Approved 2-11-91
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative John M. Solbach at
Chairperson

3:30 ~~xxx~~m./p.m. on January 28, 1991 in room 313-S of the Capitol.

All members were present except:

Representatives Douville, Gomez, and Everhart who were excused

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee:

Mr. Kelly Kindscher
John Phillips, Ks. Child Support Enforcement Assn.
Jamie Corkhill, Attorney for Child Support Enforcement SRS
Chip Wheelen, Lobbyist for Ks. Psychiatric Society
Jim Clark, Kansas County and DA's Association

The Chairman called the meeting to order and called for bill requests.

Mr. Kelly Kindscher, Lawrence, Kansas appeared and requested legislation to allow use of conservation easements to protect land and to adopt the uniform Conservation Easement Act. See (Attachments # 1 and 2).

Representative O'Neal made a motion that the proposed legislation be introduced. Representative Carmody seconded the motion. The motion carried.

Revisors Staff reviewed HB 2004 and explained amendments and new sections.

Mr. John Phillips, Kansas Child Support Enforcement Association appeared as a proponent of HB 2004. See (Attachment # 3). Mr. Phillips explained and requested the Committee to support his suggested amendments.

Committee discussion followed. A committee member asked if the intent is to change the burden of proof from ponderance of the evidence to clear and convincing evidence.

Mr. Phillips said a statutory change is needed regarding the time allowed to challenge a blood test report, to expedite the flow of cases. Mr. Phillips noted his recommendations also include a new section regarding interlocutory orders as explained in Attachment # 3.

A committee member asked if an order can be enforced without criminal sanctions. Another member asked how many of these cases appear per year in Kansas and if any case can be prosecuted regardless of financial status. Mr. Phillips explained collection formula for the State 4D Agency.

Jamie Corkhill, Attorney for Child Support Enforcement for SRS, appeared as a proponent of HB 2004 and distributed (Attachment # 4). There were no further conferees wishing to testify. The hearing was closed on HB 2004.

The Chairman opened the hearing on HB 2005.

Chip Wheelen, lobbyist for the Kansas Psychiatric Society appeared

as a proponent for HB 2005, and distributed (Attachment # 5).

A committee member asked why there was an exclusion of certified PHD's and Masters of Social Work.

Mr. Wheelen said he had no objection to broadening the bill to include a licensed psychologist or a licensed specialist social worker; that he would leave it up to the Court to accept or reject a statement of a qualified expert witness.

A committee member suggested using "may" instead of "shall" in Section 1 (C).

Mr. Wheelen said the language "when applicable" was inserted to make it clear that the judge determines whether the testimony is worthwhile; that he prefers the word "shall".

Jim Clark, Kansas County and DA's Association, appeared in opposition to HB 2005 and distributed (Attachment # 6). Mr. Clark suggested adding new sub-section "C" and say "consider evidence on these issues" and rely on the civil procedure code for disability of that evidence.

The hearing on HB 2005 was closed.

The meeting adjourned at 4:20 p.m. The next meeting of the committee is scheduled for Tuesday, January 29, 1991, at 3:30 p.m. in room 313-S.

GUEST LIST

COMMITTEE: JUDICIARY (HOUSE) DATE: 1/28/91

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Kelly Kindscher	R+2 Box 394A Lawrence	Kansas Land Trust
Michelle Moore		Kansas Action For Children
Jamie Corkhill	Topeka	CSE (SRS)
Chip Wheelen	Topeka	KS Psychiatric Soc
Jack Phillips	Leawood	KS Child Support Enforcement ASSN
Kay Farley	Topeka	Office of Judicial Administration
Paul Shelby	Topeka	OJA
Jim CLARK	TOPEKA	KCDAA

January 28, 1991
Kansas Land Trust
Rt. 2, Box 394A
Lawrence, KS 66046
913-842-1203

Dear Judiciary Committee Members,

The Kansas Land Trust was established in July, 1990 to work with landowners to protect land. We would like to use conservation easements as a tool to protect prairies, woodlands, and farmland for future generations. The current state law on conservation easements (KSA 58-3803) limits the use of easements to being given only for wetlands and riparian areas, and limits them to being held only by governmental entities. We would like to see the Uniform Conservation Easement Act adopted. It will expand the current law to remedy these deficiencies.

We believe that landowners should have the right to protect their land by separating development rights from fee simple ownership, for all types of land.

The Uniform Conservation Easement Act appears to be a superior law to our existing one. Over 40 states have conservation easement laws. In recent years, 11 have adopted the Uniform Conservation Easement Act. It should be noted that the passage of this law in other states has not been controversial. We believe that this occurs because conservation easement laws enhance landowner's property rights and provide federal tax advantages. We would like to see the Judiciary Committee consider this important matter and bring our conservation easement law up to date by adoption of the Uniform Conservation Easement Act.

Sincerely,

Kelly Kindscher

Kelly Kindscher
Director

HJUD
ATTACHMENT 1
1/28/91

KANSAS LAND TRUST

**a membership organization
that promotes the preservation of the
natural, recreational, scenic,
or agricultural values of land
for the benefit of the general public**

Established in 1990

Mailing address and phone:
Mr. Kelly Kindscher
**Route 2, Box 394A
Lawrence, Kansas 66046
(913) 842-1203**

H JUD
ATTACHMENT 2-A
1/28/91

QUESTIONS AND ANSWERS ABOUT CONSERVATION EASEMENTS
from the Kansas Land Trust

Q. What is a conservation easement?

A. It is a legal agreement a property owner makes to restrict the type and amount of development that may take place on his or her property. Each easement's restrictions are tailored to the particular property and to the interests of the individual owner. The owner conveys to Kansas Land Trust, as easement holder, certain rights to use and develop the property; these may include the right to subdivide the land, farm it, build buildings or harvest the timber on it.

Q. Will an easement protect the land for future generations?

A. Yes, it is a legal interest in the land that is binding in perpetuity. The KLT will assure that unwanted development will never take place.

Q. What are the benefits of a conservation easement to the landowner?

A. The donation of an easement to KLT, a non-profit, tax-exempt organization, can keep land in one's family by reducing or eliminating inheritance taxes and preserve the property for one's children and grandchildren.

Q. What are the benefits of a conservation easement to the public?

A. An easement preserves the beauty of the landscape, including prairie, woodlands, agricultural lands, wetlands, and other wildlife habitat. It saves land for future farmers and ranchers. It promotes an ethic of conserving our natural heritage and resources. It safeguards our quality of life.

Q. Do conservation easements condemn land in private ownership?

A. Emphatically not. Easements are a completely voluntary arrangement. They do not require any change in ownership, and the land remains privately owned.

Q. Will easements stifle a community's economic development?

A. No. On the contrary, easements can stimulate a higher quality of development and a higher return on neighboring lands. By making a community more attractive to live in, they can attract new residents and businesses.

Q. Will easements interfere with public utilities?

A. No, utility companies will retain rights of access.

Q. Where can I get more information about the Kansas Land Trust?

A. Write to the Director, Mr. Kelly Kindscher, Route 2, Box 394A, Lawrence, Kansas, 66046.

THE LAND TRUST IDEA:

What Other States Are Doing

- **Iowa Natural Heritage Foundation**

- **Ozark Regional Land Trust**

Preserving NATURAL AREAS

Land Stewardship and Preservation

The goal of the Iowa Natural Heritage Foundation is to protect important natural, wildlife, recreational, and cultural resource lands in Iowa. The Foundation's Land Stewardship and Preservation Program is the most direct and visible means toward achieving this goal.

As founding Chairman of the Foundation, I continue to be amazed at the creativity, sensitivity, diversity, and aggressiveness of the Land Stewardship Program. We have demonstrated the effectiveness of cooperation between the public and private sectors.

The Foundation has directly assisted in the protection of over 14,000 acres in its first decade.

Foundation File Photo

Robert Buckmaster was the first Chair of the Iowa Natural Heritage Foundation's Board of Trustees, serving from 1979 to 1982. He is a retired attorney and communications executive from Waterloo, Iowa.

Thousands of other acres have been protected indirectly as well. Many other major projects are currently underway to protect important forest lands, trout streams, river corridors, trails, wetlands, and other sensitive areas.

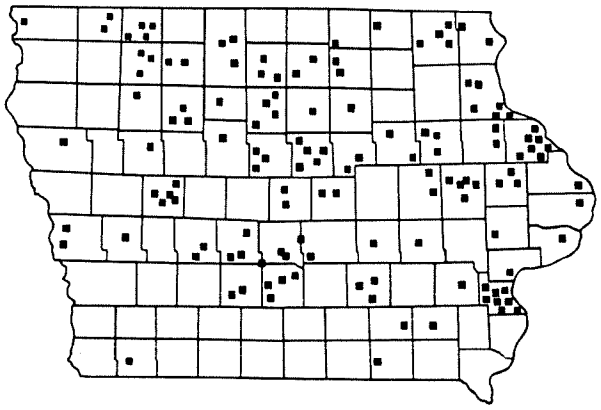
Each of these areas is an investment in Iowa's future — an investment in a better quality of life. Many are an investment in sites to protect important plants, animals, and cultural resources. Some are an investment in multiple use recreation.

Securing the financial future of the Iowa Natural Heritage Foundation is our way of investing in Iowa. I'm doing all I can. I hope you are, too.

by Robert Buckmaster

Looking back at the Land Stewardship Projects the Iowa Natural Heritage Foundation assisted in over the last ten years, it is hard to pick special projects to use as examples. Each of the 135 projects is unique in itself. Our challenge and success has been (and continues to be) our ability to respond with flexibility and creativity and to build coalitions of supporters. The following projects are geographically distributed and are representative of the types of projects the Foundation has assisted in and the methods of protection we have used.

14,092 Acres Valued At $12.4 Million



Areas protected by the Iowa Natural Heritage Foundation's Land Stewardship & Preservation Program.

PROTECTION THROUGH CONSERVATION EASEMENTS

Upper Iowa Palisades

The Upper Iowa River Palisades near Bluffton in Winneshiek County, a spectacular geologic formation, is one of the most widely recognized scenic areas in Iowa.

Twenty-three acres of these beautiful blufflands have been protected with a conservation easement (permanent restriction of uses on land) granted by the Iowa Farmers Home Administration. The Iowa Natural Heritage Foundation prepared and negotiated the easement request on behalf of the Winneshiek County Conservation Board.

Since development or misuse of these spectacular bluffs could permanently damage the scenic beauty of the area, these specific uses are prohibited: commercial, residential, and industrial development; billboards; dumping; excavation; cultivation; cutting of timber within sight of the river; and any other act which is detrimental to the scenic beauty, erosion control, fish and wildlife habitat, or archaeological resources of the area.

Forest Acres

A conservation easement negotiated by the Iowa Natural Heritage Foundation has protected 98 acres of scenic forest area adjacent to the Loess Hills Pioneer State Forest in Harrison County. The private owner must care for the area according to an approved Forest Management Plan, and any activity which would be detrimental to the scenic beauty of the area is prohibited.

WILDLIFE HABITAT

Shagbark Hills

Increasing wildlife habitat in Woodbury County was the primary focus of the 148-acre Shagbark Hills acquisition. The woodlands and the planted prairies are home to quail, partridge, turkey, fox, oppossum, mink, owls, hawks, and many other Iowa creatures. The property is now managed as a wildlife area by the Woodbury County Conservation Board.

State Wildlife Habitat Funds, Pheasants Forever, and a loan from a private individual made the acquisition possible. The Iowa Natural Heritage Foundation coordinated the joint effort and provided technical and negotiating assistance to the Woodbury County Conservation Board and tax benefits to the seller.

PRAIRIES

Rolling Thunder Prairie Preserve

The 122-acre Rolling Thunder Prairie in southwest Warren County is believed to be one of the largest remaining prairies in southern Iowa. The prairie is located along a rolling hillside and is home to a rich diversity of plant and animal life.

The Iowa Natural Heritage Foundation assisted the Warren County Conservation Board during negotiations and arranged interim financial assistance. Since the landowner wanted a cash payment and the county did not have all the funds available, the Foundation purchased the property with a loan from the Peoples Trust and Savings Bank of Indianola. The county was then able to acquire the property from the Foundation over several years. The prairie has been dedicated as a State Preserve.

HIDDEN GEOLOGIC JEWELS

Falling Rock — Sandstone Palisades

When seeking nature's hidden treasures, one merely needs to explore the Iowa River Valley in Hardin County. One of these marvelous treasures is the Falling Rock (soon to be re-named Sandstone Palisades) near Steamboat Rock and Eldora. This region of the state has been heavily influenced by receding glacial activity, creating 100-foot rock out-croppings with rare ferns, white pine, yellow birch, and paper birch.

The Falling Rock area has been preserved through the help of the Hardin County Conservation Board, the Hardin County Savings Bank, and the former owner, Vera Reisinger. The Iowa Natural Heritage Foundation received a loan from the Hardin County Savings Bank to purchase the property. The County Conservation Board acquired the property from the Foundation on contract. Currently the property is being considered for designation as a State Preserve — a well deserved honor.

Blood Run Natural Landmark

The site of Blood Run-Rock Island (designated in 1975 as a National Historic Landmark by the U.S. National Park Service) is located along the valley of the Big Sioux River in northwestern Iowa and southeastern South Dakota. The Iowa Natural Heritage Foundation, in cooperation with the State Historical Society of Iowa and the Lyon County Conservation

Board, helped acquire approximately 200 acres of this 1,000-acre site.

The first European explorers and traders arrived at the Blood Run site in the late 1600s. In 1700 Blood Run was a significant cultural center frequented at times by as many as 3,000 Native Americans. Important archaeological resources and the visual qualities of the site remain. Some of the first to write about Blood Run described it as unique, very large, and worthy of preservation. Most of its burial mounds (over 275 — some as large as 60 feet across and 8 feet high) and other surface features were constructed during its principal occupation.

RAILS-TO-TRAILS

Cedar Valley Nature Trail and Heritage Trail

Iowa is recognized as a national leader in rail-to-trail projects. The first such major project was the Cinder Path between Chariton and Derby, maintained by the Lucas County Conservation Board. The projects that "grandparented" the movement in Iowa, however, were the Cedar Valley Nature Trail and Heritage Trail, each currently receiving 50,000-65,000 visitor use days per year.

The Cedar Valley Nature Trail stretches along 52 miles of a former electric inter-urban railroad corridor between Hiawatha/Cedar Rapids and Evansdale/Waterloo. This multiple-use conservation/recreation corridor includes woodlands, wetlands, prairie remnants, historical depots, and open vistas. The trail is managed cooperatively by the Linn and Black Hawk County Conservation Boards.

The Heritage Trail extends 26 miles above a former railroad corridor from Dubuque to Graf to Dyersville through an area of towering limestone bluffs along the Little Maquoketa River on its way to the open prairie lands. This beautiful corridor is managed by the Dubuque County Conservation Board with the assistance of Heritage Trail, Inc.

Both projects demonstrate the technical skills, cooperation, and persistence needed for this type of project. The Iowa Natural Heritage Foundation, working with many individuals and organizations, has developed a national reputation for its abilities in facilitating these efforts.

WOODLAND

Whitham Woods

This 130-acre area west of Fairfield in Jefferson County stands as a lasting memorial to Daisy Iowa Whitham and her family. Whitham Woods, the Iowa Natural Heritage Foundation's first land protection project, is a wildlife refuge, passive recreation area, and an environmental education area. It is owned by the Foundation and maintained on a cooperative basis with the Jefferson County Conservation Board.

MULTIPLE USE

Motor Mill Conservation Area

This 103-acre area in Clayton County contains Motor Townsite (listed on the National Register of Historic Places) along with adjoining forest, river, and recreational lands. The townsite, founded in the 1860s, is nestled under a steep bluff overlooking the Turkey River a few miles south of Elkader.

The Iowa Natural Heritage Foundation provided a portion of the acquisition funds on an interim basis using its Revolving Endowment Fund, with the Central Bank of Elkader providing special financial assistance. The entire property is managed by the Clayton County Conservation Board for wildlife, historic preservation, recreation, and environmental/cultural interpretation.

Mines of Spain

This 1,300-acre area immediately south of Dubuque contains over three miles of Mississippi River blufflands, large native trees, prairie tracts, and a variety of rare or endangered plant and animal species. This is the largest acreage project the Iowa Natural Heritage Foundation has completed to date.

The Mines of Spain became the Foundation's first priority for protection soon after the Foundation's incorporation in 1979. Working with a large number of individuals and organizations, the Foundation prepared a preliminary resource assessment, secured an option to purchase, and helped secure the necessary funding.

This multiple use area (wildlife, preserve, education, park and recreation) was acquired by the Iowa Conservation Commission (now Iowa Department of Natural Resources) in 1980. The DNR is continuing its evaluations and planning for the long-term management of the area.

WETLANDS

Leo Shimon Marsh

This 265-acre area wetland complex is one of the best examples of the conservation efforts of the Iowa Natural Heritage Foundation's Wetlands for Iowa Program. Located in Pocahontas County, this natural prairie pothole wetland provides hunting, wildlife photography, and bird-watching opportunities. Because of his concern for this area, Dennis Shimon donated 105 acres of the wetland to the Foundation. The remaining upland was jointly purchased by the Foundation's Wetlands for Iowa Program and the Iowa Department of Natural Resources.

Anspach Marsh

Water quality in Iowa is without question an environmental concern. Few people know, however, that wetlands help filter out chemicals and other pollutants from surface water. Anspach Marsh, located in the watershed of Lake West Okoboji, helps protect the water quality of that popular northwest Iowa lake and provides quality habitat for many species of wildlife.

This 21-acre marsh complex was a joint venture of the Okoboji Protective Association, Dr. William Anspach, the Iowa Department of Natural Resources, and the Iowa Natural Heritage Foundation's Wetlands for Iowa Program.

Program information by Iowa Natural Heritage Foundation staff: Mark C. Ackelson, Associate Director; Ben Van Gundy, Wetland's For Iowa Program Director; and Lisa Hein, Land Conservation Specialist.

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2A-7

Ozark Regional Land Trust

This we know,
the Earth does not belong to man,
man belongs to the Earth.

This we know,
All things are connected.

Whatever befalls the Earth
befalls the sons of the Earth.

Man did not weave the web of life
he is merely a strand in it.

Whatever he does to the web
he does to himself.

—CHIEF SEATTLE 1854

Ozark Regional Land Trust (ORLT) is an environmental land trust network based in the Ozark region. Organized in 1983 for nonprofit conservation purposes, ORLT uses innovative planning to protect the natural beauty, ecology and resource base of the Ozarks. By protecting the natural order and health of our streams, forests, glades and natural areas, we can assure the preservation of the Ozarks for our children. Careful use of our open spaces, recreational areas, farm and wood lands will leave a legacy of wise stewardship for future generations.

The conservation mission is accomplished through a variety of programs and projects designed and implemented by ORLT. Our projects are based on voluntary and cooperative relationships with individuals, landowners, local communities, state and local government and other organizations.

Ozark Regional Land Trust's activities and programs can be divided into three general categories. They are 1) Education about and appreciation of the Ozark natural environment; 2) Conservation protection of our natural resources; 3) Demonstration of ecological methods of land use and low impact technology which will minimize the loss of our farms, forests, open spaces, rivers and urban green spaces.

Education & Appreciation of The Ozark Environment

The Ozark region has a functionally different ecological system from other areas outside the natural Ozark boundary. It is important to understand just how this system operates and how we can live in this bioregion (life-zone) without destroying its natural systems and native species. Through education about the Ozark bioregion people can understand and appreciate efforts to protect it from permanent degradation. When our relationship to the environment is fully known, understood and appreciated, then an appropriate design for living and managing our resources is possible.

Conservation Protection of Our Natural Resources

Methods of permanent protection must be found for our land and water. Our nation and communities will suffer a tragic loss if our clean waters are fouled, fertile farmlands are eroded, natural areas are destroyed, and forests are lost due to poor management and development. Wild species must be protected, too, because the insects, mammals, reptiles, fishes, birds and plant life play an essential role in the health of the planet. Significant disturbance of the natural balance and activities of those species will signal an irreparable decline in the environment and threaten our own future. Many of us are already acutely aware that we are being endangered by our polluted environment. Legislation which will enforce a minimum standard of environmental protection is clearly needed, but ORLT stresses the need for non-legislated designs that are created on a case by case basis to be more appropriate, flexible and specific. Environmental planning, cooperatively and voluntarily designed by ORLT, can be an effective approach to assure protection of our streams, forests, landscapes, farmland and natural areas. ORLT protects land and resources with a variety of custom designed plans that include the use of permanent conservation easements on private property, open space planning, managed wildlife areas and local community land trusts.

Demonstrating Methods of Ecological Land Use and Low Impact Technology

A major problem for all of us is that much of the common technology and methodology that our society supports is without adequate consideration to its impact on the environment. The by-products of our culture are too much energy consumption, trash and toxicity. The solutions include energy efficient housing, appliances and machinery; biodegradable and recyclable waste, and more natural (non-toxic) products in our homes and industry. New methodologies in managing our resources need to be developed so that we can use or restore our limited farmlands, forests, streams and other resources in a sustainable fashion. Our communities and industry must be designed on a scale and efficiency that will not violate the natural ecological system of our region and locality. ORLT has initiated and number of important demonstrations in conjunction with cooperating members and community land trusts.

Ozark Regional Land Trust Is A Conservation Pioneer

ORLT presents this message to thousands of people in the Ozarks each year through publications, exhibitions, meetings, workshops and projects. We have assisted the direct and indirect permanent environmental protection of more than a thousand acres of land in the Ozarks through conservation easements, voluntary agreements, management plans, natural area conservancies and community land trusts. Our projects have demonstrated new technologies and methodologies in farming, forestry, and housing. These include the Keyline design for soil and water management on farmland (first of its kind in the nation); FORGE (Financing Ozarks Rural Growth and Economy) which enables a depositor's interest bearing savings account to be used to support loans to ecological and organic farmers; Black Walnut agroforestry project which documents the inter-cropping advantages of selected native black walnut trees to enhance and diversify farm production without chemical inputs; and integrated ecological land use designs on community land trusts which demonstrate efficient housing and minimize the use of toxic and non-recyclable materials and waste. Operating with a voluntary staff and modest funding, ORLT has shown that people committed to a clean and safe environment do make a difference.

Tr[illegible] For Environmental Protection

CO[illegible]RVATION EASEMENTS – Permanent restrictions placed on land by its owner in cooperation with ORLT. Easements are a tool widely used to protect land and can be specifically designed for each situation. They can be used to preserve the future use of land for farming, forestry, open space, or to prevent future streamside development or use of toxic chemicals. An easement designed by a current landowner and ORLT will apply to all future owners of the land.

NATURAL AREA PRESERVES – Requires permanent management planning to protect the natural characteristics and species of a site. Usually involves management by the State, ORLT or another organization.

COMMUNITY LAND TRUSTS – For productive rural land, such as farms, forests or residential sites, ORLT sets up a perma[illegible]land use plan and a local affiliated community land tru[illegible]anage it. Use of the land is made available to people thro[illegible]ong term and secure leases with environmental covenants.

RIVER CORRIDOR PROTECTION PLANNING – "We all live downstream" from somebody, so river protection is of interest for everyone. Clean and healthy rivers require careful protec[illegible]on of their corridor buffer zone throughout their whole course. [illegible]th various owners and many use patterns along the river [illegible]annel, it is a challenging problem to solve. ORLT has several [illegible]utions for people concerned about this form of protection.

[illegible]N WE HELP YOU? – YES

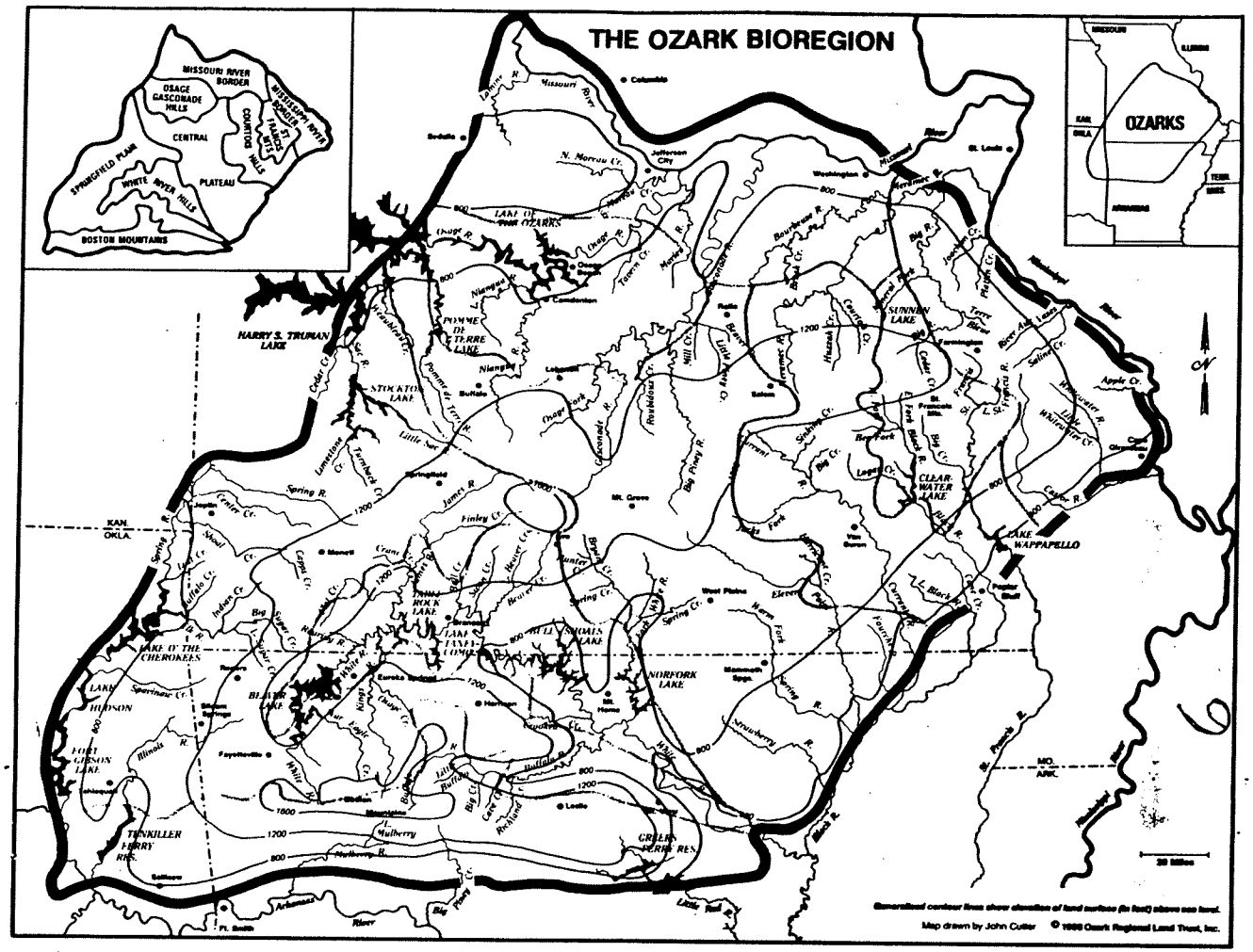
[illegible]ease write to ORLT if you need specific information about [illegible]ome of these conservation tools. If you are a concerned landowner or individual interested in protection of a specific piece of land or watershed, then write us for information. We will see that a volunteer member contacts you about your planning options. Please help by sending along a contribution. ORLT is also interested in working with people involved in the design of specific ecological land use methods or technology.

CA[illegible] HELP US? – YES

ORL[illegible]onprofit membership organization. Your membership [illegible] and contributions sustain us in this work. If you can afford $10.00 then become a member now. If everyone who reads this became a member, we would be able to accomplish much more in the future. We are not a club which has regular member meetings or outings. As an ORLT member you will receive an annual report and our award winning photographic OZARK CALENDAR, and invitations to special public events. Above all, you will become a partner with us in protecting the Ozarks and creating a brighter future. So please send your membership or contribution today. All contributions are tax-dedu[illegible]e and a good choice!

Membership — $10.00

OZARK REGIONAL LAND TRUST
427 S. MAIN STREET • CARTHAGE, MO 64836



THE OZARK BIOREGION

The region known to us as the Ozarks is a geological plateau that rose above the surrounding plains when they were still an ancient seabed 380 million years ago. At that time the Ozark plateau had a fairly regular dome shaped surface. But the uplifted plateau, with an underlying bedrock of soluble limestone and sandstone became extensively weathered and eroded. It was abundant rains and the climatic temperature extremes that carved the Ozark plateau into the rough hills and hollows we know today.

The varied landscape and seasons made this plateau island in the middle of the continent a unique sanctuary. It became home to a diverse mix of plant and animal species that often were only found in a range to the north, west, south or east of the Ozarks. It is the special mix of plant life and animal species cohabiting on this geological unit that defines the boundaries of this region. Hence, we call it a "bioregion," indicating that is a region not defined by human design but by an interrelationship of the natural order.

The bioregional boundary of the Ozarks is drawn along the perimeter of the plateau, causing the boundary to run through parts of Missouri, Arkansas, Oklahoma and a bit of Kansas and Illinois. Within the Ozark bioregion are several distinct geographic subregions. The Springfield Plain is a high, rolling area with several important prairie habitats. The Central Plateau is rolling hill country with wide river basins and once extensive forest lands. The Osage-Gasconade Hills are dissected by the many tributaries of the Osage and Gasconade rivers. The Courtois Hills has some of the steepest and wildest land in the Ozarks. The White River Hills region is some of the most scenic and diverse terrain in the Ozarks. The highest points in the Ozarks are the St. Francis and Boston Mountain regions with their rough and remote character.

Throughout the entire Ozarks, the problems of environmental management of the groundwater, streams, forest, wildlife and soils remains the same. It can be learned and understood from any corner of this bioregion and appropriately applied to the whole. And that is the challenge: to learn to live in relation to the whole of things.

KANSAS LAND TRUST:
OFFICERS, BOARD MEMBERS, AND ADVISORS

Director	**Kelly Kindscher** Consultant with Prairieland Ecological Services; author and Ph.D. candidate in ecology, University of Kansas
President	**Steven Hamburg** Chairman of Environmental Studies Program, University of Kansas
Vice-President	**Bill Ward** Attorney for the Environmental Protection Agency specializing in wetlands
Secretary	**Ernie Eck** Realtor with the Gill Agency, Lawrence, Kansas
Treasurer	**Sarah Dean** Agricultural land management and investment partner in Simpson-Dean farm properties
Board Members	**Marsha Marshall** Member of the Board of the Kansas Water Authority, formerly with Kansas Natural Resource Council
	Diane Simpson Attorney in Lawrence, Kansas
	Sandra Strand Community Services Director, Douglas County Senior Services
	Joyce Wolf Co-President of Jayhawk Audubon Society and legislative liaison for Kansas Audubon Council
	Donald Worster Professor of American History, University of Kansas
Advisors	**Rich Niebaum** Computing Services, University of Kansas
	John Simpson Attorney in Fairway, Kansas

UNIFORM CONSERVATION EASEMENT ACT

Table of Jurisdictions Wherein Act Has Been Adopted

Jurisdiction	Laws	Effective Date	Statutory Citation
Alaska	1989, c. 73	5–31–1989	AS 34.17.010 to 34.17.060.
Arizona	1985, c. 171	4–18–1985 *	A.R.S. §§ 33–271 to 33–276.
District of Columbia	D.C.Law 6–113	5–16–1986	D.C.Code 1981, §§ 45–2601 to 45–2605.
Idaho	1988, c. 222	7–1–1988	I.C. §§ 55–2101 to 55–2109.
Indiana	1984, H.1074	9–1–1984	West's A.I.C. 32–5–2.6–1 to 32–5–2.6–7.
Kentucky	1988, c. 251	4–9–1988*	KRS 382.800 to 382.860.
Maine	1985, c. 395	6–21–1985 *	33 MRSA §§ 476 to 479–B.
Minnesota	1985, c. 232	5–24–1985 *	M.S.A. §§ 84C.01 to 84C.05.
Mississippi	1986, c. 404	3–27–1986	Code 1972, §§ 89–19–1 to 89–19–15.
Nevada	1983, c. 291	5–13–1983*	N.R.S.111.390 to 111.400.
Texas	1983, c. 434	9–1–1983	V.T.C.A., Natural Resources Code §§ 183.001 to 183.005.
Virginia	1988, cc. 720, 891		Code 1950, §§ 10.1–1009 to 10.1–1016.
Wisconsin	1981, c. 261	4–27–1982	W.S.A. 700.40.

* Date of approval.

Historical Note

The Uniform Conservation Easement Act was approved by the National Conference of Commissioners on Uniform State Laws in 1981. The complete text of the act, the prefatory note and comments are set forth in this supplement.

PREFATORY NOTE

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. Under the conditions spelled out in the Act, the restrictions and obligations are immune from certain common law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes. In each instance, if the requirements of the Act are satisfied, the restrictions or affirmative duties are binding upon the successors and assigns of the original parties.

The Act thus makes it possible for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., which will be enforceable by Conservation and its successors whether or not Conservation has an interest in land benefitted by the restriction, which is assignable although unattached to any such interest in fact, and which has not arisen under circumstances where the traditional conditions of privity of estate and "touch and concern" applicable to covenants real are present. So, also, the Act enables the Owner of Heritage Home to obligate himself and future owners of Heritage to maintain certain aspects of the house and to have that obligation enforceable by Preservation, Inc., even though Preservation has no interest in property benefitted by the obligation. Further, Preservation may obligate itself to take certain affirmative actions to preserve the property. In each case, under the Act, the restrictions and obligations bind successors. The Act does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a consensual arrangement freed from common law impediments, if the conditions of the Act are complied with.

These conditions are designed to assure that protected transactions serve defined protective purposes (Section 1(1)) and that the protected interest is in a "holder" which is either a governmental body or a charitable organization having an interest in the subject matter (Section 1(2)). The interest may be created in the same manner as other easements in land (Section 2(a)). The Act also enables the parties to establish a right in a third party to enforce the terms of the transaction (Section 3(a)(3)) if the possessor of the right is also a governmental unit or charity (Section 1(3)).

The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory

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conservation and preservation interests. The first removes the common law disabilities associated with covenants real and equitable servitudes in addition to those associated with easements. As statutorily modified, these three common law interests retain their separate existence as instruments employable for conservation and preservation ends. The second approach seeks to create a novel additional interest which, although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.

The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.

In assimilating these easements to conventional easements, the Act allows great latitude to the parties to the former to arrange their relationship as they see fit. The Act differs in this respect from some existing statutes, such as that in effect in Massachusetts, under which interests of this nature are subject to public planning agency review.

There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system. The Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross. It is is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept the administrative and fiscal responsibilities of such a program.

In addition, controls in the Act and in other state and federal legislation afford further assurance that the Act will serve the public interest. To begin with, the very adoption of the Act by a state legislature facilitates the enforcement of conservation easement serving the public interest. Other types of easements, real covenants and equitable servitudes are enforceable, even though their myriads of purposes have seldom been expressly scrutinized by state legislative bodies. Moreover, Section 1(2) of the Act restricts the entities that may hold conservation and preservation easements to governmental agencies and charitable organizations, neither of which is likely to accept them on an indiscriminate basis. Governmental programs that extend benefits to private donors of these easements provide additional controls against potential abuses. Federal tax statutes and regulations, for example, rigorously define the circumstances under which easement donations qualify for favorable tax treatment. Controls relating to real estate assessment and taxation of restricted properties have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local property tax revenues resulting from unduly favorable assessment and taxation of these properties. Finally, the American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the values implicit in this norm.

The Act does not address a number of issues which, though of conceded importance, are considered extraneous to its primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments (Section 4). For example, with the exception of the requirement of Section 2(b) that the acceptance of the holder be recorded, the formalities and effects of recordation are left to the state's registry system; an adopting state may wish to establish special indices for these interests, as has been done in Massachusetts.

Similarly unaddressed are the potential impacts of a state's marketable title laws upon the duration of conservation easements. The Act provides that conservation easements have an

unlimited duration unless the instruments creating them provide otherwise (Section 2(c)). The relationship between this provision and the marketable title act or other statutes addressing restrictions on real property of unlimited duration should be considered by the adopting state.

The relationship between the Act and local real property assessment and taxation practices is not dealt with; for example, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system. The Act enables the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions of the income, estate and gift tax laws which are applicable. Finally, the Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that power and the entitlement of property owners to compensation upon its exercise are determined not by this Act but by the adopting state's eminent domain code and related statutes.

General Statutory Notes

Arizona. The Arizona act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Idaho. Adds sections as follows:

"55–2107. Eminent domain.

"A conservation easement pursuant to this chapter shall not be created through eminent domain proceedings pursuant to chapter 7, title 7, Idaho Code."

"55–2108. Other interests not impaired by conservation easements.

"No interest in real property cognizable under the statutes, common law or custom in effect in this state prior to the effective date of this chapter shall be impaired, invalidated, or in any way adversely affected by reason of any provision of this chapter. No provision of this chapter shall be construed to mean that conservation easements were not lawful estates in land prior to the effective date [July 1, 1988] of this chapter. Nothing in this chapter shall be construed so as to impair the rights of any entity with eminent domain authority pursuant to chapter 7, title 7, Idaho Code, with respect to right-of-way, easements or other property rights upon which facilities, plants, highway systems or other systems of that entity are located or are to be located. Nothing in this chapter shall be construed so as to impair or conflict with the provisions of chapter 46, title 67, Idaho Code, relating to the preservation of historic sites, or with the provisions of chapter 43, title 67, Idaho Code, relating to the preservation of recreational places."

"55–2109. Taxation.

"The granting of a conservation easement across a piece of property shall not have an effect on the market value of property for ad valorem tax purposes and when the property is assessed for ad valorem tax purposes, the market value shall be computed as if the conservation easement did not exist."

Indiana. Adds section as follows:

"32–5–2.6–7 Taxation

"For the purposes of IC 6–1.1, real property subject to a conservation easement shall be assessed and taxed on a basis that reflects the easement."

Kentucky. Adds section as follows:

"382.50. Transfer of easement—Effect on mining operation and on eminent domain powers.

"(1) A conservation easement shall not be transferred by owners of property in which there are outstanding subsurface rights without the prior written consent of the owners of the subsurface rights.

"(2) A conservation easement shall not operate to limit, preclude, delete or require waivers for the conduct of coal mining operations, including the transportation of coal, upon any part or all of adjacent or surrounding properties; and shall not operate to impair or restrict any right or power of eminent domain created by statute, and all such rights and powers shall be exercisable as if the conservation easement did not exist."

Mississippi. Adds sections as follows:

"§ 89–19–11. Capital improvements on property upon which easements have been granted.

"With the exception of 'Mississippi Landmarks,' as defined by the Antiquities Law of Mississippi (Section 39–7–1 et seq., Mississippi Code of 1972) and of properties entered in the National Register of Historic Places, no public money, derived either from a special fund or the General Fund, shall be expended for capital improvements on any real property upon which a conservation easement has been granted unless the conservation easement is perpetual, a governmental body is the holder of the easement and the capital improvements are solely for the use and benefit of such holder."

"§ 89–19–15. Recorded easements to be filed with Attorney General and Department of Wildlife Conservation.

"Whenever any instrument conveying a conservation easement is recorded after the effective date of this section, the clerk of the court recording it shall mail certified copies thereof, together with notice as to the date and place of recordation, to the Attorney General of the State of Mississippi and the Mississippi Department of Wildlife Conservation. The requirement that certified copies be mailed to the Attorney General and the Mississippi Department of Wildlife Conservation shall be stated in any instrument which conveys a conservation easement after the effective date of this section. The holder of any conservation easement created prior to the date hereof wishing to qualify such easement for the benefits provided under this chapter shall provide to the Attorney General and the Department of Wildlife Conservation, within one (1) year after the effective date of this section, a certified copy of the instrument creating such easement, indicating the date and place of the recordation."

Nevada. The Nevada act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

New York. Sections 49–0301 to 49–0311 of the New York Environmental Conservation Law do not constitute a substantial adoption of the Uniform Act, although they contain some similar provisions and have the same general purpose.

Virginia. While the Virginia act is a substantial adoption of the major provisions of the Uniform Act, it departs from the official text in such manner that the various instances of substitution, omission, and additional matter cannot be clearly indicated by statutory notes.

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JURISDICTIONS ADOPTING UNIFORM ACT IN MANNER PRECLUDING COMPARATIVE NOTES

Not infrequently a jurisdiction will substantially adopt the major provisions of a Uniform Act and, yet, depart from the official text in such a manner that the various instances of substituted, omitted, and added matter cannot be clearly indicated by statutory notes. Where this has occurred for a particular jurisdiction, the General Statutory Notes found near the beginning of the Uniform Act will so state. In such a case, there will not be any notes for that jurisdiction under the headings "Action in Adopting Jurisdictions" and "Variations from Official Text" in the individual sections of the Uniform Act.

UNIFORM CONSERVATION EASEMENT ACT

1981 ACT

An Act to be known as the Uniform Conservation Easement Act, relating to (here insert the subject matter requirements of the various states).

§ 1. [Definitions].

As used in this Act, unless the context otherwise requires:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(2) "Holder" means:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

COMMENT

Section 1 defines three central elements: What is meant by a conservation easement; who can be a holder; and who can possess a "third-party right of enforcement." Only those interests held by a "holder," as defined by the Act, fall within the definitions of protected easements. Such easements are defined as interests in real property. Even if so held, the easement must serve one or more of the following purposes: Protection of natural or open-space resources; protection of air or water quality; preservation of the historical aspects of property; or other similar objectives spelled out in subsection (1).

A "holder" may be a governmental unit having specified powers (subsection (2)(i)) or certain types of charitable corporations, associations, and trusts, provided that the purposes of the holder include those same purposes for which the conservation easement could have been created in the first place (subsection (2)(ii)). The word "charitable", in Section 1(2) and (3), describes organizations that are charities according to the common law definition regardless of their status as exempt organizations under any tax law.

Recognition of a "third-party right of enforcement" enables the parties to structure into the

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transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement (Sections 1(3), 3(a)(3)). But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person. But whether such a grant might be valid under other applicable law of the adopting state is left to the law of that state. (Section 5(c).)

Action in Adopting Jurisdictions

Variations from Official Text:

Alaska. Introductory clause reads: "In this chapter,".

Subsec. (1) reads: "(1) 'conservation easement' means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations to retain or protect natural, scenic, or open space values of real property, ensure its availability for agricultural, forest, recreational, or open space use, protect natural resources, maintain or enhance air or water quality, or preserve the historical, architectural, archaeological, or cultural aspects of real property;".

Subsec. (2)(ii) reads: "a nonprofit corporation, charitable corporation, charitable association, or charitable trust exempted from taxation under 26 U.S.C. 501(c)(3) and empowered to retain or protect the natural, scenic, or open space values of real property, ensure the availability of real property for agricultural, forest, recreational, or open space use, protect natural resources, maintain or enhance air or water quality, or preserve the historical, architectural, archaeological, or cultural aspects of real property".

Subsec. (3) reads: "(3) 'third-party right of enforcement' means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, nonprofit corporation, charitable corporation, charitable association, or charitable trust that is not a holder."

District of Columbia. Introductory material reads: "For the purposes of this act, the term:".

Idaho. In introductory material, omits "unless the context otherwise requires".

Maine. In subsec. (1), omits "or preserving the historical, architectural, archaeological, or cultural aspects". . . .

In subsecs. (2)(ii) and (3), substitutes "nonprofit corporation" for "charitable corporation, charitable association".

Additionally, defines "real property" to include surface waters.

Mississippi. Section reads:

"For purposes of this chapter, the following words shall have the meaning ascribed herein unless the context otherwise requires:

"(1) 'Conservation easement' shall mean a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, historical or open-space values of real property, assuring its availability for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air and water quality or preserving the natural, historical, architectural, archaeological or cultural aspects of real property.

"(2) 'Holder' shall mean either:

"(a) A governmental body empowered by the law of this state or the United States to hold an interest in real property; or

"(b) A private, nonprofit, charitable or educational corporation, association or trust, the purposes or powers of which include retaining or protecting the natural, scenic, historical or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air or water quality or preserving the natural, historical, architectural, archaeological or cultural aspects of real property which is the recipient or grantee of a conservation easement.

"(3) 'Third-party right of enforcement' shall mean a right granted in a conservation easement to a governmental body or private, nonprofit charitable corporation, association or trust, which is not a holder but which is eligible to be a holder, to enforce any of the terms of the conservation easement.

"(4) 'Person' shall mean any natural person or legal entity."

Texas. In subsec. (1), substitutes "designed to" for "the purposes of which include" (with conforming grammatical variations not affecting substance, e.g., "retain" for "retaining").

In subsec. (2)(ii), substitutes "created or empowered to" for "the purposes or powers of which include" (with conforming grammatical variations not affecting substance, e.g., "retain" for "retaining").

In subsec. (3), substitutes "that is eligible to be a holder but is not a holder" for ", which, although eligible to be a holder, is not a holder".

Adds subsec. (4) as follows: " 'Servient estate' means the real property burdened by the conservation easement."

Wisconsin. In subsec. (1), inserts "preserving a burial site, as defined in s. 157.70(1)(b)," following "water quality,".

Library References

Health and Environment ⇐25.5(4).
C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 2. [Creation, Conveyance, Acceptance and Duration].

(a) Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

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(c) Except as provided in Section 3(b), a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

COMMENT

Section 2(a) provides that, except to the extent otherwise indicated in the Act, conservation easements are indistinguishable from easements recognized under the pre-Act law of the state in terms of their creation, conveyance, recordation, assignment, release, modification, termination or alteration. In this regard, subsection (a) reflects the Act's overall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that rubric to the extent necessary to effectuate the Act's purposes given the adopting state's existing common law and statutory framework. For example, the state's requirements concerning release of conventional easements apply as well to conservation easements because nothing in the Act provides otherwise. On the other hand, if the state's existing law does not permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) effectively authorizes their assignment.

Conservation and preservation organizations using easement programs have indicated a concern that instruments purporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without notice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations. Subsection (b) makes clear that neither a holder nor a person having a third-party enforcement right has any rights or duties under the easement prior to the recordation of the holder's acceptance of it.

The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate it in states whose case or statute law accords their courts that power in the case of easement. See Section 3(b). The latitude given the parties is consistent with the philosophical premise of the Act. However, there are additional safeguards; for example, easements may be created only for certain purposes and may be held only by certain "holders." These limitations find their place comfortably within similar limitations applicable to charitable trusts, whose duration may also have no limit. Allowing the parties to create such easements also enables them to fit within federal tax law requirements that the interest be "in perpetuity" if certain tax benefits are to be derived.

Obviously, an easement cannot impair prior rights of owners of interests in the burdened property existing when the easement comes into being unless those owners join in the easement or consent to it. The easement property thus would be subject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) which pre-exist the easement, unless the owners of those rights release them or subordinate them to the easement. (Section 2(d).)

Action in Adopting Jurisdictions

Variations from Official Text:

Alaska. Subsec. (b) reads: "(b) A right or duty in favor of or against a holder and a right in favor of a person having a third-party right of enforcement may not arise under a conservation easement before the conservation easement is accepted by the holder and the acceptance is recorded."

Subsec. (c) reads: "(c) Except as provided in AS 34.17.020(b), a conservation easement is unlimited in duration unless the instrument creating the conservation easement provides a limitation on duration."

Adds a subsec. (e) which reads: "(e) The state or a municipality may not establish a conservation easement on property by eminent domain."

District of Columbia. Section reads:

"(a)(1) Except as otherwise provided in this chapter, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, provided that the recordation of any conservation easement as defined in § 45–2601, or of any assignment, release, modification, termination, or other alteration of a conservation easement shall be exempt from the recordation tax imposed by § 45–923, and from the transfer tax imposed by § 47–903.

"(2) The exemption provided for in paragraph (1) of this subsection shall not apply if the consideration for the conservation easement exceeds $100 in value.

"(b) No right or duty in favor of or against a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

"(c) Except as provided in § 45–2603(b), a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

"(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

"(e) A conservation easement is valid even under the following circumstances:

"(1) It is not appurtenant to an interest in real property;

"(2) It can be or has been assigned to another holder;

"(3) It is not of a character that has been recognized traditionally at common law;

"(4) It imposes a negative burden;

"(5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

"(6) The benefit does not touch or concern real property; or

"(7) There is no privity of estate or of contract."

Maine. In subsec. (a), adds "created by written instrument" at the end thereof.

Subsec. (b) reads: "No right or duty in favor of or against a holder arises under a conservation easement unless it is accepted by the holder and no right in favor of a person having a 3rd-party right of enforcement arises under a conservation easement unless it is accepted by any person having a 3rd-party right of enforcement."

Subsec. (c) reads:

"Except as provided in this subchapter, a conservation easement is unlimited in duration unless:

"A. The instrument creating it otherwise provides; or

"B. Change of circumstances renders the easement no longer in the public interest as determined in an action under section 478."

Adds a subsection which reads: "The instrument creating a conservation easement must provide in what manner and at what times representatives of the holder of a conservation easement or of any person having a 3rd-party right of enforcement shall be entitled to enter the land to assure compliance."

Mississippi. Subsec. (a) reads: "Except as otherwise provided by this chapter, a conservation easement may be created, conveyed, recorded and assigned, in the same method and manner as other easements."

In subsec. (b), substitutes "no right of a person having a third-party right" for "no right in favor of a person having a third-party right".

In subsec. (c), inserts "its" following "unlimited in".

In subsec. (d), substitutes "the conservation easement" for "it" following "is not impaired by".

Adds a subsection which reads: "A conservation easement shall continue to be effective and shall not be extinguished if the easement holder is or becomes the owner in fee of the subject property."

Texas. Subsec. (b) reads as follows: "A right or duty in favor of or against a holder and a right in favor of a person having a third-party right of enforcement does not arise under a conservation easement before its acceptance by the holder and the recordation of the acceptance."

In subsec. (c), substitutes "makes some other provision" for "otherwise provides".

In subsec. (d), substitutes "that exists in real property" for "in real property in existence" and omits "by it" following "impaired".

Adds subsections as follows:

"(e) A conservation easement must be created in writing, acknowledged and recorded in the deed records of the county in which the servient estate is located, and must include a legal description of the real property which constitutes the servient estate.

"(f) If land that has been subject to a conservation easement is no longer subject to such easement, an additional tax is imposed on the land equal to the difference, if any, between the taxes imposed on the land for each of the five years preceding the year in which the easement terminates and the taxes that would have been imposed had the land not been subject to a conservation easement in each of those years, plus interest at an annual rate of seven percent calculated from the dates on which the differences would have become due."

Wisconsin. Makes minor language changes not affecting substance.

Library References

Health and Environment ⇐25.5(4).
C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 3. [Judicial Actions].

(a) An action affecting a conservation easement may be brought by:

(1) an owner of an interest in the real property burdened by the easement;

(2) a holder of the easement;

(3) a person having a third-party right of enforcement; or

(4) a person authorized by other law.

(b) This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

COMMENT

Section 3 identifies four categories of persons who may bring actions to enforce, modify or terminate conservation easements, quiet title to parcels burdened by conservation easements, or otherwise affect conservation easements. Owners of interests in real property burdened by easements might wish to sue in cases where the easements also impose duties upon holders and these duties are breached by the holders. Holders and persons having third-party rights of enforcement might obviously wish to bring suit to enforce restrictions on the owners' use of the burdened properties. In addition to these three categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.

A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions affecting the property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation. A variety of doctrines, including the doctrines of changed conditions and *cy pres*, have been judicially developed and, in many

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states, legislatively sanctioned as a basis for responding to these vagaries. Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified if they no longer substantially achieve their purpose due to the changed conditions. Under the statute or case law of some states, the court's order limiting or terminating the restriction may include such terms and conditions, including monetary adjustments, as it deems necessary to protect the public interest and to assure an equitable resolution of the problem. The doctrine is applicable to real covenants and equitable servitudes in all states, but its application to easements is problematic in many states.

Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor's charitable intentions cannot be effectuated, courts under their equitable powers may prescribe terms and conditions that may best enable the general charitable objective to be achieved while altering specific provisions of the trust. So, also, in cases where a charitable trustee ceases to exist or cannot carry out its responsibilities, the court will appoint a substitute trustee upon proper application and will not allow the trust to fail.

The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts.

Action in Adopting Jurisdictions

Variations from Official Text:

Indiana. In subsec. (b), adds the following at the end thereof: ", or the termination of a conservation easement by agreement of the grantor and grantee."

Maine. Section reads:

"1. Action or intervention. An action affecting a conservation easement may be brought or intervened in by:

"A. An owner of an interest in the real property burdened by the easement;

"B. A holder of the easement; or

"C. A person having a 3rd-party right of enforcement.

"2. Intervention only. An action affecting a conservation easement may be intervened in by the State or a political subdivision of the State in which the real property burdened by the easement is located.

"3. Power of court. This subchapter does not affect the power of a court to enforce a conservation easement by injunction or proceeding in equity or to modify or terminate a conservation easement in accordance with principles of law and equity. A court may deny equitable enforcement of a conservation easement when it finds that change of circumstances has rendered that easement no longer in the public interest. If the court so finds, the court may allow damages as the only remedy in an action to enforce the easement.

No comparative economic test may be used to determine under this subsection if a conservation easement is in the public interest."

Mississippi. Section reads:

"(1) Any action to enforce a conservation easement may be brought by:

"(a) An owner of an interest in the real property burdened by the easement;

"(b) A holder of the easement;

"(c) A person having a third-party right of enforcement; or

"(d) The Attorney General of the State of Mississippi;

"(e) The Mississippi Department of Wildlife Conservation; or

"(f) A person otherwise authorized and empowered by law.

"(2) This chapter does not, and shall not be construed to, affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity. In such proceeding, the holder of the conservation easement shall be compensated for the value of the easement."

Texas. In subsec. (a)(4), inserts "some" following "authorized by".

Wisconsin. Makes minor language changes not affecting substance.

Library References

Health and Environment ⇐25.5(4).

C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 4. [Validity].

A conservation easement is valid even though:

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to another holder;

(3) it is not of a character that has been recognized traditionally at common law;

(4) it imposes a negative burden;

(5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) the benefit does not touch or concern real property; or

(7) there is no privity of estate or of contract.

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COMMENT

One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends. Section 4 addresses this goal by comprehensively identifying these defenses and negating their use in actions to enforce conservation or preservation easements.

Subsection (1) indicates that easements, the benefit of which is held in gross, may be enforced against the grantor or his successors or assigns. By stating that the easement need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of the easement must own an interest in real property (the "dominant estate") benefitted by the easement.

Subsection (2) also clarifies common law by providing that an easement may be enforced by an assignee of the holder.

Subsection (3) addresses the problem posed by the common law's recognition of easements that served only a limited number of purposes and its reluctance to approve so-called "novel incidents." Easements serving the conservation and preservation ends enumerated in Section 1(1) might fail of enforcement under this restrictive view. Accordingly, subsection (3) establishes that conservation or preservation easements are not unenforceable solely because they do not serve purposes or fall within the categories of easements traditionally recognized at common law.

Subsection (4) deals with a variant of the foregoing problem. The common law recognized only a limited number of "negative easements" —those preventing the owner of the burdened land from performing acts on his land that he would be privileged to perform absent the easement. Because a far wider range of negative burdens than those recognized at common law might be imposed by conservation or preservation easements, subsection (4) modifies the common law by eliminating the defense that a conservation or preservation easement imposes a "novel" negative burden.

Subsection (5) addresses the opposite problem—the unenforceability at common law of an easement that imposes affirmative obligations upon either the owner of the burdened property or upon the holder. Neither of those interests was viewed by the common law as true easements at all. The first, in fact, was labelled a "spurious" easement because it obligated the owner of the burdened property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the easement's holder to perform acts on the burdened property that the holder would not have been privileged to perform absent the easement.)

Achievement of conservation or preservation goals may require that affirmative obligations be incurred by the burdened property owner or by the easement holder or both. For example, the donor of a facade easement, one type of preservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement may agree to undertake restoration. In either case, the preservation easement would impose affirmative obligations. Subsection (5) treats both interests as easements and establishes that neither would be unenforceable solely because it is affirmative in nature.

Subsections (6) and (7) preclude the touch and concern and privity of estate or contract defenses, respectively. Strictly speaking, they do not belong in the Act because they have traditionally been asserted as defenses against the enforcement not of easements but of real covenants and of equitable servitudes. The case law dealing with these three classes of interests, however, had become so confused and arcane over the centuries that defenses appropriate to one of these classes may incorrectly be deemed applicable to another. The inclusion of the touch and concern and privity defenses in Section 4 is a cautionary measure, intended to safeguard conservation and preservation easements from invalidation by courts that might inadvertently confuse them with real covenants or equitable servitudes.

Action in Adopting Jurisdictions

Variations from Official Text:

District of Columbia. Omits this section.

Maine. In subsec. (1), inserts "or does not run with" following "to".

Adds a subsec. (8) which reads: "It does not run to the successor and assigns of the holder."

Mississippi. Introductory material reads: "A conservation easement shall be valid despite the following".

In subsec. (2), substitutes "It may be" for "It can be".

Texas. In subsec. (5), substitutes "on" for "upon" in both instances.

Wisconsin. Makes minor language changes not affecting substance.

Library References

Health and Environment ⇐25.5(4).

C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 5. [Applicability].

(a) This Act applies to any interest created after its effective date which complies with this Act, whether designated as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise.

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(b) This Act applies to any interest created before its effective date if it would have been enforceable had it been created after its effective date unless retroactive application contravenes the constitution or laws of this State or the United States.

(c) This Act does not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this State.

COMMENT

There are four classes of interests to which the Act might be made applicable: (1) those created after its passage which comply with it in form and purpose; (2) those created before the Act's passage which comply with the Act and which would not have been invalid under the pertinent pre-Act statutory or case law either because the latter explicitly validated interests of the kind recognized by the Act or, at least, was silent on the issue; (3) those created either before or after the Act which do not comply with the Act but which are valid under the state's statute or case law; and (4) those created before the Act's passage which comply with the Act but which would have been invalid under the pertinent pre-Act statutory or case law.

It is the purpose of Section 5 to establish or confirm the validity of the first three classes of interests. Subsection (a) establishes the validity of the first class of interests, whether or not they are designated as conservation or preservation easements. Subsection (b) establishes the validity under the Act of the second class. Subsection (c) confirms the validity of the third class independently of the Act by disavowing the intent to invalidate any interest that does comply with other applicable law.

Constitutional difficulties could arise, however, if the Act sought retroactively to confer blanket validity upon the fourth class of interests. The owner of the land ostensibly burdened by the formerly invalid interest might well succeed in arguing that his property would be "taken" without just compensation were that interest subsequently validated by the Act. Subsection (b) addresses this difficulty by precluding retroactive application of the Act if such application "would contravene the constitution or laws of (the) State or of the United States." That determination, of course, would have to be made by a court.

Action in Adopting Jurisdictions

Variations from Official Text:

Alaska. In subsec. (a), substitutes "on or after" for "after".

Idaho. In subsec. (a), adds the following sentence at the end thereof: "The instrument creating the conservation easement shall state it was created under the provisions of this chapter."

Maine. Subsec. (b) reads: "This subchapter applies to any conservation easement created before the effective date of this subchapter if the conservation easement would have been enforceable had it been created after the effective date of this subchapter, unless retroactive application contravenes the Constitution of Maine or the United States Constitution."

Mississippi. Section reads:

"(1) This chapter shall apply to an interest created after the effective date of this chapter, whether the interest is designated as a conservation easement or as a covenant, equitable servitude, restriction, easement or otherwise, as long as such interest complies with the provisions of this chapter.

"(2) This chapter shall apply to any interest created prior to the effective date of this chapter if the interest would have been enforceable had it been created after the effective date of this chapter unless retroactive application would contravene the Constitution or laws of this state or the United States.

"(3) This chapter shall not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement or otherwise, that is enforceable under any other law of this state.

"(4) The provisions of this chapter are cumulative and supplemental to any other provision of law."

Texas. In subsec. (a), substitutes "on or after September 1, 1983, that" for "after its effective date which".

In subsec. (b), substitutes "September 1, 1983" for "effective date" where first appearing and "on or after September 1, 1983" for "after its effective date".

Wisconsin. Omits subsec. (a) and (b).

In subsec. (c), omits reference to preservation easement and makes minor language changes not affecting substance.

Library References

Health and Environment ⇐25.5(4).

C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 6. [Uniformity of Application and Construction].

This Act shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.

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Library References

Health and Environment ⇐25.5(2).
C.J.S. Health and Environment §§ 61 et seq., 91 et seq., 106 et seq., 115 et seq., 125 et seq., 133 et seq.

TESTIMONY OF JACK PHILLIPS
PRESIDENT OF THE KANSAS CHILD SUPPORT ENFORCEMENT ASSOCIATION
Amendments to the Kansas Parentage Act--HB 2004

I urge the committee to support these amendments which will simplify and expedite the handling of paternity cases.

1. New-- presumption regarding time of conception. This section will facilitate litigation of paternity cases by officially recognizing scientific facts about human gestation. In the typical case it will reduce or eliminate the need to present legal proof of such matters. Otherwise, one must call the mother's obstetrician as an expert witnesses or request that the court take judicial notice of medical textbooks. The weight of an infant at birth is significant because low birth weight frequently indicates prematurity.

"For any child whose weight at birth is equal to or greater than five pounds and twelve ounces it shall be presumed that the child was conceived between 300 and 230 days prior to the date of the child's birth. This presumption may be rebutted by clear and convincing evidence."

2. Amendment-- to 38-1118 defining time for notice of intent to challenge blood test report. This section will correct a deficiency in the present statute. The present rule does not provide sufficient advance notice to the court or petitioner's counsel regarding objections to the blood test report. Without sufficient advance notice it is impossible to properly schedule the length of the trial or to make approriate arrangements for expert witnesses.

Present form: **". . . . The verified written report of the court-appointed expert shall be considered to be stipulated to by all parties unless written notice of intent to challenge the validity of**

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the report is given to all parties not less than 20 days before trial. . . . ." (underlining added)

Requested form: ". . . . The verified written report of the court-appointed expert shall be considered to be stipulated to by all parties unless written notice of intent to challenge the report is given to all parties not more than 20 days after receipt of a copy of the report. . . . . "(underlining added)

3. New-- Interlocutory Orders. This section enumerates various interlocutory orders available in paternity cases and establishes minimum requirements for ex parte orders. In this manner, arrangements for genetic testing could be made without unnecessary delay because the formality of a hearing would not be needed in the typical case. Present law already requires paternity blood tests upon the request of any party. By confirming the existing custody of the child, the court invokes maximum legal protections against parental kidnapping or other interference with parental rights.

"After filing a parentage action, the court, without requiring bond, may make and enforce orders which:

(1) restrain the parties from molesting or interfering with the privacy or rights of each other;

(2) confirm the existing de facto custody of the child subject to further order of the court;

(3) appoint an expert to conduct genetic tests for determination of paternity as provided in K.S.A. 38-1118;

(4) order the mother and child and alleged father to contact the court appointed expert and provide blood samples for testing within 30 days after service of the order.

Ex Parte Orders. Interlocutory orders authorized by this section may be issued after ex parte hearing, provided: (1) the appointed expert shall be a Paternity Laboratory accredited by the American Association of Blood Banks and (2) the order may not require an adverse party to make advance payment toward the cost of the test. If issued ex parte, and if an adverse party requests modification thereof, the court will conduct a hearing with 10 days of such request."

THE KANSAS CHILD SUPPORT ENFORCEMENT ASSOCIATION

The Kansas Child Support Enforcement Association is a non-profit Kansas corporation affiliated with the National Child Support Enforcement Association and the Kansas Children's Coalition. Its membership includles a large number of people who work in child support enforcement. Many are employees of the Department of Social and Rehabilitation Services. We also have District Judges, District Court Trustees, County and District Attorneys, Clerks of District Court and personnel from the Office of Judicial Administration. The board of directors includes representative from a cross-section of viewpoints: custodial parents, non-custodial parents, business people, child advocates, an educator and a legislator.

The Association publishes a quarterly newsletter and holds a statewide conference each year. Our most recent conference was in Lawrence, Kansas where we enjoyed presentations by regional and national authorities. Our next Conference will be held July 19th and 20th, 1991 at Manhattan, Kansas.

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Department of Social and Rehabilitation Services

House Bill 2004

Before the House Judiciary Committee
January 28, 1991

The primary responsibility of the SRS Child Support Enforcement Program is to help children by establishing and enforcing support orders. When necessary, this responsibility includes establishing the parentage of a child under the Kansas Parentage Act. From that perspective, SRS favors passage of this bill.

During the past two fiscal years, the SRS Child Support Enforcement Program has successfully established paternity for 5,324 children. These children are now able to look to both parents for personal and financial support; to draw upon normal benefits of the parent-child relationship such as insurance and social security; and to have access to their complete family medical history.

The Parentage Act has provided a good procedural framework for these paternity proceedings, but experience has revealed areas where the act needs to be strengthened. While SRS favors House Bill 2004 as a whole, the proposal concerning challenges to blood test results is the most urgently needed and would quickly improve the coordination and completion of SRS paternity cases. The remaining changes proposed by House Bill 2004 are also favored by SRS because they would encourage the orderly conduct of parentage cases and provide guidance in identifying necessary parties to the action.

As it now stands, a party wishing to challenge blood tests results may wait until just 20 days before trial to notify the other party of the challenge. When an alleged father objects to test results, SRS must arrange at the eleventh hour for expert witnesses to appear and testify on behalf of the mother and child. In the majority of SRS' cases, the expert must fly in from out of state, with all the complications of scheduling and transportation arrangements.

It has been necessary to postpone several trials in SRS cases because the expert could not be available on the original trial date. Fortunately the courts have been very understanding of this dilemma and have been willing to grant reasonable continuances. Such postponements, however, make court administration more difficult and frustrate the parties' desire for a prompt resolution. Furthermore, SRS must satisfy federal time standards for completing court actions, once initiated, and every delayed trial increases the risk that those time standards will not be met.

As a general rule, both parties can tell immediately whether they agree with the test results or not. Shifting the deadline for challenging the results to 20 days following their arrival deprives no one of a reasonable opportunity to investigate and raise objections. It is a simple and fair way to relieve the problems inherent in last minute challenges to test results.

Fiscal Impact. It is estimated that passage of House Bill 2004 would save SRS $13,305.60 per year by improving the efficiency of legal staff and eliminating delays in trials. To the extent that SRS risks federal penalties for delayed resolution of cases, penalties ranging from $670,000 to $78,000,000 per year would be avoided.

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For these reasons, SRS urges passage of House Bill 2004.

Jamie L. Corkhill
Child Support Enforcement
Social and Rehabilitation Services
296-3237

Kansas
Psychiatric
Society

1259 Pembroke Lane
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Telephone: (913) 232-5985
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January 28, 1991

TO: House Judiciary Committee

FROM: Kansas Psychiatric Society

SUBJECT: House Bill 2005; Parental Rights vs. Rights of Children

Thank you for this opportunity to express support for HB 2005. This bill was requested by the KPS during the 1990 interim. Our amendment would require that the court take into account a physician's statement in addition to the many other factors that may affect the question of whether parental rights should be terminated.

While this amendatory language is specifically requested on behalf of the Kansas Psychiatric Society, it is drafted in such a way that any physician could offer a clinical opinion as to how the child's best interests would be better served (either way, termination or not). The physician's statement would include an explanation of the nature of his or her relationship with the patient and the reasons for making the statement. The confidentiality of the physician-patient relationship (K.S.A. 60-427) is waived in order to enter this information in the court record.

A similar bill was passed last year by the Senate 39-1 (1990 SB 536). It was considered by the House Judiciary Committee late in the Session and was recommended for passage as amended.

Because of other controversial legislation, SB 536 did not come up on general orders of the House until the day after second house deadline. It was therefore stricken from the calendar.

We urge you to favorably reconsider this issue and recommend passage of HB 2005. Thank you.

CW/cb

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Kansas County & District Attorneys Association

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EXECUTIVE DIRECTOR • JAMES W. CLARK, CAE

Testimony in Opposition to

House Bill 2005

The Kansas County and District Attorneys Association opposes House Bill No. 2005 on the grounds that it is a broad stroke which dilutes or avoids evidentiary requirements for admission of expert testimony into evidence.

At first reading, the bill appears to assist those involved in protecting children, especially in medically under-served areas. However, as written, the bill makes no requirement that the person licensed to practice medicine or surgery have training or education upon which to base their opinion; nor is there any specific requirement that they be familiar with the child or children in question. Further, the bill gives no authority for the physician or surgeon to give their opinion that the child's physical, mental, or emotional needs would **not** be better served if parental rights were terminated.

The provisions of the bill contravene K.S.A. 60-456(b) requires that a witness testifying as an expert must base their opinion on facts or data that are known to the witness, and that must be within the scope of the witness' special knowledge, experience or training. If testifying as a lay witness, opinions are generally excluded, except under the specific authority of 60-456(a), which requires a judge to find that the opinion is rationally based on the perception of the witness, and that the opinion is helpful to a clearer understanding of the witness' testimony.

In the area of child abuse, the reliance on expert testimony is extremely important. The use of so-called "experts" in this area, especially on the part of criminal defendants, is a growing phenomena. Reducing established qualifications for admitting such testimony, even for the limited purpose of termination of parental rights, serves no worthwhile purpose in assisting a court to reach a decision that has such a radical effect on children and their families.

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