
Fall 2019 Newsletter

In The Law: Topics

401(k) Hardship
Distribution Updates

Tennessee Public
Records Act Update

IN THE SPOTLIGHT

"I am energized by helping
clients, and I sometimes
wonder which of us benefits
most."

Douglas J. Toppenberg

In The Law: Topics

Tennessee MAP
Trust

Statute of Repose
and Construction
Litigation

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For the third consecutive year, Kennerly Montgomery & Finely has been recognized as one of the Best Law Firms in America©.

It is an absolute honor to be included in this list, and even more of an honor to spend our days serving the greater community of Knoxville and East Tennessee.

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Congratulations to seven of our attorneys for being selected for Best Lawyers in America 2020©.



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Twelfth Year

James N. Gore, Jr.
Third Year

Douglas J. Toppenberg
Fifth Year

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Litigation - ERISA

Litigation - Insurance

Family Law

Kevin C. Stevens
First Year

Jack M. Tallent, II
Thirteenth Year

Robert H. Green
Thirteenth Year

Construction Law

Litigation - Construction

Construction Law
Litigation - Construction



Elijah C. Lovingfoss, Esq.

We would like to publicly welcome our newest associate, Elijah C. Lovingfoss, who was admitted to the Bar on October 18, 2019.

Eli will be working alongside our Civil Litigation, Construction, and Real Estate law groups.

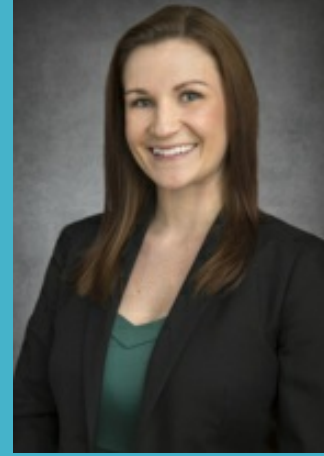
The IRS Updated 401(k) Hardship Regulations
Here's What You Need to Know
by **Ashley N. Trotto, Esq.**

The Internal Revenue Service and Treasury Department have published final regulations on 401(k) hardship distributions. Following a ten-month

vetting process, the proposed regulations—published November 14, 2018—were lightly modified before publication on September 23, 2019.

The substantive changes to the hardship distribution rules can be summarized as follows:

- The previously required six-month suspension on plan contributions following a participant's receipt of a hardship distribution has been **eliminated**.
- The cumbersome facts and circumstances test for determining whether a requested hardship distribution is necessary to satisfy an immediate and heavy financial need was **replaced** with the following generally applicable 3-prong standard:
 - The employee has obtained all other currently available distributions from plans maintained by the employer;
 - The employee has represented that they have insufficient cash or other liquid assets reasonably available to satisfy the need; and
 - The plan administrator does not have actual knowledge that is contrary to the employee's representation.
- Hardship distributions are now permitted from elective contributions, QNECs, QMACs, and earnings on those amounts, regardless of when contributed or earned.
- The previous requirement that Participants must take any available plan loans prior to requesting a hardship distribution has been **eliminated**.
- The safe harbor list of expenses for which distributions are deemed to be made on account of an immediate and heavy financial need was amended to:
 - Add the primary beneficiary under the plan as an individual for whom qualifying medical, education, and funeral expenses may be incurred;
 - Clarify that expenses for the repair of damage to the employee's principal residence that would qualify for a casualty deduction is **not** limited by Code §165(h)(5) (restricting the casualty deduction to Federally declared disasters); and
 - Add a new type of expense to the list, relating to expenses (including loss of income) incurred as a result of certain FEMA-declared disasters.



There are many nuances in the final regulations, including effective dates and amendment deadlines, that are not covered in this summary. Please note: the final regulations also affect hardship distributions from 403(b) plans. Call us at **(865) 546-7311** with any questions you may have or to request our assistance with the adoption of a plan-specific amendment.

The Complexities of the Statute of Repose in Construction and Related Litigation

by Jack M. Tallent, II, Esq. and Elijah C. Lovingfoss, Esq.

Perhaps one of the most critical issues to parties involved in—or threatened with—construction litigation is timing. As a plaintiff, failure to bring your claim within the required time limit can bar your claim. As a defendant, a plaintiff's failure to timely bring a claim can protect you from a claim. In either case, knowing when a claim must be brought is an important aspect of construction defect litigation. This is particularly true, and complicated, when applying the statute of repose to construction defect claims. The statute of repose acts as both a bitter end to a plaintiff's lawsuit before it begins and a shield for defendants against unlimited exposure to claims.



Tennessee Code Annotated (TCA) § 28-3-202 provides that a suit involving construction defects or

injuries resulting from construction defects against “any person performing or furnishing the design, planning, supervision, observation of construction, or construction . . .” must be brought within four years of “substantial completion” of the construction. The statute of repose is not applicable to the owner or possessor of the property where the injury occurred. TCA § 28-3-202. If the personal injury or property damage occurs after the statute of repose runs, and no exception applies, then no claim may be brought against the covered construction service providers or professionals involved in the design or construction of the improvement.

Putting aside defining what “substantial completion” means, this statute seems straightforward: claims must be brought within four years of substantial completion. However, TCA § 28-3-203 provides an exception for any injuries to person or property that occurred in the fourth year after substantial completion. In those cases, the suit must be brought within one year from the date of the injury. For example, if an injury or damage occurred at three years and ten months after substantial completion, the plaintiff would have until four years and ten months after substantial completion to file suit.

The complexity does not stop there, however, because the statute also provides an exception for cases involving fraud. Specifically, the statute states that a person who committed fraud in the provision of construction services or fraudulently concealed the claim cannot use the statute of repose as a defense.

Tennessee Courts have elaborated on the application of the statute on several occasions. In *Watts v. Putnam County*, the Tennessee Supreme Court stated that because the statute of repose begins to run from substantial completion, when a defect is discovered is irrelevant to the application of the statute. In that case, the Court held that the personal injury claim, although filed within the one-year personal injury statute of limitation, was barred against those providing professional design and construction services due to the statute of repose because substantial completion had occurred more than four years before the personal injury. The Court recognized that though the result is harsh, the clear intent of the statute is to protect construction and design professionals from liability. The Court also noted that the statute was an outer limit of liability and that statutes of limitations for injuries to person and property still applied. Thus, just because a claim is filed within the statute of repose does not mean that it is within the time for other statutes of limitation. (525 S.W.2d 488, 493-94 (Tenn. 1975))

Furthermore, in *Counts Company v. Praters, Inc.* the Tennessee Court of Appeals held that the statute began to run, and continued to run, while a contractor attempted to repair defects in the construction. (392 S.W.3d 30, 86 (Tenn. Ct. App. 2012)) Additionally, in *Henry v. Cherokee Construction and Supply Company, Inc.* the Tennessee Court of Appeals held that for purposes of the concealment exception, the wrongful concealment must be of the claim rather than concealment of some defect in the original construction. (301 S.W.3d 263, 267 (Tenn. Ct. App. 2009))

The lesson taken from reading the statute and the cases is that any person or entity involved in a potential construction defect claim—or personal injury arising from construction—will need to make a prompt evaluation of the date of substantial completion as the countdown clock of the statute of repose continuously runs from that date. A plaintiff cannot rely exclusively upon the date of injury or property damage to calculate the time for asserting a legal claim.

Those persons or entities providing construction or design services for construction should likewise be familiar with the statute of repose and the exceptions which may extend it beyond four years from substantial completion. Tennessee Courts have made it clear the statute is intended to protect construction and design professionals from unlimited exposure to liability and that it will be applied.

In The Spotlight: Douglas J. Toppenberg Meet the New Divorce and Family Law Practice Group Head

What are your areas of practice?

From the beginning I have concentrated my practice in family law, including divorce, separation, child custody, support issues, adoption and juvenile law. My work is litigation oriented, although mediation and negotiations often settle these emotionally charged situations. Family law remains my primary focus, but in later years I have expanded to include trust and estate litigation, which similarly involves family disputes.

Tell us about yourself and your family.

I grew up in California, and later New England, but I have been practicing divorce and family law in Knoxville for 32 years. I attended law school at UTK, where I met my wife, and we practiced together for twenty-six years before she became an administrative law judge. Our two children spent their early years in our office, and we would sometimes meet with clients or conduct depositions with a sleeping baby by our side. Our children are now grown and gone, but hands-on



parenting in those early years was its own reward.

And your present circumstances?

After the Tennessee Theatre purchased our office building earlier this year, I accepted a position at Kennerly Montgomery to head their family law division. Thankfully, I have no further management responsibilities and can devote all my energies to representing clients. My new colleagues are a great group of hard-working lawyers, and the move has been a win-win for all.

What do you like about your chosen profession?

I am energized by helping clients, and I sometimes wonder which of us benefits most. I enjoy trying lawsuits when required, and take pleasure in creatively working to resolve the circumstances each case presents. I believe the legal profession has the highest degree of integrity and commitment to justice, and I'm proud to be part of it.

What are your thoughts about the practice of law in our ever-changing world?

Like most vocations, attorneys face challenges of automation and do-it-yourself trends. The internet has made huge changes in communication, research, document preparation, and marketing for law firms, and traditional notions of what it means to be a lawyer are changing. Things that haven't—and must never—change, however, are the concepts of a personal and confidential attorney-client relationship, independent legal advice, and experienced advocacy. These can never be replaced by the production line of big box and online services.

What should someone look for in a family law attorney?

Experience, ability, communication skills, case load levels, and value for fees paid. Look for an attorney who demonstrates professional maturity and commitment, and don't rely solely on advertising pitches to make this important decision. Ask which family law lawyers have these qualities, then consult with him or her before committing to someone with whom you will be closely involved.

What do you do outside the practice of law?

I bicycle to work when weather and circumstance permits and I'm working with neighborhood groups and the City to expand the Greenway network in Knoxville. With our children through college and grad, school my wife and I have more time for traveling, reading, and involvement in community affairs. We enjoy exploring the country in our RV and look forward to perhaps trading it in for a sailboat someday.

Tennessee's Marital Asset Protection ("MAP") Trust by Michael R. Crowder, Esq.

In Tennessee, when a married couple owns an asset together, they are presumed to own it as "tenants by the entirety." This type of ownership provides several advantages:

1. The asset automatically passes at the first spouse's death to the surviving spouse, avoiding probate.
2. While both spouses live, there is creditor protection as an individual spouse's creditor cannot seize that spouse's interest in assets held as tenants by the entirety. The creditor of an individual spouse's only remedy is to attach, which is to seize property to satisfy a judgment, that spouse's survivorship interest in the asset. Only a creditor of both spouses may attach the asset while both spouses are living.

Tennessee Code Annotated § 35-15-510 enables married clients to transfer property to a joint trust—the Marital Asset Protection Trust (MAP Trust)—and obtain the same asset protection as property held as tenancy by the entirety. This was previously unavailable with the use of revocable trusts.

The MAP Trust protects any assets that a married couple owned as tenants by the entirety before they were transferred to the trust, if it meets the following requirements:

1. Must be revocable by either spouse acting alone or both spouses acting together;
2. Both spouses must be permissible current beneficiaries while living;
3. The trust instrument, deed, or instrument of conveyance must reference the statute as applying to the property and its proceeds.

Specifically, the statute provides that while the spouses are married, the trust assets "shall have the same immunity from the claims of their separate creditors as would exist if the husband and wife had continued



to hold the property or its proceeds as tenants by the entirety.” This means that even if a creditor gets a judgement on one spouse, the creditor’s only remedy is to attach that spouse’s survivorship rights in his or her half of the trust. Note that this protection only applies while the parties are married and does not apply to their joint creditors. For example, if both spouses have signed a bank loan, the assets will not be exempt from that bank.

The benefit of a MAP Trust over traditional tenants by the entirety ownership is that upon the first spouse’s death, the assets in a MAP Trust can remain protected from creditors if left in the trust and if the surviving spouse does not have the power to unilaterally withdraw the assets from the trust. Without such a trust, the creditor protection provided by traditional tenants by the entirety ownership is lost at the first spouse’s death, leaving the surviving spouse more vulnerable to creditors.

If you have any questions about Tennessee’s MAP Trust, or estate planning in general, please contact us.

Clarifying The Tennessee Public Records Act Looking Into the Recent Scripps Media, Inc. Case by Zack R. Gardner, Esq.

On June 15, 2018, Kim Locke, wife of former acting Tennessee Bureau of Investigation (TBI) Director Jason Locke sent emails to then-Governor Bill Haslam asserting that her husband was having an affair with a Tennessee Department of Mental Health and Substance Abuse Services (TDMHSAS) employee, Sejal West and were doing so on State time.



Between June 15 and June 18, 2018, Gov. Haslam asked the Tennessee Department of Safety and Homeland Security and the State Comptroller’s Office to investigate. Also on June 18, the District Attorney General for the 20th Judicial District announced he was joining the investigation.

Ms. Locke also contacted journalist Phil Williams, an employee of Scripps Media Inc. Mr. Williams began investigating the matter, submitting several requests for public records, including all travel reimbursement and per diem requests submitted by Mr. Locke; transaction summaries for any credit cards or p-cards assigned to Mr. Locke; all logs of phone calls made on Mr. Locke’s state-assigned mobile phones since November 2016; Mr. Locke’s electronic calendar beginning in November, 2016; and any text messages or emails between Mr. Locke and Ms. West. Mr. Williams submitted a similar request to TDMHSAS regarding Ms. West as well as information related to her personnel file and job status.

On June 22, 2018, the State refused to disclose the records, citing an ongoing criminal investigation. In response, Scripps filed a Petition for Access in the Trial Court pursuant to the Tennessee Public Records Act (TPRA), specifically citing Tenn. Code Ann. § 10-7-503(a)(2)(A):

All state, county and municipal records shall, at all times during business hours, [...], be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law. Tenn. Code Ann. § 10-7-503(a)(2)(A) (Supp. 2018).

In September 2018, the State finished its investigation and released the requested documents. The Trial Court, after finding the public interest exception to the Mootness Doctrine applicable, ruled the records were exempt from disclosure. The Trial Court stated that, even though the requested records were of the type described in Tenn. Code Ann. § 10-7-503(a)(2)(A), they became investigative records not subject to the TPRA under the “unless otherwise provided by state law” clause and, therefore, were governed by Tenn. R. Crim. P. 16, which exempted the records from TPRA requests for disclosure.

On appeal from the Trial Court, the Tennessee Court of Appeals affirmed, in part, and overruled, in part, the Trial Court, finding that the public interest exception applied, but that the records in question were not exempt from TPRA. The Court of Appeals reasoned that the records were created in the ordinary course of business and not as part of an ongoing criminal investigation. The Court stated, “Indeed, these records were accessible [via the TPRA] from their inception. That they were later relevant to a criminal investigation did not alter either their nature or where they are kept.” The Court also distinguished this case from *Tennessean v. Metro. Gov’t of Nashville*, which involved the request of records created by a private entity, Vanderbilt University, which subsequently became relevant to a criminal investigation.

Of interest, the Court of Appeals also dismissed Scripps Media Inc. from the complaint as it lacked standing as a non-citizen of Tennessee, and its employee, Mr. Williams, remained as the sole appellant in the case.

Ultimately this decision affirms the ability of citizens of the State of Tennessee, including journalists, to

obtain all state, county, and municipal records that are created during the normal course of business and unrelated to an ongoing criminal investigation. The State may not deny access to these records simply because they became, or may become, relevant to a subsequent criminal investigation. As the Court of Appeals stated, “[u]nder the State’s position, even public records accessible via the TPRA for years prior may abruptly become exempt from disclosure, *an astonishing proposition.*” (emphasis added).



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