Approved: January 14, 1999
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:15 a.m. on January 13, 1999 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:

Randy Hearrell, Kansas Judicial Council
Melissa Wangemann, Office of Secretary of State
Barbara Tombs, Kansas Sentencing Commission
Kathy Porter, Office of Judicial Administration
Ron Smith, Kansas Bar Association

Others attending: see attached list

Conferee Hearrell requested introduction of five bills from the Judicial Council. He briefly described the contents of the bills which cover the following subjects: terms of "custody" and "residency" as used in K.S.A. chapter 60, Article 16; modification of child custody orders; K.S.A. 60-208 relating to the general rules of pleadings; K.S.A. Chapter 7, Article 1 relating to attorneys at law; and amendment to K.S.A. 22-2809 relating to revocation of bond. He also informed Committee about bills he will be introducing in the House Judiciary Committee. (attachment 1) He stated that he had distributed a detailed copy of the requested bills to the Chair and Staff. (attachment 2) A motion to introduce the bills was made by Senator Petty and seconded by Senator Oleen. Carried.

Conferee Wangemann requested introduction of a Revised Model Trademark Bill. She briefly explained the history of the bill and the changes it effects. (attachment 3) She distributed a copy of the bill. (attachment 4) A motion to introduce the bill was made by Senator Bond and seconded by Senator Goodwin. Carried.

Conferee Tombs requested "the introduction of a comprehensive bill that reflects the work of the Commission during the interim". She stated, " the bill focuses on the issue of proportionality as related to the Sentencing Guidelines and recommends corresponding adjustments to the sentencing grids and the Sentencing Guideline Act". (attachment 5)A motion to introduce the bill was made by Senator Goodwin and seconded by Senator Vratil. Carried.

Conferee Porter presented a content summary of bills requested for introduction by: the Kansas Association of District Judges; the Kansas Association of District Magistrate Judges; the Kansas Association of Court Services Officers; and an individual judge. (attachment 6) A motion to introduce the bills was made by Senator Bond and seconded by Senator Goodwin. Carried.

Conferee Smith briefly summarized several bills requested for introduction by the Kansas Bar Association. He instructed Committee to strike the second request concerning notary signatures since this subject was to be introduced in the house by Kansas Judicial Council. (attachment 7) A motion to introduce the bills was made by Senator Bond and seconded by Senator Donovan. Carried.

The Chair briefly summarized each of the four bills he requested for introduction and explained what each would do. The first bill would strike "cause of" language in K.S.A. 22a-231 as follows ..... "the coroner or deputy coroner of the county in which the ~~cause of~~ death occurred"..... (attachment 8) A motion to introduce the bill was made by Senator Bond and seconded by Senator Vratil. Carried. The second bill would strike the phrase "pursuant to judicial order" in line 14 of 79-1437e. (attachment 9) Senator Bond moved to introduce the bill with the understanding that the lengthy transfer of title application form be reviewed when the bill is returned to Committee; the motion was seconded by Senator Vratil. Carried. The third bill, requested by Raytheon Aircraft Company, proposes an amendment to Article 9 of the Uniform Commercial Code. (attachment 10) Senator Harrington moved to introduce the bill, Senator Vratil seconded. Carried. The fourth and final bill is a request from Senator Praeger to reintroduce the "Child in Need of Care" bill or SB 616 from the 1998 session. (attachment 11) Senator Harrington moved to introduce the bill, Senator Vratil seconded. Carried.

Staff person Heim reviewed portions of the Special Committee on Judiciary Report and Recommendations summarizing the following topics: driving privileges; expedited evictions; and expungement of records. (attachment 12) Discussion followed.

The Chair adjourned the meeting at 10:52 a.m. The next scheduled meeting is Thursday, January 14, 1999.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-13-99

NAME	REPRESENTING
Melissa Ulangemann	Sec. of State
Fariba Pouraryan	Sec. of State
Marci Hess	Sedgwick County
Kathy Porter	OJA
Vicki Glenn Hesse	~~DOB~~
James Clark	~~KCDAA~~
Sarah Tomb	KSC

S Jud
1-13-99
att 1

KANSAS JUDICIAL COUNCIL

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301 S.W. Tenth Street, Suite 262
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January 12, 1999

Senator Tim Emert
Chairman, Senate Judiciary Committee
State Capital Building
Topeka, Kansas 66612

Dear Senator Emert,

The Kansas Judicial council respectfully requests introduction of bills on the following subjects:

1. The terms "custody" and "residency" as used in K.S.A. Chapter 60, Article 16;
2. Modification of child custody orders;
3. K.S.A. 60-208 relating to the general rules of pleadings;
4. K.S.A. Chapter 7, Article 1 relating to attorneys at law; and
5. Amendment to K.S.A. 22-2809 relating to revocation of bond.

A brief description of the contents of each bill requested is attached. I have also furnished the secretary and staff with complete copies of the bills requested.

Also, for your information I will request bill introductions in the House Judiciary Committee on the subjects of administrative procedure, eminent domain, the Kansas Estate Tax Act, immunity in criminal cases and the self-proved will statute.

Very truly yours,

Randy M. Hearrell

Enclosures
cc: Members and Staff of Senate Judiciary Committee

S. Judiciary
1-13-99
attachment 1

January 12, 1999

CUSTODY AND RESIDENCY

The Kansas Judicial Council respectfully requests the introduction of a Senate bill clarifying the use of the terms "custody" and "residency" in K.S.A. Chapter 60, Article 16. The bill was drafted by the Judicial Council's Family Law Advisory Committee whose members are Hon. Nelson E. Toburen, Chair, Pittsburg; Sara S. Beezley, Girard; Hon. Sam K. Bruner, Olathe; Dr. David Ermer, Kansas City; Charles F. Harris, Wichita; John H. "Topper" Johntz, Jr., Overland Park; Senator Janis Lee, Kensington; Professor Nancy Maxwell, Topeka; Hon. Jerry L. Mershon, Manhattan; Brian J. Moline, Topeka; Dr. Alex Scott, Junction City; and Ardith Smith-Woertz, Topeka. The bill was then approved by the Kansas Judicial Council.

The bill does not make a substantive change in the law; rather, it is intended to clarify the commonly misunderstood terms, "custody" and "residency," as they are used in divorce cases. The bill clarifies that the term "custody" refers only to the right to make decisions about the child in the child's best interests while the term "residency" refers to the physical living arrangements of the child.

Under the bill, the trial court would first provide for a "legal custody arrangement." If the court orders joint legal custody (the presumptive arrangement), both parties would have equal rights to make decisions in the best interests of the child. If the court orders sole legal custody to one party, that party alone would have the right to make such decisions. Any order for sole legal custody must be supported by specific findings of fact explaining why joint legal custody is not in the best interests of the child.

Next, the trial court would provide for one of the following residential arrangements:

- primary residency with one parent while the other parent has visitation;
- shared residency with both parents sharing the residency and direct expenses of the child on an equal or nearly equal basis;
- divided residency for the exceptional case where one or more children reside with each parent and have visitation with the other; or
- nonparental custody where neither parent is fit to care for the child.

January 12, 1999

CHILD CUSTODY MODIFICATION

The Kansas Judicial Council respectfully requests the introduction of a Senate bill relating to modification of child custody orders. The bill was drafted by the Judicial Council's Family Law Advisory Committee whose members are Hon. Nelson E. Toburen, Chair, Pittsburg; Sara S. Beezley, Girard; Hon. Sam K. Bruner, Olathe; Dr. David Ermer, Kansas City; Charles F. Harris, Wichita; John H. "Topper" Johntz, Jr., Overland Park; Senator Janis Lee, Kensington; Professor Nancy Maxwell, Topeka; Hon. Jerry L. Mershon, Manhattan; Brian J. Moline, Topeka; Dr. Alex Scott, Junction City; and Ardith Smith-Woertz, Topeka. The bill was then approved by the Kansas Judicial Council.

The bill is intended to address one-sentence motions to modify child custody orders which contain no factual allegations constituting a material change of circumstances sufficient to justify a change in custody. The Judicial Council is of the opinion that requiring an early identification of the factual allegations involved in a motion to modify child custody would prevent the filing of some motions of questionable merit and would assist in the earlier spotting of frivolous motions. The bill does not apply to motions to modify visitation orders.

January 12, 1999

AMENDMENT TO K.S.A. 60-208

The Kansas Judicial Council respectfully requests the introduction of a Senate bill amending K.S.A. 60-208 relating to the general rules of pleadings. The bill was drafted by the Judicial Council's Civil Code Advisory Committee whose members are J. Nick Badgerow, Overland Park; Susan S. Baker, Overland Park; Hon. Barry Bennington, St. John; Hon. Terry L. Bullock, Topeka; Professor Robert C. Casad, Lawrence; Hon. Jerry G. Elliott, Lawrence; Stan Hazlett, Topeka; Joseph W. Jeter, Hays; Phillip Mellor, Wichita; David Prager, Topeka; David M. Rapp, Wichita; Justice Fred N. Six, Topeka; and Donald W. Vasos, Fairway. The bill was then approved by the Kansas Judicial Council.

K.S.A. 60-208(a) and (g) both refer to specific dollar amounts which correspond directly with the statutory amount in controversy for federal court diversity jurisdiction contained in 28 U.S.C. § 1332. The purpose of the bill is to obviate the need for recurrent amendments to K.S.A. 60-208(a) and (g) as the federal jurisdiction amount changes. By referring specifically to the federal diversity statute, rather than to a specific amount in controversy, it will be unnecessary to amend the statute each time the federal jurisdiction amount changes.

January 12, 1999

K.S.A. CHAPTER 7-ATTORNEYS AT LAW

The Kansas Judicial Council respectfully requests the introduction of a Senate bill repealing several sections of K.S.A. Chapter 7, Article 1. The bill was drafted by the Judicial Council's Civil Code Advisory Committee whose members are J. Nick Badgerow, Overland Park; Susan S. Baker, Overland Park; Hon. Barry Bennington, St. John; Hon. Terry L. Bullock, Topeka; Professor Robert C. Casad, Lawrence; Hon. Jerry G. Elliott, Lawrence; Stan Hazlett, Topeka; Joseph W. Jeter, Hays; Phillip Mellor, Wichita; David Prager, Topeka; David M. Rapp, Wichita; Justice Fred N. Six, Topeka; and Donald W. Vasos, Fairway. The bill was then approved by the Kansas Judicial Council.

In November 1997, the Kansas Judicial Council directed its Civil Code Advisory Committee to study K.S.A. Chapter 7, Article 1, dealing with the regulation of the practice of law. Many of the provisions of Chapter 7 were enacted during the early years of Kansas' statehood before the promulgation of written ethics codes. The Model Rules of Professional Conduct, adopted in 1988, now set out the general standards of conduct for Kansas attorneys and the practice of law is regulated by the Kansas Supreme Court. The Civil Code Advisory Committee's goal was to identify and recommend repeal of any K.S.A. Chapter 7 provision which was in conflict with, or addressed a subject fully covered by, the Model Rules of Professional Conduct or any other Supreme Court Rule. Accordingly, the Committee recommends that the following provisions of K.S.A. Chapter 7 be repealed: 7-104, 7-106, 7-107, 7-111, and 7-121.

January 12, 1999

REVOCATION OF BOND

The Kansas Judicial Council respectfully requests the introduction of a Senate bill relating to the revocation of bond. The bill was drafted by the Judicial Council's Criminal Law Advisory Committee whose members are Hon. Marla J. Luckert, Chair, Topeka; Hon. Carol J. Bacon, Wichita; Professor Ellen Byers, Carbondale; James W. Clark, Topeka; Edward G. Collister, Lawrence; Representative Jim D. Garner, Coffeyville; Hon. Michael Malone, Lawrence; Debra Peterson, Wichita; Steven L. Opat, Junction City; Elwaine F. Pomeroy, Topeka; Mark J. Sachse, Kansas City; and Loren L. Taylor, Kansas City. The bill was then approved by the Kansas Judicial Council.

The Criminal Law Committee was concerned with the due process implications of revoking a defendant's bond. The Committee proposes a bill which amends K.S.A. 22-2809 to give the trial court discretion in whether to revoke a bond, and to require the bail bondsman to show good cause for requesting the bond revocation.

LEGISLATION REQUESTED BY KANSAS JUDICIAL COUNCIL FOR INTRODUCTION IN SENATE

Sen. Judiciary
1-13-99
Attachment 2

PROPOSED AMENDMENTS RE CUSTODY AND RESIDENCY

Article 16.--DIVORCE AND MAINTENANCE

60-1601. Grounds for divorce or separate maintenance.
(a) The district court shall grant a decree of divorce or separate maintenance for any of the following grounds: (1) Incompatibility; (2) failure to perform a material marital duty or obligation; or (3) incompatibility by reason of mental illness or mental incapacity of one or both spouses.
(b) The ground of incompatibility by reason of mental illness or mental incapacity of one or both spouses shall require a finding of either: (1) Confinement of the spouse in an institution by reason of mental illness for a period of two years, which confinement need not be continuous; or (2) an adjudication of mental illness or mental incapacity of the spouse by a court of competent jurisdiction while the spouse is confined in an institution by reason of mental illness. In either case, there must be a finding by at least two of three physicians, appointed by the court before which the action is pending, that the mentally ill or mentally incapacitated spouse has a poor prognosis for recovery from the mental illness or mental incapacity, based upon general knowledge available at the time. A decree granted on the ground of incompatibility by reason of mental illness or mental incapacity of one or both spouses shall not relieve a party from contributing to the support and maintenance of the mentally ill or mentally incapacitated spouse. If both spouses are confined to institutions because of mental illness or mental incapacity, the guardian of either spouse may file a petition for divorce and the court may grant the divorce on the ground of incompatibility by reason of mental illness or mental incapacity.

60-1602. Grounds for annulment.
(a) The district court shall grant a decree of annulment of any marriage for either of the following grounds: (1) The marriage is void for any reason; or (2) the contract of marriage is voidable because it was induced by fraud.
(b) The district court may grant a decree of annulment of any marriage if the contract of marriage was induced by mistake of fact, lack of knowledge of a material fact or any other reason justifying recission of a contract of marriage.

60-1603. Residence.
(a) State. The petitioner or respondent in an action for divorce must have been an actual resident of the state for 60 days immediately preceding the filing of the petition.
(b) Military residence. Any person who has been a resident of or stationed at a United States post or military reservation within the state for 60 days immediately preceding the filing of the petition may file an action for divorce in any county adjacent to the post or reservation.
(c) Residence of spouse. For the purposes of this article, a spouse may have a residence in this state separate and apart from the residence of the other spouse.

60-1604. Petition and summons.

(a) Verification of petition. The truth of the allegations of any petition under this article must be verified by the petitioner in person or by the guardian of an incapacitated person.
(b) Captions. All pleadings shall be captioned, "In the matter of the marriage of _____ and _____." In the caption, the name of the petitioner shall appear first and the name of the respondent shall appear second, but the respective parties shall not be designated as such.
(c) Contents of petition. The grounds for divorce, annulment or separate maintenance shall be alleged as nearly as possible in the general language of the statute, without detailed statement of facts. If there are minor children of the marriage, the petition shall state their names and dates of birth and shall contain, or be accompanied by an affidavit which contains, the information required by K.S.A. 38-1309 and amendments thereto.
(d) Bill of particulars. The opposing party may demand a statement of the facts which shall be furnished in the form of a bill of particulars. The facts stated in the bill of particulars shall be the specific facts upon which the action shall be tried. If interrogatories have been served on or a deposition taken of the party from whom the bill of particulars is demanded, the court in its discretion may refuse to grant the demand for a bill of particulars. A copy of the bill of particulars shall be delivered to the judge. The bill of particulars shall not be filed with the clerk of the court or become a part of the record except on appeal, and then only when the issue to be reviewed relates to the facts stated in the bill of particulars. The bill of particulars shall be destroyed by the district judge unless an appeal is taken, in which case the bill of particulars shall be destroyed upon receipt of the final order from the appellate court.
(e) Service of process. Service of process shall be made in the manner provided in article 3 of this chapter.

60-1605. Answer and cross petition.
The respondent may answer and may also file a counterpetition for divorce, annulment or separate maintenance. If new matter is set up in the answer, it shall be verified by the respondent in person or by the guardian of an incapacitated person. If a counterpetition is filed, it shall be subject to the provisions of subsections (a), (b) and (c) of K.S.A. 60-1604 and amendments thereto. When there are minor children of the marriage, the answer shall contain, or be accompanied by an affidavit which contains, the information required by K.S.A. 38-1309.

60-1606. Granting of degree mandatory; exceptions; denial of relief; orders authorized.
The court shall grant a requested decree of divorce, separate maintenance or annulment unless the granting of the decree is discretionary under this act or unless the court finds that there are no grounds for the requested alteration of marital status. If a decree of divorce, separate maintenance or annulment is denied for lack of grounds, the court shall nevertheless, if application is made by one of the parties, make the orders authorized by subsections (a) and (b) of K.S.A. 60-1610 and amendments thereto.

60-1607. Interlocutory orders.
(a) Permissible orders. After a petition for divorce, annulment or separate maintenance has been

filed, the judge assigned to hear the action may, without requiring bond, make and enforce by attachment, orders which:

(1) Jointly restrain the parties with regard to disposition of the property of the parties and provide for the use, occupancy, management and control of that property;

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

(3) provide for the legal custody and residency of the minor children and the support, if necessary, of either party and of the minor children during the pendency of the action;

(4) make provisions, if necessary, for the expenses of the suit, including reasonable attorney's fees, that will insure to either party efficient preparation for the trial of the case; or

(5) require an investigation by court service officers into any issue arising in the action.

(b) Ex parte orders. Orders authorized by subsections (a)(1), (2) and (3) may be entered after ex parte hearing upon compliance with rules of the supreme court, but no ex parte order shall have the effect of changing the ~~custody~~ residency of a minor child from the parent who has had the sole de facto ~~custody~~ residency of the child to the other parent unless there is sworn testimony to support a showing of extraordinary circumstances. If an interlocutory order is issued ex parte, the court shall hear a motion to vacate or modify the order within 10 days of the date that a party requests a hearing whether to vacate or modify the order. In the absence, disability, or disqualification of the judge assigned to hear the action, any other judge of the district court may make any order authorized by this section, including vacation or modification or any order issued by the judge assigned to hear the action.

(c) Support orders. (1) An order of support obtained pursuant to this section may be enforced by an order of garnishment as provided in this section.

(2) No order of garnishment shall be issued under this section unless: (A) Ten or more days have elapsed since the order of support was served upon the party required to pay the support, and (B) the order of support contained a notice that the order of support may be enforced by garnishment and that the party has a right to request an opportunity for a hearing to contest the issuance of an order of garnishment, if the hearing is requested by motion filed within five days after service of the order of support upon the party. If a hearing is requested, the court shall hold the hearing within five days after the motion requesting the hearing is filed with the court or at a later date agreed to by the parties.

(3) No bond shall be required for the issuance of an order of garnishment pursuant to this section. Except as provided in this section, garnishments authorized by this section shall be subject to the procedures and limitations applicable to other orders of garnishment authorized by law.

(4) A party desiring to have the order of garnishment issued shall file an affidavit with the clerk of the district court stating that:

(A) The order of support contained the notice required by this subsection;

(B) ten or more days have elapsed since the order of support was served upon the party required to pay the support; and

(C) either no hearing was requested on the issuance of an order of garnishment within the five days after service of the order of support upon the party required to pay the same or a hearing was requested and held and the court did not prohibit the issuance of an order of garnishment.

(d) Service of process. Service of process served under subsection (a)(1) and (2) shall be by

personal service and not by certified mail return receipt requested.

60-1608. Time for hearing; pretrial conferences; counseling, when.
(a) Time. An action for divorce shall not be heard until 60 days after the filing of the petition unless the judge enters an order declaring the existence of an emergency, stating the precise nature of the emergency, the substance of the evidence material to the emergency and the names of the witnesses who gave the evidence. A request for an order declaring the existence of an emergency may be contained in a pleading or made by motion. Unless otherwise agreed by the parties, a request for the declaration of an emergency shall not be heard prior to the expiration of the time permitted for the filing of an answer. Unless waived, notice of the hearing requesting the declaration of an emergency shall be given to all parties not in default not less than seven days prior to the date of the hearing. Upon a finding that an emergency exists, the divorce and all issues pertaining thereto may be heard immediately.
(b) Pretrial conferences. The court shall conduct a pretrial conference or conferences in accordance with K.S.A. 60-216, and amendments thereto, upon request of either party or in the court's own motion. Any pretrial conference shall be set on a date other than the date of trial and the parties shall be present or available within the courthouse.
(c) Marriage counseling. After the filing of the answer or other responsive pleading by the respondent, the court, on its own motion or upon motion of either of the parties, may require both parties to the action to seek marriage counseling if marriage counseling services are available within the judicial district of venue of the action. Neither party shall be required to submit to marriage counseling provided by any religious organization of any particular denomination.
(d) Cost of counseling. The cost of any counseling authorized by this section may be assessed as costs in the case.

60-1609. Evidence.
(a) Admissions. Upon the trial of the action, the court may admit proof of the admissions of the parties to be received in evidence, excluding such as shall appear to have been obtained by connivance, fraud, coercion, or other improper means.
(b) Marriage. Testimony admissible to prove a common-law marriage may be received as evidence of the marriage of the parties.
(c) Husband and wife as witness. Either party to the action shall be competent to testify upon all material matters involved in the controversy.
(d) Corroborating testimony. A decree of divorce, separate maintenance or annulment may be granted upon the uncorroborated testimony of either party or both of them.

60-1610. Decree; authorized orders.
A decree in an action under this article may include orders on the following matters:
(a) Minor children. (1) Child support and education. The court shall make provisions for the support and education of the minor children. The court may modify or change any prior order, including any order issued in a title IV-D case, within three years of the date of the original order

or a modification order, when a material change in circumstances is shown, irrespective of the present domicile of the child or the parents. If more than three years has passed since the date of the original order or modification order, a material change in circumstance need not be shown. The court may make a modification of child support retroactive to a date at least one month after the date that the motion to modify was filed with the court. Any increase in support ordered effective prior to the date the court's judgment is filed shall not become a lien on real property pursuant to K.S.A. 60-2202 and amendments thereto. Regardless of the type of custodial or residential arrangement ordered by the court, the court may order the child support and education expenses to be paid by either or both parents for any child less than 18 years of age, at which age the support shall terminate unless: (A) The parent or parents agree, by written agreement approved by the court, to pay support beyond the time the child reaches 18 years of age; (B) the child reaches 18 years of age before completing the child's high school education in which case the support shall not terminate automatically, unless otherwise ordered by the court, until June 30 of the school year during which the child became 18 years of age if the child is still attending high school; or (C) the child is still a bona fide high school student after June 30 of the school year during which the child became 18 years of age, in which case the court, on motion, may order support to continue through the school year during which the child becomes 19 years of age so long as the child is a bona fide high school student and the parents jointly participated or knowingly acquiesced in the decision which delayed the child's completion of high school. The court, in extending support pursuant to subsection (a)(1)(C), may impose such conditions as are appropriate and shall set the child support utilizing the guideline table category for 16-year through 18-year old children. Provision for payment of support and educational expenses of a child after reaching 18 years of age if still attending high school shall apply to any child subject to the jurisdiction of the court, including those whose support was ordered prior to July 1, 1992. If an agreement approved by the court prior to July 1, 1988, provides for termination of support before the date provided by subsection (a)(1)(B), the court may review and modify such agreement, and any order based on such agreement, to extend the date for termination of support to the date provided by subsection (a)(1)(B). If an agreement approved by the court prior to July 1, 1992, provides for termination of support before the date provided by subsection (a)(1)(C), the court may review and modify such agreement, and any order based on such agreement, to extend the date for termination of support to the date provided by subsection (a)(1)(C). For purposes of this section, "bona fide high school student" means a student who is enrolled in full accordance with the policy of the accredited high school in which the student is pursuing a high school diploma or a graduate equivalency diploma (GED). In determining the amount to be paid for child support, the court shall consider all relevant factors, without regard to marital misconduct, including the financial resources and needs of both parents, the financial resources and needs of the child and the physical and emotional condition of the child. Until a child reaches 18 years of age, the court may set apart any portion of property of either the husband or wife, or both, that seems necessary and proper for the support of the child. Every order requiring payment of child support under this section shall require that the support be paid through the clerk of the district court or the court trustee except for good cause shown.

(2) Child custody and residency. (A) Changes in legal custody or residency. Subject to the

provisions of the uniform child custody jurisdiction act (K.S.A. 38-1301 et seq., and amendments thereto), the court may change or modify any prior order of legal custody or residency when a material change of circumstances is shown.

(B) Examination of parties. The court may order physical or mental examinations of the parties if requested pursuant to K.S.A. 60-235 and amendments thereto.

(3) Child custody or residency criteria. The court shall determine legal custody or residency of a child in accordance with the best interests of the child.

(A) If the parties have a written agreement concerning the legal custody or residency of their minor child, it is presumed that the agreement is in the best interests of the child. This presumption may be overcome and the court may make a different order if the court makes specific findings of fact stating why the agreement is not in the best interests of the child.

(B) In determining the issue of legal custody or residency of a child, the court shall consider all relevant factors, including but not limited to:

(i) The length of time that the child has been under the actual care and control of any person other than a parent and the circumstances relating thereto;

(ii) the desires of the child's parents as to legal custody or residency;

(iii) the desires of the child as to the child's legal custody or residency;

(iv) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;

(v) the child's adjustment to the child's home, school and community;

(vi) the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent; and

(vii) evidence of spousal abuse.

Neither parent shall be considered to have a vested interest in the legal custody or residency of any child as against the other parent, regardless of the age of the child, and there shall be no presumption that it is in the best interests of any infant or young child to give legal custody or residency to the mother.

(4) Types of legal custodial arrangements. Subject to the provisions of this article, the court may make any order relating to custodial arrangements which is in the best interests of the child. The order shall ~~include, but not be limited to,~~ provide one of the following legal custody arrangements, in the order of preference:

(A) Joint legal custody. The court may ~~place~~ order the joint legal custody of a child with both ~~parties on a shared or joint-custody basis.~~ In that event, the parties shall have equal rights to make decisions in the best interests of the child ~~under their custody. When a child is placed in the joint custody of the child's parents, the court may further determine that the residency of the child shall be divided either in an equal manner with regard to time of residency or on the basis of a primary residency arrangement for the child. The court, in its discretion, may require the parents to submit a plan for implementation of a joint custody order upon finding that both parents are suitable parents or the parents, acting individually or in concert, may submit a custody implementation~~

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plan to the court prior to issuance of a custody decree. If the court does not order joint custody, it shall include in the record the specific findings of fact upon which the order for custody other than joint custody is based.

(B) Sole legal custody. The court may place order the sole legal custody of a child with one parent, and the other parent shall be the noncustodial parent. of the parties when it finds that it is not in the best interests of the child that both of the parties have equal rights to make decisions pertaining to the child. If the court does not order joint legal custody, it shall include in the record the specific findings of fact upon which the order for sole legal custody is based. The custodial parent shall have the right to make decisions in the best interests of the child, subject to the visitation rights of the noncustodial parent.

(5) Types of residential arrangements.

After making a determination of the legal custodial arrangements, the court shall determine the residency of the child from the following options which arrangement the court must find to be in the best interests of the child. The court, in its discretion, may require the parties to submit a plan for implementation of a residency order or the parties, acting individually or in concert, may submit a residency implementation plan to the court prior to issuance of a residency decree.

(A) Primary residency

The court may order primary residency of a child with one party and with the other party having visitation.

(B) Shared residency

The court may order a shared residency arrangement in which the parties share the residency of a child an equal or nearly equal amount of time and the parties share the direct expenses of the child on an equal or nearly equal basis.

(C) Divided custody residency.

In an exceptional case, the court may divide the custody of two or more children between the parties order a residential arrangement in which one or more children reside with each of the parties and have visitation with the other.

(D) Nonparental custody residency.

If during the proceedings the court determines that there is probable cause to believe that: (i) Tthe child is a child in need of care as defined by subsections (a)(1), (2) or (3) of K.S.A. 38-1502 and amendments thereto; (ii) or that neither parent is fit to have custody residency; or (iii) the child is currently residing with such child's grandparent; grandparents, aunt or uncle and such relative has had actual physical custody of such child for a significant length of time, the court may award temporary custody residency of the child to such relative, another person or agency if the court finds the award of custody

residency to such relative, another person or agency is in the best interests of the child. In making such a ~~custody~~ residency order, the court shall give preference, to the extent that the court finds it is in the best interests of the child, first to awarding such ~~custody~~ residency to a relative of the child by blood, marriage or adoption and second to awarding such ~~custody~~ residency to another person with whom the child has close emotional ties. The court may make temporary orders for care, support, education and visitation that it considers appropriate. Temporary ~~custody~~ residency orders are to be entered in lieu of temporary orders provided for in K.S.A. 38-1542 and 38-1543, and amendments thereto, and shall remain in effect until there is a final determination under the Kansas code for care of children. An award of temporary ~~custody~~ residency under this paragraph shall not terminate parental rights nor give the court the authority to consent to the adoption of the child. When the court enters orders awarding temporary ~~custody~~ residency of the child to an agency or a person other than the parent ~~but not a relative as described in subpart (iii),~~ the court shall refer a transcript of the proceedings to the county or district attorney. The county or district attorney shall file a petition as provided in K.S.A. 38-1531 and amendments thereto and may request termination of parental rights pursuant to K.S.A. 38-1581 and amendments thereto. The costs of the proceedings shall be paid from the general fund of the county. When a final determination is made that the child is not a child in need of care, the county or district attorney shall notify the court in writing and the court, after a hearing, shall enter appropriate ~~custody~~ residency orders pursuant to this section. If the same judge presides over both proceedings, the notice is not required. Any disposition pursuant to the Kansas code for care of children shall be binding and shall supersede any order under this section. ~~When the court enters orders awarding temporary custody of the child to a relative as described in subpart (iii), the court shall annually review the temporary custody to evaluate whether such custody is still in the best interests of the child. If the court finds such custody is in the best interests of the child, such custody shall continue. If the court finds such custody is not in the best interests of the child, the court shall determine the custody pursuant to this section.~~

(b) Financial matters. (1) Division of property. The decree shall divide the real and personal property of the parties, including any retirement and pension plans, whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts, by: (A) a division of the property in kind; (B) awarding the property or part of the property to one of the spouses and requiring the other to pay a just and proper sum; or (C) ordering a sale of the property, under conditions prescribed by the court, and dividing the proceeds of the sale. Upon request, the trial court shall set a valuation date to be used for all assets at trial, which may be the date of separation, filing or trial as the facts and circumstances of the case may dictate. The trial court may consider evidence regarding changes in value of various assets before and after the valuation date in making the division of property. In dividing defined-contribution types of retirement and pension plans, the court shall allocate profits and losses on the nonparticipant's portion until date of distribution to that nonparticipant.

In making the division of property the court shall consider the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and reasonable division of property. The decree shall provide for any changes in beneficiary designation on: (A) Any insurance or annuity policy that is owned by the parties, or in the case of group life insurance policies, under which either of the parties is a covered person; (B) any trust instrument under which one party is the grantor or holds a power of appointment over part or all of the trust assets, that may be exercised in favor of either party; or (C) any transfer on death or payable on death account under which one or both of the parties are owners or beneficiaries. Nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of such policy.

(2) Maintenance. The decree may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances. The decree may make the future payments modifiable or terminable under circumstances prescribed in the decree. The court may make a modification of maintenance retroactive to a date at least one month after the date that the motion to modify was filed with the court. In any event, the court may not award maintenance for a period of time in excess of 121 months. If the original court decree reserves the power of the court to hear subsequent motions for reinstatement of maintenance and such a motion is filed prior to the expiration of the stated period of time for maintenance payments, the court shall have jurisdiction to hear a motion by the recipient of the maintenance to reinstate the maintenance payments. Upon motion and hearing, the court may reinstate the payments in whole or in part for a period of time, conditioned upon any modifying or terminating circumstances prescribed by the court, but the reinstatement shall be limited to a period of time not exceeding 121 months. The recipient may file subsequent motions for reinstatement of maintenance prior to the expiration of subsequent periods of time for maintenance payments to be made, but no single period of reinstatement ordered by the court may exceed 121 months. Maintenance may be in a lump sum, in periodic payments, on a percentage of earnings or on any other basis. At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that has not already become due, but no modification shall be made without the consent of the party liable for the maintenance, if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree. Every order requiring payment of maintenance under this section shall require that the maintenance be paid through the clerk of the district court or the court trustee except for good cause shown.

(3) Separation agreement. If the parties have entered into a separation agreement which the court finds to be valid, just and equitable, the agreement shall be incorporated in the decree. The provisions of the agreement on all matters settled by it shall be confirmed in the decree except that any provisions for the legal custody, residency, support or education of the minor children shall be

subject to the control of the court in accordance with all other provisions of this article. Matters settled by an agreement incorporated in the decree, other than matters pertaining to the legal custody, residency, support or education of the minor children, shall not be subject to subsequent modification by the court except: (A) As prescribed by the agreement or (B) as subsequently consented to by the parties.

(4) Costs and fees. Costs and attorney fees may be awarded to either party as justice and equity require. The court may order that the amount be paid directly to the attorney, who may enforce the order in the attorney's name in the same case.

(c) Miscellaneous matters. (1) Restoration of name. Upon the request of a spouse, the court shall order the restoration of that spouse's maiden or former name.

(2) Effective date as to remarriage. Any marriage contracted by a party, within or outside this state, with any other person before a judgment of divorce becomes final shall be voidable until the decree of divorce becomes final. An agreement which waives the right of appeal from the granting of the divorce and which is incorporated into the decree or signed by the parties and filed in the case shall be effective to shorten the period of time during which the remarriage is voidable.

60-1611. Effect of a decree in another state.

A judgment or decree of divorce rendered in any other state or territory of the United States, in conformity with the laws thereof, shall be given full faith and credit in this state, except that, if the respondent in the action, at the time of the judgment or decree, was a resident of this state and did not personally appear or defend the action in the court of that state or territory and that court did not have jurisdiction over the respondent's person, all matters relating to maintenance, property rights of the parties and support of the minor children of the parties shall be subject to inquiry and determination in any proper action or proceeding brought in the courts of this state within two years after the date of the foreign judgment or decree, to the same extent as though the foreign judgment or decree had not been rendered. Nothing in this section shall authorize a court of this state to enter a custody decree, as defined in K.S.A. 38-1302, contrary to the provisions of the uniform child custody jurisdiction act.

60-1612. Obligation to comply with orders not suspended by other party's failure to comply; nature of certain motions to modify orders.

(a) If a party fails to comply with a provision of a decree, temporary order or injunction issued under K.S.A. 60-1601 et seq., the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended, but the other party may request by motion that the court grant an appropriate order.

(b) Motions to modify visitation, ~~or~~ legal custody, or residency in proceedings where support obligations are enforced under part D of title IV of the federal social security act (42 USC S. 651 et seq.), as amended, shall be considered proceedings in connection with the administration of the title IV-D program for the sole purpose of disclosing information necessary to obtain service of process on the parent with physical custody of the child.

60-1613. Enforcement of support or maintenance order; income withholding; wage assignment.

(a) The provisions of K.S.A. 23-4,107 shall apply to all orders of support issued under K.S.A. 60-1610 and amendments thereto.
(b) Any assignment previously ordered under this section remains binding on the employer, trustee or other payor of the earnings or income. The payor shall withhold from the earnings or trust income payable to the person obligated to support the amount specified in the assignment and shall transmit the payments to the district court trustee or the person specified in the order. The payor may withhold from the earnings or trust income payable to the person obliged to pay support a cost recovery fee of $5 for each payment made or $10 for each month for which payment is made, whichever is less. An employer shall not discharge or otherwise discipline an employee as a result of an assignment previously ordered under this section.

60-1614. Interviews; court; minors.
The court may interview the minor children in chambers to assist the court in determining legal custody, residency and visitation. The court may permit counsel to be present at the interviews. Upon request of any party, the court shall cause a record of the interview to be made as part of the record in the case.

60-1615. Information relating to legal custody and residency of children.
(a) Investigation and report. In contested legal custody or residency proceedings, the court may order an investigation and report concerning custodial or residential arrangements for the child. The investigation and report may be made by court services officers or any consenting person or agency employed by the court for that purpose. The court may use the department of social and rehabilitation services to make the investigation and report if no other source is available for that purpose. The costs for making the investigation and report may be assessed as court costs in the case as provided in article 20 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto.
(b) Consultation. In preparing the report concerning a child, the investigator may consult any person who may have information about the child and the potential custodial or residential arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric or other expert persons who have served the child in the past. If the requirements of subsection (c) are fulfilled, the investigator's report may be received in evidence at the hearing.
(c) Use of report and investigator's testimony. The court shall make the investigator's report available prior to the hearing to counsel or to any party not represented by counsel. Any party to the proceeding may call the investigator and any person whom the investigator has consulted for cross-examination. In consideration of the mental health or best interests of the child, the court may approve a stipulation that the interview records not be divulged to the parties.

60-1616. Visitation orders; enforcement.
(a) Parents. A parent not granted ~~custody or~~ primary residency of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger

seriously the child's physical, mental, moral or emotional health.
(b) Grandparents and stepparents. Grandparents and stepparents may be granted visitation rights.
(c) Modification. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.
(d) Enforcement of rights. An order granting visitation rights to a parent pursuant to this section may be enforced in accordance with K.S.A. 23-701, and amendments thereto.
(e) Repeated denial of rights, effect. Repeated unreasonable denial of or interference with visitation rights granted to a parent pursuant to this section may be considered a material change of circumstances which justifies modification of a prior order of child legal custody or residency.
(f) Repeated child support misuse, effect. Repeated child support misuse may be considered a material change of circumstances which justifies modification of a prior order of child legal custody or residency.
(g) Court ordered exchange or visitation at a child exchange and visitation center. (1) The court may order exchange or visitation to take place at a child exchange and visitation center, as established in K.S.A. 75-720.
(2) A parent may petition the court to modify an order granting visitation rights to require that the exchange or transfer of children for visitation or visitation take place at a child exchange and visitation center, as established in K.S.A. 75-720. The court may modify an order granting visitation rights whenever modification would serve the best interests of the child.

60-1617. Counseling.
(a) Family counseling. Upon motion by any party or on the court's own motion, the court may order at any time prior to or subsequent to the alteration of the parties' marital status that the parties and any of their children be interviewed by a psychiatrist, licensed psychologist or other trained professional in family counseling, approved by the court, for the purpose of determining whether it is in the best interests of any of the parties' children that the parties and any of their children have counseling with regard to matters of legal custody, residency and visitation. The court shall receive the written opinion of the professional, and the court shall make the opinion available to counsel upon request. Counsel may examine as a witness any professional consulted by the court under this section. If the opinion of the professional is that counseling is in the best interests of any of the children, the court may order the parties and any of the children to obtain counseling. Neither party shall be required to obtain counseling pursuant to this section if the party objects thereto because the counseling conflicts with sincerely held religious tenets and practices to which any party is an adherent.
(b) Costs. The costs of the counseling shall be taxed to either party as equity and justice require.

60-1618. Interpretation of terms.
For purposes of interpretation, the terms "alimony" and "maintenance" are synonymous.

60-1620. Change in child's residence; notice; effect.
(a) Except as provided in subsection (d), a parent entitled to the sole legal custody or primary residency of a child pursuant to K.S.A. 60-1610 and amendments thereto shall give written notice

to the other parent not less than 21 days prior to changing the residence of the child to a place outside this state or removing the child from this state for a period of time exceeding 90 days. Such notice shall be sent by restricted mail, return receipt requested, to the last known address of the other parent.

(b) Failure to give notice as required by subsection (a) is an indirect civil contempt punishable as provided by law. In addition, the court may assess, against the parent required to give notice, reasonable attorney fees and any other expenses incurred by the other parent by reason of the failure to give notice.

(c) A change of the residence of a child to another state or removal of a child from this state for a period of time exceeding 90 days may be considered a material change of circumstances which justifies modification of a prior order of child support, ~~or~~ legal custody or residency.

(d) A parent entitled to the sole legal custody or primary residency of a child pursuant to K.S.A. 60-1610 and amendments thereto shall not be required to give the notice required by this section to the other parent when the other parent has been convicted of any crime specified in article 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated in which the child is the victim of such crime.

1999 _____ Bill _____

New Section 1. Motions to modify child custody or residential placement orders.

(a) A party filing a motion to modify a final order pertaining to child custody or residential placement pursuant to K.S.A. 38-1101 *et seq.* or K.S.A. 60-1601 *et seq.*, and amendments thereto, shall include with specificity in the verified motion, or in an accompanying affidavit, all known factual allegations which constitute the basis for the change of custody or residential placement.

If the court finds that the allegations set forth in the motion or the accompanying affidavit fail to establish a *prima facie* case, the court shall deny the motion.

If the court finds that the motion establishes a *prima facie* case, the matter may be tried on the factual issues.

(b) In the event the court is asked to issue an *ex parte* order modifying a final child custody or residential placement order based on alleged emergency circumstances, the court shall:

(1) Attempt to have the nonmoving party's counsel, if any, present before taking up the matter.

(2) Set the matter for review hearing at the earliest possible court setting after issuance of the *ex parte* order, but in no case later than 15 days after issuance.

(3) Require personal service of the order and notice of review hearing on the nonmoving party.

No *ex parte* order modifying a final custody or residential placement order shall be entered without sworn testimony to support a showing of the alleged emergency.

COMMENT

The Family Law Advisory Committee recommends adoption of a statutory provision to address one-sentence motions to modify child custody orders. No factual allegations are contained in such motions, or any accompanying affidavits, which would constitute a material change in circumstances necessary to justify a change in custody.

A motion to change custody is a tremendously significant event to the persons involved. A motion containing only a general allegation of a material change in circumstances gives the respondent little or no idea of the underlying factual issues. The respondent must hire counsel to defend against the allegation at considerable expense. There is no clear procedure for ascertaining the alleged factual basis for such a motion short of the time and expense involved in discovery.

It appeared to the Committee that requiring an early identification of the factual allegations would prevent the filing of some motions of questionable merit and would assist in the earlier spotting of frivolous motions.

The Committee considered provision for requesting a bill of particulars in connection with such motions but rejected this approach on the basis it requires an additional procedural step.

Instead, the Committee recommends adoption of a statutory provision which will promote early identification of the factual issues.

In joint custody situations, the court may order a primary residency arrangement or that residency be divided in an equal manner. The proposed statute applies to motions to modify existing orders pertaining to residential placement.

The proposed statute is not intended to apply to motions to modify visitation. The Committee recommends exempting motions to modify visitation from the requirement of verified factual allegations for the following reasons:

(1) Motions to modify visitation generally involve issues which are less traumatic and stressful than those involved in motions to change custody.

(2) Motions to modify visitation are less expensive to defend and are frequently handled based on arguments of counsel or even on a pro se basis. Expert witnesses are not usually involved.

(3) Motions to modify visitation frequently will not affect child support and will not be brought for financial gain.

(4) Modifications to visitation are generally not handled on an ex parte basis.

(5) Modifications to visitation generally do not involve negative allegations against the custodial parent at least as to the child's environment.

(6) Modifications of visitation frequently become necessary due to passage of time and changes in the child's circumstances. A different standard, the best interests of the child, applies in visitation modifications.

§ 60–208. General Rules of Pleadings

(a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain: (1) A short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which the pleader deems such pleader's self entitled. Every pleading demanding relief for damages in money in excess of ~~$75,000,~~ THE AMOUNT STATED IN 28 U.S.C. §1332 without demanding any specific amount of money, shall set forth only that the amount sought as damages is in excess of ~~$75,000~~ THE AMOUNT STATED IN 28 U.S.C. § 1332, except in actions sounding in contract. Every pleading demanding relief for damages in money in an amount ~~of $75,000 or less~~ EQUAL TO OR LESS THAN THE AMOUNT STATED IN 28 U.S.C. §1332 shall specify the amount of such damages sought to be recovered. Relief in the alternative or of several different types may be demanded.

(g) **Special Damage.** When items of special damage are claimed, their nature shall be specifically stated. In actions where exemplary or punitive damages are recoverable, the amended petition shall not state a dollar amount for damages sought to be recovered but shall state whether the amount of damages sought to be recovered is in excess of or not in excess of ~~$75,000.~~ THE AMOUNT STATED IN 28 U.S.C. §1332.

RULE 118. PLEADING OF UNLIQUIDATED DAMAGES.

(a) In any action in which a pleading contains a demand for money damages "in excess of ~~$50,000~~" THE AMOUNT STATED IN 28 U.S.C. § 1332 as provided in K.S.A. 60–208(a) and amendments thereto, the party against whom relief is sought may serve on the party seeking relief a written request of the actual amount of monetary damages being sought in the action. Within ten (10) days following service of the request, the party seeking relief shall serve his adversary with a written statement of the total amount of monetary damages being sought in the action and at the same time shall cause a copy of the written statement to be filed in the action. The amount recited in the written statement may be amended downward at any time prior to the action being submitted to the trier of facts for determination. The amount recited in the written statement may be amended upward if the judge hearing a motion to amend the amount recited in the written statement is satisfied the reasons recited in the motion justify the amendment.

GENERAL COMMENT

In July 1997, the Kansas Judicial Council directed its Civil Code Advisory Committee to study K.S.A. Chapter 7, Article 1, dealing with the regulation of the practice of law. Many of the provisions of Chapter 7 were enacted during the early years of Kansas' statehood before the promulgation of written ethics codes. However, the Supreme Court now regulates the practice of law by rule and case law. The Model Rules of Professional Conduct, adopted in 1988, set out the general standards of conduct for Kansas attorneys. The Civil Code Advisory Committee's goal was to identify and recommend repeal of any K.S.A. Chapter 7 provision which was in conflict with, or addressed a subject fully covered by, the Model Rules of Professional Conduct or any other Supreme Court Rule. The Committee recommends that the following provisions of K.S.A. Chapter 7 be repealed:

7-104. Attorneys from other states. Any regularly admitted practicing attorney in the courts of record of another state or territory, having professional business in the courts or before any board, department, commission or other administrative tribunal or agency, of this state, may, on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, upon taking the oath as aforesaid and upon it being made to appear by a written showing filed therein, that he or she has associated and personally appearing with him or her in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record of this state, upon whom service may be had in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on such foreign attorney, within this state, and such foreign attorney shall thereupon be and become subject to the order of, and amenable to disciplinary action by the courts, agencies or tribunals of this state. No such court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation of the provisions of this section, but nothing in this section shall be construed to prohibit any party from appearing before any of said courts, tribunals or agencies, in his or her own proper person and on his or her

own behalf.

History: G.S. 1868, ch. 11, § 4; R.S. 1923, § 7-104; L. 1935, ch. 69, § 1; L. 1939, ch. 83, § 1; L. 1947, ch. 94, § 1; L. 1977, ch. 26, § 1; July 1.

Comment

K.S.A. 7-104 is worded similarly to Supreme Court Rule 116, but is in conflict with the Rule as to whether a non-resident Kansas lawyer may practice in a Kansas court without associating a resident Kansas attorney. The Committee recommends repeal of this provision.

7-106. Deceit or collusion; suit without authority. An attorney or counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court or judge, or a party to an action or proceeding, or brings suit or commences proceedings without authority therefor, is liable to be disbarred, and shall forfeit to the injured party treble damages, to be recovered in a civil action.

History: G.S. 1868, ch. 11, § 6; Oct. 31; R.S. 1923, § 7-106.

Comment

K.S.A. 7-106 provides for damages against an attorney who is guilty of deceit, collusion, or bringing a lawsuit without authority. Because K.S.A. 60-211 provides for sanctions against an attorney who brings a suit without a reasonable basis in law and fact, and because current law allows punitive damages for egregious conduct by an attorney, this section is no longer needed. The Committee recommends repeal of this provision.

7-107. Proof of authority. The court may, on motion, for either party, and on the showing of reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove, by oath or otherwise, the authority under which he or she appears, and, until the attorney does so, may stay all proceedings by him or her on behalf of the parties for whom he or she assumes to appear.

History: G.S. 1868, ch. 11, § 7; Oct. 31; R.S. 1923, § 7-107.

Comment

K.S.A. 7-107 has not been cited by the appellate courts since 1940, and it has little current significance. The Committee recommends repeal of this provision.

7-111. Grounds for discipline or disbarment. An attorney-at-law may be disbarred or disciplined by the supreme court, for any of the following causes arising after admission to practice in this state: 1. For willful disobedience of an order of court requiring the attorney to do or forbear an act connected with or in the course of his or her profession. 2. For a willful violation of the attorney's oath, or of any duty imposed upon an attorney-at-law. 3. For neglecting or refusing, on demand, to pay over money in his or her hands, due or belonging to a client, except where such money is retained under a bona fide claim of a lien for services. 4. For destroying, secreting, fraudulently withdrawing, mutilating, or altering any paper or record belonging to the files or records in any action or proceeding.

History: L. 1913, ch. 64, § 2; R.S. 1923, § 7-111; L. 1968, ch. 303, § 2; March 27.

Comment

The Committee recommends repeal of this provision because the grounds for discipline and disbarment are fully covered by the Model Rules of Professional Conduct.

7-121. Legalizing admission June 1 to 15, 1903. Laws 1907, chapter 235, section 1, included by reference. [Legalizes orders made June 1 to 15, 1903, admitting to practice in district and inferior courts the same as if made prior to June 1, 1903.]

History: R.S. 1923, § 7-121.

Comment

The original purpose of K.S.A. 7-121 seems to have been lost in historical obscurity. The Committee recommends repeal of this provision with the notation that the repeal is not intended to create any substantive change, but that the provision has outlived its useful purpose.

Amendment to K.S.A. 22-2809
Proposed by Criminal Law Committee
December 18, 1998

K.S.A. 22-2809. Surrender of obligor by surety. Any person who is released on an appearance bond may be arrested by his surety or any person authorized by such surety and delivered to a custodial officer of the court in any county in the state in which he is charged and brought before any magistrate having power to commit for the crime charged; and at the request of the surety, the magistrate ~~shall~~ may, for good cause, commit the party so arrested and indorse on the bond, or a certified copy thereof, the discharge of such surety; and the person so committed shall be held in custody until released as provided by law.

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REVISED MODEL TRADEMARK BILL

In 1951 Kansas adopted the 1949 Model State Trademark Bill promulgated by the International Trademark Association (INTA). INTA updated the model act in 1992 to address the current needs of commerce and the recent changes in the federal law, the Lanham Act. The result was the Revised Model State Trademark Bill. Provisions patterned after the Federal Trademark Dilution Act of 1995 were added to the model in 1996.

The Revised Act has been adopted by 21 states and has received the recognition of the International Association of Corporate Administrators (IACA) and the National Association of Secretaries of State (NASS).

CHANGES EFFECTED IN KANSAS TRADEMARK LAW BY THE REVISED ACT:

* Trademark/Servicemark definitions expanded to include marks that indicate the source of goods, even if that source is unknown. This means the mark does not have to denote a precise source of origin but can identify an anonymous source by indicating the trademark without reference to the name or location from which the goods came.

* Definitions of "abandoned" and "dilution" added. A trademark is deemed abandoned when it is no longer used. "Dilution" is the lessening of a mark's capacity to identify and distinguish goods and services.

* Definition of "use" is expanded to allow usage on documents if the nature of the goods make placement of the mark on the good impractical.

* A registrant whose mark has been diluted may seek an injunction from district court. The willful intent to trade on the registrant's reputation or to dilute the mark also allows for monetary damages.

* Registration of a mark that would otherwise be unregistrable is allowed if it has become "distinctive." Proof of continuous use in the state for 5 years is evidence of distinctiveness.

* Secretary of State may request information from applicants on federal trademark registration.

* Amendments to the trademark application may be made by the applicant. The applicant may also authorize the Secretary of State to make amendments to the application.

* The applicant may file a writ of mandamus to compel registration if the Secretary of State refuses registration.

* The expiration period is reduced from ten years to five years, allowing the Secretary of State's office to clear its records of abandoned trademarks and opens up marks for use by others.

1-13-99 Senate Judiciary
Attachment 3

* A registrant or applicant may record a name change on the trademark registration or application.

* The Secretary of State may file licenses, security interests or mortgages relating to marks. This gives public notice that a third party has an interest in the mark.

* Grants the district court the power to cancel a mark that has become generic.

* The Secretary of State is appointed to serve as service agent for nonresident registrants.

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REVISED MODEL STATE TRADEMARK BILL

SECTION 1. DEFINITIONS.

(a) The term "trademark" as used herein means any word, name, symbol, or device or any combination thereof used by a person to identify and distinguish the goods of such person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown.

(b) The term "service mark" as used herein means any word, name, symbol, or device or any combination thereof used by a person, to identify and distinguish the services of one person, including a unique service, from the services of others, and to indicate the source of the services, even if that source is unknown. Titles, character names used by a person, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor.

(c) The term "mark" as used herein includes any trademark or service mark entitled to registration under this Act whether registered or not.

(d) The term "trade name" means any name used by a person to identify a business or vocation of such person.

(e) The term "person" and any other word or term used to designate the applicant or other party entitled to a benefit or privilege or rendered liable under the provisions of this Act includes a juristic person as well as a natural person. The term "juristic person" includes a firm, partnership, corporation, union, association, or other organization capable of suing and being sued in a court of law.

(f) The term "applicant" as used herein embraces the person filing an application for registration of a mark under this Act, and the legal representatives, successors, or assigns of such person.

(g) The term "registrant" as used herein embraces the person to whom the registration of a mark under this Act is issued, and the legal representatives, successors, or assigns of such person.

(h) The term "use" means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For the purposes of this Act, a mark shall be deemed to be in use (1) on goods when it is placed in any manner on the goods or other containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and the goods are sold or transported in commerce in this state, and (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in this state.

(i) A mark shall be deemed to be "abandoned" when either of the following occurs: (1) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for two consecutive years shall constitute prima facie evidence of

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abandonment. (2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to lose its significance as a mark.

(j)The term "Secretary" as used herein means the Secretary of State.

k) The term "dilution" as used herein means the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (a) competition between the owner of the famous mark and other parties, or (b) likelihood of confusion, mistake, or deception.

SECTION 2. REGISTRABILITY.

A mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it (a) consists of or comprises immoral, deceptive or scandalous matter; or

(b) consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or

(c) consists of or comprises the flag or coat of arms or other insignia of the United States, or of any state or municipality, or of any foreign nation, or any simulation thereof; or

(d) consists of or comprises the name, signature or portrait identifying a particular living individual, except by the individual's written consent;

(e) consists of a mark which, (1) when used on or in connection with the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them, or (2) when used on or in connection with the goods or services of the applicant is primarily geographically descriptive or deceptively misdescriptive of them, or (3) is primarily merely a surname, provided, however, that nothing in this subsection (e) shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods or services. The Secretary may accept as evidence that the mark has become distinctive, as used on or in connection with the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this state for the five years before the date on which the claim of distinctiveness is made; or

(f) consists of or comprises a mark which so resembles a mark registered in this state or a mark or trade name previously used by another and not abandoned, as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion or mistake or to deceive.

SECTION 3. APPLICATION FOR REGISTRATION.

Subject to the limitations set forth in this Act, any person who uses a mark may file in the office of the Secretary, in a manner complying with the requirements of the Secretary, an application for registration of that mark setting forth, but not limited to, the following information:

(a) the name and business address of the person applying for such registration; and, if a corporation, limited liability company, limited partnership, limited liability partnership or other business entity, the state of organization, or if a partnership, the state in which the partnership is organized and the names of the general partners, as specified by the Secretary,

(b) the goods or services on or in connection with which the mark is used and the mode or manner in which the mark is used on or in connection with such goods or services and the class in which such goods or services fall,

(c) the date when the mark was first used anywhere and the date when it was first used in this state by the applicant or a predecessor in interest, and

(d) a statement that the applicant is the owner of the mark, that the mark is in use, and that, to the knowledge of the person verifying the application, no other person has registered, either federally or in this state, or has the right to use such mark either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods or services of such other person, to cause confusion, or to cause mistake, or to deceive. The Secretary may also require a statement as to whether an application to register the mark, or portions or a composite thereof, has been filed by the applicant or a predecessor in interest in the United States Patent and Trademark Office; and, if so, the applicant shall provide full particulars with respect thereto including the filing date and serial number of each application, the status thereof and, if any application was finally refused registration or has otherwise not resulted in a registration, the reasons therefore.

The Secretary may also require that a drawing of the mark, complying with such requirements as the Secretary may specify, accompany the application.

The application shall be signed and verified (by oath, affirmation or declaration subject to perjury laws) by the applicant or by a member of the firm or an officer of the corporation or association applying.

The application shall be accompanied by three specimens showing the mark as actually used.

The application shall be accompanied by the application fee payable to the Secretary of state.

SECTION 4. FILING OF APPLICATIONS.

(a)Upon the filing of an application for registration and payment of the application fee, the Secretary may cause the application to be examined for conformity with this Act.

(b) The applicant shall provide any additional pertinent information requested by the Secretary including a description of a design mark and may make, or authorize the Secretary to make, such amendments to the application as may be reasonably requested by the Secretary or deemed by applicant to be advisable to respond to any rejection or objection.
(c) The Secretary may require the applicant to disclaim an unregisterable component of a mark otherwise registerable, and an applicant may voluntarily disclaim a component of a mark sought to

be registered. No disclaimer shall prejudice or affect the applicant's or registrant's rights then existing or thereafter arising in the disclaimed matter, or the applicant's or registrant's rights of registration on another application if the disclaimed matter be or shall have become distinctive of the applicant's or registrant's goods or services.

(d) Amendments may be made by the Secretary upon the application submitted by the applicant upon applicant's agreement; or a fresh application may be required to be submitted.

(e) If the applicant is found not to be entitled to registration, the Secretary shall advise the applicant thereof and of the reasons therefor. The applicant shall have a reasonable period of time specified by the Secretary in which to reply or to amend the application, in which event the application shall then be reexamined. This procedure may be repeated until (1) the Secretary finally refuses registration of the mark or (2) the applicant fails to reply or amend within the specified period, whereupon the application shall be deemed to have been abandoned.

(f) If the Secretary finally refuses registration of the mark, the applicant may seek a writ of mandamus to compel such registration. Such writ may be granted, but without costs to the Secretary, on proof that all the statements in the application are true and that the mark is otherwise entitled to registration.

(g) In the instance of applications concurrently being processed by the Secretary seeking registration of the same or confusingly similar marks for the same or related goods or services, the Secretary shall grant priority to the applications in order of filing. If a prior-filed application is granted a registration, the other application or applications shall then be rejected. Any rejected applicant may bring an action for cancellation of the registration upon grounds of prior or superior rights to the mark, in accordance with the provisions of Section 9 of this Act.

SECTION 5. CERTIFICATE OF REGISTRATION.

Upon compliance by the applicant with the requirements of this Act, the Secretary shall cause a certificate of registration to be issued and delivered to the applicant. The certificate of registration shall be issued under the signature of the Secretary and the seal of the state, and it shall show the name and business address of the person claiming ownership of the mark, the date claimed for the first use of the mark anywhere and the date claimed for the first use of the mark in this state, the class of goods or services and a description of the goods or services on or in connection with which the mark is used, a reproduction of the mark, the registration date and the term of the registration.

Any certificate of registration issued by the Secretary under the provisions hereof or a copy thereof duly certified by the Secretary shall be admissible in evidence as competent and sufficient proof of the registration of such mark in any actions or judicial proceedings in any court of this state.

SECTION 6. DURATION AND RENEWAL.

(a) A registration of mark hereunder shall be effective for a term of five years from the date of registration and, upon application filed within six months prior to the expiration of such term, in a

manner complying with the requirements of the Secretary, the registration may be renewed for a like term from the end of the expiring term. A renewal fee, payable to the Secretary, shall accompany the application for renewal of the registration.

(b) A registration may be renewed for successive periods of five years in like manner.

(c) Any registration in force on the date on which this Act shall become effective shall continue in full force and effect for the unexpired term thereof and may be renewed by filing an application for renewal with the Secretary complying with the requirements of the Secretary and paying the aforementioned renewal fee therefor within six months prior to the expiration of the registration.

(d) All applications for renewal under this Act, whether of registrations made under this Act or of registrations effected under any prior act, shall include a verified statement that the mark has been and is still in use and include a specimen showing actual use of the mark on or in connection with the goods or services.

SECTION 7. ASSIGNMENTS, CHANGES OF NAME AND OTHER INSTRUMENTS.

(a) Any mark and its registration hereunder shall be assignable with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark. Assignment shall be by instruments in writing duly executed and may be recorded with the Secretary upon the payment of the recording fee payable to the Secretary who, upon recording of the assignment, shall issue in the name of the assignee a new certificate for the remainder of the term of the registration or of the last renewal thereof. An assignment of any registration under this Act shall be void as against any subsequent purchaser for valuable consideration without notice, unless it is recorded with the Secretary within three months after the date thereof or prior to such subsequent purchase.

(b) Any registrant or applicant effecting a change of the name of the person to whom the mark was issued or for whom an application was filed may record a certificate of change of name of the registrant or applicant with the Secretary upon the payment of the recording fee. The Secretary may issue in the name of the assignee a certificate of registration of an assigned application. The Secretary may issue in the name of the assignee, a new certificate or registration for the remainder of the term of the registration or last renewal thereof.

(c) Other instruments which relate to a mark registered or application pending pursuant to this Act, such as, by way of example, licenses, security interests or mortgages, may be recorded in the discretion of the Secretary, provided that such instrument is in writing and duly executed.

(d) Acknowledgement shall be prima facie evidence of the execution of an assignment or other instrument and, when recorded by the Secretary, the record shall be prima facie evidence of execution.

(e) A photocopy of any instrument referred to in Sections (a), (b), or (c) above shall be accepted for recording if it is certified by any of the parties thereto, or their successors, to be a true and correct copy of the original.

SECTION 8. RECORDS.

The Secretary shall keep for public examination a record of all marks registered or renewed under this Act, as well as a record of all documents recorded pursuant to Section 7.

SECTION 9. CANCELLATION.

The Secretary shall cancel from the register, in whole or in part:

(a) any registration concerning which the Secretary shall receive a voluntary request for cancellation thereof from the registrant or the assignee of record;

(b) all registrations granted under this Act and not renewed in accordance with the provisions hereof;

(c) any registration concerning which a court of competent jurisdiction shall find (1) that the registered mark has been abandoned, (2) that the registrant is not the owner of the mark, (3) that the registration was granted improperly, (4) that the registration was obtained fraudulently, (5) that the mark is or has become the generic name for the goods or services, or a portion thereof, for which it has been registered, (6) that the registered mark is so similar, as to be likely to cause confusion or mistake or to deceive, to a mark registered by another person in the United States Patent and Trademark Office prior to the date of the filing of the application for registration by the registrant hereunder, and not abandoned; provided, however, that, should the registrant prove that the registrant is the owner of a concurrent registration of a mark in the United States Patent and Trademark Office covering an area including this state, the registration hereunder shall not be cancelled for such area of the state, or

(d) when a court of competent jurisdiction shall order cancellation of a registration on any ground.

SECTION 10. CLASSIFICATION.

The Secretary shall by regulation establish a classification of goods and services for convenience of administration of this Act, but not to limit or extend the applicant's or registrant's rights, and a single application for registration of a mark may include any or all goods upon which, or services with which, the mark is actually being used indicating the appropriate class or classes of goods or services. When a single application includes goods or services which fall within multiple classes, the Secretary may require payment of a fee for each class. To the extent practical, the classification of goods and services should conform to the classification adopted by the United States Patent and Trademark Office.

SECTION 11. FRAUDULENT REGISTRATION.

Any person who shall for himself or herself, or on behalf of any other person, procure the filing or registration of any mark in the office of the Secretary under the provisions hereof, by knowingly making any false or fraudulent representation or declaration, orally or in writing, or by any other fraudulent means, shall be liable to pay all damages sustained in consequence of such filing or registration, to be recovered by or on behalf of the party injured thereby in any court of competent jurisdiction.

SECTION 12. INFRINGEMENT.

Subject to the provisions of Section 16 hereof, any person who shall (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a mark registered under this Act in connection with the sale, distribution, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods or services; or (b) reproduce, counterfeit, copy or colorably imitate any such mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale or other distribution in this state of such goods or services; shall be liable in a civil action by the registrant for any and all of the remedies provided in Section 14 hereof, except that under subsection (b) hereof the registrant shall not be entitled to recover profits or damages unless the acts have been committed with the intent to cause confusion or mistake or to deceive.

SECTION 13. INJURY TO BUSINESS REPUTATION; DILUTION.

The owner of a mark which is famous in this state shall be entitled, subject to the principles of equity and upon such terms as the court seems reasonable, to an injunction against another person's commercial use of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this section. In determining whether a mark is distinctive and famous, a court may consider factors such as, but not limited to:

(a) the degree of inherent or acquired distinctiveness of the mark in this state;

(b) the duration and extent of use of the mark in connection with the goods and services with which the mark is used;

(c) the duration and extent of advertising and publicity of the mark in this state;

(d)the geographical extent of the trading area in which the mark is used;

(e) the channels of trade for the goods or services with which the mark is used;

(f) the degree of recognition of the mark in the trading areas and channels of trade in this state used by the mark's owner and the person against whom the injunction is sought;

(g) the nature and extent of use of the same or similar mark by third parties; and

(h) whether the mark is the subject of a state registration in this state, or a federal registration under the Act of March 3, 1881, or under the Act of February 20, 1905, or on the principal register.

In an action brought under this section, the owner of a famous mark shall be entitled only to injunctive relief in this state, unless the person against whom the injunctive relief is sought willfully intended to trade on the owner's reputation or to cause dilution of the famous mark. If such willful intent is proven, the owner shall also be entitled to the remedies set forth in this chapter, subject to the discretion of the court and the principles of equity.

The following shall not be actionable under this section: (a) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark, (b) Noncommercial use of the mark, (c) All forms of news reporting and news commentary.

SECTION 14. REMEDIES.

Any owner of a mark registered under this Act may proceed by suit to enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof and any court of competent jurisdiction may grant injunctions to restrain such manufacture, use, display or sale as the court deems just and reasonable, and may require the defendants to pay to such owner all profits derived from and/or all damages suffered by reason of such wrongful manufacture, use, display or sale; and such court may also order that any such counterfeits or imitations in the possession or under the control of any defendant in such case be delivered to an officer of the court, or to the complainant, to be destroyed. The court, in its discretion, may enter judgment for an amount not to exceed three times such profits and damages and/or reasonable attorneys' fees of the prevailing party in such cases where the court finds the other party committed such wrongful acts with knowledge or in bad faith or otherwise as according to the circumstances of the case.

The enumeration of any right or remedy herein shall not affect a registrant's right to prosecute under any penal law of this state.

SECTION 15. FORUM FOR ACTIONS REGARDING REGISTRATION; SERVICE ON OUT OF STATE REGISTRANTS.

(a) Actions to require cancellation of a mark registered pursuant to this Act or in mandamus to compel registration of a mark pursuant to this Act shall be brought in the district court. In an action in mandamus, the proceeding shall be based solely upon the record before the Secretary. In an action for cancellation, the Secretary shall not be made a party to the proceeding but shall be notified of the filing of the complaint by the clerk of the court in which it is filed and shall be given the right to intervene in the action.

(b) In any action brought against a non-resident registrant, service may be effected upon the Secretary as agent for service in accordance with the procedures established for service upon foreign corporations under K.S.A. 60-304.

SECTION 16. COMMON LAW RIGHTS.

Nothing herein shall adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time at common law.

SECTION 17. FEES.

The Secretary shall by regulation prescribe the fees payable for the various applications and recording fees and for related services. Unless specified by the Secretary, the fees payable herein are not refundable.

SECTION 18. SEVERABILITY.

If any provision hereof, or the application of such provision to any person or circumstance is held invalid, the remainder of this Act shall not be affected thereby.

SECTION 19. TIME OF TAKING EFFECT - REPEAL OF PRIOR ACTS; INTENT OF ACT.

This Act shall take effect and be in force from and after its publication in the statute book but shall not affect any suit, proceeding or appeal then pending. All acts relating to marks and parts of any other acts inconsistent herewith are hereby repealed on the effective date of this Act, provided that as to any application, suit, proceeding or appeal, and for that purpose only, pending at the time this Act takes effect such repeal shall be deemed not to be effective until final determination of said pending application, suit, proceeding or appeal.

The intent of this Act is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the Trademark Act of 1946, as amended. To that end, the construction given the federal Act should be examined as persuasive authority for interpreting and construing this Act.

SJ 1-13 Att 5

State of Kansas
KANSAS SENTENCING COMMISSION

Honorable Richard D. Walker, Chair
District Attorney Paul Morrison, Vice Chair
Barbara S. Tombs, Executive Director

TO: **Senator Tim Emert, Chairperson Of Senate Judiciary Committee**

FROM: **Barbara S. Tombs, Executive Director**

RE: **Bill Introduction**

DATE: **January 13, 1999**

Bill No. _____

The Kansas Sentencing Commission respectfully requests the introduction of a comprehensive bill that reflects the work of the Commission during the interim. The bill focuses on the issue of proportionality as related to the Sentencing Guidelines and recommends corresponding adjustments to the sentencing grids and the Sentencing Guidelines Act.

Jayhawk Tower 700 SW Jackson Street - Suite 501 Topeka, Kansas 66603-3731
(785) 296-0923 Phone (785) 296-0927 FAX Web Page: http://www.ink.org/public/ksc

Senate Judiciary
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attachment 5

SJud 1-13-99

State of Kansas

Office of Judicial Administration

Kansas Judicial Center
301 West 10th
Topeka, Kansas 66612-1507
(785) 296-2256

January 13, 1999

Senator Tim Emert
Room 356-E, Statehouse
Topeka, Kansas 66612

Dear Senator Emert
and members of the Senate Judiciary Committee:

Following is a list of bills respectfully requested for introduction during the 1999 Legislative Session by the Kansas Association of District Judges, the Kansas Association of District Magistrate Judges, the Kansas Association of Court Services Officers, and an individual judge. The Kansas District Judges' Association Executive Board has reviewed and has voted to support all of the bills noted. With the exception of the bill noted as being requested by an individual judge, the bills were proposed and discussed by the legislative committees of the groups noted. All bills were further discussed at a meeting of the legislative chairs of all of the groups noted above. If there are any questions on any of these bills, please do not hesitate to call me.

Kansas Association of District Court Judges:

Imposition of Consecutive Sentences for Crimes Committed While the Offender Is Released on Felony Bond

A bill before the 1998 Legislature, SB 435, would have amended a criminal procedure statute dealing with imposition of consecutive sentences. The bill would have added persons who are released on felony bond to the provisions of current law that provide when a new felony is committed by a person who is already incarcerated for a felony or who is on probation, parole, in community corrections, postrelease supervision, or conditional release, the new sentence shall be served consecutive to the original sentence. Further, judges would have been given the authority to sentence the person to prison even if the sentence for the new crime presumes a nonprison sentence and this new sentence would not be considered a departure from the sentencing guidelines law.

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This bill was introduced by Senators Oleen and Goodwin on behalf of the Kansas Sentencing Commission during the 1998 Legislative Session. As introduced, the bill included only this provision, and the bill passed the Senate 40 to 0. Other provisions were added on the House floor, where the bill passed 123 to 0. The bill died in conference committee.

During their discussions of this bill, the KDJA Executive Board voted to introduce a bill making it permissive, rather than mandatory, to impose consecutive sentences when persons released on felony bond commit a new felony. I contacted Sentencing Commission staff to allow them to discuss this proposal with the Commission. At its December 29, 1998, meeting, the Kansas Sentencing Commission voted to support the permissive version of the bill as proposed by the KDJA Executive Board.

Expanding the Jurisdiction of District Magistrate Judges to Grant Orders Authorized by the Protection from Abuse Act

K.S.A. 1997 Supp. 20-302b provides that district magistrate judges do not have jurisdiction or cognizance over actions pursuant to the protection from abuse act, but that, "in the absence, disability or disqualification of a district judge," they may grant any order authorized by the Protection from Abuse Act. The proposed bill would amend current law to allow district magistrate judges to have jurisdiction in this area.

The KDJA Executive Board recommended that this be linked to K.S.A. 20-329, which provides that the administrative judge shall have general control over the assignment of cases within a district. The District Magistrate Judges Association Legislative Committee supports the bill.

Kansas Association of District Magistrate Judges:

Expanding the Jurisdiction of District Magistrate Judges to Include Conducting Arraignments in Felony Cases

The Kansas Association of District Magistrate Judges respectfully requests the introduction of a bill expanding the jurisdiction of district magistrate judges to allow district magistrate judges to hear arraignments in felony cases.

The draft report of the Organization of Courts Subcommittee to the Kansas Citizens Justice Initiative notes that, while district magistrate judges are authorized to conduct preliminary hearings in felony cases, they are not authorized to arraign felony defendants. Although arraignment customarily follows immediately after the preliminary hearing, delay may result if a district judge is not available. The report further notes that the resulting delay and scheduling problems are exacerbated in multi-county districts where only one or two district judges sit.

The proposed bill would allow district magistrate judges to take both not guilty and guilty pleas. The KDJA Executive Board recommended that this be linked to K.S.A. 20-329, which provides that the administrative judge shall have general control over the assignment of cases within a district. The District Magistrate Judges Association Legislative Committee supports the bill.

Kansas Association of Court Services Officers:

The Kansas Association of Court Services Officers respectfully requests the introduction of a bill providing that a court services officer may arrest a juvenile offender without a warrant or may deputize any other officer with the power of arrest to do so by giving the officer a written statement setting forth that the juvenile has, in the judgment of the court services officer, violated the conditions of the juvenile's release. The written statement delivered with the juvenile to the official in charge of a juvenile detention facility or other place of detention would be a sufficient warrant for detention of the juvenile.

This amendment is patterned after a similar provision in criminal law, and is intended to provide court services officers the same option for arresting juveniles that they have with adults under the specified circumstances. The requested bill would also add an arrest by a court services officer pursuant to this provision to the list of criteria specified in K.S.A. 1998 Supp. 38-1640 for determining whether to place a juvenile in a juvenile detention facility. K.S.A. 1998 Supp. 38-1624(c) specifies that a juvenile may not be placed in a juvenile detention facility unless the juvenile meets one or more of the specified criteria, and that a law enforcement officer must first consider whether taking the juvenile to an available nonsecure facility is more appropriate.

Court, Education, Juvenile Justice Authority, and Department of Social and Rehabilitation Services Liaison Committee:

Change of Venue for Sentencing Purposes in Juvenile Offender Cases

On behalf of the Court, Education, Juvenile Justice Authority, and Department of Social and Rehabilitation Services Liaison Committee, a district judge member of that committee respectfully requests the introduction of a bill regarding transfer of venue for sentencing purposes in juvenile offender cases. When the sentencing hearing is to be held in a county other than the county where the offense was committed, current law requires the trial judge to transmit the record of the trial and recommendations as to sentencing to the court where the sentencing hearing is to be held. The requested amendment would require that, upon adjudication, the judge is to contact the judge of the sentencing court to advise the judge of the transfer. The court adjudicating the juvenile is to send by facsimile to the sentencing court the complaint, the adjudication journal entry or judges' minutes, if available, and any recommendations as to sentencing. These documents are to be for purposes of notification. A complete copy of the official file in the case is to be mailed to the sentencing court within five working days.

The stated purpose of the bill is to facilitate the handling of juvenile matters in multiple jurisdictions and to make the notification procedures similar to those found in child in need of care cases.

Sincerely,

Kathy Porter

Kathy Porter
Exec. Assistant to Judicial Administrator

KP:nrt

SJ 1-13-99
att.

January 11, 1999

KANSAS BAR ASSOCIATION

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P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (785) 234-5696
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ronsmith@ksbar.org
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Voice Mail Ex. 330

Hon. Tim Emert
Chair, Senate Judiciary Committee
Statehouse
Topeka Kansas 66612

Dear Tim,

Enclosed are requests for bill introductions by the Kansas Bar Association for the 1999 session. Several are a reintroduction of previous bills and others are new.

Once they are introduced formally, I would be glad to work out an arrangement for hearings.

Best Regards,

Ron Smith
General Counsel

cc Rep. O'Neal
Members, Senate Judiciary Committee.
enc/

Senate Judiciary
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KBA Legislation Requests

1. **More cleanup, dual filing requirements**. The 1998 legislature enacted a law that ended dual filing requirements of corporate documents with the Secretary of State and the Register of Deeds of the host county. Further examination of the statutes indicates other statutes which should be changed in that manner for conformity to this 1998 public policy change. We believe duplicate filing requirements should be repealed and one central filing of corporate and other entity documents be all that is statutorily required. The logical central filing agency is the Secretary of State's office. A bill is not attached, but we would like to reserve a slot for this bill and we will get a version to the revisor's office as quickly as possible. This is cleanup legislation.
2. **Notary signatures of out-of-state notaries**. KSA 59-606 requires a notary public's signature for self-proving wills by a notary who is authorized to take acknowledgments "under the laws of this state." Advances in medical science means that Kansas residents may spend their last days in a medical facility in another state but yet desire to make valid wills or codicils to dispose of their Kansas property. While Kansas notaries can witness documents in Kansas, the statutes do not allow witnessing of self-proving wills by notaries from other states. An out-of-state notary's signature would invalidate a Kansas self-proving will. Such technical hair-splitting based on where the Kansan spends their last days is not desirable if it leads to thwarting the valid and coherent desires of a dying citizen. *It is our understanding that the Judicial Council may have a similar bill in their "list," and we would defer to their list. However, if not, we would like a bill draft.* The proposed bill is attached.

3. **A reintroduction of 1997 SB 95**, which changes the distribution of child placement investigator reports.

4. We would like to reserve a slot for a bill that includes **Roth IRAs** as exempt property under our current exemptions from attachment or garnishment statutes.

NORMAN J. FURSE, ATTORNEY
REVISOR OF STATUTES

JAMES A. WILSON III, ATTORNEY
FIRST ASSISTANT REVISOR

ASSISTANT REVISORS
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LEGAL CONSULTATION—LEGISLATIVE COMMITTEES AND LEGISLATORS
LEGISLATIVE BILL DRAFTING
SECRETARY—LEGISLATIVE COORDINATING COUNCIL
SECRETARY—KANSAS COMMISSION ON INTERSTATE COOPERATION
KANSAS STATUTES ANNOTATED EDITING AND PUBLICATION
LEGISLATIVE INFORMATION SYSTEM

COMPUTER INFORMATION STAFF
MARY O. CHENG, M.S
RICHARD M. CHAMPNEY, B.S

August 14, 1998

Senator Tim Emert
PO Box 747
Independence, KS 67301-1539

Dear Tim:

Enclosed with this letter is a copy of the amendment to K.S.A. 22a-231 which you requested. I have also included copies of K.S.A. 22a-230, 22a-232 and 22a-233 all of which contain the language "cause of death" with reference to district coroners. I am not recommending that these statutes be changed because of the language change in 22a-231, but you should review them from the viewpoint of the change in 22a-231 to make sure this does not create a practical problem with the application of these other statutes.

If you are interested in prefiling this legislation, during this year senators may prefile after the general election.

Please let me know if you have any questions on the draft bill or would like to make any changes or additions.

Sincerely,

Norm

Norman J. Furse
Revisor of Statutes

NJF:kll

Enclosures

S. Judiciary
1-13-99
Attachment 8

SENATE BILL NO. ____

By Senator Emert

AN ACT concerning district coroners; amending K.S.A. 22a-231 and repealing the existing section.

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

Section 1. K.S.A. 22a-231 is hereby amended to read as follows: 22a-231. When any person dies, or human body is found dead in the state, and the death is suspected to have been the result of violence, caused by unlawful means or by suicide, or by casualty, or suddenly when the decedent was in apparent health, or when decedent was not regularly attended by a licensed physician, or in any suspicious or unusual manner, or when in police custody, or when in a jail or correctional institution, or in any circumstances specified under K.S.A. 22a-242, and amendments thereto, or when the determination of the cause of a death is held to be in the public interest, the coroner or deputy coroner of the county in which the ~~cause of~~ death occurred, if known, or if not known, the coroner or deputy coroner of the county in which such dead body was found, shall be notified by the physician in attendance, by any law enforcement officer, by the embalmer, by any person who is or may in the future be required to notify the coroner or by any other person.

Sec. 2. K.S.A. 22a-231 is hereby repealed.

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

22a-230

22a-230. Same; inquest, when; jury; oath; subpoenas; arrest. (a) The coroner may hold an inquest upon the dead bodies of such persons whose deaths appear to have been caused by unlawful means when the circumstances relating to such deaths are unknown. The inquest shall be held in accordance with the provisions of this section. Except as provided in subsection (b), upon being notified of any such death occurring within the district, if an inquest is to be held, the coroner shall summon a jury of six residents of the county in which the death occurred, at a time and place named, for the purpose of inquiring into the cause of death. In any other case in which this act requires that the coroner be notified, the coroner may also summon six citizens of the county to appear at a time and place named.

(b) When the coroner has been notified of any death as provided in subsection (a), and the cause of such death occurred in a county other than the county in which the death occurred, the coroner of the county in which the cause of death occurred shall take the responsibility of summoning a jury as provided in subsection (a) for the purpose of inquiring into the death, if requested to do so by the coroner of the county in which the death occurred.

(c) If any juror fails to appear, the coroner shall summon the proper number from bystanders immediately, and proceed to impanel them and administer the following oath, in substance: "You do solemnly swear (or affirm) that you will diligently inquire and true presentment make, when, how and by what means the person whose body lies here dead came to death, according to your knowledge, and evidence given you. So help you God."

(d) The coroner may issue subpoenas within the judicial district for witnesses, returnable forthwith, or at such time and place as the coroner shall therein direct. Witnesses shall be allowed the fees provided in K.S.A. 28-125 and amendments thereto. In cases of disobedience of the coroner's subpoena, it shall be the duty of the judge of the district court, on application of the coroner, to compel obedience to the coroner's subpoena by indirect proceedings for contempt as in cases of disobedience of a subpoena issued from the district court.

(e) An oath shall be administered to the witness, in substance as follows: "You do solemnly swear (or affirm) that the testimony which you shall give to this inquest, concerning the death of the person here lying dead, shall be the truth, the whole truth, and nothing but the truth. So help you God."

(f) The testimony shall be reduced to writing, under the coroner's order, and subscribed by the witness.

22a-232

22a-232. Notice of death; duties of coroner. (a) Upon receipt of notice pursuant to K.S.A. 22a-231, and amendments thereto, the coroner shall take charge of the dead body, make inquiries regarding the cause of death and reduce the findings to a report in writing. Such report shall be filed with the clerk of the district court of the county in which the cause of death occurred if known, or if not known the report shall be filed with the clerk of the district court of the county in which the death occurred. If the coroner determines that the dead body is not a body described by K.S.A. 22a-231, and amendments thereto, the coroner shall immediately notify the state historical society.

(b) If in the opinion of the coroner information is present in the coroner's report that might jeopardize a criminal investigation, the coroner shall file the report with the clerk of the district court of such county and designate such report as a criminal investigation record, pursuant to subsection (a)(10) of K.S.A. 45-221, and amendments thereto.

History: L. 1963, ch. 166, § 8; L. 1976, ch. 124, § 4; L. 1989, ch. 234, § 15; L. 1993, ch. 214, § 7; July 1.

8-14

22a-233

22a-233. Autopsy, when; fees and travel allowances; specimens; record and report to coroner and clerk of the district court; exhumation and autopsy. (a) If, in the opinion of the coroner, an autopsy should be performed, or if an autopsy is requested in writing by the county or district attorney or if the autopsy is required under K.S.A. 22a-242, and amendments thereto, such autopsy shall be performed by a qualified pathologist as may be designated by the coroner. A pathologist performing an autopsy, at the request of a coroner, shall be paid a usual and reasonable fee to be allowed by the board of county commissioners and shall be allowed and paid the travel allowance prescribed for coroners and deputy coroners in accordance with the provisions of K.S.A. 22a-228, and amendments thereto, the same to be paid by the board of county commissioners of the county in which the cause of death occurred except that autopsies performed under K.S.A. 22a-242, and amendments thereto, shall be paid for in accordance with K.S.A. 22a-242, and amendments thereto.

(b) The pathologist performing the autopsy shall remove and retain, for a period of three years, such specimens as appear to be necessary in the determination of the cause of death.

(c) A full record and report of the facts developed by the autopsy and findings of the pathologist performing such autopsy shall be promptly made and filed with the coroner and with the clerk of the district court of the county in which decedent died. If, in any case in which this act requires that the coroner be notified, the body is buried without the permission of the coroner, it shall be the duty of the coroner, upon being advised of such fact, to notify the county or district attorney, who shall communicate the same to a district judge, and such judge may order that the body be exhumed and an autopsy performed.

History: L. 1963, ch. 166, § 9; L. 1965, ch. 164, § 13; L. 1967, ch. 135, § 1; L. 1975, ch. 158, § 2; L. 1976, ch. 124, § 2; L. 1977, ch. 109, § 13; L. 1978, ch. 91, § 1; L. 1988, ch. 103, § 3; L. 1991, ch. 95, § 1; L. 1992, ch. 312, § 36; L. 1993, ch. 214, § 8; July 1.

8-48-5

(g) The jurors, having inspected the body, if available, heard the testimony, and made all needful inquiries, shall return to the coroner their inquisition in writing, under their hands, in substance as follows, and stating the matter in the following form suggested, as far as found: State of Kansas, _____ County. An inquisition held at _____, in _____ county, on the _____ day of _____, A.D., 19__, before me, _____ coroner of such county, on the body of _____ (or, a person unknown), there lying dead; by the jurors whose names are hereunto subscribed. The jurors, upon their oaths, do say (here state when, how, by what person, means, weapon or accident the person died, and whether feloniously). In testimony whereof, the jurors have hereunto subscribe, the day and year aforesaid. Which shall be attested by the coroner.

(h) If the inquisition finds a crime has been committed on the deceased, and name the person the jury believes has committed the crime, the inquest shall not be made public until after the arrest directed in the next subsection.

(i) If the person charged is present, the coroner may order the person arrested by an officer or any other person, and shall then make a warrant requiring the officer or other person to take the arrested person before a judge of a court of competent jurisdiction.

(j) If the person charged is not present, the coroner may issue a warrant to the sheriff of the county, directing the sheriff to arrest the person and take the arrested person before a judge of a court of competent jurisdiction.

(k) The warrant of a coroner in the above case shall be of equal authority with that of a judge of a court of competent jurisdiction. When the person charged is brought before the court, the person charged shall be dealt with as a person held under a complaint in the usual form.

(l) The warrant of the coroner shall recite substantially the transaction before the coroner, and the verdict of the jury of inquest leading to the arrest. The warrant shall be a sufficient foundation for the proceeding of the court instead of a complaint.

(m) The coroner shall then return to the clerk of the district court the inquisition, the written evidence and a list of the witnesses who testified to material matters.

(n) The district coroner shall receive such compensation, in addition to other compensation provided by law for the coroner, for holding an inquest as specified by the county commissioners of a single-county judicial district or the county commissioners of the county with the largest population in multiple-county judicial districts.

History: L. 1963, ch. 166, § 6; L. 1969, ch. 143, § 4; L. 1976, ch. 124, § 1; L. 1993, ch. 214, § 5; July 1.

proposed legislation

SJ 1-13-99 att #9

History: L. 1991, ch. 162, § 3; L. 1992, ch. 159, § 1; L. 1992, ch. 282, § 18; L. 1995, ch. 252, § 25; Jan. 1, 1996.

Law Review and Bar Journal References:

"Survey of Kansas Law: Taxation," Sandra Craig McKenzie, 61 K.L.R. 727, 734 (1993).

Attorney General's Opinions:

Real estate appraisers and assessment of property; real estate sales questionnaire; what constitutes an agent. 91-105.

Open public records; real estate sales validation questionnaires; certified or licensed appraisers. 92-38.

Authority of register of deeds to reference exemption on face of deed. 92-122.

Public records; application of open records act; effect of review of record in executive session. 95-119.

79-1437d. Same; devised by director of property valuation; approval by legislature; information to be contained therein. The real estate sales questionnaire shall be devised by the director of property valuation, and the director shall furnish copies thereof to the register of deeds. Upon proposing modifications or changes in the real estate sales validation questionnaire devised and used prior to 1992 or any validation questionnaire approved by the legislature in 1992 or thereafter, the director of property valuation shall submit such proposal to the legislature. Upon the failure of the legislature to enact legislation modifying the director's proposal within 60 days of submission thereof, such proposal shall be deemed to be approved, and the director's modified questionnaire may be utilized at anytime thereafter. The questionnaire shall be devised to obtain information regarding the identification and location of the property, name and address of the purchaser, sales price, date of sale, the classification and subclassification to which such property belongs, nature and circumstances peculiar to the sale, whether any personal property was included in the sales price, whether the purchaser assumed any mortgages or liens, loans, leases or taxes, the method of financing, whether any special assessments are levied against the property and such other information as the director of property valuation shall require. No information shall be requested in such questionnaire which would require the disclosure of the interest rate paid by the purchaser or the specific term of any mortgage.

History: L. 1991, ch. 162, § 4; July 1.

Attorney General's Opinions:

Real estate appraisers and assessment of property; real estate sales questionnaire; what constitutes an agent. 91-105.

79-1437e. Same; inapplicability to certain transfers of title. (a) The real estate sales validation questionnaire required by this act shall not apply to transfers of title:

(1) Recorded prior to the effective date of this act;

(2) made solely for the purpose of securing or releasing security for a debt or other obligation;

(3) made for the purpose of confirming, correcting, modifying or supplementing a deed previously recorded, and without additional consideration;

(4) by way of gift, donation or contribution stated in the deed or other instrument;

(5) to cemetery lots;

(6) by leases and transfers of severed mineral interests;

(7) to a trust, and without consideration;

(8) resulting from a divorce settlement where one party transfers interest in property to the other;

(9) made solely for the purpose of creating a joint tenancy or tenancy in common;

(10) by way of a sheriff's deed;

(11) by way of a deed which has been in escrow for longer than five years;

(12) by way of a quit claim deed filed for the purpose of clearing title encumbrances;

(13) when title is transferred to convey right-of-way or pursuant to eminent domain;

(14) made by a guardian, executor, administrator, conservator or trustee of an estate ~~pursuant to judicial order;~~ or

(15) when title is transferred due to repossession.

(b) When a real estate sales validation questionnaire is not required due to one or more of the exemptions provided in subsection (a), the exemption shall be clearly stated on the document being filed.

History: L. 1991, ch. 162, § 5; L. 1992, ch. 159, § 2; L. 1994, ch. 275, § 12; July 1.

Attorney General's Opinions:

Authority of register of deeds to reference exemption on face of deed. 92-122.

79-1437f. Same; disposition and use of contents thereof, to and by whom. The contents of the real estate sales validation questionnaire shall be made available only to the following people for the purposes listed hereafter:

(a) County officials for cooperating with and assisting the director of property valuation in de-

Senate Judiciary
1-13-99
attachment 9

Jim

This is the statute which provides exemptions from the requirement of filing a real estate transfer questionnaire - it doesn't seem to cover the case you described - probably will need to amend this statute to so provide.

Dan

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Please Reply to Topeka Office

December 16, 1998

Senator Tim Emert, Chair
Senate Judiciary Committee
Statehouse
Topeka KS 66612

Re: Uniform Commercial Code--Proposed Amendment to Article 9

Dear Tim:

Raytheon Aircraft Company, is requesting legislation to amend K.S.A. 84-9-102, dealing with the scope and subject matter of article 9 (secured transactions). The amendment would add:

> This article does not prevent the transfer of ownership of accounts or chattel paper. The determination of whether a particular transfer of accounts or chattel paper constitutes a sale or transfer for security purposes is not governed by this article. This is a declaration of the meaning of the Uniform Commercial Code as originally adopted.

This language is taken from the official UCC commentary immediately following this section. Oklahoma recently added this to their statute. The last sentence is to make clear that this is intended to clarify, but not to change, existing law.

Raytheon Aircraft Credit Corporation, a Kansas corporation needs to be able to sell its accounts receivables. An impediment to the company transacting business in Kansas exists because of a Tenth Circuit Court of Appeals Case Octagon Gas Systems, 995 F. 2d 948 (10th Cir. 1993) which held that receivables sold by a debtor prior to bankruptcy remain property of the debtor's bankruptcy estate even though the sale was outright and without recourse. In fact, Article 9 of the UCC requires the buyer of receivables to file a financing statement, but in no way prohibits outright sales of receivables. The Octagon Gas decision is inconsistent with the law in other Circuits and has never been followed. It misconstrues the UCC and has been uniformly criticized by all commentators including Barkley Clark, who notes in his Law of Secured Transactions:

> The most worrisome aspect of the Tenth Circuit decision is its obliteration of the distinction between a true sale transaction and a secured loan transaction where accounts receivable are involved. The decision severely undermines the conceptual basis for a number of widely used financing structures intended to mitigate the legal risks associated with the bankruptcy of a debtor/seller of receivables. Statements warning people of the decision are beginning to appear in "true sale" opinions in structured receivables financings.

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That is exactly what has happened to Raytheon. Without a change, the Tenth Circuit (of which Kansas is a part) might interpret Kansas law the same way they did Oklahoma law. As the law stands now, a Kansas company faces unnecessary barriers in the factoring or securitization of its receivables because there is a risk that the debtor's trustee in bankruptcy could reclaim the receivables. In order to eliminate this barrier to standard financing transactions in Kansas, we urge your enactment of the proposed legislation this session.

Please contact me with any questions.

Best personal regards,

John C. Peterson
JCP:dk

84-9-102. Policy and subject matter of article. (1) Except as otherwise provided in section 84-9-104 on excluded transactions, this article applies

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also

(b) to any sale of accounts or chattel paper.

(2) This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in section 84-9-310.

(3) The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

History: L. 1965, ch. 564, § 348; L. 1975, ch. 514, § 5; Jan. 1, 1976.

(4) This article does not prevent the transfer of ownership of accounts or chattel paper. The determination of whether a particular transfer of accounts or chattel paper constitutes a sale or transfer for security purposes is not governed by this article. This is a declaration of the meaning of the Uniform Commercial Code as originally adopted.

OFFICIAL UCC COMMENT

Prior Uniform Statutory Provision:

None.

Purposes:

The main purpose of this Section is to bring all consensual security interests in personal property and fixtures under this Article, except for certain types of transactions excluded by Section 9-104. In addition certain sales of accounts and chattel paper are brought within this Article to avoid difficult problems of distinguishing between transactions intended for security and those not so intended. As to security interests in fixtures created under the law applicable to real estate, see Section 9-313(1).

1. Except for sales of accounts and chattel paper, the principal test whether a transaction comes under this Article is: is the transaction intended to have effect as security? For example, Section 9-104 excludes certain transactions where the security interest (such as an artisan's lien) arises under statute or common law by reason of status and not by consent of the parties. Transactions in the form of consignments or leases are subject to this Article if the understanding of the parties or the effect of the arrangement shows that a security interest was intended. (As to consignments the provisions of Sections 2-326, 9-114 and 9-408 should be consulted.) When it is found that a security interest as defined in Section 1-201(37) was intended, this Article applies regardless of the form of the transaction or the name by which the parties may have christened it. The list of traditional security devices in subsection (2) is illustrative only; other old devices, as well as any new ones which the ingenuity of lawyers may invent, are included, so long as the requisite intent is found. The controlling definition is that contained in subsection (1).

The Article does not in terms abolish existing security devices. The conditional sale or bailment-lease, for example, is not prohibited; but even though it is used, the rules of this Article govern.

2. If an obligation is to repay money lent and is not part of chattel paper, it is either an instrument or a general intangible. A sale of an instrument or general intangible is not within this Article, but a transfer intended to have effect as security for an obligation of the transferor is covered by subsection 1(a). In either case the nature of the transaction is not affected by the fact that collateral is transferred with the instrument or general intangible. Such a transfer is treated as a transfer by operation of law, whether or not it is articulated in the agreement.

An assignment of accounts or chattel paper as security for an obligation is covered by subsection (1)(a). Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by subsection (1)(b) whether intended for security or not, unless excluded by Section 9-104. The buyer then is treated as a secured party, and his interest as a security interest. See Sections 9-105(1)(m), 1-201(37). Certain sales which have nothing to do with commercial financing transactions are excluded by Section 9-104(f); compare Spurlin v. Sloan, 368 S.W.2d 314 (Ky.1963). See also Section 9-302(1)(e), exempting from filing casual or isolated assignments, and Section 9-302(2), preserving the perfected status of a security interest against the original debtor when a secured party assigns his interest.

Neither Section 9-102 nor any other provision of Article 9 is intended to prevent the transfer of ownership of accounts or chattel paper. The determination of whether a particular transfer of accounts or chattel paper constitutes a sale or a transfer for security purposes (such as in connection with a loan) is not governed by Article 9. Article 9 applies both to sales of accounts or chattel paper and loans secured by accounts or chattel paper primarily to incorporate Article 9's perfection rules. The use of terminology such as "security interest" to include the interest of a buyer of accounts or chattel paper, "secured party" to include a buyer of accounts or chattel paper, "debtor" to include a seller of accounts or chattel paper, and "collateral" to include accounts or chattel paper that have been sold is intended solely as a drafting technique to achieve this end and is not relevant to the sale or secured transaction determination. See PEB Commentary No. 14, dated June 10, 1994 [Appendix V, infra].

3. In general, problems of choice of law in this Article as to the validity of security agreements are governed by Section 1-105. Problems of choice of law as to perfection of security interests and the effect of perfection or non-perfection thereof, including rules requiring reperfection, are governed by Section 9-103.

4. An illustration of subsection (3) is as follows:

The owner of Blackacre borrows $10,000 from his neighbor, and secures his note by a mortgage on Blackacre. This Article is not applicable to the creation of the real estate mortgage. Nor is it applicable to a sale of the note by the mortgagee, even though the mortgage continues to secure the note. However, when the mortgagee pledges the note to secure his own obligation to X, this Article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage. This Article leaves to other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or non-recording of an assignment of the mortgagee's interest. See Section 9-104(j). But under Section 3-304(5) recording of the assignment does not of itself prevent X from holding the note in due course.

5. While most sections of this Article apply to a security interest without regard to the nature of the collateral or its use, some sections state special rules with reference to particular types of collateral. An index of sections where such special rules are stated follows:

ACCOUNTS

Section	
9-102(1)(b)	Sale of accounts subject to Article
9-103(1)	When Article applies; conflict of laws rules
9-104(f)	Certain sales of accounts excluded from Article
9-106	Definitions
9-205	Permissible for debtor to make collections
9-206(1)	Agreement not to assert defenses against assignee
9-301(1)(d)	Unperfected security interest subordinate to certain transferees
9-302(1)(e)	What assignments need not be filed
9-306(5)	Rule when goods whose sale gave rise to an account return to seller's possession
9-318(1)	Rights of assignee subject to defenses
9-318(2)	Modification of contract after assignment of contract right
9-318(3)	When account debtor may pay assignor
9-318(4)	Term prohibiting assignment ineffective
9-401	Place of filing
9-502	Collection rights of secured party
9-504(2)	Rights on default where under was sale of accounts or cc

CHATTEL PAPER

9-102(1)(b)	Sale subject to Article
9-104(f)	Certain sales excluded from A
9-105(1)(b)	Definition
9-205	Permissible for debtor to ma
9-206(1)	Agreement not to assert de signee
9-207(1)	Duty of secured party in poss rights against prior parties
9-301(1)(c)	Unperfected security intere certain transferees
9-304(1)	Perfection by filing
9-305	When possession by secured curity interest
9-306(5)	Rule when goods whose sale paper return to seller's po
9-308	When purchasers of chattel p over security interest
9-318(1)	Rights of assignee subject to
9-318(3)	When account debtor may pa
9-502	Collection rights of secured p
9-504(2)	Rights on default where unde was sale

DOCUMENTS AND INSTRUM

9-105(1)(e)	Definition of document (and
9-105(1)(g)	Definition of instrument
9-206(1)	Rule where buyer of goods a ble instrument and securit
9-207(1)	Duty of secured party in pos ment to preserve rights ag
9-301(1)(c)	Unperfected security intere certain transferees
9-302(1)(b) and (f)	What interests need not be fi
9-304(1)	How security interest can be p
9-304(2, 3)	Perfection of security interest session of issuer of negoti of other bailee
9-304(4, 5)	Perfection of security interest negotiable documents w transfer of possession
9-305	When possession by secured p curity interest
9-308	When purchasers of instrume over security interest
9-309	When purchasers of negotiabl negotiable documents have curity interest
9-501(1)	Rights on default when collate
9-502	Collection rights of secured pa

GENERAL INTANGIBLES

9-103(2)	When Article applies; conflict
9-105	Obligor is "account debtor"
9-106	Definition
9-301(1)(d)	Unperfected security interest certain transferees
9-318(1)	Rights of assignee subject to d
9-318(3)	When account debtor may pay
9-502	Collection rights of secured pa

10-4

THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE

REVISED EDITION

1996 Cumulative Supplement No. 3

BARKLEY CLARK
Shook, Hardy & Bacon, LLP
Kansas City

WARREN, GORHAM & LAMONT

injury action. This assignment was not covered by Article 9 because it was not given as security for a loan. Therefore, since Dupuis sold the intangible prior to his marital difficulties, his estranged wife had no right to attach the lawsuit's proceeds. Under the proposed revision, failure of the assignee to file a UCC-1 would leave the intangible exposed to the claims of a levying creditor, such as the estranged wife. Of course, in the facts of this case, the UCC would also have to be amended to include tort claims within its scope.

Page 1-32:

Add the following new subsection.

[3] The *Octagon Gas* Case [New]

The law surrounding the rights of receivables purchasers when the seller goes bankrupt has always been murky. A recent Tenth Circuit decision further muddies the waters by holding that the receivables remain as property of the seller's bankruptcy estate.

[a] Facts and Holding

In *Octagon Gas Systems, Inc. v. Rimmer*,[97.2] an oil patch financer named Rimmer acquired a perpetual "5% overriding royalty interest" in the revenues of a debtor that operated a natural gas gathering system. The debtor had no interest in any mineral reserves, so the term "overriding royalty interest" was something of a misnomer. Rimmer had actually bought an interest in the accounts receivable of the debtor—monies owing by natural gas pipeline purchasers. He received royalty payments regularly from 1976 until 1990.

In 1988, the debtor, Meridian Reserve, Inc., went into Chapter 11 bankruptcy. Rimmer had never filed an Article 9 financing statement covering the receivables. Nonetheless, the lower courts, relying on the "true sale" nature of the transaction, held that Rimmer's interest in the receivables was not part of the transferor's estate under § 541 of the Bankruptcy Code. Therefore, Rimmer's interest was not affected by the bankruptcy reorganization plan that sold the gas system to a third party "free and clear of liens, claims, interests, and encumbrances." The court concluded that he had previously carved out his interest when he obtained the 5% override.

The Tenth Circuit saw it otherwise. In a 2-to-1 panel decision, the court noted that Article 9 treats the interest of a receivables purchaser as a "security interest." Under § 9-102(1)(b), Article 9 applies to an outright sale of receivables. Moreover, the term "security interest" includes the interest of a receivables purchaser, and the term "secured party" includes a person to whom receivables have been sold outright.

[97.2] Octagon Gas Sys., Inc. v. Rimmer, 995 F2d 948 (10th Cir. 1993).

On the basis of these statutory definitions, the court reasoned broadly that purchased receivables must remain as part of the seller's bankruptcy estate in the same way that any other asset subject to a security interest (i.e., a pledge or a lien) would. The fact that Rimmer took "title" to the receivables was irrelevant under § 9-202. Since the receivables remained as property of the bankruptcy estate under § 541, they were part of the Chapter 11 plan and were transferred to the third party free and clear of all encumbrances. Therefore, the third-party transferee was within its rights to cut off royalty payments to Rimmer. The bottom line was that a debtor's sale of receivables prior to bankruptcy does not necessarily place those receivables beyond the reach of the bankruptcy trustee.

[b] Critique

The Tenth Circuit decision seems wrong in its broad holding. For purposes of § 541 of the Bankruptcy Code, a distinction should be drawn between a traditional security interest in receivables and an outright sale of those receivables without recourse. Receivables securing a loan remain assets of the borrower, just like a piece of equipment or a batch of inventory. By contrast, an outright sale of receivables without recourse should be treated like an outright sale of equipment or inventory to a third party—that is, the debtor no longer has an interest in the property under the jurisdiction of the bankruptcy court. The case law has long recognized this sale/security interest distinction.[97.3]

Article 9 applies to the sale of receivables only to the limited extent that it requires the filing of a financing statement by the purchaser. The theory here is that creditors of the seller would otherwise be misled by a secret lien, just as would creditors of a borrower when the lender fails to file. The cases cited by the Tenth Circuit were cases where the purchaser of receivables failed to file a financing statement and therefore lost the property to the trustee under § 544.[97.4] There is nothing revolutionary in those cases.

It is one thing to invoke Article 9 as a basis for filing. It is quite another to invoke it as a basis for finding that receivables sold outright prior to bankruptcy remain as property of the estate for all purposes, including the automatic stay under § 362 and the trustee's rights to use or sell collateral under § 363. The Tenth Circuit could have simply held that failure of Rimmer to file under Article 9 gave the receivables to the trustee as a lien creditor under § 544 if there were no exemption from filing. Instead, the court went much further and thereby unnecessarily limited the rights of receivables purchasers.

[97.3] The leading cases are Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F2d 538 (3d Cir. 1979) (dealing with rights on default); In re Contractors Equip. Supply Co., 861 P2d 241, 245 (9th Cir. 1988) (receivables sold outright do not remain as property of the bankrupt seller's estate, at least if UCC filing is accomplished).

[97.4] See, e.g., In re Cripps, 31 BR 541 (Bankr. WD Okla. 1983).

After holding that the receivables sold to Rimmer remained as property of Meridian's estate under § 541, subject to the trustee's sale to a third party free and clear of encumbrances, the Tenth Circuit remanded to determine whether Rimmer's interest was in fact perfected even though no UCC financing statement had been filed. On that point, Rimmer had argued that his purchase of a mere 5% override was an "insignificant" part of the seller's receivables, which would exempt him from filing a financing statement under UCC § 9-302(1)(e).

The Tenth Circuit recognized this argument and, in a footnote, suggested that Rimmer would be entitled to "adequate protection" of his royalty interest if no filing was required. In other words, Rimmer could recover the value of the royalty interest that had been sold. So in the long run Rimmer might still prevail, in spite of the expansive holding of the Tenth Circuit.

[c] Broad Implications

The most worrisome aspect of the Tenth Circuit decision is its obliteration of the distinction between a true sale transaction and a secured loan transaction where accounts receivable are involved. The decision severely undermines the conceptual basis for a number of widely used financing structures intended to mitigate the legal risks associated with the bankruptcy of a debtor/seller of receivables. Statements warning people of the decision are beginning to appear in "true sale" opinions in structured receivables financings.

In many structured transactions, special purpose entities purchase receivables as a protected source of payment for newly-issued securities. In evaluating the quality of such securities, rating agencies and investors alike have routinely considered the characterization of the transaction as a sale, together with perfection by UCC filing, to be sufficient protection against a claim that the receivables remain property of the seller's estate in case of a bankruptcy proceeding. The *Octagon Gas* case changes all this. Now, investors having an interest in what they thought to be property of a special purpose vehicle will find themselves instead having an interest in property of the seller. Payment of the income stream could be delayed in an open-ended way. Although investors would be entitled to "adequate protection," the content of that protection is probably not as great as being an outright owner of the receivables.

As another example, suppose a factor has purchased a block of receivables without recourse and has properly filed a UCC financing statement. The factor notifies the account debtors to begin making payments directly to it. Then the seller files bankruptcy. Under the rationale of the Tenth Circuit, the receivables would remain as property of the seller's estate, and continued collections would be subject to the automatic stay. The same problem could apply to a dealer's discounting of chattel paper.

These are some of the unfortunate implications of the *Rimmer* decision. One can only hope that its rationale is not followed by other courts and that the rating agencies see the case as an aberration of the Tenth Circuit.

[d] PEB Commentary

On January 25, 1994, the Permanent Editorial Board of the UCC (an arm of the American Law Institute) issued a Proposed Commentary on *Octagon Gas*. After final approval, it will be published as a supplement to the Official Comments to the UCC. It could have an important impact on any further cases in this area.

Not surprisingly, the proposed PEB Commentary sharply criticizes the *Octagon Gas* decision. The bottom line for the PEB is that application of Article 9 to the sale of accounts (and chattel paper) does not prevent the transfer of ownership from seller to buyer for bankruptcy purposes. The Commentary agrees that outright sales of accounts are covered by Article 9 and that the seller is treated as the "debtor," the buyer as the "secured party," and the accounts themselves as "collateral." However, the Commentary points out that it is a fundamental principle of law that an owner of property may transfer ownership to another person. If the UCC intended to take away that right by bringing the sale of accounts within the scope of Article 9, the drafters would have said so in the text of the Official Comments. Yet, there is no hint of such an intent. In fact, Comment 1 to UCC § 2-403 reaffirms the general principle of outright property transfer.

The proposed Commentary then points to UCC § 9-502(2) to show that Article 9 recognizes the basic distinction between outright sales and security interests in accounts. Under that section, if an outright sale is involved, the buyer of the receivables is entitled to any surplus from collections; if a security interest is involved, the seller gets the surplus. Moreover, Comment 4 to § 9-502 acknowledges that it is for the courts to draw the line between a true sale of accounts and a security interest.

The proposed Commentary argues that Article 9 applies to the outright sale of receivables because the line between sales and security interests is often very fuzzy and the purpose of requiring filing in both cases is to inform third parties of existing interests in a debtor's receivables. But this *limited purpose* does not mean that outright sales should be considered mere secured transactions for such *other purposes* as bankruptcy. Article 9 does have a bankruptcy impact in that failure of the buyer to file will allow the seller's trustee to grab the accounts under the strong-arm clause (i.e., § 544(a) of the Bankruptcy Code). But that impact does not affect the transfer of ownership as between seller and buyer. If the buyer properly files under Article 9 or is exempt from filing, the accounts should not be subject to any claims by the seller's trustee in bankruptcy.

On the basis of its conclusion that Article 9's application to sales of receivables does not prevent the transfer of ownership for bankruptcy purposes, the proposed Commentary suggests amending Official Comment 2 to § 9-102 to read as follows:

> Neither Section 9-102 nor any other provision of Article 9 is intended to prevent the transfer of ownership of accounts or chattel paper. The deter-

mination of whether a particular transfer of accounts or chattel paper constitutes a sale or a transfer for security purposes (such as in connection with a loan) is not governed by Article 9. Article 9 applies both to sales of accounts or chattel paper and loans secured by accounts or chattel paper primarily to incorporate Article 9's perfection rules. The use of terminology such as "security interest" to include the interest of a buyer of accounts or chattel paper, "secured party" to include a buyer of accounts or chattel paper, "debtor" to include a seller of accounts or chattel paper, and "collateral" to include accounts or chattel paper that have been sold is intended solely as a drafting technique to achieve this end and is not relevant to the sale or secured transaction determination.

¶ 1.05 SCOPE PROBLEM: TRUE LEASE OR DISGUISED SECURITY INTEREST?

[1] UCC Definition of Security Interest

Page 1-35:

Add at end of subsection.

In *In re Zaleha*,[101.1] the court relied on new Article 2A and the associated amendment to UCC § 9-201(37) in moving away from a multi-factored test to determination of whether, at the time of contracting, the lessor retained a meaningful residual interst in the goods.

For a Massachusetts decision that invokes the new UCC approach to the lease/security interest distinction even though the legislature had not yet enacted Article 2A and the revised definition, see *Carlson v. Giacchetti*.[101.2] The court felt free to draw on the new statutory definition in cases where there was no apparent inconsistency between the new statute and the old. This approach seems sound.

[101.1] In re Zaleha, 159 BR 581, 23 UCC Rep. 2d 1035 (Bankr. D. Ida. 1993).

[101.2] Carlson v. Giacchetti, 616 NE2d 810, 21 UCC Rep. 2d 872 (Mass. App. Ct. 1993).

[3] Lease or Security Interest: The Case Law

[b] Open-End Leases

Page 1-38:

Add at end of subsection.

An Alabama decision that rejects cases like *Tulsa Port Warehouse* and holds that an open-end lease is a true lease for purposes of applying the default rules of Article 9 because it contains no purchase option is *Sharer v. Creative Leasing,*

Session of 1998

SENATE BILL No. 616

By Committee on Judiciary

2-10

AN ACT concerning the Kansas code for care of children; relating to post-termination dispositional alternatives following voluntary relinquishment of parental rights.

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

Section 1. The purpose of this section is to provide stability in the life of a child who must be removed from the home of a parent or parents, in those particular situations in which the child's parent or parents have voluntarily relinquished their parental rights and in which the court approved case plan provides: (1) That the child will be or is placed in an identified preadoptive home; and (2) that continued contact with the relinquishing parent or parents is in the best interests of the child, while recognizing that the relinquishing parent or parents are unable, by reason of conduct or condition, to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future. This section also acknowledges that time perception of a child differs from that of an adult and that the ongoing physical, mental and emotional needs of the child are decisive considerations in proceeding under this section. The primary goal for all children whose parent or parents have voluntarily relinquished their parental rights is placement in a permanent family setting.

(b) When a child's parent or parents have voluntarily and conditionally consented to an adoption or have voluntarily and conditionally relinquished their parental rights to the secretary of social and rehabilitation services pursuant to this section, the court shall enter an order granting custody of the child to the proposed adoptive parents, pursuant to the following: (1) The court shall on the record inform the relinquishing parent or parents of the consequences of a conditional consent to adoption or a conditional relinquishment, and shall make a finding regarding the voluntariness of the conditional consent to adoption or conditional relinquishment.

(2) The relinquishing parent or parents and the proposed adoptive parents, and the child, if over 14 years of age and of sound intellect, have agreed, in either a separate written agreement, signed by all interested parties, which is to be submitted to the guardian ad litem and the court at least 14 days prior to the hearing, or in a court approved case plan, to

oral or written communication, or both, between the child and the relinquishing parent or parents, or contact between the child and relatives of the relinquishing parent or parents. The communication may also include exchange of information or visitation between the relinquishing parent or parents or their relatives, or both, and the adoptive parents, or visitation

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between the relinquishing parent or parents, their relatives, or both, and the child. The guardian ad litem shall have the opportunity to state objections or recommendations to the court within seven calendar days from receipt of the proposed agreement. In making any determination regarding communication agreements as provided in this subsection, the court shall make such determination which is in the best interests of the child.

(3) Every agreement of case plan entered into pursuant to provisions of this section shall contain a clause stating that the parties agree to the continuing jurisdiction of the court and that any disagreement or litigation regarding the terms of the agreement after the entry of the decree of adoption shall not be grounds for setting aside an adoption decree or for the revocation of the voluntary relinquishment of parental rights or written consent to the adoption after the court has accepted the voluntary relinquishment or consent, or both.

(4) On approval by the court, the terms of the case plan or open adoption agreement shall be incorporated into the decree of adoption.

(5) The court shall retain jurisdiction after the decree of adoption is entered for purposes of hearing motions brought to enforce or modify an agreement entered into pursuant to the provisions of this section. The terms of the adoption decree may be enforced by motions based on the decree of adoption. The prevailing party in that action may be awarded, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney fees.

(6) The court shall not modify an agreed order unless it finds that modification is necessary to serve the best interests of the child, and that: (A) The modification is agreed to by the relinquishing parent or parents and the adoptive parents and the child, if the child is over 14 years of age and of sound intellect; or (B) exceptional circumstances have arisen since the agreed order was entered that justify modification of the order. When the parties are not in agreement regarding a proposed modification, the court shall not hear a contested motion under this section unless it finds that the parties have made a good faith effort to mediate the contested issues. If the child is over 14 years of age and of sound intellect, the child shall also participate in the mediation if such child desires to do so. Use of uninitialized value at /usr/local/lib/perl5/INK/Common.pm line 63, chunk 5. If the court determines that a guardian ad litem should be appointed under this subsection, the guardian ad litem shall conduct an independent investigation of the basis for the proposed modification and shall prepare recommendations to the court. The costs of the guardian ad litem shall be

assessed by the court.

(7) All interested parties shall agree that the court granting the adoption shall retain jurisdiction of the case until the child reaches majority, and this agreement shall be made part of the order of the court.

(C) The provisions of this section shall be part of and supplemental to the Kansas code for care of children.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

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SPECIAL COMMITTEE ON JUDICIARY

DRIVING PRIVILEGES FOR TEENAGE DRIVERS*

CONCLUSIONS AND RECOMMENDATIONS

The Special Committee on Judiciary recommends a bill whereby the driver's license law would be changed by amendments similar to those contained in 1998 S.B. 417, as drafted, with minor revisions.

BACKGROUND

The National Highway Safety Administration (NHTSA) and other safety related groups are encouraging states to implement a graduated driver's license (GDL) system According to NHSTA, this system is intended to ease young drivers into the driving environment through a three-tiered licensing system with each level designed to introduce the driver to progressively more difficult driving experiences. A GDL system consists of three stages: a learner's permit, an intermediate license, and a full license. Young drivers would be required to demonstrate responsible driving behavior in each stage before advancing to the next stage. Proponents of the GDL believe that it would result in low teen crashes and fatalities. The topic was considered during an interim study in 1996. The Committee, however, did not recommend any changes at that time. In 1998, the issue was revisited in S.B. 417 and endorsed by the same safety related groups. That bill died in Committee. The Chairman of the Senate Transportation and Tourism Committee then asked that the subject be studied by an interim committee. The issue of road rage was included in the request. This topic, however, has not previously been considered.

In its original form, S.B. 417 would have raised the age, from16 to 17, under which an individual could receive an unrestricted driver's license. In addition, the bill would have done the following:

- required holders (at least 15 years of age) of a restricted driver's license to provide a signed affidavit from either a parent or guardian stating that the applicant had completed at least 50 hours of actual driving with ten of those hours being at night;
- allowed holders of restricted licenses or farm permits to drive only between the hours of 5:00 a.m. and 12:00 midnight; and
- prohibited drivers under the age of 17 with restricted licenses or farm permits and convicted of two or more separate traffic violations from receiving an unrestricted driver's license until they reached the age of 18.

COMMITTEE ACTIVITIES

Safety Groups Testimony. At its meeting on the GDL system the Committee heard from various safety related groups including the American Automobile Association and NHTSA. Conferees agreed that the goal of a GDL system was to make teens better and more responsible drivers. To lend support for the GDL system conferees provided the Committee with data about teen crashes and fatalities. These conferees

* H.B. 2006 was recommended by the Committee.

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reported that the GDL program had recently been adopted in Iowa and Nebraska. They also reported that in California, Maryland, Oregon, and Ontario, Canada, GDL legislation had resulted in reducing motor vehicle crashes among teens.

Driver Education Programs. In order to learn about driver education in Kansas, the Committee invited the spokesperson of the Kansas Department of Education to update the Committee on the state's driver education programs. The spokesperson for this agency pointed out that 90 percent of 30,000 teens eligible to drive each year participate in driving education programs. He presented an overview of the history and development of the Kansas Driver Education Curriculum approved by the Department of Education and funded by the Safety Fund. In 1990, Kansas began developing a new driver education curriculum modeled after the Washington state program. This program will measure both classroom and behind-the-wheel instruction. To date, 12 states have adopted this method.

Opposition to GDL

The principal opponent of the measure introduced in 1998 was Kansas Farm Bureau. The Farm Bureau conferee explained the reasons it opposed the bill. Specifically, it was noted that Farm Bureau members were polled on the issue in a 1998 Policy Development Questionnaire and decided not to endorse the concept. The Farm Bureau conferee said, however, another poll would be taken in 1999.

Law Enforcement Concerns. Law enforcement concerns were expressed by a local law enforcement officer and a trooper of the Kansas Highway Patrol. The local law enforcement officer told the Committee that it is difficult for law enforcement officials to determine the age of a teen driver. He also said that it is not easy to determine when a teen is driving to and from work or school as the statute allows. A trooper from the Kansas Highway Patrol also presented testimony about educating teens on safe driving. He said that a previous program had been dropped due to lack of manpower. The state trooper also briefed the Committee on the growing problem of "road rage" among the motoring public. Measures which are being used to address this problem include enforcing existing law and educating the public.

Director of Vehicles Testimony. The Director Vehicles, Kansas Department of Revenue, provided the Committee with a comparison of the GDL and the Division of Vehicles' current driver's licensing system. She indicated that Division's personnel had studied the GDL topic and concluded that although the agency did not have a comprehensive GDL system, it did have a similar driver's licensing system.

Conclusions and Recommendations

Under consideration of the importance of providing a safer driving environment for teen drivers, the Committee recommends a bill that would amend current law to:

- raise the age by which a person receives an unrestricted driver's license from age 16 to 17;
- require a parent or guardian to sign an affidavit stating that an applicant for a restricted driver's license or a farm permit has completed at least 50 hours of actual driving with at least ten of those hours being at night;
- require that an accompanying driver of a person with a restricted license or a farm permit be at least 21 years old; and
- prohibit a holder of a restricted license or farm permit convicted of two separate moving violations from receiving an unrestricted license until they reach age 18.

The change from the original version of 1998 S.B. 417 is to eliminate the originally proposed provision that would have allowed individuals with a restricted license or farm permit to drive only between the hours of 5:00 a.m. and 12:00 midnight.

Application and Issuance of Marriage Licenses by Mail*

Conclusions and Recommendations

The Committee recommends a bill be drafted to allow for marriage licenses by mail.

Background

This issue was recommended for study as a result of the following scenario: a young couple who work or go to college and live out of state but who wish to be married in Kansas encounter difficulty getting a marriage license since Kansas law requires at least one of the applicants to appear in person to apply for the marriage license. To appear in person would require the travel expense in getting to Kansas, as well as taking time off from work or school, to appear during the week when the courthouses are open for business.

Committee Activities

A hearing on the issue was held to explore the feasibility of allowing a marriage license to be issued by mail. Testimony was received from a family law specialist in support of the measure since Kansas is a state that recognizes common law marriages which require no marriage license. The only requirements of a common law marriage include the capacity to marry, the agreement to be married, and a declaration to others that there is a marriage. Certain prior state requirements such as blood testing were eliminated during the 1980s as too impractical. The current licensing law, K.S.A. 23-106, also requires a three-day waiting period before a license can be issued but this provision can be waived.

Application by mail forms would need to be developed to initiate the process. These forms would need to provide for verification of information in order to ensure the accuracy of the information provided by the applicant.

Conclusions and Recommendations

The Committee, after review of the topic, recommends that a bill be drafted for presentation and consideration by the 1999 Legislature. The bill would allow marriage licenses by mail to be issued. Further, the bill will contain appropriate provisions to determine the veracity of information contained in the application for such a license.

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* S.B. 5 was recommended by the Committee.

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PARTIAL BIRTH ABORTIONS (SEC. 18 OF H.B. 2531)*

CONCLUSIONS AND RECOMMENDATIONS

The Committee in its study of partial birth abortions (Sec. 18 of H.B. 2531) recommended that a bill be drafted which contains a provision that amends the Board of Healing Arts Act to provide that abortion ban violations be considered as unprofessional conduct; inserts a single definition of viability throughout the statutes; amends the partial birth abortion ban to remove the mental health exception and replaces it with an exception when it is necessary to save the life of the mother whose life is endangered by a physical disorder, illness, or injury.

BACKGROUND

In 1998, the Legislature passed H.B. 2531 which originally dealt with assisted suicide. The provisions dealing with abortion were added on the Senate floor and the House concurred in the amendments. Regarding abortion, H.B. 2531 does the following.

Post-Viability Abortions

The bill amends prior law regarding post-viability abortions as follows:

- adds a new definition of "viable" to apply only to post-viability abortions under K.S.A. 65-6703 to include "that stage of fetal development when it is the physician's judgment according to accepted obstetrical or neonatal standards of care and practice applied by physicians in the same or similar circumstances that there is a reasonable probability that the life of the child can be continued indefinitely outside the mother's womb with natural or artificial life-supportive measures;
- replaces the existing fetal abnormality exception to the post-viability abortion prohibition with an exception that would allow a post-viability abortion if "continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman";
- requires a physician to determine gestational age of the fetus according to accepted obstetrical and neonatal practice and standards prior to any abortion, except in the case of a medical emergency:
  - if the physician determines the gestational age to be less than 22 weeks, the physician must document the basis for the determination in the woman's medical records;
- after 22 weeks gestational age, requires the doctor to determine whether the fetus is viable and conduct medical examinations and tests to determine gestational age of the fetus:
  - viability determination must be made by the physician exercising that degree of care exercised by the ordinary prudent physician engaged in the same or similar circumstances, and
  - findings and determinations of viability must be recorded in the woman's medical records.
- prohibits "legal or financial affiliation" rather than "financial association" of the two doctors required to be involved in a post-viability abortion and in partial birth abortion decisions.

* H.B. 2007 was recommended by the Committee.

The bill requires that the doctor then must report to the Kansas Department of Health and Environment (KDHE) the reason for determining that gestational age was 22 or more weeks and the fetus was not viable. If a post-22-week viable fetus is aborted, the bill requires a report to KDHE regarding the basis for the determination of fetal age and viability and the necessity for the abortion. Further, doctors are required to retain the woman's medical records, including the determination of gestational age, fetal viability, and necessity for the abortion, and the required written reports to KDHE for at least five years.

A conviction of a violation of any provision of the post-viability abortion restrictions is a class A nonperson misdemeanor for the first offense and a level 10 nonperson felony for second or subsequent offenses. Women upon whom an abortion is performed shall not be prosecuted for conspiracy to violate the post-viability abortion law.

Partial Birth Abortions

In regard to partial birth abortions, the bill:

- prohibits the use of partial birth abortion procedures on a viable fetus unless the woman has a referral from another doctor and both doctors determine that the abortion procedure is necessary to preserve the woman's life or a continuation of the pregnancy will cause a substantial and irreversible impairment of a major physical or mental function of the woman;
- defines a partial birth abortion as an "abortion procedure which includes the deliberate and intentional evacuation of all or a part of the intracranial contents of a viable fetus prior to removal of such otherwise intact fetus from the body of the pregnant woman";
- requires the doctor to include the reasons for a determination of necessity for a partial birth abortion in reports filed with KDHE; and
- makes violations of the partial birth abortion provisions a level 10 person felony. Women upon whom an abortion is performed may not be prosecuted for conspiracy to violate the partial birth abortion law.

General Abortion Regulations

The bill also requires physicians to conform with the Woman's Right to Know Act, whether or not an abortion is performed.

The abortion reporting requirement for medical facilities is amended to include the reports of determination of fetal viability, gestational age, and medical necessity for abortion.

In August, the Legislative Coordinating Council approved of and assigned the topic of partial birth abortion (Sec. 18 of 1998 H.B. 2531) to the interim Special Committee on Judiciary.

COMMITTEE ACTIVITIES

The Committee held two days of meetings on the topic of partial birth abortion. An associate professor from the University of Kansas Medical Center School of Medicine presented information on a number of medical issues including the medical and legal definitions of abortion as well as viability. Additional information was provided which included the survival rates for premature infants.

Staff provided background information for the Committee including an overview of pertinent U.S. Supreme Court decisions from *Roe v. Wade* in 1973 *Schenk v. Pro Choice Network* in 1997, on abortion; a review of recent cases, *Women's Medical Professions Corporation v. George Voinovincn* (1997) from the Sixth Circuit and the case of *Carhart v. Sternberg* (1998). Additional material was provided for an in-depth analysis of the provisions of 1998 H.B. 2531 as well as a review of the recent case of *George R. Tiller, M.D. v. Gary Mitchell, Secretary, Kansas Department of Health and Environment*. The Kansas Supreme Court ultimately dismissed the *Tiller* lawsuit challenging the new law but did not rule on the

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merits of the law. In addition, the Kansas Board of Healing Arts decided not to initiate any disciplinary action.

The Executive Director of the Board of Healing Arts addressed some internal problems with the language of H.B. 2531 and other sections of the law. Specifically, the term viable or viability was cited as problematic. The term physician was also mentioned as in need of clarification. Further, the conferee indicated a criminal violation of Sec. 18 of H.B. 2531 did not constitute unprofessional conduct under the Healing Arts Act.

Opposition to abortion and in support of a partial birth abortion ban was expressed by the conferees representing Right to Life of Kansas, Inc., the Kansas Catholic Conference, and Kansans for Life.

The representative from the Kansas Religious Leaders of Choice expressed support for abortion rights. A private citizen appeared in opposition to Sec. 18 of H.B. 2531. Additional opposition to H.B. 2531 was voiced on behalf of Planned Parenthood of Kansas and Mid-Missouri. A perinatal specialist at the University of Kansas Medical Center spoke against the repeal of the fetal abnormality exception to the ban on abortion.

A law professor from the Washburn School of Law submitted an analysis of H.B. 2531 and pointed out potentially problematic areas including the fetal abnormality deletion as well as other provisions of the bill.

Conclusions and Recommendations

The Committee in its study of partial birth abortions (Sec. 18 of H.B. 2531) recommended that a bill be drafted which contains a provision that amends the Board of Healing Arts Act to provide that abortion ban violations be considered as unprofessional conduct; inserts a single definition of viability throughout the statutes; amends the partial birth abortion ban to remove the mental health exception and replaces it with an exception when it is necessary to save the life of the mother whose life is endangered by a physical disorder, illness, or injury.

Covenant Marriages*

Conclusions and Recommendations

The Committee recommends the 1999 Legislature consider the covenant marriage license procedure with provisions for premarital counseling. Further, the Committee recommends to the 1999 Legislature a bill in essentially the same form as 1998 H.B. 2985 dealing with marriage reconciliation.

Background

1998 H.B. 2839 dealt with covenant marriages. The bill was based on Louisiana law on covenant marriages. The bill gives couples about to be married as well as those already married the option to sign a declaration of intent to take part in a covenant marriage. The signing of the declaration would have triggered a fault based divorce proceeding in case the couple later decided to get a divorce. Kansas currently has a no fault divorce proceeding. Under the bill a divorce could be granted upon proof of the following grounds:

* H.B. 2003 was recommended by the Committee.

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- The other spouse has committed adultery.
- The other spouse has been convicted of :
    - capital murder;
    - murder in the first degree;
    - murder in the second degree;
    - voluntary manslaughter;
    - involuntary manslaughter;
    - indecent liberties with a child;
    - aggravated indecent liberties with a child;
    - criminal sodomy subsection (a)(2) and (a)(3) of K.S.A. 21-3505;
    - aggravated criminal sodomy;
    - indecent solicitation of a child;
    - aggravated indecent solicitation of a child;
    - sexual exploitation of a child;
    - aggravated sexual battery; or
    - any conviction for a felony offense that is comparable to a crime listed above, or any federal or other state conviction for a felony offense that under the laws of this state would be offense as listed above.
- The other spouse has abandoned the matrimonial domicile for a period of one year and constantly refuses to return.
- The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.
- The spouses have been living separate and apart continuously without reconciliation for a period of two years.
- The spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgement of separate maintenance was signed.

In addition, the bill outlines various procedures and responsibilities related to entering into a covenant marriage. For example, a couple who sign a declaration of intent must receive premarital counseling from authorized individuals. Further, certain state agencies would be given responsibilities under the provisions of the bill. The Attorney General's Office would be responsible for developing an informational pamphlet describing the law as related to covenant marriages. The pamphlets would be distributed to marriage counselors. The Department of Health and Environment would be responsible for the registration of all covenant marriages. Also, the clerks of the district courts would be responsible for making alterations to marriage licenses for covenant marriages.

Additionally, the Committee considered 1998 H.B. 2985 which dealt with the reconciliation of marriage. The bill would have established court-sponsored marriage counseling for persons expressing an interest in reconciliation prior to filing an action for divorce, annulment, or separate maintenance. For those persons a petition for reconciliation would be filed and the court could order the parties into marriage counseling. Under current law, the court has jurisdiction only over marriages for which a petition for divorce, annulment, or separate maintenance has been filed. If the counseling should prove to be unsuccessful, the reconciliation petition could be converted into a divorce, annulment, or separate maintenance action. The bill also would have allowed persons who have suffered abuse in marriages to forgo the reconciliation and file a separation action. Once filed, the petition for reconciliation would act as a stay against a divorce action except in those situations specifically noted.

COMMITTEE ACTIVITIES

Conferees who addressed the Committee included a law school professor who teaches in the family law area and an attorney whose law practice is primarily focused on family law as well as a Kansas University law student. Both attorneys spoke in opposition to the fault-based divorce aspect of H.B. 2839. Objection was raised over the increased amount of litigation such a proposal would generate and, specifically, conferees emphasized efforts to legislate should be geared toward the marriage laws rather than to change the divorce laws.

The prime sponsor of the bill expressed support for the concept of covenant marriages but agreed to support a bill without fault-based divorce provisions.

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Conclusions and Recommendations

As a result of the hearing and consideration of the issues involved, the Committee recommends that the 1999 Legislature examine the topic of the covenant marriage licensing procedure with provisions for premarital counseling.

In addition, the Committee recommends introduction of a bill, in essentially the same form as 1998 H.B. 2985—dealing with marriage reconciliation—to the 1999 Legislature.

Expedited Evictions for Persons Involved in Drug-Related and Other Serious Crimes

Conclusions and Recommendations

The Special Committee on Judiciary recommends the appropriate standing committees continue to review this important issue with the goal of developing legislation to protect the rights of all parties involved.

Background

The interim study was requested by the Chairman of the Senate Judiciary Committee in response to considerable interest in this subject by various legislators and other interested groups over the past several years.

Recent Legislative Proposals. At least five bills (S.B.'s 231, 628, and 668, and H.B.'s 2259, and 2823) were before the Legislature in 1998 dealing with expedited eviction of tenants who are involved in certain criminal activity. Four of the bills (H.B.'s 2259 and 2823, and S.B.'s 231 and 628) provided for a three-day notice procedure for expedited evictions, three bills would have permitted a partial eviction of some but not all tenants (H.B. 2823 and S.B.'s 628 and 668); and two bills (H.B. 2823 and S.B. 628) would have permitted local prosecutors to bring eviction actions and to recover costs. S.B. 668, which would have enacted the Kansas Expedited Eviction of Drug Traffickers Act, would have permitted the Attorney General, local prosecutors, as well as tenants' organizations, to bring eviction actions.

Committee Activities

The Committee held a hearing on the issue in August. Conferees included: representatives of the Kansas City Rosedale Development Association, Kansas City Liveable Neighborhoods, the Kansas City, Kansas Housing Authority, the Topeka Police Department, the Kansas Attorney General's Office, the Associated Landlords of Kansas, the Lawrence Apartment Association, and the Topeka Independent Living Center.

Proponents of an expedited eviction process included representatives of the Attorney General's Office, Rosedale Development Association, Liveable Neighborhoods, the Kansas City, Kansas Housing Authority, and the Topeka Police Department. An Assistant Attorney General reviewed provisions of the Model Expedited Eviction of Drug Traffickers Act (S.B. 668) and stated the Attorney General supports an innovative approach to improving the safety of Kansas citizens and protecting citizens from the violence and terror of drug dealing. The Kansas City, Kansas Housing Authority representative said

expedited eviction legislation did not take due process rights away from tenants but rather allows landlords to act more quickly. He said partial evictions were unworkable.

The representative of the Associated Landlords of Kansas recommended that county and district attorneys be given authority to evict tenants involved in drug crimes and other serious criminal activity. He urged the Legislature to insure rights of all parties are protected especially landlord rights. The representative of the Lawrence Apartment Association supported expedited eviction legislation and offered several suggested amendments to insure the constitutionality of legislation and to protect landlords from liability for unnecessary attorney's fees if local prosecutors bring the eviction action.

A representative of the Topeka Independent Living Center opposed provisions in several of the bills which would shorten the length of notice for all evictions under the Landlord Tenant Act. The Committee also received a letter from the Lawrence Human Relations Department which stated expedited evictions would violate the due process rights of tenants.

CONCLUSIONS AND RECOMMENDATIONS

The Committee believes there is a real problem regarding tenants who are involved in dangerous illegal activities and that the law needs to address this issue. The Committee, however, was unable to reach any consensus on the best approach to dealing with the rights and responsibilities of landlords, the rights of innocent tenants that may be involved, and the need to involve local prosecutors in the eviction process. The Committee therefore, recommends that the appropriate standing committees of the 1999 Legislature continue to review this issue for possible action next session.

STATE POLICY ON EXPUNGEMENT OF RECORDS*

CONCLUSIONS AND RECOMMENDATIONS

The Special Committee on Judiciary recommends that the expungement law be clarified to provide that diversion agreements for driving under the influence (DUI) conviction be considered in sentencing for subsequent convictions of DUI offenses.

BACKGROUND

The study was requested by Representative Doug Mays.

1998 Legislation. S.B. 482 was enacted by the 1998 Legislature. The bill amended criminal procedure statutes dealing with expungement to expand the law to permit the expungement of arrest records, diversion agreements, and proceedings resulting in diversion agreements. The provisions apply to arrest and diversion records involving city ordinance violations and municipal courts as well as state law violations and district courts. Persons arrested or entering into diversion agreements must be informed of their right to expunge these records. Municipal courts are authorized to set a docket fee for the expungement proceeding but no docket fee is permitted for expungement actions filed in district courts.

* S.B. 4 was recommended by the Committee.

The list of crimes for which there can be no expungement of convictions or adjudications for adults or juvenile offenders is expanded to include capital murder, murder in the first degree, murder in the second degree, voluntary manslaughter, involuntary manslaughter, and involuntary manslaughter while driving under the influence of alcohol or drugs.

The bill defines "expungement" to mean the sealing of records so they are unavailable except to the petitioner and criminal justice agencies as provided in K.S.A. 22-4701 *et seq.*

The court may grant the petition to expunge the arrest records upon finding:

- the arrest resulted from mistaken identity;
- the arrest resulted in a finding of no probable cause by the court;
- the arrest resulted in a not guilty verdict; or
- the expungement would be in the best interests of justice and:
    - charges have been dismissed; or
    - no charges have been or are likely to be filed.

If the expungement falls within the first three listed categories above, the records are not available except to the petitioner and to agencies as allowed under K.S.A. 22-4701 *et seq.* If the expungement is allowed under the circumstances where charges have been dismissed or are not likely to be filed, the court has the discretion to make the records available under certain circumstances. The bill adds another instance when expunged records shall be disclosed to include when a person makes application to be registered as a securities broker-dealer, agent, or investment advisor.

COMMITTEE ACTIVITIES

The Committee held a hearing on the issue in October. Conferees who testified included a representative of the League of Kansas Municipalities, the Office of Judicial Administration, the Kansas Bureau of Investigation, the Kansas Judicial Council, and a municipal judge.

The representative of the League of Kansas Municipalities stated that the League receives approximately 5,000 legal inquiries per year from Kansas municipalities and that, to date, no interest has been expressed by any municipality concerning the expungement of arrest records. He stated that he had made a number of calls to municipalities throughout the state and all reported that they have had no experience with the new expungement law to date. He further stated he called the Kansas Association of Municipal Court Management and the Kansas Municipal Judges Association and they both reported that there had been only one request regarding expungement under the 1998 law. He indicated that this may be due to a lack of knowledge regarding the new legislation, but this could change since people appearing in court after July 1 are being informed of their right to expungement.

A representative of the Office of Judicial Administration reported that the Judicial Branch has had limited experience in the implementation of 1998 S.B. 482 due to the fact that the law was new and the public was unaware of the right to expungement arrest records. She indicated that additional filings likely would be experienced as people are made aware that diversion and arrest records may be expunged.

An Overland Park municipal judge reported that there are approximately 20 to 30 expungement requests per year but no requests have been made for expungement of diversion or arrest records since S.B. 482 went into effect. She noted that Overland Park has approximately 50,000 to 60,000 municipal cases filed per year. There are 20 to 30 expungement request cases each year, of which 25 percent are attorney assisted with the majority being *pro se*.

A representative of the Kansas Bureau of Investigation addressed inquiries made by the Committee during discussion regarding the court database system and statutory DUI diversionary language. He suggested that the law may need to

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be clarified regarding diversion agreements for DUI charges and whether a diversion should be counted in sentencing for subsequent DUI convictions.

A Shawnee County district judge representing the Kansas Judicial Council explained how the recommendations for changes to the expungement statutes, which were adopted by the 1998 Legislature, were arrived at by the Judicial Council. She noted that the computer has made arrest and criminal history information available for a larger number of people than ever before.

CONCLUSIONS AND RECOMMENDATIONS

The Committee recommends a clarification in the law to insure that a diversion for a DUI charge may be used for sentencing purposes for subsequent DUI convictions. The legislation accompanying this report makes this clarification. The Committee does not believe any further changes are needed in regard to expungement at this time.

FAMILY LAW—INCLUDING PARENT CUSTODY ISSUES*

CONCLUSIONS AND RECOMMENDATIONS

The Special Committee on Judiciary concludes that the Kansas statutes should be amended to establish a presumption of equal parenting time if parents do not otherwise agree; to provide that it would be considered a material change in circumstance providing a basis for court review when the primary caregiver or parent in a joint shared custody relationship moves more than 60 miles from their current address, to replace the term "visitation" with "parenting time" and to add a statement in the child support law that both parents have an equal duty to support a child, that services provided by both parents shall be considered, and to make other changes.

BACKGROUND

The study topic called for the Committee to review family law issues, including parent custody issues. The study was requested by the Chairmen of both the House and Senate Judiciary committees.

1998 Legislative Proposals. Hearings were held on several bills during the 1998 Legislative Session dealing with the issue of child custody. H.B. 2816 passed the House Judiciary Committee, but died on the House floor. H.B. 2816 would have amended several statutes dealing with child custody matters. Major provisions of the bill are the following:

- The term "joint custody" would be replaced with the term "joint shared custody." Parents would be required to develop a plan for joint shared custody. If the parents cannot agree, the court will presume, and order a plan to the effect that, each parent shares equal or near equal time with their children. In the event that equal or near equal sharing is unworkable, the court must order a plan that supports the concept of continuing dual parent involvement.

* H.B. 2002 was recommended by the Committee.

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- The bill would require that when one parent moves from the geographical area, defined as 35 miles from the town or city in which the parents currently reside, and the parents cannot agree to a new residency arrangement, the court would be required to presume that the child will remain with the parent who is not moving.
- The term "parenting time" would replace the term "visitation or visitation rights."
- Modifications to child support orders that are made retroactive by the court would be restricted so that retroactivity could not exceed three months.

COMMITTEE ACTIVITIES

The Committee held a one-day hearing on the topic in October. Seventeen conferees appeared before the Committee including two district court judges, the Victim Rights Coordinator from the Attorney General's Office, and a number of divorced parents including representatives of the Topeka Chapter of the National Congress for Fathers and Children, noncustodial parents, divorced parents involved in joint custody arrangements, and several second wives of previously divorced husbands.

Most divorced parents supported changes in the current law regarding custody of children in cases of divorce and supported modification of child support guidelines to reflect a recognition that both parents have a continuing duty to support their children. Specifically, conferees suggested that the divorce code be amended to require that when the court orders joint custody, that the court require the residency of the child or children be divided in an equal or near equal manner with regard to time. Further, if the court does not order equal or near equal parenting time, it shall include in the record, the specific findings of fact upon which the order for primary residency is based.

In regard to child support, most conferees supported a statement be placed in the law that both parents have an equal duty to provide support; and that several child support factors contained in K.S.A. 38-1121 be amended as follows: the first factor be clarified that it is the expenses attributable to the physical, emotional, and educational needs of the child that must be considered; the 9th factor be amended to require the value of services contributed by both parents not just the custodial parent be considered; and a 10th factor be added to require the court consider expenses arising from other factors as the court may determine relevant.

Finally, most conferees also suggested a preamble be added to the divorce code to state the overriding philosophy of the law; to change the term "visitation" to "parenting time"; and to provide that the child support obligation end for children who have attained the age of 18 in the month the school ends if this occurs before June.

Several conferees pointed out that noncustodial parents have extra costs that are not considered under current law for such things as long-distance travel, telephone expenses, food and entertainment, lodging, and so forth and that these should be considered in the child support guidelines.

Other conferees described the negative impact of divorce on children and the remediation of much of the negative impact of both parents remaining involved with their children. The current visitation system was said to virtually eliminate one parent. Child support guidelines were said to be based on an "intact" family model which has little relevance to the combined costs of raising a child by a mother and father each attempting to support their own household.

Several conferees noted that joint custody was an oxymoron since it does not reflect a system of equal or near equal parenting time. Many of the conferees described on-going battles over visitation with their former spouses, costly legal fees, and high levels of frustration and anger with the current system and their current custody arrangements.

Conferees also requested that child support and visitation be combined into one issue so that visitation and child support depend upon one another.

A district judge from Shawnee County opposed a mandate of equal parenting time. He said such a system would be costly and would be detrimental to children in most cases who would not want to spend half of their time in two different households. He said equal parenting time does not exist in intact families.

A Wichita district judge said he agreed with the concepts contained in the preamble to H.B. 2816, but was concerned about how workable legislation would be since, very often, there is tremendous anger with the parties to a divorce and an unwillingness to cooperate with one another.

The Statewide Victim Rights Coordinator gave an update on the grant program for child exchange and visitation centers. Kansas received a $116,319 federal grant in September 1997. The Attorney General has made grant awards to six programs in an amount of $188,533 from state and federal funds. A 1996 state law raised marriage license fees by $10 to help fund this program.

CONCLUSIONS AND RECOMMENDATIONS

The Committee believes that the statutes dealing with child custody, and the visitation and child support laws, should be amended. These changes are contained in the proposed legislation as follows:

- A presumption is established, if parents cannot otherwise agree, that each parent should share equal or near equal time with their children. The term "joint custody" would be replaced with the term "joint shared custody." Parents would be required to develop a plan for joint shared custody. The court may order mediation regarding the development of a plan for joint shared custody. If the parents cannot agree, the court will presume, and order a plan to the effect that, each parent shares equal or near equal time with their children. If the court does not provide a plan that each parent shares equal or near equal parenting time, the court must place on the record specific findings of fact as to why joint shared custody is not the plan. In the event that equal or near equal sharing is unworkable, the court must order a plan that supports the concept of continuing dual parent involvement.
- The bill provides that when the primary caregiver or either parent in a joint shared custody relationship moves from the geographical area, defined as 60 miles from the town or city in which the parents currently reside, this would constitute a material change in circumstances providing for a basis of review by a court to determine the issue of a child's residency.
- The term "parenting time" would replace the term "visitation or visitation rights."
- Civil penalties would be established for a person who unreasonably interferes with a parent's parenting time. A $100 civil penalty may be imposed for the first violation and a $250 civil penalty may be imposed for second or subsequent violations.
- Child support statutes would be amended to state that both parents have an equal duty to support a child; that services provided by both parents may be considered; and that other factors such as entertainment, travel, and long-distance phone calls may be considered as part of establishing child support obligations.