

MEMORANDUM

TO: Judicial Council
FROM: Christy Molzen
DATE: December 6, 2013
RE: Probate Law Advisory Committee – Proposed Legislation

The Probate Law Advisory Committee is recommending two different legislative proposals for the 2014 session. Both affect the trust code, so the Revisor’s Office may choose to put them both in the same bill.

Amendments to clarify the procedure for filing a claim against a trust

The Probate Committee’s first proposal is intended to clarify the procedure for filing a claim against a trust. This proposal is nearly identical to a bill the Council introduced two years ago, 2012 SB 291. That bill failed to pass, primarily because of legislators’ concern about a provision relating to continuing the exemption of assets after a settlor’s death. That provision has been omitted from the current draft.

A copy of the proposal and explanatory comment are attached at pages 2-7.

Anti-lapse statute for trusts

The Probate Committee’s second proposal would enact an anti-lapse statute for trusts, similar to the one for wills at K.S.A. 59-615. A copy of the proposal and comment are attached at page 8.

Amendments to clarify the procedure for filing a claim against a trust:

K.S.A. 58a-505. Creditor's claim against settlor.

(a) Except as provided by K.S.A. 33-101 *et seq.* and 33-201 *et seq.*, and amendments thereto, whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution, except that the provisions of subsection (a)(3) shall apply to a creditor or an assignee of the settlor of a trust that becomes irrevocable solely due to the death of the settlor.

(3) After the death of a settlor, ~~and subject to the settlor's right to direct the source from which liabilities will be paid,;~~

(A) Except as provided further, the property of a trust that was revocable at immediately prior to the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, the homestead, homestead allowance, the elective share rights of the surviving spouse pursuant to K.S.A. 59-6a209, and amendments thereto, and statutory allowance to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances. , each referred to as a "claim." A revocable trust shall not be liable for any claim unless: (i) A petition is filed for probate of the settlor's will pursuant to K.S.A. 59-2220, and amendments thereto, or for the administration of the decedent's estate pursuant to K.S.A. 59-2219, and amendments thereto, within six months after the death of the decedent; (ii) the settlor's probate estate is inadequate to satisfy the claim, unless the settlor has specifically directed otherwise; and (iii) the claim has been properly exhibited in the settlor's probate estate, allowed by the court in the proceeding under chapter 59 of the Kansas Statutes Annotated, and not otherwise barred by K.S.A. 59-2239, and amendments thereto.

(B) If the trustee of the revocable trust has not been given notice of the hearing on the claim in the proceeding under chapter 59 of the Kansas Statutes Annotated, the finding of the court in such proceeding, although binding on the estate, shall not be binding on the revocable trust. In such event, the property of the revocable

1 trust shall only be subject to the claim if the creditor making the claim files a
2 petition for a de novo hearing on such claim in the court pursuant to the
3 proceeding under chapter 59 of the Kansas Statutes Annotated and gives notice of
4 such hearing to the trustee of the revocable trust within one year of the
5 decedent's death, and the trustee may raise any defenses the trustee has to such
6 claim at that hearing, but in no event may the amount of the claim exceed that
7 allowed in the prior hearing.

8 (C) If the trustee of a revocable trust receives notice of a claim within the nonclaim
9 period, the trustee may pay such claim from the revocable trust after determining
10 such payment is otherwise appropriate, notwithstanding that a probate estate has
11 not been opened within six months after death or the claim has not been properly
12 exhibited therein. This shall not relieve the requirements above for any claim not
13 so paid by the trustee.

14 (D) When the revocable trust designates property to be appropriated for the
15 payment of claims it shall be applied to such purpose. Otherwise the property in
16 the revocable trust which is properly subject to payment of claims shall be
17 appropriated in the following order:

- 18 (1) Personal property not disposed of by the trust;
19 (2) real estate not disposed of by the trust;
20 (3) personal property given to a residuary beneficiary;
21 (4) real estate given to a residuary beneficiary;
22 (5) property not specifically given; and
23 (6) property specifically given.

24 The property of each class shall be exhausted before resorting to that of the next
25 class, and all of one class shall contribute ratably if all the property of that class is
26 not required for the payment of claims.

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28 (b) For purposes of this section:

29 (1) During the period the power may be exercised, the holder of a power of
30 withdrawal is treated in the same manner as the settlor of a revocable trust to the
31 extent of the property subject to the power;

32 (2) upon the lapse, release, or waiver of the power, the holder is treated as the
33 settlor of the trust only to the extent the value of the property affected by the
34 lapse, release, or waiver exceeds the greater of the amount specified in section
35 2041(b)(2) or 2514(e) of the federal internal revenue code of 1986, as in effect on
36 December 31, 2002; or section 2503(b) of the federal internal revenue code of
37 1986, as in effect on December 31, 2002; and

1 (3) this subsection shall not apply to the lapse of powers held by the
2 spouse of a person occurring upon the death of such person.

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5 **K.S.A. 59-103. Application of chapter; form of petitions.**

6 (a) Chapter 59 of the Kansas Statutes Annotated may be used:

7 (1) To admit last wills and testaments to probate.

8 (2) To grant and revoke letters testamentary and of administration.

9 (3) To direct and control the official acts of executors and administrators, to settle
10 their accounts, and to order the distribution of estates.

11 (4) To administer partnership estates as provided in this act.

12 (5) To determine the heirs, devisees, and legatees of decedents.

13 (6) To appoint and remove guardians and conservators for minors, voluntary
14 conservatees and incapacitated persons, to make all necessary orders relating to
15 their estates, to direct and control the official acts of such guardians and
16 conservators and to settle their accounts.

17 (7) To supervise the administration of trusts and powers created by wills admitted
18 to probate, and trusts and powers created by written instruments other than by
19 wills in favor of persons subject to conservatorship; to appoint and remove
20 trustees for such trusts, to make all necessary orders relating to such trust
21 estates, to direct and control the official acts of such trustees, and to settle their
22 accounts.

23 (8) To appoint and remove trustees of estates of convicts imprisoned in a
24 correctional institution under sentence of imprisonment for life, to make all
25 necessary orders relating to their estates, to direct and control the official acts of
26 such trustees, and to settle their accounts.

27 (9) To hold hearings respecting mentally ill persons, and to order their
28 referral for treatment.

29 (10) To determine the validity and payment of claims.

30 (b) Every petition to commence an action pursuant to this chapter ~~59~~
31 shall state, immediately below the clause showing the name of the court,
32 parties and case docket number, the following: "Petition pursuant to
33 chapter 59 of the Kansas Statutes Annotated."
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*****TO BE REPEALED*****

58a-818. Debts of deceased settlor; notice. (1) Any trustee who has a duty or power to pay the debts of a deceased settlor may give notice to creditors thereof. Such notice shall be published once a week for three consecutive weeks in a newspaper, authorized by law to publish legal notices, of the county in which the deceased settlor was a resident. The publication notice to creditors shall be to all persons concerned. It shall state the name and address of the trustee, the name of the deceased settlor, the name of the trust from which the debts of the decedent may be paid upon receipt of proper proof thereof, and shall notify the creditors to present such claims to the trustee within the later of:

- (a) Four months from the date of the first published notice; or
- (b) thirty days after receipt of the actual notice directed by subsection (2), or be forever barred as against the trustee and the trust property.

(2) Any trustee publishing a notice to creditors under the provisions of subsection (1) shall also give actual notice to known or reasonably ascertainable creditors prior to the expiration of the period described in subsection (1)(a).

(3) The claim of a creditor of a deceased settlor shall be forever barred as against the trustee and the trust property unless the claim is presented to the trustee within the later of:

- (a) Four months from the date of the first publication of the notice under subsection (1); or
- (b) if the creditor is known or reasonably ascertainable, 30 days after actual notice was given.

(4) Nothing in this section shall affect or prevent the enforcement of a claim arising out of tort against the decedent within the period of the statute of limitations provided for an action on such claim. Any recovery by the claimant in such action shall not affect the distribution of the assets of the trust unless a claim was presented to the trustee within the time allowed for filing claims under subsection (1). The action may be filed in any court of competent jurisdiction and the rules of pleading and procedure in the action shall be the same as apply in civil actions. The trust may be terminated and the trustee promptly discharged when the statute of limitations for filing such actions has expired and no action has been filed or upon conclusion of any action filed.

(c) This section shall be part of and supplemental to the Kansas uniform trust code.

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2 **COMMENT**
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4 Currently, K.S.A. 58a-505(a)(1) and (2) provide that the assets in a “self-
5 settled” trust remain available to the settlor’s creditors to the extent the trust is
6 revocable and with respect to an irrevocable trust, to the extent the trustee has
7 any authority to distribute trust assets to the settlor. Subsection (a)(3), consistent
8 with prior common law, provides that the trust estate of a revocable trust will
9 remain liable to the claims of the settlor’s creditors, as well as for costs and
10 expenses related to the trust estate. It does not establish any procedure for a
11 creditor to pursue such claims.
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13 The bill redrafts K.S.A. 58a-505(a)(3) to bridge the disconnect between
14 probate estates and trusts so all claims against a decedent are determined in one
15 proceeding. Subsection (a)(3) was modified to include procedures applicable to
16 claims by creditors of settlors of revocable trusts which remain viable despite the
17 settlor’s death under the foregoing provisions of the Kansas Uniform Trust Code.
18 The proposed amendments to subsection (a)(3) confirm that such claims are
19 barred under the same nonclaim period as applies to estates, in keeping with
20 current law as stated in the recent decision, *Nelson v. Nelson*, 288 Kan. 570
21 (2009). (The nonclaim period runs (i) six months after death if an estate is not
22 opened during that period, or (ii) if a claim is not filed within four months after
23 notice is given if an estate is opened within six months after death.) Further,
24 these changes clarify that the procedure to reach the assets of either an estate or
25 trust will be to file a claim in the probate court, thus avoiding a two-step process
26 for creditors to file in probate then file a separate action in Chapter 60 against the
27 trust, and allow all issues regarding claims to be resolved in one forum.
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29 In order to bind the trust, the trustee must be given notice of the probate
30 hearing under new subsection (a)(3)(B). In the event the trustee of the revocable
31 trust is not notified of such hearing (*e.g.*, such trustee is not then known or
32 reasonably ascertainable), the assets of the revocable trust are not subject to a
33 claim allowed in such probate proceeding unless the trustee is subsequently
34 notified by the creditor within one year of the death of the decedent of such
35 claim and such claim is allowed in a subsequent de novo hearing in an amount not
36 to exceed that allowed in the prior hearing.
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1 New subsection (a)(3)(C) allows a trustee of a revocable trust to pay a
2 legitimate claim even if it has not been filed and allowed in a probate proceeding.

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4 Finally, a new subsection (a)(3)(D) was added to incorporate the same
5 order of priority in satisfying creditor claims from assets in a revocable trust that
6 are specified under K.S.A. 59-1405 with respect to probate assets. This should not
7 effectuate a change in the law, as such estate priority has been previously found
8 by the Kansas appellate courts to also be applicable to trust property.

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10 The bill would also repeal K.S.A. 58a-818. As currently drafted, the statute
11 is confusing because it purports to set up a different nonclaim period for trusts
12 than for probate. However, the recent decision, *Nelson v. Nelson*, 288 Kan. 570
13 (2009), made clear that the nonclaim period under K.S.A. 59-2239 applies to
14 claims against trusts. Repealing the statute will make it clear that all claims
15 against a decedent are governed by the probate nonclaim statute, K.S.A. 59-2239,
16 and the new “unified” procedure for filing and allowing claims in the probate
17 court. In making its recommendation to repeal K.S.A. 58a-818, the Committee
18 also noted that the statute is unique to Kansas and is not part of the Uniform
19 Trust Code.

1 **Anti-lapse statute for trusts**

2

3 **New Section 1. Trust distribution to spouse or relative of the grantor; “issue”**
4 **defined; effective date.**

5 (a) If a trust distribution is directed by the trust instrument to be made to a
6 spouse of the grantor or to any relative of the grantor by lineal descent within the
7 sixth degree, whether by blood or adoption, and such spouse or relative dies
8 before the date of the distribution directed by the trust instrument, leaving issue
9 who survive, such issue shall take the same distribution which said spouse or
10 relative would have taken if he or she had survived, unless a different disposition
11 is made or required by the trust instrument.

12 (b) Unless the provisions of such trust specifically provide to the contrary, the
13 term “issue” means offspring, progeny or lineal descendants, by blood or
14 adoption, in whatever degree.

15 (c) This section applies only to trusts executed on or after January 1, 2015.

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18 **COMMENT**

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20 This section is patterned after K.S.A. 59-615, the anti-lapse statute that
21 applies to wills. Since trusts are intended to be will substitutes, the same anti-
22 lapse provisions should apply to both.

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24 The statute is given an effective date of January 1, 2015, to allow some lead
25 time to educate attorneys about the new provision. The Committee recommends
26 that the provision be placed in the trust code at K.S.A. Chapter 58a.