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**TO: House Judiciary Committee**

**FROM: Kansas Judicial Council – Nancy Schmidt Roush**

**DATE: March 13, 2012**

**RE: Testimony on 2012 SB 291 Relating to the Kansas Uniform Trust Code**

### Introduction

Last year, Senator Tim Owens referred two bills relating to probate estates and trusts to the Judicial Council for study: 2011 SB 47 and SB 48. The Council's Probate Law Advisory Committee studied those bills, as well as several others, all of which had originally been drafted by the Real Estate, Probate and Trust Law Section of the Kansas Bar Association. As a result of that study, the Probate Committee recommended three new bills, one of which is 2012 SB 291.

### Purpose of Amendments

#### Section 1, amending 58a-411:

The Senate Judiciary Committee amended Section 1 of the bill to provide that a spendthrift provision in the terms of a trust "is not presumed to" constitute a material purpose of the trust, rather than "may" constitute a material purpose, as originally suggested by the Probate Committee. The Senate Judiciary Committee amendment reverts to the language of the Uniform Trust Code. The Probate Committee has no objection to the amendment and believes it accomplishes the Committee's intent.

When the original Kansas Uniform Trust Code was enacted, it was amended to say that a spendthrift provision is presumed to constitute a material purpose at the request of the Kansas Bar Association's Real Estate, Probate, and Trust Law Section. The amendment was sought as a means of strengthening the nature of such clauses in the area of asset protection. However, in two appellate decisions since that time an unintended result has been that this provision has become a significant impediment to judicial modification of trust provisions otherwise merited under other provisions of the Kansas Uniform Trust Code, in essence overriding all other considerations. Since it is routine to include a spendthrift provision in all trusts, this unintended result has had the effect of making K.S.A. 58a-411 unavailable as a practical matter.

The amendment will allow the spendthrift provision in a trust to be treated like any other trust provision, and it will be up to the court to determine if it is a material purpose.

Section 2, amending 58a-505:

Currently, K.S.A. 58a-505(a)(1) and (2) provide that the assets in a "self-settled" trust remain available to the settlor's creditors to the extent the trust is revocable and with respect to an irrevocable trust, to the extent the trustee has any authority to distribute trust assets to the settlor. Subsection (a)(3), consistent with prior common law, provides that the trust estate of a revocable trust will remain liable to the claims of the settlor's creditors, as well as for costs and expenses related to the trust estate. It does not establish any procedure for a creditor to pursue such claims.

The bill redrafts K.S.A. 58a-505(a)(3) to bridge the disconnect between probate estates and trusts so all claims against a decedent are determined in one proceeding. Subsection (a)(3) was modified to include procedures applicable to claims by creditors of settlors of revocable trusts which remain viable despite the settlor's death under the foregoing provisions of the Kansas Uniform Trust Code. The proposed amendments to subsection (a)(3) confirm that such claims are barred under the same nonclaim period as applies to estates, in keeping with current law as stated in the recent decision, *Nelson v. Nelson*, 288 Kan. 570 (2009). (The nonclaim period runs (i) six months after death if an estate is not opened during that period, or (ii) if a claim is not filed within four months after notice is given if an estate is opened within six months after death.) Further, these changes clarify that the procedure to reach the assets of either an estate or trust will be to file a claim in the probate court, thus avoiding a two-step process for creditors to file in probate then file a separate action in Chapter 60 against the trust, and allow all issues regarding claims to be resolved in one forum.

In order to bind the trust, the trustee must be given notice of the probate hearing under new subsection (a)(3)(B). In the event the trustee of the revocable trust is not notified of such hearing (e.g., such trustee is not then known or reasonably ascertainable), the assets of the revocable trust are not subject to a claim allowed in such probate proceeding unless the trustee is subsequently notified by the creditor within one year of the death of the decedent of such claim and such claim is allowed in a subsequent de novo hearing in an amount not to exceed that allowed in the prior hearing.

New subsection (a)(3)(C) allows a trustee of a revocable trust to pay a legitimate claim even if it has not been filed and allowed in a probate proceeding.

New subsection (a)(3)(D) makes clear that all assets of a decedent which were exempt from the claims of creditors immediately prior to the decedent's death remain exempt from the claims of a decedent's creditors following the decedent's death, including the proceeds of such property. This provision was deemed desirable to resolve the current ambiguity under current law as to the survivability of such exemptions following a decedent's death, there being little law on this issue. The Committee feels there should be a consistent policy in this regard with respect to all such exempt property. Existing case law, including bankruptcy law, suggests that life insurance proceeds do remain exempt from the claims of a decedent's creditors following death, even if part of the decedent's estate. Although the exemption for IRAs has similar statutory language to that for life insurance, the recent Court of Appeals decision in *Commerce Bank, N.A., v. Bolander*, 44 Kan. App. 2d 1 (2007), which has been criticized by many commentators as wrongly reasoned, found to the contrary with regard to IRAs paid to an estate or revocable trust. Clearly, creditors do not rely on the availability of exempt assets to pay creditor claims in loan or other transactions with creditors. As such, the logical resolution of this issue would seem to be to continue the exemption following the death of the debtor, particularly as any unsecured creditor claim could always be avoided irrespective of statutory construction simply by naming a beneficiary on the decedent's assets other than the debtor's estate or revocable trust.

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

### Section 3, amending 58a-1013:

The bill would amend K.S.A. 58a-1013 by removing the trust's taxpayer identification number from the list of information a trustee may furnish a qualified beneficiary in lieu of

furnishing a copy of the trust. There is currently more concern with identity theft than in 2002 when the statute was enacted. Removal of subsection (a)(7) does not materially diminish the information about the trust available to the qualified beneficiary.

Section 4, amending 59-103:

The amendment to K.S.A. 59-103 would give the probate court the authority to deal with payment of claims against revocable trusts. The amendment to this section is directly related to the amendments to K.S.A. 58a-505 which set up the procedure for a creditor to file a claim against a revocable trust in a probate proceeding.

Repealer:

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

**Committee Members**

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