Approved 4-27-89
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

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

10:00 a.m./~~p.m.~~ on March 27, 19 89 in room 514-S of the Capitol.

All members were present ~~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: None

House Bill 2026 - Aggravated vehicular homicide, increase from class E to class D felony.

Senator Moran explained the bill was in his subcommittee and the subcommittee recommended the bill be reported favorably. A copy of the subcommittee report is attached (See Attachment I). Senator Moran moved to report the bill favorably. Senator D. Kerr seconded the motion. The motion carried.

House Bill 2035 - Forensic examination authorized to be prepared by Bethany Medical Center located at Kansas City, Kansas

Senator Moran explained the bill and the recommendation of the subcommittee. Senator Moran moved to report the bill favorably. Senator Feleciano seconded the motion. The motion carried. Copy of subcommittee report is attached (See Attachment I)

House Bill 2101 - Civil liability for giving a worthless check.

Senator Moran explained the subcommittee recommended the bill be reported without recommendation with the proposed amendment of KACI (See Attachment I). Following committee discussion, Senator D. Kerr moved to report the bill favorably. Senator Morris seconded the motion. Senator Kerr then withdrew his motion. Senator Moran moved to amend the bill as recommended by the subcommittee with KACI proposal. Senator D. Kerr seconded the motion. Following committee discussion, the motion carried to amend the bill. The chairman asked staff to balloon out the amendment and bring back to committee.

House Bill 2120 - Penalties for violation of provisionf of article 5 of chapter 65 of the Kansas Statutes Annotated regulating child care homes.

Senator Petty explained the bill. Senator Moran presented the recommendation of the subcommittee (See Attachment II). Senator Bond moved to report the bill favorably and placed on the consent calendar. Senator Rock seconded the motion. The motion failed. Senator Moran moved to report the bill favorably. Senator Petty seconded the motion. The motion carried. Senator Feleciano requested his "no" vote be recorded in the minutes.

House Bill 2248 - Proceedings and hearings and arraignment and entering pleas by two-way electronic audio-video communications.

Senator Moran explained the bill. Senator Moran moved to report the bill favorably. Senator Gaines seconded the motion. The motion carried. Copy of subcommittee report is attached (See attachment II).

House Bill 2370 - Case directly to the supreme court on appeal.

Senator Moran explained the bill. Senator Moran moved to report the bill

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~xxx~~ on March 27, 19 89

House Bill 2370 - continued

favorably. Senator Gaines seconded the motion. The motion carried. Copy of the subcommittee report is attached (See Attachment II).

House Bill 2462 - Construction and interpretation of trusts.

Senator Moran moved to recommend the bill be studied by the Kansas Judicial Council. Senator Feleciano seconded the motion. The motion carried. A copy of the subcommittee report is attached (See Attachment III).

House Bill 2461 - Surviving natural guardian nominating a guardian or conservator by a trust instrument.

House Bill 2463 - Distribution of trust assets.

Senator Rock moved to report House Bill 2461 and House Bill 2463 favorably. Senator D. Kerr seconded the motion. The motion carried. Copy of subcommittee report is attached (See Attachment III).

Senate Bill 298 - Aggravated juvenile delinquency.

Senator Moran moved to report the bill adversely. Senator Gaines seconded the motion. The motion carried. Copy of subcommittee report attached (See Attachment III).

Senate Bill 305 - Validation of acts of abuse or neglect of children by department of social and rehabilitation services.

Senator Moran explained the bill and the subcommittee report (See Attachment III). Senator Moran moved to report the bill favorably. Senator Petty seconded the motion. Following committee discussion, the motion failed.

Senator Rock moved to approve the minutes of March 6, 1989. Senator Oleen seconded the motion. The motion carried.

The meeting adjourned.

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

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-27-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Jon Brax	Topeka	Lifeat it Best
Paul Shelby	Topeka	QJA
Chip Wheeler	Topeka	Ks Medical Society
KEITH R LAWDIS	"	Ks Assn Science Committee on Prescription Packaging
Marilyn Bradt	Lawrence	Kansans for Improvement of Nursing Homes
Richard Hanson	Topeka	KRA
HAROLD KLEHM	TOPEKA	K.A.A.M.
Dean Cotton		Dept. Human Res
Rud Grant	TOPEKA	KCCI
Don Lindsey	OSAWATOMIE	UTU
T R O'Neil	marysville	UTU
KEVIN HARDER	MARYSVILLE	UTU
Helen Stephens	Topeka	KPOA
Ron Smith	"	Ks Bar Assoc

Attachment IV
Senate Judiciary Committee
3-27-89

REPORT OF JUDICIARY SUB-COMMITTEE ON CRIMINAL/PROBATE MATTERS

The following is a record of the hearings held on March 15, 1989, by the Sub-Committee on Criminal/Probate Matters along with its recommendations on the bills heard:

HOUSE BILL 2026 - Aggravated vehicular homicide.

The Sub-Committee heard testimony from Representative Barbara Allen, sponsor of the bill. Others speaking in support were:

Paul Morrison, Johnson County District Attorney (Attachment I)
Mary Lou Belz, Kansas City, Kansas
Ed Van Petten, Office of the Attorney General (Attachment II)
Jim Clark, Kansas County and District Attorneys Association (Attachments III and IV)

The Sub-Committee recommends that HB 2026 be recommended favorably to the Senate Judiciary Committee.

HOUSE BILL 2035 - Forensic examinations.

The Sub-Committee heard testimony from Representative Mary Jane Johnson, sponsor of the bill. (Attachment V) Others speaking in support were:

Nick Tomasic, Wyandotte County District Attorney
Ed Van Petten, Office of the Attorney General

The Sub-Committee recommended that HB 2035 be recommended favorably to the Senate Judiciary Committee.

HOUSE BILL 2101 - Worthless checks.

Testimony was received from Representative David Heinemann, sponsor of the bill. Others appearing in support were:

Frances Kastner, Kansas Food Dealers Association (Attachment VI)
Bud Grant, Kansas Chamber of Commerce and Industry, who presented a proposed amendment for the Sub-Committee's consideration. (Attachment VII)
Ed Van Petten, Office of the Attorney General, who supported the bill with the proposed amendment.

Attachment I
Senate Judiciary Committee
3-27-89

Sub-Committee Hearings - March 15, 1989

The Sub-Committee recommended that HB 2101 with Mr. Grant's proposed amendment be reported to the Senate Judiciary Committee without recommendation.

Although the hearings on these bills were held on March 15, 1989, action was not taken until the meeting of March 22, 1989.

Senator Jerry Moran
Sub-Committee Chairman

TO MEMBERS OF THE SENATE JUDICIARY:

A few years ago when I was coming home late on a Saturday evening, after attending a family reunion in central Missouri, we noticed a drunk driver ahead of us on the two-lane highway which we were driving on. I cannot describe to you the fear and sometimes terror that we felt as we watched this drunk driver weave back and forth, at times crossing over the center line at the crest of a hill. Fortunately, there were no accidents that night and apparently this driver made it home without causing serious injury. But it always underscored to me the clear and present danger that drunk drivers pose to the safety of citizens on public highways.

As such, I am testifying here today to ask you to strongly consider this proposed legislation which increases the penalty of aggravated vehicular homicide from an E felony to a D felony. We file many of these cases each year in our county and I do not feel it is appropriate that it be relegated to the bottom rung of the criminal justice ladder.

Aggravated vehicular homicide is an unintentional, non-malicious killing of another human being while operating a motor vehicle while either driving recklessly, under the influence of alcohol or drugs, or eluding a police officer. Involuntary manslaughter, also an unintentional, non-malicious killing of another human being, is a class D felony. Aggravated vehicular homicide should at least be of the same level as involuntary manslaughter. As a matter of fact, an argument could be made that aggravated vehicular homicide is a more serious offense.

At present, aggravated vehicular homicide is the same class of crime as writing a bad check for $150 or vandalizing someone's car. This is not right.

We hope that you consider upgrading the penalty for this very serious crime.

PAUL J. MORRISON
DISTRICT ATTORNEY

Senate Judiciary Sub-Committee
Criminal/Probate Matters
3-15-89
Attachment I

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

STATEMENT OF
DEPUTY ATTORNEY GENERAL EDWIN A. VAN PETTEN
TO THE SENATE JUDICIARY SUBCOMMITTEE
RE: PENALTY ON AGGRAVATED VEHICULAR HOMICIDE
March 15, 1989

The Attorney General would like to thank the committee for this opportunity to recommend the passage of H.B. 2026, which will enhance the penalty of Aggravated Vehicular Homicide from a class E felony to a class D felony.

In the past few years, we have been bombarded with horror stories of the carnage on our roadways caused by alcohol and drug impaired drivers. However, up to this time we have subjected individuals convicted of such killings to a class E felony conviction although by definition this is a homicide similar to involuntary manslaughter, a class D felony. This bill will eliminate this injustice.

It seems appropriate to reclassify Aggravated Vehicular Homicide so that these two crimes carry the same possibilities for punishment.

Our office is presently prosecuting a matter where a young mother of three was killed by an individual who was

Senate Judiciary Sub-Committee
Criminal/Probate Matters
3-15-89
Attachment II 1-2

fleeing the scene of a prior accident and had a blood-alcohol level of .22. It seems totally reprehensible that upon conviction this person will receive a maximum sentence of one (1) to five (5) years. By passing this bill the court will at least have the authority to increase the sentence to one of three (3) to ten (10) years for this type of killing.

As you are aware, this crime also incorporates the killing of a human being done in the commission of reckless driving, and fleeing or attempting to elude a police officer, in addition to driving under the influence of alcohol or drugs.

The Attorney General strongly urges the passage of this bill, as a measure to more closely make the punishment fit the crime.

Kansas County & District Attorneys Association
827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612 • (913) 357-6351
EXECUTIVE DIRECTOR • JAMES W. CLARK, CAE

Testimony in Support of

HB 2026

The Kansas County and District Attorneys Association appears in support of HB 2026, which amends the aggravated vehicular homicide statute, 21-3405a, by increasing the penalty from a class E felony to a class D felony.

The need for the bill is the result of the holding in State v. Goodnow, which holds that aggravated vehicular homicide, defined as the killing of a human being while committing violations of DUI, reckless driving and fleeing and eluding, is more specific and controls over the general involuntary manslaughter statute, 21-3404, which is a class D felony. This is true regardless of how heinous the defendant's conduct is. The result is that the driver under the influence suffers a lesser penalty than a driver who may have fallen asleep at the wheel, where a death results.

Rather than repeal the statute, which does give more enforcement power over deaths resulting from driving under the influence, and requiring that prosecution for all instances be charged as involuntary manslaughter, this bill simply makes the penalty the same.

Senate Judiciary Sub-committee
Criminal / Probate Matters
3-15-89
Attachment III

Affirmed, but remanded for resentencing.

STATE of Kansas, Appellee,

v.

Daryl S. GOODNOW, Appellant.

No. 60123.

Court of Appeals of Kansas.

July 30, 1987.

Review Denied Oct. 6, 1987.

Defendant was convicted in the Jackson District Court, Tracy D. Klinginsmith, J., of involuntary manslaughter. Defendant appealed. The Court of Appeals, Herb Rohleder, District Judge, assigned, held that: (1) case should have been submitted to jury on theory of aggravated vehicular homicide rather than involuntary manslaughter; (2) amended information was clear and unambiguous and did not prejudice defendant; and (3) juror misconduct was harmless error.

1. Automobiles ⇐344

When accused is charged with unintentional killing of person as a result of driving in wanton manner, specific aggravated vehicular homicide statute is concurrent with and controls general and voluntary manslaughter statute. K.S.A. 21-3404, 21-3405a.

2. Automobiles ⇐344

Defendant, who was charged with unintentional killing of five people while recklessly driving and driving left of center, should have had case submitted to jury on theory of aggravated vehicular homicide rather than involuntary manslaughter. K.S.A. 21-3404, 21-3405a.

3. Indictment and Information ⇐161(3, 5)

Amendment of information is permitted at any time before verdict or finding if no additional or different crime is charged and if substantial rights of defendant are not prejudiced. K.S.A. 22-3201(4).

4. Indictment and Information ⇐161(5)

Amended information charging defendant with operating a vehicle in willful or wanton disregard for safety of persons or property and/or driving a vehicle on left side of roadway was clear and unambiguous and did not prejudice defendant. K.S.A. 8-1514, 8-1566, 21-3404, 22-3201(4).

5. Criminal Law ⇐783½

Trial court did not err in admitting evidence of defendant's blood alcohol level and subsequently admonishing jury to disregard that evidence in involuntary manslaughter prosecution; results of blood alcohol test were logically connected to defendant's general physical and mental condition at time of accident.

6. Criminal Law ⇐855(1)

Whether juror conduct requires declaration of mistrial is a matter within sound discretion of trial court. K.S.A. 22-3423(c).

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7. Criminal Law ⇐1174(2)

Jurors' conduct in visiting scene of accident, though improper, was harmless beyond a reasonable doubt and defendant was not entitled to a mistrial; one juror drove to scene of accident, turned around and stopped, and then left and did not discuss visit with anyone, and another juror passed accident scene on way to visit his mother and did not discuss going to the accident scene with anyone. K.S.A. 22-3423(c).

8. Criminal Law ⇐641.5

Determination of whether there is a conflict of interest or appearance of impropriety with respect to attorneys lies within discretion of trial court.

9. Criminal Law ⇐639(1)

Trial court did not abuse its discretion in refusing to disqualify entire county attorney's office from prosecuting case because one assistant county attorney was also a partner with his father in a law firm and accident reconstruction expert who testified on State's behalf during rebuttal in motor vehicle death case was hired by his father to investigate accident on behalf of motor vehicle accident victims in anticipation of civil action; county attorney informed court that assistant had no involvement in prosecution, assistant county attorney made no appearance on behalf of State, and county attorney had no financial interest in connection with prosecution of civil matters that were being pursued by office and firm of assistant county attorney.

Syllabus by the Court

1. When an accused is charged with the unintentional killing of a person as a result of driving in a wanton manner, the specific aggravated vehicular homicide statute (K.S.A.1986 Supp. 21-3405a) is concurrent with and controls the general involuntary manslaughter statute (K.S.A.1986 Supp. 21-3404).

2. Amendment of an information is permitted "at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced." K.S.A.1986 Supp. 22-3201(4).

3. In a prosecution for aggravated vehicular homicide, it is *held:* The trial court did not (1) err in its evidentiary rulings; (2) abuse its discretion in refusing to declare a mistrial for juror misconduct; or (3) err in refusing to disqualify the county attorney because of an alleged conflict of interest.

Donald R. Hoffman, Topeka, for appellant.

Micheal A. Ireland, Co. Atty., and Robert T. Stephan, Atty. Gen., for appellee.

Before ABBOTT, C.J., HERB ROHLEDER and CHARLES J. SELL, District Judges, Assigned.

HERB ROHLEDER, District Judge, Assigned:

This is an appeal by defendant Daryl S. Goodnow from a jury verdict finding him guilty of five counts of involuntary manslaughter. K.S.A.1986 Supp. 21-3404.

The facts surrounding this case are centered around a two-vehicle accident which ended in tragedy.

On February 26, 1986, a pickup truck driven by Goodnow was involved in a collision with a Ford Bronco. Goodnow was driving north on Highway 75 in Jackson County when his truck collided with the Bronco. Dale and Nancy Edwards and their three children were killed; Goodnow suffered injuries and was hospitalized for four days.

Several witnesses testified they had seen Goodnow driving erratically before the accident occurred. Approximately one hour after the accident, a blood sample was drawn and Goodnow's blood alcohol concentration was .07 percent.

Goodnow was charged with five counts of involuntary manslaughter. A jury found him guilty of all five counts, and he was sentenced to two to ten years of incarceration on each count, sentences to run consecutively. Goodnow appeals.

Goodnow raises a number of issues on appeal, the first and most involved being

whether the trial court erred in submitting the case to the jury on the theory of involuntary manslaughter. Defendant claims that 21-3404 has been repealed by implication in cases of this nature by the passage of K.S.A.1986 Supp. 21-3405a, aggravated vehicular homicide.

In 1984 the Kansas legislature passed and added to the criminal code aggravated vehicular homicide, 21-3405a. This statute became effective July 1, 1984. A search of the legislative history does not reveal the legislative intent for its passage. The criminal code now includes three statutes under which the State may prosecute the unintentional killing of a person: (1) involuntary manslaughter, 21-3404; (2) vehicular homicide, 21-3405; and (3) aggravated vehicular homicide, 21-3405a.

The involuntary manslaughter and vehicular homicide statutes were discussed most recently in *State v. Burrell*, 237 Kan. 303, 699 P.2d 499 (1985). The court, after discussing the term "wantonness," stated:

> "[*State v.*] *Makin* [223 Kan. 743, 576 P.2d 666 (1978)] held that when the defendant is responsible for an unintentional killing in an automobile accident, he may be guilty of involuntary manslaughter if his conduct is shown to be grossly negligent or wanton. We specifically found that the vehicular homicide statute was not intended to supersede the involuntary manslaughter statute for killings resulting from automobile accidents.
>
> "Accordingly, we find 'cases of this nature' can be appropriately charged as involuntary manslaughter provided there is at least some evidence that the defendant acted wantonly." 237 Kan. at 307, 699 P.2d 499.

In *Burrell*, the court concluded that the "existence of wantonness is a question of fact for the jury" and that the record in that case contained "ample evidence from which a jury could conclude the defendant's acts were wanton." 237 Kan. at 308, 699 P.2d 499.

The *Burrell* court did not discuss the aggravated vehicular homicide statute and whether it supersedes the involuntary manslaughter statute in automobile cases. The court, however, found that the specific statute (vehicular homicide) is concurrent with and controls the general statute (involuntary manslaughter), *except* where the acts constitute wanton conduct. The vehicular homicide statute does not include the element of wantonness. With the enactment of the aggravated vehicular homicide statute, however, the legislature has included the element of wantonness in the specific statute when reckless driving is the unlawful act alleged. It appears that the exception established by the *Makin* court is no longer relevant; therefore, the specific aggravated vehicular homicide statute would be concurrent with and control the general involuntary manslaughter statute.

Goodnow was charged with the unintentional killing of five people while in the commission of two unlawful acts: (1) reckless driving, a C misdemeanor, and (2) driving left of center, a traffic infraction. Reckless driving, included as an alternative violation, is the violation relevant to this case. Reckless driving is classified as a serious traffic offense, and is driving "in a willful or wanton disregard for the safety of persons or property" (K.S.A.1986 Supp. 8-1566). Unlike the vehicular homicide statute, the aggravated vehicular homicide statute specifically addresses the unintentional killing of a person that results from *driving* in a *wanton* manner.

The legislature, however, has not made known whether it intended the specific aggravated vehicular homicide statute to be the sole statute under which the State may charge, when the killing of a person results from driving a car in a wanton manner.

[1, 2] Established rules of statutory construction were recently set forth in *State v. Keeley*, 236 Kan. 555, 560, 694 P.2d 422 (1985), including the rule that "old statutes must be read in the light of later legislative enactments; an older statute must be harmonized with a newer one." In this case, the aggravated vehicular homicide statute is the newer and more specific statute. We hold, therefore, that the aggravated vehicular homicide statute duplicates the involuntary manslaughter statute in cases such as is presently before the

court. The convictions are affirmed under the aggravated vehicular homicide statute, and this matter is remanded to the trial court for resentencing.

The defendant next contends the trial court erred in allowing the State to amend the information after the trial had commenced.

On the second day of the trial, the court, upon motion by the State, permitted amendment of the information as follows: "operating a vehicle in willful or wanton disregard for the safety of persons or property contrary to K.S.A. 8-1566, and/*or* driving a vehicle on the left side of the roadway contrary to K.S.A. 8-1514, in violation of K.S.A. 21-3404." (Emphasis added.)

[3] Amendment of an information is permitted "at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced." K.S.A.1986 Supp. 22-3201(4).

[4] We find the amended information was clear and unambiguous, and that defendant's rights were not prejudiced.

Defendant next contends the court erred in permitting the State to introduce evidence of defendant's blood alcohol level in the absence of evidence that it was relevant to the charges against him.

Over defendant's objection, the State offered evidence regarding defendant's blood alcohol level. The court permitted the testimony of the officer responsible for securing the blood sample and the chemist responsible for testing the sample. During the jury instruction conference, defendant's counsel objected to any instruction that would advise the jury to disregard that evidence. In response to that argument, the court stated:

> "Upon reflection that evidence should have never been offered, should not have been admitted and that is the reason for that instruction so that instruction will stay."

Defendant asserts on appeal that the admission of the evidence and the jury instruction that the evidence should not be considered constitute reversible error.

The admissibility of evidence is generally within the discretion of the trial court and is determined on the basis of its relevance and connection with the accused and the crime charged. *State v. Jakeway*, 221 Kan. 142, Syl. ¶ 9, 558 P.2d 113 (1976).

[5] An abuse of discretion exists only when no reasonable man would take the view adopted by the trial court. *Stayton v. Stayton*, 211 Kan. 560, 562, 506 P.2d 1172 (1973). "Evidence that does not constitute a portion of the crimes charged is admissible if there are some natural, necessary, or logical connections between the evidence and the inference or result which it is designed to establish." *State v. Gray*, 235 Kan. 632, 635, 681 P.2d 669 (1984). The results of the blood alcohol test are logically connected to defendant's general physical and mental condition at the time of the accident. Had the trial court admitted the evidence and not admonished the jury, defendant's rights would not have been prejudiced. Therefore, the trial court did not err in admitting the evidence and subsequently admonishing the jury to disregard it.

Next, the defendant claims the trial court erred in refusing to grant a mistrial after an unauthorized visit to the scene of the accident by jurors.

On the last day of the trial, defendant's counsel informed the court that at least two members of the jury had visited the scene of the accident; he then moved for a mistrial. The trial court overruled the motion, finding misconduct had occurred, but that the misconduct did not affect a material fact or issue in the case. The court initially denied counsel's request that the court conduct juror interviews but, upon reconsideration, the judge did question two jurors. Following the interviews, the court again stated that juror misconduct had occurred, but that defendant was not prejudiced.

[6] The trial court may grant a mistrial if it finds that "[p]rejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice

to either the defendant or the prosecution." K.S.A. 22-3423(c). Whether juror conduct, falling within the statutory grounds set forth above, requires declaration of a mistrial is a matter within the sound discretion of the trial court. *State v. Jakeway*, 221 Kan. at 148, 558 P.2d 113.

"In both civil and criminal cases, juror misconduct is not a ground for reversal, new trial, or mistrial unless it is shown to have substantially prejudiced a party's rights. The burden of proof is on the party claiming the prejudice." *State v. Wheaton*, 240 Kan. 345, 353-54, 729 P.2d 1183 (1986).

Defendant asserts the juror misconduct violates his Sixth Amendment right to confrontation. The Kansas Supreme Court addressed this contention in *State v. Arney*, 218 Kan. 369, 544 P.2d 334 (1975). In the *Arney* case, a juror drove to the scene of the crime, investigated the area, timed the drive from the scene of the crime to the defendant's home and from there to defendant's work place, conveyed this information to the other jurors, and discussion ensued. The court found that "[t]he matter investigated by the juror and discussed with other members of the jury did not relate to a material issue in dispute." 218 Kan. at 372, 544 P.2d 334.

[7] In the case at bar, a juror drove to the scene of the accident, turned around and stopped, and then left. He stated that he did not discuss his visit to the scene of the accident with anyone. Another juror, when questioned by the judge, stated he passed the scene of the accident on his way to Topeka to visit his mother who was in the hospital. He did not discuss going to the scene of the accident with anyone.

Following the interviews, the court stated:

> "The Court finds based on what jurors had indicated to me this morning that this would not constitute a material matter that could prejudice the Defendant in this case. I'm not saying it is not jury misconduct, it is clearly jury misconduct but the question is as to whether it goes to a material matter and I believe that it doesn't."

Defendant has not sustained his burden of showing substantial prejudice. The jurors' conduct, though improper, was harmless beyond a reasonable doubt. The trial court's refusal to declare a mistrial was not an abuse of discretion.

The defendant next contends that the trial court erred in refusing to disqualify the Jackson County Attorney's office from prosecuting this case because of the financial interest of the assistant county attorney.

This case was prosecuted by the county attorney. The assistant county attorney, Dennis White, is also a partner with his father in White Law Offices. White made no appearance in the case at bar; however, the accident reconstruction expert who testified on the State's behalf during rebuttal was hired by his father to investigate the accident on behalf of the victims in anticipation of a civil action.

Defendant moved to disqualify the county attorney from prosecuting the case. The court denied the motion. Defendant contended in the trial court, and now contends on appeal, that the entire county attorney's office should have been precluded from prosecuting the case.

[8] No Kansas cases are found which discuss the facts presented in this case. The determination of whether there is a conflict of interest or appearance of impropriety, however, lies within the discretion of the trial court. *State v. McKibben*, 239 Kan. 574, 581-82, 722 P.2d 518 (1986). The Kansas Supreme Court has exclusive jurisdiction to discipline lawyers for violations of the Code of Professional Responsibility. Rule 201, 235 Kan. cxxiv; *In re Estate of Richard*, 4 Kan.App.2d 26, 31, 602 P.2d 122 (1979), *rev. denied* 227 Kan. 927 (1980).

[9] The county attorney informed the court that his assistant, Dennis White, had no involvement in the prosecution of the case, and White made no appearance on behalf of the State. It was also noted on the record that the county attorney had "no financial interest in or connection with prosecution of the civil matters that are

being pursued by the office and firm of White and White."

Although the appearance of impropriety may exist, defendant has not demonstrated that his right to a fair trial was prejudiced. See *In re Estate of Richard*, 4 Kan.App.2d at 31, 602 P.2d 122. There appears to have been no abuse of discretion by the trial court in its refusal to disqualify the entire Jackson County Attorney's Office.

Finally, the defendant contends that the trial court abused its discretion in sentencing the defendant to five consecutive prison terms.

With the finding made on the first issue, this issue is moot. Suffice it to say:

"[A] sentence imposed by a trial court will not be disturbed on the ground it is excessive, provided it is within the limits prescribed by law and within the realm of discretion on the part of the trial court, and the sentence is not the result of partiality, prejudice, or corrupt motive." *State v. Jennings*, 240 Kan. 377, 380, 729 P.2d 454 (1986).

Defendant's convictions are affirmed, but the case is remanded for resentencing under the aggravated vehicular homicide statute, K.S.A.1986 Supp. 21-3405a.

STATE OF KANSAS

MARY JANE JOHNSON
REPRESENTATIVE, THIRTY-SIXTH DISTRICT
WYANDOTTE COUNTY
5321 ROSWELL
KANSAS CITY, KANSAS 66104-2138

TOPEKA

COMMITTEE ASSIGNMENTS
RANKING MINORITY MEMBER: LOCAL GOVERNMENT
MEMBER: ELECTIONS
COMMERCIAL AND FINANCIAL INSTITUTIONS

HOUSE OF
REPRESENTATIVES

March 15, 1989

SENATE JUDICIARY SUBCOMMITTEE ON CRIMINAL AND VICTIMS RIGHTS

HB 2035 is a criminal procedure bill amending KSA 22-2902a, to include Bethany Medical Center as one of the authorized forensic labs recognized by the courts. HB 2069 was amended into this bill by the House Judiciary Committee. This will allow U.S. Government lab reports into evidence. HB 2035 will insure that drug cases are more efficiently and more quickly brought to trial. In the past, after a drug pusher is arrested, the District Attorney's Office has sent purported drugs to the K.B.I. Lab for forensic examination, prior to issuance of a state warrant, resulting in a 3 to 6 month delay between arrest and filing of charges.

By allowing Bethany Medical Center to analyze the drugs, the time between arrest and issuance of a warrant is cut down to 1 or 2 days. The drug seller can then be brought before the court and the legal process begun thus removing the drug dealer as a community threat.

This bill will speed up the entire criminal justice system and will not result in any increase in cost.

Senate sub-committee - Judiciary
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Attachment V

Kansas Food Dealers' Association, Inc.
2809 WEST 47th STREET SHAWNEE MISSION, KANSAS 66205
PHONE: (913) 384-3838

March 15, 1989

SUPPORTING HB 2101

I am Frances Kastner, Director of Governmental Affairs for the Kansas Food Dealers Association. Our membership includes wholesalers, distributors and retailers of food products.

We have long supported measures that provide for penalties and methods of recovering losses from bad checks and shoplifting. We agree with the provisions in HB 2101 and believe that any tools that you can give Kansas retailers to reduce their losses will be of benefit to the honest consumers.

The passage of the bad check law several years ago has had the affect of lowering the overall costs our members suffered from bad checks. Usually when one of our members writes to the person giving the bad check they make arrangements to pay the amount of the check in order to avoid triple damages, court costs and other provisions in the law.

Our objective is to recover the money. The author of this bill believes that passage of HB 2101 will make the bad check law stronger and we commend him for his efforts and support HB 2101.

I appreciate the opportunity of appearing before you today to state the views of our organization.

Frances Kastner, Director
Governmental Affairs, KFDA

(913) 232-3310

Senate Judiciary Sub-Committee
Criminal/Probate Matters
3-15-89
attachment VI

REPORT OF JUDICIARY SUB-COMMITTEE ON CRIMINAL/PROBATE MATTERS

The following is a record of the hearings held on March 22, 1989, by the Sub-Committee on Criminal/Probate Matters along with its recommendations on the bills heard:

HOUSE BILL 2120 - Penalties for child care providers.

The Sub-Committee heard testimony in support of HB 2120 from Richard Morrissey, Director of the Bureau of Adult and Child Care for the Kansas Department of Health and Environment. (Attachment I)

The Sub-Committee recommended that HB 2120 be recommmended favorably to the Senate Judiciary Committee.

HOUSE BILL 2248 - Video parole and plea hearings.

The Sub-Committee heard testimony in support of HB 2248 from Representative Vince Snowbarger, sponsor of the bill.

The Sub-Committee recommended that HB 2248 be recommended favorably to the Senate Judiciary Committee.

HOUSE BILL 2370 - Class B felony appeal jurisdiction.

Paul Shelby, Office of the Judicial Administrator and representing Chief Justice Robert Miller and Chief Judge Robert Abbott, presented testimony in support of HB 2370. (Attachment II)

The Sub-Committee recommended that HB 2370 be recommended favorably to the Senate Judiciary Committee.

SUBSTITUTE FOR HB 2436 - Verification of documents.

The Sub-Committee heard testimony in support of Substitute for HB 2436 from Ron Smith, Kansas Bar Association. Steve Joseph, Attorney from Wichita, also spoke in support of the bill on behalf of the Wichita Bar Association. He provided a copy of the federal statute on unsworn declarations under

Attachment II
Senate Judiciary Comm.
3-27-89

penalty of perjury. (Attachment III)

Bill Graves, Secretary of State, discussed the implications of Substitute for HB 2436 with the Committee.

Copies of a letter from the National Notary Association in opposition to the bill were provided to the Committee. (Attachment IV)

The Committee took no action on Substitute for HB 2436.

Senator Jerry Moran
Sub-Committee Chairman

STATE OF KANSAS

DEPARTMENT OF HEALTH AND ENVIRONMENT
Forbes Field
Topeka, Kansas 66620-0001
Phone (913) 296-1500

Mike Hayden, *Governor*

Stanley C. Grant, Ph.D., *Secretary*
Gary K. Hulett, Ph.D., *Under Secretary*

Testimony presented to

Senate Judiciary Subcommittee

by

The Kansas Department of Health and Environment

House Bill 2120

Background

The original child care licensing statutes, K.S.A. 65-501 through 65-515, were passed in 1919. They required the licensing of child care facilities caring for one or more children unrelated by blood or marriage, and were referred to in several of the separate statutes as "this act."

One of the statutes, K.S.A. 65-514, contained the penalty provisions for providing unlicensed care, which applied to anyone violating the provisions of "this act."

In 1980 additional statutes were added, i.e. K.S.A. 65-516 setting forth persons prohibited from residing, working or volunteering in a licensed or registered home, and K.S.A. 65-517 through 65-521, authorizing the registration of family day care homes caring for 6 or fewer children. However, there were no amendments to include these statutes in the child care "act." Therefore, the penalty provisions in K.S.A. 65-514 did not apply to registered homes.

Issues

The purpose of this proposed amendment is to change the wording in K.S.A. 65-514 so that the penalty provisions in the statute apply to unregistered child care providers as well as to unlicensed providers.

This proposed amendment would strengthen the enforcement of the statutes which require homes caring for six or fewer children to be registered by changing the wording from "this act" to "Article V" in K.S.A. 65-514.

Recommendation

The Department of Health and Environment recommends passage of this bill.

Presented by: Richard J. Morrissey, Director
Bureau of Adult and Child Care
Kansas Department of Health and Environment
March 22, 1989

Judiciary Sub-Committee
Proposed - Victims Rights
3-22-89

Attachment I

House Bill No. 2370

An act concerning criminal procedure; relating to appellate jurisdiction; amending K.S.A. 22-3601 and repealing the existing section.

March 22, 1989
Senate Judiciary Subcommittee on Criminal and Victims Rights

I appear before this subcommittee on behalf of Chief Justice Robert Miller of the Kansas Supreme Court and Chief Judge Bob Abbott of the Kansas Court of Appeals.

This bill amends K.S.A.22-3601 on line 32 by striking class B felony cases. Both Chief Justice Miller and Chief Judge Abbott support and favor this change to allow the Supreme Court an opportunity to hear more complex civil cases.

During the calendar year 1988 only 28 class B felony opinions were handed down and 22 class B felony with life sentences. There were 670 civil cases filed in the Court of Appeals and the Supreme Court may transfer any of these cases. The Supreme Court would like to hear the more complex civil cases, spend more time with these cases, and especially those civil cases with more precedential value.

The Court of Appeals is now current and staying current with their caseload. They are staying current by the use of District Judges on the panels. Currently, they are using one district judge to two Court of Appeals Judges. It is now a rare occasion where they will use two district judges on a panel. They continue to use the "cream of the crop" district judges.

Class B felony cases are very serious cases; however, the legal problems or issues are the same as in all felony cases. The Supreme Court will continue to hear all criminal appeals in which a life sentence has been imposed..

The Supreme Court and Court of Appeals urge your support for this change.

Paul Shelby
Office of Judicial Administration
296-2019

Judiciary Sub-committee
Criminal - Victims Rights
3-22-89
Attachment II

Title 28, U.S. Code

§ 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

(Added Pub.L. 94-550, § 1(a), Oct. 18, 1976, 90 Stat. 2534.)

Judiciary Sub Committee
Criminal / Victims Rights
3-22-89
Attachment III

A Non-Profit
Educational Organization

NATIONAL NOTARY ASSOCIATION

8236 Remmet Ave., P.O. Box 7184, Canoga Park, CA 91304-7184
Telephone: (818) 713-4000, Cable: NOTARIAN

MILTON G. VALERA
President

DEBORAH M. THAW
Executive Director

RAYMOND C. ROTHMAN
Founder

March 17, 1989

Honorable Wint Winter, Jr.
Chairman, Senate Committee on Judiciary
Kansas State Senate
State House
Topeka, KS 66612

RE: Substitute for House Bill 2436

Dear Senator Winter:

On behalf of the National Notary Association, a non-profit educational organization serving the nation's 3.8 million Notaries Public, I must express strong concern about Substitute for House Bill 2436, relating to notarial acts in Kansas. The bill would allow certain sworn declarations to be signed on penalty of perjury without the signer making an appearance before a Notary Public.

We feel the proposal is a disservice to the citizens of Kansas for several reasons:

(1) Having to appear before a Notary, raise a hand and repeat an oath alerts the signer to the importance of the document. Too often, critical documents are signed after only a superficial reading.

(2) Without a Notary to positively identify the signers of sensitive documents, it becomes ridiculously easy for signators with "second thoughts" later to claim the document is a forgery. Eliminating the Notary makes things such easier for the forger, as well. Courts will not accept affidavits and other forms of verification unless sworn before an impartial third party.

(3) The idea behind the Notary's jurat is to compel truthfulness, both (a) by threatening criminal penalties for perjury and (b) by appealing personally to the conscience of the signer. Only the Notary -- a public official who looks you squarely in the eye and asks you to vow that "the statement you are about to sign contains the truth, the whole truth, and nothing but the truth" — can accomplish both (a) and (b). (See enclosed article "In Praise Of Ceremony.")

Judiciary Subcommittee
Criminal / Victims Rights
3-22-89
Attachment IV

I urge you not to eliminate the consumer protections inherent in the Notary's execution of a jurat, and thus to oppose Substitute for House Bill 2364.

Please contact me if you have any questions about my comments.

Sincerely,

Milton G. Valera
President

MGV:jd
022124

cc: Senator Richard L. Bond
Senator Paul Feleciano, Jr.
Senator Frank D. Gaines
Senator Dave Kerr
Senator Phil Martin
Senator Jerry Moran
Senator Lana Oleen
Senator Nancy Parrish
Senator Marge Petty
Senator Richard R. Rock
Senator Don Sallee
Senator Eric R. Yost
Secretary of State Bill Graves

Enclosure

Vol. XXVI, No. 5

THE NATIONAL NOTARY

September 1983

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COMMENT

In Praise Of Ceremony

Streamlining is an endless process in modern life. "Cutting out the chaff," "snipping through the red tape," "eliminating non-essentials" — these are the expressions we hear and use over and over.

Yet there is a danger in ruthless streamlining. Too often, we cut out the "non-essentials" and end up with a whole that is much less than the sum of its parts.

Notarization provides a case in point. Notaries formerly used much more ceremony than they do today. An example of such ceremony is requiring an oath-taker to raise his right hand while the oath is being administered by the Notary. In Medieval times, when all Notaries were church officials appointed by the Pope, notarial acts were embellished with religious ritual. An affiant might have to kneel and swear on the Bible, asking eternal damnation for any untruth in a solemn and elaborate oath.

Today, of course, Notaries are governmental — not religious — officials. As a result, most of the ceremony has been removed from modern notarial procedures. It is the rare Notary who will ask an affiant to raise a hand or place it on a holy book. In fact, a trend has been growing to eliminate notarial oaths altogether through the method of signing on penalty of perjury. The proponents of doing away with the oath argue that, if a signature on penalty of perjury satisfies the Internal Revenue Service, it should satisfy anyone.

Yet we must always be careful in uprooting tradition to serve expedience. Traditional ceremonies often appeal to human psychology in useful ways, and this especially is true with the oath.

The purpose of an oath or signing on penalty of perjury is to impress a document signer with the need for truthfulness. Now, which more forcefully accomplishes that function? A "fine print" warning that "you may suffer penalties for signing a false statement"? Or a public official looking you squarely in the eye and asking you to raise your hand and vow that "the statement you are about to sign contains the truth, the whole truth, and nothing but the truth, to the best of your knowledge and belief"?

Without a doubt, the latter, traditional method appeals more forcefully to the conscience of the waiverer, the person who is considering signing a false statement. (Of course, neither method likely would deter the hardened criminal whose conscience is beyond appeal.)

Regardless of the type of notarial act, a small measure of formality and ceremony on the part of the Notary is never inappropriate. Such conduct imparts to the document signer that the notarial act is serious and important.

Sadly, too many Notaries do just the opposite. To humor a client who is in a hurry, they may flippantly belittle the notarial act as "governmental red tape." Then, they'll speed through the notarization, without taking due care in either identifying the signer or recording the notarial act. Actually, this pronouncement of notarization as red tape becomes self-fulfilling. Performed in this manner, a notarial act *is* worthless and becomes no more than just that: red tape.

We should be careful before condemning all ceremony as useless. Quite often, when we cut out the ceremony, we also cut out the effectiveness.

Milton Valera 3-4

REPORT OF JUDICIARY SUB-COMMITTEE ON CRIMINAL/PROBATE MATTERS

The following is a record of the hearings held on March 24, 1989, by the Sub-Committee on Criminal/Probate Matters along with its recommendations on the bills heard:

HOUSE BILL 2461 - Guardian appointment by trust.

The Sub-Committee heard testimony in support of HB 2461 from Charles Henson, Attorney for the Kansas Bankers Association. (Attachments I and II)

Randy Hearrell, Kansas Judicial Council, appeared before the Committee to request that the bill be referred to the Judicial Council for study. A report on the bill by the Council to the Senate Judiciary Committee could be made by the 1990 Legislative Session.

The Sub-Committee recommended to the Senate Judiciary Committee that HB 2461 be referred to the Judicial Council for study along with a letter from the Chairman of the Committee requesting a recommendation from the Council on the bill by the 1990 Legislative Session.

HOUSE BILL 2462 - Jurisdiction of trust administration.

Charles Henson, Attorney for the Kansas Bankers Association, presented testimony in support of HB 2462. (Attachments I and III)

Randy Hearrell, Kansas Judicial Council, requested that HB 2462 be referred to the Council for study, which study could be completed by the 1990 Legislative Session.

The Sub-Committee recommended to the Senate Judiciary Committee that HB 2462 be referred to the Judicial Council for study along with a letter from the Chairman of the Committee requesting a recommendation from the Council on the bill by the 1990 Legislative Session.

Attachment III
Senate Judiciary Comm.
3-27-89

HOUSE BILL 2463 - Disposition of property by trust.

The Sub-Committee heard testimony on HB 2463 from Charles Henson, Attorney for the Kansas Bankers Association. (Attachments I and IV)

Randy Hearrell, Kansas Judicial Council, requested that HB 2463 be referred to the Judicial Council for study. The study could be completed by the 1990 Legislative Session.

The Sub-Committee recommended that HB 2463 be referred for study to the Judicial Council by the Senate Judiciary Committee along with a letter from the Committee Chairman requesting a recommendation from the Council on the bill by the 1990 Legislative Session.

SENATE BILL 298 - Aggravated juvenile delinquency.

The Sub-Committee heard testimony in support of SB 298 from Janice Waide, Director of the Division of Child in Need of Care, Department of Social and Rehabilitation Services. (Attachment V)

The Sub-Committee recommended that SB 298 be reported unfavorably to the Senate Judiciary Committee.

SENATE BILL 305 - Validation of acts of abuse or neglect of children by department of social and rehabilitation services.

Janice Waide, Director of the Division of Child in Need of Care, Department of SRS, offered testimony to the Sub-Committee in support of SB 305. (Attachment VI and VII)

The Sub-Committee recommended that SB 305 be recommended favorably to the Senate Judiciary Committee.

SENATE BILL 306 - Disclosure of records and reports of child abuse or neglect.

Testimony in support of SB 306 was presented to the Sub-Committee by Janice Waide, Director of the Division of Child in Need of Care, Department

of SRS. (Attachments VIII and IX)

The Sub-Committee took no action on SB 306.

Senator Jerry Moran
Sub-Committee Chairman

Kansas Bankers Association
TRUST DIVISION
Merchants National Bldg.
Eighth & Jackson, Topeka, KS 66612

INTRODUCTORY REMARKS:

The usage of revocable living trusts in estate planning for individuals has been steadily increasing over the past few years. Retired persons, the elderly and widowed individuals have established such trusts for various reasons:

1) personal estate planning
2) privacy of financial affairs as well as personal affairs
3) avoiding use of conservatorship
4) management of assets
5) savings on time, costs and inconvenience of probate administration
6) personal freedom to enjoy quality of life
7) a revocable living trust may be less vulnerable to a legal contest than a will
8) the trust can be revoked or amended at any time and assets added or withdrawn
9) possible savings on estate taxes

Many working couples are doing their estate planning in their younger years to provide not only for themselves but for their minor children. With the use of "self-trusteed" revocable living trusts, these persons can have all the advantages of the trust but still maintain control over their investments and financial matters.

Disadvantages of revocable living trusts are relatively few. Two concerns are the paperwork of transferring title of assets to the trust and the initial set-up legal fees. However, it appears obvious that the advantages in the long range estate planning concept by far exceed these disadvantages.

Since revocable living trusts at the time of death serve the same purpose as wills, we feel it is only appropriate to have the same concepts apply to both the trust and the will. These concepts include construction and interpretation after death of grantor, disposition of personal property by a written memorandum and the ability to appoint a conservator for minor children.

Senate Judiciary Sub-committee
Criminal / Probate Matters
3-24-89
Attachment I

Kansas Bankers Association
TRUST DIVISION
Merchants National Bldg.
Eighth & Jackson, Topeka, KS 66612

HOUSE BILL 2461

CURRENT STATUTE: 59-3004 provides that a natural guardian, if not the surviving natural guardian, by last will, may nominate a conservator of only that portion of the estate of such guardian's minor children...which is devised or bequeathed by such natural guardian. The surviving natural guardian may then name by last will a guardian for such minor children, as well as a conservator for such minor children's entire estate.

PROPOSED CHANGE: Allow a surviving natural guardian to appoint a guardian and conservator for such natural guardian's minor children under the provisions of a revocable living trust.

BENEFITS: This change would apply the same concept available to wills (with respect to a surviving natural guardian) to revocable living trusts in order that individuals may have a complete financial and estate plan incorporated in the trust agreement. For individuals utilizing revocable living trusts who have minor children, this will eliminate the need to probate a will upon the surviving natural guardian's death solely to appoint a guardian or conservator for their minor children.

Senate Judiciary Sub-committee
Criminal / Probate Matters
3-24-89
Attachment II

Kansas Bankers Association
TRUST DIVISION
Merchants National Bldg.
Eighth & Jackson, Topeka, KS 66612

HOUSE BILL 2462

CURRENT STATUTE: 59-103(a)(7) provides for supervision of administration of trusts and powers created by wills admitted to probate and trusts and powers created by written instruments other than by wills in favor of persons subject to conservatorship...

PROPOSED CHANGE: Add a provision to 59-103(a) allowing for construction and interpretation of living trusts under probate proceedings.

BENEFITS: With the continued use of living trusts, it is possible for such construction issues to result as they do with wills. This change would allow such issues to be resolved in the probate division where the judge has the most knowledge and experience in such areas.

At the current time such issues are handled under Chapter 60 and personal service must be given to all interested parties. The use of Chapter 59 would allow such notice to be given by a mailing which is done for construction of wills.

It is important to note that both Chapter 59 and Chapter 60 would be available for such matters.

In smaller judicial districts, it may be preferable to use Chapter 60 for appearance before a district judge.

Senate Judiciary Sub-committee
Criminal / Probate Matters
3-24-89
Attachment III

Kansas Bankers Association
TRUST DIVISION
Merchants National Bldg.
Eighth & Jackson, Topeka, KS 66612

HOUSE BILL 2463

CURRENT STATUTE: 59-623 states a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will...

PROPOSED CHANGE: Make same procedure available to revocable living trusts.

BENEFITS: This change also would bring living trusts into conformity with wills and the same purpose of the statute is being served. For those who utilize the living trust plan, it would prevent the cost and necessity of amending the trust each time such personal property is added to the trust, sold or the intent of the grantor changes as to whom is to receive the property.

As with the statute for wills, this applies only to tangible personal property and does not apply to money, evidences of debt, documents of title, securities and property used in trade or business.

Senate Judiciary Sub-Committee
Criminal/Probate Matters
3-24-89
Attachment IV

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
Winston Barton, Secretary

SB 298

AN ACT CONCERNING CRIMES AND PUNISHMENT
MODIFYING THE DEFINITION OF AGGRAVATED JUVENILE DELINQUENCY

Chairman, Members of the Committee, I appear before you today in support of Senate Bill 298. This bill amends the Criminal Code related to the crime of Aggravated Juvenile Delinquency. This bill eliminates the requirement that a juvenile offender runaway or escape from a state youth center more than one time before being charged as an adult.

Youth who run away or escape from state youth centers have the potential and do commit offenses while away from the youth center. To provide the possibility of more severe sanction for youth who run from youth centers is an appropriate response to the behavior.

As the attached balloon depicts, we would support criminal sanction for youth who commit any felony act while at the youth center, as well as for youth who run away. The broader coverage provides additional flexibility in dealing with youth who continue to commit crimes while at the youth center. The Aggravated Juvenile Delinquency provision in the Criminal Code is a method of moving jurisdiction of youth who do not response to juvenile resources to the adult system. Aggravated juvenile delinquency charges are sought only in instances when youth are considered to be unamenable to the juvenile system. In FY 88 the Youth Center at Topeka filed these charges on 15 youth.

Submitted by

Robert C. Barnum
Commissioner
Division of Youth Services
Department of Social and
Rehabilitation Services
913-296-3284

RCB:JPT:bss

Senate Judiciary Sub-committee
Criminal / Juvenile Matters
3-24-89
Attachment V

Ordered 9
2-24 87
rec'd 9-27-89
dist. 2-28-89

Session of 1989

SENATE BILL No. 298

By Committee on Judiciary

2-21

AN ACT concerning crimes and punishment; relating to aggravated juvenile delinquency; amending K.S.A. 21-3611 and repealing the existing section.

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

Section 1. K.S.A. 21-3611 is hereby amended to read as follows: 21-3611. (a) Aggravated juvenile delinquency is any of the following acts committed by any child 16 or more years of age who has been adjudicated to be a delinquent or miscreant child under the Kansas juvenile code or a juvenile offender under the Kansas juvenile offenders code and who is confined in any training or rehabilitation facility under the jurisdiction and control of the department of social and rehabilitation services:

~~(1) willfully burning or attempting to burn any building of any of such institutions or facilities or setting fire to any combustible material for the purpose of burning such buildings;~~

~~(2) willfully burning, destroying or otherwise damaging property belonging to the state of Kansas if the damage exceeds the value of $100;~~

~~(3) committing an aggravated assault or aggravated battery upon any officer, attendant, employee or person confined to any such institutions or facilities; or~~

(1) Any act which if committed by an adult would be classified as a felony; or

(2) running away or escaping from any of such institutions or facilities ~~after having previously run away or escaped therefrom one or more times~~.

(b) Aggravated juvenile delinquency is a class E felony.

(c) Persons charged with aggravated juvenile delinquency, as defined by this section, shall not be prosecuted pursuant to the Kansas juvenile offenders code but shall be prosecuted under the general

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
Winston Barton, Secretary

Testimony in Support of S.B. 305
AN ACT RELATING TO PERSONS PROHIBITED FROM MAINTAINING HOMES FOR CHILDREN

(Mr. Chairman), Members of the Committee, I am appearing today in support of Senate Bill 305 which amends the due process procedures of K.S.A. 65-516(f)(2).

The current statute requires, in part, that before a finding can be validated concerning a confirmed perpetrator of child abuse or neglect, the alleged perpetrator must be given advance notice of the agency's proposed finding. This notice informs the alleged perpetrator of the opportunity to appear before the SRS Area Director or designee for the purpose of an informal review before the final decision is made in regard to the confirmation. After the review of the proposed finding has taken place, or the time to request a reviw has expired, a second notice is sent. This notice informs the alleged perpetrator of the finding and of the right to a fair hearing including the right to appeal to the courts. The name of a perpetrator validated by the agency may not be entered into the child abuse and neglect central registry until all appeal rights have been exercised or the time for doing so has elapsed.

The notice of proposed finding provision was added in 1987 in the belief that an informal review procedure would reduce the number of appeals and shorten the length of time decisions were pending. This has not been the case. It has had the opposite effect of delaying final action on findings resulting from an investigation. In addition, the notice of proposed finding has been confusing to alleged perpetrators and their attorneys. Moreover, the informal review procedure adds nothing to the full due process protection already afforded alleged perpetrators by state law and administrative regulations.

Senate Judiciary Sub-committee
Criminal/Probate Matters
3-24-89
Attachment VI

While these reviews are pending a person may be suspended from providing care to children which can be costly to the individual and the employer. In addition families may have their child care arrangements disrupted and experience the stress which accompanies uncertainty.

In the interest of streamlining these procedures I urge your support of this bill.

Janice S. Waide
Director
Division of Child in Need of Care
Department of Social and
Rehabilitation Services
(913) 296-3282

STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Statement Regarding S.B. 305

1. Title

An Act concerning care of children, relating to certain persons prohibited from maintaining homes for children; concerning validation of abuse or neglect; amending K.S.A. 1988 Supp. 65-516 and repealing the existing section.

2. Purpose

To provide adequate due process opportunities to persons SRS finds more likely than not to be the perpetrators of abuse, neglect or sexual abuse in a more efficient and timely manner.

3. Background

Persons who have been validated by SRS as perpetrators of confirmed child abuse, neglect or sexual abuse may not operate, work or regularly volunteer in a licensed or registered child care facility. This section of the child care facility licensing statute was amended requiring that persons SRS proposes to validate as a confirmed perpetrator of child abuse, neglect or sexual abuse be given written notice of that proposed finding; that such persons be given the opportunity for informal review of the proposed finding by the SRS Area Director or designee and then be given written notice of the finding and their right to fair hearing before a state appeals officer pursuant to the Kansas Administrative Procedures Act. It was believed that the informal review would reduce the number of state appeals and thus the length of time that elapses from the time of the investigation to final resolution. An alleged perpetrator's name cannot be entered into the Child Abuse Neglect Central Registry until all appeal rights have either been taken or time to appeal has expired.

This interim step has not served the intended purpose, has resulted in confusion to the recipient and their attorneys and has increased the time to final resolution. This is costly to individuals and agencies involved in child care. In addition it has consumed a significant amount of SRS staff time. The amendment offered does not abridge the citizen of his/her constitutional right to due process or the mandate for the agency to have its decisions reviewed.

4. Effect of Passage

Passage would retain the right to due process while simplifying the process and thus reduce the amount of time between an agency finding of confirmed abuse, neglect or sexual abuse and a administrative appeal in accordance with K.S.A. 75-3306(a) and K.A.R. 30-7-26. As a side benefit it would conserve community and agency resources.

Senate Judiciary Sub-committee
Criminal/Probate Matters
3-24-89
Attachment VII

5. Recommendation

SRS recommends passage of this bill.

Winston Barton
Office of the Secretary
Social and Rehabilitation Services
(913) 296-3271

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
Winston Barton, Secretary

Testimony in Support of S.B. 306
AN ACT CONCERNING RECORDS AND REPORTS OF CHILD ABUSE AND NEGLECT

(Mr. Chairman), Members of the Committee, I am appearing today in support of Senate Bill 306 which increases those agencies with whom SRS may share information concerning the abuse or neglect of children when it is an agency charged with the responsibility of preventing or treating abuse, neglect or sexual abuse and the agency requesting the information has standards of confidentiality as strict or stricter than the requirements of the Kansas Code of Care of Children. Currently the statute restricts the authority to share information to other state agencies. Specifically this amendment would permit the sharing of information with military personnel charged, by federal law, to prevent and treat abuse and neglect involving military dependents through their Family Advocacy Program and with Native American tribal agencies operating under the Indian Child Welfare Act.

The Department of Defense charges the Family Advocacy Program (AR 608-18) with broad responsibilities which include the prevention of child abuse, ensuring prompt investigation of abuse, protection of the victims of abuse and treatment of family members involved in abuse. Kansas has three major military installations and close cooperation between the military and SRS is important in conducting investigations of abuse/neglect and providing services available through the Family Advocacy Program to children of military personnel who are abused or neglected.

There are also four Indian reservations which are served by tribal social services. Coordination and cooperation between SRS and the tribal social service agency will be enhanced by this amendment.

Senate Sub-committee - Judiciary
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3-24-89
Attachment VIII

In addition to this amendment I am recommending a change in G of this section. Your handout includes a balloon of this proposed change that permits the sharing of information with any multidisciplinary team established in accordance with K.S.A. 38-1523. Current statutory language restricts the sharing of information with multidisciplinary teams appointed for a particular child. Some courts have indicated a willingness to authorize a standing team of experts to serve as a multidisciplinary team but they are unwilling to appoint a team for each particular child.

Janice S. Waide
Director
Division of Child in Need of Care
Department of Social and
Rehabilitation Services
(913) 296-3282

STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Statement Regarding S.B. 306

1. Title

An Act concerning records and reports of child abuse or neglect; amending K.S.A. 1988 Supp. 38-1507 and repealing the existing section.

2. Purpose

To amend K.S.A. 38-1507(a)(2)(F) to increase those agencies with whom SRS may share information concerning the abuse or neglect of children when it is "an agency charged with the responsibility of preventing or treating physical, mental or emotional abuse or neglect or sexual abuse of children, if the agency requesting the information has standards of confidentiality as strict or stricter than the requirements of this code,..."

3. Background

Currently the Kansas Code for Care of Children permits SRS to share information with an agency of another state charged with the responsibility of preventing or treating abuse, neglect or sexual abuse. This change would broaden that authorization and would permit the sharing of information with federal as well as state agencies. Specifically this would permit the free exchange of information with professional staff responsible for social services on military installations and with Native American social service agencies formed in accordance with the Indian Child Welfare Act.

The Department of Defense charges the Family Advocacy Program (AR 608-18) with broad responsibility which includes the prevention of child abuse, ensuring prompt investigation of abuse, protection of the victims of abuse and treatment of family members involved in abuse. This must be accomplished in close coordination with the state courts which have jurisdiction over civil or criminal matters arising from child abuse or neglect and with the Kansas Department of Social and Rehabilitation Services which has responsibility for the investigation of reports of child abuse, whether civilian or military. The amendment would allow the sharing of information with the military personnel who are charged with the responsibility of preventing and treating child abuse within military families.

The Indian Child Welfare Act grants authority for tribal councils to provide the full range of child welfare services to Native Americans, including the investigation of abuse and neglect on Indian reservations.

4. Effect of Passage

The ability to share information regarding reports of abuse/neglect involving military dependents and Native Americans would aid in the investigation and would maximize services available to the family through the Family Advocacy Program of the Department of Defense and tribal councils.

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5. Recommendation

SRS recommends passage of this bill. We also recommend that section G be amended to delete the restriction of sharing information with a member of a multidisciplinary team designated for a particular child. We recommend that this authority be granted to a member of any multidisciplinary team authorized under K.S.A. 38-1523.

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Session of 1989

SENATE BILL No. 306

By Committee on Public Health and Welfare

2-21

AN ACT concerning records and reports of child abuse or neglect; amending K.S.A. 1988 Supp. 38-1507 and repealing the existing section.

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

Section 1. K.S.A. 1988 Supp. 38-1507 is hereby amended to read as follows: 38-1507. (a) All records and reports concerning child abuse or neglect received by the department of social and rehabilitation services or a law enforcement agency in accordance with K.S.A. 38-1522 and amendments thereto are confidential and shall not be disclosed except under the following conditions:

(1) Upon the order of any court after a determination by the court issuing the order that the records and reports are necessary for the conduct of proceedings before it and are otherwise admissible in evidence, except that access shall be limited to *in camera* inspection unless the court determines that public disclosure of the information contained in the records and reports is necessary for the resolution of an issue then pending before it.

(2) The secretary or the law enforcement agency where the report is filed shall authorize access to any records or reports concerning child abuse or neglect to any of the following persons upon order of any court and may authorize access to such persons without a court order if the child involved is a subject of the record or report:

(A) A person licensed to practice the healing arts who has before that person a child whom the person reasonably suspects may be abused or neglected;

(B) a court-appointed special advocate for a child, which advocate reports to the court, or an agency having the legal responsibility or authorization to care for, treat or supervise a child;

(C) a parent or other person responsible for the welfare of a child, or such person's legal representative with protection for the identity of reporters and other appropriate persons;

(D) the guardian *ad litem* for such child;

(E) a police or other law enforcement agency investigating a report of known or suspected child abuse or neglect;

(F) an agency ~~of another state~~ charged with the responsibility of preventing or treating physical, mental or emotional abuse or neglect or sexual abuse of children ~~within that state~~, if the ~~state of the~~ agency requesting the information has standards of confidentiality as strict or stricter than the requirements of this code; or

(G) a person who is a member of a multidisciplinary team ~~as defined in a particular case~~, if the person has signed a confidentiality agreement with standards as strict or stricter than the requirements of this code.

(b) No individual, association, partnership, corporation or other entity shall willfully or knowingly permit or encourage the unauthorized dissemination of the contents of records or reports concerning child abuse or neglect received by the department of social and rehabilitation services or a law enforcement agency in accordance with K.S.A. 38-1522 and amendments thereto except as provided by this code. Violation of this subsection is a class B misdemeanor.

Sec. 2. K.S.A. 1988 Supp. 38-1507 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.