section 420 revisited (again)

I do realize the committee went through this exercise in 2018 in response to a legislative effort by Mike Blanton and others who were dissatisfied with the outcome in *Goldstein*, 495 S.W.3d 199 (Mo.App.E.D. 2016), tr. den., and had brought a collusive action styled *Knopik v. Shelby Investments, LLC*, that resulted in opinions by the trial court, no. 17P8-PR01016 (16th Cir. 07/09/18), the Western District appeals court, no. WD 81931 (Mo.App.W.D. 05/14/19), and the Supreme Court on transfer, 597 S.W.3d 189 (Mo. banc 2020), each of which I would characterize as "unfortunate."

My difficulty with these opinions, apart from the fact that each of these courts should have refused to entertain an obviously contrived lawsuit, is that in each case the court expressly declined to reach the question whether the *in terrorem* clause at issue was enforceable as a matter of public policy, which it clearly was not, or should not have been. To the contrary, each court enforced the clause simply because the petitioner had not availed himself of the bifurcated procedure under section 456.4-420.

The 2018 legislative effort was focused on clarifying that an *in terrorem* clause that purports to relieve the trustee of liability for a breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is unenforceable, per section 456.10-1008.

But one could argue this is already implicit in the phrase "enforceable under applicable law and public policy" in subsection 1 of section 456.4-420 and need not be elaborated in subsection 7. And apparently none of the courts involved with *Knopik* would have reached the question anyway.

The problem with *Knopik* is that by refusing to reach the question whether the *in terrorem* clause at issue was unenforceable as a matter of public policy, the courts have made the bifurcated, "safe harbor" procedure mandatory.

If a beneficiary were to pursue a petition to surcharge or remove without electing the bifurcated procedure, the clause would be raised by the trustee as an affirmative defense, and/or as in *Knopik*, as a counterclaim for a declaratory judgment that the petitioner had forfeited her beneficial interest. The enforceability of the clause as a matter of public policy would then be at issue. The issue does not, or should not, disappear simply because the petitioner has elected to forgo the bifurcated, "safe harbor" procedure.

Rather than again attempting to craft a further, express, substantive exception to be codified in subsection 7, I would propose that we add a sentence to subsection 1, saying

> An interested person need not, however, seek an interlocutory determination under this subsection in order to assert or preserve a claim that a no-contest clause is unenforceable.

in effect expressly abrogating the result in *Knopik*.