

**TO: Judicial Council**  
**FROM: Probate Law Advisory Committee**  
**DATE: December 2, 2022**  
**RE: Publication/Hearing Dates**

In June, the Council considered the attached study request from attorney Broc Whitehead asking that the Council consider recommending amendments to the stringent time requirements for publication notice and hearing dates in K.S.A. 59-2209. The Council assigned the study to the Probate Law Advisory Committee.

K.S.A. 59-2209 provides:

When notice of hearing is required by any provision of this act by specific reference to this section, such notice shall be published once a week for three consecutive weeks in some newspaper of the county authorized by law to publish legal notices. The first publication shall be made within 10 days after the order fixing the time and place of the hearing and, within seven days after the first published notice, the petitioner shall mail or cause to be mailed, postage prepaid, a copy of the notice to each heir, devisee and legatee or guardian and ward, conservator and conservatee or guardian ad litem, as the case may be, other than the petitioner, whose name and address is known to the petitioner. A copy of the petition, any attachments to it and, when applicable, a copy of the will, accounting and settlement agreement shall be included with the notice, unless excused by court order. The date set for the hearing shall not be earlier than seven days nor later than 14 days after the date of the last publication of notice.

Whenever notice is mailed to a person residing in a foreign country, such notice shall be mailed by air mail.

In his study request, Mr. Whitehead indicated that the time requirements in the statute are difficult to meet and serve no real purpose, and he is always worried that a completed probate distribution might be challenged later because one of the deadlines in the statute is slightly missed. The Probate Committee agreed with Mr. Whitehead that, as more newspapers are being published weekly rather than daily, it has become more difficult to comply with the time requirements in K.S.A. 59-2209. It also seems that publication of notice on the internet would be more likely to result in actual notice than publication in a weekly print newspaper.

The Supreme Court has held that defects in statutory probate procedures do not invalidate proceedings unless they affect the substantial rights of the parties. *In re Estate of*

*Rickabaugh*, 305 Kan. 921, Syl. ¶ 1, 390 P.3d 19 (2017). In a case specifically interpreting and applying K.S.A. 59-2209, the Court held that, where notice of hearing to probate a will had been duly and regularly published for three consecutive weeks and served upon the interested party, fixing the hearing of the petition to probate for a date five days later than the statute required was a palpable irregularity but could not be regarded as fatally defective. The appellant could not possibly have been prejudiced by receiving five extra days, and the defect did not go to the jurisdiction of the court. *In re Dumback's Estate*, 195 Kan. 26, 28-29, 402 P.2d 779 (1965).

In the long term, the Probate Committee believes that the topic of online versus print publication of notice deserves further study, possibly by a Judicial Council committee formed for that purpose. In the short term, however, it might be advisable to amend the statute. While caselaw indicates that strict adherence to the timelines set out in K.S.A. 59-2209 is not jurisdictional and a slight deviation is unlikely to result in a reversal, there is no point having deadlines in the statute that are unnecessary and difficult to comply with.

#### Proposed amendment

The Committee recommends the following amendments to K.S.A. 59-2209. The amendments are based in part on § 1-401 of the Uniform Probate Code, which only requires that the last publication of notice be at least 10 days before the date set for hearing.

**59-2209. Notice by publication and mailing.** When notice of hearing is required by any provision of this act by specific reference to this section, such notice shall be published once a week for three consecutive weeks in some newspaper of the county authorized by law to publish legal notices. ~~The first publication shall be made within 10 days after the order fixing the time and place of the hearing and,~~ Within seven days after the first published notice, the petitioner shall mail or cause to be mailed, postage prepaid, a copy of the notice to each heir, devisee and legatee or guardian and ward, conservator and conservatee or guardian ad litem, as the case may be, other than the petitioner, whose name and address is known to the petitioner. A copy of the petition, any attachments to it and, when applicable, a copy of the will, accounting and settlement agreement shall be included with the notice, unless excused by court order. The date set for the hearing shall not be earlier than ~~seven days nor later than 14~~10 days after the date of the last publication of notice.

Whenever notice is mailed to a person residing in a foreign country, such notice shall be mailed by air mail.

To remain consistent, K.S.A. 59-2308 should also be amended:

**K.S.A. 59-2308. Sale at public auction.** In all sales at public auction the personal representative shall give notice containing a particular description of the real estate to be sold, and by stating the time, terms and place of sale. The notice shall be given by publication once a week for three consecutive weeks in some newspaper, authorized to publish legal notices, of the county in which the real estate is situated. The date set for the sale shall not be earlier than ~~seven days nor~~ ~~later than 14~~10 days after the date of the last publication of notice. If the tracts to be sold are contiguous and lie in more than one county, notice may be given and the sale made in either of such counties.

**From:** Broc Whitehead <brocwhitehead@sbcglobal.net>  
**Sent:** Tuesday, February 8, 2022 8:53 AM  
**To:** Judicial Council [KSJC] <Judicial.Council@ks.gov>  
**Subject:** Publication/Hearing Dates for Probate Hearings

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Ladies & Gentlemen:

I've been a practicing probate lawyer for over 40 years and I'm writing to request a review of the necessity of the specific statutory rules for scheduling a hearing following publication notice as set forth in KSA 50-2209. It's getting more difficult to time the actual hearing since the orders are signed electronically on unknown dates and the few remaining legal newspapers have longer publication deadlines. What happens is that I get an order for hearing back from the court later than expected and it messes up the publication dates I have set at the time I file the case.

No purpose is served for any of the stringent time requirements in this statute. Yes, heirs and interested parties must be notified before the hearing date, but the notice doesn't have to be tied to the publication dates. Nor, does the hearing date have to be tied to the last publication date. These serve no practical purpose and I always worry that a probate distribution I completed may be later attacked because one of these statutory dates was slightly missed.

Please consider approaching the legislature to amend KSA 59-2209 to something more reasonable and workable for practicing lawyers.

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