

Approved: March 7, 1997  
Date

## MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Vice Chairperson Keith Schraad at 10:10 a.m. on February 6, 1997 in Room 514-S of the Capitol.

All members were present except: Senator Harris (excused)

Committee staff present: Mike Heim, Legislative Research Department  
Jerry Donaldson, Legislative Research Department  
Gordon Self, Revisor of Statutes  
Mary Blair, Committee Secretary

Conferees appearing before the committee: Linda Elrod, Kansas Bar Asso.  
Greg DeBacker, National Congress for Fathers and Children  
Steve Blaylock, Kansas Bar Asso.  
Richard Harmon, Kansas Bar Asso

Others attending: See attached list

Minutes of the March 5, 1997 meeting were approved on a motion by Senator Bond, seconded by Senator Oleen. Motion carried.

### **SB 106 - Making of gifts by conservators in certain circumstances**

Conferee Richard Harmon testified as a proponent of **SB 106** on behalf of the Kansas Bar Asso. (KBA). He stated that this bill broadens the authority of conservators. At present, conservators cannot make gifts from conservatee's property so that, for example, in the case of a debilitated conservatee, who has always given an annual gift to his church and would want to continue to do so, cannot, since the conservator of his estate lacks the power and/or authority to do so on his behalf. He also gave examples of people who give gifts to reduce a taxable estate for federal estate tax purposes or support a non-dependent family member; if they become debilitated and subject to a conservatorship, the conservator has no authority to continue giving as before. (see Attachment 2, 2/5 meeting for definitions) After discussion Senator Bond moved to pass the bill favorably, Senator Emert seconded. Motion carried.

### **SB 95 - Distribution of child placement investigator's report in divorce proceeding**

Conferee Linda Elrod testified as a proponent of **SB 95**. She stated that **SB 95** addresses child custody investigative reports and that the amendment merely attempts to equalize the position of parties who are represented by counsel and those who are not. The investigative report is available to either parties unless the court finds that such distribution would be harmful to either party, child or witnesses.

Conferee Greg DeBacker testified as a proponent of **SB 95** and stated that his group feels this bill would alleviate false testimony done in secret and bring it out into the open. Senator Harrington moved to pass the bill out favorably, Senator Emert seconded. Motion carried.

### **SB 96 - Marital property to include professional goodwill in certain circumstances**

Conferee Steve Blaylock testified as a proponent of **SB 96**, a bill which amends K.S.A. 23-201 (defining marital property for divorce or separate maintenance purposes) to include "professional goodwill to the extent it is marketable for that particular profession." Mr. Blaylock related the history of the prior law to show the necessity for the amendment, described professional goodwill vs practice goodwill, showed recent development in other jurisdictions, gave a policy for the bill and added a suggested amendment. (Attachment 1) Discussion followed.

Conferee DeBacker briefly testified that he opposed **SB 96**. Following further discussion **SB 96** was assigned to subcommittee.

There being no further business the Vice Chair adjourned the meeting at 10:57 a.m. The next scheduled meeting is March 7, 1997.

# SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/6/97

NAME	REPRESENTING
Jennifer Brummer	Constitution
DASHA M. JAROS	KSNA - Baker University
Keri Howard	KSNA - Baker University
James Jilg	KSNA - Pratt Comm. College
Bisa Hunter	Airla, College School of Nursing
Richard Hoerner	Kansas Bar Association
Patty Thudion	KSNA - Research College of Nursing
Claudia Jacobs	KSNA - Research College of Nursing
Greg DeBacker	National Congress For Fathers & Children
Paul Shelton	OJA
Linda Elrod	KBA
Stephen A. Blaylock	KBA
Don Smith	KBA
Roslyn James-Martin	SRS-Children & Family Services
Natalie Cae	Tutor Hab
Karen L. Mitchell	Washburn Univ.
Molly Mahoney	WU-KSNA
Rose Person RN	KSNA
Idella Wilcox	MO

Cindy Kern HCC  
 P. Hocum MO

5.3128 471

WOODARD, BLAYLOCK, HERNANDEZ, ROTH & DAY

ATTORNEYS AT LAW

833 NORTH WACO, RIVERFRONT PLACE  
P.O. BOX 127  
WICHITA, KANSAS 67201-0127

TELEPHONE (316) 263-4958  
TELEFAX (316) 263-0125

CHRISTOPHER S. COLE  
DWIGHT D. FISCHER  
TERESA L. MAH  
JERRY D. RANK

OF COUNSEL:  
GREER GSELL

STEPHEN J. BLAYLOCK  
CINDY L. CLEOUS  
STEVEN C. DAY  
JAMES Z. HERNANDEZ  
JAMES R. ROTH  
LEE H. WOODARD

## Memorandum

**To:** Kansas Senate Judiciary Committee

**From:** Stephen J. Blaylock, Member, Kansas Bar Association, Family Law Section

**Date:** February 6, 1997

**Subject:** Senate Bill No. 96

### REQUEST:

The Kansas Bar Association and family lawyers in Kansas support adoption of Senate Bill No. 96, which amends K.S.A. 23-201 (defining marital property for divorce or separate maintenance purposes), to include "professional goodwill to the extent it is marketable for that particular profession."

### PRIOR LAW:

The necessity for the amendment is due to the fact that domestic trial courts in Kansas will not consider professional goodwill because of the holdings in the 1982 Supreme Court of Kansas case of *Powell v. Powell*, 321 Kan. 456, in which the Court declared "a professional practice does not have goodwill value which becomes part of marital property in a divorce". While recognizing at that time there was a split of authority among other jurisdictions, the Kansas Supreme Court based its decision largely on the rationale that if a

Senate Judiciary  
Attachment #9  
2-6-97

professional dies or retires, none of the goodwill remains. While the Powell decision involved a single practice surgeon who did not have a patient base, the trial courts in Kansas have applied the theory to all types of professionals, including dentists, doctors with a patient base, accountants, chiropractors, and lawyers.

#### **KANSAS LAW CHANGES SINCE POWELL:**

The theory behind Powell, supra applied to any property assets which, in the future, might disappear if the professional or participant died before he or she received the benefit. This included defined benefit pension plans and military retirement plans. Grant v. Grant (cite omitted). The legislation after Grant amended K.S.A. 23-201 (same statute affected by Senate Bill 95), to include unvested military retirement pay. In Re Marriage of Harrison, (cite omitted), the Court of Appeals extended marital property to include the present value of a defined benefit pension plan, which benefit the participant may not receive if he or she dies prior to receiving the same.

#### **IN SOME PROFESSIONAL PRACTICES THERE IS GOODWILL VALUE THAT IS MARKETABLE:**

While it is true, as in Powell, there are many professional practices which do not have goodwill, there are a number of professional practices which do have a value beyond that of just the book value and accounts receivables. A number of these professional practices have the goodwill or intangible value even without the particular professional. Those of us who deal in the sale of these practices refer to this asset as "practice goodwill" versus professional goodwill. Examples can be found in group medical practices which

control a large patient base (family practice, HMO's, PPO's), dentists, accountants, chiropractors and sometimes lawyers who have an emphasis, such as a collection practice. We sell these practices all the time in Kansas for the practice goodwill value. Often, the professional has paid for practice goodwill with marital assets.

There exist formulas in each type of business which are used to determine what another professional or group of professionals would pay for the patient or client base. For example, a dentist who is older may be able to sell his practice beyond book and accounts receivable for an amount equal to one times gross billings. A dentist who makes \$200,000 per year after overhead might sell the practice goodwill for \$400,000. That dentist's wife of thirty (30) years presently gets no value for that. This inequity affects the non-professionals, who are usually women and children. This is not fair.

#### **RECENT DEVELOPMENT IN OTHER JURISDICTIONS:**

While there are a few exceptions, most jurisdictions are holding that when there is practice goodwill and the practice has a value that is marketable above book value and accounts receivable, that it is property that can be valued in a divorce case. See *Thompson v. Thompson*, 576 So.2d 267 (Fla. 1991, *Taylor v. Taylor*, 386 N.W.2d 851 (Neb. 1986), *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. banc 1987). An example of the changing trend is found in the Wisconsin case of *Peerenboom v. Peerenboom*, 433 N.W.2d 282 (Wis. App. 1988) in which practice goodwill was found in a dental practice. An item of interest is that it distinguishes the early case of *Hollbook v. Hollbook*, 309 N.W.2d 343 (Wis. 1981) which was relied upon heavily in *Powell, supra*, recognizing that some professional practices do have goodwill.

**POLICY FOR SENATE BILL 96:**

The current Supreme Court of Kansas is reluctant to hear domestic marital asset issues and feels that some of these decisions are for the legislature. We have goodwill in other types of businesses for marital divorce purposes and professional practices should not be excluded. The way the statute is written to be amended protects the concerns set forth in *Powell, supra*, and yet allows the trial court to consider the value when practice goodwill has a market. This will not affect a great number of physicians who have no marketable practice goodwill or are restricted by Buy-Sell Agreements, but it will allow us to consider an asset which the professional could sell on the open market. Even the I.R.S. recognizes this now, and since OBRA 1993, allows goodwill when purchased to be amortized and written off over fifteen (15) years.

**SUGGESTED AMENDMENT:**

Since there are a number of pending divorces in Kansas, Senate Bill No. 96 should apply to petitions for separate maintenance or divorces filed after its effective date.