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The mission of the Louisville Bar Association is to promote justice, professional excellence and respect for the law, improve public understanding of the legal system, facilitate access to legal services and serve the members of the association.

Professional Excellence

Community Service

Serving Our Members

Events

In this issue

LBA Welcomes New Staff Member

Meet LaQueisha Alexander, the newest member of the LBA staff! She joined the LBA team last month as our new Kentucky Lawyer Referral Service (KLRS) Assistant. LaQueisha has associate degrees in both Paralegal Studies and Business Administration Management. Most recently, LaQueisha was a medical assistant with Louisville Metro Government.

In her new role, LaQueisha will serve as a facilitator between potential clients and attorneys, match client requests with enrolled attorneys and maintain the database. Her hobbies include reading and decorating, and she is learning how to pipe icing onto cakes and cupcakes. Welcome LaQueisha!

The Benefits of Our Bench and Bar Collaboration

Among the many high points of service as your Louisville Bar Association President has been the chance to learn more about the operations of our local state and federal courts. We are fortunate to have engaged and thoughtful judges and court administrators at every level. This month, I'd like to highlight two significant ways that members of the judiciary have demonstrated their commitment to LBA's members and to fostering productive dialogue between bench and bar.

Generosity and Engagement From the Federal Courts

Under the leadership of Judge David J. Hale, the Western District of Kentucky offers a wide range of services and support to members of the LBA. Through ongoing financial contributions, the Western District has helped to establish a Federal Practice Section of the LBA, with dues for the section covered by the Western District. The Court has hosted several Federal Practice Section events, including panel presentations on practice and procedure developments, with presentations from judges from the Western District and Sixth Circuit Court of Appeals and receptions in the Court's ceremonial law library. Most recently, the Court hosted students from the LBA's Summer Law Institute for a networking lunch, after a presentation and comments by U.S. Magistrate Judge Colin Lindsay, Clerk for the Western District, James J. Vilt, Jr., Supervisory Probation Officer Andrews Cieslewicz, and Deputy U.S. Marshal Chris Lamp.

These events promote collegiality and a sense of community among frequent federal practitioners. They also provide valuable opportunities for professional development for lawyers and students who are interested in learning more about federal practice – and may wish to do so before having a case before the Court. I encourage LBA members to join the Federal Practice Section (at no additional cost!) and to take advantage of the strong partnership between the LBA and the federal courts.

Critical Work on the Jefferson County Planning and Coordinating Council

The Jefferson County Planning and Coordinating Council — commonly referred to as the "PCC" — was established by the Supreme Court of Kentucky. Its charge includes recommending policy, reviewing and approving local rules before submission to the Supreme Court, oversight of practice and procedure and development of a strategic plan to ensure the orderly operation and maintenance of the courts.

The members of the PCC include:

- the Justice for the Fourth Supreme Court District (now Justice Angela Bisig);
- the Chief Judges for the Jefferson Circuit, Family, and District Courts (now Chief Judge Mitch Perry, Chief Judge A. Christine Ward, and Chief Judge Jessica Moore, respectively);
- the Jefferson County Clerk (now David Nicholson);
- the Commonwealth's Attorney (now Gerina Whethers);
- the County Attorney (now Mike O'Connell);
- the Public Defender (now Leo Smith);
- the Sheriff (now Col. John Aubrey); and
- the Chair of the Metro Criminal Justice Commission (now Judge Tanisha Hickerson).

Fortunately for the LBA and its members, the PCC's membership also includes the President of the LBA. This LBA seat on the PCC allows a unique perspective into the hard work that goes into the smooth operation and constant improvement of our local state courts, and it also provides a chance for the LBA to share details about programming and events with the courts. The topics at PCC meetings range from practical (how to make sure that lawyers receive timely and prompt notice when a Division of the Court unexpectedly decides not to hold proceedings on a certain day) to big and visionary (exploration and research by Chief District Court Judge Moore and others into creating a dedicated domestic violence court).

At the end of every PCC meeting, I leave feeling an immense sense of gratitude for the "behind the scenes" planning and coordination that goes into keeping the courts running smoothly. For counsel appearing in these courts, it can be easy to forget the critical administrative work that is required to ensure that dockets move forward efficiently and that the courts remain accessible, even for those who must, regrettably, navigate the system without counsel and often during periods of intense crisis. By creating a space where different stakeholders can share their views on the system, the PCC furthers this important work and keeps the focus on constant improvement in the delivery of justice.

* * *

Our legal community is stronger when the bench and bar work together. By doing so, we ensure that parties appearing in court and their counsel have confidence in the process and that proceedings run smoothly. If you have questions about practicing in any of our local courts or suggestions for improvements, I hope you will consider the LBA as a resource for those conversations — send us a message or give us a call! The LBA is committed to creating opportunities for conversation between members of the bench and bar. On that front, please stay tuned for details on a planned series of judicial forums in November on "nuts and bolts" practice issues involving a variety of judges from all our local courts — including the many newly elected Circuit Court Judges. The LBA also plans to prepare a written compilation of responses from judges about their administrative preferences and procedures, which we anticipate will be a valuable resource for practitioners. The LBA remains grateful for our federal and state judges' accessibility and involvement in the LBA and for the public service they provide to our community.

Kate Lacy Crosby
LBA President

Our legal community is stronger when the bench and bar work together. By doing so, we ensure that parties appearing in court and their counsel have confidence in the process and that proceedings run smoothly.

Hydration 101

Tips on Increasing Your Water Intake

Drink up! Water is an essential part of all life. Plants, animals, humans and all living organisms need it in order to survive. How much you need each day depends on a number of factors, like the temperature where you live, how active you are, the foods you eat — as some of your water intake will come from them — and more. However, it's generally recommended that you consume half of your body weight in ounces per day. Example: If you weigh 150 pounds you should try to get 75 ounces of water per day.

Consuming enough water each day is also good for our bodies and our overall well-being. Additionally, if we don't get enough water our bodies get dehydrated, which can negatively impact our bodily functions. Below are some tips on how to increase your daily water intake.

- Drink a glass of water first thing in the morning.
- If you are not a huge fan of plain water, you can add fruit to your water. Lemons, limes and oranges are tried and true. Cucumber, watermelon, strawberries and herbs also are delicious options.
- Tie it into a routine. Drink a glass of water every time you brush your teeth, eat a meal or use the bathroom.
- Eat your water. Many fruits and vegetables have a high-water content, including melon, cucumbers, lettuce and celery.
- Use an app or smart water bottle to keep track of your water intake throughout the day.
- Set an alarm as a reminder to drink every so often.
- Challenge a friend. Kick off a healthy competition with a friend or your kids to see who can meet their goal most often.
- Take it to go. It can be challenging to drink enough water when you are on the go. Fill your water bottle before you leave home and bring it along on your daily travels.
- Make it convenient. Always keep a water bottle on your desk or somewhere handy to see and remind you to sip often.
- Drink a glass of water before bed.

Perfect Posture is Possible

Try These Simple Tips

Follow these tips to improve posture while sitting and standing during the day:

- Start with the goal of correcting your posture 15% of the time in any given scenario — at your desk, in the car, or in bed — and work your way up from there.
- Keep your shoulders pulled back and down, away from your ears.
- Have a proud chest but be careful not to go too far and make your ribs stick out.
- If you're standing with perfect posture, your ears should be in line with your shoulders, your hips with your knees, and your knees with your ankles. Imagine your hips are a bucket of water that you need to keep parallel to the ground.
- If you're seated, there should be a line between your ears and hips.
- Adjusting your environment can help keep your posture in check, such as the height of your computer monitor on your desk and the angle of your rearview mirror in the car.

Interviews with Judges Clay and Morris

Chief Judge Mitch Perry

In this edition of *Bar Briefs*, I wrap up the series of interviews I have been conducting with my new colleagues. This month I sat down with Judge Sarah Clay in Division Nine and Judge Tish Morris in Division 10.

JUDGE SARAH CLAY

Judge Clay is a native of Danville, KY where she played soccer at Danville High School. She went to the College of Charleston for undergrad where she transitioned from soccer to rugby. During her collegiate career, she became co-captain of the rugby team and led them to nationals two years in a row. After graduation, she moved to North Carolina and worked as the North Carolina state sales representative for Magic Hat Brewery. However, she moved back home to Kentucky to be closer to her parents and attend law school at the University of Louisville. Coming from a family of noted attorneys from across the state, Judge Clay had many legal role models to look up to, but her biggest inspiration was her father.

After graduating from UofL, Judge Clay began her career at the Public Defender's Office. It was the only job she applied for as she had known that was what she wanted to do since a very early age. After four years with the Public Defender, she ventured out into solo private practice doing a mix of civil and criminal work. Judge Clay traveled around the state, taking cases as far away as Henderson County. Eventually, after six years of private practice, she felt ready to run for the bench. Judge Clay readily admits that the campaign was very difficult and made even more challenging by a pregnancy. However, that made the victory all the sweeter.

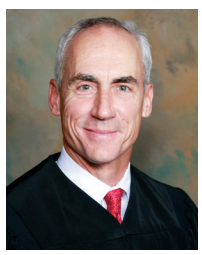
Now that she is on the bench, Judge Clay loves her new job. Her favorite part is conducting trials from this side of the bench. She remarked that speaking with jurors afterwards is very informative and enjoyable. Judge Clay loves the variety of cases she sees and the opportunities that this presents for her to explore various research challenges. This variety has created an enthusiasm for the work as every day is different and she is excited to learn something new each day. As for the future, Judge Clay has expressed interest in getting involved with a specialty drug court. Off the bench, Judge Clay is excited to spend time with her growing family.

JUDGE TISH MORRIS

Judge Morris was born and raised in Louisville where she attended Sacred Heart. She continued her education at Purdue University but changed her major and returned to Louisville to finish her degree at the University of Louisville. After graduation, Judge Morris began working as a flight attendant and then went into sales. She believes both experiences were very beneficial for learning how to interact with and handle a wide variety of different people. Judge Morris eventually decided to go back to school, inspired by her father, the late Judge Geoffrey Morris, and pursue a law degree. After she graduated from the UofL Brandeis School of Law, she worked briefly as a staff attorney for Judge Marty McDonald before joining Boehl Stopher & Graves.

Judge Morris has had a wide and varied practice throughout her career, from insurance defense, personal injury and criminal defense to family law. She has tried many cases and always loved the courtroom. Indeed, she tried a particularly memorable case many years ago here in Division Three that we are now able to share a laugh over together. Judge Morris decided to run for the bench because it was something that was always in the back of her mind from the many years she spent watching her father and the timing of this cycle was right for her. She was raised to be passionate about making a difference in her community and felt that this was the right time and opportunity to do so. She notes that this is a very surreal and full-circle moment for her because of the example laid by her father.

Judge Morris is excited to come to work every morning because of the incredible and unparalleled variety of work that faces her each day. She remarked that something she did not realize before as a practitioner was that trials are remarkably different on this side of the bench, as it is a very difficult and demanding task to stage manage the production of a trial while still dealing with the everyday demands of being a judge. Judge Morris believes that her biggest challenge will be figuring out how best to balance the conflicting interests that are constantly pulling on judges, especially the often divergent and purposefully competing interests of the different branches of government. However, as she rightly points out, the day that one stops being afraid of making a wrong decision is the day that person should cease being a judge.



I am very confident in both Judges Clay and Morris, they have hit the ground running and I believe that the practitioners of the Louisville bar will agree that they have done an exemplary job so far. This concludes my series of interviews with my new colleagues. I hope you have found it informative and illuminating. I encourage you to get to know all my new colleagues as I have. You won't be disappointed.

Chief Judge Mitch Perry presides in Division 3 of Jefferson Circuit Court. ■

Judge Russell Sworn in as New Family Court Judge

On Friday, June 9, Judge Laura P. Russell was sworn in as Louisville's newest Family Court judge. She was appointed by Governor Andy Beshear after Judge Tara Hagerty stepped down earlier this year.

Prior to serving on the bench, Judge Russell served as an attorney and partner at Eddins-Domine Law Group, where she focused her practice primarily on aspects of family law, real estate and estate planning. Prior to joining Eddins-Domine Law Group, Russell served as an associate at Frost Brown Todd, the Kentucky Transportation Cabinet and as an Assistant Jefferson County attorney.

Judge Hagerty served on the bench for nine years. Prior to her judicial election in 2014, Hagerty worked as an attorney practicing family and juvenile law for more than 20 years. She previously served as a prosecutor for the Jefferson County Attorney's Office. ■

Comstock Heads the AOC

Chief Justice of the Commonwealth Laurance B. VanMeter has announced that Katie C. Comstock will be the next director of the Kentucky Administrative Office of the Courts. Comstock is a Kentucky attorney with a long history of public service who has held positions with the Executive and Legislative branches of state government.

"Katie Comstock is a sharp, polished attorney who brings a portfolio of success in legislative drafting, government affairs and legal research," Chief Justice VanMeter said. "She has drafted hundreds of complex pieces of legislation over her career while serving in a nonpartisan capacity. I'm pleased she is bringing these invaluable skills to the role of the administrative head of the court system."

Comstock's appointment was effective June 21. She was selected from more than 30 applicants after a monthlong national search. Comstock will succeed current AOC Director Laurie K. Givens, who has accepted a position with the National Center for State Courts. ■

Summer Reading with the ABA

Summer has come, school is out, the days are longer and everyone is in brighter spirits! More free time to focus on what's important! The American Bar Association offers a Books for Bars program and LBA members can find some great summer reading by using the Books for Bars code, LOU02, to save 15% off orders (scan QR code to start shopping!).

The newest release from the Center For Professional Responsibility, *Selecting Legal Malpractice Insurance*, provides practical information to help attorney consumers understand professional liability insurance and how to select the right policy for their firm. The book also contains explanations of the types of insurance providers available to attorneys and law firms, as well as an updated 2023 Directory of Liability Insurance providers throughout the U.S. and allied territories.

SCAN ME

Additional latest webstore releases include:

- *Constitutional Policing: Striving for a More Perfect Union*
- *The Practitioner's Guide to the PCT, Second Edition*
- *An Estate Planner's Guide to Qualified Retirement Plan Benefits, Sixth Edition*
- *The Portable Bankruptcy Code & Rules, 2023 Edition*
- *The Law of Class Action: Fifty-State Survey 2023*

The ABA asks that you do not share the code itself to protect this exclusive discount. To receive more information about the ABA's Books for Bars program, please visit *www.americanbar.org/groups/departments_offices/publishing/books4bars*. ■

Metro Donation Program

Office of Housing & Community Development

A Division of Develop Louisville

What is the Metro Donation Program?

As an alternative to abandoning your property, the Louisville and Jefferson County Landbank Authority, Inc. is always accepting donations of property suitable for rehabilitation or redevelopment.

What benefits do you get from donating property?

- Peace of mind that you will not have to pay property taxes on property you do not use.
- A possible tax deduction from your donation.
- The community will benefit from a property that could be developed thanks to you!

What are the requirements for donation?

- The property must be free of any unpaid mortgages and liens from non-Metro agencies.
- If your property has any liens from delinquent property taxes and/or unpaid Louisville Metro assessed fines/fees, you may be able to have those liens waived.
- Property owners must request a waiver and complete an Application for Lien Fee Reduction/ Waiver that can be found at *www.louisvilleky.gov/vacant*.

If you would like to donate property:

To get more information about donating a property to the Landbank, please go to *www.louisvilleky.gov/vacant* and click on 'Donate Property to Metro' or call (502) 574-4016. ■

3 Tips for Creating a Summer of Unplugged Fun

Between school, work and entertainment, there are times when screens can seem like a pervasive part of modern life. For all the positive aspects of technology, there can also be a desire for children to have stretches of unplugged learning and participate in educational activities that do not require a screen.

Why Unplugged Learning Matters

"Unplugged learning is important to balance the screen time children may experience with other forms of learning; to promote physical activities, social interaction and creativity; and develop the essential skills that bolster them throughout their exploration and growth as individuals," said Rurik Nackerud from KinderCare's education team.

Summer can be an ideal time to focus on unplugged learning as it often brings a break from the traditional academic year and activities.

"We want summer to be a time when children can put down technology and connect with one another face-to-face, build important creativity skills and learn how to be social with one another without the buffer of screens," said Khy Sline from KinderCare's education team. "They can play, run, be immature and laugh with their friends, giggle at the silly things and find joys in those in-person interactions with one another."

Tips for Creating Unplugged Fun as a Family

1. **Get Outdoors.** Make time as a family to get outside and explore, even if it's simply a walk around the block after dinner. Help children notice the little things like a bug on the sidewalk or the way the sun filters through tree leaves to make patterns on the ground. Ask them about the things they see and give your children the space to ask questions and work together to find the answers. This helps teach children collaborative learning skills: asking questions, sharing ideas and working together to reach an answer.

2. **Read Together.** This could mean going to the library to check out new books or exploring your family's bookshelves for old favorites. Snuggle up together for family story time. If children are old enough to read on their own, invite them to read to you or their younger siblings. Talk about the story or even act out favorite parts to help your children actively participate in story time, which may help them better understand the story's concepts.

3. **Encourage Creative Thinking.** Help children expand their ability to think creatively by working together to make a craft or project. For example, the next time a delivery box arrives at your home, encourage your children to turn it into something new using craft supplies on hand. A blanket could turn a box into a table for a pretend restaurant while some tape or glue could transform it into a rocket ship or train. When everyone's done creating and playing, the box can be broken down for recycling. This activity can help children literally think outside of the box and apply their own unique ideas and creativity to create something new.

For more tips to encourage unplugged learning this summer, visit *kindercare.com*. ■

The Hardest Part of Being a Lawyer? Email.

Cresston D. Gackle

The first thing I do when I wake up in the morning is check my email. The last thing I do every day is check my email. Somewhere between the third and fourth sentence anyone speaks to me, I check my email.

I probably check my email in my sleep.

Email can be addictive. It's a one-stop shop of notifications of new information on all my court cases as well as an interactive to-do list. Email also makes me feel needed; responding to email makes me feel useful. But because I have no boundaries around it, it intrudes upon my work, my life and my relationships.

While email is essential to modern legal practice, it remains one of my most inefficient tools. I too often see (and use) email as a punting mechanism to kick projects between people until someone finally takes the next substantive step forward. Projects frequently stall out on receipt of a particularly long or next-steps-laden email that demands the receiver perform several tasks before responding—followed by an email that asks for clarification or updates. Email threads are a Gordian knot of information that saps everyone's memory and accountability. Email is like a coping mechanism for anxiety about task completion: As long as something resides on someone else's to-do list, it's not on our own.

Email is also highly disruptive to completing other tasks. The escalating red number on my email app and the Pavlovian ping on my electronic devices signal yet another task that demands priority. The receipt of a particularly lengthy, obtuse or disconcerting email can throw off a whole day's plan for court hearings, preparation or other tasks. Emails tacitly demand an answer before it's reasonable to expect one both during and after working hours. Coupled with institutional demands of legal practice, email systems mean 1) work piles up while we're away, building the dread of an inevitable return to a mountain of unread emails; and 2) everyone thinks their email is the one that should be answered first or within a set timeframe. Email persistently demands that we fail to keep work in its place: at work, and during those working hours when we are not in the middle of completing other tasks.

Additionally, I've found email to be the worst kind of to-do list. Because it's organized only by the time of sending and receipt, there's no concept of priority in emails. Of course, we've all received "high priority" or "urgent" emails, which in themselves are another grave misuse of email. Email is not designed for emergencies. It's like putting a post-it note on someone's desk saying there's a fire on the floor below.

Finally, email usually fails to convey tone and nuance. It's not a very humane form of communication. I don't know whether your ellipses convey impatience with me or the fact you've chosen to pause in your thought process as you composed your email. Nor is it helpful to receive a seemingly sharp email without being able to sense the sender's body language and facial expressions.

In short, email has deeply impacted my well-being as a lawyer. I have developed an unhealthy reliance upon a tool of communication never meant to be much more than a means of greeting someone and asking to set up a meeting. It is also the part of my work I take home, intruding upon my morning and nightly routines, my spare time and the time I spend with friends and family. It breaks down the boundaries I place around my attempts at work-life balance, inevitably spilling into the time I devote to not working.

Email is a daily tax on my well-being. I'm a zero-unread-emails kind of person. I can't stand leaving emails unanswered because ultimately I can't find rest outside work unless the oppressive to-do list that is my inbox has been dealt with. And so I strive constantly for the ephemeral goal of an empty inbox.

In view of my poor relationship with email, in early September 2022, I added the following to my firm and public defender email signatures:

> EMAIL RESPONSE POLICY NOTICE:
>
> Thank you for sending me your message.
>
> I appreciate your taking the time to do so.
>
> To reduce interruptions to my work flow and to my life outside of work, I will be reviewing email for one hour per business day. I will not be reviewing email on Saturdays, Sundays, legal holidays, sick days or vacation days. I will respond to your message in due time and I appreciate your patience in allowing me due time to respond.

At the time, I was checking my work email incessantly. As my partner and friends could attest, I had no boundaries around checking my email. It would be the first and last thing I did every day and the thing I'd do in every in-between moment.

So far, this experiment has been a partial success. I still check my email constantly both at and outside of my work. I haven't been consistent with holding off on checking email until I've completed my morning routine. I have succeeded in responding to email very little if at all on weekends and holidays, even if the email seems to demand a more immediate response. My email response notice has become more of a mantra than a practice, something I strive to hold to but fall short of each day. I do think it helps remind me, and others who choose to read the small print at the bottom of my emails, that email should not be used for emergencies and that work is not my top priority in non-working hours.

I believe the way I use email must fundamentally change or else it will contribute to my exit from the profession. I should, of course, send less email, and I should also respond to email more slowly. I should internalize that email is never for emergencies nor for the most important communications we have with each other. It has been and always will be a slow, shallow and soporific puzzle of an activity, not a meaningful place to engage with others in problem-solving, discussion or connection.

Rather than fighting through the slog of shallow and vague emails, I can envision a legal practice where communication only involves speaking directly to people, the kind of communication centered on collaborative interaction that is more human, more direct and more connected. Perhaps someday I will simply delete my email address and tell people they can mail me everything they need to send me and meet with me to tell me everything they need to tell me. I believe that could be a healthier—and more efficient—practice than continuing with the way our profession currently uses email.

Cresston Gackle is assistant public defender of the Third District Public Defender's Office and a sole practitioner at Cresston Law LLC in Minneapolis, Minnesota.

This article was originally published in Bench & Bar of Minnesota. ■

Trustee Appointment Lacked Due Process

John R. Cummins and Abagail D. Zaman

In Florida, the granddaughter of a married couple who had established a family trust filed a court petition seeking appointment as the successor trustee of the family trust. A circuit court granted the granddaughter's petition, but a district court of appeals reversed her appointment for the lack of due process given to the other beneficiaries of the family trust in the lower court proceeding.

In this case, the granddaughter was the last contingent beneficiary named in the family trust. Her grandmother, the co-settlor of the family trust, was still living when the petition was filed. While the grandmother was named as an initial trustee, the petition alleged (without supporting evidence) that the grandmother was incapacitated and that her son had replaced her as trustee as a result. The son had since died, so the granddaughter petitioned to be appointed as successor trustee.

The granddaughter failed to name any adverse parties in her petition and did not send any notice or summons to any of the beneficiaries of the family trust. The trial court did not hold a hearing on the petition before signing the order appointing the granddaughter as the successor trustee.

The appellate court stated that Florida trust statutes require that judicial proceedings concerning trusts must be commenced by filing a complaint and then following the Florida rules of civil procedure. Upon the commencement of an action, those rules require that service be made on the parties to the proceeding. Furthermore, parties having actual notice is not a substitute for proper service in Florida. Since no other parties were named or properly served, the petition did not comply with the Florida rules of civil procedure.

The court also noted that the petition provided no substantiation that the grandmother was incapacitated. Nor was evidence of the son's succeeding her as trustee introduced.

As a result, the trustee appointment was quashed, and the case was remanded for further proceedings compliant with the Florida rules of civil procedure. The court stated that the granddaughter could possibly be appointed as successor trustee in these new proceedings. But the court did require the granddaughter to pay the appealing beneficiary's legal fees, penalizing the granddaughter for having brought her initial petition improperly. In re Trust of Vines, 355 So.2d 1017 (D. Ct. Fla. 2023)

This Florida case serves as a cautionary tale to understand the process and procedure for appointing a successor trustee, and that failure to follow the applicable procedural rules may well result in adverse consequences. Under the uniform trust code, as adopted in Florida, Kentucky and many other states, successor trustees can be appointed in several ways, most without a court proceeding. If a person is designated as successor trustee in the trust terms, that person has first priority and does not require court appointment. The second priority trustee appointment is by the unanimous agreement of the trust's qualified beneficiaries — again, without court approval. The third statutory priority is appointment of a successor trustee by the court. Only if neither of the first two statutory appointment methods can be used does the uniform trust code require court appointment of the successor trustee.

Partner John R. Cummins and Associate Abagail D. Zaman are based in Dentons' Louisville office and are members of the firm's Trusts, Estates and Wealth Preservation group. ■

MEETING ANNOUNCEMENT

Association of Legal Administrators

The monthly chapter meeting of the KY Association of Legal Administrators will be held in person on Thursday, July 13th beginning at 11:45am at the office of Frost Brown Todd in Louisville (400 W. Market St., Ste. 3200); and Lexington (250 W. Main St., Ste. 2800). Guests are welcome to join us for lunch. RSVP to Tina Kirkland, *tkirkland@fbtlaw.com*. ■

Irrevocable Trusts and After-Death Tax Planning

Matthew H. Burnett and Jessica K. Wissing

Adding a formula General Power of Appointment to an irrevocable trust is a low risk, high reward strategy for passing on assets to your clients' beneficiaries with a greatly reduced income tax burden.

Under current law, most Americans will fortunately (unfortunately?) not have estates large enough to trigger federal estate tax at their deaths. About 4,000 Federal Estate Tax Returns (Form 706) were filed in 2018, of which only around 1,900 were taxable, according to the Urban-Brookings Tax Policy Center: "Microsimulation Model, versions 0217-1 and 0718-1." Estate tax returns are filed for around 0.15% of all estates, with only 0.07% actually owing any federal estate tax.

The Tax Cuts and Jobs Act (TCJA) passed by Congress in 2017 raised the federal applicable exclusion (also known as the unified credit) for those dying between January 1, 2018 and December 31, 2025. As of 2023, estates worth approximately $12.9 million or less will *not* be subject to federal estate tax. For those estates above the applicable exclusion amount — which is adjusted for inflation annually — the top marginal tax rate of 40% is quickly reached. For example, an individual with an estate worth $13.9 million would, as of June 2023, owe approximately $345,800 of tax upon their death; every dollar above $13.9 million would be taxed at a rate of 40%. The applicable exclusion amount will be reduced to approximately $7 million per person as of January 1, 2026.

Nevertheless, the historically high applicable exclusion amount provides significant planning opportunities, even for those who have passed away. Many surviving spouses are current beneficiaries of irrevocable trusts created by their deceased spouses. Depending on how these irrevocable trusts are structured, most, if not all, of the assets in the irrevocable trust will *not* be included in the gross estate of the surviving spouse, thereby protecting these assets from federal estate tax. With the exclusion amount as high as it is, it may benefit many taxpayers to modify these irrevocable trusts in order to include these trust assets as a part of their own gross estates.

A/B Trusts: There's a Good Chance Your Client Has One

Prior to the TCJA, the applicable exclusion amount had been around $5.2 million per person since 2011, adjusted annually for inflation. Previous applicable exclusion amounts include $3.5 million in 2009, $2 million in 2006 through 2008, $1.5 million in 2004 and 2005, and $1 million as recently as 2003. A common estate plan drafted in the context of these much lower applicable exclusion amounts is known as an "A/B trust" plan, also known as a "credit shelter trust" plan or a "bypass trust" plan (hereafter referred to as a "bypass trust" plan).

An example of a common version of this plan is as follows: at the death of John Doe, his assets will be held in trust for the lifetime benefit of his surviving spouse, Jane Doe. An amount equal in value to the applicable exclusion amount would fund John Doe's "bypass trust" or "B trust," with the balance, if any, funding the "marital trust" or "A trust" (hereafter referred to as the "marital trust"). For those who like to see numbers in your examples: say John Doe died in 2008 with a gross estate worth $2.5 million. In 2008, the applicable exclusion amount was $2 million. Under a common "bypass trust" plan, $2 million would be placed into the "bypass trust," with the remaining $500,000 placed into the "marital trust" for the benefit of Jane Doe.

The assets in the "bypass trust," along with any appreciation earned from the death of John Doe to the death of Jane Doe, would pass free of federal estate tax to John and Jane's ultimate beneficiaries (typically their children). The assets in the "marital trust," if any, would be a part of Jane Doe's gross estate at her death. The goal behind this type of "A/B trust" plan was to fully utilize the applicable exclusion amount available to each spouse, while delaying payment of any potential estate tax liability until the death of the surviving spouse.

Capital Gains vs. Estate Tax

A trade-off of the estate tax protection the common "bypass trust" plan offers is that the appreciation in the "bypass trust" passes to the ultimate beneficiaries, e.g., John and Jane Doe's children, as unrealized capital gains. The cost basis in the "bypass trust" assets is the fair market value of those assets as of the date-of-death of first spouse.

Continuing with our example above, say John Doe died in 2008 and funded his "bypass trust" with $2 million solely in the form of Ford stock. If Jane Doe, the beneficiary of the "bypass trust," were to die in 2023, the Ford stock in the "bypass trust" will have appreciated to approximately $16 million since 2008. While this $16 million will pass to the Doe children free of estate tax, $14 million of capital gain will accompany its distribution. While this is quite the income tax liability, the historical calculation was that it was better to pay a top marginal capital gains rate of 20% (23.8% including Net Investment Income Tax) on the appreciation instead of including the appreciated assets as a part of Jane Doe's gross estate at the top marginal estate tax rate of 40%.

In contrast to the assets in the "bypass trust," all assets in the "marital trust" and any other assets includable as a part of an individual's gross estate will receive a cost basis adjustment equal to the asset's fair market value of the owning individual's date-of-death. This almost always results in the appreciated asset receiving a "stepped-up" cost basis at death, greatly reducing the capital gain.

For example, say that John Doe bought Ford stock when the share price was $10. At John Doe's death, the Ford stock is now worth $100 a share. Had John Doe sold this stock just before death, he would have realized gain on $90 worth of appreciation, as his cost basis in the stock was $10. By including that stock as a part of his gross estate at death, John Doe will be able to leave the stock to his beneficiaries with the stepped-up basis of $100 per share, allowing the beneficiaries to immediately sell the stock without realizing any capital gain. For most taxpayers who individually or in combination with their spouse's applicable exclusion fall below the taxable estate threshold, receiving this basis step-up at death is a much more pressing concern than federal estate tax avoidance.

Pulling Bypass Trust Assets Into Your Gross Estate

Maximizing the size of one's gross estate while limiting any estate tax liability is an estate planning goal that many clients should explore. Utilizing the entire applicable exclusion amount available ($12.9 million for those dying before December 31, 2025; $7 million for those dying after) increases to the greatest possible extent the assets which will receive a cost basis step-up at death. For those surviving beneficiaries with gross estates worth less than the applicable exclusion amount, pulling assets from an irrevocable "bypass trust" into their own gross estate could prevent a significant income tax liability.

For example, say John Doe funded his "bypass trust" for the benefit of his surviving spouse, Jane Doe, with $3 million in 2015. Jane Doe has a modest gross estate of her own worth $500,000. Today, the "bypass trust" has appreciated to $6.5 million. If Jane Doe were to die tomorrow, Jane would likely want all $6.5 million of that "bypass trust" to be included in her gross estate so as to virtually eliminate $3.5 million of capital gain. Estate tax liability would not be a concern, given that Jane Doe's now combined gross estate of $7 million ($6.5 million pulled into her gross estate from the "bypass trust" in addition to her own $500,000) is well under the $12.9 million applicable exclusion amount.

One way for Jane Doe to pull these "bypass trust" assets into her gross estate is to add a General Power of Appointment (GPOA) to John Doe's irrevocable "bypass trust." A GPOA is a broad power given by a donor (John Doe) to a donee (Jane Doe) to dispose of the donor's property to essentially anyone the donee would like. A GPOA in a trust document could read as follows: "Upon a Beneficiary's death, such Beneficiary may appoint the assets of this trust, by specifically referring to this power in such Beneficiary's Will, to any person or entity, or to the creditors of the Beneficiary's estate."

Due to the level of control a donee has over the assets subject to a GPOA, those assets are included in the gross estate of the donee, even if the GPOA is never actually exercised. In order for Jane Doe to add a GPOA, she would need to petition the court to modify the "bypass trust." The Kentucky Uniform Trust Code permits the modification of irrevocable trusts in order to achieve the Grantor's tax objectives. *KRS 386B.4-160.* Importantly, to avoid triggering estate tax on Jane Doe's estate by inadvertently pulling *too much* of the "bypass trust" into Jane's gross estate, a formula cap can be added to the GPOA. Using a formula cap, Jane Doe would only hold a GPOA over *the largest amount of the "bypass trust" that can pass with the least amount of federal estate tax at Jane Doe's death.* This formula GPOA will maximize the assets in Jane Doe's gross estate that will receive the cost basis step-up at her death, while preventing Jane Doe's gross estate from exceeding her applicable exclusion amount and unnecessarily triggering federal estate tax.

Adding a formula General Power of Appointment to an irrevocable trust is a low risk, high reward strategy for passing on assets to your clients' beneficiaries with a greatly reduced income tax burden. Practitioners should review any irrevocable trusts currently benefiting their clients to see if this income tax saving strategy would be worth exploring further.

Matthew Burnett is an associate attorney at Dinsmore & Shohl. Burnett's practice includes estate, gift and income tax planning, asset protection planning, estate (probate), trust and guardianship administration. Burnett is Vice-Chair of the LBA's Probate & Estate Section.

Jessica Wissing started practicing law in 2004. She enjoys her role as a Trust Principal at the Glenview Trust Company because she assists generations of families with their estate planning needs and wealth management. Wissing is Chair of the LBA's Probate & Estate Section. ■

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John Hardin, LBA CFO / Director of Operations

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John Hardin is the CFO / Director of Operations for the Louisville Bar Association. ■

Practice Pointers for Representing Parents

John H. Helmers, Jr.

Defending a parent in a child abuse or neglect case in a Kentucky Family Court can be complex and emotional. The stakes are high when a parent's rights and relationship with their child are at risk. Highly-competent representation for parents in these cases greatly impacts children's lives and futures. It is extremely stressful lawyering. However, with the right approach and strategy, it is possible to mount a strong defense and achieve a positive outcome, often impacting generations to come.

For the uninitiated, child abuse cases in family court are civil, not criminal, cases. (Parents may also face a criminal investigation that may result in charges. In those cases, it is wise for the criminal defense lawyer and the family court lawyer to coordinate efforts.) As the family court action is civil, the rules of civil procedure and typical discovery apply.

Additionally, the Commonwealth has the burden to prove abuse or neglect by a preponderance standard. This class of cases is sometimes called dependency cases or D/N/A (dependency, neglect or abuse) cases. Technically speaking, dependency refers to "no-fault" situations when a parent cannot provide for a child for reasons beyond their control (e.g., a parent's being in a coma or other severe medical condition). For the purposes of this discussion, we will focus on abuse and neglect cases.

Before the Petition is Taken

When representing parents, an early start is essential. Ideally, parents who come into contact with the child welfare system should have representation from start to finish. With private representation, an attorney's involvement begins at the first contact with an investigative worker from the Cabinet for Health and Family Services. As the initial interview can be pivotal, a lawyer should insist on being present with the client and the worker.

In some cases, a client should invoke the right to remain silent. In Kentucky, the right against self-incrimination extends to civil cases. See *Akers v. Fuller*, 228 S.W.2d 29 (1950), 312 Ky. 502. Having a correct record of the interaction can later be the deciding factor, and parent counsel's presence can ensure that. For example, parents are often asked if there are any other potential causes for a suspicious injury. In court, a mother and father might be characterized as having inconsistent stories, even though they responded to questions that elicit hypothetical answers. This happens repeatedly. Care must be taken to check that the subsequent Cabinet reports and the petition match what was actually said in the interview.

Additionally, the practitioner should be aware of the increased use of "Prevention Plans" by Cabinet workers. The "plans" are not authorized by statute and have no binding effect on parents. They should be fully voluntary and, in an ideal situation, should serve to keep a child safe and at home with parents while an investigation proceeds. In many instances, the plan becomes a Cabinet ultimatum, threatening to remove the child from a "noncompliant" parent's home.

> ***When representing parents, an early start is essential. Ideally, parents who come into contact with the child welfare system should have representation from start to finish.***

In such cases, counsel must inform clients that *only a judge* may remove children from their parents. The Sixth Circuit addressed this fact pattern and denied qualified immunity to CHFS workers in *Schulkers v. Kammer*, 955 F. 3d. 520, 2020. As Cabinet workers use prevention plans to remove children, week in and week out, parent counsel must step in immediately to prevent any overreach.

The Temporary Removal Hearing

The initial, and perhaps the most important, court appearance is the Temporary Removal Hearing (TRH). At the TRH, the court will determine whether the child remains at home with their parents. Other options include placement with relatives, with fictive kin or in a foster home. This decision will vastly impact the lives of all involved. Removal is traumatic for the parents and will increase the pressure on them to stipulate to a weak case to regain custody of the child. Additionally, separating a child from their family increases the likelihood that a child will suffer from attachment disorders and separation anxiety, even when families are eventually reunited. Trivedi, "The Harm of Child Removal," 43 *NYU Rev L & Soc Change* 523, 530-531 (2019).

Given the stakes, it is important to be ready to challenge the Cabinet's proof at the TRH. The state must prove that there are reasonable grounds to believe the child would be neglected or abused if returned to or left in their parents' custody. The parent lawyer should be prepared to challenge the allegations in the petition and the social worker's investigation and consideration of relative placement. KRS 620.130 provides specific examples of the various alternatives.

In many cases, children might be able to stay home if adequate safety nets are provided. These solutions are often tailored to the purported dangers in the household. In instances of drug abuse, for example, can frequent drug testing or substance abuse treatment lessen the risk? In families where domestic violence is alleged, can the perpetrator be removed, or can the victim parent and children be removed to a safe location or shelter? By statute, the court's duty is to determine the *least* restrictive means of keeping the child safe, and effective advocacy requires underscoring this fact to the court.

The TRH "Hearsay Misconception"

At the TRH, it is often stated that hearsay evidence is admissible; however, this is only partially correct. The relevant statute (KRS 620.080 (2)) provides that hearsay is admissible for "good cause shown." The wary practitioner will ensure that the Commonwealth establishes that a good faith effort was made to have their missing witnesses present, before admitting the evidence. The "hearsay exception" can be used to streamline the removal proceedings; however, there is a danger that its overuse prevents the client from having a full and fair hearing.

The 45-Day Rule

If a child is placed in foster care at the Temporary Removal Hearing, the court must schedule the trial promptly. With children in the state's custody, the provisions of KRS 620.090 (usually called "the 45-day Rule") apply. This is the functional equivalent of a right to a speedy trial or similar constraint in a criminal case. Pursuant to the statute, the family court must conduct a trial *and* a disposition within 45 days of the child's removal. The rule may be waived by the parties, including the Guardian ad Litem, or by a specific finding by the judge. Typically, we recommend not waiving the rule, unless there is an articulable benefit to the client. The rule might be waived if there is a companion criminal case or if the client is incarcerated. In instances of rule waiver, counsel can waive it for a limited period of time rather than as a blanket waiver.

Pre-trial Preparation

Gathering evidence is crucial to defending a parent in a child abuse or neglect case. Evidence can include witness statements, medical reports, police reports and other relevant information supporting the defense. Additionally, the practitioner has the full realm of civil discovery at his or her disposal. This includes Interrogatories, Requests for Admission and Requests for Production of Documents.

Depositions of investigative workers, police investigators or other witnesses may be taken. In many cases, informal discovery can be arranged with the County Attorney, streamlining the process while affording the same protections. When formal discovery is used, it may be propounded on the County Attorney, the Cabinet itself or both.

When the state attempts to prove the case against the parent using expert proof, the parents may be entitled to their own experts. The state pays the experts under Chapter 31, a provision that was originally applied in criminal cases. The nature of the proceedings in abuse cases has resulted in the Kentucky Supreme Court's approval of funds for similar experts in abuse or neglect cases. See *Cabinet for Health & Family Services v. K.S.*, 610 S.W.3d 205, 215 (Ky. 2020).

The Adjudication

Pursuant to statute, the court is to hold a trial to determine whether the allegations in the Petition are true. Child abuse and neglect can take many forms — physical abuse, sexual abuse, emotional abuse, medical neglect, educational neglect and so on. In some cases, when the cabinet cannot prove actual harm, it will pivot and attempt to prove that abuse is shown by "risk of harm." Counsel needs to be ready for this change in strategy. The Kentucky Supreme Court has held that risk of harm must be more than a mere theoretical possibility," it must be "an actual and reasonable potential for harm." See *M.C. v. Commonwealth*, 614 S.W.3d 915 Ky. 2021, citing *K.H. v. Cabinet for Health and Family Servs.*, 358 S.W.3d 29, 32 (Ky. App. 2011).

Kentucky's appellate courts have reversed cases in which there is a "stacking of inferences" of risk of harm. For example, a parent may have pled guilty to DUI in January, but the Commonwealth cannot imply that the same parent drinks at home and, therefore, presents an interminable risk of abusing the children.

The entire skillset of a litigator may come into play at the adjudication level of an abuse and neglect case. An adjudication does not have a jury, and the judge serves as the trier of fact. Any opening and closing statements should be addressed to a sophisticated audience, namely the judge. Notwithstanding that, the other elements of the trial mirror those of a civil or criminal trial. The state's witnesses should be rigorously cross-examined, using the prior statements under oath and the discovery produced by the Commonwealth.

In the parent's case-in-chief, the parents, who are often very nervous, must be prepared for

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the pressure of trial. Because parents are so heavily-invested and can be defensive, the best testimony can often come from neutral third parties. A school counselor or a teacher could testify as to the child's good attendance and habits. A pediatrician can confirm the absence of medical neglect. Every defense is, of course, case-dependent and unique. If the court finds that abuse or neglect has not been proven by a preponderance of the evidence, the case is dismissed and the child is returned to the home immediately.

Disposition/Reunification

The statutory goal of any abuse and neglect case is reunification. If the court finds that abuse or neglect of a child has been proven, the court will schedule a dispositional hearing. Disposition in these cases determines whether the child can be safely returned to their home or will be committed to the custody of the Cabinet for Health and Family Services. The Cabinet worker is required to file a dispositional report three days in advance of the disposition. Counsel should review that report, along with any prior case plans filed by the worker, to prepare to argue that the child must be returned to the home.

In some instances, the cabinet adds further requirements to the earlier case plans, a situation that could delay reunification. The court should be made aware of any instances in which the Cabinet is "moving the goalposts." Moreover, counsel should explain that delays in reunification can result in the filing of a termination of parental rights (TPR) against the parents. Under the TPR statute, one of the aggravators is that the child has been outside of the parents' care for 15 of the prior 22 months. Thus, privately, counsel should remind the parent client that the clock is ticking to encourage quick compliance with court orders. In court, one should advocate for a case plan and court orders that permit expedient reunification. For example, a requirement of two or three years of sobriety or mental health treatment would fall outside the limits of the TPR statute, not to mention, of course, causing harm to the child.

In some instances, the court has ordered services, but the cabinet does not provide them quickly. Backlogs and waiting periods for services are epidemic. Given the time constraints, it is essential to bring the delay in or lack of reunification services to the court's attention. This might be in the form of a motion for a finding of "lack of reasonable efforts" against the Cabinet. This is a powerful tool for two reasons. First, it can create financial loss for the Cabinet because any federal reimbursement funds will be lost upon this finding. Further, this finding creates a defense in a potential TPR case. Given the above, the Cabinet may find an alternative way for the parent to fulfill the case requirement or eliminate the delay in reunification altogether.

Financial Concerns

Setting fee expectations for private counsel is challenging. While many prospective clients prefer a "flat fee," it is nearly impossible for the lawyer. Predicting whether the case will be short in duration or will consume more than a year is difficult. With each court appearance, the waiting period may be lengthy, due to overloaded and unpredictable dockets. (Of course, contingency fees are unethical in family court matters.) Therefore, most abuse/neglect contracts provide for a retainer with an agreed hourly rate. For these cases, it is important to explain to the prospective client that there is a wide range of what the final charges might be.

One benefit for parents facing abuse allegations in Kentucky is that they are eligible for court-appointed counsel if the court finds them indigent. Kentucky law provides for this representation to be at every significant stage in the litigation process, and in Jefferson Family Court includes representation at the Temporary Removal Hearing. As the court-appointed lawyers appear each week before the same judge, they are typically well-versed in which arguments are likely to be successful.

In sum, the representation of parents in abuse or neglect cases is crucial. Parents often believe that the proverbial deck is stacked against them. This feeling is not unwarranted. Quality counsel helps to counterbalance the proceeding. It is necessary for the family court to make informed decisions. By having all parties represented by zealous and dedicated advocates, the court can make decisions about the true best interests of the children.

John H. Helmers, Jr. has been practicing family law for more than 20 years. He currently serves as the Vice-Chair of the LBA's Family Law Section. Helmer's lucky number is 7, and his favorite color is blue. ■

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MEMBERS *on the move*

Vince Aprile, who practices with Lynch, Cox, Gilman and Goodman, has been reappointed to the editorial board of *Criminal Justice* magazine, the quarterly publication of the American Bar Association's Criminal Justice Section. The magazine has more than 10,000 subscribers including judges, prosecutors and defense attorneys, both retained and assigned, in both state and federal courts. Aprile has been a member of the magazine's editorial board for more than 30 years (1989-2012, 2014-present) and twice has served as its chair (2005-09, 1991-93). He continues as the author of his column, "Criminal Justice Matters," a regular feature of the magazine (1992 to present). His latest column is "The Accused's Decision to Testify," which will appear in the summer 2023 issue.

The American Bar Association (ABA) Health Law Section has ranked **Stites & Harbison** in its 10th Annual Regional Top 10 Law Firm Recognition List. The firm ranked 8th in the inaugural National Top 10 list and 4th in the South Top 10 list. Stites & Harbison has been honored nine consecutive times on the South list. The awards individually recognize the top 10 law firms with the largest number of lawyer members in the ABA Health Law Section as of August 31, 2022, nationally and in the Northeast, Southeast and DC, South, Midwest and West regions. The Health Law Section is the voice of the national health law bar within the ABA. Its mission is to lead the national discussion on pertinent health law issues.

Stites & Harbison ranks in the Top 10 "Best Places to Work in Kentucky" for 2023 in the medium company category. The firm has made the list 17 times — 10 of those in the Top 10. "Best Places to Work in Kentucky" is hosted by the Kentucky Society for Human Resource Management in conjunction with The Kentucky Chamber of Commerce. Winners are selected from three categories: large company (more than 500 employees), medium company (150-499 employees) and small company (15-149 employees). ■

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Litigation Associate:
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