KANSAS BAR ASSOCIATION

# KBA Real Estate, Probate & Trust Section Newsletter

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## Section President's Message

We are in the middle of a hot summer, and I hope you have all been able to enjoy a vacation or time off to some cooler climates. In this issue we have the reporting of Probate and Trust cases by Cal Karlin as well as the reporting of Estate Tax cases and rulings by Dan Peare. Mark Andersen reports on real estate cases and legislation.

The Executive Committee has welcomed two new members on board, Kevin M. Conley, Private Trust Counsel with UMB Bank and Professor Peter A. Cotorceanu, Associate Professor of Law at the Washburn University School of Law.

As you all know by now the succession tax has been repealed and the Kansas Estate Tax affirmed by HB 2005. For those of you who may have filed a succession tax return and paid taxes, I direct your attention to Form K-709, the Kansas Succession Tax Refund Claim form. With regard to the Kansas Estate Tax Department of Revenue Notice 03-08 sets out in detail the procedures to be used with regard to filing Kansas Estate Tax returns. The form and the Revenue Notice are available on the Department of Revenue website.

On a final note, in prior communications and newsletters, we had advised you of the Section's efforts to file an Amicus Brief in the *Miller v. SRS* case. I have been advised by Bob Collins that the Supreme Court denied the Appellant's Motion for Rehearing. For the moment, we will have to regroup and decide where to go from here.

For those of you who are withering under the sweltering summer heat, remember that football season is not far away and with that cool autumn weather.

## Estate Tax Notes

*By Dan C. Peare*
*Hinkle Elkouri Law Firm LLC. Wichita,*

### *1. Inclusion of Assets Transferred By Decedent to FLP*

The Tax Court held that under Code § 2036(a)(1) and (a)(2), assets transferred by the Decedent during his lifetime to a family limited partnership ("FLP") must be included in the Decedent's gross estate. Code § 2036(a) provides that unless a transfer is a bona fide sale for adequate and full consideration, an individual's gross estate includes property transferred during his or her lifetime if the individual retained, for life, the following:

(1) the possession or enjoyment of, or the right to the income from, the property, or;

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

In reaching its decision, the court concluded that under § 2036(a)(1) the Decedent retained the possession or enjoyment of the FLP assets based on the following factors: (1) the Decedent's son-in-law, who was also the Decedent's attorney-in-fact, controlled the FLP; (2) the Decedent had contributed approximately 98% of his wealth to the FLP, including his personal residence; (3) the FLP paid a substantial portion of the Decedent's living expenses; (4) the Decedent's children, who were the other partners in the FLP, had no meaningful economic interest in the FLP; and (5) the Decedent's use of the assets after the formation of the FLP was virtually unchanged from his use of the assets prior to the FLP's formation.

In addition, the court also concluded that under §2036(a)(2), the Decedent retained the right to designate the persons who will possess or enjoy the transferred assets and their income, because the limited partnership agreement gave the Decedent, along with the other shareholders of the corporate general partner, the right to terminate and liquidate the FLP. Further, the Decedent, in conjunction with the other shareholders of the corporate general partner, had the right to declare dividends. In distinguishing the facts of this case from the earlier case of *United States v. Byrum*, (402 U.S. 125 (1972), the court concluded that the Decedent's rights were not limited by the rights of an independent trustee, by any intra-family fiduciary duty, or by the oversight of the charity that owned a 1% interest in the FLP. *Estate of Strangi*, T.C. Memo 2003-145 (May 20, 2003).

### *2. HB 2005 - Repeal of Succession Tax and Kansas Estate Tax*

Following are some of the key provisions contained in HB 2005:

• The succession tax, enacted in 2002, has been repealed retroactive to its date of enactment and provides for refunds of such taxes that have already been paid.

• Amendments have been added to the Kansas Estate Tax Act to improve administration and enforcement. Specific definitions are provided for a number of key terms, such as "decedent," "distributee," "tax situs," and "resident decedent."

• New language clarifies who is responsible for filing estate tax returns with the Department of Revenue.

• Closing letters provided by the Department of Revenue are deemed applicable only with respect to assets reported in filed returns.

• The Kansas estate tax exemption filing threshold is conformed to the federal threshold, effective for estates of decedents dying on and after January 1, 2007.

• Kansas estate tax returns are required to be filed on or before the date federal estate tax returns are required to be filed; however, extensions may be provided upon a showing of good cause. Failure to timely file a return or pay any estate tax liability due under the act may result in a penalty. Failure to file a return or the filing of an incorrect or insufficient return will trigger a provision requiring the Director of Taxation to estimate the value of the taxable estate and assess a fifty percent (50%) understatement penalty, plus interest. Any personal representative acting with fraudulent intent is subject to a one hundred percent (100%) penalty of the tax due, plus interest. Personal representatives intentionally signing fraudulent returns are deemed guilty of a felony and subject to imprisonment for up to five years.

• Additional provisions authorize, under certain

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circumstances, the filing of tax liens and provide for the issuance of tax warrants.

### *3. Dispositions Of Life Estate In A Qualified Terminable Interest Property ("QTIP") Trust*

Decedent and spouse established Trust 1 and Trust 2 and funded said trusts with community property. While both were alive, either spouse could revoke or amend Trust 1 and/or Trust 2 with respect to that spouse's share of community property held by each trust. Upon Decedent's death, Trust 1 divided into Marital Trust 1 and Family Trust 1 and Trust 2 divided into Marital Trust 2 and Family Trust 2. In the estate tax return filed for Decedent's estate, the Executor elected under Code § 2056(b)(7) to treat pecuniary amounts that passed to Marital Trust 1 and Marital Trust 2 as qualified terminable interest property (QTIP). The Decedent's estate claimed an estate tax marital deduction for the pecuniary amounts that passed to Marital Trust 1, which was funded with marketable securities, and Marital Trust 2, which was funded with cash and real estate (including the marital residence). The Trustee of Marital Trust 2 proposed a sale of the marital residence held in Marital Trust 2 to an unrelated party. All parties with an interest in Marital Trust 2, including the spouse, would seek to terminate Marital Trust 2 and distribute its assets to the remainder beneficiaries.

The IRS noted that Marital Trust 1 and Marital Trust 2 were separately created by the Decedent and spouse under separate trust agreements. Because Marital Trust 1 and Marital Trust 2 are separate trusts, the relinquishment by the spouse of her interests in Marital Trust 2 will not be treated as a gift under § 2519 of her qualifying income interest in Marital Trust 1 and will not result in a deemed disposition of property in Marital Trust 1 under § 2519. P.L.R. 200319002.

### *4. Transfers Subject To Gift Tax*

Grantor petitioned a court for reformation of a Trust to conform with the Grantor's original intent. The Grantor and the appointed special representatives entered into an agreement to reform the Trust retroactive to the date that the Trust was created. After finding that reformation was authorized under applicable state law, the IRS held that the reformation of a Trust by entry into a binding agreement does not result in a transfer in trust under Code § 2511(a) that is subject to gift tax under Code § 2501(a). A reformation is not a sale, exchange, or other disposition of property and therefore, neither the Trust nor its beneficiaries will realize a gain or loss under Code § 1001. P.L.R. 200318064.

### *5. Gift Taxes Paid By Decedent's Spouce Treated As If Paid By Decedent — Reduces Marital Deductions*

Decedent provided his wife $3.1 million, which she used to buy a life insurance policy on the Decedent's life to be held in an irrevocable life insurance trust. Decedent also gave his wife $1.4 million to pay the gift taxes associated with the purchase of the policy in trust. The Decedent died within three years of his wife's payment of the gift tax. The estate filed an estate tax return indicating a zero tax liability. The zero balance was predicated on the assumption that the spouse would pay the gift taxes associated with the purchase of the insurance policy and that the marital trust comprising the remaining estate, which passed to the spouse, was therefore eligible for the marital deduction. The IRS disagreed with the estate's tax return claiming that the Decedent paid the gift taxes and, as such, the $1.4 million should be included in the estate. In addition, the IRS maintained that the $1.4 million would not be eligible for the marital deduction.

The court held that the gift taxes were paid indirectly by the Decedent under the step-transaction doctrine and should be included in the Decedent's gross estate. With regard to the marital deduction, the court stated that it is limited to property that passes or has passed from the Decedent to his spouse to the extent that such interest is included in determining the value of the spouse's gross estate. Citing Treas. Reg § 20.2053-3(a), the court stated that the estate is entitled to deduct the amount of actual administration expenses from the estate. As such, when administrative expenses are paid out of marital trust property, the result is a pro tanto reduction in the marital deduction. *Brown v. United States*, 91 AFTR 2d 2003-2085 (9th Cir. 2003), *aff'g.* 88 AFTR 2d 2001-6665, (C.D. Cal. 2001).

### *6. Treasury Proposal For Valuing Benefits In Split-Dollar Life Insurance Arrangements*

The Treasury has proposed regulations detailing how to value the benefits to a non-owner under an equity split-dollar life insurance arrangement taxed under economic benefit rules (the economic benefit rules apply if the arrangement is entered into using the endorsement method). REG 164754-01, 68 Fed. Reg. 24,898 (2003). The economic benefit afforded the non-owner of an equity split-dollar arrangement would be valued as the sum of (1) the cost of any current life insurance protection provided to the non-owner under the policy; (2) the amount of cash value to which the non-owner has current access (to the extent that this amount was not actually taken into account in a prior tax year), and; (3) the value of any other economic benefits provided to the non-owner (to the extent not actually taken into account in a prior tax year). Prop. Reg. § 1.61-22(d)(3)(ii)(A).

### *7. Charitable Remainder Unitrust Keeps Status And Does Not Trigger Self-Dealing Excise Taxes*

Grantor named Charity as the remainder beneficiary to a percentage of assets from a Charitable Remainder Unitrust ("CRUT") and subsequently gifted to Charity the same percentage of the unitrust interest in the CRUT. The two actions taken together effected a merger of Charity's income and remainder interests, resulting in a partial termination of the CRUT in favor of Charity. Grantor then proposed to irrevocably designate Charity as the remainder beneficiary of an additional percentage (less than 100%) of the CRUT's assets, and to sell to Charity the same percentage of Grantor's unitrust interest (again causing a merger of interests).

The IRS ruled that although the merger caused the CRUT to partially terminate, the CRUT still retained its form and function. The IRS also ruled that the Grantor is not subject to the self-dealing excise tax because Reg. § 53.4947-(c)(2)(i) does not apply to amounts payable under the terms of a split-interest trust to income beneficiaries for which a charitable deduction was allowed on creation of the CRUT. The IRS also noted the sale of the Grantor's percentage of his unitrust entitlement to Charity is not self-dealing because the amount received from the sale of the CRUT interest derives solely from his income right in the CRUT. P.L.R. 200310024.

### *8. Taxation Upon Early Termination Of Charitable Remainder Trust*

The termination of a charitable remainder unitrust, in which the charitable and non-charitable beneficiaries each received their actuarially-determined shares of the trust assets, would be treated as a sale of the unitrust interest by the non-charitable beneficiary to the charitable remainder beneficiary for its actuarial fair market value, resulting in the non-charitable beneficiary incurring capital gain. P.L.R. 200314021.

### *9. Fair Market Value Of S Corporation Held By Decendent Was Value Reported On Estate Tax Return*

The Tax Court determined that the value of the Decedent's closely-held futon business was that reported on the estate's estate tax return. The taxpayer attempted to disavow the return value in favor of a value less than half of that reported on grounds the appraisal underlying the return valuation was erroneous. The court rejected this argument. *Estate of Leichter v. Comm'r.*, T.C. Memo 2003-66 (March 6, 2003).

### *10. IRS Explains Limits On Deduction For Charitable Gifts Of Patents*

The IRS explained that a charitable gift of a patent may not be deductible if the donor retains an interest in the patent or imposes significant conditions on the charity's use of the patent. Rev. Rul. 2003-28.

### *11. Oral Promise To Reconvey Residence To Donor Makes Gift Icomplete*

The IRS stated that a taxpayer's gift of his resi-

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# PROBATE AND TRUST CASES

*By Calvin J. Karlin*
*Barber, Emerson, Springer, Zinn & Murray, L.C., Lawrence*

***NICHOLAS V. NICHOLAS***
66 P.3d 929 (Kan. App. 2003)

The Court of Appeals held that decedent violated a restraining order by attempting to sever and transfer joint tenancy interest, by changing life insurance beneficiaries, and by changing POD and TOD beneficiaries.

Decedent's wife had filed for divorce and obtained an ex parte temporary restraining order prohibiting either party from disposing of any assets "except in the normal course of business." Decedent thereafter executed a will devising all of his real property to his children. Decedent also transferred certain joint tenancy property to his trust. The decedent's son, who was executor, argued that these acts severed the joint tenancy, but the District Court and Court of Appeals disagreed.

The decedent also attempted to change beneficiaries from his wife to his children as to a life insurance policy and on POD and TOD forms for various accounts that were solely in the decedent husband's name. The Court held that he could not do this either, due to the entry of the restraining order. The wife therefore had a complete victory.

If a spouse senses that the other is about to make detrimental death bed transfers or beneficiary changes, this case indicates that a divorce proceeding should be filed and a general restraining order obtained.

***IN THE MATTER OF THE JOHN P. HARRIS TESTAMENTARY TRUST***
(June 6, 2003)

Kansas was the first state to adopt the Uniform Trust Code. This is the first Kansas Supreme Court case applying it. It involved the reformation of a trust as to which there was no dispute, but the trustee needed a ruling of the state's highest court to preserve tax advantages.

The Kansas Supreme Court acknowledged the effectiveness of the new Kansas Uniform Trust Code to trusts created before, on, or after its effective date of January 1, 2003, and to judicial proceedings commenced before its effective date absent prejudice to parties. In this case all of the beneficiaries filed written consents to the reformations sought by the trustees.

The first change sought was to limit the discretionary powers of the trustees, to eliminate the possibility of the inclusion of the trust property in the estate of testator's son (who is one of the trustees) upon his subsequent death. The trustees argued that a typographical error caused the trustees not to be limited to an ascertainable standard. They obtained an affidavit from the scrivener of the testator's will in support of their position that this was the testator's intent. The Supreme Court noted that Kansas specifically omitted the tax-curative provision of the UTC due to a difference of opinion among committee members. The Supreme Court

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# KANSAS 2003 LEGISLATIVE HIGHLIGHTS

*By Mark A. Andersen*
*Barber, Emerson, Springer, Zinn & Murray, L.C., Lawrence*

**Mechanic's Liens**

HB 2064 extends the time to file a mechanic's lien on non-residential real property to five months for both general contractors, as well as subcontractors. Traditionally, the time period to file a lien on real property was four months for a general contractor, and three months for a subcontractor, after the date material, equipment or supplies, used or consumed was last furnished or last labor performed under the contract. This legislation provides that the time period for a general contractor to file a lien may be extended to five months, provided a proper notice of extension is filed within four months. Also, the time period for a subcontractor to file a lien can be extended to five months, provided a proper notice of extension is filed within three months. The civil procedure for extending the filing deadline was approved by the 2003 Kansas legislature, and is set forth in new provisions adopted to the mechanic's lien statutes, as follows:

**K.S.A. 60-1102(c)** Notwithstanding subsection (a), a lien for the furnishing of labor, equipment, materials or supplies on property other than residential property may be claimed pursuant to this section within five months only if the claimant has filed a notice of extension within four months since last furnishing labor, equipment, materials or supplies to the job site. Such notice shall be filed in the office of the district court of the county where such property is located and shall be mailed by certified and regular mail to the owner. The notice of extension shall contain substantially the following statement: Notice of Extension to File Contractor Lien; Name of Contractor; Address of Contractor; Telephone Number of Contractor; Name and/or Number of Job; and Address of Job Site. Filing of such notice extends the time for filing a lien to five months for the above contractor providing materials or labor on property owned by: .

**K.S.A. 60-1102(d)** As used in this section and K.S.A. 60-1103, and amendments thereto, "residential property" means a structure which is constructed for use as a residence and which is not used or intended for use as a residence for more than two families.

**K.S.A. 60-1103(e)** Notwithstanding subsection (a)(1), a lien for the furnishing of labor, equipment, materials or supplies on property other than residential property may be claimed pursuant to this section, and amendments thereto, within five months only if the claimant has filed a notice of extension within three months since last furnishing labor, equipment, materials or supplies to the job site. Such notice shall be filed in the office of the clerk of the district court of the county where such property is located and shall be mailed by certified and regular mail to the general contractor or construction manager and a copy to the owner by regular mail, if known. The notice of extension shall contain substantially the following statement: Notice of Extension to File Lien; Name of Subcontractor or Supplier; Address of Subcontractor or Supplier; Telephone Number of Subcontractor or Supplier; Name and/or Number of Job; and Address of Job Site. Filing of such notice extends the time for filing a lien to five months for the above subcontractor, supplier, or other person providing materials and labor on property owned by: Owner's Name (if known); and Owner's Address (if known).

The five month filing deadline only applies to non-residential property. There is no extension for filing a lien on residential property. To obtain an extension, the contractor must still file a notice of extension within the original four month period (or three months for subcontractors). The notice of extension must satisfy the statutory requirements, which includes information not required in the actual lien statement itself, such as the address of the job site and telephone number.

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*By Mark A. Andersen*
*Barber, Emerson, Springer, Zinn & Murray, L.C., Lawrence*

KANSAS SUPREME COURT

***GENERAL BUILDING CONTRACTORS V. BOARD OF SHAWNEE COUNTY COMMISSIONERS***

**SHAWNEE DISTRICT COURT - AFFIRMED**

**NO. 89,029 - 26 Pages - April 18, 2003**

Eminent Domain - Home Rule

FACTS: Shawnee County voters approved a one-quarter of one-cent sales tax to be used for economic development. Shawnee County hired an economic development specialist, formed a Joint Economic Development Organization (JEDO) with the City of Topeka, and after availability and suitability studies, the JEDO began acquiring property in southern Shawnee County for an industrial development site. The JEDO successfully acquired options for most of the property, but Shawnee County commenced eminent domain on the small remaining portion of acreage owned by General Building Contractors (GBC) and Robert Tolbert because time was of the essence in negotiations for usage of the property. GBC and Tolbert filed a separate injunction action to prohibit the county's eminent domain proceeding and the court consolidated the actions. The district court found no merit in GBC's and Tolbert's claim that Shawnee County's petition was defective for lack of statutory authority. The district court concluded that Shawnee County could exercise eminent domain actions under its home rule powers, there was no injury other than money damages, no violation of due process, and GBC and Tolbert were not entitled to an injunction.

ISSUES: May counties exercise the power of eminent domain to take property for use in economic development? Did Shawnee County lawfully exercise its power of eminent domain? Does the proposed taking meet the "public purpose test"? Did the district court abuse its discretion when it denied injunctive relief to GBC and Tolbert?

HELD: The Court held that although the issue of an injunction by appellate decision was not appropriate, GBC and Tolbert clearly raised the question of the county's power to exercise eminent domain proceedings to acquire property for industrial and economic development and the matter is one of considerable public interest. The Court held Shawnee County has the power of eminent domain under home rule and related statutes, such power of eminent domain is to be exercised by resolution rather than motion, the taking of private property for industrial and economic development is a valid public purpose, none of the four prerequisites of *Wichita Wire, Inc., v. Lenox*, 11 Kan. App. 2d 459, 462, 726 P.2d 287 (1986) for the granting of temporary or preliminary injunctions were met, and the trial court correctly denied the requested injunction.

STATUTES: K.S.A. 12-2901 et seq.; K.S.A. 12-2904a(a)(2); K.S.A. 19-101, -101a, -101a(a)(1)-(32), -101a(b), (c), -101b, -101c; K.S.A. 19-3801 et seq.; K.S.A. 19-4101 et seq.; K.S.A. 19- 4103; K.S.A. 20-3019(c); K.S.A. 26-201; K.S.A. 26-501 et seq.; K.S.A. 26-502, -510(b); K.S.A. 60-901 et seq.

***BUTLER COUNTY R.W.D. NO. 8 V.YATES***

**BUTLER DISTRICT COURT - AFFIRMED**

**NO. 87,548 - 17 Pages - March 7, 2003**

Eminent Domain

FACTS: Water District ("District") built water tower on property adjoining Yates' residence. Yates filed suit to enforce restrictive covenants and to vacate special use permit granted to the District. District responded by adding Yates' property as a taking in its pending condemnation proceeding. Appraisers valued Yates' restrictive covenant interest at $500. Yates appealed and requested jury trial. Over Yates' objection, District's experts testified the appraised value of Yates property was same before and after the restrictive covenant interest was condemned. Yates sought $119,000. Jury awarded Yates $5,000 judgment. Yates appealed, arguing a governmental entity that claims it paid just compensation for the taking of private property cannot then assert at trial that value of the interest taken was zero.

ISSUE: Damages in Eminent Domain

HELD: Jury's verdict stands. Under unique facts of case, condemner's experts' testimony opining a difference of zero dollars in the before and after value of the partially taken property was properly admitted and legally sufficient as a measure of just compensation under K.S.A. 26- 513(a). Issue of whether District is required to compensate landowners for taking of restrictive covenant rights arising from public's need for water was not properly before the court and will not be considered.

STATUTES: K.S.A. 2002 Supp. 60-2103(h); K.S.A. 20-3018(c), 26-513(c) and (e).

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nevertheless relied upon other provisions as to reformation when necessary to conform to a settlor's intent and for retroactive modification to achieve a settlor's tax objectives.

The second change that was sought and approved was to change the word "shall" to "may" in connection with distributions to beneficiaries. The trustees were concerned that SRS or other creditors could reach the interests of the beneficiaries under the authority of State ex. rel. *Secretary of Social and Rehabilitation Services v. Jackson*, 249 Kan. 635, 822 P. 2d 1033 (1991), if mandatory distributions were provided. The Supreme Court indicated that the holding in *Jackson* could not have been anticipated. The Court held the change was consistent with the testator's "probable and actual intent."

The third change that was approved was to authorize the trust to be divided into three separate shares that could each qualify as a qualified subchapter S trust (QSST). The trustees again relied on a mistake by the scrivener in failing to include a provision granting the trustees the necessary flexibility for division into separate shares. The Court cited Revenue Ruling 93-79 as to IRS recognition of prospective state court modifications of a trust to qualify as a QSST.

The Supreme Court affirmed the Reno County District Court's approval of all three modifications. It found that the modifications did not adversely affect achievement of the trust's purposes and did not impair the rights of any beneficiary.

***CORY V. FAHLSTROM***

212 F.R.D. 593

(February 11, 2003)

Person who was party to a will contest in state court brought federal court suit against executrix who brought the will contest, attorneys for the executrix, and the state court judge alleging constitutional violations. Judge Marten granted summary judgment for the defendants relying upon the "*Rooker-Feldman* doctrine," which precludes a party losing in state court from seeking what in substance would be appellate review in a lower federal court.

***STAFFORD v. CRANE***

241 F. Supp. 2d 1249

(December 30, 2002)

Judge Vratil held an irrevocable trust was void *ab initio* where it was established by an attorney in fact operating under a general power of attorney that included no specific authority to create a trust. The purported settlor was entitled to reimbursement (plus prejudgment interest) from the trustee for misappropriated funds.

The new Kansas Power of Attorney Act would not change this holding.

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dence to his children, with a formally reserved life estate and the children's oral promise to reconvey the property to the taxpayer at his request, was an incomplete transfer for gift and income tax purposes, even though the children had to be sued to enforce the promise. P.L.R. 200308046.

#### *12. Marital Deduction Not Allowed For Widow's Trust*

The Tax Court denied the estate tax marital deduction for a bequest in trust held exclusively for the Decedent's widow during her lifetime, because the trust did not meet the technical requirements of being either a qualifying terminable interest property (QTIP) trust or of a general power of appointment trust, even though the trust assets would be included in the widow's gross estate. *Estate of Davis v. Comm'r*, T.C. Memo. 2003-55 (Feb. 28, 2003).

#### *13. IRS Liberalizes 60-Day Rollover Rules*

The 60-day rule applicable to indirect rollovers (from IRA to taxpayer to IRA) may be waived in certain hardship cases and in instances where the taxpayer fails to comply due to the fault of another. Even if the taxpayer does not qualify for an automatic waiver, he or she may still apply for a private letter ruling to seek relief. Rev. Proc. 2003-16.

#### *14. Estate Denied Income Tax Deduction For Interest Accrued On Deferred Legacies*

Decedent died on May 9, 1993, and left a will that provided each of the Decedent's four children with $1 million. The will also provided that $1.5 million was to be placed in a trust for grandchildren. These legacies were not paid in full until September 21, 1998. Because of the delay in satisfying the legacies, the estate incurred substantial interest expenses under South Dakota law. The estate argued that the interest paid on the legacies was a deductible expense for the estate for federal income tax purposes.

The court ruled that the estate was not entitled to a tax deduction for the interest incurred on the deferred legacies because the interest was not incurred as an ordinary and necessary expense of the estate's administration. The interest was incurred only because the executors failed to follow a comprehensive and explicit estate plan to use trust assets and/or stock to timely fund the legacies and thereby voluntarily left the legacies unfunded; therefore, the interest incurred was both unnecessary and not for the estate's benefit. *Schwan v. United States*, 91 AFTR 2003-1658 (D. S.D.)

#### *15. IRS Not Bound By Settlement Between IRS And Estate*

An IRS settlement offer can bind the IRS under basic contract law, but if there is not a "meeting of the minds" between the IRS and the Decedent's estate, there cannot be a binding contract. *Estate of Halder v. Comm'r*, T.C. Memo 2003-84 (March 25, 2003).

#### *16. Proceeds Of Life Insurance*

Trustor proposed a reformation that would remedy a scrivener's error and eliminate ambiguity in the Trust document. The IRS determined that the Trustor intended that the Trust corpus would not be included in her gross estate and the failure to include language giving effect to that intent was a scrivener's error.

The IRS ruled that reformation of the Trust will not be considered a release or transfer of any retained interest or power that would subject the Trust assets to inclusion in the Trustor's gross estate under Code § 2035, and Trustor does not possess any incidents of ownership over the insurance policy held in Trust, as reformed, under Code § 2042. P.L.R. 200314009.

#### *17. Measurement Of Trust's Business Participation For Passive Activity Loss ("PAL") Purpose*

In determining whether a Trust materially participates in a business for PAL purposes, the participation has to be measured by the activities of all those who run the business on behalf of the Trust, rather than just on the participation of its trustee. If their collective activities are enough to treat the Trust as a material participant in the business, its losses will be exempt from the PAL restriction. *Mattie K. Carter Trust v. U.S.*, 91 AFTR 2d 2003-1946 (N.D. Tex.).

#### *18. Capitalized Earning Method And 30% Discount Applied In Valuing Interest In Closely Held Corporation*

Decedent placed shares from a closely held corporation into a family limited partnership ("FLP"). Decedent's initial estate tax return reported the value of the shares owned by the FLP at a discounted value of $2,246,500. The IRS issued an estate tax deficiency notice valuing the decedent's interest in the FLP at $4,835,300.

The Tax Court held that the shares in the FLP had a discounted value of $3,358,209 at the time of the Decedent's death. The court stated that the capitalized earnings approach used by the IRS's valuation expert was the best approach for valuing the corporation, a long-established, financially successful, closely held operating company that has shown consistent profit and growth. The court rejected the net asset value approach used by the estate's expert. Under the capitalized earnings approach, the court concluded that the undiscounted total fair market value of the corporation was $24 million at the time of the Decedent's death. The court then applied discounts to reflect lack of marketability and lack of control. In reaching its decision, the court rejected the IRS's argument that a minority interest discount is inappropriate when the capitalized earnings approach is used. *Estate of Deputy v. Comm'r.*, T.C. Memo 2003-176 (June 13, 2003).

#### *19. First Ruling By IRS On Undivided Fractional Interests*

Through a favorable ruling for a syndicator, the IRS issued what is believed to be its first private letter ruling under Revenue Procedure 2002-22, which specifies the conditions under which the IRS will consider a request for a ruling that an undivided fractional interest in rental real property is not an interest in a business entity. The conditions cover ownership issues; voting issues; sharing issues covering proceeds, liabilities, profits, and losses; and various types of agreements including management, brokerage, leasing, and loan agreements. The conditions also address restrictions on alienation and business activities. The procedure does say that where the conditions are not satisfied, the IRS could still consider a request for a ruling where the facts and circumstances clearly establish that such a ruling is appropriate.

#### *20. Gift Tax Liability On Gift Through Assignments Of Partnership Interest*

Taxpayers, their children, and their children's partnership formed a family limited partnership. Taxpayers later assigned interests in the partnership to several assignees pursuant to an agreement that contained a formula clause. The formula clause provides that (1) Taxpayers' children, trusts for their benefit, and a certain charitable organization, are to receive interests having an aggregate fair market value of a set dollar amount, and (2) another charitable organization is to receive any remaining portion of the assigned interests. Taxpayers' children agreed to pay all applicable transfer taxes resulting from the transaction, including the estate tax liability under then Code § 2035 I.R.C 1986, that would arise if one or both Taxpayers were to die within three years of the date of the assignments. Pursuant to a second agreement, the assignees allocated the assigned interests among themselves in accordance with the formula clause, based on an agreed aggregate value of $7,369,277.60 for the assigned interests. The IRS disputed Taxpayers' gift tax returns for 1996 and claimed that Taxpayers owed additional gift taxes due in part because both Taxpayers improperly reduced the gross value by the actuarial value of the children's obligation to pay additional estate taxes attributable to the transaction.

The Tax Court held that Taxpayers' gifts had to be determined without reference to the contingent estate tax liability that their children assumed under the first agreement. Specifically, Taxpayers could not treat mortality-adjusted present values as consideration received that would reduce their gifts. *McCord*, 120 T.C. No. 13 (2003).

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KANSAS COURT OF APPEALS

***KITCHEN V. SCHMEDEMAN***
**SEDGWICK DISTRICT COURT - AFFIRMED**
**NO. 88,700 - 7 Pages - June 27, 2003**
Property - Deeds

FACTS: Kitchen signed contract to purchase real estate from Schmedemans. At closing, Kitchen delivered certified funds to title company's agent (Ayala) who was instructed to pay Schmedemans' mortgages, and Kitchen received warranty deed from Schmedemans. Ayala absconded with funds, and ultimately went to prison. Title company filed for Chapter 7 bankruptcy. Kitchen had to pay Schmedemans' mortgage to avoid losing the house. Kitchen filed petition against Schmedemans alleging breach of covenant of quiet enjoyment in warranty deed. Trial court granted summary judgment to Kitchen, finding Schmedemans signed and delivered warranty deed to Kitchen, and finding Alyala's deception was immaterial.

ISSUE: Warranty Deed

HELD: No Kansas case directly addresses issue. Warranty deed conveying subject property was passed from Schmedemans to Kitchen on date of closing. Although unfortunate situation, warranty deed obligated Schmedemans to deliver a deed free and clear of encumbrances. Because that did not happen, Schmedemans became liable to compensate Kitchen for loss sustained in clearing the title. Argument that Ayala acted as Kitchen's agent rather than agent for both parties is raised for first time on appeal and is not addressed.

STATUTE: K.S.A. 58-2203.

***WRIGHT V. SHEPHERD***
**DOUGLAS DISTRICT COURT - AFFIRMED**
**NO. 89,343 - 14 Pages - April 18, 2003**
Real Estate Broker's Commission

FACTS: Seller and broker entered into exclusive listing agreement providing for commission if a "sale or exchange is made or a purchaser is found who is ready, willing and able to purchase the property before the expiration of this listing." Broker found buyer who entered into a lease agreement. Seller paid broker the contracted fee on the monthly rental fees. Seller granted buyer an 18-month nonexclusive purchase option. Thirteen months after expiration of listing agreement, buyers purchased property without any assistance from broker. Broker sued for commission on the purchase of the property under the option contract. Trial court granted summary judgment to the seller finding the broker was unable to procure purchaser that was ready, willing, and able to purchase the property before expiration of the listing agreement.

ISSUE: Was the broker entitled to commission for sale of property pursuant to an option contract after expiration of the listing agreement?

HELD: Court affirmed trial court. Court stated that a real estate broker's entitlement to a commission is dependent on the express terms and conditions set forth in the listing agreement. Court held it was incumbent upon the broker to procure a purchaser ready, willing, and able to purchase the premises upon the terms of the listing agreement within the time provided by the listing agreement. Broker only procured a potential purchaser who was merely willing to lease the property with an 18-month purchase option. Court stated that to be entitled to a commission the broker could have easily included a provision in the listing agreement with mention of options to purchase and commissions to be paid therefrom.

STATUTES: No statutes cited.

***DAVIS ELECTRIC, INC. V. SHOWALTER***
**FINNEY DISTRICT COURT - AFFIRMED**
**NO. 89,044 - 7 Pages - February 28, 2003**
Mechanics Lien

FACTS: In foreclosure proceeding, trial court found liens of contractors and suppliers were preferred to June 21, 2000, the day before Security State Bank filed second mortgage securing a $295,000 note. Security appeals, based on "date of the earliest unsatisfied lien" provision in K.S.A. 60-1101 as amended in 1977.

ISSUE: Date of Mechanic's Lien

HELD: K.S.A. 60-1101 is interpreted and applied. No legislative history explains the 1977 amendment, but amendment cannot reasonably be interpreted to modify priority date of contractor working under single contract that has not been paid in full. Also, Security failed to protect its interests by requiring lien waivers. Trial court correctly decided the statutory liens were preferred to Security's second and third mortgages.

STATUTES: K.S.A. 60-1101; R.S. 1923 60-1401.

***MONEY V. FORT HAYS STATE UNIV. ENDOWMENT ASS'N***
**GRAHAM DISTRICT COURT - AFFIRMED**
**NO. 89,115 - 11 Pages - February 28, 2003**
Contracts

FACTS: Moneys were high bidders in auction of tracts of real estate owned by Endowment Association, and executed agreements for warranty deeds. When Endowment Association refused to approve the transactions, Moneys sought specific performance of the agreements. In cross motion for summary judgment, Association cited auctioneer's announcements that sales were subject to approval by Association's executive committee, and argued the sales agreements were conditional. Moneys did not file response prior to trial court granting summary judgment to the Association. In post-trial motion, Moneys asserted their belief the Association would have agreed to additional time to file a response, claimed no response could be filed until specific discovery was obtained, and sought to file their response to Association's cross-motion for summary judgment. Trial court denied Moneys' post-judgment motion. Moneys appeal.

ISSUES: 1) Summary Judgment, 2) Sale at Auction

HELD: Summary judgment standards stated. No matter what a party understands about its opponent's amenability to extension of summary judgment response time, the party must seek and obtain extension from district court before relying upon it. It is incumbent upon a party requiring additional discovery to defend a summary judgment motion to seek a continuance to conduct that discovery, pursuant to K.S.A. 2002 Supp. 60-256(f). Little Kansas case law on subject of auctions. General rule stated regarding manner, terms and conditions of sale. Under facts, auction seller adequately communicated the conditional aspect of the sale, and failure of that condition made the written agreement for warranty deed unenforceable.

STATUTES: K.S.A. 2002 Supp. 60-256(e) and (f); K.S.A. 60-260(b).

***DAVENPORT PASTURE, LP, V. MORRIS COUNTY BOARD OF COUNTY COMMISSIONERS***
**MORRIS DISTRICT COURT - AFFIRMED IN PART,**
**REVERSED IN PART, AND REMANDED WITH DIRECTIONS**
**NO. 87,768 - 16 Pages - February 7, 2003**
Property - Right of Access

FACTS: Davenport Pasture, LP, was the assignee of ranch property with north end of property contiguous to four platted and dedicated Morris County roads that were not maintained. Previous landowner asked Morris County Board of County Commissioners to open one of the roads to provide access to north end of ranch. Board vacated 2 of the 4 roads despite expert testimony of negative economic impact. After Davenport was assigned landowner's interest, it purchased land in an effort to gain access from a public road to the north end of ranch and applied for written damages from the Board for the cost of the newly purchased property. Board denied damages and Davenport filed petition in district court. District court granted motion for partial summary judgment to Davenport finding Board's vacation of 2 roads terminated Davenport's common-law right of access without compensation. Additionally, district court awarded damages to Davenport in the amount of $30,000 where it had requested damages in excess of $330,000. Board appeals.

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ISSUES: Was Davenport's common-law right of access denied without compensation? Did district court have jurisdiction to decide the amount of damages?

HELD: District court correctly reversed Board's arbitrary decision as being contrary to Kansas' recognition that a landowner's common-law right of access cannot be impaired without compensation. Review of decision entered pursuant to K.S.A. 60-2101(d) is to determine whether the Board's decision was within scope of authority, whether supported by substantial competent evidence, and whether it was fraudulent, arbitrary or capricious. District court had no decision from the Board before it on the amount of damages due Davenport and therefore, district court erred in allowing amendment of damages, conducting trial de novo, and arriving at award.

STATUTES: K.S.A. 2001 Supp. 68-102a; K.S.A. 68-107; K.S.A. 60-2101(d); K.S.A. 68-107.

## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF KANSAS

### *VAN SCHAACK LAND CO. V. HUB AND SPOKE RANCH CO.*
**No. 01-1227-JTM - February 10, 2003**
**244 F.Supp.2d 1231**

Real Estate Broker' Commission

FACTS: Real estate broker, Van Schaack, sued former client, Hub and Spoke Ranch Company, and former client's president, Jess M. Sun ("Sun"), for breach of contract and fraud. Sun signed an Exclusive Right-to-Sell contract with Van Schaack for the sale of ranch property. The contract provided that Hub and Spoke pay Van Schaack a commission equal to five percent of the gross sales price of the ranch and that all negotiations for the sale of the ranch would be conducted exclusively through the broker, to whom Hub and Spoke would refer all inquiries received in any form from all real estate brokers, salespersons, possible purchasers, tenants, or any other interested parties. In May 2000, Sun notified Dawkins that he could not sell the ranch because of tax implications. Sun told Dawkins that he would have to take the ranch off the market and asked what amount of commission Dawkins would accept and offered to pay Van Schaack=s expenses. Dawkins offered to accept a $100,000 commission, which Sun rejected. On June 2, 2000, Sun signed a deal to sell the ranch to a buyer ("Henderson"). Sun never informed Van Schaack of his negotiations or deal to sell the ranch. Van Schaack presented to Sun a written contract to purchase the ranch from another buyer. Sun rejected the offer. Sun continued to negotiate a deal with Henderson through his attorney. On January 18, 2001, Sun closed the deal with Henderson and sold the ranch. Van Schaack brought an action for fraud and breach of contract. The defendants moved for summary judgment on both claims, while the plaintiff moved for partial summary judgment seeking a determination that the contract was breached by the defendants.

ISSUES: 1) Breach of Contract, 2) Fraud, 3) Summary Judgment

HELD: Hub and Spoke Ranch Company and Sun breached duty of referral under listing contract by not referring Henderson to Van Schaack and by not informing Van Schaack of the negotiations, sale and purchase agreement or the amendments to the agreement with Henderson. The breach of the referral provision of the Exclusive Right-to-Sell contract and the subsequent selling of the property on their own obligated Hub and Spoke to pay the contracted commission. Summary judgement standard stated, but factual issues precluded summary judgment on fraud claim.

STATUTES: No statutes cited.

### *SCHMELZLE V. WAL-MART, INC.*
**NO. 00-2482-CM - September 23, 2002**
**230 F.Supp.2d 1254**

Premises Liability

FACTS: Customer, Rosemary Schmelzle, was allegedly injured when she slipped and fell on water on floor at Wal-Mart. Schmelzle brought personal injury action against Wal-Mart and Pepsi-Cola General Bottlers, Inc. ("Pepsi"). It was alleged that a self-service cooler which Pepsi leased to Wal-mart leaked water, and that Wal-mart and Pepsi's negligence in not fixing the leak or cleaning up the water caused her to slip and fall. The week before Schmelzle fell, Wal-mart had called Pepsi to come fix the cooler because it was leaking. Pepsi sent an employee to repair the cooler. The employee repaired the cooler. Between the date of the repair and the date of Schmelzle's accident, Pepsi was not notified of any further problems with the cooler. Pepsi moved for summary judgment, and moved to strike, or in the alternative to reply to store's memorandum in opposition and customer's memorandum in opposition.

ISSUE: Liability of absent vendor for negligence under Kansas law.

HELD: Negligence standards stated. Kansas liability law provides that in a premises liability case, to be held liable, the party charged must exercise control over the premise in question. An "absent vendor" has no such control, and a duty arises only when the vendor has notice of the alleged dangerous condition and is provided with an opportunity to remedy the dangerous condition. Pepsi was not provided notice of a dangerous condition, sufficient to give rise to a duty of care owed Schmelzle. Motion for summary judgment granted on the basis that Pepsi did not have sufficient notice of leaking from cooler, and therefore, it did not owe duty to Schmelzle. All other motions were denied.

STATUTES: No statutes cited.

### *SMITH V. MISSION ASSOCIATES LTD. PARTNER*
**No. 01-2416-JAR - October 4, 2002**
**225 F.Supp.2d 1293**

Housing Discrimination

FACTS: Richard Smith, a white male who worked for an apartment complex owned by Mission Associates Limited Partnership ("Mission Associates"), and his white girlfriend, Wardah Muhammad, and her biracial sons, daughter, and her daughter's black boyfriend sued the landlord of the apartment complex, Heritage Hills, claiming housing discrimination under Fair Housing Act (FHA) and Civil Rights Act, defamation and outrage. Defendants moved for summary judgment. Smith was a maintenance supervisor for Heritage Hills, and as part of his compensation, he received a rent-free apartment in Heritage Hills. Throughout his employment, Smith changed apartments four times to provide adequate space for the persons living with him. Smith signed a month-to-month lease for the apartment, which was the custom for all Heritage Hills' employees. An addendum to the lease, which Smith also signed, stated that if his employment ended he had two weeks to vacate the property. Plaintiffs allege that comments and conduct of defendants created a hostile living environment at Heritage Hills. The discrimination in services claim brought by one of Muhammad's sons, Dwayne McFadden, was because he was not allowed to use the weight room on one occasion. Muhammad's daughter and her boyfriend made a claim for disparate treatment based on racial discrimination.

ISSUES: 1) Discrimination under the FHA, 2) Discrimination under the Civil Rights Act, 3) Defamation under Kansas Law, 4) Outrage.

HELD: Standards for summary judgment stated. Mission Associates Limited Partnership's motion for summary judgment granted in part and denied in part. Smith, Muhammad, and the biracial children had standing to bring FHA case, because they were a protected class and of racial minority status. With regard to the hostile environment (living) claim, the plaintiffs were able to show that the harassment which created the hostile environment was based on race and that the actionable conduct was sufficiently severe or pervasive to alter their living conditions and create an abusive environment, and that the defendants knew or should have known about the conduct; therefore, the plaintiffs satisfied the elements for prima facie case of housing discrimination, under FHA and

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Civil Rights Act. The plaintiffs were not afforded disparate treatment when rent-free lease was terminated after Smith ceased performing maintenance work in complex. Dwayne McFadden failed to establish that denial of weight room usage was disparate treatment. The daughter and her boyfriend seeking to view an apartment could not establish disparate treatment arising out of failure to show apartment to her and boyfriend. Smith was successful in establishing his defamation claim under Kansas law, but failed to establish an outrage claim.

STATUTES: 42 U.S.C.A. ' 1982; Civil Rights Act of 1968; '' 804(a-d), 818, as amended, 42 U.S.C.A. '' 3604 (a-d), 3617; Civil Rights Act of 1968, ' 810(a), as amended, 42 U.S.C.A. ' 3610(a).

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS
***IN RE LARRY LEON AND***
***CONNIE FAYE ELLIS***
**NO. 02-42070-7 - November 21, 2002**
Property - Homestead

FACTS: Larry Leon and Connie Faye Ellis ("Debtors") filed for Chapter 7 bankruptcy relief and claimed that a 160 acre tract of real estate was exempt as their homestead. The trustee learned that the 160 acre tract contained not only their personal home, but also two other houses that they have rented out. The first rental home is approximately a block from the Debtors' residency and fronts the same county road. The second rental home is located behind the Debtors' personal home and must be accessed by crossing the Debtors' property. Both rental homes are currently occupied by families who are not related to the Debtors.

ISSUES: May the Debtors exempt the two rental homes as part of their homestead?

HELD: The Court was convinced that both rental houses can be partitioned from the Debtor's homestead without interfering with the Debtor's occupation and use of their homestead. The two rental homes, and the land appurtenant to them, are not exempt pursuant to K.S.A. '60-2301. Therefore, because partition is practical, the homes must be partitioned from the Debtors' homestead.

STATUTES: K.S.A. '60-2301.

# Other legislation of interest to real estate, probate and trust practitioners

*By Whitney B. Damron*
*KBA Lobbyist, Topeka*

***Kansas Power of Attorney Act***

HB 2034 recodifies the Kansas Power of Attorney Act. Selected features of the bill are as follows:

- The bill requires a durable power of attorney be signed, dated, and acknowledged. Prior law was silent.
- General powers may be granted without including in the power of attorney an exhaustive list of all powers.
- A definitions section is provided. Prior law had none. "Attorney in fact" is defined as an individual, corporation, or other legal entity appointed to act as agent of a principal in a written power of attorney.
- The powers of an attorney in fact are listed. Included in the list of powers is the ability to alienate the homestead without the joint consent of husband and wife when that relationship exists, if the power of attorney specifically gives the attorney in fact the power to sell, transfer, and convey the homestead, gives the legal description and street address of the property, states that by the execution of the power of attorney it is the intention of the parties that the act will constitute joint consent required by the Kansas Constitution, and the power of attorney is executed by both husband and wife in the same instrument.
- Those powers not delegated to the attorney in fact are listed. For example, an attorney in fact cannot make, execute, modify, or revoke a "do not resuscitate" directive for the principal. Likewise, an attorney in fact cannot make, execute, modify, or revoke a durable power of attorney for health care decisions for the principal.
- Instances which terminate the power of attorney between the principal and attorney in fact are listed.
- A principal may appoint more than one attorney in fact and the conferred authority may be exercised either jointly or severally. In the absence of specification, the attorney in fact must act jointly.
- The fiduciary standard of care is outlined.
- Regarding third party liability, if there is reasonable reliance on the durable power of attorney, there is no liability to the principal.
- Reasonable compensation and reimbursement for reasonable expenses are allowed.
- A durable power of attorney executed in another state is valid.
- The bill adopts by reference 50 U.S.C. 591 of the Soldiers and Sailors Relief Act.

***Child in Need of Care Guardian***

HB 2035 amends the Child in Need of Care Code dealing with the appointment of a guardian ad *litem* to represent a child's best interests and provides that when the child's position is not consistent with the determination of the guardian ad *litem* as to the child's best interest, the guardian ad *litem* shall inform the court of the disagreement. The guardian ad *litem* or the child may request the court to appoint a second attorney to serve as attorney for the child, and the court, on good cause shown, may appoint such second attorney. The attorney for the child shall allow the child and the guardian ad *litem* to communicate with one another but may require communications to occur in the attorney's presence.

***Kansas Judicial Council — Docket Fees***

SB 36 raises the docket fees by $1 for a two-year period to help fund operations of the Kansas Judicial Council. The moneys are to be deposited in a newly created Judicial Council Fund. The bill also allows the use of moneys in the Publications Fee Fund to be used for operating expenses of the Council.

The bill clarifies that the Kansas Judicial Council is an independent agency within the Judicial Branch of state government, shall submit its own budget, and may adopt its own pay plan and personnel rules. Membership of the Council is altered slightly to allow the Chairperson of the House Judiciary Committee to either serve on the Council or select a designee

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One practical consideration of extending the deadline to file a lien by one month (two months for subcontractors), and actually waiting to file the lien statement at the end of the five month period, is that it will defer the lien foreclosure deadline. From a practitioner's viewpoint, however, filing both a notice of extension, along with the actual mechanic's lien statement, within the original four month period (or three months for subcontractors) may have some other practical benefits. For example, by filing both a notice of extension and the mechanic's lien statement within the original time period, the practitioner may have additional time to discover and cure fatal defects in the mechanic's lien statement prior to the expiration of the extended five month filing deadline, assuming that the notice of extension was properly prepared and filed.

Prior to these recent changes, the preparation and filing of mechanic's liens was already a complex area of the law. On several occasions, practitioners have failed to comply with the existing statutory requirements for preparing and recording liens on real property, with consequences fatal to the contractor's lien rights. The ability to extend the filing deadlines for mechanic's liens on non-residential property will provide uninformed practitioners with even more opportunity for error.

**Residential Construction Defects**

Substitute for HB 2294 establishes civil procedure requirements relating to the filing of a lawsuit based on construction defects to a dwelling. The provisions of the bill will not apply to actions arising from personal injury or death or when the defect of the construction is substantial enough to be uninhabitable. "Dwelling" means a single-family house, duplex or multifamily unit designed for residential use in which title to each individual unit is transferred to the owner under a condominium or cooperative system and shall include common areas and improvements that are owned or maintained by an association or by members of an association. A dwelling includes the systems and other components and improvements that are part of a single or multifamily unit at the time of construction, but excludes certain manufactured housing.

If an action by a claimant is filed without the required service of notice, the action will be dismissed without prejudice, upon the motion of the contractor filed within 60 days of service of process. An action cannot be refiled until the parties have complied with the provisions of the bill. The statute of limitations will be tolled if the claimant gives notice of the claim within 90 days of the dismissal. If the statute of limitations would expire during the time period necessary for parties to comply with the provisions of the bill, the claimant's notice of claim will toll the statute of limitations for 180 days after the latest of the following: (i) the date the claimant serves or mails notice of the claim; (ii) the date agreed upon for the contractor to make payments; or (iii) the date agreed upon for the contractor to completely remedy the construction defect.

Before an action by a claimant is filed, the claimant must serve written notice of claim on the contractor. The initial notice of claim shall state that the claimant asserts a construction defect claim, and the notice of claim shall describe the claim or claims in detail sufficient to determine the general nature of the alleged construction defects. Within 15 days of the notice of claim, the contractor must serve a copy of the notice to each subcontractor. Within 30 days after the notice of claim, each contractor who received the notice must serve a written response on the claimant. The written response must do one of the following: (i) propose to inspect the dwelling, (ii) offer to remedy the defect at no cost to the claimant with a specification of the date when the work is to begin and a date when the work will be completed, (iii) offer to compromise and settle the claim by monetary payment, or (iv) state that the contractor disputes the claim and will neither remedy the alleged defect nor compromise and settle the claim.

If the contractor refuses service of notice, disputes the claim, does not respond to the notice within the allocated time, does not begin or complete work on the defect, or does not make the payment in the time allowed, the claimant may bring an action without further notice. The bill contains the procedure to be followed when the claimant accepts or rejects the offers of the contractor. Other procedures are outlined in the bill for the remodel of a dwelling and situations involving a property manager of an association.

The bill also requires that each contractor who constructs a new residential dwelling shall, within 30 days after the close of the sale, provide in writing to the initial purchaser of the residence (i) the name, license number if applicable, business address and telephone number of each subcontractor who performed any work related to the construction of the dwelling, and (ii) a brief description of the work performed by each subcontractor identified. The bill does not supersede any express warranty, implied warranty or other provisions of a contract between the contractor and the claimant.

**Property Tax**

HB 2205 amends the definition of "fair market value" in KSA 79-503a, and provides that in the determination of fair market value for property tax purposes of any real property subject to a special assessment, the value may not be determined by adding the present value of the special assessment to the sales price. The original bill dealt with the issue of disclosure by the sellers of property that certain special assessment or fees apply to the property. The House Committee on Judiciary struck those disclosure provisions.

**Eminent Domain**

HB 2032 amends statutes dealing with eminent domain and relocation assistance to require such assistance be paid by the State, its agencies and political subdivisions even when federal money is not used for projects. The bill extends relocation assistance payment requirements to include projects where no federal assistance is available. Current law provides that the State, any agency, and any political subdivision "may" pay fair and reasonable relocation payments to displaced persons for projects under which federal financial assistance is used to pay all or part of the costs of the project. The bill also changes the word "may" to "shall" where federal money is utilized. The relocation assistance when federal money is involved must be paid in compliance with the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. When relocation assistance is to be paid to displaced persons for projects that do not involve federal funding, payments under the federal uniform law will be deemed fair and reasonable, although voluntary negotiation of relocation amounts between the parties is permitted. The bill also provides that a party dissatisfied with the award of the appraisers in eminent domain proceedings if an award is appealed shall pay the docket fee of a new court action. The bill also clarifies that an interested party may appear in person or by an attorney.