



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

December 28, 1979

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 79- 312

The Honorable Mike Meacham
State Representative, 83rd District
641 North Woodlawn
Wichita, Kansas 67208

Re: Probate Code--Provisions Applicable to All
Estates--Corporate Fiduciaries

Synopsis: Following the amendment of K.S.A. 59-1701 in 1967, a foreign corporation may not act as fiduciary in the administration of an estate, except as authorized by K.S.A. 59-1707 and 59-1708. Since a trustee is included in the term "fiduciary" as defined by K.S.A. 59-102(2), a foreign corporation may not serve in this capacity for a non-resident decedent under the terms of a trust created under the decedent's will. K.S.A. 59-806(iii). As it dealt with K.S.A. 59-1701 prior to the 1967 amendment, Attorney General Opinion No. 61-342 is hereby withdrawn.

* * *

Dear Representative Meacham:

You have requested the opinion of this office concerning the continuing validity of a previous opinion of this office in light of a subsequent change in the statute it construed. Specifically, you wish to know whether Attorney General Opinion No. 61-342, which construed G. S. 1949 (now K.S.A.) 59-1701, is still a correct reflection of the law, in that the statute in question was significantly amended in 1967 (L. 1967, ch. 314, §11).

K.S.A. 59-1701 is a part of the Kansas Probate Code, and deals with the power of a bank or other corporation to serve as a fiduciary in the administration of a decedent's estate. First enacted in 1939 (L. 1939, ch. 180, §131), the statute currently reads as follows:

"No bank or other corporation, unless it is organized under the laws of and has its principal place of business in this state, or is a national bank located in this state, shall be appointed or authorized directly or indirectly to act as a fiduciary in this state, except as provided in K.S.A. 59-1707 and 59-1708, and amendments thereto and no officer, employee or agent of such bank or corporation shall be permitted to act as a fiduciary in this state, whether such officer, employee or agent is a resident or a nonresident of this state, when in fact such officer, employee or agent is acting as such fiduciary on behalf of such bank or corporation; nor shall any bank or other corporation be appointed guardian of the person of a ward." (Emphasis added.)

The above underscored portion was added in 1967, and replaced the phrase "except in ancillary proceedings" which had appeared in the statute originally. No other changes have been made in the statute since its enactment.

As may be seen from the wording of the statute, it appears to have the effect of greatly limiting the ability of a non-resident corporation to serve as a fiduciary. This latter term is defined by K.S.A. 59-102(2) to include trustees, and it is in this context which your inquiry is raised. More precisely, you wish to know if a non-resident corporation may serve as a trustee for property in Kansas which is left by a non-resident decedent. An earlier opinion of this office (61-342) issued by then-Attorney General Ferguson in 1961 construed K.S.A. 59-1701 so as to reach the conclusion that such activity was not barred thereunder. However, significant changes have occurred in Kansas probate law since that time, and it is our opinion that these changes require that the earlier opinion must now be withdrawn, and an opposite conclusion reached.

The Honorable Mike Meacham
Page Three
December 28, 1979

It should first be noted that the amendment made to K.S.A. 59-1701 in 1967 was but one part of an entire package which was enacted that year dealing with Kansas statutes on the subject of non-resident decedents' estates. The changes were proposed by Senators Bennett and Gaar, and appeared as Senate Bill No. 304. In addition to striking the reference to ancillary proceedings in 59-1701, the measure also contained the following new provisions:

"Sec. 3. The law of this state respecting proceedings, procedures and substantive rights relating in any way to the property in this state of a nonresident decedent and its disposition, including by way of illustration, but not limited to, all matters relating to (i) the commence and conduct of an administration, (ii) distributions during or at the conclusion of an administration, (iii) any trust created under the will of a nonresident decedent, shall apply as if the decedent had been a resident of this state . . . (now K.S.A. 59-806.)
(Emphasis added.)

"Sec. 7. Nothing in this act authorizes any 'foreign corporation,' as that term is defined in K.S.A. 59-1701, to act in any fiduciary capacity except as such foreign corporation is expressly permitted so to act by the provisions of K.S.A. 59-1701." (now K.S.A. 59-810.) (Emphasis added.)

Both of the above sections, in addition to the change in K.S.A. 59-1701 (which appeared at section 11), were passed in their original form by both the Senate and House Judiciary Committees, and by the full Senate and House. The only piece of legislative history of any significance appears in the minutes of the House Judiciary Committee for April 10, 1967, wherein Senator Bennett explained that the measure, which he had co-sponsored, was patterned after Missouri law. A review of that state's statutes in fact reveals that provisions similar to previously-quoted sections 3 and 7 do exist at R.S. Mo. 473.675 and 473.694. This is as far as the similarity goes, however, for Missouri law explicitly allows foreign corporations to serve as fiduciaries. R.S. Mo. 362.600.

The Honorable Mike Meacham
Page Four
December 28, 1979

If all three of these changes are considered together, it is apparent that their effect is to make a trust established by a non-resident decedent's will subject to the laws of this state if property in this state is involved, and to make it clear that non-resident corporations may not act in a fiduciary capacity, including that of a trustee, except as allowed under K.S.A. 59-1707 and 59-1708. This represents a significant change from the previous scope of the statute, as will be shown in the succeeding paragraphs.

When Attorney General Opinion No. 61-342 was issued, the language of 59-1701 allowed non-resident corporations to act as fiduciaries in "ancillary proceedings." The opinion seized upon this exception as crucial, noting that:

"As used in probate law, an 'ancillary proceeding' is generally defined as any administration proceeding occurring in a state other than that of the decedent's domicile. See definitions of 'ancillary administration,' 'ancillary administrator,' 'ancillary letters' and 'ancillary proceeding' in 3 Words & Phrases, (Perm. Ed.) 562-563, 564-565.

"G.S. 1949, 59-616 provides that 'no will shall be effective to pass real or personal property unless it shall have been duly admitted to probate.' Therefore, before Kansas real estate can pass under the will of a non-resident decedent, such will must be admitted to probate in Kansas. Its admission is authorized under G. S. 1949, 59-2229 and 2230. The proceeding under those statutes would be an 'ancillary proceeding' since it would occur in a state other than that of the decedent's domicile. That being so, the prohibition of 59-1701 against a foreign corporation acting as a fiduciary would not apply."

Now, however, this language has been removed, to be replaced with a statement that such fiduciaries may act only as provided by K.S.A. 59-1707 and 59-1708. These statutes, it should be noted, were enacted in 1939 along with the original 59-1701, and set forth specific types of powers which a non-resident fiduciary may exercise. K.S.A. 59-1707 authorizes such individuals or entities to assign, extend, release, satisfy or foreclose any mortgage, judgment, or lien, or collect any debts secured thereby

The Honorable Mike Meacham
Page Five
December 28, 1979

belonging to the estate. The statute by implication also allows them to sell, lease or mortgage any real estate acquired by execution or judicial sale. Even more limited is K.S.A. 59-1708, which provides that non-resident fiduciaries may sue or be sued in the courts of this state.

What import, then, is to be drawn from the present statutory framework which exists in Kansas regarding non-resident corporate fiduciaries who are in the position of trustees? Testamentary trusts created by the will of non-resident decedents are clearly to be administered under Kansas law, yet foreign corporations are allowed to act by K.S.A. 59-810 only as expressly permitted by 59-1701. That statute no longer contains the broad language in effect when Attorney General Opinion No. 61-342 was written, but instead is restricted by the express powers set forth in 59-1707 and 59-1708. Accordingly, it is our opinion that the plain effect of these statutes is to prohibit the administration of a testamentary trust in this state by a non-resident corporation. While it might be argued that this is a harsh result where a non-resident sets up a trust that has only a small portion of the trust property in Kansas, the passage of K.S.A. 59-806(iii) and 59-810, together with the simultaneous amendment of 59-1701, would clearly seem to envisage this result.

Finally, it should be noted that several Kansas commentators have reached the same conclusion as that reached herein regarding the effect of K.S.A. 59-1701, as amended. See, Laing, Does Kansas Need the Uniform Probate Code? 42 J.B.A.K. 139, 186 (1973), and Logan, Survey of Kansas Law: Estate Planning and Future Interests, 17 K.L.R. 455, 478 (1969). Perhaps more significant are the comments made by Senator Robert F. Bennett in his survey of the statutory changes made by the 1967 Legislature, which appears at 36 J.B.A.K. 169 (1967). Senator Bennett, one of the co-sponsors of the changes which have been discussed above, as well as a member of the Senate Judiciary Committee which considered these amendments, notes:

"Several changes were made in the Probate Code. One of general interest is Senate Bill 304 which generally changes all of our law with reference to the administration of estates of non-resident decedents. The law was patterned on the provisions of the Missouri Code. Under the provisions of this act, Kansas has jurisdiction of any property of a non-resident, whether real or personal, tangible or intangible, if the same is located in this state.

The Honorable Mike Meacham
Page Six
December 28, 1979

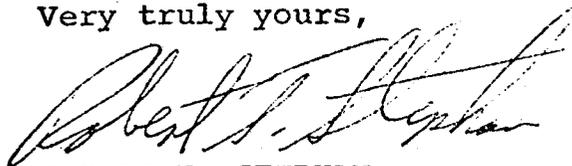
The administration is no longer ancillary and is conducted in the same manner as if the decedent were a resident. Kansas law applies to the administration and distribution of the estate, including any trusts created under the will of the decedent.

.
"The law amends K.S.A. 59-1701 so that from and after its effective date a foreign bank or foreign corporation may not act as a fiduciary even in what heretofore has been known as ancillary proceedings." (Emphasis added.)

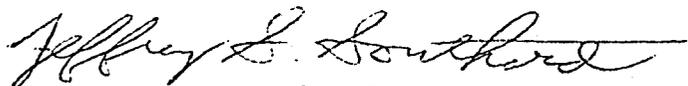
While not conclusive as indicating the legislative intent behind the measure, the above does provide some insight into the way one co-sponsor felt about the legislation. Although such a result may be considered unduly restrictive, the legislature has, in our opinion, made its views known on the subject, and any remedy must be had through it.

In conclusion, it is our opinion that, following the amendment of K.S.A. 59-1701 in 1967, a foreign corporation may not act as fiduciary in the administration of an estate, except as authorized by K.S.A. 59-1707 and 59-1708. Since a trustee is included in the term "fiduciary" as defined by K.S.A. 59-102(2), a foreign corporation may not serve in this capacity for a non-resident decedent under the terms of a trust created under the decedent's will. K.S.A. 59-806(iii). Because it dealt with K.S.A. 59-1701 prior to the 1967 amendment, Attorney General Opinion No. 61-342 is hereby withdrawn.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJs:JSS:gk