

IN THE MISSOURI SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI EX REL.)	
GINA MARIE HOUSKA, PERSONAL)	
REPRESENTATIVE OF THE)	
ESTATE OF JEFFREY A. HOUSKA,)	No. SC90701
DECEDENT)	
)	
Relator,)	Circuit Court of the County of
)	Jefferson, Missouri
Vs.)	Cause No. 07JE-PR00004
)	
THE HONORABLE RAY DICKHANER,)	
ASSOCIATE CIRCUIT JUDGE)	Missouri Court of Appeals –
23 RD JUDICIAL CIRCUIT – JEFFERSON)	Eastern District No. ED94117
COUNTY, MISSOURI,)	
)	
Respondent.)	

PETITION FOR WRIT OF PROHIBITION, OR, IN THE ALTERNATIVE, FOR A
WRIT OF MANDAMUS

REPLY BRIEF OF RELATOR

THOMAS J. RAY, JR., MOBar # 40222
3520 Jeffco Boulevard, Suite 110
Arnold, MO 63010
636-464-8353
RAY LAW OFFICES, P. C.

ATTORNEY FOR RELATOR

TABLE OF CONTENTS

I. STANDARD OF REVIEW FOR CONSTITUTIONAL CHALLENGES 1

II. ARGUMENT IN REPLY TO PANAGOS’ ARGUMENT 1A (PAGES 5-45) 2

III. ARGUMENT IN REPLY TO PANAGOS’ ARGUMENT 1B AND C (PAGES 45-55)
..... 10

IV. ARGUMENT IN REPLY TO PANAGOS’ ARGUMENT 1B (PAGES 45-51) 12

V. ARGUMENT IN REPLY TO PANAGOS’ ARGUMENT 1C (PAGES 51-55) 21

CONCLUSION 28

CERTIFICATE OF COMPLIANCE 29

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

Table of Constitutional Provisions

Missouri Constitution art. I, § 2	12 n.6, 20
Missouri Constitution art. I, § 10	9 n.4
Missouri Constitution art. III, § 23	12, 21, 23, 28
U. S. Constitution, amend XIV	3, 3n.2, 12 n.5, 20

Table of Statutes

RSMo. § 472.010(15)	12
RSMo. § 473.020.2(3)	16
RSMo. § 473.033	12, 14, 15, 15 n.8, 18, 18 n.9
RSMo. § 473.050	17, 19 n.10
RSMo. § 473.077	17
RSMo. § 473.083	17
RSMo. § 473.180	17
RSMo. § 473.360	3, 10, 13, 15 n.8, 17, 18
RSMo. § 473.433	17
RSMo. § 473.444	2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15 n.8, 19, 20, 21, 27
RSMo. § 473.463	17
RSMo. § 473.540	17
RSMo. § 473.610	17

RSMo. § 473.613	17
RSMo. § 473.617	17
RSMo. § 473.663	19, 20
RSMo. § 473.840	17
RSMo. § 473.843	17
RSMo. § 474.180	17
RSMo. § 474.290	17
U.P.C. § 1-102(b)(3)	16
U.P.C. § 3-801	15 n.8
U.P.C. § 3-801(b)	15 n.8
West’s C.R.S.A. § 15-12-803(1)(III)	19

Table of Cases

Alexander v. Wyatt’s Estate, 21 Mo. App. 550, 244 S.W.2d 121 (1951)	17
Americans United v. Rogers, 538 S.W.2d 711 (Mo. banc 1976)	1
Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822 (Mo. banc 1992)	12-14
Burnett v. Vallaneuve, 685 N.E.2d 1103 (Ind. App. 1997)	7
C. C. Dillon v. City of Eureka, 12 S.W.3d 322 (Mo. banc 2000)	21
Carmack v. Dir., Missouri Department of Agriculture, 945 S.W.2d 956 (Mo. banc 1977)	23
Corvera Abatement Technologies, Inc. v. Air Conservation Commission, 973 S.W.2d 851 (Mo banc 1998)	24
Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006)	9

Eisel v. Midwest Bankcentre, 230 S.W.3d 335 (Mo. banc 2007)	11
Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978)	7, 8
Fust v. Attorney General, 947 S.W.2d 424 (Mo. banc 1997)	22
Greenlee v. Dukes Plastering Service, 75 S.W.3d 273 (Mo. banc 2002)	14
Hatfield v. McCluney, 893 S.W.2d 822 (Mo en banc 1995)	4, 5
Heidbreder v. Tambke, 284 S.W.3d 740 (Mo. App. W. D. 2009)	15 n.8, 20
Home Builders Association of Greater St. Louis v. State, 75 S.W.3d 267 (Mo. banc)	
.....	22, 25, 27
In Re Estate of Fessler, 302 N.W.2d 414 (Wis. 1981)	4
In Re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000)	19
Jackson County Sports Complex Authority v. State, 226 S.W.3d 156 (Mo banc 2007)	
.....	22, 24
Jamison v. State Division of Family Services, 218 S.W.3d (Mo. banc 2007)	9
Litzinger v. Pulitzer Publishing Co., 356 S.W.2d 81 (Mo. 1962)	11
Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503 (Mo. Banc 1991)	13, 20
Missouri State Medical Association v. Missouri Department of Health, 39 S.W.3d 837	
(Mo. banc 2001)	22, 24
Prokopf v. Whaley, 592 S.W.2d 819 (Mo. banc 1980)	1
Schnorbus v. Director of Revenue, 790 S.W.2d 241 (Mo. banc 1990)	1, 13
St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. banc 1998)	25, 26, 27
State ex. rel State of Missouri v. Parkinson, 280 S.W.3d 90 (Mo. banc 2009)	11
State v. Hampton, 653 S.W.2d 191 (Mo. banc 1983)	23

State v. Mitchell, 563 S.W.2d 18 (Mo. 1978)	15, 19
State v. Rushing, 935 S.W.2d 30 (Mo. banc 1996)	9
Texaco v. Short, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1981)	4, 5, 6, 8
Trout v. State, 231 S.W.3d 140 (Mo. banc 2007)	22, 24
Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)	2, 3, 5, 7, 8, 10
Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) (Rehnquist C.J. dissenting)	4
Winston v. Reorganized School District R-2, Lawrence County, 636 S.W.2d 324 (Mo. banc 1982)	1, 11, 14

Other Authority

J. Borron, 4A, B, Missouri Practice – Probate and Surrogate Laws Manual (West 2 nd ed 2001)	25 n.12
“Comment: Notice and Missouri Probate Nonclaim Statutes: The Lingering Effects of Pope,” 59 Mo. L. Rev. 187 (1994)	2 n.1, 6
F. Hanna, 4 Missouri Practice – Probate Code Manual (West 2 nd ed. 2000)	25 n.12
M. Reutlinger, “State Action, Due Process, and New Nonclaim Statutes: Can No Notice Be Good Notice If Some Notice Is Not,” 24 Real Prop. Prob. & Tr. J. (1990)	2, 7
S.S.H.C.S.H.B. No. 145, Laws of Missouri 1989	21, 22, 23, 25, 27
Webster’s Third International Dictionary of the English Language Unabridge (Springfield, MA: Merriam-Webster 1993)	23, 24

I.

STANDARD OF REVIEW FOR CONSTITUTIONAL CHALLENGES

As to the standard of review on constitutional questions, the court presumes the constitutionality of a statute and will not hold the statute unconstitutional unless it “clearly and undoubtedly” contravenes the constitution; indeed, a court should enforce the statute unless it “plainly and palpably affronts fundamental law embodied in the constitution.” *Winston v. Reorganized School District R-2, Lawrence County*, 636 S.W.2d 324, 327 (Mo. banc 1982), quoting *Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. banc 1980) and *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. banc 1976), *cert. denied*, 429 U.S. 1029, 50 L. Ed. 2d 632, 97 S. Ct. 653. When a party attacks the constitutionality of a statute, the burden falls upon the party claiming the statute is unconstitutional to prove the provision is unconstitutional. *Schnorbus v. Director of Revenue*, 790 S.W.2d 241, 243 (Mo. banc 1990).

II.

ARGUMENT IN REPLY TO PANAGOS' ARGUMENT 1A (PAGES 5-45)

Respondent allowed Panagos to reassert its claim under the incorrect belief that RSMo. § 473.444 is unconstitutional as a denial of due process under *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). We note initially that *Panagos' Brief fails to cite a single case from Missouri or any other state as legal precedent in support of the Respondent's holding.* Indeed, *all of the existing legal precedent of which we are aware holds that statutes identical in function to RSMo. § 473.444 do not violate due process of law.* (See cases cited at Relator's Brief in Chief at 14-16.) Indeed, the sole support for Panagos' position comes from a cleverly-titled 1990 law review article by Professor Mark Reutlinger, "State Action, Due Process, and New Nonclaim Statutes: Can No Notice Be Good Notice If Some Notice Is Not?," 24 *Real Prop. Prob. & Tr. J.* 433 (1990).¹

Although we rely on our Brief-in-Chief to set forth our primary legal arguments, we feel compelled to reply to certain points in Respondent's Brief.

On page 16 of its Brief, Panagos wonders how "due process requires actual notice under the nonclaim statute but no notice whatsoever under the probate [self-executing statute of limitations]"? Although Panagos (and Gracie Allen) might not understand it, it

¹ A case comment – *Comment: Notice and the Missouri Probate Nonclaim Statutes: The Lingering Effects of Pope*, 59 *Mo.L.Rev.* 187 (1994) – parrots Reutlinger's musings.

is a fundamental principle that the constitutional restraints of the due process clause apply only when there is state action. The 14th Amendment restricts the actions of *states*, not the actions of private individuals.² There is a clear constitutional distinction between nonclaim statutes like RSMo. § 473.360 and self-executing statutes of limitation like RSMo. § 473.444.³

In the case of nonclaim statutes like 473.360 and the Oklahoma statute under review in *Pope*, the probate court – an agency of the state – is “intimately involved throughout” the process, through a court order appointing the personal representative, the requirement that notice be published immediately after appointment, the execution of a court order commanding publication, and the filing of an affidavit of publication with the court. 485 U.S. at 487. The nonclaim bar could not run without these acts, so the cumulative effect is “pervasive and substantial” state action under these statutes. *Id.* This involvement means that the nonclaim time bar of the Oklahoma statute and similar nonclaim statutes “lack the self-executing feature” that is “necessary to remove any due process problem” because “the legal proceedings themselves trigger the time bar.” 485 U.S. at 487. *Pope*, therefore, held that the due process clause requires the personal representative under these statutory regimes to give actual notice of the opening of the estate and the claims period to “reasonably ascertainable creditors.”

² “Nor shall any State deprive any person of life, liberty, or property without due process of law.” U. S. Const. amend. XIV.

³ Panagos calls self-executing statutes of limitation “probate statutes of repose.”

RSMo. § 473.444 and statutes like it, however, do not suffer under this infirmity because they are self-executing statutes of limitation to which due process necessities of notice do not apply. How does the self-executing feature excuse the statute from the requirements of due process? As the Chief Justice noted in *Pope*, “That term [self-executing] refers to the absence of a judicial or other determination that itself extinguishes the claimant’s right.” 485 U.S. at 494 (Rehnquist, C.J., dissenting). “The bar created by operation of a statute of limitations is established independently of any adjudicatory process. It is legislative expression of policy that prohibits litigants from raising claims – whether or not they are meritorious – after the expiration of a given period of time The passage of time itself destroys the right and remedy of the injured party.” *In Re Estate of Fessler*, 302 N.W.2d 414 at 420 (Wis. 1981) (citations omitted). RSMo. § 473.444 is self-executing because, as this Court has described the statute, it “operates independently of any notice, judicial action or jurisdiction of the probate division to bar claims.” *Hatfield v. McCluney*, 893 S.W.2d 822 at 826 (Mo. banc 1995). There is no nexus between the termination of creditors’ claims and any court proceedings under RSMo. § 473.444 – indeed, the probate court is no more involved in the running of the statute than it was in the statute’s enactment. The Supreme Court said in *Pope* that if the state’s only involvement in a self-executing statute of limitations is its enactment, “the State’s limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.” 485 U.S. at 487. *Accord Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1981).

Although Panagos dismisses the Supreme Court’s statement in *Pope* that “the State’s involvement in the mere running of a general statute of limitations [is not] generally sufficient to implicate due process,” as mere *dicta* to be ignored by this Court (Respondent’s Brief at p. 29.), Panagos strives mightily to distinguish *Pope* and *Texaco, Inc. v. Short*. Panagos invents new theories to find state action where existing legal precedents find none.

First, Panagos makes the novel argument that RSMo. § 473.444 is not a statute of limitations at all! (Respondent’s Brief at 27-28.) This comes as a surprise since this court has already said in *Hatfield v. McCluney*, 893 S.W.2d at 825 that RSMo. § 473.444 is indeed a statute of limitations.

Second, Panagos argues that the statute under consideration in *Texaco, Inc. v. Short* – which statute Panagos concedes “could be . . . described” as self-executing (Respondent’s Brief at 30.) – is distinguishable from RSMo. § 473.444. In *Texaco, Inc. v. Short*, the Court upheld the Indiana Mineral Lapse Act against due process challenge. The Act provided that any severed mineral interests not used for twenty years would revert to the surface owner, unless the owner of the mineral interest filed a statement of claim in the county recorder’s office before the expiration of the twenty year period. The Act did not require the surface owner (or any other interested party, for that matter) to give notice to the mineral interest owner that its claim would expire at the conclusion of the twenty-year period. In rejecting the argument that this lack of notice deprived an affected mineral interest holder of due process, the Supreme Court noted, “[t]hat claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a

potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding." 454 U.S. at 536.

Panagos asserts that the holding of *Texaco, Inc. v. Short* should only apply to general statutes of limitation because the event that causes it to commence "is or should be known to the person affected," (Respondent's Brief at 31 quoting Comment *supra*. note 1 at 207). Here, according to Panagos, "Relator seeks to defeat Panagos' claim based on the expiration of a deadline triggered by an event, the death of her father, known, perhaps, only to her," and so due process should apply. (Respondent's Brief at p. 31.) Panagos does not say how any state action is involved in this argument (perhaps because no state action exists). Instead, Panagos asserts that the Court in *Texaco, Inc. v. Short* did not look for state action to resolve this issue, but instead imposed a "balancing of interests" to determine what process was due under the statute. (Respondent's Brief at p. 31.) Apparently, under Panagos' novel reading of *Texaco, Inc. v. Short*, this balancing tips in favor of a creditor under RSMo. § 473.444 since it "would not likely be aware of" the decedent's passing, unlike the owner of a severed mineral interest, who would know, or should know, that his mineral interest would expire. (Respondent's Brief at 32.) We do not read *Texaco, Inc. v. Short* to apply any "balancing of interests" test. But even if a "balancing of interests" test did exist, Panagos would not prevail. Surely, a responsible creditor would seek to learn before the passage of a year why the decedent had not paid its bill, and then take appropriate action to protect its interest when it learned of decedent's death. See *Burnett v. Villeneuve*, 685 N.E.2d 1103 at 1112 (Ind. App. 1997). Even if one accepts Panagos' new "balance of interest" theory, the scales do not tip in a

creditor's favor especially where, as here, that creditor did nothing to protect its claim for two and one-half years!

Clearly, under existing precedent, no state action attaches to the enactment of claims periods in self-executing statutes like RSMo. § 473.444, and therefore the Respondent erred in applying the notice requirements of *Pope* to the statute. Yet, starting at p. 35 in a section it entitled "The Self-Executing Fallacy," Panagos' Brief seeks to overcome this clear precedent by asserting that state action can nevertheless be found in the enactment of a self-executing statute of limitation. In this section, Panagos relies completely on the "analysis" set forth in Professor Reutlinger's article. See Reutlinger, *supra*. p. 3.

We note that in his article, Reutlinger seizes upon the court's "concession" in *Pope* that enactment is state action, but then seeks to wiggle out from under *Pope*'s corollary rule that "enactment alone generally is insufficient to implicate due process." Reutlinger, *supra*. at 448. Rather than support these legal gymnastics by analyzing the text of *Pope*, Reutlinger changes the subject from *Pope* to the Supreme Court's decision in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). In *Flagg Brothers, Inc. v. Brooks*, the court upheld the constitutionality of a Uniform Commercial Code provision, which allowed a warehouseman to enforce a lien upon repossessed goods by re-selling those goods. The Court held that the state-allowed re-sale provision did not constitute state action, and thus, the plaintiff did not possess a federal due process claim. Reutlinger attempts to explain why the enactment of the UCC did not implicate due process, but would in the case of self-executing statutes of limitation like RSMo. § 473.444. The distinction, Reutlinger claims, is choice. Under

the UCC provision, the law *permits* a warehouseman to re-sell property, but does not *compel* him to do so. Therefore, no state action exists in those circumstances to implicate due process concerns. On the other hand, Reutlinger argues that the state is far more deeply implicated in the deprivation of property under a self-executing statute of limitation because the state, “in enacting a [self-executing statute of limitation] has not offered private parties a choice whether to cut off claims at the end of one year; it has mandated that all claims be cut off, regardless of any action or inaction by any private party.” And therein lies state action, or so he claims. Reutlinger, *supra*. at 448.

But Reutlinger’s argument is, in a word, specious. First, his observation ignores that *all* ordinary statutes of limitation “mandate that all claims be cut off;” therefore, his observation seems to *directly contradict* the Supreme Court’s exemption of those claims in the *Pope* and *Texaco* cases from procedural due process review. Second, the state action issue in *Flagg Brothers, Inc. v. Brooks* was not whether the statute’s enactment was state action, but rather if the warehouseman who acted pursuant to the statute was, under the circumstances, an agent of the state. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. at 149-151. The court never directly considered the role that enactment has played in creating state action. Instead, the primary thrust of the opinion in *Flagg Brothers, Inc. v. Brooks* was that the power delegated by the state to the private party did not involve a function reserved exclusively to the State.

Finally, Panagos seems to imply on pages 42-45 of its Brief that, even if our analysis is correct as a matter of *federal* constitutional law, RSMo. § 473.444 violates the

due process clause of the *Missouri* constitution.⁴ This Court, however, has said that Missouri’s due process clause “parallels its federal counterpart, and in the past this Court has treated the state and federal due process clause as equivalent.” *Jamison v. State Division of Family Services*, 218 S.W. 3d 399 at 405 n. 7 (Mo. banc 2007). In *Doe v. Phillips*, 194 S.W.3d 833 at 841 (Mo. banc 2006), quoting *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996), this Court noted that “[w]hile ‘provisions of our state constitution may be construed to provide more expansive protections than comparable federal provisions,’ . . . analysis of a section of the federal constitution is ‘strongly persuasive in construing the like section of our state constitution.’” In *Doe v. Phillips*, this Court specifically refused to interpret the Missouri due process clause more broadly than its federal counterpart because the appellant “identified no reason grounded in either the language of Missouri’s 1945 Constitution or the history of its enactment to believe that its framers intended these clauses to be interpreted more broadly than the nearly identical provision of the United States Constitution.” 194 S.W.3d at 841. Panagos has likewise failed to offer any justification for a differing interpretation of due process clause of the Missouri Constitution.

This argument is without merit.

⁴ Mo. Const. art. I, § 10: “That no person shall be deprived of life, liberty or property without due process of law.”

III.

ARGUMENT IN REPLY TO PANAGOS' ARGUMENTS 1B and C (PAGES 45-55)

On May 5, 2009, two and one-half years following the decedent's death on November 2, 2006, Panagos finally got around to filing a claim against the Relator. (Exhibit 8 of Appendix, Relator's Brief in Chief, p. A16-17.) The claim made no special allegations to justify its late filing, and the Respondent initially dismissed the claim as barred by RSMo. §§ 473.360 and 473.444. (Exhibit 9 of Appendix, Relator's Brief in Chief, p. A18). Five months later, Panagos filed a *Motion for Rehearing* of its Claim (Exhibit 10 of Appendix, Relator's Brief in Chief, p. A19-20). Panagos asserted as its legal basis *only* that denial of the claim violated Panagos' right to due process of law under the federal and state constitution. (Exhibit 10 of Appendix, Relator's Brief in Chief, p. A20, ¶5). In its *Memorandum* to the Respondent in support of the Motion, Panagos argued *only* that the Respondent's order violated its right to due process, and cited as authority *Tulsa Professional Collections Services, Inc. v. Pope, Inc.*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). (Exhibit 11 of Appendix, Relator's Brief in Chief, p. A-21-23 at A21). *Pope* dealt only with federal due process notice considerations, and had no other basis in federal constitutional law. Respondent granted Panagos' motion on this basis, *and no other basis*, on December 24, 2009. (Exhibit 1 of Appendix, Relator's Brief in Chief, p. A1-A2). Now, to bolster its case before this Honorable Court, Panagos throws in the proverbial "kitchen sink" of legal arguments and theories. Panagos asserts that, in addition to the federal due process argument upon which it prevailed before Respondent, RSMo. § 473.444 suffers additional constitutional

infirmities, to-wit: (1) the statute violates the equal protection clause of the U.S. and Missouri constitutions; and (2) the Bill in which the section was enacted violates the requirements of Article III, Section 23 of the Missouri Constitution.

This Court, however, should dismiss these claims as made in an untimely fashion. It is fundamental law in Missouri that “[c]onstitutional challenges to the validity of any alleged right or defense asserted by a party to an action *must be raised at the earliest opportunity* consistent with good pleading and orderly procedure.” *Litzinger v. Pulitzer Publishing Co.*, 356 S.W. 2d 81 at 88 (Mo. 1962) (emphasis added). *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335 (Mo. banc 2007). The rationale for this rule is “to prevent surprise to the opposing party and permit the trial court an opportunity to fairly identify and rule on the issue.” *Winston v. Reorganized School Dist. R-2*, 636 S.W.2d 324 at 327 (Mo. banc 1982). Furthermore, in the specific context of an application for writ of prohibition, this Court has said that a party can waive an issue by failure to raise it in a timely fashion. *State ex rel. State of Missouri v. Parkinson*, 280 S.W. 3d 70 (Mo. 2009).

Panagos has not brought the constitutional challenges contained in Arguments 1B and C of its Brief (pages 45-55) at the earliest opportunity before the Respondent.

Therefore, this Court should deny these claims as untimely made.

IV.

ARGUMENT IN REPLY TO PANAGOS' ARGUMENTS 1B (PAGES 45-51)

Panagos asserts that Missouri claims procedure – which includes specifically RSMo. §§ 473.033, 473.360 and 473.444 – violates the equal protection clauses of the United States Constitution⁵ and the Missouri Constitution⁶ by treating a class – the creditors of a decedent – differently than other interested parties in the estate.⁷

Panagos correctly cites *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1992) as setting forth the constitutional standard in resolving this challenge. In that case, this Court stated:

Analysis of an equal protection claim involves a two step process. The first step is to determine whether the classification burdens a “suspect class” or impinges upon a “fundamental right”; in either event, strict judicial scrutiny is required. *If no such right or category is present, then the statute will be*

⁵ U. S. const. amend XIV: “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws. . .”

⁶ Mo. const. art. I, sect. 2: “that all persons are created equal and are entitled to equal rights and opportunity under the law. . .”

⁷ RSMo. § 472.010(15) defines “interested persons” as “heirs, devisees, spouses, creditors and any others having a property right or claim against the estate of the decedent being administered. . . .”

upheld and a classification sustained if the classification is rationally related to a legitimate state interest.

...

... This Court has often articulated the minimal nature of a “rational basis” analysis. In *Schnorbus*, 790 S.W.2d [241] at 243 [(Mo. banc 1990)], we said that the standard for review for equal protection claims made under the United States Constitution is “the ‘lenient standard of rationality.’ . . . A classification will be sustained if any state of facts reasonably can be conceived to justify it.” In *Mahoney*, we pointed out that the “rational basis” test for equal protection “is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state’s objective.” *Mahoney [v. Doerhoff Surgical Services]*, 807 S.W.2d [503] at 512 [(Mo. banc 1991)]. We went on to say:

State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . . In this assessment, “States are not required to convince the courts of the correctness of their legislative judgments. Rather, ‘those challenging the legislative judgment must convince the court the legislative facts upon which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.’”

Id. In *Winston*, we pointed out that “*It is not [the Court's] province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination.*” *Winston*, 636 S.W.2d at 327.

821 S.W.2d at 829 (Emphasis added). *Accord Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273 (Mo. banc 2002).

Panagos acknowledges here that the property right of a creditor is not a fundamental right and the creditors of decedents are not a suspect class; therefore, strict scrutiny does not apply to this case. *Respondent's Brief* at 50. Instead, Panagos must show the disparate treatment (if any) of a creditor under the Missouri probate code does not rest on any reasonable state of facts to justify it. Panagos attempts to support its claim through three arguments.

First, Panagos claims that creditors as a class are subject to different notice requirements in that, pursuant to RSMo. § 473.033, “[t]he probate clerk is required to ‘send a copy of the notice [regarding the opening of the estate] by ordinary mail to each heir and devisee’ . . . but not to any spouse or creditor. . . . The statute allows, but does not require, the personal representative to mail a copy of the notice to creditors.” (Respondent’s Brief at p. 46.) We, however, note that Panagos mischaracterizes those “heirs and devisees” to which the probate clerk must give notice. Contrary to what Panagos asserts in its Brief, the applicable sentence in the statute actually says, in its entirety, “The clerk shall send a copy of the notice by ordinary mail to each heir and devisee *whose name and address are shown on the application for letters or other records of the court.* . . .” RSMo. § 473.033 (emphasis added). Thus, an heir or devisee

whose name and address is not listed on the application finds himself or herself in the same boat as a creditor.

As is typically the case in Missouri, the Legislature has provided no legislative history explaining its rationale or purpose for enacting RSMo. § 473.033, so we are given no guidance as to why the Legislature structured the statute the way in which it did. However, this Court has said we may “[look] elsewhere for such information,” such as similar laws enacted by other jurisdictions. *See State v. Mitchell*, 563 S.W.2d 18 (Mo. 1978) (gleaning the legislative objective of a Missouri law for equal protection purposes by looking to a similar federal law.) The claims procedure of the Uniform Probate Code is remarkably similar to Missouri’s claims process.⁸ According to the National

⁸ Similar to RSMo. § 473.360 – which provides a nonclaim period of six months following publication of notice (or two months following service or mailing of personal notice to the creditor, whichever is later) – U.P.C. § 3-801 invokes a nonclaims period of four months from publication of notice, or 60 days from mailing or actual delivery of notice on the creditor, whichever is later. Likewise, U.P.C. § 3-803(a)(1) provides a one-year self-executing statute of limitations like RSMo. § 473.444. Although it requires the personal representative to publish notice to creditors, it, like RSMo. § 473.033 allows, but does not require, the personal representative to mail notice to credits. U.P.C. § 3-801(b). The Missouri Court of Appeals for the Western District has said that when the U.P.C. contains a similar concept to that of Missouri, we may look to the objective of the U.P.C.

Conference of Commissioners on Uniform State Laws, an overall goal of the probate code is “to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors.” *Uniform Probate Code* § 1-102(b)(3) (2004). With this goal in mind, limiting the probate court’s mailing of actual notice only to the heirs and devisees whose names and addresses the clerk knows seems rationally related to the purpose of the probate code. The clerk does nothing to locate this information apart from reading the information supplied by the applicant on the application. The application for probate supplies the identity of these heirs and devisees to the clerk. The application must contain the “names, addresses and relationships to the decedent of the decedent’s heirs as is known to, or can be reasonably ascertained . . .” RSMo. § 473.020.2(3). This information, as a rule, is easily obtained by the applicant, who in many instances is an heir to the decedent and a relative to the other heirs. Obtaining this information would not be especially onerous or time-consuming. On the other hand, in determining the identity of creditors, most applicants would suffer under the handicap of not having personal knowledge of all of a decedent’s affairs including obligations or debts still outstanding at death. Requiring the applicant to determine the identity of the decedent’s creditors in order just to list them on the application would unreasonably delay commencement of administration of the

in discerning the objective of the Missouri law. *Heidbreder v. Tambke*, 284 S.W.3d 740 at 745 n. 3 (Mo. App. W. D. 2009).

estate. Limiting actual notice to heirs and devisees listed on the probate is rationally related to the goal of speedy and efficient administration of the estate.

Further, the “publication of notice” has greater legal significance under our probate code than actual notice. *See e.g. Alexander v. Wyatt’s Estate*, 241 Mo.App. 550, 244 S.W.2d 121 (1951) (holding that, absent the statutory published notice, actual notice will not start the running of the nonclaim statute). It is the “publication of notice,” not the mailing or serving of actual notice, that initiates the running of the three major statutes of limitation applicable to probate proceedings: (1) the nonclaim statute (RSMo. § 473.360), (2) the statute limiting will contests (RSMo. § 473.083), and (3) the section limiting the time for presentment of a will for probate (RSMo. § 473.050). And publication of notice, not actual notice, initiates the time within which a spouse must present the application for a homestead allowance (RSMo. § 474.290), the time election to take against will (RSMo. § 474.180), and certain proceedings permitted in RSMo. §§ 473.077, 473.433, 473.463, 473.540, 473.610, 473.613, 473.617, 473.840, and 473.843. When it comes to the publication of notice and the running of these important time limits, the probate code treats all interested parties in substantially the same manner.

Second, Panagos also asserts RSMo. § 473.360⁹ violates the equal protection clause because “[i]f the personal representative mails a notice to a creditor or serves him with it, Section 473.360 provides that a creditor has only two months thereafter within which to file a claim. A personal representative who promptly mails or personally serves such a notice cuts off the filing of any more claims long before the expiration of the six-month will contest deadline, . . . and long before the earliest time for the final distribution of the estate.” (Respondent’s Brief pp. 50-51 – some citations omitted.)

Here Panagos misreads RSMo. § 473.360. Contrary to what Panagos claims, if the personal representative sends written notice to a creditor informing the creditor of the personal representative’s appointment and the running of the claim statute, the creditor must file the claim within two months following the time of mailing to or service upon the creditor of the notice, or, alternatively, six months after the first publication of notice to creditors, “*whichever later occurs.*” RSMo. § 473.360.1 (emphasis added). *Accord* RSMo. § 473.033. Indeed, RSMo. § 473.360 and 473.033 actually extend the creditor’s claim period beyond the normal six-months if the written notice is mailed or served more than four months after the first publication of notice. Panagos’ argument here is without merit.

⁹ And, by extension, RSMo. § 473.033 since it contains the same provision complained of by Panagos.

Finally, Panagos asserts that a creditor is denied equal protection of law because RSMo. § 473.444 cuts off the rights of creditors one year after the decedent’s death, but, while the decedent’s will must be submitted for probate within one year of death,¹⁰ the heirs may “obtain the fruits of their inheritance” by filing a petition for determination of heirship under RSMo. § 473.663.

Again, the Legislature has provided no legislative history explaining its rationale for enacting RSMo. § 473.444. So, we must look elsewhere for the rationale behind the statute, such as similar laws enacted by other jurisdictions. *See State v. Mitchell, supra*. In this regard, and applying the test of reasonableness and rationality, we note that Colorado has a self-executing statute of limitations that likewise runs one-year from death and does not require notice to potential creditors. *See West’s C.R.S.A. § 15-12-803(1)(a)(III)*. In looking to the purpose of its statute, the Colorado Supreme Court said that a statute of limitations barring claims filed in the probate court more than one year after the decedent’s death, and without notice to creditors, “recognize[s] the policy in favor of dismissing untimely claims brought against an estate where addressing the merits of the claims would delay the settlement of the estate and the distribution of assets to the estate's devisees, legatees, and other claimants.” *In Re Estate of Ongaro*, 998 P.2d 1097, 1104 (Colo. 2000). RSMo. § 473.444 is rationally related to this legitimate state interest. By contrast, RSMo. § 473.663 has the objective of providing a

¹⁰ RSMo. § 473.050.3(2).

means by which heirs and devisees may establish title to property by showing the decedent's ownership, his death, and relationship to the decedent. *Heidbreder v. Tampke*, *supra*. note 8 (Mo. App. W. D. 2009). Thus, RSMo. §§ 473.444 and 473.663 are rationally related to different legislative objectives.

Having demonstrated a “state of facts reasonably may [be] . . . conceived to justify it,” *Mahoney*, 807 S.W.2d at 512, this Court must affirm that Missouri's probate claims procedure does not deny Panagos equal protection of laws under the 14th Amendment of the Federal Constitution or Article I, Section 2 of the Missouri Constitution.

V.

ARGUMENT IN RESPONSE TO PANAGOS' ARGUMENT 1C (PAGES 51-55)

Panagos attacks Section 473.444 because it claims S.S.H.C.S.H.B. No. 145, *Laws of Missouri 1989*, pp. 942 et seq., the bill in which it was enacted, violates Article III, Section 23 of the Missouri Constitution.¹¹ The Act in question has the following title:

AN ACT to repeal sections 194.115, 194.220, 404.007, 404.023, 404.027, 404.031, 404.038, 404.041, 404.051, 404.057, 404.071, 404.091, 404.410, 404.420, 404.440, 404.530, 404.540, 404.550, 404.560, 404.570, 404.590, 404.620, 404.650, 404.660, 456.080, 456.231, 456.730, 456.750, 473.033, 473.070, 473.083, 473.153, 473.155, 473.360, 473.663, 475.050, 486.550, 486.555, 486.560, 486.570, 486.575, 486.580, 486.585, 486.590 and 486.595, RSMo. 1986, relating to ownership and transfers of certain property, and to enact in lieu thereof eighty-three new sections relating to the same subject, with penalty provisions and an emergency clause for certain sections.

This Court has said that “Section 23 imposes two distinct procedural limitations by which the General Assembly may pass legislation: (1) a bill cannot contain more than one subject and (2) the subject of the bill must be clearly expressed in its title. Mo. Const. art.

¹¹ “No bill shall contain more than one subject which shall be clearly expressed in its title.”

III, sec. 23.” *C. C. Dillon v. City of Eureka*, 12 S.W.3d 322 at 328 (Mo. banc 2000).

Panagos, however, asserts only that the Bill failed to pass constitutional muster under the “clear title” requirement. (Respondent’s Brief at p. 52.) Its argument asserts that the title of S.S.H.C.S.H.B. No. 145 is overbroad. (Respondent’s Brief at 51-55.) Panagos does not assert that the Bill violated the “one subject” requirement.

This Court seems to have most recently expounded in detail on the legal standard in analyzing the “clear title” requirement in *Jackson County Sports Complex Authority v. State*, 226 S.W.3d 156 (Mo. banc 2007). In *Jackson*, the Court noted:

The clear title requirement is intended to keep “legislators and the public fairly apprised of the subject matter of pending laws.” *Home Builders Ass’n v. State*, 75 S.W.3d 267, 269 (Mo. banc 2002). To do this, the title need only “indicate in a general way the kind of legislation that was being enacted.” *Fust v. Attorney General*, 947 S.W.2d 424, 429 (Mo. banc 1997). Only if the title is (1) underinclusive or (2) too broad and amorphous to be meaningful is the clear title requirement infringed. *Home Builders Ass’n*, 75 S.W.3d at 270. Furthermore, for bills that have “multiple and diverse topics” within a single, overarching subject, that subject may be “clearly expressed by . . . stating some broad umbrella category that includes all the topics within its cover.” *Missouri State Med. Ass’n [v. Missouri Dept. of Health]*, 39 S.W.3d [837] at 841 [(Mo. banc 2001)].

226 S.W.3d at 161. *Accord Trout v. State*, 231 S.W.3d 140 (Mo. banc 2007).

Further, where, as here, the party challenging the title has alleged overbreadth and overinclusiveness in the bill’s title, this Court noted that “the only cases in which

this Court has so found are those in which the title could describe the better part of all legislation passed by the General Assembly. . . . In all other cases in which the bill's title 'does not describe most, if not all, legislation enacted' or include nearly every activity the state undertakes, this Court has rejected that a title was overinclusive." *Id.*

We remind the Court that it is Panagos, not Relator, who carries the burden of proving that the Legislature violated Article III, Section 23 of our Missouri Constitution when it enacted S.S.H.C.S.H.B. No. 145. *State v. Hampton*, 653 S.W.2d 191, 194 (Mo. banc 1983). Indeed, Panagos must show the constitutional limitation has been "clearly and undoubtedly" contravened. *Carmack v. Dir., Missouri Dept. of Agriculture*, 945 S.W.2d 956 at 959 (Mo. banc 1977). Panagos, however, has failed to meet this burden.

A fair parsing of the title indicates that it gives clear expression to the subject of the legislation, and did not refer to its subject in an impermissibly overbroad or amorphous manner. The title says, in pertinent part:

"AN ACT to repeal sections [listed here], relating to ownership and transfers of certain property, and to enact in lieu thereof eighty-three new sections relating to the same subject

Two words or phrases bear scrutiny: First, in this context, "*certain*" means "particular – of a character difficult or unwise to specify – used to distinguish a person or thing not otherwise distinguished or not distinguishable in more precise terms." *Webster's Third International Dictionary of the English Language Unabridged* (Springfield, MA: Merriam-Webster 1993) at 367. These "certain" properties, the ownership and transfer of which the Act refers, are properties held by agents, conservators, personal

representatives, custodians and other fiduciaries on behalf of minors, adult incompetents, and decedent's estates. How do we know this? By reference to the Sections being repealed. The Table in the Appendix to this Brief shows that these Sections all relate to properties held and distributed by fiduciaries.

The second phrase "*in lieu of*" means "in place of, instead of." *Id.* at 1306. This Court has said that this phrase "informs[s] the reader what is being substituted for the repealed provisions," and, in conjunction with the phrase "relating to the same subject," clearly states that the new sections likewise relate to the transfer and ownership of property held by fiduciaries. The title here relating to ownership and transfer of property held by fiduciaries is no broader than previous titles to bills that this Court has held to pass constitutional muster. *See e.g. Trout v. State, supra.* (no clear title violation in bill entitled "relating to ethics."); *Jackson County Sports Complex Authority v. State, supra.* (no clear title violation in bill entitled "relating to political subdivision"); *Missouri State Medical Association v. Missouri Department of Health, supra.* (no clear title violation in bill entitled "relating to health services"); and *Corvera Abatement Technologies, Inc. v. Air Conservation Commission, 973 S.W.2d 851 (Mo. banc 1998)*(no clear title violation in bill entitled "relating to environmental control"). The title "property transfers and ownerships by fiduciaries" does not describe most, if not all, legislation enacted. And,

although different fiduciaries hold and transfer property in different ways, these fiduciary relationships all fall under a single umbrella.¹²

Panagos cites two cases in support of its assertion that S.S.H.C.S.H.B. No. 145 violated the “clear title” requirement of the Missouri Constitution: *Home Builders of Greater St. Louis v. State*, 75 S.W.3d 267 (Mo. banc 2002), and *St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. banc 1998). However, each of these cases is distinguishable from this case.

In *Home Builders of Greater St. Louis v. State, supra.*, this Court struck down a bill entitled “relating to property ownership” as overbroad, thus violating the clear title mandate. Panagos admits that the case at bar is distinguishable because the title here includes two additional words: “transfers” and “certain,” yet Panagos does not explore the implications of these words, and indicates they are of little significance.

(Respondent’s Brief at p. 53.) But as we have shown above, addition of these words – especially the word “certain” – brings clarification to the title. *Home Builders of Greater St. Louis v. State, supra.*, has no application to this case.

¹² Relator notes the fact that Missouri’s leading treatise on Missouri legal practice links all these provisions together under a single volume number, which shows that they deal with a single topic – property ownership, administration, and distribution (transfers) by fiduciaries. See F. Hanna, 4 *Missouri Practice – Probate Code Manual* (West 2d ed. 2000) and J. Borron, 4A, B *Missouri Practice – Probate and Surrogate Laws Manual*, (West 2d ed. 2001).

As Panagos notes, this Court held in *St. Louis Health Care Network v. State*, *supra.*, that use of the word “certain” to modify the title relating to “incorporated and non-incorporated entities” (sic) did not save the bill in that case from being declared unconstitutional in violation of the clear title requirement of Article III, Section 23 of the Missouri Constitution. Panagos states that “[t]he court reasoned that the word ‘certain’ did nothing but narrow the range of entities to which the bill might apply to somewhere between ‘one entity or all but one.’ . . . The use of the word ‘certain’ in the title of House Bill 145 has the same inconsequential effect.” (Respondent’s Brief p. 53). However, despite Panagos’ assertion, *St. Louis Health Care Network v. State* is plainly distinguishable from the case at bar. Panagos ignores that the Court said that it “need not determine whether a listing of statutory sections in the title of a bill can operate to produce a clear title” because “even considering the section listed in the title of . . . *the bill fails to express a single subject within the meaning of article III, section 23.*” 968 S.W.2d at 148 (emphasis added). And therein lays the distinction! If a bill, as in *St. Louis Health Care Network v. State*, *supra.*, fails to express a single subject, even by reference to the sections repealed, then reference to those sections is meaningless. In that case, while “[t]hese sections arguably limit the scope of the phrase certain incorporated and non-incorporated entities, . . . they do not limit the phrase to a single subject of entities” and “[i]n fact, the list of statutory sections actually serves further to obscure the contents of the Act.” 968 S.W.2d at 148-149. There, the Court noted, “*no single subject* could be discerned from the sections described.” 968 S.W.2d 149. But in the case at bar, the “ownership and transfer of certain property” by specific reference to the repealed sections does successfully limit such ownership and transfer, since those sections deal

only with *fiduciaries*. Clearly, *St. Louis Health Care Network v. State, supra.*, is distinguishable to the case at bar.

As noted, Panagos has asserted S.S.H.C.S.H.B. No. 145 is unconstitutionally overbroad and overinclusive. This Court has said, “in the case of an overinclusive title . . . the entire bill will normally be found invalid because the title’s lack of notice as to the subject matter included in the bill applies to the bill as a whole.” *Home Builders Association of Greater St. Louis v. State*, 75 S.W.3d at 272. If this Court finds S.S.H.C.S.H.B. No. 145 unconstitutional, it will also declare unconstitutional not only RSMo. 473.444 but also important provisions of the *Durable Power of Attorney Law of Missouri*, the *Missouri Nonprobate Transfers Law*, and the *Missouri Personal Custodian Law* which thousands of Missourians have relied upon for over 20 years in governing fiduciary relationships and duties.

S.S.H.C.S.H.B. No. 145 does not violate the “clear title” requirement of Article III, Section 23 of the Missouri Constitution, and this Court should reject this argument.

CONCLUSION

Based on the foregoing argument, the Relator prays this Court will reject Panagos' unfounded arguments, make the preliminary writ absolute, and prohibit the Respondent from proceeding with Panagos' claim.

Respectfully Submitted,

Thomas J. Ray, Jr., MOBar # 40222
Attorney-at-Law

RAY LAW OFFICES, P. C.
3520 Jeffco Boulevard, Ste 110
Arnold, MO 63010
(636) 464-8353

ATTORNEY FOR RELATOR

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Mo. Sup. St. R. 55.03, complies with Mo. Sup. Ct. R. 84.06(b) and contains 7,698 words, excluding parts of the brief exempted. The undersigned also hereby certifies that the brief has been prepared in proportionately spaced typeface using Microsoft Word in 13 pt. Times New Roman font, and includes a virus-free CD-RW disk in Microsoft Word format.

Thomas J. Ray, Jr., MoBar # 40222

CERTIFICATE OF SERVICE

The undersigned certifies that, pursuant to Mo. Sup. Ct. 84.05(a), two (2) copies of the foregoing brief were mailed, by U. S. Mail, this 4th day of August, 2010 to the parties listed below:

Respondent:

The Honorable Ray Dickhaner
Associate Circuit Judge, Div. 11
Circuit Court for the 23rd Judicial Circuit
Jefferson County Courthouse
Hillsboro, MO 63050
(636) 797-5365

Attorney for JAMES T. PANAGOS, LLC:

Canice Timothy Rice, Esq.
1221 Locust Street, Ste 800
St. Louis, MO 63103-2380
(636) 241-8000
Email: ctrice@ctrice.com

Thomas J. Ray, Jr.