KANSAS BAR ASSOCIATION

TO: **The Honorable Jeff King, Chair**
And Members of the House Judiciary Committee

FROM: **Tim O'Sullivan**
On behalf of the Kansas Bar Association

RE: **HB 2109, Transfer on Death Deeds**

DATE: **March 10, 2015**

Mr. Chairman and members of the Senate Judiciary Committee, I am Tim O'Sullivan, an attorney practicing with Foulston Siefkin LLP in Wichita, concentrating my practice in estate planning, probate and trust matters. I am appearing on behalf of the Kansas Bar Association (KBA) in support of H.B. 2109 (the Bill), which is a proposed statutory change to K.S.A. 59-3504. The Bill was proposed by the KBA Real Property, Probate and Trust Section, approved subsequently by the Title Standards Section of the KBA, then by the KBA Legislative Committee and finally by the KBA Board of Governors.

The Bill is in response to a district court decision in Dickinson County, Kansas, which has held that if there is more than one beneficiary on a "transfer on death" ("TOD") deed under K.S.A. 59-304 and any beneficiary precedes the owner of the property in death without indicating in the conveyance whether such beneficiary's survival was required for such beneficiary to succeed to his or her proportional interest as a beneficiary in the owner's property, that the entire transfer must fail. Consequently, the real property that was the subject of the conveyance would become part of the owner's probate estate.

Such decision clearly brought to the forefront that there is an ambiguity in the statute that provides if a beneficiary predeceases the death of the record owner without providing for an alternative beneficiary, the transfer fails. The issue is as to whether the statutory language means the entire conveyance fails, so as to place the real property in probate, or only the conveyance as to such predeceased beneficiary, in which case the real property would pass to the surviving beneficiaries.

In the face of such palpable ambiguity, the Real Estate, Probate and Trust Section contemplated the possible approaches to clarify such ambiguity. The first approach would be to amend the statute to make it clear that should any beneficiary predecease the owner, consonant with the Dickinson County District Court decision, there would be a failure of the entire conveyance, resulting in the real property passing through the decedent owner's probate estate. The second approach would be for the real property to pass to the surviving beneficiaries.

In the end, however, the Section adopted yet a third approach, which it believes is not only most consistent with the intent of the owner, but with the anti-lapse statute had a similar disposition been made under a Will, the Kansas intestacy laws, and ownership in tenancy in common versus ownership in joint tenancy as well. There is very little doubt but that the vast majority of most individuals who are passing property to a child at death (which would be expected to be the vast majority of beneficiaries under "TOD" deeds after a spouse, as well as other close relative beneficiaries, would desire that such interest pass to a deceased beneficiary's descendants should the beneficiary precede the owner in death.

This is why the anti-lapse provisions and intestacy provisions so provide and very few individuals would desire, when they devise real property to multiple beneficiaries, that it is intended to be held in joint tenancy, as would be the case if the failed transfer passed to the surviving beneficiaries. Moreover, having the entire transfer fail so as to cause the property to pass through probate could clearly distort the deceased owner's intent as to disposition of his or her real property. For example, let's assume there is a TOD conveyance of three separate real estate parcels, each to one child of the owner, as is a fairly common occurrence. If one of the children predeceased the owner leaving a surviving child, having the entire conveyance fail and the real property pass through probate, assuming the owner either died intestate or had a Will which provided that the probate estate would pass equally to his three children, also without any survivorship language, would result in the predeceased child receiving only one-third of the failed conveyance, with the other two-thirds passing equally to the other two surviving children. The same would be true of any other TOD conveyance in which the owner is assuming the conveyance is to pass differently than it would under the provisions of the decedent's Will, be in addition to what the beneficiary might receive under the decedent's estate, or simply that there will be no probate assets at all.

Thus, as concurred in by the Title Standards Committee of the Kansas Bar Association, and subsequently approved by the Board of Governors of the Kansas Bar Association, the Kansas Bar Association endorsed the following proposed amendments to K.S.A. 59-304 with the attached Explanatory Notes of the REP&T Section :

Proposed TOD Statutory Change
(to K.S.A. 59-3504)

(c) If a grantee beneficiary dies prior to the death of the record owner, such grantee beneficiary's interest in such real estate in the transfer-on-death deed was not specifically made contingent on such grantee beneficiary surviving the record owner, and an eligible alternative grantee beneficiary has not been designated on the deed to succeed to such deceased grantee beneficiary's interest in such circumstance, the transfer with respect to any such deceased grantee beneficiary shall lapse except in the circumstance where such deceased grantee beneficiary is a spouse, lineal descendant, or other relative, by blood or adoption, within the sixth degree as determined in K.S.A. 59-509, and such deceased grantee beneficiary leaves any issue surviving the record owner, in which event the interest in the real estate that would otherwise have vested in such deceased grantee beneficiary had such deceased grantee beneficiary survived the record owner shall vest instead on such record owner's death in the then surviving issue of

such deceased grantee beneficiary, within the meaning of K.S.A. 59-615(b), as successor grantee beneficiary or beneficiaries, as the case may be, with respect to such interest.

(d) Any judicial proceeding initiated by an interested party to determine the succession of ownership of real estate of the deceased record owner under the foregoing circumstance where a grantee beneficiary has predeceased such record owner shall be subject to the procedural provisions of this Chapter 59 of Kansas Statutes Annotated in the same manner as a proceeding to determine descent.

(e) The foregoing provisions shall be applicable to deeds filed of record on or after July 1, 2014.

Explanatory Note (approved both conceptually and specifically by KSA Real Estate, Probate and Trust Section Executive Committee): Above language replaces current subparagraph (c) which states that "If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse." with the foregoing subparagraphs (c), (d) and (e). The proposed changes are designed to mirror the Kansas anti-lapse statute, as well as Kansas intestacy laws in the situation where a beneficiary predeceases the record owner and the conveyance is not specifically predicated on the survival of the named beneficiary. Such laws were enacted to comport with what was deemed to be the normal intent of decedents with respect to an interest that otherwise would have passed to a relative within the sixth degree, but who had predeceased the decedent leaving surviving issue.

There is little question but that the current statute is at least latently, if not patently, ambiguous. A Dickinson County district court held approximately two years ago that under the current statutory provisions, if there is a predeceased beneficiary and at least one other surviving beneficiary, the entire conveyance lapses in that situation, thus throwing the entire property into probate.

Rather than requiring the entire property to pass through probate, the proposed changes would allow the proportional interests of surviving TOD beneficiaries to vest in them, and apply the anti-lapse statute to the interest in the real property any predeceased beneficiary would have received had the predeceased beneficiary survived the record owner. In essence, the issue of a deceased beneficiary would thereby be treated in the same manner such surviving beneficiaries and issue of a predeceased beneficiary would have been treated under Kansas law had there been no TOD deed, but instead such real property had been devised by the Will of the record owner to the same beneficiaries not predicated on their survival.

The rationale is that there should be no difference to create a disparate treatment for deceased beneficiaries, absent language to the contrary providing for an alternative disposition, in a TOD deed to any person within the sixth degree than under the provisions of a Will. This is particularly true given the fact that most Wills are drafted by an attorney and such assumption as to anti-lapse provisions should nonetheless apply even though no alternative disposition was included by such attorney so as to cause a lapse of the interest given to a deceased beneficiary, and a high percentage of TOD deeds would be expected to have been done without any legal assistance in which no such consideration would often even have been contemplated, with the grantor often assuming the beneficiaries would survive the grantor.

The KBA REP&T Section was charged by the KBA Legislative Committee at its meeting last year (2013), after being made aware of the ambiguity of the current statute and the policy issues involved, conferring with the KBA Title Standards Committee and recommending a specific change to the KBA Board of Governors for their meeting in December which would remove the ambiguity under current law. After being apprised of the issue, the KBA Title Standards Committee had met prior to the KBA Legislative Committee meeting last year (2013). Apparently eschewing any significant discussion of the public issues underlying the three possible approaches to clarifying the current ambiguity in the statute regarding a predeceased beneficiary (i.e., lapse of a deceased beneficiary's interest, anti-lapse treatment of a deceased beneficiary's interest, or failure of the entire conveyance), the Title Standards Committee opted for the simplicity of the Colorado TOD version (deferring to Bob Collins' proposal as a member of the Title Standard Committee). Colorado law would have any TOD transfer to a deceased beneficiary simply lapse, but not the entire conveyance, if a contingent beneficiary was not named.

No meeting of the KBA REP&T Section and the KBA Title Standards Committee was achievable last year. At the KBA Title Standards Committee meeting this past February (2014), at which Tim O'Sullivan, Terry Fry and Bob Hughes of the KBA REP&T Section were in attendance, the Title Standards Committee members changed its position and endorsed the foregoing TOD proposal as well as the repeal of K.S.A. 59-505.

On behalf of the Kansas Bar Association, I respectfully ask that you give the Bill your support and am prepared to answer any questions you might present.