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# The Small Estate Affidavit: a Shortcut through Probate that also Eliminates Creditors?

By Thomas G. Glick

The small estate affidavit, like any probate proceeding, attempts to balance the rights of heirs and beneficiaries to expediently acquire the property of a decedent against the right of creditors to notice of the proceedings and their subsequent right to have their claims heard and enforced. The most recent judicial interpretation of Section 493.097, Mo. Rev. Stat. (2000), which governs small estate proceedings, tips the scale in favor of heirs and beneficiaries. This article examines the advantages of the small estate affidavit and the efforts of Missouri courts to strengthen the rights of creditors.

## The Small Estate Affidavit

Practitioners and commentators all praise various "short-cut" proceedings that allow the distribution of probateable assets without the time, expense and effort required by either supervised or independent probate administration.<sup>1</sup> The most broadly available of these is the small estate affidavit authorized by Section 473.097, Mo. Rev. Stat. (2000).<sup>2</sup> Statistically, the assets of more decedents are distributed through the small estate affidavit than through either form of regular administration.<sup>3</sup> Moreover, use of the small estate affidavit increases while use of more cumbersome methods of administration decreases.<sup>4</sup>

The many advantages of the small estate affidavit ensure that this trend will continue. Although the refusal of letters procedures are more preferable when applicable, the small estate affidavit is available to anyone as long as the net value of the estate is under \$40,000.00.<sup>5</sup> In addition, small estate affiants can either achieve basic intestacy distributions or probate a will.<sup>6</sup> The ability to probate a will under the small estate affidavit can be useful even for decedents who have completed extensive estate planning with complex trust

instruments because it can be used to admit pour-over wills and probate small wayward assets, like an automobile, that need to be properly re-titled as trust assets.<sup>7</sup>

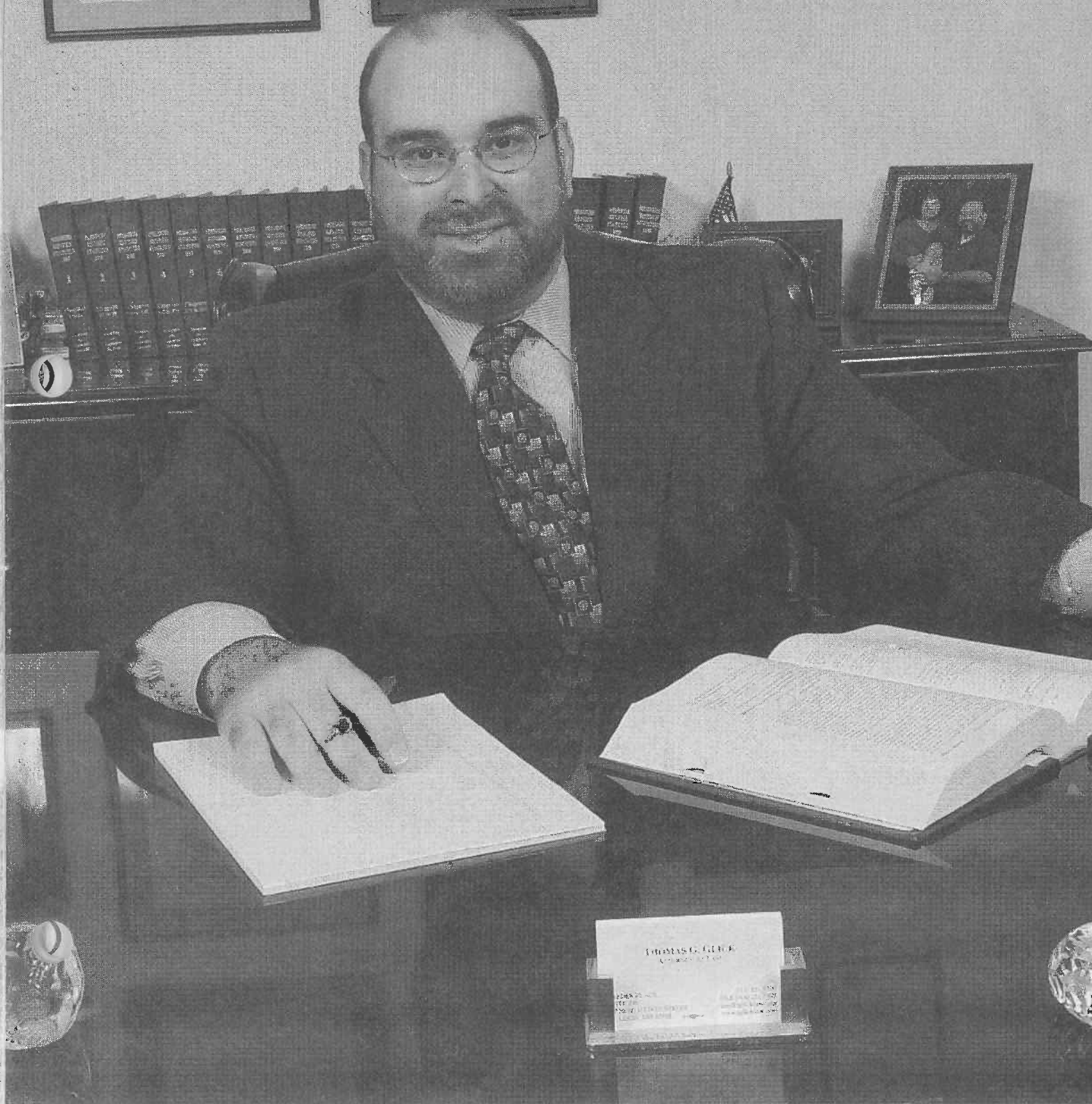
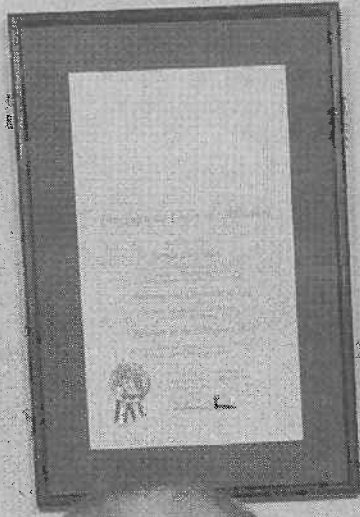
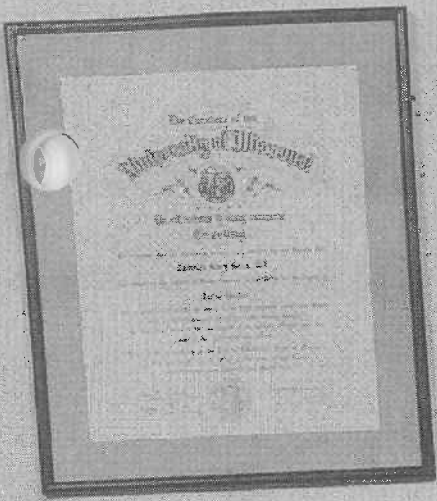
Perhaps the most useful feature of the small estate affidavit is the ability to file more than one year after the decedent's death.<sup>8</sup> The 1996 amendments to Section 493.097 removed the one year filing requirement but made provisions limiting the filing of wills to the first year only.<sup>9</sup> Thus, the procedure offers an alternative to the determination of heirs under Section 473.663, Mo. Rev. Stat. (2000) without the need for a courtroom hearing, provided the assets to be transferred are less than \$40,000.00. Some circuits view the 1996 amendments as substantive

while others classify them as merely procedural. As a result, practitioners are warned to verify the local rule with the specific probate division for cases where the decedent died before the effective date of the 1996 amendments, May 23, 1996.<sup>10</sup>

In 2002, the legislature again modified Section 473.097, Mo. Rev. Stat. (2000). This time they added the word "debt" to the threshold definition of estates which qualify for the procedure.<sup>11</sup> Under the prior formulation, when determining whether "[t]he value of the entire estate, less liens and encumbrances, [exceeded] forty thousand dollars," courts allowed offsets only with regard to claims secured by property subject to the small estate affidavit, generally mortgages and car

1. I Mo. Estate Administration §2.1 (MoBar 4th ed. 1999, 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. Section 473.090(1.1), Mo. Rev. Stat. (2000).
6. Section 473.097(2), Mo. Rev. Stat. (2000).
7. I Mo. Estate Administration §2.1 (MoBar 4th ed. 1999, 2001).
8. Section 473.097(2), Mo. Rev. Stat. (2000).
9. L.1996, S.B. No. 494 § A.
10. *Id.*
11. Section 473.097(1.1), Mo. Rev. Stat. (2000).

**Thomas G. Glick** opened his own law practice after working for four years as a staff attorney to the St. Louis County Probate Court. Mr. Glick served as chair of the Probate and Trust Section of BAMSL. He received his B.A. from the University of Texas at Austin and his J.D. from the University of Missouri-Columbia, where he was inducted into the Order of the Barristers. Mr. Glick is a frequent speaker on many topics for continuing legal education seminars. Mr. Glick serves on the Governor's Advisory Council on Aging and on the Lt. Governor's Nursing Home Compare Leadership Task Force. The Law Offices of Thomas G. Glick focus on estate administration, estate litigation, and real estate law.



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loans.<sup>12</sup> The recent redefinition remains largely unexploited by the bar, but should have the effect of opening the procedure up to offset unsecured debt.

Despite the utility and popularity of the small estate affidavit, basic economics — distributions necessarily total under \$40,000.00 — limit the number appellate opinions interpreting the statutes. This lack of jurisprudence on the subject has resulted in a substantial variance in the specifics of the procedure amongst the circuits.<sup>13</sup> While no Missouri appellate court has addressed the advantages provided to affiants and beneficiaries, the courts have twice examined the rights of creditors; namely, the right to notice and the right to have claims heard and entered.

### Notice to Creditors

Section 473.097.5 requires the probate clerk to notify creditors by publication in those estates where the assets exceed \$15,000.00. Following U.S. Supreme Court precedent, the Missouri Supreme Court held this notice requirement unconstitutional with regard to known or reasonably ascertainable creditors. The largest beneficiary of the court's ruling may be the State of Missouri's Estate Recovery Program.

In *Tulsa Professional Collection Services v. Pope*, the United States Supreme Court established that "a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted."<sup>14</sup> The Court struck down the Oklahoma non-claim statute because it was not a "self-executing" statute in that it was triggered by some action by the probate court.<sup>15</sup> The Court clearly exempted from constitutional scrutiny statutes of limitations that were "self-executing," such as statutes based on the date of death of the decedent rather than on state action.<sup>16</sup>

The Missouri Supreme Court applied the dichotomy of *Pope* to the small estate affidavit procedure in *Estate of Bohannon*.<sup>17</sup> The procedure calls for the probate court, when granting a small estate certificate over \$15,000.00, to notify creditors by publication.<sup>18</sup> Because this notice requirement runs from a starting date based on action by the

probate division, the court compared it to Section 473.360, Mo. Rev. Stat. (2000) and determined that it was not "self-executing."<sup>19</sup>

Based on the conclusion that the small estate notice requirements were not self-executing, the court found that "[t]he requirement of publication notice set out in section 473.097.5 does not suffice to meet the requirements of due process."<sup>20</sup>

This holding was not particularly surprising; many commentators had anticipated the unconstitutionality of the provision in advance of this decision.<sup>21</sup> The court made clear that this decision did not impact the constitutionality of Section 473.444, Mo. Rev. Stat. (2000), which initiates a one-year claim period for all types of estates or distributions based upon date of death rather than any

12. L.1996, S.B. No. 494 § A.
13. I Mo. Estate Administration §2.1 (MoBar 4th ed. 1999, 2001).
14. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 490 (1988).
15. *Id.* at 489.
16. *Id.* at 488.
17. 943 S.W.2d 651 (Mo. 1997).
18. Section 473.097(5), Mo. Rev. Stat. (2000).
19. *Estate of Bohannon*, 943 S.W.2d 651, 655 (Mo. 1997).
20. *Id.*
21. I Mo. Estate Administration §2.1 (MoBar 4th ed. 1999) and John J. Sastry, *Missouri's Estate Recovery Program*, 50 J. Mo. B. 95, 98 (1994).



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state action.<sup>22</sup>

The notice requirement appears to have been a cornerstone to the State of Missouri's Estate Recovery Program.<sup>23</sup> This program was designed to recoup public assistance benefits, particularly Medicaid payments, from the assets of former beneficiaries of state programs.<sup>24</sup> Although the Division of Medical Services, which oversees the program, only seeks to obtain a very small portion of the payments made by the state, it has become the most important claimant against property

distributed pursuant to the small estate affidavits.<sup>25</sup> The Division of Medical Services acknowledges that actual notice from attorneys, not even contemplated in the statute, is the most important way it receives information about estates and distributions pursuant to small estate affidavits on which it should file claims.<sup>26</sup>

In 1994 an attorney for the Division of Medical Services asserted that attorneys for estates and small estate affiants have an affirmative obligation to check with their local

state officials to determine whether the decedent was a recipient of any state benefits that may be recouped.<sup>27</sup> However, a court may disagree. After weighing the effort required to research the necessary state records against the limited stakes in a small estate distribution, a court may well decide the Estate Recovery Program is not a "reasonably ascertainable" creditor. Questioning the expediency of such action is entirely in keeping with the court's decision in *Bohannon*, which ultimately rested on a balancing of the "state's legitimate interest in the expeditious resolution of probate proceedings" with the rights of creditors to receive notice.<sup>28</sup>

Notice to the Estate Recovery Program is particularly important not just because it is such a frequent claimant against small estates, but also because as a taxing authority it is exempt from some statutes of limitations.<sup>29</sup> As a result, the key question becomes not just who is entitled to notice but what rights creditors have and what procedure to follow once they receive notice.

## Filing, Hearing and Collecting Claims

Naturally the right to notice by itself lacks value to creditors. The value of the right to receive notice of the small estate proceedings relies on the subsequent action of the creditor. Unfortunately, notified creditors will find little guidance in the statute about the procedure for making a claim against a small estate distribution.<sup>30</sup>

Commentators hypothesized that this permitted three choices for creditors. First, if the local court rules permitted, they could file and set for hearing a claim against the distribution roughly in accordance with the procedures for claims under regular administration.<sup>31</sup> Second, if time allowed, a creditor could always rely on their right to force open an estate by filing a petition to require administration and/or a petition for letters of administration.<sup>32</sup> Third, a claimant could file a suit against the affiant and their surety, if any, based on a contract theory or a theory of promissory estoppel.<sup>33</sup> Despite this speculation, an appellate court had not addressed the matter until *State of Missouri v. Brundage*.<sup>34</sup> In that case the Western District of the Court of Appeals not only addressed the issue

22. *Bohannon*, 943 S.W.2d at 655.
23. Sastry, *supra* Note 21, 50 J. Mo. B. at 98.
24. *Id.* at 95.
25. John M. Zieger, *The State Giveth and the State Taketh Away: In Pursuit of a Practical Approach to Medicaid Estate Recovery*, 5 Elder L.J. 359 (1997).
26. Sastry, *supra* Note 21, 50 J. Mo. B. at 98.
27. *Id.*
28. *Bohannon*, 943 S.W.2d at 655.
29. *Estate of Thomas*, 743 S.W.2d 74 (Mo. 1988).
30. *State of Missouri v. Brundage*, 85 S.W.3d 43, 48 (Mo. Ct. App. 2002).
31. I Mo. Estate Administration §2.6 (MoBar 4th ed. 1999, 2001). This procedure is permitted in the St. Louis County Probate Division but not the St. Louis City Probate Division.
32. Section 473.020, Mo. Rev. Stat. (2000).
33. I Mo. Estate Administration §2.1 (MoBar 4th ed. 1999, 2001).
34. 85 S.W.3d 43 (Mo. Ct. App. 2002).

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