IN THE CIRCUIT COURT OF MACON COUNTY, MISSOURI

MARY KATHRYN CROCKER-WYSS a/k/a MARY KATHRYN WYSS	)	
Plaintiff,	)	
v.	)	Case No.: 23MA-CC00020
JOHN W. BRISCOE, *et al.*	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO AMEND

Petitioner Mary Kathryn Crocker-Wyss a/k/a Mary Kay Wyss, through counsel, opposes Defendants' Motion for Judgment on the Pleadings as follows:

I. Introduction.

More than two years after the filing of the original Petition and more than a year after the First Amended Petition (the "Petition") in this case, and after a fair amount of discovery has taken place, Defendants filed a Motion for Judgment on the Pleadings to challenge the sufficiency of the Petition. The thrust of the Petition is that in carrying out an estate planning engagement for Plaintiff's mother, John Briscoe negligently drafted a beneficiary deed for Plaintiff's benefit, which deed omitted a portion of the legal description to a particular tract (called "the Judy Place") and thereby deprived Plaintiff of an intended gift.

While paying lip service to the principle that all facts alleged in the Petition are to be taken as true, Defendants completely gloss over the allegations that John Briscoe himself initially believed that that entire Judy Place tract was to go to Plaintiff outside probate via said deed, as reflected by the fact that he represented to the probate court that there was no real estate in his mother's probate estate after she died. It was not until nearly a year after his mother's death that Plaintiff learned from the Ralls County Assessor that a portion of the tract was omitted from the deed. John Briscoe learned of the omission from Plaintiff. Only then did he notify the probate court of real estate that needed to be probated due to its failure to pass by deed.

More specifically, nine months before finally including real property as a probate estate asset, John Briscoe had opened the probate estate of the deceased mother in which he represented in the Application for Letters that there was no real property in mother's estate. Seven months after that, he filed a Notice of Intent to File a Final Settlement which repeated that there was no real property in her estate, which he claimed was ready to be closed. After subsequently learning of the failure of part of the Judy Place to pass by deed, John Briscoe wrote to the personal representative, "It has recently come to light that an 80 acre parcel of the Judy Place was omitted from Mary Kay's Beneficiary Deed on the Judy Place." A factfinder could find Mr. Briscoe's characterization of the deed as "Mary Kay's Beneficiary Deed on the Judy Place" as itself inculpating, especially in conjunction with his multiple representations to the court that the probate estate contained no real property - which would have been true had the beneficiary deed contained a complete legal description. A factfinder could find that John Briscoe had understood that the deed he drafted was intended to convey the entirety of the "Judy Place" to Plaintiff.

II. Standard for Motion for Judgment on the Pleadings.

The question presented by a motion for judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings. *In re Marriage of Busch*, 310 S.W.3d 253, 259 (Mo. App. E.D. 2010). Matters quoted in, attached to, or incorporated by reference into the pleadings may be considered, but a trial court should not sustain a motion for judgment on the pleadings if a material issue of fact exists. *Id*. When the defending party is the moving party for judgment on the pleadings, the allegations of the opposing party's petition or motion seeking relief are admitted for the purposes of the defending party's motion. *Id.* at 260. The facts pleaded in the defending party's responsive pleading are not admitted and are not self-proving. *Id.* It is error for a trial court to grant judgment on the pleadings based on a factual allegation in the responsive pleading. *Id*. Judgment on the pleadings should not be entered unless "the facts pleaded by the petitioner, together with the benefit of all reasonable inferences drawn therefrom, show that petitioner could not prevail under any legal theory." *Id.* (citations omitted). Unsurprisingly, motions for judgment on the pleadings are not favored by the courts. *Id*. at 259.

III. Memorandum

a. The Petition states a claim against John Briscoe.

Consistent with the foregoing principles, the Court must accept the following allegations as true and give Plaintiff the benefit of all reasonable inferences therefrom:

> 6. Plaintiff is the daughter of Margaret Caldwell ("Margaret"), deceased, and a non-probate transfer beneficiary of Margaret.

* * *

9. During her lifetime, Margaret owned a 268-acre tract in Ralls County referred to as the "Judy Place."

10. By Beneficiary Deed dated January 22, 2010 and recorded January 26, 2010 as Document No. 2010-47298 with the Ralls County Recorder of Deeds (the "2010 Beneficiary Deed"), Margaret named Plaintiff and her sister, Rebecca Caldwell, as transfer-on-death beneficiaries of the entirety of the Judy Place. * * *

11. Defendant John Briscoe drafted the 2010 Beneficiary Deed for Margaret.

12. By Beneficiary Deed dated July 3, 2012 and recorded of even date with the Ralls County Recorder of Deeds as Document No. 2012-52191 (the "2012 Beneficiary Deed"), Margaret expressly revoked the 2010 Beneficiary Deed to the Judy Place, and named Plaintiff as sole beneficiary-grantee of the tract of land described in the 2012 Beneficiary Deed. * * *

13. John Briscoe drafted the 2012 Beneficiary Deed for Margaret.

14. Plaintiff is and was not in an adversarial relationship to Margaret Caldwell.

15. The legal description in the 2012 Beneficiary Deed encompassed 188 acres of the Judy Place and omitted 80 acres of it. The omitted 80 acres were not disposed of by any other instrument.

16. Margaret died testate on or about August 26, 2020.

17. Following Margaret's death, on behalf of Teresa Caldwell, Defendants filed an Application for Letters of Administration with Will Annexed in *In the Estate of Margaret B. Caldwell*, Estate No. 20RL-PR00071.

18. In the aforementioned Application for Letters, filed December 1, 2020, Defendants represented that there was no real property in Margaret's estate.

19. As evidenced by Notice filed with the Ralls County Circuit Court, Probate Division, as of June 10, 2021, Defendants were preparing to submit a final settlement and petition for an order of distribution based on their understanding that there was no real estate in Margaret's estate.

20. Around the week prior to August 15, 2021, Plaintiff learned from the Ralls County Assessor that the 80 acres was not included in the 2012 Beneficiary Deed, whereupon she notified Defendant John Briscoe of the omission.

21. Margaret's will disposed of the residue of her estate, which included the 80 acres omitted from the 2012 Beneficiary Deed, to her three children, per stirpes.

22. Following Plaintiff's notification to Defendant John Briscoe of the omission of 80 acres from the 2012 Beneficiary Deed, Mr. Briscoe wrote to estate Personal Representative Teresa Caldwell on August 23, 2021, to notify her of the need to dispose of the 80 acres through probate:

> It has recently come to light that an 80 acre parcel of the Judy Place was omitted from Mary Kay's Beneficiary Deed on the Judy Place.
>
> Originally, there had been a Beneficiary Deed from Marge to Mary Kay and Becky for the entire Judy Place. That deed was dated January 22, 2010, and recorded January 26, 2010, as Document #2010-47298 in the Deed Records of Ralls County, Missouri. When Marge made a new Beneficiary Deed on July 3, 2012, it was to Mary Kay only, omitting Becky. I am not sure whether it was intentional on Marge's part or a mistake on my part that one parcel containing 80 acres was omitted from the 2012 Beneficiary Deed, which did in fact revoke the 2010 Beneficiary Deed. Accordingly, that leaves that particular 80 acre parcel as a portion of Marge's residuary estate.
>
> Accordingly, when the order of distribution is made, Mary Kay will own an undivided one-third interest in that 80 acre parcel; Becky will own an undivided one-third; and Champ and Cannon will each own an undivided one-sixth interest in that 80 acre parcel.
>
> I have prepared the amended inventory, on which I need your signature. * * *

23. On September 3, 2021, Defendants filed a Second Amended Inventory in Margaret's Estate to account for the 80 acres as part of the estate residue.
* * *

> 29. An attorney-client relationship existed between Margaret Caldwell and Defendants whereby Defendants performed services which Margaret Caldwell specifically intended to benefit Plaintiff directly. It was Defendant John Briscoe's own understanding and belief that such benefit was accomplished by the 2012 Beneficiary Deed, until he learned otherwise from Plaintiff.
>
> 30. In incorporating an incomplete and incorrect legal description of the Judy Place into the 2012 Beneficiary Deed, Defendants failed to use that degree of care, skill and learning as that used under the same or similar circumstances by attorneys, and Defendants were therefore negligent.
>
> 31. The harm to Plaintiff as a result of Defendants' negligence was readily foreseeable and marked by a high degree of certainty, in that failure to identify the property correctly would and did result in its disposition to other and additional persons, resulting in Plaintiff and the decedent's estate having interests inconsistent with each other.
>
> 32. Defendants' negligence was the direct and proximate cause of Plaintiff's injury.
>
> 33. Defendants are and should be held liable to Plaintiff because future harm may only be prevented by allowing intended beneficiaries of failed transfers some avenue of recovery in malpractice claims, particularly where the decedent's estate has interests inconsistent with that of the intended beneficiary.
>
> 34. The legal profession will not be unduly burdened by being required to act competently toward identifiable persons that a client specifically intends to benefit when such persons have no other viable remedy and where such persons are not in an adversarial relationship to the client.
>
> 35. Plaintiff has been damaged . . . .

The centerpiece of Defendants' "failure to state a claim" argument is that Plaintiff lacks standing because Plaintiff was not herself a client of attorney John Briscoe. The four commonly recited elements of a legal malpractice action are: "(1) that an attorney-client relationship existed; (2) that defendant acted negligently or in breach of contract; (3) that such acts were the proximate cause of the plaintiffs' damages; [and] (4) that but for defendant's conduct the plaintiffs would have been successful in prosecution of their [underlying] claim." *Boatright v. Shaw*, 804 S.W.2d 795, 796 (Mo. App. E.D. 1990).

The Missouri Supreme Court has held that identifiable intended beneficiaries of an attorney's engagement may satisfy the element of attorney-client relationship:

> [T]he first element of a legal malpractice action may be satisfied by establishing as a matter of fact . . . an attorney-client relationship existed in which the attorney-defendant performed services specifically intended by the client to benefit [non-client] plaintiffs. As a separate matter, the question of legal duty of attorneys to non-clients will be determined by weighing the[se] factors . . .:
>
> (1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiffs.
>
> (2) the foreseeability of the harm to the plaintiffs as a result of the attorney's negligence.
>
> (3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct.
>
> (4) the closeness of the connection between the attorney's conduct and the injury.
>
> (5) the policy of preventing future harm.
>
> (6) the burden on the profession of recognizing liability under the circumstances.

Donahue v. Shughart, Thomson and Kilroy, P.C., 900 S.W.2d 624, 628-29 (Mo. banc 1995).

In *Donahue*, the Supreme Court found all criteria satisfied. *Id*. In that case, the decedent client had sent the defendant attorney $150,000 in checks written on his trust account, payable to plaintiffs (who were not trust beneficiaries and who would thus not receive the trust funds unless the checks were cashed before death) with oral instructions to ensure that plaintiffs receive the proceeds at client's death, and to prepare a beneficiary deed to client's home to transfer to one of the plaintiffs a 50% interest in client's home at client's death. *Id.* at 625. Client then sent another $100,000 check payable to one of the plaintiffs with similar instructions to counsel that the funds be distributed at client's death. *Id.* The attorney failed to see to it that the beneficiaries cashed the checks or recorded the beneficiary deed before the client's death, and the checks and deed failed. *Id.* The Supreme Court found that "the facts pleaded here are sufficient to assert a breach of a legal duty and to state a cause of action in a lawyer malpractice action" in that "[decedent's] primary purpose was to benefit the plaintiffs and . . . [i]t is clear that plaintiffs cannot be characterized as incidental or indirect beneficiaries." *Id.* at 629.

Similarly, in *Johnson v. Sandler, Balkin, Hellman, & Weinstein, P.C.*, 958 S.W.2d 42 (Mo. App. W.D. 1997), the court of appeals found that intended remainder beneficiaries of an inter vivos trust had standing to sue the decedent's estate planning attorneys for failure to employ, or at least to advise of, alternatives which would protect the intended beneficiaries from a widow's spousal election. In that case, an attorney had drafted trust amendments that left half of the decedent's trust assets to his three daughters and the other half in a QTIP trust for his second wife for life, remainder to the daughters. *Id.* at 45. After the client died, the widow exercised a spousal election which allowed her to take the QTIP assets free and clear of trust and which therefore deprived the daughters of their remainder interest in those QTIP assets. *Id.*

Contrary to Defendants' unsupported and utterly fabricated assertion that a decedent "client's intent to benefit a non-client third-party must be determined from the four corners of the executed, but failed, testamentary[1] document," the *Johnson* court considered the circumstances surrounding the drafting of the trust and its amendments to determine the decedent client's intent. *Id*. at 46, 50 – 52. Indeed, the Johnson court remarked that, even though "there [was] no direct evidence that [decedent] told [defendant attorneys] or anyone else that he specifically intended that the amendments to the trust prepared by [defendants] benefit the appellants," it was "reasonable to infer" the decedent's "intent to benefit his daughters." *Id.* at 50.

Rather than assume that the decedent was content with an estate plan that his widow could alter via spousal election, which is what the "four corners of the documents" would indicate, the *Johnson* court found, among other things that (1) "there is *the reasonable inference* that the use of these forms was initiated by the law firm because, in the attorneys' analysis of [decedent's] estate plan, the forms were deemed advantageous to effectuate

[1] Defendants and some courts imprecisely use the term "testamentary document" to refer not only to wills but also to will substitutes. Strictly speaking, a "testamentary document" is a "will, a draft of a will or written instructions for a will made by or at the request of, or under the instructions of, the testator, and any document purporting to be evidence of the contents, or to be a copy, of a will which is alleged to have been lost or destroyed." *LexisNexis Legal Glossary*. (Hence terms like Letters Testamentary, testator, and the like, associated with wills.) The authorities recognizing duties to intended beneficiaries involve not just wills but will substitutes. For instance, *Donahue v. Shughart, Thomson and Kilroy, P.C.*, 900 S.W.2d 624, 628-29 (Mo. banc 1995) deals with failed lifetime gifts which the client mistakenly believed could be deferred until death, and a failed beneficiary deed. Similarly, *Johnson v. Sandler, Balkin, Hellman, & Weinstein, P.C.*, 958 S.W.2d 42, 48 (Mo. App. W.D. 1997) deals with intended beneficiaries of an inter vivos trust. A case on which Defendants now rely, *Alberts v. Turnbull Conway, P.C.*, 641 S.W.3d 370 (Mo. App. W.D. 2022), which involves an undrafted trust amendment rather than a will, imprecisely discusses *Johnson* as dealing with "testamentary documents" and refers to the trust settlor as a "testator." *Id.* at 375, 376. Defendants and *Alberts*' reference to "testamentary documents" thus pertains to all methods to gift one's property to an intended third person beneficiary or donee.

[decedent's] intent;" (2) the widow's "statement supports the *reasonable inference* that she was not a party to discussions concerning the amendments . . .;" and (3) "[f]rom the appellants' evidence, it is *reasonable to infer* that [decedent] retained [defendant] firm to handle his estate matters intending to benefit the appellants . . .." *Id.* at 51, 52. That's a lot of inference going on outside the four corners of documents.

Defendants' effort to defeat Plaintiff's case comes down to an argument that, notwithstanding a recognized duty to intended beneficiaries, "attorneys do not owe any duty to 'prospective' beneficiaries." For this argument, Defendants rely on *Alberts v. Turnbull Conway*, P.C., 641 S.W.3d 370 (Mo. App. W.D. 2022), which involved the failure of an attorney to draft estate planning documents *at all* prior to a client's death. The Court of Appeals distinguished the case before it with *Donahue* and *Johnson* for the simple reason that "[w]here the relevant testamentary documents are never executed (like this case), issues related to the testator's intent are far more tenuous than where (as in *Donahue* and *Johnson*) the testator's intent has been manifested in an executed document," "[b]ecause the lack of an executed testamentary document introduces rampant speculation into the analysis . . .." *Id.* at 375-76. The *Alberts* court noted that because a client may change his mind and not even execute the documents, it held that "we do not find that a legal duty should be imposed upon attorneys . . . to *prospective* beneficiaries for failure to prepare testamentary instruments that *might have been executed* had they been timely prepared." *Id.* at 378 (italics in original).

The contrast between *Alberts* and this case could hardly be clearer. John Briscoe did in fact draft documents which Margaret Caldwell did in fact sign. He drafted a defective document which would be easy for Margaret Caldwell to mistake as correct because it involved a defective legal description. We know without a doubt from the executed documents that Margaret Caldwell intended to benefit Plaintiff. We can "reasonably infer" from the circumstances that she intended her real estate to avoid probate and for Plaintiff therefore to receive the entirety and not just a portion of the "Judy Place" via beneficiary deed. When viewed together, the following circumstances, which are by no means exhaustive, suggest this as Margaret Caldwell's intent:

- The Beneficiary Deed dated January 22, 2010 and recorded January 26, 2010 as Document No. 2010-47298 with the Ralls County Recorder of Deeds (Exhibit 1 to the First Amended Petition), wherein Margaret Caldwell named Plaintiff Mary Kay Wyss and her sister, Rebecca Caldwell, as transfer-on-death beneficiaries of *the entirety* of the Judy Place, including the 80 acre strip which is the subject of this lawsuit (Petition ¶¶ 9-11);
- The Beneficiary Deed executed and recorded July 3, 2012 with the Ralls County Recorder of Deeds as Document No. 2012-52191 (Exhibit 2 to the First Amended Petition), wherein Margaret Caldwell expressly *revoked* the 2010 Beneficiary Deed to the Judy Place, and named Plaintiff Mary Kay Wyss as sole beneficiary-grantee of the tract of land described therein (Petition ¶¶ 12-13, 15), which John Briscoe understood to be the entirety of the Judy Place as shown by, among other things:
    - The Application for Letters of Administration with Will Annexed in *In the Estate of Margaret B. Caldwell*, Estate No. 20RL-PR00071, filed December 1, 2020, wherein John Briscoe represented that there was no real property in Margaret's estate, reflecting Mr. Briscoe's understanding and expectation that the omitted 80 acres were intended to be included in, and to be conveyed by, the 2012 Beneficiary Deed (Petition ¶¶ 17-18);

  - John Briscoe's subsequent reference to "Mary Kay's Beneficiary Deed on the Judy Place" in his discussion of the "80 acre parcel of the Judy Place was omitted" from that Beneficiary Deed (Petition ¶ 22);
  - John Briscoe's acknowledgement that it could have been "a mistake on my part that one parcel containing 80 acres was omitted from the 2012 Beneficiary Deed, which did in fact revoke the 2010 Beneficiary Deed"– this is significant not only because it is consistent with his omission of real estate from the probate court inventory but also because he links the 2012 Deed directly to the revocation of the 2010 Beneficiary Deed which was to convey the entirety of the Judy Place. (Petition ¶¶ 9-13, 18, 22).
- The fact that the 80 acres was not actually identified in the will but passed thereunder only as estate residue, a catch-all for estate odds-and-ends (Petition ¶ 21).

It is thus clear from the executed estate planning documents which identify Plaintiff as an intended beneficiary, Plaintiff has standing under *Donahue* and *Johnson*, and therefore the Petition states a claim on which relief may be granted. *Donahue v. Shughart, Thomson and Kilroy, P.C.*, 900 S.W.2d at 628-29; *Johnson*, 958 S.W.2d at 52.

b. The Petition is timely.

Defendants argue for dismissal because the five-year statute of limitations applicable to legal malpractice claims, § 516.120(4), RSMo., has supposedly expired in that the defective deed was drafted in 2012 and this suit was filed more than five years after that. This is not a serious argument.

A limitations period does not begin running until damage is both (1) sustained and (2) capable of ascertainment. *Bettis v. Potosi R-III School Dist.*, 51 S.W.3d 183, 186 (Mo. App. W.D. 2001). A beneficiary deed is not even effective until the grantor's death,

§ 461.025.1, RSMo.[2], and a beneficiary under a beneficiary deed has no rights in the property prior to the grantor's death. § 461.031.1, RSMo.[3] Indeed, an owner can change or remove a beneficiary and can transfer the property any time during the donor's lifetime (thus terminating the beneficiary designation) and the beneficiary would have no recourse. § 461.033, RSMo. Thus, damages from a defect in a testamentary or nonprobate transfer document such as a beneficiary deed cannot even be sustained, let alone ascertained, any earlier than the grantor's death.

Roach v. Landis, 1 S.W.2d 203 (Mo. App. K.C.D. 1927), which Defendants cite for the proposition that a "valid deed commences the limitations clock" pertains to a tax deed, which necessarily entails a standard inter vivos transfer. *Id.* at 205. Such a deed would be effective upon such deed's delivery. *See Hammack v. Coffelt Land Title, Inc.*, 348 S.W.3d 75, 80 (Mo. App. W.D. 2011) (for a deed to be operative to transfer land ownership, the deed must be delivered). Because a beneficiary deed is not effective until the grantor's death, the common feature shared by an inter vivos deed and a transfer on death deed is

[2] That provision states:

> A deed that conveys an interest in real property to a grantee designated by the owner, that expressly states that the deed is not to take effect until the death of the owner, transfers the interest provided to the designated grantee beneficiary, *effective on death of the owner*, if the deed is executed and filed of record with the recorder of deeds in the city or county or counties in which the real property is situated prior to the death of the owner. A beneficiary deed need not be supported by consideration or be delivered to the grantee beneficiary. A beneficiary deed may be used to transfer an interest in real property to a trust estate, regardless of such trust's revocability.

[3] "Prior to the death of the owner, a beneficiary shall have no rights in the property by reason of the beneficiary designation and the signature or agreement of the beneficiary shall not be required for any transaction respecting the property." § 461.031.1, RSMo.

that the "limitations clock" would commence at the moment of each deed's effectiveness to transfer ownership. § 461.025.1, RSMo.

Defendants' argument that "recording a deed charges interested parties with constructive knowledge of the recorded instrument" is thus of no help to them. For one thing, the cases on which Defendants rely for this proposition, pertain to conveyances that were actually effected and thus otherwise irreversible at the time of the recordation. *Gibson v. Ransdell*, 188 S.W.2d 35, 38 (1945); *Coleman v. Alderman*, 357 Mo. 758, 210 S.W.2d 994, 996 (1948). These cases are of no help for the additional reason that they are no longer good law. They involved now-superseded limitations statutes that had no discovery or ascertainment-of-damages component and thus are now "not persuasive authority." *Bueneman v. Zykan*, 181 S.W.3d 105, 111 (Mo. App. E.D. 2005) (application for transfer denied). "[T]he purpose of the recording laws in general is to establish a priority between innocent claimants to the same property, not to give security" to tortfeasors. *Id*. "The recording of a deed or mortgage . . . is constructive notice only to those who have subsequently acquired some interest or right in the property under the grantor or mortgagor." *Id*. "The record of an instrument is notice only to those who are bound to search for it." *Id*. It is not reasonable to expect a plaintiff who does not have a current interest in property to search the recorder of deeds' records for problems. *Id*.

Besides "ascertainment of damage," a cause of action requires actual sustainment of damage. *Bettis v. Potosi R-III School Dist*., 51 S.W.3d at 186. As Plaintiff could not have been a claimant under any beneficiary deed until her mother's death, she cannot be charged with knowledge of some defect before she was even damaged by it. *Id*. There is absolutely no authority for the proposition that an action is time limited based on anticipation that one might, sometime in the future, be damaged, and Defendants' statute of limitations argument must fail.

IV. Alternatively, if the Court finds the Petition deficient, it should permit Plaintiff to amend it to allege even more facts that show Margaret Caldwell's intent to benefit her daughter.

The current Petition is by no means exhaustive in what it could include to demonstrate satisfaction of the *Donahue* standard. Besides the facts already alleged, the following would make nice (and truthful) additions to a Second Amended Petition:

- No other real estate of Margaret Caldwell's – and there was a lot of it – passed in any manner other than by beneficiary deed.
- Margaret Caldwell had three children: Plaintiff, Mary Kay Wyss; Rebecca Caldwell; and Edmond B. Caldwell, deceased, survived by Teresa Caldwell and his and Teresa's two adult children, Champ and Cannon.
  - Teresa Caldwell received from Margaret a complete tract called the Baker Place outside of probate pursuant to beneficiary deed recorded with the Ralls County Recorder January 10, 2013 as Document #2013-53376;
  - Rebecca Caldwell received a life estate in trust (because of her inability to manage her own assets) in a complete tract known as the Quinn Place outside of probate pursuant to beneficiary deed recorded with the Ralls County Recorder July 3, 2012 as Document #2012-52819, remainder to her two children free and clear of trust;
    - Note that Rebecca's beneficiary deed bears the same date as the beneficiary deed revoked her interest in the Judy Place;
  - Mary Kay Wyss was the only one who did not get a complete tract by beneficiary deed. Instead, she got only a portion of the Judy Place outside of

probate, and had to share its 80 acre frontage with Rebecca and Teresa due to the requirement that it go through probate as part of the estate residue.

  - Because the 80 acre frontage had to pass through probate as mere "residue," Rebecca got an interest in a portion of the Judy Place in fee simple, free and clear of the control of a trustee, something Margaret wanted to avoid as shown by the beneficiary deed that gave Rebecca only a beneficial life interest in the Quinn Place.
  - Champ Caldwell has testified that Margaret Caldwell had long and repeatedly stated before her death that it was her desire to leave the Judy Place to Mary Kay, the Quinn Place to Rebecca, and for Edmond/Teresa to get the Baker Place.

- The error in the "Second Beneficiary Deed" to Plaintiff which omitted a portion of the Judy Place came about this way:
  - In 1979, John Briscoe prepared for Margaret and her husband a deed to multiple tracts of real estate which included the Judy Place;
  - In that 1979 Deed, the Judy Place boundaries were not set out in one continuous description, but were interrupted by descriptions of unrelated parcels, like so (the highlighted text being the Judy Place):

to-wit: All of the Southeast Quarter (SE-1/4) of the Southeast Quarter (SE-1/4) of Section Eight (8) and the Northeast Quarter (NE-1/4) of the Northeast Quarter (NE-1/4) of Section Seventeen (17) in Township Fifty-four (54), Range Seven (7) West. Also: The Northwest Quarter (NW-1/4) of the Northeast Quarter (NE-1/4) of Section Seventeen (17); and the South 51-1/2 acres of the West Half (W-1/2) of the Southeast Quarter (SE-1/4) of Section Eight (8) being the land set apart to Nancy J. Bear in the division of the estate of George Shaver; and 11-1/2 acres in the Northwest corner of said West Half (W-1/2) of the Southeast Quarter (SE-1/4) of said Section Eight (8) being the land set off to Louisa Rouse in said Division of said George Shaver's Estate all in Township Fifty-four (54), Range Seven (7) West the last described tract being 103 acres, more or less. Also: All of the Southwest Quarter (SW-1/4) of the Southeast Quarter (SE-1/4) and Twenty (20) Acres the West Half (W-1/2) of the Northwest Quarter (NW-1/4) of the Southeast Quarter (SE-1/4) and Thirty (30) acres off the East side of the Southwest Quarter (SW-1/4) being in Section Ten (10), Township Fifty-four (54), Range Seven (7) West except a certain road or gateway along the branch which runs through said tract of land, said roadway being established by long usage. Also: All of the North Half (N-1/2) of the Northwest Quarter (NW-1/4) of Section Sixteen (16), Township Fifty-four (54), North, Range Seven (7) West comprising 80 acres, more or less. Also: the North Half (N-1/2) of the West 130 acres of the Southwest Quarter (SW-1/4) of Section Ten (10), Township Fifty-four (54), Range Seven (7) West contain-

- In the 2010 Beneficiary Deed to the Judy Place, John Briscoe used a different, more modern description that did not include the 1979 Deed's odd references to "land set apart to Nancy J. Bear" and "George Shaver's estate," etc. The area described in the highlighted language from the 2010 Beneficiary Deed corresponds (by color) with the area described in the highlighted language in the 1979 Deed, even though the wording and order are quite different. The orange highlighting pertains to the 80-acre frontage that ultimately got left off the 2012 Beneficiary Deed:

> The North Half (N½) of the Northwest Quarter (NW¼) of Section Sixteen (16), Township Fifty-Four (54) North, Range Seven (7) West; the North Half (N½) of the Northeast Quarter (NE¼) of Section Seventeen (17), Township Fifty-Four (54) North, Range Seven (7) West; all of the Southeast Quarter (SE¼) of the Southeast Quarter (SE¼) of Section Eight (8), Township Fifty-Four (54) North, Range Seven (7) West; and all of the West Half (W½) of the Southeast Quarter (SE¼) of said Section Eight (8), Township Fifty-Four (54) North, Range Seven (7) West, excepting seventeen (17) acres, more or less, in the Northeast corner of the West Half (W½) of the Southeast Quarter (SE¼) of said Section Eight (8), Township Fifty-Four (54) North, Range Seven (7) West. All of said property being subject to rights-of-way of record.

- The 2012 Beneficiary Deed did not simply re-use the superior description from the 2010 Beneficiary Deed, but reverted back to the awkward description from the 1979 Deed, except that it omitted the description of the 80 acre frontage (the "orange" text), which had lacked continuity in the 1979 Deed. The yellow and green highlighted text from the 2010 Beneficiary Deed corresponds with the yellow and green highlighted text from the 1979 Deed:

All of the Southeast Quarter (SE¼) of the Southeast Quarter (SE¼) of Section Eight (8) and the Northeast Quarter (NE¼) of the Northeast Quarter (NE¼) of Section Seventeen(17) in Township Fifty-Four (54), Range Seven (7) West. Also: The Northwest Quarter (NW¼) of the Northeast Quarter (NE¼) of Section Seventeen (17); and the South 51½ acres of the West Half (W½) of the Southeast Quarter (SE¼) of Section Eight (8) being the land set apart to Nancy J. Bear in the division of the Estate of George Shaver; 11½ acres in the Northwest corner of said West Half (W½) of the Southeast Quarter (SE¼) of said Section Eight (8) being the land set off to Louisa Rouse in said Division of said George Shaver's Estate all in Township Fifty-Four (54), Range Seven (7) West the last described tract being 103 acres, more or less.

- By his own admission, John Briscoe does not work from old drafts of documents to create new ones, because he does not keep document drafts on a computer but deletes them; therefore, he created each deed from scratch.
- Quite apparently, John Briscoe got a copy of the 1979 Deed from which to create a description of the Judy Place for the 2012 Beneficiary Deed, and neglected to note that an 80 acre frontage (the orange highlighted text) was separated from the entire tract by an unrelated description, and as a result omitted it.

If the Court were to find that the current Petition is somehow deficient but that these additional allegations would cure it, it should permit Plaintiff to amend now rather than dismiss and require a re-filing, as such would be an inefficient use of resources. Leave to amend should be freely granted when justice so requires. Rule 55.33(a). No one would be prejudiced by the proposed amendment as there is no trial date set, discovery is not closed, and all of these allegations have already been developed in this case and are not remotely a surprise to anyone.

V. Conclusion

Wherefore, Plaintiff respectfully prays that this Court deny Defendants' Motion for Judgment on the Pleadings or in the alternative, that it grant Plaintiff leave to file a second amended petition to include additional allegations Margaret Caldwell's specific intent to benefit Plaintiff, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

McDOWELL, RICE, SMITH & BUCHANAN

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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 10, 2024, the above and foregoing was filed with and served via the court's electronic filing system with notice to all attorneys of record.

/s/ Hugh L. Marshall