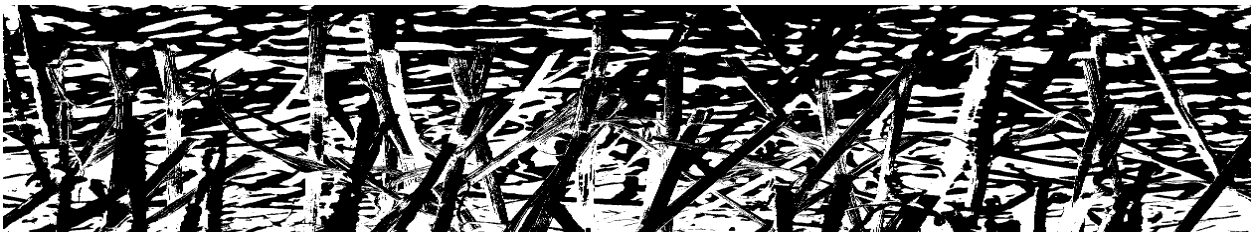

Jack Straw Fortnightly*

botch

In preparing to launch season eight of the Jack Straw, your correspondent did a search of recent state court appellate opinions in a handful of states in which he has consulting relationships,

including Missouri, where he still holds a law license, albeit inactive, and where he remains active in a few state bar committees and writes the occasional article for the metro bar journal in St. Louis.

A few years back, one of these articles had to do with a Missouri statute enacted back in 2014, drafted by a committee of the state bar, to enable a trust beneficiary to test the water before committing to a petition or motion that might trigger an *in terrorem* clause, forfeiting her interest in the trust.

And how that statute had fared in five different cases reviewed by various state appellate courts.

Tl;dr, not all that well.

We had talked about one of these cases, *Knopik*, in Jack Straw three comma four.

Your correspondent has since participated in an effort to amend the statute to clarify that

> [a]n 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[,]

which was the problem in *Knopik*. At this point it is unclear whether the proposal can clear the trust law revision subcommittee. For reasons we can discuss another time.

Anyway.

the long road

In looking through recent appeals court opinions out of Missouri, your correspondent ran across *In re Long*, decided just a few weeks ago,

in which the trial court had enforced a no-contest clause against a trust beneficiary[1] who had filed a counterclaim to the trustee's petition for instructions,

but the appeals court dismissed the appeal on procedural rather than

substantive grounds, specifically, that the appellant's briefing was so deficient as to "preserve nothing for review."[2]

Still, the case did involve some interesting issues that might have been worth raising in some other case, with better facts and better lawyering. By dismissing the appeal on procedural grounds, the appeals court neatly avoided getting into any of that.

Or so it would appear.

laying the groundwork

We begin with a cliche, an adult child of the decedent at odds with his stepmother.

The decedent had written a revocable trust back in 2007 and had amended it twice, in 2009 and again in 2012, to revise provisions dealing with the succession of interim trustees after his death in the event his surviving spouse was "unable or unwilling to act."[3]

The settlor died in 2021 with the trust holding apparently not all that much, his residence and a modest amount of cash.[4]

Beyond those basics, the underlying facts are largely "he said, she said" because the case was decided on motions, without an evidentiary hearing.

But what he said and she said was basically this.

The widow stepped into her role as interim trustee, and found that neither of the designated corporate fiduciaries would accept trusteeship of the residuary "marital" trust. She was able to engage a smaller, regional trust company, but only on condition the residence was first sold, so there would be cash to pay their fees.[5]

Possibly anticipating difficulties with her stepson in coming years, the widow proposed selling the residence and commuting the trust,

> making distribution outright to herself and the decedent's two adult children and to trusts for the grandchildren, in shares said to have been determined by reference to IRS actuarial tables.[6]

The draft settlement agreement referenced the Missouri statute tracking section 414 of the uniform trust code, which allows a trustee, on notice to "qualified" beneficiaries, to terminate an "uneconomic" trust holding less than $250k. The son (or his lawyer) balked, claiming the house alone was worth more than that, and they had not seen an accounting of the cash.

Jack observes section 111 would have allowed interested parties to make any modification to an irrevocable trust that did not frustrate a material purpose of the settlor, regardless of the value of the trust corpus.

But the problem, which was not properly addressed in the draft settlement agreement, and which as we will see in a moment was also overlooked in the ensuing litigation,

> is that minor, unborn, or unascertained beneficiaries would need to be represented, either by a court appointed *ad litem* or

virtually, by a "qualified beneficiary" who had a substantially identical interest in the matter and who was not conflicted.

The trust instrument provided that at the death or remarriage of the surviving spouse, the remainder was to be distributed 46 percent to each of the decedent's two adult children and four percent to each of two trusts for grandchildren, two on each side, **until age 25**.

Here, at least one of the grandchildren was said to be a minor. His adult sibling would have a substantially identical interest.

But all four grandchildren were arguably conflicted **as to unborn or unascertained contingent remaindermen**, who might take if any of them did not survive to distribution.[7]

Also, each of the trusts for grandchildren was rather elaborately spendthrifted, **which would likely have been an obstacle** to simply terminating them early in any event.[8]

engaging the mechanism

Having failed to secure a settlement, the widow listed the residence for sale. The son telephoned the listing agent and said something or other, which was understood to threaten interference with a pending sale.

So the widow petitioned the probate court for instructions. The petition was in three counts. The widow asked not only

(1) for an order confirming her authority as to sell -- or literally, directing her to sell --, but also

(2) for a declaratory judgment that the 2009 and 2012 amendments did not designate a successor trustee of the marital trust,[9] so that it was necessary

(3) for a modification of the trust instrument to allow the regional trust company to step in and to provide a mechanism for her to designate further successor corporate trustees, as circumstances might require.

Under each of these counts the widow also asked for her lawyer's fees to be paid by the son, for interfering with the sale and for making it necessary for her to seek a declaratory judgment to construe what she said were unambiguous trust terms.

The son filed an answer, ostensibly on behalf of himself, his sister, and the four grandchildren,[10]

(1) denying that he had "interfered" with the sale of the house,

(2) arguing that the 2009 and 2012 amendments did also apply to the marital trust,

so that in effect he should succeed as trustee, assuming the scrivener declined, and

(3) arguing that a modification that would allow the widow to designate successor trustees was "inconsistent with a material purpose of the trust," as expressed

in the existing provisions for trustee succession.[11]

a wrong turn

The respondents' pleading then included a counterclaim, in three counts,

(1) seeking removal of the widow as trustee on the ground that she had failed to provide a complete accounting and had misappropriated trust funds,

(2) seeking **to declare a forfeiture of the widow's interest** in the trust on the ground **that she had violated the no-contest clause** by proposing a nonjudicial settlement agreement and by asking the court to modify the trustee succession provisions relating to the marital trust,[12] and

(3) seeking to recoup amounts alleged to have been misappropriated from the trust and an award of lawyers' fees and punitive damages for "breach of fiduciary duty."

The widow filed a reply and then the following day a "petition," nominally pursuant to section 4-420, the "safe harbor" statute,

asking the court to determine that the second count of the counterclaim, seeking a declaration that she had triggered the no-contest clause, itself triggered the clause.

Jack says "nominally" because the statute by its literal terms affords an "interested person" the opportunity to seek an interlocutory determination **whether a petition or motion or other claim for relief to be filed by that person, not some other party**, would trigger the clause.

Properly speaking, then, the widow's "petition" was in the nature of a counterclaim to the second count of the counterclaim, or possibly a motion for a preemptive ruling on an affirmative defense.

off the rails

But just as it should be obvious that a petition for instructions and for a modification to correct a drafting oversight in the trust instrument does not trigger a generic no-contest clause,[13]

it should also be obvious that a mistaken claim that another party's pleading triggers the clause **does not in itself trigger the clause**.

How else are you supposed to raise the question?[14]

But the trial court bought the argument and entered a judgment that **not only the second count** of the counterclaim, seeking to declare a forfeiture of the widow's interest in the trust, but **also the first count**, seeking her removal as trustee, violated the no-contest clause.[15]

As a result, not only the son but also all the other named respondents lost their beneficial interests in the trust --

-- including the grandson who was identified in the pleadings as being a minor, for whom no *ad litem* was appointed and no finding was made that virtual representation by his father was appropriate --

-- as well as any additional grandchildren who might yet be born, and any great grandchildren or more remote descendants who might have taken if any of these did not survive the widow.

multiple failures

If as Jack would argue the unborn and unascertained remote contingent remaindermen were necessary parties to the second count of the counterclaim, and "indispensable" to its orderly disposition,[16]

because the defeat of the widow's interest in the trust **would accelerate the remainders to the existing class** at their expense,

and if their interests were not adequately represented by the existing class members because of this conflict,

and if the interests of the minor grandson were not adequately represented by his father, again because the defeat of the widow's interest would accelerate the remainder to his father,

whereas he would take a larger share if he survived the widow but his father did not,

then **the trial court should have appointed two, separate *ad litems*** to represent these interests before allowing the case to move forward,

and **the appeals court should have vacated the judgment** and remanded with instructions to that effect,

rather than dismissing the appeal because some lawyer wrote a noncompliant brief.

Failing all that, **the judgment below is probably void**, or at least voidable as to the parties whose interests were not represented,

see, *Pauli v. Spicer*, 445 S.W.3d 667 (Mo.App. E.D. 2014),

a quiet title action brought by a surviving spouse to determine that decedent's purported conveyance of his interest in property held in a tenancy by the entirety to a revocable trust should be canceled,

in which the judgment was rendered void because she had joined the trust itself, which is not a juridical entity, rather than the trustee or the beneficiaries,

though there may not be enough at stake here to make it worth anyone's while.

Still, Jack says, the joinder problem was **obvious from the face of the pleadings**, and both the trial court and the appeals court were derelict in failing to deal with it.

motes

[1]

More accurately, "beneficiaries" plural, but as we shall see, there was really only one beneficiary actively pursuing this matter,

and he dragged everyone else in with him, much to their detriment.

[2]

This actually happens several times a year in Missouri appeals courts. Preparing a brief that strictly complies with the court's rule 84.04 is something of a specialty practice -- in which your correspondent was engaged many, many years ago.

The trustee in *Long* hired in a second lawyer for just this limited purpose. The appellants did not, and paid the price.

But Jack asks, why did the appeals court bother to schedule oral argument if they knew they were going to dismiss the appeal for inadequate briefing.

Or more to the point, **why did they not simply vacate the judgment** despite inadequate briefing when it was obvious a necessary party had not been properly joined.

But we are getting ahead of ourselves.

[3]

The 2007 document had designated Smith Barney to act in lieu of the surviving spouse if she were unable to serve, and then Commerce Bancshares to act if Smith Barney declined.

After Citigroup sold Smith Barney to Morgan Stanley in the wake of the 2008 financial collapse, the 2009 amendment substituted the scrivener for the broker dealer.

This ostensibly left Commerce as the next successor, but with an anachronistic reference to Smith Barney declining. The 2012 amendment corrected this oversight, substituting the son as the next successor after the scrivener.

But neither of these amendments addressed the fact that Smith Barney and Commerce were **also named elsewhere in the trust instrument** as successor trustees of the so-called "marital" trust.

Which omission featured in the ensuing controversy.

[4]

Whether there might have been significant assets held in joint or entireties tenancies or subject to beneficiary designations outright is not indicated.

Much of the tangible personal property, such as it was, was designated to the son. There was no probate.

[5]

There was also some confused chatter here about the necessity of liquidating the residence to reinvest the proceeds to generate income, in order to qualify the "marital" trust as QTIP. But Jack says this reasoning is flawed on several fronts.

First, the "marital" trust would not have qualified as QTIP anyway, because by its terms it would terminate in favor of the decedent's children and grandchildren if the surviving spouse were to remarry. Not a "qualifying" terminable interest.

But even if the trust did qualify as QTIP, what the reg requires is only that the surviving spouse have a

power to direct the trustee "to reinvest in productive property." She could instead choose to allow the trustee to hold "unproductive" property for longer term growth.

And after all, she is receiving "income" in the form of the use of the residence rent free.

[6]

The percentages she proposed were 47 percent to herself and 53 percent to the children and grandchildren.

Where exactly she derived these figures is unclear. The remainder factor for an individual aged 78, given a section 7520 rate of 3.6 percent, which is where it was when these negotiations were taking place, would have been closer to 27 percent.

[7]

And the class of grandchildren was itself subject to open, at least until the death or remarriage of the surviving spouse.

[8]

In its enactment of section 411 of the uniform trust code, Missouri did not adopt the drafters' suggestion that a spendthrift clause not be treated as presumptively expressing a "material purpose," and the caselaw is to the contrary.

The fact that the scrivener spilt so much ink on these trusts for grandchildren, and on the possibility of a partial QTIP election, suggests that at some point the decedent might have anticipated the trust would be funded with rather substantial assets. The estate tax exclusion in 2007 was two million dollars.

Shortly before his death, the decedent's spouse had petitioned the probate court to appoint a guardian and conservator -- and more to the immediate point, **to revoke a durable power** of attorney held by the son --,

but that proceeding terminated with his death before anyone had filed an inventory, so we do not know from the public record how much value may have been transferred at the decedent's death through other channels.

[9]

See discussion at footnote [3] above.

[10]

though oddly, the answer notes that one of the grandchildren is a minor and thus "not a proper party," and asks that he be "stricken" as a respondent.

Which of course is nonsensical, see the discussion above re virtual representation.

But Jack says **this should have alerted the trial court** to the possibility that not all interests were adequately represented.

[11]

There was actually yet another provision in the trust instrument, allowing a majority of "primary beneficiaries" to name a further successor trustee in the event those named in the 2009 and 2012 amendments all declined,

but in context this again would seem to apply only to the interim trustee of the "administrative" trust.

In his answer and cross petition, the son took the position this provision precluded the relief the widow was seeking with respect to the "marital" trust,

but he also argued that he and his sister and their adult children were all "primary" beneficiaries for this purpose.

Which Jack says is absurd.

The trust instrument requires distribution from the marital trust not only of income but also principal sufficient to maintain the surviving spouse's "lifestyle," which could in theory exhaust the trust, making the remainder interests **not only contingent but defeasible.**

There is no meaningful sense in which remainder beneficiaries are "primary." "Qualified" yes, and entitled to an accounting.

Bottom line, if that provision of the trust instrument did apply, it would allow the widow unilaterally, as the sole "primary" beneficiary, to replace trustees of the "marital" trust. And why not, asks Jack.

[12]

particularly as the proposed modification would give the widow power to replace the successor trustee.

But as noted at footnote [11] above, this arguably is what the trust instrument already provided anyway.

[13]

By "generic," Jack means a no-contest clause that **penalizes an effort to invalidate substantive provisions** of the trust instrument.

If on the other hand you had a no-contest clause that literally said an interested party would be penalized for seeking instructions or for seeking to modify the trust instrument to correct a drafting error, Jack says **this should be unenforceable as a matter of public policy.**

And the Western District appeals court had itself ruled correctly on this issue ten years earlier, in *Winston v. Winston*, 449 S.W.3d 1 (Mo.App. W.D. 2014).

That decision has been cited favorably to the same effect by at least one other court, *Spurlock v. Wyoming Trust Co.*, 2024 WY 19. See also *Fazzi v. Klein*, 190 Cal.App.4th 1280, 119 Cal.Rptr. 3d 224 (2010), and *Conte v. Conte*, 56 S.W.3d 830 (Tex.App. 2001).

But again, the probate judge here is the same judge who enforced the no-contest clause in *Knopik*, which forbade the beneficiary

> [to] make a claim against a trustee for maladministration or breach of trust[, or to] attempt to remove a trustee for any reason, with or without cause[,]

and the state supreme court backed him up.

[14]

Not to put too fine a point on it, but this is exactly what the trustee also did in her 4.420 "petition."

That contradiction was actually raised in oral argument, but as Jack has already noted, ultimately the appeals panel abdicated its role.

[15]

quoted at length in the order, for those who are curious.

Jack says it is boilerplate and falls well within the description in footnote {13] above of what he calls a "generic" clause.

The order also notes that the respondents had belatedly filed a "safe harbor" petition of their own, but this was long after the fact, and as the court noted, without leave.

In their noncompliant briefing on appeal, the respondents argued the trustee's 4.420 "petition" had also been filed without formal leave,

but as Jack noted back on page 4, the misnamed "petition" may actually have been in the nature of a motion for judgment on an affirmative defence, for which no leave should have been required.

[16]

the latter term having to do with whether a disposition in the absence of a necessary party will leave other parties exposed to multiple, inconsistent claims.

the sandcastle virtues are all swept away