

**REPORT OF THE JUDICIAL COUNCIL
PROBATE LAW ADVISORY COMMITTEE ON 2008 SB 431**

BACKGROUND

In 2008, the Legislature passed Senate Bill No. 431 (a copy is attached at page 5) which amended four sections of the Probate Code to increase the dollar limitations in those sections. The four sections relate to the allowance to spouse and minor children (K.S.A. 59-403), the homestead allowance under the elective share of spouse (K.S.A. 59-6a215), the transfer of certain personal property by affidavit (K.S.A. 59-1507b), and the refusal to grant letters of administration (K.S.A. 59-2287). Senate Bill 431 was proposed by the Judicial Council's Probate Law Advisory Committee (PLAC) and recommended by the Judicial Council.

In April of 2008, Larned attorney Ronald D. Smith wrote Senate Judiciary Chair John Vratil and House Judiciary Chair Mike O'Neal (a copy of Mr. Smith's letter is attached at page 7) stating that he sees potential problems with K.S.A. 59-1507b, as it was amended, and stating that:

“Doubling the size of the accounts subject to the process doubles the possibility the creditors may not get paid, especially the funeral home, which is usually the largest potential creditor. There is also the possibility that SRS Estate Recovery Unit has a claim that needs resolving but the cash is gone before they can react.”

In addition, Mr. Smith stated that:

“We believe the remedy lies with having the financial institutions freeze those accounts for 90 days after the filing of the affidavit. Further the bank should send a copy of the affidavit to the ERU within ten days of filing of the affidavit.”

The Judicial Council's Probate Law Advisory Committee proposed SB 431 after a review of all the dollar amounts in the Probate Code. It had been eight years since the Committee last conducted a similar review, and the Committee conducted the review to determine if there were either policy reasons or needed cost of living adjustments that indicated some dollar amounts should be increased in the Probate Code. The Committee concluded that, among other changes it proposed, the dollar limit in K.S.A. 59-1507b should be increased from \$20,000 to \$40,000 for several reasons.

- It had been eight years since the last increase in the dollar amount limitation in K.S.A. 59-1507b and inflation had diminished the value of the \$20,000 dollar limit.

- None of the PLAC's 13 members were aware of any problems with the operation of the existing statute.
- K.S.A. 59-1507b had been amended three times since 2000 and no information about it being used improperly was brought to the attention of the PLAC or the Legislature when the proposed amendments were being considered.
- Small estates are expensive to probate because of certain fixed costs in probating an estate of any size.
- The experience of the PLAC members and Judicial Council staff is that the affidavit process is frequently used and both clients and attorneys appreciate the time and cost savings of K.S.A. 59-1507b.

The letter written on behalf of the Topeka Bar Association's Probate Committee independently reached similar conclusions in supporting the change. The letter is attached at page 9.

ISSUES RAISED BY MR. SMITH AND RESPONSES

Mr. Smith raised several specific points in his letter to which the PLAC would like to respond.

"Doubling the size of the accounts subject to the process doubles the possibility creditors may not get paid, especially the funeral home."

The PLAC members all reported that, in their areas of the state, funeral homes do not provide services until a contract is signed with someone who agrees to be responsible for the costs of the funeral. The experience of the PLAC is that funeral homes do not provide services and then hope to get paid.

The PLAC is of the opinion that the increase in the limit in K.S.A. 59-1507b will likely have no effect on funeral homes. Because the average funeral is less than \$20,000, the likelihood of the funeral home being paid is the same under both versions of the statute.

"There is also a possibility that SRS Estate Recovery Unit has a claim that needs resolving but the cash is gone before they can react."

The SRS Estate Recovery Unit no longer exists. For the last several years it has been a part of the Kansas Health Policy Authority. However, its function remains the same.

The raising of the dollar amount of personal property that can be transferred by affidavit in K.S.A. 59-1507b from \$20,000 to \$40,000 will have no effect on resolving claims by the Health Policy Authority because, if the person is subject to estate recovery, this means they will have been on Medicaid, and Medicaid rules provide they cannot have any cash or liquidable assets greater than \$2,000.

The letter written by Brian M. Vazquez, Deputy General Counsel of the Kansas Health Policy Authority, discusses the \$2,000 limitation and expresses his opinion that the use of the 59-1507b affidavit does not forestall a creditor-initiated probate action. A copy of Mr. Vazquez' letter is attached page 11.

“We believe the remedy lies with having the financial institutions freeze those accounts for 90 days after the filing of the affidavit.”

The PLAC does not agree. Long-time probate practitioners recall when all accounts were frozen for a time after death and they found that system cumbersome and inefficient. Their recollection is that the banks sought to have that freeze eliminated and would likely oppose a statute freezing accounts after death.

Also, several funeral homes have contacted the Judicial Council for the forms for use under amended K.S.A. 59-1507b. The PLAC infers from these contacts that funeral homes make these forms available to persons who then use them to obtain money from the decedent's assets to pay for the funerals. In that case, a 90-day freeze on accounts would actually delay payment to the funeral home.

The letter written on behalf of the Wichita Bar Association Probate Committee, which is attached at page 13, touches on this issue and supports the amendment the 2008 Legislature made in K.S.A. 59-1507b.

OTHER STATES

The PLAC reviewed the chapter relating to Small Estates Procedure from Jeffrey A. Schonblum's book 2003 Multistate Guide to Estate Planning. Almost every state has a simplified procedure for small estates. Some states have an affidavit procedure, some states provide for prompt probate of a will through summary administration, and a large number of states (like Kansas) provide for both procedures. Some states require notice and some do not. Some states require a hearing and some do not. Most all states have a maximum dollar amount above which the small estates procedure cannot be used.

Most states that have an affidavit procedure similar to Kansas do require that 30 days elapse before the personal property is distributed. An example of a state that has an affidavit procedure similar to Kansas, and like Kansas does not require a waiting period, is Illinois. Illinois recently raised the limit on the maximum amount that can be transferred by affidavit from \$50,000 to \$100,000.

OTHER OPINIONS

In order to obtain the opinions of a larger number of probate practitioners than serve on the Probate Law Advisory Committee, the PLAC wrote the Kansas Bar Association's Real Estate, Probate, and Trust Law Section; the Johnson County Bar Association's Probate Bench/Bar Committee; the Topeka Bar Association's Probate Law Committee; the Wichita Bar Association's Probate Committee; and Brian Vazquez of the Kansas Health Policy Authority.

Responses have been received from the Topeka Bar Association's Probate Committee, the Wichita Bar Association's Probate Committee and Brian Vazquez of the Kansas Health Policy Authority. Those responses are referenced in this report and are attached.

CONCLUSION

The Probate Law Advisory Committee proposes no change in K.S.A. 59-1507b, but acknowledges that, if the dollar amount is increased in the future, consideration should be given to a 30-day waiting period before the personal property can be distributed.

SENATE BILL No. 431

AN ACT concerning the probate code; relating to the increase in allowances for spouses and minor children; amending K.S.A. 59-403, 59-6a215 and 59-2287 and K.S.A. 2007 Supp. 59-1507b and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 59-403 is hereby amended to read as follows: 59-403. When a resident of the state dies, testate or intestate, the surviving spouse shall be allowed, for the benefit of such spouse and the decedent's minor children during the period of their minority, from the personal or real property of which the decedent was possessed or to which the decedent was entitled at the time of death, the following:

(a) The wearing apparel, family library, pictures, musical instruments, furniture and household goods, utensils and implements used in the home, one automobile, and provisions and fuel on hand necessary for the support of the spouse and minor children for one year.

(b) A reasonable allowance of not more than ~~\$35,000~~ \$50,000 in money or other personal or real property at its appraised value in full or part payment thereof, with the exact amount of such allowance to be determined and ordered by the court, after taking into account the condition of the estate of the decedent.

The property shall not be liable for the payment of any of decedent's debts or other demands against the decedent's estate, except liens thereon existing at the time of the decedent's death. If there are no minor children, the property shall belong to the spouse; if there are minor children and no spouse, it shall belong to the minor children. The selection shall be made by the spouse, if living, otherwise by the guardian of the minor children. In case any of the decedent's minor children are not living with the surviving spouse, the court may make such division as the court deems equitable.

Sec. 2. K.S.A. 59-6a215 is hereby amended to read as follows: 59-6a215. A surviving spouse is entitled to the homestead, or in lieu thereof the surviving spouse may elect to receive a homestead allowance of ~~\$35,000~~ \$50,000. The homestead or homestead allowance is exempt from and has priority over all demands against the estate. The homestead or homestead allowance is in addition to any share passing to the surviving spouse by way of elective share.

Sec. 3. K.S.A. 2007 Supp. 59-1507b is hereby amended to read as follows: 59-1507b. When a resident of the state dies, whether testate or intestate, if the total assets of the estate of the decedent subject to probate do not exceed ~~\$20,000~~ \$40,000 in value, any personal property of whatever nature transferable to the decedent's estate by any entity or person shall be transferred to the successor or successors of the decedent, if entitled thereto by will or by intestate succession, without having been granted letters of administration or letters testamentary, upon such successor's or successors' furnishing the entity or person with an affidavit showing entitlement thereto. Transfer of such personal property to the successor or successors shall be deemed to be a transfer to the personal representative of the decedent, and the receipt of the successor or successors shall constitute a full discharge and release from any further claim for such transfer to the same extent as if the transfer had been made to an executor or administrator of the decedent's estate. The affidavit required herein shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council.

Sec. 4. K.S.A. 59-2287 is hereby amended to read as follows: 59-2287. (a) The district court, in its discretion, may refuse to grant letters in the following cases:

(1) When the value of real or personal property owned by the decedent is not greater in amount than is allowed by law as exempt property and the allowance to the surviving spouse or minor children under K.S.A. 59-403 and amendments thereto.

(2) When the real and personal estate of the decedent does not exceed ~~\$35,000~~ \$50,000 and the estate is not subject to allowances pursuant to K.S.A. 59-403 and amendments thereto or such allowances are waived, any heir, devisee, legatee, creditor or other interested person may petition for refusal of letters by giving bond in the sum of not less than the value of the estate. Such bond shall be approved by the district court and conditioned upon the creditor's or heir's assuming the obligation to pay, so far as the assets of the estate will permit, the debts of the decedent in

the order of their preference, and to distribute the balance, if any, to the persons entitled thereto under the law, except that real estate sold in accordance with this section shall be deemed to have marketable title as ordered by the court, and no creditor, heir or other person shall be deemed to have an interest after passage of six months following the date of death.

(b) Proof may be allowed by or on behalf of the surviving spouse or minor children before the district court of the value and nature of the estate. If the court is satisfied that no estate will be left after allowing to the surviving spouse or minor children their exempt property and statutory allowances, or that the real and personal estate does not exceed ~~\$35,000~~ \$50,000 when the petition is filed by a creditor or heir, the court may order that no letters of administration shall be issued on the estate, unless, upon the petition of other creditors, heirs or parties interested, the existence of other or further property is shown.

(c) When a petition is filed under this section by a surviving spouse or minor children, notice of the proceeding shall be given pursuant to K.S.A. 59-2222 and amendments thereto.

(d) Whenever it appears to the court that further proceedings in the administration of an estate pursuant to this section are unnecessary, and after payment of Kansas inheritance taxes, if any, for decedents dying before July 1, 1998, the court shall enter an order terminating the administration of such estate. Such order shall be made without notice, unless the court otherwise orders, and it shall be to the effect that, unless further estate of the decedent be discovered, all further settlements and other proceedings concerning the estate be dispensed with and that the surviving spouse and minor children are relieved of any further obligations with respect to the estate. If further estate of the decedent is discovered and administration is had on it, such administration shall not abrogate or invalidate or otherwise affect any right, title or interest in property transferred or vested pursuant to this section unless the court, for good cause shown, otherwise determines and orders.

(e) Any will filed pursuant to this section within a period of six months after the death of the testator may be admitted to probate after such six-month period.

Sec. 5. K.S.A. 59-403, 59-6a215 and 59-2287 and K.S.A. 2007 Supp. 59-1507b are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

President of the Senate.

Secretary of the Senate.

Passed the HOUSE _____

Speaker of the House.

Chief Clerk of the House.

APPROVED _____

Governor.

Smith, Burnett & Larson, L.L.C.
ATTORNEYS AT LAW

Glee S. Smith, Jr., Of Counsel
Donald L. Burnett
Jerry G. Larson
Ronald D. Smith

111 East 8th Street
PO Box 360
Larned, Kansas 67550
Telephone: 620/285-3157
Fax: 620/285-3159
rdsmith1865@sbcglobal.net

112 East 6th
Kinsley, Kansas 67547
Telephone: 620/659-2400

April 28, 2008

Hon. John Vratil
Chair, Senate Judiciary Committee
Statehouse
Topeka KS 66612

Hon. Mike O'Neal
Chair, House Judiciary Committee
Statehouse
Topeka KS 66612

re: SB 431; K.S.A. 2007 Supp. 59-1507b

Dear John & Mike,

Greetings from the prairie home of Senator Vratil. Hope the final days have you both in good spirits and pursuing other issues than just coal plants.

The passage of this referenced bill, especially Section 3, has us a bit troubled out here, on behalf of our main street clients. K.S.A. 59-1507b was changed to allow smaller accounts up to \$40,000 be subject to the affidavit process. The problem is that while the affidavit says the affiant will pay the bills of the decedent from the account (or another source) the mischief is that there is no way to assure that such bills are in fact paid. Doubling the size of the accounts subject to the process doubles the possibility the creditors may not get paid, especially the funeral home, which usually is the largest potential creditor. There is also a possibility that SRS' Estate Recovery Unit has a claim that needs resolving but the cash is gone before they can react.

Our firm does a lot of probate. We've seen the instances when the heirs swoop in after the funeral and ask for an affidavit be drafted. What we believe needs to happen is to slow down this "swoop" until someone is assured that the bills are paid or that at least ERU can check their records.


We believe the remedy lies with having the financial institutions freeze those accounts for 90 days after the filing of the affidavit. Further, the bank should send a copy of the affidavit to the ERU within ten days of filing of the affidavit. Unless there is a joint signatory on the account who is a spouse, ERU could decide whether to file a creditor's probate on the sum. Ninety days also gives the funeral home the option of a creditor's probate if their bill is unpaid. Once the money is gone, lawsuit are a difficult option especially if the heirs live out of state.

While an ordinary creditor probate must be filed within six months of someone's death, since the trigger in this statute is personal property worth less than \$40,000, a lesser time frame for the freeze is not burdensome.

I doubt that this is an issue for summer interim study (unless you so desire), but it is an idea for next year that ought to be considered.

Yours Very Truly,

Smith, Burnett & Larson, LLC



Ronald D. Smith

RDS/s
Enc
KBA Legislative Counsel

**ALDERSON, ALDERSON, WEILER,
CONKLIN, BURGHART & CROW, L.L.C.**
ATTORNEYS AT LAW

W. ROBERT ALDERSON, JR.
ALAN F. ALDERSON*
JOSEPH M. WEILER
DARIN M. CONKLIN
MARK A. BURGHART*
DANIEL W. CROW**
MICHELLE L. MILLER

2101 S.W. 21ST STREET
TOPEKA, KANSAS 66604-3174
MAILING ADDRESS: P.O. BOX 237
TOPEKA, KANSAS 66601-0237

(785) 232-0753
FACSIMILE: (785) 232-1866
WEB SITE: www.aldersonlaw.com
e-mail: burghart@aldersonlaw.com

OF COUNSEL:
BRIAN FROST
THOMAS C. HENDERSON

*LL.M., TAXATION
**LICENSED TO PRACTICE IN
KANSAS AND MISSOURI

September 9, 2008

Randy M. Hearrell
Kansas Judicial Council
Kansas Judicial Center
301 SW 10th Ave., Suite 140
Topeka, KS 66612-1507

RE: Recent Amendments to K.S.A. 59-1507b

Dear Mr. Hearrell:

On behalf of the Topeka Bar Association Probate Committee, I write this letter in response to your recent inquiry regarding amendments to K.S.A. 59-1507b that are contained in 2008 S.B. 431. S.B. 431 increased the threshold amount for the small estates affidavit from \$20,000 to \$40,000. Apparently, you have received some negative comments from certain practitioners who represent creditors. The statutory change was discussed briefly at the June, 2008 meeting of the TBA Probate Committee and no concerns were expressed. I also polled a number of Shawnee County practitioners to determine if there were any individuals with negative opinions of the change. The individual practitioners without exception stated that the change was very favorable. The following reasons were given for supporting the change:

1. Probate filing fees and attorney's fees should be avoided for modest estates, if possible;
2. In the interest of promoting judicial economy, valuable Court time should not be required to be devoted to estates with minimal assets;
3. The statutory threshold amount should reflect the increases in inflation that have occurred over the years;
4. The affidavit procedure actually facilitates access to a decedent's funds that may be needed to pay necessary funeral and other final expenses; and
5. No abuse of the procedure by heirs in Shawnee County has been experienced.

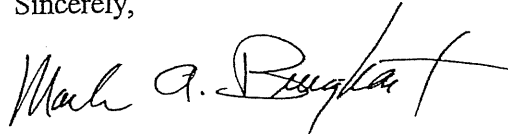
Randy M. Hearrell
September 9, 2008
Page 2

The principal complaint is that some heirs might access funds and spend the funds before lawful creditors are paid. That has not been the experience in Shawnee County. To the contrary, the affidavit procedure is used quite often to access bank accounts which can then be used to satisfy obligations to the funeral home or other creditors in a timely manner.

If the Probate Law Advisory Committee feels that some additional protections are needed for creditors, then perhaps a thirty day delay after date of death before such affidavits may be utilized might be considered by the Committee. Any freeze on assets should be of limited duration.

I trust this information satisfies your immediate needs. Please feel free to contact my office if you require any additional information.

Sincerely,

A handwritten signature in black ink that reads "Mark A. Burghart". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Mark A. Burghart, Chairman,
Probate Committee of the Topeka Bar Association

MAB:cmr

cc: Judge Frank J. Yeoman, Jr.
Douglas T. Shima

Coordinating health & health care
for a thriving Kansas



Facsimile transmission to: (785) 296-1035

Randy M. Hearrell
Executive Director
Kansas Judicial Council
301 S.W. 10th Street,
Topeka, KS 66612-1507

September 9, 2008

RE: Proposed Amendments to K.S.A. 59-1507b – Affidavit of Heirship

Dear Randy:

You had inquired earlier about concerns or objections to raising the value limitation in K.S.A. 59-1507b to \$40,000. I understood that Ron Smith in Larned had raised objections, particularly related to estate recovery. I have mixed feelings about the proposal but no real objections. I am basing this on the statutory language remaining the same, including the reference to the form suggested by the Kansas Judicial Council.

My reasoning is two-fold. One, if a person follows the Medicaid rules, it will be the unusual case where there will be personal property with high value. Two, while not ever tested in Kansas, the affidavit proposed by the Judicial Council does not forestall a creditor-initiated probate action.

If the person is subject to estate recovery, they will have been on Medicaid. If they follow the rules, there will not be any cash or liquidable asset greater than \$2,000. Otherwise, they would not be eligible for benefits. While it is possible to have assets greater than \$2,000, those assets are usually an exempted asset. (Examples include a home, a farm, a business, a car or, in rare cases, a trust or annuity.) Most Medicaid recipients would not have a large, untapped cash resource.

My hesitation concerns the various outlier cases. Theoretically, it would be possible to have personal property with high value in a decedent's estate subject to estate recovery. (A term life insurance policy that is paid back to the estate due to death of beneficiary – this would not have cash surrender value which would potentially trigger the eligibility limitations.) I am sure the committee can find more examples. So, Ron's concern does have some basis. However, I have not seen many such cases. Still, this may be a "Field of Dreams" situation that the proposed higher value may cause families to use the affidavit.

Rm. 900-N, Landon Building, 900 SW Jackson Street, Topeka, KS 66612-1220

www.khpa.ks.gov

Medicaid and HealthWave:

Phone: 785-296-3981
Fax: 785-296-4813

State Employee Health

Benefits and Plan Purchasing:

Phone: 785-368-6361
Fax: 785-368-7180

State Self Insurance Fund:

Phone: 785-296-2364
Fax: 785-296-6995

Page Two
Letter to Randy Hearrell
September 9, 2008

This leads to the second point. I have speculated that the 1507b provision does not preclude a creditor-initiated probate action. The statute does allow transfers to the affiant to be treated as equivalents to transfers to an executor or administrator. However, the statutory language does not give the affidavit process the legal status of a decedent's estate proceeding. So, I think that a creditor (or family) could initiate a probate action. Once an estate fiduciary is appointed, you could make a demand on the affiant.

As an aside, I had to engage in this speculation because of an Adult Protective Services inquiry concerning financial abuse of a disabled adult. It started with one family member using the affidavit without informing his other siblings. One of those siblings was a disabled adult receiving Kansas Medicaid. APS' query was whether Estate Recovery could conduct a probate proceeding to recover the funds on behalf of the Medicaid recipient. Since the decedent was not on Medicaid, I deferred. I suggested that the family could initiate their own proceeding. I, also, discussed the application of the conversion provisions at KSA 59-1704 along with the obvious criminal statutes as other remedies. It was eventually resolved by the affiant providing appropriate shares to the other siblings after some "discussion" between the various parties' counsels. The key point that I drew from the incident was that the other family members did not have notice of the affidavit and the bank who received the affidavit initially refused to disclose information due to privacy concerns.

I do have a "pet peeve" about the affidavit presently being suggested for use. This will also show my bias. The "Affidavit of Death and Heirship", as it presently reads in the Probate Forms handbook, is the suggested format per the statute. Para. 4 states:

"4. All debts and claims against the decedent have been paid, including expenses of last illness and funeral expenses."

If you are going to list examples of debts that have been paid, should you mix first and fourth class demands (funeral expenses would include reasonable and unreasonable) with second class demands without noting all other cognizable demands in other classes? Also, if the affidavit is offered after six months from death, is the statement even needed? While I would like to have an argument to gain a recovery of the state's first class claim, I believe that the Probate Committee has been staunch in their belief that creditors should protect themselves. My point is that the language above may create more issues than it resolves.

Please feel free to contact me at your convenience at the address or phone number listed below.

Sincerely,

Brian M. Vazquez
Deputy General Counsel
Kansas Health Policy Authority
P.O. Box 2428
Topeka, Ks. 66601
Tel. No. (785) 296-6707
Fax No. (785) 296-8825



TRIPLETT, WOOLF & GARRETSON, LLC

LAW FIRM

Thomas C. Triplett
John P. Woolf
Thomas P. Garretson
James A. Walker
Timothy E. McKee
Theron E. Fry *
Eric B. Metz
Ron H. Harnden
Tad Patton
Rachael K. Pirner
* Admitted in Kansas & Texas

2959 North Rock Road, Suite 300
Wichita, KS 67226

Email: rkpirner@twgfirm.com

TELEPHONE
(316) 630-8100

FAX
(316) 630-8101

Jeffrey D. Leonard
Jeffery C. Dahlgren
J.T. Klaus
Jerald W. Rogers
Ross E. Hellwig
Amy Fellows Cline
Tyler E. Heffron
Paula D. Langworthy
Andrew N. Kovar
Mary F. Carson, Of Counsel

July 25, 2008

Randy Hearrell
Kansas Judicial Council
301 S.W. 10th Street, Suite 140
Topeka, KS 66612-1507

RE: Our File No. 1922-05

Dear Randy:

The Wichita Bar Association Probate Committee met today. We had 36 members in attendance. Each had an opportunity to review the letter that the Judicial Council received from Mr. Smith, and the Committee's thoughts are as follows:

An increase of the small estates affidavit to \$40,000.00 is welcomed and is viewed as keeping up with inflation. The 90-day freeze period proposed by Mr. Smith makes no sense, because a small estates affidavit could be filed at any time even after the six-month period marking the end of the statute of limitations for creditors to file claims. The comments were universal in that it makes no sense to set up a special procedure as it relates to the small estates affidavit unless advisory counsel were willing to look at applying the same procedure to joint tenancy properties, properties passing by transfer on death deeds and payable on death accounts. No one proposed an overhaul of all of these procedures.

Without exception, all of the 36 members of the Wichita Bar Association Probate Committee, all were opposed to modifying the statute.

If you have any other questions or feel that the Committee could be of any other assistance, please do not hesitate to contact me.

Yours sincerely,

TRIPLETT, WOOLF & GARRETSON, LLC

[Handwritten signature of Rachael K. Pirner]

By Rachael K. Pirner

RKP/kak