

M I N U T E S

SPECIAL COMMITTEE ON JUDICIARY-B

September 26-27, 1977  
Room 528 - State House

Members Present

Representative E. Richard Brewster, Chairman  
Senator Joe Norvell  
Senator Jim Parrish  
Representative Ben Foster  
Representative Mike Glover  
Representative Phil Martin  
Representative Kent Roth

Staff Present

Art Griggs, Revisor of Statutes Office  
Paul Purcell, Kansas Legislative Research Department

September 26, 1977  
Morning Session

The meeting was called to order at 10:00 a.m. by the Chairman who announced that Proposal No. 40 would be taken up in the afternoon. He then asked Mr. Griggs to discuss the draft on child custody.

Proposal No. 43 - "Child Grabbing" (or Child Custody)

Mr. Griggs noted that the bill had been drafted in accordance with instructions given at the last meeting. He called attention to the definition section which contains the phrase "custody proceeding" which includes both divorce actions and child neglect and dependency proceedings, and makes amendments in these areas. Section 26 gives the court the right to assume jurisdiction. He noted that Section 27 amends the divorce statutes and refers to Section 9, while Sections 29 and 30 refer to orders authorized in such actions.

The Chairman asked about New Section 3 where there is reference to "initial or modification decree", and Mr. Griggs explained there is an amendment to 7 RS 1611 on page 18, which removes reference to custody since the uniform act accepts a foreign decree. He noted he had sent a copy of this draft to Professor Elrod.

Representative Roth expressed hope that the divorce mill states would adopt the uniform act because those divorce decrees would be difficult to modify in other states. The Chairman clarified the issue, explaining that if a couple is divorced in Kansas and the spouse with custody moves a long distance away and establishes residence in another state the Kansas court could still modify the support decree. Representative Foster inquired about the reference to "information" in Section 9, and Mr. Griggs explained that is information which any party in a custody proceeding must give, and also requires an update of the information e.g., if it is learned that someone else has actual custody of the child, the information should be given to the court. Representative Foster suggested that one of the district court judges should look at this section, and the Chairman agreed to consult Judge Carpenter.

The Chairman expressed concern about Section 3 which speaks to the standards for jurisdiction, and urged that there should be a provision for the second court to be aware of what happened in the other court. Mr. Griggs explained that it has a lot to do with the interpretation, and since this is a Uniform Act any modification should be made with care. Representative Foster said that it looks good on paper but he fears a lot of misinformation will be given to the court and he suggested a penalty clause. Mr. Griggs stated he felt the court could use its contempt powers. Also, the perjury statutes are broad enough to cover this situation. It was moved by Representative Foster and seconded by Senator Parrish that a subsection (d) be added to Section 9, making it a Class C misdemeanor. The motion carried.

The Chairman noted that he and Representative Stites had lengthy discussion last year about the matter of standing in custody disputes involving third parties where a surviving parent has not been declared unfit, and suggested that if there was to be a provision for such cases this might be the place to put it. Representative Roth stated he could support the concept if there were safeguards that the child's best interests were protected in cases where someone with influence might be able to sway the court. The Chairman suggested that probably this should not be put in the bill and stated he would talk with Representative Stites and see what happens in the standing committee.

Representative Martin asked if New Section 5, dealing with notice, would cause trouble in getting out-of-state service. Mr. Griggs pointed out that it authorizes the use of whatever form of notice is used in the state where the person is, and there could be a variety of different situations. It was moved by Senator Parrish and seconded by Representative Martin that the time be changed to 30 days. The motion carried.

It was moved by Representative Foster and seconded by Senator Parrish that the proposal be recommended for introduction. This motion also carried.

#### Proposal No. 38 - Lien Laws

The Chairman noted that Representative Whitaker's bill provides that if an owner can show that he has paid the contractor, no subcontractor lien will be valid. He expressed the opinion that the subcontractor would be in a better position to get recourse than the homeowner. Representative Martin inquired if bonding had been ruled out and the Chairman stated it was a possibility and that he had discussed it with contractors who did not seem to be adverse to the concept. Representative Roth stated he could support Representative Garrett's bill providing for notice, and explained that he liked the idea of having the homeowner know who the subcontractors are.

The Chairman pointed out that in Representative Garrett's bill, the subcontractor can file a lien only if he has filed a notice with the property owner.

Senator Norvell stated that on the basis of the complaints heard, he is in favor of the Whitaker bill. Mr. Griggs said parts of both could be used in a new bill.

The Chairman suggested that the draft provide that if the subcontractor fails to give notice and the owner pays the contractor, there would be no lien right because he failed to give notice to the owner. If he gives notice and the owner pays the contractor anyway and the contractor fails to pay the subcontractor, the homeowner can be made to pay again. It was moved by Senator Parrish and seconded by Senator Norvell that staff be directed to include this concept in the draft. The motion carried.

Representative Martin asked if the owner would have to know the amount of dollars when notice is filed, and the Chairman explained that it would only require the subcontractor to notify the owner within five days of the commencement of work that he is furnishing supplies or services.

#### Afternoon Session

#### Proposal No. 40 - Determinate Sentencing

The Chairman directed the Committee's attention to Draft 7 R S 1579. Representative Roth noted that New Section 1 makes it a Class E felony to hire someone to interfere with parental custody, and expressed the opinion that the result would be more convictions than if it were a mere misdemeanor. The Chairman stated even though it is

a felony, it is still discretionary with the governor of the state whether to allow extradition, but it is an effort to get at the professional childnapper. After considerable discussion it was agreed that there was no objection to New Section 1.

Mr. Griggs noted that New Section 3 changes aircraft piracy to a Class C felony, Sections 5 through 15 relate to the changes the Committee authorized at the previous meeting, and he called attention to the fact that the \$50 value has been changed to \$100 and left a Class D felony.

The Chairman noted that Section 4 changes rape from Class C to Class B, and Representative Glover expressed the opinion that it should go down rather than up. Senator Parrish asked about "aggravated" rape and the Chairman explained there is a presumption of force in the first place, and noted that the Committee had agreed that rape and aggravated sodomy should carry the same penalty. Representative Martin stated he felt these are among the most serious crimes and would oppose reducing the penalty below what it had been previously.

The Chairman noted the habitual criminal statute is invoked by the district or county attorney and questioned whether it belongs in plea bargaining, or if it should be imposed by the court after conviction. Representative Lorentz felt strongly that the prosecutor should have the power.

Mr. Griggs explained that Sections 17, 18, and 19, prescribe what the court can do, taking into consideration the maximums set by the court. He pointed out that the language regarding a parole hearing has been changed to require a hearing in accordance with (a) through (f), and it may still be necessary to make a further amendment. He noted that if an inmate makes a contract it will shorten the time prescribed in subsection (a) and probably should say "subject to the provisions of Section 20." The Committee authorized staff to make this change.

At the bottom of page 16 the language has been changed to allow eligibility "immediately or after the court jurisdiction has elapsed." He noted that subsection (7) should be taken out and mentioned there had been discussion at the previous meeting regarding consecutive and concurrent sentences and that there had been a bill on this last year which came to Committee too late to deal with.

Page 18 requires filing of rules and regulations, and New Section 20 deals with the contract arrangements. Representative Foster inquired if it was intentional to say "may provide" and the Chairman stated the Committee had not wanted to mandate a procedure. Representative Foster felt the language should read "shall provide the opportunity by rules and regulations".

With regard to consecutive and concurrent sentences, the Chairman noted H.B. 2523 had been introduced and that Representative Hurley wanted more time to look at it, and agreed that someone from the Department of Corrections would discuss their reasons for the bill.

The Chairman directed the Committee's attention to the material and documents which had been distributed concerning the Minnesota corrections procedures.

The Chairman noted that the bill did not deal with the matter of restitution, and inquired if anyone knew whether the adult authority ever requires that as a condition for parole, or if they can do that under existing statute.

#### Proposal No. 37 - Juvenile Code

Mr. Griggs stated the subcommittee had reviewed the interim study of two years ago before starting their draft, and pointed out proposed changes in the treatment of traffic offenders. The Chairman asked if anyone had problems with Item No. 10, and pointed out there has been no provision for bail for juveniles, although it might sometimes be difficult to obtain bond. It was suggested that a juvenile could surrender his license in lieu of bond. The Chairman mentioned there was some disagreement about sealing juvenile records and whether or not such records should be available once the person becomes 18 and commits an additional crime.

Proposal No. 40 - Determinate Sentencing

Mr. Bernie Dunn of the Department of Corrections stated they cannot get the records and can only get them if the inmate discloses the fact, or if they show up on the K.B.I. records. Representative Foster inquired why they are not just expunged. The Chairman agreed there might be merit in doing so but the subject will be dealt with when the Committee reconvenes on the 27th. Also, he said the subcommittee would try to meet soon and be ready at the next meeting to submit a proposal.

There was discussion as to whether the inmate and his counsel should have access to the K.R.D.C. reports. Representative Martin felt such reports should not be withheld unless it would be detrimental to the inmate. Mr. Dunn agreed that the psychological impact on the individual should be the primary issue. He explained that now K.R.D.C. can decide whether or not they can see the reports and they rely on the doctor's suggestions.

The Chairman suggested drafting something to the effect that the defendant and his counsel may have the evaluation report, starting with the assumption that they have the right to see the reports, and empowering the Secretary and the Adult Authority to decide that the person should not see such report.

The Chairman asked Mr. Dunn to review H.B. 2523 and let the Committee know the next day if the draft covers any of the areas of concern.

September 27, 1977

Morning Session

Proposal No. 39 - Expungement and Annulment

The Chairman asked Mr. Griggs to distribute and discuss the draft concerning expungement and annulment. Mr. Griggs pointed out the proposed changes as shown in the draft and mentioned that it had been decided that the provision relating to persons age 21 and under be repealed and make these persons subject to the provisions for those over 21, which would allow expungement after two years. The matter of job applications was deleted, but the record would be available in certain specified conditions.

The Chairman noted the problem is that conviction of certain crimes would seem to disqualify an individual from employment in certain areas and it would not seem appropriate for the statutes to provide for a lie.

Major Russell Hill of the Topeka Police Department told the Committee that there are some jobs where a person convicted of certain crimes should not be allowed to work. Also, he explained they have a problem maintaining expungement files, plus a further problem that records and information on expunged records have not been received by them and they are involved in litigation because of disclosure. He stated if there could be a "willful" provision on disclosure, it would provide some protection for them.

Captain Reardon agreed that one of the problems is distribution of the expungement order because sometimes the court does it, sometimes the attorney, and sometimes nobody.

The Chairman noted that the draft shows a waiting period for all convictions at two years, and asked if there was merit in having a two-year waiting period on misdemeanors and D and E felonies, but go back to five years on A, B and C. It was moved by Representative Glover and seconded by Representative Martin that this change be made. The motion carried.

The Chairman stated that ordinarily expunged records would not be available to courts and prospective employers but in employment involving public safety and security he thought it was proper, although it would result in some discrimination. After considerable discussion it was conceded that the court could be directed to make specific findings for expungement. Representative Foster suggested that some civil official or authority might be appropriate to make this kind of finding, and everyone could go to the same place, taking it away from the convicting court. The Chairman suggested setting some standards for the court in finding expungement appropriate, and authorizing the court to obtain recommendations prior to the expungement hearing. Mr. Devon Knoll noted the statute now allows the court to receive that information.

Mr. Dunn suggested an amendment to the Civil Rights Act, but it was pointed out that they already have a large backlog of business.

It was moved by Representative Foster that the language be stricken so a person cannot say he has never been convicted. Motion was seconded by Senator Parrish. Senator Parrish offered a substitute motion that the language be stricken and new language drafted to allow someone to answer that his conviction has been expunged, and require that knowledge of expungement cannot be used against a person. Representative Martin seconded the motion for the purpose of getting a written draft. The motion carried with Representative Glover voting no.

The Chairman asked Mr. Dunn to discuss H.B. 2523, and Mr. Dunn stated the proposal had come from the Department of Corrections last year. He explained that the reason for the language on line 27 is because when sentences are imposed at different times sometimes a concurrent sentence will have more impact than the consecutive sentence. With regard to flat sentences he explained there had been considerable input from different sources when this was written. Lines 27 through 74 speak to the amount of time served for conditional release and there have been differences of opinion as to whether it was to be added or deleted, and the practice generally has been to give credit, and this language does that. At lines 88 through 99, there have been problems with a person's getting consecutive sentences at a later date and following the established rules.

Mr. Dunn explained there had been problems with other state courts and that line 111 gives Kansas continuing jurisdiction. The Chairman asked Mr. Dunn to supply what he felt was appropriate language. Mr. Dunn explained that starting at line 125, the language attempts to deal with the person committing crimes while under the custody of the Adult Authority, and that they want to make sure that person will not get off without further penalty, and has a great deal to do with security and control while the person is in prison. The Chairman asked Mr. Dunn to get with Mr. Griggs and see if some of the concepts can be merged.

Mr. Jim Marquez, Acting Secretary of Corrections, appeared before the Committee and discussed the proposed draft. He pointed out that on page 16, subsection (b) they felt that the Department perhaps should make the decision about parole rather than the Authority because the Department is concerned with the inmate on a day-to-day basis and in his training, whereas the Authority is more concerned with him as he goes back into the community. He stated, however, that he had not discussed the matter with the parole board.

The Chairman explained that the Committee had felt, even though the sentence is indeterminate, the inmate should have a fairly good idea as to when he will be eligible for parole. Further, he mentioned that the draft provides for review of the rules and regulations in order to achieve some objective standard.

Mr. Marquez assured the Committee that the Department does not intend to abuse the inmates by not letting them see the parole board, however, the nonviolent offenders now are serving about one to two months more time than they would under the old system where the parole board set the date. He explained that the violent offenders are serving less and that there needs to be more balance. He stated that as long as the court has jurisdiction for 120 days they cannot start them on any program. Then at the end of that period they try to put them in a program and it may take another six months because of the fact there are only so many programs.

The Chairman stated he believed the provision mandating a minimum term is designed so that violent offenders will serve more time but it probably does not reduce the time for the nonviolent.

Mr. Marquez pointed out that under the old law, when the Department feels an individual is rehabilitated it is their duty to certify them as parole eligible and they are not supposed to concern themselves with the attitude of the community, and that there are some problems in this area. Mr. Marquez stated he has problems with the contract concept because even though an inmate might be a good candidate for a program if there is not space there simply is not space, and to make a contract under such circumstances could cause problems. The Chairman noted the concern, but also indicated it was the hope that more programs could be provided. Also, it was the feeling that if the inmate knew he could take advantage of a contract he would have an opportunity to get out earlier.

Mr. Marquez stated that they are doing that now, and that he does not feel it needs to be contracted. The Chairman stated that the draft seeks to provide basic outlines so that the Department can operate under rules and regulations subject to the Ways and Means Committee.

Representative Martin asked if the Department would summarize in memorandum form the problems that are bothering them so that the Committee could look at the memorandum and draft at the same time. Mr. Marquez agreed to do this.

Mr. Marquez also expressed concern about the rules and regulations because of the specialized kind of environment they are dealing with, and sometimes emergencies arise which need to be dealt with immediately. Mr. Griggs stated the general filing statutes would be applicable and an emergency rule could be put into effect as soon as it is drafted.

#### Afternoon Session

The Chairman stated he had hoped to dispose of the sentencing bill today but perhaps consideration should be given to the Department's input before final action. He agreed that probably the Department should be involved in the rules and regulations. Representative Martin suggested more input from the Adult Authority. The Chairman stated he is very concerned about the Authority's finding a program and that all of these things are going to cost money.

Mr. Griggs noted the closest the bill comes to referring to the community is on page 15. The Chairman pointed out that there is nothing else in the statute requiring them to look at the community and they are doing that by rules and regulations or by practice, and expressed the opinion there is no reason why they could not parole him to another community.

Representative Martin stated he felt the contract arrangement will only provide the opportunity for the inmate to take advantage of programs if and when they are made available, otherwise, everything will operate as it does now. Representative Glover felt that the contract concept would give the Department more leverage with the Ways and Means Committee, but that it will take some time to get the programs organized.

After discussion it was moved by Senator Norvell that the word "may" be changed to "shall". The motion was seconded by Representative Roth and carried.

The Chairman inquired if anything had been done on page 17, (3) concerning eligibility for a parole hearing. Representative Roth moved to put a period after "parole hearing" and strike the rest of the sentence. There was no second.

The Chairman suggested wording on page 17 (3): ". . . in order to inform the inmate of the date when he or she will be eligible for a parole hearing and of the ability to advance such date by entering into a contractual agreement, and of such contractual arrangements as may be available, which may advance such date. . ." There was no disagreement.

The Chairman announced that the next meeting was set for October 20 and 21 and that they will be long working days considering this bill, the Juvenile Code, and conferees on Death with Dignity, plus looking at the draft on lien laws.

The meeting was adjourned at 5:00 p.m.

Prepared by Paul Purcell

Approved by Committee on:

December 16, 1977  
(Date)