Approved: March 8, 2000
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on February 16, 2000 in Room 313-S of the Capitol.

All members were present except:
Representative Andrew Howell - Excused
Representative Dale Swenson - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Representative Ward Loyd
Representative Kathe Lloyd
Greg Debacker, National Congress for Fathers & Children
Representative Jerry Aday
Patrick Brazil, Chief Judge, Kansas Court of Appeals
Sandy Jacqot, League of Kansas Municipalities
Kirk Lowry, President, Kansas Trial Lawyers
Representative Michael O'Neal

Hearing on **HB 2785 - child custody when primary residential custodial parent is deceased**, was opened.

Representative Ward Loyd appeared as one of the sponsors of the proposed bill. He stated that there are instances where a non-custodial parent would not be the best person to raise a child. The bill would allow the courts to always determine what the best interest of the child when the custodial parent has died. (Attachment 1)

Representative Kathe Lloyd also appeared as one of the sponsor of the bill. She got interested in the bill when she saw an ABC special called "When Will The Children Have a Voice." It told the story of a 10-year-old boy whose mother had remarried and then got killed in a car accident. The boy's biological father, whom he had no contact with for a period of six years, wanted the child. A court battle took place and the judge ruled that the child belonged with the biological father. There are many good non-custodial parents but there are also bad ones that never have contact with their children and should not be able to have custody just because something happened to the custodial parent. (Attachment 2)

Greg Debacker, provided the committee with an recent article regarding a Philadelphia case where the Pennsylvania Supreme Court declined give a 10-year-old boy to his biological father. Not because he was unfit, but because the loss of his mother, the absence of his stepbrother, stepsister and stepfather would cause more up evil in the child's life. (Attachment 3)

Hearing on **HB 2785** was closed.

Hearing on **HB 2876 - common-law marriages**, was opened.

Representative Jerry Aday appeared as the sponsor of the bill. He had received information that the Ellsworth Correctional Facility has had problems with common law marriages between inmates and young teenagers. He requested the bill so these types of marriages would be harder for those inmates to have. (Attachments 4)

Hearing on **HB 2876** was closed.

Hearing on **HB 2906 - Court of Appeal discretionary jurisdiction**, was opened.

Judge Patrick Brazil appeared on behalf of the Kansas Court of Appeals, stated that limiting appeals in some cases would allow the Court to spend more time on those that really need it. The bill would allow attorneys to ask for an appeal and then the courts would view the appeal and decided whether it was something they

were interested in hearing. He suggested that the Committee request that the Judicial Council study the bill and report back next legislative session. (Attachment 5)

Sandy Jacquot appeared in opposition to the bill. She stated that the municipalities are regularly involved in administrative appeals and it is important that they have access to the Court of Appeals as a matter of right on behalf of taxpayers. (Attachment 6)

Kirk Lowry, oppose the bill and believes that adding four new judges to the Court would help with their caseload. Everyone should have the option of appealing to the Court and being heard. (Attachment 7)

Hearing on **HB 2906** was closed.

Hearing on **HB 2907 - filing of cross appeals**, was opened.

Representative Michael O'Neal explained that he requested the bill because it had come to his attention that there was no procedure for cross-appeals within the workers compensation statutes.

Hearing on **HB 2907** was closed.

HB 2906 - Court of Appeals discretionary jurisdiction

The committee recommended that the Kansas Judicial Council study the bill and report back to the 2001 Legislature.

HB 2673 - increasing the dollar amounts in the probate code

Representative Carmody made the motion to insert on page 2, line 22 after the word deceased, "subject to probate". Representative Loyd seconded the motion. The motion carried.

Representative Carmody made the motion to report **HB 2673** favorably for passage, as amended. Representative Loyd seconded the motion. The motion carried.

HB 2209 - wage garnishment, assignment of account, benefit entitlement restriction

Representative Carmody made the motion to report **HB 2209** with revisors technical changes, favorably for passage. Representative Long seconded the motion. The motion carried 7-6.

HB 2372 - Retirement system for justices & judges, retirement age

Representative Carmody made the motion to withdraw the **HB 2372** from the table. Representative Loyd seconded the motion. The Chairman reminded the committee that as it stands, the bill would be effective upon publication of the Kansas Register. Representative Klein stated that the passage of this bill would be tampering with the election process and didn't believe this was a good policy. The motion carried

Representative Carmody made the motion to withdraw the amendment that would make it effective upon publication in the Kansas Register. Permission from the second, Representative Flaharty, was denied. She commented that retirement age should be subject to fairness and equity so when the law is applied it would encompassed all judges who are currently elected.

Representative Carmody made the motion to report **HB 2372** favorably for passage. Representative Lightner seconded the motion.

Representative Haley made the substitute motion to table the bill. Representative Klein seconded the motion. The motion failed 5-7.

The motion to report **HB 2372** failed 4-8.

HB 2775 - abatement of common nuisances adding felonies committed by gang members to list of unlawful activities

Representative Loyd made the motion to report **HB 2775** favorably for passage. Representative Carmody seconded the motion. The motion carried.

HB 2501 - Enacting the Uniform Principal & Income Act

Representative Carmody made the motion to report **HB 2501** favorably for passage. Representative Lightner seconded the motion.

Representative Crow made the substitute motion to amend on page 3, adding the site for K.S.A. prudent investor statute. Representative Carmody seconded the motion. The motion carried.

Representative Carmody made the motion to report **HB 2501** favorably for passage, as amended. Representative Loyd seconded the motion. The motion carried.

HB 2805 - theft detection shielding devices

Representative Pauls made the motion to amend in a balloon amendment.(Attachment 8) Representative Long seconded the motion. The motion carried

Representative Carmody made the motion to report **HB 2805** favorably for passage, as amended. Representative Lightner seconded the motion. The motion carried.

The committee adjourned at 5:00 p.m. The next meeting was scheduled for February 17, 2000.

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STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: JUDICIARY
RULES AND JOURNALS
TRANSPORTATION
UTILITIES
JOINT COMMITTEE ON
SPECIAL CLAIMS AGAINST
THE STATE

TESTIMONY

BEFORE THE HOUSE JUDICIARY COMMITTEE

IN SUPPORT OF H.B. 2788

Chairman O'Neal, Committee Members,

We appear today in support of House Bill 2788, standing for the proposition that the best interests of the children of this state, where custody and residency are concerned, are not always best determine by genetics. There may be occasions where nonparental custody may be in the best interest of a child.

However, such issues have arisen where remarriages have occurred. And, in K.S.A. 59-2136, legislative intent has been codified where formal action has been taken by a step-parent to adopt a child. The following are factors which have been identified as appropriate for a court's consideration,

> 59-2136. **Relinquishment and adoption; proceedings to terminate parental rights.**
>
> . . . . . .
>
> (h) When a father or alleged father appears and asserts parental rights, the court shall determine parentage, if necessary pursuant to the Kansas parentage act. If a father desires but is financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following:
>
> (1) The father abandoned or neglected the child after having knowledge of the child's birth;
>
> (2) the father is unfit as a parent or incapable of giving consent;
>
> (3) the father has made no reasonable efforts to support or communi-

House Judiciary
2-16-2000
Attachment 1

cate with the child after having knowledge of the child's birth;

(4) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;

(5) the father abandoned the mother after having knowledge of the pregnancy;

(6) the birth of the child was the result of rape of the mother; or

(7) the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition.

In making a finding under this subsection, the court may disregard incidental visitations, contacts, communications or contributions. In determining whether the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption, there shall be a rebuttable presumption that if the father, after having knowledge of the child's birth, has knowingly failed to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, for a period of two years next preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent.

We apologize that time has not permitted us to present an abstract of the Kansas law relating to the custodial rights of a parent, in the event of the death of the custodial parent.

STATE OF KANSAS

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HOUSE OF
REPRESENTATIVES

REPRESENTATIVE, SIXTY-FOURTH DISTRICT
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RILEY COUNTIES

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COMMITTEE
EDUCATION
JUDICIARY
EDUCATION AND LEGISLATIVE BUDGET

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
FEBRUARY 16, 2000

Thank you Mr. Chairman for allowing testimony today in regards to Bill 2785. Selfish interest has prompted me to suggest the proposed legislation and be standing before you today.

My daughter married a man and subsequently had a daughter, Jessica, who is now five years old. My daughter Staci and her husband divorced approximately four years ago. My ex son-in-law was and is a drug user, provider and heavy drinker. He had been in prison on an assault conviction prior to the marriage and has been in the court system for different offenses since their divorce. My daughter had problems of her own at that time but I am happy to say there have been wonderful changes in her life since. My point is that my daughter made a grave judgment error but from that our family received a wonderful blessing, my granddaughter.

Her father lives in the same small community of 4500 people as she does but has not seen her since May. On that occasion he was upset because she was at his house and he wanted to go out with friends so he had Jessica returned to her mother by his girlfriend. There has been no contact from him since that time. Child support is sporadic even though he holds a full time job. The practice of his employer is to pay cash to his men so child support is not taken out of their checks.

On December 28 my granddaughter was spending the night with me and we were in bed watching television together, she had fallen asleep in my arms. An ABC special came on called "When Will The Children Have A Voice?" hosted by John Stossel. I do believe there are issues on news programs such as this that are one sided and dramatized. This first story of the night was about 10 years of age; his mother had remarried and had a second child. She was suddenly killed in an accident. At her funeral the boy's biological father, with whom he had had no contact with for 6 years, showed up and said he was taking his son. The young boy did not want to go and so court battles started. The judge decided because the man was

the biological father he was the natural "best choice" for the child. The case is being appealed.

My thoughts turned to my granddaughter and what would happen to her if her mother would be killed.

There are many good non-custodial parents and they should have the opportunity to raise their children.

A biological connection does not mean you are a good parent. If this were true we would have no need for foster care in this state or country.

With this legislation I hope that dialogue can be opened and something can be agreed upon that will protect children and give them a voice in decisions affecting their lives.

Thank you Mr. Chairman. I will stand for questions.

PROPOSED AMENDMENTS TO
HB2785

(3) The emotional and psychological needs of the child (i.e. bonding)

(4) Input from the child

Kathe L Lloyd

HB2785
Child custody when primary residential custodial parent is deceased

From the Philadelphia Inquirer, Jan. 22, 2000
http://www.phillynews.com/inquirer/2000/Jan/22/front_page/SKID22.htm

Stepfather wins battle for custody

The Pa. Supreme Court declined to turn over a boy, 10, to his biological father. Experts voiced surprise.

By Ralph Vigoda INQUIRER STAFF WRITER

In an unusual and perhaps far-reaching child-custody decision, the Pennsylvania Supreme Court ruled this week that a Pittsburgh boy should remain with his stepfather, even though the boy's biological father was neither an unfit nor an uncaring parent.

Acknowledging that the biological father would normally be given custody, the court nevertheless decided it was in the best interest of the10-year-old to live with Randall A. Charles, his stepfather for the past nine years.

The boy's mother died of cancer in 1995 while she was married to Charles.

The justices said they saw no evidence from lower court records that Richard Stehlik, the biological father, was not an active part of his son's life.

"I guess this is the limit," Stehlik, 56, who lives in Morris Plains in north-central New Jersey, said yesterday. "I can't believe it's all gone wrong for me."

The case comes at a time when courts nationwide are struggling with custody issues involving divorced parents, grandparents, same-sex unions, out-of-wedlock births, and paternity disputes. It also comes against a backdrop of vocal complaints about the rights of fathers.

Legal experts said that in most states it is all but automatic for a surviving parent to be granted custody. They were unaware of any other case in Pennsylvania in which a stepfather was picked over an active parent.

The court's split opinion, dated Wednesday, included a dissent from Justice Russell M. Nigro, who argued that Pennsylvania should follow the lead of states such as North Carolina, Iowa, Arkansas, Alabama and Wisconsin, in which a third party can be awarded custody only if the natural parent is "unfit or unable to assume parental responsibilities."

"Right off the bat, when you make a father a noncustodial parent, you're saying he has less rights. That's not fair to the father," said Diana Thompson, executive director of the American Coalition for Fathers and Children in Washington. "Why should they lose some of their parental rights just because of a judge's ruling?"

Mary Vidas, past chair of the Philadelphia Bar Association's family-law section, said the ruling could cause complications - and more litigation. "We have clients getting divorced who come into the office all the time and say, 'I want to make sure that if something happens to me, my child goes to my

m r or my sister family member other than the other parent,' " she sai nd we tell the most cases, if something happens to you, there's nothing they can do to prevent the child going to the other parent. "But what this case says is, in this day and age, with so many blended families, that's no longer automatic, at least in Pennsylvania."

On the other hand, Chris Gillotti, a family-law attorney in Pittsburgh, said the significance of the opinion is that it actually strengthens the idea that biological parents are automatically presumed to have greater rights. "This opinion says that the natural father starts with a leg up, which is something that hadn't been clear in [earlier cases]," said Gillotti, former chair of the Pennsylvania Bar Association's family law section.

Stehlik said the ruling was one more blow in his fight to be with his child permanently.
"I really thought I had a good chance in the low court," Stehlik said. Stehlik said he would continue to see the boy during holidays, one weekend a month, and for six weeks in the summer.

Charles, 45, said yesterday that he hoped the decision would "bring some kind of closure, but I don't know if it will. I don't know what further actions Mr. Stehlik plans to take." Stehlik's lawyer, Melaine Shannon Rothey, said yesterday she might appeal to the U.S. Supreme Court.

Stehlik married Linda Bauer, who had two children from a previous marriage, in 1986. The couple's son was born in March 1989. That August they separated, and Bauer moved with her three children to Pittsburgh to be with her parents. There, Bauer met Charles, and they were married in 1990. The new household also included Charles' daughter.
Bauer was diagnosed with cancer in 1993, and died in September 1995 at age 44. The two children from her first marriage returned to their father in Virginia, but the custody of the boy, who was 6 at the time, was unclear. Eleven days after Bauer's death, Stehlik filed a complaint seeking primary custody. Charles fought it.

According to court records, the judge in Common Pleas court relied heavily on the testimony of William F. Fischer, a court-appointed psychologist. Fischer said the child should remain with Charles "at least for the present time." It was thought that the loss of his mother, plus the absence of the stepbrother and stepsister who had left the house, should not be aggravated by removing him from his home.

The court found Stehlik was "a good man and truly wants to be a loving (and loved) father," according to records. There were some concerns, though, about bouts of anger Stehlik showed and that he sometimes was withdrawn. Ultimately, it gave custody to Charles, and increased the time the boy would visit Stehlik.

State Superior Court upheld the decision, and Stehlik then turned to the Pennsylvania Supreme Court. "While the Commonwealth places great importance on biological ties, it does not do so to the extent that the biological parent's right to custody will trump the best interests of the child," the high court ruled.

Greg DeBacker
National Congress for Fathers and Children

Presented to House Judicial Committee
by State Representative Jerry Aday
on House Bill 2876
February 16, 2000

I stand before you today in strong support of House Bill 2876. As the originator of the House Bill 2876, I felt it was important for you to know why I brought this bill forward. Last summer I was approached by a group of residents in Ellsworth who had been made aware of the state's common law marriage laws and some problems that had resulted at the Ellsworth Correction Facility. These individuals were very disturbed about the laws and felt that some changes should be made.

For your review I have attached copies of emails I have received and a copy of the current common law marriage laws. Under the current law the age of consent for common law marriages is 12 years of age for a female and 14 years of age for a male.

Although the law isn't widely used by youth, there is the ability to use this law and it is being used in some cases. In a time when we are concerned with parent involvement with their children it seems "out of date" to have an even "limited used" laws on the books that allows youth to make major decisions without parental input or supervision. For this reason I requested that this bill be written. It is my hope that the committee will support this bill and pass it out favorable.

Thank you for your time and consideration. I will stand for questions.

From: "Lynn Oberle" <loberle@informatics.net>
To: <aday@house.state.ks.us>
Date: Mon, Feb 14, 2000 8:13 PM
Subject: Common-Law Marriage Bill

Representative Jerry Aday,

It is my understanding that the State of Kansas is only one (1) of fourteen juridications that still recognize common-law marriages. This is an out-dated law, originally established to accomodate clergy who were limited by time, distance and means of travel. A common-law marriage does not require declaration of love, marriage vows, or committment by either party. Sometimes persons involved may not even know eachother. The current
common-law marriage, allows a convicted sexual predator to be legally married to a 12-yr. old child. On the one hand we punish sex offenders, but on the other we hand them over their next victim.

Please accept this letter as my personal support for the bill you plan to introduce on 02-16-2000, requiring parental consent or Court Order for a 12-yr. old female, and / or a 14 yr. old male to be common-law married.

Thank you!

Ruth Lynn Oberle, Kansas Citizen
P.O. Box 44
Lorraine, KS 67459

§14.16 D. Voidable Marriages

Voidable marriages are potentially invalid.[84] Until they are judicially invalidated, however, voidable marriages are valid for all purposes.[85] These marriages cannot be attacked after death, nor may they be attacked collaterally.[86] They may be ratified.[87] Examples of voidable marriages include those based upon mistake of fact or those marriages induced by fraud.[88] In addition, marriages contracted prior to the expiration of the 30-day appeal time under K.S.A. 60-1610(c)(2) are voidable.

§14.17 E. Consent

Consent to marry must be freely and voluntarily given.[89] A marriage is voidable if it is induced by duress, fraud, coercion, or fear.[90] Where one party did not intend to marry and only proceeded in jest or for a limited purpose, the marriage is voidable.

§14.18 IV. COMMON-LAW MARRIAGE

Kansas has long recognized common-law marriage and Kansas case law is well settled in this area. In fact, Kansas has recognized these marriages for more than 100 years.[91]

The practitioner seeking to establish the existence of a common-law marriage must prove three elements. First, the parties must have the requisite capacity to enter into a marriage relation. Second, the parties must have formed a present agreement to marry. Third, the parties must hold each other out to the community as husband and wife.[92]

All three elements must be proven before the common-law marriage is established.[93] Additionally, the burden of proving the existence of a common-law marriage is on the person alleging the common-law marriage.[94]

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84 52 AM.JUR.2D *Marriage* § 105 (1970).

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Brice-Nash v. Brice-Nash*, 5 Kan. App. 2d 332, 338, 615 P.2d 836, 840-41 (1980) (*quoting Birdzell v. Birdzell*, 33 Kan. 433, 435-36, 6 P. 561, 562 (1885)).

90 52 AM.JUR.2D *Marriage* § 27 (1970).

91 *In re Estate of Mazlo*, 211 Kan. 217, 218, 505 P.2d 762, 763 (1973); *State v. Walker*, 36 Kan. 297, 309, 13 P. 279, 285 (1877).

92 *Dixon v. Certainteed Corp.*, 915 F.Supp. 1158, 1160 (D.Kan. 1996); *Chandler v. Central Oil Corp.*, 253 Kan. 50, 52, 853 P.2d 649, 652 (1993); *In re Estate of Hendrickson*, 248 Kan. 72, 73, 805 P.2d 20, 21 (1991); *Fleming v. Fleming*, 221 Kan. 290, 291, 559 P.2d 329, 331 (1977); *Driscoll v. Driscoll*, 220 Kan. 225, 227, 552 P.2d 629, 632 (1976); *State v. Johnson*, 216 Kan. 445, 448, 532 P.2d 1325, 1328 (1975); *In re Estate of Keimig*, 215 Kan. 869, 872, 528 P.2d 1228, 1330 (1974); *In re Estate of Mazlo*, 211 Kan. 217, 217, 505 P.2d 762, 763 (1973); *Schrader v. Schrader*, 207 Kan. 349, 350, 484 P.2d 1007, 1008 (1971); *Sullivan v. Sullivan*, 196 Kan. 705, 709, 4 13 P.2d 988, 992 (1966); *Whetstone v. Whetstone*, 178 Kan. 595, 596, 290 P.2d 1022, 1023 (1955); *In re Estate of Freeman*, 171 Kan. 211, 213, 231 P.2d 261, 263 (1951); *Cain v. Cain*, 160 Kan. 672, 675, 165 P.2d 221, 222 (1946).

93 *Fleming v. Fleming*, 221 Kan. 290, 291, 559 P.2d 329, 331 (1977).

94 *Matter of Estate of Hendrickson*, 248 Kan. 72, 77, 805 P.2d 20, 24 (1991); *Driscoll v. Driscoll*, 220 Kan. 225, 227, 552 P.2d 629, 632 (1976); *Whetstone v. Whetstone*, 178 Kan. 595, 596 290 P.2d 1022, 1023 (1955).

§14.19 A. Capacity to Marry

The capacity requirements for common-law marriage are the same as those set forth for solemnized marriages.[95] These requirements were previously discussed in this chapter. Capacity includes: mental and physical capacity, legal capacity or age, absence of incest taboo, and absence of spouse.[96]

§14.20 B. Present Agreement to Marry

A present agreement to marry need not meet any particular form, nor must it be in writing.[97] However, the agreement must demonstrate a "mutual present consent" to marry.[98] Such agreement may be evidenced and established by the parties' conduct.[99]

The Kansas Supreme Court affirmed a finding that no common-law marriage existed in *Schrader v. Schrader*[100] due to the parties' personal behavior, even though they held themselves out to the community as husband and wife, bought property together, and filed joint tax returns. The fact the parties were not faithful to each other led the court to the conclusion they did not form a present agreement to marry. The court also determined no common-law marriage existed in *Sullivan v. Sullivan.*[101] In *Sullivan*, the parties cohabited for 16 years and held each other out to the community as husband and wife on most occasions. However, the court focused its attention on the few situations in which the parties did not hold themselves out to the community as husband and wife. Additionally, testimony indicated the couple often spoke about getting married in the future.

§14.21 C. A Holding-Out to the Community

Indices of this element include, among others, filing joint tax returns, opening and maintaining joint checking and savings accounts, designating the other as a beneficiary on insurance policies, using the same surname, and having children together. One or two of these indices alone may be insufficient to prove a common-law marriage exists. However, the more indices present, the more likely a court will find the parties meet the element of holding themselves out to the community as husband and wife.

The parties must hold themselves out to the community as husband and wife consistently. The Kansas Supreme Court, in *State v. Johnson,*[102] held the parties did not establish this element due to the fact the parties held each other out as husband and wife only when it was advantageous for them.[103]

Additionally, the court has held the parties' general reputation as single or married does not conclusively prove the marriage agreement. Rather, it is evidence the court may consider in determining whether the parties meet this element of common-law marriage.[104]

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95 *Whetstone v. Whetstone*, 178 Kan. 595, 596, 290 P.2d 1022, 1023 (1955).

96 *In re Estate of Hendrickson*, 248 Kan. 72, 73, 805 P.2d 20, 21 (1991).

97 *Cain v. Cain*, 160 Kan. 869, 872, 165 P.2d 221, 223 (1946); *In re Estate of Keimig*, 215 Kan. 869, 872, 528 P.2d 1228, 1230 (1974).

98 *Pitney v. Pitney*, 151 Kan. 848, 853, 101 P.2d 933, 936 (1940); *Schrader v. Schrader*, 207 Kan. 349, 351-52, 484 P.2d 1007, 1009 (1971).

99 *Cain v. Cain*, 160 Kan. 672, 676, 165 P.2d 221, 222 (1946) (*quoting Renfrow v. Renfrow*, 60 Kan. 277, 280, 56 P. 534, 535 (1899)).

100 207 Kan. 349, 484 P.2d 1007 (1971).

101 196 Kan. 705, 413 P.2d 988 (1966).

102 216 Kan. 445, 532 P.2d 1325 (1975).

103 *Id* at 449.

104 *In re Estate of Freeman*, 171 Kan. 211, 213, 231 P.2d 261, 263 (1951).

KANSAS COURT OF APPEALS
301 WEST TENTH
TOPEKA, KANSAS 66612-1507

J. PATRICK BRAZIL
CHIEF JUDGE

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Remarks to the House Judiciary Committee

H.B. 2906

By: J. Patrick Brazil, Chief Judge, Court of Appeals

February 16, 2000

First of all, I would like to thank you for recognizing the need for more judges on the Court of Appeals as evidenced by your vote to recommend adoption of H.B. 2601. Passage of that bill is the single most important thing the legislature can do to help the court now and for the next ten years.

House Bill 2906 is an additional way to deal with the ongoing growth in the number of new appeals filed each year. A growing number of states have adopted some use of discretionary appeals. In fact, H.B. 2906 is in part patterned after such provisions from Georgia, Michigan and Virginia.

Before addressing any of the provisions, I should probably explain the difference between a mandatory appeal (an appeal as a matter of

right) and a discretionary appeal. A mandatory appeal is one in which either party who disagrees with a decision of a trial court or administrative agency can appeal that case to the Court of Appeals. We are required to hear and decide those cases.

A discretionary appeal still provides a party the right to file an application for appeal. The difference is that after review of their application, the court has the power to turn down their application for appeal. While many appeals may still be permitted, some will be denied.

As a side note, I would point out that under the existing bill, orders granting or denying temporary restraining orders would become discretionary. At the present time, these orders are not final orders and, thus, not appealable. Making them discretionary would actually increase our cases. Also, our court has reservations about making child custody orders and some administrative actions discretionary appeals. I point these out merely as examples of why we need a study.

The idea of making some appeals to the Court of Appeals discretionary was first mentioned as a result of our efforts with the Justice Initiative and the National Center for State Courts. During that process all participants were aware that back in 1974 when this state was considering creating a court of appeals, one of the principles of the Kansas Judicial Study Advisory Committee (JSAC) report was that every

litigant should have the right to at least one appeal. It also recommended, however, that delay and cost should be not greater than necessary for sound decision making. Keeping all the precepts of the JSAC report in mind, the Justice Initiative, after much discussion and study, recommended adding four additional judges to our court. It also recommended further study of the idea of discretionary jurisdiction for our court, and stated, "Changes in this area should not be made lightly."

Chief Justice McFarland and I have discussed this bill, and she and I concur that changes in this area should not be made lightly. We also agree with the Justice Initiative's recommendation that the legislature initiate a study of whether some cases should no longer be appealable as a matter of right. Any changes in this area should only come after determining if any such changes are in the best interests of the citizens of Kansas.

Therefore, I recommend that H.B. 2906 be referred to the Judicial Council for further study.

Thank you.

LKM
League of Kansas Municipalities

300 SW 8t ,ue
Topeka, Kansas 66603-3912
Phone: (785) 354-9565
Fax: (785) 354-4186

TO: House Judiciary Committee

FROM: Sandra Jacquot

DATE: February 16, 2000

RE: HB 2906

Thank you for letting me appear in opposition to a portion of HB 2906 on behalf of the League of Kansas Municipalities. First, the League understands the tremendous caseload carried by the Kansas Court of Appeals and the reasoning behind creating classifications of discretionary appeals. Our primary opposition is making appeals from administrative actions discretionary. Municipalities are regularly involved in administrative appeals and we believe it is of the utmost importance that cities have access to the Court of Appeals as a matter of right on behalf of taxpayers and good government in general.

Some examples of administrative actions that may involve cities include the Kansas Department of Health and Environment in its regulatory capacity, workers compensation, unemployment compensation, Kansas Human Rights Commission rulings and Public Employee Relations Board rulings. The list could go on, but these are representative of the types of actions in which cities are involved. The issues involved in these actions range from strictly monetary, as in fines or disability determinations, to legal findings that could impact the city for years to come. A ruling such as KDHE's interpretation of water quality standards could have statewide impact on cities and counties. Not knowing what criteria will be used to determine appellate review, the League is concerned that some very important decisions adversely affecting local government could be allowed to stand with no opportunity for review. Local government officials are elected to be stewards of the community's resources and this provision in HB 2906 takes away one avenue for elected officials to perform their duties. As such, the League believes making appeals from administrative actions discretionary is bad public policy. Therefore, the League proposes that the exception provided in Section 2 (b)(2) be eliminated.

House Judiciary
2-16-2000
Attachment 6

Jerry R. Palmer *
LJ Leatherman

ATTORNEYS
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L.L.P.

Kirk W. Lowry
Gary D. White Jr.

February 16, 2000

My name is Kirk W. Lowry. I am president of the Kansas Trial Lawyers Association. We oppose HB 2906. The right of Kansas citizens to appeal workers compensation and domestic relations cases to the Court of Appeals should not be restricted or eliminated. The proper way to deal with the backlog is to add more judges. KTLA supported HB 2601, a bill to add four new judges to the Court of Appeals. This committee passed the bill to the House. HB 2906 makes the right of appeal in domestic relations cases and workers compensation cases discretionary. KTLA supports further study of the backlog problem. The Judicial Council should study and consider this problem. The bill may create more work. Would the Court of Appeals have to review "petitions for review" and the record and then, if accepted, have the case fully briefed and argued? It is not good public policy to limit the right to appeal based on substance of the cause of action. The right of appeal should not be limited.

Respectfully submitted,

Kirk W. Lowry
President
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Session of 2000

HOUSE BILL No. 2805

By Committee on Judiciary

2-2

AN ACT concerning crimes and punishment; relating to theft detection shielding devices.

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

Section 1. (a) Unlawful ~~use~~ manufacturing or selling of a theft detection shielding device is intentionally manufacturing, selling, offering for sale or distributing in any way a laminated or coated bag or device particular to and ~~marketed~~ intentionally for shielding and intended to shield merchandise from detection by electronic or magnetic theft alarm sensor.

(b) Unlawful possession of a theft detection shielding device is intentionally possessing any laminated or coated bag or device particular to and designed for shielding and intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor, with the intent to commit theft.

(c) Unlawful possession of a theft detection device remover is intentionally possessing any tool or device designed to allow the removal of any theft detection device from any merchandise with the intent to use such tool to remove any theft detection device from any merchandise without the permission of the merchant or person owning or holding such merchandise.

(d) Unlawful removal of a theft detection device is intentionally removing the device from merchandise prior to purchase.

(e) Violation of this section is a severity level 9, nonperson felony.

(f) This section shall be part of and supplemental to the Kansas criminal code.

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