

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Wint Winter at  
Chairperson

10:00 a.m. ~~p.m.~~ on January 17, 1989 in room 514-S of the Capitol.

~~xxx~~ All members were present ~~xxx~~ except: Senators Winter, Yost, Moran, Bond, Feleciano, Gaines, D. Kerr, Martin, Morris, Oleen, Parrish, Petty and Rock.

Committee staff present:

Mike Heim, Legislative Research Department  
Jerry Donaldson, Legislative Research Department  
Gordon Self, Revisor of Statutes  
Jane Tharp, Committee Secretary

Conferees appearing before the committee:

Yo Bestgen, Kansas Association of Rehabilitation Facilities  
Jamie Schwartz, United Telecom

Yo Bestgen, Kansas Association of Rehabilitation Facilities, presented a request for a committee bill concerning the requirement to register for fund raising activities. Following her explanation, Senator Feleciano moved the bill be introduced as a committee bill. Senator Morris seconded the motion. The motion carried.

Jamie Schwartz, United Telecom, requested a bill be introduced relating to business combinations with interested stockholders (See Attachment I). Following his explanation, Senator D. Kerr moved the bill be introduced. Senator Parrish seconded the motion. The motion carried.

Staff presented a summary of selected state and federal decisions concerning Child Abuse and Felony Murder, Capital Punishment, Child Witness Protection, Rape Shield Statute, Habitual Criminal Act, Abortion, and Tort Reform-Medical Malpractice. Following discussion of Child Abuse, Senator Bond moved to draft a bill that would allow for charge of felony murder in the instance of child abuse resulting in death. Senator Petty seconded the motion. The motion carried.

Senator Gaines reported on the Governor's Commission on Prison Overcrowding.

Randy Hearrell presented two bill requests; one relating to administrative judge, and the second request concerning an act to recodify the Kansas Adoption Laws. Senator Morris moved to introduce the two bills as committee bills. Senator Feleciano seconded the motion. The motion carried.

Senator Morris moved to approve the minutes of January 11, 1989 and January 12, 1989, with the change to attach the list of the subcommittees to the minutes. Senator Rock seconded the motion. The motion carried.

The meeting adjourned.

Copy of the guest list is attached (See Attachment III).

Copy of Memorandum from Kansas Legislative Research Department is attached (See Attachment II).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 1-17-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Jon Dray	Topeka	Kansas Life at its Best!
JEFF RUSSELL	TOPEKA	United Tel. Co. of KS
Paul Shelby	Judicial	Supreme Court
Don Lindsey	OSAWATOMIE	UTU
James Schwarz	Topeka	United Telecom
Gerhard Metz		KCCI
Brod Lupton	Topeka	KS Tort Reform
Jerry Waples	Lawrence	KWLS
Richard Wason	"	KRA
Robert Frey	Liberals	KTLA
Jeff Bockitt	Topeka	St. Francis - Wichita
Jo Bestgen	Topeka	KARF
Patrick J. Murphy	Manhattan	KTLA
Salmon Wells	Topeka	Budget Division
Matt Lynch	"	Judicial Council
Randy M. Nearrell	"	"
Rob Tabor	Lawrence	

## SUMMARY OF THE PROPOSED STATUTE

The proposed statute is quite detailed, but the basic thrust of the statute is quite simple. An acquiror who directly or indirectly acquired 15% of the common stock of a publicly held Kansas corporation may not for a period of three years enter into a merger or similar "business combination" with the corporation unless one of several events occurs, all of which involve the voluntary action by a large percentage of the public stockholders of the corporation. Those events are:

(i) The Board of Directors of the corporation has exempted the corporation from the coverage of the statute prior to the person becoming an "interested stockholder." This power expires 90 days after the statute is enacted.

(ii) The corporation's articles of incorporation, either when originally prepared or by a subsequent amendment approved by the holders of a majority of the shares entitled to vote, exempts the corporation from the statute. Such an amendment would not be effective for 12 months following the vote.

(iii) An independent third party proposed a business combination with the corporation in which event the corporation has to give notice of the proposed transaction to the interested stockholder so he can make a competing offer.

(iv) The interested stockholder became "interested" inadvertently and promptly divests enough shares to go below the 15% level.

(v) The transaction is approved by the board of directors of the corporation prior to the person becoming an interested stockholder.

(vi) The transaction is approved after the person becomes an interested stockholder both by the corporation's board of directors and the holders of at least two-thirds of the corporation's voting stock not held by the interested stockholder.

(vii) In the transaction in which the interested stockholder became such he acquired at least 85% of the corporation's voting stock. Shares held by directors who are also officers of the corporation and shares held by employee stock plans in which the participants do not have the right to determine confidentially whether the shares held subject to the plan will be tendered are excluded in calculating the number of shares outstanding for the purpose of determining whether the 85% test has been met.

An "interested stockholder" is defined generally as the owner of 15% of the outstanding voting stock of the corporation. Persons holding such amount of stock on a specific date to be inserted in the statute would be exempt from the statute as would those who acquire their shares by gift or inheritance.

*Attachment I*

*JJC*  
*1-17-89*

Be it enacted by the Legislature of Kansas:

An Act Relating to Business Combinations with Interested Stockholders.

Section 1. Notwithstanding any other provisions of this chapter, a corporation shall not engage in any business combination with any interested stockholder for a period of 3 years following the date that such stockholder became an interested stockholder, unless (1) prior to such date the board of directors of the corporation approved either the business combination or the transaction which resulted in the stockholder becoming an interested stockholder, or (2) upon consummation of the transaction which resulted in the stockholder becoming an interested stockholder, the interested stockholder owned at least 85% of the voting stock of the corporation outstanding at the time the transaction commenced, excluding for purposes of determining the number of shares outstanding those shares owned (i) by persons who are directors and also officers and (ii) employee stock plans in which employee participants do not have the right to determine confidentially whether shares held subject to the plan will be tendered in a tender or exchange offer, or (3) on or subsequent to such date the business combination is approved by the board of directors and authorized at an annual or special meeting of stockholders, and not by written consent, by the affirmative vote of at least 66-2/3% of the outstanding voting stock which is not owned by the interested stockholder.

Section 2. The restrictions contained in this Act shall not apply if:

(1) the corporation's original articles of incorporation contain a provision expressly electing not to be governed by this Act;

(2) the corporation, by action of its board of directors, adopts an amendment to its bylaws within 90 days of the effective date of this Act expressly electing not to be governed by this Act, which amendment shall not be further amended by the board of directors;

(3) the corporation, by action of its stockholders, adopts an amendment to its articles of incorporation or bylaws expressly electing not to be governed by this Act, provided that, in addition to any other vote required by law, such amendment to the articles of incorporation or bylaws must be approved by the affirmative vote of a majority of the shares entitled to vote. An amendment adopted pursuant to this paragraph shall not be effective until 12 months after the adoption of such amendment and shall not apply to any business combination between such corporation and any person who became an interested stockholder of such corporation on or prior to such adoption. A bylaw amendment adopted pursuant to this paragraph shall not be further amended by the board of directors;

(4) the corporation does not have a class of voting stock that is (i) listed on a national securities exchange, (ii) authorized for quotation on an inter dealer quotation system of a registered national securities association or (iii) held of record by more than 2,000 stockholders, unless any of the foregoing results from action taken, directly or indirectly, by an interested stockholder or from a transaction in which a person becomes an interested stockholder;

(5) a stockholder becomes an interested stockholder inadvertently and (i) as soon as practicable divests sufficient shares so that the stockholder ceases to be an interested stockholder and (ii) would not, at any time within the 3 year period immediately prior to a business combination between the corporation and such stockholder, have been an interested stockholder but for the inadvertent acquisition; or

(6) the business combination is proposed prior to the consummation or abandonment of and subsequent to the earlier of the public announcement or the notice required hereunder of a proposed transaction which (i) constitutes one of the transactions described in the second sentence of this paragraph; (ii) is with or by a person who either was not an interested stockholder during the previous 3 years or who became an interested stockholder with the approval of the corporation's board of directors; and (iii) is approved or not opposed by a majority of the members of the board of directors then in office (but not less than 1) who were directors prior to any person becoming an interested stockholder during the previous 3 years or were recommended for election or elected to succeed such directors. The proposed transactions referred to in the preceding sentence are limited to (x) a merger or consolidation of the corporation (except for a merger in respect of which, pursuant to K.S.A. 17-6701(f), no vote of the stockholders of the corporation is required); (y) a sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions), whether as part of a dissolution or otherwise, of assets of the corporation or of any direct or indirect majority-owned subsidiary of the corporation (other than to any direct or indirect wholly-owned subsidiary or to the corporation) having an aggregate market value equal to 50% or more of either that aggregate market value of all of the assets of the corporation determined on a consolidated basis or the aggregate market value of all the outstanding stock of the corporation; or (z) a proposed tender or exchange offer for 50% or more of the outstanding voting stock of the corporation. The corporation shall give not less than 20 days notice to all interested stockholders prior to the consummation of any of the transactions described in clauses (x) or (y) of the second sentence of the paragraph. Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection, a corporation may elect by a provision of its original articles of incorporation or any amendment thereto to be governed by this Act, provided that any such amendment to the articles of incorporation shall not apply to restrict a business combination between the corporation and an interested stockholder of the corporation if the interested stockholder became such prior to the effective date of the amendment.

Section 3. As used in this Act only, the term:

(1) 'affiliate' means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, another person.

(2) 'associate,' when used to indicate a relationship with any person, means (i) any corporation or organization of which such person is a director, officer or partner or is, directly or indirectly, the owner of 20% or more of any class of voting stock, (ii) any trust or other estate in which such person has at least a 20% beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (iii) any relative or spouse of such person, or any relative of such spouse, who has the same residence as such person,

(3) 'business combination,' when used in reference to any corporation and any interested stockholder of such corporation, means:

(i) any merger or consolidation of the corporation or any direct or indirect majority-owned subsidiary of the corporation with (A) the interested stockholder, or (B) with any other corporation if the merger or consolidation is caused by the interested stockholder and as a result of such merger or consolidation subsection (a) of this Act is not applicable to the surviving corporation;

(ii) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions), except proportionately as a stockholder of such corporation, to or with the interested stockholder, whether as part of a dissolution or otherwise, of assets of the corporation or of any direct or indirect majority-owned subsidiary of the corporation which assets have an aggregate

market value equal to 10% or more of either the aggregate market value of all the assets of the corporation determined on a consolidated basis or the aggregate market value of all the outstanding stock of the corporation;

(iii) any transaction which results in the issuance or transfer by the corporation or by any direct or indirect majority-owned subsidiary of the corporation of any stock of the corporation or of such subsidiary to the interested stockholder, except (A) pursuant to the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into stock of such corporation or any such subsidiary which securities were outstanding prior to the time that the interested stockholder became such, (B) pursuant to a dividend or distribution paid or made, or the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into stock of such corporation or any such subsidiary which security is distributed, pro rata to all holders of a class or series of stock of such corporation subsequent to the time the interested stockholder became such, (C) pursuant to an exchange offer by the corporation to purchase stock made on the same terms to all holders of said stock, or (D) any issuance or transfer of stock by the corporation, provided however, that in no case under (B) - (D) above shall there be an increase in the interested stockholder's proportionate share of the stock of any class or series of the corporation or of the voting stock of the corporation;

(iv) any transaction involving the corporation or any direct or indirect majority-owned subsidiary of the corporation which has the effect, directly or indirectly, of increasing the proportionate share of the stock of any class or series, or securities convertible into the stock of any class or series, of the corporation or of any such subsidiary which is owned by the interested stockholder, except as a result of immaterial changes due to fractional share adjustments or as a result of any purchase or redemption of any shares of stock not caused, directly or indirectly, by the interested stockholder; or



(v) any receipt by the interested stockholder of the benefit, directly or indirectly (except proportionately as a stockholder of such corporation) of any loans; advances, guarantees, pledges, or other financial benefits (other than those expressly permitted in subparagraphs (i) - (iv) above) provided by or through the corporation or any direct or indirect majority owned subsidiary.

(4) 'control,' including the term 'controlling,' 'controlled by' and 'under common control with,' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract, or otherwise. A person who is the owner of 20% or more of a corporation's outstanding voting stock shall be presumed to have control of such corporation, in the absence of proof by a preponderance of the evidence to the contrary. Notwithstanding the foregoing, a presumption of control shall not apply where such person holds voting stock, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more owners who do not individually or as a group have control of such corporation.

(5) 'interested stockholder' means any person (other than the corporation and any direct or indirect majority-owned subsidiary of the corporation) that (i) is the owner of 15% or more of the outstanding voting stock of the corporation, (ii) is an affiliate or associate of the corporation and was the owner of 15% or more of the outstanding voting stock of the corporation at any time within the 3-year period immediately prior to the date on which it is sought to be determined whether such person is an interested stockholder; and the affiliates and associates of such person; provided, however, that the term 'interested stockholder' shall not include (x) any person who (A) owned shares in excess of the 15% limitation set forth herein as of, or acquired such shares pursuant to a

tender offer commenced prior to, \_\_\_\_\_\*, 1989 or pursuant to an exchange offer announced prior to the aforesaid date and commenced within 90 days thereafter and continued to own shares in excess of such 15% limitation or would have but for action by the corporation or (B) acquired said shares from a person described in (A) above by gift, inheritance or in a transaction in which no consideration was exchanged; or (y) any person whose ownership of shares in excess of the 15% limitation set forth herein is the result of action taken solely by the corporation provided that such person shall be an interested stockholder if thereafter he acquires additional shares of voting stock of the corporation, except as a result of further corporate action not caused, directly or indirectly, by such person. For the purpose of determining whether a person is an interested stockholder, the voting stock of the corporation deemed to be outstanding shall include stock deemed to be owned by the person through application of paragraph (8) of this subsection but shall not include any other unissued stock of such corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

(6) 'person' means any individual, corporation, partnership, unincorporated association or other entity.

(7) 'voting stock' means stock of any class or series entitled to vote generally in the election of directors.

(8) 'owner' including the terms 'own' and 'owned' when used with respect to any stock means a person that individually or with or through any of its affiliates or associates:

(i) beneficially owns such stock, directly or indirectly; or

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\* Date needs to be inserted. Probably should be date of enactment.

(ii) has (A) the right to acquire such stock (whether such right is exercisable immediately or only after the passage of time) pursuant to any agreement, arrangement or understanding, or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise; provided, however, that a person shall not be deemed the owner of stock tendered pursuant to a tender or exchange offer made by such person or any of such person's affiliates or associates until such tendered stock is accepted for purchase or exchange; or (B) the right to vote such stock pursuant to any agreement, arrangement or understanding; provided, however, that a person shall not be deemed the owner of any stock because of such person's right to vote such stock if the agreement, arrangement or understanding to vote such stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made to 10 or more persons; or

(iii) has any agreement, arrangement or understanding for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in item (B) of clause (ii) of the paragraph), or disposing of such stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such stock.

Section 4. No provision of the articles of incorporation or bylaws shall require, for any vote of stockholders required by this Act, a greater vote of stockholders than that specified in this Act.

Section 5. The provisions of this Act are severable and any provision held invalid shall not affect or impair any of the remaining provisions of this Act.

MEMORANDUM

January 17, 1989

TO: Senate Judiciary Committee

FROM: Kansas Legislative Research Department

RE: Selected State and Federal Decisions, Some of Which  
May Result in Proposed Legislation

1. Child Abuse and Felony Murder. In State v. Lucas 243 Kan. 462 (1988), the court held that a single assaultive incident of child abuse which results in the death of a child merges with killing and constitutes only one offense. The coupling together of prior acts of abuse does not prevent the operation of the merger rule. The purpose of the felony murder doctrine is to deter those engaged in felonies from killing negligently or accidentally (see p. 473). Justices Herd, Miller, and Holmes dissented (see pp. 480-481).

2. Capital Punishment. The U.S. Supreme Court (Justice Stevens in a plurality opinion) held that the Eighth Amendment's proscription of cruel and unusual punishment prevented any defendant from being sentenced to death for crimes committed before age 16. Justice O'Connor concurred but refused to hold the Eighth Amendment flatly prohibits the death penalty in such cases holding instead that such a juvenile cannot be executed under a capital punishment statute that specifies no minimum age. (Justices Scalia and White and Chief Justice Rehnquist dissented. Justice Kennedy did not participate.) See Thompson v. Oklahoma 56 LW 4892, 6/29/88.

3. Child Witness Protection. In Coy v. Iowa, 56 LW 4931, 6/29/88, the Court held that a defendant's Sixth Amendment right to confront witnesses against him was violated during a trial when a screen was set up to block the defendant from the view of his two thirteen year old accusers who testified he had assaulted them. Justice Scalia wrote the majority opinion.

4. Rape Shield Statute. In Older<sup>n</sup> v. Kentucky 57 LW 3410, 12/13/88, the Supreme Court in a Per Curium opinion held two black defendants were denied their Sixth Amendment right to effectively cross examine a witness against them. The Kentucky Court of Appeals upheld the trial court; denied the defendants' right to cross examine the complaining witness about her current cohabitation with a black man who was also a state's witness.

5. Habitual Criminal Act. An inmate whose life sentence for a class A felony is enhanced pursuant to the Habitual Criminal Act is eligible for parole after serving 15 years for each life sentence ordered. (See A.G. Opinion No. 88-151A.)

6. Abortion. In Hodgson v. State of Minnesota 853 F2d 145 2 (8th Cir. 1988), the Eighth Circuit Court of Appeals upheld a Minnesota law which provides that no abortion shall be performed upon an unemancipated minor until at least 48 hours after notice to the parents. In the alternative a by pass court proceeding is provided.

In Akron Center for Reproductive Health v. Staby 854 F2d 852 (6th Cir. 1988) the Sixth Circuit Court of Appeal found a similar parental notification statute to be unconstitutional.

*Attachment II*

*SJC*  
*1-17-89*

In Reproductive Health Service v. Webster 851 F20 1071 (8th Cir. 1988), the Eighth Circuit Court of Appeals held:

(1) section of statute requiring abortions performed at 16 weeks gestational age or later to be performed at hospital was unconstitutional; (2) state could not dictate either test or findings which enter into physician's decision whether fetus is viable; (3) section which declared that life began at conception was unconstitutional; (4) section which prohibited public funds, employees and facilities from being used for "encouraging or counseling" women to have abortions not necessary to save mother's life was unconstitutional; (5) section prohibiting use of public facilities for abortion not necessary to save life of mother was unconstitutional when no public moneys were expended; (6) section prohibiting public employees from performing abortions not necessary to save mother's life was unconstitutional when no public moneys were expended; and (7) section prohibiting use of public funds for performing or assisting abortion not necessary to save life of mother did not violate Eighth Amendment rights of pregnant female inmates.

7. Tort Reform -- Medical Malpractice. The Kansas Supreme Court in Kansas Malpractice Victims Coalition v. Bell 243 Kan. 333 (1988) held the \$1 million cap and annuity provisions of 1986 H.B. 2661 violated the right to a jury trial guaranteed by Section 5 of the Bill of Rights and the right to a remedy by due course of law guaranteed by Section 18 of the Bill of Rights of the Kansas Constitution. The Court further concluded that the \$1 million cap on the Health Care Stabilization Fund did not apply concluding the Legislature would not have reduced the limits of the Fund in the absence of the cap and annuity provisions.