



**KANSAS BAR
ASSOCIATION**

TO: The Honorable Kellie Warren, Chair
and Members of the Senate Committee on Judiciary

FROM: Joseph N. Molina, On Behalf of the Kansas Bar Association

RE: HB 2144 – Authorizing the modification of a noncharitable irrevocable trust to provide that the rule against perpetuities is inapplicable.

DATE: March 23, 2023

Chairman Warren and members of the Senate Committee on Judiciary, my name is Joseph Molina and I provide this information on behalf of the Kansas Bar Association as it relates to HB 2144 – Authorizing the modification of a noncharitable irrevocable trust to provide that the rule against perpetuities is inapplicable.

As background, the Kansas Bar Association was afforded the opportunity to review SB 400 as introduced by the Kansas Bankers Association during the 2022 Legislative Session. SB 400 would have altered the rule against perpetuities (RAP) as well as amend the Kansas Decanting statutes. However, the Kansas Judicial Council was studying both issues with the goal of submitting amendments during the 2023 session. Several members of the Judicial Council Probate Advisory Committee also serve on various Kansas Bar Association committees and sections. After they reviewed SB 400 and realized the duplicative work being performed by the Judicial Council, it was suggested that they be given an opportunity to review SB 400 as part of the Judicial Council's Decanting/RAP study. As such, the Kansas Bar Association made a request to have SB 400 studied by the Judicial Council to ensure a smooth transition of the decanting statutes and of any changes to the RAP. That letter is attached.

SB 400 was referred to the Kansas Judicial Council who promptly reviewed the additional provisions and submitted a report on the bill. That report is attached for your consideration.

While the Kansas Bar Association takes no formal position on HB 2144, we do appreciate the work performed by the Kansas Judicial Council, the Probate Advisory Committee and the Kansas Bankers on this issue. We believe the report is a comprehensive review of the Kansas Decanting Statute and of the rules against perpetuities.

Thank you for your time and attention. I am happy to stand for questions if appropriate.

About the Kansas Bar Association:

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals. Its more than 7,200 members include lawyers, judges, law students, and paralegals. www.ksbar.org

**REPORT OF THE PROBATE LAW ADVISORY COMMITTEE ON 2022 S.B. 400 PROVISIONS
RELATING TO TRUST DECANTING AND THE RULE AGAINST PERPETUITIES**

December 2, 2022

In March 2022, the Kansas Bar Association requested that the Judicial Council study two topics that arose during the legislature's consideration of 2022 S.B. 400: the rule against perpetuities and trust decanting. As introduced, Section 1 of S.B. 400 would have made the rule against perpetuities inapplicable to trusts under certain circumstances. That provision was based on a Missouri statute. Section 2 of the bill would have enacted a trust decanting provision also based on a Missouri statute. The proponents of S.B. 400, the Kansas Bankers Association and Midwest Trust, agreed to have those two sections removed from the bill and referred to the Judicial Council for further study. See attached study request.

The Judicial Council assigned the study to the Probate Law Advisory Committee (Committee). The Committee held three meetings during the fall of 2022 to conduct the study, and, at the Committee's invitation, Kelly VanZwoll and Alex Orel from the Kansas Bankers Association and Will Bergman of Midwest Trust attended several of those meetings.

Committee membership

The members of the Probate Law Advisory Committee are:

Sarah Bootes Shattuck, Ashland; Chair
Eric Anderson, Salina
Shannon Barks, Kansas City, MO
Cheryl Boushka, Kansas City, MO
Emily Donaldson, Topeka
Christine Graham, Kansas City, MO
Mark Knackendoffel, Manhattan
Hon. James McCabria, Lawrence
Kent Meyerhoff, Wichita
Rep. Fred Patton, Topeka
Dave Snapp, Dodge City

Trust Decanting

The Committee has spent the last several years reviewing the Uniform Trust Decanting Act and drafting amendments appropriate to Kansas. After reviewing the Committee's draft, the representatives of the Bankers Association and Midwest Trust agreed with the Committee that the Uniform Act is a better, more comprehensive approach than the Missouri statute, Mo. Rev. Stat. § 456.4-419, that provided the model for 2022 S.B. 400.

The Committee's recommendation relating to the Uniform Trust Decanting Act is being submitted to the Judicial Council for approval separately, and more detail about the Act is included in that submission.

Rule Against Perpetuities (RAP)

Section 2 of S.B. 400 would have enacted another Missouri-based provision making the rule against perpetuities inapplicable to trusts under certain circumstances. The common law rule against perpetuities is a rule that prevents the "dead hand" from controlling property interests far into the future. As commonly stated, the rule prohibits the creation of any future interest in property which does not necessarily vest within 21 years after a life or lives in being at the time of creation of the interest, plus the period of gestation if gestation is taking place. See *Jason Oil Co., LLC v. Littler*, 310 Kan. 376, 381, 446 P.3d 1058, 1062 (2019).

In Missouri, Mo. Rev. Stat. § 456.025 creates an "opt-out" provision specifically for trusts, which states that for trusts created after August 28, 2001, and for certain other trusts, the rule against perpetuities (and any rule prohibiting unreasonable restraints on or suspension of the power of alienation) will not apply to the trust if the trustee has the power pursuant to the terms of the trust or applicable law to sell the trust property during the period of time the trust continues beyond the period of the rule against perpetuities that would otherwise apply. This provision essentially allows the drafter of a trust to opt out of the rule against perpetuities by including the necessary language in the trust instrument. Senate Bill 400 would have enacted a similar provision in Kansas.

Kansas, unlike Missouri, is one of 29 jurisdictions that have adopted the Uniform Statutory Rule Against Perpetuities (USRAP). See K.S.A. 59-3401, *et seq.* The USRAP supersedes the common law rule against perpetuities. K.S.A. 59-3408. Among other changes, the USRAP adds a "wait-and-see" approach to the rule, by providing that an interest that is not certain to vest within the common law period is still valid if it actually vests within 90 years after the date it is

created. K.S.A. 59-3401(a). The USRAP also contains a cy pres provision authorizing judicial reformation of a disposition that would otherwise be invalid to conform it to the limits of the 90-year waiting period. K.S.A. 59-3404.

Almost every state has modified the common law rule against perpetuities in some manner, with some states abolishing the rule entirely. Among states that have adopted the USRAP, several have made major modifications including extending the 90-year period up to 500 or even 1000 years. See Bogert's Law of Trusts and Trustees, § 214.

The rule against perpetuities was first developed to prevent the practice of tying up family property for generations, which creates an unreasonable restraint upon the alienation of that property. The Kansas Supreme Court has recognized alienability of property as the overarching public policy consideration behind the continued application of the rule in Kansas. *Jason Oil*, 310 Kan. at 389.

While some Committee members expressed the concern that repealing or further modifying the rule against perpetuities could undermine the public policy behind it, the Committee recognized that the rule has already been so eroded by its modification and outright abolition in other states that the rule no longer offers the protection it once did. The Committee also noted that the Kansas legislature has already created an exemption from the rule for "fidfin" trusts administered by technology enabled fiduciary financial institutions (TEFFI's). See K.S.A. 9-2326, enacted in 2021.

The Committee heard from proponents of S.B. 400 that, when wealthy people who want to establish dynasty trusts learn that they cannot do so in Kansas, they simply venue shop and find a company that will establish the trust in another state with more lenient trust laws. In fact, some trust companies are specifically marketing themselves based on their ability to administer trusts in those other states. Thus, repealing or limiting the application of the rule against perpetuities would make Kansas trust companies more competitive.

The Committee agreed that providing an "opt-out" provision to allow the drafter of a trust to specifically exclude a trust from the application of the rule would provide greater flexibility and help Kansas keep trust business in the state. The Committee considered the Missouri provision contained in S.B. 400 but decided that it would be better to incorporate any opt-out provision into the Kansas USRAP rather than the trust code. The Committee ultimately chose the Nebraska statute, Neb. Rev. St. § 76-2005(9), as a model, because that state has also adopted the USRAP with modifications. The Committee also agreed that any change to the rule should be

made prospective only, because some existing trusts have been drafted with the understanding that they would terminate no later than the end of the statutory 90-year perpetuities period.

The Committee also recommends an amendment to the Kansas uniform trust code to clarify that a court can modify an existing trust to opt out of the rule against perpetuities. Under K.S.A. 58a-411, a noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. The Committee recommends adding language to the statute making clear that application of the rule against perpetuities is not presumed to be a material purpose of the trust. This amendment is important because, under Section 20 of the Uniform Trust Decanting Act, a second trust is subject to any rule against perpetuities that applied to the first trust. Thus, it may be necessary to modify the first trust to opt out of the rule against perpetuities before decanting to a second trust.

Recommendation

The Committee recommends the following amendments:

K.S.A. 59-3404. Kansas USRAP; exclusions.

K.S.A. 59-3401, statutory rule against perpetuities, does not apply to:

- (1) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;
- (2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease or mortgage property, and the power of a fiduciary to determine principal and income;
- (3) a power to appoint a fiduciary;
- (4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;
- (5) a nonvested property interest held by a charity, government or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral or other current or deferred benefit plan for one or more employees, independent contractors or the beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; ~~or~~

(7) a property interest, power of appointment or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this state; or

(8) A trust in which the governing instrument states that the rule against perpetuities does not apply to the trust and under which the trustee or other person to whom the power is properly granted or delegated has power under the governing instrument, any applicable statute, or the common law to sell, lease, or mortgage property for any period of time beyond the period which would otherwise be required for an interest created under the governing instrument to vest. This subsection shall apply to all trusts created by will or inter vivos agreement executed or amended on or after July 1, 2023, and to all trusts created by exercise of power of appointment granted under instruments executed or amended on or after July 1, 2023.

58a-411. Modification or termination of noncharitable irrevocable trust by consent

(a) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all qualified beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an attorney in fact under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed. This subsection does not apply to irrevocable trusts created before, or to revocable trusts that became irrevocable before, January 1, 2003.

(b) A noncharitable irrevocable trust may be terminated upon consent of all of the qualified beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the qualified beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(c) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust. Application of the rule against perpetuities is not presumed to constitute a material purpose of the trust.

(d) Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as agreed by the qualified beneficiaries.

(e) If not all of the qualified beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:

(1) If all of the qualified beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) the interests of a qualified beneficiary who does not consent will be adequately protected.



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March 7, 2022

Nancy Strouse, Executive Director
Kansas Judicial Council
301 SW 10th Avenue
Topeka, Kansas 66612

Dear Ms. Strouse:

I am writing to request the Kansas Judicial Council study a topic that arose during the consideration of legislation by the Senate Committee on Financial Institutions and Insurance during the 2022 Session. I believe that in-depth consideration of the issues raised by the legislation by the Judicial Council would be appropriate and helpful before the Legislature considers this issue next session.

Substitute for SB 400 certain requirements and conditions relating to the creation, modification and termination of trusts in the Kansas uniform trust code and updating the definition of resident trust for tax purposes.

SB 400 was introduced at the request of Kansas Bankers Association on behalf of their member Midwest Trust. The Bankers and Midwest Trust testified in favor of the bill while the Kansas Bar Association took a neutral position.

Prior to the scheduled hearing on SB 400 it came to our attention that the Kansas judicial Council was working on amending various Decanting statutes within the Kansas Uniform Trust Code. SB 400 as introduced, would have also amended those Decanting statutes with language from the Missouri Trust code. We believe these two various decanting proposals should be studied to determine which would best fit within our current trust code scheme.

The Kansas Bankers Association, along with Midwest Trust, agreed to amend their initial proposal by removing the decanting amendments and the provision eliminating the Rules Against Perpetuities. This agreement was contingent upon the Kansas Bar Association requesting this study, which we do so now.

I would appreciate any recommendation by the Judicial Council regarding this topic and Senate Sub for SB 400, including ways to address the concerns raised at the hearing.

I have included with this letter testimony from that hearing,

I have included with this letter testimony from that hearing, which is available at http://www.kslegislature.org/li/b2021_22/measures/SB400/testimony .

Please let me know if I can provide any further information or answer any questions regarding this request.

Sincerely,

Cheryl J. Whelan

Cheryl Whelan
President, Kansas Bar Association