■ **Consent to removal by multiple defendants; timing; certification.** Where one defendant filed a timely notice of removal accompanied by a certification that other defendants had given their consent to the removal, a second defendant filed a timely consent to the removal, but a third defendant filed a seemingly untimely consent to removal, the 8th Circuit acknowledged a circuit split and then joined the 4th, 6th and 9th Circuits in holding that a defendant's timely removal which reflects the consent of a codefendant, signed pursuant to Rule 11, and followed by a notice of consent filed by the codefendant, is sufficient to establish the codefendant's consent to removal. ***Griffioen v. Cedar Rapids & Iowa City Rwy. Co.***, ___ F.3d ___ (8th Cir. 2015).

■ **Removal; remand; request for attorney's fees under 28 U.S.C. §§ 1447(c) and 1927.** Where the defendants removed the plaintiff's civil rights action on the basis of federal question jurisdiction and immediately sought the dismissal of the action; the district court ultimately remanded the action because the plaintiff had failed to exhaust its administrative remedies; and the district court denied the plaintiff's request for attorney's fees under 28 U.S.C. §§ 1447(c) and 1927, and the court's inherent power, the 8th Circuit, affirming the denial of the plaintiff's requests for attorney's fees, rejected the plaintiff's argument that removal is improper when its "sole purpose" is to have the action dismissed for want of jurisdiction, and instead held that attorney's fees are not warranted anytime removal is "objectively reasonable." ***Convent Corp. v. City of North Little Rock***, ___ F.3d ___ (8th Cir. 2015).

■ **28 U.S.C. § 1920; taxation of costs for transcribed and recorded depositions.** The 8th Circuit rejected a challenge to a district court's award of costs for both printed and electronically recorded deposition transcripts despite the fact that 28 U.S.C. §1920(2) allows the recovery of costs for "printed or electronically recorded transcripts," finding that the "context" of the statute supported a "conjunctive" reading. ***Stanley v. Cottrell, Inc.***, ___ F.3d ___ (8th Cir. 2015).

■ **"Motion for opportunity to respond to plaintiff's motion" denied.** Where the defendant failed to disclose its expert's opinions in accordance with the Pretrial Scheduling Order and failed to file timely opposition to the plaintiff's motion for summary judgment, but instead filed a "motion for opportunity to respond to plaintiff's motion" three days before the April 17 summary judgment hearing, which was supported by its counsel's declaration that he had not "learned of the existence of the motion" until April 10, Judge Frank denied the "opportunity" motion in its entirety, found that the "opportunity" motion was brought "without good cause," and reserved the right to award attorney's fees to the plaintiff pursuant to Local Rule 7.1(g)(4). ***D.C. Riggot, Inc. v. Estate of Kearns***, 2015 WL 1729533 (D. Minn. 4/15/2015).

■ **Diversity jurisdiction; master limited partnerships.** While acknowledging that unit holders in publicly traded master limited partnerships are have "limited influence" on the partnership and are similar to stockholders, Judge Nelson relied on a half-dozen decisions from district courts around the country in concluding that the citizenship of the unit holders must be considered in determining whether the parties are diverse. ***Great Lake Gas Trans. L.P. v. Essar Steel Minnesota, LLC***, ___ F. Supp. 3d ___ (D. Minn. 2015).

■ **"Fixed time to act;" weekend deadlines in scheduling order; Fed. R. Civ. P. 6(a)(1)(C).** Where a Pretrial Scheduling Order established a Saturday deadline for motions to amend pleadings but the motion to amend was not filed until the following Monday, Chief Judge Davis cited multiple decisions from the District of Minnesota and several treatises, and determined that Magistrate Judge Noel was "within his discretion" in granting the untimely motion to amend.

This is at least the third case in the district in the past two years to analyze the interplay between Fed. R. Civ. P. 6(a)(1)(C) and "fixed" deadlines. While the deadline was ultimately extended in each of these cases, litigants should remain aware that Rule 6(a)(1)(C)'s weekend/holiday extension does not automatically apply to "fixed" deadlines. ***Hood Pkg. Corp. v. Steinwagner***, 2015 WL 1197464 (D. Minn. 3/16/2015).

■ **Discovery relating to sexually transmitted diseases barred.** Granting in part and denying in part defendants' motion to compel, Judge Nelson limited discovery to the six named plaintiffs in the NHL concussion litigation MDL and ordered those six plaintiffs to provide a complete medical history going back to age 15 rather than limiting discovery to treatment for head or brain injuries as the plaintiffs requested, but found that "highly-sensitive" information relating to HIV, AIDS or sexually-transmitted diseases need not be disclosed unless the defendants could establish the relevance of this information for a specific plaintiff.

At the Court's request, the parties submitted supplemental briefing that analyzed how other District of Minnesota MDL's have handled discovery of plaintiffs in mass tort and personal injury actions, and it appears that Judge Nelson relied on this information in reaching her decision. Accordingly, future litigants may want to educate themselves regarding the commonly permitted scope of medically related discovery in the District of Minnesota. ***In Re National Hockey League Players' Concussion Injury Lit.***, 2015 WL 1334027 (D. Minn. 3/16/2015).

■ **Recent awards of attorney's fees.** Judge Nelson awarded the prevailing plaintiff in a "contentious" and "time-intensive" battle over claims brought under the Equal Payment Act and the MHRA just under $2 million in attorney's fees and costs. Press reports suggest that this is the largest statutory award of attorney's fees to an individual in the history of the district. The order is also notable for approving of paralegal rates as high as $210 per hour, which may also be a record for the district. ***Ewald v. Royal Norwegian Embassy***, 2015 WL 1746375 (D. Minn. 2015).

Judge Doty awarded a prevailing plaintiff, who had been awarded only $27,640 in an excessive force case, more than $243,000 in attorney's fees and costs, describing plaintiff's lead counsel's hourly rate of $650 per hour as "reasonable" for excessive force cases in the district. ***Fancher v. Klann***, 2015 WL 1810235 (D. Minn. 4/21/2015).

– Josh Jacobson
Law Office of Josh Jacobson

IMMIGRATION LAW

JUDICIAL LAW

■ **Denial of motion to reopen asylum hearing was proper.** In an unpublished decision, the 8th Circuit Court of Appeals upheld the immigration judge's denial of the petitioner's motion to reopen after a removal order was issued *in absentia* when he missed his deportation hearing. The IJ properly found the petitioner failed, in his motion to reopen, to rebut the strong presumption that the hearing notice was delivered to him by certified mail, nor for that matter, present any previously unavailable evidence of changed country conditions to warrant reopening his

asylum hearing. ***Guevara-Ascencio v. Holder***, No. 14-2041, *slip op.* (8th Cir. 2/20/2015) at *http://media.ca8.uscourts.gov/opndir/15/02/142041U.pdf*

■ **No more continuances.** The 8th Circuit Court of Appeals found the BIA did not abuse its discretion when it affirmed the Immigration Judge's denial of a 13th continuance when the petitioner failed to show "good cause," after the petitioner was found to have entered into a sham marriage, never appealed that finding, and presented no evidence of any likelihood of an approval of his wife's relative petition. ***Mogeni v. Holder***, No. 13-3597, *slip op.* (8th Cir. 3/9/2015) at *http://media.ca8.uscourts.gov/opndir/15/03/133597P.pdf*

■ **Gang violence victims do not constitute a "particular social group."** The 8th Circuit Court of Appeals held the petitioner failed to demonstrate that being a victim of gang violence constituted a particular social group within the political asylum context. That group did not show sufficient "particularity" and "visibility" to warrant its being perceived as a cohesive group by Guatemalan society. ***Chilel v. Holder***, No. 14-1936, *slip op.* (8th Cir. 3/10/2015) at *http://media.ca8.uscourts.gov/opndir/15/03/141936P.pdf*

■ **Personal retribution is not a valid basis for an asylum claim.** The 8th Circuit Court of Appeals upheld the denial of political asylum because the petitioner's persecutor (Adrian Sanchez) was motivated by personal retribution, and fear of personal retribution alone is not a valid basis for that form of relief. The targeting of Martinez-Galarza is not "on account of his membership in a particular social group" as would be the case for people providing information to ICE in its efforts to remove individuals residing in the United States without authorization. Rather, according to Martinez-Galarza, Sanchez sought to harm him because he ended Sanchez's American dream by helping ICE remove him to Mexico. ***Martinez-Galarza v. Holder***, No. 14-1436, *slip op.* (8th Cir. 4/9/2015) at *http://media.ca8.uscourts.gov/opndir/15/04/141436P.pdf*

■ **Failure to demonstrate changed country conditions.** The 8th Circuit Court of Appeals affirmed the denial of the petitioner's motions to reopen and reconsider within the political asylum context on account of his failure to demonstrate, through evidence, that the death of his friend in Guatemala reflected a change in country

conditions there. ***Martinez v. Lynch***, No. 14-1213, -1926, *slip op.* (8th Cir. 5/12/2015) at *http://media.ca8.uscourts.gov/opndir/15/05/141213P.pdf*

ADMINISTRATIVE ACTION

■ **FY 2015 H-2B cap reached.** U.S. Citizenship and Immigration Services (USCIS) recently announced that the H-2B cap for Fiscal Year 2015 (employment with a start date before 10/1/2015) had been reached as of 3/26/2015. The H-2B program provides employers the opportunity to petition for certain foreign national workers to fill temporary nonagricultural jobs in the United States. Employers petitioning for such workers must prove that there are insufficient workers "able, willing, qualified, and available to do the temporary work"; their employment "will not adversely affect the wages of and working conditions of similarly employed U.S. workers"; and the need for such workers' services or labor is "temporary, regardless of whether the underlying job can be described as temporary." "Temporary" is construed to mean a "one-time occurrence," "seasonal need," "peakload need," or "intermittent need." The current H-2B cap set by Congress is 66,000 visas per fiscal year with 33,000 set aside for the first half of the fiscal year (10/1 – 3/31) and the remaining 33,000 for employment in the second half of the fiscal year (4/1 – 9/30). *http://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-fiscal-year-2015*

■ **New rules for H-2B visa program.** The Departments of Labor (DOL) and Homeland Security (DHS) announced that in response to recent court decisions, changes have been made in the H-2B visa program. Improvements to the program were initiated through the recent promulgation of an interim final rule. 80 *Fed. Reg.* 24042-144 (4/29/2015). *http://www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09694.pdf*

As part of that process, a final rule establishing a prevailing wage methodology was issued as well. 80 *Fed. Reg.* 24146-90 (4/29/2015). *http://www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09692.pdf*

These new rules, according to both DOL and DHS, strengthen protections for U.S. workers by giving them a fair opportunity to find and apply for positions contemplated for H-2B workers while at the same time ensuring employers are able to hire H-2B workers when U.S. workers are unavailable. These new rules are likewise viewed as strengthening protections for both H-2B and U.S. workers as they relate to wages, working conditions, and benefits. *http://www.uscis.gov/news/new-rules-h-2b-visa-program-announced-us-departments-labor-and-homeland-security*

■ **FY 2016 H-1B cap reached.** On 4/7/2015, just one week after the period opened for employers to file H-1B visa petitions for prospective foreign national employees, USCIS announced that the cap of 65,000 visas set by Congress had been reached for Fiscal Year 2016 with nearly 233,000 H-1B petitions being filed. With that, USCIS will next employ a lottery to randomly select individuals for further H-1B visa processing. The H-1B visa is a temporary worker visa for individuals holding a bachelor's degree or higher (or its equivalent) to fill positions with that educational background as a minimal requirement. *http://www.uscis.gov/news/news-releases/uscis-reaches-fy-2016-h-1b-cap*

■ **Change in H-1B job site location may be a material change.** On 4/9/2015, the Administrative Appeals Office (AAO), USCIS, DHS, found that a change in an H-1B worker's place of employment that necessitates the filing of a new Labor Condition Application may affect H-1B eligibility and thus constitutes a "material change." As such, the employer is required to file an amended or new H-1B petition. ***Matter of Simeio Solutions, LLC***, 26 I&N Dec. 542 (AAO 2015). *http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/04/16/3832.pdf*

■ **No original signature.** In a decision issued on 5/14/2015, the Board of Alien Labor Certification Appeals (BALCA) upheld the denial of three labor certifications (a process involving employer-sponsored permanent residence for foreign national employees) for failing to have original signatures. "While 20 C.F.R §656.17(g)(1) does not distinguish between handwritten and electronic signatures, there is no indication that the typed name on the recruitment report was intended to be a signature." ***Matter of New York City Department of Education,*** 2012-PER-02553, -02632, -02658 (BALCA 5/14/2015). *http://www.oalj.dol.gov/decisions/alj/per/2012/in_re_new_york_city_depart_2012per02553_%28may_14_2015%29_140438_cadec_sd.pdf*

■ **Foreign terrorist organizations.** Secretary of State John Kerry recently announced that both the Revolutionary Armed Forces of Colombia (FARC) (also known as Fuerzas Armadas Revolucionarias de Colombia) as well as the Popular Front for the Liberation of Palestine (and other aliases) will continue to remain designated as foreign terrorist organizations in accordance with Section 219 of the Immigration and Nationality Act (8 U.S.C. §1189). 80 *Fed. Reg.* 19728 (4/13/2015) and 80 *Fed. Reg.* 25766 (5/5/2015/2015). *http://www.gpo.gov/fdsys/pkg/FR-2015-04-13/pdf/2015-08475.pdf*

http://www.gpo.gov/fdsys/pkg/FR-2015-05-05/pdf/2015-10581.pdf

– R. Mark Frey
Frey Law Office

PROBATE & TRUST LAW

JUDICIAL LAW

■ **Requirements applicable to protected persons' exercise of elective share rights do not violate equal protection.** The Minnesota Supreme Court ruled that a statute that requires a surviving spouse under conservatorship to obtain a court order authorizing the exercise of elective share rights does not violate constitutional equal protections rights. Under Minn. Stat. §524.2-212, a surviving spouse can independently exercise elective share rights, but a protected surviving spouse can only exercise the same rights after a court has determined that "exercise is necessary to provide adequate support for the protected person" and "the election will be consistent with the best interests of the natural bounty of the protected person's affection." Conservator for protected surviving spouse sought and was granted a district court order authorizing the exercise of the surviving spouse's elective share rights, but the required elements were not addressed. The district court held that Minn. Stat. §524.2-212 violates the surviving spouse's equal protection rights, because it treats protected surviving spouses differently than non-protected spouses. The court of appeals disagreed, holding that protected and non-protected surviving spouses are not similarly situated and that a protected person's impairments warrant additional protection under the law. The Supreme Court, applying a rational basis standard of review, determined that:

The distinctions are genuine and substantial because a protected person has an impairment that warrants an order of protection.

A clear connection exists between the unique needs of a protected person and the required judicial oversight. A conservator has a duty to manage the pecuniary affairs of the protected person, but "should not have the unilateral power to make a decision that should