Approved: March 15, 1999
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:09 a.m. on March 11, 1999 in Room 123-S of the Capitol.

All members were present except: Senator Feleciano (excused)

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
Jason Oldham, Dispute Resolution Coordinator
Elwaine Pomeroy, Kansas Credit Attorneys Association and Kansas Collectors Association
Others attending: see attached list

The minutes of the March 10 meeting were approved on a motion by Senator Bond and seconded by Senator Donovan; carried.

HB 2154–concerning probate; relating to execution and attestation of wills; self-proved wills

Conferee Hearrell testified in support of **HB 2154.** He summarized the "self-proved" will statute and stated that this bill amends the statute by striking the phrase "under the laws of this state" to facilitate the signing of the self-proved affidavit (attachment 1) Brief discussion followed. The Chair stated that **HB 2549**, which is a clean-up bill regarding the Kansas Estate Tax Act is on General Orders in the House and if passed will be considered as an amendment to **HB 2154.**

HB 2150–concerning dispute resolution; relating to arbitration and mediation; confidentiality of proceeding

Conferee Oldham testified in support of **HB 2150.** He stated that the bill would provide Kansas mediators with a clear law covering confidentiality. He discussed several modifications to the bill relating to the dispute resolution act, domestic disputes and rules of evidence covering mediation and further discussed how these changes would benefit mediators. Discussion followed. (attachment 2) He also referred Committee to written testimony submitted by Judge Larry Solomon, Thirtieth Judicial District, Kingman, Kansas who supports **HB 2150.** (attachment 3) Following discussion, Senator Vratil made a motion to restore the language on Pg 2 at lines 7,8,9 and on pg 3 at lines 40 and 41, Senator Goodwin seconded; carried.

HB 2222–concerning the code of civil procedure for limited actions; relating to actions in forcible detainer of rental premises

Conferee Pomeroy testified in support of **HB 2222.** He explained how current law creates a problem for attorneys who handle eviction matters and stated that this bill will allow attorneys for landlords to fully enforce their clients' legitimate claims and "not run afoul of the federal law". (attachment 4) Following discussion Senator Oleen moved to pass the bill out favorably, Senator Petty seconded; carried.

HB 2221–concerning code of civil procedure for limited action; adopting by reference certain provisions relating to liability for worthless checks and actions to collect thereof.

Conferee Pomeroy testified in support of **HB 2221.** He stated that the bill would amend K.S.A. 61-1725 in the code of civil procedure for limited actions to provide that the provisions of K.S.A. 60-2610 and 60-2611 relating to civil actions brought on worthless checks are adopted as part of the code of civil procedure for limited action and made applicable to actions brought on worthless checks under Chapter 61. He elaborated on the need for this amendment. (attachment 5)

The meeting adjourned at 10:38 a.m. The next scheduled meeting is Monday, March 15, 1999.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mar 11, 1999

NAME	REPRESENTING
Randy M. Hearrell	Kansas Judicial Council
Jason Oldham	OJA
Elwaine Pomeroy	KS Credit Attorneys Assn KS Collectors Ass'n Inc
Brian Tongier	Kansas Legal Services
JAKE FISHER	WHITNEY DAMRON
Jean Barbee	KADC
Martha Jean Steeby	KCMHA

March 11, 1999

JUDICIAL COUNCIL TESTIMONY
ON 1999 HB 2154

In 1975, the Judicial Council recommended to the legislature that Kansas adopt a "self-proved" will statute and K.S.A. 59-606 was amended to so provide.

The amendment provided that a will could be "proved" by a statutory affidavit signed by the witnesses to the will, and acknowledged. The affidavit contains the requirements to admit a will to probate and record, such as stating that the testator possessed the rights of majority and was of sound mind, that the will was made voluntarily and that the testator declared the document to be his or her last will and testament.

The amended statute seemed to work well, but about one year ago we heard of a small problem, which HB 2154 will solve.

Current law allows self-proved affidavits to be acknowledged by "an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths **under the laws of this state.**" The phrase, "under the laws of this state," for practical purposes, means a Kansas Notary Public. The Uniform Law of Notarial Acts found at K.S.A. 53-501 et seq. allows Kansas notaries to notarize only within the state of Kansas.

An example of a situation which shows the need for this bill is as follows: A resident of Kansas is admitted to a health care facility in Missouri and desires to make a will. According to current Kansas law, the self-proved affidavit must be notarized by a Kansas notary, but the Kansas notary cannot notarize in Missouri. The only lawful solution is to bring the person back to Kansas to execute the affidavit. By striking the phrase, "under the laws of this state," the problem is solved.

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(Revised 01/99)

S Jud 3-10-99 #2

Testimony in Support of HB 2150

Jason Oldham
Office of Judicial Administration
March 11, 1999

Good morning committee. My name is Jason Oldham and I am the dispute resolution coordinator with the Office of Judicial Administration. It is my pleasure to address this body on the following legislation.

House Bill 2150, if enacted, would not greatly change how mediation is conducted in Kansas but would greatly aid Kansas mediators by providing them with a clear law covering confidentiality. I will mainly discuss pages one and two of the House Bill which modifies K.S.A. 5-512 (dispute resolution act), some of K.S.A. 23-605 (domestic disputes), and K.S.A. 60-452a (rules of evidence covering mediation) in a similar manner.

The first change is found on page one, line 25 and is merely a clarification. It states the parties and the mediator have the privilege themselves to refuse to disclose and/or prevent a witness from disclosing any communication made during the mediation proceeding. Under the current language, there is the appearance that the neutral person (the mediator) is a party to the mediation. This confuses the roles of mediator and parties working with the mediator. The same changes are made on page one, lines 29 and 30.

Next, amendments to section (b)(1), found on lines 33 through 41, change what information remains confidential. This change is necessary so investigations into alleged mediator ethical misconduct can be conducted. This language provides for two things. First, as under current law, it allows a mediator or staff of an approved program to remove the cloak of confidentiality from the mediation to establish a defense in an action filed by a party to the proceeding. Second, the new language allows for confidentiality to be lifted to allow investigations into alleged ethical violations by a mediator.

The last changes, which were stricken by the House Judiciary Committee, occurred on page two, lines 7 through 9, and page three, lines 39 though 41. This new language would have allowed, but would not have required, the mediator to report to the court any threats of physical violence made by a party during mediation. Currently, only mediators conducting domestic dispute mediations, K.S.A. 23-601 *et seq.*, can report these threats.

This language was stricken by the House Judiciary Committee because a definition of what constituted a threat of physical violence was not part of the legislation. A definition was created and delivered to the committee, but not before the bill was reported out. Here is the definition which was provided:

A definition of "threat of physical violence made by a party during the proceeding" could be created by breaking this phrase up into three pieces and defining each piece.

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- threat of physical violence - words or conduct which communicate an intent to cause bodily harm or words or conduct used in reckless disregard of the risk of causing the apprehension of bodily harm to another party or to a neutral person.

- made by a party - the act was done by a decision-making participant to the mediation who is not a neutral person conducting the mediation.

- during the proceeding - the act occurred during a mediation session or caucus of such session.

The other approach would be to leave this phrase undefined, as it has been since it became law in K.S.A. 23-605 in 1985, allowing any definition to be created by case law. It is interesting that this phrase has not been defined by case law, to the best of my knowledge, even though domestic mediation is a litigious and emotional area of practice. This suggests judges and mediators in Kansas seem comfortable to leave this phrase undefined.

Thus, I would ask the committee to restore the language on page two, lines 7 through 9, and page three, lines 39 though 41. Mediations should be conducted without one party being able to intimidate the other party. To accomplish this, we must allow all mediators, not just domestic mediators, the ability to report such threats.

Thank you for your attention today and I'll be pleased to answer any questions of the committee.

Written ST 3-10-99 att

State of Kansas
Thirtieth Judicial District

Larry T. Solomon
District Judge
Courthouse

Box 495
Kingman, Ks. 67068-0495
Phone 316-532-5151

March 10, 1999

To: Senate Judiciary Committee Members

Re: HB 2150

Dear Senate Judiciary Committee Members:

Let me introduce myself. My name is Larry T. Solomon and I am the Administrative Judge for the 30th Judicial District, Kingman, Kansas. I am also the Chairman of the Dispute Resolution Advisory Council which advises the Dispute Resolution Coordinator and the Supreme Court of Kansas on matters concerning alternative dispute resolution and which requested this bill be introduced. I was unable to personally testify in support of HB 2150 today because of my heavy caseload and the many trials I have scheduled. This letter explains why I support this important legislation.

First, this bill provides necessary clarification to existing law. Current wording of the mediation confidentiality statutes is awkward and confusing. This bill clarifies that the parties and the mediator have the privilege to refrain from disclosing confidential information and may keep witnesses from doing so.

Second, confidentiality is necessary so parties feel free to fully discuss matters in mediation as they develop an agreement. This protection, however, should not be used to cover unethical behavior by a mediator. This is why the change to 5-512(b)(1) is necessary. Under the new language, confidentiality cannot be used to prevent an investigation into alleged ethical violations. Conversely, a mediator or staff member of an approved mediation program should be able to forego confidentiality to defend themselves against an allegation of unethical behavior. This language strikes a necessary balance.

Lastly, I want to explain why this bill does not change the current K.S.A. 5-512(b)(5) language which allows a Judge to order a mediation to be opened. Mediation is normally a confidential process. This characteristic sets mediation apart from other forms of dispute resolution such as conciliation. There are situations, however, where the court should be able to hear evidence regarding the mediation process. As referenced above, a Judge should be able

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to order a mediation opened if unethical behavior is alleged. The Judge should also be able to order a mediation opened if there are claims of duress or over-reaching by one of the parties during the mediation process. Another very important instance where a Judge should be able to open the mediation process involves a scenario where the parties reach an agreement during the mediation process. In the majority of cases, an agreement reached during the mediation process is reduced to some form of writing and then presented to the parties' lawyers for technical "clean-up". On occasion, I have had parties attempt to back out of a mediated agreement. If, in fact, the parties reached an agreement during the mediation process, it is my opinion that, absent duress, over-reaching, etc., the agreement is as enforceable as any other agreement might be. Information concerning the bargaining process and the fact of the agreement during the mediation process should be open to Court review.

In closing, I would advise you that I have never had to open a mediation. I have talked to numerous Judges across the state about this issue and I am not aware of any instance where a Judge has breached the mediation process, although that power exists. I would suggest that it is a power that is used rarely and infrequently by Judges. I further suggest that the power is not being abused. Please leave our discretion in this regard in tact.

Thank you for your consideration of this matter.

Very truly yours,

Larry T. Solomon, Chairman
Dispute Resolution Advisory Board

LTS:mh

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REMARKS CONCERNING HOUSE BILL 2222

SENATE JUDICIARY COMMITTEE

MARCH 11, 1999

Thank you for giving me the opportunity to appear in support of House Bill 2222, which is a bill introduced at the request of the Kansas Credit Attorneys Association, which is a state-wide organization of attorneys whose practice includes considerable collection work, and Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas.

HB 2222 would amend K.S.A. 61-2305 pertaining to forcible detainer (eviction) actions filed under the code of civil procedure for limited actions (Chapter 61). The amendment would allow a landlord to file an action for possession only and pursue a claim for rent in a subsequent action. Current law requires that any rent which is due at the time of filing must be included in the action for possession or the claim for rent is waived.

Current law creates a problem for attorneys who handle eviction matters. Those attorneys are considered to be debt collectors under the federal Fair Debt Collection Practices Act (15 U.S.C. Sec, 1692, et. seq.). The federal law, which takes precedence over state law, requires a debt collector to wait a period of 30 days after first contact with a debtor before taking any action to collect the debt. That means an attorney handling an eviction action must either wait at least 30 days after making initial contact with the

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REMARKS CONCERNING HOUSE BILL 2221

SENATE JUDICIARY COMMITTEE

MARCH 11, 1999

Thank you for giving me the opportunity to appear before you in support of HB 2221, which was introduced at the request of the Kansas Credit Attorneys Association, which is a state-wide organization of attorneys whose practice includes considerable collection work, and Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas.

HB 2221 would amend K.S.A. 61-1725 in the code of civil procedure for limited actions to provide that the provisions of K.S.A. 60-2610 and 60-2611 relating to civil actions brought on worthless checks are adopted as a part of the code of civil procedure for limited actions and made applicable to actions brought on worthless checks under Chapter 61.

Most attorneys who handle claims for worthless checks believe that current law allows suits on worthless checks to be brought under Chapter 61. Most suits on worthless checks are in fact filed under Chapter 61.

However, it is not entirely clear that the provisions of K.S.A. 60-2610 and 60-2611 apply to suits brought under Chapter 61. This bill will merely clarify what most attorneys believe already applies, and will implement what appears to have been the intent of the legislature in 1986 when K.S.A. 60-2610 was first adopted (House Bill No.

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2849, Chapter 223, 1986 Session Laws). Chapter 223 was a part of the section of the 1986 Session Laws dealing with "Procedures, Civil, For Limited Actions".

There was nothing in 1986 HB 2849 which restricted the bringing of a civil action on a worthless check to Chapter 60 only. The bill provided in pertinent part, which is still the law today, the following:

"..... (b) The amounts specified by subsection (a) shall be recoverable in a *civil action* (emphasis added) ....."

After HB 2849 became law, it was surprisingly placed in Chapter 60 at the apparent whim of the Revisor of Statutes. It could have just as easily, and we believe more appropriately, been placed in Chapter 61.

There is nothing in the jurisdictional limits under Chapter 61 (K.S.A. 61-1603) which would prohibit the filing of an action on a worthless check under Chapter 61.

K.S.A. 60-2610 has been construed twice by Kansas appellate courts. (Shollenberger v. Sease, 856 P. 2d 951, 18 Kan. App. 2d 614 (1993), and Dillon's Food Stores v. Brosseau, 842 P. 2d 319, 17 Kan. App. 2d 657 (1992)). Both of these cases had originally been filed in district court under Chapter 61. In neither case did the appellate court mention anything to indicate that the cases had been filed under the wrong chapter.

The Small Claims Procedure Act (K.S.A. 61-1701, et seq.) which is a part of Chapter 61, was amended by 1986 HB 2849 to specifically authorize actions on worthless checks to be filed in small claims court. (See K.S.A. 61-2703, 61-2706, and 61-2713.) It would be an odd situation if our law specifically authorized the bringing of worthless check actions under the small claims act, which is a part of Chapter 61, but not under Chapter 61 in general.

In short, this proposed amendment will simply clarify the law as we believe was originally intended by the legislature and give express authority to a procedure that most attorneys are already following.

I have attached copies of K.S.A. 1998 Supp. 60-2610, K.S.A. 60-2611, and the first page of Chapter 223 of the 1986 Session Laws, which gives the title of 1986 HB 2849, and shows the section of the Session Laws where it appeared.

Elwaine F. Pomeroy
For Kansas Credit Attorneys Association
And Kansas Collectors Association, Inc.

Demand for judgment:

Based on the claim stated above, judgment is demanded against plaintiff as follows:

1. Payment of $_____, plus interest and costs.
2. Recovery of the following described personal property, plus costs:

~~Said~~ *This* property has an estimated value of $_____.

I, _____, hereby swear that, to the best of my knowledge and belief, the ~~foregoing~~ *above* claim asserted against the plaintiff (including the estimate of value of any property sought to be recovered) is a just and true statement.

[Signature] _____
Plaintiff

Subscribed and sworn to before me this _____ day of _____, 19____.

[Signature] _____
Judge (clerk or notary)

Sec. 5. K.S.A. 61-2703, 61-2704, 61-2706 and 61-2713 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 4, 1986.

CHAPTER 223

House Bill No. 2849
(Amended by Chapter 224)

AN ACT concerning worthless checks; providing certain civil remedies; increasing the service charge; amending K.S.A. 61-2703, 61-2706 and 61-2713 and K.S.A. 1985 Supp. 21-3707 and repealing the existing sections.

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

New Section 1. (a) If a person gives a worthless check, as defined by K.S.A. 21-3707 and amendments thereto, the person shall be liable to the holder of the check for the amount of the check plus an amount equal to the greater of the following:

(1) Damages equal to three times the amount of the check but not exceeding the amount of the check by more than $500; or

(2) $100.

(b) The amounts specified by subsection (a) shall be recoverable in a civil action brought by or on behalf of the holder of the check only if: (1) Not less than 21 days before commencing the action, the holder of the check made written demand on the maker or drawer for payment of the amount of the check; and (2) the maker or drawer failed to tender to the holder, prior to commencement of the action, an amount not less than the

60-2610. Civil liability for worthless check. (a) If a person gives a worthless check, as defined by subsection (g), the person shall be liable to the holder of the check for the amount of the check, the incurred court costs, the costs of restricted mail and the service charge and the costs of collection, including but not limited to reasonable attorney fees, plus an amount equal to the greater of the following:

(1) Damages equal to three times the amount of the check but not exceeding the amount of the check by more than $500; or

(2) $100.

The court may waive all or part of the attorney fees provided for by this subsection, if the court finds that the damages and other amounts awarded are sufficient to adequately compensate the holder of the check. In the event the court waives all or part of the attorney fees, the court shall make written findings of fact as to the specific reasons that the amounts awarded are sufficient to adequately compensate the holder of the check.

(b) The amounts specified by subsection (a) shall be recoverable in a civil action brought by or on behalf of the holder of the check only if: (1) Not less than 14 days before filing the action, the holder of the check made written demand on the maker or drawer for payment of the amount of the check, the incurred service charge and the costs of restricted mail; and (2) the maker or drawer failed to tender to the holder, prior to the filing of the action, an amount not less than the amount demanded. The written demand shall be sent by restricted mail, as defined by subsection (g), to the person to be given notice at such person's address as it appears on such check, draft or order or to the last known address of the maker or drawer and shall include notice that, if the money is not paid within 14 days, triple damages in addition to an amount of money equal to the sum of the amount of the check, the incurred court costs, service charge, costs of restricted mail and the costs of collection including but not limited to reasonable attorney fees unless the court otherwise orders, may be incurred by the maker or drawer of the check.

(c) Subsequent to the filing of an action under this section but prior to the hearing of the court, the defendant may tender to the plaintiff as satisfaction of the claim, an amount of money equal to the sum of the amount of the check, the incurred court costs, service charge, costs of restricted mail and the costs of collection, including but not limited to reasonable attorney fees. The court may waive all or part of the attorney fees provided for by this subsection, if the court finds that the damages and other amounts awarded are sufficient to adequately compensate the holder of the check. In the event the court waives all or part of the attorney fees, the court shall make written findings of fact as to the specific reasons that the amounts awarded are sufficient to adequately compensate the holder of the check.

(d) If the trier of fact determines that the failure of the defendant to satisfy the dishonored check was due to economic hardship, the court may waive all or part of the damages provided for by this section, but the court shall render judgment against defendant for not less than the amount of the dishonored check, the incurred court costs, service charge, costs of restricted mail and the costs of collection, including but not limited to reasonable attorney fees, unless otherwise provided in this subsection. The court may waive all or part of the attorney fees provided for by this subsection, if the court finds that the damages and other amounts awarded are sufficient to adequately compensate the holder of the check. In the event the court waives all or part of the attorney fees, the court shall make written findings of fact as to the specific reasons that the amounts awarded are sufficient to adequately compensate the holder of the check.

(e) Any amount previously paid as restitution or reparations to the holder of the check by its maker or drawer shall be credited against the amount for which the maker or drawer is liable under subsection (a).

(f) Conviction of giving a worthless check or habitually giving a worthless check, as defined by K.S.A. 21-3707 and 21-3708 and amendments thereto, shall not be a prerequisite or bar to recovery pursuant to this section.

(g) As used in this section:

(1) "Giving a worthless check" means the making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivering of any check, order or draft on any bank, credit union, savings and loan association or depository for the payment of money or its equivalent:

(A) With intent to defraud or in payment for a preexisting debt; and

(B) which is dishonored by the drawee because the maker or drawer had no deposits in or credits with the drawee or has not sufficient funds in, or credits with, the drawee for the payment of such check, order or draft in full upon its presentation.

(2) "Restricted mail" means mail which carries on its face the endorsements "restricted mail" and "deliver to addressee only."

(3) "Service charge" means $10, or subject to limitations contained in this subsection, if a larger amount is posted conspicuously, the larger amount. In no event shall the amount of such insufficient check service charge exceed $30.

History: L. 1986, ch. 223, § 1; L. 1990, ch. 209, § 1; L. 1991, ch. 72, § 2; L. 1994, ch. 273, § 14; L. 1995, ch. 230, § 3; L. 1996, ch. 203, § 2; July 1.

Attorney General's Opinions:

Giving worthless check; prima facie evidence of intent to defraud; demand for service charge. 94-141.

60-2611. Civil action to collect on check or order; reasonable attorney fees assessed as costs. In any civil action to enforce payment of or to collect upon a check, order or draft on any bank, credit union, savings and loan association or depository for the payment of money or its equivalent, payment upon which such instrument has been refused because of insufficient funds or no account, the party prevailing on such cause of action shall be awarded reasonable attorney fees, such fees to be assessed by the court as costs against the losing party. The fees shall not be allowed unless the plaintiff offers proof during the trial of such action that prior to the filing of the petition in the action demand for payment of the check, order or draft had been made upon the defendant by registered mail not less than 14 days prior to the filing of such suit.

History: L. 1990, ch. 209, § 3; April 19.