Approved: January 20, 1999
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:12 a.m. on January 14, 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:

Nancy Lindberg, Office of Attorney General
Kathy Olsen, Kansas Banker's Association
Jim Clark, County and District Attorney's Association

Others attending: see attached list

The minutes of January 13, 1999 were approved on a motion by Senator Bond and seconded by Senator Pugh. Carried.

Senator Vratil requested introduction of a bill amending K.S.A. 22-3717 which would permit video tape recordings to be presented to the parole board when they are considering parole applications. (no attachment) Following brief discussion a motion was made by Senator Vratil to introduce the bill, seconded by Senator Oleen. Carried.

Conferee Lindberg requested bill introductions which address the following issues: child protection law; criminal discovery; victim impact evidence; and capital murder mitigation discovery. (attachment 1) Senator Bond moved to introduce the bills, Senator Goodwin seconded the motion. Carried.

Conferee Olsen presented proposed legislation amending a provision of the Small Claims Court Act (K.S.A 61-2707(a)). (attachment #2) Senator Bond moved to introduce the bill, Senator Harrington seconded. Carried.

Conferee Clark requested "an amendment to K.S.A. 60-1507, the habeas corpus state proceeding to mirror the federal governments habeas corpus limitations to one year after the conviction becomes final". He stated that this was the substance of 1998 SB 600. (no attachment) Following discussion Senator Goodwin moved to introduce the bill, Senator Vratil seconded. Carried.

The Chair presented a bill request from a constituent of Senator Lee which would hold the position that a magistrate judge must reside in the county or district where he/she is appointed. (no attachment) Following discussion Senator Feleciano moved to introduce the bill, Senator Bond seconded. Carried.

Staff person Heim presented an overview of the Special Committee on Judiciary Report and Recommendations on the Joint Shared Custody issue the contents of which are in **HB 2002.** (attachment 3 pp. 4 11-13)

Staff person Donaldson presented an overview of the Special Committee on Judiciary Report and Recommendation on the following issues: application and issuance of marriage licenses by mail (**SB 5**); covenant marriages (**HB2003**); and partial birth abortion (**HB2007**). (attachment 3 pp. 4-3, 4-6, and 4-4) She noted a post-Report change on page 9 of **HB 2007** at lines 9 and 21 striking the word viable.

The meeting adjourned at 10:54 a.m. The next scheduled meeting is Wednesday, January 20, 1999.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Jan 14, 1999

NAME	REPRESENTING
Kathy Olsen	KS Bankers Assn.
Nancy Lindberg	Atty General
Vicky Hummel?	DOB
Pat Brown	Minn. Am. Bankers Assn.
Kathy Porter	OJA
James Clark	KCDAA
Gene Johnson	Ks Comm. ASAP Assn
Martha Neu Smith	KMHA
Whitney Damron	Kansas Bar Assn.
Stephanie Buchanan	DOB

1-14-99 #1

State of Kansas

Office of the Attorney General

301 S.W. 10th Avenue, Topeka 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

MAIN PHONE: (785) 296-2215
FAX: 296-6296
TTY: 291-3767

TO: Senate Judiciary Committee
FROM: Attorney General Carla Stovall
RE: Bill Introductions
DATE: January 14, 1999

1. **Child Protection Law** - Create a new law to require any person who knows or has reason to know that an attempted unlawful sexual act or an unlawful sexual act or an inherently dangerous felony or attempted inherently dangerous felony report the crime to the police or sheriff's department of the city or county in which the crime is taking place.

2. **Criminal Discovery -** Amend K.S.A. 22-3212 to provide for reciprocal discovery of a defense witness's reports when the witness is expected to testify at a hearing and the reports were prepared by the witness and relate to the witness's testimony, even if the reports are not intended to be introduced as evidence at the hearing.

3. **Victim Impact Evidence -** Amend K.S.A. 21-4624 (c) and (e) by allowing the jury to consider the admission of victim impact evidence, in certain limited situations, during the penalty phase of a capital murder trial.

4. **Capital Murder Mitigation Discovery** - Provide for the examination of a defendant in a capital case when the defense intends to use expert testimony regarding the mental state of the defendant in the penalty phase of the case. The results of the examination would only be admissible in rebuttal, when relevant to the defendant's mental condition which has been raised as a mitigation issue by the defendant.

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The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

To: Senate Committee on Judiciary

From: Kathleen Taylor Olsen

Date: January 13, 1999

Re: Introduction of Legislation: Small Claims Court

Members of the Judiciary Committee:

Thank you for the opportunity to present for introduction, proposed legislation amending a provision of the Small Claims Court Act. Specifically, we are asking for an amendment to KSA 61-2707(a).

The need for such an amendment was brought to our attention by a banker from Cloud County. He had tried to collect a debt owed to the bank in small claims court and was told that corporations could not appear in small claims.

That led us to discover a conflict in the law which we hope to resolve with this amendment.

We will be pleased to share the background and other details of this proposal should a hearing be granted.

Thank you for your attention to this matter.

800 SW Jackson Suite 1500 • Topeka, Kansas 66612-1265 • (785) 232-3444 FAX (785) 232-3484
email kbaoffice@ink.org

61-2707. Trial of action; exclusion of attorneys; enforcement of judgment; certain judgments null and void. (a) The trial of all actions shall be by the court, and no party in any such action shall be represented by an attorney prior to judgment. Discovery methods or proceedings shall not be allowed nor shall the taking of depositions for any purpose be permitted. No order of attachment or garnishment shall be issued in any action commenced under this act prior to judgment in such action.

A corporation may be represented by an officer of the corporation or by an agent designated by corporate resolution.

(b) When entering judgment in the action, the judge shall include as a part of the judgment form or order a requirement that, unless the judgment has been paid, the judgment debtor shall submit to the clerk of the district court, within 30 days after receipt of the form therefor, a verified statement describing the location and nature of property and assets which the person owns, including the person's place of employment, account numbers and names of financial institutions holding assets of such person and a description of real property owned by such person. The office of judicial administration shall develop the form to be used in submitting information to the clerk under this subsection. The court shall also include as a part of the judgment form or order a requirement that, within 15 days of the date judgment is entered, unless judgment has been paid, the judgment creditor shall mail a copy of the judgment form or order to the judgment debtor, together with the form for providing the information required to be submitted under this subsection, and that the judgment creditor shall file with the court proof of the mailing thereof. When the form containing the required information is submitted to the clerk as required by this subsection, the clerk shall note in the record of the proceeding that it was received and then shall mail the form to the judgment creditor. No copy of such form shall be retained in the court records nor shall it be made available to other persons. Upon motion of the judgment creditor, the court may punish for contempt any person failing to submit information as required by this subsection.

(c) Any judgment entered under this act on a claim which is not a small claim, as defined in K.S.A. 61-2703 and amendments thereto, or which has been filed with the court in contravention of the limitation prescribed by K.S.A. 61-2704 and amendments thereto on the number of claims which may be filed by any person, shall be void and unenforceable.

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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.

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

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

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.

- 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.

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

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.

- 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.