JUDICIARY SUBCOMMITTEE ON CIVIL PROCEDURES

Senator Richard Rock, Chairman

March 23, 1992

HB 2756 - disposition of property by will or other lawful disposition.

PROPONENTS

Edward Larson, Kansas Judicial Council (ATTACHMENT 1)
John Kuether, Washburn University School of Law

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable for passage and to be placed on the Consent Calendar.

HB 2856 - bonds approved by district court judge not clerks.

PROPONENTS

Paul Shelby, Office of Judicial Administration (ATTACHMENT 2)
Sherilyn Sampson, Chief Clerk of the District Court, Lawrence

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: to amend by striking the work "approved" in line 31 of page 19; recommend favorable for passage as amended.

HB 3055 - orders of support payments during protection from abuse proceedings.

PROPONENTS

Kay Farley, Office of Judicial Administration Child Support Coordinator (ATTACHMENT 3)
Brian Farley, Kansas Child Support Enforcement Association

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: to recommend favorable and to be placed on the Consent Calendar.

HB 3056 - child support/maintenance exempt from garnishment.

PROPONENTS

Kay Farley, Office of Judicial Administration Child Support Coordinator (ATTACHMENT 4)
Brian Farley, Kansas Child Support Enforcement Association

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: amend by striking section F; recommend the bill favorable for passage as amended.

Senators, Ladies, and Gentlemen:

I am Edward Larson. I appear before you today as a member of the Probate Law Committee of the Kansas Judicial Council.

In considering House Bill 2756 you need to recall that its provisions are substantially the same as 1989 Senate Bill 261, which was recommended by the Judicial Council and passed by the Senate by a vote of 40-0 in your 1990 session.

I may be repeating myself from comments which I previously made before your committee, but I can't recall exactly what I said so I doubt that considering the variety of issues you consider that you can recall those comments either.

Lets consider two problems, the first is an immediate problem. HB 2756 presents a solution to that. The second is long-term and the changes inherent in our society appear to the Probate Law Committee of the Kansas Judicial Council to make future consideration of the second suggestion desirable.

Now, let me tell you what the first problem is and how it got started.

It started in 1963 when we had our first revocable trust case which was *Ackers v. First National Bank*, 192 Kan. 319, which held a spouse could elect against a revocable inter vivos trust. It the spouse didn't consent, the trust was voidable.

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Attachment 1

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For the next 25 years, which was the heart of my law practice, we slowly but surely moved away from a Kansas society dominated by real property to a more urban society in which personal property which consisted of stocks and primarily interests in retirement programs became the dominant assets of the estates of Kansas. We went from the classic marital share distribution, which was to a trust or outright, and outright became more popular in my practice because women became more interested and active in the management of property and resented a plan which turned it over to a trustee who they viewed as being adverse to their interests, unduly conservative, and not being willing to do what they desired. The second part of the estate was the non marital trust, Trust B, the life estate, (which worked great with the landed estates) or the grandfather trust where you skipped a generation if the children were wealthy enough. The usual provisions had some power of appointment rights in the spouses marital deduction share which if not exercised upon death of the spouse poured the assets into the non-deductible share where it was held or distributed when both spouses had died.

During this period we slowly but surely recognized the rising of a new devise which was advertised to reduce probate or death costs, provided privacy and insure management if the settlor became incapacitated. It was called revocable inter vivos trust, the living trust or in our modern up to date time the "loving" trust. Now two other things have developed dramatically during these years.

First and maybe most important for someone like me (and Elizbeth Taylor) is going to be 60 years old is the increase in our life expectancy which used to be in the 70's and now is in the 80's.

The second phenomena is the dramatic change in our divorce rates and the numbers of second, third, and maybe fourth marriages which we find in our society.

I used 25 years ago when I talked about *Akers* for 25 years later in 1988, came *Newman v. Young*, 243 Kan. 183, which had a peculiar fact situation which many think gives a totally unfair result which is why we have HB 2756. The facts in *Newman* are easy but the result was unexpected. Husband and Wife had no children of that marriage; rather that using a will they used a revocable trust, all to each other, remainder to husbands two sister's who took care of them. Nothing to her son from a previous marriage. Wife was incapacitated and did not or could not consent to the trust. Husband died. Who got the property? Son came in, had himself appointed conservator and guardian, elected against the trust, under *Ackers* the trust was void and all the Husband's assets passed to wife who was inherited from by the son and sisters got nothing. Justice Herd said "Too bad, you should have made a will."

A Johnson County Lawyer, Franklin Taylor, thought this was unfair and suggested to his senator, Bud Burke, that the result in cases like this in the future should be changed. The

matter was referred to the Judicial Council in 1990, who came up with the suggested changes in K.S.A. 59-602 and 603.

The first section of 602(1) merely extends present law to prohibit giving property to any foreign country by any other disposition in addition to a will. Now historically I think in the 1939 code didn't want people with national ties to their homeland (immigrants) giving money back to their homeland and this is continued.

Subsection (2) says that in addition to where you will property, by any other disposition subject to a surviving spouses right of election, you can only transfer as you absolutely desire one-half of the property unless the spouse has consented to the transfer.

K.S.A. 59-603(a) gives the surviving spouse the right to elect against the will or the revocable trust or any other disposition subject to an spouses right of election and gives that spouse the amount a spouse would be entitled to as if there was spouse and a child (which is one-half of the property). It goes on to say the will (which is the law now) and "other dispositions" (which would change the result of *Newman v. George*) is effective except as to the elected share.

Subsection (b) says how you do this if you have an election against the assets of a trust. You have to open an estate and administer it as was done in *McCarty v. State Bank of Fredonia*, 14 Kan. App. 2d 552.

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Why do we use the wording "any other dispositions determined to be subject to a surviving spouses right of election."? You can inherit property by act an operation of law (intestate), will (testate), joint tenancy, POD accounts, IRA accounts, U.S. Government Bonds, handwritten lists authorized under K.S.A. 59-2296, a conveyance during marriage not consented to by a spouse, a beneficiary designation of (a) life insurance, (b) retirement benefit account [KPERS, federal service retirement, city funds, private pensions, state,] 401 (K) accounts, revocable and irrevocable trusts and I'm sure there are other ways one may receive property as the result of the death of another.

The wording is used to take advantage of case by case law and let it develop either judicially or by statute, if you desire, where a spouse should have or not have the right of election.

The legislature has done that with Payable on Death accounts under K.S.A. 9-1215 and 16, 17-5828 and 29, 17-2263 and 64, where you say Chapter 59 does not apply. We followed that judicially in *Snodgrass v. Lyndon State Bank*, 15 Kan. App. 2d 546 (1991).

Now I think HB 2756 provides a better climate for Kansas than *Newman v. George* and I encourage you to adopt it but that is not the be all, end all, of this problem.

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If you decide that Kansas needs the Non Probate Transfer Act (HB 2149) before you do that you need to consider the complete revision of the elective share provisions. At this point what looks desirable to me are the provisions of the Uniform Probate Code which creates an "argumented" estate approach which is similar to the combined adjusted gross estates of wife and husband to give the surviving spouse a percent of the "argumented" estate with a minimum amount. The percentage to which the survivor is entitled is a percentage for each year of marriage up to 50% of the couples combined assets. Such as 3% for the first 10 years of marriage and 4% for each year thereafter which gives 50% after 15 years of marriage.

The statutes which I suggest we ultimately need to consider are §§ 2-201 through 2-207 of the 1990 text of the Uniform Probate Code and while it sounds and is complicated it is a uniform law which is desirable. It has received the endorsement of the National Association of Womens Lawyer. These provisions consider the needs of the surviving spouse and considers and applies the amount of property owned or controlled by both spouses. Our present laws probably over compensates a surviving spouse in a short-term marriage and there are also ways a surviving spouse may be disadvantaged.

I don't want to have you abandon HB 2756 but you need not only to think about what you are doing today but to be thinking about where you need to be going. The probate code of 1939 is 53 years old and it has served Kansas well. It is not perfect. Times and the needs of society change and we need to be ready to change our laws to fit the needs of Kansans.

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House Bill No. 2856
Senate Judiciary Committee
March 23, 1992

Testimony of Paul Shelby
Assistant Judicial Administrator
Office of Judicial Administration

Mr. Chairman and members of the committee:

I appreciate the opportunity to appear today to discuss House Bill No. 2856 which relates to the approval of bonds in the district courts. This is a proposal from the Kansas Association of District Court Clerks and Administrators.

This bill transfers the responsiblity for approving certain statutorily required bonds to judges from clerks of the district court. The clerk of the district court is a ministerial officer of the court; that is, clerks perform duties required by a court order, by rule, or by statute. Normally the clerk does not exercise discretion in the performance of ministerial duties, but follows clearly established guidelines.

K.S.A. 20-3133 clearly states that clerks of the district court and their deputies are forbidden to practice law. Often discretion, legal knowledge, and application of legal principles are necessary in judging whether a bond is legally sufficient and in accordance with the requirements set out in these statutes.

Judges have the necessary legal skills to assess whether bonds submitted are sufficient. The state and the judge are protected by the doctrine of judicial immunity if a judge were to make an error in making a judicial decision which causes injury to an entity. On the other hand, clerks who are negligent in performing ministerial acts cause the state to be liable under the Tort Claims Act.

The passage of this bill would relieve clerks of a responsibility for which ministerial officers are not suited.

The House Judiciary Committee made one amendment to the bill on page 19, line 32, which deleted the approval of contractor bonds.

We urge your favorable consideration of this bill. Sherlyn Sampson appears on behalf of the Kansas Association of District Court Clerks and Administrators.

Civil Procedures Subcommittee
March 23, 1992
Attachment 2

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HOUSE BILL No. 3055
Senate Judiciary Subcommittee on Civil Procedure
March 23, 1992

Testimony of Kay Farley
Child Support Coordinator
Office of Judicial Administration

Senator Rock and members of the subcommittee:

I am pleased to be here today to discuss 1992 House Bill 3055 with you.

This bill amends the statutes concerning protection from abuse proceedings relating to support payments.

As we understand it, this bill was introduced to reconcile conflicting language within the statute.

We support this proposal and recommend passage of this bill with Representative Macy's amendments.

Thank you for the opportunity to discuss HB 3055 with you.

Civil Procedure Subcommittee
March 23, 1992
Attachment 3

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HOUSE BILL No. 3056
Senate Judiciary Subcommittee on Civil Procedure
March 23, 1992

Testimony of Kay Farley
Child Support Coordinator
Office of Judicial Administration

Senator Rock and members of the subcommittee:

I am pleased to be here today to discuss 1992 House Bill 3056 with you.

This bill amends a statute which limits the application of garnishment process.

The Office of Judicial Administration and the District Court Trustees support this bill. We have had several instances in which a Clerk of the District Court or a District Court Trustee has been served with a garnishment to attach support payments as payment to other creditors. As the support payments are to provide for the needs of minor children, we would like to see this money protected from other creditors.

Additionally, this bill would provide some protection for the interests of the obligors by insuring that the obligors' support payments will be used for the support of their children and not attached by creditors for other purposes.

We recommend passage of this bill.

Thank you for the opportunity to discuss HB 3056 with you.

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Attachment 4