MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 11:00 a. m./p. m. on March 14, 19 78.

All members were present except: Senators Garr and Hess

The next meeting of the Committee will be held at 11:00 a. m./p. m. on March 15, 19 78.

These minutes of the meeting held on ~~XXXXXXXXXXXXXXXXXXXX~~, 19~~XXXX~~ were considered, corrected and approved.

Elwaine Pomeroy
Chairman

The conferees appearing before the Committee were:

Representative Patrick B. Augustine
Representative Ward P. Ferguson
J. C. Brown - Kansas Bureau of Investigation
E. J. Kuntz - Wichita Police Department
W. L. Albott - Kansas Bureau of Investigation
Charles Henson - Kansas Bankers Association
Gerald Goodell - Kansas Savings and Loan Association
Floyd Gehrt - Kansas Manufactured Housing Association

Staff present:
Art Griggs - Revisor of Statutes
Jerry Stephens - Legislative Research Department
Cynthia Burch - Legislative Research Department

House Bill 2612 - Sub. for HB 2612; mobile home liens. Representative Augustine testified in support of the bill. He stated he chaired the subcommittee of the House Judiciary Committee which worked the bill, and which introduced the substitute bill. He explained the problems people have who own mobile home parks in collecting rent that is due them for the lot on which the mobile home is parked.

Charles Henson testified on behalf of the Kansas Bankers Association. He stated the association has no particular position on whether or not the owner of a park should have a lien; they have no particular objection to that part of the bill. He did object very strongly to the provision which would give the mobile home park owner a priority lien over security interest which had previously attached to the mobile home.

Jerry Goodell appeared on behalf of the Kansas Savings and Loan League. He stated he concurs with the position of the bankers. He stated giving park owners priority liens would increase the risk of lenders, and would cause lenders to withdraw from the financing of mobile homes.

continued -

HB 2612 continued -

Floyd Gehrt, representing the Kansas Manufactured Housing Association, appeared and explained the problem mobile home park operators have. Their particular problem is when people desert the mobile home and skip out without paying the rent. The operator then has the problem of the mobile home occupying the lot, thus keeping the operator from renting the lot to someone else who would pay rent. Moving the mobile home is expensive. Since in the usual case the bank has a great interest in seeing that its security on the mobile home is kept secure and safe, the bank should be responsible for future rent after notice of default in the payment of rent has been furnished the bank. The bill does not provide for the bank to be responsible for any prior back rent. In response to a question from the chairman as to the procedure for giving notice to someone to vacate for nonpayment of the lot rent, Mr. Gehrt said the owner is required to give notice to vacate; if the tenant does not move the mobile home, the operator has to go to court to obtain authority to have the mobile home moved. In most of these situations, the tenant has already abandoned the mobile home, and the park operator is simply left holding the bag.

House Bill 2711 - Expungement and annulment of certain convictions. Representative Ferguson appeared in support of the bill. He explained the study made by the interim committee, and the difficulties with the present law. This bill would eliminate the differences between annulment procedures and expungement procedures.

Carey Brown, of the Kansas Bureau of Investigation, testified concerning the bill. He stated the KBI is very pleased with the bill in general. He did suggest changes, particularly in section 2 of the bill. He stated the present wording of the bill leaves the matter unclear as to whether old expungements should be handled the same way as new expungements.

Major Kuntz, of the Wichita Police Department, testified that his department is very happy with the bill. He did suggest that the bill be changed so as to not permit expungement of the record of repeat violators, and that certain violent crimes should not be expunged.

Mr. Albott testified; a copy of his statement is attached hereto.

House Bill 2713 - Uniform child custody jurisdiction act. The chairman called attention of the committee to the material which had been distributed giving background information on the interim committee study of the subject.

House Bill 2299 - Less than unanimous jury verdicts in certain civil cases. The chairman reported to the committee that the staff had discovered that the statutes dealing with commitment for mentally ill persons, alcoholism, and for the appointment of a conservator and a guardian all provide for six person juries, and so the amendment made to the bill yesterday was not needed. Senator Parrish moved to reconsider the committee's action on reporting the bill favorably as amended; Senator Hein seconded

CONTINUATION SHEET

Minutes of the Senate Committee on Judiciary March 14, 19 78.

HB 2299 continued

the motion, and the motion carried. Senator Berman then moved to remove the amendments; Senator Parrish seconded the motion, and the motion carried. Senator Parrish moved to report the bill favorably; Senator Hein seconded the motion, and the motion carried.

House Bill 2147 - Prohibiting disclosure of certain arrests, declare certain acts to be a crime and providing for nondisclosure of certain arrests no amendments. Mr. Albott testified with regard to the bill; a copy of his statement is attached hereto.

Mr. Carey Brown testified that it should be possible for persons in the criminal justice system to provide information to other persons in the system. Other places where disclosure would be helpful would be to persons doing research, medical practitioners treating patients, and halfway treatment facilities operated by private nonprofit organizations.

Major Kuntz suggested that the provisions of this bill would work better if they were amended into HB 2711, so that the procedure for the expungement of an arrest would be the same as the procedure for the expungement of a conviction.

The meeting adjourned.

These minutes were read and approved by the committee on 4-24-78.

3-14-78

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Donna Wilson	Topeka	Church Women United
Elsa Pomeroy	Topeka	" " "
Ella DeGraffe	Topeka	" " "
Darla Tales	Topeka	" " "
Lora Kekas	Topeka	" " "
Arleta Bell	Topeka	" " "
Sister Nora Ellen Richard	Kansas City	Ward High School
Jerry Yadrich	Kansas City	Ward High
Eddie Krupich	Kansas City	Ward
Ken Koke		
Adar Glover	Kansas City	Ward
Cecilia Blount	Kansas City	Ward
W. L. Albott	Topeka	KTSW
E. J. Kuntz	Wichita, Ks	Police Dept
J. C. BROWN	TOPEKA	KBI
Jerald L. Sadler	Topeka	Ks. Savings & Loan Assn
Charles Herron	Topeka	Kansas Bankers Assn
Ellen Richardson	Box 5314 Topeka	Ks. Children's Service League
Annabelle Haupt	1001 Arnold, Topeka	Church Women United

3/14/78

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Wm Ferguson	Topeka	House of Rep.
Thomas Bluestone	Topeka	House of Rep
Steve Starr	Topeka	TPN
Marvin C. Umholtz	Lawrence	KCUL
Kathleen Sebelius	Topeka	KTLA
Sr Dolores Binkley	KCK	Criminal Justice Ministry
Charles F. Hamm	State Office Bldg	S.R.S.
Harold Storm	Top.	KBI
Bill Henry	"	Governor's Office
Tom Morris	Topeka	KMHRVI
Lloyd E. Gehrt	"	"

STATE OF KANSAS

KANSAS BUREAU OF INVESTIGATION

3420 VAN BUREN
TOPEKA, KANSAS 66611
(913) 296-3026

W. L. ALBOTT
DIRECTOR

JACK H. FORD
ASST. DIRECTOR

ROBERT R. CLESTER
SAC—INVESTIGATION

JACK A. WEST
SAC—SPECIAL SERVICES

DWAYNE SACKMAN
ADMIN. OFFICER—CRIMINAL JUSTICE SERVICES

February 24, 1978

Senator Elwaine Pomeroy
Chairman, Senate Judiciary Committee
Statehouse
Topeka, KS 66612

Dear Senator Pomeroy:

House Bill 2711 was recently passed by the house. We expect that upon its arrival in the Senate, it will be referred to your committee, if this has not already been done.

As presently written, HB2711 does an admirable job of addressing the problems that presently exist with expungements and annulments in Kansas. The bill significantly improves the situation regarding handling of these orders, and allows for appropriate disclosures to protect the public. We are encouraged by the bill, and have no concerns with any of its present provisions.

One thing does worry us, and we hope that when you hold hearings on the bill, you will be able to consider the possibility of further amendments. The bill presently says, on line 92, "Whenever the record of any conviction has been expunged under the provisions of this section, the custodian of the records...." Similar wording appears at line 183, in Section 2. This choice of words leaves it unclear whether expungements and annulments processed under earlier statutes are to be handled differently, or may be disclosed under the specific situations mentionned in HB2711.

If earlier expungements are to be treated as a separate class, then records custodians throughout the state will be forced to maintain an additional filing system to avoid mistaken disclosures. This effort will be extremely costly, and will also include a significant possibility of error, especially in offices with small staffs or frequent turnover problems, as is common in the rural areas of the state. Further, we hope that the legislature intended to eliminate the problems described in committee hearings concerning expunged persons being employed in criminal justice or security agencies, or posessing firearms, etc. The maintenance of two classes of records will not address this problem, as regards those older orders.

We are requesting that the committee consider amending the referenced lines to read, "Whenever the record of any conviction has been expunged under the provisions of this section, or earlier statutes for this same purpose, the custodian of the records...", or similar wording to accomplish the same purpose.

An additional problem that we can forsee if HB2711 is not amended in this fashion is that subjects eligible for expungements will realize, probably with the help of well-informed attorneys, that if they accomplish the expungement before the effective date of the bill, they will obtain an expungement that will not be as disclosable. This would place an immediate, and potentially major burden on criminal justice agencies as subjects try to beat the deadline.

Amending the bill would eliminate these problems, and provide for a more equitable approach to expungements, and make for more efficient records handling. If we can provide any additional information about these processes, please feel more than free to contact me or my staff.

Cordially,

W.L. Albott

W.L. Albott
Director

WLA:jcb

3-14-78

STATE OF KANSAS

STATE BOARD OF LAW EXAMINERS

March 9, 1978

The Honorable Elwaine Pomeroy, Chairman
Senate Committee on Judiciary
Statehouse
Topeka, Kansas 66612

Re: House Bill 2711

Dear Senator Pomeroy:

I am Chairman of the State Board of Law Examiners, and at our last meeting the Board, being aware of the pendency of HB 2711 before the legislature, by motion requested that I ask for amendments to this bill to provide for disclosure of such prior convictions on an application by a student to take the Kansas bar examination or an application of a non-resident attorney applying for admission to practice in Kansas under reciprocity, Supreme Court Rule 225(i), and for a further amendment to allow the custodian of the records of arrest, conviction and incarceration relating to the crime to disclose such records when requested by the State Board of Law Examiners.

The foregoing would require an amendment of HB 2711 as amended by the House Committee in the following manner:

On page 2, line 75, after "section 3," by inserting "or (D) an application to take the state bar examination or admission to the practice of law in the state of Kansas under reciprocity,"

On page 3, following line 111, by inserting a new paragraph to read as follows: "(6) the state board of law examiners."

The same amendments should be made at the appropriate place on page 5, line 164, and page 6, following line 202.

The State Board of Law Examiners will appreciate the committee's consideration of our request. It appears to the Board that particularly a conviction for a felony

must be known and considered by the Board in passing upon and certifying to the Kansas Supreme Court, as is required by the Court's rules, that the person seeking admission to the bar is a person of "good moral character." Such conviction would not necessarily establish bad moral character but would only be an element for consideration among other elements of the moral character of the applicant.

Very truly yours,

Mark L. Bennett

MLB:eg

3-14-78

RE: PROPOSAL NO. 43 - "CHILD GRABBING" (OR CHILD CUSTODY)*

Proposal No. 43, assigned to the Special Committee on Judiciary - B, was a study of problems relating to parental custody of children contrary to a court order, including problems arising when a child is taken outside of the state.

Background

The term "child grabbing" refers to the taking of a child to another state by or on behalf of a non-custodial parent for the purpose of bringing a proceeding in that other state wherein an award of custody to that non-custodial parent is sought.

Under K.S.A. 60-1610, a district court having jurisdiction in a divorce, annulment, or separate maintenance proceeding is required to make provision for the custody of the minor children of the parties to the proceeding. The court may modify or change any custody order at any time and the court retains jurisdiction to make a custody order to advance the welfare of a minor child if the child is physically present in the county, or if the domicile of the child is in the state, or if the court has previously exercised jurisdiction to determine the custody of a child who was domiciled in the state at that time. In a typical divorce proceeding, a court will award custody of the minor children to one of the divorcing parents.

Article IV, Section 1 of the Constitution of the United States requires that full faith and credit be given in each state to the judicial proceedings of every other state. Whether the full faith and credit clause applies to custody decrees has not been decided by the U.S. Supreme Court. That court has held, however, that a second state need not honor the terms of a custody decree by another state if modification of the decree would have been permitted in the state rendering that decree.

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* H.B. 2713 and H.B. 2714 accompany this report.

New York ex rel Halvey v. Halvey, 330 U.S. 610 (1947). Likewise, where the decree-rendering forum awards custody to one of the spouses without having had personal jurisdiction over the other spouse, a second forum is not bound by the federal constitution to give full faith and credit to the custody decree. May v. Anderson, 345 U.S. 528 (1953).* Kansas custody decrees, as noted above, are modifiable and, therefore, need not be honored by the courts of another state.

Situations arise where a parent not awarded custody in Kansas, or not within the personal jurisdiction of the court when the custody decree was rendered, will take his or her child to another state and there commence a proceeding for custody alleging a change of circumstances after the original decree was rendered. The reverse also occurs, i.e., a parent not awarded custody in another state or not within the personal jurisdiction of the court where the custody decree was rendered, will bring the child to Kansas and here commence a proceeding for custody on the same or similar grounds. The Kansas Supreme Court recently held that, absent unusual circumstances, where a parent brings a child into this state for temporary visitation under an order of a court of another state, which has continuing jurisdiction to change or modify its decree, in the interest of comity a Kansas court may, and in most instances should, give full faith and credit to the decree of the other state and decline to hear on its merits an application to change custody made here under such circumstances. Jolly v. Avery 220 Kan. 692 (1976). Even assuming the holding's applicability to child grabbing, the court's language is advisory and not mandatory and the decision, therefore, could not be used as a solution to that problem.

K.S.A. 21-3422 makes it a Class A misdemeanor to take away any child under the age of 14 years, with the intent to detain or conceal such child from the person having the lawful charge of the child. Because the crime is merely a misdemeanor, extradition of a child grabber to Kansas cannot

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* K.S.A. 60-1611 appears to track with this decision.

be assured and most likely will not occur. Hence, even state criminal law generally cannot restore the child to the parent awarded custody in Kansas.

The issue is whether child grabbing should be prevented and, if so, how this may be accomplished.

Seventeen states have dealt with this problem by adopting the Uniform Child Custody Jurisdiction Act, a 1968 product of the National Conference of Commissioners on Uniform State Laws. In that Act, the section on jurisdiction establishes two major bases for jurisdiction. First, a child's home state has jurisdiction. Second, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction. If the second basis produces concurrent jurisdiction in more than one state, mechanisms provided in later sections are used to assure that only one state makes the custody decision.

Committee Activity

The Committee reviewed the Uniform Child Custody Jurisdiction Act and two Colorado Supreme Court cases dealing with questions which arose subsequent to that state's adoption of the Act. A conferee from the Washburn University School of Law described to the Committee the impact on current law that the Uniform Act would have. The Committee examined alternatives to K.S.A. 21-3422 and considered a recently promulgated Wyoming criminal statute directed at professional child grabbers. The Committee also discussed the possibility of codifying a modification of Jolly v. Avery, making mandatory a court's refusal to hear on the merits a child grabber's petition for custody.

Conclusions and Recommendations

Recognizing the possible effects of child grabbing on the children-victims of this activity, and believing it necessary to take action to prevent this practice, the Committee recommends passage of the two appended bills. H.B. 2714

creates the crime of aggravated interference with parental custody and makes the crime a Class E felony. H.B. 2713 enacts the Uniform Child Custody Jurisdiction Act. The Committee recommends that both bills be introduced in the House of Representatives.

Respectfully submitted,

November 18, 1977

Rep. Richard Brewster,
Chairperson
Special Committee on
Judiciary - B

Sen. Donn J. Everett,
Vice-Chairperson
Sen. Ron Hein
Sen. Joseph F. Norvell
Sen. Jim Parrish
Rep. Ben Foster

Rep. Michael G. Glover
Rep. John F. Hayes
Rep. Fred C. Lorentz
Rep. Phil Martin
Rep. Kent A. Roth

Session of 1978

HOUSE BILL No. 2713

By Special Committee on Judiciary—B

Re Proposal No. 43

12-7

AN ACT enacting the uniform child custody jurisdiction act, relating to jurisdictional grounds and civil procedures with regard to judicial determinations of child custody matters; amending K.S.A. 60-1605, 60-1610 and 60-1611 and K.S.A. 1977 Supp. 38-820 and 60-1604 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) The general purposes of this act are to:

(1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and the child's family have the closest connection and where significant evidence concerning the child's care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and the child's family have a closer connection with another state;

(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) make uniform the law of those states which enact it.

(b) This act shall be construed to promote the general purposes stated in this section.

New Sec. 2. As used in the uniform child custody jurisdiction act:

(a) "Contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

(b) "custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;

(c) "custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings;

(d) "decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree;

(e) "home state" means the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period;

(f) "initial decree" means the first custody decree concerning a particular child;

(g) "modification decree" means a custody decree which mo-

difies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

(h) "physical custody" means actual possession and control of a child;

(i) "person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody; and

(j) "state" means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.

New Sec. 3. (a) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This state (A) is the home state of the child at the time of commencement of the proceeding, or (B) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(2) it is in the best interest of the child that a court of this state assume jurisdiction because (A) the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and (B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this state and (A) the child has been abandoned or (B) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise dependent and neglected; or

(4) (A) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (B) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine the child's custody.

New Sec. 4. Before making a decree under this act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to section 5.

New Sec. 5. (a) Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) By personal delivery outside this state in the manner prescribed for service of process within this state;

(2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requesting a receipt; or

(4) as directed by the court, including publication, if other means of notification are ineffective.

(b) Notice under this section shall be served, mailed, or delivered, or last published at least thirty (30) days before any hearing in this state.

(c) Proof of service outside this state may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(d) Notice is not required if a person submits to the jurisdiction of the court.

New Sec. 6. (a) A court of this state shall not exercise its jurisdiction under this act if at the time of filing the petition a

proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this act, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(b) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under section 9 and shall consult the child custody registry established under section 16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 19 through 22. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

New Sec. 7. (a) A court which has jurisdiction under this act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian *ad litem* or other representative of the child.

(c) In determining if it is an inconvenient forum, the

shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) If another state is or recently was the child's home state;

(2) if another state has a closer connection with the child and the child's family or with the child and one or more of the contestants;

(3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(4) if the parties have agreed on another forum which is no less appropriate; and

(5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

(d) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(e) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate such party's consent and submission to the jurisdiction of the other forum.

(f) The court may decline to exercise its jurisdiction under this act if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(g) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys' fees,

made to the clerk of the court for remittance to the proper party.

(h) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(i) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

New Sec. 8. (a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(b) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(c) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

New Sec. 9. (a) Every party in a custody proceeding in the party's first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or

affidavit every party shall further declare under oath whether:

(1) The party has participated (as a party, witness, or in any other capacity) in any other litigation concerning the custody of the same child in this or any other state;

(2) the party has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(3) the party knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(b) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(c) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which the party obtained information during this proceeding.

(d) Any party who submits information pursuant to this section knowing the same to be false shall, upon conviction, be deemed guilty of a class C misdemeanor.

New Sec. 10. If the court learns from information furnished by the parties pursuant to section 9 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of such person's joinder as a party. If the person joined as a party is outside this state the person shall be served with process or otherwise notified in accordance with section 5.

New Sec. 11. (a) The court may order any party to the proceeding who is in this state to appear personally before the court. If that party has physical custody of the child the court may order that the party appear personally with the child.

(b) If a party to the proceeding whose presence is desired by the court is outside this state with or without the child, the court

may order that the notice given under section 5 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(c) If a party to the proceeding who is outside this state is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

New Sec. 12. A custody decree rendered by a court of this state which had jurisdiction under section 3 binds all parties who have been served in this state or notified in accordance with section 5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this act.

New Sec. 13. The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this act or which was made under factual circumstances meeting the jurisdictional standards of the act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this act.

New Sec. 14. (a) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (1) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify the decree and (2) the court of this state has jurisdiction.

(b) If a court of this state is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other

documents of all previous proceedings submitted to it in accordance with section 22.

New Sec. 15. (a) A certified copy of a custody decree of another state may be filed in the office of the clerk of any district court of this state. The clerk shall treat the decree in the same manner as a custody decree of the district court of this state. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this state.

(b) A person violating a custody decree of another state which makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or such party's witnesses.

New Sec. 16. The clerk of each district court shall maintain a registry in which the clerk shall enter the following:

(a) Certified copies of custody decrees of other states received for filing;

(b) communications as to the pendency of custody proceedings in other states;

(c) communications concerning a finding of inconvenient forum by a court of another state; and

(d) other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this state or the disposition to be made by it in a custody proceeding.

New Sec. 17. The clerk of the district court of this state, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person.

New Sec. 18. In addition to other procedural devices available to a party, any party to the proceeding or a guardian *ad litem* or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and

may prescribe the manner in which and the terms upon which the testimony shall be taken.

New Sec. 19. (a) A court of this state may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this state; and to forward to the court of this state certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties or, if necessary, ordered paid by the county.

(b) A court of this state may request the appropriate court of another state to order a party to custody proceedings pending in the court of this state to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid.

New Sec. 20. (a) Upon request of the court of another state the courts of this state which are competent to hear custody matters may order a person in this state to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this state or may order social studies to be made for use in a custody proceeding in another state. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced and any social studies prepared shall be forwarded by the clerk of the court to the requesting court.

(b) A person within this state may voluntarily give testimony or statement in this state for use in a custody proceeding outside this state.

(c) Upon request of the court of another state a competent court of this state may order a person in this state to appear alone or with the child in a custody proceeding in another state. The court may condition compliance with the request upon assurance by the other state that travel and other necessary expenses will be

advanced or reimbursed.

New Sec. 21. In any custody proceeding in this state the court shall preserve the pleadings, orders and decrees, any record that has been made of its hearings, social studies, and other pertinent documents until the child reaches eighteen (18) years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents.

New Sec. 22. If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this state, the court of this state upon taking jurisdiction of the case shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in section 21.

New Sec. 23. The general policies of this act extend to the international area. The provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

New Sec. 24. If any provision of this act or the application thereof to any person or circumstances is held invalid, its invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

New Sec. 25. Sections 1 to 25 of this act may be cited as the uniform child custody jurisdiction act.

Sec. 26. K.S.A. 1977 Supp. 38-820 is hereby amended to read as follows: 38-820. No order or decree permanently depriving a parent of his or her parental rights in a dependent and neglected child under subsection (c) of K.S.A. ~~1976~~ *1977* Supp. 38-824, shall be made unless *the court has jurisdiction to enter a child custody determination in accordance with section 3 and* such parent is present in district court or has been served with summons as provided by K.S.A. ~~1976~~ *1977* Supp. 38-810. The judge of the district court shall assign an attorney to any such parent who

is unable to employ counsel and may award a reasonable fee to said counsel to be paid from the general fund of the county.

Sec. 27. K.S.A. 1977 Supp. 60-1604 is hereby amended to read as follows: 60-1604. (a) *Verification of petition.* The truth of the allegations of any petition under this article must be verified by the plaintiff in person.

(b) *Contents of petition.* The grounds for divorce, annulment, or separate maintenance shall be alleged as nearly as possible in the general language of the statute, without detailed statement of facts. The petition shall state the names and ages of any minor children of the marriage. *When there are minor children of the marriage, the petition shall contain, or shall be accompanied by an affidavit which contains, the information required by section 9.*

(c) *Bill of particulars.* The opposing party may demand a statement of the facts which shall be furnished in the form of a bill of particulars and the facts stated therein shall be the specific facts upon which the action shall be tried but if interrogatories have been served on or a deposition taken of the party from whom the bill of particulars is demanded the court may in its discretion refuse to grant the demand for a bill of particulars. A copy shall be delivered to the judge. The bill of particulars shall not be filed with the clerk of the court or become a part of the record except on appeal, and then only when the issue to be reviewed relates to such facts.

(d) *Service of process.* Service of process shall be made in the manner provided in article 3 of this chapter.

Sec. 28. K.S.A. 60-1605 is hereby amended to read as follows: 60-1605. The defendant may answer and may also file a cross petition for divorce, annulment, or separate maintenance regardless of the residence of the defendant if the plaintiff qualifies under subsection (a) or (b) of K.S.A. 60-1603. If new matter is set up in the answer, it shall be verified by the defendant in person. If a cross petition is filed, it shall be subject to the provisions of subsections (a), (b) and (c) of K.S.A. *1977 Supp.* 60-1604. *When there are minor children of the marriage, the answer shall contain, or be accompanied by an affidavit which contains, the informa-*

Sec. 29. K.S.A. 60-1610 is hereby amended to read as follows: 60-1610. A decree in an action under this article may include orders on the following matters:

(a) *Care of minor children.* The court shall make provisions for the ~~custody,~~ support and education of the minor children, and may modify or change any order in connection therewith at any time, and shall always have jurisdiction to make any such order to advance the welfare of a minor child if (i) the child is physically present in the county, or (ii) domicile of the child is in the state, or (iii) the court has previously exercised jurisdiction to determine the custody or care of a child who was at such time domiciled in the state. *The court shall make provision for the custody of the minor children only when the court has jurisdiction to make a child custody decree under the provisions of the uniform child custody jurisdiction act.* In connection with any decree under this article, the court may set apart such portion of the property of either the husband or the wife, or both of them, as may seem necessary and proper for the support of all of the minor children of the parties, or of either of them. Any order requiring either parent or both parents to pay for the support of any child until the age of majority shall terminate when such child attains the age of eighteen (18) years, unless by prior written agreement approved by the court such parent or parents specifically agreed to pay such support beyond the time such child attains the age of eighteen (18). If the court finds that both parties are unfit to have the custody of such minor children, their parental rights may be terminated and the custody of such children placed with an appropriate person, agency, or association, in or out of the state of Kansas. If such an order remains in effect for one year or more, the person, agency, or association having such custody may be given by the court the power to consent to the adoption of any such minor child under the adoption laws of this state under the following conditions:

(1) *Application.* Application shall be made to the district court in which the decree was granted for permission to consent to such adoption.

application shall be given to the parents, if their whereabouts are known, and to their attorneys of record, if any, by restricted mail prior to the hearing of the application.

(3) *Restoration of parental rights.* If the court permits such consent to be given, the court in which the adoption proceedings are commenced shall have exclusive jurisdiction over the custody of the minor child. If the adoption proceedings do not result in final adoption, the jurisdiction of the district court shall be immediately restored, and parental rights which have been terminated under the provisions of this subsection may be restored on the application of either party by order of the court in which they were terminated and on such reasonable notice to all parties affected as the court may require.

(b) *Child custody where parental rights not terminated.* In all cases involving the custody of any minor children, the court shall consider the best interests of such children to be paramount. Where parental rights have not been terminated, neither parent shall be considered to have a vested interest in the custody of any such child as against the other parent, regardless of the age of the child.

(c) *Division of property.* The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in his or her own right after marriage, or acquired by their joint efforts, in a just and reasonable manner, either by a division of the property in kind, or by setting the same or a part thereof over to one of the spouses and requiring either to pay such sum as may be just and proper, or by ordering a sale of the same under such conditions as the court may prescribe and dividing the proceeds of such sale.

(d) *Maintenance.* The decree may award to either party an allowance for future support denominated as alimony, in such amount as the court shall find to be fair, just and equitable under all of the circumstances. The decree may make the future payments conditional or terminable under circumstances prescribed therein. The allowance may be in a lump sum or in periodic payments or on a percentage of earnings or on any other basis. At any time, on a hearing with reasonable notice to the party af-

fected, the court may modify the amounts or other conditions for the payment of any portion of the alimony originally awarded that have not already become due, but no modification shall be made, without the consent of the party liable for the alimony, if it has the effect of increasing or accelerating the liability for the unpaid alimony beyond what was prescribed in the original decree.

(e) *Separation agreement.* If the parties have entered into a separation agreement which the court finds to be valid, just, and equitable, it shall be incorporated in the decree; and the provisions thereof on all matters settled thereby shall be confirmed in the decree except that any provisions for the custody, support, or education of the minor children shall be subject to the control of the court in accordance with all other provisions of this article. Matters, settled by such an agreement, other than matters pertaining to the custody, support, or education of the minor children, shall not be subject to subsequent modification by the court except as the agreement itself may prescribe or the parties may subsequently consent.

(f) *Restoration of name.* Upon the request of the wife, the court shall order the restoration of her maiden or former name.

(g) *Costs and fees.* Costs and attorneys' fees may be awarded to either party as justice and equity may require.

(h) *Effective date.* Every decree of divorce shall contain a provision to the effect that the parties are prohibited from contracting marriage with any other persons until thirty (30) days after the entry of the decree, unless an appeal is taken, and then until the receipt of the mandate issued in accordance with subsection (c) of K.S.A. 60-2106. Any marriage contracted before the expiration of that period shall be null and void, and any agreement to waive the right of appeal shall not be effective to shorten such period of time.

Sec. 30. K.S.A. 60-1611 is hereby amended to read as follows: 60-1611. A judgment or decree of divorce rendered in any other state or territory of the United States, in conformity with the laws thereof, shall be given full faith and credit in this state; except, that in the event the defendant in such action, at the time of such

judgment or decree, was a resident of this state and did not personally appear or defend the action in the court of such state or territory, and such court did not have jurisdiction over his or her person, all matters relating to alimony, ~~and to the~~ property rights of the parties~~,~~ and ~~to the custody and~~ maintenance of the minor children of the parties, shall be subject to inquiry and determination in any proper action or proceeding brought in the courts of this state within two (2) years after the date of the foreign judgment or decree, to the same extent as though the foreign judgment or decree had not been rendered. *Nothing herein shall authorize a court of this state to enter a custody decree, as defined in section 2, contrary to the provisions of the uniform child custody jurisdiction act.*

Sec. 31. K.S.A. 60-1605, 60-1610 and 60-1611 and K.S.A. 1977 Supp. 38-820 and 60-1604 are hereby repealed.

Sec. 32. This act shall take effect and be in force from and after its publication in the statute book.

Session of 1978

HOUSE BILL No. 2714

By Special Committee on Judiciary—B

Re Proposal No. 43

12-7

AN ACT defining and classifying the crime of aggravated interference with parental custody; supplementing the Kansas criminal code.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (1) Aggravated interference with parental custody is hiring someone to commit the crime of interference with parental custody, as defined by K.S.A. 21-3422, or committing interference with parental custody, as defined by K.S.A. 21-3422, when:

(a) Done by a person who has previously been convicted of interference with parental custody, as defined by K.S.A. 21-3422; or

(b) committed by a person who is armed with a dangerous weapon;

(c) committed by a person for hire; or

(d) the child is taken outside the state or the defendant, after lawfully taking the child outside the state while exercising visitation rights, refuses to return the child to this state to a parent entitled to custody of the child.

Aggravated interference with parental custody is a class E felony.

(2) This section shall be a part of and supplemental to the Kansas criminal code.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

□

3-14-78

RE: PROPOSAL NO. 39 - EXPUNGEMENT OF CRIMINAL RECORDS - ANNULMENT OF CONVICTIONS*

Proposal No. 39, assigned to the Special Committee on Judiciary - B, was a review of the statutes governing expungement of criminal records and annulment of convictions, an attempt to identify any problems or "loopholes" in those laws, and a study of possible curative legislation for any problems so identified.

Background

Three Kansas statutes govern expungements and annulments: K.S.A. 1976 Supp. 12-4515; 21-4616; and 21-4617. In all three statutes there is authorization to the person whose records of an offense are expunged or conviction is annulled to state in any application for employment, a license, or other civil right or privilege, that he or she was never convicted of that offense. All three statutes also provide that after the annulment or expungement occurs the person is to be treated in all respects as not having been convicted of that offense, except that upon conviction of any subsequent offense such conviction may be considered as a prior conviction in determining the sentence to be imposed. Supreme Court Rule No. 184 details the procedure to be followed.

Two bills concerning expungement and annulment were introduced during the last session. At the end of the session, S.B. 214 remained in the Senate Judiciary Committee, while H.B. 2467 remained in the House Judiciary Committee.

Committee Activity

The Committee reviewed S.B. 214 and H.B. 2467 and the statutes governing expungements and annulments. The Committee also reviewed the Habitual Violator Act (K.S.A. 1976 Supp. 8-284 et seq., as amended) and the habitual

* H.B. 2711 accompanies this report.

criminal statute (K.S.A. 21-4504). Conferees appearing before the Committee included representatives of the Kansas Bureau of Investigation, the Independent Insurance Agents of Kansas, the Topeka Police Department, and the Wichita Police Department.

The following were identified by the conferees as problems with the present statute:

1) The statutes make no provision for expungement of records of a person who was not convicted of an offense but merely arrested and subsequently released or tried and acquitted for that offense.

2) The existence of three statutes is confusing.

3) The use of two terms (i.e., expungement; annulment) is confusing.

4) A felon whose records have been expunged could possibly become a police officer or other criminal justice employee, hold elective office, obtain firearms legally, or practice law.

5) The present law does not allow sufficient time for automobile insurance companies to obtain information needed in order to adjust insurance rates for an unsafe driver convicted of violating a traffic ordinance. Hence, insurance companies allege that safe drivers have higher premiums than they otherwise would.

The Committee considered in detail each of these problems as well as a proposed revision of S.B. 214 submitted by the representatives of the Topeka Police Department. Several new bill drafts were directed and considered as possible curative legislation for some of the problems noted. From among that group of bill drafts, the Committee voted to introduce the bill described below and appended to this report.

Conclusions and Recommendation

It is recommended that H.B. 2711 be introduced in the House of Representatives.

This bill would repeal three Kansas statutes currently governing expungements and annulments as well as the statute (K.S.A. 1976 Supp. 8-290, as amended) dealing with persons convicted during any five-year period of 10 violations of statutes or ordinances regulating the operation of motor vehicles on highways. The procedures established by those statutes would be replaced by the following procedures:

1) To obtain an expungement of a conviction of a violation of a city ordinance, or a misdemeanor, or a Class D or E felony which are not also items enumerated in K.S.A. 1976 Supp. 8-285(a), two years must have elapsed since the sentence was satisfied or the person was otherwise discharged.

2) To obtain an expungement of a conviction of a violation of a city ordinance that is also one of the items enumerated in K.S.A. 1976 Supp. 8-285(a), or a Class A, B or C felony, or one of the items enumerated in K.S.A. 1976 Supp. 8-285(a), five years must have elapsed since the sentence was satisfied or the person was otherwise discharged.

The bill establishes procedures for a hearing on the petition for expungement and sets forth findings required by the court before an expungement is required. The legal effects of an expungement are described and a requirement of a notice of the opportunity to expunge is imposed. Rules for nondisclosure and disclosure of the existence of records related to the conviction are established. The bill states that expungement does not relieve the person whose conviction is expunged from complying with state or federal laws prohibiting the carrying of firearms for a period of time after a felony conviction.

The Committee is aware that expungement procedures and their legal effects have been assailed as allowing legislatively authorized lies. The dilemma posed by the truth of that criticism and the need to allow a person who made a mistake, or who has reformed, to begin afresh is of concern to the Committee. The Legislature should study this problem in the future for the purpose of finding a satisfactory solution to the issues posed by the dilemma.

Respectfully submitted,

November 18, 1977

Rep. Richard Brewster,
Chairperson
Special Committee on
Judiciary - B

Sen. Donn J. Everett,
Vice-Chairperson
Sen. Ron Hein
Sen. Joseph F. Norvell
Sen. Jim Parrish
Rep. Ben Foster

Rep. Michael G. Glover
Rep. John F. Hayes
Rep. Fred C. Lorentz
Rep. Phil Martin
Rep. Kent A. Roth

Session of 1978

HOUSE BILL No. 2711

By Special Committee on Judiciary—B

Re Proposal No. 39

12-7

AN ACT relating to crimes; concerning the expungement of certain convictions; concerning certain traffic offenses and penalties; repealing K.S.A. 1977 Supp. 8-290, 12-4515, 21-4616 and 21-4617.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Except as provided in subsection (b), any person who has been convicted of a violation of a city ordinance of this state may petition the convicting court for the expungement of such conviction if two or more years have elapsed since the person: (1) Satisfied the entire sentence imposed; or (2) was discharged from probation, parole or a suspended sentence.

(b) In the case of a conviction for the violation of a city ordinance which would also constitute a violation of any of the items enumerated in subsection (a) of K.S.A. 1977 Supp. 8-285, and any amendments thereto, no person may petition for expungement until five or more years have elapsed since the person: (1) Satisfied the sentence imposed; or (2) was discharged from probation, parole or a suspended sentence.

(c) When a petition for expungement is filed, the court shall set a date for a hearing thereon and shall give notice thereof to the prosecuting attorney. Any person who may have relevant information about the petitioner may testify at the hearing. The court may inquire into the background of the petitioner and shall have access to any reports or records relating to the petitioner that are on file with the secretary of corrections or the Kansas adult authority.

(d) At the hearing on the petition, the court shall order the

(1) That the petitioner has not been convicted of a felony in the past two years and no proceeding involving any such crime is presently pending or being instituted against the petitioner;

(2) that the circumstances and behavior of the petitioner warrant the expungement;

(3) that the expungement is consistent with the public welfare; and

(4) that the rehabilitation of the petitioner has been attained to the satisfaction of the court.

(e) When the court has ordered a conviction expunged, the petitioner shall be treated as not having been convicted of the crime, except that:

(1) Upon conviction for any subsequent crime the conviction that was expunged may be considered as a prior conviction in determining the sentence to be imposed;

(2) in any application for employment as a law enforcement officer, as defined by K.S.A. 1977 Supp. 22-2202, the petitioner, if asked about previous convictions, must disclose that the conviction took place;

(3) the court, in the order of expungement, may specify other circumstances under which the conviction is to be disclosed; and

(4) the conviction may be disclosed in a subsequent prosecution for an offense which requires as an element of such offense a prior conviction of the type expunged.

(f) Whenever a person is convicted of an ordinance violation, pleads guilty and pays a fine for such a violation or is placed on parole or probation or is given a suspended sentence for such a violation, the person shall be informed of the ability to expunge the conviction.

(g) Subject to the disclosures required pursuant to subsection (e), in any application for employment, license or other civil right or privilege, or any appearance as a witness, a person whose conviction of an offense has been expunged under this statute may state that he or she has never been convicted of such offense.

(h) Whenever the record of any conviction has been expunged under the provisions of this section, the custodian of the records of arrest, conviction and incarceration relating to that crime shall

not disclose the existence of such records, except when requested by:

(1) The person whose record was expunged;

(2) a law enforcement agency, and the request is accompanied by a statement that the request is being made in conjunction with an application for employment with such agency by the person whose record has been expunged;

(3) a court, upon a showing of a subsequent conviction of the person whose record has been expunged;

(4) a person entitled to such information pursuant to the terms of the expungement order; or

(5) a prosecuting attorney, and such request is accompanied by a statement that the request is being made in conjunction with a prosecution of an offense that requires a prior conviction as one of the elements of such offense.

Sec. 2. (a) Except as provided in subsection (b), any person convicted in this state of a misdemeanor or a class D or E felony may petition the convicting court for the expungement of such conviction if two or more years have elapsed since the person has: (1) Satisfied the sentence imposed; or (2) was discharged from probation, parole, conditional release or a suspended sentence.

(b) In the case of a conviction for a class A, B or C felony or any violation enumerated in subsection (a) of K.S.A. 1977 Supp. 8-285, and any amendments thereto, no person may petition for expungement until five or more years have elapsed since the person: (1) Satisfied the sentence imposed; or (2) was discharged from probation, parole, conditional release or a suspended sentence.

(c) When a petition for expungement is filed, the court shall set a date for a hearing thereon and shall give notice thereof to the prosecuting attorney. Any person who may have relevant information about the petitioner may testify at the hearing. The court may inquire into the background of the petitioner and shall have access to any reports or records relating to the petitioner that are on file with the secretary of corrections or the Kansas adult authority.

(d) At the hearing on the petition, the court shall

petitioner's conviction expunged if the court finds:

(1) That the petitioner has not been convicted of a felony in the past two years and no proceeding involving any such crime is presently pending or being instituted against the petitioner;

(2) that the circumstances and behavior of the petitioner warrant the expungement;

(3) that the expungement is consistent with the public welfare; and

(4) that the rehabilitation of the petitioner has been attained to the satisfaction of the court.

(e) When the court has ordered a conviction expunged, the petitioner shall be treated as not having been convicted of the crime, except that:

(1) Upon conviction for any subsequent crime the conviction that was expunged may be considered as a prior conviction in determining the sentence to be imposed;

(2) in any application for employment as a law enforcement officer, as defined by K.S.A. 1977 Supp. 22-2202, the petitioner, if asked about previous convictions, must disclose that the conviction took place;

(3) the court, in the order of expungement, may specify other circumstances under which the conviction is to be disclosed; and

(4) the conviction may be disclosed in a subsequent prosecution for an offense which requires as an element of such offense a prior conviction of the type expunged.

(f) Whenever a person is convicted of a crime, pleads guilty and pays a fine for a crime or is placed on parole or probation or is given a suspended sentence or conditional release, the person shall be informed of the ability to expunge the conviction.

(g) Subject to the disclosures required pursuant to subsection (e), in any application for employment, license or other civil right or privilege, or any appearance as a witness, a person whose conviction of a crime has been expunged under this statute may state that he or she has never been convicted of such crime, but the expungement of a felony conviction does not relieve an individual of complying with any state or federal law relating to the use or possession of firearms by persons convicted of a felony.

(h) Whenever the record of any conviction has been expunged under the provisions of this section, the custodian of the records of arrest, conviction and incarceration relating to that crime shall not disclose the existence of such records, except when requested by:

(1) The person whose record was expunged;

(2) a law enforcement agency, and the request is accompanied by a statement that the request is being made in conjunction with an application for employment with such agency by the person whose record has been expunged;

(3) a court, upon a showing of a subsequent conviction of the person whose record has been expunged;

(4) a person entitled to such information pursuant to the terms of the expungement order; or

(5) a prosecuting attorney, and such request is accompanied by a statement that the request is being made in conjunction with a prosecution of an offense that requires a prior conviction as one of the elements of such offense.

Sec. 3. K.S.A. 1977 Supp. 8-290, 12-4515, 21-4616 and 21-4617 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

□

Re: HB 2773

3-14-78

No. 48,125

In the Matter of the Application of Nancy E. Jolly for a Writ of Habeas Corpus. NANCY E. JOLLY, *Appellee*, v. LYNDELL L. AVERY, *Appellant.*

(556 P. 2d 449)

SYLLABUS BY THE COURT

1. PARENT AND CHILD—*Bringing Child into Kansas under Visitation Order—Continuing Jurisdiction in Michigan Court—Full Faith and Credit.* Where a parent brings a child into this state for temporary visitation under an order of a court of another state, which has continuing jurisdiction to change or modify its decree, then in the interest of comity a Kansas court may, and in most instances should, give full faith and credit to the decree from our sister state and decline to hear on its merits an application to change custody made here under such circumstances.

2. HABEAS CORPUS—*Child Custody Proceedings—Refusing to Transfer to Another Division—Accepting Allegations of Petition—Refusing to Hear Evidence of Changed Conditions.* In a habeas corpus proceeding for the custody of a child, it is *held* that the trial court did not err (1) in refusing to transfer the matter to another division of the same court where another action between the parties was pending, and in proceeding to hear and determine the matter with dispatch; (2) in accepting the allegations of the verified petition as true, in the absence of a good faith denial thereof; (3) in refusing to hear evidence of changed circumstances, in the exercise of its discretion; and (4) in granting the petition.

Appeal from Johnson district court, division No. 6; LEWIS C. SMITH, judge. Opinion filed November 6, 1976. Affirmed.

Bruce F. Landeck, of Lowe, Terry & Roberts, of Olathe, argued the cause and was on the brief for the appellant.

No appearance or brief was filed on behalf of the appellee.

The opinion of the court was delivered by

MILLER, J.: This habeas corpus proceeding involves the custody of eleven-year-old Michael Lynn Avery. His mother, Nancy E. Jolly, is the petitioner-appellee; his father, Lyndell L. Avery, is respondent and appellant. The matter was heard and the petition granted in Division 6 of the District Court of Johnson County, Kansas. The respondent raises several points on appeal, most of which involve the exercise of discretion by the trial court.

The background facts are not remarkable. Nancy and Lyndell were married in Kansas in 1957. They then moved to Michigan, where Michael was born in 1964. Four years later the parents separated. Nancy remained in Michigan; Lyndell returned to Kansas and has resided in Johnson County since 1968. Nancy filed

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for divorce, and a default decree was entered in April, 1969, by the Circuit Court of Oakland County, Michigan, dissolving the marriage contract and granting to Nancy the care and custody of Michael. The court also granted visitation privileges to Lyndell, including the right to have Michael come to Kansas for a visit of up to one month each summer. Both Nancy and Lyndell have remarried.

Michael came to visit his father during the summer of 1975. Nancy says that Michael came to Kansas on August 8, and that Lyndell agreed to return him to Michigan on August 28, but instead, Lyndell telephoned Nancy's attorney on that date advising him that Michael would not be returned to Michigan. Lyndell acknowledges that Michael came to Kansas to visit him under and pursuant to the visitation orders entered by the Circuit Court of Oakland County, Michigan, and that Michael remained in Kansas until the petition for writ of habeas corpus was heard.

Next in the chain of events, the circuit court entered an emergency order on August 29, directing Lyndell to return Michael to his home in Michigan immediately, or to appear before that court on September 17 at 9 a. m. to show cause why he should not be punished for contempt. This order was served upon Lyndell on September 5.

Lyndell, on September 2, commenced an action in the District Court of Johnson County, Kansas wherein he sought the temporary and permanent custody of Michael. He alleged in his petition a change of circumstances since the granting of the Michigan decree in 1969, and the unfitness of both Nancy and her present husband. Nancy was served with summons on September 9. This case was assigned to division 5.

Nancy filed her verified application for a writ of habeas corpus in the District Court of Johnson County, Kansas on September 8. She pleaded the 1969 decree of the Michigan court granting her Michael's custody and the emergency order of August 29 requiring Lyndell to return Michael to Michigan. She alleged that not withstanding these orders, Lyndell was unlawfully restraining and holding Michael in his custody. This action was assigned to division 6, and a writ of habeas corpus was issued, returnable on September 10. The record does not reflect the date on which the writ was served.

Lyndell answered the habeas petition and a hearing was held

before division 6 of the Johnson County District Court on September 10, both parties appearing in person and by counsel, and Michael being out of the courtroom but within the building. The court refused to hear evidence as to changed circumstances or fitness of the parents, and limited its consideration to (1) whether there was a valid and effective order of the Michigan court awarding custody, and (2) whether there was a violation of that order. It found in the affirmative on both questions, determined that in the interest of comity it should give full faith and credit to the Michigan court order, and granted Nancy immediate custody of Michael.

Simply stated, respondent here complains that the court erred in not holding an evidentiary hearing; in failing to transfer the matter to division 5 under local rule 3; and in refusing to grant respondent a stay pursuant to K. S. A. 60-1505. We will consider these points in the order stated.

The court was first faced with a determination of whether to hold a full evidentiary hearing on the issue of change of custody as urged by the respondent. Lyndell's answer denied all of the allegations of the petition except the identities of the parties and their residences, and that they are the natural parents of Michael. However, attached as an exhibit to the answer was a copy of the verified petition for change of custody filed by Lyndell a few days previously in the same court. By that verified document Lyndell pleaded facts which he chose to deny in the habeas action—that the parties were divorced by decree of a Michigan court, which decree awarded custody of Michael to Nancy and visitation privileges to him; and that Michael was physically present in Johnson County pursuant to the visitation granted Lyndell by the court in Michigan. He challenged the copies of the orders of the Michigan court appended to the habeas petition because they were certified and not authenticated. The trial court specifically inquired if respondent denied or in any way challenged the validity of those orders, and no challenge except as to lack of certification was forthcoming. The long and short of respondent's argument then and now is that he wanted the trial court to hold an evidentiary hearing not on the validity of the Michigan court orders but upon his request for a change of custody.

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sister state, and then seeks to invoke the equity jurisdiction of our courts to avoid compliance with the order under which temporary custody of the minor was secured. The Michigan court has continuing jurisdiction in child custody matters under MSA 25.97, and may upon proper application and showing, change the custody or otherwise alter or revise the decree insofar as it provides for the care, custody or support of minor children of the marriage. *Rybinski v. Rybinski*, 333 Mich. 592, 53 N. W. 2d 386; *Sperti v. Sperti*, 326 Mich. 620, 40 N. W. 2d 746; *Young v. Young*, 13 Mich. App. 395, 164 N. W. 2d 585.

At the time of the hearing on September 10 before the trial court in this matter, the Michigan court had already issued its emergency order of August 29, and had scheduled a hearing for September 17. The trial court recognized its jurisdiction to hold an evidentiary hearing, but declined to do so in the exercise of its discretion. In its memorandum, the trial court said:

". . . The Court is aware that it could have jurisdiction to have an evidentiary hearing on change of custody but feels that it should give full faith and credit . . . [to the Michigan court proceedings]."

The trial court also indicated that it was invoking the "clean hands" doctrine in exercising its discretion.

The problem facing the trial court is a recurring one. Justice (now Chief Justice) Fatzer discussed it in detail in *Perrenoud v. Perrenoud*, 206 Kan. 559, 576-578, 480 P. 2d 749, where he said:

"Frequently courts have been faced with the problem whether to give 'full faith and credit' or 'comity' to a sister state's decree and refuse to reexamine its merits, or to exercise their own discretion and protect the welfare of minor children within their jurisdiction. . . . This court has recognized that a decree of a court of one state having jurisdiction relating to the custody of minor children, is, under the doctrine of 'comity' prevailing among sister states, entitled to recognition in this state. However, full faith and credit has only limited application to child custody decrees; it is inherent in the nature of such a decree that it is not final and conclusive, but is subject to the right of the parties to show a change of circumstances and conditions. . . .

"It is apparent that . . . the door is open wide, so to speak, to 'forum shopping'. . . . Some decisions point out that such abuse may be prevented by the imposition of the 'clean hands' doctrine which prevents a parent from invoking the court's jurisdiction if he is a fugitive from the state issuing such decree, or has made misrepresentations in some way to obtain the custody of the children, or is flaunting a foreign proceeding or decree. The doctrine seems to be making advancement in family law and is being relied upon in some jurisdictions where the circumstances merit its application. In cases of this character, the court is dealing with a matter equitable in nature

where the child's welfare is the paramount consideration, and it is a familiar equitable maxim that '[h]e who comes into equity must come in with clean hands.' . . .

. . . . . .

"The 'clean hands' doctrine, as applied in child custody cases, is an equitable one, is not an absolute, and is to be applied or not applied at the court's discretion in each particular case. . . ."

Anderson v. Anderson, 214 Kan. 387, 520 P. 2d 1239, is factually similar to the case at hand. The Andersons were divorced in Minnesota. The trial court gave Mr. Anderson custody of the minor child, and granted Mrs. Anderson visitation privileges, including the right to bring the child to Kansas for four weeks during the summer. Mrs. Anderson brought the child here in the summer as authorized, and before the visit ended filed an action in the District Court of Sedgwick County alleging a change of circumstances and praying for a change of custody. While that action was pending and undetermined, Mr. Anderson, finding his child and former wife living in El Dorado, filed an action in habeas corpus in the District Court of Butler County. In his petition he set out the Minnesota decree and alleged that Mrs. Anderson was violating its provisions by retaining the child after her visitation rights expired. The trial court granted the writ. It gave full faith and credit to the Minnesota decree and, applying the "clean hands" doctrine, denied Mrs. Anderson's request to introduce evidence showing a change of circumstances. We affirmed, relying upon and citing extensively from *Perrenoud*, supra.

We think the trial court here was fully justified in taking like action. Plaintiff complains that there was no evidence before the trial court on which to render such a decision. He points out that his answer constituted a general denial, thus putting in issue all of the factual allegations of the habeas petition. His answer, however, includes a copy of his verified petition in the change of custody action he had commenced. A comparison of the denials in the answer with the averments in respondent's petition indicates that the general denial was not advanced in the utmost good faith.

Our rule, K. S. A. 60-208 (*b*) (since amended), provides in applicable part that a party:

". . . [S]hall admit or deny the averments upon which the adverse party relies. . . . Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part . . . of an averment, he shall specify so much of it as is true . . . and shall deny only the remainder. . . ."

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As Judge Gard notes in his Kansas Code of Civil Procedure, p. 33, the rule requires in substance that where a pleader denies generally, he must mean it. Respondent, in his answer, denied that the parties were divorced on April 9, 1969, in the Circuit Court of Oakland County, Michigan. He denied that that court granted the custody of Michael to Nancy and granted visitation privileges to him. In his petition, however, he alleged that the parties were divorced by decree of the Circuit Court of Oakland County in April, 1969; that the decree granted the custody of Michael to Nancy; and alleged that Michael was physically present in Johnson County, Kansas, visiting with respondent at his residence under the visitation orders entered by the Circuit Court of Oakland County, Michigan in its divorce decree. Further, he alleged that he remarried on May 10, 1969, the month following the entry of the decree. It was readily apparent to the trial court at the hearing, and is readily apparent to us, that respondent did not in good faith controvert the material allegations of the habeas petition. No useful purpose would have been served by requiring the petitioner to offer evidence to establish the allegations of her petition, when those allegations were not controverted. The answer, when read with the conflicting averments of the attached petition to change custody, did not constitute a specific denial of the material allegations of the petition.

Respondent's counsel orally indicated a desire to offer evidence before the trial court in support of respondent's application for a change of custody—not evidence challenging the allegations of the habeas petition. Under these circumstances it was not error for the trial court to accept the statements in the petition as true.

Respondent contends that the court erred in not holding an evidentiary hearing on his request to change custody. He contends that he was not "forum shopping"; that he came into court with "clean hands"; and that he was not in contempt under the Michigan court order since the show cause hearing had not yet been held. The court found that the Michigan custody order had not been vacated, modified or changed and that respondent received the minor child with the understanding that the child would be returned on August 28. Notwithstanding, respondent did not return the child to his mother in Michigan, but maintained him within this state. The Michigan court then entered its emergency order requiring respondent to immediately return the minor child to

Michigan or show cause why he should not be punished for contempt. These findings of the trial court are supported by the record.

We hold that absent unusual circumstances, where a parent brings a child into this state for temporary visitation under an order of a court of another state, which has continuing jurisdiction to change or modify its decree, then in the interest of comity a Kansas court may, and in most instances should, give full faith and credit to the decree from our sister state and decline to hear on its merits an application to change custody made here under such circumstances. To hold otherwise would create chaos in child custody proceedings, discourage the granting of visitation privileges to nonresidents, aggravate relationships between separated spouses, and, most importantly, would adversely affect the children involved. Here, it is clear that respondent was holding the child in violation of the orders of the Michigan court. That court had, prior to the Kansas hearing, set the matter down for hearing. Respondent had notice of that setting. Under the circumstances, petitioner did not come into the District Court of Johnson County with "clean hands," and the trial court did not abuse its discretion by declining to hear the application to change custody, and by giving full faith and credit to the Michigan proceedings, where the matter was already set and could be fully heard.

Petitioner also complains that the trial court erred in not transferring the habeas petition to division 5 of the District Court of Johnson County where his action to change custody was pending. Local rule 3 provides for the assignment of companion cases to the division having the lowest number. A similar question arose in *Anderson v. Anderson,* supra. There we noted that the habeas court might have deferred taking action until after final hearing on the pending change of custody action, but we held it was not required to give the earlier case priority. Similarly, we know of no legal impediment to the trial court's proceeding to hear the habeas petition here.

As the United States Supreme Court observed in *Fay v. Noia,* 372 U. S. 391, 399, 400, 9 L. Ed. 2d 837, 83 S. Ct. 822:

"We do well to bear in mind the extraordinary prestige of the Great Writ, *habeas corpus ad subjiciendum,* in Anglo-American jurisprudence: 'the most celebrated writ in the English law.' 3 Blackstone Commentaries 129. It is 'a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. . . .'"

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Habeas corpus has been described as a high prerogative common law writ of ancient origin. Its function is to provide a speedy and efficacious remedy to illegal restraint. Clearly, by its very nature, a proceeding in habeas corpus is entitled to priority; the judge is directed by statute to "proceed in a summary way to hear and determine the cause. . . ." K. S. A. 60-1505 (*a*). We conclude that the trial court did not err in proceeding to hear the matter with dispatch on the return date of the writ, and in denying the requested transfer to division 5 under local rule 3.

Finally, respondent contends that the trial court committed reversible error in failing to grant a stay of its order pursuant to K. S. A. 60-1505 (*d*). Respondent, however, has sustained no prejudice and we therefore need not consider this point.

For the reasons stated, the judgment is affirmed.

3-14-78

STATE OF KANSAS

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March 14, 1978

Senator Elwaine Pomeroy, Chairman
Senate Judiciary Committee
Statehouse
Topeka, KS 66612

Dear Senator Pomeroy:

This letter will hopefully describe some of the comments that I and members of my staff made before your committee today as we testified concerning House Bill 2147.

The Bureau has several concerns with HB2147. The first is a strong feeling that the bill perpetuates what we feel is an inadvisable situation of encouraging legal lies. That is, the bill allows persons to make a statement that is totally untrue and remove themselves from any disability for their previous actions. Such a policy encourages, to some extent, persons to commit crimes, since they know that should they be caught, they will not suffer any additional penalties for their actions, and will be able to continue their activities without additional hindrances due to a criminal history record. Such a situation may be desireable for first time, one time only offenders, but the present arrangements, and those contemplated under this bill, would extend the same advantages to repeat offenders who commit serious crimes.

The bureau also has some concerns about the mechanics of the bill and the processes that it allows. In line 34, the bill specifies that requests from criminal justice agencies for arrest data be made in writing. This general statement would seriously distrub the arrangements that exist in the criminal justice community, where, for example, a detective in one agency calls another agency and asks that a copy of an individual's criminal history record be sent to him through the communications network or by mail. Under the bill, this type of request would be eliminated, although the exchange would doubtless take place. Instead, the detective would encounter delays as he makes and probably mails the request, and waits for an answer. Similar hindrances would hamper the effectiveness of prosecutors, courts, and probation/parole authorities, who would encounter longer delays in information.

For some time, the state has tried to improve the effectiveness of the state's criminal justice information systems. Forcing information transfers to take place only in writing would push the state backwards, and eliminate many of the advances that we have been able to make in information systems.

We feel that the existing federal regulations that deal with the completeness and accuracy of information, to say nothing of the state statutes in this area (such as Senate Bill 406, which recently became law), provide the best safeguards presently available in the area of criminal records. It appears to us that making sure that information is correct, accurate, and used properly is much more important that the mechanisms that are used to request and provide information.

A further item of concern to us is the allowance in the paragraph that starts on line 35, describing the subject's ability to state that no arrest ever took place. We can forsee several possible situations where an individual may encounter criminal justice authorities and state that no arrest has ever taken place, while at the very instant, the agency is holding a record describing exactly the opposite. The agency will undoubtably become suspicious, and will probably treat the subject differently than they would have if the subject had been honest. Further difficulties could occur if the subject ever became involved in a court case, and attempted to deny the existance of an arrest record when the prosecuting attorney had a copy of it in hand. Although the bill allows witnesses to disclaim arrests, it does not allow defendants the same privilege. We doubt that many persons will be able to make the distinction while on the stand, and will commit perjury, further complicating their case.

A similar occurrence may take place when a person applies for employment with a criminal justice agency. The person will probably indicate on the application form that no arrest has ever taken place, while the agency, using the authority granted in the statute, knows every possible fact about the previous arrests. Such a situation would probably eliminate such a person from employment.

Finally, the elimination of this information may seriously hamper security investigations, such as are common for judicial appointments, security clearances in national defense work, or Federal Civil Service investigations. Psychiatric treatment of offenders, half-way treatment facilities run by private non-profit operations, and researchers will also be seriously hampered by the bill.

I hope that this short written summary of our testimony is helpful. If we can provide any additional information, please contact us.

Sincerely,

W.L. Albott
DIRECTOR