

Approved: 3/6/97
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Tim Carmody at 3:30 p.m.. on February 3, 1997 in Room 313--S of the Capitol.

All members were present except: Representative Kline (excused)
Representative Krehbiel (excused)

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Jill Wolters, Revisor of Statutes
Jan Brasher, Committee Secretary

Conferees appearing before the committee: Ron Smith, Kansas Bar Association
Wendy McFarland, ACLU

Others attending: See attached list

The Chair called the meeting to order at 3:40 p.m.

Bill Introductions:

Ron Smith, Kansas Bar Association requested a bill that would amend statutes dealing with limited liability companies. The conferee stated that the requested bill deals with the corporate code, concerning limited liability companies and limited liability partnerships and the changes are basically technical. The proposal would aid in estate planning. (Attachment 1)

A motion was made by Representative Shriver and seconded by Representative Kirk to introduce Mr. Smith's bill proposal. The motion carries.

Representative Pugh requested the introduction of a Committee bill that would amend part of the probate code, K.S.A. 59-3018. Representative Pugh stated that this proposal will provide that the guardian of an incapacitated person(ward) may sign the person back into a medical hospital or treatment center over the ward's objections. The ward will then be given notice and provided a hearing if the ward wants to contest the hospitalization. Representative Pugh stated that this bill will allow for immediate treatment.

A motion was made by Representative Pugh and seconded by Representative Mays to introduce as a Committee bill. The motion carries.

Representative Adkins requested a bill that would embody the recommendations of the Youth Authority regarding the transition plan for juvenile offenders to go from the custody of SRS to the new Juvenile Commissioner. Representative Adkins stated that there are technical changes needed and that this bill will allow for the greater capacity of juvenile placement at community levels. This bill outlines the operations of the Commissioner of Juvenile Justice's office, the community planning that will be necessary to accommodate the greater capacity, and the funding of that system.

A motion was made by Representative Adkins, second by Representative Presta to introduce as a Committee bill. The motion carries.

Representative Garner requested on behalf of Representative Correll that a bill be requested that would enhance the penalty for battery of a law enforcement officer to comply with the penalty for battery of a corrections officer.

A motion was made by Representative Garner and seconded by Representative Adkins to introduce as a Committee bill. The motion carries.

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Representative Garner requested a bill on behalf of Representative Howell that will prohibit federal prosecutors/federal law enforcement agents from becoming employees of the State of Kansas. Representative Garner stated that this bill will place boundaries on who can be employees of state government and federal government.

A motion was made by Representative Garner and seconded by Representative Mayans to introduce as a Committee bill. The motion carries.

Representative Pauls requested a Committee bill concerning ignition interlock and the second refusal. Representative Pauls stated that this bill will require administrative remedies by the Department of Transportation, and that upon a second refusal or second DUI the Motor Vehicle Department could impose the use of an interlock.

A motion was made by Representative Pauls and second by Representative Garner to introduce as a Committee bill. The motion carries.

Representative Pauls requested a bill proposal for a set standard in Kansas concerning open adoptions. This would codify the concept of open adoptions and provide as an option that the relationships would be known to all parties at the time of the adoption. The judge would be given statutory authority in authorizing visitation in certain cases.

A motion was made by Representative Pauls and seconded by Representative Ruff to introduce as a Committee bill. The motion carries.

Representative Klein requested a bill relating to the prosecution of juvenile traffic offenders. Representative Klein stated that this bill would allow prosecution for the traffic offense and for driving without insurance to occur outside the Juvenile Code.

A motion was made by Representative Klein and seconded by Representative Garner to introduce as a Committee bill. The motion carries.

HB 2007: Judiciary amendments to rules of civil procedure.

The Chair stated the hearing was still open on **HB 2007**. The Chair recognized Ron Smith, Kansas Bar Association.

Mr. Smith testified in support of removing the *Daubert* language as recommended by Mr. Badgerow, KTLA. The conferee stated that his association will also support the Wichita Bar Association's recommendation on changes to K.S.A. 60-245a on business records' subpoenas. The conferee referred to language contained in his handout on the second page. The conferee suggested that no other substantive changes be to added to this bill. (Attachment 2)

The conferee discussed with Committee members issues in the bill concerning when a subpoena may be quashed or modified due to the travel distance required for those served and issues of involuntary dismissal (page 39, lines 8-25).

The Chair closed the hearing on **HB 2007**. The Chair referred to a handout (balloon) which will amend the bill by deleting the *Daubert* rule language, and by making technical changes to the language; replacing "report and disclosure" with "disclosure," and inserting "If a case management conference is held" on line 31, page 9. Referring to lines 17 through 20 on page 53, the Chair stated that the controversy in this bill was over what constitutes expert testimony. The Chair stated that neither Mr. Badgerow or Mr. Dickerson were comfortable with the language the way it was written in the bill. The Chair proposed as an amendment to substitute the language that has been used in Kansas as a standard since 1923. The Chair stated that "the amendment will restrict the scope of expert testimony to that which is generally accepted as reliable within the expert's particular scientific field; and also within that expert's knowledge, skill, etc."

Discussion followed concerning Section 29 of the bill, and other changes with the rule of evidence.

The Chair related that the *Frye* rule has been embedded in case law since 1923, but is not in the statute as a standard, therefore, the purpose of the amendment was to codify the *Frye* rule.

Representative Garner made a substitute motion to delete entirely Section 29, the evidence rule part from **HB 2007**, and incorporate the technical changes requested by the Revisor. Representative Pauls seconded the

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substitute motion. The substitute motion fails seven in favor, eleven opposing.

The Chair made a motion to amend **HB 2007** as to expert testimony along with the Revisor's changes. The motion was seconded by Representative Adkins. The motion carries.

The Committee members discussed returning discretion to the judges.

Representative Pugh suggested an amendment that will restore the judge's ability to determine whether something should be deemed admitted.

Representative Pugh made a motion to amend **HB 2007** to provide the judge's authority to waive sanctions upon good cause and to incorporate the Revisor's changes. The motion was seconded by Representative Powell. The motion carries.

Representative Garner made a motion to amend the amount to \$75,000 for all three references concerning pleading in a petition where the damages sought exceed or do not exceed that amount. Representative Dahl seconded the motion. The motion carries.

A motion was made by Representative Pauls to restore the stricken language, "provided for by this article" on page 5, line 36 of the bill and in other locations. Representative Garner seconded the motion. The motion carries.

Representative Pauls made a motion to delete the italicized language in lines 10 through 13 on page 3 and go back to the original language. Representative Garner seconded the motion. Motion carries.

The motion will allow court filings on Saturday/Sundays and legal holidays to be included unless the deadline falls on one of those days which it is extended to the next day the clerk's office is regularly opened.

The Committee members discussed issues concerning dismissal with prejudice.

The Chair referred to a proposed amendment requested by Mr. Ron Smith, Kansas Bar Association.

The Chair made a motion to amend **HB 2007** per request by Mr. Smith to require a notice of the issuance of a subpoena to a custodian of business records, notice to all the parties in the case and ten days prior notice. The motion was seconded by Representative Powell. The motion carries.

A motion was made by Representative Mays, seconded by Representative Powell to pass **HB 2007** favorably as amended. The motion carries.

HB 2013: Release of federal prisoners.

The Chair recognized Wendy McFarland, ACLU. Ms McFarland testified in opposition to **HB 2013**. The conferee stated that this amendment to K.S.A. 22-2713 in **HB 2013** violates due process rights. The conferee countered testimony offered by proponents. The conferee concluded by stating that the reason for this bill was administrative convenience and would circumvent due process rights. (Attachment 3)

A Committee member discussed with the conferee issues concerning those who will be affected under this bill. It was stated that those who have already been convicted of a crime in another state are the only ones affected.

The Chair closed the hearing on **HB 2013**.

The Chair distributed a handout (balloon) that would amend **HB 2013** by deleting lines 1 through 7 on page 2 of the bill and inserting language to clarify the conditions by which a person may be released to the custody of the duly accredited officers, or designees. The Chair stated that the change to this bill removes references to the Penitentiary at Leavenworth, Kansas and substitutes "any federal facility." The Chair stated that the reference to subsection (a) is deleted by this balloon. (Attachment 4)

The Chair related that the purpose of this bill is to avoid delivering to the custody of the State of Kansas a person released from federal prison who has violated the terms of probation, postrelease supervision, parole or who has an unexpired sentence in a foreign state and whose agents are receiving the prisoner to transport to that state.

The Chair made a motion to amend **HB 2013** per the balloon. Representative Ruff seconded the motion.

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Discussion by Committee members concerning personal jurisdiction followed.

Substitute motion was made by Representative Haley, seconded by Representative Shriver to take out subparagraph 2 and to insert the word "and" in the amendment to **HB 2013**. The motion fails.

The Committee members discussed the use of the term "federal facility." Concerns with the language in the amendment dealing with the identity of the person and expressly waive extradition were discussed by the Committee members.

The motion to amend **HB 2013** per the balloon carried.

A motion was made by Representative Mays, seconded by Representative Ruff to recommend **HB 2013** favorably for passage as amended. The motion carries.

The Chair announced that the meeting at noon on Tuesday, February 4, will be a demonstration and presentation by Representative Morrison concerning the Digital Signature Act.

The Chair announced Committee agenda plans for the remainder of the week.

The Chair adjourned the meeting at 5:30 p.m.

The next meeting is scheduled for February 4, 1997.

Ron Smeltz
#1

Proposed new bill _____

Section 1. KSA 17-7616. is hereby amended to read as follows: 17-7616 (a) A member shall not receive out of limited liability company property any part of the member's contribution to capital until:

(1) All liabilities of the limited liability company, except liabilities to members on account of their contributions to capital, have been paid or sufficient property of the company remains to pay them; and

(2) the consent of all members is obtained, unless the return of the contribution to capital may be rightfully demanded as provided in the Kansas limited liability company act.

(b) Subject to the provisions of subsection (a), a member may rightfully demand the return of the member's contribution:

(1) On the dissolution of the limited liability company; or,

(2) when the date or event specified in the articles of organization for the return of the contribution has arrived; or

~~(3) after the member has given all other members of the limited liability company six months' prior notice in writing, if no time is specified in the articles of organization for the dissolution of the limited liability company.~~

(c) In the absence of a statement in the articles of organization to the contrary or the consent of all members of the limited liability company, a member, irrespective of the nature of the member's contribution, has only the right to demand and receive cash in return for the member's contribution to capital.

(d) A member of a limited liability company may have the limited liability company dissolved and its affairs wound up when:

(1) The member rightfully but unsuccessfully has demanded the return of the member's contribution; or

(2) the other liabilities of the limited liability company have not been paid or the limited liability company property is insufficient for their payment, and the member otherwise would be entitled to the return of the member's contribution.

Sec. 2. KSA 56-1a353. is amended as follows: 56-1a353 A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in writing in the partnership agreement and in accordance with the partnership agreement. If the agreement does not specify in writing the time or the events upon the happening of which a limited partner may withdraw, ~~or a definite time for the dissolution and winding up of the affairs of the limited partnership; a limited partner may withdraw upon not less than six months' prior written notice to each general partner at the general partner's address set forth in the certificate of limited partnership filed in the office of the secretary of state. the limited partner will have no right to withdraw.~~

Sec. 4. This act shall apply to limited partnerships or limited liability companies formed on or after the effective date of this act and publication in the statute book. Entities formed before the effective date of this act shall continue to be governed by prior law.

House Judiciary
Attachment 1
2/3/97



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Legislative Testimony

TO: House Judiciary Committee

FROM: Ron Smith, General Counsel

SUBJ: HB 2007, civil procedure changes.

DATE: January 28, 1997

The legislation as introduced was studied by the summer interim Judiciary Committee and is in fairly good shape except for one particular area. Section 29 on page 53 makes changes which attempt to implement the *Daubert* decision as a means of qualifying an expert witness in a civil trial. *We suggest you delete the changes made in subsection 29(b).* This is important because both sides in many major civil cases turn on the testimony of expert witnesses. Thus changes you make to these civil procedure rules control the rules by which these cases are tried.

Not all persons are competent to testify on certain topics. For example, if a plaintiff is trying to prove medical malpractice, the plaintiff must present the jury a physician licensed in the specialty which is the subject of the trial. Without such experts usually there is no case. Currently, to decide what type of preliminary foundation a lawyer must present the court in order for the court to approve an expert's qualifications to testify on a subject, Kansas uses the rule in *Frye v. United States.*, 293 F. 1013 (D.C.Cir. 1923). The lawyer must show the court proof the expert's theory and techniques are generally accepted within relevant scientific specialties.

The Frye test, codified in the original language in Section 29(b), only requires the judge to find that the opinion of the expert is based on facts or data perceived by or made known to the witness at the hearing, and the opinion the expert will render is within the scope of the knowledge, skill and experience of that witness. The *jury* decides whether to believe the expert's testimony.

The *Daubert* rule attempts to incorporate the findings of *Daubert v. Merrill Dow Pharmaceuticals*, 113 S.Ct. 2786, 2795-2800 (1993) into Kansas law. *Daubert* changes the qualifications test from a two factor (Frye) test to a four factor test. It incorporates the two *Frye* factors, but also requires the judge determine that the reasoning and methodology used by the expert is "scientifically valid." It is one thing for a judge to determine the first two *Frye* factors. It is quite another to have the judge make a decision as to whether a person's reasoning or methodology is scientifically valid. Typically, the juries do this when they review the creditability of the experts that the plaintiff and the defendant offer at trial.

(over, please)

House Judiciary
Attachment 2
2/3/97

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ACLU

American Civil Liberties Union

Wendy McFarland - Lobbyist
(913) 575-5749

TESTIMONY OPPOSING HB 2013
DELIVERED 2/3/97 BEFORE THE HOUSE JUDICIARY

THE AMERICAN CIVIL LIBERTIES UNION ARGUES THAT THE AMENDMENT OFFERED IN THIS BILL VIOLATES THE RIGHTS OF DUE PROCESS IN EFFECTIVELY ELIMINATING THE RIGHT OF AN INMATE AT THE UNITED STATES PENITENTIARY AT LEAVENWORTH TO PETITION THE GOVERNMENT IN AN ATTEMPT TO AVOID EXTRADITION.

IN ADDITION TO THE DUE PROCESS PROTECTIONS OFFERED IN THE 14TH AMENDMENT WE ALSO FEEL THIS PROVISION MAY VIOLATE THE FOLLOWING:

- 1) KANSAS GOVERNORS EXTRADITION MANUAL
- 2) UNIFORM CRIMINAL EXTRADITION ACT
- 3) KSA 22-2702 WHICH REQUIRES THAT THE PERSON BEING EXTRADITED BE A FUGITIVE
- 4) ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION... SPECIFICALLY THE COMPACT CLAUSE
- 5) THE FEDERAL CIVIL RIGHTS ACT OF 1871

THE REQUEST AND THE SUPPORTING TESTIMONY INDICATES THE NEED FOR SUCH AN AMENDMENT IS LIMITED TO ADMINISTRATIVE CONVENIENCE.

THE SUPREME COURT AND OTHER LOWER COURTS HAVE HELD THAT CONVENIENCE, COST AND TIME SAVINGS CAN NEVER PREVAIL OVER THE RIGHTS OF DUE PROCESS.

WE RESPECTFULLY REQUEST THAT YOU VOTE AGAINST THE PROPOSED AMENDMENT FOR THE ABOVE REASONS.

House Judiciary
Attachment 3
2/3/97

HOUSE BILL No. 2013

By Representative Wilk

12-17

9 AN ACT concerning extradition; relating to the release of certain pris-
10 oners; amending K.S.A. 22-2713 and repealing the existing section.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. K.S.A. 22-2713 is hereby amended to read as follows: 22-
14 2713. (a) Whenever any person within this state is charged on the oath
15 of any credible person before any judge or magistrate of this state with
16 the commission of any crime in any other state and, except in cases arising
17 under K.S.A. 22-2706 and amendments thereto, with having fled from
18 justice, or with having been convicted of a crime in that state and having
19 escaped from confinement, or having broken the terms of the person's
20 bail, probation, assignment to a community correctional services program,
21 postrelease supervision or parole, or with being under sentence, some
22 portion of which remains unexecuted, from which such person has not
23 been paroled, placed on postrelease supervision or discharged or other-
24 wise released, or whenever complaint has been made before any judge
25 or magistrate in this state setting forth on the affidavit of any credible
26 person in another state that a crime has been committed in such other
27 state and that the accused has been charged in such state with the com-
28 mission of the crime, and, except in cases arising under K.S.A. 22-2706
29 and amendments thereto, has fled from justice, or with having been con-
30 victed of a crime in that state and having escaped from confinement, or
31 having broken the terms of the person's bail, probation, assignment to a
32 community correctional services program, postrelease supervision or pa-
33 role, or with being under sentence, some portion of which remains unex-
34 ecuted, from which such person has not been paroled, placed on post-
35 release supervision or discharged or otherwise released, and is believed
36 to be in this state, the judge or magistrate shall issue a warrant directed
37 to any law enforcement officer commanding the apprehension of the per-
38 son named therein, wherever such person may be found in this state, and
39 to bring such person before the same or any other judge, magistrate or
40 court who or which may be available in or convenient of access to the
41 place where the arrest may be made, to answer the charge or complaint
42 and affidavit, and a certified copy of the sworn charge or complaint and
43 affidavit upon which the warrant is issued shall be attached to the warrant.

House Judiciary
Attachment 4
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1 (b) ~~Whenever any person who has broken the terms of such person's~~
 2 ~~probation, postrelease supervision, parole or who has an unexpired sen-~~
 3 ~~tence and who is currently held and is subsequently being released from~~
 4 ~~custody of the United States Penitentiary at Leavenworth, Kansas, and a~~
 5 ~~warrant for the apprehension of such person has been issued pursuant to~~
 6 ~~subsection (a), the duly accredited officers, or such officers' designees, of~~
 7 ~~a foreign state may enter the state of Kansas to apprehend such person.]~~
 8 For that purpose no formalities shall be required other than establishing
 9 the authority of the officer and the identity of the person to be appre-
 10 hended. All legal requirements to obtain extradition of fugitives from jus-
 11 tice are hereby expressly waived by the state of Kansas, as to such persons.

12 Sec. 2. K.S.A. 22-2713 is hereby repealed.

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

Any person incarcerated in any federal facility may be released to the custody of the duly accredited officers, or such officer's designees, of a foreign state, if:

- (1) Such person has violated the terms of such person's probation, postrelease supervision, parole or who has an unexpired sentence in the foreign state;
- (2) the foreign state has personal jurisdiction over such person; and
- (3) the foreign state has issued a valid warrant for the apprehension of such person.