PROBATE AND CIVIL PROCEDURE SUBCOMMITTEE

Senator Richard Rock, Chairman

February 28, 1990 - West Lounge - 10:00 a.m.

SB 689 - limitation on action for latent disease. (Bill requested by Senator Johnston)

PROPONENTS:

Jerry Palmer, Kansas Trial Lawyers (ATTACHMENT I)
John W. Campbell, Deputy Attorney General, Litigation Division (ATTACHMENT II)
John Klamann, International Brotherhood of Boilermakers
Jim DeHoff, Kansas AFL-CIO (ATTACHMENT III)
Bert S. Braud, Popham Law Firm (ATTACHMENT IV)

OPPONENTS:

None appeared

Subcommittee recommendation: to amend conceptually by adding language that would allow victims diagnosed prior to July 1, 1990 a one-year window to qualify under this statute also; and to recommend the bill favorably for passage as amended.

SB 313 - military retirement as marital property. (Senator Oleen requested hearing)

PROPONENTS:

Richard Pinaire, Junction City Attorney (ATTACHMENT V)

OPPONENTS

None appeared.

Subcommittee recommendation: to recommend favorably and be placed on the Consent Calendar.

SB 718 - providing witness fees and mileage in criminal cases (Bill requested by Senator Oleen)

PROPONENTS:

James Clark on behalf of Bill Kennedy, Riley County Attorney (ATTACHMENT VI)
Paul Shelby, Office of Judicial Administration (with amendment)

OPPONENTS:

None appeared.

Subcommittee recommendation: to amend on line 22, replacing "as determined" with "if authorized"; recommend favorable with amendment.

SB 719 - allowing municipal court judges to officiate marriage ceremonies. (Bill requested by Senator Ehrlich)

PROPONENTS:

Judge Lynn Hall, Russell was listed to appear but did not attend the hearing.

OPPONENTS:

None appeared.

Subcommittee recommendation: to recommend favorable and be placed on the Consent Calendar.

SB 721 - marriage licenses and officiants' credentials. (Bill requested by Office of Judicial Administration)

PROPONENTS:

Paul Shelby, Office of Judicial Administration
Carolyn Burns, Clerk of the District Court, Barton County (ATTACHMENT VII)
Dr. Lorne A. Phillips, State Registrar, Division of Information Systems, Kansas Department of Health and Environment (ATTACHMENT VIII)

OPPONENTS:

None appeared.

Subcommittee recommendation: to adopt the amendment offered by Dr. Phillips; and to recommend favorable for passage as amended.

February 28, 1990 - Room 522-S - 12:00 noon

SB 722 - depositions; certified shorthand reporters. (Bill requested by Office of Judicial Administration)

PROPONENTS:

Paul Shelby, Office of Judicial Administration
Connie Uphaus, Kansas Shorthand Reporters (ATTACHMENT IX)

OPPONENTS:

None appeared.

Subcommittee recommendation: to recommend favorable for passage and placed on the Consent Calendar.

SB 690 - probate proceedings, venue in any county where decedent owned real property. (Bill requested by Senator Lee)

PROPONENTS:

James L. Bush, Smith Center Attorney (ATTACHMENT X)

OPPONENTS:

None appeared.

Subcommittee recommendation: to conceptually amend for prioritizing venue from county to county where death occured if property was owned in that county, to county of last residence where property was owned or county of administrator's choice; and to recommend favorable for passage as amended.

SB 717 - probabe procedure, attestation, affidavit. (Bill requested by Senator Lee)

PROPONENTS:

James L. Bush, Smith Center Attorney (ATTACHMENT XI)

OPPONENTS:

None appeared.

Subcommittee recommendation: to recommend favorable for passage and placed on the Consent Calendar.

SB 724 - crimes and punishments; transfer of supervision of certain persons. (Bill requested by Office of Judicial Administration)

PROPONENTS:

Paul Shelby, Office of Judicial Administration

Cathy Leonhart, Kansas Association of Court Services Officers (ATTACHMENT XII)

OPPONENTS:

None appeared.

Subcommittee recommendation: to amend on line 22 changing "shall" to "may"; and to recommend favorable for passage and placed on the Consent Calendar.

February 28, 1990 - Room 522-S - on adjournment (4:45 p.m.)

SB 716 - recovery from parents for malicious or willful acts by children. (Bill requested by the Attorney General)

PROPONENTS:

Julene L. Miller, Deputy Attorney General, Civil Division (ATTACHMENT XIII)

OPPONENTS:

None appeared.

Subcommittee recommendation: none made (motion to recommend favorable died for lack of a second.)

SB 723 - enforcement of support; international reciprocity. (Bill requested by Office of Judicial Administration)

PROPONENTS:

Paul Shelby, Office of Judicial Administration

Kay Farley, Child Support Coordinator, Office of Judicial Administration (ATTACHMENT XIV)

Camille A. Nohe, Assistant Attorney General, Civil Division (ATTACHMENT XV)

OPPONENTS:

None appeared.

Subcommittee recommendation: to recommend favorable for passage.

SB 725 - public health laboratory tests; laboratory defined. (Bill requested by Office of Judicial Administration)

PROPONENTS:

Paul Shelby, Office of Judicial Administration

Cathy Leonhart, Kansas Association of Court Services Officers (ATTACHMENT XVI)

Theresa L. Hodges, Laboratory Improvement Program Office, Kansas Health and Environmental Laboratory - with amendment (ATTACHMENT XVII)

Tony Robinson, Kansas Department of Corrections - with the H&E amendment

OPPONENTS:

None appeared

Subcommittee recommendation: to amend as suggested by the Department of Health and Environment; and to recommend favorable for passage as amended.

The Subcommittee concluded its currently assigned business.

Senator Richard Rock, Subcommittee Chairperson

KANSAS TRIAL LAWYERS ASSOCIATION

Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756 FAX (913) 232-7730

TESTIMONY
of the
KANSAS TRIAL LAWYERS ASSOCIATION
before
SENATE JUDICIARY COMMITTEE
February 28, 1990

SB 689 - LIMITATION OF ACTIONS FOR LATENT DISEASE

The Kansas Trial Lawyers Association has nearly 1000 members in all parts of the state and its members represent injured persons who claim that others are responsible for their damages. Of great concern to injured persons is whether they can present their claims in court to seek compensation for their damages against those who have wrongfully injured them. Limitations of actions (statutes of limitation) arbitrarily restrict access to the courts based solely on a consideration of time. The underlying public policy for such limitations is that persons should not sit on their rights and present stale claims and that after a certain point in time, even just claims should expire. The question with victims of latent diseases is when their injuries are discovered and the statute of limitations should commence.

A brief history of K.S.A. 60-513 is necessary to put this issue in perspective. In 1963 this statute of limitation limited the discovery period in tort actions to 10 years. The Supreme Court of Kansas in the case of Ruthraff, Administrator v. Kensinger, 214 Kan. 185, 519 P.2d 661 in 1974 interpreted the language to mean that the period of limitation did not begin to run until the date on which substantial injuries resulted and the 10-year provision referred only to injuries which were not reasonably ascertainable until some time after the initial act. In the case of traumatic torts, such as when a machine amputates a person's limb, the two-year statute of limitation did not start to run until the time of the amputation, even if it was 15 or 20 years after the manufacture of the product.

Two significant things have occurred within the last two years which impact this issue. First in 1987, language overcoming the effect of the Ruthraff decision was adopted pursuant to HB 2386 (1987). More significantly in the context of an asbestos-related claim the Supreme Court of Kansas considered the case of Tomlinson v. Celotex Corp., 224 Kan. 474, 770 P.2d 825 delivering its opinion on March 3, 1989. The Court ruled that the 10-year limitation applies to claims based on latent diseases and that such statute was constitutional, thus barring any recovery from an exposure to a disease where the exposure had taken place more than 10 years before.

Attachment I
P&CP Subcommittee - Judiciary
2-28-90

The Court concluded that the 10-year limitation period commenced at the latest upon the last exposure of the plaintiff to the asbestos. The Court recognized that many asbestos-related injuries will not manifest themselves until more than 10 years after the last exposure to the produce. They were also cognizant of the harsh effect this application had in the instant case, but felt constrained to find that the statute barred the claim.

The result of the interpretation in Tomlinson is that Kansas arguably stands alone in barring latent disease cases. Other states do not have a similar period of repose or, if they do, exempt latent disease. Other courts have read latent disease out of the ambit of their statute of limitations, such as in North Carolina.

The problem of asbestos victims and the wrongdoing of the industry make an excellent example of the basic unfairness of an arbitrary 10-year limit. There are people who are going to die of cancer from a product that was manufactured and distributed after the manufacturer well knew (but the public did not know) of its potential for harm. Motivated by profit, the industry went on releasing and selling this product, knowing that people would be injured and die from exposure to the product, but nevertheless did not warn these people. However, the nature of a disease-process related to the inhaling of the fibers is such that the disease does not show up within a 10-year period in the ordinary case. The period of latency is much longer and only because the people have not discovered their fatal disease is the wrongdoer released from the consequences of his act.

Asbestos fibers, though, are just one example of environmental hazards which are arbitrarily eliminated by an inflexible application of a 10-year statute of limitations. The use of toxic materials and their relationship to disease emerges with more scientific information each year. It is only then that the questions are asked as to what knowledge the industry might have had and whether or not they were negligent in releasing their products and the degree of willfulness or recklessness that might have been involved in the distribution of the product. Thus, the Kansas law bars a claim before victims could even be aware they had a claim.

SB 689 tries to comprehend not just asbestos (to protect its constitutionality from being special legislation or being an arbitrary classification), but extends to the class of latent diseases. This preserves the basic purpose of a statute of limitations to discourage people from sitting on their rights when they knew or should have known they should be in court. The bill tries to strike a balance, so that just claims can be filed when they are ripe (and not before) and likewise that after a person has a fair opportunity to file the suit, the statute would then expire.

A more extreme measure would simply be to delete the whole reference to the 10-year statute. However, we believe the legislature still wants to deal with the problem of stale claims and thus the bill is narrowly drawn to address latent diseases only.

The Supreme Court's harsh interpretation of our statute of limitations as to latent diseases commands the attention of the legislature to revise the period within which to discover wrongful conduct and seek a remedy for injuries caused by that conduct. The awful tale of asbestos and the disadvantages experienced by Kansans demands an immediate remedy for those Kansans who have been exposed to asbestos and who will die from its consequences without a lawful remedy solely because they are residents of Kansas and exposed in Kansas.

The legislature in 1963, when it considered this Act, could not have foreseen what the science of 1990 would tell us about latent diseases. The 10-year period which may have appeared reasonable then, clearly is unreasonable now. Our courts have their hands tied in trying to give relief to victims because of the strict construction of K.S.A. 60-513(b). The wording of the legislature works inequities never intended by the legislature. The 1987 Amendment does further harm to those asbestos victims and other victims of latent diseases. This legislation did not stand exposed to all the policy arguments which are advanced today and the decision needs to be reconsidered in the light of this new information.

The Kansas Trial Lawyers Association respectfully encourages you to act favorably on this bill.

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

SENATE JUDICIAL SUB-COMMITTEE ON

PROBATE AND CIVIL PROCEDURE

TESTIMONY IN SUPPORT OF

SENATE BILL 689

By

John W. Campbell

Deputy Attorney General

February 28, 1990

Mr. Chairman, Members of the Committee:

My name is John Campbell. I am a Deputy Attorney General for the State of Kansas. Attorney General Robert T. Stephan has asked me to testify in support of Senate Bill 689.

SB 689 would amend the Kansas statute of limitations. It would allow victims of latent diseases a realistic opportunity to seek a court remedy against those

Attachment II
Judiciary P&CP Subcommittee
2-28-90

whose negligence or wrongdoing caused their disease. Such an amendment is needed. It is especially needed for those persons who are exposed to hazardous, toxic or radioactive materials in the work place.

Workers are exposed to chemicals and minerals which can cause diseases. Exposure to some of these materials can result in immediate harm. The law provides remedies in such cases. However, other materials, such as asbestos, do not result in immediate harm, but can cause diseases which manifest themselves 10, 15, even 25 years after exposure.

Under current Kansas law, if one was exposed to asbestos and developed asbestosis and/or a cancer 10 years and one day after his last exposure, our courts could not provide him with a remedy. This is true even though there was no way for this person to know that his exposure would result in disease. By the adoption of SB 689, Kansas would join a growing number of states who have adopted the discovery rule. This rule states that one must seek judicial remedies for a disease caused by the negligence or wrongdoing of another, within two years of the time the victim knew or should have known that he had, in fact, developed a disease. States which have adopted this discovery rule include Louisiana, Maryland, Massachusetts, Michigan, South Carolina, Texas, Colorado, California, Delaware, Florida, Georgia, Illinois, New Jersey, North

Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, West Virginia, Wisconsin, Connecticut, and New York.

A worker denied access to the courts faces financial ruin. He is totally dependent on his own resources and whatever public assistance he can obtain. SB 689 would provide the opportunity to distribute the financial burdens associated with the devastating diseases caused by asbestos and other hazardous materials found in the work place.

The Attorney General requests the sub-committee adopt SB 689 and correct this situation.

Kansas AFL-CIO

110 W. 6th St. Topeka, KS 66603 (913)357-0396

Senate Judiciary Sub Committee

Mr. Chairman and Committee members. I am Jim DeHoff representing the Kansas AFL CIO. We urge your support of Senate Bill 689. Senate Bill 689 would alleviate a very serious problem that some of our members are experiencing with the ten year latent disease limitation.

In 1989, the Kansas Supreme Court ruled that the ten year limitation of KSA 60-513B applies to claims based on latent disease. The problem with this ruling is that asbestos related diseases do not show up for a period of 25 to 30 years after exposure. Language in Senate Bill 689 would allow up to two years to file legal action after being medically diagnosed as having a latent disease.

By allowing Senate Bill 689 to become law, you will be helping some workers who have had the misfortune of being directed to work around material which causes massive health problems.

We urge favorable passage of Senate Bill 689.

Attachment III
Judiciary P&CP Subcommittee
2-28-90

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TESTIMONY
of
BERT S. BRAUD
of the
POPHAM LAW FIRM
before the
SENATE JUDICIARY COMMITTEE
February 28, 1990

SB 689 - LIMITATIONS OF ACTIONS FOR LATENT DISEASE

IN THE INTEREST OF CLAIMANTS WITH ASBESTOS RELATED DISEASE:

I bring before this honorable committee today several perspectives. I bring the perspective of a trial lawyer, a member of the Bars of the States of Kansas and Missouri. I bring the perspective of a partner in the Popham Law Firm, a firm that has represented hundreds of claimants who have suffered from asbestos related diseases. Most importantly, however, I bring the perspective of a citizen of this great State, who is concerned that countless fellow citizens are dying from diseases caused by exposure to asbestos, who will never be given the slightest opportunity to receive just compensation for their injuries caused by the manufacturers of those asbestos products.

No matter what perspective is taken, it is clear to me that the current state of the law in Kansas does not provide an adequate system of justice to those harmed by the well-known hazards of asbestos. This is because of a fatal defect in the Kansas statute of limitations, and the judicial interpretation of that statute in the recent case of Tomlinson v. Celotex Corp., 224 Kan. 474, 770 P.2d 825 (1989). Both the statute and its interpretation fail to consider the nature of the harm sought to be redressed.

The diseases caused by exposure to asbestos and asbestos containing products have a latency period - a delay between exposure and the manifestation of the debilitating and often deadly diseases. The medical literature has known of this delay, or latency period, for years. Dr. Irving Selikoff, in his 1978 book, *Asbestos and Disease*, noted a latency period of between 20 and 40 years from the time of exposure to the time of diagnosable illness. Other literature supports Dr. Selikoff's conclusions.[1] So well

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[1] See, e.g. *Sourcebook on Asbestos Disease: Medical, Legal and Engineering Aspects*, Peters, George A. and Peters, Barbara J.; Garland STPM Press, New York and London, 1980; Current Perspectives in Asbestosis, Kagan, Elliot, M.D., *Annals of Allergy*, June 1985, pp. 464-474, among many others.

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Judiciary P&CP Subcommittee
2-28-90

accepted is the latency period that manufacturers not only acknowledge the delay, but use it as a weapon to defeat claims filed before the minimum period has run.

Medically speaking, the latency period is a function of the manner in which the asbestos fibers cause disease. The microscopic asbestos fiber works its way into the lung tissue, where chemical and biological reactions occur to form what are known as asbestos bodies. These bodies are believed to be the source of the disease, but the process is slow. The victim has no idea that changes are occurring in his lung tissue that could ultimately kill him.

These latency periods are also confirmed by our experiences. Of the literally hundreds of claimants our firm has represented, none have been diagnosed as having an asbestos related disease within twenty years of their exposures. Many of our current clients are in their 60s, having first been exposed in their 20s.

One of these clients is John Zuger. I asked Mr. Zuger yesterday if he was up to coming here today to address you . You see, Mr. Zuger recently had a portion of his lungs removed because of cancer caused by his 20 years of exposure to asbestos in a Kansas refinery. He is not with me because he did not think he was up to the trip. He simply does not have the stamina to walk from the parking lot to this building. Even the slightest exertion leaves him breathless.

Mr. Zuger does not understand why he can not bring a lawsuit against those we know caused his condition. He is frustrated by the medical literature from the 1920s, '30s and '40s, in many cases reporting studies commissioned by the asbestos industry, confirming the harmful nature of asbestos before he was ever exposed, and decades before anyone told him there was a danger. He is baffled by the lack of any warnings on the products, when the manufacturers knew of the threat to his health. He is discouraged by the fact that he will die of a cancer caused by a product that made companies profitable long after those companies knew their product would kill its users, and he is angry that they will, in his case, walk away unscathed by their acts.

The Catch-22 inherent in the current statute is lost on Mr. Zuger. He did not know he had any health problems within ten years of his exposure to asbestos, caused by that exposure. He now knows that, had he developed cancer within that ten year period, the manufacturers would have used the latency period against him, arguing that his illness came too soon to be caused by asbestos.

Of course, now they cry foul because the statute of limitations has run.

Mr. Zuger is not a lawyer, but he knows an injustice when he sees one. He knows he has been wronged, but can not understand why there is no remedy for that wrong.

The Kansas Legislature has the opportunity to provide that remedy, if not for Mr. Zuger, for his co-workers. On behalf of Mr. Zuger and all similarly situated, I urge you to see Senate Bill 689 through to its enactment into law.

Thank you.

Session of 1990

Compliments of
Senator Lana Oleen

SENATE BILL No. 313

By Committee on Governmental Organization

(By request)

2-21

AN ACT concerning domestic relations; relating to property considered to be marital property; amending K.S.A. 23-201 and repealing the existing section.

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

Section 1. K.S.A. 23-201 is hereby amended to read as follows: 23-201. (a) The property, real and personal, which any person in this state may own at the time of the person's marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to a person by descent, devise or bequest, and the rents, issues, profits or proceeds thereof, or by gift from any person except the person's spouse, shall remain the person's sole and separate property, notwithstanding the marriage, and not be subject to the disposal of the person's spouse or liable for the spouse's debts.

(b) All property owned by married persons, including the present value of any vested or unvested military retirement pay, whether described in subsection (a) or acquired by either spouse after marriage, and whether held individually or by the spouses in some form of coownership, such as joint tenancy or tenancy in common, shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment. Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 60-1610 and amendments thereto.

(c) The provision of subsection (b) which states that the present

Attachment V
Judiciary P&CP Subcommittee
2-28-90

value of any vested or unvested military retirement pay shall become marital property at the time of the commencement of an action for divorce, separate maintenance or annulment shall be effective with respect to any decree incorporating a separation agreement entered after February 1, 1983.

Sec. 2. K.S.A. 23-201 is hereby repealed.

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

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February 14, 1989

Senator Lana Oleen
Capitol Building
Topeka, KS 66612

Re: Substitute for House Bill No. 2376 amending K.S.A. 23-201

Dear Senator Oleen:

The substitute for HB 2376 amending K.S.A. 23-201 expanded the type of property that could be considered as marital property and specifically included the present value of any vested or unvested military retirement pay as marital property. This bill was effective on July 1, 1987.

The federal law allowing the division of retirement pay, i.e. the Uniformed Services Former Spouses Protection Act, P.L. 97-252, 10 U.S.C. 1408, became effective on February 1, 1983. The Kansas Court of Appeals in Grant v. Grant, 8 K.A. 2d 671 indicated military retirement benefits could not be divided by the Court and as a result, the substitute for House Bill 2376 was introduced and adopted.

I have a particular problem that I need to have cured with respect to these issues. I obtained a Decree of Divorce in May of 1986 and by agreement of both parties, that Decree made provisions for the division of military retirement pay. The case in question was not a "contested case", rather, it was a case where there was a Separation and Property Settlement Agreement. When I sent in the Decree of Divorce to the United States Army Finance and Accounting Center, they sent me back a copy of the enclosed letter which states that House Bill 2376 took effect on July 1, 1987 and that the Decree in question was entered in May of 1986. They further noted that the change in the substantive law made no provision for decrees entered prior to July 1, 1987.

Accordingly, I would like to see another statute enacted or some further amendment to K.S.A. 23-201 which would allow the parties' agreement to take effect so that a direct allotment could be made to my client, who is a former spouse of a retired service member. Although I am sure that the legislative research people will be of assistance, I would appreciate it if the following language could be added to K.S.A. 23-201 or some other statute. I am not really wedded to the language, so much as to the concept. The language I would suggest is as follows:

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"(c) The provision of subsection (b) which states that the present value of any vested or unvested military retirement pay shall become marital property at the time of the commencement of an action for divorce, separate maintenance or annulment shall be effective with respect to any decree incorporating a separation agreement entered after February 1, 1983."

I have written a similar letter to Mike Johnston. I hope between the two of you, you can come up with some solution to this problem so that my client, the former spouse of a retired member, can obtain direct payments of her share of her ex-husband's retirement.

Respectfully submitted,

Richard A. Pinaire

RAP:ae
Enc.

V 4/9

DEPARTMENT OF THE ARMY
U.S. ARMY FINANCE AND ACCOUNTING CENTER
INDIANAPOLIS, INDIANA 46249-0001

June 8, 1987

FINCL-G

SUBJECT: Dueck, Walter E., SSN 512-50-7258

Richard A. Pinaire
Attorney at Law
811 N. Washington
Junction City, Kansas 66441

Dear Mr. Pinaire:

This follows up our telephone conversation. Information provided by the Senate of Kansas representative informs us that the House Bill 2376 does not become effective until July 1, 1987. Please note that there was no mention of retroactive payments. Thank you for your cooperation in this matter.

Sincerely,

Bonita Rowley

Bonita Rowley
Paralegal Specialist
Garnishment/Bankruptcy Division
Legal Office

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DEPARTMENT OF THE ARMY
U.S. ARMY FINANCE AND ACCOUNTING CENTER
INDIANAPOLIS, INDIANA 46249-0001

July 22, 1987

FINCL-G

SUBJECT: Dueck, Walter E., 512-50-7258, Payments pursuant to 10 U.S.C. 1408 Former Spouses' Protection Act

Richard A. Pinaire
Attorney at Law
811 North Washington
Junction City, Kansas 66441

Dear Mr. Pinaire:

The House Bill 2376 took effect July 1, 1987. The divorce decree incident to this matter was entered May 1986. The change in the substantive law makes no provision for decrees entered prior to July 1, 1987. Therefore we are unable to honor Mrs. Duek's request for direct payments. The retiree can however request that an allotment be set up. He needs to put his request in writing giving a date to start and the appropirate amount. This request should be directed to Retired Pay Operations.Dept 96, Indianapolis, Indiana 46216-0001 and must bear his signature. I am sorry that a more favorable response could not be provided.

Sincerely,

Bonita Rowley
Paralegal Specialist
Garnishment/Bankruptcy Division
Legal Office

V 6/9

DEPARTMENT OF THE ARMY
U.S. ARMY FINANCE AND ACCOUNTING CENTER
INDIANAPOLIS, INDIANA 46249-0001

FINCL-G

SUBJECT: Request for Information on the Uniformed Services Former Spouses' Protection Act

Richard Pinore
811 North Washington
Junction City, Kansas 66441

317-546-9211

542-2900

The Uniformed Services Former Spouses' Protection Act, P.L. 97-252, 10 U.S.C. 1408, effective 1 February 1983, provides for direct payments to a spouse or former spouse from a retiree's military pay for child support, alimony or as a division of property. It is required that the alimony, child support or division of retired pay be provided in a final court order as this is defined in the Act.

522-2155

1-317-542-2155

This Headquarters has been designated as agent to receive the requests for direct payments from a retiree's U.S. Army pay under Section 1408. The following documents and information should be sent by certified or registered mail to Commander, U.S. Army Finance and Accounting Center, Attn: FINCL-G, Indianapolis, Indiana 46249-0160:

1) An application for direct payment from a member's U.S. Army retired pay pursuant to Section 1408 of Title 10, U.S. Code.

2) A certified copy of the court order providing for child support, alimony or a division of retired pay, and, if necessary, other certified supporting documents. The court order must be certified within ninety (90) days immediately preceding its service on this Headquarters at the above address.

Commander
U.S Army
Finance
& Acct. Cntr
ATT: FINCL-G
Ind, Ind
46249-0001

3) A certification that the court order is final.

4) If the court order was issued while the member was on active duty and the member was not represented in court, the court order or other documents served with the court order must show that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 501 et seq.. were complied with. A statement by the former spouse or his/her attorney is insufficient.

5) If the court order provides a division of retired pay as property, the court order must show that the former spouse and the member were married at least ten (10) years, during which the member performed at least ten (10) years of service creditable towards retirement. Otherwise, the former spouse must furnish evidence that such a requirement was met; for example, a copy of the marriage certificate.

317- 546-92-11

Eric Silfow

202-224-3121

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6) If the court order provides a division of retired pay as property, it must appear from the order that the court had jurisdiction over the member by reason of (a) the member's residence, other than because of military assignment, in the territorial jurisdiction of the court, or (b) the member's domicile in the territorial jurisdiction of the court, or (c) the member's consent to the jurisdiction of the court.

Enclosed for your use is an application form (USAFAC Form 0-1767) and a certification of finality form (USAFAC Form 0-1765).

No action may be taken on a request for direct payments from a member's U.S. Army retired pay until all the required forms, documents and information are actually received by this Headquarters at the above office. Once all the required documents have been received and reviewed, the retiree will be notified of the request for direct payments from his/her retired pay, and given thirty (30) days to provide any evidence as to why the court order should not be complied with by this Headquarters.

The applicant former spouse will then be notified of the date and amount of retired pay to be sent to him/her in accordance with the court order and the applicable provisions of law, or the reason why this Headquarters cannot comply with the court order.

Sincerely,

Bonita Rowley
Paralegal Specialist
Garnishment/Bankruptcy Division
Legal Office

SESSION OF 1987

SUPPLEMENTAL NOTE ON SUBSTITUTE FOR
HOUSE BILL NO. 2376

As Amended by House Committee on Judiciary

Brief of Bill*

Substitute for H.B. 2376 amends K.S.A. 23-201, to expand the type of property that can be considered to be marital property. The present value of any vested or unvested military retirement pay would be considered marital property under the bill.

Background

The sponsor stated there is a need for the bill since the case of Grant v. Grant 9 K.A. 2d 671.

* Bill briefs are prepared by the Legislative Research Department and do not express legislative intent.

V 9/9

GABRIELLE M. THOMPSON
SUE L. LAKE
BREN ABBOTT
Assistant Riley County Attorneys

Office of the Riley County Attorney

WILLIAM E. KENNEDY III
Riley County Attorney

Carnegie Building
105 Courthouse Plaza
Manhattan, Kansas 66502
(913) 537-6390

GENIECE A. WRIGHT
Legal Specialist

February 27, 1990

Senate Hearing Committee
Richard Rock, Chairperson
Topeka, Kansas

Re: Senate Bill 718

MEMORANDUM OF TESTIMONY

WITNESS FEES/MILEAGE

A careful reading of current Kansas Statutes demonstrates that no lawful vehicle exists for a County to pay for food and lodging for a witness. Only mileage and $10.00 per diem can be paid. The problem arises, therefore if an important witness to a Riley County case resides, for example, in North Carolina. First the prosecutor must either accept on good faith that the witness will voluntarily come to the hearing, and then pay mileage, or the prosecutor must work through the interstate compact to secure the witness' attendance. Then when the witness arrives, the prosecutor must either find free lodging (an emergency shelter is rarely an appropriate bedroom for a friendly witness) or dig into an unauthorized or unduty-bound pocket. The purport of the amendment to K.S.A. 28-125 as seen in Senate Bill Number 718 is to authorize a County Commission to allow reasonable out-of-pocket expenses of food and lodging for witnesses from afar. The wording of the amendment is designed to allow each commission to review various situations. The term reasonable will vary from town to town and county to county within the State of Kansas. The term reasonable would also allow consideration of how long a witness is needed in any case.

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SENATE BILL NO. 721
SENATE JUDICIARY SUB COMMITTEE

Testimony of Carolyn Burns
Clerk of the District Court, Barton County
Legislative Chairman of KADCCA

Mr. Chairman:

I appreciate the opportunity to appear today on behalf of our association, to discuss Senate Bill No. 721. This bill will amend the Marriage Licenses statutes KSA 23—112, KSA 23—107, repeal KSA 23—113 and repeal KSA 23—104b, filing of minister's credentials. We feel these changes will greatly improve the effectiveness of the Clerk's office.

KSA 23—112: The basis for this statute is, a copy of license issued and a copy of the endorsed license by the person performing the ceremony shall be retained by the clerk's office. Therefore the court is required to keep two copies of each license.

The change we are requesting is that one official copy, with the endorsement of the person performing the marriage ceremony, be retained by the clerk's office.

With the increased amount of storage problems in county courthouses over the state, reducing the amount of copies being kept and later microfilmed will be cost productive for the counties. This may seem like a small amount, but in the entire state for the year of 1988 the total number of marriages performed was 22,705.

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KSA 23—107: This statute states that the license shall contain a part in duplicate to be detached and issued to the applicant.

The change we are requesting is a photocopy be given to the applicant. This change will be a savings to the Department of Health and Environment, as that department furnishes the forms for marriage license. The duplicate form we now use is a carbon and if a change needs to be made after the license is typed the carbon copy must be corrected. Making a photocopy of the license after the applicants have completely checked the form, will result in a neater form and more expedient service for the public.

KSA 23—133: This statute, originated in 1867, we are requesting to have repealed. It states that a judge or clerk failing to issue or to record a copy of the license shall be guilty of a misdemeanor.

We, as clerk's of the court, do not refuse to process or file any documents, and if this situation would inadvertently take place, the clerk has personnel rules to follow which would handle the situation.

KSA 23—104b: Ministers credentials filed and recorded with the clerk of court.

The clerk's office has on file numerous types of credentials, we do not question if these are official or legal, our job is to file and record. Failure to file such proof shall not affect the validity of the marriage, therefore we request that the statute be repealed.

Ministers credentials cannot be destroyed, so courts have in storage all credentials that have been filed over the years, creating storage problems. Not having to file and record the credentials saves clerical staff time.

State of Kansas
Mike Hayden, Governor

Department of Health and Environment
Division of Information Systems
Landon State Office Bldg., Topeka, KS 66612-1290

Stanley C. Grant, Ph.D., Secretary

(913) 296-1415
FAX (913) 296-6231

Testimony presented to

Senate Judiciary Subcommittee on Probate and Civil Procedure

by

The Kansas Department of Health and Environment

S.B. 721

S.B. 721 is being introduced to make the marriage license process more efficient and less burdensome for the court officials; however, the Department of Health and Environment would recommend two revisions to the bill as presented:

1. We recommend that the language in K.S.A. 23-107 be revised to require that the photocopied document be marked "DUPLICATE" to eliminate any confusion with the original.

2. That the language in K.S.A. 23-107 be clarified to denote the fact that the photocopy will be prepared after the court official has completed the necessary personal information on the original license being issued. The current language implies that a blank copy will be reproduced and issued.

With the above modifications, we would recommend passage.

Testimony presented by: Dr. Lorne A. Phillips
State Registrar
Division of Information Systems
February 28, 1990

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Charles Konigsberg, Jr., M.D., M.P.H., Director of Health (913) 296-1343

James Power, P.E., Director of Environment (913) 296-1535

Lorne Phillips, Ph.D., Director of Information Systems (913) 296-1415

Roger Carlson, Ph.D., Director of the Kansas Health and Environmental Laboratory (913) 296-1619

February 28, 1990

RE: SB 722

Senators:

Thank you for this opportunity to speak in support of SB 722. My name is Connie Uphaus and I am the Legislative Chairperson for Kansas Shorthand Reporters. We are concerned about the quality of stenographic transcripts in the freelance field in taking depositions.

Upon review of K.S.A. 60-228(a)(1), I found that a deposition may be taken by anyone authorized to administer an oath such as a notary. From research, I have learned of Gregg Shorthand writers with tape recorders taking depositions, charging the same price as a certified reporter, without the same quality of transcript that your constituents are entitled.

Kansas is the forerunner in the nation of a C.S.R. (Certified Shorthand Reporter) law, enacted in 1941. Presently an applicant must pass a written knowledge test of Kansas judicial procedure and a skill portion consisting of five-minute takes of testimony at 210 wpm, jury charge at 190 wpm, and medical testimony at 170 wpm, all within 95 percent accuracy.

As an aside, I want to share with you that last August I was elected to the Board of Directors of National Court Reporters. Since then I have been a representative in seven states. I am proud to return to Kansas and this judiciary. We Kansans have one of the best judicial systems in the country.

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But let's not rest on our laurels. We must continue to be the best and enforce our C.S.R. law that our forefathers wisely enacted.

Senators, I urge your support of SB 722.

Respectfully submitted,

Connie Uphaus

Connie Uphaus, C.S.R.
Wichita, Kansas

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TESTIMONY
RE
SENATE BILL NO. 690

To: Probate and Civil Procedure Committee

From: James L. Bush
Attorney at Law
206 S. Main
Smith Center, Kansas

HISTORICAL BACKGROUND

K.S.A. 59-2203 establishes the venue for various types of probate prceedings. The statute currently requires that proceedings for the probate of a will or for administration of a decedant's estate be had in the county of the residence of the decedent at the time of his or her death. In many parts of the state, this imposes a hardship and additional expense for the family of the deceased. It is not uncommon for elderly Kansans requiring nursing home care to move into a nursing home in a neighboring county when they are unable to get into a home in their own community. In many instances they will continue to own real estate in their "home community". Upon their deaths, the statutes require that the probate proceedings be filed in the the "county of residence" at the time of death, even though all real estate and other property may be located in another county, and their only contacts with the "county of residence" may be that they were merely residing there. This requires that additional expense be incurred in filing certified copies of the proceedings in the county where the property is located after the proceedings are completed in the "county of residence". Ironically, estates of "non-residents" may be probated in any county where the decedent left any estate to be administered. Other types of estate proceedings where administration is not required, such as Determination of Descent Proceedings, may be filed in the county where the property is located.

SUGGESTED AMENDMENT

Senate Bill No. 690 would amend K.S.A. 59-2203 to permit the probate of a will or the administration of an estate in any county where the decedent owned real estate at the time of the decedent's death. The language proposed in SB 690 could be made clearer by changing the bill to read: "...or in any county where the decedent had an interest in real property at the time of decedent's death;..."

Respecfully submitted:

James L. Bush
WINDSCHEFFEL & BUSH, Chtd.
206 S. Main
Smith Center, Ks.
66967

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2-28-90

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TESTIMONY
RE
SENATE BILL NO. 717

To: Probate and Civil Procedure Committee

From: James L. Bush
Attorney at Law
206 S. Main
Smith Center, Kansas

HISTORICAL BACKGROUND

K.S.A. 59-606 sets forth the legal requirements for a valid written will. As originally enacted in 1939, the statute required that a will be signed at the end by the party making the will, in the presence of two witnesses, and then "attested" by the two witnesses, who were also to sign the will in the presence of the testator. This procedure required the inclusion of an "attestation clause" at the end of the will immediately following the signature of the testator. Although no specific language was outlined in the statutes for the "attestation clause", various forms were ultimately adopted by lawyers to meet the requirements of the statute. A sample "attestation clause" is attached hereto and identified as ATTESTATION CLAUSE. A flaw existed in this procedure in that the testimony of the subscribing witnesses was often required in order to prove that the will had been executed according to law and to admit the will to probate following the death of the decedent, which was sometimes made impossible where the witnesses could not be located or had preceded the testator in death. This sometimes jeopardized the admission of an otherwise lawfully executed will to probate. Therefore, in 1975, the statute was amended to permit the use of a "self-proving affidavit" at the conclusion of a will, thereby alleviating the necessity of having the witnesses later testify regarding the lawful execution of the will. The form and contents of the "self-proving affidavit" was included in the statute. The "self-proving affidavit" contained virtually the same language that had long been used in the "attestation clause", but went somewhat beyond the "attestation clause" in that the "self-proving affidavit" also required that the signatures of all parties be witnessed and attested to by a Notary Public. A sample "Self-proving Affidavit" is attached hereto and identified as SELF-PROVING AFFIDAVIT. Following the amendment of the statute to permit the use of a "self-proving affidavit" some lawyers interpreted the statute to permit the use of the "self-proving affidavit" in lieu of the traditional "attestation clause". Other lawyers interpreted the statute to permit the use of the "self-proving affidavit" in addition to the traditional "attestation clause". Therefore, many wills have been drafted since 1975 that include both the "attestation clause" and the "self proving affidavit", notwithstanding the fact that both forms contain virtually the same language. In 1980 the Kansas Supreme Court in the case of In re Estate of Petty, 227 Kan. 697, ruled that the use of the "self-proving affidavit" in lieu of the usual attestation clause did not destroy the validity of the will inasmuch as the use of such affidavit at the end of the will complied with the attestation statute. Nonetheless, with

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most lawyers being a rather cautious lot, many continue to draft wills with both clauses being included following the dispositive provisions and signature of the testator. This makes the execution of wills an even more complex procedure and further confuses the testator who legitimately questions the necessity of two clauses saying virtually the same thing.

SUGGESTED AMENDMENT

The suggested amendment codifies the Kansas Supreme Court's ruling in Petty, and makes it clear that K.S.A. 59-606 permits the use of a "self-proving affidavit" in lieu of the traditional "attestation clause".

Respecfully submitted:

James L. Bush
WINDSCHEFFEL & BUSH, Chtd.
206 S. Main
Smith Center, Ks.
66967

ATTESTATION CLAUSE

The foregoing instrument was subscribed, published and declared by the above-named Mary Jane Smith as her Last Will and Testament in the presence of us two, who at her request, in her presence and in the presence of one another, hereto subscribe our names as witnesses thereof, all on the date last written above; and we declare that at the time of the execution of this instrument the said testator is, in our opinion, of sound and disposing mind and memory and under no constraint.

_____
Testator

_____ residing at _____
Witness

_____ residing at _____
Witness

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SELF-PROVING AFFIDAVIT

STATE OF KANSAS
COUNTY OF SMITH, ss:

Before me, the undersigned authority, on this day personally appeared Mary Jane Smith, John Q. Public, and Jane Doe, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me first duly sworn, said Mary Jane Smith, testator, declared to me and to the said witnesses in my presence that said instrument is her last will and testament and that she had willingly made and executed it as her free and voluntary act and deed for the purposes therein expressed; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is her last will and testament, and that she executed same as such and wanted each of them to sign the same as witnesses in the presence of each other and in the presence of the testator and at her request, and that said testator at that time possessed the rights of majority, was of sound mind and under no restraint.

_____
TESTATOR

_____
WITNESS

_____
WITNESS

Subscribed, acknowledged and sworn to before me by Mary Jane Smith, testator, and John Q. Public and Jane Doe, witnesses, this 28th day of February, A.D., 1990.

_____
Notary Public

My Commission Expires:

KANSAS ASSOCIATION OF COURT SERVICES OFFICERS

M E M O R A N D U M

TO: Judiciary Committee

FROM: Cathy Leonhart - Legislative Chairman

RE: SB 724: An act concerning crimes and punishment repealing K.S.A. 21-4613

The current statute provides for transfer of cases between judicial districts with the receiving district assuming all power over the defendant except that the length of supervision shall not be changed without a written order of the sentencing court. We are asking that this statute be changed to reflect that all power with respect to this defendant will remain with the sentencing court. The district of original jurisdiction is most likely to have a Judge, District or County Attorney, Court Services Officer, Community Corrections staff, and sometimes a victim who has knowledge of this client's history and investment in the successful completion of programs ordered by the court. We feel the individual needs to be accountable to the sentencing court. The receiving district is essentially providing "courtesy supervision" and information to the sentencing court regarding the client's progress. The Office of Judicial Administration's current procedure for intra-state transfers is that the sentencing district handles all subsequent actions on a case at the recommendation of the receiving district. We ask that the exisiting statute be changed to reflect what we have found works very well in practice.

iew

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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

Senate Committee on Judiciary
Senate Bill No. 716

Testimony Presented By
Julene L. Miller
Deputy Attorney General
February 28, 1990

Mr. Chairman and Members of the Committee:

Attorney General Stephan has asked that Senate Bill No. 716 be introduced in order to update the amount of damages recoverable from the parents of a child who maliciously or willfully injures another person or their property. Currently such recovery is limited to $1,000 unless the court finds that the child's act was the result of parental neglect, in which event there is no limit to the amount recoverable. The Attorney General supports the amendment to raise the limit to $5,000.

K.S.A. 38-120 was last amended in 1978, but the dollar limit has not been changed since 1965. By 1980 the $1,000 limit was thought to be merely an attempt to cover the acts of young vandals. Now, in 1990, $1,000 may not be enough to cover even that. We are advised that one state, Texas,

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currently has a $15,000 recovery cap, and others, such as California, have even attempted to impose criminal sanctions on parents for the malicious acts of their children. Because of the rise in juvenile crime and our belief that parents ought to take some responsibility for the acts of their children, I am asking that you consider this proposed amendment favorably.

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Lead Column

Parents' Liability For A Child's Wrongful Acts

by **Randall K. Rathbun**

One of the more discouraging situations visited upon plaintiff's counsel arises when a tortfeasor is financially impecunious. Although this situation is always frustrating, it seems especially so when the tortfeasor is a minor. The minor can, of course, be sued for his tortious conduct, see American Family Ins. Co. v. Grim, 201 Kan. 340, 440 P.2d 621 (1968); however, obtaining a judgment is usually only half the battle since minors will not have liability coverage unless they happen to be additional named insured under a policy insuring their parents. Consequently, counsel may spend considerable time and effort in attempting to preserve a judgment through execution or revivor. Unfortunately most judgments against minors are eventually discharged in bankruptcy when the minor reaches adulthood and becomes financially responsible.

Accordingly, counsel usually looks to the parents of a minor tortfeasor in attempting to obtain compensation for his client's injuries. This article examines several ways in which counsel can proceed along this vein. Besides statutory liability which may be imposed upon the parents, there exist two additional common law theories of liability whereby a parent may be held responsible for a child's wrongful act.

STATUTORY LIABILITY

Kansas statutes impose liability on the parents of a child for certain acts. K.S.A. 38-120 (1979 Supp.) provides that an action lies against the parents of a child who maliciously or willfully inflicts personal injury or damages property. There are several limitations on this liability. The child must be a minor living with his parents at the time of the wrongful acts. Further, recovery under this statute for personal injury is limited to actual medical expenses. Finally, the statute contains a monetary limitation which serves to render it almost useless. Recovery is limited under the statute to actual damages not to exceed $1,000.00 unless the finder of facts concludes that the malicious or willful act was the result of parental neglect.

Obviously, the limitations imposed by the statute render the statute of little value in all but a very few small cases. The limitation pertaining to personal injury losses further serves to decrease the utility of the statute. The statute should probably be viewed as a legislative attempt to impose liability on the parents of young vandals.

COMMON LAW LIABILITY

There are two theories which can be utilized in Kansas for imposing liability on he parents of a minor who has injured a third party by wrongful acts. The first of these, negligent entrustment, is well established in Kansas case law. The second, negligent failure to control, is of relatively recent import.

Before proceeding with discussion of these theories, legal purists should note that neither of these theories impute the negligence of a child to the parent, i.e., a parent's liability is not vicarious as in the principal-agent relationship. The parents are liable for the damages caused by the child's wrongful act because of some act of commission or omission on their part.

Negligent entrustment is well recognized in this state as the basis for a cause of action against the parents of a minor tortfeasor. Although most of the cases involving negligent entrustment deal with a negligently entrusted automobile, the basis for this

theory in Kansas springs from an early case in which a parent entrusted his son with an air gun. Capps v. Carpenter, 129 Kan. 462, 283 P. 655 (1930), was an action brought on behalf of a minor who had sustained an eye injury when the defendant's eight year old son discharged his air gun into the plaintiff's right eye. The plaintiff alleged that the defendant's son was mischievous and inclined to inflict punishment upon his playmates and that the defendant knew or should have known of his son's disposition and habits. The court held that the minor's parent could be held liable for the injuries sustained by the plaintiff. This liability was not based on the parent's relationship to the tortfeasor:

> It is idle to say the parent consented to the act which caused the injury. It is equally idle to say the [instrumentality] was used in the parent's business. The parent however is subject to liability not because of his relation to the [instrumentality] as owner or because of his relation to the child as parent, but because of his own negligence--because of not taking reasonable precaution against an injurious result which he could well foresee. Id. at 469.

The negligent entrustment theory was first applied to automobiles in Priestly v. Skourup, 142 Kan. 127, 45 P.2d 852 (1935). In Priestly, plaintiff alleged that the defendant father had allowed his son, a co-defendant, to drive the family automobile even though the father knew the son was incompetent, careless, and a reckless automobile driver. The court, in holding that the plaintiff had a cause of action against the defendant father for negligent entrustment, reviewed the authorities and precedents from other jurisdictions and concluded that the owner of an automobile who lends it to the one he knew or should have known to be an incompetent, careless and reckless driver is liable to third parties injured by such driver in the negligent operation of the automobile.

Subsequent Kansas cases have established a condition precedent for imposition of liability on the lender of an instrumentality. In a negligent entrustment case, the liability of the parent-lender is completely dependent upon actionable negligence on the part of the child. In other words, there can be no recovery against the parents of the child unless the plaintiff first shows the underlying tort which caused the damages for which plaintiff seeks compensation. Richardson v. Erwin, 174 Kan. 314, 255 P.2d 641 (1953), involves an action against a father whose minor son had allegedly caused the death of plaintiff's decedent by the negligent operation of the father's automobile. The plaintiff alleged that the defendant father knew his son to be an incompetent, careless and reckless driver and that the father was neglient in allowing his son to drive the automobile. The defendant father contended that an earlier action which the plaintiff had brought against his son's estate was a bar to the present case since the earlier action had exonerated his son of all negligence. The father alleged that any and all liability on his part was completely dependent upon the establishment of negligence on the part of his son. The court agrees:

> Conceding that the father knew the son to be an incompetent, careless and reckless driver, and therefore was negligent in permitting him to drive the car, the fact remains that such negligence on the part of the father would not render him liable in the absence of negligence by the son in operating the car at the time of the collision. In our opinion there can be but one answer to the question and that is that defendant father's liability in such a case is completely dependent upon actionable negligence on the part of the son. Id. at 318.

Gossett v. Van Egmond, 176 or 134, 155 P.2d 304 (1945), illustrates the use of the negligent entrustment doctrine in connection with a negligence per se theory. In Gossett, plaintiff brought action for the death of his

minor son through the alleged negligence of the defendant's minor son. Plaintiff alleged that defendant's son operated the defendant's automobile at an excessive rate of speed and that he had negligently driven the automobile into the rear of the plaintiff's automobile resulting in the death of plaintiff's son. During trial, plaintiff proved that the defendant's son had been denied a motor vehicle operator's license because of his mental condition, a fact of which the defendant was aware. In discussing the negligence of the father, the court noted that under Oregon law it is a misdemeanor to allow an unlicensed driver to operate a motor vehicle. The court further stated that since he had allowed his son to operate the automobile on frequent occasions the father was deprived of any presumption that he did not willingly violate the law. The course of conduct by the defendant illustrated a carelessness for the safety of others for which the defendant was held liable. The defendant made possible the infliction of injury upon other persons using the highway by his negligence.

It should be noted that several Kansas statutes can be utilized in this context. K.S.A. 8-222 provides that if an owner of a motor vehicle knowingly allows a minor under the age of 16 years to drive that vehicle upon a highway, then he and any person who gives or furnishes the vehicle to a minor shall be jointly and severally liable with the minor for any damages caused by the negligence of the minor in driving the vehicle. K.S.A. 8-263 states that no person shall knowingly permit his or her child or ward under the age of 18 years to drive a motor vehicle upon any highway unless the minor is authorized to operate the vehicle under the provisions of the Motor Vehicles Act. Counsel cannot afford to overlook these statutes when confronted with a case involving an automobile accident precipitated by the negligence of a minor.

In recent years, the negligent entrustment theory has been utilized in conjunction with homeowner's insurance policies to provide a source of insurance. Nearly all homeowner's insurance policies contain a section which provides coverage for personal liability which may be incurred by the insured. The carrier typically agrees to pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage." This coverage usually includes an accompanying duty to defend. In Upland Mutual Insurance, Inc., v. Noel, 214 Kan. 339, 520 P.2d 784 (1974), the Kansas Supreme Court was confronted with the basic issue of whether personal liability coverage in a homeowner's policy applied to a judgment in a negligent entrustment case. The insurance company contended that the basic purpose of a homeowner's insurance policy was to provide protection for a home-premises related occurrence. The insureds contended that the coverage for personal liability was simply that--a comprehensive personal liability insurance policy. The court, in reviewing the insuring clause, indicated that there was nothing contained in the clause which restricted coverage to accidents or injuries occurring upon the premises of the homeowner. The court pointed out that the basis for a negligent entrustment action was not the insured's ownership or use of the automobile but in knowingly entrusting an automobile to a careless and reckless driver. Although the Upland case involved a negligent entrustment of an automobile, its greatest utility has been in cases in which the defendant's conduct does not fall within an area in which liability insurance coverage commonly exists.

Another theory upon which parents of a minor tortfeasor may be held responsible for a minor's acts is relatively new in Kansas. This theory, negligent failure to control, was recently applied in Mitchell v. Wiltfong, 4 Kan. App.2d 231, 604 P.2d 79 (1979). Mitchell involved an action brought against the parents of a nine year old for the intentional torts of the child. Plaintiffs alleged that the defendants' child beat, harassed, and assaulted their children and other children in

the neighborhood. The court reviewed Capps, supra, and reiterated the ruling that parents may be liable for the tortious acts of their child if they were negligent in failing to exercise reasonable care to control the child.

However, the court went on to discuss cases from other jurisdictions which recognize a cause of action against the parents of a minor child where the parents know and should have known that injury to another was a proable consequence of failure to exercise control over the child. The court further cited the Restatement of Torts 2d, Section 316 (1965), which provides that:

> A parent is under a duty to exercise reasonable care to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know the necessity and opportunity for exercising such control. Id at 234.

The court then applied Capps and Restatement §316 to the facts of the case and held that the plaintiffs stated a cause of action against the defendant parents. The court noted that the plaintiff had alleged the defendants' child had a vicious or malignant disposition; that the defendants knew or had reason to know that they had the ability to control their child; that the defendants knew or should have known of the necessity and opportunity for exercising such control; and, that the defendants' breach of their duty to exercise reasonable care in controlling their child was the proximate cause of the injuries received by the plaintiff's child. Accordingly, the plaintiff's petition stated a cause of action.

A Kentucky case illustrates another possible use of the negligent failure to control theory. In Moore v. Lexington Transit Corporation, 418 SW.2d 245 (Ky. 1967), plaintiff was a bus passenger who sustained personal injury when he was thrown out of his bus seat when the bus stopped suddenly because an automobile door was opened against the side of the moving bus. Plaintiff brought an action against the bus company as well as the parents of the child who had opened the door. At trial, the defendant mother testified that she had previously let her son out at the intersection where the accident occurred but that at no time had he ever opened or attempted to open the door unless she had directed him to do so and that on this occasion the door was opened without her knowledge or consent. The court, relying on Restatement §316, found there could be no question that the action of the child in opening the car door was the proximate cause of plaintiff's injury. The court further noted it was undisputed that the child' mother had control of him. Finally, the court held that the trial court had improperly directed a verdict for the defendant parents since it was clearly up to the jury to determine whether the mother was negligent in failing to anticipate that the child might do what he did. A careful parent might well have anticipated the child doing exactly what he did since the mother had on occasion opened the car door at the location in question.

Thus, as the above decisions illustrate, the theory of negligent failure to control extends beyond that of negligent entrustment and must be distinguished therefrom. The basis for negligent entrustment arises from the lending of an instrumentality to an individual unable to properly control the instrumentality. The theory of negligent failure to control extends further. It goes to the actual ability to control a child and negligently failing to do so when the parent knows or should know of the necessity and opportunity for exercising the control.

CONCLUSION

Plaintiff's counsel has several theories of liability to utilize in Kansas in an attempt to hold parents of a minor child liable for the acts of

the child. Negligent entrustment has been utilized quite often in the state and its basis is well established in the cases. Although the Kansas Supreme Court has yet to rule on negligent failure to control, the theory's application by the Kansas Court of Appeals indicates that plaintiff's counsel has another theory available in which to hold a parent liable.

Randall K. Rathbun is an associate in the law firm of Depew and Gillen of Wichita, Kansas. He is a member of the Kansas Trial Lawyers Association and the Association of Trial Lawyers of America.

Family Law Column

Common Law Marriage

by **Leon B. Graves** and **John R. Mettner, Jr.**

ELEMENTS OF COMMON LAW MARRIAGE

In a long line of decisions, the Supreme Court of Kansas has recognized the validity of common law marriages. Fleming v. Fleming, 221 Kan. 290, 291, 559 P.2d 329 (1977). The necessary elements of a common law marriage are as follows: (1) capacity of the parties to marry; (2) a present marriage agreement between the parties which may be shown by circumstantial evidence; and (3) a holding out to the public as being husband and wife. Id.

CASES IN WHICH ISSUE ARISES

Issues relating to common law marriage arise in a variety of cases. One or both parties may seek a divorce and related orders pertaining to division of property, support, custody and visitation. Driscoll v. Driscoll, 220 Kan. 225, 552 P.2d 629 (1976). A party obligated by a divorce decree to pay alimony may seek to prove that the exspouse has entered into a common law marriage with a third party, and that alimony should therefore be terminated. Fleming v. Fleming, supra.

Common law marriage issues also arise in criminal proceedings. In State v. Johnson, 216 Kan. 445, 532 P.2d 1325 (1975), the defendant in a robbery case objected to the testimony of a witness on the grounds that she was his common law wife and that he was therefore entitled to invoke the marital privilege. After excusing the jury and hearing testimony, the court found that no common law marriage relationship existed and the witness was permitted to testify.

When one party to a relationship dies, the survivor may find it necessary to prove the existence of a common law marriage to support a claim to the decedent's estate. In re Estate of Keimig, 215 Kan. 869, 528 P.2d 1228 (1974); In re Estate of Mazlo, 211 Kan. 217, 505 P.2d 762 (1973). Similar issues may arise in connection with claims for survivor's benefits under the Social Security Act or workers' compensation laws. Hawkins v. Weinberger, 368 F.Supp. 896 (D.Kan. 1973); Gillaspie v. E.W. Blair Const. Corp., 192 Kan. 455, 388 P.2d 647 (1964).

PROOF OF COMMON LAW MARRIAGE

Various facts and circumstances which tend to prove a common law marraige are listed in 3 Am. Jur. Proof of Facts, Common Law Marriage, Proof 1 at 272 (1959). Specific examples can also be found in reported cases from Kansas and other jurisdictions. It should be noted, however, that most recent common law marriage cases from the appellate courts of Kansas have affirmed

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Senate Bill No. 723
Senate Judiciary Committee
February 28, 1990

Testimony of Kay Farley
Child Support Coordinator
Office of Judicial Administration

Mr. Chairman:

I appreciate the opportunity to appear today to discuss Senate Bill No. 723.

The Office of Judicial Administration and the Court Trustees of Kansas support the passage of Senate Bill 723. A loophole in the enforcement program exists when an obligor moves to another country. Some countries, such as Germany, are very cooperative on child support enforcement matters and willing to accept requests for assistance from Kansas. Other countries have a more formal process and require that Kansas request in writing to be granted reciprocity status with that country before they will honor any requests for enforcement services. A case in point is a case in Johnson County. The parties were granted a divorce on April 7, 1980 and child support was ordered for two daughters ages three and four. The obligor has never made a child support payment. The obligor subsequently moved to Australia and now owes an arrearage of $44,498. Requests for the enforcement of the child support order have been made to Australia, but they will

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not proceed on the case until a formal request for reciprocity status is made by an official in Kansas. I have enclosed copies of two letters from Australia for your information.

Current Kansas statutes do not empower any agency with the authority to make such a request for reciprocity status. We ask that the Attorney General be delegated this authority so that we can proceed on the case in Australia and others like it to collect the child support that is due minor children of the state of Kansas.

Enclosures

ATTORNEY-GENERAL'S DEPARTMENT

TEL.: 71 9111

ROBERT GARRAN OFFICES
NATIONAL CIRCUIT
BARTON, A.C.T. 2600

Please Quote: JAL88/13854
Your Ref.:

Diane Linder
Family Support Officer
District Court Trustee
PO Box 760
Olathe, Kansas 66061

Dear Madam

Reciprocal Enforcement of Maintenance, Kansas, USA

I refer to your letter dated 22 July 1988 concerning reciprocal enforcement of maintenance.

As the State of Kansas is not a reciprocating jurisdiction for the purposes of our legislation, and if you wish to establish reciprocity, it will be necessary for the relevant authority in Kansas to write to us requesting Kansas' addition to the list of jurisdictions, together with an assurance that Kansas URESA legislation would allow enforcement in Kansas of Australian maintenance orders. We may then be in a position to make the necessary amendments to our Regulations. To establish reciprocity we also need to be satisfied that there is compatibility of our respective laws on maintenance. In this regard I would be grateful for details of maintenance laws in Kansas. In relation to Australian law I enclose a copy of the relevant legislation and a paper on maintenance in Australia.

Once the State of Kansas becomes a reciprocating jurisdiction, then Australian courts will accept URESA petitions. Alternatively, final orders from your courts could be registered by Australian courts. I attach for your information a copy of the Australian Family Law Regulations, relating to overseas enforcement of maintenance. Also enclosed is a copy of a booklet on reciprocal enforcement of maintenance which may be helpful to you. While the booklet is out of date, most of the information is still relevant.

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The answers to your questions as set out in paragraph 4 of your letter are:

1. As explained above we will accept an URESA petition as required by your legislation.

2. We require certified copies of all orders forwarded to us.

3. We do not charge a fee for enforcement of overseas maintenance.

4. We do not have our own forms.

5. Once an order is registered by an Australian court, the registrar of the recipient court is required to endorse the order with the exchange rate of $A to $US at the date of the order.

I hope the foregoing is of assistance to you.

Yours faithfully

D Wallace

(DAVID WALLACE)
for Secretary

14 October 1988

ATTORNEY-GENERAL'S DEPARTMENT

TEL.: 71 9111

ROBERT GARRAN OFFICES
NATIONAL CIRCUIT
BARTON, A.C.T. 2600

Please Quote: JAL88/13856
Your Ref.: 89C1439

21 FEB 1989

Diane Linder
District Court Trustee
PO Box 760
OLATHE KANSAS 66061
USA

Dear Madam

Reciprocal Enforcement of Maintenance
Cynthia Sue Newman v Denis Gene Newman

I refer to my letter dated 14 October 1988 and your URESA Action Request dated 7 February 1989 relating to Newman v Newman.

In discussions held with Mr Markstein of the United States Embassy in Canberra it was agreed that Australia would consider registration of maintenance orders made in the State of Kansas if that State would give an undertaking to register and enforce Australian orders. This was on the basis of being a temporary arrangement while reciprocity was being established between Kansas and Australia.

As yet this Department has not been approached by the State of Kansas requesting reciprocity. I should point out that Kansas is a prescribed jurisdiction for the recognition of custody orders.

As advised before we can prescribe Kansas as a reciprocating jurisdiction we require compatabilty of maintenance laws and the establishment of reciprocity, which is afforded by your URESA scheme. In the case of Newman v Newman the District Court of Johnson County has directed Australia to specifically recognise that order. Accordingly please forward the relevant legislation in relation to maintenance applied by courts in

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Kansas. We require this information before we can recommend the prescription of Kansas under the Australian Family Law Act.

At this stage I do not consider that sufficient attention has been given by the Kansas authorities to enable us to establish reciprocity for the enforcement of maintenance orders and therefore cannot considering registering the matter of Newman v Newman. I herewith return the documents forwarded with your URESA Action Request of 7 February 1989.

Yours faithfully

D Wallace

(DAVID WALLACE)
for Secretary

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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

TESTIMONY OF
ASSISTANT ATTORNEY GENERAL CAMILLE A. NOHE
ON BEHALF OF ATTORNEY GENERAL ROBERT T. STEPHAN
TO THE SENATE JUDICIARY SUBCOMMITTEE

RE: Senate Bill 723

February 28, 1990

Mr. Chairman and Members of the Subcommittee:

The purpose of the Uniform Reciprocal Enforcement of Support Act (K.S.A. 23-451) is to improve and extend by reciprocal legislation the enforcement of duties of child support. This Act provides the means of enforcing child support obligations when the obliger lives in one state and the obligee lives in another state, even if neither person lives in the state which originally issued the order of support.

However, the enforcement provisions of this Act stop at the borders of the United States. As a consequence Kansas courts simply have no means to enforce an order of child support if the obligor has moved, either temporarily or permanently, to another country. A parent may presently escape from the legal obligation of supporting his or her children by crossing the nation's border.

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Senate Bill 723 would provide the mechanism needed to enforce child support obligations across international borders if a foreign country has also enacted reciprocal provisions of child support enforcement.

Attorney General Robert Stephan supports the concept of such international cooperation by a coordinated effort to ensure that children in Kansas are financially supported by both of their parents, no matter where in the world the non-residential lives.

KANSAS ASSOCIATION OF COURT SERVICES OFFICERS

M E M O R A N D U M

TO: Judiciary Committee

FROM: Cathy Leonhart, Legislative Chairperson

RE: SB 725: An act concerning public health labortory testing

The individuals that Court Services Officers supervise while on probation are all too often abusing chemicals. It is frequently a condition of probation that random urinalysis be done to monitor this problem. We are asking that we be exempt under the definition of "laboratory" in 65-1,108 for the purpose of doing internal screening for case management purposes. Community corrections programs, which have virtually the same responsibilities as Court Services, are currently exempt. These tests are not to be used for show cause and revocation. If a test was positive, it would be sent on to an approved "laboratory" for confirmation.

It is very costly to send all tests out to an approved lab as there is often a flat rate regardless of whether the test is negative or positive. Internal screening would eliminate doing expensive testing on negative screens. It saves a good deal of time and also has a certain psychological advantage. When a probationer knows the test is going to tell you something immediately, as opposed to forty-eight hours to one week later, he or she is more likely to admit using. The admission is more valuable than the test.

The exemption allows the Office of Judicial Administration to explore the most accurate and financially reasonable method of testing as funding options become available statewide.

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State of Kansas
Mike Hayden, Governor

Department of Health and Environment
Kansas Health and Environmental Laboratory
Forbes Field, Bldg. 740, Topeka, KS 66620-0002

Stanley C. Grant, Ph.D., Secretary

(913) 296-1620
FAX (913) 296-6247

Testimony presented to
Senate Judiciary Subcommittee on Probate and Civil Procedure

by

The Kansas Department of Health and Environment

Senate Bill 725

In 1988, the legislature amended KSA 65-1,107 and 65-1,108 to require approval of laboratories performing tests for controlled substances under schedule I and II of the uniform controlled substances act.

Drug screen tests are performed in a variety of settings, including the typical clinical laboratory, industry, private unregulated laboratories, and the criminal justice system. Drug test technology is marketed as virtually 100% accurate with no training required to perform the test. Furthermore, in an effort to market drug testing at a low cost per test, quality control is most often inadequate or nonexistent. A review of proficiency test results from clinical laboratories suggest that many laboratories have difficulty with controlled substance testing. In 1987, 21% of sample challenges were incorrectly reported; in 1988, 33% were incorrectly reported. These results were obtained from laboratories which do have on-going quality assurance programs and staff with laboratory experience. Regulations of facilities performing tests for controlled substances is necessary to assure quality laboratory data.

It is our understanding that the test results obtained from testing by the court services programs may be used to revoke or deny probations. Testing exempted for the Department of Corrections is limited to that testing used for institutional management of inmates only. It is our position that persons within the criminal justice system do have a right to accurate test results and this can best be assured in settings which are required to meet minimal standards.

The KDHE offers a compromise "balloon" bill which amends (b) (3) on line 28 to read "urinalysis tests for controlled substances performed only for management purposes on inmates, parolees, or probationers by personnel of the department of corrections or office of judicial administration and which shall not be used for revoking or denying parole or probation." Subsection (5) is then deleted. Additionally, I would like to point out that the rules and regulations promulgated by the secretary of corrections for the community correction programs exempted in subsection (4) also limits testing to management purposes only.

Testimony presented by: Theresa L. Hodges, Section Chief
Laboratory Improvement Program Office
Kansas Health and Environmental Laboratory
February 28, 1990

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Charles Konigsberg, Jr., M.D., M.P.H., Director of Health (913) 296-1343
James Power, P.E., Director of Environment (913) 296-1535
Lorne Phillips, Ph.D., Director of Information Systems (913) 296-1415
Roger Carlson, Ph.D., Director of the Kansas Health and Environmental Laboratory (913) 296-1620

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Session of 1990

SENATE BILL No. 725

By Committee on Judiciary

2-20

AN ACT concerning public health laboratory testing; relating to the validity of tests; amending K.S.A. 1989 Supp. 65-1,108 and repealing the existing section.

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

Section 1. K.S.A. 1989 Supp. 65-1,108 is hereby amended to read as follows: 65-1,108. (a) It shall be unlawful for any person or laboratory to perform prenatal serological tests for syphilis, serological tests for human immunodeficiency virus or tests for controlled substances included in schedule I or II of the uniform controlled substances act unless the laboratory in which such tests are performed has been approved by the secretary of health and environment to perform such tests. Any person violating any of the provisions of this section shall be deemed guilty of a class B misdemeanor.

(b) As used in this section and in K.S.A. ~~1988~~ *1989* Supp. 65-1,107 and amendments thereto, "laboratory" shall not include: (1) The office or clinic of a person licensed to practice medicine and surgery in which laboratory tests are performed as part of and incidental to the examination or treatment of a patient of such person; (2) the Kansas bureau of investigation forensic laboratory; (3) ~~urinalysis tests for controlled substances performed by the department of corrections for institutional management purposes on inmates in the custody of the secretary of corrections and incarcerated in a correctional institution or facility under the jurisdiction of the secretary of corrections~~; ~~or~~ (4) urinalysis tests approved by the secretary of corrections for controlled substances performed by the community corrections programs~~, or (5) urinalysis tests approved by the Kansas supreme court, office of judicial administration, for controlled substances performed by the court services programs~~.

urinalysis tests for controlled substances performed only for management purposes on inmates, parolees or probationers by personnel of the department of corrections or office of judicial administration and which shall not be used for revoking or denying parole or probation.

or

delete

Sec. 2. K.S.A. 1989 Supp. 65-1,108 is hereby repealed.

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