KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.ks.gov
www.kansasjudicialcouncil.org

TO: **Senate Judiciary Committee**
FROM: **Kansas Judicial Council – Kent A. Meyerhoff**
DATE: **March 13, 2013**
RE: **Testimony in support of 2013 HB 2014**

INTRODUCTION AND BACKGROUND

I am appearing today on behalf of the Kansas Judicial Council's Probate Law Advisory Committee, which recommends HB 2014 as originally introduced. The main purpose of the bill is to automatically revoke an ex-spouse's inheritance rights upon divorce. The Probate Committee does not support the amendment made by the House Judiciary Committee because it defeats the purpose of the bill, as I will explain later in this testimony. Please note that my testimony refers to, and is in support of, the original unamended version of the bill.

As background, the Judicial Council recommended similar bills in both 2011 and 2012. 2011 HB 2071 was the product of discussions of the Probate Committee of the Wichita Bar Association, the Executive Committee of the Real Estate, Probate and Trust Section of the Kansas Bar Association, and the Judicial Council's Probate Law Advisory Committee. That bill passed the House, but stalled in the Senate because of concerns raised by insurance industry representatives. The Probate Committee worked with those insurance industry representatives to resolve their concerns and came up with a revised bill, 2012 SB 292. That bill passed the Senate unanimously but died in the House, although there were no opponents to the bill.

House Bill 2014 is identical to 2012 SB 292. It is also very similar to Uniform Probate Code Section 2-804, *Revocation of Probate and Nonprobate Transfers by Divorce; No Revocation by other Changes of Circumstances*, with just a few changes to adapt it to Kansas.

PURPOSE OF HB 2014

One of the first estate administration matters I remember working on as a young attorney involved a case in which we represented the surviving children of a decedent. The decedent had divorced her husband some time prior to her death. In the divorce decree, each party was granted ownership of his/her own life insurance policies and retirement accounts. However, the decedent had never followed through with actually changing the beneficiary designations on her life insurance policies or IRA. Upon her death, they still named her ex-husband as the beneficiary. I was surprised to discover that under Kansas law, because the beneficiary designations were never changed, the ex-husband, and not the decedent's surviving children (who were named as the contingent beneficiaries), would receive the proceeds from both the life insurance policies and IRA. It was quite clear to everyone involved that the decedent would not have intended her ex-spouse to inherit the life insurance proceeds or IRA. However, because the beneficiary designations had never been changed, he did.

Since the current Kansas Probate Code was adopted in 1939, K.S.A. 59-610 has provided that a provision in a Will for a spouse is automatically revoked if the spouses divorce after the Will is executed. However, this statute applies only to Wills. It does not apply to revocable trusts or to property passing other than pursuant to the terms of a Will. Today, more and more people are using Will substitutes, such as revocable trusts, or are placing "pay on death" or "transfer on death" designations on most of their property so that the property does not pass by Will. This means K.S.A. 59-610 does not apply. Kansas should adopt a new, broader law that automatically revokes any inheritance rights in favor of an ex-spouse upon divorce. This should apply to trusts, life insurance policies, annuities, IRAs, and transfer on death and pay on death designations. It also should automatically convert joint tenancy property to tenants in common in the event of a divorce.

The Kansas Legislature took a small step in 1996, when it amended K.S.A. 60-1610 (now K.S.A. 23-2802) to require that divorce decrees provide for any changes in beneficiary designation on:

(i) any insurance or annuity policy that is owned by a spouse, or, in the case of a group life policy, under which a spouse is a covered person;
(ii) any trust under which one spouse is the grantor or holds a power of appointment over all or part of the trust assets that may be exercised in favor of the other; or
(iii) any transfer on death or payable on death account under which one or both spouses are owner or beneficiary.

The statute goes on to provide that "Nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of such policy." It appears that although these

issues are to be addressed in the divorce decree, it is still up to the parties to take steps to carry out the provisions of the divorce decree by executing a new beneficiary designation. In *Cincinnati Life Insurance Company v. Palmer*, 32 Kan. App. 2d 160, 94 P.3d 729 (2004), the Kansas Court of Appeals held that although the divorce decree incorporated a property settlement agreement that provided that each spouse was to retain his or her own life insurance policy, because the husband had not changed the beneficiary designation on the policy prior to his death (and because the divorce decree had not specifically revoked or changed the beneficiary designation), his ex-spouse, who was still named as the beneficiary, was entitled to the entire death benefit.

Currently, Kansas does not track which cases are *pro se* in our district courts. Surveys of Kansas judges and clerks indicated that judges are seeing a significant increase in the number of self-represented cases in their courts (Report of Kansas Self-Represented Study Committee, 2009). In May of 2010 the Kansas Supreme Court approved divorce forms developed by the Judicial Council for use by self-represented parties. It is reasonable to expect that there will be an increasing number of self-represented parties in the future. While there have been problems in the past with persons not effectuating the changes in beneficiary designations, with an increasing number of persons representing themselves in divorce proceedings, it is reasonable to expect more such problems in the future. This is another reason to adopt HB 2014.

A better solution would be to provide for automatic revocation of any inheritance rights of an ex-spouse upon entry of a divorce decree or annulment, as has been done in many other states, including those that have adopted some version of the Uniform Probate Code. If someone desired to continue to name an ex-spouse as a beneficiary of a life insurance policy or other property (which would almost certainly occur only in a small minority of situations), such designation could be reconfirmed in writing following the divorce.

Three of our neighboring states have some form of automatic beneficiary revocation upon divorce. Oklahoma law provides that if, after entering into a written contract in which a beneficiary is designated or provision is made for the payment of any death benefit, the party who has the right to designate such beneficiary divorces the named beneficiary, all provisions in the contract in favor of the former spouse are revoked. Colorado has adopted a version of the Uniform Probate Code, which not only revokes provisions for a former spouse, but also for family members of the former spouse. Missouri's statute also revokes provisions for an ex-spouse and family members of the ex-spouse.

HB 2014 not only revokes inheritance rights of an ex-spouse, but it also revokes rights of relatives of such ex-spouse, because those relatives are often named as alternate takers under trust documents or beneficiary designations. An exception is made for employee benefit or retirement plans governed by ERISA. The United States Supreme Court, in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), held that ERISA preempted a state statute that automatically revoked a beneficiary designation in favor of an ex-spouse upon divorce. Therefore, HB 2014 specifically excepts property subject to federal law preemption from its application, so it should not run afoul

of the *Egelhoff* decision. Finally, HB 2014 provides protection for innocent third party purchasers who purchase property without notice of the divorce, and for third parties such as insurance companies or banks who pay out funds based on a beneficiary designation without notice of the divorce.

In summary, the changes proposed by HB 2014 would ensure that whether someone does their estate planning using a Will, a trust, beneficiary designation, or joint tenancy, there will be consistent results in the event of a divorce, and the likely intent of the parties will be carried out without further affirmative action required on the part of the divorced spouses.

HOUSE AMENDMENT TO HB 2014

HB 2014 was amended by the House Judiciary Committee to provide that inheritance rights of an ex-spouse are revoked only if the divorce decree specifies that such rights are to be revoked. This amendment defeats the whole purpose of the bill, which is to make revocation automatic if a divorce occurs. This is essentially the same approach that was tried in 1996, when K.S.A. 60-1610 (now K.S.A. 23-2802(d)) was amended to require that divorce decrees must provide for changes in beneficiary designations on insurance policies, trusts, TOD and POD accounts, etc. The problem has been that these items are still not always being addressed in the divorce decrees. The *Cincinnati Life* case, discussed above, demonstrated this approach does not fix the problem. In addition, the increasing number of pro se litigants only exacerbates the problem. If attorneys who practice in the domestic arena forget (or don't know) they need to include this information in the divorce decree, then self-represented litigants are not going to know it needs to be included either. The amendment renders the bill itself almost meaningless.

PROBATE LAW COMMITTEE MEMBERS

Members of the Kansas Judicial Council Probate Law Advisory Committee are:

Sarah Bootes Shattuck, Chair	Ashland
Eric Anderson	Salina
Cheryl Boushka	Kansas City, MO
Hon. Sam Bruner, Chair	Overland Park
James Bush	Hiawatha
Tim Carmody	Overland Park
Martin Dickinson, Jr.	Lawrence
Mark Knackendoffel	Manhattan
Hon. Edward Larson	Topeka
Philip Ridenour	Cimarron
Nancy Schmidt Roush	Kansas City, MO
Jennifer Stultz	Wichita
Willard Thompson	Wichita
Molly Wood	Lawrence