

Approved by the Judicial Council December 4, 2009

MEMORANDUM

TO: Kansas Judicial Council

FROM: Probate Law Advisory Committee

DATE: December 4, 2009

RE: K.S.A. 59-618(a) Relating to Filing Certain Wills in Court, etc.

Attached is a copy of K.S.A. 59-618(a) with proposed amendments that have been approved by the Probate Law Advisory Committee and Wichita attorney Bob Collins on behalf of the Title Standards Committee. A comment prepared by Probate Law Advisory Committee member Eric Anderson is attached.

59-618a. Filing of certain wills in court; affidavit; admission to probate. (a) Any person possessing a decedent's will may file in the district court of the county of the decedent's last residence the decedent's will and an affidavit which complies with subsection (b) if the decedent's probate estate contains no known real or personal property and or the value of the decedent's probate estate is less than the total of all demands enumerated in K.S.A. 59-1301 and amendments thereto.

(b) An affidavit filed pursuant to this section shall state: (1) The name, residence address and date and place of death of the decedent; (2) the names, addresses and relationships of all the decedent's heirs, legatees and devisees which are known to the affiant after a diligent search and inquiry; (3) the name and address of any trustee of any trust established under the will; (4) the property left by the decedent and its approximate valuation; (5) the approximate amount and nature of any demands enumerated in K.S.A. 59-1301 and amendments thereto which were outstanding against the decedent's estate upon the decedent's death; (6) that the will is being filed with the district court for the purpose of preserving it for record in the event that probate proceedings are later required; and (7) that a copy of the affidavit and will has been mailed to each heir, legatee and devisee named in the affidavit.

(c) Any will filed pursuant to this section within a period of six months after the death of the testator may be admitted to probate after such six-month period.

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(c) Any will filed pursuant to this section within a period of six months after the death of the testator may be admitted to probate after such six-month period.

Comment:

Problem Identified: The current version of KSA 59-618a allows a person to execute an affidavit to file a decedent's Will to preserve its integrity for possible future probate only if the "decedent's estate contains no real property." That is a definitive statement and does not allow the person who has possession of the decedent's Will to execute such an affidavit based upon whether the affiant knows whether the decedent's estate contains real property. Thus, if a person files an affidavit stating that there is no real property in the decedent's estate, but then later discovers real property, some courts in Kansas will deem that the Will has been properly filed and will permit the Will to be probated even if that probate action occurs more than six months after the decedent's date of death. There are other courts in Kansas, however, that will not permit the Will to be filed to administer the distribution of the newly discovered real property. Thus, we have inconsistencies among District Courts in Kansas in the interpretation of the same statute.

The statute must be amended to clear up the inconsistent application by the courts.

Solution:

If we amend KSA 59-618a by adding the underlined words above, then we accomplish the following:

1. If there is property in the probate estate, real and/or personal, with a value in excess of the value of claims under 59-1301, then 59-618a is not available as a way to preserve the Will. It must be probated, the creditors notified, and the remaining assets are distributed accordingly.
2. If there is property in the probate estate, real and/or personal, with a value less than the value of claims under 59-1301, then the Will can be filed, but no probate administration started. It would then be up to creditors to proceed to open an estate. This provides the identical outcome as is the case with the current situation whereby if there is no real property, but there is personal property having a value less than the value of claims under 59-1301, the Will can be filed of record, but it is up to creditors to open an estate.
3. If there is no property in the probate estate, real and/or personal, then by definition the probate estate will be less than the value of all claims under 59-1301. But, on the chance that property – real and/or personal – is found at a later date, we have preserved the right of the testator to direct the disposition of that property in accordance with the terms of the testator's Will.

The purpose of the proposed changes would be to preserve the intent of the testator by allowing a decedent's Will to be filed of record in the county of the decedent's domicile. Some might argue that this impedes the rights of the decedent's heirs to inherit vis-à-vis a Determination of Descent procedure if the Will is not filed within six months of the decedent's date of death. I agree with that criticism, but I think it is misplaced. The "intent of the testator" is a concept that the courts strive to preserve and by amending 59-618a in this way is simply extending that concept to real property.

Will such a change create real property title problems? No. Generally, if a decedent dies in Kansas, a probate procedure (if required) is initiated in the county of the decedent's domicile. If there is real property in a county different from that of the decedent's domicile, an authenticated copy of the probate administration procedures from the domicile county is filed in the second county. In that way, the testator's intent is preserved as to real property located in more than one county.

The current state of the law states that if a decedent died as a resident of, for example, Saline County and a probate administration was not commenced within 6 months, the decedent's Will becomes void. If that same decedent owned property in Dickinson County, but that property was not discovered until a later date, then a Determination of Descent procedure would be typically be filed in Saline County (the domiciliary County), with a copy of that procedure eventually being filed in Dickinson County to allow the property in Dickinson County to pass accordingly.

Let's change the facts. What if there would have been a probate procedure in Saline County, but property of the decedent was later discovered in Dickinson County? In that case, someone would have the burden to check the Saline County District Court records – given that the decedent was domiciled in Saline County upon his date of death – to see if a probate procedure

was filed in Saline County. Finding such a procedure, a copy of the Saline County probate records would be filed in Dickinson County and the property would pass accordingly.

If we make the proposed changes to 59-618a, the identical burden occurs such that if real property is found in County A, someone needs to check the records of the county where the decedent was domiciled to see if a probate procedure was filed in that county, or at least whether the decedent's Will was filed of record according to 59-618a. If the Will was filed, then a probate procedure would be required to pass the property in the manner determined by the decedent's Will. The only difference is that instead of a Determination of Descent procedure that allows the "newly discovered" real property to pass to the decedent's heirs at law, a probate procedure that administers the Will, either formally or informally, will be needed to transfer title to the property to the testator's chosen beneficiaries.

Will creditors be prejudiced in any way by filing the Will under 59-618a and potentially not probating it until a later date? No. There is no change being proposed to the notion that creditors have six months from the date of death to initiate a probate procedure if a creditor believes there is property in the probate estate to satisfy a debt owed to a creditor. Thus, if more than six months after the date of death there is a probate procedure to probate a Will that was filed according to 59-618a, one of the allegations in the Petition would be that more than six months have passed since the date of death of a decedent, so the time for creditors to file a claim against the estate has passed. In other words, conceptually, this is exactly like the Determination of Descent. The only difference is that instead of heirs at law being the recipients of the probate estate, the recipients are the beneficiaries named in the Will.

Given the proliferation of Revocable Living Trusts and the good faith attempts to title property in trusts – both real and personal – the ability to file the "pour over" Will of record is an extremely important "insurance policy" to preserve the intent of the testator on the chance a tract of real property was missed in the trust funding process.

The proposed changes will solve this problem without any adverse consequences.