

To Everything There is a Season: A Time for Change to the Missouri Probate Code's Procedures for Dispensing with Administration

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I. INTRODUCTION

Probate. Mere mention of the word ignites negative remarks. The process appears to be as popular as a root canal.¹ Even those who are only vaguely familiar with probate proceedings have heard horror stories about the process.² It seems that everyone knows the story of the little old widow who endured endless probate proceedings, only to be left with legal fees that completely exhausted the assets of the estate.³ Opponents of the process claim that the sole purpose of probate is to protect the jobs of attorneys and judges.⁴ Actually, the probate process is to assure orderly property transfers for the protection of heirs and beneficiaries.⁵

Generally, probate is the judicial process to administer a decedent's estate.⁶ If a "testamentary document" exists, a court establishes the document as a valid will during probate.⁷ If no will exists, the estate is administered using intestate procedures defined by statute, meaning essentially the state mandates a will for the decedent.⁸ The probate process varies among states but always involves a court determining the proper recipient

¹ JAMES JOHN JURINSKI, BARRON'S LEGAL-EASE: PROBATE AND SETTLING AN ESTATE, 132 (1997).

² *Id.*

³ *Id.*

⁴ THEODORE E. HUGHES & DAVID KLEIN, THE HANDBOOK TO WILLS, FUNERALS, & PROBATE, 299 (3rd ed. 2007).

⁵ *The Probate Division*, MISSOURI BAR (2006), <http://www.mobar.org/5b04bde7-5f25-4079-8f76-bf3e2b14001a.aspx>.

⁶ BLACK'S LAW DICTIONARY 567 (3rd Ed. 2006).

⁷ *Id.* at 566.

⁸ JURINSKI, *supra* note 1, at 20.

of the deceased's assets.⁹ Generally, the probate code¹⁰ also provides procedures for paying creditors and places limits on when interested parties can bring claims against the estate.¹¹ Probate also enhances the chance that creditors, including state and federal governments are paid.¹²

Despite the seemingly useful purpose, some of the horror stories have a sound basis. Probate can be costly and is often time consuming, for both courts and individuals.¹³ The process is also always public record,¹⁴ which is troublesome for some families.¹⁵

All courts, including probate divisions, have time constraints, and many face an excessive number of cases. In Missouri, as in other states, the probate division handles decedents' estates, as well as the estates of disabled and incapacitated persons.¹⁶ The probate court handles more cases than people might expect. For example in 2007, the citizens of Missouri filed 14,084 cases under the probate division's jurisdiction.¹⁷

In addition to constraints on the courts, the administration of estates can be time-consuming for individuals and families. In the best case scenario, courts can close an

⁹ *What is Probate?*, OREGON STATE BAR, <http://www.osbar.org/public/legalinfo/1117.htm>.

¹⁰ A probate code is a set of statutes which states the law governing decedent's estates. BLACK'S LAW DICTIONARY 567 (3rd Ed. 2006).

¹¹ AMERICAN BAR ASSOCIATION, GUIDE TO WILLS & ESTATES, 10 (2nd ed. 2004).

¹² HUGHES & KLEIN, *supra* note 4, at 33.

¹³ JURINSKI, *supra* note 1.

¹⁴ MARY RANDOLPH, EIGHT WAYS TO AVOID PROBATE, 5 (6th Ed. 2006).

¹⁵ *See infra* note 25.

¹⁶ *The Probate Division*, *supra* note 5.

¹⁷ *Annual Report 2007: Probate Cases Filed and Disposed by Case Type*, MISSOURI COURTS (2007) <http://www.courts.mo.gov/file/2007-17%20Probate%20and%20Mental%20Health%20Cases%20Filed%20-%20Table%2043%20-%2044.pdf>.

estate six months after the opening.¹⁸ Unfortunately, estate administration rarely occurs that quickly,¹⁹ typically taking eighteen to twenty-four months.²⁰

Though statutes generally dictate probate costs, these costs can still be substantial.²¹ In most situations, such costs include court costs, personal representative and attorney's fees, bond premiums, and publication expenses.²² These costs can easily consume 5% or more of the assets of an estate.²³

Moreover, probate administration is public record, meaning that anyone interested can determine the value of an estate, along with debts and ultimate distributees of the property.²⁴ For example, the Busch family, of the Anheuser-Busch empire, was the subject of an unauthorized biography, whose authors obtained much of their research through public record, including the records of the St. Louis County Probate Court.²⁵ Historically, publicity has been a problem for wealthy and powerful families whose personal affairs become publicized, but still may be a concern for smaller estates. Publicity can lead to unwanted attention for beneficiaries, as well as fraudulent claims against the estate.²⁶

¹⁸ *The Probate Division*, *supra* note 5.

¹⁹ HUGHES & KLEIN, *supra* note 4, at 34.

²⁰ JESSE DUKEMINIER ET AL., WILLS, TRUST, AND ESTATES, 318 (7th ed.2005).

²¹ *The Probate Division*, *supra* note 5.

²² *Id.*

²³ RANDOLPH, *supra* note 14.

²⁴ HUGHES & KLEIN, *supra* note 4, at 34.

²⁵ PETER HERNON & TERRY GANEY, UNDER THE INFLUENCE: THE UNAUTHORIZED STORY OF THE ANHUESER-BUSCH DYNASTY, 411-50 (1991).

²⁶ HUGHES & KLEIN, *supra* note 4, at 34.

Fortunately, most state statutes contain provisions that can lessen the burdens of probate in specific situations.²⁷ These are “small estate” procedures and allow the transfer of assets without a full probate administration.²⁸ Such simplified administration procedures are available in many states if assets do not exceed a specified amount,²⁹ ranging from \$3,000 to \$200,000 in different states.³⁰ Missouri “pioneered the movement toward dispensing with unnecessary administration of small estates,”³¹ and has worked toward simplification of all probate procedures.³² The 1980 changes to the Missouri Probate Code marked a major overhaul, and in the following years additional changes have continued the trend.³³ Nearly all other states have followed suit, partially in response to public criticism of traditional methods, which are often expensive and prolonged.³⁴ Experts predict that all states will continue to simplify administration using a variety of “short form” methods.³⁵

Though Missouri was a leader in developing the small estate procedures, the state has not made significant changes to the statutes recently subjecting some of its citizens to unnecessary probate proceedings.³⁶ Many large estates are always subject to full probate administration, but simply by updating the small estate statutes, the state can reduce the unnecessary burden on many families and the courts.

²⁷ AMERICAN BAR ASSOCIATION, *supra* note 11, at 312.

²⁸ Bruce A. Tannahill, *Probate Code Changes Continue Trend Toward Simplicity*, 53 J. MO. B. 273 (1997).

²⁹ *Id.*

³⁰ HUGHES & KLEIN, *supra* note 4, at 307.

³¹ Douglas A. Walker, *Improving Missouri's Small Estate Statute*, 22 J. MO. B. 412, 412 (1966).

³² Tannahill, *supra* note 28.

³³ *Id.*

³⁴ HUGHES & KLEIN, *supra* note 4, at 299.

³⁵ Marc S. Bekerman and Gerry W. Beyer, *Trusts and Estates Practice Into The Next Millennium*, 13 PROBATE & PROPERTY 6, 11 (1999).

³⁶ *See infra* Part III.

Because they are outdated, the procedures for dispensing with administration in the Missouri Probate Code are inadequate for protecting the interests of Missouri citizens; therefore, the Missouri Legislature should make improvements by simplifying the spouse's refusal³⁷ and increasing the values used in the small estate affidavit³⁸ and creditor's refusal³⁹ procedures. Part II of this Note will examine the statutes and provide a brief history of the procedures. In Part III, this Note will analyze the problems with the existing statutes. Finally, Part IV will provide suggestions that would improve the small estate statutes and ensure that Missouri protects the interests of its citizens by remaining a leader in legislation dispensing with administration.

II. History and Current Statutes

The procedures for dispensing with administration are generally in place to allow certain estates to bypass full probate, including the cost and duration.⁴⁰ Missouri is one of many states which have procedures to completely dispense with administration.⁴¹ Other states take a slightly different approach by simply making the process "expeditious, informal, and inexpensive" without completely dispensing with the administration.⁴² Regardless of the method used, the objectives of small estate administration are to keep costs at a minimum and expedite the time for settlement.⁴³

³⁷ See *infra* Part II.A.

³⁸ See *infra* Part II.B.

³⁹ See *infra* Part II.C.

⁴⁰ I MO. ESTATE ADMINISTRATION § 2.1 (Mo. Bar 4th ed. 1999).

⁴¹ 31 AM. JUR. 2D *Executors and Administrators* § 16.

⁴² *Id.*

⁴³ W. Hugh McLaughlin, *Present Probate Laws Relative to Small Estates*, 25 J. MO. B. 236 (1969).

Missouri encourages the use of the provisions allowing for dispensing of administration if they are appropriate.⁴⁴ The court also has the power to convert an existing estate administration to a simpler procedure if it determines that the estate originally qualified under such a procedure.⁴⁵ This power indicates a strong preference for the use of the simplest form available. The court can also use this provision where the original filing of the estate was correct, but where subsequent events or information indicate that the estate qualifies for a simpler procedure.⁴⁶

If an estate does not exceed the statutory allowances, probate administration generally serves little purpose.⁴⁷ Missouri was one of the first jurisdictions in the United States to reach this conclusion and to provide expeditious procedures for such estates, beginning in 1877.⁴⁸ Essentially, Missouri led the trend of “dispensing with unnecessary administration”⁴⁹ in order to protect the assets of small estates from the exhaustion due to the unnecessary costs.⁵⁰ The Missouri statutes have become a model for other states;⁵¹ yet, Missouri has remained “in the forefront with streamlined small estate legislation.”⁵² In 1980, the legislature redrafted the Missouri Probate Code with a major emphasis on

⁴⁴ I MO. ESTATE ADMINISTRATION, *supra* note 40.

⁴⁵ Mo. Rev. Stat. § 473.092 (1996).

⁴⁶ Tannahill, *supra* note 28.

⁴⁷ John A. Borron, Jr., 5A MO. PRACTICE SERIES: PROBATE LAW & PRACTICE § 601 (3d ed.).

⁴⁸ *Id.*

⁴⁹ Walker, *supra* note 31.

⁵⁰ *Id.*

⁵¹ I MO. ESTATE ADMINISTRATION, *supra* note 40, at § 2.3.

⁵² McLaughlin, *supra* note 43.

simplifying the procedures⁵³ and carried this emphasis through to the last major renovation of the code in 1996.⁵⁴

The current Missouri Probate Code contains three main methods for dispensing with administration.⁵⁵ The first two methods are “orders refusing letters.”⁵⁶ These methods are commonly called the spouse’s refusal⁵⁷ and creditor’s refusal.⁵⁸ The final method is the small estate affidavit procedure.⁵⁹

A. Spouse’s Refusal

In a full probate administration, the probate estate is opened when the personal representative⁶⁰ or an interested party⁶¹ files an application requesting that the court grant letters.⁶² In response, the court generally grants letter testamentary or letters of administration,⁶³ which authorizes the person filing to act on behalf of the estate,⁶⁴ and full probate administration begins.

The spouse’s refusal arises when the court refuses to grant letters because the value of the estate is not greater than the exempt property and the family allowance.⁶⁵ Exempt property includes “the family bible and other books, one automobile or other passenger motor vehicle, including a pickup truck, with its means of propulsion, all wearing apparel

⁵³ Tannahill, *supra* note 28.

⁵⁴ *Id.*

⁵⁵ Mo. Rev. Stat. §§ 473.090, 473.097.

⁵⁶ Borron, Jr., *supra* note 47.

⁵⁷ Mo. Rev. Stat. § 473.090.

⁵⁸ Mo. Rev. Stat. § 473.090.

⁵⁹ Mo. Rev. Stat. 473.097.

⁶⁰ Mo. Rev. Stat. § 473.110.

⁶¹ Interested persons include heirs, devisees, spouses, creditors, and other persons having rights or claims against the decedent’s estate. Mo. Rev. Stat. § 472.010(15).

⁶² Mo. Rev. Stat. § 473.017.

⁶³ Mo. Rev. Stat. § 473.023.

⁶⁴ DUKEMINIER ET AL., *supra* note 20, at 34.

⁶⁵ Mo. Rev. Stat. § 473.090(1)(1).

of the family, all household electrical appliances, all household musical and other amusement instruments and all household and kitchen furniture, appliances, utensils and implements.”⁶⁶ The exempt property is granted to the spouse and the children whom the deceased was obligated to support and was actually supporting regardless of the value of the listed property.⁶⁷ The family allowance consists of a reasonable amount for maintenance for a period of up to one year, in addition to the homestead allowance and exempt property,⁶⁸ as determined by the court based on the specific circumstances of each estate.⁶⁹ At its discretion, the court may also award property in lieu of money.⁷⁰ The homestead allowance is an amount that does not exceed fifty percent of the value of the estate, excluding the exempt property and the family allowance, but in no event can the homestead allowance exceed fifteen thousand dollars.⁷¹

Missouri introduced the spouse’s refusal in 1877 as the first method for dispensing with administration.⁷² Since that time the state has updated the statute several times, most recently, to include all property passing at death, including non-probate assets, such as life insurance and trusts, in valuing the estate.⁷³ Additionally, the legislature made revisions to reflect the changing family structures in society⁷⁴ by including among the

⁶⁶ Mo. Rev. Stat. § 474.250.

⁶⁷ Mo. Rev. Stat. § 474.250.

⁶⁸ Mo. Rev. Stat. § 474.260(1).

⁶⁹ Francis M. Hanna, 4 MO. PRACTICE SERIES: PROBATE CODE MANUAL § 474.260 (2d ed.).

⁷⁰ Mo. Rev. Stat. § 474.260(2).

⁷¹ Mo. Rev. Stat. § 474.290(1).

⁷² I MO. ESTATE ADMINISTRATION, *supra* note 40, at § 2.3.

⁷³ Hanna, *supra* note 69.

⁷⁴ Tannahill, *supra* note 28.

recipients of the allowance children the decedent was obligated to support and those the decedent was actually supporting, even if those children are not minors.⁷⁵

The allowances and exemptions can be substantial in some situations because some of the provisions do not contain specific limits.⁷⁶ Thus, the “small estate” description is somewhat misleading. The refusal procedure is often simpler than the small estate affidavit because it does not involve the burdens of filing an affidavit.⁷⁷ This factor, in addition to the requirement under the small estate affidavit procedures that all debts have been or will be paid,⁷⁸ may make the spouse’s refusal easier to implement if it is an option.

B. Creditor’s Refusal

The creditor’s refusal is somewhat like the spouse’s refusal, but has significant differences. In particular, this procedure grants a creditor, rather than a family member,⁷⁹ possession of property without probate administration, under limited circumstances.⁸⁰

Section 473.090 provides that a creditor must meet several requirements before the court will issue a refusal,⁸¹ provided the decedent left no surviving spouse or unmarried minor children.⁸² The estate must not have a value greater than \$15,000 and the creditor must file a bond covering the amount of the estate.⁸³ The court may dispense with the

⁷⁵ *Id.*

⁷⁶ Borron, Jr., *supra* note 47.

⁷⁷ Tannahill, *supra* note 28.

⁷⁸ Mo. Rev. Stat. § 473.097(2).

⁷⁹ *See supra* Part II.A.

⁸⁰ Mo. Rev. Stat. § 473.090.

⁸¹ Mo. Rev. Stat. § 473.090.

⁸² Mo. Rev. Stat. § 473.090.

⁸³ Mo. Rev. Stat. § 473.090.

bond requirement,⁸⁴ and often does if the creditor's claim is for funeral expenses which are greater than the personal property of the estate.⁸⁵ The creditor must also agree to pay the decedent's debts⁸⁶ in the preference ordered by statute⁸⁷ as far as the estate will allow.⁸⁸ Though the \$15,000 limit on the value of the estate takes into consideration both real and personal property, a creditor cannot take possession of real property through this procedure.⁸⁹

The creditor's refusal first appeared in the code in 1941⁹⁰ and purports to protect the surviving spouse and children from creditors,⁹¹ because creditors can only use the procedure if there is no surviving spouse or children.⁹² Missouri modified the code most recently in 1996, raising the limit on the value of the estate from \$5,000 to its current level of \$15,000.⁹³

C. Small Estate Affidavit

The small estate affidavit procedure first appeared in Missouri in 1955⁹⁴ to provide for the distribution of real and personal property without probate administration if the estate's worth is less than a specified amount, currently \$40,000.⁹⁵ This procedure is the most common of the three procedures for dispensing with administration.⁹⁶ In

⁸⁴ Mo. Rev. Stat. § 473.090.

⁸⁵ I MO. ESTATE ADMINISTRATION, *supra* note 40, at § 2.4.

⁸⁶ Mo. Rev. Stat. § 473.090.

⁸⁷ *Id.* at § 473.397.

⁸⁸ Mo. Rev. Stat. § 473.090.

⁸⁹ Borron, Jr., *supra* note 47, at § 604.

⁹⁰ *Id.* at § 601.

⁹¹ I MO. ESTATE ADMINISTRATION, *supra* note 40, at § 2.8.

⁹² Mo. Rev. Stat. § 473.090.

⁹³ I MO. ESTATE ADMINISTRATION, *supra* note 40, at § 2.4.

⁹⁴ Borron, Jr., *supra* note 47.

⁹⁵ Mo. Rev. Stat. § 473.097(1)1.

⁹⁶ *Annual Report 2007*, *supra* note 17.

2007, 4,104 estates used the small estate affidavit, which was more than the combined use of the creditor's refusal and spouse's refusal in 2,654 cases.⁹⁷

Either the person designated as the personal representative in the will or any distributee entitled to part of the estate can file the affidavit if the estate meets the statutory requirements.⁹⁸ The estate's value must not be greater than \$40,000,⁹⁹ and thirty days must have passed since the decedent's death.¹⁰⁰ There must be no pending applications for administration or letters,¹⁰¹ and the affiant generally must file a bond "in an amount not less than the value of the personal property" that is approved by the clerk or judge of the probate division.¹⁰² However, the court may excuse this requirement,¹⁰³ and often will if all distributees have waived the bond or where only real property is at issue.¹⁰⁴ The person filing must also pay a fee, in accord with section 483.580 of the Missouri Revised Statutes.¹⁰⁵ If the value of the estate exceeds \$15,000, the clerk will publish a notice to creditors to make their claims within six months.¹⁰⁶ In that situation, the affiant is required to pay an additional fee to cover publication costs.¹⁰⁷

⁹⁷ *Id.*

⁹⁸ Mo. Rev. Stat. § 473.097(2).

⁹⁹ Mo. Rev. Stat. § 473.097(1)1.

¹⁰⁰ Mo. Rev. Stat. § 473.097(1)2.

¹⁰¹ Mo. Rev. Stat. § 473.097(1)2.

¹⁰² The bond is conditioned that the estate will pay all debts of the decedent, that court order will be followed in relation to the state, and that property will be delivered to distributees. Mo. Rev. Stat. § 473.097(1)3.

¹⁰³ Mo. Rev. Stat. § 473.097(1)3.

¹⁰⁴ I MO. ESTATE ADMINISTRATION, *supra* note 40, at § 2.6.

¹⁰⁵ Mo. Rev. Stat. § 473.097(1)4. The fee is \$65. *Probate Court Costs and Other Fees*, 7th Judicial Circuit of Clay County, Missouri, (2006) http://www.circuit7.net/documents/probate/probate_fees.pdf.

¹⁰⁶ Mo. Rev. Stat. § 473.097(5).

¹⁰⁷ Mo. Rev. Stat. § 473.097(1)4. The fee is generally around thirty dollars, but can vary depending on the newspaper used for publication. *See, e.g., Probate Court Costs and Other Fees*, 7th Judicial Circuit of Clay County, Missouri, (2006) http://www.circuit7.net/documents/probate/probate_fees.pdf.

The affidavit must contain a statement that the decedent either left no will or a qualified individual has presented the will to probate, in addition to an itemized description and value of all property that the decedent owned.¹⁰⁸ It must also state the names and addresses both of those currently in possession of the itemized property and those entitled to receive the property.¹⁰⁹ Finally, the affidavit must declare that the person filing has paid or will pay all debts.¹¹⁰ This often makes the use of the spouse's refusal, discussed above, a better option for the spouse and children.¹¹¹

After the court approves the affidavit and enters the order, the affiant can collect the decedent's property and properly distribute it to the heirs or devisees, after dealing with all claims against the estate.¹¹² The affiant must pay all valid claims before distributing the remaining property to the individuals listed in the affidavit.¹¹³ Distributees have the same rights and title to property as in a full probate proceeding.¹¹⁴

III. Problems with the Current Statutes

In order to alleviate unnecessary burdens of probate, Missouri historically has been at the forefront of developing procedures for dispensing with administration of estates,¹¹⁵ but recently other states have seen weakness in their statutes and made significant changes.¹¹⁶ In order to remain a leading jurisdiction in the area and protect its

¹⁰⁸ Mo. Rev. Stat. § 473.097(2).

¹⁰⁹ Mo. Rev. Stat. § 473.097(2).

¹¹⁰ Mo. Rev. Stat. § 473.097(2).

¹¹¹ I MO. ESTATE ADMINISTRATION, *supra* note 40, at § 2.6.

¹¹² Mo. Rev. Stat. § 473.097(7).

¹¹³ Mo. Rev. Stat. § 473.097(7).

¹¹⁴ Mo. Rev. Stat. § 473.097(6).

¹¹⁵ Walker, *supra* note 31.

¹¹⁶ See, e.g., Ark. Code Ann. § 28-41-101; 755 Ill. Comp. Stat. 5/15-1; Iowa Code § 635.1; Or. Rev. Stat. § 114.515; Wash. Rev. Code § 11.62.010.

citizens, the Missouri Legislature must consider the problems and areas for improvement in the current Probate Code.

A. Spouse's Refusal

The spouse's refusal procedure in Missouri has two problems. First, the method for determining the value of estate which gives rise to the procedure is burdensome and unclear. The second area of concern involves the privacy of the estate in regard to non-probate assets.¹¹⁷ The legislature should modernize and update both of these problem areas.

One of the largest problems with the current statutes involving the spouse's refusal is the difficulty in determining the value of the estate which allows the use of the procedure. To make this determination the court must establish the amount of the family allowance.¹¹⁸ Because it is also used in full probate, where time and expense are not a substantial concern, the family allowance is not adapted to meet the spouse's refusal's purpose of simplified probate.

When considered in relation to the spouse's refusal, the process for determining the family allowance is overly complicated in several areas. The decedent's yearly income is the basis for the support calculation,¹¹⁹ but income levels can fluctuate yearly depending on type of employment and retirement status, sometimes skewing this starting point. In making the determination, the court can and should consider the prior standard

¹¹⁷ Hanna, *supra* note 69.

¹¹⁸ Mo. Rev. Stat. § 474.260

¹¹⁹ Borron, Jr., *supra* note 47, at § 602.

of living, condition of estate, income, and other assets.¹²⁰ Nonetheless, the statute does not contain standards for the calculation, meaning two similar estates could have noticeably different results. The surviving spouse may have the responsibility to prove factors relating to standard of living for the court to consider, such as expenses, in order to receive an adequate level of support.¹²¹ Yet, there may be some situations where the spouse may have difficulty conclusively proving a factor in summary probate, leaving the spouse without a sufficient means of support. Missouri also has no definite minimum or maximum for the amount of support that courts can grant.¹²² Other states have such limits to simplify the procedure.¹²³ Clearly, the current use of the family allowance under the spouse's refusal is not meeting the goals of expeditious and cost-efficient summary probate.

The spouse's refusal may also pose problems for those attempting to maintain privacy. In determining the family allowance, the court has the authority to examine other sources of income that the surviving spouse may have.¹²⁴ This includes sources that may not be subject to probate proceedings, such as trusts and payable-on-death contracts.¹²⁵ If the court makes a "detailed inquiry into the non-probate transfers of the decedent, the record will contain information that otherwise would have remained unpublicized."¹²⁶ Privacy is often a large concern during estate planning, and the spouse's refusal can destroy previous efforts taken by the decedent to maintain privacy.

¹²⁰ Mo. Rev. Stat. § 474.260

¹²¹ Estate of Welch, 797 S.W.2d 742 (Mo. Ct. App. 1990).

¹²² I MO. ESTATE ADMINISTRATION, *supra* note 40, at § 2.3.

¹²³ See 755 Ill. Comp. Stat. 5/15-1; Kan. Stat. Ann. § 59-403 (2006).

¹²⁴ Mo. Rev. Stat. § 474.260.

¹²⁵ Hanna, *supra* note 69.

¹²⁶ *Id.*

Additionally, despite efforts to the contrary, independent sources of support that the surviving spouse may have also could become public.

B. Creditor's Refusal

The creditor's refusal procedure is not as complicated as the spouse's refusal and has only one area of concern, the limit on the size of the estate. The last time the legislature updated the value of the estate's limit was 1996¹²⁷ in response to inflation,¹²⁸ and since that time inflation has risen 38%.¹²⁹ Based on the inflation rate alone, the limit should be at least \$20,700,¹³⁰ indicating the statute needs updated.

C. Small Estate Affidavit

The small estate affidavit procedure in Missouri currently has three problem areas. The value of the estate and the value which triggers the requirement of publication to notify creditors are both outdated and need revision. Additionally, the statute requires a seemingly unnecessary thirty day waiting period.

The most significant problem with the small estate affidavit procedure is the limit on the estate value, which is outdated and not effectively protecting the welfare of Missouri citizens. The legislature last updated the dollar amount nearly fifteen years ago in 1994,¹³¹ and this update was the first since 1980.¹³² The change, from \$15,000 to \$40,000,¹³³ represented a 267% increase. If the legislature raised the current level by an

¹²⁷ I MO. ESTATE ADMINISTRATION, *supra* note 40, at § 2.3.

¹²⁸ Tannahill, *supra* note 28.

¹²⁹ Inflation Calculator, UNITED STATES DEPARTMENT OF LABOR BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl>.

¹³⁰ Inflation Calculator, *supra* note 129.

¹³¹ Tannahill, *supra* note 28.

¹³² 3 MO. PRACTICE SERIES: PROBATE FORMS MANUAL, Form 2.15 (2d ed.).

¹³³ Tannahill, *supra* note 28.

equal proportion, the limit would become \$104,000. Inflation indicates that the current statute is not up to date.¹³⁴ Inflation since 1994 has been 46%,¹³⁵ that standard alone indicates that the appropriate level is at least \$58,400.

In addition to exposing citizens to unnecessary probate, Missouri is also falling behind many other states in small estate legislation. Though the value of small estate statutes differs from state to state, the trend to increase these amounts for the benefit of the public has been almost universal and likely will continue.¹³⁶ Many other states, including some that are similarly situated to Missouri, have recently raised small estate values up to \$100,000.¹³⁷ California was one of the earliest states to do so in 1996, when the state increased the limit from \$60,000 to \$100,000.¹³⁸ Since that time several other states also have reached the \$100,000 level.¹³⁹

Other states have taken a slightly different approach by treating real and personal property differently.¹⁴⁰ Oregon's small estate statute, for example, now includes a total fair market value of \$200,000, as opposed to its prior value of \$140,000.¹⁴¹ However, only \$50,000 can be personal property with the remaining \$150,000 available only for real property.¹⁴² The Illinois statute applies to personal property only, and the state legislature raised the limit from \$50,000 to \$100,000 in 2004.¹⁴³

¹³⁴ Inflation Calculator, *supra* note 129.

¹³⁵ *Id.*

¹³⁶ Bekerman & Beyer, *supra* note 35.

¹³⁷ Ark. Code Ann. § 28-41-101; Cal. Prob. Code § 13100; Iowa Code § 635.1; Wash. Rev. Code § 11.62.010.

¹³⁸ Cal. Prob. Code § 13100.

¹³⁹ Ark. Code Ann. § 28-41-101; Iowa Code § 635.1; Wash. Rev. Code § 11.62.010.

¹⁴⁰ *See, e.g.*, 755 Ill. Comp. Stat. 5/15-1; Or. Rev. Stat. § 114.515.

¹⁴¹ Or. Rev. Stat. § 114.515.

¹⁴² Or. Rev. Stat. § 114.515.

¹⁴³ 755 Ill. Comp. Stat. 5/15-1.

Another option that provides for greater values of estates is the method adopted by the Uniform Probate Code,¹⁴⁴ which is reflected in the small estate statute of Michigan.¹⁴⁵ The statute provides that the value of the estate must not exceed mortgages, the homestead allowance not exceeding \$15,000, exempt property not exceeding \$10,000, the family allowance not exceeding \$18,000 (which the court has discretion to increase), and the expenses of the funeral and last illness.¹⁴⁶

In addition to the problems with the general statutory limits of small estates, Missouri's \$15,000 value of the estate which triggers the publication to notify creditors is outdated. The problems associated with the value of the small estate are also applicable to the limit on the notification requirement. For example, the value is outdated based on the inflation analysis discussed in relation to the small estate affidavit procedure. Using inflation data, the legislature should increase the value to at least \$21,750.

Another provision of the small estate affidavit that requires reexamination is the required thirty day waiting period before filing is allowed. Since as early as 1966 experts have criticized that the waiting period because it "adds nothing to the section."¹⁴⁷ Even without the waiting period, interested parties', such as creditors, rights are still protected by the bond filed with the affidavit.¹⁴⁸ Additionally, in 2007 of the forty-one states that have a form of small estate affidavit procedure, thirty-five did not require any waiting

¹⁴⁴ Uniform Probate Code § 3-1203.

¹⁴⁵ Mich. Comp. Laws § 700.3987.

¹⁴⁶ Mich. Comp. Laws § 700.3987.

¹⁴⁷ Walker, *supra* note 31, at 415.

¹⁴⁸ Walker, *supra* note 31, at 415.

period.¹⁴⁹ It seems there is no significant reason that the small estate affidavit in Missouri should not also be immediately available upon death.

In summary, each of the procedures for dispensing with administration in Missouri has weaknesses. The spouse's refusal is overly complicated and does not protect privacy, while the value of the creditor's refusal is out of date. The value of a small estate is also out of date, along with the value required for notification of creditors. Additionally, the thirty day waiting period required under the small estate affidavit is unnecessary.

IV. RECOMMENDATIONS FOR IMPROVEMENT

Despite the weaknesses with the current state of the Missouri Probate Code, many solutions are available to the legislature. Though each suggested approach has drawbacks, legislators should weigh the positive impacts on the citizens of Missouri.

A. Spouse's Refusal

To improve the spouse's refusal procedure in Missouri, the legislature should simplify the process for determining the value of an eligible estate, which largely involves the family allowance. The legislature has two main paths to achieve this goal: completely eliminate the reference to the family allowance in the spouse's refusal or provide a simplified method for determining the amount of the family allowance outside of full probate.

The legislature could completely eliminate the need to determine the family allowance by providing a set value for the spouse's refusal. This would provide a specific standard, such as those in the creditor's refusal and the small estate affidavit.

¹⁴⁹ HUGHES & KLEIN, *supra* note 4, at 303-04.

However, this is probably not the best approach because it would completely alter the procedure.

The legislature could also simplify the procedure for determining the family allowance when it is used for the spouse's refusal. The use of the family allowance in full probate is beyond the scope of this note, but the legislature could include provisions which apply only when using the allowance in relation to the spouse's refusal. One way to simplify this process is to insert a minimum amount for the allowance under the statute, through a set number. Setting a bare minimum could be a problem for extremely small estates, and as such the statute should provide that if an estate is below the minimum, the entire value of the estate should be the allowance. The court could then easily determine that these estates fall within the spouse's refusal.

Similarly, the Missouri legislature could include a maximum amount of for the allowance in the statute, which would simplify procedures for larger estates. The probate court could easily identify estates which exceed this level, thereby eliminating the time and expense of examining each estate. In some situations, the maximum would also eliminate the process of examining non-probate assets, thereby protecting the family's privacy as the decedent likely intended. Unfortunately, a maximum limit could be inequitable for estates of extreme wealth.

Including both a minimum and maximum range for the support allowance would provide added simplicity to the court's determination. This obviously would simplify the procedure because the court would have a much narrower range with which to work. The court could easily identify both large and small estates and award the maximum or

minimum amount, respectively. This approach, however, would not be without its problems, including both limits could lead to inequity for any estate of extreme size.

Despite the potential for inequity, the legislature should carefully consider the benefits of simplified procedures. The procedures could significantly ease the burden on the court, saving both time and money. Though courts may inadvertently treat some large estates unequally, in actuality large estates will probably not be using the spouse's refusal and a maximum would not affect them.

Additionally, the legislature should provide further guidance as to the factors considered by the court. The statute currently states that the court may consider several factors, but does not specifically say what weight to give each consideration.¹⁵⁰ To clarify, the legislature could specify that the support should be equal to a set amount. For example, the statute could declare that the spousal allowance is a set percentage of the decedent's annual income less the yearly income from other non-probate assets. With this type of approach, courts would more easily compute the amount and ensure similar treatment of all estates.

The spouse's refusal also causes concern for those attempting to maintain privacy.¹⁵¹ The legislature should reevaluate the procedure by which courts consider non-probate assets, by providing standards regarding the details that courts can disclose in the process.

The main area of concern with the spouse's refusal is the difficulty in determining the level of the family allowance which gives rise to the procedure. The current procedures

¹⁵⁰ Hanna, *supra* note 69.

¹⁵¹ See *supra* Part III.A.

do not have specific standards, leaving courts with broad discretion, which varies from county to county. Additionally, the process raises privacy concerns because non-probate assets are evaluated. The legislature should update the statute to include guidelines for determining the family allowance under the spouse's refusal and should include limitations on what details of non-probate assets can be disclosed by the court.

B. Creditor's Refusal

The primary problem regarding the creditor's refusal is simply an outdated maximum value of the estate under which the procedure is applicable. The simple solution is to raise that amount. If the Missouri legislature were to raise this amount directly in response to inflation, the new amount would be \$20,700.¹⁵² Another option is for the legislature to raise the number in correspondence with the other amounts in the code. For example, if legislators increase the limit for the small estate affidavit,¹⁵³ they could also increase the creditor's refusal by the same proportion.

The creditor's refusal does not require as much consideration as the other two small estate procedures, but legislators should still ensure that it remains current. The best way to ensure that this occurs is to increase the creditor's refusal value in correspondence with the small estate value. By increasing the two values in accord, the legislature can ensure that the protection to creditors remains in proportion to the protection to the decedent's family or other interested parties under the small estate affidavit.

¹⁵² See *supra* Part III.B.

¹⁵³ See *infra* Part IV.C.

C. Small Estate Affidavit

The small estate affidavit procedure needs improvement in three areas. The most necessary improvement involves increasing the value of a small estate, which is outdated. Legislators should also consider changing the limit on the value of the estates which triggers the requirement of publication of creditor's notice, along with eliminating the thirty day waiting period for filing an affidavit.

The value of the small estate has not been updated since 1994,¹⁵⁴ accordingly the legislature should raise the amount considerably. One way to address this is to simply use the amount of inflation since the last increase,¹⁵⁵ raising the limit \$58,400. Likewise, by following Missouri's historical approach to the statute,¹⁵⁶ \$104,000 is the appropriate value. The historical approach provides a sound basis for the amount of increases, but might not be an appropriate predictor to adequately provide for the future. Merely because the legislature previously made such increases does not mean that they were appropriate at the time, nor does it mean that the same approach will always be sufficient.

Another approach involves following the position taken by other states. Many states have doubled their numbers,¹⁵⁷ and if Missouri follows this trend the statutory legislature should make the limit \$80,000. Likewise, several states have settled their statutes at the \$100,000 level. This would be a straightforward approach, by simply choosing a round number; however the citizens of other states have different financial situations, meaning the appropriate level may differ between states.

¹⁵⁴ Tannahill, *supra* note 28.

¹⁵⁵ *See supra* Part III.C.

¹⁵⁶ *See supra* Part III.C.

¹⁵⁷ *See e.g.* Ark. Code Ann. § 28-41-101; 755 Ill. Comp. Stat. § 5/25-1(b).

In following other states, Missouri could also separate the limits on the value of a small estate to personal and real property.¹⁵⁸ This would allow the state added flexibility. The statute would provide that both real and personal property must be below a set limit before an estate would qualify for the affidavit procedure. Alternatively, the statute would state that as long as personal property is below the limit the probate administration would not include personal property, and likewise with real property. This alternative would simplify probate procedures for certain estates, such as those that contain farmland but little personal property. Contrarily, the approach could also complicate the procedure in some situations because the court would have to make two separate determinations for each estate.

When determining the appropriate level for the statute, legislators should not only consider the current economy, but also the near future. Based on the history of the statute, the legislature will probably not reevaluate the statute for several years. Consequently, legislators should set the limit slightly above what is appropriate at this time.

As an alternative, the Missouri legislature could set the limit to present value, with a provision included for scheduled increases. The legislature could base the provision on adjustments for average inflation or actual inflationary data. Though exact inflation is not steady, by using an average, legislators would ensure that the limit stays somewhat current.

¹⁵⁸ See discussion *supra* Part III.C.

This approach is, of course, not without drawbacks. Inflation could increase or decrease more dramatically than predicted, setting the limit at an inappropriate level. However, estimates of inflation likely will lead to a more appropriate level than if the statute was simply set at a limit for a period of years, as in recent history. Additionally, estimates of inflation will be more accurate than merely maintaining the statute at its current outdated level.

Using actual data is also possible. The statute could simply provide, for example, that for annual increases based on the Consumer Price Index¹⁵⁹ for the previous year. This would eliminate the fears about extreme changes in inflation because it would reflect actual data.

A similar alternative is for the statute to include automatic increases. For example, the statute could be set to \$80,000 but provide in five years the limit would increase to \$90,000. Alternatively, the statute could simply provide that each year the amount would be raised by \$500. This would likely be very similar to the provision being based on average inflationary data, but would provide a somewhat simpler calculation. Unfortunately annual changes, whether based on automatic increases or inflation, require frequent attention which could become burdensome.

Though each of the alternatives has advantages and drawbacks the best is probably to set the limit at \$100,000. The level is a round number that does not require complicated calculations to reach or to adjust. This approach reflects the changes made in other states

¹⁵⁹ Consumer Price Index, UNITED STATES DEPARTMENT OF LABOR BUREAU OF LABOR STATISTICS, <http://www.bls.gov/cpi/> (publishing statistics on the prices paid by consumers for a representative basket of goods and services).

and roughly approximates the Missouri's historical approach. While other states do not exactly mirror the financial situation of Missouri citizens, they do provide a rough estimate and their legislatures likely have done significant research before choosing the level. The limit is probably high enough to allow the statute to stand for several years without additional revision. Overall, \$100,000 is probably the most appropriate level and simplest approach for the legislature to adopt.

The second area that the Missouri Legislature should reevaluate in the statute is the value of the estate that prompts the required publication to notify creditors. The legislature should increase this value along with the value of the small estate. Legislators have several options by which to achieve this. By referring to inflation, as mentioned above, the appropriate value is \$21,750.¹⁶⁰ As with the value of the small estate, the legislature could include a provision to automatically increase the amount. The variety of approaches for an automatic increase discussed with the value of the estate are also appropriate in this situation.¹⁶¹

An alternative approach is to base the creditor notification level on the small estate limit. Missouri could accomplish this by maintaining the current relationship between the two limits. Currently, the \$15,000 creditor notification level is 37.5% of the \$40,000 small estate value. The legislature could maintain the 37.5% level regardless of the changes in either number.

¹⁶⁰ See *supra* Part III.C.

¹⁶¹ See discussion *supra* Part IIV.C

The best solution for this area of the statute is for the legislature to increase the level in proportion with any changes made to the value of the small estate. Maintaining the relationship ensures that the provisions continue to work in conjunction with one another to serve interested parties. In following this approach, the legislators should raise the notification level to \$37,500 in correlation with the increase of the small estate value to \$100,000.

The final change that Missouri should make involves the thirty day waiting period required before an interested party can file the affidavit. As discussed above, this requirement serves little purpose in the statute and is not present in many other states' statutes.¹⁶² To rectify this, the legislature should simply remove the language from the statute.

The small estate affidavit procedure is the method that requires the most attention. The legislature should increase the value of the small estate, as well as the value required for creditor notification. Additionally, the thirty day waiting period should be eliminated from the statute.

V. CONCLUSION

Missouri has a rich history as a pioneer and leader in the procedures for dispensing of administration for small estates in order to prevent citizens from facing unnecessary probate. However, if the legislature is not proactive, the state will soon begin to lag behind current trends. The lag will expose some citizens, along with the courts, to unnecessary probate, costing time and money. Thus, it is essential for the legislature to

¹⁶² See *supra* Part III.C.

update the Probate Code to be updated in order to maintain Missouri's position as a leading jurisdiction and protect its citizens.

In order to improve the current procedures for dispensing with administration the legislature should update the spouse's and creditor's refusal, along with the small estate affidavit. Legislators should simplify the spouse's refusal procedures by providing additional guidance for determining the value of an estate under the spouse's refusal through the use of the family allowance. The state should also update the creditor's refusal to a modern level. The Legislature, however, should place the greatest emphasis upon the small estate affidavit procedure. In particular, the legislature should raise the value of a small estate \$100,000. Similarly, the state should raise the limit triggering the requirement for publication of a notice for creditors in accordance with the small estate value. Finally, Missouri should eliminate the required thirty day waiting period for filing an affidavit.

By updating its Probate Code, Missouri will remain current in the area of small estate legislation. In order to protect the interests of citizens and remain a leader, the state should regularly review its probate procedures and continue to make changes as necessary.