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Dear MSLaw Students, Faculty, Administration, and Alumni,

MSLaw’s Student Bar Association is excited to welcome you to the 2016-2017 academic year. As the SBA President, it is my pleasure to introduce the other 2016-2017 officers: Vice President Nikolas Amicone and Treasurer Alissa Doiron. We currently have an opening for Secretary (contact me for details).

The SBA serves to represent the student body of MSLaw within the school and the community. As MSLaw’s student government, the SBA has its own Constitution and Board of Governors (comprised of SBA officers and representatives who represent first-, second-, and third-year classes). One of our goals this year is to increase student participation in the SBA’s various social and service-related activities. To that end, I’m happy to report that the SBA’s Annual “Welcome and Welcome Back Barbeque” saw a dramatic increase in attendance, a trend that I hope will continue throughout the academic year.

I strongly encourage my fellow students to attend and participate in the SBA’s meetings. All MSLaw students are SBA members. Your ideas and input are critical to our mission: we cannot represent the student body without your help. As you begin or continue along with your studies here at MSLaw, I ask you to consider becoming a class representative. Application forms for Class Representative are located in a folder attached to the SBA bulletin board. Class representatives are allowed to vote on SBA matters, and there is no limit to the number of class representatives allowed. The term for these positions starts the day of the Law Day Gala in May and runs until the following gala.

The SBA generally meets every other week to discuss issues facing the student body and to plan for upcoming events. Please see our bulletin board located on the second floor, like our Facebook page (MSL SBA), and sign up for e-mail notifications regarding the dates and times of future SBA meetings and events. The SBA is in the process of planning this year’s Law Day Gala, as well as some other informal social gatherings. We welcome your ideas, help, and participation with these events.

The SBA also has a student mentor program, a great resource and networking tool for new students. Hours are posted on the door of the SBA office, which is located in the library just before the quiet section. If you have any questions or comments please e-mail us at mslsba@gmail.com. We look forward to hearing from you!

Sincerely,
David N. Del Papa
President, MSL SBA 2016-2017
Greetings MSLaw Family:

To the class of 2019, let me be the first to welcome and congratulate you on your excellent choice of MSLaw. You are in for an exciting journey over the next three years, as you will not only learn the law, but you will learn how to be a lawyer as well. The National Black Law Student Association’s (NBLSA) theme for this academic year is “Embracing our Legacy: Pursuing Racial Justice and Lasting Social Action,” and your local chapter here at MSLaw strives daily to achieve this goal. We believe that the first step in achieving a goal is believing that it can be done. It is our mission to make sure that the MSLaw chapter of BLSA and its members are performing to the best of their abilities at all times, both in the community and in the classroom. We will present a strong and intellectual presence wherever we are. We push to excel past expectations in all aspects of our daily human endeavors. BLSA presents great opportunities to network and work with your fellow classmates not only at MSLaw, but also around the country. It also presents the opportunity to meet attorneys who were a part of their school’s BLSA chapter.

The 2015-2016 academic year was one of success and excitement for the BLSA community. BLSA continued its work with helping out at the local Lawrence YMCA and holding its annual food and clothing drive to support local families in need. MSLaw’s BLSA chapter has a strong tradition in helping the community and we will continue to keep this tradition rich and healthy. The BLSA trial teams (coached by Dean Coyne and Professors Harayada and Dimitriadis) came just one point short of going back to the National Championships for a fifth straight year. Although the loss was a tough one to swallow, the team did tackle some tough competition in its route to such a heart breaking defeat. Some of the stiff competition were the highly respected New York School of Law, Brooklyn School of Law, and St. John’s Law School. This year the trial teams plan on getting back on track with its winning traditions and returning to the National Championships.

BLSA celebrated Black History Month by bringing in Brockton’s very first African-American Councilwoman, Shayna Barnes. She discussed in detail her political experience and the steps it takes to achieve such success. She also gave some insight on some of the trials and tribulations that she had to overcome while running for office. The discussion was one of great insight, and students gained a lot of knowledge from the session.

BLSA’s goals this year are to continue the rich traditions of excellence that we have both in the community and in the classroom. We plan to stay involved with the local YMCA’s and continue our annual food and clothing drive for those in need. If you would like to expand your networking community while being an asset to your school and community then BLSA is for you! Feel free to contact me at BLSAPres@mslaw.edu. Other board members for the 2016-2017 school year are:

President: Jullian Jones  
Vice President: Devin Brown  
Secretary: Rose Thompson  
Treasurer: Karen Areyzega  
Community Service Director: Cassaundra Troiano

We look forward to having you on our team to continue “Fortifying the Road to Excellence.”

Jullian Jones  
President
Many of us get good advice. Some of us recognize its value. Still fewer have the wisdom and determination to apply it. David Hoey is a member of the last group. His college wrestling coach at Western New England sold him on “the three D’s”: dedication, determination, and discipline. And a senior lawyer told him not long after he graduated MSLaw to find an area of the law no one else was doing, do it, get good at it, and tell everyone you’re good at it.

David is now a nationally recognized specialist in the representation of injured and neglected nursing home residents, has been regularly ranked among the top lawyers in the country, and not only practices but teaches and is the Dean of Students of the Keenan Ball Trial College in Atlanta, which draws attorneys from around the country for small-group civil trial practice training with a 12-course curriculum focusing on major cases being or about to be handled by those attorneys.

Yet, as with most MSLaw students and grads, the road was far from straight or barrier-free. David was headed for the Air Force after high school, ready to follow a grandfather who’d been a pilot during World War II. (A great grandfather had been a leftfielder for the Red Sox and played with Cy Young.) That path was sidetracked by behind-the-scenes machinations of that college wrestling coach (a Vietnam combat vet) who, unknownst to David, was determined to recruit him. After graduating with majors in criminal justice and sociology, David tried to get hired by the Department of Justice or the FBI, but didn’t have the law or accounting degree needed unless he had at least a couple of years of field experience. So he went into private security and gained a couple of years of P.I. training, got his license, and hoped to get into the FBI but hit the wall of the six-year Reagan hiring freeze.

Law school would have looked like the next step, but, David says, at the time he hated to read and didn’t know how to write well. An uncle offered to pay for an LSAT prep course, but neither the course nor three attempts at the LSAT seemed to get him any closer, despite his looking at law schools all over the country. Then he saw an ad in the Sunday Boston Globe for a new law school that was about to move into a new building and went to an Open House at the old MSLaw quarters by the railroad tracks in downtown Andover. He liked what he saw and heard: it was local; the LSAT didn’t matter; the people all seemed blue-collar types; and David found himself in his comfort zone. David applied his “three D’s” and got his degree (in fact, he had these words on the wall of his study), though the bar exam required a second try with the extra time to which he was demonstrably entitled but failed to ask for on the first go-round.

Then a thousand résumés mailed all over Massachusetts and Connecticut yielded a thousand rejections. Unable to get hired as an associate, David took a clerking job with a Boston law firm for a couple of years, a job that yielded him praise for his work but no opportunity for advancement. That’s when a senior partner gave him the advice mentioned above. David’s mother had been running a nursing home that was being bought out by a large chain, and she warned David that “these people are going to get neglected.” At about that time, David saw that the American Trial Lawyers Association was holding a seminar in Las Vegas on nursing home litigation. He financed the trip with money he borrowed, and on the trip back wrote a newsletter that he then distributed to all the attorneys he knew and asked each of them to forward it to two others, quickly developing a list of a thousand names and addresses for networking. That was the beginning, and the
three D’s have kept him moving and growing—not much in size, he likes to keep things small and manageable (hiring numbers of MSLaw students and grads)—but in referral contacts, knowledge, skill, and reputation. Hoeylaw, as it’s called, concentrates in representing the injured and neglected elderly. His motto is “protecting the dignity of the elderly,” and his mission statement is Advocacy, Education through Litigation. He has the highest verdict in all of New England against a nursing home and a punitive damages award. In other words, David is just another typical, exceptional MSLaw alumnus.

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MSLaum

John Bosse is clearly impressive by the numbers: since graduating in 2006, over a three-year span as an assistant district attorney, Bosse drafted 55 appellate briefs and argued 11 cases in front of the Massachusetts Supreme Judicial Court. Bosse now serves as assistant general counsel at The Massachusetts Sex Offender Registry Board, which is under the Executive Office of Public Safety and Security. He concentrates on appellate work, drafting appellate briefs for review by the SJC and Appeals Court. Several of the cases on which Bosse worked involved issues of first impression or constitutional issues.

“One case that I particularly enjoyed working on at the DA’s office was defending a second-degree murder conviction,” Bosse recounted. “The trial prosecutor worked extremely hard to obtain the conviction, despite the fact that the body of the male victim was never recovered. After years of litigating post-conviction motions, I argued the case at the Appeals Court, and the Court affirmed the defendant’s conviction. Although the victim’s family does not have complete closure because the body has not found, they do have the satisfaction that the defendant’s conviction was affirmed and that he remains in state prison.”

After being admitted to the Massachusetts bar in 2006, Bosse began his legal career for the Salem, Massachusetts legal department as an associate attorney from 2006 through 2008. He then worked as an ADA at the Berkshire County district attorney’s office, from 2008 to 2012 in the District Court Division and then from 2012 to 2015 in the Appeals Division.

Bosse also worked on the case of Commonwealth v. Gomes, which he argued at the SJC. In that case, the Court not only affirmed the defendant’s conviction for mayhem, but also used the case as an opportunity to adopt a provisional jury instruction on eyewitness identification. Commonwealth v. Gomes, 470 Mass. 352 (2015). He also argued Commonwealth v. Keefner, a case where the SJC concluded that the possession of marijuana with the intent to distribute remains a criminal offense, even if the amount possessed by the defendant is one ounce or less, a vital case in the wake of Massachusetts citizens voting to decriminalize the simple possession of one ounce or less of marijuana. Commonwealth v. Keefner, 461 Mass. 507 (2011).

“One of the biggest challenges is the volume of cases that you work on as a public safety attorney,” Bosse said. “You have to stay organized and develop excellent time management skills. If you do not, the work will become overwhelming, and you will not be effective in advocating for public safety and a fair outcome to the particular case that you are assigned.”

In 2013, Bosse received an award for outstanding service, spirit, and professionalism as a prosecutor at the annual Massachusetts Prosecutor’s Conference in Boston. In May, he was recognized as one of 20 “Up & Coming Lawyers” by Massachusetts Lawyers Weekly and the Massachusetts Bar Association.

“Working with a number of government attorneys and law enforcement officials who are dedicated to public safety goals and missions is a certainly a rewarding part of my job,” Bosse said, also noting the thrill of arguing cases at the SJC and the Appeals Court on a routine basis. “It is an honor to present the government’s case to a panel of justices who are extremely intelligent and have great legal minds.”
As an International representative for the International Brotherhood of Electrical Workers (IBEW), responsible for servicing and assisting IBEW local unions in New England, Ed Starr ('07) is a busy man. And that’s just how he likes it. “I’m taking my first vacation in 10 years,” he admitted. In fact, when he isn’t working for the union, he is working for others: in his limited amount of leisure time, Ed volunteers, serving on various boards, and teaches employment/human resource law classes at a community college. “I just like being in the community—that’s fun for me,” he said.

Ed entered MSLaw in the middle of transitioning from his first career as a FiOS technician with Verizon, a job he held for 18 years, to his current one as a union leader. He credits MSLaw with giving him the ability to analyze an issue. “Every day, I use the skills I learned at MSLaw, whether it’s proposing legislation on behalf of the consumer or negotiating new contracts,” stated Ed. “The fact that I became a lawyer instantly gave me stature at the bargaining table, as no other lawyer was present in the room during negotiations.”

Negotiations have been a big part of Ed’s job, and constitute some of his biggest accomplishments. He negotiated a collective bargaining agreement with Verizon, representing more than 40,000 Verizon workers in all jurisdictions. He was also chosen to work with the Federal Mediation and Conciliation Service in Washington, D.C. to mediate final resolutions in the contract. (Ed was also involved in the most recent Verizon strike last spring but had to leave the negotiations when he started his new job two days into the strike.)

Although he works long hours and on any given day can find himself in any part of New England, Ed loves his job and wouldn’t do anything else. “Each day is different, in the obstacles to overcome with local unions,” he explained. “One day it might be negotiating, the next it might be working on public policy or lobbying at the state or federal level. Another day I might be doing the legal work associated with arbitrations and negotiations or filing unfair labor practice charges with the National Labor Relations Board.” Whatever the day’s tasks are, Ed sees himself doing them until he retires.

To incoming students at MSLaw, Ed strongly advises volunteering in the community. “Get out there and network; meet people,” he said. “Serve on local communities. Gain the experience that will greatly help you when you graduate—especially if you do not know what you want to ultimately do.” Ed credits his volunteer opportunities with giving him skills to succeed in his current career. “When I was at MSLaw, I served on the Greater Lawrence Community Action Council, as well as on the Middlesex Community College Continuing Education Advisory Board and University of Lowell Labor Extension Advisory Board,” Ed noted. “Serving in the community has been a fantastic experience and allowed me to meet many people and gain some valuable skills.” Currently, Ed serves on the Massachusetts Bar Association, as Section counsel Leader for labor and employment law, an appointment that he finds incredibly rewarding. “I do a lot of mentoring of young lawyers and law students, and I serve as a panelist for the mock trial competitions,” he added.

When he isn’t working or volunteering, Ed can be found spending time at home in Tewksbury with his wife Marithza or attending a Zumba class. And what grand plans does he have for that long-overdue vacation this summer? “We’re just staying home,” he stated. “My wife wants to do some ziplining and hit the beach.” So even in rest, Ed will be moving quickly from one place to the next.
Lisa Barratta ('09) accepted a position as an Assistant Judicial Case Manager at the Middlesex Probate and Family Court in Cambridge. . . Jeff Maher ('02) has retired from the Nashua Police Department where he worked as a police captain and prosecutor. He has accepted a position at Keene State College as its Title IX coordinator. . . Elisabeth LeBrun ('95) is now Assistant General Counsel for the Committee for Public Counsel Service, working for the Commonwealth of Massachusetts. . . Alanna Spero ('14) has accepted a new position at New England Research Institute as its Contracts Manager and In-house Counsel, drafting and reviewing Agreements and Grants within the US and Internationally between NERI and the federal government (NIH and NHLBI), collaborative hospitals, pharmaceutical companies, and labs for performance of research studies. . . Adam Barnett ('95) just passed the Florida Bar Examination and was sworn into the Florida Bar. He practices Personal Injury Law, Longshore & Harbor Workers’ Compensation Act law, and Social Security Disability at the Law Offices of Jason G. Barnett, P.A. in Fort Lauderdale, FL. . . Darshan Thakkar ('95) was promoted to Director of Strategy and Accountability at the Haverhill Public School district. He will oversee compliance with all the curriculum and assessment requirements that stem from the Every Student Succeeds Act and will also monitor programs that function under the Education Reform Act's Titles I, II, III, and IX. . . Connie Mortara ('08) accepted the position of Court Service Center Manager at the Worcester Trial Court a year ago. “We’ve served over 7000 self-represented litigants since then,” she writes. “We always need volunteers and interns, and it is a great way to learn the nuts and bolts of Probate and Family Court practice, and Summary Process Evictions. Contact me for more info.” Connie’s email address is conniemortara@gmail.com. . . Joe Orlando, Jr. ('10) was elected Gloucester City Councilor at Large and nominated for Massachusetts Super Lawyers 2016 Rising Stars. . . Patrick Brown ('14) and Katisha Brown ('13) recently welcomed a daughter, Peyton. . . Karen Wayne ('06) was the first female lawyer to be awarded the Bar Advocate of the Year award from the Quincy Bar Association, a public service award in recognition of her exemplary service and dedication to her indigent clients. Karen was also awarded the Excellence Award from the Quincy District Court Drug Court. . . Rosario (Terrazas) Ruiz ('97) resides and practices in Texas. In June, she opened her law office in El Paso, Texas, practicing Immigration Law (www.rruizimmigration.com). . . Cynthia (DeVries) Jolley ('03) was recently named one of the 40 stars at Metrowest Legal Services’ “Honoring 40 Stars in Forty Years” event. . . Ruth (Deras) Adeyinka ('09) and Ben Adeyinka ('11) were married this Summer. Ruth also accepted a position as Court Service Center Manager in Brockton. . . Barbara Collins-RigordaEva ('11) was recently sworn in to practice federal law. Barbara and her partner, Marcus Scott ('10) (who was also sworn in to federal court earlier this summer) are owners of the North Andover firm SCOTTCOLLINS LLP, which specializes in family law, contract, torts, IP and criminal law. . . Trustee Laurie Hogan ('01) and her husband James Hogan recently celebrated their 25th wedding anniversary. . . Timothy King ('06) was appointed by Governor Charlie Baker to the MassDOT Board of Directors. King serves as a Detective Sergeant for the Waltham Police Department and President of the Massachusetts Police Association. . . Heather Budrewicz ('09) accepted a position as Town Administrator in Ashburnham, Massachusetts. . . MS Law Reserve Desk Manager Arvi Schott ('04) was recognized by the Western New York Paralegal Association for her service as past President. She was also selected as Worker of the Week at WXLO Radio (nominated by MSLAW student AJ Saganich) and was awarded $500 for her hard work and dedication to MSLAW. . . Richard Rodriguez ('01) was just appointed to the Massachusetts Commission Against Discrimination by Governor Charlie Baker. Rodriguez currently is the chairman of Lawrence’s Commission on Disability and will advise MCAD on policy matters. ■

In Memoriam
Irwin Pollack ('05) died in January, 2017. He was the founder and lead attorney of Pollack Law Group, P.C., a divorce and family law practice.
With a high divorce rate and an increasingly litigious society, attorneys have been trained to advise their clients of the lurking threats that could deplete their wealth during their lifetime or deplete the wealth inherited by the beneficiaries of their estates. In devising a plan to protect assets from creditors and divorcing spouses, (i) minimizing or eliminating an individual’s control of assets and (ii) removing the definitiveness of an expectancy in assets are two essential principles. With these basic tenets in mind, the legal community has collectively breathed a sigh of relief after the Massachusetts Supreme Judicial Court’s ruling in \textit{Pfannenstiehl v. Pfannenstiehl}. The issue at the heart of \textit{Pfannenstiehl} was, to what extent may divorcing spouses lay claim to their ex-spouse’s trust inheritance if the ex-spouse’s rights to distribution from such trust are at a third party’s discretion? With Massachusetts already being known as somewhat of an outlier when it comes to the inclusion of inheritances in the division of a marital estate, the lower court’s decision in \textit{Pfannenstiehl}, if upheld, would have represented a watershed decision in weakening spendthrift protection in a dissolution of marriage context.

The SJC reached a decision that has seemingly calmed the waters on the issue of spousal inheritance through trusts. However, although the ultimate outcome of \textit{Pfannenstiehl} has provided some clarity on the effectiveness of certain asset protection strategies through trusts, its impact nonetheless is likely to produce a wide spread re-assessment of the traditional concepts of trust drafting and asset protection.

\textbf{The Parties}

\textit{Pfannenstiehl} revolves around divorcing spouses’ dispute over the divisibility of a trust for which the husband was a discretionary beneficiary. Husband’s deceased father had established an irrevocable trust with husband’s brother and the primary family attorney as the two co-trustees of the trust.\textsuperscript{1} At the time of the trial, the trust had an approximate valuation of 25 million dollars.\textsuperscript{2} The husband in the case is the member of a wealthy family and was employed as a store manager at a family run bookstore with a salary of approximately $170,000 (an amount the Court determined is likely over $100,000 more than the industry standard for such a position).\textsuperscript{3} The wife is a former U.S. Army Reserve member who had retired two years short of the necessary time period to guarantee her military pension in order to serve as a homemaker and care for the couple’s disabled child.\textsuperscript{4} Her decision to retire from the Reserves was brought on from the pressure of her husband and his family for her to devote her time and efforts to caring for the child.\textsuperscript{5}

\textbf{Trust Instrument}

The trust at issue in \textit{Pfannenstiehl} is what is commonly referred to as a “spray trust” wherein a Trustee has discretion to disburse payment to a class of beneficiaries in equal or unequal amounts. As it related to those entitled to distributions from the trust, the trust stated:

\textit{the Trustees shall pay to, or apply for the benefit of, a class composed of any one or more of the Donor’s then living issue such amounts of income and principal as the Trustee, in its sole discretion, may deem advisable from time to time, whether in equal or unequal shares, to provide for the comfortable support, health, maintenance, welfare and educa-}

\begin{itemize}
\item \textsuperscript{2} \textit{Id.}
\item \textsuperscript{3} \textit{Id.} at 124-125.
\item \textsuperscript{4} \textit{Id.} at 128.
\item \textsuperscript{5} \textit{Id.}
\end{itemize}
The Higher Court’s Ruling

In ruling that the husband’s interest in the trust was marital property, subject to division, the Probate and Family Court ruled the husband had a 1/11th interest in the trust (11 representing the total number of beneficiaries of the trust) valued at $2,265,474.31, and $1,133,047.79 of which was to be allocated to the wife. To accomplish this allocation to the wife, the Judge ordered that the husband was to make 24 equal monthly payments to the wife in the amount of $48,699.77. Both parties appealed.

The Appeal

In a 3-2 ruling, the Appeals Court upheld the Probate and Family Court’s ruling that the trust was marital property subject to division in accordance with the discretionary powers set forth in M.G.L. chapter 208, § 34. The Appeals Court found that, notwithstanding the discretionary standard for distributions and spendthrift clause set forth in the trust instrument, husband had a present and enforceable right to distributions from the trust and that the spendthrift clause was not a bar to division. The Appeals Court reasoned that, not only were the prior distributions to husband evidence that regular distributions were within the standard set forth in the trust, but also that, given the family’s regular monthly expenses, the trust distributions were “woven into the marriage fabric” and necessary to support the family’s customary lifestyle. The Appeals Court did not specifically address the lower court’s specific ruling of husband having a 1/11th interest in the trust assets, other than to validate the trial court’s authority to make such valuation.

In their dissent, Justice Fecteau, joined by Justice Kantrowitz, argued that the Appeals Court erred in its ruling due to the speculative nature of husband’s future right to distributions. Of particular concern to the dissenting Justices was the valuation of husband’s interest in the trust. The dissent argued that the very nature of providing a 1/11th valuation of the interest underscores the impracticality of valuing the husband’s interest at all, since the trust has an open class of beneficiaries and distributions to such beneficiaries may be made in equal or unequal shares. Additionally, the dissenting Justices argued that the behavior of the parties on the eve of divorce in changing the recent distribution pattern to husband should only be a second consideration after analysis of the trust.

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7 Id. at 131-2.
8 Id. at 129-131.
9 Id.
10 Id.
11 Id.
12 Id. at 126.
13 Id.
14 Id. at 132-3.
15 Id. at 134-5.
16 Id. at 137.
17 Id. at 140.
The Supreme Judicial Court granted certiorari and, on August 4, issued its ruling vacating the Probate and Family’s Court’s order dividing husband’s interest in the trust. In reaching its conclusion, the Court stated that the husband’s interest in the trust was too speculative to be subject to division as part of the marital estate. The SJC further dispelled of any argument that husband’s interest as a remainder beneficiary on termination of the trust rendered the trust assets part of the marital estate because there was no reasonable likelihood that the Trustees of the trust would use their discretion to terminate the trust.

Massachusetts Law Regarding Inheritances/Marital Property Prior to Pfannenstielh

M.G.L. ch. 208, § 34 sets forth the discretionary powers the Court may use in its determination of what the marital estate is comprised of and the proportion of division that should result therefrom. In the context of inheritances and interests in trusts, the Court will first determine whether the interest is a part of the marital estate, and the court is not bound by traditional concepts of title or property. This provides the Court with discretion to determine if an intangible asset, or an asset that may not be completely within the control of the spouse, should nonetheless be subject to division in a marital dissolution. Although such discretionary powers are quite broad, they are not unlimited in scope. The nature of the expectancy and “whether the future acquisition of assets is fairly certain, and current valuation possible” are relevant in determining whether an interest in a specific trust should be subject to division under §34. In making the determination of whether or not an interest in a trust is too speculative to be subject to division, the Court may look to the trust instrument itself, as well as “other relevant evidence.” If the trust interest is too speculative to actually be a part of the marital estate, the court may still consider the asset for division of the remaining assets of the estate under its discretionary power to look at “the opportunity of each [spouse] for future acquisition of capital assets and income.”

A seminal case in the determination of this statutory provision and in the area of third-party trusts in divorce in Massachusetts is Lauricella v. Lauricella, which is one case in Massachusetts evidencing a growing trend that paved the way for the almost game-changing ruling by the Appeals Court in Pfannenstielh. In Lauricella, a 26-year-old divorcing husband was the one-half beneficiary of a trust set up by his deceased father. The sole trust asset was real estate which comprised the residence in which he and his wife resided prior to the divorce action. The trust was to terminate 21 years after the death of the donor and prior to such time the beneficiaries could not require partition or distribution of the trust property without unanimous vote of the trustees and beneficiaries. In determining that the trust was not a marital asset subject to division the trust, the Probate and Family Court reasoned that the trust had "nothing, per se, to do with the marriage," that the husband was neither settlor nor trustee, that the trust could be amended, and that the husband could be eliminated as a beneficiary. Upon the wife’s appeal, the Supreme Judicial Court was transferred the case on its own motion, and ruled that, despite the contingency that the husband’s beneficial interest could be subject to divestment if he does not survive the 21-year time period following his father’s death, given the husband’s age and current ability to use the residence, that the trust property should be subject to division as a present and enforceable inter-

18 Id. at 141.
20 Id. at 20-21.
24 MASS. GEN. LAWS, ch. 208 § 34 (2012).
26 Id. at 212.
27 Id. at 213.
The Court further noted that although valuation of the interest may be difficult, it makes it no less divisible.

As exemplified in Lauricella, case law in Massachusetts has clearly shown a willingness to include a spouse’s beneficial interest in a trust in the marital estate subject to division, even if such interest may be remote or subject to divestment. However, most such case law concerns a trust instrument which anticipates a beneficiary’s receipt of an asset upon the occurrence of a contingency (such as the death of a person still living) and the Court has evaluated the likelihood of that contingency occurring.

Prior to the SJC’s ruling, Pfannenstiehl had taken the prior jurisprudence on the division of trust assets and gone a big step further in calling into question whether a purely discretionary trust interest, that the beneficiary may never demand regardless of the circumstances, may be valued and divided nonetheless. Ultimately, as it pertained to the specific trust in Pfannenstiehl, it was determined that husband’s interest was, in fact, too remote for inclusion in the marital estate.

**Bad Facts**

As the old adage goes “bad facts make bad law,” and such may be a reason why the Pfannenstiehl case reached the point that it did. The actions of the Trustees leading up to his divorce proceedings were deeply analyzed by the lower court in reaching its determination. Of specific concern to the court was the abrupt cessation of seemingly patterned distributions to husband on the eve of the divorce action. The Appeals Court stated that these actions were a “deliberate manipulation to erase a major component of the husband’s annual income and to silence his interest in the trust—for a convenient time while the divorce was ongoing.”

As the dissenting Justices in the Appeals Court intimated, one must wonder if the parties had not taken such seemingly transparent overt action to exclude the trust assets from the divorce proceeding, or whether the Probate and Family Court and the Appeals Court may have taken a more procedural approach to analyze the terms of the trust itself, rather than the actions of the parties surrounding it.

Interestingly, the SJC made little mention of the cessation of distributions prior to the divorce, which is likely indicative of an opinion that, while their actions may be viewed as distasteful, the prior actions of the trustees were essentially immaterial to the question of law of whether, given the express language of the trust, the interest should be includible in the marital estate. However, as discussed later herein, this does not necessarily mean that the trust parties’ behavior will not still be pertinent to the proportional amount of the husband’s ultimate award of the marital estate.

**Distribution Standard**

The plain language of the trust instrument in Pfannenstiehl employs an “ascertainable standard” for trust distributions, whereby the trustee is directed to use discretion to distribute to beneficiaries for their “comfortable support, health, maintenance, welfare and education.” Another approach to a trustee’s standard for distributions in a trust could provide that the trust has unfettered discretion to distribute to a beneficiary such amounts as the trustee sees fit. Provided discretion rests solely in the trustee, the application of either an ascertainable standard or a purely discretionary standard, did not (prior to Pfannenstiehl) appear to presume any substantially greater rights in the beneficiaries to receipt of a distribution from the trustee.

A case frequently cited by the dissent in Pfannenstiehl was the case of D.L. v. G.L., wherein the Massachusetts Court of Appeals ruled that various trusts in which the husband in the divorce action had a beneficial interest were properly excluded as marital property due to the speculative nature of the husband’s interests. The Appeals Court found that, as it pertained to

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28 Id. at 216.
29 Id. at 216-17 (citing Hanify v. Hanify, supra at 188 and Dewan v. Dewan, 399 Mass. at 755-757).
31 Id.
32 Id. at 131.
33 Id. at 132.
one of the trusts, wherein the husband had a beneficial interest purely at the discretion of the trustee, that the husband’s interest was “‘too remove or speculative’ to be included within the marital estate.”\(^{35}\) Interestingly, the Court in \(D.L. v. G.L.\) did note the lack of distribution history to husband in rendering its opinion, but it is unclear whether a different conclusion regarding the inclusion of the principal balance of the trust would have occurred if there had been any substantial distribution history.\(^{36}\)

The majority opinion in the Appeals Court in \(Pfannenstiehl\) distinguished its position on the facts of the case from that \(D.L. v. G.L.,\) on the basis that the trust instrument in \(Pfannenstiehl\) contained an ascertainable standard, whereas distributions from the trust in \(D.L. v. G.L.\) were wholly in the trustee’s discretion. The applicable language of the Appeals Court ruling in \(Pfannenstiehl\) stated “[g]iven these ascertainable standards, the husband’s interest in the trust is vested in possession, with a presently enforceable right to the trust distributions to support his lifestyle during his lifetime including for maintenance, welfare, and education (and including educational funds needed for the special needs of the two children). Indeed, the pattern of distributions up to the time of the divorce filing (with the husband regularly receiving distributions until the eve of the divorce filing) reflects distributions from the 2004 trust that fall within these ascertainable standards.”\(^{37}\)

This Appeals Court ruling temporarily represented a seismic shift in the traditional analysis of the implications of an ascertainable standard in a trust. Had the SJC upheld the ruling, it is likely that thousands of trust instruments in Massachusetts containing an ascertainable standard for distributions would need to be re-assessed to attempt to uphold a donor’s intent that their assets not become subject to their beneficiary’s spouses and creditors.

Given the wide latitude provided in the ascertainable standard set forth in \(Pfannenstiehl,\) it would seem that, practically and rationally, the difference between an ascertainable standard and pure trustee discretion is somewhat minimal. The breadth of the Appeals Court ruling in \(Pfannenstiehl\) as it pertains to distributions pursuant to an ascertainable standard represented an incredible leap forward (or backward depending on your perspective). Given the novelty of the Appeals Court ruling, one could certainly question if the ruling was specifically aimed at undoing the inequities caused by the trustees’ actions, rather than an objective view of the concepts of discretionary standards and fiduciary duty. Accordingly, this type of ruling seemingly represented an attempt by the Court to subjectively discount the legitimacy of the trust instrument’s provisions regarding the trustee’s discretion to force the trustees’ hands to make distributions they likely otherwise would not make. While few objective people would doubt that there is collusion between the trustees and husband in this case to limit husband’s access to distributions, the reality is that the mere presumption of collusion should not overwhelm a Court’s perspective on the plain language of a document. Rarely, if ever, would a settlor of a trust intend for the trust corpus to become subject to creditor’s claims or subject to division in a dissolution of marriage and, had the \(Pfannenstiehl\) lower court rulings been upheld, results in contravention to many donor’s intent could have been undermined.

In its ruling, the SJC acknowledge the wife’s argument that the ascertainable standard for distributions presented certain fiduciary obligations upon the trustee to give consideration to husband’s specific needs.\(^{38}\) However, given the fact that the trust had an open class of beneficiaries with varying needs outside of just the husband himself, the SJC found that husband’s specific right to distribution was too speculative.

Another relatively important takeaway related to the \(Pfannenstiehl\) decision and its planning implications related to the usage of the term “shall” in a trust distribution standard. While some may argue that the difference between the terms “shall” and “may” in a provision that

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\(^{35}\) Id. at 497.

\(^{36}\) Id. at 513.

\(^{37}\) Id. at 134.

\(^{38}\) Pfannenstiehl (LEXIS 591) at 18.

\(^{39}\) Id. at 19.
invokes complete third-party discretion either way is immaterial, the *Pfannenstiehl* case has resulted in an evaluation of whether the inclusion of either verb could result in significantly different outcomes in a divorce action. As the trust instrument in *Pfannenstiehl* inserted the term “shall” into the trustee’s distribution standard, one may wonder if that seemingly trivial verb could’ve swayed the Judge’s decision in determining the husband’s beneficial interest subject to division. Many practitioners are likely to abandon the “shall” term in favor of “may” to avoid any argument that their pure discretion is undercut by a term suggesting distributions are obligatory.

**Spendthrift Protection (or lack thereof)**

A topic of debate relating to the *Pfannenstiehl* decision also related to the inclusion of the husband’s interest in the trust in the marital estate notwithstanding the presence of a valid spendthrift provision. The Massachusetts Uniform Trust Code under M.G.L. ch. 203E, § 502 codifies the enforceability of a spendthrift provision, such as the one used in *Pfannenstiehl*. As it relates to the assignability of an interest in a trust containing a spendthrift provision, § 502 states “[a] beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.”

Although the presence of a “spendthrift provision” in a trust would seem to traditionally spell doom for a creditor’s ability to access an asset, the effectiveness of such a provision has been on the decline. The Appeals Court did not see the provision as a factor at all in providing husband protection of his beneficial interest. Divisibility of a trust interest notwithstanding the existence of a spendthrift provision has been addressed several times by the courts in Massachusetts and the prevailing result has been that the provision in itself is not a bar to inclusion of a trust interest in the marital estate.  

Although trust assets may includible in the marital estate, this, however, does not mean that the Court necessarily has the authority to order a trustee to make distributions in conflict with such spendthrift provision. The Appeals Court in *Pfannenstiehl* was likely aware of this distinction and precipitated the reasoning for the ruling requiring monthly payments of the husband to the wife, rather than ordering that the trust assets be distributed to the wife directly. There are, however, some potentially troubling aspects to the Appeals Court’s reasoning in its ruling that will be discussed later in this Article.

The SJC specifically addressed the spendthrift provision issue stating “although the existence of a spendthrift provision alone does not bar equitable division of a trust, in light of the provisions in the 2004 trust, discussed supra, an order dividing it to benefit [wife] cannot create a right in [husband] to compel distributions in her favor, when he does not otherwise have a right to compel distributions.”

**Valuation**

While the Appeals Court ruling that the husband’s expectancy from the trust is an identifiable marital asset subject to division under G.L. ch. 208, § 34 was a potentially groundbreaking determination in itself, of additional interest is the actual valuation of his interest in the trust. Clearly, given the various contingencies related to the husband’s interest in the trust, valuation of his interest was a difficult task (to say the least). However, as previously mentioned from the *Lauricella* case, the difficulty of valuation does not in itself, mean a trust interest should not be deemed a marital asset subject to division.

In making its 1/11th valuation, the Probate and Family Court likely attempted to arrive at a valuation that could be rationally substantiated. With eleven representing the then living beneficiaries of the trust, it is certainly an easy number to rationalize, however, many would argue it is an overly simplistic approach to evaluating such a

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40 MASS. GEN. LAWS., ch. 203E, § 502(c) (2012).
fluid set of circumstances. When evaluating the terms of the trust as having (i) an open class of beneficiaries; (ii) a distribution standard based on individual needs; and (iii) no duty of the trustee to equalize distributions amongst beneficiaries, a 1/11th valuation is really not grounded in the realities of the trust and its parties. One may even argue in this case that, given only husband and his two siblings had ever received any distributions from the trust following their parents’ death, that a valuation based on a 1/11th interest is actually generous to husband and a one-third valuation is more appropriate. Whatever the rationale, it seems likely that the Court’s valuation was made with the ostensibly punitive intent of making sure that the husband and his family’s collusive techniques to deprive the wife of any expectancy in the trust assets was not successful.

While the Court’s valuation and division of the husband’s beneficial interest was clearly defined in the ruling, the realities of subsequently enforcing it were fraught with problems and the potential for additional litigation. Upon failing to make a required monthly payment after the initial ruling, the Probate and Family Court found husband in contempt and sentenced him to 60 days in jail unless he made the payment.43 The husband had previously written a letter to the Trustees requesting payment, which they denied.44 While questioning the sincerity of husband’s distribution request and the motivations for the trustees rejecting it, the Appeals Court set aside the contempt order due to the fact that husband had made an attempt to request the distributions and it had not been proven that husband “intentionally violated a clear and unequivocal order.”45

Interestingly, by requiring husband to make monthly payments to wife in excess of his available assets, the lower court and the Appeals Court agreed with the premise of awarding the wife a large portion of assets that husband has no reasonable legal right to demand. Essentially, the Court was artfully saying to the husband “I don’t care how you come up with it, but this is what you owe.” While basing an equitable division on non-liquid assets is certainly not a foreign concept in divorce, it is somewhat problematic where the specific asset the Court seeks to divide is an interest in an asset which the husband has no legal method to access. This places the trustee in the untenable position of either refusing to provide husband with distributions (thereby potentially resulting in husband’s contempt of a court order) or providing the distributions to husband and risking an action from the other beneficiaries of the trust based on a breach of fiduciary duty. Due to the nature of the relationship of the parties and relevant history of their conduct in Pfannenstiehl, the lower court and the Appeals Court were likely willing to accept that if “push comes to shove,” the payments would be made and concepts of fiduciary duty as they apply to the trustees of the trust is immaterial.

The alternative approach in awarding a trust interest to a divorcing spouse would be what is referred to as the “if and when” approach. Meaning if and when a distribution is made, it is to be given to the spouse rather than the beneficiary. Of course, Judges are keen to the realities of this type of order, because they know that with an “if and when” order in place, there is little to no likelihood that a distribution will ever again occur. In her SJC brief, wife relied on an unpublished opinion in Krintzman v. Honig, wherein the Massachusetts Appeals Court found that a trial court’s order of an “if and when” division of trust assets exceeded “the scope of judicial discretion,” and, upon remand, the trial court determined that a lump sum distribution was the only alternative.46 Although certainly evidencing the distaste for “if and when” divisions, the Krintzman diverges from the facts of Pfannenstiehl, as the trust in Krintzman involved a self-settled trust wherein the spouse was the discretionary beneficiary for whom the trustee’s discretion was specifically aimed at sustaining the beneficiary for her lifetime.47 Notwithstanding judicial hesitancy to use it, the “if and when” method was previously applied in S.L. v. R.L., where the

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43 Pfannenstiehl (App. Ct.) at 136.
44 Id.
45 Id.
47 Id. at Note 2.
Appeals Court found the method appropriate in the case of a wife’s beneficial interest in a trust because the value of the interest was subject to uncertainty and the interest was subject to divestment to other beneficiaries.48

The “if and when” approach is analogous to cases where membership interest in a Limited Liability Company is the only valuable asset of an individual available to pay a judgment. In many states, a creditors’ only remedy upon obtaining a judgment against an individual’s LLC interest is to get “charging order,” entitling the creditor to any distributions which would otherwise be provided to the judgment debtor by the Company. Most often, creditors end up with nothing for their efforts in obtaining the charging order because after the charging order is obtained, the LLC simply makes no further distributions to the judgment debtor. It is the same concept with a trust; a court typically cannot put fiduciaries in a position to breach their duty as to all the other beneficiaries of a trust to benefit the creditors of one beneficiary. The Appeals Court in Pfannenstiehl, knowing this reality, seemingly sought to wield its own brand of justice in squeezing the husband as much as possible to force the trustee’s hand in making distributions.

Although its application is disfavored, where a beneficiary’s only potential entitlement to a distribution depends on the discretion of a trustee with little to no motivation to provide such distribution, it is hard to see how any approach other than “if and when” is legally viable as it relates to division of a discretionary trust interest. The circumstances in S.L. v. R.L., where the “if and when” method were applied to a trust interest, are very similar to Pfannenstiehl, where the valuation of the husband’s interest was subject to a substantial amount of uncertainty. Any other method, including the method actually employed by the Probate and Family Court in Pfannenstiehl, seems only to promote substantial subsequent litigation to compel distributions that a civil court is unlikely to order.

In ruling that the trust interest was not a part of the marital estate, the SJC did not need to address this valuation issue, as its enforcement became moot. This leaves the legal community in Massachusetts left to wonder where the Court may have come down on this difficult and important issue had the interest been deemed includible in the marital estate.

Still Discretionary for the Judge

An important distinction regarding Pfannenstiehl that should be clarified is that, even had the Appeals Court ruling been upheld and a portion of the trust corpus was considered part of the marital estate, this would not change a Judge’s discretion to still exclude the assets from division. Ruling that an interest in a discretionary trust is not too speculative as to render it outside of the marital estate only increases the pantheon of property which may be subject to division under G.L. ch. 208, § 34. In a different case, where the facts and equities were not so skewed in the wife’s favor, a Judge could have determined that, notwithstanding the inclusion of the trust assets as part of the marital estate, that equity dictates that an inheritance that a decedent did not intend to benefit a divorcing spouse should not be part of the marital division, or at least should be subject to a less proportional division compared to other marital assets. As set forth in Williams v. Massa, even after a conclusion that the trust interest is divisible under § 34, the Judge may consider “the source of the assets, each parties' role in managing the assets, and whether the assets in question had been kept separate or commingled with the couple's jointly owned property.”49 These factors clearly indicate that the mere inclusion of a trust interest in the marital estate is not the final hammer of the gavel rendering that a trust interest will be split 50/50. The conduct of the beneficiary in insulating the property from the marriage may go a long way in limiting the percentage a judge may allocate to the non-beneficiary spouse. In Pfannenstiehl, the Appeals Court noted that the husband’s trust distributions were “woven into the fabric of the marriage,” and coupled that with the pre-divorce conduct of the trustees that the Court deemed distasteful, the discretionary factors did not

48 S.L. at 885.
weigh in husband’s favor, thereby producing a result where the wife was allocated a large proportion of husband’s interest.

The concept of judicial discretion for the Probate and Family Court was not lost on the SJC in issuing its ruling. Perhaps as a “wink and nod,” the SJC, in ruling that the trust interest was not a part of the marital estate, clarified that “however, the trust may be considered as an expectancy of future ‘acquisition of capital assets and income’ in determining what disposition to make of the property that [i]s subject to division.”51 This means that although the Probate and Family Court may not seek division of the actual trust interest, it is free, in its permitted discretion, to disproportionately award wife the remaining marital estate based on the Judge’s determination of what benefits the trust will likely offer to the husband in the future. Accordingly, the trust parties’ actions leading up to the divorce will likely still play a major role in limiting the husband’s share in the marital estate. As far as an impact outside of this specific case, the lack of inclusion of the trust in the marital estate will substantially affect the rights of a divorcing spouse where the assets includible in the marital estate are relatively insignificant compared to the ex-spouse’s beneficial interest in a discretionary spendthrift trust.

Conclusion

While divorce attorneys may be accustomed to the unpredictability of litigation and judicial discretion, it is relatively atypical for estate planners to operate without clear guidance on the effectiveness of commonly used trust provisions. The uncertainty surrounding Pfannenstiehl created substantial difficulties in advising clients of the best possible method to protect their wealth and their beneficiaries from unintended dissipation by creditors or divorcing spouses. Although the outcome reached by the SJC in Pfannenstiehl provides some clarity, the case itself has inspired a hyper-awareness of practitioners as to the ever-trending weakness of spendthrift protection through trusts, and the way in which the conduct of the parties in the administration of a trust could undermine an objective view of the trust’s language.

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Conflicts of Interest in the Context of Federal Law

By Beth Smiley, Esq.

All attorneys and law firms must guard against and be aware of the possibility of conflicts of interest in representing or continuing to represent multiple clients. For attorneys licensed in the Commonwealth of Massachusetts, Rule 1.7 of The Massachusetts Rules of Professional Conduct sets out parameters defining where such a conflict of interest may arise in a case brought within the courts of the Commonwealth and, further, may apply to cases brought in a federal court under certain judicially prescribed conditions.

It is readily understood that an attorney cannot represent multiple parties to a lawsuit when the interests of the parties are directly adverse. Rule 1.7(a)(1). It is also clear that a conflict of interest exists where “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client…” Rule 1.7(a)(2). There are numerous situations where the existence of a conflict requires much more careful analysis, such analysis being further complicated by the determination of whether a state or federal court has subject matter jurisdiction over an ethical question arising from attorney conduct pertaining to federal law, as described in the following example.

In Maling v. Finnegan, et al., 473 Mass. 336 (2015), the client Maling had engaged the Boston office of the law firm of Finnegan, et al. (Finnegan) to draft and prosecute patent applications involving an invention of a type of eyeglasses, and Finnegan ultimately obtained four patents for Maling on his inventions. During the same time period, a competitor of Maling, Masunaga, engaged the Washington, D.C., office of Finnegan to obtain patents on a similar but not identical invention, and it successfully obtained patents for Matsunaga. Id. at 337.

After realizing that Finnegan had also been representing Masunaga and thereby learning of the Masunaga patents, Maling asked Finnegan to provide a legal opinion comparing his patents with the Masunaga patents, which Finnegan declined to do. Maling at 338. This service was not included in the original engagement agreement of Finnegan by Maling. It is likely that Finnegan realized that doing so would have presented conflict of interest. However, despite the similarity of the inventions, there was no evidence that prosecution of the Maling patents was in any way affected or limited by the simultaneous prosecution of the Masunaga patents. In patent law in particular, providing such a confidential legal opinion to one entity in a particular technology area might lead to a conflict of interest necessitating refusal to represent a competitor with only a purely economic adverse interest—one reason the cost charged for such opinions can be high. Many patent practitioners will also refuse to provide such opinions because of concerns about liability and other factors.

Federal law applies to obtaining and enforcing patents. The fact of preparing, filing, and prosecuting a patent application is confidential between the applicant(s) and the United States Patent and Trademark Office (USPTO) until such time as the application is published, generally more than a year after an application is filed. Only a single patent may issue for a single invention, 35 U.S.C. § 101, or an obvious variation thereof.

Maling filed suit against Finnegan in the U.S. District Court for the District of Massachusetts alleging damages resulting from Finnegan’s failure to disclose the alleged conflict of interest in also representing Masunaga, a competitor in the marketplace, in obtaining patents. Maling at 338, fn. 4. The U.S. District Court dismissed Maling’s complaint in light of the U.S. Supreme Court’s unanimous ruling in Gunn v. Milton, 133 S.Ct. 1059 (2013) finding “that legal malpractice claims arising from representation in patent proceed-

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ings are not within the exclusive subject matter jurisdiction of the Federal courts.” *Maling* at 338, fn.4. *Gunn* provides a framework for deciding when a state law claim may properly be brought in a federal court, which is not limited in scope to analysis of alleged patent law malpractice.

According to the *Gunn* decision, the basis for determining whether a federal court has jurisdiction over a controversy is whether the “state law claim necessarily raise(s) a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Gunn*, at 1065 citing *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 125 S.Ct., 2363 (2005). In *Gunn*, which also involved alleged malpractice in a patent-related matter but was unrelated to alleged conflict of interest, the plaintiff had lost the malpractice suit in the state trial court and was trying for a second bite at the apple by attempting to file the same case in the Federal District Court. The Court in *Gunn* held that the federal courts did not have exclusive jurisdiction under the circumstances, thereby reversing the Texas Supreme Court. *Gunn* at 1059.

After the federal court dismissed Maling’s complaint against Finnegan in light of *Gunn*, he filed his complaint in the Superior Court, again seeking damages for alleged malpractice based on conflict of interest pursuant to Rule 1.7. The judge dismissed the case pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim for which relief could be granted. *Maling* at 337. This result should not have been a surprise. Comment [6] of Rule 1.7 states “…simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.” Mailing appealed and finally lost when the Massachusetts Supreme Judicial Court affirmed.

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Franz Kafka’s short story about Alexander the Great’s horse invites us to begin to think about law at the end of history. “The New Advocate” is a look into the post-historical career of Bucephalus, the world-famous “ox-headed” warhorse, known to readers of Plutarch’s Lives no less than the people of Northern India.

The story tells of the aging horse, now retired from war, who has recently passed the bar and become a lawyer. We learn of Bucephalus’s situation as a new attorney, how he is viewed by the bar and by a court officer. The odd scene illuminates our situation and task today. How do we think about our legal work in view of this horse, admittedly of “world-historic significance,” practicing law? Kafka’s narrator advises us: “perhaps it really is best to do as Bucephalus has done and absorb oneself in law books.”

Kafka himself was a lawyer with the Workers Accident Insurance Institute for the Kingdom of Bohemia and a great reader of worthwhile books, including Plato, Dostoevsky, and Flaubert. He joins the list of other poets and intellectuals—Wallace Stevens, Alexandre Kojeve, for example—who worked in government bureaucracies or insurance agencies. Kafka’s biographer and friend Max Brod (who also read the above-mentioned books together with Kafka) reports: “Kafka derived a great amount of his knowledge of the world and of life, [from] his experiences in the office, from coming into contact with men who had suffered injustice, and from having to deal with the long-drawn-out process of official work, and from the stagnating life of files.”

Kafka’s legal training let him notice concrete details and evidentiary facts more readily in work and life, to be sure. But reading classic books with his friends helped him to interpret his legal work and shaped his thought-provoking writing style.

“The New Advocate” is a short work of comedy that can serve as a prelude to a longer and more complex analysis of law. Contemplating the history from which Bucephalus has come points us down a longer path of inquiry that proceeds through Plutarch’s Life of Alexander, back to Aristotle, and Plato, and wanders for decades through the great books of the world. While we cannot undertake the longer analysis here, a close reading of Kafka’s text may encourage those who are predisposed to such an inquiry, or arouse the curiosity of those who are not.

For our purposes, the phrase “the end of history” refers here to the condition in which the

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3 Max Brod, Franz Kafka: A Biography, trans. G H Roberts and R Winston, 2 ed. New York: Schocken Books Inc, 1963. It should go without saying that Kafka knew Bucephalus from reading and not from work experience, but we should say it, lest one believe that Kafka shared an office with a horse.
ultimate questions of justice have been resolved and are no longer debated seriously by jurists. This is not to say that violent wars are not waged today to gain power to impose theocratic or authoritarian systems on large populations; or that activists do not engage in nonviolent protests to correct the failures of political systems. Social conditions around the world have not yet been brought into line with our opinions regarding equality, but can anyone openly deny that the only legitimate political goal is to bring about such conditions as soon as possible—and to do so through legislation?

What does law mean in the “Sunday of life?” (a phrase coined by Hegel in *Lectures on Fine Art* to describe the providential conditions of equality at the end of history). “[It] is the Sunday of life which levels everything and rejects everything bad; people who are gifted with such good-humor cannot be altogether bad and base.”

Hegel observed a change in social conditions that the Flemish, German and Dutch schools of painting captured in their works. They composed “scenes in the tavern, in weddings and other merry-making of peasants [that] appear so completely penetrated by a naïve cheerfulness and jollity that the real subject-matter is not vulgarity, [but] cheerfulness and naïveté.”

The suggestion here is that scenes of tavern drinking that would at one time have been interpreted as a warning against low-class vulgarity, became sympathetic scenes of the sociable goodness of the people. One can imagine a modern Bruegel painting the ultimate civic affair: a throng of small claims litigants, “cheerful, roguish and comic,” packed into the public courthouse, pleading their cases before the judge. Where lawyers’ suits are so shabby and ill-fitting, judges often have to ask “which is the counsel here?”

The routine administration of justice is not as tragic as the classic meting-out of justice. No one will lose an eye or tooth, and no one will have to pay his or her debts with a pound of flesh.

The image of peasant-lawyers should be contrasted with Kafka’s hero-turned-lawyer, but the conditions of the work are the same. Both work in a society that has a heightened consciousness about the conditions of equality and the furthering of such conditions through participatory law.

Kafka’s scene depicts a different side of the situation than our imaginary Bruegel. While the historical context within which Bucephalus practices law is the hinted background, his quiet dignity stands in the foreground. Comparing the situation of Bucephalus to our own, we wonder how the noble Thessalian accepted his fate.

Kafka’s three-paragraph story is reproduced here in full, with a runaway commentary. *The New Advocate* begins:

(First paragraph) We have a new attorney, a certain Dr. Bucephalus. There is little in his external appearance to remind one of the time when he was Alexander of Macedonia’s warhorse. Those, however, who are acquaint-

ed with the circumstances will notice a thing or two. And I lately saw a simple court usher on the free-standing staircase, who marveled at the attorney, with the appraising eye of a regular at the horse races, as the latter lifted his flanks high, ringing his hoofs against the marble as he climbed from step to step.

Bucephalus has just begun his career as a lawyer, joining us, members of the bar. The nar-
The Reformer

rator remarks on his drastic change in appearance, presumably changed from the muscled, black-coated stallion described in Plutarch, into an elderly philosophic horse. Those members of the bar who know the story of Alexander of Macedonia will notice signs of Bucephalus’s royal past more readily than those who do not know. His scars signify courage in battle rather than a medical fact in a tort action; his wrinkles have world-historic meaning as a visible burden of past empire still weighing heavily on him. Bucephalus in no way looks like Petruchio’s horse in *Taming of the Shrew*,

possessed with the glanders and like to mose in the chine, troubled with the lampass, infected with the fashions, full of windgalls, sped with spavins, rayed with the yellow, past cure of the fives, stark spoiled with the staggers, begnawn with the bots, swayed in the back and shoulder-shotten, near-legged before, and with a half-cheeked bit and a head-stall of sheep’s leather...;13

One does not have to be an expert in equine medicine or a scholar of Elizabethan drama to know that Petruchio’s horse is badly diseased. The change in Bucephalus’s appearance, then, is due to time, not neglect. We know from Plutarch that Alexander properly tamed his horse: “letting him go forward a little, stroking him gently... and with one nimble leap secured mounted him, ... and curbed him without either striking or spurring him.”14

Bucephalus recognized Alexander; and Alexander recognized Bucephalus by naming a city after him. While Bucephalus commands our respect too, a certain court officer in the story could not help viewing Bucephalus as a race-horse to be bet on. Clearly, he is not in such bad shape as to be overlooked for competition. The usher’s lack of knowledge of the story of Bucephalus, his illiteracy, is mostly harmless; it is good-humored, cheerful, and naïve. As they pass each other on the grand staircase of the courthouse, his look expresses admiration of the fine animal dressed in lawyerly robes, clopping up the courthouse steps. Nonetheless, Kafka reminds us that we should make an additional effort to recognize the horse, beyond the bar’s recognition of him.

(Second paragraph) In general, the Bar approves of Bucephalus’s admission. With astonishing judiciousness one tells oneself, that Bucephalus is in difficult position in today’s social order, and that he therefore, -- and also because of his world-historical significance -- deserves at least some accommodation.

The bar examiners have given Bucephalus a passing score. The rules for admission are applied equally, not on the basis of aristocratic lineage or breeding. From the bar’s point of view, Bucephalus is a free and equal citizen of the State. Yet, anyone who remains concerned about the prestige of Bucephalus is rightly concerned. Bucephalus is in a difficult position socially. If occasional whinnying is not distracting, his difficulty pronouncing certain Latin words could disadvantage him in court. Therefore, we should meet him halfway—he is a horse after all. Our additional effort, then, consists of learning the logic of the struggle for recognition and advancing the conditions of satisfaction through law.15

Meanwhile, history has carried Bucephalus to this fate, negating the option to continue as a warrior. There is no conquering Alexander, no one with the authority of a Leader.16

(Second paragraph continued.) Today—that nobody can deny—there is no Alexander the great. How to murder, this is admittedly understood by some; and the adroitness to spear a friend over the banquet table is not lacking; and many find Macedonia too cramped, so that they curse Philip, the father—but no one, no one can lead to India.

13 Shakespeare, The Taming of the Shrew, Act III.i. lines 41-61
16 Alexandre Kojève, On the Notion of Authority, Ed and trans. Hagar Weslati. Brooklyn: Verso, 2014. (Originally published 1942) pp. 18-20. The authority of the Leader is a type of authority that was described by and is attributed to Aristotle.

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Even back then India’s gates were unreachable, but their direction was indicated by the royal sword. Today the gates are elsewhere and wider and higher; no one shows the way; many hold swords, but only to wave them about, and one’s glance, if one tries to follow them, becomes confused.

Some are skilled in murder, but they could not have achieved empire in Alexander’s day even if they wanted to.17 Early in his life, just upon taming Bucephalus, Philip declared, "Macedonia is too little for thee."18 Alexander pointed his sword to the gates of India, to new continents, to universal empire. Even so, universal empire was beyond his reach, or, more accurately, beyond his complete comprehension.

The lack of an Alexander means no one successfully points the way: political goals do not come about by conscious ruling but by administrative action. The basis of authority has shifted from that of “enlightened” law-givers (prophets or kings) to law-makers whose constant law-making gains authority by appearing to be democratic, and loses authority when it appears to have been manipulated by an elite group, such as the wealthy, intellectuals, scientists, or religionists. Rule of law has replaced rule of men. Those who attempt to point the way with their flashy swords—petty tyrants with unintelligible claims—confuse us. What do they even mean? One wonders whether universal empire might someday be comprehended correctly and cured of injustices, but the question of enlightened politics, including the question of globalization or empire, is lost in the clamor.

Are we capable of imagining the practical consequences of utopian and scientific political visions, whether they come about through global economics or international law? Political outcomes may or may not be inevitable, but the question of political possibilities and the role of law is worth confronting. Should lawyers assist or resist grand political visions? The example of Bucephalus, doctor of jurisprudence and lifelong learner, offers an answer to the question of our task as lawyers.

Kafka’s story concludes with a double-answer in its two concluding sentences.

(Third paragraph) Perhaps for that reason it really is best to immerse oneself in the law books, as Bucephalus has done. Free, his sides unpressed by the loins of a rider, by a still lamp, far from the roar of the Alexander’s battles, he reads and turns the pages of our old books.

The first sentence is the logical conclusion of the preceding argument in the story. Because the gates of universal empire are high and remote, law is a practical alternative to war. Given the modern situation, Bucephalus absorbs himself in the work and study of law. We do well to follow in his hoof-steps. Knowledge of the law has practical value as work, as a means of earning a living, as Kafka knew. Cases reveal the “effectual truth” of our theories of justice; concrete outcomes help us to evaluate the claims of legislators and to imagine practical consequences. Aristotle, Maimonides, Burke, Tocqueville, Lincoln, and others, agree with Bucephalus on the value of law. We only add that the thoughtful practice of law can also help to point the way in an era of confused politics.

But notice the slight change in the final sentence. Having finished the work of the day, near the quiet lamplight, Bucephalus reads and turns the pages of old books. He is free, physically and intellectually unhampered. The contrast between putting law books to use and leisurely reading suggests a difference (and a relationship) between work and study. While it is true that the narrator speaks of “our” old books, he does not mean old law books. Knowing the story of Bucephalus, he is a member of the subset of the bar who notices details from a more comprehensive perspective. He knows the difference between telling and showing, or the argument of the action that has played out in history as “a


18 Plutarch, Life of Alexander, p. 3.
Kafka’s Aesopian story grants a glimpse into law at the end of history. We are reminded that if we know the story of Bucephalus, we are aware of something—of historical progress, of his deeds and life. Plutarch prefaced the *Life of Alexander* with a comment on his purpose: “It must be borne in mind that my design is not to write Histories, but Lives; therefore as portrait painters are more exact in the lines and features of the face in which character is seen than in other parts of the body, so must I be allowed to give more particular attention to the souls of men.”

The sculptor Lysippus, Plutarch adds, expressed Alexander’s features with “great exactness,” (as a historian might do) but the painter Appelles, “who drew him with thunderbolts in his hand,” made his complexion darker than it was naturally. Elsewhere we learn that Appelles also painted Bucephalus. When Alexander “went to see his own portrait with that of his horse,” he did not praise his own image. Bucephalus, however, “on being brought up, neighed at the horse in the picture. “Your Majesty,” said Apelles, “your horse seems to be a better judge of painting than you are.”

Bucephalus had the capacity to recognize an image as an image (*eikasia*), indicating self-consciousness.

Alexander’s first interaction with Bucephalus was not a typical training session; it was an introduction to philosophy itself. Having boasted about his ability to tame the horse, the 12-year-old Alexander “ran to the horse, and taking hold of the bridle, turned him directly to the sun; [having] observed that he was disturbed [by] his own shadow.” We are reminded of Plato’s analogy of the sun outside of the cave, which momentarily hurts the eyes, but finally alleviates the confusion of shadows. His glimpse into the empire of light was a prelude to the longer path of learning.

We are now left to wonder where Bucephalus learned to read. The education of Bucephalus comes just on the heels, or pasterns, if you please, of his taming, and of Philip’s recognition of Alexander’s rare qualities:

> Philip saw that his son’s nature was unyielding and that he resisted compulsion, but was easily led by reasoning into the path of duty; … he sent for the most famous and learned of philosophers, Aristotle… Alexander not only received from [Aristotle] his ethical and political doctrines, but also…secret and more profound teachings.

Given the proximity of the stables to the outdoor classroom, we can assume that Bucephalus was present at the lessons with Aristotle. We can further assume that on their campaign to India, Alexander read aloud to Bucephalus, that they discussed the works of Homer and Sophocles.

Plutarch tells us that besides his interest in medicine and liberal arts, Alexander kept a copy of Homer’s *Iliad* under his pillow:

> He was naturally a great lover of all kinds of reading and learning; [he] laid Homer’s Iliad (as corrected by Aristotle), called the casket copy, with his dagger under his pillow. … When he was in upper Asia, being destitute of other books, he ordered Harpalus to send him Sophocles, and Aeschylus.

The struggle for recognition was unresolved for Alexander and Bucephalus (the longer analysis would show) as they conquered the world and enslaved thousands. But, there is consolation in the wisdom that speaks from the pages of old books and remains in conversation with others. Bucephalus is not merely functionally literate like his colleagues. His dignity does not depend on the approval of the bar or regular bettors (read, “investors”). His experience and legal education prepared and pointed the way. Such an education is a circuitous path to understanding, but it is

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19 Plutarch, *Life of Alexander*, p. 3.
a reliable basis for judging one’s own actions and evaluating both expert and popular opinion. This mixed education, pursued by Kafka and others, finds its own balance between time-consuming work and leisurely study, professional expertise and philosophic wonder. The training that makes us resist jumping to conclusions can be cultivated as good judgment. By following Bucephalus’s example in law and learning, we are more likely to recover the authority of knowledge and judgment that is always needed but often lacking in politics.27

Jason Rocinante is a lawyer and philosophy teacher in and around colleges and universities of New England. He recently presented a guest lecture on "The American Lawyer in Tocqueville’s Democracy in America" to a class of aspiring lawyers (real people, not horses).

27 Alexandre Kojeve, On the Notion of Authority, Ed and trans. Hagar Weslati. Brooklyn: Verso, 2014. (Originally publish 1942) See note 18 above, and pp. 21-24. The authority of the Judge is a type of authority that was described by and is attributed to Plato.
In their first year of law school, Professor Martin’s students read *A Civil Action*. On their last official day of being a student, they heard from the book’s noted attorney himself, Jan Schlichtmann, who delivered the commencement address to MSLaw’s 27th graduating class.

Engaging and speaking without a single written word, Schlichtmann urged graduates to never give up, even when doing so would be the popular and easier choice. He stressed the importance of finding the truth and then ardently protecting and advancing it. He shared with the audience at Andover High School’s Collins Center the rough period he and his family experienced during his lawsuit against Beatrice Foods and W.R. Grace, when money was scarce and tensions were high, yet he continued to fight because it was the right and ethical thing to do. With his college-aged son in the auditorium, Schlichtmann dispensed advice that was timely, sage, and relevant to all listeners.

Sullivan Scholars Christopher Basso and Kathleen McKenzie then delivered their speeches, which were followed by the conferring of more than 100 Juris Doctor degrees.

Following Professor Copani’s closing remarks, graduates and their families and guests joined MSLaw faculty and staff at the school for a special reception sponsored by the Student Bar Association.
The Reformer

Intergenerational Justice and Tales of Fire, Ice, Tipping Points and Feedback Loops

By Kurt Olson, Esq.

A little less than a year ago, 21 minors and a relatively unknown environmental organization joined forces to sue President Obama, the United States, and ten different federal agencies to obtain intergenerational justice (Juliana et al. v. U.S.A.). The plaintiffs alleged that the government had violated their 5th Amendment rights to Due Process and Equal Protection, their 9th Amendment right to implicit liberties which include a stable climate system, and the Public Trust Doctrine. In a well-reasoned opinion issued in April, a magistrate judge of the United States District Court for the District of Oregon, denied defendants’ motions to dismiss. While significant hurdles remain for the plaintiffs to clear, a victory in court might be the only way for current and future generations to vindicate their right to be free from increasingly violent and frequently occurring superstorms, crop-killing drought, and throngs of environmental refugees driven from their homes by rising sea levels which threaten to inundate coastal communities.

The quest for intergenerational justice was prompted by a 75-year-old curmudgeon in a scruffy hat who looked into the eyes of his grandchildren and realized he needed to take the case for a planet threatened by catastrophic climate change public. Dr. James Hansen, not exactly a household name to those who don’t pay attention to climate, began his career studying Venus’s atmosphere. After some years of distinguished service in NASA’s Goddard Institute for Space Studies, he became concerned when he observed that the same atmospheric conditions which cause extreme heat on our sister planet were becoming prevalent in Earth’s atmosphere. In other words, CO₂ was starting to accumulate in concentrations not measured for hundreds of thousands of years. Hansen recognized the long-term consequences of such concentrations—warming of the planet with potential disastrous consequences for the Earth’s climate system.

Once he became convinced that his observations were correct, Hansen took his case to Congress 28 years ago. Though some in Congress were receptive to the scientific case presented (perhaps because 1988 was one of the hottest summers experienced in DC up to that point), Hansen soon became frustrated with the lack of action. As he came to understand the political realities better, Hansen recognized that it’s difficult for politicians to think in terms of time scales beyond election cycles. He also understood then as he does now that “the public doesn’t understand that we have an emergency.” Hansen’s cynicism of politics and politicians was enhanced during the administration of George W. Bush when Hansen was Director of the Goddard Institute; Bush assigned him a handler who made sure he did not make any inflammatory comments to the press about climate change and the potential for dangerous warming with potentially catastrophic consequences. Needless to say, the fossil-fuel-friendly Bush administration was even less receptive to the scientific data than other politicians.

Soon after the rebuke by Bush, Hansen decided to leave his position at Goddard and begin to spread the message to the press and public, to take direct action against fossil fuel companies, and to work to preserve the planet for future generations. In 2009, Hansen wrote Storms of my Grandchildren: The Truth About the Coming Climate Catastrophe and Our Last Chance to Save Humanity. While the act of looking into the eyes of his grandchildren spurred Hansen to

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speak out, he realized that not only his grandchildren, but also all future generations were threatened if he didn’t more effectively communicate the nature and extent of the threat. Called by many of his peers “perhaps the foremost climatologist of his generation,” Hansen has become the reluctant public speaker and hesitant Guardian for the minors in the intergenerational lawsuit to “preserve the remarkable planet that we were fortunate enough to get from our parents.”

Part of the problem faced by Hansen and others in terms of communicating the magnitude of the climate change threat is that the public sees the statistic of a few degrees Fahrenheit increase in worldwide average temperature and asks “What’s the big deal?” To appreciate what a big deal it is, people need to understand a little bit about the nature of science and scientific inquiry. Scientists are by nature quite a skeptical lot; to make his educated predictions about what is likely to happen over the course of 10-, 20-, and 100-year increments, Hansen relies on climate (computer) modeling, paleoclimate data or data collected over hundreds of thousands of years from ice cores and samples taken from under the oceans, and observation. Only when these numbers correspond is Hansen confident enough to offer his predictions about what is likely to happen, not only in the near-, but also in the long-term.

**Fire**

Observation is usually the most accessible for the average human because few of us have access to ice core drilling equipment and instrumentation, and even fewer have the massive ships and accompanying equipment necessary to carry out deep-water drilling. Suffice it to say that scientists learn a great deal about what our climate was like in past epochs of Earth’s history by measuring the composition of bubbles of air trapped in ice or the chemical composition of the soil extracted from deep beneath the oceans. But when it comes to observation, no one has contributed more to what’s been happening in Earth’s atmosphere for the last 58 years than Charles David Keeling and his son, Ralph Keeling.

In the 1950’s, Charles D. Keeling recognized that the best way to measure carbon dioxide levels in the atmosphere would be to locate places far removed from industrial sources whose emissions of CO₂ would tend to skew the results. Thus, he set up two observatories – one on the remote Hawaiian volcano of Mauna Loa and the other on the South Pole. While Keeling had to abandon the site on the South Pole in the 1960’s because of funding cuts, his observatory on the top of Mauna Loa has been measuring CO₂ levels in the atmosphere continuously since 1958. The observations in the “Keeling Curve” match up surprisingly well with scientific truths people have accepted for millennia. The jagged red line on Keeling’s Curve moves up and down with the seasons; in summer the line moves down because plants are actively ingesting carbon to grow, and in winter the line moves up as plants become dormant and more CO₂ escapes into the atmosphere. On the contrary, the black line has been moving upwards inexorably since Keeling began his measurements in 1958. Pre-industrial levels of CO₂ in the atmosphere topped out at 285 parts per million while current levels hover at slightly over 404 ppm; more than half of the increase since the industrial revolution has occurred within the past fifty years. According to the ice core record, CO₂ levels have not been higher in the last 800,000 years.

According to Ralph Keeling, director of Scripps CO₂ Group,

The larger story remains that Earth hasn’t seen levels this high in at least several million years. Unless fossil fuel emissions soon drop significantly below current levels, I expect CO₂ levels will surpass the 450 mark by around 2035 and the 500 mark around 2065. Barring some major breakthrough that allows excess CO₂ to be scrubbed from the air, it is currently an impossibility for us to reach the

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target of 350 ppm that many consider the threshold of dangerous climate change effects. I expect it will take at least 1,000 years before CO₂ drops again below 350 ppm.

Wide consensus exists in the scientific community that 350 ppm is the threshold we need to return to in order to ensure a livable planet for future generations. The Juliana complaint has alleged that the government’s failure to take steps to return to this threshold dooms future generations to catastrophic consequences, including extreme heat, increasingly devastating wildfires in Australia, California and other already dry places, and crop-killing drought around the globe. This failure amounts to intergenerational injustice and should entitle the Juliana plaintiffs to damages and equitable relief.

**Ice (or the Increasing Worldwide Disappearance of Ice)**

Other observable effects of a warming planet, which confirm Dr. Hansen’s climate modeling and paleoclimate data, include a steady decrease in North Pole sea ice extent, the inexorable rise in sea levels caused by the disintegration of the Greenland and Antarctic Ice Sheets, and the noticeable disappearance of glaciers from places like Glacier National Park, the Himalayas, and the Alps and the steady decline of snowpack in the Sierra Nevada in California. Scientists now predict that North Pole sea ice will not exist in the summer by 2050. Multiple species, including the polar bear, rely on sea ice for survival because if they don’t have sea ice to swim to, they and their young drown.

One of the great ironies of the shrinking sea ice is that polar bears have shown their adaptability and resiliency in the face of a changing climate by traveling southward in search of food. When they reach grizzly bear habitat, polar bears and grizzlies interbreed, resulting in something called a pizzly. Unfortunately, other species will not be lucky enough to find compatible mates, and biologists have predicted that man is in the middle of causing the “Sixth Extinction.” Scientists predict that roughly 16% of all the Earth’s species will be extinct by the end of the 21st century, and this threatens future generations’ survivability.

Melting sea ice does not threaten to inundate coastal communities because the ice is already in the ocean; like the ice cube in your favorite beverage, when it melts, it doesn’t raise the level of the liquid in the glass. This is not the case with melting the Greenland and Antarctic ice sheets which contain roughly 75% of the Earth’s freshwater. When these sheets melt (and they are observably melting in a warming world), sea levels rise around the world. According to the NASA Earth Observatory, if all this ice were returned to the world’s oceans, it would raise sea levels 75 meters. While this doomsday scenario is unlikely to occur in the next few hundred years, Dr. Hansen warned of a lesser known but perhaps more disastrous consequence of this melting which is happening now.

Ice experts have long referred to ocean conveyors (thermohaline circulation) by which cold, less salty deep waters sinking near the poles allows the transfer of warmer waters near the Equator to the surface. The gulf stream, which warms the ocean (and countries which would otherwise be significantly colder) off Northern Europe and the American East Coast, results from this transfer of surface and deep waters. According to Dr. Hansen, evidence suggests that these massive ocean conveyors, while not shutting down as in the movie The Day after Tomorrow, are slowing because of the gradual disintegration of the Greenland and Antarctic Ice Sheets. Climate modeling and paleoclimate data suggest that continued melting will increase the likelihood of both the frequency and severity of superstorms.

Finally, melting of land-based glaciers in places like the Alps, Montana, the Himalayas and steadily decreasing snow packs in formerly cold places like the Sierra Nevada in California portend disastrous consequences for our ability to feed the planet. As the Earth has warmed, experts in the cryosphere (frozen water part of the Earth system) have pointed out that glaciers have retreated in most of the world. In Montana, scientists with the United States Geological Survey warn that if the current rate of warming continues, all of Glacier National Park’s glaciers will be

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gone by 2030. More recent estimates suggest this could happen as soon as 2020. Coming up with a new name for an iconic National Park might be an interesting public relations gimmick; however, it’s a tragedy with consequences beyond mere aesthetics. Glaciers and snow packs throughout the world feed the rivers which run through the valleys beneath them. When these rivers run dry, irrigation shuts down and places like the Central Valley in California, which produces ¼ of the nation’s food, loses its ability to produce crops.

**Tipping Points and Feedback Loops**

I’m not a scientist, but I’ve been reading about global climate change ever since my son was born about 13 years ago. Dr. Hansen has said that he started taking a more active role in publicizing what he knows when he realized his granddaughter Sophie could one day legitimately ask her own daughter, “Opa knew about this, so why didn’t he do more to tell more people?” I think Hansen and I both feel like we owe it to future generations to do more before it’s too late, and that’s where the tipping points come in.

In some cases, we won’t know it’s too late before it’s already too late. That’s probably the case with Glacier National Park; because carbon dioxide persists in the atmosphere. As David Archer, author of *The Long Thaw*, put it, “The lifetime of fossil fuel CO₂ in the atmosphere is a few centuries, plus 25 percent that lasts essentially forever. The next time you fill your tank, reflect upon this.” So, the glaciers are toast by 2030 no matter what steps we take to reduce our carbon footprints now. When it comes to things like the ocean conveyors, there’s probably still time to cut emissions and find some ways to sequester carbon in deep mine shafts or some other technological fixes before we reach tipping points—or points of no return.

Unfortunately, feedback loops could doom all human interventions to failure. One example involves the Earth’s water cycle. Put simply, water evaporates from the land and sea, which eventually returns to Earth as rain and snow. Climate change intensifies this cycle because as air temperatures increase, more water evaporates into the air. This leads to more frequently occurring and more severe superstorms—the most recent example of this is the catastrophic flooding in Maryland where 6.5 inches of rain fell in three hours. National news outlets like to refer to such events as 1,000 year events because that’s how infrequently they happened in the past, but we’ve got a new normal. Another example involves the disappearing sea ice in polar regions. When the ice floats on the surface, sunlight is reflected back into space—it’s something known as the albedo effect. Once the ice is gone, sunlight (and heat) is absorbed by the ocean. The last, and most devastating feedback loop, involves methane trapped in the Alaskan tundra and along ocean borders. As the oceans and northern places warm, methane is released into the atmosphere—methane is a global warming gas that doesn’t persist in the atmosphere as long as CO₂; however, it is between 25 and 100% more powerful in terms of its ability to trap solar radiation within our atmosphere.

So, if you’ve got kids, or you like kids, or you care about what future generations will say about you, take some action to support those fighting for intergenerational justice. Modern environmentalists like to quote from the Lakota Sioux, who said, “We didn’t inherit this planet from our ancestors, but we borrow it from our children.” If we don’t pass down a planet resembling what we got from our forebears, our children, just like Dr. Hansen’s granddaughter Sophie, will have the right to ask some very tough questions about us and whether we did enough to preserve what we were only borrowing from them.

Kurt Olson is a professor at Massachusetts of Law, where he teaches legal ethics, legal writing, environmental law, and law office technology.
Law Day or Cinco de Mayo? Professor Olson will celebrate either occasion. With him is Peter Burke.
Barbara Kelly receives the Dean’s Award from Dean Coyne

Kaileen Paiva, Rachel Tennis, Shawn Tennis, and guest

MSLaw’s two Deans, Registrar Louise Rose, and State Senator Lovely pose with the graduating students of the American College of History and Legal Studies: Catherine Newman, Barbara Kelly, Erin Frazee, Kelsey Kerr, and Lieren McElory

MSLaw alumnus State Senator Joan Lovely accepts her award from 2016 SBA President Shawn Crapo
Pre-graduation Party

The first Friday in June marks the MSLaw rite of passage known as graduation. But the festivities start the night before, when graduates, students, alumni, faculty, and staff gather at the annual pre-graduation “Party on the Patio.”
If someone can be said to be both typical and exceptional at the same time, Paul Errico may be the man. Like many an MSLaw alum, Paul had dropped off the educational track, gone to work, started a family, and gained some life experience before coming to MSLaw. For example, some alumni (and current students) have worked in the health field, some have come from—or still work in—law enforcement, some have been in the military. Paul? He’s done it all.

After a year at Franklin Pierce University, Paul took an EMT course and went to work for a couple of ambulance companies. Then he went on to the Police Academy and the UMass police force. Not leaving his medical skills to get old or rusty, Paul did over a year of paramedical school. He also went to police-prosecutor school in what might be called (for a lesser person) his spare time. He went on to work for the Middlesex Sheriff’s Department, working in the House of Correction and running down warrants, as far as Alaska on one occasion.

And, oh yes, the military. In 2006, Paul, with his medical expertise, was a Navy corpsman assigned to the Marines then taking Falluja in Iraq from the determined insurgents who had killed and displayed the bodies of contracted Blackwater soldiers, reported at the time as the heaviest and most vicious fighting by American forces in Iraq. Two years later, Paul went back for another “tour” in Iraq. His chuckling descriptions of surviving what would have been life-ending attacks but for the failures of enemy equipment will stop any listener in mid-breath, as one marvels at the man.

On his journey to advance and educate himself, Paul, having gotten his undergraduate degree after six years, part time, applied to nurse-practitioner school and medical school but got no further than wait lists. So he applied to law schools as well, ready to go with whomever took him first, though he will confess to leaning toward MSLaw. He had friends here and was particularly taken with what he heard from Dean Coyne during an open house. MSLaw, to his and its good fortune, said yes.

Paul is looking forward to law practice, perhaps hanging his own shingle, and focusing on criminal defense work and family law.
Some people attend law school because they want to advance their current careers. Others attend to change careers. For 2L Karen McCall, the decision to attend law school emanated from a suggestion to do so. “I did some work with this really excellent county attorney who questioned why I was in school for social work,” explained Karen. “She said, ‘You don’t really want to do that—you should go to law school.’ So I did.”

The law has been part of Karen’s life for the better part of 20 years. In 1997, she joined the AmeriCorps program, which, in exchange for one year of service, would give her an educational grant. In that program, she was placed with the Hillsborough County (New Hampshire) County Attorney’s office as a victim witness advocate. Impressing those she worked with, Karen was hired after her year of service by the YWCA Crisis Center, a position she found much more rewarding. “As a victim witness advocate, my role was unofficially as an ‘agent of the state,’ and people were forced to deal with me. But at the Crisis Center, I worked with people who were reaching out to me, including some whom I had worked with in my previous position. And I was working with all types of people—such as child abuse and sexual abuse survivors—instead of predominantly domestic abuse victims,” she noted. “We accompanied victims when they were involved with various systems, such as law enforcement, medical services, civil and criminal matters, child protective services, and housing, for example. We offered 24-hour access to information and emotional support. For example, we would stay with sexual assault victims while they underwent forensic evidence collection (rape kits) in a hospital emergency room. That was also the year that Manchester (NH) created a domestic violence unit, receiving federal funding that required it to work with the Crisis Center. It was a good opportunity, and I made long-term connections.”

Karen stayed with the Crisis Center for three years before moving to the New Hampshire Coalition Against Domestic and Sexual Violence as a trainer, helping it engage in system reform. She enjoyed that position the most because she helped shape the approach to a volume of cases as opposed to just the individual clients she helped in her previous roles. “The state was very troubled in its approach to domestic violence cases that overlapped with child abuse and neglect,” she said. “The previous system didn’t recognize that different types of abuse warrant different approaches. Additionally, the old approach was to put pressure on battered moms at the same time the perpetrator was putting pressure on her. It was an incredibly broken system.” Under Karen’s leadership, the Division of Children, Youth, and Families (DCYF, New Hampshire’s version of child protective services) in the Department of Health & Human Services created a memorandum of understanding and improved and increased statewide services available through the Domestic Violence Prevention Specialist Program (DVPS). The DVPS put an advocate in every district office of DCYF, an accomplishment she is most proud of. “Having an advocate in every office is an excellent resource and hugely important for people involved in the system,” she added. These enhancements also resulted in New Hampshire being one of six sites funded by the Greenbook Initiative, which joined domestic violence service providers, child protection agencies, and the courts in an effort to provide better services for victims. “We were chosen because our program was solid,” said Karen.

While she greatly enjoyed the “concrete, tangible assistance” that she provided people, Karen said the job was emotionally draining, and she started to feel burned out in that profession. While she is encouraged by law school’s ability to broaden her perspective, she admits that she may not leave behind her previous career permanently. “I probably will find a way back in some

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capacity, such as public policy,” she stated. Other areas of law that interest her are human rights law, as she would like to help “any marginalized group of people who have to really advocate for themselves to have access to the systems that they should be benefitting from.” Litigation also appeals to her, but she is unsure in what form.

Karen chose MSLaw for the practical reasons of it being affordable and close to her Nashua home, but what she really enjoys most about it is the diverse student population. “I like that there is a whole group of people with careers in their background who have a lot to contribute to the educational experience. I like the mix of middle-aged and younger-aged people, and I like that it offers an opportunity to people who would otherwise not be able to attend law school, perhaps due to cost,” she explained.

To 1Ls and incoming students, Karen offers the following advice: “Allocate for study time, which is more hours than class time. And find classes or law-related activities that stir your passions and remind you why you are doing this. It keeps your passions and motivations high.”

When she is not in school, Karen enjoys any outdoor activity, with biking and running being two of her favorites. She recently completed a sprint triathlon and hopes to do more. She is also the busy mom of three daughters: 24-year-old Shannon, and 12-year-old twins Ashley and Delaney, who will graduate middle school the same time Karen receives her MSLaw diploma.