

Approved by the Judicial Council December 3, 2010

**REPORT OF THE PROBATE LAW ADVISORY COMMITTEE
ON 2010 HOUSE BILL 2514**

Introduction

2010 House Bill 2514 relating to the capacity of the settlor of revocable trusts was introduced by Representative J. Robert Brookens of Marion. Hearings were not held on the bill and House Judiciary Committee Chair Lance Kinzer requested that the Judicial Council study the bill and report its findings back to the 2011 Legislature. The Council agreed to undertake the study and referred the bill to the Judicial Council's Probate Law Advisory Committee.

The Probate Law Advisory Committee (PLAC) considered the bill at two meetings and Rep. Brookens served as a member of the Committee while the bill was being considered.

Background

Rep. Brookens informed the PLAC that he requested that HB 2514 be drafted and introduced because he was concerned that an opportunity exists to use living trusts to take advantage of the elderly and others with limited capacity. Representative Brookens explained that a will requires two witnesses and those two witnesses are focused on the capacity of the person making the will. In contrast, with a revocable trust there is only a notary public and the notary's role is only to be sure the trust is acknowledged and signed.

Representative Brookens said that when he requested the bill, he requested it be drafted to change the capacity required to create, amend or add property to a revocable trust from the "will standard" that is currently in K.S.A. 58a-601 to the "contract standard." He said he is not entirely satisfied with how the "contract standard" was stated in the bill and believes the language can be improved.

Committee Study

Before making a recommendation on HB 2514, the Committee reviewed information relating to the mental capacity necessary to make a will, create a trust and to make a deed or contract. The results of that review follows:

Capacity to Make and Execute a Will

In *Re Estate of Perkins*, 210 Kan 619 (1972) at p 626 states:

"The test of a testamentary capacity is not whether a person has capacity to enter into a complex contract or to engage in intricate business transactions nor is absolute soundness of mind the real test of such capacity. The established rule is that one who is able to understand what property he has, how he wants it to go at his death

and who are the natural objects of his bounty is competent to make a will even though he may be feeble in mind and decrepit in body.”

The American Law Institute Restatement (Third) of the Law Property (Wills and Other Donative Transfers) in Part A. Donor’s Capacity, §8.1 Requirement of Mental Capacity states:

“(a) A person must have mental capacity in order to make or revoke a will, a will substitute, or a gift.

(b) To have mental capacity to make or revoke a will, a revocable will substitute, or a revocable gift, the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.

(c) To have mental capacity to make an irrevocable gift, the donor must have the mental capacity necessary to make or revoke a will and must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor.”

Capacity for Trusts

K.S.A. 58a-601 reads as follows:

“The capacity required to create, amend, revoke or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.”

The Uniform Law Commissioners comments to Uniform Trust Code Section 601 (which is identical to K.S.A. 58a-601) read, in part, as follows:

“This section is patterned after Restatement (Third) of Trusts §11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor’s death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the

revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. *See* Section 407 and Comment.

The Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402 does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust.”

The American Law Institute Restatement of the Law (Third) TRUSTS in Part 2, Creation of Trusts, Chapter 3, Basic Principles and Requirements, §11, Capacity of a Settlor to Create a Trust states:

“(1) A person has capacity to create a trust by will to the same extent that the person has capacity to devise or bequeath the property free of trust.

(2) A person has capacity to create a revocable inter vivos trust by transfer to another or by declaration to the same extent that the person has capacity to create a trust by will.

(3) A person has capacity to create an irrevocable inter vivos trust by transfer to another or by declaration to the same extent that the person has capacity to transfer the property inter vivos free of trust in similar circumstances.

(4) A person has capacity to create a trust by exercising a power of appointment to the same extent that the person has capacity to create a trust of his or her own property under Subsection (1), (2), or (3) above, as appropriate to the type of transfer and trust being created.

(5) Under some circumstances, an agent under a durable power of attorney or the legal representative of a property owner who is under disability may create a trust on behalf of the property owner.

Capacity for Deeds or Contracts

In *Mills v. Shepherd*, 159 Kan. 668 (1945) at p 673, the Kansas Supreme Court considered the mental capacity required to execute a deed and stated:

“A person may therefore understand the general nature of a deed and not be capable of exercising a reasonably normal judgement concerning the disposition of property made thereby. The mere fact a grantor recognizes his relatives, knows he has property, and signs a deed does not necessarily mean he is mentally competent to understand both the nature and effect of what he is doing.”

In *State v. Maxon*, 32 Kan App. 2d 67 (2003) at p 78 the Kansas Court of Appeals cited the holding in the *Mills* case and stated:

“The test of mental capacity to contract or to convey property is whether the person possesses sufficient mind to understand in a reasonable manner, the nature and effect of the act in which he is engaged.”

Conclusion

The PLAC Committee is aware that abuse in the trust area can occur when the settlor of a revocable trust is the victim of either opportunistic or targeted abuse. The Committee is aware such abuse can occur not only in the trust area but also in the areas of conservatorships, powers of attorney and decedent’s estates. How to prevent such abuse has long been the concern of the Probate Law Advisory Committee and will likely be a concern of the Committee as long as it exists.

However, while acknowledging the existence of a problem, the Committee does not recommend adoption of HB 2514. It is the opinion of the PLAC that the mental capacity required to create a revocable trust is well established by case law and statute (23 states have adopted the Uniform Trust Code and the included “will” standard and the Committee is not aware of any state that has a different standard). The Restatement of the Law (Third) Trusts also supports the standard Kansas has adopted. The Committee does not recommend that Kansas take a position which is contrary to what has become a national standard in the area of capacity to create a revocable trust.