Approved: April 28, 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 March 8, 2000 in Room 313-S of the Capitol.

All members were present except:
Representative John Edmonds - Excused
Representative Phill Kline - 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:
Randy Hearrell, Kansas Judicial Council
Honorable Marla Luckert, Judge Shawnee County
Terra Morehead, Wyandotte County District Attorneys Office
Professor Robert Casad, Member Kansas Judicial Council Civil Code Advisory Committee
Robin Becker, Clerk of the District Court, Phillips County
Kathy Olsen, Kansas Bankers Association
Elwaine Pomeroy, Kansas Collectors & Credit Attorneys Association
Roger Viola, General Counsel, Security Benefit Life Insurance Company

Hearings on **SB 424 - admissibility of child victim hearsay statements at preliminary examinations**, were opened.

Honorable Marla Luckert, Judge Shawnee County, stated that the intent of the bill was to change the statutes regarding the admissibility of hearsay statements of a child victim of less than 13 years of age at a preliminary examination. (Attachment 1)

Terra Morehead, Wyandotte County District Attorneys Office, appeared in opposition to the bill. She believes that it does not protect children from unnecessary stress and emotional strain. It would subject the child to a preliminary hearing with the defendant presence, be cross-examined by defense counsel and be called as a witness by the defense. (Attachment 2)

Hearings on **SB 424** were closed.

Hearings on **SB 420 - rules of civil procedure relating to interspousal tort actions**, were opened.

Randy Hearrell, Kansas Judicial Council, explained that the purpose of the bill was to set out the applicable civil procedures where spouses anticipate filing both a divorce action and an interspousal tort action. (Attachment 3)

Hearings on **SB 420** were closed.

Hearings on **SB 425 - filing and status of foreign judgements**, were opened.

Professor Robert Casad, Member Kansas Judicial Council Civil Code Advisory Committee, commented that the proposed bill would delete provision added in 1999 to the Uniform Enforcement of Foreign Judgements Act which allows a foreign judgement from another state to be enforced in a Kansas court even if the statute of limitations would be a defense if it were a Kansas judgement as long as the judgement could still be enforced in the state where the judgement originated. This change made Kansas the only state to treat foreign judgements more favorably than its own. (Attachment 4)

Hearings on **SB 425** were closed.

Hearings on **SB 447 - notice requirements related to subpoenas of business records**, were opened.

Robin Becker, Clerk of the District Court, Phillips County, commented that the bill would delete the requirement that the clerk of the district court, upon receipt of the business records, to notify the party causing the subpoena to be issued. It would also require the party requesting the business records to pay the costs of copying the records including staff time. (Attachment 5)

Kathy Olsen, Kansas Bankers Association, requested an amendment that would include in the costs the time it took to research the records. The language would be consistent with language found in the Kansas Open Records Act, K.S.A. 45-219. (Attachment 6)

Elwaine Pomeroy, Kansas Collectors & Credit Attorneys Association, requested an amendment which would allow items (copying) to be taxed as a costs. (Attachment 7)

Randy Hearrell, Kansas Judicial Council, requested an amendment to clarify section (e) by adding "intent to request." (Attachment 8)

Hearings on **SB 447** were closed.

Hearings on **SB 485 - nonprobate transfer on death as nontestamentary**, were opened.

Randy Hearrell, Kansas Judicial Council, commented that the statute would provide that a varity of contractual arrangements, including beneficiary designations in individual retirement accounts, be regarded as nontestamentary in nature. (Attachment 9)

Hearings on **SB 485** were closed.

Representative Carmody made the motion to approve the committee minutes from February 9, 10, 16, 17, 21 & 22. Representative Haley seconded the motion. The motion carried.

The committee meeting adjourned at 5:30 p.m. The next meeting was scheduled for March 9, 2000.

TESTIMONY OF THE JUDICIAL COUNCIL OF KANSAS IN SUPPORT OF SENATE BILL NO. 424

March 8, 2000

Senate Bill 424 is the result of a study of the Criminal Law Advisory Committee of the Judicial Council. The legislation seeks to resolve ambiguities in the current statutes which allow the use of prior statements of a child without the child having to be called at the preliminary hearing in a criminal case. The legislation also eliminates conflicts between the various statutes which deal with the admission of statements of a child witness at trial or other hearing.

In 1993, legislation was introduced to allow the admission of out-of-court statements of children less than 13 years of age at preliminary hearings and under other circumstances. From the legislative history, it appears the purpose of the provisions was to protect the child witness from the stress and emotional upset of having to testify in court.

The Judicial Council study began when the Honorable Kay Royse of the Kansas Court of Appeals noted ambiguities in K.S.A. 22-2902(3) which currently reads: "Except for witnesses who are children less than 13 years of age, the defendant shall have the right to cross-examine witnesses against the defendant and introduce evidence in the defendant's own behalf." The intent of the provision would seem to be that if a prosecutor elected to use an out-of-court statement of a child witness, the defendant could not insist on a right to cross-examine. However, if literally interpreted, the provision would prohibit the defendant from cross-examining a witness who did testify in court and prevent the defendant from calling witnesses on his own behalf even in situations which might not be traumatic for the child witness.

House Judiciary
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Attachment 1

Then in *State v. Correll,* 25 Kan. App. 2d 770 (1998), the Court of Appeals found a conflict between K.S.A. 22-3433 and 60-460(dd). The Court of Appeals stated that the conflict "must eventually be addressed by our Supreme Court and/or legislature. Meanwhile, we hold that where both statutes apply, as they do under the facts of the present case, K.S.A. 60-460(dd) takes precedence and controls the proceedings." 25 Kan. App. 2d at 775. The conflict arises because K.S.A. 22-3433 requires a finding that the child is available to testify, but would be traumatized. K.S.A. 60-460(dd) requires a finding that the child be unavailable to testify.

Senate Bill 424 repeals K.S.A. 22-3433, and deletes the ambiguous language from K.S.A. 22-2902. In place of the repealed language a simple statement is added to K.S.A. 22-2902a to allow the admission of hearsay statements of a child victim less than 13 years of age at preliminary hearings. Currently, this statute allows the admission of reports of certain forensic tests without the testimony of the tester. This provision has been upheld as constitutional in *State v. Sherry*, 233 Kan. 920, 929, 667 P.2d 367 (1983). Hence, the Committee believes the language at lines 36 and 37 of Senate Bill 424 would be found constitutional under the reasoning of the decision in *Sherry* and of cases upholding the constitutionality of K.S.A. 60-460(dd) (*see State v. Chisholm*, 245 Kan. 145, 777 P.2d 753 (1989); *State v. Eaton*, 244 Kan. 370, Syl. ¶¶ 1, 2, 769 P.2d 1157 (1989); *White v. Illinois*, 502 U.S. 346).

The Criminal Law Advisory Committee believes Senate Bill 424 accomplishes the legislative intent of protecting child victims from testifying, and resolves conflicts and ambiguities in current language. The Judicial Council adopted the report of the Criminal Law Advisory Committee and recommends the passage of Senate Bill 424.

Office of The
DISTRICT ATTORNEY
Of The 29th Judicial District of Kansas
Wyandotte County Justice Complex
710 N. 7th Kansas City, Kansas 66101
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DISTRICT ATTORNEY
Nick A. Tomasic

March 8, 2000

Chairman O'Neal and Members of the House Judiciary Committee:

I am Terra Morehead, an Assistant District Attorney for Wyandotte County from the Twenty-ninth Judicial District. This is my first opportunity to be heard on S.B. 424, as I only found out about the proposed amendments after it passed through the Senate Judiciary Committee. I would first like to say that I do support the amendment to K.S.A. 22-2902a which would add the Kansas City, Missouri Police Crime Laboratory to the list of crime laboratories.

My opposition to the proposed amendments is as it relates to child victims at preliminary hearings. Upon learning of these proposed changes the Wyandotte County District Attorney's Office had grave concerns about the resulting consequences. It is my understanding that these changes were proposed not for the purpose of substantively changing the law, but only to resolve ambiguities within the statute. As a prosecutor of thirteen and a half years and as someone who handles hundreds of child victim cases a year, I feel the amendments do make substantive changes, which are quite obvious upon review.

The legislature in 1993 saw fit to pass S.B. 354. This bill enacted all of the provisions which are now being proposed should be deleted from K.S.A. 22-2902. A review of the legislative intent shows the changes were made to "relieve youthful witnesses of significant stress and emotional strain caused by the very nature of court appearances." The changes allowed for several things to occur at a preliminary hearing: 1. to base the preliminary hearing involving a victim less than 13 years of age, upon hearsay evidence in whole or in part; 2. to present the testimony of a child less than 13 years of age outside of the defendant's presence; 3. to present the testimony of a child less than 13 years of age without the child being subjected to cross-examination; and, 4. to disallow the defendant from then calling the child less than 13 - years of age as his own witness. Under the existing law a prosecutor has a choice on how to proceed for probable cause purposes at a preliminary hearing. They can either not have the child testify and rely upon hearsay evidence, or they can have the child testify, without giving defense counsel the opportunity to question or cross-examine the child and if necessary, have the defendant removed during the child's testimony. The 1993 legislature thoroughly discussed that these provisions in no way violate any of the constitutional rights of a defendant. The preliminary hearing is only to establish that a crime has occurred and that probable cause exists that the defendant committed the crime.

In her testimony before the House Judiciary, Judge Luckert indicated that the Judicial Council was trying to clear up ambiguities first raised by the Honorable Kay Royse. In Wyandotte County, we have not found the existing law to be ambiguous. It speaks for itself and it certainly serves a legitimate purpose: it prevents young children from being subjected twice to a "trial" atmosphere. Judge Luckert also brought up *State v. Correll*, 25 Kan. App.2d 770 (1998) and noted that the Court of Appeals found a conflict between K.S.A. 22-3433 and K.S.A. 60-460 (dd). A review of that case and those statutes have no bearing or correlation whatsoever with K.S.A. 22-2202 - the preliminary hearing statute. The *Correll* Court does not even mention any of the issues that are before this committee. I suggest if there is a conflict between K.S.A. 22-3433 and K.S.A. 60-460(dd) then those statutes should be changed, not K.S.A. 22-2202.

It is my firm belief that the amendment does not serve to protect our children from unnecessary stress and emotional strain. While the proposed amendment adds K.S.A. 22-2902a(b), which continues to allow for hearsay statements of a child victim at a preliminary hearing, it takes away the other three safeguards which I mentioned in paragraph three above . Children would once again be subjected at a preliminary hearing to the defendant's presence, to cross-examination by defense counsel and to being called as a witness by the defendant.

I take great pride when I meet other prosecutors from other states and tell them how protective our laws are when it comes to child victims. The provision that we currently have in Kansas to protect children at a preliminary hearing are but one of the examples that I brag about. Please do not take away the law our 1993 legislature implemented in an effort to make the criminal justice system a little more bearable for child victims of tender years. Thank you so much for your consideration.

Respectfully submitted,

Terra D. Morehead

Terra D. Morehead
Assistant District Attorney

JUDICIAL COUNCIL TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
ON 2000 S.B. 420

MARCH 8, 2000

The issue addressed by this bill was first brought to the attention of the Judicial Council's Family Law Advisory Committee by Topper Johntz who is a long time member of the committee and has extensive experience in the area of divorce law in both Kansas and Missouri. Topper was aware of a recent Missouri decision which identified a problem that is becoming more and more common nationwide. That problem is how simultaneous divorce proceedings and interspousal tort actions should be handled.

Before the 1980's, Kansas had in place a judicial doctrine called interspousal tort immunity. That doctrine prevented spouses from suing each other for things like assault and battery, or negligence in causing a car accident. In 1982, the Kansas Supreme Court created an exception to that doctrine and allowed spouses to sue each other for intentional torts. *Stevens v. Stevens*, 231 Kan. 726, 647 P.2d 1346 (1982). Then, in 1987, the Kansas Supreme Court followed the national trend and abolished interspousal tort immunity completely in *Flagg v. Loy*, 241 Kan. 216, 734 P.2d 1183 (1987). Since that time, spouses in Kansas have been able to sue each other for both intentional and unintentional torts.

The purpose of this bill is to set out the applicable civil procedure where spouses anticipate filing both a divorce action (or action for separate maintenance) and an interspousal tort action. Some of the questions that arise in discussing interspousal torts and divorce proceedings are whether the two types of actions should be tried together or separately, and whether one type of action should preclude the other.

Subsection (a) of this bill addresses the first question-- whether there should be permissive or compulsory consolidation of an interspousal tort claim with a divorce action. The Committee decided that it would be best not to consolidate the two types of actions for the following reasons:

(1) the factual situation in the divorce case is far more wide ranging than the specific factual situation of an interspousal tort case;
(2) the divorce action sounds in equity and its factual issues must be determined by the court, whereas the tort action sounds in law and a jury trial may be demanded to determine the factual issues; and
(3) attorneys may charge a contingency fee in a tort action, but not in a divorce action.

Accordingly, subsection (a) only allows consolidation where the parties agree and the court approves the arrangement.

Subsections (b) and (c) deal with the issue of whether an action for divorce precludes the bringing of a separate interspousal tort action, and vice versa. A person may sue for divorce under one of three different grounds:

- incompatibility or "no-fault" under K.S.A. 60-1601(a)(1),
- failure to perform a marital duty or "fault" under K.S.A. 60-1601(a)(2), or
- mental illness or incapacity under K.S.A. 60-1601(a)(3).

By far the majority of divorce cases in Kansas are brought under the no-fault, or incompatibility provision of 60-1601(a)(1).

Subsection (b) of the bill states that if a party brings the action for divorce under K.S.A. 60-1601(a)(1) or (a)(3) (the no-fault grounds, or mental illness/incapacity, divorce provisions), then a separate action for interspousal tort is not precluded.

Subsection (c) of the bill states that if a party brings the action for divorce under K.S.A. 60-1601(a)(2) (the "fault" grounds divorce provision), then he or she would be precluded from bringing a separate interspousal tort action which is based upon the same factual allegations. This subsection addresses the rare circumstance where a person sues for divorce under the fault provision. Even under this subsection, the court will only consider fault in determining the financial aspects of the divorce in the "rare and unusual situation where misconduct is so gross and extreme that failure to penalize would itself be inequitable." *Marriage of Sommers*, 246 Kan. 652, 792 P.2d 1005 (1990). However, where the court does consider fault in making a division of the marital property or in awarding maintenance, it would be unfair to allow the plaintiff to then file a tort action based upon the same facts that constituted the fault element of the divorce, thereby obtaining a double recovery.

Logically, if a party elects to bring his or her divorce action on a fault ground (thereby attempting to obtain a more favorable division of property or maintenance) the party should be precluded from "double dipping" by bringing a separate tort action in front of a jury and asking for what amounts to additional financial compensation for the same injury. On the other hand, if a party brings a divorce action under a non-fault ground (or mental illness/incapacity), then a separate tort action would be appropriate.

When this bill was heard in the Senate Judiciary Committee on January 26, 2000, District Judge Terry Bullock was present. When Chairman Emert asked his opinion of the bill, Judge Bullock responded that he believed the bill was a good idea. He said as a district judge it is always appreciated when a statutory procedure is provided.

The University of Kansas

School of Law

January 19, 2000

To: Members of the Judiciary Committee

From: Robert C. Casad

Ladies and Gentlemen:

I am writing to support Senate Bill 425, recommended by the Kansas Judicial Council, which would restore K.S.A. 60-3002 to the way it was before last year's probably inadvertent amendment. From the bill you can see that it simply repeals the final clause that was added last year as part of the legislative package of the Kansas Credit Attorneys' Association and the Kansas Collectors' Association.

K.S.A. 60-3002 is part of the Uniform Enforcement of Foreign Judgments Act, promulgated by the Commissioners on Uniform State Laws, and adopted in at least 46 states. Before last year, the wording of the section was nearly identical to that of the Uniform Act. It is that wording that S.B. 425 seeks to restore.

K.S.A. 60-3002 provides that a foreign judgment – and "foreign judgment" here means a judgment of a sister state of the United States, not a foreign country judgment – can be enforced in Kansas by merely filing it with the clerk of any district court of the state. It will then be enforceable like a Kansas judgment, and be subject to the same procedures and defenses as a Kansas judgment. That meant, before last year's amendment, that if a foreign judgment had remained unenforced for a period of time longer than Kansas law would allow a Kansas judgment to remain enforceable, then the foreign judgment could not be enforced in Kansas, even if it was still enforceable in the state where it was rendered. That meant that the Kansas period of limitations on enforceability of judgments applied to foreign judgments as well as to Kansas judgments, even if the period of limitations of the state where the judgment was rendered was longer than ours.

Last year's amendment to K.S.A. 60-3002 added an exception, which you can see in the stricken language of SB 425. In effect, it said that the Kansas period of limitations would no longer apply to foreign judgments. If the limitation period of the state where the judgment was rendered was longer than that of Kansas, then the foreign judgment would be enforceable here even though the judgment creditor delayed longer than our statute deems appropriate to take steps to enforce the judgment.

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The effect of this change was to make Kansas the only state in the union that treated foreign judgments more favorably than our own This is not good policy

No plausible Kansas policy purpose could be served by such an exception. It allowed foreign judgment creditors to receive more favorable treatment in our courts than those judgment creditors holding Kansas judgments. And it subjected Kansas judgment debtors to enforcement of judgments that our legislature otherwise would consider too stale to be enforced. A judgment creditor should act with due diligence to enforce a judgment, and Kansas generally says that means the creditor must act within 5 years. After 5 years the judgment becomes dormant. K.S.A. 60-2403. A judgment that has become dormant can be revived by the creditor within two further years, and once revived it remains enforceable for a further period of 5 years. The same procedure should apply to foreign judgments, and the Kansas Supreme Court has so held. Johnson Bros. Wholesale Liquor Co. v. Clemmons, 233 Kan. 405, 661 P.2d 1242 (1983). If the foreign judgment is older than 5 years, the creditor should get it revived in the state where it was rendered.

It is true that every state owes full faith and credit to the judgments of every other state, and that generally means giving the judgment the same effect that is has in the state where it was rendered. But as early as 1839 the Supreme Court of the United States ruled that it was not a denial of full faith and credit for a state where a judgment is sought to be enforced to apply its own statute of limitations on the enforceability of judgments rather than that of the state where the judgment was rendered. McElmoyle for the use of Bailey v. Cohen, 13 Pet. 312 (1839). See also Union Nat. Bank of Wichita v. Lamb, 337 U.S. 38 (1949). All states, except Kansas for the past year, have followed that practice, applying their own statutes of limitations to foreign judgments There is utterly no reason why a state should want to keep alive a foreign judgment that would be considered too stale if it were its own domestic judgment.

I asked one of the promoters of last year's amendment why they did it. The only answer that made any sense was that they thought that the Federal Fair Debt Collection Practices Act applied to suits to enforce foreign judgments, and that the venue provisions of that Act prevented suing on a judgment in any state other than the one in which the debtor resided. This argument, however, is not valid. A judgment, once obtained in a court that did meet the venue requirements of the FDCPA, is no longer a debt subject to the act. The Federal Trade Commission (the agency charged with enforcing the FDCPA) has published commentaries on the act that serve as guidelines for the enforcement of the act. The commentary to section 811, the venue section, specifically states

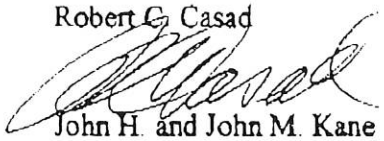
> "5. Enforcement of judgments. If a judgment is obtained in a forum that satisfies the requirements of this section, it may be enforced in another jurisdiction, because the consumer previously has had the opportunity to defend the original action in a convenient forum."

So the only impediment to a foreign judgment creditor enforcing the judgment in Kansas during the 5 years that it is viable is the creditor's own failure to act.

Accordingly, I urge the committee to recommend SB 425 for passage so that Kansas can

once again provide equal treatment for Kansas and foreign judgments, so that a judgment creditor who has rested on his, her or its rights for more than 5 years cannot find a haven for the stale judgment in Kansas.

Robert G. Casad



John H. and John M. Kane
Professor of Law Emeritus

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SENATE BILL NO. 447
SUBPOENA OF BUSINESS RECORDS OF A BUSINESS NOT A PARTY
K.S.A. 60-245a

TESTIMONY
ROBIN BECKER, CLERK OF THE DISTRICT COURT
17TH JUDICIAL DISTRICT

Mr. Chairman and Members of the Committee:

I am here speaking on behalf of the Kansas Association of District Court Clerks and Administrators (KADCCA). We appreciate the opportunity to state our views on Amended SB 447.

KADCCA originally requested the following changes in K.S.A. 60-245a, which was to delete section (e) the notice of the issuance of a subpoena 10 days prior to the clerk issuing the subpoena for business records, and section (f) the provision requiring the clerk, upon receipt of the business records, to notify the party who caused the subpoena to be issued.

The KADCCA Legislative Committee agrees with the proposed Amendment to SB 447 allowing section (e) to remain, as long as it is the party requesting the issuance of the subpoena's requirement to send the notice of issuance not the clerk's office, and the deleting of old Section (f) which states, "upon receipt of the business records the clerk of the court shall so notify the party who caused the subpoena for the business records to be issued," be deleted because the Affidavit of a Custodian of Business Records certificate of mailing notifies the issuing attorney that the business records are filed with the court. This notice causes unnecessary steps for the clerks.

We appreciate you taking time to hear our concerns on this matter.

I will be glad to answer any questions you may have.

Thank You.

KANSAS ASSOCIATION OF DISTRICT COURT
CLERKS AND ADMINISTRATORS

House Judiciary
3-8-2000
Attachment 5

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

March 8, 2000

TO: House Judiciary Committee

FROM: Kathleen Taylor Olsen

RE: SB 447: Subpoena of business records not a party

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today regarding **SB 447** relating to the subpoena of business records when the business is not a party to the lawsuit. We are appearing today to support an amendment made to the bill by the Senate Committee.

We requested this amendment as it had come to our attention that while this section of the statute provides that a business complying with a subpoena of its records when it is not a party to the lawsuit can recover the reasonable costs of copying the records, it does not specifically provide for the recovery of the costs of researching those records.

Banks are often served with subpoenas "duces tecum" to produce bank records of someone involved in a lawsuit. Researching records takes time away from an employee's normal banking duties. Therefore, we asked that the bill be amended to specifically include recovery of the cost of "staff time required to make the information available". This language is consistent with language found in the Kansas Open Records Act, K.S.A. 45-219.

In 1998, we conducted a survey of nine banks of varying asset size and geographic location around the state and found that generally, they were charging from $15 per hour to $25 per hour for researching records. We believe recovery of such costs is reasonable and is an acceptable expense to the party requesting the records.

Thank you for your attention and we hope you will act favorably on **SB 447**, as amended.

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

REMARKS CONCERNING SENATE BILL 447
AS AMENDED BY SENATE COMMITTEE

HOUSE JUDICIARY COMMITTEE

MARCH 8, 2000

Thank you for giving me the opportunity to urge a further amendment to this bill on behalf 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.

The amendment to the bill on page 2, lines 17 and 18, will increase the costs of copying. Our groups feel this makes it more important that the costs of copying these records may be taxed as costs. If it is clearly provided that these expenses can be taxed as costs, there is a possibility of recovering those costs if judgment is rendered and the judgment is collected.

We would urge the committee to add a new subsection (g) on page 5, following line 7 to read as follows:

"(g) The costs of copying allowed by this act may be taxed as costs as allowed by Article 20 of Chapter 60 of the Kansas Statutes Annotated, and amendments thereto."

Thank you for your consideration of this matter.

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

House Judiciary
3-8-2000
Attachment 7

PROPOSED JUDICIAL COUNCIL AMENDMENT TO SB 447

The Judicial Council Civil Code Advisory Committee recommends amendment of K.S.A. 60-245a(e) at page 4, line 37, of SB 447 as follows:

> **(e) Notice of intent to request the issuance of a subpoena pursuant to this section where the attendance of the custodian of the business records is not required shall be given to all parties to the action at least 10 days prior to the issuance thereof by the party requesting issuance of the subpoena. A copy of the proposed subpoena shall also be served upon all parties along with such notice. In the event any party objects to the production of the documents sought by such subpoenaior to its issuance, the subpoena shall not be issued until further order of the court in which the action is pending.**

The Committee is of the opinion that the amendment clarifies the section. Some Committee members were bothered by the sentence which refers to giving "notice of issuance" prior to "issuance."

House Judiciary
3-8-2000
Attachment 8

The Security Benefit Group of Companies

Security Benefit Life Insurance Company
Security Benefit Group, Inc.
Security Distributors, Inc.
Security Management Company, LLC

700 SW Harrison St.,
Topeka, Kansas 66636-0001
(785) 431-3000

Date: March 8, 2000

To: Members of the House Judiciary Committee

From: Roger K. Viola
Senior Vice President,
General Counsel and Secretary
Security Benefit Life Insurance Company

Subj: Senate Bill 485

Mr. Chairman, members of the Committee, my name is Roger Viola and I am pleased to appear before you today on behalf of the Security Benefit Group of Companies.

Security Benefit Life Insurance Company ("Security Benefit") is a Kansas life insurance company located in Topeka, Kansas with approximately $10 billion in assets under management. Security Benefit offers fixed and variable annuities, money management services, retirement plans and, through its subsidiary broker/dealer, Security Distributors, Inc., a family of mutual funds. Security Benefit also offers individual retirement accounts. Approximately 3,500 Kansas residents invest in Security Benefit's mutual funds through IRAs.

Proposal: Security Benefit Life Insurance Company proposes that the Kansas Legislature enact Senate Bill 485, Section 101 of the Uniform Nonprobate Transfers on Death Act. This statute would provide that a variety of contractual arrangements, including beneficiary designations in individual retirement accounts, be regarded as nontestamentary in nature.

Background: Nonprobate transfers on death have been challenged as invalid testamentary transfers in states that have not adopted the Nonprobate Transfers on Death Act or similar legislation. See, e.g., E.F. Hutton & Co. v. Wallace, 863 F.2d 472 (6th Cir. 1988) (plaintiff argued that assets of custodial IRA were part of probate estate and did not pass to beneficiary named by the owner-decedent); In re Catanio, 703 A.2d 988, 991 (N.J. Super. Ct. App. Div. 1997) (where trust beneficiary did not acquire any interest in trust property prior to the death of the settlor, the trust was testamentary and invalid if not executed in compliance with the statute of wills); Virgil v. Sandoval, 741 P.2d 836, 838 (N.M. Ct. App. 1987) (plaintiff argued that deed executed by decedent was an attempted testamentary disposition and was invalid because it did not comply with the statutory provisions for the making and execution of a will); Bielat v. Bielat, 721 N.E.2d 28, 31

(Ohio 2000) (wife argued that beneficiary clause in husband's IRA constituted testamentary language and was therefore null and void).

Kansas law on nonprobate transfers has evolved through a series of court decisions and legislative enactments. In 1974, the Kansas Supreme Court held that the transfer of a savings account payable to a third party upon the death of the depositor was testamentary in character, and thus invalid because it was not executed in compliance with the statute of wills. Truax v. Southwestern College, 214 Kan. 873, 883, 522 P.2d 412, 420 (1974). The Kansas Legislature effectively overruled Truax in 1979 when it enacted Kan. Stat. Ann. §§ 9-1215 to -1216, which authorized the transfer of property through payable on death bank accounts without compliance with the statute of wills. In 1987, the Supreme Court held that the payable on death statutes applied to Totten trusts, as well. In re Estate of Morton v. Moore, 241 Kan. 698, 705, 769 P.2d 616, 621 (1987). A Totten trust is created by depositing money into a bank account as "trustee" for a named beneficiary. Id. at 701, 769 P.2d at 618. The beneficiary's right to the trust funds arises upon the depositor's death. Id. Kansas law therefore clearly permits payable on death bank accounts and Totten trusts.

In McCarty v. State Bank of Fredonia, 14 Kan. App. 2d 552, 795 P.2d 940 (1990), the Kansas Court of Appeals held that the beneficiary designation in a custodial IRA was void and invalid. Ralph McCarty named his brother Clarence as the beneficiary of his IRA. Id. at 553, 795 P.2d at 942. After Ralph's death, Ralph's surviving spouse, Mary, sued to have the IRA beneficiary designation declared invalid and to have the assets of the IRA become a part of Ralph's estate. Id. The court rejected Clarence's argument that Ralph's IRA should be treated as a payable on death account or a Totten trust under Kan. Stat. Ann. § 9-1215. Id. at 559, 795 P.2d at 945. Instead, the court treated Ralph's IRA as a revocable inter vivos trust and ordered that the IRA assets be distributed in accordance with Ralph's will, subject to Mary's right to receive one-half of the assets. Id. at 557, 561-62, 795 P.2d at 944, 947.

The Supreme Court later disapproved of the McCarty Court's invalidation of the entire IRA in Taliaferro v. Taliaferro, 252 Kan. 192, 843 P.2d 240 (1992). The Taliaferro Court stated that the portion of Ralph's IRA not subject to Mary's right to elect should have been distributed to Clarence rather than to Ralph's estate. Id. at 204, 843 P.2d at 248. The dicta in Taliaferro, however, was based on the Court's opinion that McCarty improperly expanded the elective share law. Taliaferro did not address the issue of whether an IRA beneficiary designation would be invalid as testamentary in nature.

In 1994, the Kansas Legislature adopted Section 301 of the Uniform Nonprobate Transfers on Death Act, the Uniform Transfer on Death Security Registration Act (Kan. Stat. Ann. §§ 17-49a01 to 49a12). This law allows the owner of a security to register the title in transfer-on-death form. Kansas therefore already permits those nonprobate transfers governed by Section 201 (pay-on-death bank accounts) and Section 301 (transfer-on-death security registrations) of the Uniform Nonprobate Transfers on Death

Act. By enacting Section 101, the remaining section of the Act, the Kansas Legislature would remove any doubt as to the validity of provisions for nonprobate transfers contained in other instruments, such as IRAs, tax-sheltered annuity custodial agreements, and retirement plans. Section 101 would eliminate litigation like McCarty, and ensure that beneficiary designations are upheld as suggested in Taliaferro.

Note that Security Benefit's proposal would not affect a surviving spouse's right of election. In 1994, the Kansas Legislature adopted the "Redesigned Elective Share" under the Uniform Probate Code. Kan. Stat. Ann. §§ 59-6a201 to -6a217. Under the new law, a surviving spouse is entitled to a specified percentage of the decedent's "augmented estate," which includes nonprobate transfers to others. Had Senate Bill 485 been the law at the time of McCarty, the proceeds of the IRA would have been payable to the IRA beneficiary, subject to spousal election, rather than payable to the decedent's estate, subject to spousal election.

Eleven states (Alaska, Arizona, California, Colorado, Kentucky, Montana, Nebraska, New Mexico, North Dakota, Texas and Wisconsin) have already adopted Section 101 of the Uniform Nonprobate Transfers on Death Act (or identical provisions found at Section 6-101 of the Uniform Probate Code). Four other states (Idaho, Maine, South Carolina and Utah) have adopted the pre-1989 version of the Act. Five states (Connecticut, Louisiana, Massachusetts, Michigan and Missouri) have adopted other legislation specifically designating certain nonprobate transfers as nontestamentary.

Impact: By designating certain nonprobate transfer provisions as nontestamentary, Senate Bill 485 would ensure that instruments containing such provisions do not need to be executed in compliance with the formalities required for wills and do not need to be probated. Uniform Nonprobate Transfers on Death Act § 101 comment (1991). Adoption of this statute would (i) ensure that the legitimate expectations of contract holders would be satisfied and their beneficiary designations upheld as valid; and (ii) save life insurance companies and other financial institutions from possible litigation regarding the lawful payee of contract proceeds on the death of the contract holder.