

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 p.m. on February 3, 2004 in Room 313-S of the Capitol.

All members were present except:

Representative Rick Rehorn- excused
Representative Dale Swenson- excused
Representative Dan Williams- excused

Committee staff present:

Jill Wolters, Revisor of Statutes
Diana Lee, Revisor of Statutes
Jerry Ann Donaldson, Kansas Legislative Research Department
Cindy O'Neal, Secretary

Conferees appearing before the committee:

Jerry Goodell, Kansas Judicial Council
Whitney Damron, Kansas Bar Association

The Chairman entertained requests for bill introductions.

Representative Davis requested a bill which would amend K.S.A. 44-4015 & 44-1016, Victim of Domestic Violence Act to have it apply with regard to discrimination of rental and sales. He made the motion to have the request introduced as a committee bill. Representative Patterson seconded the motion. The motion carried.

Representative O'Malley requested a bill which would disallow the use of a social security number on a drivers license. Representative Owens made the motion to have the request introduced as a committee bill. Representative Long-Mast seconded the motion. The motion carried.

Representative Goering requested a bill which would amend K.S.A. 40-284(b) to allow the claim to the extent the coverage exceeds the limits of the amount of liability proceeds actually available to an injured insured. He made the motion to have the request introduced as a committee bill. Representative Patterson seconded the motion. The motion carried.

The Chairman appointed the following committee members to a sub-committee on **HB 2581 - reporting adult abuse to SRS**: Representative Goering, Chair; Representatives Jack & Davis.

Hearings on **HB 2554 - amendments to the Kansas Power of Attorney Act**, were opened.

Jerry Goodell, Kansas Judicial Council, reviewed the proposed changes to the Kansas Power of Attorney Act (Attachment 1)

Hearings on **HB 2554** were closed.

Hearings on **HB 2555 - amendments to the probate code; preparation of wills; claims against an estate**, were opened.

Jerry Goodell, Kansas Judicial Council, explained that there were three proposed changes:

- ▶ Section 1 clarifies that adopted children are included in the exception and conforms the language used in this section to K.S.A. 58a-406.
- ▶ Section 2 amendment keeps this section consistent with a similar requirement contained in the proposed nonclaim statute for trustees.
- ▶ Section 3 strikes "pursuant to K.S.A. 59-2209. The Judicial Council believes that some form of notice should be required but not necessarily a publication notice.

Hearings on **HB 2555** were closed.

CONTINUATION SHEET

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on February 3, 2004 in Room 313-S of the Capitol.

Hearings on **HB 2556 - amendments to the Uniform Trust Code**, were opened.

Jerry Goodell, Kansas Judicial Council, appeared as a proponent of the bill. He proceeded to explain the proposed changes to the Uniform Trust Code. (Attachment 2)

Whitney Damron, Kansas Bar Association, appeared to provided testimony on behalf of Tim O'Sullivan who was in opposition to the changes to K.S.A. 58a-111 found in Section 3 which would expand the list to include "the interpretation or construction of the terms of the trust" and the "direction to a trustee to refrain from performing a particular act or the grant to the trustee of any necessary or desirable power." He believes that the expanded provisions are overly broad and takes too much authority away from the settlor and trustee and places it with trust beneficiaries. There was also concern that the terms "interested persons" and "material purpose" are not defined. Any recommendations addressing these concerns by the Kansas Bar Association would not be ready till the 2005 Kansas Legislature. (Attachment 3)

Hearings on **HB 2556** were closed.

Committee minutes from January 26, 27 & 28 were distributed.

The committee meeting adjourned at 4:45 p.m. The next meeting was scheduled for February 4, 2004.

**JUDICIAL COUNCIL TESTIMONY
ON 2004 HB 2554**

Comment to Section 1

Subsections (b), (c) and (d) are amended to use the term "disabled," which is a defined term.

The new language at the end of subsection (b) is an effort to facilitate transactions with governmental agencies and large corporations who frequently require specific power of attorney forms and are reluctant to accept any other forms. This amendment may eliminate the problem that often results when such entities require the execution of their propriety form after the principal is disabled.

Subsection (f)(10) is rewritten to accomplish the same objective as the subsection it is amending. That is to provide a procedure to allow the principal's attorney in fact to consent to alienation of the principal's homestead if proper procedures are followed. The stricken language was taken from the title standards and was not as clearly stated as the new language which was drafted by the Probate Law Advisory Committee with the assistance of representatives of the Bar Association.

It is unclear from the current (f)(10) whether or not the power of attorney is to serve as a joint consent or is to authorize the attorney in fact to enter into a joint consent on behalf of the principal. The amendment clarifies that the latter is the case.

Subsection (f)(13) is a new subsection under the list of powers that may be authorized by the power of attorney if specifically authorized. The amendment allows the principal to include specific language in the power of attorney to delegate to the attorney in fact the authority to pay reasonable and ordinary expenses incurred for the funeral and burial or other disposition of the body of the principal. Such expenses are the first obligation most families want paid and constitute a first class claim against the estate. This amendment will facilitate the payment of these amounts and possibly eliminate the need for estate proceedings in some small estates.

Comment to Section 2

Subsection (b) is amended by striking reference to the uniform custodial trust law, which has not been enacted in Kansas, and inserting reference to K.S.A. 9-1607 from the Kansas Banking Code, and by adding reference to a state or national bank or trust company.

Comment to Section 3

Subsection (b)(1) is amended by inserting reference to subsection 5(f)(13) which is the proposed amendment that will allow the payment of burial or funeral expenses.

Comment to Section 4

The stricken language in subsection (f) contains a reference to a section of the Missouri law which was not enacted by Kansas.

Subsection (i) is amended by striking "attorney in fact" and inserting "principal" in lieu thereof. This is a technical correction.

February 3, 2004

**JUDICIAL COUNCIL TESTIMONY
ON 2004 HB 2556**

New Section 1.

COMMENT

This section changes Kansas law by adding a statutory nonclaim period during which creditors of a decedent must present claims to the trustee of a trust of which the decedent was a settlor. The notice requirements and the nonclaim periods conform with the Probate Code nonclaim statutes contained in K.S.A. 59-709 and 59-2239. The intent of the statute is to expedite the payment of claims and the final settlement and distribution of the assets of revocable trusts. The statutory notice procedure also provides finality for trustees who have historically had to delay final distributions to beneficiaries for indefinite periods in order to retain trust assets for payment of claims that have not been presented or are yet to be identified.

The statute allows the trustee to provide notice both by publication and by actual notice to reasonably ascertainable creditors. The statutory requirement to provide actual notice to reasonably ascertainable creditors conforms with the due process requirements set forth in *Tulsa Professional Collection Services, Inc. V. Estate of Pope*, 485 U.S. 478, 108 S.Ct. 1340.

The nonclaim period is the later of four (4) months from the first date of publication of the notice to creditors or thirty (30) days after actual notice is given to a reasonably ascertainable creditor. The 30-day limitation period is new. The limitation which was included in the Trust Code and added to the Probate Code to enable a creditor to have sufficient time to file a claim, particularly when the creditor receives notice immediately before the expiration of the 4-month nonclaim period.

The Kansas UTC and Probate Code nonclaim statutes differ in that the Trust Code notice provisions are elective and the Probate Code notice provisions are mandatory. However, if a trustee wishes to enforce the nonclaim period for creditors' claims, the statutory notice must be published and actual notice must be given to any reasonably ascertainable creditors whose claims a trustee wishes to bar.

Subsection (4) conforms with K.S.A. 59-2239(2) under the Probate Code. These sections address the rights of creditors who have potential tort claims against decedent's estates. Both of these provisions require that creditors who have been given notice, either by publication or by actual notice if such creditor were reasonably ascertainable, to file such claims within the nonclaim period in order to preserve the right to file an action within the two-year statute of limitations for tort actions. If the trustee publishes a notice to creditors or gives actual notice, and no claim is filed by

a creditor within the nonclaim period, then the creditor forfeits his or her right to obtain a judgement against the trust and receive payment from the trust assets.

Section 2. K.S.A.2002 Supp 58a-103

COMMENT

The amendment to this section was proposed by the Kansas Bar Association. In testimony before the 2003 Legislature, the KBA testified that the reason for the change is that the existing "language is somewhat ambiguous as many practitioners and trustees are reading (12) (A) and (B) in the disjunctive, whereas it should be read in the conjunctive. The term "qualified beneficiary" is used in: Section 705 to define the class to whom notice must be given of a trustee resignation; Section 813 defining the class to be kept informed of the trust administration; Section 417 specifying to whom notice must be given before a trust is combined or divided; Section 704 defining persons who may consent to certain actions such as the appointment of a successor trustee; and Section 108(d) requiring to whom notice must be given in transferring a trust's principal place of administration. The definition in this context simply makes no sense unless read in the conjunctive, nor would it appear to be good public policy to permit "first tier" remainder beneficiaries to be potentially excluded from all of the foregoing statutory provisions."

Section 3. K.S.A. 58a-105

COMMENT

The amendment to subsection (b)(5) was suggested by Professor David English, Reporter for the Uniform Trust Code, in his 2003 article in the University of Kansas Law Review. In that article, he writes:

"Yet, in its rush to solidify the effectiveness of a spendthrift provision, the Kansas Legislature deleted the provision providing that rights of creditors, to the extent protected in the UTC, are not subject to waiver in the terms of the trust. Because all provisions of the UTC not made mandatory are subject to override in the terms of the trust, under the Kansas UTC, a settlor in theory can provide that the settlor's creditors cannot reach the settlor's retained interest in an irrevocable trust. Also, a settlor can in theory provide that a revocable trust is totally exempt from creditor claims, whether the claim is made before or after the settlor's death. This result, which was surely unintended, should be corrected by technical amendment."

The amendment to subsection (b)(12) is included to give the proposed nonclaim provisions in section 15 status as a mandatory provisions that cannot be overridden by the trust.

Section 4. K.S.A. 58a-111

COMMENT

The changes in this section restore much of the original UTC language. The proposal is a result of suggestions made to the Committee by practicing lawyers. It is the opinion of the Committee that subsection (c) provides adequate protection and that the restoration of subsections (d)(1) and (d)(3) makes trust law more consistent with family settlement agreements under K.S.A. 59-102(8).

Section 5. K.S.A. 58a-401

COMMENT

The amendment clarifies that the statute permits a trust to be created by transfer of property to the trustee or to the trust. This is intended to solve the problem of persons transferring property to the trust and not the trustee and is consistent with K.S.A 58a-810.

Section 6. 58a-406

COMMENT

Subsection (b) is similar to K.S.A. 59-605 and the changes not only conform the subsection to the language used in that section but clarify that adopted children are also included in the exception.

Section 7. K.S.A. 58a-411

COMMENT

The amendment to this section is a part of a group of amendments proposed in 2003 by the Uniform Law Commissioners, who drafted the Uniform Trust Code. Their comment to the proposed amendment is:

“The amendment, which adds the language “modification or” to subsection (a), fixes an inadvertent omission. It was the intent of the drafting committee that a representative of the settlor be able to participate not only in a decision to terminate a trust but also in a decision to modify it.”

Section 8. K.S.A. 58a-502

COMMENT

This amendment was suggested by Professor David English, Reporter for the Uniform Trust Code, in his 2003 article in the University of Kansas Law Review. He is of the opinion that Kansas pared back the provisions on creditors rights too far, and the Probate Law Advisory Committee agrees with his suggestion.

See also the comment to the amendment to K.S.A. 58a-105.

Section 9. K.S.A. 58a-505

COMMENT

The amendment to subsection (a)(3) is intended to clarify that, although the property of a trust that was revocable at the settlor's death may be subject to the settlor's surviving spouse's elective share rights, it is so only to the extent, and subject to, the provisions set forth in K.S.A. 59-6a209.

The amendments to subsection (b) are nearly identical to those proposed by the Kansas Bar Association in 2003. The date "2000" is stricken and "2002" is inserted in lieu thereof twice in subsection (b)(2). If no changes are made in the cited code section in 2003, the cite can be changed to "2003."

The KBA also proposed the language in (b)(3) as a part of (b)(2). In testimony before the 2003 Legislature the K.B.A. presented the following testimony:

“For purposes of determining whether an individual has created a “self-settled” trust with respect to creditor issues, Section 505 addresses the issue of lapses of withdrawal rights. Although there was not a significant amount of prior case law on this issue, it would appear that lapses of withdrawal rights would not literally meet the requirements under most self-settled trust statutes, including that under Kansas law (K.S.A. 33-101). These statutes, literally read, would seem to require an affirmative act. In deciding to include trust property with respect to which lapse of a withdrawal right (which would appear to include general powers of appointment) had occurred in this category, the Uniform Commissioners carved out a safe harbor under 505 (b), which reads as follows:

- (b) for purposes of this section:
- (1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and
 - (2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503 (b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code]] [,or as later amended].

This limited exception, patterned after Texas and Arizona laws, was designed to accommodate "Crummey" powers. It does not accommodate "reciprocal general powers of appointment" between spouses which are being increasingly used to balance estates between spouses for federal estate tax purposes (as sanctioned by recent IRS letter rulings) and /or to arguable achieve a "step up" in basis in all spousal assets upon the death of the first spouse. The lapse of the surviving spouse's general power of appointment over the predeceased spouse's assets upon the death of the predeceased spouse could subject all assets left in trust by the predeceased spouse for the benefit of the surviving spouse not only to the claims of the surviving spouse's creditors, but also to inclusion in the surviving spouse's taxable estate, as the exposure of the trust assets to the surviving spouse's creditors would constitute a general power of appointment under I.R.C. Section 2041."

Section 10. K.S.A. 58a-602

COMMENT

The amendment to subsection (b)(3) is a part of a group of amendments proposed in 2003 by the Uniform Law Commissioners, who drafted the Uniform Trust Code. Their comment to the proposed amendment is:

"The amendment, which adds a new subsection (b) (3), requires that in the case of a joint trust that is revoked or amended by fewer than all of its settlors, that the trustee must give prompt notice of the change to the other settlors." This new subsection is a substitute for Section 603 (b), which is repealed by this amendment."

The amendment to subsection (e) is a technical correction which strikes "agent" and inserts "attorney in fact," which is the term used in the Kansas Power of Attorney Act.

Section 11. K.S.A 58A-603

COMMENT

The amendment to this section is part of a group of amendments proposed in 2003 by the Uniform Law Commissioners who drafted the Uniform Trust Code. Their comment to the proposed amendment is:

_____“The purpose of subsection (b), which is being repealed, was to make certain that upon revocation or amendment of a joint trust by fewer than all of its settlors, that the trustee would notify the nonparticipating settlor or settlors. Explaining how subsection (b) achieved this result, however, required considerable verbiage in the comments. Also, subsection (b) imposed other duties on the trustee. The drafter’s original intent is restored, and in a much clearer form, by repealing subsection (b) of this section, and by adding language to Section 602 that states explicitly what subsection (b) was trying to achieve.”

Section 12. K.S.A. 58a-802

COMMENT

The first amendment to subsection (f) this section was suggested by United Missouri Banks and is part of a group of amendments proposed in 2003 by the Uniform Law Commissioners who drafted the Uniform Trust Code. Their comment to the proposed amendment is:

“This amendment revises subsection (f) to clarify that compensation received from a mutual fund for providing services to the fund is in addition to the trustee’s regular compensation. It also clarifies that the trustee obligation to notify certain of the beneficiaries of compensation received from the fund applies only to compensation received for providing investment management or advisory services. The amendment conforms subsection (f) to the drafters’ original intent.”

The amendment which strikes and reinserts the reference to K.S.A. 58a-813 was made for clarity.

Section 13. K.S.A. 58a-810

COMMENT

The amendment to subsection (e) expands the application of this section to include all interests in property.

The amendment also clarifies that the statute permits alternate methods of titling trust property: either in the name of the trust or in the name of the trustee. However, property that is titled in the name of the trust must be transferred or conveyed in the name of the trust.

Section 14. K.S.A. 2002 SUPP. 58a-813

COMMENT

The amendment to subsections (a) through (d) clarify that a trustee has a duty to both qualified beneficiaries and permissible current distributees to keep them reasonably informed regarding the administration of the trust. The drafting committee of the Kansas Judicial Council believes permissible current distributees should have the same standing as other beneficiaries with respect to access to information about the trust. The scope of “permissible current distributees” is also clarified to include beneficiaries who may receive either income or principal distributions from the trust, or both. The expansion of this duty to include permissible current distributees was necessary under the Kansas UTC because of its narrower definition of qualified beneficiaries, which does not specifically include permissible distributees. The term “permissible current distributees” is only used in this section of the Kansas Uniform Trust Code and is defined in subsection (a).

The amendment to subsection (e) was proposed by the Kansas Bar Association. In testimony before the 2003 Legislature the K.B.A. testified that the reason for the change is that:

“Subsection (e) of K.S.A. section 58a-813 renders the section’s notice provisions inapplicable to persons other than a surviving spouse with respect to certain trusts, principally “bypass” trusts where the remainder beneficiaries are descendants of the surviving spouse. Clearly, subsection (e) would preclude a trustee from sending a non-surviving spouse beneficiaries the three notices described in subsections (b)(2), (b)(3) and (b)(4). Subsection (e), however, does not specifically reference a trustee’s reporting requirements under subsection (c) or a trustee’s requirement to furnish a copy of the trust instrument upon request under subsection (b) (1).

The intent was not to limit Section 58a-813 to notice provisions only. If a non-surviving spouse beneficiary is a distributee or permissible distributee of a trust described in subsection (e), the trustee would still have a requirement under subsection (c) to send a periodic report to that beneficiary. Or, if a non-surviving spouse beneficiary, who is a first-line remainderman of a trust described in

subsection (e), requests a periodic report, the trustee would still have a requirement under subsection (c) to furnish the requested report. Or, if a non-surviving spouse beneficiary of a trust described in subsection (e) requests a copy of the trust instrument, the trustee would still have a duty under subsection (b)(1) to furnish the requested copy.”

Section 15. K.S.A 58a-815

COMMENT

This amendment was proposed by both Professor David English, Reporter for the Uniform Trust Code, in his 2003 article in the University of Kansas Law Review and was included in a group of amendments proposed in 2003 by the Uniform Law Commissioners. Their comment to the proposed amendment is:

“This amendment corrects an inadvertent style glitch. As the comments to this section make clear, the drafters intended that the trustee have both the powers stated in the terms of the trust and the powers specified in this Act, not that they be alternatives.”

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TESTIMONY

TO: The Honorable Mike O'Neal, Chairman
And Members Of The
House Judiciary Committee

FROM: Whitney Damron
On Behalf Of The
Kansas Bar Association

RE: HB 2556 – Uniform Trust Code Amendments

DATE: February 3, 2004

Good afternoon Chairman O'Neal and Members of the House Judiciary Committee. I am Whitney Damron and I appear before you today on behalf of the Kansas Bar Association in general support of HB 2556 relating to amendments to the Uniform Trust Code.

Attached to this cover page you will find a four page document prepared by Mr. Tim O'Sullivan, a partner with the Wichita-based law firm of Foulston Siefken, LLP. Mr. O'Sullivan is a member of the Kansas Bar Association and represents the Real Property, Probate and Trust Section of the KBA. I will not read all of Mr. O'Sullivan's work product, but would like to highlight some of his comments and concerns.

For additional information on this subject, I have included Mr. O'Sullivan's contact information.

Thank you.

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TESTIMONY BEFORE HOUSE JUDICIARY COMMITTEE

From: Whitney Damron and Tim O'Sullivan on behalf of the Kansas Bar Association

Date: February 3, 2004

Re: Uniform Trust Code Provisions of HB 2556

Although the Kansas Bar Association (KBA) is generally supportive of suggested changes to the Uniform Trust Code (UTC) proposed by the Kansas Judicial Council (the Judicial Council), the KBA remains strongly opposed to the proposed changes to K.S.A. 58a-111 found in Section 3. Those changes would reinsert into the Kansas version of the UTC (Kansas UTC) provisions of the UTC which were opposed by the KBA and deleted from the UTC by the Senate Judiciary Committee when Kansas enacted its version two years ago. The reasons for KBA's opposition remain fundamentally unchanged.

K.S.A. §58a-111 involves non-judicial settlements. Currently, the Kansas UTC permits non-judicial settlements in the areas of: the approval of a trustee's report or accounting; the resignation or appointment of a trustee and the determination of a trustee's compensation; the transfer of a trust's principal place of administration; and the liability of a trustee for an action relating to the trust. These changes are largely ministerial in nature and do not normally impact on the intent of the settlor in creating the trust instrument. Such is not the case with the suggested additional provisions. The recommended additional provisions would expand the list to include "the interpretation or construction of the terms of the trust" and the "direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power."

To have a valid and binding non-judicial settlement, K.S.A. §58a-111 requires that such agreement be entered by "interested persons" and not violate a "material purpose" of the trust. In its comments to this Section, the Judicial Council states that the proposal was suggested by practicing lawyers to the Probate Advisory Committee to the Judicial Council. However, the KBA was only made aware of one attorney who requested such change, Gretchen Fleischut of the Husch & Eppenberger firm, who practices in the firm's Kansas City, Missouri office. Moreover, it is the understanding of the KBA that the example Ms. Fleischut gave to the Judicial Council exemplifying the need for the change was the situation of corporate trustees entering indemnification or waiver of liability agreements with trust beneficiaries in order to avoid liability with respect to their interpretation of certain provisions of the trust instrument. It would appear that if this situation is the genesis of the need, that such authority presently exists under K.S.A. §58a-111(d)(4), which permits non-judicial settlements with respect to "the liability of a trustee for an action relating to the trust." In any event, there does not appear among the Real Property, Probate and Trust Section members of the KBA anything approaching a groundswell of support.

These expanded provisions are overly broad and appear to create far more problems than they could possibly solve. There has been much discussion among attorneys and commentators that the UTC in general takes too much authority away from the settlor and trustee and places it instead in the hands of trust beneficiaries. Nowhere is this concern more specifically evident than in the subject provisions.

The first problem is the UTC does not define the term “interested persons.” Although the Kansas UTC currently does follow the language of the UTC in providing that “interested persons” are persons whose consent would be required to achieve a binding settlement if the settlement was to be approved by the court, the Comments to the UTC drafted by the Uniform Commissioners indicate that the Commissioners intentionally did not precisely define such term, thereby creating definitional ambiguities. For example, do only current beneficiaries have to be parties? If not, do only living remainder beneficiaries have to be parties? What about contingent or unborn future beneficiaries? What about permissible appointees under powers of appointment? Absent a court determination that all “interested persons” were parties to the non-judicial settlement, this would lead to great uncertainty with respect to whether any specific non-judicial settlement was binding on the trustee.

Moreover, the Commissioners’ Comments in discussing the issue of “interested persons” go on to state that “the consent of the trustee would ordinarily be required to obtain a binding settlement with respect to matters involving a trustee’s determination, such as approval of a trustee’s report or resignation.” The implication is that the Commissioners intended for the trustee to not necessarily be an “interested person” with respect to other matters which are the subject of a non-judicial settlement and with respect to which the trustee is not directly affected, such as the subject provisions. This leaves open the possibility of trust beneficiaries entering an agreement with respect to the interpretation of the terms of a trust (e.g., an interpretation favorable to the beneficiaries) and then presenting the executed settlement agreement to the trustee as a settlement agreement binding on a trustee who or which was not a party thereto. Conversely, if a judicial proceeding is instituted to approve any settlement involving matters under the subject provisions, it would be hard to conceive that the trustee would not be a necessary party. It is important to keep in mind that the trustee may be the last bastion in ensuring that the intent of the settlor is carried out and not circumvented by beneficiaries whose only interest may be in increasing trust distributions for their own personal benefit.

The same issue is also present with respect to an agreement granting to the trustee “a necessary or desirable power” authorizing additional distributions to the trust beneficiaries not provided for by the settlor in the trust instrument. It is unclear whether the term “desirable power” is limited to administrative provisions, such as trust investments, or whether it would also include dispositive provisions governing the distribution of trust assets to trust beneficiaries. Moreover, this provision allowing non-judicial settlements to grant a “desirable power” may conceivably create an independent right in trust beneficiaries to determine that the creation of such a power is “desirable” irrespective of whether it might otherwise violate a “material purpose” of the trust. For

example, the trust beneficiaries may determine that broadening the trust distribution standard to their benefit was a “desirable power” for the trustee to possess.

Another problem is that the term “material purpose” is not defined. As previously noted, the Kansas UTC provides that a valid non-judicial settlement may not violate a “material purpose” of the trust. As most settlors do not specifically state in the trust instrument the “material purposes” for the creation of the trust, in the absence of a judicial determination it would be purely speculative in a high percentage of situations whether the agreement violated a “material purpose” of the trust. As with the issue of “interested persons,” this creates significant uncertainty as to the validity of any non-judicial settlement. Consequently, the provisions may not serve their purpose of avoiding the need for judicial approval of settlements. Unless the trustee was a party to the settlement, it would be expected that the trustee would be forced in many situations to nonetheless contest the agreement in court in order to avoid potential liability for giving credence to an invalid agreement.

In short, these provisions are overly broad, create opportunities for beneficiaries to circumvent the involvement of the trustee in interpreting and amending trust provisions, inject undesirable uncertainty in the enforceability of non-judicial settlements, and would fail in many situations to avoid their purpose of avoiding judicial approval of settlement agreements. Just as importantly, these provisions could frustrate the intent of the settlor in the creation of the trust and its governing provisions. The Kansas legislature deleted the exceptions in the UTC with regard to the efficacy of spendthrift provisions when it enacted the Kansas UTC. These and other provisions of the Kansas UTC have made Kansas a desirable trust situs. Thus, a settlor can be assured that asset protection objectives in the creation of a trust will be achieved under the current provisions of the Kansas UTC. However, if the legislature enacts the subject provisions, many settlors and their advisors are not likely to take comfort that their wishes with regard to the dispositive provisions of the trust will be similarly honored. This uncertainty is not in the personal interest of settlors, who have a legal right to determine the terms with respect to the administration and distribution of trust assets, nor in the economic interests of Kansas and Kansas trustees, particularly corporate trustees. If these provisions are enacted into law, many settlors, both within and without Kansas, may simply choose to create a trust situs in another state which does not so broadly permit non-judicial settlements.

Judicial approval of settlements in the areas covered by the subject provisions is demanded by the sanctity of the trust instrument and as the only responsible course of action to achieve legal certainty. If the trustee and trust beneficiaries are otherwise in agreement, this certainty can be achieved without incurring any significant legal costs. If the trustee and the trust beneficiaries are in disagreement, judicial action should be required as provided under current law in order to avoid the possibility of trust beneficiaries circumventing the settlor’s intent by entering into a binding non-judicial settlement.

The KBA’s Real Property, Probate and Trust Section is currently undertaking a review of this Section in order to determine whether it is possible to appropriately expand non-

judicial settlements, at least in part, to the areas covered by the subject provisions while at the same time not running a significant risk of compromising the settlor's intent and achieving certainty as to their validity. If so, definitions would probably need to be inserted with respect to "interested persons" (to include the trustee in many situations) and "material purpose." Any such recommendations which are approved by the KBA would be proposed for consideration by the 2005 Kansas legislature. In the interim, the KBA respectfully requests that the Committee amend the Bill by deleting these provisions prior to passage.