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# Special Statutes of Limitation and the Servicemembers Civil Relief Act: Case Closed?

*State ex rel. Estate of Perry v. Roper*<sup>1</sup>

## I. INTRODUCTION

The Servicemembers Civil Relief Act (SCRA)<sup>2</sup> was enacted by Congress “to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.”<sup>3</sup> To this end, the SCRA prevents any period of military service from being “included in computing any period limited by law, regulation, or order . . . by or against the servicemember or the servicemember’s heirs, executors, administrators, or assigns.”<sup>4</sup>

In *State ex rel. Estate of Perry v. Roper*, the Court of Appeals for the Western District of Missouri applied the SCRA to prevent the application of a “special” statute of limitations contained in Missouri’s Probate Code.<sup>5</sup> This note examines the court’s decision and the policy implications thereof in light of the history of the SCRA and Missouri Revised Statutes section 473.050, the statute of limitations on presentment of wills under Missouri law.

## II. FACTS AND HOLDING

Marvin J. Perry died on July 25, 2003.<sup>6</sup> His son, Paul E. Perry, filed a petition in the Probate Division of the Circuit Court of Boone County to enter a self-proving will into probate on September 9, 2004.<sup>7</sup> Perry claimed that, pursuant to the SCRA, his active duty service in the U.S. Army from January 8, 2003, to July 13, 2004, tolled Missouri’s one-year statute of limitations applicable to presentment of wills and applications for letters testamentary.<sup>8</sup>

One day after Perry filed the petition and application, Judge Ellen S. Roper entered an order denying both, stating that the “Petition for Probate of

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1. 168 S.W.3d 577 (Mo. Ct. App. 2005).

2. Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501-596 (2000). The provision applicable to tolling statutes of limitation is found in section 526 of the act. *Id.* at § 526.

3. 50 U.S.C. app. § 502.

4. *Id.* at § 526(a).

5. *State ex rel. Estate of Perry v. Roper*, 168 S.W.3d 577, 589 (Mo. Ct. App. 2005)

6. *Id.* at 581.

7. *Id.*

8. *Id.*

Will and Application for Letters Testamentary are denied, the Court finding more than one year has passed since the date of death of decedent which occurred on July 25, 2003.”<sup>9</sup> Perry filed a petition for writ of certiorari in the Court of Appeals for the Western District of Missouri on September 23, 2004.<sup>10</sup> On October 8, Perry filed a notice of appeal with the court,<sup>11</sup> and on October 14, 2003, the court entered its writ of certiorari.<sup>12</sup> After the parties filed their briefs, Perry filed a motion to consolidate the writ case with his direct appeal, and the Court of Appeals granted this motion shortly thereafter.<sup>13</sup>

On review, the Court of Appeals reversed and remanded the case for further proceedings to determine whether Perry’s period of service was sufficient to render his filings timely.<sup>14</sup> The court decided that “[a] trial court’s dismissal of an action based upon the running of a statute of limitations is a final, appealable order”<sup>15</sup> and that the SCRA “acts to toll the limitations period contained in [section] 473.050, which pertains to the bringing of a proceeding in probate court.”<sup>16</sup> Ultimately, the court held that the SCRA preempted a state statute of limitations, and so long as his military service qualified under the terms of the SCRA, Perry was able to file a petition to present a will and an application for letters testamentary despite the running of the statute of limitations.<sup>17</sup>

### III. LEGAL BACKGROUND

The court in *Perry* dealt with two main areas of law. First, the court examined the procedural posture of the case in light of Missouri law dealing with appeals in probate matters. Second, the court examined the preemption of Missouri Revised Statutes section 473.050, defining the time limitations for presenting a will for probate, by the provision of the Servicemembers’ Civil Relief Act (SCRA) that provides for the tolling of statutes of limitation, 50 U.S.C. app. § 526.

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 581-82.

13. *Id.* at 582.

14. *Id.* at 589.

15. *Id.* at 583.

16. *Id.* at 587.

17. *Id.* at 589.

*A. Certiorari, Appeals, and Missouri Revised Statutes Section 472.160*

After a court has issued an order, a party may petition for a writ of certiorari from a higher court requesting review of that order.<sup>18</sup> A writ of certiorari is permitted by Missouri Revised Statutes section 386.510 to authorize an inquiry into whether an original court order is reasonable or lawful.<sup>19</sup> When issued, such a writ commands a lower court to “certify the record” for review by a higher court.<sup>20</sup> Missouri allows writs of certiorari only for the purposes of reviewing “‘questions of jurisdiction, power, and authority of [an] inferior tribunal . . . and all questions of irregularity in the proceedings.’”<sup>21</sup> In Missouri, the law has long been settled that if a proper appeal is possible for a given order, certiorari will not lie.<sup>22</sup>

Under Missouri law, grounds for appeal in probate matters are defined by statute rather than by court rules.<sup>23</sup> The statute governing probate appeals, Missouri Revised Statutes section 472.160, specifies a number of circumstances under which appeals are allowed, closing with the catch-all phrase: “[i]n all other cases where there is a final order or judgment of the probate division of the circuit court under this code except orders admitting to or rejecting wills from probate.”<sup>24</sup> The exception in this provision, “except orders admitting to or rejecting wills from probate,”<sup>25</sup> only applies to express admittance or rejection of a will by a probate court, excluding other orders even though they may have the effect of admitting or rejecting a will.<sup>26</sup>

*B. The Special Statute of Limitation: Missouri Revised Statutes Section 473.050*

As early as 1894, the Missouri Supreme Court distinguished general statutes of limitations from other statutory regimes that limited the time pe-

18. *See* MO. REV. STAT. § 386.510 (2000).

19. *Id.*

20. *State ex rel. Southwestern Bell Tel. v. Broan*, 795 S.W.2d 385, 388 (Mo. 1990) (en banc).

21. *Id.* at 387-88 (quoting 14 AM. JUR. 2d *Certiorari* § 2 (1964)).

22. *State ex rel. Kan. & Tex. Coal Ry. v. Shelton*, 55 S.W. 1008, 1012 (Mo. 1900) (en banc); *see also State ex rel. Palmer v. Elliff*, 58 S.W.2d 283, 286 (Mo. 1933) (per curiam); *Boren v. Welty*, 4 Mo. 250, 251-52 (1835) (Certiorari “was never used for the purpose of reversing a judgment of the inferior court.”); *State ex rel. Hill v. Davis*, 488 S.W.2d 305, 308 (Mo. Ct. App. 1972) (Certiorari “cannot be made to serve the purpose of an appeal or writ of error.”).

23. MO. REV. STAT. § 472.160 (2000).

24. *Id.* at § 472.160.1(14).

25. *Id.*

26. *See Politte v. Politte (In re Politte’s Estate)*, 460 S.W.2d 733, 735 (Mo. Ct. App. 1970) (per curiam) (concluding that such a rejection “must be based on the invalidity of the purported will” to be covered by the statute).

riod within which an action could be brought.<sup>27</sup> The court named these other statutes of limitation “special,”<sup>28</sup> and differentiated them from general statutes of limitation because special statutes are created by the same means that allow for the causes of action to which they apply.<sup>29</sup> The court also held that special statutes of limitation are “exclusive of other statutes of limitation,” meaning that special statutes of limitation preempt all other periods of limitation and their implicitly-attached exceptions.<sup>30</sup> By 1897, the court had applied this special designation to a statute limiting the contest of a will to “within five years after the probate or rejection thereof,” establishing that the terminology of “special statute” applies to the probate code.<sup>31</sup> This precedent continues to be authoritative.

The modern version of the Missouri Probate Code provision which limits the time within which a will may be exhibited for proof is Missouri Revised Statutes section 473.050. In relevant part, the statute requires:

3. No proof shall be taken of any will nor a certificate of probate thereof issued unless such will has been presented within the applicable time set forth as follows:

...

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27. See *Davenport v. City of Hannibal*, 25 S.W. 364 (Mo. 1894) (discussing MO. REV. ST. § 2275 (1889), which is a statute requiring that all writs of error be brought within three years after the rendering of a judgment or decision).

28. *Id.* at 364-65.

29. See, e.g., *Stowe v. Stowe*, 41 S.W. 951, 953-54 (Mo. 1897). The means by which a special statute of limitation is created may not necessarily be the same statute creating a given cause of action; rather, such a differentiation distinguishes statutory causes of action, which may be governed by special statutes of limitation, from those that exist solely in the common law and are only governed by general statutes of limitation.

30. *Id.* at 954; see also *Frazer v. Partney*, 314 S.W.2d 915, 919 (Mo. 1958) (holding that a special statute of limitations is exclusive). Such exclusivity necessarily prohibits exceptions that would apply to a general statute of limitations, such as fraud or concealment. See *State ex rel. Bier v. Bigger*, 178 S.W.2d 347, 350 (Mo. 1944) (holding that a special statute of limitations cannot be tolled because of any reason not provided in the statute); see also *State ex rel. Plymesser v. Cleaveland*, 387 S.W.2d 556, 560 (Mo. 1965) (affirming *Bier*); *Kober v. Kober*, 23 S.W.2d 149, 152 (Mo. 1929) (holding that neither failure to discover fraud nor concealment toll a statute that does not allow for such exceptions). But see *Howell v. Murphy*, 844 S.W.2d 42, 47 (Mo. Ct. App. 1992) (holding that a statute limiting a wrongful death cause of action to five years from the time of death was tolled by concealment because the law would not permit a missing person to be presumed dead until he or she has been missing for at least five years).

31. *Stowe*, 41 S.W. at 953 (quoting GEN. ST. MO. §29 (1865)).

(2) In cases where notice has not previously been given in accordance with section 473.033 of the granting of letters on the estate of testator, within one year after the date of death of the testator;

...

5. A will not presented for probate within the time limitations provided in subsection 3 of this section is forever barred from admission to probate in this state.<sup>32</sup>

Section 473.050 contains no provisions for excepting the absolute bar in paragraph five. Additionally, once the time limitation has passed, probate courts have jurisdiction only to order that a will was presented in an untimely fashion.<sup>33</sup>

### *C. The Servicemembers' Civil Relief Act*

The Servicemembers Civil Relief Act (SCRA) is the latest development in a series of laws designed to protect men and women serving in the United States Armed Forces from a variety of proceedings "that may adversely affect [their] civil rights."<sup>34</sup> Enacted in 2003, the SCRA is the latest version of a series of laws dating back to the Civil War.<sup>35</sup> The original Civil War era statute was relatively simple by contemporary standards, and mainly functioned to prevent service to the United States from acting against the interest of those who served.<sup>36</sup>

In comparison, the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1918 was a complicated piece of legislation that, having expired by its own provision six months after the termination of World War I,<sup>37</sup> was largely re-stated in the SSCRA of 1940.<sup>38</sup> Though the Act has been amended no fewer

32. MO. REV. STAT. § 473.050 (2000).

33. See *Politte v. Politte (In re Politte's Estate)*, 460 S.W.2d 733, 735 (Mo. Ct. App. 1970) (per curiam).

34. Servicemembers Civil Relief Act, 50 U.S.C. app. § 502(2) (2000).

35. See *Soldiers' and Sailors' Civil Relief Act*, Pub. L. Nos. 108-189, 117 Stat. 2835 (1940) (codified as amended at 50 U.S.C app. §§ 501-596 (2000)); *Soldiers' and Sailors' Civil Relief Act*, ch. 20, 40 Stat. 440 (1918); Lt. Colin A. Kisor, *Who's Defending the Defenders?: Rebuilding the Financial Protections of the Soldiers' and Sailors' Relief Act*, 48 NAVAL L. REV. 161, 161-62 (2001). During the American Civil War, the Federal Government enacted laws limiting civil and criminal actions against Union soldiers and sailors, an act that was soon mirrored by several of the Confederate States. *Id.* at 161.

36. Act of June 11, 1864, ch. 118, 13 Stat. 123.

37. *Soldiers' and Sailors' Civil Relief Act*, ch. 20, § 603, 40 Stat. 440, 449 (1918).

38. *Soldiers' and Sailors' Civil Relief Act of 1940*, ch. 888, 54 Stat. 1178 (1940).

than eleven times since its revival in World War II,<sup>39</sup> much of the material language from the original 1918 version has survived in the modern SCRA.<sup>40</sup>

Today, the SCRA as a whole is comprehensive in its approach to protecting servicemembers from a variety of civil liabilities that result from or may be complicated by their service to the United States. Ultimately, the SCRA enshrines the rights of servicemembers to pursue claims at home while simultaneously protecting those persons who have claims against active servicemembers that might be impossible to reach in a timely fashion.<sup>41</sup>

The section of the SCRA at issue in *Perry*, section 526,<sup>42</sup> serves a similar purpose as the very earliest Act in 1864.<sup>43</sup> Section 526 forbids including

39. Before 2003, the SSCRA was amended in 1942, 1944, 1948, 1952, 1958, 1960, 1962, 1966, 1972, and 1990. Kisor, *supra* note 35, at 163.

40. *Compare*:

That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service.

Soldiers' and Sailors' Civil Relief Act, ch. 20, § 205, 40 Stat. 440, 443 (1918), *and*:

The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service.

Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, § 205, 54 Stat. 1178, 1181 (1940), *with*:

The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

Servicemembers Civil Relief Act, 50 U.S.C. app. § 526(a) (2000).

41. *See generally* 50 U.S.C. app. §§ 501-596 (2000).

42. Prior to the 2003 republication of the Act, the tolling statute was codified in 50 U.S.C. app. §525.

43. The entire text of the original act seems dedicated to the issue of limitation periods:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or the arrest of such person, or whenever, after such action, civil or criminal, shall have accrued, such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings,*

“[t]he period of a servicemember’s military service . . . in computing any period limited” by statutes, court orders, and orders from most state and federal agencies.<sup>44</sup> This provision of the SCRA, like that of its predecessor, the SSCRA, applies not only to active duty military personnel, but also to reservists on active duty,<sup>45</sup> national guardsmen who have been called up by the president or secretary of defense for service,<sup>46</sup> civilians bringing acts against any qualifying servicemembers,<sup>47</sup> partnerships in which at least one partner was a qualifying servicemember,<sup>48</sup> and the heirs,<sup>49</sup> beneficiaries,<sup>50</sup> and assigns<sup>51</sup> of qualifying servicemembers. However, this section is limited to servicemembers in active service or those who inherit their legal rights, and has been held not to apply to retired military personnel,<sup>52</sup> civilian employees

be arrested or served with process for the commencement of the action, the time during which such person shall so be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action.

Act of June 11, 1864, ch. 118, 13 Stat. 123.

44. 50 U.S.C. app. §526(a) (2000). Specifically, the statute forbids the periods limiting any “law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States.” *Id.* Its predecessor has even been applied to a period of limitations found in a contract provision. *See* *Steinfeld v. Mass. Bonding & Ins. Co.*, 112 A. 800, 800 (N.H. 1921) (holding that the 1918 SSCRA applies to an indemnity insurance policy). *But see* *Opsal v. United Servs. Auto. Assn.*, 10 Cal. Rptr. 2d 352, 358 (Cal. Ct. App. 1991) (holding that under California law, *Steinfeld* is not dispositive of whether the SSCRA tolls a contractual time limitation).

45. *See, e.g.*, *Mouradian v. John Hancock Cos.*, No. 88-2072, 1989 WL 225052, at \*2 (1st Cir. May 26, 1989) (*per curiam*); *see also* *Markowitz v. Carpenter*, 211 P.2d 617 (Cal. Ct. App. 1949) (holding that inactive service in the reserves does not entitle litigant to protection of provision of the SSCRA).

46. National Guardsmen are covered during “service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds.” 50 U.S.C. app. § 511(2)(A)(ii) (2000). The Act apparently does not contemplate extended periods of National Guard service under the auspices of State governance.

47. *See, e.g.*, *Ray v. Porter*, 464 F.2d 452, 455-56 (6th Cir. 1972); *Henderson v. Miller*, 477 S.W.2d 197, 198 (Tenn. 1972).

48. *See* *Crawford v. Adams*, 213 S.W.2d 721 (Tex. App. 1948).

49. *See, e.g.*, *Easterling v. Murphey*, 11 S.W.2d 329 (Tex. App. 1928).

50. *See, e.g.*, *Chichester v. Chichester*, 48 So. 2d 123 (Miss. 1950).

51. This includes subrogees, *see* *Am. Motorists Ins. Co. v. Manhattan Lighterage Corp.*, 80 F. Supp. 335 (S.D.N.Y. 1948), and bankruptcy trustees, *see In re Meade*, 60 F. Supp. 69 (D. Mass. 1945).

52. *E.g.*, *Jax Navy Fed. Credit Union v. Fahenbruch*, 429 So. 2d 1330 (Fla. Dist. Ct. App. 1983).



of the armed services,<sup>53</sup> or family members who had not directly inherited the legal rights of servicemembers.<sup>54</sup> Further, there is little authority outside of the statutory language as to when this section applies to members of the National Guard,<sup>55</sup> though it is clear that local National Guard training does not qualify as active service.<sup>56</sup>

A split of authority exists as to whether those in career military service must demonstrate that their ability to bring or defend against a suit has been handicapped by their service. The dominant line of cases holds that section 526 applies unconditionally to career military personnel.<sup>57</sup> This includes servicemembers who are stationed domestically, an inclusion that has given birth to the claim that “absurd results” may consequentially arise.<sup>58</sup> In the opposing line of cases, several courts have held that relief under the SCRA is “discretionary” and will only be applied if the court finds that the defendant was prejudiced or “materially affected” by military service.<sup>59</sup>

The cases in this second line were called into doubt by the Supreme Court’s holding in *Conroy v. Aniskoff*.<sup>60</sup> The majority in *Conroy* held that there was no support for the argument that application of section 526 of the SCRA<sup>61</sup> is conditioned upon a showing of “hardship or prejudice.”<sup>62</sup> The Court went further, claiming that the express inclusion of a demonstration of prejudice in a number of other sections of the Act and the legislative history both serve to support a literal construction of the section excluding all necessity of demonstrating hardship from the application of section 526.<sup>63</sup>

53. *E.g.*, *Hart v. United States*, 1953 WL 6110 (Ct. Cl. 1953).

54. *E.g.*, *Wanner v. Glen Ellen Corp.*, 373 F. Supp. 983 (D. Vt. 1974).

55. 50 U.S.C.A. App. § 511(2)(A)(ii) (West 2004); *see supra* note 50 and accompanying text.

56. *Bowen v. United States*, 292 F.3d 1383, 1386 (Fed. Cir. 2002).

57. *See Conroy v. Aniskoff*, 507 U.S. 511, 515-18 (1993) (reasoning that the omission of a prejudice requirement in former section 525, now section 526, was a deliberate act of Congress); *see also e.g.*, *Bickford v. United States*, 656 F.2d 636, 641 n.9 (Ct. Cl. 1981); *McCance v. Lindau*, 492 A.2d 1352 (Md. Ct. Spec. App. 1985). The court in *McCance* recognized that “absurd results may ensue” from such a doctrine, and implicitly lamenting that it was without power to change it, described the tolling provision of the SSCRA as a “Damoclean sword” that “was placed there by Congress.” *Id.* at 1357.

58. *See, e.g.*, *McCance*, 492 A.2d at 1357.

59. *Crouch v. United Techs. Corp.*, 533 So. 2d 220, 223 (Ala. 1988); *see also Pannell v. Continental Can Co.*, 554 F.2d 216, 225 (5th Cir. 1977) (holding that the tolling provisions of the SSCRA are inapplicable to a career serviceman not demonstrably handicapped by military service); *King v. Zagorski*, 207 So. 2d 61 (Fla. Dist. Ct. App. 1968).

60. 507 U.S. 511 (1993).

61. The Court was actually reviewing section 525 of the Soldiers’ and Sailors’ Civil Relief Act, which is today section 526 of the SCRA. *Id.* at 512.

62. *Id.* at 511.

63. *Id.* at 515-18.

In his concurrence with the majority in *Conroy*, Justice Scalia cited excerpts of the legislative history of the SCRA to outline his disagreement with the majority's assertion that the history supported its holding.<sup>64</sup> Scalia found that the original 1918 SSCRA was explicitly intended to "permit denial of protection to members of the military who could show no hardship."<sup>65</sup> The legislative history of the 1940 Act, which was a "substantial reenactment" of the 1918 Act,<sup>66</sup> its amendment in 1942, and its indefinite extension in the Selective Service Act of 1948,<sup>67</sup> demonstrated the same intention "to protect those who were *prejudiced* by military service" rather than all career servicemembers.<sup>68</sup> Despite finding that the legislative history was in contravention of the majority's opinion, Scalia claimed that the language of the statute clearly indicated that no finding of prejudice to the servicemember is necessary to apply the tolling provisions of the Act.<sup>69</sup> Scalia maintained that if Congress intended a different result, as cursory examination of the legislative history indicated, it would have to correct its own mistake.<sup>70</sup>

Missouri courts have had only a few opportunities to deal with section 526 of the SCRA. In an early case, *Warinner v. Nugent*, the court held that the tolling provision protects both servicemembers and those who have claims against them, and consequentially tacked the defendant's period of military service on to a five year statute of limitations to allow a suit that otherwise would have been barred.<sup>71</sup>

The Missouri Supreme Court treated the subject with more depth in *Worlow v. Mississippi River Fuel Corp*, a case in which a plaintiff sought a wrongful death action for the death of his mother.<sup>72</sup> In *Worlow*, the court held that the tolling provisions of the SCRA are mandatory rather than discretionary, and that "[a] showing of prejudice to the person in military service is" unnecessary.<sup>73</sup> Additionally, the court determined that Congress intended to modify all statutory time limitations on rights of action that "did not exist independently of the statute."<sup>74</sup> The *Worlow* court ultimately remanded the

64. *Id.* at 520-28 (Scalia, J., concurring).

65. *Id.* at 522.

66. *Id.* (quoting *Boone v. Lightner*, 319 U.S. 561 (1943)).

67. An Act "to amend the Act of August 1, 1947, to clarify the position of the Secretary of the Air Force with respect to such Act, and to authorize the Secretary of Defense to establish six additional positions in the professional and scientific service, and for other purposes." Act of June 24, 1948, ch. 624, 62 Stat. 604.

68. *Conroy*, 507 U.S. at 525-26 (Scalia, J., concurring).

69. *Id.* at 527-28. There is a stinging comment by the majority (other than Justice Thomas) regarding its disagreement with Scalia's conclusions regarding the meaning and usefulness of legislative history. *Id.* at 518 n.12 (majority opinion).

70. *Id.* at 528 (Scalia, J., concurring).

71. *Warinner v. Nugent*, 240 S.W.2d 941, 945 (Mo. 1951) (per curiam).

72. *Worlow v. Miss. River Fuel Corp.*, 444 S.W.2d 461 (Mo. 1969) (per curiam).

73. *Id.* at 463-64.

74. *Id.* at 464.

case to a lower court for a finding of fact regarding the plaintiff's military service, but not before holding that the SCRA preempts the period of limitations imposed by the provisions of Missouri's wrongful death statute.<sup>75</sup> *Worlow* was the first case in Missouri to apply the tolling provision of the SCRA to a special statute of limitations,<sup>76</sup> as Missouri's wrongful death statute is a special statute not tolled for fraud or concealment.<sup>77</sup>

The last Missouri case in which the court addressed this issue, and the only one discussing the SCRA's application to the probate code, was *Ludwig v. Anspaugh*.<sup>78</sup> *Ludwig* involved a will contest by a necessary party who was not notified as required by the 90-day notice provision in section 473.083.6 of the Missouri code.<sup>79</sup> However, because the party that was not notified was in military service at the time the contest was filed, the court held that the tolling provision of the SCRA applied to the statutory limitation.<sup>80</sup> As discussed in the dissent, the situation in *Ludwig* is distinguishable from *Worlow* because in *Ludwig*, the tolling provisions of the SCRA were applied to a "service of summons" statute that limits the time period within which a party can perfect a timely-filed will contest, which is a "procedural step in the prosecution of the action."<sup>81</sup> Effectively, the decision in *Ludwig* extended the application of Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501-596 (2000). section 526 to "any action," specifically including those created by statute, will contests, and actions at common law.<sup>82</sup>

#### IV. THE INSTANT DECISION

In *Perry*, the court analyzed two main issues. Initially, the court dealt with the procedural posture of the case, deciding whether the appeal was properly before it.<sup>83</sup> Next, the court determined whether section 526 of the SCRA preempted Missouri Revised Statutes section 473.050.<sup>84</sup> It did this in two parts: first, by considering whether section 473.050 was a "statute of limitations;" second, by deciding whether the SCRA was meant to apply to

75. *Id.*

76. *Id.*

77. See *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958) (holding that fraud does not toll Missouri's wrongful death statute, then codified as Section 564.450 of the Missouri Revised Statutes).

78. 785 S.W.2d 269 (Mo. 1990) (en banc).

79. *Id.* at 270.

80. *Id.* at 272.

81. *Id.* (Holstein, J., dissenting).

82. *Id.* (quoting Servicemembers Civil Relief Act, 50 U.S.C. app. § 526 (2000)).

83. *State ex rel Estate of Perry v. Roper*, 168 S.W.3d 577, 582 (Mo. Ct. App. 2005).

84. *Id.* at 585.

section 473.050.<sup>85</sup> After deciding these issues, the court addressed arguments against applying the tolling provisions to section 473.050.<sup>86</sup>

The court began by examining whether Perry's direct appeal was properly before the court, because certiorari cannot substitute for an appeal.<sup>87</sup> The court discussed appeals in probate cases under Missouri law,<sup>88</sup> which provides that any interested person may appeal where there is a "final order or judgment" of the probate court.<sup>89</sup> With a reminder that liberal construction is the standard with regard to the finality of an order, the court dismissed the argument that the circuit court's order rejecting Perry's petition was not final, holding instead that the order was final and appealable because it disposed of "all issues and parties in the case, leaving nothing for future determination."<sup>90</sup>

The court then directed its attention to the exception contained within the statute for "orders admitting to or rejecting wills from probate."<sup>91</sup> In the view of the appellate court, since the probate court had dismissed the application based upon the statute of limitations without considering it on the merits, the dismissal was not a "rejection" that would fall under the exception.<sup>92</sup> The court also rejected the argument that section 473.050 was not a statute of limitations, and held that the probate court's dismissal based on the running of the statute was reviewable on appeal.<sup>93</sup> Because the order was properly before the court on appeal, certiorari would not lie, and the court quashed its own writ of certiorari in favor of Perry's direct appeal.<sup>94</sup>

After establishing the propriety of Perry's appeal, the court turned its attention to the standard of review: that the pleadings are to be liberally construed in favor of the plaintiff.<sup>95</sup> The court held that Perry had affirmatively averred his active duty service from January 2003 to July 2003, and that Perry had asserted in a timely fashion that the statute of limitations for presenting the will and filing an application for letters testamentary was tolled pursuant to the SCRA.<sup>96</sup> The court determined that by simply dismissing Perry's original pleadings as barred by the statute of limitations,<sup>97</sup> the probate court found that the tolling provision of the SCRA<sup>98</sup> did not apply.<sup>99</sup> After examining the

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85. *Id.* at 586-87.

86. *Id.* at 587-89.

87. *Id.* at 582.

88. *Id.*

89. MO. REV. STAT. § 472.160.1(14) (2000).

90. *Perry*, 168 S.W.3d at 582-583.

91. MO. REV. STAT. § 472.160.1(14).

92. *Perry*, 168 S.W.3d at 583.

93. *Id.*

94. *Id.*

95. *Id.* at 584.

96. *Id.*

97. The operable statute of limitations is MO. REV. STAT. § 473.050 (2000).

98. The tolling provision of the SCRA is 50 U.S.C. app. §526(a) (2000).

99. *Perry*, 168 S.W.3d at 584.

language of the statute of limitations, the court concluded that the statute “would bar Perry’s petition and application unless [it] . . . was tolled.”<sup>100</sup>

The court then addressed the issue of whether the tolling provisions of the SCRA applied to Missouri’s probate statute of limitations.<sup>101</sup> Citing *Ludwig v. Anspaugh* and referring to the Supremacy Clause of the United States Constitution,<sup>102</sup> the court determined that if the tolling provision of the SCRA applied to Missouri’s statutes of limitations for presentment of a will and filing of letters testamentary, the SCRA controlled and the period of limitations was tolled while Perry was serving on active duty in the military.<sup>103</sup> This analysis distilled for the court the “ultimate issue” of the instant case: “whether [section 526] of the SCRA applies to toll the limitations period set forth in § 473.050.”<sup>104</sup>

Citing section 473.050 as a “special statute of limitations to which the regular tolling provisions under Missouri law [are] not applicable,”<sup>105</sup> the court discussed whether the SCRA was intended to modify all limits on rights of action not existing outside of their statutory creation.<sup>106</sup> The court examined two cases in which the Missouri Supreme Court applied the tolling provisions of the SCRA to non-traditional statutes of limitations: *Worlow v. Mississippi River Fuel Corp.*, and *Ludwig v. Anspaugh*.<sup>107</sup> Because Perry’s petition for presentment and application for letters testamentary involved “judicial proceedings” that could have an adverse affect on his civil rights, and both the petition and application instituted “proceedings” that he “had a right to bring, if timely filed, in the probate court,” the court held that section 526(a) acted to toll the limitations period contained in section 473.050.<sup>108</sup>

100. *Id.*

101. *Id.* at 584-89.

102. U.S. CONST. art. VI, cl. 2. The court went so far as to spell out the rather obvious proposition that “Missouri Courts are obliged to apply federal law.” *Perry*, 168 S.W.3d at 585 (quoting *State ex rel Nixon v. McClure*, 969 S.W.2d 801, 804-05 (Mo. Ct. App. 1998)).

103. *Perry*, 168 S.W.3d at 585 (citing *Ludwig v. Anspaugh*, 785 S.W.2d 269 (Mo. 1990) (en banc)).

104. *Id.*

105. *Id.* at 586.

106. *Id.* (citing *Worlow v. Miss. River Fuel Corp.*, 444 S.W.2d 461, 464 (Mo. 1969) (per curiam)).

107. *See Ludwig v. Anspaugh*, 785 S.W.2d 269 (Mo. 1990) (en banc) (holding that the SCRA tolls the period limitations on perfecting a timely-filed will contest by securing service of process within 90 days of filing the petition); *Worlow*, 444 S.W.2d 461 (holding that the SCRA tolls the period of limitations on Missouri’s wrongful death statute). *Ludwig* also articulated Missouri’s “policy interest in furthering the prompt settling of estates and in expediting prosecution of will contests” but stated that “[t]his salutary policy must give way . . . to the mandatory tolling provisions made by Congress.” *Perry*, 168 S.W.3d at 586 (alteration in original).

108. *Perry*, 168 S.W.3d at 586-87.

The court discussed this result in light of Congress' intent that Perry should not be concerned with the legal proceedings with regard to his father's will while he was in active service and framed the decision in *Ludwig* as controlling.<sup>109</sup> The court reasoned that a special statute of limitation, like the one in section 473.050, was not excepted from the tolling provision in the SCRA, particularly because Congress had "explicitly and unambiguously" excluded other types of proceedings "as it did in 50 U.S.C. [a]pp. § 527," which excluded periods of limitation under federal internal revenue laws.<sup>110</sup> Because there was not a similar provision pertaining to special statutes of limitation generally, or periods of limitation in probate matters specifically, the court found that such an exception could not be inferred in the instant case.<sup>111</sup>

When the court examined the cases relied on for the argument that the tolling provisions of the SCRA should not apply, it distinguished the application of the SCRA's tolling provision to probate proceedings from facially contrary doctrines in those cases as applied by courts in other states.<sup>112</sup> The court also found unpersuasive the claim that application of the SCRA's tolling provisions to the presentment of wills would lead to the "absurd result" of allowing interested individuals to circumvent the statute of limitations by simply engaging an active duty serviceperson to present the will.<sup>113</sup> The court relied on the doctrine that estate administration only commences when an interested party files an application for letters testamentary or letters of administration.<sup>114</sup> Thus, the court found that non-interested servicemembers would not be able to commence the administration of an estate, and the SCRA would not allow an interested party who is not an active duty servicemember to do so more than one year after the death of the decedent.<sup>115</sup> The court closed by asserting that such a result would not impose a burden greater than did the holding in *Ludwig* that tolled the period of limitations for will

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109. *Id.* at 587.

110. *Id.* (quoting *Anderson v. Dalkon Shield Claimants Trust (In re A.H. Robins Co.)*, 996 F.2d 716, 719-20 (4th Cir. 1993)).

111. *Id.*

112. *Id.* at 588. The cases discussed by the court were *McCoy v. Atl. Coast Line R.R. Co.*, 47 S.E.2d 532, 534 (N.C. 1948) (questioning whether the tolling provision of the SCRA was meant to apply to probate proceedings), *McLaughlin v. McLaughlin*, 46 A.2d 307, 309 (Md. 1946) (excepting the filing of a will from the SCRA's requirement found in 50 U.S.C. app. § 521 (2000) that a plaintiff must file an affidavit prior to the entry of judgment regarding the defendant's military service, but also assuming that the tolling provisions applied to a period of limitations upon caveat after probate), and *Case v. Case*, 124 N.E.2d 856, 861 (Ohio Prob. Ct. 1955) (holding that the SCRA, specifically 50 U.S.C. app. § 521, did not apply to proceedings to admit a will into probate in Ohio). *Perry*, 168 S.W.3d at 588.

113. *Perry*, 168 S.W.3d at 588.

114. *Id.* The court does discuss that Missouri law allows non-interested parties to present a will or codicil, but cautions that presentment does not equate with commencement of administration of the estate. *Id.* at 589 n.10.

115. *Id.* at 588.

contests, and held that the SCRA applied to Missouri's probate statute of limitations.<sup>116</sup>

In conclusion, the court reversed and remanded the case to the probate court for a hearing to determine whether Perry's service was valid and if so, whether it persisted long enough to toll the statute of limitations.<sup>117</sup> If the probate court so found, it was directed to reinstate Perry's petition for presentment and application for letters testamentary.<sup>118</sup>

## V. COMMENT

The court's first decision, that Perry's appeal was properly before the court, was undoubtedly correct. When the probate court denied Perry's petition for presentment and application for letters testamentary, the court in fact left "nothing for future determination," and as such was a "final and appealable" order.<sup>119</sup> Even the most persuasive argument to the contrary, that the statute of limitations was a jurisdictional prerequisite and the probate court lacked jurisdiction to do anything other than dismiss the case, fails because such a dismissal is still appealable.<sup>120</sup> Consequently, the court was absolutely correct to quash its fallaciously issued writ of certiorari and take up the direct appeal in its place.

Next, the court was correct in finding that section 473.050 is a statute of limitations, albeit a special one. The body of case law surrounding this statute does not ever seriously question that it is, and facially, the mere fact that it is a "statute" that "limits" the time period in which action must be taken would necessitate its classification thereas even had it not been deemed so in prior cases.<sup>121</sup> However, even if it were found not to be a statute of limitations, the Supreme Court of Missouri's ruling in *Worlow*<sup>122</sup> that the tolling provision of the SCRA was "intended to modify not only those statutes properly called statutes of limitations . . . but statutes creating a right of action which did not exist independently of the statute where the time for bringing such an action is limited in some way" would govern section 473.050 regardless of whether or not it was branded a "statute of limitations."<sup>123</sup> In applying the SCRA to section 473.050, the court has done exactly what Congress and the United States Constitution required it to do.

116. *Id.* at 589.

117. *Id.*

118. *Id.*

119. *Id.* at 583 (quoting *Clark v. Clark (In re Estate of Clark)*, 83 S.W.3d 699, 702 (Mo. Ct. App. 2002)).

120. *Id.* (citing *Sexton v. Jenkins & Assocs., Inc.*, 152 S.W.3d 270, 273 (Mo. 2004) (en banc)).

121. See *supra* note 48 and accompanying text.

122. *Worlow v. Mississippi River Fuel Corp.*, 444 S.W.2d 461 (Mo. 1969)

123. *Id.* at 464 (quoting *Stutz v. Guardian Cab Corp.*, 74 N.Y.S.2d 818, 822-23 (N.Y. App. Div. 1947)).

As the court correctly found, the purpose of the SCRA is clear: to protect those who, like Perry, are engaged in military service for the entirety of a period of limitations.<sup>124</sup> The fact that Congress has specifically excepted Internal Revenue statutes from the tolling provisions of the Act is further evidence of this proposition.<sup>125</sup> Presumably, Congress had the knowledge and the opportunity to except those special statutory periods of limitation that do not toll for fraud, concealment, or other extraordinary circumstances that ordinarily toll general statutes of limitation. That it refrained from doing so is a tacit endorsement of the supremacy of the tolling provision in the SCRA.

Read in a vacuum, the instant decision is undoubtedly correct. Assuming the fact of Perry's service, it was unnecessary and perhaps even burdensome for him to file an application for letters testamentary while in military service, and the delay in the administration of his father's estate was a mere few months longer than the statutory period would ordinarily allow. Perry's father, the decedent, had specifically nominated him to serve as executor of the will, a desire that would have been thwarted but for the tolling of the statute of limitations.<sup>126</sup> The result here is just, and in this case the delay is nominal enough that no real harm is caused by such a tolling of the statute of limitations. However, there are policy implications that the court did not address.

The recent history of cases refusing to require a demonstration of prejudice by career servicemembers leaves open the door to the possibility that results contrary to Missouri's stated policy interest in furthering "the prompt settling of estates and [in expediting] prosecution of will contests," will be realized.<sup>127</sup>

As career servicemembers are rightly considered to be "on active duty," such service could potentially be indefinite. Because courts do not require a demonstration of prejudice for such servicemembers to invoke the tolling provisions of the SCRA,<sup>128</sup> the instant decision could stand for the proposition that career servicemembers may be allowed to indefinitely postpone probate proceedings, because they are not specifically exempted by the Act. The relatively small impact that the instant decision would have in the lack of such a requirement, being limited only to matters of probate, is compounded

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124. See *Conroy v. Aniskoff*, 507 U.S. 511, 519-28 (1993) (Scalia, J., dissenting). Justice Scalia confesses that he has not "personally investigated" the entire body of legislative history on the subject; nonetheless, his analysis of key provisions offers a succinct and thorough discussion of the issue and provides a starting point for further examination. *Id.* at 527-28.

125. See Servicemembers Civil Relief Act, 50 U.S.C. app. §526(c) (2000).

126. *Perry*, 168 S.W.3d at 581 n.1.

127. *Ludwig v. Anspaugh*, 785 S.W.2d 269, 271 (Mo. 1990) (en banc).

128. This view of career servicemember eligibility, firmly established by the Supreme Court in *Conroy v. Aniskoff*, 507 U.S. 511, 516-18 (1993), is seemingly entirely dominant in recent caselaw. The opposing view, that a demonstration of prejudice is required before career servicemembers can invoke the tolling provisions of the SCRA, has not been upheld since *Conroy*.



when it is considered in light of *Worlow*, which applied the tolling provisions of the SCRA to Missouri's wrongful death statute, and *Ludwig*,<sup>129</sup> which applied the provisions to a procedural matter. Viewed in concert, these three cases strongly support the notion that the SCRA tolls all periods of limitation not specifically excepted from section 526 within the SCRA itself.

Such a result is legally correct, but ignores the potential for abuse by career servicemembers, especially those who, though stationed in the domestic United States, could still invoke the tolling provision of the SCRA. When viewed alongside the fact that it is unclear whether National Guard soldiers in a similar circumstance would not be afforded the same consideration by the SCRA, the result begins to appear manifestly unjust.<sup>130</sup>

The opinion in *Perry*<sup>131</sup> does not describe the nature of Perry's service, but under *Worlow*, which has been subsequently buttressed by the Supreme Court's holding in *Conroy*,<sup>132</sup> that nature is immaterial. In the case of will presentment, a domestically stationed servicemember could be in a good position, physically and vocationally, to receive notice and file petition within the statutory period of time, but could instead elect not to do so simply because of the SCRA's mandatory tolling provision. As this presumably extends to all time limitations imposed by statute or other functions operating in a governmental capacity, there are a variety of circumstances under which a servicemember could potentially use this tolling provision to delay adjudication or revive prior actions. One example of such an undesirable scenario could involve a servicemember excluded from a will contesting its administration long after all other parties involved thought the issue was settled.

This kind of unintended result could come from and unfairly benefit those with actions involving or against servicemembers as well. A claimant could revive an action after an indefinite amount of time in which there is a single interested party in career military service, even though the claimant could with little or no difficulty have notified or instituted an action against them. Because no showing of hardship is necessary under *Conroy*, this provision could be used strategically and in bad faith by savvy individuals. In addition to potentially harming unsuspecting individuals who believe an issue to be settled, such a development would inevitably serve to undermine the claims of those servicemembers who truly are meant to be protected by the SCRA, especially considering that with increasingly long periods of overseas deployment for active duty members, guardsmen, and reservists, the need for such protection is as strong now as ever.

Despite the possibility for an "absurd" result, the court found itself in a difficult position if it hoped to remedy this particular problem. Faced with the narrowly defined issue before it, the court decided *Perry* correctly. It is clear

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129. *Ludwig*, 785 S.W.2d 269.

130. See *supra* note 50 and accompanying text.

131. *Perry*, 168 S.W.3d 77.

132. *Conroy*, 507 U.S. 511.

from both the statutory language and the prior decisions in the Supreme Court and Missouri courts that section 526 of the SCRA is meant to apply to all statutory periods of limitation, whether they be “general” or, as in the instant case, “special.” Indeed, the court’s only possible alternative with regard to the application of the SCRA to probate law would have been to decide against *Ludwig* and cast *Worlow* into doubt by ruling that the tolling provisions of the SCRA simply did not apply to the statutory period of limitations contained in section 473.050. Such a ruling would be at best inconsistent with the body of case law on the subject and may well have carried little weight on further appeal.

Unfortunately, the possibility of such a result, inconsistent with the policy of efficient adjudication, still lingers. Because Congress refrained from clarifying the issue of career servicemembers and the lack of a requisite showing of prejudice when it revisited the Act in 2003, courts will undoubtedly uphold *Conroy*’s result in future litigation. Should this issue arise again, the courts are without the power to unilaterally remedy the situation, and Congress must act if it wishes to prevent the potential for limitless time periods concerning, among other things, filing of a new will by career servicemembers.

Nonetheless, acting within the scope of its authority, the Court of Appeals rightly decided this case. Should the issue of whether another statute of limitations is tolled by section 526 of the SCRA that has as-of-yet remained undecided by the courts arise, *State ex rel. Perry v. Roper* will solidify the body of case law which requires such statutes be tolled.

## VI. CONCLUSION

Due to recent U.S. military actions in Afghanistan and Iraq, and the resulting call-up of Reservists and National Guardsmen to active duty, the Servicemembers Civil Relief Act will no doubt see increasing amounts of litigation in the near future. The language of the statute and the fact that Congress declined to alter it in the face of broad judicial interpretation make it unequivocal that the tolling provision is intended to protect all qualifying servicemembers from all periods of limitation not specifically excepted by the Act. For the most part, the results of this legislation will be just, and prevent harm to and by those men and women serving in the armed forces of the United States of America. However, those persons assuming that the requisite period of time has run on an action adverse to their interests must be aware of the potential for a servicemember, career or otherwise, to make use of the SCRA to revive actions that would otherwise be proscribed by law. Unless and until Congress changes the requirements of the tolling provisions within the Act, qualifying servicemembers are entitled to toll almost any statute throughout the duration of their service for any or no reason at all.

ALFRED J. LUDWIG

