(2\)](#). Upon termination under [KRS 386B.4-110\(2\)](#), the trustee will distribute assets as agreed upon by the beneficiaries.
 - e. The court can also approve a *modification* if (1) all beneficiaries consent and (2) the court concludes that the modification is not inconsistent with a material purpose of the trust. [KRS 386B.4-110\(2\)](#).

⁶ [KRS 386B.4-110\(6\)](#).

⁷ *Id.* at 278.

⁸ *Id.* at 278.

⁹ *Id.* at 279-280.

¹⁰ District court has exclusive jurisdiction. [KRS 386B.4-110\(7\)](#).

- f. If not all beneficiaries consent, the modification or termination can still be approved by the court, provided: (1) If all of the beneficiaries had consented, the trust could have been modified or terminated under [KRS 386B.4-110](#); and (2) the interests of a beneficiary who does not consent will be adequately protected. [KRS 386B.4-110\(5\)](#). See the section below regarding consent by representation. Note that in Kentucky, [KRS 386B.4-110\(3\)](#) specifies that a spendthrift provision is not presumed to constitute a material purpose.
- g. Now back to *Garland v. Miller*. The petitioner, Carr (formerly Miller) requested the trust be terminated on two grounds, including that the trust no longer served a material purpose. The trustee, Garland, objected. The *Garland* court found that termination of the trust under [KRS 386B.4-110\(2\)](#) was proper. Termination under this section does not require consent of the grantor. The court looked to the trust document to determine if continuance of the trust was necessary to achieve its material purpose.
- h. The *Garland* trust stated its purpose as follows: "to provide for the convenient administration of the assets of BECKY GARLAND MILLER without the necessity of court supervision in the event of the Trustor's incapacity or death".¹¹
- i. The trustee argues that in addition to that purpose, the trust was created to help manage and protect family business assets, which the petitioner had inherited. (Garland managed this family business and was also a part owner.¹²) The court found that the document was clear and unambiguous. "An unambiguous document is construed solely from the language contained therein".¹³
- j. Thus, the court then considered whether continuance of the trust was necessary to achieve its stated purpose. The court reviewed the trust and Carr's associated estate plans. At Carr's death, the trust was to make distributions according to Schedule B (which was completely blank) and Schedule C, which was missing.¹⁴ The court found as follows: "Whether by design or inartful drafting, the Trust deferred to Carr's will for the distribution of her assets upon her death. Accordingly, the continuation of the Trust was not necessary to achieve the material purpose of the Trust".¹⁵
- k. See a sample petition in Appendix 2.

¹¹ *Id.* at 280.

¹² *Id.* at 277.

¹³ *Id.* at 280.

¹⁴ *Id.* at 281.

¹⁵ *Id.* at 281.

4. Modification or termination due to unanticipated circumstances – [KRS 386B.4-120](#).
- a. Who: Trustee or beneficiary may petition court.
 - b. What: Modification or termination due to unexpected circumstances.
 - c. Where: District court.¹⁶
 - d. [KRS 386B.4-120](#) allows the court to modify or terminate a trust in order to further the grantor's purposes under certain circumstances.
 - e. This section expands the court's ability to deviate from the trust terms while still working towards the grantor's purposes.¹⁷ The court may also modify the trust if the existing terms would be impractical or wasteful or impair the trust's administration. Modification under this section is not precluded by a spendthrift provision because beneficiary consent is not required.¹⁸
 - f. Action may be taken by the court to modify the administrative or dispositive trust terms or terminate a trust due to unanticipated circumstances to further the purposes of the trust.
 - g. Upon termination under [KRS 386B.4-120](#), the trust funds should be distributed as consistent with trust's purposes. According to the Uniform Law Commission, "Typically, such terminating distributions will be made to the qualified beneficiaries, often in proportion to the actuarial value of their interests, although the section does not so prescribe".¹⁹
 - h. *In re Moeder*, 2012 Ind. App. Unpub. LEXIS 1361, 2012 WL 5328124 (Ind. Ct. App. Oct. 30, 2012) ("Moeder I")²⁰; *In Re: Petition to Docket Trust of Mary Ruth Moeder Susan Moeder v. Robert W. York, Temporary Successor Trustee of the Irrevocable Trust of Mary Ruth Moeder*, 21A-TR-2522 ("Moeder II").²¹ The Moeder case has been a

¹⁶ District court has exclusive jurisdiction. [KRS 386B.4-120\(4\)](#).

¹⁷ Uniform Law Commission, Uniform Trust Code, general comment, page 70.

¹⁸ Uniform Law Commission, Uniform Trust Code, comments, page 72.

¹⁹ Uniform Law Commission, Uniform Trust Code, comments, page 71-72.

²⁰ This case is unpublished but is available online: https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=aWNF6cMJzREXRzccD4tifBwlgMgN6d5xpzyhV2XhH84n3WYWfvKd_fsdltYvtwAv0.

²¹ This case is continuing to be litigated. Last year, the court found sister's appeals and motions to be frivolous and ordered her to pay attorney fees of over \$500,000. See more: https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=IkdbW1ZGCPQET6VSCmCJPtv5c2bvCf7gHEkDgBREbn1_354snlXsYJ5mXIGD4s_70; Jordan Morey, "COA again shuts down daughter's

long-time battle between two siblings resulting in at least five appeals.²² Mary Ruth Moeder set up her trust in 1997 naming her children, Susan and John, as beneficiaries at her death.²³ Susan received half her share of the trust and in the words of the appellate court, “spent the next 15 years trying to claim her disabled brother’s remaining equal share as well”.²⁴

- i. In *Moeder I*, the court reviewed a petition by John’s guardian to modify the trust. The trial court granted the request and Susan appealed.²⁵ John was blind and received Social Security Disability payments.²⁶ In his petition to modify, John’s guardian asked the court to review and modify some special needs language in the trust document that appeared to conflict. The trustee also argued Mrs. Moeder did not realize that SSDI payments would not be affected by an outright inheritance.²⁷
- j. The court looked to the purpose of the trust. The purpose was to manage her assets during her lifetime and then distribute them equally to her children. The court found additionally, the trust’s purpose “was to shield Mother’s Trust assets from being included in the estate of a handicapped or disabled beneficiary so that the individual would not be deemed ineligible for need-based government benefits”.²⁸ Because of that purpose, the court found that it must use the funds for John’s maintenance.
- k. The court further pointed out the commentary to §412(a) of the UTC states “modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury”.²⁹ Therefore, the court found the modification allowing for discretionary

arguments in trust dispute, orders appellate attorney fees,” *The Indiana Lawyer*, September 22, 2022, available: <https://www.theindianalawyer.com/articles/coa-again-shuts-down-daughters-arguments-in-trust-dispute-orders-appellate-attorney-fees>.

²² *Moeder II*, paragraph 1.

²³ *Moeder II*, paragraph 2.

²⁴ *Moeder II*, paragraph 1.

²⁵ *Moeder I*, page 2.

²⁶ *Moeder I*, page 2-3.

²⁷ *Moeder I*, page 4-5.

²⁸ *Moeder I*, page 10.

²⁹ *Moeder I*, page 12.

distributions from the trustee outright to John to be appropriate under Uniform Trust Code §412.30.

- I. See a sample petition in Appendix 2.
5. Uneconomic trust – [KRS 386B.4-140](#).
 - a. Who: Trustee may petition court.
 - b. What: Modification or termination of an uneconomic trust.
 - c. Where: District court.³¹
 - d. A trustee holding trust assets valued at less than \$100,000³² may give notice to the qualified beneficiaries and terminate the trust if the trustee concludes that the value of the trust does not justify the costs of administration.³³ In considering termination, the court should still consider the purpose of the trust.³⁴
 - e. Upon termination, the trustee should distribute the property consistent with the purposes of the trust.³⁵
6. Reforming trust to correct mistakes – [KRS 386B.4-150](#).
 - a. Who: Trustee or beneficiary may petition court.
 - b. What: A mistake and a trust.
 - c. Where: District or circuit court.
 - d. The court can reform trust provisions to conform to the intent of the grantor, even if the terms of the trust are unambiguous. The petitioner must prove the grantor's intent by clear and convincing evidence and show that the terms of the trust were affected by a mistake of law or fact.
 - e. In *Frakes v. Nay*, 273 P.3d 137 (Or. Ct. App. 2011), an Oregon court reformed a trust based upon mistake made by the drafting attorney.

³⁰ *Moeder I*, page 13.

³¹ District court has exclusive jurisdiction. [KRS 386B.4-140\(5\)](#).

³² The Uniform Trust Code as recommended by the Uniform Law Commission, suggests \$50,000 as the threshold. See page 75.

³³ [KRS 386B.4-140\(1\)](#).

³⁴ Uniform Law Commission, Uniform Trust Code, page 76.

³⁵ [KRS 386B.4-140\(1\)](#).

The court relied upon correspondence between the grantor and the attorney to prove the mistake.

7. Modification to achieve tax objectives – [KRS 386B.4-160](#).
 - a. Who: Trustee or beneficiary may petition court.
 - b. What: Modification for taxes.
 - c. Where: District court.³⁶
 - d. A court may modify a trust provided that modification is not contrary to the grantor's likely intent in order to achieve the grantor's tax objective.
 - e. A finding that there is simply a way to save on taxes may not be sufficient in some states.³⁷
 - f. Comments to the UTC note, "Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. See [Rev. Rul. 73-142](#), 1973-1 C.B. 405."³⁸

C. Decanting under [KRS 386.175](#)

1. Just like pouring a bottle of wine into a new container, a trust can be renewed and leave behind sediment through trust decanting. The resulting second trust is actually a modification of the first trust.
2. A trustee may exercise discretionary powers granted to them in the trust document to distribute principal or income for the benefit of one or more current beneficiaries of the original trust by appointing all or part of the principal or income to the trustee of a second trust. This may be done without prior court authorization.³⁹ The trustee also has the power to create the second trust. Decanting may not be done for a charitable remainder trust.⁴⁰ A trustee or beneficiary may seek the court's approval or

³⁶ District court has exclusive jurisdiction. [KRS 386B.4-160](#).

³⁷ *In re Trust D Created Under Last Will and Testament of Darby*, 234 P.3d 793 (Kan. 2010).

³⁸ Uniform Law Commission, Uniform Trust Code, Section 416 comments, page 78.

³⁹ [KRS 386.175\(2\)](#).

⁴⁰ [KRS 386.175\(9\)](#).

disapproval of the trustee's proposed exercise of a special power of appointment.⁴¹

3. [KRS 386.175\(4\)](#) sets forth requirements for the second trust:

- a. The second trust must be created under the laws of any jurisdiction – inside or outside of the United States.
- b. Beneficiaries of the second trust may include only beneficiaries of the original trust.
- c. Beneficiaries who are not currently entitled to receive income or principal may not have their interest accelerated
- d. Second trust may not reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of the first trust; this includes any future interest.
- e. Second trust cannot contain any provision that if included in the original trust would have prevented the original trust from qualifying for a marital or charitable deduction provided the original trust qualified.
- f. If contributions to the original trust were excluded from gift tax, “the second trust shall provide that the beneficiary’s remainder interest in the contributions shall vest and become distributable no later than the date upon which the original would have vested and become distributed under the terms of the original trust”.⁴²
- g. A beneficiary who had a right of withdrawal in the first trust shall either have the same right or the original trust shall retain sufficient assets to meet this beneficiary's power.
- h. If the original trust contained S corporation stock, the second trust cannot prevent the election to be a qualified subchapter S trust.
- i. When the trustee is a possible beneficiary and distributions under the original trust were subject to an ascertainable standard, the second trust must have the same or more restrictive standard.
- j. Second trust may confer a power of appointment to a beneficiary of the original trust if the trustee has the power to appoint principal or income to that beneficiary. The appointment may be made in favor of persons who were or were not beneficiaries of either trust.

⁴¹ [KRS 386.175\(10\)](#).

⁴² [KRS 386.175\(4\)\(e\)](#).

4. The process to decant as is follows:⁴³
- a. Trustee must exercise his or her power of appointment in a signed writing. The writing shall set forth the terms of the second trust and the effective date of the appointment.
 - b. Trustee must give written notice to all current beneficiaries and the oldest generation of the remainder beneficiaries. Notice shall be sent by certified mail and mailed at least 60 days prior to the effective date of the appointment. The notice shall include a copy of the written exercise of the trustee's power of appointment.
 - c. After beneficiaries receive the required notice, they can waive the notice period by executing a signed instrument delivered to the trustee.
 - d. The persons entitled to notice may object no later than 30 days after receiving notice by filing a judicial action. If such objection is made, the decanting may only take place with court approval.
 - e. If certified mail notice is not successful for at least one beneficiary, the trustee must seek the approval of the court.

D. Representation of Parties

1. [KRS 386B.3-010 et seq.](#) allows for one person to bind another through representation. This representation is binding on the other person unless the person objects before the consent becomes effective.⁴⁴ A grantor cannot be a representative of a beneficiary if modifying or terminating a trust by consent under [KRS 386B.4-110\(1\)](#). The ability to represent and bind another also applies to decanting under [KRS 386.175](#).⁴⁵
2. Provided there is not conflict of interest, the following persons can bind another:
 - a. Holder of a power of appointment. The holder of a general testamentary power of appointment and other persons represented with respect to the particular question or dispute, [KRS 386B.3-020](#).
 - b. Fiduciaries or parents. Conservator, guardian, curator, agent under power of attorney; trustee of a trust may bind beneficiaries; personal representative of the estate may bind persons interested in the estate; parent or guardian may bind a minor or unborn child. [KRS 386B.3-030](#).

⁴³ [KRS 386.175\(7\)](#).

⁴⁴ [KRS 386B.3-010\(2\)](#).

⁴⁵ [KRS 386B.3-010\(5\)](#).

- c. Persons having substantially identical interest. Persons who are minors, incapacitated, unborn, or missing, can be bound by a person whose interest is substantially identical. [KRS 386B.3-040](#).
- d. Guardian *ad litem*. A court can appoint a guardian *ad litem* for persons whose representation through another is not available. [KRS 386B.3-050](#).

III. FOR ADDITIONAL READING

- A. Richard C. Ausness, "Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of 'Irrevocable' Trusts," 28 *Quinnipiac Pro. L.J.* 237 (2015), available: https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1496&context=law_facpub
- B. David M. English, Scot W. Boulton & Dana G. Fitzsimons, Jr., *Case Law under the Uniform Trust Code through 2014*, ACTEC 2016.
- C. Bradley E. S. Fogel, "Terminating or Modifying Irrevocable Trusts by Consent of the Beneficiaries – A Proposal to Respect the Primacy of the Settlor's Intent," *Real Property, Trust and Estate Law Journal* Vol. 50, No. 3 (Winter 2016), pp. 337-380, available: https://www.americanbar.org/content/dam/aba/publications/real_property_trust_and_estate_law_journal/v50/03/2016_aba_rpte_journal_v50_no3_fogel_terminationg_or_modifying_irrevocable_trusts.pdf

APPENDIX 1 – SAMPLE NONJUDICIAL SETTLEMENT AGREEMENT

NONJUDICIAL SETTLEMENT AGREEMENT

REGARDING THE YELLOWSTONE RANCH IRREVOCABLE TRUST AGREEMENT

Pursuant to [KRS 386B.4-110](#), this Nonjudicial Settlement Agreement is entered into between John Dutton III, Bethany Dutton (aka “Beth Dutton”), and Kayce J. Dutton, the parties herein, on the ____ day of _____, 2023.

Whereas, John Dutton III established the Yellowstone Ranch Irrevocable Trust on 15 March 2020 (the “trust”);

Whereas, John Dutton III is the Grantor and Lifetime Beneficiary; and Bethany Dutton and Kayce J. Dutton are the remainder beneficiaries; and

Whereas, the parties wish to modify the distribution of the trust assets upon the death of the Grantor;

Now therefore, the parties now hereby enter into this Agreement as follows:

1. The trust was validly executed in Lexington, Kentucky and is subject to the laws of the Commonwealth of Kentucky.
2. The trust holds the real property located at 123 Main Street, Yellowstone, Kentucky (“the property”). At the death of the grantor, that property shall be distributed to Bethany Dutton, should she survive the grantor. If she does not survive the Grantor, then the property shall be distributed to Kayce J. Dutton, *per stirpes*.
3. The parties shall execute any documents which may be required to effectuate the terms of the agreement.
4. Each party agrees not to interfere or attempt to thwart the purpose of this agreement.
5. Each party shall bear any tax consequences associated with their share of the distribution.
6. The purpose of this agreement is not illegal or otherwise prohibited.
7. This non-judicial settlement agreement does not violate any material purpose of the trust and includes conditions that could be properly approved by the court under [KRS 386B](#) or other applicable law.
8. Each party acknowledges and agrees that there have been no other promises, assurances or inducements, written or oral, not expressly stated in this agreement, which constitutes the entire integrated agreement among all the parties. Any modification of this agreement shall require the signed consent of each affected party.
9. This settlement is intended to be binding upon and insure to the benefit of each party’s respective personal representative, heirs, successors and assigns. Each party has had the opportunity to seek the advice of separate counsel of his or her choice.

We, the undersigned, have read and agree with this binding non-judicial settlement agreement.
We approve of the agreement and agree to adhere to the individual requirements herein.

Dated: _____, 2023

John Dutton III, Grantor and Trustee

Bethany Dutton, Remainder Beneficiary

Kayce J. Dutton, Remainder Beneficiary

COMMONWEALTH OF KENTUCKY
COUNTY OF _____

This instrument was subscribed to and acknowledged before me on _____, 20____,
by JOHN DUTTON III, BETHANY DUTTON, and KAYCE J. DUTTON.

Notary Public
My commission expires: _____

APPENDIX 2 – SAMPLE PETITION TO TERMINATE TRUST

COMMONWEALTH OF KENTUCKY
FAYETTE DISTRICT COURT
PROBATE DIVISION
CASE NO. _____

IN RE: THE LEE DUTTON REVOCABLE LIVING TRUST

PETITION TO TERMINATE TRUST

Comes now, Jamie Dutton, the Trustee of the Lee Dutton Revocable Living Trust dated December 20, 2015, by and through counsel, and requests that this court terminate the trust pursuant to [KRS 386B.4-110\(1\)](#) or alternatively under [KRS 386B.4-120](#). The District Court has exclusive jurisdiction over these matters. The qualified beneficiaries have consented to the termination.

Applicable Law

[KRS 386B.4-110\(2\)](#), allows for the termination of a noncharitable irrevocable trust “upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.” Alternatively, the trust could be terminated under [KRS 386B.4-120](#) due to unanticipated circumstances.

Background

Lee Dutton executed the Lee Dutton Revocable Living Trust on December 20, 2015. The trust became irrevocable upon his untimely death on August 7, 2019. The express purpose of his trust was to “provide for ease of management during [Lee’s] lifetime and to provide a home to his children upon death.” The trust requires that the land be held in the trust for 20 years after his death before being distributed outright to beneficiaries. Lee’s named his “children” as beneficiaries and his sibling, Kayce Dutton, *per stripes*, as his contingent remainder beneficiary.

Lee Dutton died without children. The trust holds a single piece of property with a home. As Lee does not have children that need a home and his remainder beneficiary does not need the property as a home, the trustee requests termination of the trust.

Kayce Dutton has consented to the termination. Monica Long, Kayce’s wife and the mother of Kayce Dutton’s minor son, Tate Dutton, has consented on behalf of her son.

Conclusion

Termination of the trust under [KRS 386B.4-110\(2\)](#) is proper because all beneficiaries have consented and continuation of the trust is not required for any material purpose. Likewise, termination is appropriate under [KRS 386B.4-120](#) due to unanticipated circumstances – Lee’s death was unexpected at his age of thirty-eight and he did not leave behind children.

Therefore, Jamie Dutton requests that this honorable court grant the motion to terminate pursuant to [KRS 386B.4-110\(2\)](#) or alternatively under [KRS 386B.4-120](#).

Respectfully Submitted,
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