Colleagues, in response to a proposal to amend Section 456.4-420, R.S.Mo. previously circulated by Mike Blanton and posted on this message board, I wish again to share the latest version submitted to the General Assembly as an alternative to that proposal (which evolved to some extent from the November 2017 version previously considered and overwhelmingly approved by the Probate and Trust Division, but which also was shared, commented upon and approved by the Fiduciary Litigation Committee and other members of the Probate and Trust Division.)

(7) For trust instruments created after the effective date of this subdivision, filing a motion, pleading, or other claim for relief concerning a serious breach of trust by a trustee that would be sufficient cause for removal under sections 456.7-706.2(1) and 456.10-1001, unless and only to the extent the trustee's conduct or inaction is or could be permitted by the trust instrument under section 456.10-1008, or has been consented to or ratified by the interested person under section 456.10-1009.

To reiterate the rationale behind the additional limitations, I offer a truncated version of comments I submitted in writing (augmenting my oral testimony before several Senate committees) considering both bills as well as Senator Scott Sifton, who unsuccessfully attempted to mediate a compromise version between our two proposals.

Missouri law on No contest clauses

The current law in Missouri is that no contest clauses are enforceable based on the long-held Missouri public policy that testators and trust grantors have the freedom to dispose of their own property as they wish. *In re Chambers' Estate*, 322 Mo. 1086, 1092, 18 S.W.2d 30 (Mo. banc 1929). *See also Rossi v. Davis*, 133 S.W.2d 363 (Mo. 1939), *Commerce Trust Co. v. Weed*, 318 S.W.2d 289 (Mo. 1958), and *Cox v. Fisher*, 322 S.W.2d 910 (Mo. 1959). The Missouri Supreme Court succinctly summed up the rationale for enforcement of such clauses as follows: "[W]hen a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall, without compliance with that condition, receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes." *Rossi,* 133 S.W.2d at 375-376, citing, among other cases, *Smithsonian Institution v. Meech,*169 U.S. 398 (1898). Trust law in this respect is entirely consistent with the law as it pertains to wills.

Given this fundamental tenet of Missouri law, a person should not be forced to give money to anyone, including his children, especially if they are aggressively litigious to others in the family. As a person should not be forced to give such money during a person's lifetime, likewise they should not be forced to give that money on death. Put another way, no child (or any person) is entitled to receive the property of his parents (or another) in life or at death. Consequently, a grantor has had (and should continue to have) the freedom under Missouri law to provide a gift to a litigious child at his death while, at the same time, protecting his other children, trustees, or beneficiaries from being dragged into court.

In keeping with the long-standing public policy that a grantor has the right to dispose of property as he or she sees fit, a Missouri grantor should be able to place conditions on property gifts to protect trustees from exercising express discretion in administering the trust or to protect the trustees from other frivolous claims. As it is common for a grantor in Missouri to name a trusted child or family member to serve as trustee of his or her trust, grantors should thus also continue to be permitted to protect their children or other named trustees from lawsuits by other litigious beneficiaries relating to how the trustees exercised their discretion expressly given to them in the trust instrument by adding a no contest clause as a condition to the litigious beneficiary's gift. *In re Chambers' Estate*, 322 Mo. at 1092.

We respectfully disagree that there is no set or accepted meaning to the words "serious breach of trust" under the MUTC. Terminology is crucial in this area. As noted in the MUTC, a "breach of trust" is defined as "[a] violation by a trustee of a duty the trustee owes to a beneficiary...." Mo. Rev. Stat. @ 456.10-1001.1. The case law equates a "breach of trust" with a "breach of fiduciary duty" claim, which can include virtually **any** type of conduct, no matter how trivial, and "regardless of whether the breach is 'wrongful and fraudulent or done through negligence or aris[es] through mere oversight and forgetfulness.'" *Jo Ann Howard and Associates, P.C. v. Cassity*, 868 F.3d 637, 645-46 (8th Cir. 2017) (applying Missouri law). In other words, virtually any type of claim against a trustee could be construed or couched as a "breach of trust," including conduct expressly authorized on the face of the trust instrument itself.

By contrast, a "**serious** breach of trust" is one that is sufficient to warrant removal of a trustee, and arguably presents a different matter altogether. The MUTC provides that a "serious breach of trust" is sufficient to warrant removal of a trustee *for cause* under section 456.7-706.2(1), R.S.Mo. While "serious breach of trust" is not expressly defined in the statute, Missouri courts have adopted the official UTC Comment's definition, providing that "[a] serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct." *Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon ex rel. Weldon*, 231 S.W.3d 158, 179 (Mo. App. 2007) (citing 4C Francis M. Hanna, Missouri Practice, Trust Code and Law Manual @ 456.7–706 UTC Comment (2007)). For example, a "serious breach of trust" sufficient to warrant removal of a trustee would exist where the fund is in danger of being lost because of the trustee's conduct. *Id.* (citations omitted).

Moreover, under the MUTC, and as Mr. Blanton's proposal appears to recognize, a grantor has the ability in some instances to override the default provisions of the MUTC as to duties exculpate certain conduct by a trustee, a grantor may not exculpate bad faith or reckless conduct (see Section 456.10-1008) and all beneficiaries have the ability to ratify improper conduct by a trustee (see Section 456.10-1009). So, for example, if a trustee refuses to distribute property or to fund a trust as required under the instrument, or is looting, stealing or impermissibly self-dealing from the trust, a persuasive case can be made that Missouri public policy should **not** prevent a beneficiary who is harmed by such serious misconduct from filing a lawsuit to redress such violations without fear of violating a forfeiture clause provided the conduct was not permissively exculpated by the grantor under 456.10-1008, or ratified by the beneficiary under 456.10-1009.

A no-contest clause should be permitted to be drafted or structured to preclude ordinary claims for removal of a trustee (save for a "serious" breach of trust) because otherwise a litigious beneficiary would be able to thwart the grantor's intent by filing litigation to attempt to remove the grantor's designated trustee based on minor issues or disagreements. Under the MUTC, a trustee can be removed for many reasons at a court's discretion, not only for a "serious breach of trust." (*e.g.*, lack of cooperation with other co-trustees, or a purported failure to administer the trust "effectively.") *See* Mo. Rev. Stat. @ 456.7-706.2. A grantor should be permitted to name trusted family members as trustees and prevent them from being embroiled in litigation simply because a litigious beneficiary alleges the trustee is not "effective" or the trustee is not "cooperative" in the mind of a disgruntled and litigious beneficiary. Such lawsuits would also further deplete or reduce the assets of a trust or estate contrary to the grantor's intent.

In sum, one should not seek to take away such a long-standing right of property holders (repeatedly affirmed by the highest court in this state) to place conditions on gifts to litigious beneficiaries in order to protect their children or other loved ones (our version also affirms that such a right may not be withdrawn retroactively with respect to trust instruments already in existence-which we submit current law prohibits in any event). One cannot question that grantors in general have a right under Missouri law to disinherit their children entirely. By extension, they likewise have or should have the (lesser) right to condition substantial gifts in trust on not suing siblings, family members or trusted friends or entities appointed as trustees merely for exercising discretion expressly granted under the trust instrument. The proposal we have advocated and the Committee has approved balances the interests and property rights of grantors with legitimate rights of beneficiaries to be free from bad

faith or reckless conduct on the part of a trustee that a grantor cannot exculpate, and that would justify the trustee's removal for cause under the MUTC.

Respectfully, [redacted]