

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Michael R. O'Neal at 12:00 p.m. on April 11, 2002 in Room 524-S of the Capitol.

All members were present except:

Representative Karen DiVita - Excused
Representative Peggy Long - Excused
Representative Dean Newton - Excused
Representative Candy Ruff - Excused
Representative Clark Shultz - Excused
Representative Dale Swenson - Excused

Committee staff present:

Jerry Ann Donaldson, Department of Legislative Research
Sherman Parks, Department of Revisor of Statutes
Cindy O'Neal, Committee Secretary

SB 297 - Uniform Trust Code

A balloon amendment from the Kansas Bar Association was distributed. (Attachment 1)

The Chairman explained that a problem exists that due to the amount of time left in the House Chambers it might be easier to pass the bill out of committee without amendments and if agreed to by the committee, place them on the bill during debate on the floor. If amendments are made in committee then it will take an additional day or two before the bill would be ready for debate.

Committee members were concerned with the spend thrift provision of the bill. Representative Pauls made the motion to reinstate sections 42 & 43. Representative Lloyd seconded the motion. The motion failed.

Representative Loyd made the motion to report SB 297 favorably for passage, with the understanding that the suggested amendments by the Kansas Bar Association would be done on the House Floor during debate. Representative Crow seconded the motion. The motion carried.

The committee meeting adjourned at 1:00 p.m.



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MEMORANDUM

April 8, 2002

TO: Members of the House Judiciary Committee

FROM: Paul Davis, KBA Legislative Counsel
William Q. Martin, General Counsel and Trust Officer
The Smith County State Bank & Trust Co.

RE: Senate Bill 297 (Uniform Trust Code)

During hearings before the Senate Judiciary Committee, the Kansas Bar Association opposed the provisions of Senate Bill 297, primarily due to the existence of Section 42 and 43 of the proposed legislation; these provisions added exceptions to spendthrift provisions of current Kansas law. These provisions were supported by the Probate Advisory Committee of the Kansas Judicial Council, but as the result of a joint meeting of Kansas Bar Association and the Probate Advisory Committee, it was agreed that these provisions should be stricken from Senate Bill 297.

During testimony before the House Judiciary Committee, a representative of the Uniform Laws Commission provided testimony in favor of these provisions. Testifying on behalf of the Kansas Bar Association, Bill Martin restated the position of the bar on this issue. **The Kansas Bar Association strongly opposes the reinsertion of these provisions.**

It is still the strong position of the Kansas Bar Association that the provisions of Section 42 and 43 should not be included in the final version of the proposed legislation and that the addition of these provisions would be detrimental. A few of the reasons for the position of the KBA are listed herein:

Grantors of trusts should continue to have the ability to direct the ultimate disposition of their property as they may desire. Grantors of trusts are NOT able to shelter their assets from their own creditors. (see K.S.A. 33-101 and *Ackers v. First National Bank*, 192 Kan. 319, 387 P.2d 840 (1963)). However, current Kansas law does not impose any obligation to provide for, or subject trust assets, to the creditors of other third party beneficiaries or their creditors. This right would be considerably weakened should these exceptions to the spendthrift law be adopted.

The general policy of Kansas has been to allow for people to distribute property to or for the benefit of others, including the right of disinheritance. This right should be retained. Assets placed in trust by a grantor for the benefit of beneficiaries remain subject to the directive of the grantor and are not the property

of the beneficiary. Kansas has held spendthrift provisions to be valid as to income and principal in trust (*In re Watts*, 160 Kan. 377, 162 P. 2d 82 (1945))

Adoption of the exceptions to the Spendthrift rights may cause some grantors to purposely disinherit family members. Without the ability to shelter assets from a class of creditors, some grantors may opt to totally disinherit family members. This would create a draconian effect in many family situations by encouraging outright disinheritance in lieu of holding assets in trust to benefit these same family members. Few, if any states have actually adopted the provisions of the Restatement of Trusts that provide for exceptions to the spendthrift power; the trend is toward more asset protection, rather than less protection of trust assets. Although the Restatement of Trusts has addressed this issue, we have been unable to find court rulings of legislative actions that have actually adopted these provisions. Indeed, the national trend is to encourage more asset protection in trusts.

One of the areas of dispute in this area has been in the tort claim area. In spite of the lack of a significant number of commentators calling for a change and no feeling bridled by the absence of judicial precedent, The Mississippi Supreme Court in the case of *Sligh v. First National Bank of Holmes County*, 704 So. 2d 1020 (Miss. 1997) became the first state to create a common law exception to spendthrift trusts with respect to tort claims. However, the consternation following the *Sligh* decision was immediate. The Mississippi legislature in 1998 overrode the *Sligh* decision with the enactment of the Family Trust Preservation Act.

Due to the strong current Kansas policy in favor of spendthrift provisions, and the national trend toward more asset protection in trusts, the Kansas Bar Association urges this policy to continue. The existence of a trust created to benefit a trust beneficiary does not weaken the rights of creditors to reach all assets of that beneficiary. Should any creditor, including a spouse, former spouse or child, have a claim against a trust beneficiary, all assets and income of that beneficiary, including all assets distributed to that beneficiary, can be reached by these creditors. The assets of the beneficiary may be attached and the wages of any beneficiary can be garnished to satisfy the rights of these creditors.

The very existence of a trust created to benefit a trust beneficiary may cause a court to increase the support obligations of a trust beneficiary. Even if a trust is a third party trust created by another to benefit a beneficiary, and even if the trust has full spendthrift protection, the very existence of the trust, and the fact that possible distributions may be made to or for the benefit of the beneficiary, may cause a court to consider these possible resources in awarding support awards.

The loss of spendthrift protection will cause counsel to advise their clients to move trusts out of the state of Kansas. Should other states retain favorable spendthrift provisions, many trust grantors will be prompted to move the administration of trusts to these states and out of the state of Kansas.

Summary

For the reasons stated above, the Kansas Bar Association STRONGLY OPPOSES the reinsertion of the provisions of Section 42 and 43 in Senate Bill 297. We also urge you to adopt the attached balloon amendments. We have worked on several of these amendments with the Trust Division of the Kansas Bankers Association. Additionally, we have shared these amendments with the Judicial Council Probate Advisory Committee and they have no objection to their adoption.

This is a significant piece of legislation to the members of the KBA and we sincerely thank you for your consideration.

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LEGISLATIVE TESTIMONY

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4/1/02

TO: CHAIRMAN MIKE O'NEAL AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE

FROM: BILL MARTIN

RE: SENATE BILL 297 (UNIFORM TRUST CODE)

Chairman O'Neal and Members of the Committee:

I thank you for the opportunity to present this testimony today on behalf of the Kansas Bar Association. My name is Bill Martin and reside in Smith Center. I am a member of the KBA Real Estate, Probate & Trust Law Section and have served as a member of the special KBA committee that has reviewed the Uniform Trust Code (UTC).

Our special committee has spent many hours reviewing the UTC in detail. This committee is comprised of Mike Dwyer of Overland Park, Royce Nelson of Salina, Peter Johnston of Salina, Terry Fry of Wichita, Tim O'Sullivan of Wichita, Jim Bush of Hiawatha and Doug Pringle of Wichita. We originally had a number of concerns about the Code, but through discussions with the members of the Kansas Judicial Council Probate Advisory Committee, we have been able to resolve those concerns. The amendments to the bill that were offered in the Senate Judiciary Committee are representative of changes that the KBA recommended to the bill and were agreed upon by the Judicial Council.

We do have a few largely technical amendments to present to you today. We have discussed these amendments with the Judicial Council and we believe they are agreeable to the Council. As I mentioned, these amendments are technical in nature but I want to walk you through them briefly.

I appreciate your consideration of Senate Bill 297 and respectfully request adoption of the amendments that are presented in the attached balloon. I am happy to stand for any questions you have. Thank you!

1 (7) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

3 (8) "Jurisdiction," with respect to a geographic area, includes a state
4 or country.

5 (9) "Person" means an individual, corporation, business trust, estate,
6 trust, partnership, limited liability company, association, joint venture,
7 government; governmental subdivision, agency, or instrumentality; public
8 corporation, or any other legal or commercial entity.

9 (10) "Power of withdrawal" means a presently exercisable general
10 power of appointment other than a power exercisable only upon consent
11 of the trustee or a person holding an adverse interest.

12 (11) "Property" means anything that may be the subject of owner-
13 ship, whether real or personal, legal or equitable, or any interest therein.

14 (12) "Qualified beneficiary" means a beneficiary who, on the date of
15 the beneficiary's qualification ~~is determined; possesses a vested income
16 interest or vested remainder interest in a trust.~~

is determined:

17 (A) ~~Is a distributee or permissible distributee of trust income or
18 principal;~~

(A) Is a distributee of trust
income or principal; or

19 ~~(B) would be a distributee or permissible distributee of trust income
20 or principal if the interests of the distributees described in subparagraph
21 (A) terminated on that date; or~~

(B) would be a distributee of
trust income or principal
if the trust terminated
on that date.

22 ~~(C) would be a distributee or permissible distributee of trust income
23 or principal if the trust terminated on that date.~~

24 (13) "Revocable," as applied to a trust, means revocable by the settlor
25 without the consent of the trustee or a person holding an adverse interest.

26 (14) "Settlor" means a person, including a testator, who creates, or
27 contributes property to, a trust. If more than one person creates or con-
28 tributes property to a trust, each person is a settlor of the portion of the
29 trust property attributable to that person's contribution except to the ex-
30 tent another person has the power to revoke or withdraw that portion.

31 (15) "Spendthrift provision" means a term of a trust which restrains
32 ~~both voluntary and involuntary transfer of a beneficiary's interest.~~

either

33 (16) "State" means a state of the United States, the District of Co-
34 lumbia, Puerto Rico, the United States Virgin Islands, or any territory or
35 insular possession subject to the jurisdiction of the United States. The
36 term includes an Indian tribe or band recognized by federal law or for-
37 mally acknowledged by a state.

or

38 (17) "Terms of a trust" means the manifestation of the settlor's intent
39 regarding a trust's provisions as expressed in the trust instrument or as
40 may be established by other evidence that would be admissible in a ju-
41 dicial proceeding.

42 (18) "Trust instrument" means an instrument executed by the settlor
43 that contains terms of the trust, including any amendments thereto.

1 Sec. 10. (UTC 110) OTHERS TREATED AS QUALIFIED
2 BENEFICIARIES. (a) Whenever notice to qualified beneficiaries of a
3 trust is required under this code, the trustee must also give notice to any
4 other beneficiary who has sent the trustee a request for notice.

5 ~~(b)~~ A charitable organization expressly entitled *mandated* to receive
6 benefits *distributions* under the terms of a trust or a person appointed
7 to enforce a trust created for the care of an animal or another nonchar-
8 itable purpose as provided in section 29 or 30, and amendments thereto,
9 has the rights of a qualified beneficiary under this code.

10 ~~(c)~~ (b) The attorney general of this state has the rights of a qualified
11 beneficiary with respect to a charitable trust having its principal place of
12 administration in this state.

13 Sec. 11. (UTC 111) NONJUDICIAL SETTLEMENT AGREE-
14 MENTS. (a) For purposes of this section, "interested persons" means
15 persons whose consent would be required in order to achieve a binding
16 settlement were the settlement to be approved by the court.

17 (b) Except as otherwise provided in subsection (c), interested persons
18 may enter into a binding nonjudicial settlement agreement with respect
19 to any matter involving a trust.

20 (c) A nonjudicial settlement agreement is valid only to the extent it
21 does not violate a material purpose of the trust and includes terms and
22 conditions that could be properly approved by the court under this code
23 or other applicable law.

24 (d) Matters that may be resolved by a nonjudicial settlement agree-
25 ment include:

are limited to

- 26 (1) ~~The interpretation or construction of the terms of the trust;~~
- 27 ~~(2) the *The* approval of a trustee's report or accounting;~~
- 28 ~~(3) direction to a trustee to refrain from performing a particular act~~
29 ~~or the grant to a trustee of any necessary or desirable power;~~
- 30 ~~(4) (2) the resignation or appointment of a trustee and the determi-~~
31 ~~nation of a trustee's compensation;~~
- 32 ~~(5) (3) transfer of a trust's principal place of administration; and~~
- 33 ~~(6) (4) liability of a trustee for an action relating to the trust.~~

34 (e) Any interested person may request the court to approve a non-
35 judicial settlement agreement, to determine whether the representation
36 as provided in article 3 of this code was adequate, and to determine
37 whether the agreement contains terms and conditions the court could
38 have properly approved.

39 Sec. 12. (UTC 112) RULES OF CONSTRUCTION. The rules of
40 construction that apply in this state to the interpretation of and disposition
41 of property by will also apply as appropriate to the interpretation of the
42 terms of a trust and the disposition of the trust property.

43 Sec. 13. (UTC 201) ROLE OF COURT IN ADMINISTRATION

1 31, 2000.

2 (d) The provisions of this section shall be effective as to all trusts not
3 construed prior to the effective date of this act.

4 **Sec. 35. (UTC 414) TERMINATION OF UNECONOMIC**
5 **TRUST.** (a) After notice to the qualified beneficiaries, the trustee of a
6 trust consisting of trust property having a total value less than \$100,000
7 may terminate the trust if the trustee concludes that the value of the trust
8 property is insufficient to justify the cost of administration.

9 (b) The court may modify or terminate a trust or remove the trustee
10 and appoint a different trustee if it determines that the value of the trust
11 property is insufficient to justify the cost of administration.

12 (c) Upon termination of a trust under this section, the trustee shall
13 distribute the trust property in a manner consistent with the purposes of
14 the trust.

15 (d) This section does not apply to an easement for conservation or
16 preservation.

17 **Sec. 36. (UTC 415) REFORMATION TO CORRECT MIS-**
18 **TAKES.** The court may reform the terms of a trust, even if unambiguous,
19 to conform the terms to the settlor's intention if it is proved by clear and
20 convincing evidence that both the settlor's intent and the terms of the
21 trust were affected by a mistake of fact or law, whether in expression or
22 inducement.

23 **Sec. 37. (UTC 416) MODIFICATION TO ACHIEVE SET-**
24 **TTLOR'S TAX OBJECTIVES.** To achieve the settlor's tax objectives, the
25 court may modify the terms of a trust in a manner that is not contrary to
26 the settlor's probable intention. The court may provide that the modifi-
27 cation has retroactive effect.

28 **Sec. 38. (UTC 417) COMBINATION AND DIVISION OF**
29 **TRUSTS.** (a) After notice to the qualified beneficiaries, a trustee may
30 combine two or more trusts into a single trust or divide a trust into two
31 or more separate trusts, if the result does not impair rights of any bene-
32 ficiary or adversely affect achievement of the purposes of the trust. The
33 trustee may make a division under this section by:

34 (1) Giving written notice of the division, not later than the 30th day
35 before the date of a division under this subsection, to each qualified ben-
36 eficiary; and

37 (2) executing a written instrument, acknowledged before a notary
38 public or other person authorized to take acknowledgments of convey-
39 ances of real estate stating that the trust has been divided pursuant to
40 this section and that the notice requirements of this subsection have been
41 satisfied.

42 (b) A trustee, in the written instrument dividing a trust, shall allocate
43 trust property among the separate trusts on a fractional basis by identi-

(e) This section does not apply to any trust if its assets are distributable to the trustee or anyone the trustee is obligated to support.

1 present or future distributions to or for the benefit of the beneficiary or
2 other means. The court may limit the award to such relief as is appropriate
3 under the circumstances.

4 Sec. 41. **(UTC 502) SPENDTHRIFT PROVISION.** (a) A spend-
5 thrift provision is valid ~~only if it restrains both voluntary and involuntary~~
6 ~~transfer of a beneficiary's interest.~~

7 (b) A term of a trust providing that the interest of a beneficiary is
8 held subject to a "spendthrift trust," or words of similar import, is suffi-
9 cient to restrain both voluntary and involuntary transfer of the benefi-
10 cary's interest.

11 (c) A beneficiary may not transfer an interest in a trust in violation of
12 a valid spendthrift provision and, except as otherwise provided in this
13 article, a creditor or assignee of the beneficiary may not reach the interest
14 or a distribution by the trustee before its receipt by the beneficiary.

15 ~~Sec. 42. **(UTC 503) EXCEPTIONS TO SPENDTHRIFT PRO-**~~
16 ~~**VISION.** (a) As used in this section, "child" includes any person for whom~~
17 ~~an order or judgment for child support has been entered in this or another~~
18 ~~state.~~

19 ~~—(b) Even if a trust contains a spendthrift provision, a beneficiary's~~
20 ~~child, spouse, or former spouse who has a judgment or court order against~~
21 ~~the beneficiary for support or maintenance, or a judgment creditor who~~
22 ~~has provided services for the protection of a beneficiary's interest in the~~
23 ~~trust, may obtain from a court an order attaching present or future dis-~~
24 ~~tributions to or for the benefit of the beneficiary.~~

25 ~~—(c) A spendthrift provision is unenforceable against a claim of this~~
26 ~~state, subdivisions thereof, or the United States to the extent a statute of~~
27 ~~this state or federal law so provides.~~

28 ~~Sec. 43. **(UTC 504) DISCRETIONARY TRUSTS; EFFECT OF**~~
29 ~~**STANDARD.** (a) As used in this section, "child" includes any person~~
30 ~~for whom an order or judgment for child support has been entered in~~
31 ~~this or another state.~~

32 ~~—(b) Except as otherwise provided in subsection (c), whether or not a~~
33 ~~trust contains a spendthrift provision, a creditor of a beneficiary may not~~
34 ~~compel a distribution that is subject to the trustee's discretion, even if:~~

35 ~~—(1) The discretion is expressed in the form of a standard of distri-~~
36 ~~bution, or~~

37 ~~—(2) the trustee has abused the discretion.~~

38 ~~—(c) To the extent a trustee has not complied with a standard of dis-~~
39 ~~tribution or has abused a discretion:~~

40 ~~—(1) A distribution may be ordered by the court to satisfy a judgment~~
41 ~~or court order against the beneficiary for support or maintenance of the~~
42 ~~beneficiary's child, spouse, or former spouse; and~~

43 ~~—(2) the court shall direct the trustee to pay to the child, spouse, or~~

————— Whether or not a trust
contains a spendthrift provision,
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that is subject to the trustee's
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