

**TESTIMONY OF LANCE A. WEEKS
TO THE KANSAS HOUSE JUDICIARY COMMITTEE
REGARDING HOUSE BILL 2166
February 13, 2013**

Mr. Chairman and members of the Committee:

My name is Lance Weeks and I am an attorney at the law firm of COFFMAN, DeFRIES & NOTHERN, a Professional Association, Topeka, Kansas. I am a 1997 graduate of the University of Kansas School of Law, and received an *LL.M in Taxation* from the University of Missouri-Kansas City School of Law in 1998. My principal areas of practice are probate administration, trust administration, estate planning, and taxation, and I have been appointed as the Administrator of approximately twenty (20) probate estates at the request of the Kansas Estate Recovery Contractor. I have been asked to testify regarding House Bill 2166 by the Kansas Estate Recovery Contractor, especially how the legislation seeks to address problems I have observed in my role as the Administrator of estates for which probate was initiated by the Kansas Estate Recovery Contractor.

House Bill 2166 seeks to lengthen the non-claim period from six months to one year and also extend the time period for which a determination of descent can be sought from six months to one year. Although I am not necessarily an ardent proponent of a departure from the current six month time periods set forth in the existing statutes, it has been my observation that the current time frame presents a significant challenge to the Estate Recovery Contractor in terms of referral of cases to prospective administrators.

K.S.A. 39-709(g)(2) only confers a claim, and not a lien, against the property of the estate of a deceased recipient or the estate of a surviving spouse. Because a recipient of medical

assistance is only allowed \$2,000 of non-exempt resources, the primary asset remaining in the vast majority of cases is the decedent's residence. The real estate must be sold in order to pay administration expenses and satisfy the claim against the estate for medical assistance. In my experience, most residential real estate associated with these estates suffers from significant deferred maintenance and often has multiple years of unpaid real estate taxes. Occasionally, there will be a previously filed federal tax lien which is superior to the claim of the State of Kansas for medical assistance. Furthermore, the real estate may be subject to the homestead claim of an adult child that lived at the residence at the time of the medical assistance recipient's death. In other words, there are many factors which must be considered before making a determination whether it is financially worthwhile to pursue a probate proceeding in a particular case, and making such a determination within six months is a very difficult task in many circumstances, especially when the decedent's family has little, if any, incentive to volunteer information.

House Bill 2166 also attempts to amend K.S.A. 58a-818, of the Kansas Uniform Trust Code, by adding a provision which requires the successor trustee of a deceased settlor to provide notice to the Department of Health and Environment within 90 days of the death of the settlor or of a deceased trust beneficiary of such settlor. This provision must be analyzed in light of two Kansas Supreme Court cases, *Nelson v. Nelson*, 288 Kan. 570 (2009) and *Draper v. Bank of America*, 288 Kan. 510 (2009). These cases established that a claim against a deceased settlor of a trust must be filed first against the deceased settlor's probate estate. Once adjudicated as a valid claim against the probate estate, the executor or adminis-

trator of the estate must then seek to enforce the claim against the trust estate. The obligation for a trustee of a deceased settlor's trust to pay claims against settlor's probate estate exists in many cases because the trust often contains language for the trustee to pay all valid debts and expenses of the deceased settlor existing at the time of the settlor's death.

Theoretically, the trust estate of a deceased medical assistance recipient should be less than \$2,000 because of the spend-down requirement to obtain eligibility for assistance, but occasionally trust assets are not listed by the applicant or adequately identified and spent down during the Medicaid application process. If a deceased medical assistance recipient has a trust estate at the time of death, but no other assets requiring probate administration outside of the trust, it is extremely difficult for a creditor such as the Kansas Estate Recovery Contractor to uncover the existence of the trust prior to the expiration of the non-claim period without a mandatory notice provision. The proposed amendment to K.S.A. 58a-818 contained in this bill provides a useful mechanism for the Kansas Estate Recovery Contractor to uncover the existence of trust assets that would be subject to estate recovery, but not properly identified or disclosed during the Medicaid application process.

The State of Kansas also has a claim against the probate estate of a surviving spouse of a deceased medical assistance recipient. Depending on the language of a surviving spouse's trust, the trustee may have a duty to pay from trust assets all valid claims against the surviving spouse's probate estate which may include a claim by the Kansas Department of Health and Environment for medical assistance paid for the benefit of a

predeceased spouse. The existing language of House Bill 2166 does not require the trustee of a deceased surviving spouse of a medical assistance recipient to notify the Kansas Department of Health and Environment of the existence of a trust, leaving the Kansas Estate Recovery Contractor without a means to evaluate whether a potential for estate recovery exists from the trust estate of a surviving spouse. It is well established that a surviving spouse's probate assets are subject to estate recovery for medical assistance paid to a predeceased spouse, and the Department of Health and Environment is to receive notice of the commencement of the surviving spouse's estate. On the other hand, if the surviving spouse places his or her assets in a trust after the death of the medical assistance recipient and prior to the death of the surviving spouse, the assets may pass outside the reach of estate recovery because there is no mechanism in present law for the Kansas Estate Recovery Contractor to learn of the existence of the trust or the assets contained therein. If the Legislature determines trust assets of a surviving spouse should be subject to potential estate recovery just as probate assets, then additional language to impose this duty upon the trustee of a surviving spouse's trust should be considered.

As noted, the proposed amendment to K.S.A. 58a-818 also imposes the duty on the trustee of a deceased grantor to notify the Kansas Department of Health and Environment in the event of a death of a deceased trust beneficiary. The extension of a trustee's duty to notify the Kansas Department of Health and Environment whether a trust beneficiary dies while receiving medical assistance should be weighed very carefully before it is included in any final

version of the bill because of the potential burdens it places upon the trustee.

Proposed House Bill 2166 adds a provision granting authority for the Secretary of Health and Environment to establish a table to value life estates of decedents at the time immediately prior to death when a decedent's retained life estate is subject to an estate recovery claim. The establishment of a statutory method to value life estates will provide much needed clarity and certainty to the process when a life estate is involved in an estate recovery matter because a generally accepted valuation technique does not exist at the present time.

The requirements that clearance be received from the Kansas Department of Health and Environment as a condition of final settlement of a probate estate through the proposed amendments to K.S.A. 59-1501, K.S.A. 59-2222, and K.S.A. 59-2247 will greatly reduce, if not eliminate, the instances where notice was not given to the Department of Health and Environment despite being required by current law. Often an attorney representing an Administrator or Executor will rely upon the information provided by the personal representative who may not know of the existence of a potential estate recovery claim, particularly if the claim is based upon medical assistance provided to a predeceased spouse.

The proposed amendment to K.S.A. 59-1507b contained in House Bill 2166 providing the Department of Health and Environment with legal standing to submit a small estate affidavit pursuant to K.S.A. 59-1507b is a welcome and much needed addition. There have been many occasions in which my firm's long-time clients pass away with their sole asset being a bank account containing less than the \$2,000 Medicaid eligibility threshold. In many instances, an

attorney is serving as the decedent's attorney-in-fact under a general durable power of attorney because there is not a family member available to assist with the medical assistance recipient's affairs. As a result, there is no one with standing as an heir-at-law readily available or willing to sign an affidavit to permit the release of the modest bank account from the financial institution, and opening a probate estate for such a small amount is simply not feasible. In many cases, these small bank accounts are simply left to remain in the financial institution until such time as they are turned over to the State Treasurer's office. This addition to K.S.A. 59-1507b will permit the Kansas Department of Health and Environment to increase its recoveries and will ease the burden on financial institutions, which must continue to service these small, inactive accounts, as well as the decedent's legal representatives who are either not able to finalize the client's affairs or must expend considerable time and effort to locate a family member with standing and willing to execute an affidavit as an heir-at-law under the current statute.

Thank you for the opportunity to address the Committee today. As an attorney with a unique perspective of working on both sides of estate recovery issues, I believe there are gaps in the current law that frustrate the estate recovery process. House Bill 2166 is an excellent starting point in addressing some of the gaps and provides a much needed streamlined procedure for addressing small bank accounts which exist upon the death of a decedent.